

File

February 12, 1964

MEMORANDUM TO THE DEPUTY ATTORNEY GENERAL

RE: President's Commission on the Assassination  
of President Kennedy

Under the provisions of Executive Order No. 11130, dated November 29, 1963, the President's Commission has the responsibility of investigating and reporting upon all the facts and circumstances relating to the assassination of President Kennedy and the subsequent violent killing of the alleged assassin, Lee Harvey Oswald. Since the inception of the Commission, it has been assumed by everyone that the most critical issue before the Commission is the identity of the assassin or assassins of President Kennedy. At the very least, it has been generally understood by the members of the Commission, the Commission staff, and the public that the final report of the Commission will set forth all the items of evidence linking Oswald or anyone else to the assassination. Whether or not the final report concludes that Oswald or anyone else is the assassin, any discussion of the available evidence will probably come close to a responsible judgment that one or more persons were involved in the assassination. Since this determination is to be made by the President's Commission rather than by means of an adversary court proceeding with all the judicial safeguards, the question has been presented as to the need for procedures which might be adopted by the Commission to protect the rights and reputation of the alleged assassin.

129-11

Background of Problem

Since the beginning of the Commission most responsible people have recognized the existence of this problem. Many people, attorney Mark Lane of New York most vociferously, have urged that the Commission appoint a defense counsel to represent Oswald with full rights of participation in hearings, cross-examination of witnesses, and possibly some limited rights of access to investigative materials. However, the Commission over the past two months

has taken the position that its task of fact finding can be accomplished accurately and fairly without the appointment of defense counsel. On January 23, 1964, Mr. Rankin on behalf of the Commission wrote Mark Lane in response to his inquiry and stated that the Commission did not believe that appointment of defense counsel would be useful or appropriate in view of the function of the Commission. This decision was reaffirmed by the Commission on Tuesday, February 11, 1964, when Mr. Lane was not permitted to remain in the witness room during the interrogation of Mrs. Marguerite Oswald, after the witness indicated that she wanted to be represented by another attorney. On the same day the Chief Justice announced that the President's Commission was not a prosecuting agency and that therefore there was no need to appoint a defense counsel.

#### Proposal

The Commission is currently considering a request to the American Bar Association asking that one or more lawyers be designated to serve as defense counsel for Lee Harvey Oswald in the work of the President's Commission. As I understand the proposal, it is contemplated that these ABA designees would be given full access to all the investigative materials and allowed to cross-examine all witnesses. It is also understood that the Commission would announce that this step is being taken on behalf of the entire family of Lee Harvey Oswald.

#### Discussion

If this proposal is adopted and made public at this time certain consequences will immediately follow. First, the reversal in the position of the Commission, without any significant change in the relevant circumstances will make the Commission appear either indecisive or untruthful. The Commission will have either reversed itself for no reason or will be admitting that its objection to Lane's proposal was not on the merits but was made because Lane was not acceptable to the Commission. Second, this reversal will be a substantial propaganda victory for Mark Lane. It will also give comfort to the left wing and Communist press in the United States and abroad, who have been giving full publicity to the allegations made by Mark Lane regarding the deficiencies in the Commission's procedures. Third, the decision reflects

adversely on the staff of the Commission and the members of the Commission themselves since it suggests serious doubt as to their ability and/or desire to exercise the necessary responsibility to insure that Lee Harvey Oswald's rights and reputation are given due recognition. In fact, the decision will be widely interpreted as an admission that the Commission's staff is performing the role of prosecutor instead of the broad fact-finding function assigned to it.

All of the above problems might be readily overcome if the decision were one which would help the President's Commission do its job more effectively over the next several months. After giving this proposal some initial thought, however, I am persuaded that this is not the case. I think that no need has been demonstrated for such a procedure and that the Commission has not yet given full consideration to all the difficulties and disadvantages involved in adopting such a course of action.

In the first place, I think that the initial decision of the Commission on this subject was correct and that there has been no change in circumstances which would justify reconsideration. At this time, the members of the staff are in the final stages of submitting their initial memoranda reviewing the investigative materials and suggesting tentative conclusions, where these are appropriate, and recommending additional investigation either through investigative agencies or by the taking of testimony of specified witnesses. It has always been assumed by members of the staff that every item of evidence linking Oswald with the assassination would have to be carefully evaluated, that every contrary lead would have to be fully investigated, that every witness with relevant information should be cross-examined for possible exculpatory information, and that the final report would accord proper weight to Oswald's rights and reputation. There is no indication that the staff, or in fact the members of the Commission, cannot perform this function to the full satisfaction of the American public. Although there are certainly persons other than Mark Lane who have criticized the procedures of the Commission, nevertheless I think that the weight of professional and political opinion in the United States has confidence in the members of the Commission and will certainly wait to judge the final report on its merits.

In the second place, I am concerned that the Commission has not given full consideration to some of the problems inherent in this proposal. The following come to mind:

(1) The Commission currently has a staff of approximately 15 lawyers, with more than 10 working full time. If the Commission decides to adopt this proposal and implement it fully, I think it will be necessary for the ABA to designate at least 8 or 10 lawyers for this assignment if they intend in fact to read all the pertinent materials and try to conduct a responsible and complete defense on behalf of Lee Harvey Oswald. It is clear that attaching such a number of additional lawyers to this staff with this particular function will raise substantial practical difficulties in terms of access to materials and dealings with other government agencies.

(2) I think that a real question is presented as to which areas of Commission work the ABA designees should be permitted to examine. There are some areas of this Commission's work which are of limited relevance to the question whether Oswald pulled the trigger of the gun which killed President Kennedy, but which might be appropriate matter for defense attorneys to explore. Two particular sensitive areas in this regard are the questions whether Oswald operated as an undercover agent for any federal agency prior to the assassination and whether he was part of any foreign conspiracy.

(3) The security problems, already substantial with a staff of the size which the Commission has acquired, would be aggravated by the addition of more lawyers. This is particularly the case in view of the fact that certain investigative agencies are apprehensive regarding the work of this Commission, the fact that most of the members of the staff do not even possess the necessary clearance at this point, and the fact that the ABA designees would have a job which might at some time conflict with obligations of security which can be reasonably imposed on members of the staff.

(4) In order to conduct a full and complete defense of Lee Harvey Oswald, I assume the ABA designees ought to have independent subpoena powers and access to the investigative agencies who are doing work for the Commission staff. The alternative, of course, is to say that the Commission will make any and all requests desired by the defense attorneys, which, it seems to me, raises obvious problems regarding the relationships between the Commission and the federal investigative agencies. Another alternative is to state that the defense attorneys would have no more right to subpoena witnesses or have access to investigative materials in the possession of the Commission than would be the case in the federal courts, in which event problems under the Federal Rules of Criminal Procedure and the Jencks Act will become substantial and time-consuming.

(5) Adoption of this proposal at this time, if it is fully implemented, will mean that steps already taken by the Commission would have to be retraced in order to permit the ABA designees to perform their responsibility. At the very least, this would mean that Marina Oswald and Marguerite Oswald would have to testify again before the Commission to permit full rights of cross-examination.

(6) This proposal will result in a substantial delay in the work of the President's Commission. Since the Commission staff has already been reviewing the investigative materials for some four or five weeks, and is on the point of recommending substantial additional investigation, it seems clear the ABA-designated lawyers would find it almost impossible to make themselves current in time to perform their assigned function. I think this proposal would render the tentative June 1, 1964 deadline for the final report of the Commission beyond reach.

(7) It is clear that the ABA is never going to be warmly embraced by Mark Lane or any civil liberties group as an aggressive protector of Lee Harvey Oswald's rights. Most of these groups have disassociated themselves from Lane and asserted their confidence in the Commission and its staff to protect Oswald's rights. It is unlikely that they can maintain this position if the Commission delegates this responsibility to the ABA. If, in fact, the ABA designees make less than a full bona fide effort to perform their job, then it will give further fuel to criticism of the Commission.

(8) It is also possible that any effort by the ABA designees to perform their responsibilities, no matter how well intentioned, will cause some member of the Oswald family, most probably Mrs. Marguerite Oswald, to criticize this procedure publicly and maintain that Mark Lane or someone else rather than the ABA's designees should be protecting her son's rights and reputation. It might even be urged that the Commission should permit John J. Abt to represent Lee Harvey Oswald since this is in fact the lawyer Oswald desired for his advocate.

(9) The proposal also increases the possibility that the Commission's final report will be accompanied by an official or unofficial dissenting opinion. If the Commission itemizes the evidence against Oswald and then reaches conclusions of guilt based on this, it can be reasonably suggested that the assigned defense attorney should be permitted his summation of the case in favor of his client -- either as part of the Commission's report or apart from it but with Commission approval. If the Commission denies such approval, of course, its position not

only looks vulnerable in light of its previous concessions but also might well be ineffective to prevent issuance of such a statement by assigned counsel.

It is possible, of course, for this proposal to be adopted by the Commission and then implemented to only a partial extent. The ABA could designate one or two prominent members of the Bar to visit the Commission offices periodically, cross-examine witnesses, and put their stamp of approval on the final product of the Commission without any real effort to represent Lee Harvey Oswald. If this is the case then many, but not all, of the above listed disadvantages will disappear. If this course of action is adopted, however, the procedure sooner or later will be recognized as a public relations measure, devoid of substance, which does not enhance the protection accorded by the Commission to Oswald's rights.

Regardless of the extent to which this proposal is implemented, the procedure cannot help but dilute the responsibility felt by the members of the Commission and the Commission staff to handle these difficult problems with sensitivity and good judgment. Once one or more ABA designees are on the scene as defense counsel, the Commission staff, and probably the Commission, will feel increasingly similar to prosecutors. The net result, I think, will not be very adequate consideration of Oswald's involvement in the assassination of President Kennedy.. Also, the legitimate interests of the State of Texas may be affected adversely by this procedure, which certainly was not contemplated at the time the Texas Court of Inquiry was put in abeyance in favor of the Commission.

#### Conclusion

The above discussion is designed only to point out that this proposal is an important matter which requires the most careful attention. Part of this consideration should focus on available alternatives, if it is assumed that additional action by the Commission is necessary to meet public criticism that the Commission is not adequately protecting Lee Harvey Oswald's rights. One such alternative would be to assign to one or two staff members, already familiar with the mass of underlying materials, the responsibility of protecting Oswald's rights, including participation in hearings and cross-examination of witnesses. Short of this, it might be publicly announced that selected members of the staff at the appropriate time will have a fixed responsibility to raise all available

defenses and related considerations to make sure that they are evaluated by the remainder of the staff and the Commission prior to the preparation of any final report. Since some of the members of the staff have reputations in civil rights circles more extensive than that generally accorded the ABA, I think that this alternative might not only serve the purposes of the Commission more effectively but might also win a greater degree of public acceptance. Certainly these alternatives or others which come to mind should be fully considered by the Commission before this proposal is acted upon.