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WHY THE WARREN COMMISSION?

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THE shock, anger and grief at President Kennedy's assassination, and the horror of the televised killing of his accused assassin, brought with them an overwhelming popular demand to know what had actually happened, and why. Unsatisfied by any concrete facts, the popular imagination began to fill the gap; rumors and theories combined to provide the wildest sort of explanations and rationalizations. One person had heard this, another had seen that; each remembered scrap of conversation or facial resemblance provided a new motive, a new set of relationships, a new group of associations with the two principal actors. Oswald did it! Oswald didn't do it! Ruby had silenced Oswald so he couldn't tell! The spirit of hate abroad in the land had done it! It was the Rightists! The Leftists![1]

In the face of this universal, unceasing clamor for facts, everyone with any grounds for doing so decided to investigate. The Dallas police, of course, investigated the killings, and the state of Texas considered conducting two additional investigations—a special court of inquiry under the authority of a Dallas magistrate's court, and a grand jury investigation under the Dallas county court. Congress considered holding committee hearings in both houses to draft legislation making the murder of the President a federal crime. The FBI, at the President's order, undertook an investigation of the assassination and the murder of the accused assassin. The news media made use of their facilities to ferret out and publicize reports of eye-witnesses, police officials, and anyone with an imaginative story.

Then on November 29, 1963, one week after the killing of President Kennedy, President Johnson created the Warren Com-

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1. An example of how such rumors started and grew is given by the Warren Commission: "While attempting to enter the Carousel Club . . . shortly after Oswald was shot, [an entertainer named] Crowe encountered two news media representatives who were gathering information on Jack Ruby. At that time, Crowe, who included a memory act in his repertoire, mentioned the 'possibility' that he had seen Oswald at the Carousel Club. As a result he was asked to appear on television. In Crowe's own words, the story 'started snowballing.' He testified:

> They built up the memory thing and they built up the bit of having seen Oswald there, and I never stated definitely, positively, and they said that I did, and all in all, what they had in the paper was hardly even close to what I told them."

Report of the President's Commission on the Assassination of President Kennedy 360 (1964) [hereinafter Report]. See also App. XII, Speculation and Rumors, id. at 637-68.

mission,[2] instructing it to determine and evaluate the facts and report directly to him. On December 13, the President approved a Joint Resolution giving the Commission power to subpoena witnesses and compel their testimony, even to the extent of granting them immunity if they pleaded compulsory self-incrimination.[3]

Considering the intense national curiosity about the President's death, it might seem frivolous to ask what purposes the Commission was created to serve. But such a question is not wholly idle for two reasons. First, ours is a national government with only delegated powers—and the power to investigate merely to satisfy public curiosity is not one of them; second, injecting an agency which is neither prosecutive nor judicial into the business of deciding who committed a crime is so sharp a break with our traditions as to demand the most careful and critical analysis. Thus it would appear proper to examine the purposes behind the creation of the Warren Commission and the powers available to achieve those purposes. For what constitutional purposes can the executive branch of the government investigate? Was the Commission investigating for these purposes? If it was investigating for other purposes, what are the implications of this for our system of government?

Basis of the Executive Power to Investigate

There are a number of executive powers that could be used to justify investigating the assassination of a President. The first of these involves the power to investigate violations of federal law. Unlike the state of Texas, which has power to investigate all killings within its jurisdiction, the federal government has no inherent power to investigate crime.[4] Only when a federal criminal statute has been violated does the executive have the power to investigate and prosecute. Even where Congress has constitutional power to create a federal crime, it has not always seen fit to do so. Thus, while it is a federal crime to threaten to harm the President,[5] to conspire to injure him,[6] to advocate the overthrow of the government "by force or violence or by the assassination" of any of its officials,[7] or to murder a federal judge, marshal, or a number of other specified officers,[8] Congress has not yet made it

2. Exec. Order No. 11130, 28 Fed. Reg. 12789 (1963).
3. 77 Stat. 362 (1963).
4. See United States v. Hudson, 11 U.S. (7 Cranch) 31 (1812), in which the Supreme Court held that there could be no federal common law of crimes.
5. 18 U.S.C. § 871 (1958).
6. 18 U.S.C. § 372 (1958).
7. 18 U.S.C. § 2385 (1958).
8. 18 U.S.C. § 1114 (1958).

a federal crime to murder the President of the United States.†

Since murdering the President is not a federal crime, the executive has no direct power to investigate such a murder. Therefore, if it is to investigate, it has to do so on the grounds that some other federal statute may have been violated. Two statutes exist which might conceivably form the basis for such an investigation. One of these, part of the old Civil Rights Act of 1866, makes it a federal crime punishable by up to $1,000 fine, for any state officer to subject a person to the "deprivation of any rights, privileges, or immunities secured or protected by the Constitution. . . ."[9] Since Oswald had been killed while in the custody of the Texas police, an argument could be made that, in permitting him to be killed, the state of Texas had denied him his life without due process of law, which would violate the statute. The statute, however, requires that such deprivations be "willful,"[10] and there was no suggestion that the Dallas police had intended Oswald's death. Even if they had, it would only have justified investigating Oswald's death, and could hardly have been stretched to justify an investigation of the assassination of the President. The statute was not even mentioned as a possible basis for FBI action in the case.

The second statute is the one mentioned above which makes it a crime to conspire to injure the President (or any other federal officer). On the basis of this the FBI could, and presumably did, investigate the question whether or not there was a conspiracy. But the further they dug into the matter the clearer it became that no one but Oswald was involved, and as the Commission pointed out, "once it became reasonably clear that the killing was the act of single person, the State of Texas had exclusive jurisdiction."[11] This being the case, "Federal agencies participate only upon the sufferance of the local authorities."[12]

A second basis for executive action stems from powers inhering in the President in his role as Chief of State. It is he who makes foreign agreements, and it is he who recognizes foreign

† Since the writing of this article, legislation making it a crime to kill the President has been passed by the House and, in amended form by the Senate. H.R. 6097, 89th Cong., 1st Sess. (1965).

9. 18 U.S.C. § 242 (1958).

10. In 1945 the conviction under this section of a sheriff for killing a prisoner was reversed because the jury was not charged that the deprivation of rights had to be "willful." Screws v. United States, 325 U.S. 91 (1945).

11. Report 454.

12. Report 456. The awkwardness resulting from this lack of federal jurisdiction was emphasized by FBI Director J. Edgar Hoover, who testified that the absence of clear federal jurisdiction had led to embarrassment and confusion in the subsequent investigation by federal and local authorities. Ibid.

governments and breaks off diplomatic relations with them. It is he, too, who directs the conduct and attitude of our diplomatic and consular representatives throughout the world.[13] For this reason, the possible existence of an international plot to kill the President of the United States is a question of the utmost importance. Which countries are involved, the extent of their involvement, and what follow-up plans, if any, have been laid, have the most direct and powerful bearing on the conduct of the presidency. There is unquestioned power in the presidency to investigate these matters, and a full-time agency, the CIA, does just that.

A third basis for possible executive investigation stems from the President's somewhat amorphous role as *protector of the peace*. This role concedes to the President the power to take whatever action is needed to protect the institutions of the United States government from harm or destruction, and it owes its existence to the classic case of *In re Neagle*.[14] A bizarre series of events had culminated in 1889 in an attempt on the life of Mr. Justice Field in which the assailant was killed by a deputy marshal, Neagle, appointed by the Justice Department to guard Field. There was no statute authorizing such a bodyguard, let alone killing in the course of this duty, and Neagle was charged by the state of California with murder.[15] He could only be released on habeas corpus if he were acting pursuant to a law of the United States, and the Supreme Court found that he was acting under such a law:

> In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. . . .[16]
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> We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death . . . .[17]
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> That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United

13. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936). See also Corwin, The President: Office and Powers, 170-226 (4th ed. 1957).

14. 135 U.S. 1 (1889).

15. Neagle's chance of acquittal on self-defense was narrowed by the fact that Terry, the victim, had been Chief Justice of the California Supreme Court. His quarrel with Mr. Justice Field was a cause célèbre, and the public generally sided with Terry. For a graphic account of the background of In re Neagle, see Lewis, The Supreme Court and a Six-Gun, 43 A.B.A.J. 415 (1957).

16. 135 U.S. at 59.

17. Id. at 67.

> States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them.[18]

Despite the refusal of the Court to expand this doctrine in the *Steel Seizure Case*,[19] it remains the basis for most speculation on the inherent powers of the President. The Court in *Neagle* was unhappy at congressional failure to provide protection for the judiciary, and Congress has since made the murder of a federal judge a crime.[20] It has not only failed to do as much for the President, but agents of the Secret Service, while authorized to "protect" the President, are not even authorized to arrest the person making an attack upon him.[21] But surely the killing of a President is as much a breach of the "peace of the United States" as an attempt on the life of a Supreme Court justice, and investigating such a breach of the peace is the normal function of peace officers.

The Power to Investigate—Scope and Limits

While the limits on the scope of governmental power to investigate have been developed almost entirely in connection with congressional investigations, these limits are so fundamental in nature that they would unquestionably apply to administrative agencies as well. The first of these is the requirement that Congress, in investigating, must pursue a legitimate constitutional purpose. The power to investigate does not exist for its own sake, but is ancillary to the power of government to act: each branch has its assigned duties to perform, and it is through investigation that it gets the information necessary to perform them properly. A congressional investigation, therefore, is valid only because it is necessary and proper for Congress to have information in order to legislate intelligently.[22] Since Congress is limited by the Constitution to those powers which are delegated to it, and those which can be reasonably implied therefrom, it is apparent that the power to investigate, ancillary as it is, must be similarly limited. Congress cannot investigate where it cannot legislate.

It can, however, investigate, not only things about which it is actually contemplating legislating, but also those things about

18. Id. at 69.

19. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The Court rejected the argument that the President had an inherent power to protect the nation broad enough to enable him to seize the steel mills.

20. See note 8 supra.

21. 18 U.S.C. § 3056 (1958).

22. See McGrain v. Daugherty, 273 U.S. 135 (1927).

which legislation merely could be had.[23] There have been periods in our history when the Supreme Court took a very restricted view of the power of Congress to legislate, but since 1936 the Court has modified its attitude to enable Congress, under existing constitutional provisions, to deal with most of the national problems with which it is confronted. This broadening of the power to legislate has necessarily been matched by a broadening of the power to conduct investigations. As the Court said in *Barenblatt v. United States*, the "scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[24] The breadth of this power was pointed up in that case by the fact that, despite the absence of any very clear authority on the part of Congress to legislate in the field of education, the Court held valid a House Un-American Activities Committee investigation into Communism in education. But despite this broadening of legislative, and hence investigative power, in at least one area the fundamental limitation still applies. Investigations cannot be made solely for the purpose of exposing the citizen's dereliction or misconduct to the public view.[25] When Congress investigates, it must be for a legitimate governmental purpose[26] which will justify violating the individual's right of privacy. It has no right to violate that privacy solely for the sake of satisfying the public's curiosity.

The impact of this limitation upon the potential power of Congress to publicize its findings is materially softened by Supreme Court decisions which indicate that Congress may pursue an illegitimate purpose so long as it is incidental to a legitimate one. The Court made this clear as early as 1919 in *United*

23. "Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. . . . The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object." Id. at 177-78.

24. 360 U.S. 109, 111 (1959).

25. "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress." Watkins v. United States, 354 U.S. 178, 187 (1957).

26. While the Constitution mentions only powers, the Supreme Court has always passed on the "purposes" or "ends" for which the powers were used; a constitutional purpose being one for which, in the Court's judgment, the power was intended to be used. Probably the earliest, and certainly best known reference to such valid purposes is by Chief Justice Marshall in McCulloch v. Maryland. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (4 Wheat.) 315, 421 (1819).

States v. Doremus[27] in which it held valid the Harrison Narcotic Drug Act of 1914.[28] The act required all dealers in narcotics to register and pay a $1.00 per year tax, and it was made a crime to buy or sell drugs without paying the tax and complying with elaborate registration and record-keeping provisions. The Court conceded that Congress had no authority to regulate the sale of narcotics in general, but it upheld the statute as a legitimate exercise of the revenue power, despite the fact that it "has a moral end as well as revenue in view. . . ."[29] Making it easier for the states to catch illicit drug peddlers did not invalidate a valid revenue measure. A similar conclusion was reached in *United States v. Darby*,[30] in which the court held valid the Fair Labor Standards Act of 1938[31] despite the charge that it was really an attempt to regulate the conditions of manufacture, a local operation, rather than interstate commerce. The Court pointed out that "it is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the state. . . ."[32]

Just as the Court will refuse to invalidate congressional activity if legitimate as well as illegitimate purposes are being pursued, so will it not look into the motives behind congressional legislation.[33] The classic statement of this is in *McCray v. United States*[34] in which the Court held valid a tax of ¼ cent a pound on uncolored oleomargarine, and 10 cents a pound on oleomargarine colored to look like butter. Although obviously passed at the behest of the dairy interests to prevent competition from oleomargarine, the Court noted that on its face the statute appeared to be a revenue measure and refused to look into the motives which prompted Congress to enact it. It rejected the argument that

> because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not

27. 249 U.S. 86 (1919).

28. 38 Stat. 785 (1914).

29. 249 U.S. at 94. "The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue." Ibid.

30. 312 U.S. 100 (1941).

31. 52 Stat. 1060 (1938), 29 U.S.C. §§ 201-19 (1958).

32. 312 U.S. at 114.

33. The distinction between "motive," the driving force or incentive prompting a certain action, and "purpose," the end or goal to be achieved, is frequently ignored by the Court. In general, motives tend to be hidden, or unacknowledged, in contrast to purposes which may be inferred from the wording of the statute. "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts." Sonzinski v. United States, 300 U.S. 506, 513-14 (1937).

34. 195 U.S. 27 (1904).

> justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power whenever it seems to the judicial mind that such lawful power has been abused. . . . [T]his reduces itself to the contention that, under our constitutional system, the abuse by one department of the government [the legislative] of its lawful powers is to be corrected by the abuse of its powers by another department [the judicial].[35]

And, as the Court made clear in the *Darby* case, "the motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. . . ."[36]

In *Watkins v. United States*, a case reversing a contempt of the House Un-American Activities Committee, the Court held this doctrine applicable to the question of congressional investigations. There, while emphasizing that "there is no congressional power to expose for the sake of exposure,"[37] the Court made it clear that "a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served."[38] The applicability of the *McCray* doctrine was emphasized even more strongly in *Barenblatt*, in which the exposure argument was strongly pressed:

> Nor can we accept the further contention that this investigation should not be deemed to have been in furtherance of a legislative purpose because the true objective of the Committee and of the Congress was purely "exposure." So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power. . . . "It is, of course, true," as was said in *McCray v. United States* . . . "that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functons, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of lawful power." These principles of course apply as well to committee investigations into the need for legislation as to the enactments which such investigations may produce. . . . Having scruti-

35. Id. at 54.

36. 312 U.S. at 115. That the Court has not abandoned all concern for "purposes" is apparent from Watkins and Barenblatt. See text accompanying notes 37-39 infra.

37. 354 U.S. 178, 200 (1957).

38. Ibid.

> nized this record we cannot say that the unanimous panel of the Court of Appeals which first considered this case was wrong in concluding that "the primary purposes of the inquiry were in aid of legislative processes."[39]

While Congress must investigate things about which it could legislate, as long as it does so, there is, apparently, no serious limitation upon its power to publicize the results. Nor will the Supreme Court look behind the record in an effort to determine whether the motives of the congressional inquiry were really exposure for the sake of exposure, rather than for some legitimate legislative purpose.

In only one case, apparently, has this basic limitation actually been applied by the Supreme Court to administrative agencies. In holding void an SEC investigation as beyond the agency's power, the Court emphasized that "an official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means."[40] But as the power of Congress to regulate expanded into more and more areas, Congress correspondingly broadened the power of administrative agencies to make the investigations on which effective regulation must be based. From an early suggestion that "fishing expeditions" might be unconstitutional,[41] the Supreme Court became more and more complaisant until, in *United States v. Morton Salt Co.*, it indicated that in regard to corporations, at least, an investigation might be based on nothing more than official curiosity.[42]

Despite this broadening of the scope of administrative investigations, it seems clear that an administrative agency, like Congress and its committees, cannot expose individual misbehavior solely for the sake of exposure. If Congress cannot do so, surely it cannot authorize an agency to do so; the reasons for thus limiting Congress are even more applicable to the administrative agency, insulated as it is from direct responsibility to the public at the polls. Even *Morton Salt* must clearly be limited to corporations, and even there an "investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power."[43] It is not likely the Court would permit unnecessary

39. 360 U.S. at 132-33.

40. Jones v. SEC, 298 U.S. 1, 25-26 (1936).

41. FTC v. American Tobacco Co., 264 U.S. 298, 306 (1924).

42. "Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." 338 U.S. 632, 652 (1950).

43. Id. at 652.

exposure of private corporate business secrets, let alone the activities of private individuals. As in the case of Congress, however, it seems unlikely that the Court would interfere with an executive agency investigation because of questionable motives. Based as it is on the theory that such things are not properly the business of the judiciary, such immunity would seem to apply to all branches of government. Thus it seems safe to conclude that the Warren Commission could not investigate *solely* for the purpose of satisfying public curiosity—but if it were investigating something it had power to investigate, such as the existence of a possible conspiracy, the Commission could make its findings on matters related to conspiracy public, even though motivated not by a desire to uncover violations of the conspiracy laws, but by a desire to meet the public demand for information concerning the assassination.

A second basic limitation on the congressional investigative power is that the questions asked must be pertinent to the investigation actually under way. Like the requirement that there be a legitimate purpose in view, this limitation reflects the concept that the right to privacy should be invaded only in the interest of some clear governmental authority, and hence would apply equally to administrative and legislative investigations. This would seem to be true despite the fact that in both cases the right to investigate is reinforced by federal statute. In the case of congressional investigations, Congress has made it a crime to refuse "to answer any question pertinent to the question under inquiry. . . ."[44] and in both *Watkins* and *Barenblatt* this was interpreted to mean that a person could refuse to answer a question not shown to be pertinent. On the other hand, the Joint Resolution authorizing the Warren Commission to obtain testimony empowered any United States court to punish for contempt a person who does not give testimony "touching the matter under investigation."[45] Although, on its face, the scope granted the Commission to ask questions seems greater than that given to congressional committees, the difference is probably more apparent than real, since under the jurisdictional concept of pertinency, the questions would be limited, in any event, to those relevant to a valid purpose for which Congress could authorize a committee investigation.[46] The Court in *Watkins* makes this clear by distinguishing

44. 52 Stat. 942 (1938), 2 U.S.C. § 192 (1964).

45. 77 Stat. 362 (1963).

46. Cf. the statement in Jones v. SEC, that "the citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer." 298 U.S. at 26.

between an inherent, or jurisdictional concept of pertinency, and that imposed by statute:

> Plainly these committees are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area. This is a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority. It is not wholly different from nor unrelated to the element of pertinency embodied in the criminal statute under which petitioner was prosecuted.[47]

One further limitation upon the power to investigate, one that applies *only* to administrative agencies, is that they can exercise only those powers which have been delegated to them. While Congress and the President are limited only by the Constitution, an agency is not only limited by the Constitution, but also by the extent of the power given it by the body whose agent it is. While the Supreme Court has, in the past, limited investigations to the areas authorized by Congress, Congress has, by statute, so broadened the grant of investigative power to regulatory agencies that no question of scope has arisen in recent years.[48] The fact remains, however, it is not enough that the President and Congress have inherent powers enabling them to investigate; it must be shown that the Warren Commission, at least by implication, was authorized to conduct the kind of investigation which it did in fact conduct.

Validity of the Commission's Investigation

Having explored briefly the nature of the executive power to investigate and the limits which the Constitution places upon that power, we now turn to the question whether the Warren Commission was, in fact, conducting the kind of investigation that meets the constitutional tests laid down by the Court. Was it investigating for a legitimate governmental purpose? Had it been delegated authority to conduct such an investigation? Were the questions it asked pertinent to a valid investigation?

Oddly enough, there is no official statement explaining or discussing the relationship between the purposes being pursued by the Warren Commission and the constitutional power being relied on to achieve those purposes. The executive order creating the Commission makes clear that its purpose was to "evaluate and report upon the facts relating to the assassination of the late

47. 354 U.S. at 206.

48. For a discussion of this development, see Davis, Administrative Law 96-99 (1951).

President John F. Kennedy and the subsequent violent death of the man charged with the assassination."[49] But no effort is made to show through what interpretation of the Constitution, or upon what statutory base, these are purposes which the government has the power to pursue. The executive order itself is issued merely "pursuant to the authority vested in me as President of the United States," and the "purposes of the Commission" which are mentioned in the order are, in fact, the things the Commission is to do, rather than the goals it is to pursue or the power on which such pursuit is based. Congress, too, in its Joint Resolution granting subpoena power, failed to give any clue as to the nature of the Commission's purposes or powers, although very clearly it gave its approval and backing to whatever duties had been given it by the President.

Nor did the Commission itself consider the question of its power, either in its proceedings or in the final report. J. Lee Rankin, the Commission's General Counsel, conceded that the problem had not been discussed, and indicated that while he himself had considered it, the existence of presidential power seemed so obvious as not to warrant serious discussion. "The President," Mr. Rankin said, "unquestionably has the inherent power to investigate how his predecessor was killed. He has a great personal interest in this, not as an individual, but as head of the government. If there is a conspiracy, he is entitled to know if he is next on the list."[50] He emphasized, too, the importance of the international aspects of such a conspiracy. If there were a foreign government involved, the President had to have the facts to act effectively. "If someone is planning a coup d'état, he should know about it."[51]

Without an official statement as to the purposes and powers of the Commission, one is forced to speculate as to what powers it actually was using. The first and most obvious power to consider seems to be the power to investigate the existence of a conspiracy, domestic or foreign, to harm the President. Such a conspiracy is a crime against the United States, so the Commission could clearly have been given authority to investigate it. Furthermore, it seems apparent that it was, in fact, given this power. The statement in the executive order that the Commission was to collect and evaluate "all the facts and circumstances surrounding such assassination" certainly implies an instruction to

49. Exec. Order No. 11130, 28 Fed. Reg. 12789 (1963).

50. Interviews with J. Lee Rankin in New York City, March & April, 1965 [hereinafter Rankin, Interviews].

51. Ibid.

look into the matter of conspiracy, and the Commission itself certainly understood this to be a part of its job.

It seems equally clear that it could also have been given the power to check on the adequacy of the system for protecting the President. Certainly it is within the scope of congressional power to legislate on this matter, and probably, under his inherent power as Protector of the Peace, the President could take steps to improve his own protection. There seems little doubt that he could order an investigation to determine what steps were necessary and make recommendations to Congress.[52] There is some doubt, however, whether the Warren Commission was actually authorized to investigate and recommend in this area. It is not mentioned in the executive order as one of the things the Commission was expected to do, and Mr. Rankin indicated that, while the Commission had considered this function, the decision to undertake it had been delayed because of concern both that it might intrude on the prerogatives of the President, and that it might seem to dictate to him measures to put his house in order. The Commission finally decided to go ahead with this function, and after a careful review of the job done by the various agencies concerned, it recommended that murdering the President be made a federal crime, and strongly urged that something be done to integrate and coordinate the efforts of those agencies responsible for the President's protection or possessing information bearing upon it.[53]

Although it can be plausiby argued that Congress or the President would have given the Commission sufficient authority to investigate this matter had it been deemed necessary, there is no direct evidence that any such authority was given, and the Court has cautioned against a "process of retroactive rationalization" by which a grant of authority is implied from the authority that has actually been exercised.[54] On the other hand, while power

52. Nothing in the Neagle case suggests that inherent power comprehends prosecuting an alleged assassin for murder, and since investigation depends on a valid power to act, the Commission's investigation would seem limited to the problems of protection. Nor does inherent power over foreign affairs appear to add perceptibly to the statutory power to investigate conspiracy.

53. Report 454-56.

54. No one could reasonably deduce from the charter the kind of investigation that the Committee was directed to make. As a result, we are asked to engage in a process of retroactive rationalization. Looking backward from the events that transpired, we are asked to uphold the Committee's actions unless it appears that they were clearly not authorized by the charter. As a corollary to this inverse approach, the Government urges that we must view the matter hospitably to the power of the Congress—that if there is any legislative purpose which might have been futhered by the kind of disclosure sought, the witness must be punished for withholding it. No doubt every reasonable indulgence of legality must be accorded to the actions of a coordinate branch of our government. But such

to investigate the need for increased presidential protection was not expressly delegated to the Commission, the delegation of power to investigate "all the circumstances" surrounding the murder would seem adequate to entitle the Commission to collect the facts from which the adequacy of such protection could be judged. But this grant of power to investigate the murder in general is so broad that it raises serious doubts as to its constitutionality. Could it nevertheless be construed as granting a much narrower, though valid, power to investigate presidential protection? While the logic of doing so is a bit tenuous, it seems not unreasonable to hold that the President did intend to delegate all the power to investigate which he possessed.

Although there were two constitutional purposes which the Commission doubtless legitimately could have pursued in its investigation, it seems apparent that these purposes were not the ones which really sparked either the creation of the Commission or the job that it did. It seems wholly unlikely, for instance, that this agency would have been created solely to determine the existence of a conspiracy against the President. Had Oswald lived to come to trial, the question of conspiracy would undoubtedly have been left to the FBI to investigate in order to enable the Justice Department to decide whether it would try to indict him for conspiracy. But even with Oswald dead, they could still have performed this investigative function. Certainly in no other case of suspected conspiracy or presidential assassination has a commission such as this been deemed warranted. Furthermore, while such a commission might have been set up to weigh conflicting evidence regarding a conspiracy, in this case seven agency heads reached the independent conclusion that no evidence of conspiracy existed.[55] An eighth agency would hardly have been created for this purpose alone.

Nor is it likely that the Commission would have been created merely to determine whether the presidential protection system was functioning satisfactorily, and if not, what should be done about it. Because of the sensitivity of the FBI and the Secret

deference cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms. Watkins v. United States, 354 U.S. 178, 204 (1957).

55. "The conclusion that there is no evidence of a conspiracy was also reached independently by Dean Rusk, the Secretary of State; Robert S. McNamara, the Secretary of Defense; C. Douglas Dillon, the Secretary of the Treasury; Robert F. Kennedy, the Attorney General; J. Edgar Hoover, the Director of the FBI; John A. McCone, the Director of the CIA; and James J. Rowley, the Chief of the Secret Service, on the basis of the information available to each of them." Report 374. The FBI investigation resulted in a five-volume report which was turned over to the Commission. Foreword to Report at xi.

Service, and their difficulties in working with each other and with local officials, there is no question that an outside agency would be desirable to determine the need for a change. A logical agency to do this would be a committee of Congress. But even if the President decided on an executive investigation, a high-powered commission such as the Warren Commission would hardly seem appropriate. Furthermore, the absence of any mention of this problem in the executive order suggests that the Commission was not intended to investigate presidential protection, and the Commission's own hesitance in this regard bears this out.

The one purpose that seems adequate to justify the creation of the Warren Commission was the satisfying of public curiosity. The American people demanded answers to certain basic questions. Had Oswald really done it? If so, how had he done it, and why? Had he acted alone? Had Ruby "silenced" Oswald? Were the police covering up something? Only the public clamor to have these questions answered adequately accounts for the creation of the Commission. A number of factors indicate that this desire to satisfy the public demand was the principal, if not, indeed, the only reason for the creation of the Warren Commission. First, it was this clamor that dictated the creation of a new agency. There had to be just *one* agency, *one* investigation.[56] Under no circumstances would it do to have conflict, competition and disagreement as to the results. Agencies vying with each other for prestige and public attention would be driven to leak the most spectacular bits of evidence to the press, each outdoing the other in sensationalism. The outcome, far from resolving the factual issues, would in all likelihood merely provide more food for rumor and speculation. And, if only one agency were to do the job, it clearly could not be one already in existence. Texas, which had the strongest jurisdictional right to investigate, obviously did not have the facilities to do a complete job. Adequate, perhaps, for the activities in Texas itself, it had no access to out-of-state information that might bear on a possible foreign conspiracy, not to mention intelligence material available only to the federal government. In addition, the failure of the Dallas authorities to protect both the President and Oswald had brought them into disrepute, and whether or not this was merited, it would have weakened public faith in whatever conclusions were reached.

Nor could the job be given to the FBI, Secret Service, or the

56. "President Johnson sought to avoid parallel investigations and to concentrate factfinding in a body having the broadest national mandate." Foreword to Report at x.

CIA. Each of these agencies had some share of the field to be investigated; each had its own lines of communication and sources of information to protect; each had its morale and prestige to consider. The selection of one over the others to make the final integration and evaluation might well have caused resentment and jealousy which would have impeded the investigation and jeopardized public acceptance of the results.

Although possessed of ample authority, Congress was also ruled out as the "one" agency to investigate and report to the people. Though suitable for a legislative function, such as deciding whether more presidential protection was needed, legislative bodies are not well equipped to determine questions of personal guilt or innocence. While the spirit of selflessness and unity that pervaded the country during this period made a nonpolitical investigation more likely than usual, the impartiality of congressional committees and their appropriateness for investigative work of this nature has long been a subject of bitter controversy. Moreover, congressmen are peculiarly sensitive to political, economic and sectional pressures, and a real possibility existed, even if only one committee undertook to investigate,[57] that discontented members might attack its findings and urge rejection of its conclusions. The prospect that it would command sufficient respect to satisfy the public was not encouraging; thus the President was clearly justified in rejecting this alternative.[58]

Second, only the public interest in Oswald's guilt, coupled with the necessity for one agency to satisfy that interest, adequately explains the unusual composition of the Commission. There is no doubt that the membership was chosen to win public confidence in its legal ability and impartiality as well as allay any jealousy that might develop on the part of Congress. The Chief Justice of the United States, while not a wholly uncontroversial figure, stood as the uncontested symbol of judicial standards of fairness and justice throughout the nation and the world.[59] The

57. The House Judiciary Committee, the House Un-American Activities Committee, and the Senate Judiciary Committee, were all considering separate investigations at the time the appointment of the Warren Commission was announced. N.Y. Times, Nov. 30, 1963, p. 12, col. 3.

58. Congress apparently agreed with this conclusion, since all plans to investigate were dropped when the Warren Commission was created, and congressional leaders assured the President they would use their influence to discourage all committees from undertaking investigations. Ibid. In addition, the bill to give the Commission subpoena powers passed both houses without debate. 109 Cong. Rec. 22639, 22787 (daily ed. Dec. 9, 10, 1963).

59. According to the N.Y. Times, Chief Justice Warren at first refused to head the Commission. "Then President Johnson called him over to the White House and talked to him about patriotism, about the country's urgent need to settle the assassination rumors, about the special trust foreign lands would place in an inquiry he headed." N.Y. Times, Sept. 28, 1964, p. 14, col. 6.

four members of Congress on the Commission not only represented both parties in each house, but two held party offices in Congress. Together, they brought a variety of gubernatorial, prosecutive and judicial experience to the Commission. Of the two non-governmental members, Allen W. Dulles had served both in the diplomatic service and as head of the CIA, while John J. McCloy had been Assistant Secretary of War, President of the World Bank, and U. S. Military Governor and High Commissioner for Germany. Of the seven members, two were Democrats from the deep South; the rest were Republicans, one from a border state, two from the East, and one each from the Middle West and Far West. All of them were lawyers with practical legal experience. It would indeed have been difficult to assemble a group more eminently suited to command public confidence and raise the Commission above all competing bodies. The caliber of the Commission members was matched by that of its staff. Headed by J. Lee Rankin, former Solicitor General of the United States, it included "14 assistant counsel with high professional qualifications, selected by it from widely separated parts of the United States."[60] It also had the help of highly qualified personnel borrowed from other federal agencies, including "lawyers from the Department of Justice, agents of the Internal Revenue Service, a senior historian from the Department of Defense, [and] an editor from the Department of State . . . ."[61]

Third, the executive order and Commission's own report indicate that satisfying the public as to the guilt of Oswald was the primary purpose of the Commission. President Johnson directed the Commission to "evaluate all the facts and circumstances surrounding such assassination, including the subsequent violent death of the man charged with the assassination, and to report to me its findings and conclusions."[62] The news release accompanying the executive order added that the Commission was to "satisfy itself that the truth is known as far as it can be discovered," and that such findings and conclusions were to be reported to the President, "to the American people, and to the world."[63] The Commission itself viewed as its ultimate objective the identification of the "person or persons responsible for both the assassination of President Kennedy and the killing of Oswald through an examination of the evidence."[64] It emphasized that it sat

60. Foreword to Report at xi. A one-paragraph biography of each member of the Commission and its staff is printed in the report. Report 475-81.

61. Foreword to Report at xi.

62. Exec. Order No. 11130, 28 Fed. Reg. 12789 (1963).

63. Report 472.

64. Foreword to Report at xiv.

"neither as a court presiding over an adversary proceeding nor as a prosecutor determined to prove a case, but as a factfinding agency committed to the ascertainment of the truth,"[65] and concluded that "the public interest in insuring that the truth was ascertained could not be met by merely accepting the reports or the analyses of Federal or State agencies."[66] Even the investigation of a possible conspiracy was primarily directed at satisfying the public's desire to know, rather than discovering violations of the law. Mr. Rankin confirmed this, emphasizing that "rumors do damage to the country" and that it was "important for the good of the country that this investigation be done with thoroughness, so as to nail down the facts as far as possible."[67]

A number of aspects of the Commission's approach to its work confirm that it viewed its role as one of satisfying public curiosity. In some respects, despite the Commission's disclaimer, the investigation had the characteristics of a posthumous trial. In order to insure that Oswald was afforded due process of law, the Commission requested Walter E. Craig, president of the American Bar Association, "to participate in the investigation and to advise the Commission whether in his opinion the proceedings conformed to the basic principles of American justice."[68] All data was made available to Mr. Craig, and he was invited to cross-examine all witnesses and suggest witnesses of his own. Thus, if the Commission found Oswald guilty, the fairness of his "trial" would not be subject to serious challenge.

Furthermore, two things concerning the issuance of the report itself support our argument. The Warren Commission undertook to answer all the questions even remotely relevant, did answer them with clear statements of conclusions (obviously designed to quell, so far as possible, doubt and rumor), and gave as part of its report the factual information on which the conclusion was based, with cross-references to the twenty-six volumes of testimony and exhibits before the Commission. Where it was unable to give a definite answer, as in the case of Oswald's motives, it presented the evidence and its best judgment about the answer.[69] In addition, one section of the report was devoted

65. Ibid. The staff, too, was characterized by "a total dedication to the determination of the truth." Id. at xi.

66. Foreword to Report at x. It is not here suggested that the term "public interest" is synonomous with "public curiosity," but the entire discussion by the Commission of its goals and purposes emphasizes the job of getting the truth to the public.

67. Rankin, Interviews.

68. Foreword to Report at xiv.

69. An entire chapter in the Report is devoted to an examination of Oswald's background and possible motives. Report 375-424.

to "speculation and rumors"[70] in which each important rumor was taken up and the facts concerning it were reviewed and analyzed. Finally, both the report and its accompanying testimony and exhibits *were* made public; the discovered facts, and the conclusions drawn from them, were made available to help discount rumor and satisfy a sensation-oriented public, avid for news. Only by inspecting the report and the supporting matter can one appreciate the tremendous lengths, surely without parallel in the history of criminal investigation, to which the Commission went to determine the truth in order that the public might know.[71] Clearly, whatever other purpose was served by the Commission, it was secondary to this overriding consideration.

Although it seems apparent that the Warren Commission was primarily, if not exclusively, concerned with satisfying the public's curiosity, the fact remains that it could have, and did, conduct a perfectly legitimate[72] investigation into the existence of a conspiracy against the President and his need for added protection. Since the Commission could have conducted exactly the same investigation that it actually did undertake under the guise of investigating a conspiracy or the need for presidential protection, it is possible that the Supreme Court might hold the investigation valid despite the primary purpose of satisfying public curiosity.[73] But could the Commission constitutionally conduct such a farflung investigation into the murder of the President on the ground that it was investigating conspiracy or protection? The answer is probably no, although the evidence is not altogether conclusive. It can be argued, for instance, that questions asked and much of the information collected were irrelevant to these valid purposes, and the Commission itself recognized their lack of relevance. Only two chapters in the report, one devoted to the question of conspiracy and the other dealing with the details of the assassination, are considered by the Commission itself to concern the conspiracy problem. Similarly, a mere 45 pages are devoted to the protection of the President. While this suggests that chapters comprising over half the report were, to the Commission's mind, irrelevant, it does not follow that this material was the result of asking irrelevant questions. In taking

70. Report 637-68.

71. "This Commission was created . . . in recognition of the right of people everywhere to full and truthful knowledge concerning these events." Report 1.

72. Perfectly legitimate is perhaps too strong, since the Commission was not expressly authorized to prosecute conspirators, if any, or to recommend legislation to Congress. Its sole function, apparently, was to inform the President and public.

73. But note that the Court in Barenblatt takes cognizance of "the primary purposes of the inquiry." See text accompanying note 39 supra.

its testimony the Commission asked each witness to tell all he knew that he thought relevant. That no one knew anything of a conspiracy would necessarily emerge only after the questions were asked and answered. Much irrelevant information would inevitably result that could legitimately be included in the report, and placing it in separate chapters would be only logical. The paucity of information on conspiracy characterizes the result of the investigation, not its purpose. Furthermore, it is possible to argue that no fact bearing on the President's death is entirely unrelated to either conspiracy or presidential protection. Certainly this is true in the sense that the more we know, the wiser our judgment will be.

On the other hand, to be valid, inquiry into the murder would have to be incidental to a legitimate investigation, and the Commission's failure, either to limit or relate its questions to conspiracy or protection, suggests that such a limited investigation would not have served; that the broad questioning was essential to the Commission's job. The resolution adopted by the Commission with respect to taking depositions provided that witnesses be informed of the "nature of the Commission's inquiry and the purpose for which the witness has been asked to testify and produce evidence."[74] Although an obvious bow to the pertinency requirements of *Watkins* and *Barenblatt*, this was not interpreted by the staff to require a showing of a *constitutional* purpose, and in fact no such showing was made. Almost without exception, this preliminary statement announced to the 550-odd witnesses that the Commission's purpose was to ascertain, evaluate, and report the facts relevant to the death of President Kennedy and Lee Harvey Oswald, a phraseology much too broad to show pertinency to a legitimate purpose. Nowhere, except in cases where a witness had reportedly linked Oswald and Ruby together, did any mention of conspiracy enter the preliminary statement. Furthermore, even a casual sampling of the voluminous record and the report confirm that the Commission, had it really been investigating conspiracy and protection, must necessarily have conducted a far more restricted investigation than it did. That this would not have served the Commission's purpose seems apparent.

Finally, it is clear that the Commission viewed its job as the ascertainment of "the truth concerning the assassination of

74. "At the opening of any deposition a member of the Commission's staff shall read into the record a statement setting forth the nature of the Commission's inquiry and the purpose for which the witness has been asked to testify or produce evidence." Report 502.

President Kennedy to the extent that a prolonged and thorough search makes this possible."[75] This could not have been done had it felt limited to conspiracy and protection. But the Commission conceded that "there was no Federal criminal jurisdiction over the assassination of President Kennedy,"[76] and that the FBI investigation was conducted at the "sufferance"[77] of local officials who had "exclusive"[78] jurisdiction. In doing so the Commission actually cut the base from under its own investigative powers because this denial of any bona fide basis for an FBI investigation must apply equally to the Commission itself, since both look to the statutes and the President for their power. Nor does the Commission anywhere suggest anything to contradict this. To this writer the conclusion seems irresistible that the investigation conducted by the Warren Commission went far beyond any constitutional governmental purposes, and thus was exposure solely for the sake of exposure.

One further problem concerning the validity of the Warren Commission investigation remains to be considered. How can an investigation be called unconstitutional if no attempt was ever made to challenge it in the courts? In a practical sense, questions that cannot be subjected to judicial review tend to enjoy a status of constitutionality by default. Constitutional decisions are made every day by persons at all levels of government; and these decisions, like the assumption of the Warren Commission that it had jurisdiction to investigate as it did, are final unless tested in the courts. From the standpoint of a student of government, however, this is not a particularly satisfactory definition of constitutionality. It suggests, for example, that the decision of a school board not to desegregate its public schools is constitutional unless and until a challenge to its action can be reversed by a court. Academically speaking, the certainty that it would be reversed means that the Constitution forbids it, despite its momentary impregnability. Thus, it can be argued that the use of a governmental power is unconstitutional, even though its immunity from judicial review leaves the argument unsettled. Constitutionality, for the scholar, is a guess as to what the Supreme Court *would* decide.

But suppose there is no possibility of a decision because the question is one which, even if brought to the Court, could not be answered by it. Such has been the case with "political

75. Report 18.
76. Id. at 454.
77. Id. at 456.
78. Id. at 454.

questions"—questions whose decision has been left by the Court to the political branches of government.[79] Such, too, is the case with a question which raises no justiciable controversy.[80] In these circumstances a guess as to what the Court would do is not an appropriate test of constitutionality, because constitutionality has ceased to have a judicial meaning.

It is possible to argue that this rule applies to the Warren Commission investigation, since all the testimony taken by it was given voluntarily. An actual court test could have been brought, of course, both as to the validity of the exposure and the relevance of the questions asked, had some witness refused to answer and been compelled to answer under threat of contempt. While an executive agency does not have an inherent power to subpoena witnesses and punish them for contempt if they balk,[81] Congress may grant the subpoena power to the agency and authorize it to seek judicial aid in compelling testimony. Not only was this done in the present case, but Congress authorized the Commission to grant immunity to any witness who refused to testify on grounds of compulsory self-incrimination.[82] The Commission, however, never exercised any of these powers given it by Congress. All the witnesses testified willingly before the Commission, and, with one exception, answered all the questions they were asked.[83] Can

79. See Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

80. See Ex parte Lévitt, 302 U.S. 633 (1937), where the Supreme Court dismissed a suit challenging the right of Mr. Justice Black to take his seat on the Court. "[T]o entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U.S. at 634.

81. Not only is it not inherent, but winning the right to delegate such power to administrators has been a struggle for Congress. For an excellent summary of this development see Davis, supra note 48, at 90-93. In practice, Congress confers subpoena powers very freely, although, as here, failure to comply with a subpoena must be enforced in a court.

82. See text accompanying note 3 supra.

83. The Commission never made use of its power to compel self-incriminating testimony by granting immunity. Foreword to Report at xi. See also note 85 infra. One witness, however, refused to give the name of an informant who claimed to have seen Ruby, Officer Tippit and a right-winger named Weismann in conference a week before the assassination. The witness, Mark Lane, was a New York attorney and spokesman for a group who believe Oswald was innocent. N.Y. Times, Sept. 28, 1964, p. 1, col. 7. He was Mrs. Oswald's attorney for a time, and lectured to paying audiences on his theory of Oswald's innocence. Although he was brought home from Europe at Commission expense on the assumption that he would reveal the informant's name, he refused on the ground that he had "promised the individual that his name would not be revealed without his permission." Report 297. See also N.Y. Times, Nov. 25, 1964, p. 19, cols. 1-2 and 5 Hearings before the President's Commission on the Assassination of President Kennedy 553-55 (1964). He was not ordered to divulge the name and did not do so.

one question, even theoretically, the constitutionality of an investigation in which testimony is wholly voluntary? Why isn't an administrative agency, like any private individual, entitled to ask questions, even out of mere curiosity, as long as people will answer them voluntarily? If no governmental force is being employed to coerce the answers, then the power of government is not being used, and the constitutional protections against government action simply do not apply. No justiciable issue is raised because no constitutional rights have been violated.

Tempting as this suggestion is, it does not apply in the present case because the Warren Commission did use governmental power, and hence did pose potentially justiciable issues. Although the Commission did not have to use its subpoena power, it does not follow that the testimony was wholly voluntary and free from official coercion. The Supreme Court has held that even the informal questioning of police officers can amount to governmental force and intimidation,[84] and as Mr. Rankin put it, "You can't discount the fact that its power to subpoena had the full endorsement of Congress and the President. Anyone who refused to cooperate willingly had to face up to the fact that the Commission could compel him to cooperate unwillingly."[85] Thus it seems apparent that the Warren Commission was exercising governmental authority to obtain evidence, so a legitimate question as to its authority can be raised, despite the fact that no challenge was brought in the courts.

The Commission and the Balance of Values

One of the satisfactory things about our Constitution is the fact that, when properly interpreted, it permits the government to do the things that are necessary, while at the same time maintaining the fundamental values cherished by the people as individuals. Put another way, we know it is properly interpreted if it produces this result. The Supreme Court, on which the duty of interpretation largely falls, must necessarily be very circumspect in weighing such competing values, but it has been many years since the Court has felt free to decide constitutional cases

84. "Silverstein's compliance . . . was not voluntary. People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . . ." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 68 (1963).

85. In Mr. Rankin's view the fact that they could be compelled brought them willingly, since any show of reluctance would merely bring down on them unnecessarily the wrath of a public which demanded that no facts be withheld. The fact that the Commission paid their expenses, whether they were subpoenaed or merely invited, made the use of the subpoena unnecessary. He could recall no instance in which a subpoena had been necessary. Rankin, Interviews.

in a social vacuum. For this reason, no assessment of the validity of the purposes of the Warren Commission would be complete that did not weigh against the obvious advantages of full public disclosure, the possible threat to long held values implicit in the Commission's existence and its work.

Little need be said in defense of the Commission and its report. The tremendous public demand for information, the damage to public morale and faith in our institutions from unanswered rumors, make abundantly clear the vital importance, in times of public catastrophe, of telling the people what has really happened. Had the talk of right and left-wing conspiracies been allowed to go unchecked the consequences to our political system might well have been disasterous. Nor can it be argued that the Commission was costly in terms of competing values. While not everyone was completely satisfied by the report, only a few people felt injured by it.[86] Surely the advantages far outweigh the disadvantages.

If, however, we consider what might have happened, the balance sheet is a good deal less one-sided. Suppose, for example, the Commission had turned up evidence that someone else—some unanticipated suspect—might have killed President Kennedy. Or, what is practically the same, suppose it turned up one or more accomplices to the killing. What does it do? Does it back gracefully out of its role as chief investigator, letting the normal law enforcement agencies take over? Does it turn its information over to the Dallas police? If so, it ceases to serve the function of satisfying public curiosity. If not, what of the rights of this new suspect? He could be granted immunity and forced to testify, but it is unlikely that that would serve the public interest. Could they investigate him as they did Oswald? His past? His relationships? His private papers? Could they announce that he was guilty of killing the President? That he was not guilty? That he was insane? The investigation of crime has traditionally been in the hands of prosecutive and police forces, which have a legitimate interest in punishing violations of the law. Today there is increasing concern that pretrial disclosures, even by these agencies, of information merely to satisfy public curiosity, is hindering our administration of justice. If exposure by these agencies poses a problem, how much less desirable is exposure by an agency which is performing no essential governmental function.

While the suspect would be entitled to a jury trial on the question of his guilt, the Commission's findings would make an

86. Mrs. Oswald, for instance, remained convinced that her son was innocent and the Commission had brought in an erroneous "verdict" against him.

impartial trial almost impossible. Like a well-publicized pretrial confession, the Commission's finding of guilt or innocence would make selection of a jury virtually impossible.[87] Furthermore, a good deal of the information available to the Warren Commission could never be received by a trial court, with the likely result that their conclusions would differ. If this happened, which group would the public believe? Even assuming the Commission delayed making public its findings (as it actually did, out of deference to Ruby)[88] a subsequent release, however long delayed, could still challenge the result of the jury trial and undermine public confidence in either our jury system or the Commission —or both. Clearly, in this situation, there would be a dangerous conflict between the interest of the public in obtaining information and the rights of the accused.

Moreover, the very excellence of this kind of agency poses a threat to our traditional adversary system of justice. While nominally an executive agency, in the mind of the public the Commission was a kind of court, designed to determine, once and for all, who killed President Kennedy. True, its structure and procedures were not those of a court, but the very stature of the Commission, its elite staff, its tremendous investigative facilities, and the unanimity of its findings, all combined to give it an authority second to none. It seems hard to avoid the conclusion that such an agency was more apt to arrive at the truth than any other possible investigative agency. Surely more apt to do so than the twelve men of a trial jury, untrained, with only technically admissible evidence available to them. More apt, too, than the grand jury which the Commission, in a sense, was designed to supplant. And what commensurate public interest is served by insisting upon an agency (the trial jury) and procedure (trial rules of evidence) that are not best suited for determining the truth? The essential values of a fair trial are not jeopardized. Unless one subscribes to the sporting theory of justice, the desirability of a trial lies in its ability to find the truth of guilt or innocence. An accused can reasonably ask for no more than the truth, and here is an agency that will more likely produce it. And if it is good for presidential assassinations, what of other spectacular crimes? Or *any* crimes? In short, what does

87. The Harris survey reported that 94% of the people had heard of the Warren Commission report, and although 31% remained unconvinced that Oswald had acted alone, only 13% were not convinced of Oswald's guilt. Washington Post, Oct. 19, 1964, p. 2, cols. 1-3.

88. "The Commission concluded that the premature publication by it of testimony regarding the assassination or the subsequent killing of Oswald might interfere with Ruby's rights to a fair and impartial trial on the charges filed against him by the State of Texas." Foreword to Report at xiii.

our adversary system offer compared to the inquisitorial system exemplified by the Warren Commission? However one answers this question, serious consideration should be given to any step so at odds with our traditional method of dispensing justice.

Whatever potential threat to justice is posed by such a commission in the abstract is magnified immeasurably by having at its head the Chief Justice of the United States. While he unquestionably lent authority, dignity and stature to the Commission that bears his name, it need scarcely be said that he should not associate himself with any kind of investigation which might ultimately come before the courts of the land. Unhappily, it is never possible to be certain that this will not occur, however unlikely it may seem at the time. Suppose Mrs. Oswald, for instance, suspecting that the Commission was going to issue a report naming her son as the President's assassin, sued to enjoin the publication of the report. Or, suppose that after the Commission had made its report she sued for damages, arguing that since he had not been found guilty in a court of law, and since they were not performing a legitimate governmental function, it was libel to pronounce him a murderer. It is not particularly important whether suits of this kind would succeed or not. The important thing is that the decision of the Commission with the Chief Justice at its head, would embarrass, if not imperil, the determination of such a question. Even the determination of the justiciability of such an issue would be colored by the fact that, with the Chief Justice on the Commission, justiciability would be highly undesirable. The fact that Chief Justice Warren would not sit on the case, should it come to the Supreme Court, hardly answers the problem even at that level; how much greater, then, would be the impact of his presence upon the judges of the lower courts. Moreover, the presence of the Chief Justice would aggravate the already embarrassing position of the Commission were it to turn up a new suspect or an accomplice. Had there been the least suspicion that this could occur it seems inconceivable that Chief Justice Warren would have accepted appointment to the Commission. Faced with the prospect of directing an investigation designed to decide if a living person were guilty of murder, he would have no alternative but to resign, with an attendant embarrassment, if not disruption, of the Commission's work.

So strong are the arguments against a publicity-oriented agency of this kind investigating the guilt of live suspects, with or without the Chief Justice as chairman, that it seems almost inconceivable that the Commission would have been created had

Oswald not been killed. Although Mr. Rankin indicated that the Commission did not assume that Oswald was the murderer,[89] this can probably be interpreted as indicating the open-mindedness of the Commission toward its evidence, rather than any serious doubts about Oswald's guilt. The Commission itself appears to concede this when it notes that its creation was an "alternative means for instituting a complete investigation"[90] of the President's murder, since "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."[91] Thus the Commission, apparently without realizing it, was in the anomalous position of having its very existence depend upon a particular answer to those questions which it was set up to investigate—namely, that Lee Harvey Oswald, acting alone, assassinated President Kennedy. Surely the injection into our system of justice of an agency based on such a preconception poses a threat to impartial justice worthy of the most careful consideration.

It is not the intention of this writer to disparage in any way the members of the Commission, its staff, or the job that they did. Nor should any criticism be implied of the wisdom and judgment of those involved in the Commission's creation. One does what one has to do, and in the emotion-charged period following President Kennedy's assassination it seemed imperative to set up the most competent and respected body possible to assure a worried nation that everything was all right. It is only with the passage of time, and the benefit of hindsight, that we realize luck was riding with the Commission—luck which could not, perhaps, be counted on another time. Problems which did not, but might have, materialized raise serious questions for calm consideration before the need for another such agency appears. And until such consideration has been given, and wise judgments reached, only clearly legitimate governmental purposes should justify placing in jeopardy any of the values of our system of justice. There is great wisdom in Chief Justice Warren's implications in the *Watkins* case that government should not expose for the sake of exposure.

89. Rankin, Interviews.
90. Foreword to Report at x.
91. Ibid.