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Minutes of the Meeting of the  
New York State Temporary  
Commission on Revision of the  
Penal Law and Criminal Code,  
held at 155 Leonard Street,  
New York, New York, at 10:00 a.m.  
on Tuesday, December 18, 1962.

Present: Richard J. Bartlett, Chairman  
Timothy N. Pfeiffer, Vice Chairman  
Nicholas Atlas  
Howard A. Jones  
William Kapelman  
Herbert Wechsler  
Richard G. Denzer, Chief Counsel

Joseph F. Czechlewski, Representative of the  
Speaker of the Assembly

Excused: John J. Conway, Jr.  
Philip Halpern  
William Mahoney  
Samuel J. Kearing, Jr., Representative of the  
Majority Leader of the Assembly  
Herman Bass, Representative of the Majority  
Leader of the Senate

Joseph Kunzeman, Representative of the Assembly

Ways and Means Committee

Robert Bentley, Representative of the Senate

Committee on Finance

Peter Preiser, Associated Counsel

Also Present: William Bulman, Assistant Counsel, Judicial  
Conference

Arnold D. Hechtman, Assistant Counsel

John Kelligrew, Assistant Counsel

Peter J. McQuillan, Assistant Counsel

Charles E. Torcia, Assistant Counsel

Meeting commenced at 10:00 a.m. by Chairman Bartlett with a  
discussion of grand jury presentments.

Bartlett: "...I have Mr. Mahoney's vote in favor of  
maintaining the law as set down in Wood v.  
Hughes. So, we have a 5-4 vote on that."

Wechsler: "I would like to say that the tentative grand  
jury draft bill is a brilliant job." [prepared  
by Hechtman, Kelligrew, McQuillan and Torcia]

(Mr. Denzer concurred with Professor Wechsler on the staff's bill.)

Bartlett: "It takes 16 to constitute a quorum? It takes  
12 to indict, right?"

(Discussion ensued on the tentative bill.)

Wechsler: "I wouldn't feel too unhappy if this were passed, either."

Bartlett: "Is it necessary for us to spell out anything by waiver of immunity here, as under 2-B? I have two votes in my pocket on this issue: Messrs. Conway and Mahoney. And Mahoney will be negative on this [the grand jury issue]. Conway is for it."

Pfeiffer: "He's for the change in the law and this?"

Bartlett: "Right. It is my thought that the report ought to reflect that a majority of the Commission favor (recommend) no change in the law as established by Wood v. Hughes."

Denzer: "Just a flat outline on the law of presentments?"

Bartlett: "Right."

Pfeiffer: "Phrase it as follows: In the event the Legislature may consider a change in the Wood v. Hughes situation, the Commission recommends a bill in the form proposed."

Denzer: "Then, put in a short comment that the present law and constitutional provision respecting waiver of immunity will remain as it is. No substantive changes whatsoever are intended to be made in the area of immunity."

Bartlett: "I recommend in our report that we give some mention to the bill introduced by the

- Bartlett: District Attorneys Association--the Kuh-  
Robbins bill."
- Pfeiffer: "Include, also, that the Commission held a  
hearing on it."
- Wechsler: "Basically, we are satisfied that adequate  
agencies and machinery for the investigation  
of persons and officials already exist and  
that the grand jury will best serve its  
function by limiting it to the return of  
indictments."
- Denzer: "The memorandum could indicate that the abuses  
do not outweigh the advantages of permitting  
grand juries to file reports."
- Wechsler: "I think it can be short, though."
- Bartlett: "We can determine how we fit it together."
- Wechsler: "We recognize that the Legislature may determine  
itself to proceed with legislation restoring  
some right of reporting and, therefore, we  
undertook to draft a bill that both meets the  
needs of the grand jury and at the same time  
limits the possibility of abuse. The memorandum  
can also indicate that all the members of the  
Commission but one agreed that this proposed  
bill is satisfactory [Mr. Mahoney]. It's best  
we don't say in our memorandum, 'Here's an  
idea.' I actually would not be unhappy if

Wechsler: this bill were passed."

Bartlett (to "Howard, how do you feel about it?"

Jones):

Jones: "What was the thinking behind it, to make it a new section 253-a...since §253 already relates to misconduct of public officers?"

McQuillan: "We have in mind, also, §245."

Bartlett: "The 'general investigatory power'...Let me ask the staff: Was there any particular idea why this bill should follow §253?"

Jones: "Then, too, I suppose, it's being headed 'Grand Jury Reports'. Why does the opening paragraph of subdivision 1 refer to 'the court for which it was impanelled' instead of 'by which it was impanelled'?"

McQuillan: "I suggest 'for' instead of 'by' because, for example, the 1962 term of Supreme Court will generally impanel the January 1963 term of the grand jury."

Bartlett: "'for which it was impanelled': Will this cover all things?"...

Pfeiffer: "Will this provision cover extraordinary terms of the Supreme Court called by the Governor for special investigations?"

Jones: "§253, now,...I notice here we've veered away from that language: Is there any particular

Jones:            reason for that?"

(The Commission then agreed to reletter paragraph "C" in subdivision 1 as "B" and reletter "B" as "C.")

Bartlett:         "...Is this really what we're trying to say?"

Wechsler:         "I think 'B' (§253-a-1) has got the 'cart before the horse.'"

(The Commission agreed that the language of §253-a-1-B should be changed to read as follows:)

"Containing recommendations of a general and objective character for legislative or executive action in the public interest"

Bartlett:         "We did get into a discussion of whether 1-C could be used to castigate the accuser..."

Atlas:             "May I point out that we have a criminal libel section on the books which has never resulted in a prosecution...or criminal action."

Wechsler:         "I think when we get to Libel, we'll recommend a repeal of that law."

Bartlett:         "That, I think, is covered by 2-C. This takes care of the matter of the grand jury shooting back at Lane, for example, in the Lane-Carlino matter."

Wechsler:         "The grand jury examined the facts and found that the public official's conduct was not wrong."

Bartlett (to Jones): "Howard, any other comments on this?"

Jones: "When do we want it to take effect?"

Bartlett: "I see no reason why it can't take effect immediately."

Atlas: "I have no feeling about this at all."

Pfeiffer: "Subsection 5, would that be §2 of the bill?"

Bartlett: "When drafted in bill form, have it read that it shall take effect immediately."

Atlas: "...I think it should be said."

Wechsler: "It's all right with me."

Czechlewski: "...We wouldn't want the public official in the position of losing his job."

Bartlett: "That was the idea of this in the first place."

Atlas: "It's just an invitation."

Bartlett: "...We want to make sure he has the right to make a decision of whether or not he [an official] wants to appear."

Wechsler (to Bartlett): "Maybe it would be better, Dick, to say 'subpoenaed' or 'invited.'"

Bartlett: "I think this is what Joe [Czechlewski] means-- I think 'invited' or 'subpoenaed' does it."

Atlas: "Or, 'appears at his own request.'"

(Mr. McQuillan read from the New York State Constitution relating to the calling of public officials before the grand

jury and the consequences of the public officer's refusal to sign a waiver of immunity.)

Bartlett: "Is the constitutional provision supplemented by legislation?"

McQuillan: "No, it's self-executing."

Wechsler: "...Give him an opportunity to keep his job, if he comes in."

(Messrs. Denzer and Atlas concurred with Professor Wechsler.)

Bartlett: "...Use the constitutional angle...be given an opportunity to appear without a waiver of immunity."

(The following words were suggested: "to appear voluntarily without signing a waiver of immunity")

Hechtman: "Even if he appears voluntarily, he may still lose his job."

Bartlett: "What Arnold [Hechtman] is saying, is, it isn't necessary to spell this out."

Hechtman: "The Constitution doesn't permit us to."

Atlas: "I'm glad I raised this."

Bartlett: "...I think Herb's original point [is good]... We ought to use 'subpoena' instead of 'invitation.'

"I think we've missed a point here: All we're saying is the public officer appeared or could have appeared..."

Atlas: "...I think you could write a book on the word 'call'...That word doesn't mean a thing except an argument."

Wechsler: "I don't agree with you, Nick, I think 'called' means 'subpoenaed' or 'compelled.'...I don't believe he's out of office (if he doesn't sign a waiver of immunity)."

Bartlett (to Denzer): "...'called' is more than 'invite.'"

Wechsler: "Well, there never has been such a case."

Atlas: "This section becomes a trap for a man who is willing to testify..."

Czechlewski: "...It could be used as a waiver against the person for whom he testified."

(Mr. Atlas suggested using the words "have an opportunity", in subdivision 2-B of the bill.)

Bartlett: "Are there any other questions on the language of the statute?"

Atlas: "Everyone knows I'm against the language of 2-B."

Bartlett: "Are there any other comments on the tenor of our report?"

Atlas: "I'm worried about the words 'pending' and 'matter' in subdivision 4."

Wechsler: "...I think it's good enough."

Bartlett: "I do, too. May we take a vote now as to our

Bartlett: recommending this bill in the event that the Legislature assumes to consider some authority for the filing of grand jury reports?"

Wechsler: "Kapelman probably favors this."

Vote on Recommendation of Commission

Drafted Bill re Grand Jury Reports:

Five of the members present were in favor of this recommendation (Bartlett, Pfeiffer, Atlas, Jones, Wechsler), and two members, by proxy votes, were also in favor (Conway, Halpern). Mr.

Mahoney (by proxy) was opposed to the recommendation.

(Discussion now turned to the exonerating clause of section 1-C.

Professor Wechsler said that it was his recollection that the Commission had decided to limit the exonerating clause to public officers.)

McQuillan: "...Our independent recollection is that it wasn't decided."

Atlas (to Denzer): "This puts the grand jury in the position of granting absolutions."

Bartlett: "I think we ought to decide whether 1-C should stand as it is here, or we should conform it to the vote taken at the last meeting."

(Chairman Bartlett then turned the meeting to a discussion of the Marchi Advisory Report (i.e., the question of identifying Commission members by name as to the position taken by them on the various proposals put to a vote.)

Bartlett: "...I think our best policy would be to call

Bartlett: to the public's attention that the Commission was divided...and the minority position was stated."

Wechsler: "...I don't think that's feasible: You can't refuse to answer that question when put to you by newspapermen (e.g., how did you vote, etc.). I'd like my position to be identified to obviate newspaper inquiry."

Atlas: "...I'd like to have my vote recorded... whether or not I go down in fame or infamy; I have strong considerations on this bill... I want to feel there is a record, when consulted."

Bartlett (to Jones): "Howard, how do you feel about it?"

(Mr. Pfeiffer and Professor Wechsler agreed on this; that is, the Commission having an identified position.)

Jones: "No, I have no objection to identification of members."

Bartlett (and Pfeiffer): "...It doesn't seem to me that we have to record our [individual] position in every single subsection of the report; if some members wish, they can do so."

Wechsler: "It is my judgment that the exoneration clause will be a failure; it will create more

Wechsler: difficulties than it's worth. I feel confident about this. I would like something said in the report about my position on this clause."

Pfeiffer: "I'd like to change my vote: I'd like to vote against exoneration."

Bartlett: "...I'd like to agree on a change of language in 1-C to conform with what we said last week."

Pfeiffer: "I vote against the inclusion of C."

Bartlett: "I'll call the other members."

Vote on Retaining 1-C as Amended Here

Two of the members present were in favor of the retention of 1-C, as amended (Bartlett, Jones), and three of the members present did not approve of the inclusion of any provision authorizing the grand jury to file a report stating\* (Pfeiffer, Atlas, Wechsler). By telephone, the Chairman contacted Judges Halpern and Kapelman and Mr. Conway. They were in favor of the retention of 1-C, as amended. Mr. Mahoney, who returned Mr. Bartlett's call, informed the Chairman that he does not favor even the submission of a bill on grand jury reports.

The new subdivision 1-C is as follows: "Containing a statement that after investigation it finds no grounds for recommending disciplinary or removal proceedings against a public officer or employee."

Bartlett: "If they look into misconduct, they can

\*that after investigation it finds no grounds for recommending disciplinary or removal proceedings against a public officer or employee.

Bartlett: report it. Is there anyone who prefers the language here--in C--to the substitute? I prefer the substitute. Is there anything else we have to vote on grand jury reports, understanding, of course, that we have to complete the vote on this issue?"

Atlas: "I am expressing my objection to the language general and/objective character in this bill."

(The meeting then turned to a discussion of Draft #6 of the Homicide Article.)

(Chairman Bartlett then reported on the Rochester Capital Punishment Hearing.)

Bartlett: "I have become concerned about the Commission presenting abolition as its final and unequivocal position. ...I think the overwhelming position of the Commission would be the abolition of capital punishment...I'm particularly concerned about an abolition recommendation that we might make and the results that might ensue if the Legislature does not follow our recommendation. I think we would be doing the abolition movement a disservice. I'm concerned about the long-range effect such a rejection of our recommendation might have on our project. I feel that we

Bartlett:           should place heavy emphasis on our new Homicide Article."

Atlas:             "...I don't think this Commission can evade its clear-cut responsibility to take a position..."

Bartlett:          "...I want to be sure that we present our position on capital punishment to the Legislature so that it won't be an impediment in the future. Our long-range role is a revised penal law and criminal code."

(Professor Wechsler questioned why Chairman Bartlett thought this would be an impediment.)

Wechsler:          "If we recommend abolition, the Legislature might be forced to take a position. We could report that we favor abolition but, then, in appropriate language, say that our two-stage bill is a major step toward abolition."

Bartlett:          "I think there should be a number of outs. We shouldn't say in the report negatively 'if the Legislature opposes abolition.' We might say that New York can acquire some valuable experience under the two-stage bill and then, after a period of time, re-examine abolition in light of this experience."

Atlas:             "...This is a matter of good writing, that's

Atlas: all it is. ...We are there to be helpful to the Legislature and not obstruct it..."

Wechsler: "I think we could present our recommendation now with the bill to implement it, to the legislative leaders, and say that if the recommendation is not adopted, we will make modifications of the law relating to capital punishment. It is a question for them. It is no problem for us. We want to make our position known, but we want a solution available for those who are opposed to abolition. For example, they may wish to humanize the law in some fashion."

(Chairman Bartlett mentioned that there hasn't yet been a discussion of the Executive position on this.)

Bartlett: "...I'm concerned that our overall success is important..."

(Professor Wechsler referred to the Commission's published Interim Report.)

Bartlett: "I did want to suggest that we take this up with the Governor and the legislative leaders before a vote is taken."

(Professor Wechsler agreed.)

Wechsler: "Suppose you have those conversations before we take a vote."

Denzer: "If we submit an abolition bill and it is defeated, I don't think it will do this Commission any good."

Bartlett (to Denzer): "You mean, if the bill comes up for a vote..."

(Discussion ensued on the Delaware question--the reinstatement of the death penalty.)

Bartlett: "Delaware is a community...(This is the difference between New York and Delaware.)  
"I'd like to have a vote beforehand...before we decide what we'll do with our position, in relation to its presentation to the Governor and the Legislature."

Pfeiffer: "We may have to take a position which is diametrically opposed to the leaders and the Governor."

Bartlett: "I'd like to take a vote and then report the vote to the leaders. This may help shape a decision for them."

Wechsler: "Someone may be concerned with homicides committed in prison. I wouldn't oppose including this in any abolition bill. For example, Rhode Island, which is considered an abolition state, has retained the death penalty for homicides in prison committed by prisoners serving life sentences for murder."

(All the members agreed to take a vote on the question of abolition.)

Vote on Abolition of Capital Punishment

Four of the members present were in favor of abolition (Bartlett, Pfeiffer, Atlas, Wechsler). Mr. Jones was opposed to abolition. By telephone, the Chairman contacted Judge Kapelman and Mr. Mahoney, who were in favor of abolition, and Mr. Conway and Judge Halpern, were were opposed to abolition. (Discussion then ensued on Homicide Draft #6.)

Bartlett: "In the absence of Judge Halpern, we will leave that portion on felony murder, and we'll discuss it at the next meeting [January 18, 1963]."

(Mr. Denzer then explained the draft.)

Denzer: "...I've tried to collate all the basic principles under the Definitions section (§1040). Many of the provisions in this draft have adopted the language presently in the Homicide Article of the Penal Law, for examples, the definitions of excusable homicide, justifiable homicide and the abortion-manslaughter provisions of the Homicide Article."

Bartlett (to Denzer): "Incidentally, Dick, I think the report should say that this is not the ultimate revised Homicide Article, that the Commission at a

Bartlett: later date will reformulate some of the provisions in this draft."

Denzer: "I don't want to use 'recklessly' in the Murder provision."

(Mr. Denzer then discussed the definitions of "criminal negligence" and "recklessly" in his draft. He noted that Mr. Uviller, of the New York County District Attorney's office, suggested substituting the word "grave" for "substantial" in the definition of "Recklessly." After discussion, the Commission unanimously agreed to make no substantive changes.)

(Mr. Denzer then reviewed the provisions in "§1041. Murder.")

Czechlewski: "What is the definition of 'depraved?'"

Wechsler: "Very bad; morally blah ('mad dog')."

(Chairman Bartlett called for a vote on leaving subdivision 2 of §1041 as is, in Draft #6; also, substitute "design" for "intent" (§1041, subd. 1).)

Bartlett: "One way or the other, our bill is going to be adopted."

(With reference to §1042, all the members agreed on a change in language, in the first paragraph, to read as follows: "Murder is punishable by life imprisonment, unless the death sentence is imposed, as provided in section ten hundred forty-three of this Article." The Commission also suggested that changes be made elsewhere to conform with this language.)

Bartlett: "The whole Code will have to be gone through, with reference to this."

McQuillan: "Section 1043 is essentially the California and Pennsylvania statutes and the A.L.I. Code."

Bartlett: "Wherever possible, the language should show preference for life imprisonment."

(In discussing the evidence to be admitted in the second stage proceeding, it was asked as to what are the California standards of admissibility. Mr. McQuillan then read the pertinent California and Pennsylvania statutes.)

Wechsler: "...It means that in California they didn't drop the rules of evidence."

Bartlett: "Are there any other questions other than the preservation of privileges that we want to discuss?"

Wechsler: "I move that the brackets around 'not legally privileged' be removed (§1043, subd. 4)."

(The motion was seconded by Judge Kapelman. Howard A. Jones dissented but, subsequently, Mr. Jones changed his vote to conform with the majority. The motion was carried unanimously. The Commission agreed that the recommendation or consent of the District Attorney not be required so that §1043, subdivision 2, be operative.)

Bartlett (to "What does California say, Pete?"

McQuillan):

McQuillan: "The statute is silent."

(The Chairman called for additional comments on subdivision 5; there were none.)

(Judge Kapelman suggested that consideration be given to reversing the order of presentation in closing arguments since, unlike the case in chief, the prosecution does not have the burden of proof. The Commission rejected this suggestion and unanimously agreed to make no changes in subdivision 5.)

(Discussion of §1044. Manslaughter followed. Mr. Denzer felt that no substantive changes were made in the Manslaughter provisions of the Penal Law. It was decided to discuss this and eventually redraft these provisions at another time. It was agreed that subdivision 6 of §1044 would become the new subdivision 3, and 3, 4 and 5 would be subsequently renumbered.)

(Professor Wechsler then initiated a discussion of the Illinois Code provisions in relation to manslaughter under an erroneous belief of a right to kill. Chairman Bartlett then read from the Illinois Criminal Code (§9-2, subd. B) regarding a killing under a mistake of fact.)

Bartlett: "We now have a 'reasonable belief' clause (§1040, Justifiable homicide) but we don't have an 'unreasonable belief' clause."

(Professor Wechsler said that he considered subdivision 1, of the second paragraph of Justifiable homicide, p. 2, as a "reasonable belief" clause.)

(Mr. Denzer said that he would use the Illinois Criminal Code for his revisionary work.)

(Professor Wechsler cited an English murder case: The jury

should have that kind of evidence in order to reduce the charge from murder to manslaughter.)

(It was agreed that Mr. Denzer would formulate this along the lines of the Illinois Code; and to leave the language that was bracketed, but delete the brackets.)

Wechsler: "I prefer the use of the word 'excuse' rather than 'explanation' [in §1044-6; now renumbered §1044-3] with respect to mistaken belief."

(Mr. Pfeiffer indicated that he preferred the word "excuse" to "explanation," also. It was agreed to reinstate the former phrase: "reasonable explanation or excuse.")

(The members agreed on the term of imprisonment for Manslaughter to be fifteen years.)

Judge Kapelman and  
(Professor Wechsler/were excused at 2:30 p.m.)

(The members present discussed the two-stage proceeding.)

Denzer: "Draft a two-stage proceeding for kidnapping. When the victim isn't returned alive, we need a two-stage proceeding. Spell out the two-stage proceeding again. Make kidnapping two stage."

Bartlett: "If the jury recommendation comes in for other than death, then it will stay as it is now: The judge will impose sentence within the limits of the statute."

Denzer: "The question of aiding a suicide...is defined and punished as Manslaughter in the First Degree."

(It was decided that this should be changed to Manslaughter--with no degree.)

Bartlett: "We've never come to grips as to whether I should introduce the bill to amend McNaughton. I was going to suggest that the notice of the next meeting should include a notice of this. January 18th, we'll take up the question of felony murder."

Pfeiffer: "I move that we adjourn with the hope that the members have a Merry Christmas and a Happy New Year."

(The motion was unanimously approved. The meeting was adjourned at 3:00 p.m.)

Respectfully submitted,

Rita Cheren

Notes for Stenographer per Chairman Bartlett:

1. The American Law Institute voted down 2-1 in favor of abolition of capital punishment.
2. Mail revised Grand Jury draft; and Homicide draft #7 (as discussed at meeting) to members and ex-officio members. With reference to the Homicide draft, members should communicate comments to Mr. Denzer.

Proposed Changes in Draft #6  
of the Homicide Article:

It was agreed that the words "commits an act which", under Criminal negligence, be deleted

It was agreed that the words "commits an act which", under Recklessly, be deleted.

In §1041. Murder, subdivision 1, it was agreed that the word "design" be substituted for "intent;" also, that the words "commits an act which" be deleted. In subdivision 2, it was agreed that the words "commits an act involving a grave risk of human fatality and thereby" be deleted.

In §1042, paragraph 1, it was agreed that the words "either by death or" be deleted and that the words "unless the death sentence is imposed" be added following the word "imprisonment." [Note: It was later agreed, by the staff, to delete the words "of this Article", following the word "forty-three."

A new paragraph "3" was to be added under §1042. [shifted from §1043]

In §1043. Determination of sentence for murder, it was agreed that subdivision 2 be revised and added to §1042 as a new paragraph "3". The present subdivision 3, of §1043, would be renumbered "2" and it was agreed that just the brackets would be deleted from the language "unless the court for good cause shown discharges that jury, and imparels a new jury for that purpose." The present subdivision 4, of §1043, would be renumbered "3" and it was agreed that just the brackets would be deleted from the language "not legally privileged".

The present subdivision 5, of §1043, would be revised and renumbered "4". The present subdivision 6, of §1043, would be renumbered "5". It was agreed that a new subdivision "6" would be added.

In §1044. Manslaughter, it was agreed that the present subdivision 6 would become the new subdivision "3" and that the word "design" would be substituted for "intent"; also, that the letters (a) and (b) would be added before designated clauses in present subdivision 6. In clause (a), it was agreed that the words "or excuse" would be added, to make the phrase read as follows: "for which there is a reasonable explanation or excuse". The new clause (b) would be revised, and there would also be an alternate (b). In subdivision 2, of §1044, it was agreed that the words "commits an act which" would be deleted. It was agreed that the paragraph following present subdivision 6 would follow the new subdivision "6" [which, in substance, is present subdivision 5 renumbered]. It was agreed that the term for Manslaughter would be changed from twenty to fifteen years. It was agreed that present subdivision 3, <sup>4 and 5</sup> would be renumbered "4", "5", and "6".

In §1045. Criminally negligent homicide, it was agreed that the words "commits an act which" be deleted from the first paragraph.