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LEGAL RESEARCH TRANSLATED INTO LEGISLATIVE ACTION*

The New York Law Revision Commission 1934-1963

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In 1921, Benjamin N. Cardozo published his article "A Ministry of Justice" in the Harvard Law Review.[1] He had given it as an address

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[1] Cardozo, "A Ministry of Justice," 35 Harv. L. Rev. 113 (1921).

By no means was this the first suggestion for such an agency. Mr. Ben W. Heineman in his article, "A Law Revision Commission for Illinois," 42 Ill. L. Rev. 697, 699 n.5 (1948), has collected some other sources prior to 1921: 1 Nash, Life of Lord Westbury 189-193 (1888); Ferri, Criminal Sociology 153 (Morrison ed. 1896); Pound, "Anachronisms in Law," 3 J. Am. Jud. Soc'y 142 (1920); Report of Lord Haldane's Comm. on the Mach. of Gov't 63 (1918). To these he adds others after 1921: Glueck, "A Ministry of Justice and the Problem of Crime," 4 Am. Rev. 139 (1926); Mullins, In Quest of Justice 339, 420 et seq. (1931); Report Comm'n to Investigate Defects in the Law and its Administration, 1924 N.Y. Leg. Doc. No. 70; Report Comm. on Administration of Justice in New York State, 1934 N.Y. Leg. Doc. No. 50; Comment, 20 Cornell L.Q. 119 (1934). See also Pound, "Anachronisms in the Law," 3 J. Am. Jud. Soc'y 142, 145, 146 (1920):

> [O]ur legislative organization rests on the assumption that law-making on other than political subjects is something exceptional. . . . [W]e assume that no expert provision is necessary . . . to do the small amount of petty tinkering of the legal system which is necessary to keep it in running order. Our legislative organization and legislative methods are devised for appropriations and political legislation, not for legislation on legal matters. As to the latter, there is no continuity, . . . little or no expert criticism, and there are no systematizing or coordinating agencies.

before the Association of the Bar of the City of New York.[2] This paper summarizes the experience of an agency consciously created[3] in response to that proposal, an experience dating back to 1934.[4]

I. The Need for Information in the Legislative Process

A thoughtful and scholarly participant in the legislative process has characterized it as being "in its essence, a judicial process" in which the "burden of proof is on the plaintiff."[5] "Very little legislation ever originates within the legislature itself," he wrote.[6] "The legislature is the tribunal to which are brought proposed changes in the rules governing our lives. That tribunal, weighing the arguments for and against, renders judgment by the adoption or rejection of the proposed amendment to the laws."[7]

This may be oversimplification. The premise, however, is sound that in the exercise of its functions the legislature must be informed.[8] "No parliament can fulfil its basic duties intelligently without ascertainment of the facts."[9]

Information is necessary with respect to the existence of a problem, the desirability of legislation as a solution as compared with other possible solutions, the alternative courses which the legislation might take, the experience acquired in other places and perhaps at other times, and the relative advantages and disadvantages of one decision over the other. Presumably, with this information, the legislature is ready to decide and to act.

Is this information available and where does the legislature get it?

An obvious source is the Executive. Perhaps in great questions of public policy, this is the major source. The President of the United States "shall from time to time give to the Congress Information of the State of the Union and recommend to their Consideration such Measures as

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. . . I submit that we require not merely legislative reference bureaus to deal with the forms of legislation, important as these are, but even more a ministry of justice, charged with the responsibility of making the legal system an effective instrument for justice. We need a body of men competent to study the law and its administration functionally, to ascertain the legal needs of the community and the defects in the administration of justice not academically or a priori, but in the light of everyday judicial experience and to work out definite, consistent, lawyer-like programs of improvement.

2 Lectures on Legal Topics, Ass'n of the Bar of the City of New York, vol. iii, p. 69 (Nov. 8, 1921). See also Cardozo, Law and Literature 41 (1931).

3 See note 38 infra.

4 N.Y. Sess. Laws 1934, ch. 597; N.Y. Legis. Law art. 4-a.

5 Moffat, "The Legislative Process," 24 Cornell L.Q. 223, 228 (1939).

6 Id. at 230.

7 Id. at 229.

8 Cf. Read, MacDonald & Fordham, Cases and Materials on Legislation 67-70 (2d ed. 1959).

9 Ehrman, "The Duty of Disclosure in Parliamentary Investigation: A Comparative Study," 11 U. Chi. L. Rev. 1 (1943).

he shall judge necessary and expedient."[10] The Governor of New York "shall communicate by message to the legislature at every session the condition of the state, and shall recommend such matters to it as he shall judge expedient."[11] In addition to the Chief Executive, the President or the Governor as the case may be, information and recommendations also come to the legislature from the various executive departments. This has caused the development in the federal government of a system of "central clearance" to avoid the possibility that various departments might be working at cross purposes, if not with administration policy itself.[12]

Another obvious source of information and demand is from interests outside of the legislature, those with very special interests of their own, those who are acting pro bono publico and those—most of them—running in the large middle area from one extreme to the other. Moffat has justified the existence of the "lobbyist," the individual who presents these positions to the legislature.[13]

Despite all these sources, and because of some of them, the need is such that from early days British and American legislatures sought to inform themselves not only with respect to the need for legislation, but also with respect to the execution and administration of existing legislation.[14]

One kind of legislative inquiry has so occupied the news spotlight as to make it seem as if there were no other. This type of legislative investigation is based on the use of the subpoena and the forced testimony of witnesses.[15] It involves the full panoply of power. It has caused controversies which have racked public opinion and caused much trouble to the courts.[16]

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10 U.S. Const. art. II, § 3.

11 N.Y. Const. art. IV, § 3. For references to comparable provisions in other states, see Index Digest of State Constitutions 503-04 (2d ed. 1959).

12 See Neustadt, "Presidency and Legislation: The Growth of Central Clearance," 48 Am. Pol. Sci. Rev. 641 (1954). See Read, MacDonald & Fordham, supra note 8, at 347. On a more informal basis, a procedure comparable to this practice exists in at least some of the states, e.g., in New York the executive departments bring their programs to the attention of the Governor, partly in order for the Governor to determine which of the departmental bills, if any, will become part of his own program and be recommended in his annual message.

13 See Moffat, supra note 5, at 229.

14 See Read, MacDonald & Fordham, supra note 8, at 357-60.

15 See Read, MacDonald & Fordham, supra note 8, at 357; Ehrman, supra note 9, at 2.

16 This is by no means a discussion of the kind of legislative investigation which depends on subpoena and contempt. Therefore, this is not a full annotation, nor is it intended to be. However, consider Russell v. United States, 369 U.S. 749 (1962); Deutch v. United States, 367 U.S. 456 (1961); Braden v. United States, 365 U.S. 431 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957); United States v. Rumely, 345 U.S. 41 (1953); McGrain v. Daugherty, 273 U.S. 135 (1927); Kilbourn v. Thompson, 103 U.S. 168 (1880). See 52 Stat. 942 (1938), 2 U.S.C. § 192 (1958). Cf. Mr. Justice Clark in Watkins v. United States, supra at 225. "If the Court is saying

That there is an effective means by which a legislature may itself obtain information required for intelligent action, other than use of the legislative investigation based on sanction and power, is the thesis of this paper. There are areas, even areas with strong conflicts of interest and policy, in which this other effective means of investigation may well be, and has been used. This has been particularly true in New York. This statement is not meant to be provincial. It is a fact that in New York the process is older, more continuous, and more highly organized than in most other common law jurisdictions.[17] The basic tool of this kind of legislative investigation is pure research, the kind of research which goes into preparation of theses, articles and treatises—done by professional people with an intellectual bent for this kind of activity, some of whom make it their life work. It is not ivory tower research, with publication and sharing with scholars the sole goal. It is research which looks to a decision, statute or no-statute, as the goal, with the final place of contention the legislative floor itself. The scope of the research will be determined by the scope of the problem, the imagination and skill of the researcher and of those to whom he reports, and the active nature of the decision which will ultimately be required. Publication of the results of the research is only an incidental objective (historically, perhaps, it is accidental that there is publication);[18] publication is part

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that its new rule does not apply to contempt cases tried before the bar of the House affected, it may well lead to trial of all contempt cases before the bar of the whole House in order to avoid the restrictions of the rule." A great deal of literature, public and professional, has come out of the problems presented by congressional and legislative investigations of this sort.

[17] This history of the New York Commission is discussed in note 38, infra; see also Heineman, supra note 1, at 708-09 n.31; Stone & Pettee, "Revision of Private Law," 54 Harv. L. Rev. 221 (1940).

[18] Although it was never officially reported, the question whether there should be publication of the research studies was seriously debated in the early days of the Law Revision Commission. There was a fear expressed that the study might minimize the Recommendation, for which the responsibility was taken solely by the Commission itself. Correspondingly, the courts might fail to distinguish between what was written in the studies and what was written in the Recommendations as expressions of legislative intent.

There has been some indication that the misgivings might be warranted. See, for instance, Schwarz v. General Aniline & Film Corp., 305 N.Y. 395, 113 N.E.2d 533 (1953) with respect to a statute (N.Y. Sess. Laws 1945, ch. 869) recommended by the Law Revision Commission. (N.Y. Gen. Corp. Law art. 62. See 1945 N.Y. Law Revision Comm'n Rep. 131-75.) Both the majority of the court and the dissent rely heavily on excerpts from the legislative document accompanying the bill. The majority of the court quoted solely from the Recommendation, and wrote, at 402:

> Appellant gets some comfort from a brief equivocal footnote in a study, made by an attorney employed by the Law Revision Commission, and attached to the 1945 Report of the Law Revision Commission. . . . But that was a mere comment by the writer of a study made for the Commission. . . . There is nothing to indicate that the legislature, or, indeed, the Law Revision Commission ever had any such thing in mind.

The note in question was relative to a statement in the text, "It may be urged that this language might cover certain types of action." The note read "e.g., a criminal proceeding against the corporation and its officers or directors for violation of the anti-trust laws." 1945 N.Y. Law Revision Comm'n Rep. at 161 n.36—the very question involved in the General Aniline case. In his dissent, Judge Fuld relied strongly on this footnote, 305 N.Y. 395, 408, 113 N.E.2d 533, 543 (1955), attributing the language of the note specifically to

of a forensic process to accomplish a result, and when the result is accomplished, either positive (enactment) or negative (rejection), the purpose of publication is explanation of legislative intent.

II. The Proposal of a Ministry of Justice

In 1921, Judge Benjamin N. Cardozo, addressing the Association of the Bar of the City of New York, proposed the establishment of an agency —he called it a Ministry of Justice—"to mediate between [courts and legislatures]."[19]

> Today courts and legislatures work in separation and aloofness. The penalty is paid both in the wasted effort of production, and in the lowered quality of the product. On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to workings of one rule or another, patches the fabric here and there, and mars often when it would mend.[20]

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the Commission. This possibility is again illustrated from two statements in the Symposium on the Law Revision Commission, 40 Cornell L.Q. 641 (1955). See MacDonald, "Foreword to the Symposium," at 642:

> It alone speaks through its Recommendations or Communications. Although it publishes materials submitted to it by its staff or by its consultants, it does not publish them as authoritative statements of its intent; it publishes them only as materials before it, as it would likewise publish the transcript of one of its hearings. The intent of the Commission is expressed only through its formal Recommendation or communication which is the culmination of every study it completes.

Compare Fuld, "The Commission and the Courts," 40 Cornell L.Q. 646, 662-65 (1955). He discussed thoroughly the use which the dissenting judges made of footnote 36 in General Aniline.

> Undoubtedly, the study is, in any case, pertinent reference material for ascertaining the background of the statute and the problems or defects which motivated its adoption. . . . [T]he study itself may not be regarded as persuasive a clue to the legislative design as are the Commission's own comments. . . . [A]part from furnishing guidance to the construction of statutes, the Commission's recommendations and the accompanying studies may also serve the courts as intelligent and learned discussions of the basic subject matter . . . [enabling the courts to] accord 'recognition to statutes as starting points for judicial law-making comparable to judicial decisions'

citing Chief Justice Stone, "The Common Law in the United States," 50 Harv. L. Rev. 4, 12 (1936), 40 Cornell L.Q. at 663, 664. Cf. Read, MacDonald & Fordham, supra note 8, at 45-59.

The writer has never, despite the dispute, regretted the decision of the Commission to publish the studies which it had before it when it made its Recommendations or communications to the Legislature.

19 See note 2 supra. Judge Cardozo implies an interesting analogy with respect to the effect of the lack of information on the courts when, in the absence of precedent, a new rule is declared:

> Those who know best the nature of the judicial process, know best how easy it is to arrive at an impasse. Some judge, a century or more ago, struck out upon a path. The court seemed to be directed by logic and analogy. No milestone of public policy or justice gave warning that the course was wrong, or that danger lay ahead. Logic and analogy beckoned another judge still farther. Even yet there was no hint of opposing or deflecting forces. Perhaps the forces were not in being. At all events, they were not felt. The path went deeper and deeper into the forest.

35 Harv. L. Rev. 113, 115 (1921).

20 Id. at 113-14.

And it is not in the area of public law where information is lacking; the judge marvels and laments "that the great fields of private law, where justice is distributed between man and man, should be left without a caretaker."[21]

He proceeds: "Discharge of such a task requires an expenditure of time and energy, a single hearted consecration, not reasonably to be expected of men in active practice. It exacts, too, a scholarship and a habit of research not often to be found in those immersed in active duties."[22]

He concludes, therefore, that the task should not be left to the attorneys-general, "overwhelmed with other duties,"[23] or to one man, "not likely to combine in himself attainments so diverse,"[24] or to "desultory or sporadic" works of Bar Associations,[25] or other voluntary bodies, but that it should be left to a "single committee . . . charged with responsibilities of office . . . organized as a ministry of justice"[26]—with a membership not less than five in number, with representatives "not less than two, perhaps as many as three, of the faculties of law or political science in institutes of higher learning."[27] Cardozo, in this 1921 speech rarely used the word "research"—but he used it at least once.[28] Yet, with respect to the membership of faculty men, he says "Hardly elsewhere shall we find the scholarship on which the ministry must be able to draw if its work is to stand the test."[29]

> Such a board would not only observe for itself the workings of the law as administered from day to day. It would enlighten itself constantly through all available sources of guidance and instruction; through consultation with scholars; through studies of the law reviews, the journals of social science, the publications of the learned generally; and through investigations of remedies and methods in other jurisdictions, foreign and domestic.[30]

Thus, Cardozo spelled out the meaning of research.

The purpose is not primarily a code.[31]

> The statute that will do this, first in one field and then in others, is something different from a code, though, as statute follows statute, the material may be given from which in time a code will come. Codification is, in the main, restatement. What we need, when we have gone astray, is change. Codification is a slow and toilsome process, which, if hurried,

[21] Id. at 115.
[22] Id. at 124.
[23] Id. at 123.
[24] Ibid.
[25] Id. at 123-24.
[26] Id. at 124.
[27] Ibid.
[28] Ibid. See also text accompanying note 22 supra.
[29] Ibid.
[30] Ibid.
[31] Id. at 116.

is destructive. What we need is some relief that will not wait upon the lagging years. . . . Something less ambitious, in any event, is the requirement of the hour. . . . Often a dozen lines or less will be enough for our deliverance.[32]

III. The Creation of Such an Agency in New York

In 1923, two years after the publication of this most influential law review article, the State of New York created the Commission to Investigate Deffects in the Law and its Administration.[33] Cardozo's Ministry would have had at least five members;[34] the Commission had seventeen. Cardozo would have had "if possible" a representative of the bench, and a representative or representatives of the bar; the Comission had five judges to be designated by the Governor, two from the Court of Appeals, two from the appellate divisions, and one a trial judge. Cardozo mentioned nothing about legislators or the attorney-general; the Commission had four legislators and also that executive officer. Cardozo would have had two or even three law faculty men; the Commission had seven men to be appointed by the Governor with no specific qualifications other than that they must have been admitted to the bar. So far as can be ascertained, the 1923 Commission had no legislative program except perhaps a bill to transform this "heavy commission with judges on it, into a straight commission of five."[35]

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32 Id. at 117. It is notable that the particular illustrations of defects in the law which Judge Cardozo provides to show the type of work which should occupy the attention of such an agency are very specific, and, in some instances, quite narrow: modification and discharge of a contract under seal; delivery of a deed in escrow; release of a surety by modification of the principal obligation; release of one joint tort feasor as being a release of another (117); the rule in Pennel's case; the rule in Dumpor's case; the presumption in the law of wills that a gift to issue is to be divided, not per stirpes, but per capita (118); —the author asks us to consider a New York statute, N.Y. Sess. Laws 1921, ch. 379, in this connection; the rule in Kelly Asphalt Block Co. v. Barber Asphalt Paving Co., 211 N.Y. 68, 71, 105 N.E. 88, 90 (1914)—and the author asks us to compare art. 1110 of the French Civ. Code; the distinction between liability of a municipality for torts of its employees in governmental as opposed to proprietary functions; the tort liability of the state; the application of the same rule of contributory negligence to a passenger as is applied to the driver approaching a railroad grade crossing; a proposal that entries in books of account are to be admitted as prima facie evidence on proof that they were made in the course of business—and the author asks us to compare an English statute, 42 & 43 Vict. c. 11 (Id. at 117-22).

33 N.Y. Sess. Laws 1923, ch. 575. This Commission was recommended by Governor Smith as "an honorary commission to serve without pay" to study the law of the State of New York, both civil and criminal, with a view to its defects and the possibility of bringing it "into harmony with existing sound, economic and business conditions" and to report back to the legislature in 1924. (28 N.Y. State Dep't Reps. 515 (1923).) He envisaged a temporary commission, and the commission organized by N.Y. Sess. Laws 1923, ch. 575, itself recommended the formation of a permanent body to be known as the Law Revision Commission. See 1924 N.Y. Leg. Doc. No. 70.

34 Cardozo, supra note 1, at 124.

35 The statute creating the Commission appropriated $15,000 for its actual and necessary expenses. The entire amount was reappropriated in 1924 (N.Y. Sess. Laws 1924, ch. 140, p. 343); an apparently unexpended balance of $10,245.61 was reappropriated in 1925 (N.Y. Sess. Laws 1925, ch. 181, p. 361); such a balance of $8,957.81 was reappropriated in 1926. After that year no appropriation or reappropriation appears in the statutes. The existence of the Commission is first noted in the New York Red Book in 1927 (p. 233) and

Independent of this agency created in response to Judge Cardozo's suggestion, in 1931 the Legislature created a temporary legislative Commission on the Administration of Justice in New York State.[36]

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it continued until 1933 (p. 357), but since that time it has been unidentified in that source book. On December 2, 1935, at a joint meeting of the New York Law Revision Commission and the New York State Bar Association Committee, the then President of the New York State Bar Association, Mr. John Godfrey Saxe, who had been Chairman of the 1923 Commission, spoke with regard to it as follows:

> I might say, however, I take more interest in the Law Revision Commission than almost any activity in the State. I know you all remember how Judge Cardozo made his now celebrated address at Harvard, in favor of a Ministry of Justice, whereupon Judge Shientag undertook to write legislation to carry it into effect. And legislation was passed, I think, in about 1923.
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> At any rate, I knew something was all wrong when I got a telephone message from Governor Smith that I had been appointed to be Chairman of the Commission, because I knew that if it was all smooth-sailing that either the Chief Judge, who was a member of the Commission—Judge Hiscock, or Judge Cardozo, who invented the plan, would have been Chairman if all had went well. And I soon found that my hunch was correct, because Judge Cardozo sent for me and explained to me that the Commission, which contained Judges as well as lawyers, and had a membership of some fifteen members, was improperly organized for the purpose of what he had in mind by law revision, namely a small commission, part-time workers, as I understand it, who would patiently and carefully weed out defects and anachronisms in the law.
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> Dean Smith and Mr. Justice Shientag and I talked before the Columbia Law School last year, and we all had different ideas as to what Judge Cardozo meant; and I guess we were all of us partly right and partly in error.
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> But that was the picture I gathered from him at that time. But I said, "Judge, having been appointed Chairman of the Commission, I can't commit hari-kari unless you give me a little help."
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> But we talked it over, and our first session, held in this room, the Committee on Permanent Organization was appointed. And that Committee on Permanent Organization, of which Alfred Frankenthaler, now a Justice of the Supreme Court, was Chairman, brought in a report that we should have a committee on plan and scope. And I immediately appointed Judge Cardozo Chairman of the Committee on Plan and Scope. And he brought in that marvelous report which you undoubtedly have read, which is my basis, my principal basis, for outlining his views in the manner which I have frequently stated them and have stated them here to you today. I think it is probably one of the most eloquent documents that have ever been written. And I shall never forget the thrill that I had when I sat where Mr. Pollak [an original appointed member of the Commission, Walter H. Pollak] is sitting here today, and Judge Cardozo beside me, and he almost recited that report. . . .

(Unpublished Transcript in New York Law Revision Commission Minutes of Meeting, December 2, 1935.)

Following this, Mr. Saxe told how the bill creating the new Commission, which was to be called a Law Revision Commission, passed the Senate the first year but was killed in the Assembly, and how it ultimately failed to pass apparently because of the desire of Governor Roosevelt to revive the 1923 Commission to Investigate Defects in the Law and its Administration (either in its original form or in the form proposed by the Committee on Plan and Scope—it does not appear from Mr. Saxe's remarks) and "to appoint some laymen to the Commission."

The "marvelous report" of the Committee on Plan and Scope is, it would seem, contained in part in the report of the Commission on the Administration of Justice on the establishment of a Law Revision Commission. See note 39 infra and accompanying text.

[36] N.Y. Sess. Laws 1931, ch. 186. It made a preliminary report on March 1, 1932 (1932 N.Y. Leg. Doc. No. 92) and its final report on January 25, 1934 (1934 N.Y. Leg. Doc. No. 50). There were four ex officio members and sixteen appointed members. Of the latter, three were appointed by the President pro tem of the Senate, three by the speaker of the Assembly, four by the New York Bar Association and six by the Governor.

The composition of the Commission on the Administration of Justice was thus twenty persons—so large as to be almost unwieldy.

At the inception of the work of this Commission, certain members undertook singly to direct a considerable portion of its research work. For instance, Prof. Raymond Moley, an appointee of the Governor, was appointed Director of Research, and served for about a year, after which he relinquished the directorship but remained on the Commission.

The proposal for this Commission was first made by Governor Roosevelt. The basis of the proposal was quite different from that of Cardozo's.[37] That Commission, however, in its 1934 report recommended the creation of a permanent agency, the Law Revision Commission, a recommendation accepted by the Legislature in its enactment of article 4-a of the Legislative Law.[38] In recommending the creation of the Law Revision Commis-

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One of the published studies of this group ("Recommended Changes in Practice, Procedure and Evidence," 1934 N.Y. Leg. Doc. No. 50(D) 241-310) was prepared by Philip Halpern under the direction of Robert H. Jackson who was a member of the Commission, likewise appointed by the Governor.

[37] In his Annual Message to the Legislature of January 1, 1930 (his second Message), Governor Franklin D. Roosevelt wrote:

> Many, probably a majority of our citizens, continue to be dissatisfied with the existing administration of Justice. They object to the costliness, the delays and complexities of civil actions and the inequalities and slowness of criminal procedures. They ask that we go to the roots of the disease and cease our sporadic efforts merely to prune off occasional dead branches. Because the great majority of parties to court actions are not lawyers, it seems fitting that laymen should have a large part in any comprehensive study and revision of the methods by which their actions at law should be handled. I asked the last Legislature for a mixed commission of laymen and lawyers. Instead a bill was passed creating a body composed wholly of lawyers, most of them members of the Legislature. I vetoed that bill: and now renew my recommendations of last year.

Public Papers, Governor Franklin D. Roosevelt 29, 30 (1930).

In approving (1930) Sen. Int. 1620, Pr. 1928, which created a commission to investigate and collect facts relating to the present administration of justice in the state and to report thereon, the Governor wrote as follows:

> I am glad to approve this bill. . . . This commission was suggested by me in my speech of acceptance made immediately after my nomination. . . . I pointed out at that time and have pointed out many times subsequently that the proper function of such a commission was not merely the remedying of minor procedural defects but was rather a fundamental revision and speeding up of the business of our courts. It was apparent to me that such a commission should have a large proportion of laymen on it for such purposes. Last year the Legislature, disregarding my recommendation, passed a bill providing for a commission which would have been composed wholly of lawyers. I promptly vetoed it.
>
> I am glad that this year the Legislature has seen fit to pass this bill in which laymen will undoubtedly play a most important part. I feel confident that it will go a long way toward making justice in this state cheaper and speedier.

Public Papers, Governor Franklin D. Roosevelt 288 (1930).

[38] See Message of Governor Lehman following this report, and urging the enactment of a statute creating the Law Revision Commission, 46 N.Y. State Dep't Rep. 516 (1934), stating, "It will be good for the Legislature to have before it a thorough and disinterested recommendation by this commission." The recommendation of the Commission and of the Governor was accepted, 1934 N.Y. Sess. Laws, ch. 597, adding to N.Y. Legis. Law a new article 4-a. The statute creating the Law Revision Commission was amended by 1944 N.Y. Sess. Laws, ch. 239; 1948 N.Y. Sess. Laws, ch. 141; 1949 N.Y. Sess. Laws, ch. 457; 1955 N.Y. Sess. Laws, ch. 147; 1961 N.Y. Sess. Laws, ch. 358.

At least five states have functioning groups similar to the New York Revision Commission. See "Substantive Law Revision Programs in United States," a mimeograph prepared for the Statutory Revision Workshop, Nat'l Legis. Conf., Council of State Gov'ts, Phoenix, Arizona, Sept. 18-21, 1962. See also Heineman, supra note 1, at 710-11.

As New York created its Commission to Investigate Defects in the Law and its Administration in 1923, two years after the Cardozo address, note 33 supra, a similar agency was created in New Jersey in 1925. N.J. Laws 1925, ch. 110, p. 324. In 1939 the Commission on Statutes was created, N.J. Laws 1939, ch. 91, with authority to conduct substantive law revision. This Commission was abolished in 1944 and the Law Revision and Bill Drafting Commission established in its stead, N.J. Laws 1944, ch. 105. See 52 N.J. Stat. Ann. § 52:11-8 (1954). See Heineman, supra note 1, at 710. "A study of the annual reports of the Law Revision and Bill Drafting Commission and its predecessor make clear that substantive law revision has been sacrificed because of pressure for the performance of the other auxiliary legislative services for which the Commission is responsible." This comment, however, was made in 1948. See, however, infra.

sion, the Commission on the Administration of Justice wrote as follows:[39]

> The foregoing discussions are replete with evidence of the need for systematic law revision. While we have devoted much attention to certain

The Louisiana State Law Inst. was created in 1938 (La. Act 1938, No. 166). The statute is now found in La. Rev. Stat. §§ 24:201-05 (1950). The provision with respect to its duties is similar to New York's. See "Substantive Law Revision Programs in Selected States," supra at 13-29.

The California Law Revision Commission is the one most recently created, and most like New York's, since it is patterned on the New York Commission. It came into being in 1953 (Cal. Stat. of 1953, ch. 1445). For its manner of functioning see Government Code §§ 10300-340; also 1 Cal. Law Revision Comm'n Rep. 7 (1957). The California Law Revision Commission succeeds the California Code Commission which was engaged from 1929 to 1953 in codifying the statutory law of the State. That Commission recommended the creation of the present California Law Revision Commission. See "Substantive Law Revision Programs in Selected States," supra at 1-13.

A North Carolina agency, now defunct, was called the "North Carolina Commission for Improvement of Laws." By 1940 it had recommended ten bills, of which four became law. Stone & Pettee, "Revision of Private Law," 54 Harv. L. Rev. 221, 231 n.22 (1940). It was created in 1931 (N.C. Laws 1931, ch. 98), and the statute was repealed in 1943 (N.C. Laws 1943, ch. 746). See Heineman, supra note 1, at 710 n.34. It was succeeded by the General Statutes Commission created in 1945, which was assigned the task of substantive law revision in 1951. See N.C. Gen. Stat. art. 2, ch. 164. See "Substantive Revision Programs in Selected States," supra, at 29-32.

In 1959, the duty of substantive law revision was assigned to the Legislative Counsel Committee in Oregon (Ore. Rev. Stat. § 173.155 (1959)). That Committee had been created in 1953 (Ore. Rev. Stat. § 173.150) and assigned the task of bill drafting and publishing new editions of the Oregon Revised Statutes. See "Substantive Law Revision Programs in Selected States," supra at 33-57.

A Law Revision Committee was established in England in January, 1934 by the Lord Chancellor (Lord Santey) to study such subjects as the "Lord Chancellor may from time to time refer to them." 177 L.T. 30 (1934).

It made eight interim reports and six statutes were enacted by Parliament. See Heineman, supra note 1, at 709 n.32.

This Committee stopped functioning in 1939. It was succeeded by the Law Reform Committee in 1952. See Goodhart, "Law Reform in England," 33 Aust. L.J. 126, 131-35 (1959).

As to the constitution and organization of both the pre-war and post-war committees, see Megarry, "Law Reform," 34 Can. Bar Rev. 690, 690-93 (1956) in which, discussing the requirement of reference of projects by the Lord Chancellor, he writes: "In practice what happens is that the committee . . . collects suggestions of possible subjects for consideration, decides on the most suitable, and . . . seeks the authority of the Lord Chancellor to consider the chosen topics."

A Law Revision Committee was established in New Zealand in 1937. See Heineman, supra note 1, at 709 n.33 for a recent discussion of its record and work. For a more recent discussion of its work see Cameron, "Law Reform in New Zealand," 32 N.Z.L.J. 72, 88, 106 (1956).

The article by Mr. Heineman referred to in note 1 supra is particularly good in its discussion of the work of these agencies in other jurisdictions.

For a collection of proposals with respect to law revision activities and proposals for establishment in other states, see Goodrum & Gordon, "Substantive Law Revision in Texas," 37 Texas L. Rev. 740, 759-63, particularly nn.125, 128, 129, 131, 132; Stern, "A Law Revision Commission for Pennsylvania," 29 Penn. B.A.Q. 180 (1958).

See also Shientag, "A Ministry of Justice in Action," 22 Cornell L.Q. 183 (1937); Stone & Pettee, "Revision of Private Law," 54 Harv. L. Rev. 221 (1938), and the collection of literature with respect to the New York Commission in Heineman, supra note 1, at 708-09 n.31; Pound, "Criminal Justice in Cleveland," 559, 604 (1922); Vanderbilt, "The Idea of a Ministry of Justice Considered and its Functions Distributed," 22 J.B.A.D.C. 346, 419, 473, 531 (1955).

See also "Permanent Legislative Service Agencies," a pamphlet published by the Council of State Governments (Aug. 1962), in which there is a summary, state by state of all agencies, which service the legislatures, broken down into various categories of functions, including "Recommends substantive legislative program." Interestingly enough, the New Jersey Law Revision and Legislative Services Commission, supra, is not included under this column. Many agencies in many states are, however, included.

[39] The excerpt relating to the proposal, from the Commission's final report (1934 N.Y.

aspects of the problem, it is clear that the task is too large for any commission of limited tenure to assume. It is, in fact, a continuing problem which, while it can never be deemed completed, requires constant attention, if our system of law is to possess coherence and current application in all its parts.

In our Preliminary Report we pointed out the distinction between a Ministry of Justice and the bodies which have come to be known as Judicial Councils. The former was powerfully advocated by Mr. Justice (then Judge) Cardozo in 1921. In the time that has elapsed since Mr. Justice Cardozo's article first appeared, a Judicial Council has come to be known as a group, composed, at least in part, of judges, vested with authority to collect information and make recommendations to the Legislature on matters chiefly concerned with the administration of the courts and methods of practice and procedure. Such bodies have been established in twenty states. On the other hand, a Ministry of Justice, or, as we have called it, a Law Revision Commission, has come to be thought of as a group of students of the law, vested with the responsibility of considering particularly the substantive statutory law with a view to scientific revision in the light of modern conditions, and acting as a link between the courts and the Legislature. So far as we are aware, no state has yet adopted the idea of such a commission, although the suggestion has received wide support from legal scholars, leaders of the bar and students of government. However, according to Judge Cardozo, "in countries of continental Europe the project has passed into the realm of settled practice."

There is in New York State a distinct need for such a commission. . . .

The suggestion that such a permanent law revision commission be created is not new in New York State. Governor Smith in his Annual Message to the Legislature of January 3, 1923, recommended the creation of a temporary commission to consider the need for law reform. He stressed the dissatisfaction voiced by judges, lawyers and laymen with many of the existing rules of law as outworn or defective and said:

> "It is necessary that in this respect we keep pace with our growth and with modern conceptions of right and justice. The law of the State, civil and criminal, should be brought into harmony with existing social, economic and business conditions."

In 1923, the Legislature created a Commission on law improvement, which had Judge Cardozo as Chairman of its Committee on Plan and Scope. Acting upon the suggestion of Judge Cardozo and that Committee, the Commission recommended a proposed bill for the creation of such a permanent body, to be known as a Law Revision Commission.

The proposal of Judge Cardozo was for a Commission which should re-examine the entire *corpus juris* of the State. He said:

> "We find a widespread agreement that there should be established

Leg. Doc. No. 50, pp. 53-58), is set forth in full (a) as a matter of historical interest; (b) to contrast the work of a law revision commission with that of a judicial council, also proposed by the Commission and accepted by the Legislature (N.Y. Sess. Laws 1934, ch. 128, N.Y. Judiciary Law § 49-48), and later replaced by the Judicial Conference of the State of New York (N.Y. Sess. Laws 1955, ch. 869), and presently by the Administrative Board of the Judicial Conference (N.Y. Judiciary Law art. 7-a, added by N.Y. Sess. Laws 1962, ch. 684); (c) because it quotes extensively from the Report of the Committee on Plan and Scope of the 1923 Commission to which Mr. Saxe referred in his address to the joint meeting of the Law Revision Commission and the State Bar Association Committee to Cooperate with it (see note 29 supra).

a permanent agency, continuously functioning, to consider the changes essential to the proper administration of justice and to report its recommendations yearly. One of the anomalies of our legal institutions is that no such agency exists. The courts and the Legislature work aloof and in isolation with no responsible intermediaries through which the needs of the one may be communicated to the other. Hardships are not corrected by the lawmakers because it is not the business of anyone to give notice that they exist or to frame measures of correction. Let responsibility be centered somewhere and at once the difference appears. The attorney-general discovers that in the administration of the tax law or of the Workmen's Compensation Law or in some other field within his province changes are essential if justice is to be done. At once he is before the Legislature with a bill for the correction of the evil. The Legislature has confidence in the sincerity of his motives, and in a great majority of cases approves the bill which he submits. The difficulty is that there is no one to discharge a like duty, to fulfill a like function, in the great mass of controversies arising between man and man. Anachronisms persist not because they are desired, but because they lie buried from the view of those who have the power and the will to end them. Reforms are not made because the impulse to make them is sporadic, working by fits and starts, and at times because the motives of the sponsors are unworthy or at least suspect. A disinterested agency should exist to survey the body of our law patiently and calmly and deliberately, attempting no sudden transformation, not cutting at the roots of centuries, the products of a people's life in its gradual evolution, but pruning and transplanting here and there with careful and loving hands. . . ."

"Your Committee therefore advises that the Commission recommend to the Legislature the formulation of a permanent agency or commission for the amendment and correction of the law as it is administered in the courts. . . . The members . . . should not be more than five in number. We are strongly persuaded that at least two of the five should be members of the law faculties of some university of the State or of some institute of learning of like standing and authority. Scattered amendments of the law are likely to prove a snare and an evil unless effected with scientific understanding of the law as a whole. Correction at one spot may produce abnormalities and inconsistencies at another unless the relation between the parts is remembered and perceived. The scholarship essential to so delicate a task can be found in the law schools more readily than elsewhere. On the other hand, the practising lawyer, too busy often to arm himself with the scientific equipment of the scholar, must contribute his knowledge of affairs, his experience of the practical workings of the law, his readiness of resource, his skill in administration, his sagacity and wisdom. Representation of both these elements of strength with their diverse points of view is likely to bring us in the end to the level of the best results."

Governor Smith in his Annual Message of 1925 said:

"I am thoroughly in accord with the report of the Commission and I recommend that you enact suitable legislation to create such a permanent agency."

The bill proposed by the above described Commission, as the result

of Judge Cardozo's report, would have established a commission to study and recommend reforms both in law and in methods of judicial administration. A Judicial Council, if established pursuant to the recommendation of the Commission on the Administration of Justice, would deal with all questions in the field of *judicial administration,* but would leave unprovided for any permanent agency to study *"the amendment and correction" of the law.* The need for the latter type of agency, so cogently expressed by Judge Cardozo in his report and by Governor Smith in his messages, is certainly as great now as it was eight or ten years ago, and the material available to such an agency is greater at the present time by reason of the intervening studies made by the American Law Institute, the Commissioners on Uniform State Laws, and by various research bodies and associations. . . .

The membership and purposes of the Commission are set out in the footnote.[40]

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[40] N.Y. Legis. Law § 70:

A law revision commission is hereby created to consist of the chairman of the committees on the judiciary and codes of the senate and assembly, ex officio, and five additional members appointed by the governor. . . . Four members appointed by the governor shall be attorneys and counsellors at law, admitted to practice in the courts of this state, and at least two of them shall be members of law faculties of universities or law schools within the state recognized by the board of regents of the state of New York.

N.Y. Legis. Law § 72:

It shall be the duty of the law revision commission:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.

2. To receive and consider proposed changes in the law recommended by the American Law Institute, the commissioners for the promotion of uniformity of legislation in the United States, any bar association or other learned bodies.

3. To receive and consider suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.

4. To recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.

5. To report its proceedings annually to the legislature before February first, and, if it deems advisable, to accompany its report with proposed bills to carry out any of its recommendations.

As originally constituted in 1934, only the chairmen of the Senate and Assembly Committees on the Judiciary were ex officio members of the Commission. The chairmen of the Codes Committees were added by N.Y. Sess. Laws 1944, ch. 239.

As to the qualifications of the members appointed by the Governor, it is interesting to note that only four of five need be lawyers. Cf. Governor Roosevelt, supra note 37, and the controversy indicated by his veto of the Legislature's 1929 bill. Cf. Saxe, supra note 35. In this same address, Mr. Saxe said:

I think by that time we had already renamed it the Law Revision Commission in our bill. When President Roosevelt became Governor I went up and spent two hours with him on the subject, and he wanted the Commission on the Administration of Justice recalled, because he wanted to appoint some laymen to the Commission, as he expressed it to many lawyers, and he wanted the laymen to take a whack at reforming our laws.

The Commission to which Mr. Saxe referred was the old 1923 Commission to Investigate Defects in the Law and its Administration, see note 33 supra, or perhaps, and more likely, the Law Revision Commission which it proposed in its 1924 bill, after report of its Committee on Plan and Scope. See note 35 supra. The heat engendered by Governor Roosevelt's proposal to have laymen participate in the reform of the law was very substantial. He proposed the reform in his speech of acceptance of the nomination for Governor (supra note 37); he had won the governorship in 1928 by plurality of only 25,564 out of 4,471,426 votes cast. Governor Smith, as candidate for President, had lost the State by

This paper studies the work of the New York Law Revision Commission as an agency which, from the time of its organization, has depended solely on research as its tool for investigation and report to the legislature.

The 1923 Commission to Investigate Defects in the Law and its Administration was specifically given the power "to compel the attendance of witnesses and the production of books and papers." It was likewise given "all the powers of a legislative committee as provided in the legislative law, including the adpotion of rules for the conduct of its proceedings."[41] The 1934 statute creating the Law Revision Commission and defining its duties contained no such provisions or powers.

The Law Revision Commission held its organizational meeting on July 31, 1934. On February 21, 1935, the first bills recommended by it were introduced in the Legislature. In the twenty-eight legislative sessions between 1935 and 1962, bills on 327 different subjects were recommended by it to the Legislature. During three years of this period, 1954-1956, the Commission, on direction of the Governor, was exclusively occupied with one study, the Uniform Commercial Code, and no bills were recommended by it. Of these 327 bills, 243 were enacted into law. This is a study of the techniques employed in the transition from research by the Commission to legislative action, especially to the favorable action disclosed by this record.[42]

103,481 votes. The Senate was Republican 27-24; the Assembly was Republican 89-61. The lawyers of the state were not too enthusiastic; it was a major political issue.

So, in the constitution of the Law Revision Commission, the fact that only four out of five appointed members need be lawyers would seem to be a bow in the direction of the winner of the 1930 controversy. Yet it is interesting to note that since the organization of the Commission only one of its members had not been admitted to practice as a lawyer, and he had a Columbia law degree. That member was Mr. Bruce Smith, a specialist in police science and administration of the staff of the Institute of Public Administration.

[41] N.Y. Sess. Laws 1923, ch. 575, § 3. Cf. Mr. Chief Justice Warren in Watkins v. United States, supra note 16, at 191:

> Modern times have seen a remarkable restraint in the use by Parliament of its contempt power. Important investigations, like those conducted in America by congressional committees are made by Royal Commissions of Inquiry. These commissions are composed of experts in the problems to be studied. They are removed from the turbulent forces of politics and partisan considerations. Seldom, if ever, have these commissions been given the authority to compel the testimony of witnesses or the production of documents.

[42] See note 102 infra. See also Fuld, supra note 18, at 649.

> The Law Revision Commission has discharged its functions admirably, with skill and diligent application, and has fully justified the hopes and expectations of its founders. When it embarked upon its appointed task, many defects and anachronisms, which the courts felt powerless to eliminate, stood deeply rooted in the law. In careful, methodical fashion, and only after comprehensive and painstaking study of the problems involved, the Commission recommended legislation designed to root out many antiquated and unjust rules of law, whose only reason for being was often merely that of historical accident.

The achievements of the first year after organization are described in MacDonald & Rosenzweig, "The Law Revision Commission of the State of New York: Its Organization, Procedure, Program and Accomplishment," 20 Cornell L.Q. 415 (1935). See also Scheintag, supra note 38; Comment, 4 Fordham L. Rev. 104 (1935). There is a vast collection of

Perhaps, to a participant in this process, any one factor can be overemphasized. Was the Commission's research the key to its success? This, I suppose, is the major question posed by this paper.

It cannot be denied that there are problems which are peculiar to an official agency whose sole purpose and function is to "root out many antiquated and unjust rules of law" by recommending legislation to one of the great political branches of the government, concerned as it is with many problems far removed from law reform in "the great fields of private law, where justice is distributed between man and man."[43] An examination of those problems, disclosed over the years, will be helpful in showing the background of the research and the recommendations of this agency and the pattern within which they are made.

"Research" and "scholarship" are themselves not objectionable words in the legislative process. Many jurisdictions have legislative research bureaus, or legislative reference libraries. Legislative committees have counsel, assistant counsel, and staffs. Let it be understood, however, that words have pleasant or unpleasant significations. Cardozo called his agency a "ministry" and the members of it "ministers."[44] In New York, the agency was deliberately called a "commission" and the members of it "commissioners." It is not inconceivable that in the hurly-burly of politics, a "ministry" and "ministers" might have had trouble in getting off the ground. Thus the Law Revision Commission, with membership required by statute to include two law professors, with a mandate to receive and consider suggestions from "other learned bodies," *inter alia*, not only had to "guard against the twin dangers of overzeal on the one hand and of inertia on the other."[45] It had to guard against even the appearance of affected superiority, of talking down to its creator and its master.

The first years were critical. Although the Commission thought of itself as permanent, there was nevertheless the problem of survival.[46]

periodical and other literature about the Commission. No attempt will be made to present it here. Indeed, it probably would be difficult, because a great deal of it is found in discussions of specific legal subjects on which the Commission has made recommendations. See, however, Heineman, supra note 1, at 709 n.31. In a Symposium in 40 Cornell L.Q. 641 (1955), the impact of the Commission in twenty years (1934-1954) on various fields of law was described: On the Courts by Judge Stanley S. Fuld, at 646; on the law of Restitution by Prof. Edwin W. Patterson, at 667; on the law of Corporations, by Carlos L. Israels, Esq., at 686; on the law of Contracts, by Prof. Robert Braucher, at 696; on Criminal Law by Simon Rosenzweig, Esq., at 719; on the law of Real Property, by Prof. W. David Curtiss, at 735-63. In a foreword to the Symposium, the present writer noted at 645: "There has been a record made in torts, in secured transactions, in implementing the abolition of the distinction between law and equity and distinctions between the forms of action" and "There could be more, limited only by space and the availability of generous and authoritative contributors."

[43] Supra note 21.

[44] Cardozo, supra note 1, at 124.

[45] Id. at 125.

[46] The most drastic proposal of these early years was Mr. Abbot Low Moffat's bill Ass.

Adequate financing was a pressing question, and there were other special problems, such as its status as an official agency, the development of methods of research, and the establishment of sound relationships with the Legislature and the Governor. There was also the necessity to make and keep contact with the bar and with the courts. All these matters the Commission considered as it entered upon its function of translating abstract research into legislative action.

IV. Organization of Research Within the Law Revision Commission

One of the first acts of the 1934 Commission was to appoint an Executive Secretary and Director of Research, these dual functions being for many years assigned to one individual.[47] It was his responsibility to acquire a research and clerical staff and to organize the work of the Commission. At the same time a Committee on Projects was created which at once directed inquiries to judges and lawyers, to the reporters and annotators of the American Law Institute, and to other groups interested in or concerned with reform of the law.

At its second meeting the Commission drew up a list of twelve subjects for immediate study, and a division was made between those which were intended to be completed for submission to the 1935 Legislature and those which involved long-term consideration. The procedure of drawing up a project list and compiling an "immediate" and a "reserve" study list worked well and has continued to this day in somewhat altered form. The selection and allocation of topics for study is done in the spring of each year at the time when the Commission's Calendar is being set up.

The Plan of Research Within the Commission

With the headquarters of the Commission organized and its staff

Int. 816, Pr. 843, 1537, 1723, 2199 (1937) which actually passed the Assembly after three readings on March 24, 1937, and was reported by the Senate Judiciary Committee where it went to third reading. The Legislative Index describes the bill as "adding new sections 73, 74 of the Legislative Law by enlarging powers of the law revision commission." Enlarge them it did, by combining with the Commission's duties revision powers like those of the Wisconsin Revisor of Statutes and by actually making it possible to have Commission bills introduced automatically upon report. But the complexion was changed. The bill created the office of Director, with nearly triple the then salary of the Executive Secretary and Director of Research, and reduced the Commissioner's salaries by 80%. Cf. Cardozo, supra note 1, at 123: "No man is likely to combine in himself attainments so diverse." Mr. Moffat was a legislative leader in 1937; he was chairman of the Assembly Ways and Means Committee, a scholarly man, a graduate of Harvard and the Columbia Law School, where he was greatly interested in the work of statutory revision as opposed to law revision and in the work of the Wisconsin Revisor of Statutes. He was finally persuaded that law revision requires more than one man, or one man with five advisors, and he did not press his bill to passage in the Senate.

47 I was the first appointment—July 31, 1934. Upon my appointment to the Commission in 1956, the functions were divided, and since that time have been in two persons. Mrs. Laura T. Mulvaney was appointed Director of Research; Professor W. David Curtiss was appointed Executive Secretary, and upon his resignation Walter C. O'Connell, Esq., was appointed to succeed him.

provided for, a fundamental question facing the new agency was the planning of a research program for the members of the Commission itself. It was necessary to decide how the Director of Research and his staff would function in relation to the Commission members and how research tasks would be distributed within the membership. Obviously, a distinction had to be made from the first between the appointed members of the Commission and the *ex officio* members. Their positions differ. The *ex officio* members, of course, are neither appointed nor paid. Their membership results from their position in the Legislature. For them, regular attendance at meetings and definite assignments could not be planned. Their presence at working sessions of the Commission would be appreciated, but could not be required. All members present at meetings are of course entitled to vote; *ex officio* members should be able to exercise this right without being bound when the same matter later came up for consideration in the Legislature, either before a committee or in the deliberative body itself.

The appointed members, therefore, became the active group. Immediately, a decision had to be made as to how they would function: would each member of the Commission participating in research himself conduct his own research, reporting to the full Commission his findings and his recommendations? Or would research be conducted under the general supervision of the Director of Research, for the Commission as a whole, with the results reported directly or indirectly to the full group for its decision? It was decided that instead of members of the staff being assigned to each individual Commissioner, with duties comparable to those of law secretaries to judges, the Director of Research himself would be responsible to the organization as a unit and would direct the entire research program of the Commission.

The Selection of Projects

From whence comes the grist for the Commission's mill?[48] It comes from the project suggestions sent to the Commission by outside individuals or groups, and from its own study of New York law.

Outside suggestions follow no particular pattern. They may be detailed or merely briefly stated. Usually, they gave no more than a mere idea of the nature of the desired change—an unbriefed, unresearched idea. This is true no matter whether the suggestion comes from the courts, from the Governor, from the Legislature, from public officials, from lawyers, or from the public.

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[48] See text of the enabling statute, N.Y. Legis. § 72, at note 40 supra.

Although a suggestion from a court may go no further than, "We must read statutes as they are written and, if the consequence seems unwise, unreasonable or undesirable, the argument for change is to be addressed to the Legislature, not to the Courts."[49] It may be more succinctly stated in an opinion which makes specific reference to the Commission, as was done by Judge Moule in the case of *Germain v. Germain:*[50]

> The court believes that consideration should be given to amending the New York State law to provide for the appointment by the court of a conservator of the property of one who disappears voluntarily or involuntarily and cannot be proved dead, seen or heard of.
>
> . . . .
>
> This court, by sending copies of this opinion to the New York State Law Revision Commission, New York State Bar Association and Erie County Bar Association, is suggesting that remedial legislation be enacted.

The suggestion for change may be contained in a letter from the Court directed to a particular case, which if followed leads to an undesirable result:

> That case [Karminski v. Karminski, 272 App. Div. 764, 70 N.Y.S.2d 327 (1st Dep't 1947)] has prompted the Court to call the attention of your Commission to the provisions of Section 1171-b of the Civil Practice Act and the decisions construing that section. In conference the Judges were unanimously of the opinion that that section may result in great hardship and that an amendment should be made permitting wide discretion in the court to which an application is presented.
>
> A Copy of the record, which speaks for itself, is enclosed herewith for the consideration of your Commission and for such action as it may deem advisable.[51]

At times, the Governor may transmit a specific suggestion for study by the Commission, as has been done respecting several matters: the desirability of changes in the Penal Law and in the Code of Criminal Procedure with regard to the establishment of commissions to examine the sanity of persons accused of crime;[52] the need for changes in the

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[49] People v. Kupprat, 6 N.Y.2d 88, 90, 160 N.E.2d 38, 44 (1959).

[50] 31 Misc. 2d 401, 406, 220 N.Y.S.2d 1013 (Sup. Ct. Erie County 1959). See 1961 N.Y. Leg. Doc. No. 65(G) recommending the enactment of N.Y. Sen. Int. 1338, Pr. 1354, Ass. 1554, Pr. 1556 (1961); N.Y. Sen. Int. 1335, Pr. 1351, Ass. Int. 1624, Pr. 1626 (1961); N.Y. Sen. Int. 1332, Pr. 1348, Ass. Int. 1617, Pr. 1619 (1961); N.Y. Sen. Int. 1336, Pr. 1352, Ass. Int. 1737, Pr. 1739 (1961); N.Y. Sen. Int. 1337, Pr. 1353, Ass. Int. 1553, Pr. 1555 (1961). The first four of these bills became law after certain amendments: N.Y. Sess. Laws 1961, chs. 108, 109, 367, 360. The fifth bill, having passed the Legislature in amended form, was disapproved by the Governor on April 6, 1961.

[51] See 1948 N.Y. Law Revision Comm'n Rep. 241-42, 249. See also Read, MacDonald & Fordham, supra note 8, at 39-40.

[52] 1935 N.Y. Law Revision Comm'n Rep. 633-81.

Uniform Criminal Extradition Act[53] and the Correction Law;[54] the question of what should be done respecting the law of felony murder and second degree rape;[55] and, notably, the study of the Uniform Commercial Code.[56]

The Legislature may, itself, direct the Commission to undertake a particular study. Most recently, this was done as the result of a bill introduced in the Legislature in 1961,[57] duly enacted into law, which "authorized and directed" the Law Revision Commission to make a thorough study and examination of all laws of the State relating to the offices of coroner and medical examiner. And in 1962, by concurrent resolution, the Legislature directed the Commission to study the desirability and feasibility of an Administrative Procedure Act for the State.[58]

Suggestions have come to the Commission from other executive departments of the State. For instance, the Comptroller wrote that the abolition of the distinction between sealed and unsealed instruments had had some unexpected results affecting bonds of the state and of some municipalities, so far as the statute of limitations was concerned, and that correction was needed.[59]

Proposals indicating a need for change in the law quite frequently come from lawyers, with respect to problems disclosed in counseling or in advocacy, or with respect to problems which have been noted without particular professional interest.

When the project suggestion comes from within the Commission itself —from one of the members or from the staff—it usually has been very carefully considered before being proposed. This is the source of most topics for consideration.[60]

Thus it can be seen that the suggestions received are many and varied. Some merit careful study while others are trivial in nature, perhaps the mere expression of whim, and should be disregarded. But it is the Commission that must make this decision. There is an exception, however, in the case of a directive from the Legislature or a request from the Governor. These, unless consultation should reveal the inappropriateness

53 See 1935 N.Y. Law Revision Comm'n Rep. 91-156; see also 1936 N.Y. Law Revision Comm'n Rep. 477-573.
54 See 1935 N.Y. Law Revision Comm'n Rep. 477-573.
55 See 1937 N.Y. Law Revision Comm'n Rep. 399-871.
56 See N.Y. Law Revision Comm'n Rep. 7.
57 See N.Y. Sess. Laws 1961, ch. 479.
58 Sen. Res. 103 (1962), passed Senate March 28, 1962; concurred in by Assembly March 29, 1962.
59 See N.Y. Civ. Prac. Act § 47-a. 1950 N.Y. Law Revision Comm'n Rep. 193-219, particularly at 215-217.
60 Since 1934, approximately three thousand suggestions for study have been received from all sources; approximately half of these have come from outside the Commission itself and its staff.

of the Commission's undertaking such a study, must be complied with even though outside the agency's own view of its own skill and competence.

In reaching its decision as to whether to include a particular suggestion on its study list, the Commission weighs many factors, but primarily the evidence of a need for such an undertaking. If the subject is already being studied by an established agency of the State (perhaps an existing State department or legislative investigating committee), or falls within the jurisdiction of that agency, or if it is a facet of a study already undertaken by the Commission or of an earlier suggestion which has been rejected or disposed of, the Commission will undoubtedly decide not to go ahead. This is true also if the suggestion involves primarily questions of policy, even though it may concern a field within which no previous Commission study has been made. It should be emphasized that no one of these factors is absolutely controlling. The Commission receives some one hundred or more suggestions each year and all are carefully evaluated.[61] When a proposal is submitted with accompanying explanation of its meaning and its connection with and place in the general pattern of the law, it is very helpful. The Commission, however, in considering subjects for study is not solving any legal problems, it is simply deciding whether or not to take up the subject as a project for study. Decision-making of this kind imposes no major demand on the research function of the Commission. At this stage it is necessary only to formulate enough of a study to supply an answer to the question whether the subject is to be studied or not, and if not, what other disposition is to be made of it.

Projects Report

These efforts, undertaken chiefly by the Director of Research, result in a Projects Report which is usually submitted annually, but may be made several times during the year. This report is in two parts: (a) a short study explanatory of the submitted suggestion, in cases where it is a new suggestion coming either from the outside or from within the Commission; and (b) in cases where the suggestion is *not* new, a brief re-study bringing up to date previous items submitted to the Commission but not yet studied, or on which study has for some reason been suspended.

The Projects Report is submitted annually to the full Commission, which determines the calendar for the ensuing year. This Calendar of

[61] See note 60 supra.

Topics for Study[62] falls into three main divisions: (1) The Immediate Study List, *i.e.*, those projects on which study has been authorized and which will be assigned by the Director of Research; (2) The Reserve List, *i.e.*, those topics not rejected or referred elsewhere, on which study has not yet been authorized and which will be re-examined; (3) The Suspended Study List, *i.e.*, those topics which have been previously studied, including in large part subjects which reached the stage of a proposal being submitted to the Legislature but which was not accepted by it, and also subjects as to which it was decided after study to make no recommendation for legislation; and including, in lesser part, those subjects on which study was begun but, for some reason, was not completed.

The placing of a study on the immediate Study List of the Calendar does not necessarily mean it will be studied in the year in which the calendar action was taken. It simply means authorization to the Director of Research to begin study when, in his own determination, it can and should be begun. This decision is based on a number of factors: (a) the availability of qualified personnel to undertake the study; (b) a prediction, made substantially nine months prior to the opening of the next session of the Legislature, as to what will then be a balanced program of proposed bills, including an estimate of the work that can be finished before the session and that which predictably cannot; (c) a judgment as to which studies are likely to result in legislation and which are not; and (d) a balancing of work among the various members of the Commission, according to their specialized interests or professional experience. The most important factors are the availability of qualified research personnel, and the balancing of work within the Commission itself.

Organization of the Membership of the Commission with Respect to Research

We have seen the participation of the Commissioners in the selection of projects and the formulation of the Calendar. Once the Director of Research has determined which subjects are to be studied during a given year, a committee of the Commission, usually consisting of two members—sometimes in a simple case of one member, rarely of three members—is appointed to undertake the preliminary study. A research

[62] The report of the Commission is published each year as a legislative document and is assigned the number 65. It is later reprinted in the bound volume for that year of the Commission's Report, Recommendations and Studies, presents the Immediate Study List and the Reserve List under the title "Proposals for Future Consideration." The Suspended Study List is not published.

assistant or a research consultant is then assigned to the topic and he makes the basic study under the supervision of the Director of Research. Sometimes, particularly in the case of a large exploratory subject, the Committee holds a preliminary meeting with the person assigned to the research. Thereafter the research assistant or consultant proceeds to make the basic study (to be later discussed) culminating in a lengthy report which concludes with his personal recommendations for action. Upon completion of this report and its submission to the Committee, a meeting or a series of meetings of the Committee is held at which all of the research materials are considered. Minutes are kept of each meeting. The Committee then meets with the full Commission and presents its plan of action. All the material considered by the Committee, including the conclusions of the research assistant or Consultant, however tentative and even if overruled by the Committee, goes to the full Commission. The Committee's submission may or may not include a proposed recommendation and draft statute, depending upon whether or not there is agreement respecting the need for legislation. The Commission considers the subject from every angle. There is debate. If no decision can be reached the matter may be referred back to the Committee for further study and the whole process is repeated. If the Commission decides to recommend legislation, consideration is at once given to the drafting of a suitable statute, which may not, in its final form, be approved until a later meeting.

The Functioning of Research Assistants and Research Consultants

The basic research of the Commission is carried on by research assistants, who are members of its regular staff, and by research consultants, who are engaged only for a particuar topic. The consultants may be law professors or lawyers with offices remote from the Commission's headquarters.

As has been noted, researchers are not individually assigned to the members of the Commission, but are responsible directly to the Director of Research who, in turn, is responsible to the full Commission.

Research assistants are employees of the State. They are paid annual salaries on the same basis as other State employees and are a part of the State civil service, although not a part of the classified competitive service.[63]

Research consultants, on the other hand, are independent contractors. They are engaged for the specific project and have no other assignment.

[63] See Op. Atty. Gen. N.Y. 538 (1934); see also Op. Atty. Gen. N.Y. 439 (1935).

The pleasant word "honorarium" is used to describe their compensation, although undoubtedly their contractual arrangement could be enforced in the Court of Claims. Neither their names nor their positions appear in the segregation of budget items certified from time to time by the Director of the Budget, as required by law. Instead, the compensation of the whole group of consultants is covered by a lump sum item certified for this purpose.

The use of assistants and consultants has shifted over the years. In the early years there were as many as nine research assistants, with relatively fewer consultants. In later years, the Director's staff has included as few as two, or even one assistant. This shift began when the war and draft made it nearly impossible to recruit and keep a regular staff. It was accelerated after the war by the great increase in the beginning salaries paid by metropolitan law offices to young lawyers who would be considered eligible for appointment as research assistants. One assistant today costs as much as three or more in 1934, and the appropriation for the Commission has not been increased proportionately. There has been no comparable increase in the sum paid to consultants as honoraria. The smaller number of research assistants reflects this more attractive beginning salary in law offices generally, and also the increased opportunities for top law graduates, as well as the increasingly satisfactory experience with a smaller staff and reliance on the consultant system.

For the most part, a typical research assistant is a high-ranking recent law school graduate who takes the job with the idea that it is a temporary step (one year or two) in obtaining experience and prestige. The research consultant, on the other hand, is usually a member of a law school faculty, sometimes of outstanding prestige and authority, or, as is equally possible, a young professor who desires to supplement his income and to obtain the professional prestige that attaches to an appointment as consultant to the commission. It is an experience which consultants often repeat year after year, partly due, perhaps, to the satisfactions inherent in being a participant in reform of the law—of having a part in this forward movement.

The research assistant participates in all of the research activities of the Commission, including the preliminary study which precedes selection of projects for study and their allocation to the various study lists. A member of the permanent staff also participates in activities which are on the fringe of research, the technical details of indexing, and the preparation of supplements and appendices to the annual bound volumes of the Commission's Reports.

The research consultant, however, acts only in one area: the study of the subject assigned, which is taken from the Immediate Study List of the Calendar. When the research assistant is similarly undertaking a study, both are doing the same job, and the nature of their activity at such time is the same.

The Research Study

This brings us to the research study, the heart of the research process. The Commission has drawn up general standards which apply to all such work and which serve as a guide to research assistants and research consultants alike. They are in line with the exposition that follows.

The basis upon which a study is undertaken is that it is to provide the Commission with a thorough review of the problem, in all its varied and related aspects, so that a correct conclusion can be reached as to whether or not legislative action is required, and if such action is to be recommended, how it is to be formulated. Any study must include an analysis of the New York law, a comparison of it with the law in other jurisdictions, sometimes even including foreign law, and a consideration of the policy questions involved. Statutory as well as decisional law is to be examined, and the thinking of jurists, textwriters and eminent authorities consulted. All available pertinent legal literature is to be considered—treatises, periodicals, restatements, model or uniform laws, etc. The search for relevant authorities and the recognition of a sufficient quantum of authority is, of course, the professional responsibility of the researcher. Factual investigations are seldom called for, since the studies made by the Commission are legal studies. However, where factual data is needed,[64] or where it may be deemed helpful to obtain the opinion of the bar in specialized fields of practice,[65] this may be done,

[64] For example, where it was relevant to determine the number of assignment proceedings from the benefit of creditors (see 1950 N.Y. Law Revision Comm'n Rep. 285, 337-42); or where the interpretation given by county clerks to a particular statute administered by them became important (see 1948 N.Y. Law Revision Comm'n Rep. 65, 71); or where it was deemed important to have information with respect to the amount of judgments and settlement of actions for wrongful death in the case of young children (see 1935 N.Y. Law Revision Comm'n Rep. 157, 221-25).

[65] An example is in trade-mark law and practice. See Study made for the Commission on "Trade Marks" by Prof. Milton Handler of Columbia Law School, the Appendix to which reports the public conference or hearing held by the Law Revision Commission on this subject in 1952. 1953 N.Y. Law Revision Comm'n Rep. 769.

Another example is in the Commission's study of the assignment of accounts receivable. See 1946 N.Y. Law Revision Comm'n Rep. 351, 601-52, for a Stenographic Report of a Hearing on the subject attended by representatives of the Subcomm. on Accounts Receivable of the Comm. on Unif. State Laws of the Ass'n of the Bar of the City of New York, The National Conference of Comm'rs on Unif. State Laws, The National Ass'n of Credit Men, the New York State Bankers Ass'n, and executives of various lending organizations and attorneys having special experience in this method of financing.

Another example is a hearing held in connection with the Commission's study of the problems involved in conferring on newspapermen a privilege to refuse to disclose the

but the manner in which it takes place is always a matter to be decided by the Commission. Neither the assistant nor consultant is expected to conduct any such inquiry upon his own initiative, but he may recommend to the Commission that such inquiry be made.

The function of the research person, therefore, is to assist the Commission, first reporting to its special Committee that has been appointed to deal with the particular project for study. The researcher collects, organizes and reports the research data. He also presents, separately, his views as to whether legislation is desirable, and if it is thought to be, what its scope and tenor should be. His presentation is made first to the Committee, and then before the full Commission. The matter is discussed and debated. It may be that additional research is needed on particular points, in which case the assistant or consultant resumes his study and makes a further report at a reconvened meeting. The research person attends all meetings of the Commission at which his project is being considered. He is usually called upon for a short oral summary of his findings, but the proposals outlining whatever action it is thought the Commission should take is orally presented by the Chairman of the Committee responsible for the topic.

As has been indicated, the studies made for the Commission are published in its annual reports. But this normally occurs ony if a recommendation or communication to the Legislature results. If no action whatever is taken, the study is simply filed. All studies are reviewed by the Director of Research for the purpose of editing. Since they are frequently consulted by the bar, it is important to exclude any passages, originally written to convey to the Commission the Consultant's own opinion, that could be erroneously relied on as expressing views of the Commission, especially as to matters of policy or as to possible interpretations of the recommended statute. It is advisable, also, in some cases, to withhold from publication passages dealing with matters on which the Commission is reserving action.

Necessary Steps After Approval of the Research Study

With the research study completed, the next step, assuming the Commission has reached a decision that legislative action is desirable,

source of information given to them—a study, incidentally, directed by the Legislature itself, see text accompanying notes 57, 58 supra, where a hearing was held attended by newspapermen, editors, publishers, representatives of bar associations, district attorneys, etc. See 1949 N.Y. Law Revision Comm'n Rep. 23, 126-68.

Perhaps the best example of this kind of activity is the study of the Uniform Commercial Code. 1954 N.Y. Law Revision Comm'n Rep. vols. 1, 2. Hearings were held in Buffalo, Syracuse, Albany and New York City, on the entire Code; hearings were held in New York City on each article of the Code, each involving a number of specialized fields of practice.

is the drafting of the proposed statute. This will be submitted in bill form to the Legislature, and is accompanied by an explanatory "statutory note," a short statement of what the bill accomplishes. The "statutory note" is printed with the bill as a kind of footnote. Along with the proposed legislation goes a separate and distinct document known as the "Recommendation," which is particularly helpful since it explains the reason for the proposed legislation and reviews concisely but fully the entire problem as presented in the research study. The legislation proposed is the product of the joint considerations of all members of the Commission, and has been fully passed upon and agreed to by them before it is submitted to the Legislature.

The proposal, however, is not yet ready for submission to the Legislature. There are some preliminary steps. The most important of these bears upon the relation of the Commission with the organized bar of the State. From the beginning there has been cooperation between these two groups.[66] It is perhaps sufficient to state here that the voice of the organized bar is heard through a standing committee of the New York State Bar Association especially created in 1935 to cooperate with the Law Revision Commission. Consultation with this group is deemed by the Commission to be an essential part of the research process before its recommendations and proposed statutes are formally presented to the Legislature.

The Cooperating Committee of the State Bar Association meets annually with the Law Revision Commission, usually at the completion of the year's work of the Commission, and shortly before the Commission makes its report to the Legislature, which it is required to do "on or before" February 1st, each year. But the Cooperating Committee has been apprised much earlier of the Commission's planned program. Early in the Fall, the Director of Research advises the Chairman of the Com-

[66] The Committee to Cooperate with the Commission, although first created in 1935, did not become a standing committee until the ensuing year, 1936. The Committee, which has met annually with the Law Revision Commission ever since (with the exception of the years 1954 and 1956 when the Commission made no recommendations to the Legislature because of the pendency of its study of the Uniform Commercial Code), has had extraordinary continuity of service on the part of its chairmen, and indeed of its membership. In twenty-seven years there have been only six chairmen:

Robert E. Lee, 1935-1936 (later President)
Arthur VD. Chamberlain, 1937-1950 (President, 1950)
Edmond Borgia Butler, 1951-1956 (Died March 21, 1956)
Louis J. Merrell, 1957
M. Harold Dwyer, 1958-1962
John H. Hollands, 1962-

All of the chairmen had served several years on the Committee prior to assuming that post. Indeed, the immediately past chairman, Mr. Dwyer, was a member of the research staff of the Commission and the co-author of one of its most influential studies immediately after his graduation from law school in 1935.

mittee of those projects which seem likely to be completed for submission to the next legislative session, and the Chairman, in turn, advises the Commission of his designation of subcommittees of the Cooperating Committee to report on each of the topics. Materials showing the tentative recommendations of the Commission on each topic are sent to the entire membership of the Cooperating Committee. Copies of the research materials which were before the Commission are also lent to the members of the subcommittees. Each subcommittee later reports to a full meeting of the Cooperating Committee, at which the conclusions that have been reached are either approved (with possible suggested changes) or rejected. In many instances, perhaps more often than not, the Cooperating Committee approves the Recommendations proposed by the Commission. There then follows a joint meeting of the Committee and the full Commission and all the proposals are reviewed in round-table discussion. The full Commission, at a subsequent meeting, determines what action it should take respecting the suggestions of the Cooperating Committee.

The legislative program has now been finally determined and bills to carry out the Commission's recommendations are prepared for introduction in the Legislature. The *ex officio* members of the Commission—the Chairmen of the Judiciary and Codes Committees of both houses—introduce the bills or arrange for their introduction by other legislators.

The Bills in the Legislature

An attempt is made, and it is nearly always successful, to have the bills ready for introduction during the first week of the legislative session. Simultaneously, a complete set of the Recommendations of the Commission, in multilithed form, is delivered to the post office box of each member of the Legislature, to the Governor's Counsel and to the clerks of each house.

Following their introduction, the bills are referred to the appropriate legislative committees, usually Judiciary and Codes, and preparations are made for a joint legislative hearing before those Committees, usually held, at their convenience, in mid-February.

Also, soon after the Commission's bills have been introduced, copies are distributed to other groups—to the appropriate committees of the different bar associations located in metropolitan New York; to local bar associations upon a current mailing list furnished by the Executive Director of the New York State Bar Association; to the State Library and to several court libraries and other law libraries; and to such legal

reference services as the Legislative Index and the New York Legislative Service, Inc. A substantial number of the Recommendations are also distributed in response to requests received from lawyers and other interested persons while the bills are before the Legislature. Thus the Commission disseminates information about its propoals to interested groups throughout the State. The Legislative Reporter of the New York State Bar Association usually devotes the first three issues of his weekly report to discussion of the Commission's bills.

In the period that elapses between the introduction of the Commission's bills and the joint legislative hearing, the Commission is busy keeping itself informed of the sentiment regarding its proposals. An "objections" file is made up for each bill before the Legislature. In many cases a very satisfactory liaison has been established between bar committees and other legally oriented groups. For example, the Director of Research keeps in touch, either by correspondence or telephone, with the legislative committee members of the two major metropolitan bar associations. Comparable liaison has been established with the legislative committees of various other organizations such as the Executive Committee of the New York State Surrogates' Association, the Committee on Law Reform of the Supreme Court Justices, the Association of County Clerks, of District Attorneys, etc.

Once again the Commission holds a full meeting, before the legislative hearing is scheduled to take place, and examines all the accumulated data. It reconsiders its previous action in the light of this material—the objections and the approvals—and either reaffirms its prior stand or may propose that certain of its pending bills be amended, or even, in some instances, that they be withdrawn for further study.

The full Commission attends the joint legislative hearing and each Commissioner in turn presents those measures which were assigned to him and which have been his responsibility. He explains them and answers any questions raised concerning them.

It sometimes happens that the Legislature itself amends the Commission's bills. The Commission may approve this action, but if it does not, its objections are made known to the Governor at the time the bill comes before him for signature. It is noteworthy that all Commission bills that go before the Governor are accompanied by a full memorandum, directed to his legal counsel, which supplements the formal "Recommendation" already previously supplied by the Commission, and analyzes all comments on the proposal, whether they be for or against.

V. Problems Peculiar to an Official Agency Engaged in Law Reform

Political Aspects

The operations of the Law Revision Commission are divorced from politics, but the question of partisan influences may arise, so it may be well to examine the Commission's legislative record in this light. This seems particularly pertinent since the Commission is a part of the legislative branch of the government, with an appointive power in the Governor and with four *ex officio* members from the Legislature (chairmen of legislative committees) whose identity is determined by the control in the Legislature.

There is an obvious connection between the political affiliation of the appointing officer and the nature of his appointments. In the twenty-eight years that the Commission has been functioning, the Governorship has been held almost an equal number of years by the Democrats and the Republicans.[67] For thirteen years a Democratic Governor appointed the salaried members; for fifteen years, a Republican Governor. One might expect to find that the political association of the appointees accorded with that of the Governor, but this has not always been the case. Significantly often, the Governor ignored political hue, and either permitted the incumbent to hold over or reappointed him despite his different political affiliation.[68] This accounts in part for the remarkable continuity of service among the appointed members of the Commission,[69] a continuity found also, as it happens, among the *ex officio* members.[70]

[67] See Appendix I for table showing the political complexion of the Executive and Legislative Branches of the government of New York.

[68] Governor Dewey, for example, when he took office in 1943, left the composition of the Commission substantially unchanged during his first term. A majority of the members continued in office, having been appointed by Governor Lehman, Mr. Dewey's predecessor. (Membership on the Commission is so staggered that one vacancy occurs each year.)

Governor Harriman, who followed Governor Dewey in 1955, made no appointments until 1957, permitting the incumbents to hold over when a vacancy occurred. This was done at the special request of the Commission which was then deeply engaged in a study of the Uniform Commercial Code, and it was desirable that the membership of the Commission remain unchanged until the task was finished.

In 1959 Governor Rockefeller filled the first vacany that occurred with his own appointee, but on the occasion of the next vacancy, he reappointed the incumbent. In 1961 another vacancy occurred and Governor Rockefeller again filled it with his own appointee. In 1962 and in 1963 he reappointed the incumbents.

[69] See Appendix II for schedule of the length of service of all members appointed to the Commission since its creation July 31, 1934. The average length of service is ten years, which is an impressive indication of absence of undue partisan influence in making Commission appointments.

[70] See Appendix III for table setting forth the length of service of the legislative members of the Commission.

It is the legislative, or ex officio, members who introduce the Commission's bills into the Legislature, duly noted as being introduced "upon the recommendation of the Law Revision Commission." The position of the ex officio members as chairmen of the Judiciary and Codes Committees of both houses has come about by virtue of their seniority; there-

The possible influence of these facts on the legislative record of the Commission is later discussed.

Budgetary Matters

Another area sensitive to issues of a partisan nature is budget and appropriation. Appended hereto are figures showing the amounts appropriated for the Commission since its establishment, with an explanatory note.[71] The subject will not be examined in any detail here except to note that in this area also there has been a remarkable freedom from partisan political influence.

An analysis of the allocation of the appropriation made to the Commission in 1962-1963 by the Executive Budget as enacted by the Legislature, this allocation being made by the Division of the Budget, is set forth below:

Personal Service:		
Commissioners Salaries	32.92%	
Straight Research Salaries*	31.5 %	
Administrative and Office Salaries	20.98%	
Total Personal Service		85.4%
Maintenance & Operation		
Travel	4.5%	
Supplies	2.5%	
Printing**	4.5%	
Communications	1.9%	
Rentals	1.0%	
Equipment Replacements	.1%	
Total Maintenance & Operation		14.5%
Total		99.9%

* 28.3% of this item, 8.9% of the total appropriation is allocated to independent contractors.

** Primarily for the bound volume, the legislative documents being charged to legislative funds.

The Third House or Super-Legislature Fear

On several occasions, early in the Commission's history, fear was expressed that it would become a "super-legislature,"[72] and the agency

fore a successor to a retiring chairman has had considerable experience with Commission bills and practices prior to his chairmanship.

[71] See Appendix IV.

[72] On the occasion of the first meeting between the Commission and the New York State Bar Association Committee to Cooperate with the Law Revision Commission, held in December, 1935, Mr. John Godfrey Saxe, then President of the State Bar Association, addressed the group and adverted to the fear expressed by Judge John Knight at the time

was scrupulous to avoid any practices which would point in that direction.[73] Even before its creation, when the idea of a Law Revision Commission was first proposed in 1923, a somewhat similar fear was expressed. This was the concern lest it become a "super-court."[74] But the point was apparently never raised again.

The "super-legislature" fear has long since died, but it may be well to consider just what is meant by it. How it manifests itself is not wholly clear, but it would seem that if the Commission had ever sought to make its bills "must" legislation; if it had lobbied for its bills, or its "program," then it might have been regarded as striving to override the Legislature and to assert its own dominance. But this has never been the case. The Commission not only has never thought in terms of "must" legislation—an incredible position to the early Commission—but has refrained from even referring to its "program" until it had been established for many years, and the phrase became one of common parlance. The Commission, it is true, does more than merely "suggest"—it recommends. But it attempts to give to its "Recommendations" a truly integral and distinctive status comparable to a judicial opinion. The Legislature is not expected to take the Commission's proposals on faith, nor does it do so. There is little danger that the Legislature will abdicate its function here. It has, on the other hand, come to rely on the Commission's proposals, being fully aware of the careful and complete study and consideration that has been given to each bill recommended.

Another possible manifestation of a "third house" or "super-legislature" would be if the Commission attempted to defeat proposals made in the Legislature under the sponsorship of others; or if it attempted to secure

when he was majority leader of the State Senate, that a Law Revision Commission, if established, "would be a super-legislature." See note 35 supra.

73 After the creation of the Commission, the Chairman of the Assembly Judiciary Committee, Horace N. Stone, an ex officio member, warned the writer, then newly appointed as Executive Secretary and Director of Research, against the adoption of any practices which would indicate a "super-legislature" or "third-house" approach. The idea implicit in this warning was: the Legislature gives, and it can take away.

In his article, "A Law Revision Commission for Illinois," Mr. Ben W. Heineman expresses a similar warning: "Prominent among the obstacles are . . . fears that it may attempt to act as a super-legislature, or third house." Heineman, "A Law Revision Commission for Illinois," 42 Ill. L. Rev. 697, 708 (1948).

> There is nothing of greater consequence to the establishment of the Commission or to the success of its subsequent operations than the nature of its relationship to the legislature. Opposition to the establishment of the Commission cannot be grounded upon lack of need or upon the existence of a more desirable alternative. But opposition can rest and flourish upon an inarticulate fear that to establish the Commission would be to establish a super-legislature or third house in the field of private law at the expense of the prerogatives of the General Assembly.

Id. at 721.

74 Report of the Commission to Investigate Defects in the Law and Its Administration, 1924 N.Y. Leg. Doc. No. 70, pp. 9-10. In the succeeding year the proposal met with "virtually unqualified approval." 1925 N.Y. Leg. Doc. No. 74, the second Report of the Commission.

a veto by the Governor of bills coming from other sources. But such action would never be taken by the Commission, for it would be deemed beyond its competence.

The experience of the Commission with two of its bills may serve to illustrate this problem:

1. *1936 Competing Bills—Seal and Consideration.* In 1935, the Commission reported to the Legislature that it had begun to study the law of contracts relating to consideration and the effect of the seal.[75] It was one of the long-term exploratory studies undertaken by the Commission upon its own initiative. In 1936, the Commission submitted to the Legislature two documents relating to this topic and also submitted a Recommendation which pointed out that its study was much more extensive than the Recommendation. The study traced the history of the seal and consideration not only in Anglo-American law, but also in Roman and modern European law, for purposes of comparison.[76] The Recommendation dealt only with those matters with respect to which the Commission believed immediate changes were desirable.

On February 27, 1936, the Commission's bills on this subject were introduced into the Senate[77] and the Assembly.[78] But in the meantime, on January 29, 1936, Senator Jacob H. Livingston of Kings County had introduced a bill[79] which provided (amending section 342 of the Civil Practice Act) that: "The common law effect heretofore given to a seal upon a written instrument is hereby abolished as to all instruments executed after this section takes effect. . . ." In the previous year section 342 had been amended also.[80] The Commission's 1936 proposal differed from the Livingston bill of 1936 in that it would have amended

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75 See 1935 N.Y. Law Revision Comm'n Rep. 15.

76 The Studies in question were the following:

1. The development of the Doctrine of Consideration, by Professor Horace E. Whiteside of the Cornell Law School.

2. The Counterpart of Consideration in Foreign Legal Systems, by Professor A. Arthur Schiller, Columbia Law School.

3. A Promise to Perform or the Performance of a Pre-existing Duty as Consideration, by Mordecai Rochlin of the Commission staff.

4. Doctrines relating to the Seal, by Milton Rosenberg of the Commission staff and Mordecai Rochlin.

77 Senator William T. Byrne introduced the Commission bills in the Senate. 1936 Sen. Int. 1429, Pr. 1448.

78 Assemblyman Harry A. Reoux introduced the Commission bills in the Assembly, 1936 Assem. Int. 1524, Pr. 1716.

79 1936 Sen. Int. 601, Pr. 635.

80 N.Y. Sess. Laws 1935, ch. 708. It amended old § 342 of the Civ. Prac. Act to read as follows:

A seal upon a written instrument hereafter executed shall not be received as conclusive or presumptive evidence of a sufficient consideration. A written instrument, hereafter executed, which modifies, varies or cancels a sealed instrument, executed prior to the effective date of this section, shall not be deemed invalid or ineffectual because of the absence of a seal thereon.

the old section 342 of the Civil Practice Act as it had been amended by the 1935 legislation; yet it was difficult to see how the amendment could be accomplished if the Livingston bill of 1936 took away all the common law effects given to the seal.[81] (The Livingston measure was not supported by any published recommendation or study.)

While the Commission bills were pending in the Legislature, the Livingston bill was signed by the Governor,[82] having passed the Legislature on the same day that the Assembly and Senate had each passed the Commission bill. The Commission was presented with a problem. Should it abandon its own bill, which was completely inconsistent with the Livingston law? Or should it press on despite the enactment of the Livingston bill?

A conference with Senator Livingston was deemed desirable. As a result of that conference, it was decided to amend the Commission bill to provide that the Livingston law be repealed and that the Commission bill should be further amended to insert a new provision.[83] The problem was thus resolved.

2. 1952-1953 Competing Bills—Trademarks. In May, 1948, the Commission had added to the Immediate Study List of its Calendar the general topic "Revision of Law Relating to Trade Marks and Trade Names," which was reached for study about two years later. Professor Milton Handler of the Columbia Law School was retained as research consultant. After this study was initiated, the National Association of Secretaries of State approved a so-called Model Uniform State Trade Mark bill. That Association had been assisted by the United States

[81] There was this difference in the premises of the 1935 and 1936 Livingston bills: the 1935 bill removed the seal from any relationship to consideration in the law of contracts. The 1936 bill removed the seal, and all that it imported, from the statutes. The Commission amending the statute as it had been amended in 1935 accepted the premise that the seal had no relationship to consideration, but accepted statutory recognition that there was such an instrument as a sealed instrument. The 1936 Livingston bill had removed that recognition and all common law effects of the seal.

[82] N.Y. Sess. Laws 1935, ch. 708.

[83] It would seem that the one common law effect of the seal in which Senator Livingston was most interested was the effect given, in the law of agency, to the position of undisclosed principals on a sealed instrument. See Crowley v. Lewis, 239 N.Y. 264, 146 N.E. 374 (1925), and Hon. Walter E. Treanor at Cincinnati Conference on the Status of the Rule of Judicial Precedent, 14 U. Cinc. L. Rev. 220, 227 (1940). The Commission's 1936 bill was amended to include a new subdivision 2 of § 342 to read: "The right and liabilities of an undisclosed principal upon any sealed instrument hereafter executed shall be the same as if the instrument had not been sealed." A new § 2 of the bill was added to repeal N.Y. Sess. Laws 1936, ch. 353. As so amended the 1936 Commission bill became law. N.Y. Sess. Laws 1936, ch. 685.

See Cochran v. Taylor, 273 N.Y. 172, 7 N.E.2d 89 (1937), and 1941 N.Y. Law Revision Comm'n Rep. 357. As indicated, the Commission continued its study until 1941, when a comprehensive series of bills was enacted (N.Y. Sess. Laws 1941, chs. 325, 329, 330, 331) after a study made at the direction of the Commission by Professor Paul R. Hays of the Columbia Law School, and a supplementary study "The Notary and the Formal Contract in Civil Law" by Rudolph B. Schlesinger, then a student in the Columbia Law School.

Trade Mark Association, which also worked with a committee of the Council of State Governments. Prior to the completion of the Commission's study of the subject a bill was introduced into the New York Legislature in 1952 which would, if passed, enact the Model Act.[84] It bore the sponsorship of the New York Department of State and of the Joint Legislative Committee on Interstate Cooperation. It passed both Houses, but was vetoed by Governor Dewey for the reason that it had been introduced late in the session and a substantial number of business and trade associations as well as the practicing bar had not had sufficient opportunity to examine its provisions.

Meanwhile, the Commission had concluded its study in 1952, following a conference with representatives of interested groups, held on October 29, 1952. It recommended its own bill in 1953.[85]

There were significant differences between the Model Act and the Commission bill. Another conference was held on January 7, 1953, this time with the sponsors of the Model Act. Both bills went to the Legislature.[86]

In the meantime, a bill on which the Commission took no position, dealing with the related subject of marking of receptacles, came before the Legislature.[87] To enable this measure to stand on its own feet, without technical objection, the Commission introduced a revision bill amending its own bill to avoid any inconsistency with the receptacle bill if it were to pass the Legislature.[88]

All the bills passed the Legislature, leaving the choice to the Governor. He vetoed them on April 17, 1953, obviously hoping that the conflicting points of view could be resolved. They were resolved by events. The Law Revision Commission on February 8, 1953, was assigned by the Governor the task of studying and reporting on the Uniform Commercial Code. No bills were introduced in the Legislature for the next three years on the Commission's recommendation. In 1954 the Model Act became law.[89]

These two case histories show how the Commission is sometimes faced with bills before the Legislature, introduced from another source and

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[84] 1952 Assembly Int. 2477, Pr. 3664.

[85] 1953 Sen. Int. 416, Pr. 416; Assembly Pr. 3280, Assembly Int. 581, Pr. 581, together with a revision amendment (1953 Sen. Int. 2828, Pr. 3176; Assembly Int. 3159, Pr. 3419. See also "Act, Recommendation and Study relating to Registration of Trade Marks," 1953 N.Y. Law Revision Comm'n Rep.

[86] The Model Act bill was introduced on January 27-28, 1953 (Sen. Int. 879, Pr. 918, Assembly Int. 925, Pr. 943). The Commission bill was introduced on January 19, 1953. For bill numbers see note 83 supra.

[87] 1953 Assembly Int. 924, Pr. 942, Sen. Int. 878, Pr. 917.

[88] 1953 Sen. Int. 2828, Pr. 3176, Assembly Int. 3159, Pr. 3419.

[89] 1954 Assembly Int. 174, Pr. 174, 1281; N.Y. Sess. Laws 1954, ch. 628.

inconsistent with a pending Recommendation of its own. Absent such a Recommendation, the Commission would not oppose any other pending bill. This is a standing policy which has obtained since the formation of the Commission. However, with respect to a proposal which competes with its own Recommendation, the Commission necessarily takes a position but acts with complete respect for legislative supremacy.

The Problem of Possible Impingement on Another State Agency

The several trademark bills just discussed present another interesting facet—that of the respective competence or jurisdiction of state agencies. The Model Act was recommended by the Department of State and by the Joint Legislative Commission on Interstate Cooperation. The Commission bill was its own product, drafted after its own study and recommended by it alone. The two were in conflict. The matter happened to resolve itself. In line with this attitude, the Commission refrains from entering an area within the province, or the scope of interest, of another department of the government. Likewise it declines to undertake matters involving primarily a question of policy. This avoidance cannot be stated in terms of an absolute rule. It has become a practice rather than a rule.

On the other hand, there are always bills within the area of private law, the area of the Commission's own special competency, in which other departments of government definitely have some interest. Such other departments, not subject to the problems of this agency, do not hesitate to oppose such measures as seem to them undesirable.

Illustrations of some specific proposals in various areas, and the experience with them, may help in an understanding of this problem. These are set forth in Appendix V, hereto, for those particularly interested in this aspect of the Commission's functions.[90]

The Uniform Commercial Code Study

In 1953, the Law Revision Commission was directed by the Governor to study the Uniform Commercial Code.[91] This direction was the result of the joint urging of the New York State Bar Association and the

[90] Appendix V lists some of the proposals of the Commission which were not enacted, and some proposals which were not enacted in the form originally submitted but were subsequently resubmitted and enacted in revised form, concerning which criticisms were expressed by one of the departments of state government. These have been selected to illustrate the range and variety of instances in which proposals in the field of private law may be of particular interest to a department of state government. The list does not include proposals relating to liability of the state or otherwise affecting the pecuniary interest of the state, and does not include instances where the expressed interest of an administrative department did not involve criticism.

[91] On February 8, 1953, the Governor directed the Law Revision Commission to make such a study.

Association of the Bar of the City of New York that a publicly sponsored and financed study be made of the Code as proposed by the National Conference of Commissioners on Uniform State Laws and the American Law Institute in 1952 (hereinafter called the sponsors or the sponsoring organizations). What was envisaged was a detailed study and critical analysis of the provisions of the Code and the changes in New York law that would result if it were enacted. It was expected that such a study would make possible an informed decision as to whether the Code was satisfactory in its present form or whether it would need to be revised.

The Commission's study of the Uniform Commercial Code was a major undertaking, engaging its attention to the exclusion of all other work until its completion some three years later.[92] During this period the Commission not only increased its regular staff in order to handle all aspects of the problem, but as well engaged law teachers and legal practitioners conversant with this particular field of knowledge—some twenty in number—to make special studies of various aspects of the Code.[93] A series of public hearings was held, as a consequence of which a considerable number of memoranda were received. A large volume of correspondence was carried on. Ultimately, all these materials were studied and debated by the Commission itself, which considered each section of the Code in detail.

The following is an excerpt from Professor Karl N. Llewellyn's "Statement to the Law Revision Commission," which introduces its Study of the Uniform Commercial Code. 1954 N.Y. Law Revision Comm'n Rep., Hearings on the Uniform Commercial Code, vol. I, 23:

> With the Uniform Commercial Code, the New York Law Revision Commission approached for the first time a profound piece of legislation which had already received the benefit of ten years of expert study, labor and critique; of sustained section by section consideration in draft after successive draft, by two such bodies as the American Law Institute and that same Conference of Commissioners on Uniform State Laws which had produced the whole body of older uniform commercial acts which the Code will displace; the benefit of consultation and criticism by informed representatives of industry after industry and group upon group occupied in various areas of commerce or of commercial finance; and the general critique of bar association committees and of an extraordinary number of independent legal experts. What came before the New York Law Revision Commission for study was the result of all of this, backed by the strong and increasing approval of an overwhelming majority of those who had given careful study either to the Code as a whole or to specialized parts thereof. It is against this background that the New York Law Revision did its work.

[92] See reference to the Commission's report of its study of the Uniform Commercial Code, 1957 N.Y. Law Revision Comm'n Rep. 9-10. The final report of the Commission on the Code, published in Leg. Doc. (1956) No. 65(A), was included in the 1956 bound volume of the Report of the Law Revision Commission. Previous to this Report, materials in the Commission's study were published in Legislative Documents for 1954, later compiled in two 1954 volumes, and in Legislative Documents for 1955, later compiled in three 1955 volumes.

[93] The following research consultants and research assistants were retained or employed by the Commission in this work: On the Problems of Codification in Commercial Law, Profs. Edwin S. Patterson (Columbia) and Rudolf B. Schlesinger (Cornell); on the Impact of the Code on the Law of Contracts, Prof. Patterson; on Procedure, Prof. Samuel M. Hesson (Albany); on Constitutional and Federal Law, Prof Paul A. Freund (Harvard); on Legislative Techniques, Profs. Freund and Carl H. Fulda (Ohio State);

The Commission's Report to the Legislature was submitted in March, 1956.[94] It discussed significant aspects of the Code and commented briefly on a number of provisions. The conclusion reached was that the Uniform Commercial Code as promulgated by the sponsoring organizations in 1952 was not suitable for adoption in New York without making changes so extensive as to require comprehensive reexamination:

> The Commission believes that it is clear, from the criticisms indicated in this Report, that the Uniform Commercial Code is not satisfactory without comprehensive re-examination and revision in the light of all critical comment obtainable.[95]

Criticisms of the Uniform Commercial Code advanced at public hearings which the Commission held in the course of its study led the sponsors to reconsider its draft and a revised text was published in 1954. Throughout its study the Commission kept in touch with the sponsors and transmitted to its various subcommittees copies of all studies prepared for the Commission by its consultants and staff, and also materials which indicated criticisms and questions raised in the Commission's own discussions. The subcommittees, in turn, furnished to the Commission the reports of their discussions, including comment on questions raised in the Commission's materials and comment as well on other problems arising in their own discussions or coming to them from studies that were going on in other states.[96]

In 1957 the recreated Editorial Board of the sponsors recommended

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on Article 1, General Provisions, Profs. Fulda, Freund, John Hanna (Columbia), Hesson, Patterson, Ernest N. Warren (Cornell), Mr. John D. Killian III, and Mrs. Laura T. Mulvaney; on Article 2, Sales: Profs. John O. Honnold, Pennsylvania, Patterson, Hesson, and Robert S. Pasley (Cornell); Article 3, Commercial Paper, Profs. Bertram F. Willcox, W. David Curtiss, Harry G. Henn, Pasley, and Hesson; Article 4, Bank Collections, Prof. Horace E. Whiteside (Cornell), Mrs. Laura T. Mulvaney, Mr. Edward Greenbaum, and Mr. Killian; Article 5, Letters of Credit, Prof. Schlesinger; Article 6, Bulk Transfers, Samuel Nirenstein and Donald Rapson, Esqs., and Prof. Freund; Article 7, Documents of Title, Prof. Warren, Mr. Greenbaum, and Prof. Hesson; Article 8, Investment Securities, Profs. Richard I. Fricke (Cornell), Hesson, Mr. Greenbaum, and Mrs. Constance E. Cook; Article 9, Secured Transactions, Profs. Hanna and Freund; Amendments and Repeals, Prof. Ralph D. Semerad and Edward S. Godfrey (Albany).

[94] N.Y. Leg. Doc. (1956) No. 65(A), found also in 1956 Report and Appendices Relating to the Uniform Commercial Code, beginning at p. 11.

[95] Id. at 68. See the two 1954 volumes of the Law Revision Commission and the three 1955 volumes. The 1954 volumes contain the stenographic reports of the public hearings, with the correspondence and memoranda received in connection with them. In the 1955 volume were collected the legal studies previously published as Legislative Documents (1955) Nos. 65(A) through 65(J) and 65(L). The 1956 volume also contains Leg. Doc. (1955) No. 65(K) relating to the repeals and amendments that would be necessary if the Code were enacted in New York.

[96] At the time of the Commission's Report on the Code, detailed studies of the Code were either in progress or in prospect in other states.

The Uniform Commercial Code which was first enacted in Pennsylvania in 1953, is now on the statute books of seventeen additional states: Alaska, Arkansas, Connecticut, Georgia, Illinois, Kentucky, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Rhode Island and Wyoming.

the adoption of many amendments to the Code to meet criticisms and suggestions. Some of the amendments arose out of the studies going on in other states, or originated within the various subcommittees. A very large number of them, however, were responsive, directly or indirectly, to comments of the New York Law Revision Commission. These amendments were approved by the National Conference of Commissioners on Uniform State Laws, the American Law Institute and the American Bar Association, with the result that a revised Code was published as the 1957 Official Edition, and after a number of further changes approved in 1958, an Official Text was published in that year, which is the current text.[97]

Thus the work of the Law Revision Commission has played a part in the history of the Code since 1952 and has had an influence on the provisions of the Code as it exists at this time.

Study of the Uniform Commercial Code has continued in New York under the direction and sponsorship of the New York Commissioners on Uniform State Laws, resulting in the publication of New York Annotations[98] and a recommendation for the enactment of the Code in New York.[99] A bill to this effect went before the 1962 Legislature, sponsored by the New York Joint Legislative Committees on Interestate Cooperation and on Commerce and Economic Development and by the New York Commissioners on Uniform State Laws.[100] The text of the bill proposed some changes from the 1958 official version of the Uniform Commercial Code. On April 18, 1962, the Governor signed this bill, with a memorandum, as N.Y. Sess. Laws 1962, ch. 553.[101] The effect of the Commission's study is extensively discussed in the memorandum of approval. This study is discussed herein in the next section.

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97 Pennsylvania, which had enacted the 1952 text, and Massachusetts, which had originally enacted the 1957 text, have amended their laws to conform with the 1958 text.

98 See "New York Annotations to the Uniform Commercial Code," which brings up to date the analyses of the effect of the Code on New York law that were made in the studies and report of the Law Revision Commission. It also notes the extent to which suggestions and criticisms made in the Commission's study and report have been reflected in the present Code. The annotations were prepared by Profs. William E. Hogan and Norman Penney of the Cornell Law School.

99 This is to be found in the Report of the New York Commissioners on Uniform State Laws, submitted to the Legislature and published in October, 1961. The recommendation calls for enactment of the Code with certain changes and additions which are set forth in detail at pages 307 to 312 of the book containing the report of the Commission and the annotations.

100 1962 Sen. Int. No. 1928, Pr. 1993, Assembly Int. No. 3056, Pr. 3131.

101 In his memorandum of approval Governor Rockefeller wrote in part as follows:

> When a semifinal version of the Code was completed in 1952, New York State's Law Revision Commission, at the request of Governor Dewey, devoted three years exclusively to exhaustive study and analysis of the Code, which resulted in a six volume study.
>
> The Law Revision Commission's efforts led to a comprehensive revision of the Code, and the great majority of the Commission's recommendations are reflected in the

VI. The Influence of Research Upon Legislative Action

To paraphrase a question posed at the beginning: Is it possible to evaluate the influence of research by the Commission's staff and its consultants, and by the Commissioners themselves, in the legislative record achieved in enactment or rejection of bills recommended by the Commission in the legislative process?[102]

To attempt an answer to this question is the prime purpose of this paper. The answer, such as it will be, comes from an active participant in the history. Perhaps it is therefore a biased answer, one colored by preconceptions, hopes, and misconceptions of results. Perhaps the answer should be given by one of those to whom the recommendations were directed,[103] or by a disinterested observer of the legislative scene.[104]

Code as enacted by New York and by 15 other States which include all but one of New York's neighboring States.

Pursuant to the Law Revision Commission's recommendations, a Permanent Editorial Board for the Uniform Commercial Code has been established to make recommendations to adopting states which will keep the Code up to date on a national basis. N.Y. Unif. Comm. Code vii-viii (effective, Sept. 2).

[102] In twenty-five legislative sessions, 1935-1959, bills were recommended on 281 different topics, excluding bills which were "duplications," i.e., where bills were resubmitted or revised bills on the same topics were submitted. For 3 years there were no bills. The average is about 13 per year. Of these, 207 were enacted into law. The average number is 9 or 10. It is emphasized that these are new proposals in each case. There are always a few other bills annually submitted on which previous recommendations have been made, but which have been restudied after failure of enactment or withdrawal of the recommendation and which may have been changed substantially. The ratio of new proposals submitted to those accepted by the Legislature is about 4 to 3.

These statistics were compiled after very careful study of the quarter century of legislative sessions between 1935 and 1959. Fine decisions with respect to what bills constituted "duplications" had to be made in some cases. The classification as "new" or "duplication" was first proposed by a researcher and then approved by the Director of Research and by the writer, each of whom had experience throughout the period.

The statistics are brought up to date in this footnote: In the legislative sessions 1960, 1961 and 1962, 52 bills were submitted including 6 duplications. Of the 46 new proposals, 36 were enacted.

[103] See letter of former Assemblyman Harry A. Reoux, then (in 1948) seventeen years in the Legislature, and twelve years as chairman of the Assembly Judiciary Committee, to Mr. Ben W. Heineman in Heineman, supra note 71, at 721 n.54:

> They [the Commission] have annually submitted their views, their proposals, their reasons and their arguments and they have then completely and entirely rested the case. By their conduct as briefly indicated herein, if for no other reason (and there are other reasons) our Commission has certainly earned and received the complete confidence of the members of the Legislature.

Mr. Heineman then notes that a comparable communication had been received from Senator Pliny W. Williamson, the Senate Judiciary chairman.

[104] Shientag, "A Ministry of Justice in Action," 22 Cornell L.Q. 183, 194 (1937):

> The character of the Commission's work, combining, as it does, scientific legal scholarship and social utility, is at once an inspiration to legal students and practitioners everywhere and a realization of the hopes and expectations of those who urged its creation. How gratifying it must have been to Mr. Justice Cardozo, whose name will ever be identified with this agency, to read this report of the ministry. . . .

See also Fuld, "The Commission and the Courts," 40 Cornell L.Q. 646, 649 (1955):

> The Law Revision Commission has discharged its functions admirably, with skill and diligent application, and has fully justified the hopes and expectations of its founders. . . . In careful, methodical fashion, and only after comprehensive and painstaking study of the problems involved, the Commission recommended legislation

Before any answer is attempted, I will try to name other influences which could have been present and indeed some of which certainly were present.

In any evaluation of influences on the Legislature, no one can fail to include the one popularly supposed to be omnipresent: lobbying.[105] I have testified that "the Commission will not lobby for one of its bills."[106] I do not know whether this statement has been publicly challenged; it certainly has been privately—by direct inquiry or by a quizzical and sometimes incredulous glance. Does this mean that the Commission is so disinterested a participant in the legislative process that it recommends as if in a moot court of mythical jurisdiction, with no interest whatever in result? Indeed it does not so recommend, nor is the agency that disinterested. What it does mean is that the Commission will not attempt, in any way or manner, to enlist support or invoke pressure from sources outside the Legislature for enactment of its bills or any of them or for rejection of any proposal before the Legislature from any other source.[107]

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designed to root out many antiquated and unjust rules of law, whose only reason for being was often merely that of historical accident. Today, many of the changes affected as the result of the Commission's proposals are taken for granted, without realization of the thought and labor that went into the work.

Stern, "A Law Revision Commission for Pennsylvania," 29 Pa. B.A.Q. 180, 183 (1958): "In the twenty-three years of its experience the recommendations of the Commission [N.Y.] supported by thorough, expert studies, have brought about many important reforms and its work has been enthusiastically acclaimed by the New York bench and bar alike."

These quotations, the first from Judge Cardozo's great and good friend and the draftsman of the 1923 legislation, the second from a present judge of the New York Court of Appeals, and the third from a former chief justice of the Supreme Court of Pennsylvania, are not presented for the encomia—which is but incidental and undeletable without destruction of the premises; they are presented to show what these observers thought of the influence of study and research.

[105] See Read, MacDonald & Fordham, Cases and Materials on Legislation, 441-47 (2d ed. 1959). See also United States v. Harriss, 347 U.S. 612 (1954), construing 60 Stat. 839-42 (1946), 2 U.S.C. §§ 261-270, the Federal Regulation of Lobbying Act. See N.Y. Legis. Law § 66 entitled "Legislative Appearances," added by N.Y. Sess. Laws 1906, ch. 321, the New York lobbying statute. See Moffat, "The Legislative Process," 24 Cornell L.Q. 223, 229 (1939).

[106] MacDonald, "Foreword to the Symposium," 40 Cornell L.Q. 641, 642 (1955). This is only a summary of statements made orally and in writing many times before.

[107] The temptation on occasion may be serious, in greater or less degree. In Women's Hosp. v. Loubern Realty Corp., 266 N.Y. 123, 194 N.E. 56 (1934), the Court of Appeals granted an immunity from liability to a receiver in mortgage foreclosure for his passive as opposed to his active negligence. That there are problems, e.g., as to priority of a judgment with regard to preexisting liens such as the lien of the mortgage in foreclosure, cannot be denied, when there is liability of the receiver for negligence in respect of a condition which antedates his appointment. That, on the other hand, there is a windfall to an insurer who takes premiums for public liability insurance in a situation where there is immunity from liability also cannot be denied. The Commission attempted to get the rule changed in 1936, 1937, and 1938, with alternative bills in 1938 (see 1946 N.Y. Law Revision Comm'n Rep. 619-98; 1937 N.Y. Law Revision Comm'n Rep. 27-33; 1938 N.Y. Law Revision Comm'n Rep. 57-63.

These years were in the middle of the great depression, and many urban tenements, apartment houses and hotels were in foreclosure and therefore in receivership. With respect to liability for injuries to persons and property resulting from continuance of unsafe conditions antedating the foreclosure and the receivership, all the receiver had to

On the other hand, the Commission is highly sensitive to criticism of and objections to its proposals, from whatever source they may come. Perhaps the best illustration of this attitude is expressed in the consideration by the Commission of actions by the New York State Bar Association Committee to Cooperate with the Law Revision Commission. Not only does the Commission receive the reported action of the Committee, it also receives the individual memoranda which the Committee debated and on which it acted. And not only does the Commission consider the reported actions, it considers scrupulously the individual suggestions which may have been rejected by the full Committee.[108]

This certainly is not hypersensitivity to the possibility of individual objection or pressure on the Legislature. It is a manifestation of the overwhelming motive to be right, to have a good solution, one which will not cause as many problems as it solves. This Commission was specifically suggested because it was said that the Legislature acting "without expert or responsible or disinterested or systematic advice . . . patches the fabric here and there and mars often when it would mend."[109] Those were serious words to a Commission set up to give that kind of advice and to avoid marring of the fabric of the law. It is a rare rule which cannot remain for a few years until the right change is made,[110] if any change is to be made. Rightness, in such changes, is a matter of study and consideration, of logic, and experience—and it does not necessarily depend on a majority vote in a committee.

Of course, when the Commission finally does recommend legislation, it attempts in all ways possible, as a messenger to the Legislature to convince that body of the correctness of its position. How does it act in this regard? First and primarily, it submits its full Recommendation to each member of the Legislature individually.[111] Second, it appends

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do was to avoid active negligence. If he repaired, he might be guilty of active negligence. All of this was despite the fact that he carried public liability insurance, which he would prudently carry, for he was liable for his active negligence. The bills failed year after year. There was no insurance company opposition: after all, if there were no liability, there would be no insurance at all. The real opposition came from a fear that a recorded judgment against a receiver, even only in his official capacity, might raise inferences detrimental to his personal credit.

Not until 1946 was a bill enacted, N.Y. Sess. Laws 1946, ch. 402, adding Civ. Prac. Act § 977(c). See 1946 N.Y. Law Revision Comm'n Rep. 21.

108 See note 66 supra, note 151 infra.

109 See Cardozo, "A Ministry of Justice," 35 Harv. L. Rev. 113, 114 (1921).

110 Cf. note 107 supra.

111 An attempt is made to do this on the very day of the introduction of bills. The Executive Secretary personally delivers three packages of Recommendations to the Clerk of each House, a set to each of the Majority and Minority leaders and to their clerks, personally, and an individual package for each Senator and Assemblyman to the Postmaster of each House for distribution to each member in his box. These are the Recommendations, with the proposed statutes and statutory notes, only; they are not accompanied by the study. Cf. note 18 supra.

to each of its bills a short statutory note as an exposition of the change, and conscientiously not argumentative for the change.[112] Argument is reserved for the Recommendation to which the note refers. Third, the Commission attempts to identify every serious objection made to its proposal, and it attempts seriously to consider them, accept or reject them and if rejected to answer them. Fourth, it maintains contact with the legislative committees considering its bills, and with their clerks, and later with the Office of the Counsel to the Governor, for these purposes and for the purpose of avoiding merely procedural difficulties in the advancement of its proposals. Fifth, it presents orally both explanation and argument at a joint hearing of all the legislative committees considering its bills during each session. Finally it sends its Executive Secretary weekly to the Capitol during the course of the session for the purpose of obtaining such information as it may require with respect to all of these matters, and for the purpose of transmitting to the legislative committees such actions as the Commission itself has taken relative to measures which are before them. More than this, it does not do. This much is simply not in my definition of lobbying.

Certainly some of the success which the Commission has had with its program is attributable to the extraordinary continuity of service of its numbers.[113] The terms of the appointed members are five years, and are so staggered that one term expires each year.[114] There have been only nineteen members appointed since the beginning. Of these nineteen five currently compose the appointed membership;[115] three terms ended by death in service;[116] three terms ended by resignation to accept other appointments;[117] one term ended by retirement.[118] In the twenty-eight years (four appointing governors), there have only been seven replacements upon expiration of terms,[119] and of these one was

112 The statutory notes do not appear on the "engrossed bill" or in the official text of the session laws. However, they are printed with the unofficial edition of the session laws and are printed as annotations in the several widely used commercial editions of the New York statutes.

113 See Appendix II and III, and notes 68, 69, 70 supra.

114 N.Y. Legis. Law § 70.

115 John W. MacDonald, Chairman, Emil Schlesinger, William Hughes Mulligan, Arthur H. Schwartz and Paul J. Yesawich.

116 Dean Charles K. Burdick, Chairman, 1934-1940, Walter H. Pollak, 1934-1940, and Dean John F. X. Finn, 1940-1956.

117 Glen R. Bedenkapp, 1947-1949, resigned to become a member of the Public Service Commission; Mario Pittoni, March 14, 1957-June 3, 1957 to become a justice of the N.Y. Supreme Court; and Charles M. Metzner, April 3, 1959-September 28, 1959, to become a Judge of the United States District Court for the Southern District of New York. Not counting the latter two incumbents, who served less than eight months together, there have been only seventeen appointed members of the Commission since its organization.

118 Dean Young B. Smith (1934-1958).

119 To replace Warnick J. Kernan (1934-1947), Bruce Smith (1934-1945), Emil Schlesinger (1940-1947), John R. Bartels (1945-1957), Edwin F. Jaeckle (1949-1956), Millard H. Ellison (1947-1958), and Thomas V. Kenney (1956-1961).

subsequently reappointed twice and is currently serving.[120] The original Commission served six years without change in membership,[121] the association being terminated by death of two members in 1940.[122] The other three original members served eleven,[123] thirteen[124] and twenty-four years[125] respectively. The replacements of the two original members who died served sixteen years[126] and twelve years[127] respectively, the latter currently serving. I served as Executive Secretary and Director of Research with the original Commission for twenty-two years, and have served six years on the Commission itself. Mrs. Laura T. Mulvaney, the Director of Research who retired on March 1, 1963, joined the staff one year after the organization of the agency.[128]

Counting the length of service of the current membership, the average length of service of the appointed members is substantially ten years. In twenty-eight years, the Commission assimilated two members in 1940,[129] 1947,[130] 1957,[131] and 1958,[132] it assimilated a single member in 1945,[133] 1949,[134] 1956,[135] 1959,[136] 1960[137] and 1961.[138] No academic member has ever been replaced, two served until death,[139] one served until retirement,[140] two are currently serving.[141]

This continuity of service is equally true of the *ex officio* members of the Commission. Of seven Senate Judiciary Chairmen,[142] two served

120 Emil Schlesinger, reappointed 1957, and 1961 by Governors Harriman and Rockefeller.
121 Messrs. Burdick, Young Smith, Pollak, Kernan and Bruce Smith.
122 Messrs. Burdick and Pollak.
123 Mr. Bruce Smith.
124 Mr. Kernan.
125 Dean Young B. Smith.
126 Dean Finn, until his own death in 1956.
127 Mr. Schlesinger.
128 The year before she began on the Commission staff, she had been employed on Commission work by Professor Horace E. Whiteside, a research consultant in 1934. She was suceeded by Rosemary Edelman.
129 Dean Finn and Mr. Schlesinger.
130 Messrs. Bedenkapp and Ellison.
131 Mr. Schlesinger, who had previously been a member with seven years' experience, and Judge Pittoni.
132 Dean Mulligan and Mr. Nickerson.
133 Mr. John R. Bartels, now a Judge of the United States District Court for the Eastern District of New York.
134 Mr. Jaeckle.
135 Mr. Kenney, who had, several years before, resigned after ten years on the Commission staff as Research Assistant. I do not count myself as necessary to "assimilate."
136 Mr. Metzner, now a judge of the United States Court for the Southern District of New York.
137 Judge Schwartz, one time justice of the New York Supreme Court.
138 Mr. Yesawich.
139 Dean Charles K. Burdick of Cornell Law School (Chairman) and Dean John F. X. Finn of Fordham Law School.
140 Dean Young B. Smith of Columbia Law School (Chairman).
141 Professor John W. MacDonald, Cornell Law School (Chairman) and Dean William Hughes Mulligan of Fordham Law School.
142 Senators William T. Byrne (1935-1936), Philip M. Kleinfeld (1937-1938), Benjamin F. Feinberg (1939-1943), Earle S. Warner (1944-1945), Pliny W. Williamson (1946-1958), George H. Pierce (1959-1962).

eighteen years;[143] there were six Assembly Judiciary Chairmen,[144] three of them serving twenty-five years.[145] The Chairmen of the Codes committees became *ex officio* members eighteen years ago.[146] Of four Senate Codes Chairmen,[147] two served thirteen years;[148] of three Assembly Codes Chairmen,[149] one served thirteen years[150] and is now Lieutenant Governor.

The continuity of service on the Commission is matched by the length of service of the service of the membership and the chairmen of the New York State Bar Association Committee to cooperate with the Law Revision Commission. In twenty-seven years there have been only five chairmen,[151] one of whom served as chairman for thirteen years and the previous three years as a member, and left the post to become president of the association.[152]

So relatively few people being together so long is bound to have had notable effects.

Within the Commission itself traditions had a chance to develop and to grow. The selection of projects, the balancing of the annual program, the number of recommendations annually, the style of the recommendations, the form of statutory notes, the use of various kinds of drafting techniques, saving clauses, communications to the Legislature and many other methods and activities of the Commission were greatly influenced by the long experience of some of its members and by their being with each other so long. In the solution of new and difficult problems, someone would remember how a comparable earlier problem was solved. The use of precedents is not entirely a technique of the judicial process.[153]

So also the Commission's relationships with the Legislature have been strengthened. Influential legislators, as chairmen of two of the most important committees in each house, have worked over long periods of time with substantially the same group of men. Two of these chairmen became majority leaders of the Senate[154] and one of them became Lieu-

143 Senators Feinberg, five years, and Williamson, thirteen years.
144 Assemblymen McCreery (1935), Horace M. Stone (1936), Harry A. Reoux (1937-1951), Justin C. Morgan (1951-1956), Robert Walmsley (1956-1960), and John R. Brook (1960-).
145 Messrs. Reoux, fifteen years, Judge Morgan, five years, Mr. Walmsley, five years.
146 N.Y. Sess. Laws 1944, ch. 239.
147 Senators Mahoney, Young, Bennett, and Hughes.
148 Senators Bennett, five years, and Hughes, eight years.
149 Assemblymen Suitor (1945), Wilson (1946-1958), and Volker (1959-).
150 Assemblyman Wilson.
151 See note 66 supra.
152 Mr. Arthur VD. Chamberlain (1937-1950).
153 See Read, MacDonald & Fordham, supra note 105, at 71-75. See also Horack, "The Common Law of Legislation," 23 Iowa L. Rev. 41, 41-43 (1937).
154 Senator Benjamin F. Feinberg and Senator Walter H. Mahoney.

tenant Governor.[155] Long associations developed deep friendships, and participation and familiarity with the work developed respect in places where it counts.

The same comment can be made with respect to the Commission's relationship with the organized bar.

There have been other influences in the extraordinary success of the legislative program. It is notable that in all of the recommendations made there has never been a "dissenting opinion" submitted. This does not mean that there have been no disagreements within the Commission itself.[156] It does mean that an attempt is made to hammer out conflicting views as to policy and drafting to the point that the solution is quite acceptable to all. From the very first it became a principle to make no recommendation whatever if there was substantial—even if not a majority —opposition to the proposal within the Commission itself. What is substantial opposition in this connection varies from case to case. In large measure it depends on a majority's recognition of the validity of the minority's opposition. In some measure, compromise obviously plays a role as it does in all of the legislative process.

The variety of professional experience in the membership has played its part. The process of keeping the Commission balanced between upstate and the metropolitan area obviously provides a means for varying that experience. All of the appointments have turned out well, some of the members have been leaders of the bar of their time.[157]

My strong belief is that the fact that the state pays the appointed members of the Commission a substantial salary is extremely important. This salary is on an annual rather than on a per diem basis. In the original statute the salary was fixed at five thousand dollars;[158] the present salary is in excess of nine thousand dollars,[159] and the item of

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155 Assemblyman Malcolm Wilson in the administration of Governor Nelson A. Rockefeller.

156 Of course there have been disagreements, and there have been negative votes also. It is believed that dissenting opinions could only make the process of construction more difficult.

157 No attempt will be made to list these "leaders." It is worthy of mention that during the period of his service as Commissioner (later Chairman) Warnick J. Kernan was President of the New York State Bar Association.

158 As provided by N.Y. Sess. Laws 1934, ch. 597, § 71.

159 It reached this sum not by individual treatment, but by participation from time to time over 28 years, in general across-the-board state salary increases, cost of living adjustments, and general adjustments of state salaries. Following these adjustments, but not coincident with them, N.Y. Sess. Legis. Law § 71 was amended to conform. N.Y. Sess. Laws 1948, ch. 141; N.Y. Sess. Laws 1949, ch. 457; N.Y. Sess. Laws 1955, ch. 147. In two years, 1939 and 1942, in order to absorb the effect of serious budget reductions in those years, the commissioners accepted salaries of two thousand dollars only, thus in effect reducing their own salaries. See Appendix IV. Presently, the statutory salary has disappeared from N.Y. Legis. Law § 70 (see N.Y. Sess. Laws 1961, ch. 358), it being fixed in the annual Executive Budget as it is passed by the Legislature.

Commissioners' salaries is about one-third of the annual budget.[160] In an individual case, the amount of the salary provided emphasizes the part-time nature of the work, as is implicit also in the statutory provisions regarding qualifications of the appointed members. But the amount also emphasizes the fact that membership on the Commission is definitely not merely honorary but involves work of a substantial amount. The Commission is a working group. And work is more than attendance at meetings. It is more than the making of decisions. It involves individual homework. Four men will tell a newcomer so, as each of the four was in his own time told. This has a definite effect on the staff and on the quality of the research submitted to this working group of Commissioners. The product is to be tested by experienced lawyers and law teachers, questioned, checked, doubted and discussed. The study—no matter if it comes from one of the great authorities in the field[161]—goes before professionals who keenly feel their responsibility to the legislature and to their own reputations, group and individual. The kind of work expected of and done by the membership of the Commission has an effect on the chief executive officers of the staff. They obviously participate in the discussional and in the decisional process, but neither of them individually decides. If the Executive Secretary in the course of discussion with a legislative committee chairman, member or clerk discovers that a change in a bill, however minor it may be, will bring the bill out of committee for a vote, he never himself gives the go-ahead, if the amendment is to bear a Commission recommendation. He reports back and gets a vote, and a minute is made.[162] A few incidents of this sort in the Legislature provides understanding to the legislator involved. And it brings respect and prestige to the agency of which the head of the staff is only a messenger. So also with the Director of Research in her relationships with the Commission. It is the Commission which decides and which recommends.

I seriously doubt that any honorary membership guarantees in every case the quality of every commissioner's work. It was the 1923 Commission which never submitted a bill[163] and which ultimately disappeared. It was not a salaried group. I think that fact is highly significant.

Another influence on the success of the Commission before the Legis-

[160] The last budget allocation (not taking into account an across-the-board increase effective August 1, 1962) was $44,185 out of $133,900.

[161] No attempt will be made to list them. Cf. notes 65, 83, 93 supra, and note 193 infra for examples.

[162] The other course—and ultimately far less effective and very damaging—would be for him to indicate his own authority to say "OK—amend it," or even to sit down and draft an amendment.

[163] Except the bill to change its scope, size and function. See note 35, supra.

lature is the selection of a program to be presented. A basic question concerns the scope of projects. Should the work undertaken be one study of great magnitude which might last well over the years, session by session? Cardozo certainly had less in mind: "The statute that will do this, first in one field and then in others, is something different from a code,"[164] he wrote. And, again, "something less ambitious . . . is the requirement of the hour."[165] Sometimes the choice is not the Commission's own. Sometimes, as in the study of the Uniform Commercial Code, or in the current study of the desirability of a State Administrative Procedure Act, the direction comes from higher authority.[166] The Commission, however, is not available to study everything. It is not a complete, always-ready substitute for the temporary joint legislative committee or commission set up to study a particular field of law.[167] Currently there are important legislative committees or commissions in New York investigating very basic and very large areas of law: for instance, all the laws, substantive and procedural, relating to crimes and offenses;[168] all of the laws, substantive and procedural, relative to decedents' estates;[169] all of the corporation laws;[170] the laws relative to domestic relations and the family.[171] Some of these investigations may take longer than five years to make. Some of them will be expensive, and substantial appropriations are made to the committees and commissions charged with the responsibility. Each topic could have been assigned to the Law Revision Commission, some of them might well have been so assigned. No one of them in its entirety would the Commission undertake without direction so to do.

Nor does it seem wise for such legislative directions to be made wholesale. A large scale study takes the Commission out of the business which Cardozo thought so important to undertake,[172] the correction of the rules

164 Cardozo, supra note 109, at 116.

165 Id. at 117.

166 See notes 57 and 58 supra and accompanying text.

167 E.g., the temporary commission which recommended the Law Revision Commission. See note 36 supra. A legislative commission is established by statute and has appointed as well as legislative members. A joint legislative committee is established by resolution, and includes only legislative members.

168 By a temporary commission established by N.Y. Sess. Laws 1961, ch. 346.

169 By a temporary commission established by N.Y. Sess. Laws, 1961, ch. 731.

170 By a joint legislative committee, continued by 1962 Sen. Res. 108. The new Business Corporation Law (effective Sept. 1, 1963), replacing the former Stock Corporation Law and General Corporation Law in part, N.Y. Sess. Laws 1961, ch. 855, was recommended by this Committee.

171 Likewise by a committee, continued by 1962 Sen. Res. 92.

172 When asked by one of the legislative leaders whether, within the annual budget already appropriated, the Commission could undertake a certain long-range project, while continuing its regular work, I replied that it could of course do so, but that there would necessarily have to be some accommodation to the additional task—a reduction of other projects to be studied and on which recommendations would be submitted, and allocation

of private law between man and man. It takes the Commission for long periods out of the Legislature. It concerns itself with one product only, submitted after years in which no other Commission bills were considered by the Legislature. It stakes the Commission's influence and prestige, and perhaps its ultimate existence, on the acceptance or rejection of one study which was spread out over years of effort.

The Commission has believed it more in line with its function to undertake the narrower studies which are illustrated by its record of recommendations to the Legislature. If a broader project is later to come, it comes by natural evolution of the greater from the less. Future undertakings presently being considered by the Commission are good examples of this possibility. Is the time ripe for a general obligations law in New York?[173] Is it possible to consolidate the real and personal property laws into a general property law,[174] and then to consolidate—from the combined material—new chapters dealing with trusts and fiduciaries, actions and proceedings, and landlord and tenant?[175] Cardozo had this development in mind when he wrote "as statute follows statute, the material may be given from which in time, a code will come."[176]

Within this framework, it has been the practice of the Commission to have about twenty to twenty-five projects being studied at one time, some short, and others long-term—the test being "is this to be ready for the next Legislature?" They will be in the area of private law, with policy questions subordinate to legal. They will not be in the special jurisdiction—or skill and competence—of another state agency, whether it be an executive department or a legislative committee specifically constituted.[177] They will be balanced, so as to provide a grist for succeeding legislative sessions. About fifteen bills must be ready for the next Legislature. Without regard to the importance of the project, they

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of a longer time to the long-range project. Even with funds available for additional staff or consultants, there is also involved the time of the Commission, in committee or as a unit. No recommendations to the Legislature were submitted 1954-1956 during the study of the Uniform Commercial Code, although substantial additional appropriations were made. See Appendix IV.

173 I.e., a reconsolidation of statutes, now scattered throughout the consolidated laws, relating to creation, definition, enforcement and discharge of "obligations" in the broad sense of duties imposed by law as well as those arising from contract. See, (1963) Sen. Int. 1564, Pr. 1584; Assem. Int. 1811, Pr. 1814. At the time of preparing this manuscript, the Senate bill had passed both houses of the Legislature and on March 29, 1963 went to the Governor for his action.

174 I.e., a statute combining the parallel or identical provisions governing aspects of "property" now stated separately for real and personal property. The substantive changes in this area now being considered by the Temporary Commission on the Law of Estates (note 169 supra) are of course significant for the feasibility of such a reconsolidation as well as for the content of the statute that might result.

175 A Real Property Actions Law was enacted in 1962. N.Y. Sess. Laws 1962, ch. 142.

176 Cardozo, supra note 109, at 116-17.

177 See text accompanying notes 60, 61 supra.

should relate to a variety of subjects, some controversial, some not. It is not advisable to have them all directed toward one special group interest.[178] All of this, and more, is involved in having a balanced program both in relation to studies and bills. And without a balanced program, failure is inevitable—and with repeated failures the existence of the agency is at stake.

In summary, consideration has been given to certain influences which have either had or not had part in the Commission's successful legislative record. Lobbying, at least as defined herein, simply does not take place. The continuity of service of its members, the fact that the Commission is salaried and is a working group, and the selection of a balanced program have been presented as positive influences in the record.

We are finally at the question of the influence of the research process.

How can any influence be measured? Why was the Commission's budget drastically cut in 1939 and in 1942?[179] Would the quality of research have saved it from these cuts? The quality of research—and, indeed, a good legislative record—did not save the Judicial Council from abolition.[180]

Withal, it must be concluded that the hard core reason for the Commission's success, undoubted prestige and continued existence as a law reform agency is the quality and character of the research which goes into the resolution of the projects which it undertakes and which composes the grist of its legislative mill. Both in the selection of subjects and in their solution, it is the all-important factor. The Commission will not take any action—for anyone—directed or not—on a subject it has not itself studied.[181] Time and again, a particular solution is rejected because in the final discussion a problem is disclosed on which there was no study.[182] Repeatedly, also, a narrow proposal is made reserving other

[178] A long time ago, a chairman of a legislative committee—to be anonymous—said to me: "We've done enough to them this year. Wait for another time for the rest." Some of the rest have not yet passed.

[179] See Appendix III, and note 159 supra.

[180] By N.Y. Sess. Laws, 1955, ch. 869.

[181] This is tested time and again, sometimes by requests from outside the Legislature—rarely by requests from individual legislators. The most important application of this is with respect to bills pending before the Governor during the 10-day period while the Legislature is in session within which he must act or during the 30-day period following its adjournment. It is customary for the Governor to request memoranda from various state agencies on bills pending before him that fall within the special interest, jurisdiction or competence of the particular agency. At the very beginning of the Commission's history, and steadfastly maintained since, is the fact that memoranda which are supplied are not Commission action, but merely staff studies of the Director of Research, supplied simply as an aid to Governor's Counsel. The memoranda are so entitled, and so understood.

[182] Most of these actions, except when bills are before the Legislature and then withdrawn—see note 184 infra—are unpublished, and the statement is therefore made only on the authority of a participant in the discussion.

matters for future study.[183] Elaborate proposals have been withdrawn because the Commission concluded that its own study was inadequate or incomplete.[184]

All of these propositions were thoroughly tested in the three-year period in which the sole matter before the agency was the Uniform Commercial Code.[185] This was the only time the Commission ever had to pass specifically on another's product, completely finished and unified.[186] It would have been impossible to undertake the job, section by section, studying independently so as to have results come out without any regard whatever to what the sponsors of the Code had originally proposed. In the beginning of the Commission's study, this was really the attitude which motivated certain of the individual Commissioners.[187] Each section was a new project for individual study and for an ideal solution, no matter what the Code said.[188] This was the danger which the Commission had to overcome if the study was to have any merit at all.

And, on the other hand, the sponsors had to come to realize, as they

183 Many examples could be given. See 1946 N.Y. Law Revision Comm'n Rep. 163. The Commission is continuing its study of the disabilities imposed on persons sentenced to state prison for terms less than for life and of the status of civil death. No recommendation for legislation is made at this time, however, except with regard to the two matters referred to above (right of a convict on parole to sue; right of a sentenced person whose sentence is suspended to sue). See N.Y. Sess. Laws 1946, ch. 260.

184 See, e.g., 1959 Sen. Int. No. 865, Pr. No. 865, Assembly Int. No. 1740, Pr. No. 1748; 1959 N.Y. Law Revision Comm'n Rep. 547.

Recommendations have also been withdrawn in order to allow more time for study of the proposal by interested groups and for consideration of questions raised by such groups. An excellent example of this is 1957 Sen. Int. 1897, Pr. 1990, Assembly Int. 2345, Pr. 2418, relating to Lost Property. See 1957 N.Y. Law Revision Comm'n Rep. 367-485. The Senate Bill was reported March 5, 1957, went to third reading March 6, and passed the Senate on March 11. The Assembly bill was reported March 6, 1957 and advanced to third reading March 7. It was recommitted on March 13, the recommendation of the Commission having been withdrawn for further study. See Id. at 492. Leg. Doc. (1958) No. 64, p. 7. In 1958, having held two hearings on the subject, the Commission again submitted a recommendation. 1959 N.Y. Law Revision Comm'n Rep. 19. The two bills recommended in 1958 were enacted. N.Y. Sess. Laws 1958, chs. 118, 860.

185 See notes 91-101 supra.

186 Promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Professors Karl N. Llewellyn and Soia Mentschikoff were Chief Reporter and Associate Chief Reporter, respectively.

187 The membership of the Commission at the time the Code was referred to the Commission by Governor Dewey in 1953 was Dean Young B. Smith, Chairman (appointed 1934), Dean John F. X. Finn (appointed 1940), John R. Bartels (appointed 1945), Millard H. Ellison (appointed 1947), and Edwin F. Jaeckle (appointed 1949). Governor Harriman took office in 1955, and to allow the Code study to continue permitted all the incumbent Commissioners whose terms expired on each succeeding December 31, i.e., 1955 and 1956, to hold over until final report was made. He made only one replacement, my own appointment to fill the vacancy caused by the death of Dean Finn.

188 This was particularly true in Article 2, Sales, which was the first article studied in detail by the Commission. The consultants were Professors Edwin W. Patterson on the Impact of the Code on the Law of Contracts, and John O. Honnold on Article 2 specifically. Dean Smith, Chairman of the Commission, who had been on the Commission from the start, was Chairman of the Committee on Article 2. See, e.g., 1956 N.Y. Law Revision Comm'n Rep. 367, Appendix IV, Excerpts from the Proceedings of the Commission in its Study of the Uniform Commercial Code, on Section 2-20. Formal Requirements; Statute of Frauds.

ultimately did, that study is basic to the Commission's work, and that it would study on its own and without regard to how much study others had concededly made. In view of the Commission's consideration of its own general function it simply was impossible to have the Code accepted without change. The Commission undertook independent and uncontrolled research. And it had had twenty-two years' experience in legal research as it relates to legislation and to a very active Legislature.

In the first days of the study of the Code by the Commission, an impasse nearly developed. The 1952 edition of the Code was the text which had been submitted to the Commission for study. That draft—ostensibly the final work of the sponsors—had already been introduced in the New York Legislature.[189] In section 1-102(3)(g) the draft provided: "Prior drafts of text and comments may not be used to ascertain legislative intent." With respect to this the comment was

> It is also intended by subsection 3(g) to preclude resort to prior drafts either of text or comment to ascertain intent. Frequently matters have been omitted as being implicit without statement and language has been changed or added solely for clarity. The only safe guide to intent lies in the final text and comments.

Of course, in its study of the Code to determine whether or not to recommend its enactment, the Commission was bound by no such mandate. Nor was it helpless in this regard. Previous texts of both text and comments were readily available. But the Commission wanted more: it desired the background studies of existing law, wherever available, from which the Code provisions had sprung. It was not able to get this material except by its own study. So the Commission really started from scratch. Undoubtedly the decision to do this must have disappointed those who felt that the 1952 draft was so final that even pre-existing drafts—let alone, basic research—could not be consulted to ascertain legislative intent.

On the other hand, a twin danger was engendered and this within the Commission itself. Would this basic research result in the Commission starting to work out solutions independently and without regard to the fact that the Code was supposed to be a finished product ready for acceptance or rejection, as a unit, by the states to which it was submitted? There are illustrations in the Commission's actions of just such decisions and activity.[190] And, for a while, the Commission, not consid-

[189] 1952 Assembly Int. 3338, Pr. 3792. This bill embodied, with some variations, the text of the Code set forth in a "Final Text Edition" published in November 1951, following a joint meeting of the sponsoring organizations on September 15, 1951. The "Official Draft, Text and Comments Edition, 1952," contained several changes in the 1951 "Final Text Edition." See 1956 N.Y. Law Revision Comm'n Rep. 15 n.1.

[190] See note 188 supra.

ering that its responsibilities were misunderstood outside of New York, worked alone, in camera, as it were, and with little, if any contact with the sponsoring organizations. The impasse was finally recognized on each side, and the Commission began to distribute to the sponsors of the Code as tentative actions its minutes, and finally all research reports, as they were prepared and even prior to Commission consideration. The results in the case of the Code are illuminating with respect to the translation of research into legislative actions. The Editorial Board under whose supervision the 1952 Code had been prepared, was reactivated by the sponsors, subcommittees on each article of the Code were appointed, and serious consideration was given to a vast amount of research and decisional material supplied by the New York study. The result was the 1957 Official Edition of the Code and then the 1958 Official Edition embodying minor changes from 1957. Pennsylvania was the only state to adopt the 1952 text. No other state adopted the Code until 1957.[191] New York adopted the Code in 1962, becoming the 16th state to do so.[192]

The notable record of recommendations which have been accepted by the Legislature is matched by another factor quite likely to be overlooked. In some instances where recommendations have been made and there has been no enactment, the research of the Commission in identifying the problem may have been influential in the change of the rule when the problem is met again by the courts.[193] Sometimes, the Legislature itself has accepted an alternative solution.[194] And, in one instance at least, a federal court, in applying New York law, used the recommendation and Commission research to determine in an uncharted field the further course of New York decision.[195]

Attention has already been called to the great amount of statutory revision and reconsolidation, and codification, which has recently taken

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191 Massachusetts.

192 N.Y. Sess. Laws 1962, ch. 553. Governor Rockefeller's memorandum of approval said: "I look forward to the time when this forward step by New York State will be followed by similar action of the remaining 34 States which have not adopted the Code and which look to New York State for commercial leadership."

193 See for example, 1943 N.Y. Law Revision Comm'n Rep. 409-82; 1945 Id. 19-25; 1959 Id. 53. 1959 Sen. Int. No. 863, Pr. 863, Assembly Int. No. 1732, 1740, relating to recovery for breach of warranties in sale of goods. See Greenburg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

See also 1938 N.Y. Law Revision Comm'n Rep. 31-16; 1937 Id. 871-952, relating to discharge of a surety. See Becker v. Ferber, 280 N.Y. 146, 19 N.E.2d 997 (1939).

See 1935 N.Y. Law Revision Comm'n Rep. 451, relating to prenatal injuries. See Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951), overruling Drobner v. Peter, 232 N.Y. 220, 133 N.E. 567 (1921).

194 See the discussion of the Trademark bills, notes 84-96 supra.

195 See Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co., 206 F.2d 103 (2d Cir. 1953).

place or is now taking place in New York.[196] The ferment in the law indicated by these changes is very great. In 1921, Cardozo, from Professor Hazeltine, and through him from Pascal, quoted "Le droit a ses epoques." The law has "its epochs of ebbs and flow," and then he observed "One of the flood seasons is upon us."[197] If this statement were true in New York in 1921, it was true legislatively only by adoption of the Civil Practice Act as against the Code of Civil Procedure.[198] It was true prospectively in the demand for change witnessed by the very article itself. Forty years later, the demand has been realized, and is being realized annually. In the number of studies made and projected, the experience and advice of the New York Law Revision Commission as a research agency in law reform through legislation is first sought and freely given.[199] The staff of one legislative committee after another

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[196] See notes 168-71 supra. When these activities are added to the enactment of the Business Corporation Law (N.Y. Sess. Laws 1961, ch. 855), the new Civil Practice Law, repealing the Civil Practice Act and Rules of Civil Practice, and revising the practice in civil actions and proceedings (N.Y. Sess. Laws 1962, ch. 308, with accompanying statutes chs. 309, 310, 311, 312, and 237), and the enactment of the new Real Property Actions and Proceedings Law (N.Y. Sess. Laws 1962, ch. 142), the extent of the ferment in New York law is vividly illustrated.

To all this should be added the change in the New York Rule against Perpetuities (N.Y. Sess. Laws 1958, ch. 153, and supplemental legislation by N.Y. Sess. Laws 1960, ch. 448) and in the Rules against Accumulations (N.Y. Sess. Laws 1961, ch. 866). See 1936 N.Y. Law Revision Comm'n Rep. 473-608; 1938 Id. 281; 1961 Id. 23. The Commission's consultants on these topics were variously Profs. Richard R. Powell (Dwight Professor of Law, Columbia Law School), Horace E. Whiteside (late White Professor of Law, Cornell Law School), Robert S. Pasley (Cornell Law School). No list of authorities in this particular area would be complete without mention also of Mrs. Laura T. Mulvaney, presently Director of Research of the Commission, who began her service in 1934 as Professor Whiteside's assistant on this study, from which she came to the Commission staff in 1935; one time Assistant Professor of Law, Cornell Law School (1943) where she taught Future Interests.

With a new Business Corporations Law, a new Civil Practice Law, a new Real Property Actions and Proceedings Law, a new rule against perpetuities and accumulations, a study of all the other corporations statutes, of the penal law, the code of criminal procedure, the decedent estate law, including the law of "estates" broadly, the surrogate's court act, various laws with respect to the family, a projected administrative procedure act, complete court reorganization (New art. VI Const.) and the 1962 Court Reorganization Acts (N.Y. Sess. Laws 1962, chs. 686, 693, 697, 684, 685, 686-696, and 698-705), the New York lawyer is well aware of the ferment.

[197] Cardozo, "A Ministry of Justice," 35 Harv. L. Rev. 113, 126 (1921).

[198] N.Y. Sess. Laws 1920, ch. 925.

[199] Not only have the new Committee and Commission chairmen and counsel visited the Commission headquarters; the files of the Commission have been opened freely and materials of every kind have been furnished to the Committee and Commissions and their staffs.

Commissioner Finn served as Chairman and I as a member of the Advisory Committee (to the so called Tweed Commission and to the Senate Finance and Assembly Ways and Means committees in their continuance of the work of the Tweed Commission) which drafted and proposed the new Civil Practice Law and Rules.

Upon the organization of the California Law Revision Commission, several members and the Executive Secretary of that Commission spent several days at headquarters of the Law Revision Commission, to study its organization of research.

Previous to the organization of the Legislative Research Center at the University of Michigan Law School, Prof. William J. Pierce, now Director of the Center, was employed by the sponsors of the Michigan Center to study the methods of the New York Law

has been patterned on that developed within the Commission itself. The first grist of suggestions to these committees have come from the vast number of specialized suggestions accumulated over twenty-nine years by the Commission, partially or fully researched. The method of work adopted by the Commission has been utilized by these temporary groups with special jurisdiction: The identification of the problem is the first job; the relation of the problem to existing law in New York is the second; the various solutions to the problem disclosed by other experiences is the third; the possibilities of solution which come from analogies, experience, imagination and creation is the fourth; the testing of the solution by logic, experience and available data, legal or non-legal, is next; the testing of the solution in the vast body of remaining law, written and unwritten, is the last. In the process, research in the library, by questionnaire, by factual investigation by qualified personnel and by voluntary conference and hearings are the only tools employed. A good filing system, cross-referencing and all the other periphery of research are required. The availability of excellent general and law library facilities are absolutely essential.[200] The process differs from merely bill drafting as it is practiced by legislative draftsmen.[201] It is drafting not to accomplish an already determined result. This is research to determine the result and drafting only to accomplish it. Has this kind of research been translated into legislative action? The result speaks for itself, for fundamentally research is the only real weapon in the armory of the Law Revision Commission. Other factors favorably influencing the long legislative record are themselves by-products of the quality of the research itself.

Revision Commission by working for six months (1949-1950) as a member of its research staff.

The Commission is also in constant touch with scholars, legislators and law reform groups throughout the world.

[200] Since its organization, the Commission headquarters have been located at Myron Taylor Hall, the seat of the Cornell Law School.

[201] Cf. MacDonald, "The Position of Statutory Construction in Present Day Law Practice," 3 Vand. L. Rev. 369, 372 (1950). See N.Y. Legis. Law § 24.

APPENDICES

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APPENDIX I

TABLE

The Political Complexion of the Executive and Legislative Branches of Government, New York
(1934-1962)

Governors		*Assembly*			*Senate*	
		Rep.	Dem.	Other	Rep.	Dem.
(Election)						
Lehman	1934	79	65	6	25	26
Lehman	1935	73	77	—	22	29
Lehman	1936	81	69	—	22	29
Lehman	1937	74	76	—	22	29
(Election)						
Lehman	1938	84	61	5	22	29
Lehman	1939	85	64	1	27	24
Lehman	1940	85	65	1	27	24
Lehman	1941	87	62	1	30	21
(Election)						
Lehman & Poletti	1942	87	62	1	30	21
Dewey	1943	90	59	1	31	20
Dewey	1944	90	59	1	31	20
Dewey	1945	94 92	55 54	1 (after 6/1)	34	19 (after 9/1)
(Election)						
Dewey	1946	93	54	1 (Vac. 2)	36	19 (Vac. 1)
Dewey	1947	109	40	1	41	14 (other 1)
Dewey	1948	107	42	1	40	15 (other 1)
Dewey	1949	87	63		31	25
(Election)						
Dewey	1950	84	62	(Vac. 4)	31	25
Dewey	1951	87	63		32	22 (other 2)
Dewey	1952	86	63	(Vac. 1)	31	23 (other 2)
Dewey	1953	98	52		37	19

TABLE (*cont'd*)

Governors		*Assembly*			*Senate*	
		Rep.	Dem.	Other	Rep.	Dem.
(Election) Dewey	1954	97	52	(Vac. 1)	37	18 (Vac. 1)
Harriman	1955	90	60		34	24
Harriman	1956	90	60		34	24
Harriman	1957	95	53	(Vac. 2)	37	20 (Vac. 1)
(Election) Harriman	1958	96	54		37	21
Rockefeller	1959	92	57	(Vac. 1)	34	24
Rockefeller	1960	92	58		33	24 (Vac. 1)
Rockefeller	1961	84	65	(Vac. 1)	33	25
Rockefeller	1962	84	66		33	25
Rockefeller	1963	85	65		33	25

Summary 1934-1963

Democratic Senate and Assembly and Governor	1
Democratic Senate and Governor, Republican Assembly	4
Republican Senate, Republican Assembly, Democratic Governor	8
Republican Governor, Senate and Assembly	17
	30

APPENDIX II

The following is a summary of the service on the Commission (including date of termination) of the complete appointive membership since July 31, 1934:

1. Charles K. Burdick, July 31, 1934—June 20, 1940 (Death)
2. Young B. Smith, July 31, 1934—February 28, 1958 (Retired)
3. Walter H. Pollak, July 31, 1934—October 2, 1940 (Death)
4. Warnick J. Kernan, July 31, 1934—March 27, 1947 (Expiration)
5. Bruce Smith, July 31, 1934—March 12, 1945 (Expiration)
6. John F. X. Finn, November 8, 1940—September 8, 1956 (Death)
7. Emil Schlesinger, November 8, 1940—March 28, 1947 (Expiration)
   March 14, 1957—December 31, 1958
   Reappointed Term Ending December 31, 1966 (*Current*)
8. John R. Bartels, March 12, 1945—December 26, 1959 (Resignation)
   Term unfilled (Justice Supreme Court)
   Reappointed January 16, 1952—March 14, 1957 (Expiration)
9. Glen R. Bedenkapp, March 28, 1947—April 11, 1949 (Resignation)
10. Edwin F. Jaeckle, April 11, 1949—December 27, 1956 (Expiration)
11. Millard H. Ellison, March 29, 1947—March 1, 1958 (Expiration)
12. John W. MacDonald, July 31, 1934—October 23, 1956, Executive Secretary and Director of Research; Commissioner, October 23, 1956, Reappointed March 1, 1958, Reappointed January, 1963 for Term Ending December 31, 1967; Designated Chairman, March 1, 1958, Redesignated January, 1963 (*Current*)
13. Mario Pittoni, March 14, 1957—June 3, 1957 (Resignation)

14. Thomas V. Kenney, December 27, 1956—June 14, 1961 (Expiration)
15. William Hughes Mulligan, February 13, 1958—December 31, 1964 (*Current*)
16. Eugene H. Nickerson, March 1, 1958—April 3, 1959 (Expiration)
17. Charles M. Metzner, April 3, 1959—September 28, 1959 (Resignation)
18. Arthur H. Schwartz, January 25, 1960—December 31, 1963 (*Current*)
19. Paul J. Yesawich, Jr., June 15, 1961—December 31, 1965 (*Current*)

APPENDIX III

The same continuity of service and concentration of personnel which is observed in the case of the appointed members of the Commission is likewise evidenced in the case of the *ex-officio* members:

Senate Judiciary Chairmen

William T. Byrne	2 years	1935-1936	Terminated—election to Congress
Philip M. Kleinfeld	2 years	1937-1938	Change in legislative control
Benjamin F. Feinberg	5 years	1939-1943	Became Majority leader
Earle S. Warner	2 years	1944-1945	Election to Supreme Court
Pliny W. Williamson	13 years	1946-1958	Death
George H. Pierce	4 years	1959-1962	Retirement
MacNeil Mitchell		1963	Current

Assembly Judiciary Chairmen

William C. McCreery	1 year	1935	Change in control
Horace M. Stone	1 year	1936	Retirement
Harry A. Reoux	15 years	1937-1951	Retirement
Justin C. Morgan	5 years	1951-1956	Appointed U.S. District Judge
Robert Walmsley	5 years	1956-1960	Retirement
John R. Brook		1961	Current

Senate Codes Chairmen

Walter J. Mahoney	1 year	1945	Appointed Chairman Insurance
Fred A. Young	3 years	1946-1948	Appointed Court of Claims
John D. Bennett	5 years	1949-1953	Elected Surrogate Nassau County
John H. Hughes		1954	Current

Assembly Codes Chairmen

Harry D. Suitor	1 year	1945	Death
Malcolm Wilson	13 years	1946-1958	Elected Lieutenant-Governor
Julius Volker		1959	Current

APPENDIX IV

BUDGET

	Appropriations	
1934	$ 50,000	(until January 1, 1935)
1935	77,500	
1936	70,000	
1937	80,000	
1938	83,340	
1939	45,000	
1940	60,000	
1941	62,520	
1942	40,000	
1943	59,820	
1944	59,820	
1945	61,620	
1946	66,620	
1947	69,090	
1948	77,800	
1949	74,239	
1950	83,982	
1951	85,344	
1952	86,663	
1953	136,663	($50,000 added for Code)
1954	126,685	
1955	114,362	
1956	114,362	
1957	115,000	
1958	117,635	
1959	117,635	
1960	117,564	
1961	117,686	
1962	133,900	
1963	139,250	

In this table only three years are significant.

1953: The appropriation was increased $50,000 over the preceding year. The reason was the assignment by Governor Dewey of a study of the Uniform Commercial Code concluded in 1956. There was therefore no political significance in this increase in appropriation.

1942: The Executive budget bill submitted to the legislature in 1942 carried an appropriation to the Commission of $64,800 inline items—the first and only time the budget of the Commission was not in lump sum form. Although there was no major budget fight between the Governor and the Legislature as in 1939 (see below), there was still considerable jockeying for position between the two branches of the government. The Executive Budget was submitted on January 26 (Assembly Int. No. 437, Pr. No. 444). It was referred to the Ways and Means Committee, which amended the bill reducing the Commission's appropriation from $64,800 inline items to $40,000 in lump sum. This was the last time the Commission's budget was a political casualty.

1939. The reduction in appropriation from $83,340 as made in 1938 to $45,000 as made in 1939 is attributable to a conflict between the Executive and

the Legislature that year in budgetary policy. In 1939, the Senate became Republican for the first time in several years, by a majority of 27 Republicans to 24 Democrats. The preceding year it had been Democratic by 29 to 22. The Republicans had controlled the other legislative house, the Assembly, since 1936. Thus in 1939, a Republican Legislature faced a Democratic Governor.

The major problem that year was the Executive Budget, which was sponsored by the Ways and Means Committee of the Assembly, of which Abbot Low Moffat was chairman, and passed by the Legislature, was challenged in the Courts and held unconstitutional in *People* v. *Tremaine,* 257 App. Div. 117 (1939), modified in the Court of Appeals, 281 N.Y. 1 (1939). The history of the budget fight is well set out in Mr. Justice Heffernan's opinion in the Appellate Division, pp. 119-120.

Chairman Moffat, a Columbia Law School graduate who had been associated as a student with the Legislative Bill Drafting Fund of that school, had definite ideas with respect to law revision activities, as well as on budget making (see notes 46 and 5 supra). The appropriation for the Commission was a minor item in a very long bill, but was not overlooked by Chairman Moffat. In the 1939 budget the Ways and Means Committee, drastically revising the executive budget as introduced, included an item for the Commission (N.Y. Sess. Laws 1939, ch. 460, p. 1050) which limited the Commissioners' salaries to $1,000 each. This was enacted but later supplemented by a bill (N.Y. Sess. Laws 1939, ch. 922, p. 3015) which raised the figure to $45,000 and included the Commissioners' salaries at not to exceed $2,000 each. This specific limitation on the salaries of the Commissioners was made despite the then statutory salary of $5,000 found in the New York Legis. Law § 71.

Upon the declaration of unconstitutionality, *People* v. *Tremaine, supra,* the Legislature was called into extraordinary session and it passed a new budget (N.Y. Sess. Laws 1939, ch. 925, p. 3339) which set the Commission's appropriation at $45,000, without any limitation upon the Commissioners' salaries. In order to preserve its staff, the Commissioners voluntarily reduced their statutory salaries for that year and received only $2,000.

APPENDIX V

Extent to Which Proposals in the Field of Private Law May Be of Concern to Departments of State Government

Illustrative List of Some Law Revision Commission Proposals Concerning Which Criticisms Were Expressed by Departments of the State Government

1. 1935 Sen. Int. No. 1238, Pr. No. 1401, Assembly Int. No. 1586, Pr. No. 1732, disapproved by the Governor. See Leg. Doc. (1935) No. 60(D). Compare 1936 Sen. Int. No. 382, Pr. Nos. 39, Assembly Int. 1547, 2688, which became law as ch. 892 of the Laws of 1936 and see Leg. Doc. (1936) No. 65(A), Act and Recommendation relating to Criminal Extradition.

2. 1943 Sen. Int. No. 221, Pr. Nos. 223, 1292, 1910; Assembly Int. No. 211, Pr. No. 213. See Leg. Doc. (1943) No. 65(D). Compare 1944 Sen. Int. No. 46, Pr. No. 46; Assembly Int. No. 37, Pr. No. 37, which became law as ch. 178 of the Laws of 1944. See Leg. Doc. (1944) No. 65(B), Act, Recommendation and Study relating to Consumption of Plans of Reorganization of Corporations Under the National Bankruptcy Act.

3. 1948 Sen. Int. No. 132, Pr. Nos. 132, 2106; Assembly Int. No. 148, Pr.

Nos. 148, 3229 (disapproved by the Governor). See Leg. Doc. (1948) No. 65(P). 1949 Sen. Int. No. 123, Pr. No. 123; Assembly Int. No. 241, Pr. Nos. 241, 3561. See Leg. Doc. (1949) No. 65(O), Act, Recommendation and Study relating to Requirements for Authentication of Acknowledgments Taken by Notaries Public, and see history of 1949 bill set forth, 1949 N.Y. Law Revision Comm'n Rep. 894. Compare 1953 Sen. Int. No. 139, Pr. No. 139; Assembly Int. No. 311, Pr. No. 311, which became law as chapter 501 of the Laws of 1953 and see Leg. Doc. (1953) No. 65(I), Act, Recommendation and Study relating to Authentication of Acknowledgments Taken by Notaries Public.

4. 1949 Sen. Int. No. 231, Pr. No. 231; Assembly Int. No. 159, Pr. No. 159 (disapproved by the Governor). See Leg. Doc. (1949) No. 65(K), Act, Recommendation and Study relating to Computation of Period of Time When Last Day is Sunday. 1950 Sen. Int. No. 100, Pr. No. 100; Assembly Int. No. 63, Pr. No. 63 (disapproved by the Governor). See Leg. Doc. (1950) No. 65(C). Compare 1952 Sen. Int. No. 76, Pr. Nos. 46, 1409, 3065; Assembly Int. No. 82, Pr. Nos. 82, 883, 3441, which became law as ch. 821 of the Laws of 1952 and see Leg. Doc. (1952) No. 65(D), Act, Recommendation and Study relating to Extension of Time Where Performance of Act is Due on Sunday or a Public Holiday.

5. 1950 Sen. Int. No. 96, Pr. No. 96; Assembly Int. No. 65, Pr. No. 65. See Leg. Doc. (1950) No. 65(Q), Act, Recommendation and Study relating to Presumption of Joint Ownership of Bank Deposits

6. 1957 Sen. Int. No. 1897, Pr. No. 1990; Assembly Int. No. 2345, Pr. No. 2418 (recommendation withdrawn to allow further time for study by state and municipal officers). See Leg. Doc. (1957) No. 65(L), Act, Recommendation and Study relating to Lost Property. Compare 1958 Sen. Int. No. 1004, Pr. Nos. 1007, 4044; Assembly Int. No. 1460, Pr. Nos. 1462, 4724, which became law as Laws of 1958, ch. 860.

7. 1959 Sen. Int. No. 861, Pr. No. 861; Assembly Int. No. 1739, Pr. No. 1747; see Leg. Doc. (1959) No. 65(K), Act, Recommendation and Study relating to the Right of a Pledgee to Buy at Public Sale of the Pledge. Compare 1959 Sen. Int. No. 861, Pr. No. 3997; Assembly Int. No. 1739, Pr. No. 4664 (*i.e.*, the bill as amended), which became law as ch. 243 of the Laws of 1959.