

## **A Presidential commission on drug policy: instrument of reform or defender of the status quo?**

BY RICHARD J. BONNIE

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*Critics of the War on Drugs often invoke the two reports of the National Commission on Marihuana and Drug Abuse (1971–73) to signify an alternative conception of drug policy, one rooted in the public health tradition rather than criminal law enforcement. Based on the example of the Marihuana Commission, contemporary proponents of a “harm reduction” strategy have supported the creation of a Presidential commission to conduct a comprehensive study of U.S. drug policy. They envision an ambitious project designed to rethink the current approach and develop a blueprint for a reformed policy aiming to reduce harm rather than to eradicate drugs or drug use. When established to study controversial social problems, however, Presidential advisory commissions are utilized either to help set an agenda for a Presidential initiative or to reaffirm the status quo. Given the present political climate, it is doubtful that a new commission will be the instrument of much-needed reform.*

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Critics of the War on Drugs often invoke the two reports of the National Commission on Marihuana and Drug Abuse (1971–73) to signify an alternative conception of drug control policy, one rooted in the tradition of public health rather than criminal law enforcement. Having served as associate director of the commission (chaired by former Pennsylvania governor Raymond P. Shafer), I welcome the attention now being given to the commission's work, 25 years after it recommended decriminalization of marijuana use and endorsed a treatment-oriented approach to drug addiction. Based on the example of the Marihuana Commission, proponents of what is now called a "harm reduction" approach have supported the creation of a Presidential commission to conduct a comprehensive study of U.S. drug policy. They envision an ambitious project designed to rethink the premises of the current approach and to develop a blueprint for a reformed policy aiming to reduce harm rather than to eradicate drugs or drug use. The question addressed in this paper is whether the history of national advisory commissions, including the Marihuana Commission, provides any basis for such optimistic expectations.

## I.

Presidential advisory commissions (or "national" advisory commissions when some members are appointed by the Congress) are most often used in American government as sources of technical advice on the administrative organization of the executive branch or on specific substantive issues for which specialized expertise is acknowledged to be essential. (Illustrative issues include the basing of the MX missile and the desirability of restructuring the appellate jurisdiction of the federal courts.) Less often, such commissions have been established to serve investigative or fact-finding roles relating to disasters or other social traumas. (Illustrations include the Rogers Commission on the *Challenger* disaster, the Kerner

Commission on the 1967 riots, and the Warren Commission on the Kennedy assassination.) In all of these contexts, commissions have made genuine and significant contributions to public understanding and to the making of public policy.<sup>1</sup> (For general assessments of the use of Presidential commissions, see Flitner, 1986; Tutchings, 1979; Wolanin, 1975.)

In contrast, Presidential advisory commissions have had only mixed success when asked to address value-laden issues of social or economic policy. These commissions have often sponsored or stimulated valuable research and have helped to advance public understanding of a subject. But when success is measured in terms of an impact on public policy, the record is a spotty one. Commission reports have often been ignored, even by the President who requested them. Well-known examples include the reports of the Commission on Obscenity and Pornography and the Scranton Commission on Campus Unrest, both issued in 1970.<sup>2</sup>

In other cases, however, commission reports have been converted into immediate action. Two examples of successful commissions are the Commission on Law Enforcement and the Administration of Justice (the "Crime Commission"), chaired by former attorney general Nicholas Katzenbach (1967), and the Commission on an All-Volunteer Armed Forces (1972). (On these two commissions, see Graham, 1985, 5-25.) The recent report of the National Bioethics Advisory Commission recommending a federal statutory ban on "somatic cell nuclear transfer" (cloning) in humans is likely to be adopted swiftly.

The variety of subjects and political circumstances make generalizations difficult, but a review of the recent history of Presidential advisory commissions leaves me with the following impressions.

First, commissions are rarely established to study intensely contested, highly moralized issues of social policy such as

criminal punishment, sexual behavior, or human reproduction. There has never been a commission on the death penalty, consensual sexual behavior, or abortion. In these contexts “the lines are so sharply drawn and the scientific issues so peripheral that any commission would be viewed as purely political and lacking in legitimacy” (Mendeloff, 1985, 89). Pornography is the exception that proves the rule. Two commissions have reported on this subject: one in 1970 recommended liberalization, and a counter-commission appointed by Attorney General Ed Meese in 1984 took a more repressive view. Neither had a significant impact on public policy.

Second, commissions are sometimes established, by agreement of the President and Congress, in order to enable them to find the middle ground in a highly polarized debate. The in a highly polarized debate. The commission’s report provides political cover for the compromise; the President and Congress can thus deflect the pleas of constituents for the status quo or for more extreme changes. The Commission on Social Security (1983) is the best example. (See Greenberg and Flick, 1983.)

Third, commissions on social issues are usually established as tactical moves with short-term political aims. They are rarely established for the purpose of breaking new ground or conducting a genuinely unconstrained assessment. Sometimes, for example, a President establishes a commission primarily to counter intensifying argument against existing policies and to reaffirm the status quo. In other situations, a commission is appointed to help the President mobilize support for a new initiative that he has already decided to undertake.

In sum, Presidential advisory commissions on social issues tend to be extensions of ongoing political discourse. They are politically constituted and politically constrained. By and large, they are not expected to displace the existing dialogue or to reconfigure the debate. And they are never appointed as

a way of questioning basic premises or rethinking controversial social policies.

It is possible to envision a more ambitious role for Presidential advisory commissions. For example, we can imagine a conversation between President Bill Clinton and Senate majority leader Trent Lott during which both participants endorse the following observations:

Our current social policies in this area (e.g., crime, drugs) are unsatisfactory. The debate has exposed fundamental differences of opinion about goals, about the effects of our current policies, and about the likely consequences of various new measures. We should really take a good hard look at the situation. Perhaps we need a new paradigm. We may decide to perpetuate our current approach, but we should not do so without first giving truly open-minded attention to the alternatives. The only way to get a meaningful study is to appoint an independent, non-partisan commission. Right now, fear of political repercussions tends to close off debate. It is too risky for any politician even to discuss an alternative approach, much less to endorse it. We need to take this issue out of everyday political debate in order to better understand the nature of the problem and to make an informed assessment of the alternative approaches that are available for dealing with it.

This would be an excellent rationale for appointing a commission on many highly contested subjects. Two prime candidates would be drug policy and criminal justice policy, especially the proper uses of imprisonment. But this will not happen. As I have said, commissions do not serve a "rethinking" function in the U.S. political scene. Neither the President nor Congress would want to put all options on the table or to acknowledge the need for an independent voice. Neither the President nor Congress wants to surrender agenda control or the prerogative of framing an issue to a politically unresponsive or unpredictable body.<sup>3</sup> George Stigler (1963, 23) emphasized the political role of commissions in an interesting paper thirty years ago. "Why," he asked, "does the government form commissions?"

The most important answer . . . is that the commission is deemed an efficient instrument of propaganda. The many semi-unanimous voices will somehow sound louder in chorus than the sum of their individual efforts. The whole art of commissionmanship is to select honorable and disinterested members who will mostly agree with the position which the creators of the commission desire. This is not so difficult as it may sound, because most honorable and disinterested men of distinction (1) have no very definite ideas on most specific questions . . . but (2) have definite, known sentiments and inclinations; and hence are predictable. (Stigler, 1963, 23)

The politically constrained role of Presidential advisory commissions in the United States should be contrasted with the successful history of the Royal Commission in the United Kingdom (and perhaps in other Commonwealth countries). As Frank Popper (1970, 50) has observed, British Royal Commissions have compiled "a far better record than Presidential commissions for the impact, usefulness and nonpolitical character of their advice." He correctly observes that "Royal Commissions [are] less narrowly political and more concerned with substantive long-range policy than Presidential commissions" (Popper, 1970, 55). Since the early 19th century, Royal Commissions have been a major source of British social reform. In the 1950s and 1960s a Royal Commission recommended abolition of the death penalty, and a prestigious committee appointed by the Home Office recommended decriminalization of consensual sexual behavior. To an American observer, it is nothing short of remarkable that Parliament enacted legislation to implement each recommendation.

Popper attributes the less partisan and more authoritative role of Royal Commissions to a variety of factors, including structural differences between the Presidency and the Crown, but I am inclined to emphasize important differences in the political culture. In Britain, the prevailing conception of democratic governance leaves room for policy-making bodies selected on the basis of wisdom and authority rather than political affiliation.

The heart of the matter is that the Royal Commissions represent the authority of an intellectual elite,<sup>4</sup> whereas the authority of a U.S. Presidential commission is largely the reflected authority of the President. The work of U.S. commissions is also inevitably constrained and shaped by the interest-group politics of a diverse, pluralistic political culture.

The highly symbolic features of political debate in the United States tend to suppress consideration of long-term societal interests. This accounts in part for the role the U.S. Supreme Court has come to play in our political order. Only by allowing the courts to exercise the power of constitutional review on complex issues of social justice and personal freedom is it possible to correct for the nearsightedness of American politics. For better or worse, the Supreme Court has from time to time served the role of Royal Commission.<sup>5</sup>

To recapitulate my observations up to this point, U.S. Presidential commissions on social policy issues serve mainly as extensions of political discourse rather than as an opportunity to undertake a detached and objective inquiry above the political fray, as it were. They ordinarily conduct politically constrained inquiries to reach preordained conclusions. Such a commission is not likely to make a transforming contribution to public policy or public dialogue. Instead, the value of such a commission has to be measured in relation to the short-term aims and expectations of the President who established it. In this regard, there are two main Presidential motivations.

When established to study controversial social problems, Presidential advisory commissions are meant either to set the stage for, and develop the details of, an initiative that the President has already decided to undertake, or to deflect growing political pressure to change an existing policy. That is, they are meant either to help set an agenda for a Presidential initiative or to reaffirm the status quo. Another way of putting the same point is that commissioners are appointed either "to raise the public interest in an issue" or "to move a

hot issue off the agenda" (Greenberg and Flick, 1983, 9). The so-called Crime Commission established by President Johnson (1965–67) is of the first type. The National Commission on Marihuana and Drug Abuse established by President Nixon (1971–73) is of the second type.

## II.

In the literature on Presidential advisory commissions, the National Commission on Marihuana and Drug Abuse is regarded as an example of a renegade commission because it recommended change (decriminalization of marijuana) against the wishes of a President who preferred to maintain the status quo. (See, for example, Greenberg and Flick, 1983.) It is often mentioned as one of four such controversial commissions, the other three being the Kerner Commission (1968); the Eisenhower Commission on Violence (1969), appointed after the Chicago convention and the assassinations of Martin Luther King, Jr. and Robert Kennedy; and the Scranton Commission on Campus Unrest (1970).

I think this characterization of the Marihuana Commission is an exaggeration. The other three commissions were appointed in reaction to symptoms of deep social distress rather than to help the President set an agenda of his own. In contrast, President Nixon had already identified drug abuse control as a major priority of his administration. Moreover, aside from the decriminalization recommendation, the Marihuana Commission's report was a general endorsement of the main components of the Nixon administration's drug policy. What has been largely forgotten during the repressive years of the Reagan-Bush drug war is that the Nixon administration's policies were innovative and enlightened, notwithstanding the President's occasionally repressive rhetoric. In this sense, I believe that most of the Marihuana Commission's work fits the usual model of the Presidential commission—it provided an intel-



lectual and scientific rationale and some programmatic details for initiatives that the President was already undertaking.

What initiatives do I mean? I am referring, for example, to the voluntary-treatment strategy embodied in the Drug Abuse Office and Treatment Act of 1972, which was a major departure from the coercive approach of the past and has served as a model for legal response to the AIDS epidemic. The Nixon administration created the administrative structure for a community-based treatment system and invested billions of federal dollars to create a stable program capacity offering multiple modalities of treatment.

The Marihuana Commission's report set out a conceptual foundation for a public health approach to drug use and, in so doing, reinforced and validated the important innovations being undertaken by the Nixon administration. In retrospect, it is evident that the Nixon administration accepted the idea that rational drug policy should be guided by considerations of social harm rather than by abstract moralisms. It also accepted the idea that drug use is not one problem but many problems, raising different levels of social concern, and that differential social responses would be required. The Marihuana Commission developed these ideas in depth by producing typologies of drug use and an inventory of social and legal responses.

Among the Marihuana Commission's most controversial ideas was the suggestion that U.S. drug policy had overrelied on criminalization. If criminal sanctions were to be deployed against drug users, the commission reasoned, they should be used for therapeutic leverage, not as a means of punishment. Even this idea was not radically inconsistent with the policies implemented by the Nixon administration—downgrading of penalties for drug users to misdemeanors and the development of diversion programs for users through its TASC (Treatment Alternatives to Street Crime) program.

Although President Nixon himself did not realize it, this was not a renegade commission. I am sure that Drs. Jerome Jaffe and Robert DuPont—who directed the White House Special Action Office for Drug Abuse Prevention (SAODAP) during its five-year existence from 1973 through 1977—would agree. Many of the commission's ideas about research and the development of information systems were implemented by SAODAP and later by the National Institute on Drug Abuse (NIDA).

This is not the whole story, of course. In one respect the commission did reach beyond the political constraints within which it was expected to operate. The commission's first report recommended decriminalization of possession of up to one ounce of marijuana for personal use. This was clearly not what either the administration or the proponents of reform expected from such a conservative commission. The commission's second report not only reaffirmed its support for decriminalization of marijuana use but also set forth a vision of drug policy that would rely less on criminal sanctions and more on other methods of discouraging consumption and reducing the social burdens associated with drug use. It also emphasized the costs of prohibitory interventions and counseled against militaristic rhetoric, which tends to suppress consideration of cost and relative gain. In short, it was a forerunner of what is now called a harm-reduction approach.

The Marijuana Commission's second report was issued in 1973. What was its fate? Over the short term, the commission was a huge success. Its marijuana proposal had a demonstrable and immediate effect on public discourse and on public policy. Numerous professional organizations and national opinion-makers endorsed the commission's recommendation. During 1973–77 eleven states enacted decriminalization legislation. President Carter also endorsed decriminalization, illustrating that what was formerly a radical idea had come into the mainstream of political debate. Because the Ford and Carter administrations also continued federal support for the

public health initiatives of the Nixon years, it seemed to me during that period that the commission's work had helped to lay a foundation for a coherent and stable social response to drug use in modern society.

Unfortunately, this proved to be too optimistic an appraisal. Support for decriminalization began to erode in 1977 and had virtually disappeared by the time President Reagan took office. Not long thereafter, the nation was fighting another drug war; increased law enforcement and reduced domestic spending obliterated the public health infrastructure that had been so painstakingly built over the past decade. The commission's vocabulary, focusing on "relative harm" and "costs and benefits," was displaced by the rhetoric of repression and "zero tolerance."

Did the work of the Marihuana Commission have an enduring impact? I don't think so. The commission did not alter the basic terms of the debate. The political winds that shape, and reshape, drug policy have not been stilled. In retrospect, it seems that the commission's ideas serve only as historical footnotes, not as an authoritative blueprint for policy-making in the future.

Perhaps this is an unduly pessimistic assessment. Perhaps the commission's contribution is reflected in what is now taken for granted. Together with Canada's LeDain Commission, the Marihuana Commission brought the concept of decriminalization—as distinct from legalization—into the policy-making vocabulary. The commission helped to broaden the frame of reference in thinking about drug problems to include alcohol and nicotine. And the commission helped to create the information systems that help us monitor the incidence and patterns of use. Frankly, however, these are traces of footsteps in the sand. The lesson, as I see it, is that a social-issue commission cannot have an enduring impact without receptive political leaders who are willing to put new policies in place. But even then, if the policies do not become deeply

rooted, a change in the political climate can easily sweep them away. The battle for reform must then begin anew.

### III.

Memories are short. Toward the end of the Reagan-Bush administration in the early 1990s, frustration with the status quo produced calls for a new commission on U.S. drug policy. Congressman Conyers sponsored a proposal to establish a National Commission to Study the Causes of the Demand for Drugs in the United States, and many drug law reformers called for a commission with a broader charge. In September 1991 I testified in Congress in favor of Congressman Conyers's bill (Bonnie, 1992). At that time, however, my mission was entirely rhetorical: offering support for a commission to study the causes of demand was a way of registering my opposition to the Reagan-Bush administration's preoccupation with supply reduction. Creation of a commission was not then a realistic prospect.

After President Clinton took office in 1993, some reform-minded observers were hoping for a change in the direction of U.S. drug policy. However, in light of the President's personal history ("I didn't inhale"), any significant reversal of policy would have been politically suicidal, especially after the President blundered into controversial positions on other divisive social issues such as gays in the military. Meanwhile the War on Drugs continued unabated during Clinton's first term.

One ray of hope emerged for reformers, however. In a comprehensive crime bill enacted in August 1994, Congress created a new bipartisan, 28-member National Commission on Crime Prevention and Control as a mild concession to moderates whose views were slighted in the ongoing conflict between opposing strategies of suppression ("three strikes") and prevention ("midnight basketball"). Within the commis-

sion's broad charge Congress included a specific study of the causes of demand for drugs, as Congressman Conyers had sought in 1991.

The new crime commission has never met. President Clinton has appointed 10 members, including the chair (former Ohio attorney general Lee Fisher), but the Republican-controlled Congress has not named its complement of members. Meanwhile the administration has signaled a slight tilt toward the "demand" side of drug policy and has toned down the rhetoric of the "War on Drugs." The question may therefore be raised whether a shift in political control of Congress (or a shift in public opinion) might present an opportunity for serious reassessment of drug policy through the currently inchoate National Crime Commission. The limited usefulness of past social-issue commissions should at least lead to lowered expectations. It is highly unlikely that President Clinton will want the new crime commission to rethink the premises of drug policy. That scenario, as I observed earlier, is sheer fantasy. However, if the President is prepared to put drug policy on a new course, or to change the direction of present policy, a commission could legitimize and provide political cover for such an approach. However, the downside must be recognized as well. If President Clinton is not receptive to a new approach, the commission is likely to issue a report calling for changes at the margins packaged as if they were important innovations.

It is 25 years since the Marihuana Commission issued its two reports. The nation continues to pursue a mistaken and costly drug control policy, and the arguments continue along virtually the same lines. A thorough reappraisal of U.S. drug control policy is clearly in order. In the present political climate, however, it is doubtful that a new commission will be the instrument of much-needed reform.

- Notes
1. This paper addresses advisory commissions. In recent years commissions have also been used as instruments of governance through decision rules that require an up-or-down vote on the commission's recommendations as a whole and thereby preclude political horse-trading. (The most successful example is the military-base-closing commission.)
  2. Daniel Bell (1966, 5) complained that the report of the National Commission on Technology, Automation and Economic Progress, issued in January 1966, had been "swept under the rug" because it was "too controversial" and "the White House did not want to become identified too directly" with some of its proposals.
  3. President Johnson's critical reaction to the Kerner Commission's 1968 report on the 1967 urban riots illustrates the political risk. He thought the commission's rhetoric was counterproductive, that its recommendations were unrealistic, and that it failed to give adequate support to his Great Society legislative programs.
  4. Hanser (quoted in Popper, 1970, 52) ascribes the success of the Royal Commission to "the public service orientation in [British] higher education; the sense of public duty and the influence of the older aristocratic *noblesse oblige*; the high ranking given public life generally; and the honor of being selected as a Royal Commissioner."
  5. I often regret that the Court lacked the courage to abolish the death penalty when it had the opportunity to do so 20 years ago. A more aggressive Supreme Court could also serve us well today by enforcing a constitutional prohibition against disproportionate criminal punishment that would counteract the trend toward severe and mandatory sentences.

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