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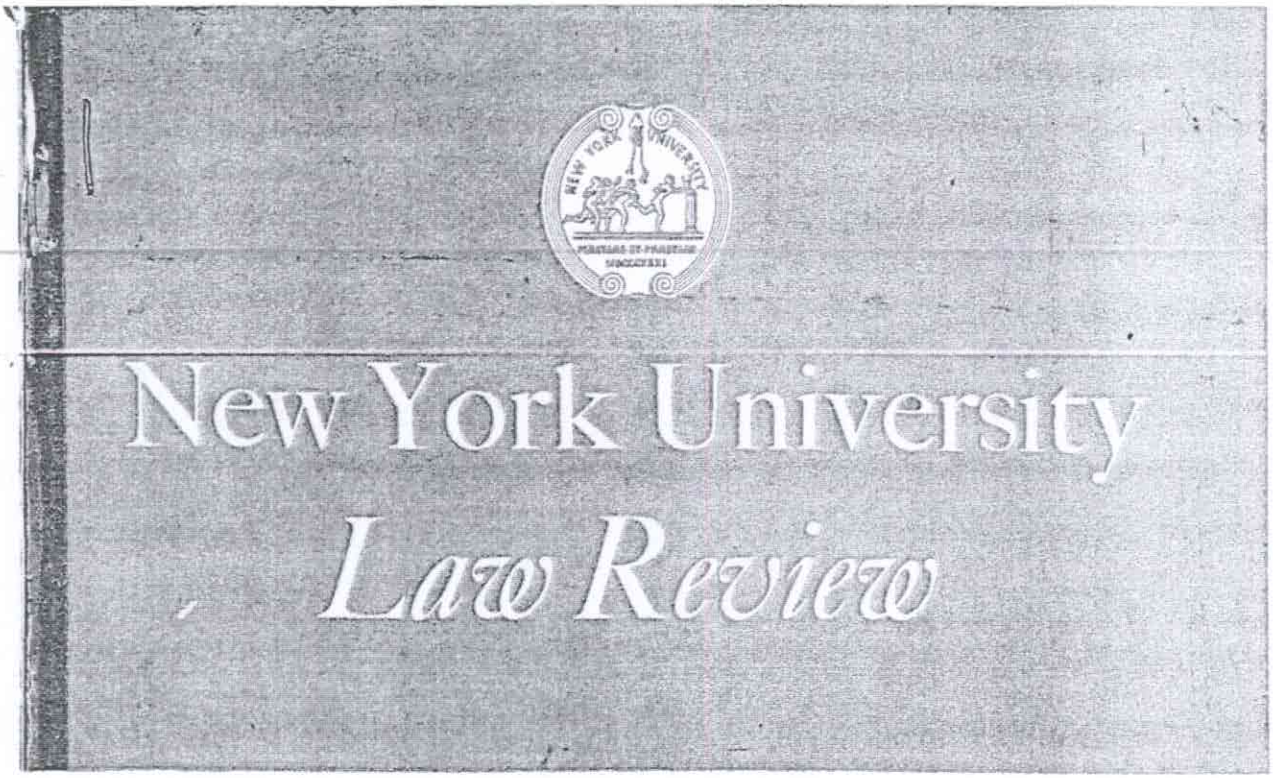

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## SYMPOSIUM ON THE WARREN COMMISSION REPORT

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MR. JUSTICE POTTER STEWART
EN BANC HEARINGS IN THE FEDERAL COURTS OF APPEALS:
ACCOMMODATING INSTITUTIONAL RESPONSIBILITIES
(PART I)

(Note -- See critical article by Freese, see C.A.-84H)

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# A SYMPOSIUM
# ON THE
# WARREN COMMISSION REPORT

*President Lyndon B. Johnson, by Executive Order No. 11130 dated November 29, 1963, created this Commission to investigate the assassination on November 22, 1963, of John Fitzgerald Kennedy, the 35th President of the United States. The President directed the Commission to evaluate all the facts and circumstances surrounding the assassination and the subsequent killing of the alleged assassin and to report its findings and conclusions to him.*

Foreword to the Report of the
President's Commission on the
Assassination of President Kennedy.

# THE WARREN COMMISSION FROM THE PROCEDURAL STANDPOINT

ARTHUR L. GOODHART

ON November 29, 1963, President Lyndon B. Johnson appointed by Executive Order[1] a Commission, generally known as the Warren Commission "to ascertain, evaluate and report upon the facts relating to the assassination of the late President John F. Kennedy and the subsequent violent death of the man charged with the assassination." The Commission submitted its final report to the President on September 24, 1964, ten months after its appointment.

There can be few persons, having a modicum of education, who did not at the time read a summary of the findings made by the Commission, and the conclusions and recommendations based on them. These were discussed at length by all the various news media so that it is probably true to say that no other legal report has ever had such a wide coverage both in this country and throughout the world.

On the other hand there have been few, if any, important commissions that have been so anonymous in character. Apart from the fact that it had been appointed by the President, and that its chairman was Chief Justice of the United States, little was known concerning the powers that had been given to it or the nature of the machinery by which it functioned. How was the evidence collected? Who was responsible for presenting it to the Commission? What was the legal relationship between the Commission and the witnesses? Could they claim any privileges when under examination? Were they entitled to be represented by counsel? Were the hearings of the Commission to be held in public, or in private, or in secret? Was evidence, such as hearsay, which is not admissible in a court of law, to be considered by the Commission? These, and other procedural problems arose out of, and in relation to the work of the Commission, but comparatively little attention has been paid to them even by the legal profession itself. This will undoubtedly be remedied in the future, but at the present time there seems to be little interest in the subject. This may be due to a number of different reasons.

The first is that it has not been generally realized that the Warren Commission was novel in character and in purpose. The Journal of the American Judicature Society stated this suc-

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1. No. 11130, 28 Fed. Reg. 12789 (1963).

cinctly when it said, "Thus, although it was never a court, the Warren Commission has added an interesting and commendable chapter to the judicial history of this country."[2] This may, indeed, prove to be a most important chapter, but little attention has been directed to the possibility that a new and more satisfactory system of investigation has been found than ever existed in the past. Perhaps this has escaped notice owing to the magnitude and horror of the subject-matter being considered by the Commission—the assassination of the President—because this obscured the fact that a similar procedure might be applied successfully to lesser investigations in the future. It is natural that there should be a general desire to regard the Commission as unique, in the belief that no similar tragedy will ever again fall to be investigated, but it may help to an understanding of the Commission's work if it is considered in relation to other methods of investigation applied in Great Britain and in the United States.

The second reason why so little attention has been paid to procedure is that, with one minor exception, all the hearings were conducted in private.[3] There were sound reasons for this. As Chief Justice Warren emphasized on a large number of occasions, the Commission was not conducting the trial of an accused person; its function was to collect the relevant evidence and to draw conclusions from it. Now whatever may be said for our open trial system it is not one to encourage people to give evidence voluntarily or freely; many witnesses are terrified of speaking in public. A study of the fifteen volumes in which the evidence collected by the Commission has been published shows that those witnesses, who at first seemed to be hesitant and nervous, seemed to gain confidence in the quiet atmosphere of a private hearing.

There was also the danger that a public hearing might be peculiarly unfair to third persons because witnesses were allowed, and even encouraged, to give evidence concerning any rumors they had heard because this might lead to a useful trail in pursuing any possible conspiracy. Such freedom to give hearsay evidence might, however, have encouraged a malicious witness to throw suspicion on innocent persons which might do them permanent harm.

The great number of the investigations carried on by the members of the Commission and the members of its legal staff also militated against public hearings; the testimony of 552 witnesses

2. Editorial, Canon 35 Is Not Enough, 48 J. Am. Jud. Soc. 83, 84 (1964).

3. There is a distinction between a private and a secret hearing. At a private hearing the public, including the press, are excluded, but the witness can repeat what he has said. In the case of a secret hearing nothing can be published concerning what was said at it.

was taken, 94 of whom appeared before the Commission itself. If all of these witnesses had been heard in public the hearings would have been prolonged for an inordinate length of time; on the other hand, if only a few of them had appeared in public this might have given rise to the suspicion that other relevant evidence was being suppressed.

The Commission was also in the delicate position that while some of the hearings were being held, the trial of Jack Ruby for the murder of Oswald was progressing. There was, therefore, a certain danger that some of the evidence it was hearing might, if published, interfere with Ruby's fair trial which was not concluded until March 14, 1964.

Against these considerations Lord Devlin in his extremely interesting article *Death of a President: The Established Facts*[4] has advanced the suggestion that the Commission paid too little attention to the value of publicity. "By its decision," he said, "to sit in private, whether right or wrong, the Commission necessarily gave hostages to its potential critics."[5] Fortunately, the fact that the Chief Justice of the United States presided, that all the evidence has been published, and that nothing was found which could support even the possibilities of a conspiracy, provided a complete answer to any suspicions. On balance, therefore, the decision to hold private hearings, unless a witness asked for a public one, proved to be the correct one on practical grounds. It did, however, have the result, as has been suggested above, that little attention was called to the procedure followed by the Commission in providing that all witnesses could, if they wished, have counsel to assist them, and to the various steps taken by it to obtain all evidence that might be even remotely relevant to its investigation. The public has never become aware of the full extent and the thoroughness of the work done by the Commission.

The Report issued by the Commission, admirable though it was as a narrative, tended to screen from the reader the extreme care with which each witness was examined. The question and answer system of an ordinary legal trial has been found to be an essential part of the common law process, for it concentrates attention on the particular point that is being considered; it may be said to pin-point each separate fact. It is also the most dramatic way in which a story can be told because each witness comes alive when his own words are given. The narrative method of the Re-

4. The Atlantic Monthly, March 1965, pp. 112-18. Lord Devlin was a Justice of the High Court, Queen's Bench Division, from 1948 to 1960, when he was made a Lord of Appeal. He resigned in 1964. At present he is Chairman of the Press Council.

5. Id. at 118.

port, however, hid this. The story to be told by the Commission was a tremendous one but it was only reported at second-hand. The public never saw or heard the actors, and even in the Report itself they are dim figures rather than real persons. It is not until the reader turns to the fifteen volumes containing a verbatim report of all that was said by the witnesses that he is able to form for himself an independent judgment concerning the evidence given by them. Perhaps the best illustrations of this can be found in the evidence given by Marina Oswald,[6] the widow of Lee Harvey Oswald, and by Mark Lane,[7] a New York lawyer.

As a result the importance of Mrs. Oswald's evidence has not been sufficiently realized. In an article entitled *A Lawyer's Notes on the Warren Commission Report*,[8] Mrs. Alfreda Scobey, who was a member of the Commission's staff, wrote: "[T]he fact is inescapable that the report, although crammed with facts that would not be admissible on the trial of a criminal case, sets out the whole picture in a perspective a criminal trial could never achieve."[9] It has sometimes been suggested that if Oswald had lived and could have been tried, a truer picture of the facts would have been established than was that achieved by the Commission.[10] Mrs. Scobey has, however, pointed out that the opposite is probably the truth, because if Oswald had lived his wife could not have given evidence at his trial. She would not have been able to testify concerning his ownership of the rifle from which the shots were fired, she could not have identified the blue jacket and the white jacket which were material in regard to the murder of Patrolman J. D. Tippit, she could not have given evidence concerning the abortive plan to kill General Walker, and she could not have identified various material photographs. Above all, she could not have given evidence concerning possible motives that might have induced Oswald to assassinate the President. The most important and the most dramatic moments during all the Commission's hearings can be found in this brief extract from her interrogation by Mr. Rankin, General Counsel to the Commission:

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6. Hearings Before the President's Commission on the Assassination of President Kennedy 1-126 (1964) [hereinafter Hearings].

7. 2 Hearings 32-61; 5 Hearings 546-61.

8. 51 A.B.A.J. 39 (1965).

9. Id. at 40.

10. "After Lee Harvey Oswald was shot by Jack Ruby, it was no longer possible to arrive at the complete story of the assassination through normal judicial procedures during a trial of the alleged assassin." Foreword to Report of the President's Commission on the Assassination of President Kennedy at x (1964) [hereinafter Report].

*Mr. Rankin*: Do you have any idea of the motive which induced your husband to kill the President?

*Mrs. Oswald*: From everything that I know about my husband, and of the events that transpired, I can conclude that he wanted in any way, whether good or bad, to do something that would make him outstanding, that he would be known in history.

*Mr. Rankin*: And is it then your belief that he assassinated the President for this purpose?

*Mrs. Oswald*: That is my opinion. I don't know how true that is.[11]

An interesting incident occurred during the interrogation. Mrs. Oswald was asked to identify a document showing that she was a fullfledged pharmacist:

*Mrs. Oswald*: This is my diploma. My goodness, what did they do with my diploma? I can't work [without] it. The government seal is missing. Who will give me a new diploma?[12]

After it had been explained to her that the seal had been removed for examination, she said: "I am sorry—it is a pity for my diploma."

During her examination Mrs. Oswald consulted her counsel. She explained that she had done so because she wanted to refer to a letter which she had written to "the prosecuting attorney" in the Ruby trial, opposing capital punishment. She said:

I do not want another human life to be taken. And I don't want it to be believed because of this letter that I had been acquainted with Ruby, and that I wanted to protect him.[13]

The importance of these extracts is that they throw such a clear light on the character of the witness. It is difficult to feel any doubt concerning the truthfulness of her evidence.

Mr. Mark Lane's evidence is of importance, not because of any relevant facts that it contained, but because on it most of the criticisms directed against the Commission Report, both in this country and abroad, have been based. When Oswald's mother, Mrs. Marguerite Oswald, appeared before the Commission she asked that her son "who is accused of assassinating the President," should be represented by Mr. Lane as his counsel. The chairman (Chief Justice Warren) replied:

[T]he Commission is not here to prosecute your dead son. . . . You may be sure that if Mr. Lane has any evidence of his own knowledge, or has any accumulation of affidavits . . . that he will have an opportunity to come here, just as you are here, in order to present those to the Commission.

But so far as his being here at all times before the Commission to cross-examine or to be present when all witnesses are testifying

11. 1 Hearings 76.
12. Id. at 86.
13. Id. at 83.

—that is not in accordance with the procedures of the Commission.[14]

Thereafter Mr. Lane appeared before the Commission to give evidence "of his own knowledge" but the word *evidence* must be interpreted in a very wide sense if it is to cover the testimony he gave. Mr. Lane was the only witness who asked that his evidence should be given in public, so that it is not surprising to find that it was directed rather to the press than to the Commission itself. The only new evidence was Mr. Lane's statement that an undisclosed informant had told him that Jack Ruby and Patrolman Tippit had met on November 14th at Ruby's Carousel Club with a right-wing anti-Kennedy man.[15] This might have suggested that there was some right-wing conspiracy which induced Ruby to murder Oswald, but the connection is not a clear one. Mr. Lane said that he had promised his informant not to reveal his name, but he agreed that he would try to obtain his permission to do so.

Shortly before the Commission concluded its hearings Mr. Lane again appeared before it, this time at its request. He was asked to disclose his informant's name as importance had been placed on the alleged meeting at the Carousel Club, especially by Mr. Lane himself during a radio appearance, but he refused to give the name as he had not obtained the necessary permission from his informant.[16] Mr. Lane's attention was also called to a statement by Mrs. Markham, who had been present when Patrolman Tippit had been killed, that Mr. Lane's report of an interview with her had been inaccurate; he replied that he had a tape-record of the interview, but he refused to produce it on the ground that to do so would be a violation of the "sanctity of working documents of an attorney."[17] Neither the Commission

14. Id. at 128. It is not entirely clear why the Commission, having taken this stand, then requested Mr. Walter E. Craig, the President of the American Bar Association, in fairness to Oswald and his family, to participate in the investigation. Oswald's widow agreed to this. All the evidence and all the other data that have now been published were made available to him, and he was given an opportunity to cross-examine any witness that he wished. It must be remembered that Mr. Craig was not acting as a defense counsel at an ordinary murder trial who seeks to get his client acquitted by every possible means; his duty was to study the evidence, and if he thought that any evidence had been misinterpreted against Oswald or that any evidence favorable to him had been omitted or ignored, then to take the necessary steps to call this to the attention of the Commission. This is more than a British Tribunal would have done in the circumstances, but the Commission probably felt that the appointment of Mr. Craig was an additional guaranty that every possible step had been taken to ascertain the truth. See Foreword to Report at xiv.

15. 2 Hearings 58, 60.

16. 5 Hearings 552.

17. Id. at 547.

nor its General Counsel had ever heard of this privilege, but they took no further steps in the matter. (Reference to this will be made hereafter.)

The third evidence of special importance given to the Commission was a prepared statement by Captain King, administrative assistant to Chief Curry of the Dallas police. It said:

> At that time we felt a necessity for permitting the newsmen as much latitude as possible. We realized the magnitude of the incident the newsmen were there to cover. . . . We believed that we had an obligation to make as widely known as possible everything we could regarding the investigation of the assassination and the manner in which we undertook that investigation.[18]

That the police were mistaken in the interpretation they placed on their obligation is now generally accepted. What is less generally recognized is that this is strong evidence that there was no police association with any suspected conspiracy, because newsmen are not usually invited to be present on such an occasion. If there had been any conspiracy they would have been carefully excluded.

This introduction will have suggested how novel and difficult were the problems which faced the Commission, which had to decide, in a very brief time, what machinery to adopt in investigating the assassination of the President. Were there any guides that they could follow? To determine this it may be of interest to discuss briefly the inquiries and investigations that have been a part of the common law system of government for more than eight hundred years. Part of this history is only of antiquarian interest, but the part relating to the recent English practice is of direct relevance to the Warren Commission itself.

The story of English inquiries begins with *Domesday Book*, the great survey of the kingdom which was made in the last years of William the Conqueror's reign. Of this Maitland has said: "If English history is to be understood, the law of *Domesday Book* must be mastered."[19] Professor Plucknett has described in detail how this record was compiled and the accuracy with which the information it contained was extracted. It exemplified "the Norman spirit of clever administration and orderly government. . . . Upon this basis was the common law to be built in later days."[20] This development of the law can be traced through the gradual establishment of a system by which the necessary facts could be investigated. During the reign of Henry

18. Report 239.
19. Domesday Book and Beyond 3 (1897).
20. Plucknett, A Concise History of the Common Law 13 (5th ed. 1956).

II the Justices in Eyre were sent throughout the country to inquire into the enforcement of order and justice: "every crime, every invasion of royal rights, every neglect of police duties must be presented."[21]

It is at this time that an institution was established that still plays a major role in the administration of criminal justice in the United States. "[I]n the Assize of Clarendon (1166) we find the establishment of a definite system of inquisitions as part of the machinery of criminal justice which have come down to our own day as 'grand juries.'"[22] The historical unity of the common law can be found in the fact that if the Warren Commission had not been appointed, the investigation of the assassination of President Kennedy and the murder of Oswald might have been carried on by the Texas grand jury in Dallas. It was not until 1933 that the grand jury was abolished in England by the Administration of Justice (Miscellaneous Provisions) Act, 1933,[23] in large part for reasons of economy.

Another link with the past can be found in the office of the coroner which still exists today. Lord Devlin begins his article with these words:

> The Lord Chief Justice of England is *ex officio* the chief coroner of the realm, an office he had held since time immemorial. There is therefore to an English mind something fitting in the idea that the inquiry into the death of President Kennedy, in its scope and importance the greatest inquest that has ever been held, should have been presided over by the Chief Justice of the United States.[24]

Here again, it was suggested by some persons that it was the function of the Dallas coroner to hold an inquest, but no steps were taken in this regard. As it was, two local officials tried to forbid the removal of President Kennedy's body without the autopsy which Texas law required, but President Johnson's first official act was to overrule them.

From the past, we can turn to the present to see how investigations can now be held under the English law. This list is not complete because it does not include investigations that may be conducted by local bodies, such as counties or boroughs, or by magistrates when committing a defendant for trial by a higher court.

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21. 1 Pollock & Maitland, The History of English Law 201 (2d ed. 1898).
22. Plucknett, supra note 20, at 112.
23. 24 Geo. 5, c. 36.
24. The Atlantic Monthly, supra note 4, at 112.

## The Royal Commission

The Royal Commission is the most dignified body concerned with the investigation of some subject assigned to it for report. It is constituted by the Sovereign, on the recommendation of the Prime Minister, by a Royal Warrant submitted and countersigned by the Home Secretary. The document begins with the Sovereign's name, and is directed to the various members of the Commission who are addressed either as "Our Right Trusty and Well-beloved" if the member is a Privy Counsellor, or as "Our Trusty and Well-beloved" if he is not.[25] The Warrant then states, usually in fairly wide terms, the subject-matter that the Commission is to consider. This is of great practical importance because the Commission will be acting ultra vires if it deals with any matters that fall outside of the prescribed scope, although it is not clear what would happen if it exceeded its limits. The Warrant then gives the Commission the full power to call before it any persons having any information on the assigned subject-matter, to examine all relevant books, documents, etc., and to inspect and visit all places deemed to be expedient. It is an extraordinary fact that the law is not clear concerning the steps that a Royal Commission can take if it is hindered in the exercise of these powers, but it is probable that some means could be found to enforce them. The Warrant concludes with the words: "And Our further will and pleasure is that you do, with as little delay as possible, report to Us your opinion upon the matters herein submitted for your consideration." These are important because they make it clear that the Commission is not sitting as a court, delivering judgment on specific questions of fact, but is reporting its opinion on problems submitted for its consideration.[26]

Nothing is said in the Warrant concerning the nature of the hearings to be held by the Commission, the methods by which the evidence will be collected, or the machinery by which it will function. Concerning the first point it may be said that it has been the practice of recent Commissions to hold most of their hearings in public. This is of importance both in obtaining the confidence of the public, and in enabling the public to understand for itself what are the matters that are being considered. It has

25. If the member is not a British subject then these expressions of regard are omitted. See the Royal Warrant for the Royal Commission on the Police, 1962.

26. While the Royal Commission on the Police was sitting, an anti-bomb meeting was held in Trafalgar Square. It led to a disturbance which required police intervention. Charges were brought against the police claiming that undue force had been used. The Commission held that it was not the proper body to consider the disputed facts in this case.

been said that the primary purpose of a Commission is to instruct the public so that it can be guided along the proper lines. The method of collecting evidence will vary from Commission to Commission. The one on Capital Punishment visited a number of foreign countries, but this is unusual. As the Commission is not a court it does not have a legal counsel attached to it; its chief administrative officer is a civil servant, seconded from the Ministry that is directly concerned with the subject that is being considered. He usually has assistants and secretarial help. To be appointed secretary to an important Commission is a mark of special distinction.

Some recent well-known Commissions, to mention only a few, have been those on Capital Punishment (1949-53) which led to a revision of the law of murder in 1957, the Press (1947) which led to the establishment of the Press Council, the British Broadcasting Corporation (1949) which led to commercial television, Equal Pay for Men and Women (1946), Betting and Lotteries (1951), Marriage and Divorce (1951), Mental Health (1957), and the Problems of Greater London and Middlesex Government (1957) which led to an entire reconstruction of the Metropolitan system of government. The primary purpose of all these Commissions was to provide the necessary material for future legislation. They have never been used as fact-finding bodies investigating a particular case.

## Ministerial Committees

The second type of committee, appointed by the executive, is the ministerial committee. All ministers of the Crown have such a power of appointment because they could not fulfil their functions without such help. These committees are of all different kinds and are concerned with an infinite variety of subjects. They may have as many as fifteen or twenty members or they may have only a single one. The famous 1943 Beveridge report, on which much of the modern British welfare state has been founded, began with a committee of three, but ended with Sir William Beveridge (later Lord Beveridge) as the sole signatory. They may be able to complete their task in less than a month if they are reporting on a single specific topic, or they may be semi-permanent if they are assigned a general subject. Thus the original Law Revision Committee, and the present Law Reform Committee, were designed to consider possible reforms in regard to those legal matters which were referred to them by the Lord Chancellor. Their reports are made to him, and it is thereafter

for him to decide what further steps, if any, will be taken to implement them.[27]

Ministerial committees have no powers by which they can compel persons to give evidence or to disclose documents. There is, however, always the latent threat that Parliament may be asked to provide further powers. Thus when last year the Prime Minister asked Lord Denning, the Master of the Rolls, to make a report on the various rumors that circulated after the Stephen Ward trial, with which the names of Miss Christine Keeler and Mr. John Profumo, a former Minister, were also associated, it was realized by some critics that no one could be compelled to give evidence, but it was made clear that Parliament, if necessary, would be moved to grant Lord Denning the required powers.

Various statutes provide for the appointment of committees or of individuals with powers to hear evidence on oath and to subpoena witnesses, in particular fields. Various Acts relating to Local Government, Education and the Fire Services are illustrations of this. The most recent example is Section 32 of the Police Act, 1964,[28] which enables the Home Secretary to set up a local inquiry into any matter connected with the policing of an area.

The machinery of these committees may be of various kinds, but in almost all of them it is centered on a secretary who is a permanent civil servant. It is not always realized how great is the role played by these highly trained officials in the British system of government.

### Parliamentary Inquiry Committees and Tribunals

In the case of Royal Commissions and of Ministerial Committees the appointment of the members is vested either in the Crown or in a Minister, and the report is made to them. In the case of a Parliamentary Inquiry the appointment of members is vested in either the House of Commons or the House of Lords, and the report is made to them. There is a direct analogy here with the committees of the Senate and the House of Representatives.

27. In an article entitled Current Judicial Reform in England, 27 N.Y.U.L. Rev. 395 (1952), I discussed at length the work of the Committee on Practice and Procedure in the Supreme Court appointed in 1947 by the then Lord Chancellor, Viscount Jowitt. The chairman was Lord Evershed, Master of the Rolls. The Committee, which held more than 300 meetings, sat for three years. Mr. Justice Felix Frankfurter and the Hon. John W. Davis gave evidence concerning the use of written briefs in the United States Supreme Court. Many of the Committee's recommendations have been put into force.

28. 13 Eliz. 2, c. 48.

Parliament may set up a committee which includes persons who are not members of Parliament. In 1887 *The Times* began publishing a series of articles entitled *Parnellism and Crime* which included certain treasonable letters said to have been written by Charles Parnell, an Irish member of Parliament. He declared that they were forgeries, and asked the House of Commons to refer this issue to a Select Committee of the House. This was refused, but finally by Act of Parliament a special commission, composed of three judges of the High Court, was appointed to inquire into all the charges. One of the most dramatic trials of history followed. On cross-examination Pigott, who had sold the letters to *The Times*, broke down completely. He fled to Madrid where he committed suicide.

The more usual form of Parliamentary inquiry is by a Select Committee composed of members of the House of Commons. Such committees of the House of Lords have been less frequent. Their history goes back to 1689 when this method was first used to investigate the conduct of the war in Ireland. The main function of the Select Committee is to do the work for which the House is not adequately fitted, to find out the facts of a case, to examine witnesses, and to draw up reasoned conclusions.[29] The members are nominated, having expressed their willingness to serve, on the motion of a Government Whip. In the House of Commons not more than fifteen members may be appointed except by special leave of the House. These committees were used on various occasions during the 19th century, but the chief objection to them was that in those cases in which the fate of the Government might be at stake, political considerations were likely to influence the votes of the members. This became obvious in the notorious *Marconi Inquiry* in 1913. It had been alleged that three members of the Liberal cabinet had improperly invested in the shares of the *English* Marconi Company when it was negotiating a contract with the Crown. When it was shown that the shares they had bought were those of the entirely independent *American* Marconi Company the Committee divided on strictly party lines concerning the propriety of this transaction. Lloyd George's political career might have been ended if the vote had gone against him. In retrospect it was felt that this would have been a disastrous result both for him and for the country, and the faith in the impartiality of Select Committees was in large part destroyed.

29. Hood Phillips, Constitutional and Administrative Law 100-01, 205-06 (3d ed. 1962); Wilding & Laundy, An Encyclopaedia of Parliament (1958).

### TRIBUNALS OF INQUIRY (EVIDENCE) ACT 1921[30]

After the First World War ended in 1918 a committee was set up to settle the accounts of various Government contractors. A Member of Parliament, who had become suspicious regarding the actions of a senior official in the Ministry of Munitions, pressed for an inquiry by a Select Committee, but the memories regarding the *Marconi Inquiry* were too vivid. It was recognized that some more efficient method of investigation ought to be established, so Parliament enacted the 1921 act after a very short debate. Rarely has such a useful act been passed in such a brief time.

The act provides that if both Houses of Parliament resolve that it is expedient that a tribunal be established for inquiring into a definite matter described in the resolution as of urgent public importance, then a Tribunal shall be appointed either by the Crown or by a Secretary of State. Such a Tribunal shall have all the powers, rights, and privileges that are vested in the High Court. It can enforce the attendance of witnesses whom it may examine under oath, and it may compel the production of documents. If a witness refuses to answer any question to which the tribunal may legally require an answer or does anything which would constitute contempt of court in a court of law, then the chairman may certify the offence to the High Court which may inquire into the facts and hear witnesses, including any statements that may be offered in defence, and if the witness is found guilty may then punish him. A witness before the Tribunal shall have the same privileges and immunities as in a court of law. The Tribunal may authorize any person appearing before it who appears to it to be interested to be represented by counsel or solicitor. The final provision is that the public are to be admitted to all hearings unless the Tribunal finds that this is against the public interest. It will be noted that the act contains no provisions concerning the procedure to be followed by the Tribunal or in regard to its machinery.

During the first twenty-five years after the act came into force a number of Tribunals were set up to deal with such matters as complaints against the police, charges of bribery and corruption in provincial cities, and the investigation of charges of negligence in the loss of the submarine *Thetis*. In 1936 what was called the Budget Leak Tribunal was held; Mr. J. H. Thomas, the Colonial Secretary in the National Government, was found guilty of having negligently disclosed to some of his

30. 11 Geo. 5, c. 7.

friends a provision in the forthcoming Budget of which they took advantage. He was forced to resign his office and his Membership in Parliament. In all these inquiries it was the practice for the chairman of the Tribunal to take the leading part in questioning the witnesses. This was not very satisfactory as it gave the impression that the Tribunal was inquisitorial in character. Most of the evidence was collected by various government agencies.

In 1948 a more clear-cut procedure was adopted by the Tribunal at which Mr. Justice Lynskey presided. Charges had been brought against various persons holding public office that they had shown favors to one Sydney Stanley in return for favors that he had given them. They were so small that they could hardly be described as bribes. The whole matter proved to be of little importance, but a Parliamentary Under-Secretary to the Board of Trade and a Director of the Bank of England were found guilty and forced to resign. The importance of the Lynskey Tribunal, as it was called, lay, however, in the fact that the Attorney-General, Sir Hartley Shawcross, examined the various witnesses that were called before the Tribunal. This proved to be a great improvement in the practice previously followed as it gave more form to the procedure. It was not suggested, however, that the strict rules of a court of law should be applied, and no clear line was always drawn between examination and cross-examination. Nor was hearsay evidence always excluded, as the Tribunal was an investigating body and not a court of law.

Perhaps a clearer understanding of the procedure under the Tribunals of Inquiry Act, 1921, can be obtained by a detailed description of what has been called *The Vassall Affair* in 1963.[31] In 1962 William John Vassall, an Admiralty clerk, was found guilty of offences against the Official Secrets Act, and was sentenced to eighteen years' imprisonment by the Lord Chief Justice. He had first become a spy for the Russians when he was sent in 1954 to Moscow as a clerk in the Naval Attaché's office. In 1956 he returned to London, working in the Naval Intelligence Division, and in 1959 he was posted to the Fleet Section of Military Branch II where he had access to secret material. He was arrested in September, 1962, and made a full confession. After his conviction there were vigorous criticisms both in the press and in Parliament concerning the security arrangements in

31. A brilliant analysis of the Vassall case can be found in a short book entitled The Vassall Affair by Dame Rebecca West (1963). Some of the conclusions reached by the author may, however, have been affected by her sympathy for the newspaper reporters.

the Admiralty and in the Foreign Office, culminating in the suggestion put forward by some members of the Opposition (the Labour Party) that Lord Carrington, the First Lord of the Admiralty, should resign on the ground that the Minister in charge of a Department must be held responsible for any error committed by his subordinates. Mr. Macmillan, the Prime Minister, thereupon appointed a committee of three distinguished civil servants—the Permanent Under-Secretary at the Home Office, the Treasury Solicitor, and the Second Secretary at the Treasury —to determine what, if any, faults there had been in the security arrangements. Before they could do so, the situation changed because Vassall, after his arrest, had sold his life story and his personal papers to the *Sunday Pictorial*. Among his letters were found twenty-three from Mr. T. D. Galbraith who had been Civil Lord of the Admiralty in 1957. These were in themselves completely innocuous, but it seemed strange to the newspaper that a Minister of the Crown should have corresponded with a clerk in his Department. The newspaper thereupon sent copies of the letters to the Government, and to one of the leaders of the Labour Party in Parliament. As rumors began to spread the Opposition pressed for a further inquiry. The committee of three civil servants was asked to make an interim report in which they found that the correspondence had been innocent but unwise. This did not satisfy the newspapers; they published various stories implying that there was important material that had not been disclosed. In particular it was suggested that Vassall, who was a self-confessed homosexual, had been favored by some persons in the Admiralty for this reason. Finally the Prime Minister moved the House that a Tribunal of Inquiry should be set up with wide terms of reference. These included the circumstances in which Vassall's offences had been committed, and also "Any other allegations . . . reflecting on the honour and integrity of persons who, as Ministers, naval officers, and Civil servants, were concerned in the case."[32] This provision was of great importance for it enabled the Tribunal which consisted of Lord Radcliffe, Lord of Appeal, Mr. Justice Barry, and Sir Edward Milner Holland, Q.C., to inquire into the source and the truth of the various rumors that had been circulated.

It is not necessary to consider here the evidence that was heard by the Tribunal or the conclusions that it reached that no favoritism had been shown to Vassall, but certain points are of special interest when considered in relation to the Warren Com-

32. West, supra note 31, at 50.

mission. The first was that the right to be represented by counsel was granted to those persons who were involved in the allegations, such as the newspapers who had carried various stories, Lord Carrington, Mr. Galbraith, and Vassall who gave evidence that no one at the Admiralty had ever helped him. For that matter, he attributed his spying in part to the fact that he had felt that he was being ignored. The second point was that Mr. Gerald Gardiner, Q.C., (now the Lord Chancellor) applied that representation be accorded to Mr. Hugh Gaitskell, as Leader of the Opposition, to take part in all sessions, including the secret sessions. This was refused by the Tribunal. It held that if Mr. Gaitskell had any relevant evidence to give he could, of course, do so, and be represented by counsel at that time, but he could not ask to play a part in the work assigned to the Tribunal.

The third, and most dramatic, point concerned the refusal by two newspaper reporters to disclose the sources from which they had obtained certain information which they had published. Mr. Mulholland was asked to give the name of the person who had told him that Vassall had had two sponsors in the Admiralty who had made arrangements for him to avoid the strictest part of the security vetting, and Mr. Foster was asked for the source of the statement "Why did the spy catchers fail to notice Vassall who sometimes wore women's clothes on West End trips?" Both the reporters claimed that they could not be required to answer as they had promised their informants not to disclose their names. The Tribunal held that there was no such privilege as was claimed for the press, and remitted the cases to the High Court where Mr. Mulholland was sentenced to six months' and Mr. Foster to three months' imprisonment for contempt of court. At first sight these sentences may seem to be harsh, but on further consideration it is clear that the alleged information which had been published would, if true, have shown that those in authority at the Admiralty had been grossly derelict in the performance of their duty. It was therefore essential in the public interest that these statements should be traced to their sources so that they could be properly tested; to stop the inquiry at the reporters on the ground that their information had been "confidential" would have left a miasma of doubt and suspicion. Perhaps the most important result of the *Vassall Affair* was to make it clear that harmful gossip may prove to be as dangerous for the person who publishes it, even if he is a member of the press, as it is to the person against whom it was directed.

## The Warren Commission

When President McKinley and President Garfield were assassinated there never was any question concerning the identity of the men who had killed them, and there was no suspicion that others could have been involved in a conspiracy. There was therefore no demand in either case for an inquiry.[33] On the other hand when President Kennedy was killed, and especially after Ruby had shot Oswald, no one ever doubted that some public inquiry would have to be held. The only question was, by whom should it be conducted? The two legal possibilities were the grand jury or the coroner in Dallas, but in the circumstances these were obviously unsuitable. The death of a president of the United States should not be inquired into in such a way. It was essential that some national forum, to use a neutral word, should be found, but the only one that seemed to be readily available was a congressional committee.[34] There were, however, objections to this, the most obvious being that such a body might be regarded as having a political tinge. Moreover the character of such an investigation would depend in large part on the qualities of the chairman, and these had not always proved satisfactory in the past.[35] Perhaps President Johnson, as a former Senator, was especially aware of these difficulties when he took a step which was novel and imaginative. Before there was any risk that the Senate or the House of Representatives might act, he appointed by Executive Order a Commission with Chief Justice Warren as its chairman. To placate Congress, two senior Senators, and two Congressmen who were leaders of the Democratic and Republican parties in the House, were appointed. Fortunately, they were also distinguished lawyers so that their legal qualifications were of more importance than their political ones on a Commission that was semi-judicial in character. To complete the Commission there were two outstanding members of the Bar: Mr. John J. McCloy[36] and Mr. Allen W. Dulles.[37]

33. When President Lincoln was assassinated, a Congressional committee conducted an extensive investigation into all the surrounding circumstances, but the report that it issued was subjected to severe criticism.

34. "As speculation about the existence of a foreign or domestic conspiracy became widespread, committees in both Houses of Congress weighed the desirability of congressional hearings to discover all the facts relating to the assassination." Foreword to Report at x.

35. The Senatorial inquiry into the Titanic disaster in 1912 is still remembered. Senator Smith, who presided, asked the famous question: "Did the boat go down by the bow or the front?"

36. Mr. McCloy had been President of the World Bank from 1947 to 1949 and the United States High Commissioner for Germany from 1949 to 1952.

37. Mr. Dulles, a partner in a leading New York law firm, had been the Director of the Central Intelligence Agency from 1953 to 1961.

When the Commission first met on December 5, it concluded that it could not act solely on the reports made by the various federal and state agencies; it decided that it must conduct its own independent examination into the facts. There was, however, no existing statutory provision for doing this, so on December 13, Congress enacted Senate Joint Resolution 137[38] giving the Commission the necessary powers to subpoena witnesses and inspect documents. It was also given the power to order a witness to answer the questions put to him, and on his refusal to do so the Commission could remit the matter to the federal court for action. The latter could then punish any contumacy as a contempt. This resembles in so striking a manner the similar provision in the Tribunals of Inquiry (Evidence) Act, 1921,[39] that it makes it seem probable that the British act served as a model on this point.

Strange to say, both the President's Executive Order appointing the Commission and the Joint Resolution of Congress were silent concerning the procedure it was to follow in conducting its hearings and obtaining the necessary evidence. The Commission therefore set up its own machinery, and in doing this it was outstandingly successful. A reader of the Report might, however, fail to notice how successfully this was done unless he also turned to the fifteen volumes containing the evidence.[40]

The Commission could not call on the Attorney General for his personal assistance in presenting the evidence and in examining the witnesses as does a British Tribunal of Inquiry, for the American Attorney General is fully occupied as head of the Department of Justice. Moreover it would not have been fitting in the present case to do so as the Attorney General, Mr. Robert Kennedy, was the brother of the late President.[41] The Commission therefore invited Mr. J. Lee Rankin to become its General Counsel. He had been appointed assistant Attorney General in 1953 by President Eisenhower, and in 1956 he became Solicitor General. In 1961 he resigned to enter private practice in New York City. Much, if not most, of the credit for the success of the Commission must be ascribed to him because the skill and courtesy with which he examined the witnesses left little uncertainty concerning the facts to which they were testifying.

38. 77 Stat. 362 (1963).

39. 11 Geo. 5, c. 7.

40. There were an additional eleven volumes in which facsimiles of the various exhibits were published.

41. As Attorney General, Mr. Robert Kennedy was closely in touch with the Commission as he was the titular head of the Federal Bureau of Investigation.

The Commission also appointed fourteen assistant counsel, recruited from widely separated parts of the country. They constituted a remarkable group of young lawyers, representing both the practical and the academic sides of the law. They were assisted by twelve staff members who helped in the various investigations carried on by the Commission.[42]

It may seem strange that such formidable machinery had to be used, as no other inquiry in the whole of legal history ever approached the Warren Commission in the extent and detail of its researches. The reason for this is that, as matters turned out, the Commission was faced with the task of ascertaining a negative, which requires far more proof than does a positive conclusion. It was necessary, therefore, to explore every circumstance related in any way with the assassination in case this might furnish a clue to some concealed facts. It was also necessary to examine everything that might explain the strange mental processes both of Oswald and of Ruby. In the end the simple explanation given by Mrs. Oswald was probably the correct one in regard to both men—the passionate desire to attract attention to oneself—but the Commission could not assume that this was true.

Perhaps it was the negative character of much of this evidence which led in part to the Commission's decision, which has been discussed above, to hold the hearings in private unless a witness asked for a public one. If it had seemed probable that the evidence would lead to a positive conclusion in regard to a conspiracy, or that someone besides Oswald had independently taken part in killing the President, there would have been stronger reasons for calling attention to the evidence at a public hearing as this would have enabled the public to judge how much weight should be given to it. But no such immediate publicity need be given to negative evidence that leads nowhere. This point is of practical importance in regard to the future as it does not follow that because the Commission was right in the present case to hold private hearings at the inquiry it was conducting, the same procedure should be followed in all other future cases.

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Moreover, one of the assistant counsel and two staff members had been seconded to the Commission from the U.S. Department of Justice. It is inconceivable that if Mr. Kennedy, who was the most devoted of brothers, had felt that there had been the least evidence, or even any rational suspicion, of a conspiracy to assassinate the President, or that anyone other than Oswald had murdered him, he would not have insisted that further steps should be taken to see that justice was done. If he has not questioned the conclusions reached in the Report, it seems extraordinary that others should do so.

42. It is interesting to note that two members of the staff were professional historians.

Thus, to take one illustration, the Vassall inquiry would have lost much of its force if it had been held behind closed doors.

A final point concerning Mr. Lane's evidence is of importance because it has had some effect on foreign opinion. It has been used as an argument that as the Commission took no steps to require him to answer its questions concerning the alleged Carousel Club meeting or concerning Mrs. Markham's evidence, his allegations ought to be accepted as having been true. The Vassall Tribunal, on the other hand, took a stronger line in regard to the reporters' refusal to give the names of their anonymous informants as it felt that this was necessary so as to make it clear that there was no evidence to support their allegations. It is possible that the Warren Commission would have taken similar steps if it could have foreseen the effect of its forbearance.

In conclusion Lord Devlin's tribute to the Report may be set out:

> It is a monumental work. Even after taking into account the quality and quantity of the staff which assisted the Commission and the resources which it had at its command, its production within ten months is an outstanding achievement. The mass of material is superbly organized. The structure is clear. Each fact is to be found in its proper place to sustain each conclusion. The minor conclusions support the major, and on the major the verdict rests.[43]

The verdict was that Oswald had murdered the President, not for any political motive but because of a desire for self-glorification or to obtain revenge against a society into which he did not fit; that Ruby's murder of Oswald had no rational explanation except for his craving to be recognized and to be the center of attention; and that there was no trace of any evidence that anyone else was connected with these crimes or that there was any conspiracy.

Lord Devlin has delivered many outstanding judgments in his years in the High Court of Justice and in the House of Lords but none has been more persuasive than the one in the present case:

> It is no doubt distressing to the logical mind when after an immense investigation, two extraordinary murders occurring in the course of the same story are explained only as disconnected and senseless actions. But life is often more distressing than logic. And what is the alternative? Perhaps one day the critics will produce one. If they can suggest one that is even faintly credible, they will deserve more public attention than they are likely to get by making charges of suppression that are more than faintly ridiculous.[44]

43. The Atlantic Monthly, supra note 4, at 112.
44. Id. at 118.