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Evaluation of  
The Special Prosecutor's Office  
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Evaluation of  
The Special Prosecutor's Office of Philadelphia

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February 10, 1977

Prepared with funds provided by LEAA through  
the Governor's Justice Commission of Pennsylvania  
and the General Assembly of Pennsylvania.

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## Preface

This evaluation of the Office of the Special Prosecutor of Philadelphia was performed under a contract with the Attorney General of Pennsylvania in his dual roles as Chairman of the Governor's Justice Commission and as head of the Pennsylvania Department of Justice. A copy of the contract and the letter proposal on which it was based are attached as an appendix to this report.

At the outset it should be stated that Attorney General Robert P. Kane fully cooperated with the evaluation and provided all of the assistance he had promised and that was requested of him. His staff was equally helpful in promptly and supportively responding to the project's needs.

Special mention must also be made of the unqualified cooperation received by the evaluation project from former Special Prosecutor Walter Phillips and his staff and from his successor, Bernard Siegel and his staff. Walter Phillips put aside everything he was doing to launch a new law practice in order to make himself completely available for interviews.

The evaluation's heaviest demands for records and information occurred at a most inconvenient time for the Office of the Special Prosecutor. Mr. Siegel and his staff were engaged in a desperate fight for survival while trying to maintain their investigations and prosecutions. They were short-handed and overworked. Yet they good naturedly allowed the evaluation staff to occupy their offices and go through their files and records at the convenience of the evaluators.

One further acknowledgement is necessary. The supervising judge of the then sitting November 1975 Special Investigating Grand Jury, Philadelphia Common Pleas Court Judge Myrna Marshall, gave invaluable support and assistance to the evaluation. Most important to the project was the order she signed allowing the staff to inspect grand jury records and transcripts.

The evaluation was performed by a small staff of six, not all of whom were employed on a full-time basis, on a limited budget of approximately \$56,000 and during a period of five months. In addition to the principal investigator, Samuel Dash, the project staff consisted of the deputy principal investigator, Charles H. Rogovin; the administrative assistant, Sara G. Dash; and three evaluation staff assistants, Jeffrey Blattner, Michael Lubline and Mitchell Miller. Each of the staff assistants had previous investigative experience.

The staff shared their findings with and received advice from five expert consultants: Martin Danziger, former Director of the National Institute of Law Enforcement and Criminal Justice of LEAA; Ronald Goldstock, Executive Director of the Cornell Institute on Organized Crime; Henry Ruth, former Watergate Special Prosecutor; Edward H. Steir, Deputy Director of the Division of Criminal Justice of the Department of Law and Public Safety of New Jersey; and Charles Work, former Assistant U.S. Attorney in charge of District of Columbia affairs and former Deputy Administrator of the Law Enforcement Assistance Administration of the U. S. Department of Justice. Although the staff received invaluable advice from these expert consultants, the evaluation project's staff is solely responsible for the language,

findings and recommendations of this report.

The methodology employed in the evaluation is described in the appended copy of the informal letter proposal. As the proposal indicates, the peculiar nature of a special prosecutor's office does not permit an evaluation or measurement of the work of this office either in quantifiable terms, or against a larger quantifiable context. For this reason statistical or social science methodology was not attempted. Instead, this evaluation depended solely on the professional judgments of experienced experts based on their review of relevant records and interviews of relevant persons.

The findings presented and inferences drawn in this report have, therefore, not been copied from computer print-outs or verified by any other method of quantitative analysis. They do not spring from evidence tested by an adversary process (although an attempt was made to obtain information on both sides of a disputed matter). They represent rather the professional judgments of the principal investigators.

The evaluation of the OSP covers its operations only during Walter Phillips' tenure as Special Prosecutor. Bernard Siegal held the position too briefly and during too chaotic a period to permit a fair evaluation of his performance. However the Siegel period is still relevant to the evaluation of the Phillips' office to the extent that it reflects the forces and obstacles with which the office was confronted and the outcome of the investigations it began.

During July, August, September and October, 1976 the staff analyzed virtually all the materials generated by the Office of the Special Prosecutor's two and one half year investigation. These materials include:

- all grand jury presentments and indictments;
- all investigative files;
- all accounts of the office's work in the press;
- the transcripts of much of the testimony given before the grand juries and of a representative number of the trials brought by the OSP;
- all official correspondence;
- all the office's payroll records and personnel files;
- all relevant court decisions;
- all the grant application and funding data;
- all accounts of expenditures for undercover operations; and most of the individual attorneys' non-personal files.

In addition, interviews were conducted, mostly by the principal

investigators of:

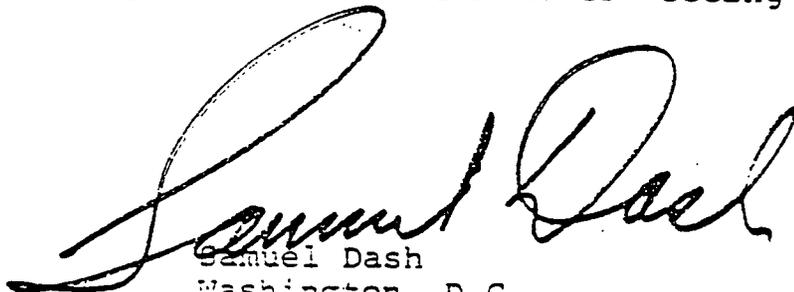
- the two former Special Prosecutors;
- 23 members of the office's staff;
- 8 local or appellate judges;
- 15 members of the Philadelphia bar;
- the Governor of Pennsylvania;
- 3 present and former Pennsylvania Attorneys General;
- the Mayor of Philadelphia;
- the former and present District Attorneys of Philadelphia and members of the present D.A.'s staff;
- the Philadelphia Police Commissioner and Internal Affairs Chief;
- 2 former Crime Commission officials;
- 3 local reporters;
- 3 state legislators;
- 3 business and civic leaders;
- 2 law school deans;
- the 1975 Special Investigating Grand Jury;
- the Chief of the U.S. Department of Justice's Criminal Division;
- the former U.S. Attorney for the Eastern District of Pennsylvania; and
- 4 LEAA officials.

Both of the principal investigators have been prosecutors and defense lawyers in Philadelphia and are well known to the bench and bar and to the governmental, business and community leaders of the City. Consequently, all doors were opened to them when they sought information. It is significant to this evaluation that officials who are bitterly opposed to one another, politically or philosophically are willing to confide in the principal investigators. Thus, it is believed that the project received a substantially complete and balanced account of the events relevant to the operations of

the Office of Special Prosecutor.

The evaluation project was confronted with a major dilemma concerning its use of information it received from grand jury records or investigative files of the OSP. To support its findings on the OSP's handling of investigations and cases it would ordinarily be expected to produce the underlying data it collected. However, many of the investigations or cases are still pending. Because of this, the principal investigators believe it is inappropriate and unprofessional (if not a violation of grand jury secrecy) for them to reveal any information which might prejudice future prosecutions of individuals under investigation or indictment. Therefore, in a number of instances, names and actual events have not been used in the report, and the facts have been masked as effectively as possible.

This evaluation reports unpleasant findings. Unfortunately, it does so about many individuals that the investigators are personally fond of. Although many officials believe that evaluations of this kind are inherently critical, the principal investigators and their staff did not undertake this assignment merely to be critical. They share a concern for Philadelphia and a commitment to seeing that justice is served.



Samuel Dash  
Washington, D.C.  
February 10, 1977

Introduction

This is an evaluation of a special prosecutor's office that no longer exists. The Office of the Special Prosecutor of Philadelphia was closed, not because its work had been completed, but because it was destroyed by the action of powerful Pennsylvania public officials, some of whom were targets of its investigations. This premature and essentially violent ending compels the posing of questions not unlike those raised at an inquest: What was the state of health of the victim? What was the cause of death? Who was responsible? However, even if supportable answers to these questions can be produced, we are persuaded that Philadelphians possess neither the will nor the means to assure that justice is done.

Bleak as conditions may be in Philadelphia, we are not suggesting that a single reason explains what happened to the Office of Special Prosecutor. When we look at the office itself and ask how successful it was in carrying out its mission, we must answer that it was largely unsuccessful. Although, as a result of the Special Prosecutor's activities, a number of indictments were returned by the grand jury and some of those indicted were convicted, the results of the Special Prosecutor's efforts to expose and prosecute cases of police and official corruption were, on the whole, insignificant. The office's initial mandate was to ferret out police corruption. Yet, it accomplished practically nothing in this area. The office's impact on major official corruption in Philadelphia was only spotty and superficial. It was unable to develop large-scale conspiracy cases involving major public officers. And, with the exception of a former

city councilman convicted for an isolated transaction, the Special Prosecutor failed to bring to trial and convict any high ranking city officials. If the charges given to the special investigating grand juries were true, i.e. that there was widescale, systematic corruption by high ranking officials in Philadelphia, then this corruption must still exist; because the Special Prosecutor touched only the surface. The recent indictments obtained by the U.S. Attorney's Office underscore the continuing existence of corruption in Philadelphia.

In part, personal and administrative inadequacies caused the poor record of the office. Walter Phillips, though a determined and honest prosecutor, had neither the temperament nor the experience for the job. His experience as an assistant district attorney in Philadelphia and as an assistant U.S. attorney in the Southern District of New York did not prepare him for the extremely difficult investigative and managerial responsibilities that are inherent in directing the development of hard cases of police and official corruption. The staff Phillips was able to recruit was even less experienced for their mission. Unfortunately, their intelligence, dedication and integrity could do little to compensate for their inexperience.

Though the deficiencies of the Special Prosecutor's office contributed to its inability to successfully carry out its mission, there were other factors, external to the office itself, which were overpowering in assuring failure. These included: the lack of effective assistance and support of the Governor and Attorney General of Pennsylvania; the hostility and finally fatal interference of the Pennsylvania State Legislature; the crippling actions and decisions of some appellate and local judges; the uncooperative attitude and

practices of other law enforcement agencies, such as the Philadelphia Police Department, Philadelphia District Attorney's Office, the U.S. Attorney's Office for the Eastern District of Pennsylvania and the absence of support from the civic and business leadership of Philadelphia, the Philadelphia Bar Association, and the Philadelphia public.

This evaluation undertakes to look at all of these factors -- those relating to the Special Prosecutor's Office, as well as those relating to officials, institutions, organizations and individuals external to it. Although we have not been able to examine all the external factors in depth, we believe we have been able to identify the elements which significantly influenced the fate of the Special Prosecutor. Together, they provide a context in which to view the performance of the Special Prosecutor's Office -- a context which starkly reflects the surrender to corruption by the fourth largest city in the country. What happened there has not happened before in its scope and significance anywhere in the United States.

#### THE APPOINTMENT OF WALTER PHILLIPS AS SPECIAL PROSECUTOR OF PHILADELPHIA

On April 1, 1974, Attorney General Israel Packel of Pennsylvania created the Office of the Special Prosecutor of Philadelphia within the Pennsylvania Department of Justice and appointed Walter M. Phillips, a deputy attorney general to take charge. The title, Special Prosecutor has acquired a distinct meaning in recent years. When the title is used most people think of the Watergate Special Prosecutor in Washington. Contrary to public belief, there is no legal provision in Pennsylvania for the appointment of an independent special prosecutor. Walter Phillips could only be appointed a deputy attorney general under the direction and supervision of the Attorney General. The additional

title of Special Prosecutor added nothing to his powers or authority as a prosecutor. His authority and independence in that office rested solely on the discretion of the Attorney General.

The following questions are significant in reviewing Phillips' appointment: Why did the Attorney General create the Office of Special Prosecutor of Philadelphia? How was Walter Phillips selected? What was his mission? At the time of his selection, what signs and omens were there for Phillips to read, concerning the likelihood of his succeeding in his mission?

The creation of the Office of Special Prosecutor of Philadelphia was the direct result of a recommendation in the Report of the Pennsylvania Crime Commission's investigation of police corruption in Philadelphia. This investigation was begun in November, 1971 under the supervision of then Pennsylvania Attorney General, J. Shane Creame. It provided Democratic Governor Milton Shapp's administration with the opportunity to mount a good-faith challenge to corruption, while also creating a potential weapon to embarrass political opponents -- incumbent Republican District Attorney Arlen Specter, whose gubernatorial aspirations were well known, and Police Commissioner and Mayor-elect Frank L. Rizzo, whose election in November, 1971 created another potential obstacle in Shapp's road to re-election.

The Crime Commission's investigation had a peak budget of over one million dollars a year and a staff of fifty-two investigators. These investigators, frequently working undercover, exposed a widescale system of payoffs to Philadelphia policemen to protect illegal bar operations, prostitutes, illegal gambling activities and narcotic violations. They were aided by informers, several cooperative bar owners, a "turned" police officer and a cooperative former police officer.

The Pennsylvania Crime Commission did not perceive its role as making prosecutable cases. Rather, it sought to expose police corruption through public hearings and a written report as means of encouraging further investigation and prosecution by the appropriate law enforcement agency.

It formally issued its 1400-page "Report on Police Corruption and the Quality of Law Enforcement in Philadelphia" on March 11, 1974. The principal finding of this report was:

"That police corruption in Philadelphia is ongoing, widespread, systematic and occurring at all levels in the police department. Corrupt practices were uncovered during the investigation in every police district and involved police officers ranging in rank from policeman to inspector. Specific acts of corruption involving improper cash payments to the police by gamblers, racketeers, bar owners, prostitutes and others are detailed in the report; more than 400 individual police officers are identified by first name, last initial and badge or payroll number as receiving improper payments in terms of cash, merchandise, sexual services or meals." Report, page 5 (Emphasis added)

Seven areas of corrupt police activities were described in detail by the Commission:

- (1) overlooking liquor code violations;
- (2) receiving payments from gamblers;
- (3) receiving payments from prostitutes;
- (4) receiving payments from narcotics dealers;
- (5) accepting bribes from individuals stopped for driving violations;
- (6) theft by police officials from unprotected property; and
- (7) receiving payments from business in return for extra police protection.

The report's treatment of the last area (7) and a Commission decision to identify police officers involved by their first names, last initial, and badge number, proved to be the undoing of the report.

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\* The fate of these hearings is discussed at p. 12-15.

One hundred fifty-two police officers were named as having accepted free food from Gino's Restaurants, and another 2,000 were accused of so doing. Spokesman for the Fraternal Order of Police and the Police Department quickly began to call the document the "hamburger report", drawing public attention away from the far more serious charges that policemen accepted payments from vice figures.

The Crime Commission pointed out in its report that the Philadelphia District Attorney should not be responsible for the prosecution of police corruption cases. It reasoned that the District Attorney depended upon Philadelphia police officers as witnesses and as investigators in his regular caseload and would have an irreconcilable conflict if he had to prosecute Philadelphia police officers for the corrupt activities exposed in the report. Instead, the Commission recommended that the General Assembly establish a permanent statewide special prosecutor's office for police matters. It acknowledged that in the interim, a special prosecutor should be recommended by a search committee of law school deans and appointed by the Attorney General. This recommendation was worded as follows:

"As an interim measure, the Commission recommends that the Attorney General appoint a special deputy attorney general and give him jurisdiction to investigate and prosecute instances of police corruption in Philadelphia. Potential funding difficulties and the need for rapid action in Philadelphia has led the Commission to recommend the jurisdiction be limited to police corruption in Philadelphia. It is absolutely imperative that the special prosecutor should have not only the greatest degree of independence possible under the law but also should be selected in such a manner that the public will have confidence in the independence of the special prosecutor." At Report, p. 820.

Attorney General Packel followed the recommendation of the Crime Commission. On March 13, 1974, he appointed a search committee of the

three Philadelphia area law school deans - Bernard Wolfman of the University of Pennsylvania Law School; Peter J. Liacouras of Temple University School of Law and J. Willard O'Brien of Villanova University School of Law. In his appointment letter he asked the committee to recommend to him three persons "most competent and willing to serve as a special prosecutor. . . for the matters dealt with in the Report of the Pennsylvania Crime Commission."

The deans acted with remarkable speed. They took only five days to send Packel three names for consideration. They were (in alphabetical order): Walter M. Phillips, Jr., Chief of the Narcotics Unit of the United States Attorney's Office for the Southern District of New York; Fred Speaker, former Pennsylvania Attorney General; and James A. Strazella, Associate Professor of Law, Temple University Law School. The committee added the following recommendation to their list of nominees.

". . . Whomever you appoint as a special prosecutor should also be designated to serve as the prosecutor with respect to any grand jury investigation of official corruption in Philadelphia. . . "

Packel, however, made no response to this recommendation.

One of the nominees, Mr. Speaker, told the search committee that he did not want the job. Although Walter Phillips was the only candidate not well known by the deans, he was not, at any time, interviewed by a member of the committee in person or in any extensive manner by telephone. According to Phillips, when two of the deans on the committee made separate calls to him, it was merely to tell him that he would be recommended as a candidate and not to ask any questions relating to his qualifications for the position.

The deans committee did not, and in fact could not, have executed an extensive search for a candidate within the five days it took to complete the task. Perhaps it determined that it did not have far to look. Walter M. Phillips was an aggressive and likely candidate for the post. He had grown up in Philadelphia and spent two years as an assistant district attorney in Arlen Specter's office prior to going to the U.S. Attorney's Office in New York. He was recommended by his supervisor at the U.S. Attorney's Office, a Federal District Judge in New York and by several prominent attorneys and law professors.

Phillips believed he had already received all the experience he was likely to get at the U.S. Attorney's Office in the Southern District of New York and was eager to return to Philadelphia. In fact, he had made some earlier overtures to the Pennsylvania Attorney General's office. In the fall of 1972, Attorney General Creamer had discussed with Phillips the possibility of his serving as special prosecutor to pursue police corruption cases which would be generated from the Crime Commission's investigation. However, Creamer did not follow through with the appointment, believing it premature to create a special prosecutor for the Crime Commission's work.

Later, in 1973, Attorney General Packel offered Phillips a Pennsylvania narcotics enforcement position. This time Phillips declined, believing he had more challenging opportunities to prosecute narcotics violators in the Southern District of New York. However, Phillips was still seriously considering returning to the city. He acknowledges an undefined interest in elective office.

The position of Special Prosecutor presented Phillips with the opportunity to design and manage his own investigation and prosecution

apparatus. Although he had been promoted to a Section Chief's position in the U.S. Attorney's Office (Narcotics), he did not have either high-level or complicated management responsibilities in that job. He was convinced that if given the opportunity, he could develop a great office. He envisioned the OSP as a place where young attorneys would ". . . get tremendous amounts of trial experience and be much better lawyers than they were when they first came."

While Phillips acknowledged that his early vision of the future of the OSP suggested the development of an institution, he insists that he had neither permanency nor a specific term of years in mind. He stated that whether or not the office became permanent, he anticipated its survival for at least as long as F. Emmett Fitzpatrick, Jr. was District Attorney. In the winter of 1974, this would have meant at least three and one-half years. In fact, Phillips' tenure was little more than half that period.

From Packel's letter to the search committee, it is clear he intended only to have the Special Prosecutor follow up the investigation of the Pennsylvania Crime Commission and to limit his jurisdiction to police corruption in Philadelphia. Packel's present recollection is that this was his instruction to Phillips when he appointed him. However, there is no written record of such instruction. Packel's letter of appointment to Phillips makes no mention of what Phillips' areas of investigation and prosecution would be.

Phillips understood that his initial activities would relate to police corruption in Philadelphia. However, he believed that he was also authorized to investigate official corruption in Philadelphia, when and if Attorney General Packel agreed to staff the January

1974 Special Investigating Grand Jury charged by Philadelphia  
Common Pleas Court Judge Harry Takiff. \* Whatever Phillips'  
expectations may have been, it is highly unlikely that Packer  
either intended or desired to have Phillips' jurisdiction expanded  
from police corruption to official corruption in Philadelphia. \*\*

At the time of his appointment, Phillips had the critical  
opportunity to shape the conditions that were essential for the  
continued existence and success of the newly created office.  
However, he failed to do this. Any lawyer with experience in  
the investigation and prosecution of corruption or organized  
crime cases knows these undertakings are extremely complex,  
difficult and fraught with pitfalls and pressures. A cardinal  
rule followed by experienced prosecutors dictates that a  
corruption probe should not be undertaken at all by an attorney  
unless he receives at the outset reliable commitments from the  
appointing authority guaranteeing (1) a reasonable period of time  
to do the job; (2) sufficient funding for the duration of the  
operation; (3) an adequate staff with reasonable salary and  
promotion provisions; (4) a rigid standard assuring independence  
and protection from unwarranted dismissal; (5) a clear mandate as  
to the areas to be covered by the investigation; and (6) the full  
support and cooperation of the Governor and Attorney General in  
seeking and pushing legislation necessary to provide the prosecutor  
with the additional tools he may need to fulfill his responsibilities.

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\* The problem of staffing the January 1974 Special Investigating Grand  
Jury is discussed subsequently in this report.

\*\* See discussion at p 22-24.

These initial commitments are critical. An investigation of corruption is strongest at its beginning when it poses the greatest threat to those who become targets. At that time the prosecutor's public image is at its peak and he can demand the full resources he needs. Thereafter, his investigations must gradually weaken as those who are threatened develop strategies to defeat them.

Phillips should have obtained these commitments from Packel and from Governor Shapp. For his protection, he should have obtained the commitments in writing and through public statements by both officials. The very first time that a commitment was broken -- Phillips should have confronted the Governor and the Attorney General with their written and public statements.

If Walter Phillips was not aware of the need to bind the Governor and the Attorney General to hard supporting commitments at the time he accepted the position of Special Prosecutor, he apparently had learned about it by October 3, 1975, after he had been in office for about 18 months. He appeared as a speaker before the National Conference on Organized Crime and told his audience:

"Investigating and prosecuting corruption is by far the most difficult and frustrating work a prosecutor can become involved in. . . In addition to the difficulties in hiring and just proving corruption charges, a prosecutor making a serious effort in this area, is bound to face tremendous resistance from outside sources. Public officials strongly resent being investigated, and they have many friends who are very protective, if only because they see themselves as potential targets of investigations."

Phillips advised the Conference that in order to successfully deal with these problems, the special prosecutor had to be guaranteed adequate resources from the beginning. He said:

"Are there adequate resources at the prosecutor's disposal, that is, what does the law provide in the way of grand juries, electronic surveillance, immunity and other important investigative tools? Are competent personnel, both legal and investigative, available to work on the probe? While a yes answer to each of these questions does not guarantee an indictment and conviction of every public official in sight, a negative response to all would make embarking on a full scale corruption probe an exercise in futility."

However, Phillips was apparently willing to embark on such an "exercise in futility." When he met with Attorney General Packel on March 23, 1974 to discuss his interest in the job, he did not insist upon the commitments essential for a successful probe. He accepted the position despite the fact that Packel could promise him a first year budget of only \$500,000.00 - a figure Phillips had reason to believe was four or five times too low - and a staff of only about half the size Phillips believed he needed. Packel offered assurances only that Phillips could act independently and hire his own staff. He did not discuss any other guarantees, and Phillips did not press him.

Actions by the Governor and Attorney General shortly before his first meeting with Packel gave Phillips more reason to believe he needed assurance of their complete support. In February 1974 Shapp and Packel had undercut the Pennsylvania Crime Commission's Philadelphia police corruption probe by cancelling scheduled public hearings in Philadelphia on the findings of the investigation. In addition, they created doubts about funding the publication of the Commission's final report. They backed down, however, on the report appeared because of heavy Philadelphia newspaper pressure which characterized Shapp's interference with the Crime Commission's proposed public hearings and final report as a form of "cover-up".

Phillips was aware of these events. His interest in returning to Philadelphia had led him to keep abreast of Philadelphia news while in New York. In addition, he had had lengthy talks with Lawrence Hoyle, the Executive Director of the Pennsylvania Crime Commission to learn about the Special Prosecutor's job. Hoyle believed that holding public hearings in Philadelphia would be the only way to obtain the public interest and support needed for the continued investigation and prosecution of police corruption cases. Although he viewed the final report as an essential record of what the Crime Commission had done, he did not think it would be widely read or could serve as a catalyst for public support.

He complained to Phillips that Shapp's cancellation of the public hearings greatly weakened the impact of the Crime Commission. Phillips was concerned over this withdrawal of support for the Crime Commission by the Governor and Attorney General and asked Packel about it at their March 23 meeting. He was not satisfied with Packel's answer that the public hearings had been cancelled because they would not reveal anything more than could be found in the report, and that they created a risk to the safety of certain undercover witnesses.

Phillips told us he thought Packel's responses were "fuzzy". For that reason and because of the inadequate support Packel had offered him, he was tempted to withdraw his name from consideration. He discussed these matters with Lawrence Hoyle and permitted himself to be reassured by him. Hoyle urged him to take the job of Special Prosecutor with the advice that even if he could not obtain the funds and staff he needed in the beginning, he would be able to get them later from the Governor and Attorney General if he continued to push

for them. Hoyle told Phillips that that had been his experience in running the Crime Commission investigation. This, of course, was unfortunate advice and Phillips should not have followed it.

The Governor's interference with the Crime Commission raised even more significant problems for Phillips to consider. Shapp's and Packel's explanation for cancelling public hearings of the Crime Commission findings were hardly credible. As was subsequently established, the final report was clearly inadequate as a substitute for public hearings. One has only to read the testimony in the Crime Commission report taken from police officers, bar owners, prostitutes, gamblers and Crime Commission investigators to picture the impact such testimony would have on the people in Philadelphia through public hearings. The Senate Watergate hearings proved how valuable such public hearings can be in focusing the citizen's attention and interest on a major corruption scandal.

Why then did the Governor put a halt to the Crime Commission's scheduled hearings? There may not be a final answer, but there are revealing tracks and traces to follow. Information we have received shows that whatever enthusiasm the Shapp administration may have had for the Crime Commission investigation of police corruption in Philadelphia in November, 1971, had cooled by February 1974. The reason for the cooling is understandable. In the early part of the investigation, Governor Shapp was confronted with two powerful rivals who were potential seekers for his office -- Philadelphia District Attorney Arlen Specter, and the then Mayor-elect Frank Rizzo. Arlen Specter was knocked out of the running when the Democratic candida

for District Attorney, F. Emmett Fitzpatrick, whom Shapp had supported defeated Specter, whom Rizzo had supported. Rizzo had been additionally weakened earlier that year when he failed a lie detector test about a patronage squabble with then Democratic City Committee Chairman, Peter Camiel. Therefore, by the close of 1973, Shapp's position was decidedly stronger.

Democratic party leaders who participated in the decision-making during this period have informed us that this turn of the table in Shapp's favor influenced his decision to stop the public hearings. According to them, Shapp was a cautious and conservative politician who would not unnecessarily embarrass an opponent or provoke a retaliatory attack.

Crime Commission public hearings in February 1974 could only serve to embarrass and embitter Mayor Frank Rizzo. Rizzo was still a powerful Democratic leader in Philadelphia, although his recent losses had made him an unlikely contender for the gubernatorial nomination in 1974. Thus Shapp may have concluded that Crime Commission public hearings would be an unnecessary attack on Rizzo that would likely engulf him in a political blood bath in Philadelphia at a time when he most needed to consolidate his strength in his party throughout the state. Five days after Shapp cancelled the Crime Commission's projected public hearings in Philadelphia Mayor Rizzo sent a letter to Shapp praising him for his handling of a strike by independent truck drivers during the energy crisis. This was reportedly the first complimentary correspondence between the two men in two years.

## The January 1974 Grand Jury

The fate of the Crime Commission hearings and report was not the only guide for Phillips to understand the nature of the support he could expect from the Commonwealth. There was also the status of the January 1974 Special Investigating Grand Jury investigation. As we earlier stated, Phillips was aware of the initial limitation of his mandate to police corruption in Philadelphia, but believed that he would soon be authorized to staff the January 1974 grand jury. This would expand his mandate to include the investigation of official corruption in Philadelphia. Phillips had been informed by Attorney General Packel that he seriously questioned whether the January 1974 grand jury had been legally convened and that he had declined Philadelphia Common Pleas Court President Judge Donald Jamieson's request to staff the grand jury until its legality had been determined by the Supreme Court acting on a petition by Packel for a declaratory judgment.

Phillips did not doubt the validity of the grand jury. There was also ample information available to cause him to suspect that Governor Shapp and Attorney General Packel were reluctant, if not unwilling, to have anything to do with the January 1974 grand jury. The reasons become apparent from a cursory review of the background of this grand jury.

The investigations charged to the January 1974 grand jury grew directly from the investigations of the April 1969, January 1971 and June 1972 grand juries launched by District Attorney Arlen Specter. The April 1969 grand jury focused its attention on major construction in the city including Veterans Stadium, 1500 Market Street, and other projects undertaken by the Redevelopment Authority and the Housing

Authority. Its probe lasted 18 months, during which the jury heard over 500 witnesses, made 15 presentments detailing "systematic violation of law among police officers and criminal conspiracy respecting public business of a widespread nature jeopardizing and demonstrating public security."

The criminal activities uncovered by that grand jury were extensive. It recommended the indictment of 15 individuals, including a former city records commissioner, a city planning commission member, and a former chairman of the Philadelphia Housing Authority, as well as 19 city firms. However, a number of resulting indictments were later quashed on technical grounds and some cases were dismissed prior to trial.

The January 1971 grand jury probed narcotics traffic in Philadelphia. It led to 32 convictions, mostly of low level drug pushers, and spawned the June 1972 investigating grand jury.

The June 1972 grand jury was charged to investigate (1) narcotics violations (2) liquor violations, (3) illegal gambling engaged in by certain individuals in organized crime groups, (4) smuggling operations engaged in by employees of the Department of Revenue, Bureau of Cigarette and Beverage Taxes of the Commonwealth of Pennsylvania, (5) police corruption, (6) solicitation and receipt of bribes by enforcement officers by the State Liquor Control Board, (7) solicitation and receipt of bribes by the employees of the Court of Common Pleas Probation Department and by employees of the Office of the Prothonotary of the Court of Common Pleas, (8) solicitation and receipt of bribes by employees of the Bureau of Professional and Occupational Affairs of the Pennsylvania Department of State, and (9) unauthorized payroll disbursement and extortion efforts by

persons affiliated with the Philadelphia Housing Authority. The grand jury was also charged generally with investigating official corruption in Philadelphia.

The work of this grand jury continued during the 1973 District Attorney race. Prior to the campaign, the June 1972 grand jury had issued 9 presentments detailing crimes of bribery and/or extortion involving police officers, gamblers, and drug peddlers, two city councilmen, an attorney and building and service contractors.

After the election, the grand jury issued 11 more presentments. These last presentments described bribery and/or extortion conspiracies involving Democratic city officials and architectural engineering firms and dairies seeking city contracts; as well as bribery and/or extortion involving state cigarette tax bureau agents, state pharmaceutical board officials, state occupational and professional affairs board agents and city narcotics detectives. Two days prior to Fitzpatrick swearing in, the June 1972 grand jury also issued its final report. It called for another investigating grand jury and recommended that it be staffed by the assistant district attorneys who had run the previous probe.

Throughout January 1974, Judge Harry Takiff, who had supervised the June 1972 grand jury, publicly and privately urged Fitzpatrick to petition his court for a new grand jury. Fitzpatrick refused to file such a petition. On January 29, 1974, representatives of two civic organizations, the Committee of 70 and the Americans for Democratic Action, petitioned for a new grand jury and the supersession of the District Attorney by the Attorney General. Two days later, on January 31, 1974, Judge Takiff dismissed these petitions and on his motion charged the regular January 1974 grand jury to continue prohibiting official corruption as a special investigating grand jury. He

announced that he expected Fitzpatrick to provide the staff for it.

Judge Takiff charged the jury with pursuing investigations in 6 specific areas: (1) drug trafficking and drug related corruption; (2) corruption related to violations of the liquor code; (3) police corruption involving gamblers and business people; (4) official corruption involving bribes paid in exchange for professional services and dairy contracts; (5) cigarette smuggling and related corruption of tax bureau officials; and (6) extortion by state and city officers and employees of regulatory and law enforcement agencies including the Bureau of Professional and Occupational Affairs and the State Pharmacy Board. All these investigations had been commenced by the earlier Specter special grand juries. In addition Judge Takiff added a general charge:

"I therefore conclude and find there has existed within the period of the applicable statute of limitations and continues to exist in Philadelphia city a system or systems of related or similar crimes of official corruption including and involving payments to influence the discharge of official duties with respect to decisions, recommendations, appointments to official positions and other governmental functions and activities. . . . I, therefore, charge you to investigate all such crimes. . . . "

On February 11, 1974, the date the January 1974 grand jury was supposed to commence its hearings, Jude Takiff ordered District Attorney Fitzpatrick to staff it. On February 15, Fitzpatrick wrote Judge Takiff and informed him of his reasons for failing to comply with the order. Fitzpatrick expressed alarm at the allegedly permanent nature of the grand jury's investigation, which if true, would be illegal under Pennsylvania law (see Shenker v. Harr, 332 Pa. 382, 1939). He belittled the results of the three Specter grand juries and stated his displeasure with Specter's presentment-without-indictment accusations. Fitzpatrick made reference to the

tremendous backlog remaining from Specter's office and the problems created by the adoption of the Pennsylvania Rule of Criminal Procedure 1100, which required the trial of defendants within 180 days of arrest. Finally, Fitzpatrick set forth his belief that a special grand jury "may be the worst, not the best way to proceed" with the investigation of corruption.

It is significant that when Fitzpatrick replied to Judge Takiff and denigrated the effectiveness of the Specter grand juries and the utility of a special investigating grand jury in probing public corruption, he had been advised by one of his top assistants that exactly the contrary was true. This advice was presented in a confidential report Fitzpatrick had ordered prepared on the work of the Specter grand juries. It concluded that these grand juries had not only been successful in developing major public corruption cases and investigative leads but also that the essential incriminating evidence in most of these cases was obtainable only through the use of a grand jury.

On the same day that Fitzpatrick sent his letter to Judge Takiff, the President Judge of the Court of Common Pleas, D. Donald Jamieson, acting on Judge Takiff's request, and pursuant to section 907 of the Administrative Code of 1929, 71 PS §297, requested Attorney General Packel:

"To assign and/or retain and employ a special attorney or attorneys to represent the Commonwealth and perform all of the matters which were the subject of Judge Takiff's order. . . ."

However, as we have mentioned above, Packel refused to staff the grand jury until a declaratory judgment could be obtained from the Pennsylvania Supreme Court resolving what Packel called the "serious question as to its validity."

This was a strange position for Packel to take. After appointing a special prosecutor to investigate police corruption in Philadelphia, Packel should have welcomed the opportunity to provide his new deputy with the investigative advantages and clout of a special grand jury. He should not have been seriously concerned about the validity of the grand jury. It was unlikely that the Supreme Court would accept Fitzpatrick's argument made to Judge Takiff that the January 1974 grand jury violated the Court's admonition in Shenker v. Harr against a permanent grand jury investigation. The January grand jury was a newly constituted grand jury even though it was carrying on investigations conducted by prior grand juries. No Pennsylvania court had applied Shenker v. Harr to successive grand juries.

Even if an attack on the January 1974 grand jury was based on a contention that successive grand juries conducting similar investigations created the same evil of a permanent grand jury condemned by Shenker v. Harr, Packel should have concluded that the likley response of the Pennsylvania Supreme Court would be that the grand jury was valid because there had been a separate judicial re-evaluation of the legal and factual requirements necessary to support its creation. Indeed, the Pennsylvania Supreme Court later specifically so held in the case of In Re: Investigation of January 1974 Philadelphia City Grand Jury, 328 A. 2d 485 (1974). Although this case was decided some months after Packel had to make his decision about the January grand jury, its findings were not surprising.

Another challenge to the grand jury might have been on the ground that Judge Takiff acted on his own motion in charging the grand jury and had not responded to a petition submitted to him by

the Attorney General or another appropriate petitioner. However, no Pennsylvania case has ever held such a petition was necessary. The landmark Pennsylvania decision in Case of Lloyd and Carpenter, 3 Pa. L.J.R. (Clark) 188 (Phila. Q.S. 1845), specifically referred to criminal courts "of their own motion" charging grand juries to conduct special investigations. The Pennsylvania Supreme Court also made this point when it later upheld the January 1974 grand jury in In Re: Investigation of January 1974 Philadelphia City Grand Jury, supra. Ordinary legal research by Packel would have disclosed the same Pennsylvania legal precedents upon which the Supreme Court relied.

If Attorney General Packel had really been enthusiastic about launching the kind of investigation of official corruption in Philadelphia for which the January 1974 grand jury had been charged, he would have seized upon the opportunity to staff this grand jury with a special prosecutor, confident that he would not be running much of a risk that the grand jury would be held invalid. But Governor Shapp and Attorney General Packel no more wanted to work with the January 1974 grand jury than Fitzpatrick did -- and apparently for the same reasons.

The January 1974 grand jury began as a continuation of Republican District Attorney Arlen Specter's grand jury investigations of public officials in the Democratic administrations of the state and the city. Governor Shapp could hardly have wanted to be saddled with this grand jury probe of his own departments and subordinates, particularly if he believed that the motive behind Specter's investigation was partisan politics.

Fitzpatrick avoided the January grand jury because of similar concerns about continuing Specter's assault on Democratic office holders. However, in March 1974, he sought to assert jurisdiction over the Crime Commission's charges of police corruption by filing his own petition for a special grand jury with Philadelphia Common Plea Court Judge Charles P. Mirarchi, Jr. At the hearings on Fitzpatrick's petition, Packel objected to the empaneling of a new special grand jury to investigate police corruption. He informed Judge Mirarchi that he was superseding Fitzpatrick and would appoint a special deputy attorney general to carry on the police corruption probe recommended by the Crime Commission.

Judge Mirarchi rejected Packel's objection and his notice of supersession of the Philadelphia District Attorney, and granted Fitzpatrick's petition. Packel filed a petition for a writ of prohibition against the Mirarchi grand jury in the Supreme Court of Pennsylvania.\*

The Supreme Court granted Packel's writ of prohibition against Judge Mirarchi principally because it found no need for two grand juries to investigate police corruption in Philadelphia. The Court said that one grand jury -- the January grand jury -- had been charged to investigate police corruption and that the Attorney General of Pennsylvania had, with the blessing of the District Attorney of Philadelphia, superseded him in the investigation to be carried out by that grand jury.

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\*He had earlier filed a petition in the Supreme Court for a declaratory judgment on the validity of the January 1974 special grand jury, which had been denied by the Court on the ground that Packel was only asking for an advisory opinion which the Court was not authorized to give. (Packel v. Takiff, 321 A. 2d 649 (1974)).

When Packel had originally filed his petition against the Mirarchi grand jury, he had expected Fitzpatrick to defend the jury before the Supreme Court on the ground that the January grand jury was invalid. To his surprise, Fitzpatrick told the Supreme Court that he was not contesting the validity of the January grand jury. Packel realized that without an objection from the District Attorney of Philadelphia, the Supreme Court of Pennsylvania would not declare the January grand jury illegal. He could no longer resist the request of President Judge Jamieson to staff this grand jury. On May 1, 1974, he finally wrote to Walter Phillips and instructed him to staff the January 1974 grand jury. He told him to expand his investigation to include official corruption in Philadelphia. A few days later Packel wrote to President Judge Jamieson informing him that the Office of the Special Prosecutor would, in accordance with Judge Jamieson's request, staff the investigation of corruption in Philadelphia being conducted by the January grand jury.

However, Packel did not seek to provide Phillips with a larger staff or more funds for his newly expanded responsibility. In light of this background, the conclusion is inescapable that although the Shapp administration had been pushed into pursuing Arlen Specter's investigations, it was not willing to commit much in the way of resources for the task.

Walter Phillips could not have been oblivious to these events when he agreed to accept the position of Special Prosecutor. He should have realized that his mission was hopeless if the Commonwealth's support of this office remained as restricted as Packel had indicated. Yet Phillips had no initial meetings with Governor Shapp and had only one exploratory meeting with Attorney General Packel. Though unhappy

with his meeting with Packel, Phillips was willing to trust him and gamble on increased support from the Commonwealth as he got underway. Although Phillips' decision reflects on his judgment and qualification for the position of Special Prosecutor, the woefully inadequate support given him by the Attorney General reflects even more on the Shapp administration's conspicuous lack of commitment to investigating official corruption in Philadelphia. Indeed, it may be that no prosecutor, regardless of his experience or reputation, could have extracted the necessary commitments from the Commonwealth.

#### Recruitment, Organization and Investigation

Public prosecution in the United States is long on tradition and mythology but short on professionalism. Nearly all prosecutors -- whether elected or appointed -- are products of partisan politics. Many assistant prosecutors are selected on the basis of partisan, political sponsorship and regard their offices as criminal litigation training schools and/or a springboard to elected positions or the judiciary.

With limited exceptions at Federal and State levels, public prosecution is not a career activity. Few offices retain a cadre of professional prosecutors which remain in place when the administration of an office changes from person to person or party to party. Even fewer have established a real tradition of nonpartisan, effective public corruption investigation. Best known among the small group which has done so are the Office of the United States Attorney for the Southern District of New York and the New York County District Attorney's Office (Manhattan). More recent additions include the Office of the United States Attorney for New Jersey and the Attorney General's Office in New Jersey.

There is a tendency, perhaps inevitable, among assistant prosecutors serving in such offices -- as well as alumni -- to regard his or her office as the paradigm. Walter Phillips believed in the perfection of the Southern District's United States Attorney's Office. Much of what he did or failed to do as Special Prosecutor in Philadelphia was a consequence of his experience as an Assistant United States Attorney in the Southern District of New York from 1968 to 1974.

Although he has been out of public prosecution since his dismissal as Special Prosecutor, Phillips presents himself as though he were still one of that small, national group of career public prosecutors. Although he served for two years as an assistant district attorney in Philadelphia under Arlen Specter, before working in the Southern District, he invariably refers warmly to the latter experience and virtually ignores the former. He is justifiably -- but perhaps excessively -- impressed with the label of a "former Southern District Assistant." Phillips' preoccupation with the prosecutor model with which he was most familiar had important implications for the operations of the Office of Special Prosecutor.

During many hours of personal interviews, Phillips reiterated his admiration for the Southern District model. He noted that his intention had been to replicate that office as closely as possible in Philadelphia. This reflects a misconception by Phillips of his new role. Initially he would have to conduct a major investigation, rather than prosecute cases already made. A more apt model for him to have followed would have been the Manhattan District Attorney's Office, which emphasizes the investigation

as well as prosecution.

Phillips anticipated that he would be responsible for the investigation of both police corruption and public corruption in Philadelphia. While acknowledging a lack of familiarity with what would actually be required for those tasks, he was well aware of what a Special Prosecutor investigating corruption in the criminal justice system of New York City was starting with; forty attorneys and 100 investigators. New York City is roughly four times larger than Philadelphia in terms of population. A rough ratio of four to one would have meant that OSP should have started with ten attorneys and twenty-five agents. Because its mandate was broader than its New York counterpart's, including police and all public corruption, rather than just corruption in the criminal justice field, it should reasonably have had a larger initial personnel complement than the one in New York.

Phillips' lack of personal experience in developing and operating an investigative and prosecutive capability can be excused as a function of his youth. Yet, his apparent failure to seek advice on staffing from persons who had had similar or analogous experience is difficult to rationalize. To the uninitiated, the \$500,000 budget offered him by Packel may appear to be substantial to support police and public corruption investigations in Philadelphia. Upon closer examination, however, it is far less generous than it might seem.

Investigative agents with skill, experience and commitment to work in this area are in short supply. Few state or urban police departments employ more than a handful. These personnel are usually found within the ranks of Federal agencies; F.B.I., D.E.A., I.R.S.,

etc. Salaries for Federal investigators tend to be substantially higher than those at local or state levels and their benefits are more attractive. Therefore it is not surprising that the per man year cost for such agents is twenty-five thousand dollars or more.

Like their investigative counterparts, the number of attorneys experienced in anti-racketeering and anti-corruption work is quite small. Illustratively, in the summer of 1976, the Organized Crime Institute of Cornell Law School was able to identify less than two hundred such persons working full-time in state and local governments. There were perhaps 125 more such attorneys in the Federal service. Prosecutors experienced in the areas of interest to Phillips and willing to relocate for jobs of indefinite duration command annual salaries of \$30,000 or more. Without belaboring the point, the budget for the Office of Special Prosecutor was inadequate.

Capable personnel of the type Phillips wanted to staff his office -- and should have had -- must ordinarily be recruited from service elsewhere. While salaries are one constraint, indefinite tenure is another. Few qualified investigators or attorneys are disposed to change jobs when tenure is uncertain. That indisposition is not a function of hyper-sensitivity to job security. Rather, it is a realistic view -- tempered by an institutional skepticism -- about the often transitory character of many "reform" efforts; especially investigations of police and public corruption. To a larger degree, perhaps, than salary, this factor presented a greater recruitment obstacle for Phillips than any other. Too few "fast gun" lawyers were willing to come to Philadelphia to work in the face of this uncertainty.

Neither the Philadelphia District Attorney nor the Pennsylvania Department of Justice have developed traditions of vigorous and effective corruption investigation and prosecution. Under former District Attorney Arlen Specter, a series of investigating grand juries had heard testimony and issued various presentments under the guidance of a small group of assistant district attorneys. Phillips' assessment of that effort apparently persuaded him that it would be inappropriate to hire those assistants for his own staff.

Having ruled out the Specter grand jury team, and in the absence of other assistant district attorneys with substantial investigation or trial experience in his areas of responsibility, Phillips was compelled to look elsewhere for staff.

His first recruiting efforts were directed at the pool of former colleagues in the Southern District. For the reasons noted above, as well as the sense some of these lawyers had that Pennsylvania's legal constraints upon evidence gathering made successful execution of the Phillips mission highly unlikely, he could not recruit the people he wanted. Whether or not the particular lawyers he solicited in the Southern District would have performed more effectively than the staff finally hired can not be established. What is clear, however, is that the attorneys Phillips did recruit were essentially "green"; inexperienced in investigative work, grand jury presentation, complicated pretrial maneuvering and trial work.

Phillips' efforts to recruit among the Watergate Special Prosecutor's staff were equally unsuccessful. Philadelphia, unfortunately, is not as alluring as Boston or San Francisco, and salaries offered by Washington law firms for Cox-Jaworski-Ruth alumni far exceeded the OSP level.

Discussions with Nick Scopetta, Commissioner of Investigation in the City of New York, did not produce any candidates for Phillips. Although Scopetta contacted each of the five District Attorneys in the City in an attempt to generate interest in the OSP, his efforts were unproductive. Phillips communicated with Henry Petersen, then Assistant Attorney General in charge of the Criminal Division of the United States Justice Department, but could not secure any candidates for his staff. A conversation with the then Chancellor of the Philadelphia Bar Association about borrowing experienced trial lawyers from some of the City's large firms was equally unproductive. In fact, the only concrete suggestion he received was to place an advertisement for lawyers in the Legal Intelligencer.

While Phillips may have been somewhat misguided in his focus on recruiting experienced trial lawyers -- since he had an equal if not more compelling need for attorneys skilled in investigation -- the disinterest of the former Chancellor is instructive. There was precedent for the large Philadelphia law firms to "lend" personnel to a public service effort. During his first term as District Attorney from 1966-70, Arlen Specter sought and obtained the cooperation of a number of large firms to secure some of their younger attorneys for his staff. It had been understood that they would return to their offices and careers in the civil field when their public service was completed after a few years. Arguably, law firms saw less advantage for their young lawyers or the firms to permit their lawyers to participate in the pursuit of public corruption involving the interaction of commercial clients and public officials.

Although Phillips' efforts to recruit prosecutors experienced in anti-corruption work were unsuccessful, he did hire several lawyers who had worked in the Philadelphia District Attorney's office during Arlen Specter's regime. They left the staff relatively early in its existence. However, Phillips received a large number of unsolicited applications for attorney positions with the OSP, although none fit the profile he had in mind when he accepted his appointment.

Of the attorneys Phillips ultimately hired, at least five had experience with Public Defender offices in Philadelphia and New Jersey. The man he finally chose as his first assistant, Ben Joseph, was one of this group. Joseph, a 1968 University of Pennsylvania Law School graduate, had been a trial attorney for the United States Civil Service Commission and had investigated violations of the Hatch Act. Prior to that he had worked as an assistant public defender in Philadelphia.

Among the other attorneys several had experience in commercial law and one was a trained accountant. Another had worked on contract compliance with the Pennsylvania Human Relations Commission. Three others had had no prior full-time legal experience. More than one third of the lawyers had no trial experience at all. Law schools represented in the staff included Harvard, Georgetown, Villanova, Columbia, Temple, Pittsburgh and Yale. Most of the lawyers had graduated within three years of joining the staff.

An interesting sidelight in the recruiting process is reflected in the attorney applicant log which the OSP maintained. Repeated reference to applicants' athletic ability or experience are found in

it. Phillips appears to have been impressed whenever one of the applicants had literally been a good "ball player". He apparently assumed that the aggressiveness essential to success in some forms of athletics would carry over to success in investigation and prosecution. The evaluators have not been able to find any research which confirms that hypothesis.

The attorney cadre included one black lawyer. Phillips also hired two female lawyers, They were given investigative and prosecution assignments during their terms with the OSP. While Phillips was cognizant of the need for a skilled appellate or "law man", since he had anticipated many of the legal challenges with which the OSP was actually confronted, he was not successful in recruiting such a person.

While Phillips was successful in recruiting a very capable Chief Investigator, Wayne Bishop, he had great difficulty in securing other qualified investigators. Bishop, a former Captain in the Connecticut State Police, had headed that Department's Intelligence Division for a number of years. He had a national reputation in police circles for his work in the organized crime field and after his retirement had served as Chief Field Investigator for the Senate Watergate Committee.

Bishop was described by those who knew him well as hard-bitten, fair, creative and very demanding of his subordinates. He and Phillips developed an excellent working relationship. Bishop quickly earned the respect of the agents the OSP was able to recruit and appeared to be an excellent choice for the position. Unfortunately he died in September of 1974, before the OSP was well launched.

While Phillips had hoped to secure experienced Federal agents for the investigative staff, including some from the D.E.A. with whom he had worked complicated narcotics conspiracy cases in Southern District, he was unsuccessful. He was unable to secure federal agents, either under the provisions of the Intergovernmental Personnel Act or by inducing others to retire from federal service. Once again, it was salary and longevity that caused the reluctance.

Investigative accounting skills are a sine qua non for the investigation of public corruption, especially when the focus is upon allegedly illegal public works contracts, political contributions and bribery. Here too, it was almost impossible for Phillips to secure the necessary expertise. Until October, 1974 when he hired a former I.R.S. Intelligence Agent who had worked with a Federal Organized Crime Strike Force in New York City, he had little investigative accounting expertise available. Shortly after the OSP was created Phillips hired a recent law school graduate who had a bachelor's degree in accounting and some limited public accounting experience. In July, 1974 a recent accounting graduate was also hired to assist with the examination of books and records. These three men, and some part-time accounting students constituted the investigative accounting capability for the balance of Phillips' tenure.

During Phillips' two years as Special Prosecutor the OSP never had more than 15 investigative agents including supervisors. The complement included a youthful, retired Detective Sergeant from the New York City Police Department, John Desmond, who became Chief Investigator following Bishop's death. Desmond had had lengthy investigative experience in the New York Police Department and had

served in the detective squad assigned to the New York County District Attorney's Office. Of four former Philadelphia Police officers hired by the OSP two had served with the local District Attorney's Office. None, however, had previously done any significant police or municipal corruption investigation. In addition, this staff included a former Marine Intelligence Officer with limited investigative experience, a civilian woman who was converted to an investigator from a secretarial position.

Three investigators were former special agents of the Pennsylvania Crime Commission; two others had had some investigative experience in the Military Police Corps. One agent, with three years experience in the United States Secret Service earlier in his career, left a job as a claims adjuster to join the office. Another agent, in addition to those already noted, had worked as a prison correctional officer. With the exception of two of the former Philadelphia officers, the investigative cadre remained essentially intact throughout Phillips' tenure.

A sampling of investigative reports reveals the usual police prose, with one notable exception. One man's reports were remarkably literate. Upon inquiry it was determined that he was one of the former Philadelphia policemen who had spent several years as a reporter for United Press International covering municipal government.

## Structure of the Office

Phillips had expected to create two sections for attorneys; one to work on police corruption and one to focus upon public corruption. He envisioned having two section supervisors who would report to the first assistant who in turn would report to him. In reality, he was never able to achieve that objective because he was unable to hire attorneys with prior experience. He and Joseph made rough allocations of cases among the staff attorneys consistent with a sense of dual sections. The division, however, was more distinct for purposes of investigative assignments to lawyers than for trials. Essentially attorneys handled whatever matters had to be tried. The criteria for assignment was availability rather than a designation of subject responsibilities.

The investigative functions of the OSP were carried out by police agents and investigative accountants. The principal investigative accountant reported to Phillips, Joseph and often to any attorney who requested his aid. The remainder of the accounting staff reported to him. Police agents operated through a highly structured chain of command. This included a supervising investigator and a chief investigator. The chief investigator reported to Phillips.

On rare occasions, teams of attorneys and investigators were formed to pursue particular matters. However, the ordinary mode of operation was that investigators would work through their supervisors -- taking assignments and orders from them and reporting to them. Lawyers, on the other hand, nearly always operated on their own, without immediate supervision. The lawyers could call for

investigative assistance but ordinarily this would be done through a supervisor. Typically, some attorneys had favorite agents whom they would attempt to have assigned to their work.

Frequently, in the absence of an ad hoc team, various agents would work on individual cases. There was a distinct lack of continuity when agents would do only bits and pieces in a matter. The lawyers often conducted parts of an investigation without sharing their findings with any agents. This frequently resulted in the investigative staff having only partial information or records concerning an important prosecution in the office.

The administrative, financial and support functions in the OSP were the responsibility of an office administrator to whom Phillips delegated his authority. This administrator reported directly to him. Before designating the woman who survived his tenure, Phillips had made two unfortunate selections for the position and they had created serious problems in the operation of the office. However, Nancy Ezold, his final selection whom he appointed in November of 1974, did an excellent job.

#### Relationship With OSP Staff Lawyers

Initially, Phillips was able to maintain a high degree of morale among his legal staff. He sought to instill in them a feeling of mission and dedication. He was aided by the fact that they were fighting a difficult battle against tremendous odds. The staff, working with inadequate resources against very strong opponents, were drawn closer together. Their greatest source of encouragement was the newspaper publicity which hailed their progress.

However, Phillips was not an easily accessible or affable leader. He remained mostly in his office, aloof from his staff, and only communicated with individual staff members on a need-to-know basis. Members of the office were not told routinely what cases the OSP was pursuing. They knew about their own cases and were able to learn about some others from their associates. But they were not briefed about the office's overall strategies or caseload by Phillips or his deputy Ben Joseph. A number of the lawyers resented this secrecy. Some respected and applauded it. However, except for one or two lawyers, the staff could not form an easy relationship with the boss.

Here again, Phillips was following the model of the Southern District. But without the personality, experience or reputation of United States Attorney Robert Morgenthau, Phillips was less than effective. His leadership did not dominate the office. Rather, each of the bright, young and eager lawyers on his staff went his own way. Whatever supervision there was, came from the warmer and better liked first deputy, Ben Joseph. Joseph was the one who usually assigned cases to staff lawyers and provided continuing guidance to them. He also recognized that some of Phillips' actions or directives were considered unreasonable by some members of the staff. Because of his failure to obtain an appellate chief, Phillips insisted on having all written matters concerning OSP cases, including official letters, submitted to him for editing and rewriting. Phillips admits to being fearful that an inadequately prepared or written document from his office might be submitted to a court.

However it was the view of a number of the staff that Phillips rewriting resulted at times in a poorer, not a better presentation. Apart from the merits, the egos of some of the proud young lawyers on the staff were clearly bruised. Some of them balked and came to Joseph who mollified them by letting them bring their papers to him for less intensive review.

### Strategy, Tactics and Intelligence

Acknowledging the constraints to developing an effective investigative capability, it is nonetheless difficult to understand the failure to develop a rational program for the development of an investigative strategy and the collection and analysis of intelligence.

In broad terms, the missions of the OSP were clear; police corruption and public corruption in Philadelphia. What is unclear and in fact, has been impossible for us to discern, were the investigative strategies consciously determined by Phillips. When he assumed office there were two principal data sources upon which he could have drawn in formulating those strategies; the Pennsylvania Crime Commission Report on Police Corruption in Philadelphia with its supporting materials, and the presentments issued by a series of special investigating grand juries examining public corruption between 1969 and 1973.

Phillips did review the Crime Commission's report and spent time at its St. Davids, Pa. offices reviewing materials its staff had gathered. He conferred there with the Commission's former Executive Director, Lawrence Hoyle, who had led the lengthy police corruption investigation, and with other staff members. He is reported, however, to have expressed only limited enthusiasm for the potential in police corruption investigation. One significant omission by him

during this early period and throughout his tenure is relevant to this issue.

When the OSP was formed the Director of Field Operations for the Crime Commission was David Breen. He had been responsible for the work of all the Commission's agents assigned to the Philadelphia police corruption investigation and was the most knowledgeable member of its staff in this area.

Breen was aware that most of the Commission's materials were investigative leads, not solid cases for prosecution. He believed that many matters were ripe for intensive investigation, especially with the availability of an investigating grand jury and assumed the OSP would follow them up. For reasons that could not be clarified, Phillips never discussed these or other matters with him.

Breen was substantially more than a garden-variety investigative supervisor. His first career was with the F.B.I. from which he retired to take employment with the State of Pennsylvania. His last F.B.I. post was Philadelphia where for a number of years he was supervisor of the organized crime program. The F.B.I.'s informant and intelligence programs have been sufficiently well documented in recent years and require no extended discussion here. It is fair to note, however, that few persons, if any, had more extensive knowledge of conditions relevant to the dual missions of the OSP than Breen. Bluntly put, it is incomprehensible why Phillips ignored such a potentially helpful source.

There is no documentation available describing how, or even if, strategic alternatives for the OSP were examined. No planned priority between police corruption and public corruption was established -- although it later emerged. The different manifestations of corruption were neither ranked nor rated. The potential for impact upon various government systems was ignored in developing an OSP work plan. In short, strategic planning for the OSP effort was, as far as can be judged, non-existent.

The only strategy the OSP apparently had was one of developing every prosecution possible, within the broadest definition of the basic mandate from the Attorney General and the language of charges to investigating grand juries. In sum, Phillips opted to go "headhunting" for bad guys -- cops and public officials. The problem, however, was that there was little focus to the effort. No evidence exists that the OSP attempted to outline a corrupt system -- as for example, one for the issuance of a particularly sensitive type of contract -- identify the participants in the contract award process, and then zero in on that area. The OSP program was essentially reactive throughout its life, rather than aggressively proactive.

Given the seriously restricted evidence gathering opportunities under Pennsylvania law, tactical options for the OSP were more easily assessed. These included the use of undercover agents, creating a paid informant program and the use of grand jury process to compel the production of business records for review to disclose evidence of criminal activities, including the generation of suspicious amounts of cash. Creating an apparently illegal enterprise -- such as a lottery or a bookmaking operation -- to provide an

opportunity for corrupt police to attempt extortion was apparently considered, but rejected. The idea was opposed by Bishop and his successor, both of whom apparently felt that such activity would be per se illegal. Their opposition, while open to argument on legal grounds, persuaded Phillips against such a project. Transactional immunity was available for some time during Phillips' term -- until administratively foreclosed by Attorney General Kane -- and was utilized in a number of cases.

Until a prohibition was enacted by the Legislature in November, 1974 the OSP sought to use body microphones and body recorders to obtain evidence during investigations; especially where it could corroborate the potential testimony of a cooperating witness. Throughout its life the OSP sought to "turn" or "flip" witnesses to secure their testimony against higher-ranked figures in suspect situations. Much of its investigative activity was directed toward this objective. Developing perjury and contempt cases was also conceived of as a means to exert pressure upon knowledgeable but hostile witnesses, but due to inordinate court delays, was of only limited utility during Phillips' tenure. Phillips' efforts to utilize the penal provisions of Pennsylvania tax statutes as an anti-corruption weapon were constrained by the insubstantial sanction available in the statutory penalties.

The standard tactics available for corruption investigation were reasonably well known to Phillips and his chief investigators. The degree to which they were used effectively, however, was limited by three factors; legal constraints, inadequate support from external agencies and officials, and the competence of the staff personnel in both management and line positions.

Both before field operations began at the OSP and thereafter, when circumstances could have warranted changes, the existence of a quality intelligence capability would have contributed substantially to strategic decision-making. The elements of an intelligence program have been well known for some time. Indeed, the federal government has made available manuals for the organization and operation of intelligence units since 1970. It has also supported specialized training for both intelligence collectors and intelligence analysts. In addition there are substantial numbers of former military personnel with skills in these areas available for employment.

Early in Phillips' term, two employees from the Pennsylvania Crime Commission joined his staff and created the filing and indexing system. One left the office shortly thereafter and the second switched to work as an investigator.

Whether or not the two men who installed the original file and index system had the capability to up-grade it to support a sophisticated intelligence program is irrelevant. They left before they could do this and Phillips never sought to create such a program.

The intelligence program can be briefly described as follows. There was no regular intelligence collections plan(s) at the OSP. Each investigator collected information relevant to the particular case or cases he was working. In addition, agents were expected to report ad hoc pieces of information considered relevant to the office's mission. Newspapers were read and articles of interest -- depending upon the vagaries of individual agents -- clipped and filed.

A female employee at the OSP, nominally Head of the Intelligence Section but in fact an Administrative Assistant, maintained the so-called intelligence index and files. These were an alphabetical file of index cards mounted on a rotating bin. Names, institutions, locations, etc., contained in investigative reports and news clippings were indexed; as well as references to them in trial and/or grand jury transcript. Thus, a particular index card might contain references to specific cases, page numbers in case files, and page numbers of trial and grand jury transcript.

The Head of Intelligence also maintained the central investigative files. A woman with a strong sense of mission, she kept tight control over materials. Each investigative jacket contained pages numbered serially to make the indexing system coherent. These well ordered central files contrasted starkly with the condition of the attorney-legal files which are best described simply as a disaster.

The index cards had some utility for an agent commencing an investigation; they could provide any references recorded earlier to the subject. Unfortunately, no means were employed to discriminate among such references. There was no system for the grading of sources as to reliability or for the weighing of the probability of the accuracy of information. Therefore, an investigator had no way to know which material referenced might be relevant to his inquiry and whether or not the information might be relied upon. While subsequent references to the same subject were recorded the index did not reflect whether new information confirmed or controverted earlier material.

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The woman referred to earlier as Head of Intelligence was assigned to work with the cards and continued in that position throughout the life of the OSP. Since she had no specific training for intelligence work and no informed guidance in managing that function, it is not reasonable to charge her with any shortcomings. This is especially true since throughout the life of the office she was never provided adequate clerical support and had great difficulty keeping abreast of the routine work flow.

It is unfortunate that no thought was apparently given to training her as an analyst or alternatively, to recruiting an experienced analyst. The use of even the most elementary tool of intelligence analysis -- the link diagram -- could have contributed substantially to the work of the OSP. While it is no doubt true that agents and attorneys had varying degrees of knowledge and awareness of suspected corrupt police officers, city employees and other persons, there is no evidence of any attempt to chart the alleged systems of corruption. This deficiency had significant implications for making both strategic and tactical decisions.

While prosecutors are not known for either deep interest or dedication to the process of intelligence, Phillips' apparent absence of interest in this area is surprising. His work in the Southern District was with agents of the Drug Enforcement Administration. Within the federal investigative establishment, D.E.A. has devoted as much or more resources to the development of a sophisticated intelligence program than any other agency. It has trained large numbers of its personnel in analysis and placed

them in numerous offices throughout the United States. As Chief of the Narcotics Section Phillips should have been sensitive to the tactical and strategic value of an effective intelligence program. While a traditional case-making focus is appropriate for an individual prosecutor it is too narrow for the principal official directing investigations and prosecution of a multi-faceted corruption problem in a large city.

Since the deceased Chief Investigator, Wayne Bishop, was a knowledgeable and sophisticated former police intelligence commander it is assumed that had he lived, this omission would have been addressed. The fact that the deficiency continued throughout Phillips' tenure can only be explained by his lack of awareness of how a quality intelligence program could have contributed to the work of the OSP.

#### Investigative Procedure

Whenever a complaint or tip was received by the office, the Chief Investigator assigned it to an agent. Initially, the agent opened an investigative file and performed a "background" investigation on any individuals or companies named. The background check usually included a credit rating, motor vehicle and operators permit checks, as well as compiling biographical information and a listing of associates. However, this effort was generally unproductive since the effort was essentially unfocused. The manpower devoted to performing these initial surveys would have been more effectively employed if assigned to active matters.

After the initial step, investigators reported their findings to the Chief Investigator. If a matter appeared promising, the Chief Investigator requested additional investigation, e.g.,

physical surveillance or interviews.

A developing case was referred to the First Assistant who assigned it to a lawyer for follow-up. Thereafter, the assigned assistant received copies of all relevant investigative reports filed.

The assistant determined to whom grand jury subpoenas should be addressed and gave them to the Chief Investigator for service by an agent. No systematic attempt was made to inform investigators who had been assigned to a case about testimony secured before the grand jury. If additional investigation was necessary, an assistant made a request which traveled up through channels to the First Assistant, over to the Chief Investigator and down to an agent who was then available. The resulting lack of communication between attorneys and agents constrained the systematic construction of cases. It may well have also precluded the development of certain cases.

Because of Phillips' reservations about the creation of records, little of the history of a case's development appeared in the investigative files. The paucity of material in investigative files is also attributable to the absence of requirements of periodic status reports and case evaluations.

A review of the investigative files produced several folders which contained only the initial complaint form which had marked the opening of the investigation. There was nothing else.

Intra-office communications were also stifled by the lack of a centralized attorney-case file system. Assistants often placed memoranda describing progress they had made in their own files, but no word of their advances reached the investigators. Agents rarely received progress reports from attorneys about cases they worked on, even though some attorneys would not release case files.

## OSP Cases

The Crime Commission developed few cases that were ripe for prosecution. This was confirmed by an experienced former prosecutor, Deputy Attorney General Michael Von Moschzisker. Before Phillips was appointed Von Moschzisker had been asked by the Attorney General Packel to examine the Crime Commission's materials and assess their potential for prosecution. From his review of the cases it was clear to him that nearly all required investigative follow-up before prosecution. Von Moschzisker's conclusions were communicated to Phillips in a memorandum dated March 27, 1974.

While the OSP had only a few agents available and little original investigative work had been initiated, there were a number of Crime Commission matters and investigations begun by Arlen Specter's assistants which were pursued. By mid-May subpoenas were being issued by the January 1974 grand jury. However, until the end of August, 1974 all but one matter presented to the grand jury had originated with either the Crime Commission or with the Specter grand juries. The Crime Commission cases covered three areas of alleged corrupt police activities; gambling, prostitution and violations of the Pennsylvania liquor code. The OSP follow-up of the Specter 1972 grand jury's work involved the State Pharmacy Board, architectural and engineering contracts with the City, the Pennsylvania Liquor Control Board, dairy company kickbacks, the State Bureau of Professional and Occupational Affairs and fund raising by the Democratic City Committee through its Jefferson Jackson Day Dinner.

Ultimately, four police officers and three gamblers were indicted on a variety of charges arising from the Crime Commission investigation, including variously bribery, obstruction of the admin-

were convicted of perjury. Two officers were acquitted at trial and two convicted. One of the Crime Commission cases involved a defendant alleged to be a gambler who bribed police officers. He was acquitted by a trial jury.

A review of one of the OSP prosecutions resulting from the Crime Commission's work may provide some insights to the problems and issues which confronted the OSP. Since the three former defendants were acquitted, the following synthesizes the allegations against them. The allegations are not to be taken as facts under the circumstances. Two of the defendants in this case were police officers assigned to the Chief Inspector's Squad -- responsible for vice control activity throughout the City. The third man was an alleged gambler. All were indicted, variously for bribery and other charges arising from a "pad" or pay-off scheme developed to protect the gambler's operations.

The cases were developed through the cooperation of a corrupt former member of the Chief Inspector's Squad who recorded certain evidence against the defendants with a body tape recorder before the law was changed. Other tape recordings were made by agents of the Crime Commission from transmissions received through a body transmitter worn by the cooperating officer. He gathered the incriminating evidence while working undercover for the Crime Commission after being confronted with evidence of his own criminality by Commission agents.

The essence of the scheme between the four persons, including the state's witness was a monthly schedule of payments to him to be shared with the other two officers. A bar owner and another gambler

were purportedly able to corroborate some of the factual elements of the witness's potential trial testimony.

Obviously, the burden of persuading a trial jury of the truth of particular testimony is increased when the witness is a self-confessed criminal. Corroborative testimony from the two other civilians and use of the tape recordings would have enhanced the credibility of the witness. However, one civilian died before trial and the other, the bar owner reversed his previously cooperative stance and became patently hostile to the prosecution. Little real effort was expended by the OSP to locate him at the time of trial and he, in fact, did not testify.

The crucial Crime Commission tapes, upon which the OSP apparently expected to rely heavily to corroborate Weiner's trial testimony, were of little value. They purportedly revealed six incidents of corrupt activity by the defendants. The usefulness of several of the recordings had been seriously questioned by Von Moschzisker in his early review memorandum. More important, however, was the fact that the trial judge refused to allow four of the six recordings to be presented to the jury, on the grounds they were inaudible. An offer to introduce a fifth recording was withdrawn by the Commonwealth at trial, for reasons which are not clear. Thus, only one recording was admitted and the case depended almost exclusively upon the testimony of an admittedly corrupt witness.

OSP agents had consulted with technical experts about improving the sound quality of the recordings, but were advised that the original recordings had been made with inferior equipment and nothing could be done to improve their quality. Indeed, this same problem

confronted the OSP with all the recordings it received from the Crime Commission.

The civilian bar owner who had cooperated with the Crime Commission and was a potential witness for the OSP, apparently changed his mind when his identity and knowledge of his prior cooperation with the Commission became known. This followed the release of the Commission's Report. OSP agents learned of his alleged harassment and apparent change of heart. Yet, they apparently did little to encourage his cooperation.

The case under discussion, Commonwealth v. James Malloy, Fred Iannarelli and Leonard Gniewek, is instructive for several reasons. First, according to the Von Moschzisker review, the case against Officer Iannarelli was the strongest, potential prosecution resulting from the Crime Commission's 1974 report. If that opinion was accurate, and there is hardly reason to doubt it, little of the Crime Commission's exploration could or should have been regarded as easily convertible for prosecution purposes. Under such circumstances the necessity for the development of new informants and cooperative witnesses to make fresh cases for the OSP became an imperative. The climate of apathy toward corruption in the City of Philadelphia and the limitations upon evidence gathering under State law made that objective extremely difficult, if not impossible.

In a larger sense, the case's history illustrates the extraordinary delays the OSP encountered in attempting to bring matters to trial. Attached as Appendix 2, is a copy of the Commonwealth's Answer to Defendant's Motions to Dismiss Indictments Under Pa. Rule 1100 (which requires trial within 180 days of indictment), in the above case. The reader's attention is invited to the material

appearing as NEW MATTER, at Page 3, et seq. Although the defendants were indicted in July of 1974, trial did not occur until April of 1976. To persons sophisticated in the world of criminal justice, and more specifically the criminal courts of our larger cities, the history of delay and maneuvering in this case is disheartening perhaps, but not surprising. To the inexperienced or naive it may be shocking. For OSP attorneys, this experience was routine.

To an objective reviewer, the acquittals are hardly surprising. At best the Commonwealth's evidence was limited and its probative quality weak. Most surprising, however, is that the case was pursued at all. Phillips must have been aware that if it was lost, the office would lose credibility. The trial took place after Phillips had been dismissed. It is possible that in discussions about dismissing the case, the youthful enthusiasm of the trial prosecutor outweighed the possible disadvantages of an acquittal. Yet, dismissal might have been a wiser course.

It is neither possible nor even desirable in a report of this kind to attempt to comment upon every matter the OSP considered and processed. However, selected cases can provide insights to the operating style in the office, problems encountered both within and outside the office and ultimately some explanation for its ineffectiveness.

One of the OSP's more prominent matters was the "Metal Theft Case." Because nine persons were indicted on various charges in the matter, and only four had been tried as of this date, we are very sensitive about the possibility of prejudicing any defendant's rights, as well as those of the Commonwealth. With that caveat in mind, readers hopefully will appreciate and indulge the circumspection we have

exercized in discussing the case. We have pursued it, nonetheless, because we believe it reflects various, important aspects of OSP procedure, style and expertise -- or the absence thereof.

The case began as a "walk-in" on July 12, 1974. On that date, Ira Gregg, a convicted murderer and professional metals thief told the OSP about a metals theft and sales ring, which had allegedly been operating from 1968 until sometime in 1971 or 1972. Gregg claimed that two Philadelphia detectives assigned to a Pawn and Junk Squad had headed the operation. The alleged operation, as well as Gregg's motives for coming forward, were relatively uncomplicated. Valuable scrap and raw metals were stolen from metals dealers and then sold by prearrangement to metals fences. A principal outlet for stolen property was purportedly the Metal Bank of America, a firm which traded in scrap and raw metals. The alleged prime fence was Harold Goldberg, an employee of Metal Bank of America. Goldberg committed suicide prior to trial.

Gregg's interest in cooperating with the OSP was to secure its help in connection with a recent first-degree murder conviction for which he was awaiting sentence. He hoped to have the murder verdict vacated and then be permitted to plead to a lesser charge. He also wanted the OSP's assistance with the Federal Parole Board regarding a sentence he was serving after conviction for theft.

While Gregg was hardly a rose, he had an excellent memory and made a very credible appearance. It is to be noted that the entire operation about which Gregg informed the OSP had been investigated by federal authorities in 1972. That investigation had produced several indictments, but not of the two police officers. Gregg and several others had been convicted in federal trials.

Gregg was interviewed numerous times after his initial contact with OSP. On July 23rd and August 24th, 1974 he detailed his various criminal acts and provided identification of his fellow thieves. One of these co-conspirators was interviewed and confirmed that he had been a member of the ring. He further specifically admitted three thefts in which he had participated.

Prior to presenting the case to the grand jury, the OSP investigation was limited essentially to interviewing Gregg, the co-conspirator, and theft victims. In addition, photographs were taken of the locations where the robberies or burglaries had occurred.

Pursuant to an order by the Supervising Judge, we have reviewed the transcripts of the presentation to the grand jury which considered the metal theft case. Since there are still six defendants awaiting trial we do not feel free to comment specifically about the nature or quality of the presentations against particular defendants. However, we believe some general comments are appropriate.

The presenting assistant did a competent job in submitting the available evidence, including the testimony of Ira Gregg. We do question, however, the manner in which certain claims of privilege against self-incrimination were permitted to pass essentially unchallenged. Our reading of the grand jury record suggests that in several situations, arguments that the privilege had been waived could have been sustained. We noted in other presentations, in unrelated cases, either an apparent reluctance to pursue the waiver argument or the lack of recognition that such a waiver situation existed. Given the lack of experience in grand jury investigation of nearly all the attorneys the omission is understandable, but nevertheless unfortunate. The problems were

compounded by the absence of any experienced supervisors, other than Phillips himself. Put simply, there were no trained section leaders who could run case-by-case tutorial programs for the "green" lawyers and help them identify and deal with such issues.

The trials of four of the nine original defendants in the metal theft case commenced on September 8, 1975, and resulted in guilty verdicts for two men. A third was acquitted and the fourth was granted a mistrial. One of the original defendants committed suicide while awaiting trial; and four others are awaiting the disposition of certain pretrial motions. The trial consumed the period from September 8th to December 15th, 1975 and involved a substantial commitment of OSP attorney-power. The First Assistant and two other attorneys worked full time with the case during this period. While we recognize the complexity of the case, we regard the commitment of three lawyers as excessive. Further, we are persuaded that the involvement of one of the three attorneys had a substantial negative effect upon another matter, discussed subsequently.

It is frankly difficult to accept the justifications offered for the major commitment of attorney manpower. We agree that the range of incidents, the inter-relationships between persons, and the number of examinations of witnesses were too complicated for one attorney to control effectively. This is persuasive for the assignment of a second lawyer. Yet, in addition to the First Assistant -- who was the principal attorney at the trial -- the presenting assistant also participated. It is hard to understand why the third lawyer was necessary. We suspect that, as to the third lawyer, the case was regarded as a training opportunity; a way to

provide seasoning for an inexperienced but determined young prosecutor. This otherwise praiseworthy idea was ill advised in an office with such a small staff. An unfortunate consequence of that decision was that another case regarded as significant by the OSP was put in the hands of attorneys with insufficient experience and knowledge of the matter.

In the OSP, an unwritten operating protocol held that written materials potentially subject to discovery, were to be kept to a minimum. An overly broad interpretation and implementation of the policy had unfortunate consequences. The absence of periodic investigative case reports providing recorded continuity to matters made it very difficult to follow developments. For an attorney other than one who had had continuous involvement as a particular matter evolved, reconstruction of the case was tortuous.

The problem was compounded by the perennially chaotic state of the attorney files in the office and the inexperience of the lawyers. An aspect of the metal theft case illustrates the problems. During the early stages of that investigation, an alleged co-conspirator with Gregg was interviewed. He admitted having participated in several crimes with Gregg. At trial this defendant testified that he had, in fact, not participated in any crimes with Gregg. He was not confronted with his prior inconsistent statement and no attempt was made to lay the foundation for use of the earlier admission as substantive evidence against him. Arguably, the latter may have been a more sophisticated tactic than could reasonably be expected from attorneys with only limited experience. However, the failure to attempt to impeach the witness is incomprehensible. Either the attorneys just did not understand how to use such a critical piece of

evidence or the files were in such chaotic condition that they were unaware they had it. Certainly, with three attorneys assigned to the trial it would have been reasonable to expect the identification and ready availability of all materials relevant to the potential testimony of a defendant and all witnesses.

While the nature of a filing system or the physical condition of files may appear to be pedestrian concerns, the effects on the OSP performance were real and negative. Based upon his prior experience in the Southern District where each assistant maintained his own case files -- systematically or disorganized -- Phillips had not insisted upon either a uniform or centralized filing system for attorneys. There was no uniformity in case tracking or control.

Staff attorneys were assigned responsibilities for handling specific investigations by Phillips and later by his First Assistant, Ben Joseph. During the course of their work, attorneys would accumulate reports and memos from the investigative staff, legal documents relating to procedural matters -- such as motions, answers, pleadings, etc. -- and other items customarily found in case files. Each attorney had filing cabinets in or near his own office in which his files were kept. There were no uniform requirements as to the order in which these files were to be stored or as to the organization of the individual files. Thus, the location of any particular legal document was a matter known only to the attorney assigned to the case. If two attorneys worked on the same case, each would have his own file in his own filing cabinet.

The weaknesses of this style of operation were underscored by the turnover of attorneys or when an attorney was taken off a case to concentrate on another matter. Although uniformity might easily have been dispensed within a small office, there is no substitute for a logical form of organization. A majority of the attorneys' files we examined were incomplete in some respect. Typically, items were found out of order and opposing motions, pleadings, etc. were either not matched to OSP documents or missing from the file.

Since there was no numbering or indexing for control of attorneys' files, no one other than an assigned staff attorney could know whether a particular file was missing, or even if it had ever existed. The former First Assistant had anticipated possible problems with case tracking and control and had designed and circulated a form to be attached to all attorneys' case files. It provided for case numbers (possibly a reference to case numbers assigned by the investigative staff) defendant name, charges, key dates in the case such as presentment, arraignment, motions, hearings, attorney, sentencing, and appeals data. We could find no evidence that this form, or anything similar, was ever used.

An illustration of the consequences of such disorganization was a file which summarized the investigative work of the Philadelphia District Attorney in the matter of alleged corruption in the award of architects' and engineering contracts by the city. This file, which members of the legal staff admitted would have been

helpful in conducting the architects' investigation, was found in one attorney's filing cabinets. Although it was normal procedure for the office to use a received stamp on all documents coming into the office, this file bore no evidence as to when it had first come into the possession of a member of the Special Prosecutor's staff. One staff attorney, who did a significant amount of work in the architects' investigation, as well as the former chief investigative accountant, insisted that they had never seen the file. Our examination of their work product indicated that they had done substantial independent work to obtain the same information which had been available in the above mentioned file, as early as two years prior to the creation of the Special Prosecutor's office. How much additional manpower was wasted as a consequence of file disorder is unknown.

Consistent with what might charitably be called the "decentralized attorney file system" -- and less charitably, the near total disorganization of the lawyers' files -- was an inattention to the need for case review memoranda by attorneys. With rare exception, attorneys who departed the staff and even those who were reassigned from one matter to another, failed to prepare a briefing memorandum of points for a successor.

As a consequence, in one matter, the order from a judge to provide certain materials to a defense attorney was not complied with and the failure by the OSP to do so was made grounds for a not guilty finding by the trial judge. In pretrial motions, the defense attorney moved for the production of certain grand jury testimony. The court ruled against the OSP's effort to resist producing certain materials and in a written opinion ordered the materials provided to

the defense. In addition, the judge wrote to the defense attorney advising that he would make the materials available to him for review in the judge's courtroom. The assistant handling the pretrial proceedings sent a hand-delivered letter to the judge telling him, in effect, that since the court was making the transcript available to the defense, there was no need for the OSP to do so.

The defense attorney never in fact appeared at the pretrial judge's chambers to review the requested transcript. At trial he argued for a mistrial on the ground that the OSP had not complied with the pretrial order. Unfortunately for the OSP -- and as was too frequently the case -- the trial assistant was not the same person who had handled the pretrial proceedings; that attorney had already left the staff. Thus, the trial assistant was effectively "sandbagged." In the absence of a transition memorandum from the original attorney, he had not been forewarned about the potential problem of formal non-compliance. Further, as an inexperienced lawyer, he did not anticipate the tactic of the defense lawyer. This, despite the fact that the defense counsel was well known among the City's prosecutors as an exceptionally wily and difficult adversary.

Phillips insists that the documentation referred to above -- including the previously assigned assistant's letter -- was in the case file. Assuming that to be accurate, the failure to anticipate the potential problem must be attributed either to the inexperience of the trial assistant or the disorder of the file.

As noted earlier, Phillips exhibited a hyper-sensitivity to the potential for defense discovery of materials in OSP files. His concern was so extreme that even discussions of strategy or tactics in cases were never reduced to memoranda. Thus, there were no advisory documents in trial files to provide guidance for successive attorneys assigned particular cases. This produced confusion and often conflicts between staff attorneys assigned jointly to a case. One such matter was the investigation and prosecution of John Aleksiejczek, known as the Alec Case.

Once again, a preliminary caveat is in order. The defendant, hereafter referred to as Alec, was indicted and tried on charges of conspiracy to commit bribery or extortion. At the close of the Commonwealth's case, a Demurrer was sustained to all charges. Technically, that result reflects a finding by the trial judge that the Commonwealth failed to present sufficient evidence to make out a prima facie case on the charges. We believe that this ruling was erroneous. A post-trial, internal memorandum prepared by the OSP attorneys on the question of possible appeal agrees. For purposes of a Demurrer, the persuasiveness of evidence is irrelevant. The only question is whether there is evidence to support each element of the crime charged. However, the OSP analysis and our own view is that the trial judge could and should have granted a motion for a directed verdict of not guilty, had it been offered. The appropriate ground would have been that no jury could find the Commonwealth's evidence persuasive beyond a reasonable doubt. Thus, an appeal on the technical inaccuracy of the court sustaining the Demurrer would have served little purpose. Clearly, at a retrial the available evidence could not have survived a

motion for a directed verdict. We note the foregoing in the interest of fairness to Mr. Alec who, after all, has not been convicted of any offense.

The case, however, is instructive on many aspects of OSP operations. The dramatis personae include Alec, a man experienced in the operation of landfills,, allegedly well-connected with officials responsible for the award of contracts for the disposal of solid waste in the City of Philadelphia, and Rocco Molinari, a Philadelphian who was part-owner of a sanitary landfill located in southern New Jersey. In addition, there was a retired former city employee, and an OSP investigator, also named Rocco Molinari. For purposes of clarity, the land fill owner is hereafter referred to as Molinari-owner. The Molinaris were cousins. In addition to various city officials and employees, another relevant individual was Molinari's co-owner in the land fill, the partner.

The case began when Molinari-owner complained to his agent cousin about his then unprofitable landfill and his difficulties in securing City of Philadelphia waste disposal contracts. He told the agent that he had hired Alec, who represented that he could produce such a contract through his connections as he had done for others.

Alec, according to Molinari-owner, would work through the retired city employee who had the alleged ability to make the contract deal which would involve a substantial bribe. The names of the city officials which Molinari-owner reported that Alec was invoking generated great interest at the OSP. While Molinari-owner was at best an unstable personality, he had made tape recordings of various conversations with Alec and thus had partial corroboration for the statements he was attributing to Alec. As the investigation

developed, with OSP investigators encouraging Molinari-owner to draw Alec out as much as possible, Molinari became increasingly difficult to deal with. He was highly neurotic, the victim of a variety of phobias and subject to wide variations in mood.

As we have detailed elsewhere in this report, the OSP -- and all law enforcement in the Commonwealth -- had lost authority to use body bugs. There was therefore no way OSP investigators could monitor Alec's representations to Molinari-owner. Since wiretapping had been illegal for many years in Pennsylvania, there was also no way agents could overhear telephone conversations between Alec and the alleged go-between, the retired city employee. The OSP could, and did, however, confirm the existence of telephone calls from Alec to the retired employee. Since Alec was located at the land-fill in New Jersey and the go-between was in Pennsylvania, telephone toll record analysis confirmed that certain calls Alec told Molinari-owner he had made to the retired employee were actually made. The contents, however, could not be confirmed.

In the months following Molinari-owner's hiring of Alec, and the evolution of the alleged program to corruptly secure a \$5 million land fill contract, the potential cost of the deal escalated. It rose finally to \$100,000. The OSP investigative plan was to let the situation reach the payoff stage. Molinari-owner would then pay the \$100,000 (supplied by the OSP) to Alec who would be arrested and "turned" against his co-conspirator. In the scenario, Alec would then pay his contact, who would in turn be arrested and induced to cooperate against the suspect city officials.

After great difficulty, the OSP obtained \$100,000 in cash for Molinari-owner to deliver to Alec. None of the Philadelphia banks or businesses would cooperate to advance such a large amount of money, and no federal agency was willing or able to do so. The money was finally obtained from an organization in New York City. With the money in hand, the OSP was prepared to strike. Unfortunately a not-so-funny thing happened on the way to the forum.

Word of the government set-up was leaked and Alec backed out of the deal. Opinions vary as to the source of the leak, and whether it was deliberate or negligent. All persons agree, however, that the case was effectively blown. In an effort to salvage something from the extensive investigation that had been carried out, the decision was made to arrest Alec and charge him with attempted theft by extortion. The hope was that he could still be persuaded to cooperate. For that purpose it was important to arrest him in Philadelphia where there would be an immediate opportunity to confront him with their evidence at the OSP headquarters and try to persuade him to cooperate. After a number of weeks Alec was located in the city, arrested and brought to the office.

When first confronted with part of the evidence against him Alec allegedly stated, "You've got me." He asked immediately thereafter, however, to contact his attorney and interrogation ceased. With the appearance of his lawyer, and the attorney's comments to him questioning how long the OSP might continue to exist and its ability to protect him, Alec declined to cooperate.

It is important to note that even at the time of Alec's arrest and presentation before a committing magistrate, (Judge

Margiotti on April 9, 1975) the OSP was uncertain whether the defendant had actually been engaged in an extortion attempt, a bribery conspiracy, or was attempting to "con" Molinari-owner out of \$100,000. He was held, however, on the charge of attempted theft by extortion.

The matter was presented to the investigating grand jury where Molinari-owner and other suspected persons including the retired employee, appeared as witnesses. Molinari-owner was hardly the model government witness. His personality disorders had become more pronounced during the months the OSP had been involved with him and he was exceedingly difficult to deal with. It was interesting to us that when we reviewed the available files on this case, we found a report to the effect that in October of 1972, Molinari had been found mentally incompetent. This finding had been announced by United States District Court Judge Hannum, in connection with an unrelated federal criminal proceeding. Both the assistant who had been involved in the investigation and the grand jury presentation of the case, and the Chief Investigator told us they had no recollection of knowing that information.

At the grand jury the retired employee pleaded his privilege against self-incrimination and the city officials denied any criminal involvement. At least one aspect of the grand jury examination of the retired employee must be noted. He responded to certain questions from the presenting assistant, and then invoked his privilege. We find it at least arguable that at that point he had already waived his privilege. Without Alec's testimony against this witness --

obviously not forthcoming in the foreseeable future -- there was no way a conspiracy case could be developed against him. And without this witness' testimony, there was no way to develop a case against city officials, since he was the suspected go-between. Thus, successfully pressing the waiver argument might have had two potentially beneficial results. First, if the argument was sustained and the witness persisted in his refusal to answer, he could have been jailed for contempt. Jail might have unlocked his lips and truthful testimony would, or at least might have made the case against the public officials suspected of corrupt activities. Second, the witness might have answered falsely and a perjury case developed. Facing a perjury charge, the witness might have decided to cooperate. Unfortunately, the presenting assistant stated that he had philosophical problems with pursuing self-incrimination privilege waivers. To which we respond, anti-corruption investigation is a place for strong advocates, not philosophers.

The grand jury recommended Alec's indictment for conspiracy. He was formally indicted on June 6, 1975. The retired employee was named as an unindicted co-conspirator.

As indicated, the indictment charged Alec alternatively with conspiring to bribe and conspiring to extort. The OSP thesis was that when all their evidence was submitted at trial, the jury could decide which theory it found most persuasive. Phillips apparently believed that the case involved a conspiracy to commit bribery, although he did not profess an intimate familiarity with the matter when we interviewed him. He had been, however, very much aware of developments during the preliminary investigation stage.

He further noted that when Alec refused to cooperate on the morning after his arrest, he knew that there would be no way to make the potential case against other possible co-conspirators.

It is in the circumstances surrounding the trial of the Alec case that many of the internal operating problems of the OSP are best reflected. In what unfortunately appears to have been more the pattern for operations rather than the exception, the assistant most knowledgeable about the case could not try it. He was trying the metal theft case. The office's most experienced trial attorney-- other than Phillips -- Ben Joseph, was also on trial in the metal theft case. Another assistant Phillips regarded highly had resigned and refused to extend his commitment to try the case. By a process of elimination, Phillips came down to two assistants who had time to try the matter.

In addition to the fact that each had a different and strongly held view of the case, their personalities clashed. Put charitably, they had substantial difficulty working together to prepare the case. Phillips recalls several conversations with one of the two assistants -- the more outgoing of the pair -- and little, if any conversation with the other. He could not recall any discussion about conflict in proposed trial strategy or mention of any interpersonal conflict between the two attorneys. We are satisfied, however, from other interviews that there were serious problems in both respects. Phillips' operating style, his commitment to other matters he considered more pressing and the absence of any available intermediate supervisor contributed to the lack of resolution of the problems.

The trial opened with each of the men strongly committed to inconsistent theories. Needless to say the Commonwealth's presentation was a bit ragged. A salient aspect of the government's case, and critical evidence for a possible conviction, were recordings of conversations between Molinari-owner and Alec, which the former had made secretly.

Preparing a foundation for the introduction of tapes is not terribly complicated, but for the inexperienced prosecutors it was a difficult task. Compounding the problems for the OSP attorneys was the fact that Molinari-owner made a very difficult witness. His psychological instability was a constant irritant and he was less than completely cooperative. Throughout the trial the dual theory problem complicated the presentation. One assistant, the more aggressive of the two, was actually very upset over the fact that his colleague urged the court, sitting without a jury, to adopt the theory that Molinari-owner had originally been a co-conspirator in a scheme to bribe city officials. He finally adopted that view in his final argument to the court which then incorrectly sustained a Demurrer.

Another aspect of the trial also intrigued us. The tape recordings contained references to a number of City officials and, if true, revealed a corrupt scheme for the award of waste disposal contracts. A comparison of newspaper stories and the trial transcript shows that in one major newspaper, the Philadelphia Inquirer, transcripts of the tape recordings appeared immediately on the heels of it having been played in the courtroom. Phillips insisted that once a tape transcript had been marked for identification, although not formally introduced into evidence, it became a matter of public record and appropriate for publication.

We disagree with that interpretation on the grounds that although marked for identification, the transcripts' contents were not in evidence until admitted as such. Although marked for identification, evidence never admitted would not be part of the official record of the proceedings and would remain under the prosecutor's control.

More significant, however is the apparent conflict between Phillips' understanding of how the newspaper received the information in the transcripts and the view of his assistant, as reflected in the trial record. The assistant indicated that the Inquirer had the material it printed before it had been marked for identification and used at trial. Phillips insisted that the paper received it only after it had been marked. The time constraints applicable suggest that in fact transcript material was furnished in advance of being marked for identification.

In response to a question whether the Inquirer had had a transcript provided to them other than in court, Phillips stated:

"I don't believe so, no. I think that the Inquirer got a copy of the transcript. I don't know whether they got it from me or whether they got it from (trial assistant) or where they got it, or how they got a copy of the transcript. They may have gotten it from me, but I only gave it to them after I was assured by (trial assistant) that it had been marked for identification and was therefore a matter of public record and was being referred to."

While Phillips insists that the Alec case was pursued out of a hope to "turn" Alec and reach higher into the corruption in the city, he does acknowledge a value in having the public made aware of the tape contents. He noted:

"I recognized that if these tapes ever got played in the public courtroom that there would be perhaps some newsworthy value to them, given the names that are mentioned on the tapes and what the people were allegedly involved in."

He felt strongly that publication of the tape contents was a legitimate way to let the people of Philadelphia know what was happening in their city, so long as it was a corollary to the prosecution of Alec.

The foregoing discussion of the publication of the tape transcripts is in no way intended to suggest that Phillips lacked either personal integrity or a well developed sense of ethics. We are persuaded of his conviction about the correctness of the legal position he adopted as to when such materials might be legitimately released, although we disagree with him. We are convinced of his sincere belief that the transcripts were not provided to the press until after they had been marked for identification. His concern about protecting potential or real defendants' rights is reflected in the brevity of the presentments his grand juries issued.

We note the foregoing to suggest the ethos we believe prevailed among the OSP attorneys. Feeling beseiged, harassed and victimized by the Philadelphia "system" and confronted by the destruction of what was anticipated to have been an outstanding case to illustrate the corruption of the city government, it is probable that some prosecutive balance was lost. Disappointments of that kind are not easily borne by any prosecutors, but inevitably they are more debilitating to the less experienced. To all of this, however, must be added that the trial assistant referred to by Phillips in his records quoted above was, by all accounts, the most difficult.

lawyer on the staff. While aggressive and hardworking, he was hard to control and vastly over-confident in his very limited experience.

We sampled a variety of cases, including several which OSP staff members advised us represented both effective and ineffective efforts by the office. We also examined a number of OSP cases which had been handled by different lawyers, in order to assess the quality of attorney work before the grand jury, at trial or both. We also attempted to determine the quality of charging decisions made by the lawyers, through an independent assessment of the evidence upon which the grand jury was asked to make presentments which led to indictment.

One of the cases selected for the purpose of assessing the quality of charging decisions involved a Philadelphia defense attorney, Nino Tinari. He was indicted for obstruction of justice (6 counts), perjury (3 counts), conspiracy (7 counts), tampering with witnesses (6 counts) and solicitation to commit perjury (6 counts). His indictments grew out of the successful investigation and prosecution of a fraudulent overtime payment scheme involving employees of PENNDOT, and their superior, Joseph Brocco, a district superintendent. Brocco, reputed to be a close political associate of a powerful State Senator from Philadelphia, was convicted and sentenced to five years in prison.

The indictments against Tinari for perjury, subornation of perjury and tampering with witnesses revolved around instructions

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\* Pennsylvania Department of Transportation.

he had allegedly given to persons involved with Brocco in the fraudulent overtime scheme. In that situation, checks in the names of a number of PENNDOT employees had been endorsed by Brocco and the proceeds retained by him. Tinari allegedly instructed such persons to testify that they had authorized Brocco to endorse their checks and that they had received the proceeds.

However, our review of the grand jury testimony in this case reveals that the OSP lawyers were unable to develop by their questioning of witnesses the evidence needed to support the charges of tampering with witnesses and obstruction of justice. It was also apparent from the questions asked and answers received that the prosecutors had not even interviewed their witnesses in advance of bringing them before the grand jury. Consequently, the allegations contained in the indictment relating to these two charges could not be proved at trial.

There was sufficient evidence presented to the grand jury to support perjury charges in this case. However, the trial judge acquitted the defendant on these charges also. Why an acquittal would have been granted by a judge sitting without a jury on the perjury indictment if the same witnesses took the stand and gave the same testimony against the defendant is hard to understand. Since there was no transcript of the trial, it has been impossible to determine what the case at trial against the defendant was on the perjury charges, and whether the witnesses who testified before the grand jury in any way changed their testimony when they testified at the trial. One explanation may be found in the fact that this case was the same matter referred to earlier where the OSP failed to provide defense counsel with certain grand jury testimony as had been ordered

by a judge ruling on pretrial motions by the defense.

The inadequacies of the assistants who presented testimony to the grand jury relating to the tampering and obstruction charges are explicable on the grounds of inexperience. More troubling, however, is the fact that insufficient attention was given to a review of the adequacy of the evidence against the defendant before the indictment was laid against him. If a prosecution memorandum was prepared prior to preparation of the indictments, we did not find a copy. Given the absence of sufficient intermediate supervision within the attorney staff, we are given to wonder who, if anyone knowledgeable did or might have reviewed it.

In our sampling of various cases we found reason to question seriously not only particular charges in certain cases, but more important, the decision to prosecute certain defendants at all. The prosecution of John O'Shea, former Treasurer of the Democratic City Committee in Philadelphia, is illustrative of the dilemma corruption prosecutors face frequently.

The case was developed initially by the June 1972 Special Investigating Grand Jury. In its exploration of alleged corruption in the award of architects and engineering contracts by the City of Philadelphia, the jury learned that one firm, Meridian Engineering, had paid the salary of a secretary to work for O'Shea at the Democratic City Committee from September through December, 1972. The gravamen of the matter was set forth in the 6th presentment of the January 1974 grand jury -- issued November 13, 1974 -- before which the OSP had pursued the case, as successors in interest to Arlen Specter's investigating team. The 6th presentment detailed findings that:

"Thomas Graham, chairman of the board of Meridian Engineering, presented to John O'Shea, a list of the projects in which Meridian was interested. At or about that time, Mr. O'Shea complained to Mr. Graham that the City Committee did not have the funds to hire a full time secretary for O'Shea. By the conclusion of that meeting, Graham and O'Shea agreed that O'Shea would hire a secretary and that he or she would be carried on the books of Meridian."

Following the 6th presentment, O'Shea was indicted on December 3, 1974 for conspiracy, 8 counts of filing fraudulent accounts and 3 counts of unlawful political assessment. O'Shea was also indicted subsequently on December 30, 1974, for 3 counts of perjury. To simplify and summarize, the conspiracy alleged an unlawful agreement between O'Shea and Graham to make unlawful corporate political contributions -- the salary of the secretary. The counts of fraudulent accounts involved the books of Meridian in which the salary of the secretary was recorded. The counts of unlawful political assessment involved O'Shea securing the cost of the secretarial services from Meridian. The alleged perjury was in filing required reports with the Election Commission and the Pennsylvania Department of State and failing to include the value of the secretarial services.

There is no question about the technical sufficiency of the evidence in the case. Each element of the charges could be sustained; Graham, President of Meridian had been immunized during the Specter investigation and had described the arrangement in detail. Mrs. King, the secretary in question had also appeared before the Specter grand jury and confirmed the arrangement. The books of Meridian clearly showed the financial details of the employment of Mrs. King. In fact, the OSP interviewed Mrs. King who reaffirmed her previous grand jury testimony. Meridian's certified public accountant testified to

the January 1974 grand jury that Mrs. King was on the payroll of Meridian.

The O'Shea case file is one of the few in which we found a memorandum setting forth the assigned assistant's position as to the feasibility and desirability of prosecution. He advised Phillips that there were five reasons for prosecuting O'Shea:

1. Evidentially, the case is solid.
2. The fact that the donation was received in secretarial services is of little consequence.
3. In OSP investigations, most prominently the milk investigation, the only weak link in proving the overall conspiracy, is the link showing intent and knowledge on behalf of city officials. The only people who would ever be able to establish that link would be those who staff a Democratic City Committee. While this case is not one which realistically would hold the promise of jail should O'Shea lose, the adverse publicity surrounding an indictment and prosecution and conviction is one which Mr. O'Shea must give considerable thought to as much as he makes his living from a public relations firm.
4. Additionally, at this point we are interested in using Mr. O'Shea to establish links with the people in the Mayor's office.
5. This office should not make it appear that we are pursuing merely a course of investigation and prosecution aimed at the present (Rizzo) administration. If we are aware of a case as to a member of the Democratic City Committee, we believe that it would be detrimental to the credibility of this office to bypass that case unless the reasons for doing so are manifest and convincing." (Emphasis supplied).

As Phillips was considering whether or not to authorize prosecution, he encountered opposition from his Chief Investigator, Wayne Bishop. As we have noted earlier, Bishop was a hard-nosed, skillful, skeptical veteran investigative supervisor. He had worked on political corruption matters with the state police in Connecticut and then with the Senate Watergate Committee. Bishop sensed that in

the political climate of Philadelphia, O'Shea's actions were unlikely to be regarded as serious and that a trial jury was unlikely to convict him.

The decision whether to prosecute presented what is a classic problem for corruption fighters and Phillips was required to balance a number of factors. The target was a person whom the office believed was deeply involved in, or knowledgeable about corrupt activities in the city. Although the actual substantive violation might be regarded as minor, the available evidence was technically sufficient and its probative quality high.

If the prosecution was declined, Phillips and the office might be subject to criticism for failing to pursue a "bad" guy who had arguably violated the law. If the office convicted O'Shea he might be persuaded to become a government witness against others suspected of more serious violations. On the other hand, prosecuting a case where the essence was likely to be regarded as de minimus could well result in a jury rejecting the matter.

In that event, the office's credibility would suffer under criticisms that it was taking "cheap shots" and pursuing insignificant cases in the absence of anything worthwhile. Phillips elected to prosecute.

Unfortunately, Bishop's judgment was vindicated; the trial jury took only 90 minutes to acquit O'Shea on all counts. Newspaper accounts of the problems and experiences of the OSP -- many of which we have explored elsewhere in this report -- refer to the result in this case as one of the serious setbacks the office encountered. Yet, to the extent that the OSP perceived O'Shea as a prominent figure or functionary in the alleged systems of corrupt activities within

the government of the city, it is hard to conclude that Phillips' decision was erroneous.

Another aspect of the O'Shea matter sharply illustrates one of the obstacles with which the OSP had to contend constantly. That is the reluctance of the Philadelphia judiciary to utilize its contempt authority against recalcitrant witnesses. Mrs. King, the secretary about whose employment by Meridian the case revolved, had as noted above, testified before the Specter grand jury in 1973 and given a consistent statement later to Phillips' staff. However, before the trial was to begin, her counsel informed the OSP that he intended to instruct her to invoke her privilege against self-incrimination and refuse to testify against O'Shea. We were told that counsel acknowledged that this decision was in large part due to problems Mrs. King's husband was having with the OSP in the course of an unrelated investigation of the Philadelphia Traffic Court.

Phillips and Ben Joseph determined to seek immunity for Mrs. King, to be in a position to force her to testify at the forthcoming trial. An immunity petition was approved by Attorney General Kane and submitted to the judge assigned to preside in the matter. There was extensive pretrial skirmishing from March until June of 1975, during which all important and relevant matters with one exception were resolved in favor of the OSP. The one matter involved Mrs. King's refusal to testify. The immunity petition had been signed by Kane on June 11, 1975 and presented to the court. Mrs. King's counsel persisted in his position that she would not testify. Phillips wanted the judge to make a finding of criminal contempt and jail the witness, but was rebuffed. The judge refused to do so, ruling that any contempt was civil in nature.

Phillips determined to appeal the court's ruling and request substantial bail for the recalcitrant witness. This was refused while the OSP appeal was pending the trial proceeded with the witness at liberty under nominal bail. It is doubtful that her presence and testimony at the trial would have altered the verdict. However, the example is nonetheless symptomatic of the larger problem which confronted the office. Judges repeatedly failed to use their criminal contempt authority to support legitimate efforts by the office to secure what was considered important testimony. Our review of this matter and others where applications for contempt sanctions for reluctant or hostile witnesses were refused, convinces us that often Philadelphia judges were unwilling to exercise their contempt authority to protect the integrity of the court.

While we have sketched many of what we regard as shortcomings and inadequacies in the operation of the OSP we do not intend to suggest that Phillips and his staff did not hang some scalps upon the ledge pole of the office. In fact they did, although the hair on most was a bit thin. In one case, William Kelly, a Philadelphia police officer, was convicted by a jury on one count of obstruction of the administration of law, three counts of perjury and one count of bribery in official matters. The opinion of the trial judge disposing of post-trial motions succinctly summarizes the case:

"The defendant is an officer with the Philadelphia Police Department. On July 30, 1973, he accepted \$20.00 from a gambler in a West Philadelphia tap-room in exchange for not taking action against the latter's gambling operation. This 'payoff' was observed by a Philadelphia State Policeman who was assigned as an undercover investigator with the Pennsylvania Crime Commission.

In September, 1973, the defendant and the gambler became suspicious of the true identity of a man who was acting as a gambler but who in reality was another

Pennsylvania State Policeman also assigned to the Crime Commission. Consequently, the defendant perjured himself in an affidavit submitted to a judge on September 27, 1973, in order to secure a search warrant. The defendant intended to verify his suspicions by an arrest. The warrant was issued and executed. The arrest of the agent compelled him to abandon his undercover activities.

The defendant appeared before an investigating grand jury on December 20, 1974. At that time he reaffirmed the facts contained in his search warrant affidavit and testified further that he had not spoken or met the gambler prior to the execution of the search warrant.

At the trial the witnesses included the gambler, who testified pursuant to a grant of immunity, the two Crime Commission investigators and several other fact witnesses."

As noted in the opinion, the case was a matter developed entirely by the Crime Commission. And, to anyone knowledgeable about criminal litigation, it must be regarded as a "sure winner." Of eight police officers against whom the OSP pursued cases, two were detectives and they were convicted as part of the metal theft case developed by the OSP. \* The other officers, a patrolman and a captain were indicted for shaking down bar owners, but remain untried while the Pennsylvania Supreme Court considers the validity of the substitution of persons to the investigating grand jury which made presentments against them. Two other police officers, Malloy and Iannerelli were acquitted after trial in cases developed by the Crime Commission. Officer Barry Lees was convicted of perjury and making a false statement in connection with an investigation involving allegations that he attempted to extort money from a store owner and planted narcotics. That matter was initially investigated by the Internal Security Unit of the Philadelphia Police

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\* Reversed on post-trial motions and new trial granted.

Department with assistance from the District Attorney's office. The OSP handled the case after Phillips demanded the District Attorney turn it over, under the supersession order of Attorney General Packel. Again, we are constrained to point out that, like the prosecution of Officer William Kelly, the case against former Officer Lees was not a complicated matter. We were further quite impressed with the quality and condition of the file which the District Attorney's office transferred to the OSP; especially when we contrasted it with the regular files of Phillips' assistants.

There is little that we can characterize as either innovative or imaginative in the investigative work of the OSP, but it must be borne in mind that evidence gathering is stringently limited under Pennsylvania law. Without the authority for electronic eavesdropping (court approved wiretapping and/or bugging) and with even the use of body-recorders and transmitters denied by a hostile legislature, effective police corruption investigation was foreclosed. Given that the office's few experienced agents were well-known former Philadelphia officers and that the OSP could not attract experienced outsiders, undercover police activity could not be pursued. Public corruption investigation was also inhibited in part by the nature of the transactional immunity available under Pennsylvania law.

Arguably, if "use" immunity had been available, the OSP evidence against Alec could have been segregated for later prosecution. Then Alec could have been immunized against the use of his testimony or the fruits thereof, and compelled to testify against his suspected co-conspirator -- assuming, of course, the willingness of a Common Pleas judge to enforce an immunity order. With the evidence previously segregated, the OSP could have defended against any charge of taint

from the immunized testimony and still been able to proceed against Alec if it chose to do so. Unfortunately, the potential benefits in proceeding in such a manner were unavailable under the existing law of the Commonwealth.

There is an element in the investigation of the PENNDOT case -- discussed above in connection with the perjury prosecution of a defense attorney -- which requires some elaboration. When it was decided to present the matter to the grand jury, investigators were determined to serve all witness subpoenas simultaneously. Their objective was to attempt to interview the intended witnesses contemporaneous with service of the subpoenas, in order to obtain statements. This would inhibit witnesses from later meeting and jointly formulating one false story.

The plan was executed by teams of agents and in fact, inconsistent and contradictory statements were obtained from a number of the potential witnesses. The material thus obtained contributed to the ultimate guilty pleas by a number of the low-level defendants in the scheme to defraud PENNDOT. While we recognized the ingenuity of the approach, one aspect troubles us. That is, if the subpoenaed witnesses were in fact suspected either of fraud in securing the payment of false overtime claims and/or the theft of some guard rail materials, then they were clearly targets of the grand jury. As such, were they entitled to be warned of their rights against self-incrimination when the agents persuaded them to give interviews? And, was the issue considered when the plan was approved? Despite attempts to resolve those questions, we have been unable to clarify the situation. In the same case, the OSP made very effective use of a questioned document examiner employed by the Pennsylvania State

Police. His work established that the principal defendant, Joseph Brocco, had endorsed the checks payable to the minor defendants.

In the investigative group, there was one agent who was a capable photographer and his work contributed to the convictions obtained in the metal theft case. There was not, unfortunately, much opportunity for him to do productive, covert photographic work.

Despite their strong opposition to creating an OSP gambling operation which could become a target for corrupt police, OSP investigators did reluctantly become involved with an existing gambling operator; a numbers operator who had been developed as an informant and then complained of police harassment. Phillips, Joseph and the Chief Investigator decided to support a police pay-off operation at the informant's place of business, and placed a civilian in the premises to actually handle the money. At the same time they installed a television camera to record corrupt transactions, to be operated by the civilian from a light switch. Following the camera installation, police presence at the location was confirmed by OSP agents through physical surveillances on several occasions and then discontinued to avoid suspicion.

Unfortunately, either through the negligence of the civilian who was attending the premises and who was supposed to operate the hidden camera, or because of equipment malfunction, the anticipated films of suspect police were not obtained. Some suspicion was directed at the numbers operator as possibly responsible for the failure, but an OSP investigation could not confirm that. Typically, the inability of the OSP to employ aural electronic surveillance equipment limited pursuit of the investigation.

Shortly after Phillips assumed his position he initiated discussions with George Beall, former United States Attorney in Maryland, about tactics for corruption investigations. Beall and his staff were responsible for the investigation which led to the resignation of former Vice President Spiro Agnew. The investigative approaches which Beall described included wide-ranging subpoenas of the books and records of architects and engineers who had done work under government contracts. With such records in their custody, prosecutors could have investigative accountants search for entries which might reflect a scheme for the generation of cash for the payment of bribes.

On June 10, 1974 the OSP issued forty-seven subpoenas for the books and records of all the major architectural and engineering firms doing work in Philadelphia as well as the records of city departments which awarded such contracts. About a month later, subpoenas were issued for the records of firms holding construction contracts for work at the Philadelphia Airport.

While the subpoena "blizzard" is a recognized technique, it is generally assumed that there will be sufficient trained and experienced manpower available to review expeditiously the materials secured. Phillips' manpower constraints in the accounting area however made it very difficult to process the records with any dispatch. As we have noted, the Chief Investigative Accountant, David Eagan, did not join the OSP staff until October of 1974. At various times the OSP also obtained the bank records of suspect individuals through subpoenas, including those of John O'Shea, the Democratic City Committee Treasurer and Joseph Daley, the Assistant Treasurer. The efforts of the investigative accountants were primarily responsible for the indictments of former City Councilman

Isadore Bellis and of Daley for conspiracy, bribery and extortion.

On occasion the office received information from volunteer informants and, in a matter involving the Philadelphia Redevelopment Authority, had help from the press. While the Redevelopment Authority was mentioned in presentments of the June 1972 grand jury, the OSP probe of the Authority which began in October of 1974, was attributable to these outside informants. The focus of the OSP investigation was possible corruption in the theft of salvageable machinery and materials from Authority sites, as well as the corrupt award of contracts for security guard services and parking lot leases.

The investigation resulted in the indictment of the Director of the Redevelopment Authority, Augustine Salvitti, for perjury and theft, the indictments of metals company owners, Kenneth Shapiro and Herman Petroff for perjury and other offenses. All three defendants remain untried, pending resolution of OSP appeals from the grant of motions to quash their indictments by the Superior Court.

In the view of the OSP, their premier matter was the investigation and indictment of Hillel Levinson, Managing Director of the City of Philadelphia. That position is filled by appointment by the Mayor and is the highest administrative post in the city government. Levinson, who is an attorney and not a career professional in local government administration, was regarded as a close associate and loyal, personal adherent of Mayor Rizzo. Under the Philadelphia government structure, department heads report to the Managing Director and he has final authority over the award of city contracts.

Pursuant to the 14th presentment of the January 1974 grand jury, issued March 19, 1975, Levinson was indicted on charges of perjury, false swearing, extortion and the demand and assessment of political contributions.

Levinson has not yet been tried. As noted elsewhere, certain pretrial motions await final disposition on appeal to the Pennsylvania Supreme Court. In view of the fact that the matter is still untried we shall make no comments about the quality or sufficiency of the evidence in the case. However, some general observations are appropriate.

The 14th presentment of the January 1974 grand jury describes a general situation which, if the finding is accurate, reflects a modern, corrupt scheme of financing both political organizations and political officials. All cities must make capital improvements including construction of government buildings, work on urban transportation systems, water, sewer and waste disposal systems projects. Such projects include design and construction activities as well as consultant supervision and management services. These are, by and large, services and work which must be provided by the private sector. No large city can maintain in the public service the numbers of persons with the diversity of skills necessary for successful completion of an on-going and broad range of capital projects.

Thus, awarding contracts for such work is a continuing responsibility in municipal governments. Obviously, for the private sector such contracts are an important and often profitable source of business. Since political organizations and nearly all elected officials -- other than that miniscule number which voluntarily

serves only one term -- require constant infusions of money to support these activities. Manipulation of municipal contracts is a guaranteed means of filling political war chests.

Contract graft is a phenomenon as old as municipal politics. The Philadelphia variation, however, diminishes individual or personal corruption opportunities in favor of organizational benefits. That is, individuals do not go into business for themselves; rather, they become collection agents for the political party in power.

Unlike past eras when corrupt bosses lined their personal pockets with bribe money, the scheme today is directed at filling party coffers. While the names, numbers and positions of officials may be different, the game is the same in many cities and states. Essentially the January 1974 grand jury was describing a "profit-sharing arrangement" in which the "arm" is put on those companies and firms which want government contracts to pay for the privilege with political contributions made in advance. Unlike some other jurisdictions where a percentage of the contract price is extracted afterward, Philadelphia does it in advance -- or so the grand jury found.

What we have described above forms only the basis of the allegations in the indictments against Levinson obtained by OSP. Whether or not this prosecution ever will be presented at trial depends on the outcome of the Supreme Court's ruling on the legality of the special investigating grand jury which recommended the indictments. Also, whether or not the OSP can prove the charges will depend on the evidence it can present. As we have stated, the pendency of this important case precludes us from reviewing

or assessing the evidence in this report.

### Relationship With Courts

The Special Prosecutor and his staff dealt with three groups of judges. They had a day-to-day relationship with the supervising judges of the special grand juries. While Phillips was Special Prosecutor two successive grand juries were in existence. The January 1974 grand jury was supervised in turn by Judges Harry Takiff and Matthew Bullock. The November 1975 grand jury was supervised by Judge Myrna Marshall.

Second, Phillips' office worked with the judges of the Philadelphia Court of Common Pleas who were assigned to preside over trials of defendants prosecuted by the OSP. Finally, Phillips and his staff appeared before the Commonwealth Court and the appellate courts of Pennsylvania, the Superior Court and the Supreme Court.

The office had its best relationships with the three judges who supervised the special grand juries. They were very supportive of Phillips' efforts and spoke highly of the work of his staff. The judges disagreed with complaints by defense lawyers that Phillips and his staff were unfair or too aggressive. In their view the OSP had an extremely difficult task to perform and Phillips and his staff were persistent and firm, but not unfair. The judges believed that at times Phillips' staff might have appeared over zealous, but they attributed this to a combination of lack of experience and a strong commitment to the office's mission.

The supervising judges also believed that Phillips' office had been generally effective. Judge Bullock expressed the opinion that the very existence of the office and the grand jury served to deter corruption in Philadelphia. These judges did not think it was significant that the OSP had few convictions. They believed that Phillips was doing very well to obtain even a few convictions in the area of police and official corruption in the face of the obstacles the office encountered.

Judge Takiff, who supervised the January 1974 grand jury and the June 1972 grand jury staffed by Arlen Specter's office, generally commended the work of the Special Prosecutor's office. Although he thought Phillips did well in the face of all the obstacles that confronted him, he believed that part of Phillips' problems resulted from his selection of inexperienced staff.

Phillips, in turn, thought highly of the three supervising judges. He worked closely with each of them and acknowledged that they had been supportive of the work of his office. The only significant clash Phillips' office had with Judge Takiff occurred over the questioning of a prominent Philadelphian, Frederick R. Mann. Mann had allegedly played a role in collecting funds to renovate Mayor Rizzo's office in City Hall. Phillips, suspecting that contributions had been made by major city contractors, subpoenaed Mann before the grand jury to tell who had given him money. When Mann refused to answer questions, Phillips obtained a grant of immunity for him. Mann still refused to give any information and Phillips asked Judge Takiff to hold Mann in contempt. Judge Takiff balked at this request, claiming that the Brady decision of the Superior Court, relating to immunity, had raised a question concerning the validity

of the immunity that had been granted Mann. We believe Phillips acted properly in this case and even displayed courage in pursuing an obviously unpopular matter.

Although a number of Common Pleas Court judges handled cases prosecuted by the OSP, <sup>\*</sup> the judge who had been assigned to most of Phillips' trials was Stanley Kubacki. There is mutual admiration between Phillips and Judge Kubacki. A number of defense lawyers were of the opinion that the relationship between the judge and the prosecutor was actually too cozy. They accused Phillips and his staff of frequently having ex parte meetings with Judge Kubacki. We have found no evidence to support this claim. Both Phillips and Judge Kubacki denied that there were any such meetings relating to specific cases. Though some private meetings occurred between Judge Kubacki and lawyers from the Special Prosecutor's office, these related to general procedures. Contrary to the defense attorneys' belief that Phillips often met with Judge Kubacki, the judge expressed surprise that Phillips had never come to see him. Phillips recalled that he did meet once or twice with Judge Kubacki.

Phillips and his legal staff reserved their strongest criticism for the Superior Court of Pennsylvania. Many of the delaying motions brought by defense lawyers to challenge the legitimacy of Phillips' office or the cases he brought to court came to the Superior Court as interlocutory appeals. These challenges had the effect of stopping numerous investigations and prosecutions. Ordinarily, interlocutory appeals are dispatched with haste by a reviewing court in order to permit the cases to proceed or to end them if appropriate.

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\* The OSP staff members were generally critical of most of these judges on the ground they favored defense lawyers. However our review of the cases in which they presided does not reveal any justification for this complaint.

However, the Superior Court not only accepted the interlocutory appeals when most could have been summarily dismissed, but held them in abeyance for months for deferred hearings or decisions. Often by the time the Superior Court disposed of an interlocutory appeal, witnesses had become unavailable or the case had become stale. These long delays played into the hands of lawyers and targets who were anticipating the demise of the Special Prosecutor's office or waiting out the term of the sitting grand jury.

The Superior Court decided many cases against the OSP. On the other hand, the Supreme Court of Pennsylvania usually upheld the Special Prosecutor's positions and reversed the Superior Court. The Supreme Court also ruled in favor of the Special Prosecutor in a series of cases challenging the office's existence, the legality of its funding and of the legality of the investigating grand juries. These costly and ultimately unsuccessful actions were brought by witnesses or defendants who were thereby able to delay their appearances and divert office personnel from their investigations.

#### Phillips Relationship With Other Law Enforcement Agencies

##### 1. The District Attorney of Philadelphia

Although the Attorney General of Pennsylvania had superseded District Attorney Fitzpatrick in investigations and prosecutions of police and official corruption in Philadelphia, there was little friction between the District Attorney's office and the Special Prosecutor's office. This was because Walter Phillips did not think

\* In Re: January 1974 Special Grand Jury Re: Petition of Natale F. Carabello, Jr.,; In Re: January 1974 Special Investigating Grand Jury in the matter of Tracey Service Co. Randy General Contracting and Supplies, and Tracey Mechanical Co., Inc.,; In Re: January 1974 Special Investigating Grand Jury, Appeal of Augustine Salvitti; In Re: January 1974 Grand Jury Investigation Re: Marvin Comisky

he needed the District Attorney and generally ignored him; and because F. Emmett Fitzpatrick was delighted that Phillips' office and not his office, had the burden of investigating corruption. Indeed, Fitzpatrick told us that any time he was asked by someone, "Why aren't you out there doing something about public corruption?" he would reply, "That's Phillips' job." Fitzpatrick believed that he had been rescued from a political hotseat.

Phillips' principal complaint about Fitzpatrick was that the District Attorney did not sufficiently recognize Phillips' exclusive jurisdiction in police and official corruption cases. For example, he was annoyed over Fitzpatrick's refusal to compel the Philadelphia Police Commissioner to turn over all complaints and investigations involving police corruption to the Special Prosecutor's office. Fitzpatrick claimed that even if he had wanted to do so, he had no control over the Philadelphia Police Department. However, he denied that Phillips had exclusive jurisdiction in police corruption cases, claiming that he had never been validly superseded by the Attorney General. Fitzpatrick was wrong on this claim because the Supreme Court of Pennsylvania had in effect ruled that he had been superseded and even pointed out that Fitzpatrick had consented to the supersession. Fitzpatrick tried to draw a nice distinction between the jurisdiction of the January 1974 grand jury, in connection with which he admitted supersession, and the investigation of police corruption, where he disputed supersession. However, Fitzpatrick ignored the fact that the January grand jury had also been charged to investigate police corruption in Philadelphia, thereby shutting out Fitzpatrick from this area of prosecution.

Fitzpatrick's dispute, however, was mainly academic. He had little desire to investigate or prosecute police corruption. In only one case did Fitzpatrick interfere with Phillips' work. This was the metal theft case where the OSP had obtained the conviction of two police officers on the basis of the testimony of a convicted murderer. During the trial, it became clear that the office's principal prosecution witness, Gregg, had incorrectly identified one of the metal theft defendants in the case since that individual had been in prison when the crime was committed.

Fitzpatrick ordered Gregg arrested for perjury. He knew when he ordered the arrest that a number of major defendants in the metal thefts case were still untried and that Phillips needed Gregg to prosecute these other defendants successfully. Frustrated over Fitzpatrick's action, Phillips sent the files of the untried cases to Fitzpatrick telling Fitzpatrick to try them since he had ruined the cases for Phillips. Fitzpatrick returned the files to Phillips claiming that he had been informed by the witness that he was still willing to testify against the remaining defendants even though he had now been charged with perjury. "I didn't ruin your cases afterall," Fitzpatrick told Phillips.

Fitzpatrick boasts that he provided assistance to Phillips and cited an instance in which he sent an assistant district attorney to argue a case for the Special Prosecutor when that office had been temporarily disqualified from appearing in court. This incident occurred after Phillips had been fired, during the period when his successor, Bernard Siegal, was fighting to remain afloat in the face of the legislature's withholding of the funding for the Special Prosecutor's office.

## 2. Philadelphia Police Department

Phillips met with Police Commissioner Joseph O'Neill at the beginning of his tenure to obtain cooperation. He stated that although he was politely received at this initial meeting, he never did receive cooperation from the Philadelphia Police Department. On the contrary, Phillips said that from the Commissioner on down through Department ranks there was opposition to his investigation and an unwillingness to turn evidence of police corruption over to his office. Indeed, even in cases where Phillips' office succeeded in obtaining a conviction of Philadelphia police officers, those men were permitted to stay on the force pending appeals and final determinations of their cases. Phillips thought this was blatantly wrong and tended to undermine if not ridicule his efforts to prosecute police corruption.

On the other hand, Commissioner O'Neill claimed that he thought it was his responsibility to stand by his men until their convictions were ultimately upheld by the highest court.

A principal dispute between Phillips and Commissioner O'Neill stemmed from O'Neill's refusal to recognize Phillips' claim of exclusive jurisdiction to investigate allegations of Philadelphia police corruption. Phillips had demanded that O'Neill turn over to him all cases that the police department had initiated relating to police corruption. O'Neill refused, claiming he had an equal, if not primary, responsibility to investigate these charges himself. O'Neill also said that he had the right to refer these cases to the Philadelphia District Attorney, rather than to the Special Prosecutor's office. O'Neill did not believe that the Attorney General's supersession of Fitzpatrick could in any way limit his jurisdiction or authority.

O'Neill was obviously technically correct in his position, since the Police Department of Philadelphia does not come under the jurisdiction of the Attorney General or the District Attorney's office. It is a separate municipal department under the jurisdiction of the Mayor of Philadelphia. However, it may be argued that once the District Attorney has been lawfully superseded by the Attorney General, the only authorized prosecutor to receive evidence from the police is the Special Prosecutor appointed by the Attorney General to replace the District Attorney. This was Phillips' theory and he was upheld by Judge Kubacki in Phillips v. Fitzpatrick

In its final report, the January 1974 grand jury stated that "In many instances our efforts were frustrated by the active opposition of the Philadelphia Police Department." The report lists four complaints the jury had made: 1) the Police Department's "stonewall" attitude and lack of cooperation; 2) its failure to dismiss convicted officers; 3) the Department's failure to take active steps to clean its own house through the development of an active, independent internal affairs bureau, and 4) the active hostility of the Fraternal Order of Police.

It is obvious that no strategy employed by the Special Prosecutor would have succeeded in obtaining cooperation from the police. O'Neill was under Mayor Rizzo's supervision and Rizzo would not cooperate with the Special Prosecutor who he believed had been appointed for the sole purpose of attacking him. There was no indication that Commissioner O'Neill or the Police Department gave Siegal any more cooperation than had been given to Phillips.

3. The U.S. Attorney's Office for the Eastern District of Pennsylvania

When he became Special Prosecutor, Walter Phillips did not introduce himself to U.S. Attorney Robert Curran or solicit cooperation from his office. Instead, he called on the Special Agent in charge of the FBI office in Philadelphia and asked him to contact Curran on Phillips' behalf. This slip in protocol on Phillips' part surprised U.S. Attorney Curran and may have permanently weakened their relationship. Phillips based his reluctance to meet with Curran on rumors he had heard that Curran was politically motivated.

Phillips' failure to develop a common understanding with the U.S. Attorney's office led to constant clashes between the two offices. The first came when Phillips launched his investigation into kickback payments by architects to the Democratic City Committee. He subpoenaed the Democratic City Committee's records as well as those of city records that related to the awarding of relevant contracts. Curran, claiming to have begun an investigation in the same area -- following up evidence originally obtained by Arlen Specter's grand jury investigation -- subpoenaed the OSP for the records it had obtained. The OSP successfully resisted Curran's effort to obtain the material.

However, the dispute presented the sorry spectacle of two prosecutors' offices fighting with each other over an investigation. Curran was bitter because he believed Phillips had poached on his territory, and Phillips appeared shocked that Curran was seeking to interfere with what he considered to be his exclusive mandate.

Later, Phillips accused Curran of failing to keep an agreement to turn over evidence which Curran had received in an investigation both offices were pursuing jointly. Phillips claimed that if he had received the evidence in time he might not have lost a major prosecution against an official of the Democratic City Committee. He communicated this complaint to the Attorney General of the United States.

Curran was furious. He denied such an agreement existed and added that the evidence Phillips wanted had been equally accessible to Phillips and his investigators. He accused Phillips of being incompetent. The Attorney General, through an aide, replied to Phillips, generally supporting Curran's side of the dispute.

This scrapping between the Special Prosecutor and the United States Attorney reflected more than competition between prosecutors. It was symptomatic of the conditions which have prevented law enforcement agencies from affectively dealing with official corruption in Philadelphia. At first it was difficult for us to understand, as we reviewed Phillips' struggle to survive during his short tenure, why his mission had not been supported or augmented by federal law enforcement agencies. Together they might have scored some major victories and deterred the efforts to destroy Phillips' office. U. S. Attorney Curran must share the blame for the absence of effective corruption investigations and prosecutions in Philadelphia. His office's record does not demonstrate a vigorous commitment to this type of prosecution.

Curran's successor as U.S. Attorney in the Eastern District of Pennsylvania, David Marston, has ended the lethargy of the past and aggressively probed official corruption in Philadelphia. He has pic

up some of the investigations that were jeopardized when the Special Prosecutor's office was closed and is pursuing them with the full force of his office.

These probes, one into graduate school admissions and another into the fraudulent financing of a home mortgage company have already resulted in certain indictments. One indictment charges Speaker of the Pennsylvania House, Herbert Fineman, with ten counts of extortion, bribery, obstruction of justice, mail fraud and conspiracy. The U.S. Attorney's success in these investigations underscores the value of a strongly established prosecutor working with adequate investigative tools and a swift and effective court system.

#### Relationship with the Philadelphia Bar

This evaluation found a unique hostility toward the Special Prosecutor's office on the part of those Philadelphia attorneys who dealt with it. After numerous interviews with lawyers, we were struck by the fact that we found this bad feeling was uniform among attorneys with divergent backgrounds and practices, many of whom did not associate with one another. Moreover, the lawyers we interviewed consistently gave Phillips and his staff poor grades for competence and performance. However this low assessment of the OSP should not have produced the hostility we noted. Rather, we felt the reverse would have been more likely.

Although a number of varied allegations were related to us, the lawyers generally repeated the following complaints about the Special Prosecutor and his staff: 1) they were arrogant; 2) they were unfair in dealing with charges, evidence, witnesses and procedural matters; 3) they refused to extend courtesies defense lawyers were

normally accustomed to in dealing with the District Attorney's office in Philadelphia; 4) they took extreme adversary positions on factual and legal issues; 5) they refused to admit error even when they had to know they were wrong; 6) they concealed evidence that might establish the innocence of the lawyer's client; 7) they abused and pressured judges about rulings that were simply consistent with the law; 8) they leaked damaging and incriminating evidence against targets and defendants to the newspapers; and 9) they perceived defense lawyers as corrupt and criminally involved in the matters charged to their clients and treated them accordingly.

Some examples given to us that lawyers believed illustrated their complaints of arrogant, unfair or discourteous behavior are: 1) overbroad subpoenas that would strip a client of all his business records, forcing him to halt or close down his business; 2) refusal to agree to a short continuance to accommodate a lawyer's holiday plans or other scheduling predicaments ; 3) trying to catch a target on a perjury charge before the grand jury when they could not produce enough evidence against him for the primary substantive criminal activity under investigation; and 4) pursuing a prosecution even when there was not sufficient evidence to convict, for the purpose of harassing the defendant or injuring his public reputation.

We have concluded that many of these complaints are unfounded, although many of the attorneys no doubt felt put-upon. What they have frequently attributed to unfairness and lack of courtesy was in reality a matter of style. The office's inexperienced staff was nervous over its heavy responsibilities and was eager to succeed. They were bright, serious and highly motivated young men and women, who were naturally zealous and aggressive. Thus, they appeared to

come on strong to a defense bar that enjoyed a traditional clubby relationship with the local prosecutor's office.

Defense lawyers and assistant district attorneys in Philadelphia were accustomed to scratching one another's backs. However, there is a definite distinction between the day-to-day responsibilities of the Philadelphia District Attorney and the task entrusted to the Special Prosecutor. Walter Phillips' investigation aimed at higher stakes and more powerful persons than are usually pursued by the criminal justice system. In addition, he was underfunded, understaffed, and without adequate weapons to investigate effectively the complex white collar crimes involved in public corruption.

Phillips has correctly claimed that he had to insist that his staff stick to rigid court schedules and compel defense lawyers to promptly respond to subpoenas and appearances. Delay was his worst enemy. The defense lawyers frequently represented powerful and wealthy clients who were able and willing to pay for a strategy of delay. The leading law firms in the city were arrayed against the Special Prosecutor's office in the cases that Phillips brought. The battle plans followed by these firms, unlike simple defense tactics in ordinary criminal cases, resembled the multi-pronged strategies employed in complicated anti-trust or tax litigation. Defense counsel were willing to use every weapon that could help their clients against the Special Prosecutor. They had every right to do so. On the other hand, they had to expect that their opponent would resist them just as aggressively. The club rules were simply not applicable in these cases.

There is, of course, no justification for discourtesy, unfairness or arrogance. While we are convinced that he had no such intentions,

Phillips' style sometimes produced the appearance of such behavior. For example, he made little effort to communicate personally with members of the bar to explain the necessity of his office's actions. Phillips also conveyed to his staff the view that they had a special mission that made them a somewhat different if not superior group of prosecuting lawyers and investigators. This attitude, coupled with their beleaguered position and inadequate support, led to the adoption of a "just-us-against-all-of-them" philosophy. Since Phillips and some of his staff did view most defense attorneys as somewhat unsavor, it is no wonder they bruised the feelings of many Philadelphia lawyers. Also, in a few instances, some members of the staff pursued criminal prosecutions that were legally insufficient, apparently because they believed the defendants were actually guilty. These actions placed the Special Prosecutor's office in an unfavorable light and provided ammunition for those who wished to destroy it.

On their part the OSP lawyers complained that defense attorneys often employed dilatory tactics. And they objected to what they believed was a conflict of interest created by defense representation of multiple defendants. The January 1974 grand jury underscored this latter complaint in its final report. The grand jury stated that inordinate delays and obstacles were encountered due to defense counsel repeatedly representing two or more witnesses involved in the same alleged criminal activity. The jury noted that one witness would make blanket Fifth Amendment claims on the advice of counsel whose other clients benefited from this practice. In one case, the OSP had the court disqualify an attorney from representing 12 police officers called before the grand jury, Pirillo v. Takiff, 462 Pa. 523 (1975); cert. denied 423 U.S. 1083 (1976). The Pennsylvania Supreme

Court in the Pirillo case underscored the danger of multiple representation by holding at p. 906 that

" . . . where each witness was a potential defendant and the Court received information that the testimony of each officer might be expected to incriminate one or more of the other witnesses, and where the extent of the possible multiple cross involvement in criminal activity is known to the court but hidden from the individual witnesses by the requirements of secrecy, it is inappropriate for the supervising judge to permit multiple representation."

### Phillips and the Philadelphia Community

Walter Phillips entered Philadelphia amidst glorious newspaper plaudits, especially from the Philadelphia Inquirer. If the bells did not ring from the churches and schools as Phillips arrived, he can be excused from believing that they were ringing as he read the headlines that greeted him. However it is unfortunate that he apparently believed that what he read in the newspapers reflected the actual support of the Philadelphia community.

Phillips made little effort to communicate with the various segments and organizations in the Philadelphia community to introduce himself and explain his mission. He thought there was something improper and even "political" about meeting with civic or business leaders and organizations in connection with the work of his office. Such a professional posture may be fitting for a courtroom lawyer, but it can be self-defeating for the head of an office charged with investigating police and official corruption.

Corruption investigations are not inherently popular. Many members of the public, including community leaders, are ready to believe that such investigations are politically motivated, built on

exaggerated charges, or not nearly as important as investigations and prosecutions of crimes of violence. Ultimately if the prosecutor is successful, sensational revelations or convictions may electrify the community and provoke the general public support he needs. However at the outset of his investigation, he is in the best position to solicit the backing of powerful community leaders.

Strong community support is not obtained easily. The Special Prosecutor must communicate his general goals persuasively and persistently. He should alert those responsible for taking positions for citizens and professional groups, especially bar associations about the dangers threatening the community because of corruption. His goal should be to obtain commitments from community leaders to either speak out or encourage their organizations to voice support for his office.

Walter Phillips seemed to have worked in a community vacuum. His initial investigative efforts were greeted by silence from the community leadership. And, except for one or two ineffective utterances of support, that silence continued throughout his brief tenure as Special Prosecutor. Phillips was clearly not totally to blame. Although he was ineffective in generating community support, the business, professional and community leaders are equally at fault for not meeting Phillips half way and offering support.

It is not clear whether any prosecutor would have been successful in obtaining help from the community. At the time of the grand jury investigation, the so-called civic and community leaders

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\* Many of the leaders of the bar who had on prior occasions spoken out against wrongdoing were retained by targets of the Office of Special Prosecutor and therefore became neutralized.

of Philadelphia had substantially abdicated their responsibilities for insuring honest government. They had succumbed to either fear or self-interest. We have been told by prominent businessmen that the most influential business leaders had already decided for economic reasons to become supporters of Mayor Frank Rizzo. Although they were subsequently dissatisfied, their perception of the consequences of breaking off this alliance terrified them. Thus, when the Greater Philadelphia Partnership was confronted with the question of whether it should support the Special Prosecutor, it decided that an affirmative answer would be considered by Mayor Rizzo as a political unfriendly act. To avoid the wrath of the Mayor, it chose not to take a position. A highly reliable source has told us that the Executive Director of the Greater Philadelphia Partnership quit in protest over the less than courageous actions of his employers.

Other prominent civic and community groups in Philadelphia also held back. Although many of them may have felt helpless, they painfully bring to mind the analogous scene of the killing of a girl in the presence of hundreds of onlookers who do nothing to rescue her either because of fear or the desire not to get involved.

Perhaps a different Special Prosecutor with different experiences and personality could have won the Philadelphia community's support. <sup>The</sup> The leaders involved are persons of integrity and civic spirit, even though they lacked courage. A stronger prosecutor, with a well-defined plan of action might have inspired confidence that something could be done about official wrongdoing and might have eased the fear of supporting this prosecution effort. It is more unfortunate that community leaders took the safer and more comfortable way out by doing nothing. Consequently, when the Office of Special Prosecutor was

destroyed, few seemed to care or notice.

It will remain Philadelphia's shame that so important a prosecution effort could be so openly assaulted and looted with hardly a public protest made. One gross measure of community reaction is the number of letters sent to the editors of local newspapers. When Phillips was dismissed, and later when the OSP terminated, only a handful of letters were received. In contrast when Richard Nixon fired Special Prosecutor Archibald Cox during the "Saturday Night Massacre", a half million telegrams poured in from the people of America to the Congress during that weekend.

Relationship with the Press

Few people in public life receive more attention from the media than prosecutors investigating official corruption. Frequently, such investigations periodically uncover evidence linking well known persons with scandalous conspiracies. Because these revelations are known to yield eye-catching headlines which sell newspapers, it is hardly surprising that Philadelphia's press welcomed Special Prosecutor Walter Phillips to the city with open arms.

Throughout Phillips' two-year tenure as Special Prosecutor, and until the OSP was given up for dead in the fall of 1976, the office enjoyed mostly uncritical news coverage and overwhelmingly favorably editorial support from all three daily newspapers (particularly the Philadelphia Inquirer). The electronic media treated the office in the same way. The dailies and newscasts all carried news of each grand jury presentment and indictment as well as news of the major trials undertaken by the office. Long news analyses, often written with the cooperation of sources in the OSP, appeared in the newspapers or magazines whenever major events, mostly setbacks, affected

the office's investigations. Press representatives insist, however, that any help they received from OSP for these news analyses did not include leaks of secret investigative material.

Prosecutors, like other public officials in the limelight, often fall prey to two strong and harmful temptations: to selectively "leak" secret materials to advance their positions; and to consider the favorable coverage their offices receive in the press as an indication of strong public support. We have found that the office of the Special Prosecutor was fundamentally innocent of the charges often made by its opponents that its staff leaked protected grand jury testimony to members of the press. With few exceptions, the office refused to divulge any secret information unless and until it was admitted into evidence at trial.

Unfortunately, as we have stated, Walter Phillips often equated the positive coverage his office received in the media with what he incorrectly perceived to be active support by the Philadelphia community. Judging whether the public will respond to a continuing news story is a hit or miss proposition. Maurice Nadjari was the darling of the New York press for some time when he was Special State Prosecutor for the criminal justice system in New York. Yet after he first successfully fought his dismissal from the post, public support and press attention soon withered.

When Phillips needed public support for his positions on wiretapping and funding legislation, he actively sought and obtained media coverage for his stands. However, without the active cooperation of citizens' groups or powerful political leaders, his

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\* See discussion of Philadelphia Inquirer of 2/19/76 at 124. In one instance, the office did release evidence that had only been marked for identification, not entered into evidence. This apparently resulted from a misreading of law.

positions were easily defeated in the Pennsylvania General Assembly. By the end of his tenure as Special Prosecutor, Phillips had learned that piles of press clippings were no substitute for firm commitments for support from the Governor and Attorney General, or for an actively aroused general public.

#### Relationship with the Governor and Attorney General

During his tenure as a deputy attorney general in charge of the Office of Special Prosecutor, Walter Phillips served under two Attorneys General -- Israel Packel and Robert Kane. Although he complains of inadequate financial backing from the outset, Phillips speaks highly of the support his office received from Packel. In contrast, Phillips believes the office received little support from Attorney General Kane. Although Phillips may have experienced different relationships with his superiors, this was not entirely dependent upon who was Attorney General. The Attorney General is an appointee of the Governor of Pennsylvania and as such generally follows and implements the policies of the Governor. If Packel provided more support for the office than Kane did, this may be partially explained by the fact that while Packel was Attorney General, Governor Shapp was somewhat supportive of the Office of Special Prosecutor and had decreased his support by the time Kane became Attorney General.

There were certain well-defined areas of the Special Prosecutor's activities for which the support of the state administration was critical. These were: 1) the independence of the Special Prosecutor's office; 2) the funding provided for the OSP; 3) the availability of certain investigative tools for the OSP; and 4) public statements and

overall posture. In addition, there were more routine matters such as cutting red tape when procuring supplies, salary raises and promoting and undercover vehicles.

Although Phillips was a deputy attorney general under the supervision of the Attorney General, it was clearly necessary in the prevailing political climate that he be permitted to act independently in running his investigations of police and official corruption. In his discussion with us, Packel emphasized that he gave this independence to Phillips. Phillips confirmed Packel's claim. Attorney General Kane also left Phillips on his own for most of the time Phillips was Special Prosecutor.

On its face, this speaks well of the relationship between the Attorney General and OSP -- a relationship that certainly facilitated an autonomous and politically uncontrolled investigation by Phillips. Yet, leaving Phillips alone had political advantages. Governor Shapp was a candidate for re-election in 1974 and needed the good will of the public, as well as the aid of the Democratic political leadership in Pennsylvania. By creating an independent special prosecutor in Philadelphia, he could obtain the credit for sponsoring an investigation against public corruption and at the same time free himself from the responsibility for the Special Prosecutor's actions.

Furthermore, throughout 1974, when Packel was still Attorney General, none of Phillips' investigations appeared to threaten political leaders on whom the Governor had to rely. The presentments returned by the January 1974 grand jury during that period either related to police corruption (within Phillips' initial mandate from Packel) or involved corruption charges touching the Rizzo

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administration and the Philadelphia Democratic City Committee. Thus, it was in Shapp's interest to give basic support to the OSP, at least until he was re-elected Governor in November 1974.

At the end of February, 1974 Packel sponsored a bill in the General Assembly to create a statewide special prosecutor to investigate police corruption with a state appropriation of \$500,000. The bill died in committee. Its outspoken opponent was Senate Appropriations Committee Chairman, Henry J. Cianfrani. This bill apparently renewed the legislature's hostility toward Packel, who had become the Attorney General without its approval. The House of Representatives expressed its hostility toward Packel by adopting a resolution calling for a Constitutional amendment which would have made the Attorney General an elected rather than an appointed officer.

Shapp tried again in June 1974 to obtain funding from the legislature for the OSP. He wrote to legislative leaders that he considered "the work of the Special Prosecutor to be of the highest priority. . . To accomplish the tasks before it, the Office of Special Prosecutor needs to be well staffed and this costs money." However, his attempt was ineffective. Cianfrani prevented an appropriation for the Special Prosecutor from coming to a vote. House Democrats also defeated it. This led one Republican Representative to publicly accuse Shapp of not being serious in his support of the Special Prosecutor. He argued that if Shapp had really wanted to get the bill through he should have been able to influence the votes of sufficient legislators in his own party.

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\* In anticipation of the passage of this bill, Governor Shapp's budget message for FY 1974-75 called for an appropriation of \$1,000,000 to support the statewide special prosecutor. Because no such office was created by the legislature, the Governor's request

The legislature's refusal to provide financial support for the Special Prosecutor did not stop the office's operations. The Law Enforcement Assistance Administration of the U.S. Department of Justice supplied federal grant money for the OSP. LEAA provided these funds through its conduit in Pennsylvania, the Governor's Justice Commission (GJC). The Attorney General was chairman of this Commission and its membership was appointed by Governor Shapp.

On the occasion of his second failure to obtain legislative funding for the Special Prosecutor, Governor Shapp wrote a letter of support for the Special Prosecutor to Attorney General Packel. This letter was written on August 6, 1974 in the midst of the Governor's re-election campaign after his Republican opponent accused the Governor of "covering up" corruption in Philadelphia by failing to support the OSP. The letter in its entirety is as follows:

"Dear General Packel:

After the House of Representatives voted down the appropriation bill for the Office of the Special Prosecutor in Philadelphia, I was disturbed to learn that some people in Philadelphia are apparently under the impression that Mr. Phillips' operation will terminate shortly because of inadequate financial support. I think it is imperative that we dispel this impression immediately. I am still committed to an all-out effort to have the Commonwealth provide its necessary share of the funds.

As you know, Pennsylvania has been fortunate so far to secure a large part of the funds for the Office of the Special Prosecutor in Philadelphia from the federal government and the Pennsylvania Justice Department. To date, we have received \$289,445 from the LEAA funds designated for Pennsylvania, an additional \$305,000 from LEAA in Washington as a direct grant and \$138,802 from Pennsylvania. Under the Crime Control Act of 1972, the federal government can provide funding for this type of project of up to 90% through LEAA if the state will supply the remaining amount. With the recent Supreme Court action upholding your creation of the Special Prosecutor Office in Philadelphia, I suggest that you direct Mr. Phillips to apply immediately for federal funds to continue his operation. I understand that LEAA has suggested that the next application for funds by the

Special Prosecutor's Office in Philadelphia be for the period from October 1, 1974 to June 30, 1976.

In view of this extended period, there is a need for approximately \$500,000 of state funds to secure the federal funding. I had hoped that the General Assembly would appropriate the necessary state funds in July before the summer recess, and I am still confident that they will approve funding when they return in September. If they do not, an alternate source of funds will have to be found.

In light of the many recent events, there can be no question about the need for a special prosecutor to root out governmental corruption. It's time that a complete and thorough investigation be conducted to punish the guilty and remove suspicion from the innocent. Throughout the nation, we have seen the need for specialized prosecuting offices to deal with public corruption, as for example in New York and Washington. Now, in Philadelphia, we are on the verge of establishing such an operation. Consequently, it is vital that the Commonwealth supply its share of the funds and support the operation in Philadelphia.

Sincerely,

MILTON SHAPP  
Governor"

It is noteworthy that this letter informs Attorney General Packel to direct Phillips to apply immediately for federal funds on the basis of a budget for a period from October 1, 1974 to June 30, 1976. At no time did the OSP apply for funds from LEAA for such an extended period of time. On the contrary, Phillips complained that his inability to get long term funding placed his office in an insecure position which prevented him from recruiting experienced high level staff and threatened the success of his investigation by causing witnesses and informers to lose confidence in his office. Phillips recalled Shapp's letter of support to Packel in the summer of 1974, but he had no recollection of the reference to a 21-month budget period to be funded by LEAA. He said he could not remember Packel either suggesting to him or directing him to file such a budget request. Phillips says that he discussed long term funding with LEAA but received a negative answer.

The clearest manifestation of support for the OSP by the Governor and Attorney General was the securing of LEAA funding through the Governor's Justice Commission. Throughout the entire existence of OSP the Governor's Justice Commission with the backing of Shapp, Packel and Kane approved grants to keep the office in operation. The total funding which was made available to the OSP from its inception until June 30, 1976, is summarized in the table which appears below. More significant than the amounts which were ultimately received are the amounts which were denied the OSP by the legislature and the subsequent actions taken by that body to cut off all sources of funding, federal as well as state. Owing to the failure of expected state funding to materialize, as well as poor State budgeting techniques and poor grant accounting, numerous changes were made to the budgets originally submitted. Consequently, budget analysis is quite difficult.

Total Funding Committed to OSP 4/1/76 to 6/30/76:

	<u>Grant Number</u>	<u>Type</u>	<u>Awarded</u>	<u>Period</u>	<u>Amount</u>
1.	DS-483-73-A	State discretionary	4/1/74	4/74-6/75	\$ 289,445
2.	-	State match to above	"	"	104,802
3.	74-DF-03-009	Fed. Discretionary	1/1/75	4/74-11/74	305,000
4.	-	State March	"	"	34,000
5.	75-DF-03-008	Fed. Discretionary	10/24/75	12/74-8/75	400,000
6.	-	State Match	"	"	44,444
7.	DS-74-C-G-9-546	State Discretionary	9/74	12/74-11/75	319,210
8.	-	State Match	"	"	35,467
9.	DS-75-C-53-9-626	State Discretionary	7/75	7/75-6/76	<u>1,035,956</u>
				TOTAL	\$2,566,324

Total Actual Expenditures 4/1/74 to 6/30/76 :

<u>Expense Category</u>	<u>Actual Amount</u>
Personnel	\$ 1,410,065
Fringe Benefits	273,878
Travel	11,938
Equipment	29,315
Supplies	523,506 (1)
Consultants	20,356
Confidential Funds	<u>19,779 (2)</u>
	\$ 2,288,837

(1) Includes occupancy costs for office space.

(2) Prior to May, 1975, expenditures for confidential informers payments were charged to an account which was grouped with supplies for reporting purposes. The actual confidential payments through June 30, 1976 totalled \$40,416.

In April of 1974, the OSP received the first four payments of LEAA money as indicated in the summary above. Based upon the assumption that the state funding would be received, the grants were expected to last until June of 1975. However, in addition to the demise of the Special Prosecutor Bill, the grant did not provide funds for the expansion of the original OSP mandate -- from following-up the work of the Pennsylvania Crime Commission investigation to include staffing the Takiff grand jury.

When it became clear that this initial funding would not last the OSP until June, 1975, the office began seeking a second round of LEAA and GJC grants totalling \$719,210.

Since the legislature had not appropriated any funds to pay for the required state matching portion of either the first or second

round of grants, (state matching funds totalling \$218,713) the Attorney General used state funds from the Justice Department's appropriations to meet these grant requirements. The Attorney General's office was running short of money itself because of the support it channeled to the OSP and its failure to obtain an increase in its appropriation for FY 74-75 to cover automatic state pay increases. Despite serious fiscal problems in Pennsylvania, the legislature passed a supplemental appropriations bill on April 29, 1975, in which the Department of Justice shared. This had the practical effect of providing state funding for the OSP on a retroactive basis, since the Attorney General was reimbursed for the support funds he had given the OSP from the Department of Justice's budget.

The fiscal plan for the second year of operation of the OSP called for a state discretionary grant of LEAA funds in the amount of \$1,000,000 together with state matching funds of about \$439,000. The request for state funding was included in the budget submitted by the Justice Department to the State budget office, and was included in the 1975-76 general appropriations measure when it was introduced into the legislature. Although the House very clearly voted not to remove the OSP funding in spite of the general situation in which budgets were being slashed drastically, this support was short lived. H.B. 1336, the measure in question, emerged from the Senate Appropriations Committee with a number of alterations which ultimately were signed into law:

1. The budget of the Justice Department was cut so drastically that there was no room for supplying even a part of the required \$439,000 in state matching funds.

2. The Justice Department budget was line itemed. That is, the appropriation was divided among the various offices within the department, with a prohibition against using or shifting the funds between the offices. The OSP was conspicuous by its absence from the line item appropriation.
3. The Pennsylvania Crime Commission budget was line itemed into the Justice Department budget and was cut drastically.
4. The OSP had leased office space costing \$7.35 per square foot and the bill contained a prohibition - applying only to the Justice Department - against expenditure for rent in excess of \$6.90 per square foot.
5. The line iteming and the rental restrictions were not applied to any other agencies of the government, and were clearly designed to cut off all state funding of the OSP.

On June 30, 1975 this bill became law. The OSP was able to continue in operation despite the fact that it was receiving 100% LEAA money from the GJC. Since the GJC was supplied with sufficient state matching funds on an overall basis, the requirement for \$439,000 in matching funds specifically for the OSP was waived. This was termed an "aggregate overmatch." The legality of operating the OSP totally with LEAA money was challenged in two instances by defendants the OSP was attempting to prosecute. Although the particular issue was ultimately resolved in the courts in the favor of the OSP, this litigation provided substantial disruption in the normal operation of the office.

The Special Prosecutor's Office never received its grant from the Governor's Justice Commission for fiscal year 1976-77. The money was pirated by the Pennsylvania General Assembly, which enacted

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\* The \$6.90 prohibition did not prevent the rent from being paid on the OSP office space. By a gimmick in renegotiating the lease - hallways, restrooms and elevator shaft space became part of the premises - the per square foot rental was reduced to the allowable rate.

a statute giving it control over federal funds granted to state agencies. At a time when some Democratic legislative leaders had become targets of the Special Prosecutor's probe, the Office of Special Prosecutor was the only agency eliminated by the legislature from the list of federal fund recipients. This action ultimately led to the demise of the OSP. The fate of this last grant intended for the Special Prosecutor is more fully discussed later in this report.

#### Loss of the Body Bug

When Phillips began his work as Special Prosecutor, he believed his investigations would be handicapped by Pennsylvania's restrictive law prohibiting the wiretapping of telephone conversations and the use of concealed microphones to eavesdrop on room conversations. However, Pennsylvania law at the time did not forbid the use of body bugs. These are miniature recorders or radio transmitters which can be concealed on the body of an undercover agent or informer for the purpose of recording conversations with a suspect. Since the agent or informer is a party to the conversation, his use of such a recording device is not considered to be electronic eavesdropping.

In its investigation of police corruption, the Pennsylvania Crime Commission had effectively used such a body bug on a cooperating bar owner to record conversations with Philadelphia police officers concerning the payment of bribes. Phillips planned to use body bugs in his investigations and had submitted a purchase request to the state for some sophisticated expensive recording devices. This request was leaked to the press. It was believed that the leak may have come from a disgruntled former employee who may have made a xerox copy of the purchase order.

Shortly after the leak was reported Speaker of the House of Representatives Herbert Fineman pressed legislation to amend the Pennsylvania Wiretapping statute 18 P.S. §570. The amendment added the following definition to those acts which were prohibited under Pennsylvania law.

"Eavesdropping: Surreptitiously listening to, monitoring, transferring, amplifying or recording the voice of or action of another person without the knowledge and approval of such other person by the use of any electronic, mechanical or other device."

This amendment would prohibit body bugs. In support of his amendment, Speaker Fineman spoke loftily of the right of privacy and explained that the prohibition of body bugs would further the Pennsylvania legislature's policy against electronic eavesdropping. He warned his fellow legislators that no one was safe from the reach of eavesdroppers who now had available to them miniaturized space-aged electronic equipment. He told his colleagues, "I'm suggesting to the members of the House that out of a sense of self preservation, you should be supporting this kind of amendment."

Fineman also revealed that he learned that he had been wiretapped and bugged and claimed that the experience had had a chilling effect on his private conversations. He also reported an alleged bugging incident involving another member of the House.

On September 4, 1974, while the bill was pending, Governor Shapp wrote to Attorney General Packel to express concern over the Special Prosecutor's request for electronic surveillance equipment. Referring to reservations he had heard from legislators concerning the use of such equipment, Shapp informed Packel that although he still intended to push his request for legislation providing financial support for the Special Prosecutor, he wanted Packel to understand

that they had a "responsibility to the public to make certain any funds expended by the Special Prosecutor are in full compliance with the law."

Phillips became furious over the letter and its subsequent release to the press. He spoke to Packel and convinced him that the equipment he sought to purchase would be used in a manner consistent with Pennsylvania and federal law.

However, Phillips was alarmed about the legislation that the Speaker had introduced, because it would deprive his office of the use of the body bug in its investigations. Phillips told Packel that body bugs were absolutely essential in corruption investigations. This was especially true, he said, in corroborating an informer who accused a police officer of accepting illegal payoffs.

Apparently, Packel was able to win Shapp's support of the office's use of body bugs, since on September 20, 1974, Packel wrote the Pennsylvania legislature a letter strongly opposing the amendment and urging the legislators not to deprive Pennsylvania law enforcement officers of an essential weapon against "organized crime and corruption as well as drug abuse." In his response to the House, Fineman lashed out at Packel:

"I can understand the Attorney General's position, in view of the recent disclosure made by a newspaper of general circulation that the special prosecutor in this state has spent thousands and thousands of state dollars for the purchase of electronic surveillance equipment. What was he going to investigate? Municipal corruption? Perhaps some policeman down in the city of Philadelphia was taking free hamburgers or maybe taking some payoffs because they've allowed the numbers racket to exist in some particular area of the city, or some such similar offense. That was what Mr. Packel was going to allow his special select attorney to invade the right of privacy for, for those kinds of matters."

The anti-eavesdropping legislation was passed on November 20, 1974, and was sent to the Governor for his signature. Walter Phillips

privately and publicly urged Shapp to veto the bill. He pleaded for an opportunity to meet with Shapp to explain his position before Shapp acted. He was promised by the Governor's top aides that he would be given this opportunity. However, while Phillips was waiting to be called to the Governor's office, Shapp signed the bill on December 27, 1974 and it became law.

Shapp acted against the advice of his Attorney General and with the obvious knowledge that he was handicapping the investigation of the Special Prosecutor. He could be applauded if he was resisting over zealous law enforcement demands and striking a blow for privacy. Yet even the Warren Supreme Court had held that the secret recording of a conversation by one of the parties to it did not constitute electronic eavesdropping or a violation of privacy under the Constitution. The Court reasoned that since a party to a conversation is permitted to reveal what he has heard either to his associates or by giving testimony in court, there is no reason to prohibit him from recording the conversation to make certain his recollection is accurate. To be sure, the defendant may feel betrayed and outraged, but he has no legitimate complaint that his privacy was invaded. The Court said he chose to speak to the informer and confide in him, and therefore took the risk of betrayal.

The value to law enforcement agencies of one-party consent recordings was explained to Governor Shapp by his own Attorney General. In corruption cases, which deal mainly with white collar conspiracies involving public officials, there are no eyewitnesses or clues such as fingerprints or smoking guns. These crimes are usually exposed by a participant who has become an informer or an undercover agent who has infiltrated the conspiracy. The prosecutor

is usually confronted with having to prove word against word -- the word of an informer or undercover agent against the word of the suspect. The problem can be easily understood when one considers the credibility of the testimony given by a cooperative gambler or narcotics addict against a police officer, or even the testimony of an undercover agent given against a high public official. As Phillips repeatedly argued, this law enforcement dilemma was dramatically illustrated in the Watergate scandal where John Dean's word was pitted against the word of the President of the United States and his most powerful White House aides. The White House tapes proved to be the "ultimate witness" that could corroborate Dean.

Shapp's signing of the Fineman bill was his first step in withdrawing support from the Special Prosecutor. Attorney General Packel, himself, became a casualty. He was already persona non grata with the Pennsylvania legislature. Within days after Shapp signed the eavesdropping bill, he found it necessary to ask his old friend and advisor to resign his position as Attorney General. In his place, he appointed his campaign manager in the recent election, Robert P. Kane.

#### The Erosion of State Support for Phillips

Attorney General Kane launched his relationship with the Philadelphia Special Prosecutor by adopting the same policy of laissez faire followed by his predecessor. However, Kane did believe that Packel had gone too far in allowing Phillips to run an autonomous operation. Kane soon began to remind Phillips that he was only a deputy attorney general working under his supervision. Phillips

and Kane agree that the Attorney General usually left him alone. However, Phillips has told us he was willing to report the progress of his investigations to Kane, but was never asked. It was as if Kane didn't want to know. Kane explained that he did not want to create the appearance of interfering with the Special Prosecutor.

However, very early in his tenure as Attorney General, Kane caused alarm in the Office of Special Prosecutor and undercut its effectiveness by casting new doubt on its continued existence. Shortly after he was appointed Attorney General, Kane met with District Attorney Fitzpatrick and asked him whether he would be willing to take over the work of the Special Prosecutor's office. Fitzpatrick remembers that Kane expressed reservation about the investigation Phillips was conducting, but felt that the grand jury probe had to be continued. Fitzpatrick expressed his willingness to review all the cases in the Special Prosecutor's office and to assess the viability of each of them. He told Kane that he would be willing to pursue only those cases he concluded were sufficiently strong. Kane did not press the matter at that time.

However, at a planning meeting in Harrisburg, Kane told the heads of all Justice Department agencies that he had discussed with Phillips and Fitzpatrick the takeover by the District Attorney of the grand jury investigation of corruption in Philadelphia. Phillips was not present at the meeting but was represented by his administrative assistant, Nancy Ezold. Ezold was surprised by Kane's statement and immediately telephoned Phillips who told her he had never had such a discussion with Attorney General Kane. Kane's statement was reported in the press with the explanation that he had tried to support Phillips by seeking funds from the legislature but that all Democratic

factions were united in opposition to Phillips.

Shortly thereafter, Kane told the House Appropriations Committee that he "would look to the day when" the Philadelphia District Attorney office could take over the functions of the Special Prosecutor's office. This statement was widely publicized. It had a devastating impact on morale in the office and seriously diminished the willingness of several witnesses to cooperate with the OSP. Governor Shapp publicly discounted Attorney General Kane's statement by explaining that it did not represent a diminution of the state's support for the OSP, but only referred to an unlikely future willingness of the Philadelphia District Attorney to investigate official corruption.

Attorney General Kane's early attempt to get District Attorney Fitzpatrick to take over Phillips' role might be partially explained by the Shapp administration's inability to obtain state funding for the Special Prosecutor's office. By April, 1975, the OSP had been supported only by LEAA funds with the required state matching portion being provided from the Attorney General's budget. Attorney General Kane had asked the legislature not only to reimburse the Department of Justice for the funds it had supplied the Special Prosecutor's office, but also to appropriate \$439,000 for the Special Prosecutor's office for fiscal year 1975-76 to meet the state's matching requirement for the LEAA grant. By a supplemental appropriation the legislature did provide the necessary funds to reimburse the Department of Justice. But as we have shown above, it not only refused to appropriate any funds for the Office of Special Prosecutor for fiscal year 1975-76, it drastically cut the budget of the Department of Justice so that the Attorney General would have no surplus funds

to give the OSP. It also enacted restrictions prohibiting the Department of Justice from using any funds for any purpose other than those line-itemed by the legislature in the appropriation bill.

The funding problems could not have been the only reason the Shapp administration was seeking to have District Attorney Fitzpatrick take over the Special Prosecutor's investigations. The Governor's Justice Commission, under the control of the Governor and Attorney General, was still in a position to award LEAA funds. And, as we have stated, the Justice Department was able to employ the "aggregate overmatch" theory to excuse it from having to provide any additional state funds for OSP.

Although the Governor protested the legislature's rejection of the Justice Department's request for funds for the Special Prosecutor's Office, he failed to demonstrate any effective exercise of leadership on the members of his own party in the legislature.

The Governor has indicated to us that he had become dissatisfied with Phillips' activities. He believes that Phillips was spreading his investigations beyond the areas originally contemplated. In fact this was not so. Kane also told us that he was disturbed by the continued grand jury investigation by a special prosecutor. His concern was that the special grand jury in Philadelphia appeared to be developing into a permanent grand jury, since it was continuing the investigations of the Specter grand juries going back to 1969. Kane said it seemed inappropriate to have a special prosecutor running a grand jury probe of corruption in Philadelphia when there was a duly elected District Attorney who was now willing and able to carry on such an investigation.

It was also evident that at this time powerful Democratic leaders in the legislature -- the Speaker of the House, the Chairman of the Senate Appropriations Committee, and the Chairman of the House Appropriations Committee -- were bringing considerable pressure on the Governor and Attorney General to restrict, if not terminate, the Office of Special Prosecutor. A close political ally of one prominent legislator had been indicted by the OSP for his extensive involvement in fraudulent activities and conspiracy. Members of the Special Prosecutor's staff believe that if the defendant was convicted and sent to prison he would implicate his prominent patron.

Investigations by Phillips touched Speaker of the House Herbert Fineman, Chairman of the House Appropriations Committee Stephen Wodjak and Senate Appropriations Committee Chairman, Henry J. Cianfrani. Senator Cianfrani does not hesitate to acknowledge that he frequently complained to Shapp and Kane about Phillips' tactics. Fineman claims that it wasn't necessary for him to bring pressure on Shapp and Kane about the OSP. However, he said the Governor and Attorney General knew exactly how he felt.

However uncertain the relationship between Kane and Phillips may have been earlier, it became strained to the breaking point in the fall of 1975. In October, Phillips presented Kane with three immunity petitions for the Attorney General to sign. They related to investigations in which Fineman, Wodjak and another legislator were the primary targets. Until then Kane, like Packel, had routinely signed, without questioning, the immunity petitions Phillips had given him. These earlier petitions had involved investigations of police officers and city officials in Philadelphia. Kane says he assumed

they were prepared in accordance with the law.

However, Kane refused to sign these last three immunity petitions. He told Phillips he wanted to review them carefully and would inform Phillips about his decision on them at a later time.

In late November 1975, Kane met with Phillips and told him he had serious reservations about signing the immunity petitions Phillips had given him in October. He told Phillips that the investigations referred to in the petitions were not within the scope of the provision of the Pennsylvania Immunity Statute which authorized grants of immunity. Kane pointed out that the Statute limited granting of immunity to investigations of "organized crime and racketeering". He referred to the decision of the Superior Court in Commonwealth v. Brady, 228 Pa. Super., 233 (1974), which held that the immunity statute could not cover investigations of public corruption. The Brady case had been pending for review before the Supreme Court of Pennsylvania for over one year. Kane said that he could not act on the petitions until the Supreme Court of Pennsylvania definitively passed upon the question.

Phillips justifiably found fault with Kane's refusal to sign the immunity petitions on the basis of the Brady case. The Supreme Court of Pennsylvania had already decided the question contrary to Brady in three separate cases brought by the Special Prosecutor's office and if it followed its own precedent, would have to overrule the Superior Court. In In Re: Falone, 464 Pa. 42 (1975), In Re: Martorano, 464 Pa. 66 (1975) and In Re: LaRussa, 464 Pa. 86 (1975) the Pennsylvania Supreme Court held that the mandate of the

Office of Special Prosecutor to investigate police corruption and official corruption in Philadelphia was within the scope of the language "organized crime and racketeering" contained in the immunity statute.

A strange case of suspended animation seems to have afflicted the Pennsylvania Supreme Court in the Brady case. As of the time of the preparation of this evaluation the case has been awaiting action by the Court for more than two years.

In light of the Court's three explicit holdings contrary to Brady the Court's failure to summarily reverse it and its permitting the case to hang in limbo for so long a time cannot be properly explained.

Phillips was stymied by Kane's refusal to sign the immunity petitions. In addition to relying on Brady, Kane also told Phillips he had philosophical disagreements with the concept of immunity, thus laying the foundation for the rejection of the petitions even if the Brady case was decided favorably to Phillips' investigation.

On February 19, 1976, the Philadelphia Inquirer published a story disclosing Kane's failure to sign the immunity petitions submitted by Phillips, that were crucial to an investigation involving Pennsylvania legislative leaders. Kane believed that Phillips had leaked the story and was outraged. Phillips sought and obtained denials from everyone on his staff about the leak. He traveled to Kane's office and informed him that no one from the Special Prosecutor's office told the Inquirer reporter about the immunity petitions. Kane remained unconvinced by Phillips' denials. However, the Inquirer itself, reported that it had obtained the information in support of its story not from Phillips but from "sources in Harrisburg".

Shortly thereafter, fearing that Kane might abruptly end his investigation, Phillips obtain the permission of the supervising judge of the grand jury to take a memorandum he had prepared describing an investigation into alleged crimes by Pennsylvania legislators, to Washington. He presented it to the Chief of the Criminal Division of the United States Department of Justice. When word of Phillips' trip to Washington reached Harrisburg, Attorney General Kane charged the Special Prosecutor with "insubordination". On March 31, 1976 Kane fired Phillips and his First Assistant, Ben Joseph, claiming that his confidence in them had irrevokably eroded.

The firing of Phillips by Kane has two sides. Attorney General Kane was totally frustrated with Phillips. Kane believed Phillips would not accept his supervision, was determined to embarrass him by leaking stories to the newspapers, and had even been disloyal and insubordinate by "end running" him with his trip to the United States Department of Justice. As Attorney General, Kane had a right to set policy on all issues, including immunity. He thought if Phillips would not follow his direction, then Phillips could not remain a deputy attorney general.

Kane had reason to be dissatisfied with Phillips' performance. His investigations and prosecutions had not produced any major convictions. Kane had received complaints from lawyers, judges and public officials. It is clear from the record that Kane was genuinely unhappy with Phillips and at the time of the dismissal, had reached the point of almost complete incompatibility with the Special Prosecutor.

On the other hand, Phillips was fired in a peculiar political environment. We have received reliable information that for a period of months prior to Phillips' dismissal, the Governor and Attorney General were under constant pressure from Democratic legislative leaders to get rid of Phillips. After Judge Myrna Marshall charged the November 1975 grand jury to continue the probe of police and official corruption in Philadelphia, District Attorney Fitzpatrick, at Kane's invitation, claimed the right to staff the grand jury. Further, the proposed budget of the Department of Justice for fiscal year 1976-77 did not even have a reference to the Office of Special Prosecutor. It appeared that the Attorney General had planned to free himself of the corruption probe in Philadelphia.

In February 1976, Senator Cianfrani helped the feuding Democratic factions "cut a deal" to provide unified support for Governor Shapp's presidential bid. Cianfrani says that although this deal was not conditioned on Phillips' dismissal, it was generally understood that Phillips' continued presence was incompatible with the spirit of unified Democratic support for Shapp. This can be better understood when one considers that Phillips' office was then hot on the trail of some Democratic leaders in the General Assembly.

Kane did not believe he faced strong public opposition to his firing of Phillips. With the exception of a brief outcry on the part of Philadelphia newspapers, Kane was correct. Indeed, Kane says that he received only five protesting letters from the Greater Delaware Valley area. The near absence of public reaction to the

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\* Judge Marshall rejected Fitzpatrick's effort to take over the grand jury probe, citing his prior refusal, his heavy caseload and the inherent conflict created by his political and personal relationship with the Democratic officials who would be targets of the probe. Fitzpatrick lost his appeal in the Supreme Court of Pennsylvania

firing of the Special Prosecutor likely resulted from a combination of factors. Much of the public could not have been aware of what in fact was going on. Others did not care. Many had become convinced that there was nothing they could do to "fight City Hall".

#### Destruction of the OSP

Before Robert Kane had made know his intention to fire Walter Phillips, he had approached Bernard J. Siegel, then First Assistant District Attorney of Erie County, Pennsylvania, and tentatively offered to appoint him as Phillips' replacement. Siegel had impressed the Attorney General during his service on two Pennsylvania Criminal Justice Commissions, including the Pennsylvania Crime Commission. A graduate of Brandeis University and Harvard Law School, Siegel, 38, did not have significant experience investigating public corruption, nor was he familiar with Philadelphia's treacherous political environment. After Phillips' dismissal, Kane formally offered the Special Prosecutor's position to Siegel. Siegel became the deputy attorney general in charge of the OSP on April 15, 1976.

No attempt was made to allow an impartial group to nominate candidates to fill the position of Special Prosecutor. No individuals outside the state government "establishment" were consulted on the appointment. The resulting absence of an independently certified, well-known, investigative professional added to the uncertain status of the office.

This report will not attempt to evaluate the operation of the Special Prosecutor's Office under Siegel's direction. However, we

have included our observations concerning improvements made in the OSP's operating procedures during Siegel's tenure as Special Prosecutor. From mid-April 1976, until its slow death in December 1976, the Office of the Special Prosecutor was never more than a holding operation. \* Finally, Siegel's job was merely to oversee a terminal case of political cancer.

In the sixty days following Phillips' dismissal, half the office's legal and investigative staff resigned. For the most part, the replacements hired by Siegel were quite capable. However, they suffered from being placed in a rapidly deteriorating situation.

Siegel appointed Edward G. Rendell to his First Assistant. Before going into private practice, Rendell had been Chief of the Homicide Division of the Philadelphia District Attorney's Office under Arlen Specter. Two other attorneys were hired by the office, both of whom had strong backgrounds as criminal lawyers. All of the investigators hired in 1976 were inexperienced in large-scale corruption investigations.

Siegel made improvements in three areas of the office's operation: First, a centralized attorneys' filing system was begun. As discussed above, the absence of any coherent or organized case file system in the Phillips office made it extremely difficult to analyze the condition and status of a case or transmit it from lawyer to lawyer. Also, centralized grand jury and motions schedules were developed which improved communications within the office and allowed more efficient utilization of the grand jury and staff. Second, (perhaps because

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\* The office did obtain the indictments of two state legislators, House Appropriations Committee Chairman Stephen Wodjak (D-Phila.), and Senator Francis Lynch (D-Phila.), for their involvement in an alleged conspiracy to obtain funds from the parents of a dental school applicant in return for the legislators' assistance in

because of the steadily declining investigative resources available to the office) many of the weaker investigations initiated earlier were concluded. Third, the Special Prosecutor took positive actions to improve his relations with the District Attorney, the Philadelphia Police Department, and the United States Attorney's Office. Even with the office's future existence in serious doubt, good communication between the OSP and the United States Attorney's Office allowed several important investigations to be continued.

On March 29, 1976, just as Walter Phillips was being dismissed, the Pennsylvania Superior Court handed the Office of Special Prosecutor its greatest legal setback. Acting on an interlocutory appeal, the Superior Court quashed the indictments of Hillel Levinson, Philadelphia's Managing Director and the most powerful individual charged by the Office of the Special Prosecutor. By mid-January 1975, the January 1974 grand jury had decreased in membership from its original 23 jurors to 17 due to the death of one juror and the excusal of five others. The Special Prosecutor's Office experienced increasing difficulty in maintaining a quorum necessary to hear evidence and make presentments. Because of his fears about possible difficulty in obtaining a new investigating grand jury, Walter Phillips decided to seek the addition of new grand jurors from the original January 1974 grand jury panel. On January 15, 1975, Judge Takiff appointed six new grand jurors from the original panel. Whenever these new grand jurors were called upon to vote on a presentment, they were read any relevant testimony of the witnesses who had appeared before the grand jury.

On March 19, 1975, the January 1974 grand jury returned its 14th presentment, recommending the indictment of Hillel Levinson for perjury,

extortion, false swearing and unlawful political assessment, stemming from Levinson's discussions with Philadelphia's architects about the purchase of tickets to a Democratic City Committee dinner in October 1972. The regular indicting grand jury indicted Levinson on 35 counts.

Levinson's counsel filed a motion to quash the indictments. Judge John A. Cherry, an out-of-town judge specially appointed to preside over the case, dismissed the motion, but certified three issues for interlocutory appeal, including the substitutions authorized by Judge Takiff.

On March 29, 1976, the Pennsylvania Superior Court, in a split decision, quashed the indictments. Commonwealth v. Levinson, Pa. Super. 362 A.2d 1080 (1976). The Court held that the appointment of substitute grand jurors "was unauthorized". "Moreover, since a proper number of persons were present from the original grand jury during the 14th presentment, the original grand jury was still legally constituted and the added attenders were unauthorized persons because never properly made a part thereof." Supra at 1088.

Although the Court specifically limited its decision to the Levinson case, all the defendants named in the final 12 presentments of the January 1974 grand jury took appeal of any orders upholding their indictments. Less than 2 weeks after the Court's decision, the indictments against the second ranking official charged by the Office of the Special Prosecutor, Redevelopment Authority Director, Augustine Salvitti, were dismissed during pretrial argument. The Superior Court's decision, currently on appeal to the Pennsylvania Supreme Court, has severely damaged many cases brought by the OSP.

Cases against nine defendants have been delayed or quashed.

The Court's decision underscored a serious flaw in Pennsylvania's grand jury laws. As a special grand jury investigation proceeds, it is normal for grand jurors to be excused for cause. After several jurors have been excused it becomes increasingly difficult to reach a quorum each day testimony is heard or presentments are made. The Superior Court's decision in Levinson requires the supervising judge of the special investigating grand jury to wait until the grand jury can no longer reach a quorum before adding new grand jurors. The ruling places an extraordinary and unnecessary burden on the supervising judge and the prosecutor.

The final denial of funding to the Office of Special Prosecutor occurred as a result of the passage of three bills by the Pennsylvania legislature. As noted above, the OSP had been omitted from the Governor's executive budget for 1976-1977. Instead, in April the Governor's Justice Commission approved a \$1.3 million appropriation of federal Law Enforcement Assistance Administration funds for the office.

House Bill No. 568 was the general state appropriation bill for fiscal 1976-1977. It included several sections which sought to prevent support for the OSP. Like the appropriations measure for 1975-1976, this appropriations bill continued the line-iteming in effect for the general government operations of the Department of Justice. The leased space rental price restrictions which proved ineffective against the OSP during 1975-1976 were not present in the 1976-1977 bill. As additional insurance that the Justice Department would not allocate any of its funds for the operation of the office the following language was added to the 1976-1977

appropriations bill:

"The funds appropriated for general government operations to the Department of Justice are specifically appropriated to the bureau or division indicated and shall not be used for the purposes or functions of any other bureau or division of the department." H.B. 568, printers no. 3082, page 29.

The critical change in the state appropriations bill is to be found in section 8b. In the preceding 1975-1976 state appropriation, section 8b began "In addition to the amounts appropriated by this act, all monies received from the federal government, or from any other sources. . . are hereby appropriated. . . ." H.B. 1336, printers no. 1792, page 61. By contrast, the provision in section 8b of the 1976-1977 appropriations bill was worded: "In addition to the amount appropriated by this act, all monies received from any other source, except the federal government. . . . are hereby appropriated. . . ." (emphasis added) No mention of either this change in the language concerning federal government funds or the lack of money for the Special Prosecutor's office was made during the debates on the appropriations bill on the floor of the Pennsylvania House.

On May 18, 1976, the State Appropriations Bill, H.B. 568 was approved. Governor Shapp signed the appropriations bill on June 4, 1976.

In another action calculated to hamper support for the OSP, the Pennsylvania House overruled Governor Shapp's veto of Senate Bill 704 on March 18, 1976. This bill amended the Pennsylvania Administrative Code of 1929 to prohibit the assignment of personnel to circumvent appropriations limits. The measure had the effect of prohibiting the Attorney General from allocating his staff for the Special Prosecutor's office.

On June 1, 1976, Senate Bill 1542 was introduced. The bill contained a number of provisions which had the effect of insuring that the General Assembly, not the Governor would have the power to allocate and control federal funds coming into the state. In summary, the bill provided that (1) all requisitions to the state treasurer must indicate if any of the funds requested therein were derived from federal funds; (2) all requisitions must indicate whether any of the funds requested will be used directly or indirectly as state matching funds; (3) the state treasurer is specifically prohibited from issuing any warrants for funds to derive from federal grants unless these federal funds were specifically appropriated by an act of the General Assembly; (4) the treasurer is specifically prohibited from issuing any warrant for any funds which are to be used for state matching funds unless appropriated by the legislature; (5) the act prohibits the use of so-called restricted agency accounts unless specifically authorized for a certain agency by the legislature; (6) according to the act, it is the duty of the Secretary of Revenue, to officially certify estimates of revenues from all sources, including the federal government for use in the proposed budgets for the following year.

The bill was passed by the Senate on June 8, 1976, by a vote of 49 to 0. It was passed with amendments by the House 183 to 1, on June 16, 1976, and was submitted to the Governor on June 24, 1976. While the Governor could have waited until July 4, 1976, to veto the bill, he vetoed it on June 28, 1976. His quick action allowed the legislature to override his veto prior to the July 4th recess. Reliable sources have told this evaluation that considerable pressure was placed on Governor Shapp to veto S. B. 1542 before the holiday. However, an effective veto would have deprived all state agencies of federal funds.

Therefore it was not unreasonable for Governor Shapp to choose to contest the legislature's action by a court suit.

On July 29, 1976, the Senate overrode the Governor's veto by a vote of 40 to 10. On the same day, the House voted to override the veto by a margin of 169 to 22.

The last and final card played by the legislature was House Bill 1366, the Federal Augmentation Appropriation Act of 1976. That bill provided for the appropriation of federal funds according to the authority now possessed by the legislature by virtue of the passage of Senate Bill 1542. Two features of this bill are significant to the Office of Special Prosecutor: (1) the LEAA grant for the Office of Special Prosecutor was conspicuously omitted from the bill; (2) \$45,000 was appropriated for the exclusive purpose of paying all expenses associated with this evaluation of the Special Prosecutor's Office. \* Although the emphasis in the application of state discretionary funds were shifted with respect to some of the other programs affected by the bill, the Office of the Special Prosecutor was the only program left completely without funds by the bill. On June 30, 1976, the Senate passed H.B. 1366 by a vote of 34 to 15.

During debate on H.B. 1366 several members of the House made reference to the denial of funds for the Special Prosecutor's Office. Representative Stephen Friend of Delaware County attempted to intro-

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\* This item was not in the original draft of the bill. It was hurriedly added when the evaluation project director informed Attorney General Kane that the bill as worded would eliminate funds for the evaluation. The willingness of the bill's sponsors to include a line item for the evaluation of the OSP at Kane's urging - and not for the OSP itself - provides another clue that the primary purpose of the bill was the destruction of the OSP.

duce into the House an amendment to provide funds for the Special Prosecutor's Office. Representative Friend was cut off by the Chair and ruled out of order. Friend then made a motion to suspend the rules to allow a vote on the amendment. That motion was defeated by 104 to 84. Friend tried again, but lost his motion to suspend the rule by a vote of 105 to 82.

Representative Anthony Scirica, a Republican from Montgomery County, stated for the record that "rather than an effort by this legislature to exert discretionary control over the application or allocation of almost \$1 1/2 billion in federal funds, this bill is simply a rubber stamp of all existing federal programs with one exception. . . ." That exception, of course, was the Office of the Special Prosecutor. Representative Hutchinson made the following comments:

"The whole purpose supposedly of the legislation that we passed and overrode the Governor's veto was to provide some legislative oversight over these vast amounts of money. . . (yet) today we are faced with a bill that came over from the Senate this afternoon and we are asked to appropriate \$1 1/2 billion today. . . I think it is clear that we do not know what we are doing. I am opposed to that because I think it is a ruse and a phony. . . In addition, oddly enough, no funds are appropriated for the Special Prosecutor. . . I wonder what the real reason is that we passed this bill. Certainly we are all in favor of legislative oversight, but this is not oversight. . . ."

During debate on the floor of the General Assembly, Representative Friend said:

"Frequently our actions in this House displease many people. It is nice, however, particularly the last day when we can take actions which do please some people. We are doing for the Governor what he has wanted to do for the last 2 years but did not because of political consequences and we are pleasing any number of other people -- city councilmen and deputy mayors in Philadelphia who will not have to answer embarrassing questions any more, and the Mayor of Philadelphia will not have to answer any more embarrassing questions about the financing of his house. . . ."

Representative Friend was cut off by a point of order. According to the chair, since the Special Prosecutor's office was not included in the bill, it was not a proper item for discussion.

At the conclusion of debate, the House voted 124 to 64 to concur with the Senate version of the bill. House Bill 1366 was in the hands of the Governor on June 30, 1976. Governor Shapp signed the bill into law on July 1, 1976. He line vetoed certain minor programs in order to provide a test case in which he disagreed with the appropriations made by the legislature.

Some of the proponents of Senate Bill 1542 assert that the taking over of control of federal funds by state legislatures was part of a national trend. However, the only national association of state legislators which took a stand on the matter did so after the passage of S. B. 1542 by the Pennsylvania General Assembly.

Regardless of the rationales provided for passage of the legislation, one fact stands clear for all to see. The only state agency, office or program, that was completely denied funding by the Federal Appropriations Augmentation Act was the OSP. This fact compels this evaluation to reach the conclusion that a group of Pennsylvania legislators, under investigation by the Office of the Special Prosecutor, seized upon an idea of questionable merit and welded it into a tool to destroy the Office of the Special Prosecutor.

#### Shapp v. Sloan

On July 1, 1976, the Department of Justice presented to the State Treasurer requisitions for payment of the payroll of the Office of the Special Prosecutor. This payment was requested from federal LEAA funds which had been appropriated by the Governor's Justice Commission for the Office of the Special Prosecutor. On the same day, counsel

for the Treasurer informed the Attorney General that the Treasurer would not issue the payment warrants for this particular payroll voucher because of the new legislation.

On July 7, 1976, the Attorney General, on behalf of the Governor and other members of the executive branch, filed a petition for review in the Commonwealth Court, seeking a reversal of the Treasurer's decision not to honor the requisition for funds. Concurrently, the Attorney General filed a motion and memorandum in support of a preliminary injunction seeking an order demanding that the Treasurer honor the requisition. The request for injunctive relief was predicated on the fact that \$176,843 in funds which were part of the 1975-1976 LEAA grant had not been spent by the office during the year. The Attorney General argued that any delays in the restoration of LEAA funds would cripple the operations of the office -- possibly permanently -- by forcing the attorneys and staff to find other employment.

By order dated July 13, 1976, the General Assembly was permitted to provisionally intervene on the side of the State Treasurer pending full hearing on the merits. On July 15, the Commonwealth Court allowed the OSP to requisition funds up to an amount not exceeding \$176,000. This represented the balance of LEAA funds not expended in the prior fiscal year.

An application for a stay of the Commonwealth Court's order was filed by the legislature on July 16, 1976. This application was denied by Commonwealth Court Judge Bowman. An interlocutory appeal was taken to the Supreme Court on July 16, 1976. Supreme Court Justice Nix ordered a stay of the Commonwealth Court's order. He further ordered that the State Treasurer honor a requisition of

up to the total amount of only \$50,000. The order was subsequently vacated by the Supreme Court and the \$176,843 was paid out by the State Treasurer to the OSP.

On December 3, 1976, the Pennsylvania legislature won a major victory. The Commonwealth Court ruled that the General Assembly had the sole authority under the state Constitution to appropriate funds in the Commonwealth treasury -- including federal funds. The court brushed aside the substantial arguments made by the Attorney General relating to federal congressional priority under the Supremacy Clause of the U.S. Constitution and to the impairment of federal grants and contracts under the Contract Clauses of both the Pennsylvania and U.S. Constitutions. The court asserted that these federal rights were subordinate to the state's rights under the doctrine of state sovereignty.

Although an appeal was taken to the Pennsylvania Supreme Court, the Commonwealth Court's action was in fact fatal to the OSP. Starved of funds, the office could not continue to sustain a staff or any prosecution efforts, and it went out of existence.

Vain protests over the destruction of this important state corruption investigation were made by Mr. Siegel, Judge Marshall and the Philadelphia press. A few civic leaders complained and some citizens wrote letters, but most Philadelphia and Pennsylvania officials, including the Governor and Attorney General, observed the death of the office without a public statement of regret.

## Conclusion

This evaluation report has devoted a substantial number of pages to an analysis of how the OSP was organized and staffed as well as how it functioned under the direction of Special Prosecutor Walter Phillips. A number of serious weaknesses and deficiencies have been noted about the office which should serve as caveats for any prosecutor who, in the future may assume the difficult responsibilities of conducting a corruption investigation.

However, as this report stresses in its opening pages, the inadequacies of Walter Phillips' office were not the principal reason for the failure of his office's mission. It failed, and the OSP was ultimately destroyed, because of the overpowering forces this report has attempted to describe. Indeed, our conclusion is compelled from all the factors discussed above -- even a highly experienced corruption prosecutor and staff who made none of the strategic and judgment errors found by this evaluation would probably not have succeeded.

The factors which precluded a successful probe of police and official corruption were pervasive and overwhelming. From the outset, there never was the necessary strong and effective support for the probe by the very officials who sponsored it, the Governor and Attorney General. Although they created the Office of Special Prosecutor, provided minimal funding from federal grants and made some supportive public statements, they were essentially passive with respect to the office's investigative purpose. Later they became obstructive. They never provided the office with the symbolic and financial backing it needed to create public confidence in the continuity of its investigations.

At a crucial time in the life of OSP, the Governor signed the anti-body bugging bill passed by the General Assembly which deprived the office of an essential investigative tool. Later, when the OSP was developing a major investigation involving leading Democratic state legislators, the Attorney General refused to sign immunity petitions for essential witnesses. Finally, when funds were withdrawn from the OSP by the General Assembly, the Governor and Attorney General did no more than raise the legality of this action in court. They did not aggressively attempt to expedite court action or publicly protest the destruction of their own special investigative agency.

Other law enforcement agencies in Philadelphia either actively obstructed the efforts of the OSP, or remained on the sidelines. The Philadelphia Police Department, the District Attorney's Office and the United States Attorney's Office were all basically indifferent to probing police and official corruption during Phillips' tenure.

Unjustified court delays created major obstacles to the OSP's investigations. Also, the unwillingness of certain judges to properly use their contempt powers made it impossible for the office to obtain essential testimony.

The General Assembly had been opposed to an investigation of corruption by a special prosecutor from the outset. It refused to appropriate needed state funds on every occasion the Governor requested such appropriations. It penalized the Attorney General for using his own budget to support the OSP by passing restrictive legislation on the application of funds appropriated to the Department of Justice. It deprived the office of the use of body bugs by special

legislation enacted in the midst of the office's probe of police corruption. It struck the final blow to destroy the OSP by enacting legislation giving it control over federal funds for state agencies. Then it enacted an appropriations bill for the allocation of these federal funds that eliminated all financial support for the office.

The OSP not only lacked support from official agencies, but was abandoned by the business, bar, civic and community leadership of Philadelphia as well. It received practically no encouragement from the public.

It was in this overall context that the OSP failed in its mission. This evaluation concludes that because of all these circumstances, the Office of the Special Prosecutor was doomed to defeat from the start.

## RECOMMENDATIONS

1. A special prosecutor is not always needed in corruption investigations and prosecutions. As a general rule, the investigation and prosecution of public corruption is the responsibility of the elected District Attorney of Philadelphia. A District Attorney is not elected solely to prosecute street crime, but rather has the obligation to enforce all the criminal law in his jurisdiction, including white collar crime, organized crime and public corruption. Admittedly, most district attorneys, by virtue of their political backgrounds, may not be inclined to pursue vigorously all such responsibilities.

Thus, recognizing that a district attorney may neglect some portion of his responsibilities, especially public corruption, it is not necessary initially to create a new prosecuting agency. The Attorney General of Pennsylvania has broad law enforcement authority throughout the Commonwealth. However, under existing law in order for him to utilize an investigating grand jury or to prosecute, he must supersede a local prosecutor. As we have observed in this evaluation, supersession involves unnecessary, dilatory and time-consuming delay. We are persuaded that the Attorney General should have concurrent jurisdiction to investigate and prosecute all violations of the criminal law. When that jurisdiction is exercised the Attorney General shall have the effect of superseding the District Attorney.

We recognize that an Attorney General, for political or corrupt motives, at times may not be willing to vigorously act in such matters. In other situations, an Attorney General may confront an

actual or potential conflict of interest in the investigation or prosecution of an official within his own administration. Also, an Attorney General may have attempted to interfere with an investigation or prosecution properly begun by a District Attorney. In such situations a new prosecuting agency, a temporary Special Prosecutor, would be required. Mindful that a special prosecutor in Pennsylvania has been a deputy attorney general and subject to supervision and control, the temporary special prosecutor should be authorized by statute to be a truly independent official. He should therefore be created by an action of the courts. The Supreme Court should have the appointive function. The process could be triggered by petition of the Attorney General, the local District Attorney, if aggrieved, or by any citizen. Legislative proposals of this kind are presently pending before the Congress in the Watergate Reform Bills.

2. This evaluation highlights the critical problems of court delays and the ineffective exercise of judicial sanctions in Pennsylvania. The OSP was confronted repeatedly with dilatory pretrial motions by attorneys and interlocutory appeals. We are not suggesting that legitimate procedural protection should not be sought by or on behalf of an affected defendant or witness. Rather, we suggest that remedial action be undertaken to prevent abuse of the processes. Thus, we recommend that the Pennsylvania Rules of Criminal and Appellate Procedures be revised to provide for expeditious disposition of grand jury, pretrial and interlocutory motions and appeals.

Since a number of the Philadelphia judges handling OSP matters have taken apparently conflicting positions on the definition of criminal contempt we believe it would be appropriate for the Supreme Court of Pennsylvania to clarify the definition.

of witnesses before investigating grand juries were able to evade direct and responsive answers to questions we recommend that judges exercise their contempt powers to require responsive answers to questions legitimately put.

3. We are cognizant of Pennsylvania's long history of opposition to nearly all forms of electronic surveillance, as well as its more recent abolition of one-party consent recording. And we are aware of the competing arguments and different points of view on this issue. We have found, however, in the course of our evaluation, that the investigation of police and official corruption cannot be conducted effectively without the use of electronic surveillance; wiretapping of telephone conversations, placement of microphones in rooms and the use of body transmitters or recorders. We recommend, therefore, the enactment of a statutory scheme similar to the provisions of Title 18 U.S.C. Sec. 2510, et seq., to permit the use of electronic surveillance under court authorization. We further recommend the repeal of the prohibition against the use of one-party consent recording and/or transmission.

4. We recommend that the existing limitation on immunity based upon type of offense be repealed. The authority should be available at least in all corruption-type offenses. When a temporary special prosecutor comes into being by action of the Supreme Court, as recommended earlier, he should be empowered to petition for immunity without the approval of the Attorney General.

INSTITUTE OF CRIMINAL LAW AND PROCEDURE  
603 NEW JERSEY AVENUE, N.W., WASHINGTON, D. C. 20001  
(202) 624-8222

SAMUEL DASH  
DIRECTOR  
HERBERT S. MILLER  
CO-DIRECTOR

April 28, 1976

The Honorable Robert P. Kane  
Attorney General  
Commonwealth of Pennsylvania  
Harrisburg, Pennsylvania

Dear General Kane:

In response to your request that I make an evaluation of the Office of Special Prosecutor in Philadelphia under a contractual arrangement with your office, I wish to confirm what I have stated to you earlier that I am prepared to undertake this task and submit the following informal proposal and budget.

1. Goals and Method of Evaluation. The Office of Special Prosecutor (OSP) was created by the Attorney General more than two years ago after Judge Harry A. Takiff of the Philadelphia Court of Common Pleas had convened and charged a special investigating grand jury in Philadelphia and after the Attorney General superseded the District Attorney of Philadelphia to continue to pursue the investigation by that grand jury and the charges made by the Pennsylvania Crime Commission that a substantial number of Philadelphia police officers and other Philadelphia public officials were involved in corrupt activities. Since the OSP was established for the purpose

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of investigating and prosecuting these and related charges, the evaluation should seek to measure how well it has carried out this assignment. From the outset it is recognized that certain problems and difficulties are inherent in this kind of an evaluation. Ordinarily an evaluation of a government agency assumes that improvement can be measured in quantifiable terms and assessed against a larger quantified background. This assumption cannot apply to a special prosecutor's office.

In the first place there have been too few models of this extraordinary office and still fewer studies to provide a quantified background for comparison. There is no base line established of the universe of corruption against which the special prosecutor's work can be measured. Even the question of what constitutes "success" on the part of a special prosecutor is not readily reduced to quantification. It cannot be determined by the number of indictments or even convictions, since an essential element is the quality of these prosecution actions. And this value judgment is basically a subjective one made by professionals and ultimately the public.

For these reasons an evaluation of this kind poses unique problems which do not lend themselves to social science methodology. They require, rather, professional judgments and opinions after study and analysis by professional experts who are uniquely experienced

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in investigations of official corruption. Through an approach of this kind, by the use of such experts, it is believed that professional judgments can be made concerning the specific assignments given to the OSP and the degree of success or failure the OSP has met in responding to that assignment.

This evaluation obviously cannot attempt a definitive assessment of the base line of corruption which was the target of the operations of the OSP. However, sufficient representative informed opinion can be obtained by the evaluation team to permit it to identify with reasonable accuracy the criminal activity that should have been recognized by the OSP as its principal responsibility for investigation and prosecution. As stated earlier, it is recognized that the success of a prosecution effort cannot be measured by the number of its convictions. The quality of the prosecution activity and the obstacles or opportunities that existed to obstruct or aid this activity are relevant. The evaluation will seek to determine all the significant factors which related to the ability of the OSP to fulfill its responsibilities.

Because of the special nature of an evaluation of this kind, which does not lend itself to social science methodology, I propose to personally conduct the evaluation as the principal investigator. I have attached a copy of my resume, setting forth my qualifications, which I believe indicate that I have established a nationwide reputation.

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as an expert on the conduct of corruption investigations and prosecutions.

I recently served as Chief Counsel and Staff Director of the United States Senate Select Committee on Presidential Campaign Activities (the Senate Watergate Committee). For the past ten years I have been Director of the Institute of Criminal Law and Procedure of Georgetown University Law Center, where I have also served on the faculty as a Professor of Law in criminal law and criminal procedure. My criminal research center has conducted a number of evaluations of criminal justice programs. At present we are in the final stage of an evaluation of the pretrial release program operating in the Court of Common Pleas of Philadelphia under a grant from the William Penn Foundation. Of special significance, I believe, is the fact that I served as District Attorney of Philadelphia by appointment of the Common Pleas judges of Philadelphia to fill the vacancy left by Richardson Dilworth who resigned to run for the office of Mayor of Philadelphia. Prior to that time I served as Chief of the Appeals Division and as First Assistant District Attorney.

My close associate on this project will be Charles Rogovin, a nationally recognized expert in the field of organized crime and in the conduct of corruption investigations and prosecutions. Mr.

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Rogovin's qualifications are attached to this letter. He has had a distinguished career in the criminal justice field.

Like myself, Mr. Rogovin has had both defense and prosecution experience in the city of Philadelphia. He first worked in the Public Defender's Office and then in the District Attorney's Office where he attained the position of First Assistant District Attorney. He was one of the assistant directors of the President's Commission on Law Enforcement and the Administration of Justice (President's Crime Commission), specializing as director of the Organized Crime Task Force. He then became an assistant Attorney General for the Commonwealth of Massachusetts serving as Chief of the Criminal Division and Director of the Organized Crime Section. Mr. Rogovin was the first Administrator of the Law Enforcement Assistance Administration of the United States Department of Justice and he was the first President of the Police Foundation. After serving as a Fellow at the Institute of Politics at the John F. Kennedy School of Government at Harvard University, he established the consulting firm of Criminal Justice Associates, Inc., of which he is President. Mr. Rogovin has served on a number of advisory committees and evaluation teams reviewing the work of criminal justice agencies throughout the country.

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Mr. Rogovin and I will be assisted by one or two consultants in the police field and two law student research assistants.

The methodology will involve extensive on-site interviews with all relevant persons to be conducted by Mr. Rogovin and me together or by either of us separately. These interviews will include the former special prosecutor and his former first assistant; the present special prosecutor; all present staff members of the OSP and persons recommended to be interviewed by former and present staff members of the OSP.

Mr. Rogovin and I will also interview all relevant public officials of Philadelphia to obtain their opinions and as much detailed information concerning their knowledge of the operations of the OSP to develop an external viewpoint of the OSP in official Philadelphia circles. Further, the evaluation team will interview a number of relevant persons associated with agencies or professional activities who would have a substantial number of significant contacts with the OSP, or officials with whom the OSP related, to provide valuable factual information. In addition to Philadelphia officials we will also interview officials in Harrisburg, both in the Executive Branch and the Legislative Branch.

After appropriate judicial action has been taken at the request of the Attorney General, Mr. Rogovin and I will examine relevant grand jury records and any sealed court records or transcripts involving

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investigations conducted by the OSP. In addition to the above interviews and examination of records, an evaluation of OSP records will be made by the evaluation team, including an examination of case files and investigative records.

The study of the OSP records, files, staff offices -- including the intensive personal interviews and review of grand jury records and court files -- will permit the evaluation team to assess:

1. The tactics, strategies and skills of investigators and lawyers of the OSP.
2. Office administration.
3. Recruiting, screening, selection, training and supervising of staff.
4. Office management.
5. The OSP's security system for the protection of the office and files containing sensitive information.
6. Public information programs of the OSP and relationships between the OSP and the news media.
7. The appropriate role and function of an OSP under the circumstances that existed when the OSP was created.
8. Whether this role and function can be performed within any other institutional framework.

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During the course of the evaluation, Mr. Rogovin and I will seek the advice of specialists in the field of investigation and prosecution of official corruption and organized crime. Although it is not contemplated that a formal advisory committee will be organized, both Mr. Rogovin and I have extensive contacts throughout the country in this field and will make appropriate use of them in the interest of this evaluation.

At the conclusion of the collection of data, the evaluation team will analyze and check its data and will prepare an evaluation report for submission to the Attorney General of Pennsylvania and whatever other official agencies have been designated for the proper receipt of this report. The report will not only contain the evaluation findings, but will also include a list of specific recommendations based on these findings.

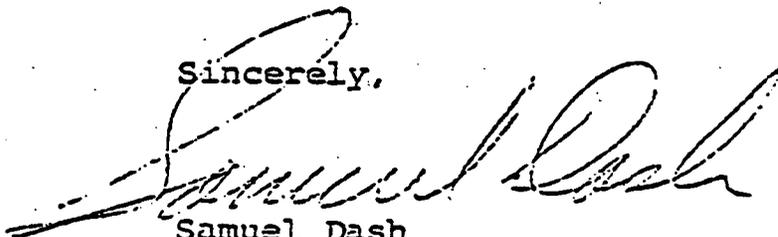
2. Timetable of Evaluation. It is believed that the field work, including all interviews and review of records, files and case materials can be completed in a period of three months -- during June, July and August, 1976. The data would be analyzed and checked during the month of September, 1976 and the evaluation report prepared and submitted by the end of October, 1976.

The Honorable Robert P. Kane--9

April 28, 1976

I have sought to cover the highlights of an evaluation of the Philadelphia OSP, since it was our understanding that you would not require a formal comprehensive proposal. However, if there are any items that you wish to have covered in greater detail or that you believe are unclear, please let me know and I will provide any additional information or explanation required.

Sincerely,

A handwritten signature in cursive script, appearing to read "Samuel Dash".

Samuel Dash  
Professor of Law

SD:mpd

Enclosures

SAMUEL DASH

Temple University, B.S. (First Honor pre-law curriculum 1947)

Harvard Law School, J.D. cum laude (1950) \*

Fairfield University, LL.D. (Honorary Degree - 1974)

Professor of Law and Director, Institute of Criminal Law and Procedure, Georgetown University Law Center.

Chief Counsel and Staff Director, U.S. Senate Select Committee on Presidential Campaign Activities (Senate Watergate Committee).

Chairman of Board of Trustees, District of Columbia Public Defender Service (Defense agency for accused persons who cannot afford counsel in criminal cases created by Act of Congress for D.C.)

Past Chairman, Criminal Law Section, American Bar Association; Criminal Law Section Delegate, House of Delegates, American Bar Association.

Special Consultant, Standards on Prosecution and Defense Function, American Bar Association Project on Standards for Criminal Justice.

Special consultant to Attorney General of Puerto Rico, 1972 (Directed instructional program in criminal procedure for Puerto Rican prosecutors.)

Former Special Consultant, National Association of Attorneys General.

Former Executive Director, D.C. Judicial Conference Project on Mental Disorders.

Former Director, Philadelphia Council for Community Advancement (pioneer Philadelphia poverty program) 1963-1965.

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\* Founded the Harvard Voluntary Defenders of Harvard Law School, while a student there (1949).

Partner, law firm of Dash and Levy, 1958-1963 (specializing in criminal trial work).

Past President, National Association of Defense Lawyers in Criminal Cases.

Author of The Eavesdroppers (Rutgers Univ. Press, 1959) based on nationwide investigation of wiretapping and eavesdropping for the Pennsylvania Bar Endowment.

Partner, law firm of Blank, Rudenko, Klaus and Rome, 1956-1958.

District Attorney of Philadelphia (by unanimous appointment of Philadelphia Board of twenty-one Common Pleas judges to fill vacancy), 1955-1956.

First Assistant District Attorney of Philadelphia, 1954-1955

Chief of Appeals Division, District Attorney's Office, Philadelphia, Pennsylvania, 1952-1954.

Trial attorney, Criminal Division, Department of Justice, Washington, D.C. 1951-1952.

Teaching Associate on faculty of Northwestern University School of Law, Chicago, Illinois, 1950-1951. (While in Chicago, conducted a study of the lower criminal courts of Chicago and reported on study in an article entitled Cracks in the Foundation of Criminal Justice.)

Former Consultant, Ford Foundation.

Member, American Law Institute

Member, ABA Commission on Campus Government and Student Dissent.

Member, ABA Special Committee on Crime Prevention and Control.

Former member, Pennsylvania Supreme Court and Superior Court Criminal Procedural Rules Committee.

Former member, Advisory Committee on the Model Penal Code of the American Law Institute.

Member of Wisconsin Chapter of the Order of the Coif, by action of the faculty of the University of Wisconsin, April 22, 1961.

Member, Board of Governors, Common Cause.

the United States.

, Board of Directors of, International League for the  
of Man (private organization having consultative status  
the United Nations).

- A. Special mission to Northern Ireland in spring of 1972 to investigate "Bloody Sunday" incident -- published report "Justice Denied A Challenge to Lord Widgery's Report on Bloody Sunday."
- B. Special mission to Soviet Union, summer of 1972 to investigate condition of activists and to make contact with members of Human Rights Committee of Moscow.

Member, Board of Governors, Hebrew University, Jerusalem.

Recipient, Earl Warren Medal for Ethics & Human Relations, Univ. of Ju

Publications (Partial Listing)

CHARLES H. ROGOVIN  
71 Kenilworth Street  
Newton, Massachusetts 02158  
617/527-3033

RESUME SUMMARY

PROFESSIONAL  
EXPERIENCE:

1956-1959 Associate in the firm of Polz, Bard, Kamsler, Goodis & Greenfield, Philadelphia

1959-1960 Assistant Public Defender, Defender Association of Philadelphia

1960-1964 Assistant District Attorney, Philadelphia

1964-1966 Chief Assistant District Attorney, Philadelphia

1966-1967 Assistant Director, President's Commission on Law Enforcement and the Administration of Justice (Director, Organized Crime Task Force)

1967-1969 Assistant Attorney General, Commonwealth of Massachusetts  
Chief, Criminal Division and Director, Organized Crime Section

1969-1970 Administrator, Law Enforcement Assistance Administration, United States Department of Justice

1970-1972 President, Police Foundation, Washington, D.C.

1973 Fellow, Institute of Politics, John F. Kennedy School of Government, Harvard University, Cambridge, Massachusetts

1973-1974 Visiting Professor, Brandeis University  
Consultant, Senate Select Committee on Presidential Campaign Activities  
Criminal Justice Consultant

Present President, Criminal Justice Associates, Inc., Torro Lecturer in Legal Studies, Brandeis University.  
Commentator, WGBH-TV News, Cambridge, Massachusetts

**EDUCATION:**

Dwight Morrow High School, Englewood, New Jersey  
Wesleyan University, Middletown, Connecticut, B.A. History,  
1952  
Columbia University Law School, New York City, LL.B., 1956

**ORGANIZATIONS:**

American Bar Association: Chairman, Organized Crime  
Committee, Criminal Law Section, 1971-1972.  
Member Advisory Committee on the Police Function, American  
Bar Association Project on Standards for Criminal  
Justice.  
Member Special Committee on Crime Prevention and Control.  
Phi Delta Phi Legal Fraternity  
Member, Massachusetts Organized Crime Control Council

**PERSONAL:**

Born January 24, 1931, Jersey City, New Jersey  
Married. Two Children

THIS AGREEMENT made and entered into this 12<sup>th</sup> day of May, 1976 by and between Robert P. Kane, Attorney General of the Commonwealth of Pennsylvania, as Chairman of the Governor's Justice Commission and as Head of the Department of Justice (hereinafter called Attorney General) and Samuel Dash, an individual (hereinafter called Investigator):

WITNESSETH:

WHEREAS, a Special Prosecutor was appointed in 1974 by Attorney General's predecessor for the purpose of investigating crime and corruption in the City of Philadelphia; and

WHEREAS, Attorney General is desirous that the performance of the Special Prosecutor's Office during the ensuing two years be thoroughly evaluated; and

WHEREAS, Investigator is uniquely qualified to conduct such an evaluation and has agreed to do so.

NOW, THEREFORE, in consideration of the facts and matters hereinabove recited and of the covenants and conditions hereinafter set forth, the parties hereto, intending to be legally bound, hereby agree as follows:

1. Investigator will conduct an evaluation of the Office of Special Prosecutor employing the methods and personnel described in the proposal submitted by Investigator to Attorney General dated April 28, 1976, which proposal is attached hereto and incorporated herein by reference.

2. Investigator will commence performance under this Agree-

November 15, 1976.

3. Attorney General will pay Investigator for his services and expenses pursuant to this Agreement and those of his agents, consultants and employees, the sum of \$55,956.00, payable as follows:

\$11,000.00 on or about June 1, 1976.

\$11,000.00 on or about the first days of July, August, September and October, 1976.

\$956.00 upon receipt of Investigator's Evaluation Report on or about November 15, 1976.

4. In the event that Investigator should determine at any time after the commencement of performance under this Agreement that larger progress payments are required to enable him to finance the performance hereunder, Attorney General agrees to adjust the payment schedule accordingly, provided that in no event shall the total payments hereunder exceed the contract price of \$55,956.00.

5. Attorney General will cooperate with Investigator by making available to him any personnel and records of the Commonwealth who or which can provide information necessary or relevant to the evaluation.

6. Investigator agrees to comply with the Commonwealth's Non-Discrimination Clause, attached hereto and incorporated herein by reference.

IN WITNESS WHEREOF, the parties hereto have executed

this Agreement the day and year first above written.

Witness:

Cony E. Chasid

Robert P. Kane

(SEAL)

Robert P. Kane  
Attorney General, as Chairman of  
the Governor's Justice Commission  
and Head of the Department of  
Justice

Approved as to form and  
legality

Samuel Dash

(SEAL)

W. W. A. Curran  
Deputy Attorney General

(I hereby certify that funds in  
the amount of \$55,956.00 are  
available under Appropriation  
01-11-14-75-1-01-02-109-10019  
(FY 76) 01-11-14-76-1-01-02-109-10019)

L. A. Titus  
Comptroller

IN THE COURT OF COMMON PLEAS  
OF PHILADELPHIA COUNTY  
Criminal Trial Division

COMMONWEALTH OF PENNSYLVANIA : JULY TERM, 1974  
V. : INDICTMENTS NOS. 879-881  
JAMES MALLOY : 1923-1925  
FRED IANNARELLI : 1928-1930  
LEONARD GNIEWEK a/k/a BEBO : NOVEMBER TERM, 1974  
INDICTMENTS NOS. 1935-1937

COMMONWEALTH'S ANSWER TO DEFENDANTS'  
MOTIONS TO DISMISS INDICTMENTS UNDER RULE 1100

The Commonwealth of Pennsylvania, by Walter M. Phillips, Jr. Deputy Attorney General, Mark J. Biros and Nancy J. Moore, Assistant Attorneys General, in response to the above-named defendants motions to dismiss the indictments under Rule 1100(f), Pa. R. Cri P., respectfully represents:

APPLICATION OF DEFENDANT IANNARELLI

- 1.-4. Admitted.
5. Denied. The defendant Iannarelli was indicted on November 29, 1974 by the November Term, 1974, Regular Grand Jury of Philadelphia County not the November Investigating Grand Jury.
6. Admitted.
7. Denied. The period from the date of the Presentment until the date this case was set for trial, to wit, February 5, 1976 is less than nineteen (19) months.
- 8.-9. Denied, for reasons set forth in paragraphs 1 through 42 of New Matter.

APPLICATION OF DEFENDANT GNIEWEK

1. Admitted.

ments No. 882-884. The Commonwealth upon order of Judge Kubacki elected not to proceed on these indictments and is prepared to go to trial on July Term, 1974, Indictments No. 1928-1930, which indictments were obtained on July 31, 1974, based upon the Presentation of the January Term, 1974, Special Investigating Grand Jury issued on July 12, 1974. The Commonwealth denies any implication that the period within which to commence trial on Indictments No. 1928-1930 commenced on June 21, 1974.

3. The Commonwealth admits the defendant has not been tried on Indictments No. 1928-1930 of the July Term, 1974; but denies any implication that it has not complied with Rule 1100, Pa. R. Crim. P.

4. Denied, for reasons set forth in paragraphs 1 through 42 of New Matter.

#### APPLICATION OF DEFENDANT MALLOY\*

1. Denied. The Commonwealth has at all times proceeded with due diligence in attempting to bring this matter to trial.

2. Denied. The time within which this case was to be tried was tolled because the Commonwealth filed a motion to extend time within which to commence trial on January 30, 1976.

3.-4 Denied, for reasons set forth in paragraphs 1 through 42 of New Matter.

5. Denied. The February 2, 1976, date was agreed to by all counsel during the fall of 1975. (Other reasons why this case was not brought to trial prior to February 2, 1976, are set out in the New Matter, infra).

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\* Although this Application was denied by Judge Kubacki on February 3, 1976, counsel for Malloy renewed the motion on February 5, 1976.

1. On May 15, 1974, the Honorable D. Donald Jamieson, President Judge of the Court of Common Pleas of Philadelphia County, designated the Honorable Levy Anderson as the judge to preside over all cases brought by the Office of the Special Prosecutor.
2. On July 12, 1974, the January 1974, Investigating Grand Jury issued a presentment recommending the indictment of the defendants James Malloy, Leonard Gniewek, and Fred Iannarelli.
3. On July 31, 1974, the July Grand Jury returned indictments charging the defendants as follows:
  - a. Nos. 1923-1925 charging James Malloy with Bribery, Obstruction of the Administration of Law, and Conspiracy.
  - b. Nos. 1928-1930 charging Leonard Gniewek with Bribery, Obstruction of the Administration of Law, and Solicitation.
  - c. Nos. 1926, 1927, and 2132 charging Fred Iannarelli with Bribery, Solicitation, and Conspiracy.
4. During most of the month of August, 1974, Judge Anderson was on vacation and was unavailable to counsel.
5. At the end of August, 1974, Judge Anderson disqualified himself from hearing these cases.
6. On August 28 and September 12, 1974, President Judge Jamieson designated the Honorable Stanley L. Kubacki to hear these cases.
7. On or about September 18, 1974, Judge Kubacki notified Anthony D. Pirillo, Jr., counsel for James Malloy, and Nicholas Clemente, counsel for Leonard Gniewek, that pre-trial motions were to be filed on October 1, 1974, and arguments would be heard on October 15, 1974.
8. On September 23, 1974, by order of Judge Kubacki, Fred Iannarelli appeared in court represented by Richard G. Phillips,

Esq., and was arraigned. At that time the Court ordered all pre-trial motions be filed by October 1, 1974, and set October 15, 1974, as the date for argument on these motions.

9. On October 15, 1974, the Court heard argument on the pre-trial applications of Malloy and Gniewek.

10. On October 15, 1974, although the Commonwealth was prepared to proceed, the Court continued the hearing on the pre-trial applications of Iannarelli.

11. On October 31, 1974, the Court was prepared to hear, and the Commonwealth was prepared to present, oral argument on all pre-trial motions. At that time, Richard Phillips, Esq., counsel for the defendant Iannarelli challenged the validity of the supersession of the District Attorney by the Attorney General based upon the recently decided case of Frame v. Sutherland, \_\_\_ Pa. \_\_\_, \_\_\_ A.2d \_\_\_ (10/25/74). The Court then postponed consideration of all motions in the Iannarelli case until after the filing of briefs on this issue. On November 7, 1974, the Commonwealth filed its brief on all pre-trial matters in the Iannarelli case. On November 15, 1974, the Court heard oral argument on all pre-trial motions.

12. On November 18, 1974, the Court ordered the indictments against Fred Iannarelli quashed. On that same date the Court denied the pre-trial applications of Malloy and Gniewek.

13. On November 18, 1974, Judge Kubacki notified Mr. Pirillo and Mr. Clemente that the cases of Malloy and Gniewek were listed for trial on January 2, 1975.

14. On November 29, 1974, after giving appropriate notice the Commonwealth obtained Indictments 1935-1937, November Term,

tion to join the case against Fred Iannarelli with the cases of Leonard Gniewek and James Malloy.

16. Paragraph 7. of the application for joinder incorporated in paragraph 15 above notified counsel for Fred Iannarelli that the cases with which his case was sought to be joined was listed for trial on January 2, 1975.

17. On December 30, 1974, the Court granted the Commonwealth application for joinder.

18. On January 2, 1975, all defense counsel requested a continuance on the grounds that they wished to file new motions in light of P.L. \_\_\_\_, Act No. 327, Act of December 27, 1974, also known as the Anti-Eavesdropping Law. This Act had been passed by the Legislature on November 20, 1974, and was signed by the Governor on December 27, 1974.

19. Counsel for Iannarelli also requested a continuance on the grounds that he had only two days notice in advance of trial and he had not had adequate time to prepare. Counsel stated that one of the things he had yet to do was listen to the tapes which the Commonwealth had in its possession. Counsel made these representations notwithstanding his awareness from December 4, 1974, that if Iannarelli's case was joined with those of Gniewek and Malloy he would have to be ready for trial on January 2, 1975. This representation was made notwithstanding counsel's awareness that the 180 days in which the case had to be brought to trial pursuant to the mandate of Rule 1100, Pa. R. Crim. P., would expire on January 8, 1975. Counsel's representation that he had not yet had the opportunity to listen to the Commonwealth's tapes was made notwithstanding the fact that all counsel were notified by a letter of November 14, 1974, that the tapes were available.

continuance on the grounds that he was attached for trial before the Honorable John B. Hannum, of the United States Court for the Eastern District of Pennsylvania on January 6, 1975, and the trial of this matter would conflict with that attachment. Counsel made these representations despite the fact that his attachment in federal court occurred several weeks after his notification by Judge Kubacki that Malloy's case was listed for trial on January 2, 1975, and despite the fact Mr. Pirillo had not personally handled any part of the federal case until that time as he had permitted his associate, Salvatore Cucinotta, to handle the federal litigation.

21. The Commonwealth was ready for trial on January 2, 1975, and opposed the continuance.

22. On January 2, 1975, the Court continued these cases until February 3, 1975.

23. Malloy, Gniewek, and Iannarelli personally waived the 180 day rule until the next listing in an on the record colloquy.

24. On January 2, 1975, after the continuance had been granted counsel for the Commonwealth learned that one of its witnesses would be unavailable during the week of February 3, 1975. Counsel immediately notified the Court of this problem. On January 6, 1975, the request to extend the time within which to commence trial made by the Commonwealth because one of its essential witnesses was unavailable was denied.

25. On January 20, 1975, a hearing was held before Judge Kubacki on the Commonwealth's renewed application for a one week continuance and extension of the 180 day rule due to the unavailability of an essential Commonwealth witness. Due to the absence of two of the three defense counsel, Judge Kubacki announced that he would not rule on that application.

Kubacki granted the Commonwealth's Motion and continued the case until February 10, 1975.

26. On or about February 6, 1975, a continuance was granted until March 24, 1975, at the request of defense counsel, and the defendant waived his rights under Rule 1100, Pa. R. Crim. P. The date set for trial was March 24, 1975.

27. On March 24, 1975, trial was continued until further notice at the request of defense counsel, to await a decision in Gwinn v. Kane, a case which sought, unsuccessfully, to challenge the existence of the Office of the Special Prosecutor. All defendants waived the 180 day rule of the record.

28. On or about June 4, 1975, a conference was held with defense counsel, Judge Kubacki and Judge Bonavita Cola. At the request of defense counsel trial was continued until October 1, 1975, because the June date which had been set was inconvenient to defense counsel. Counsel for Iannarelli was scheduled to be in San Francisco on the date set for trial; counsel for defendant Malloy was to begin the trial of Commonwealth v. Lupica; and, counsel for defendant Gniewek was unable to locate his client.

29. On June 23, 1975, a hearing was held during which the defendants waived their rights under the 180 day rule until October 1, 1975.

30. On or about September 25, 1975, Mr. Phillips, counsel for Iannarelli, contacted Judge Kubacki and informed him that after consultation with all counsel, it was agreed they would appear before Judge Kubacki on September 26, 1975 and request a continuance. Mr. Phillips explained that Mr. Pirillo was on trial and could not be ready on October 1, 1975; and, that he was leaving that weekend for Las Vegas to represent another client in

no defense counsel appeared. Judge Kubacki continued the date of the trial to November 1, 1975 because the defense was unavailable and not prepared to go forward.

31. Because November 1, 1975, was a Saturday, the case was listed for trial on November 3, 1975.

32. On November 3, 1975, Judge Kubacki continued the case until November 24, 1975, because Mr. Phillips, counsel for defendant Iannarelli, did not appear; and, Mr. Pirillo, counsel for defendant Malloy, was still involved in trial of Commonwealth v. Hallman. The Commonwealth was prepared to go forward on that date (In a telephone conversation later that day Mr. Phillips informed Assistant Attorney General Nancy J. Moore that the reason he did not appear at the time set for trial is that he assumed that Judge Kubacki was still presiding over the case of Commonwealth v. Joseph Brocco et. al. and could not go forward with this case. The Brocco case was resolved on November 1, 1975, and Judge Kubacki was in fact available on November 3, as scheduled).

33. On or about November 24, 1975, counsel for defendants Malloy and Iannarelli appeared at a conference set by Judge Kubacki. (Counsel for defendant Gniewek was notified of the conference, but failed to appear.) At that time Judge Kubacki notified counsel that because counsel for defendant Malloy was still involved in the trial of Commonwealth v. Hallman, the instant case would be continued until the resolution of that trial. Counsel for defendant Iannarelli objected to any continuance; however, Judge Kubacki stated that the three defendants would be tried together. Counsel for defendant Malloy requested a continuance until January 3, 1976. At that time counsel for defendant Iannarelli

would request a continuance until at least February 2, 1976. Counsel for defendant Malloy agreed, and counsel for defendant Iannarelli, after consulting by telephone with his client, waived all rights under the 180 day rule from November 24, 1975, until February 2, 1976 (without prejudice to any claims he might have under that rule prior to November 24, 1975).

34. On or about December 1, 1975, counsel for defendant Gniewek appeared before Judge Kubacki and was informed of the proceedings of November 24. At that time, counsel for defendant Gniewek adopted the identical position as counsel for defendant Iannarelli, i.e., he objected to any continuance, but agreed to waive all rights under the 180 day rule from November 24, 1975, to February 2, 1976, without prejudice to any claim arising therefrom prior to November 24, 1975. Counsel further stated that defendant Gniewek had agreed to such waiver and that counsel objected to having Gniewek appear personally before Judge Kubacki at that time.

35. On January 26, 1976, Judge Kubacki began trial of Commonwealth v. Kamarauskas which was scheduled to terminate on or about January 30, 1976.

36. On January 29th and 30th, 1976, Judge Kubacki was ill and no proceedings were held in the trial of Commonwealth v. Kamarauskas. It was anticipated that trial in that matter would terminate on February 3, 1976.

37. On January 30, 1976, the Commonwealth, although prepared to proceed on February 2, 1976, filed a Motion to Extend Time Within Which to Commence Trial until immediately after trial of Commonwealth v. Kamarauskas. A hearing was set for February 3, 1976, before Judge Savitt. All defense counsel were notified of

on February 3, 1976, because he had been specially assigned to hear pre-trial motions in this case. Mr. Phillips indicated he could not be there but would send someone; Mr. Clemente said he would be there at 11:00 A.M.

39. On February 3, 1976, Mr. Clemente did not appear and Mr. Phillips neither appeared nor sent someone to represent defendant Iannarelli. Mr. Tumini, an associate of Mr. Pirillo's appeared representing Mr. Malloy.

40. All counsel having been notified of the hearing and two of the three failing to appear, Judge Kubacki granted the Commonwealth's motion and set February 5, 1976 as the date to commence trial.

41. The delays in bringing this case to trial have not been the fault of the Commonwealth with the exception of a one week continuance from February 3, 1975 to February 10, 1975, because of the unavailability of a Commonwealth witness.

42. The Commonwealth has proceeded in this matter with due diligence.

WHEREFORE, the Commonwealth requests this Honorable Court to deny the defendants' Motions to Dismiss the Indictments.

Respectfully submitted,

WALTER M. PHILLIPS, JR.  
Deputy Attorney General

BY: \_\_\_\_\_

MARK J. BIROS  
Assistant Attorney General

COMMONWEALTH OF PENNSYLVANIA:

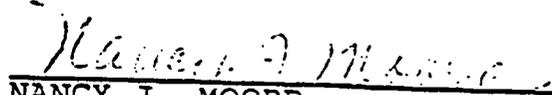
COUNTY OF PHILADELPHIA

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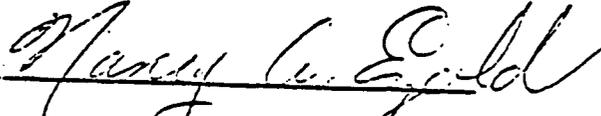
AFFIDAVIT

MARK J. BIROS and NANCY J. MOORE being duly sworn according to law, deposes and says that they are Assistant Attorneys General of the Commonwealth of Pennsylvania, and that the facts contained in the foregoing answer are true and correct to the best of their knowledge, information and belief.

  
\_\_\_\_\_  
MARK J. BIROS  
Assistant Attorney General

  
\_\_\_\_\_  
NANCY J. MOORE  
Assistant Attorney General

Sworn to and Subscribed  
before me this 9th day  
of February, 1976.

  
\_\_\_\_\_  
NANCY A. EZOLD  
Notary Public for the Commonwealth of Pennsylvania  
My Commission Expires February 23, 1976

OFFICE OF SPECIAL PROSECUTOR - RECORD 4/1/74 TO DECEMBER 31,

<u>GRAND JURY PRESENTMENTS:</u>		29
<u>INDIVIDUALS INDICTED:</u>		55
<u>CONVICTIONS:</u>		9
Perjury:	4	
Substantive Crimes:	5	
On Appeal:		
<u>GUILTY PLEAS:</u>		13
Perjury:	2	
Substantive Crimes:	11	
<u>ACQUITTALS:</u>		9
<u>NOLLE PROSS AND DISMISSALS:</u>		6
<u>AWAITING TRIAL:</u>		18
Levinson cases:	9	
Interlocutory appeals:	5	
Other:	4	

Relevant Cases

I. Background-Grand Jury Investigations:

Case of Lloyd and Carpenter, 3 Pa. L.J. R. (Clark) 188  
(Phila. Q.S. 1845).

Comm. ex rel Camelot Detective Agency v. Specter, 451 Pa. 373,  
303 A.2d 203 (1973).

Comm. v. Columbia Investment Corp., 457 Pa. 353, 325 A. 2d 238  
(1974).

Shenker v. Harr, 332 Pa. 682, 2 A.2d 298 (1938).

Smith v. Gallagher, 408 Pa. 551, 185 A. 2d 135 (1962).

II. Challenges to the Office of the Special Prosecutor, Its  
Funding and Grand Juries:

Comm. v. Levinson, Pa. Super. , 362 A. 2d 1080 (1976).

Gwinn v. Kane, 19 Pa. Cmwlth. 243, 339 A.2d 838 (1975),  
aff'd Pa. , 348 A.2d 900 (1975).

Hallman v. Phillips, 409 F. Supp. 423 (E.D. Pa. 1976).

In Re: Investigation of January 1974 Philadelphia County  
Grand Jury, Petition of Custodian of Records, et al.,  
458 Pa. 586, 328 A.2d 485 (1974).

In Re: November 1975 Special Investigating Grand Jury  
Appeal of F. Emmett Fitzpatrick, Pa. , 356 A. 2d  
759 (1976).

Myers v. Kane, Pa. Cmwlth. , 350 A.2d 909 (1976).

Packel v. Mirarchi, 458 Pa. 602, 327 A.2d 53 (1974).

Packel v. Takiff, 457 Pa. 14, 321 A.2d 649 (1974).

III. Challenges to Subpoenas and Immunity:

1. Subpoenas

In Re: January 1974 Special Investigating Grand Jury,  
Appeal of Augustine Salvitti, 238 Pa. Super, 465, 357  
A.2d 622 (1976).

In Re: January 1974 Special Investigating Grand Jury,  
Appeal of Kenneth Shapiro, 238 Pa. Super 486, 357 A. 2d  
633 (1976).

In Re: January 1974 Special Investigating Grand Jury,  
Appeal of Louis Vignola, 238 Pa. Super, 488, 357 A.2d 633  
(1976).

In Re: January 1974 Special Investigating Grand Jury,  
Appeal of Natale Carabello, 238 Pa. Super, 479, 357 A. 2d  
628 (1976).

In Re: January 1974 Special Investigating Grand Jury  
In the Matter of Tracey Services Co, 238, Pa. Super,  
476, 357 A.2d 633 (1976).

## 2. Immunity

In Re: Falone, 231 Pa. Super., 388, 332 A.2d 538 (1974),  
reversed 464 Pa. 42, 346 A.2d 9 (1975).

In Re: LaRussa, 232 Pa. Super. 272, 332 A.2d 553 (1974), reverse  
464 Pa. 86, 346 A. 2d 32 (1975).

In Re: Martorano, 231 Pa. Super., 395, 332 A. 2d 534 (1974),  
reversed 464 Pa. 66, 346 A.2d 22 (1975).

and generally Comm. v. Brady, 24 Bucks 149, aff'd 228 Pa. Super.  
323 A.2d 866 (1974).

## IV. Office's Challenges of Counsel

In Re: January 1974 Special Investigating Grand Jury,  
Re: Marvin Comisky and Jerome Richer, Pa. Super.,  
361 A.2d 325 (1976).

Pirillo v. Takiff, 462 Pa. 523, 341 A.2d 896 (1975),  
aff'd on rehearing Pa., , 352 A.2d 11 (1975),  
cert. denied, 423 U.S. 1083, 965 S. Ct. 873, 47 L. Ed.  
2d 94 (1976).

## V. Statutes:

Immunity, 19 P.S. § 640.1-6.

Supersession by Attorney General, 71 P.S. § 297.

Electronic Surveillance, P.S. §

