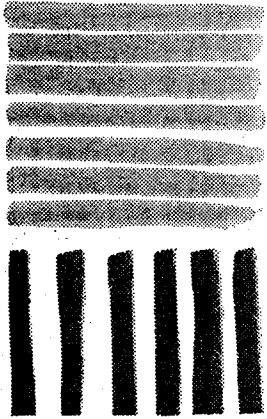


THE NATION

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September 14, 1964 . . 35c



Investigation or Trial?

THE WARREN COMMISSION

Maurice Rosenberg

The Warren Commission ^{9/14/64} Maurice Rosenberg

Soon the select commission probing the assassination of John F. Kennedy will deliver its findings to the world and to history. One inevitable result when the Warren Commission's report comes in will be to evoke anew the heavy flavor of irony which has tinged the tragedy from the start. In part, that is to be expected, for it is the habit of terrible events to reveal one bitter twist after another as their details unfold. Unhappily, in its quest for "truth," the Warren Commission it-

self seems destined to compound the irony, even though its purpose is high and its members honorable.

A week after John F. Kennedy was shot dead in the Dallas motorcade, his successor named the special commission to study the assassination and report back its conclusions. The key instruction from President Johnson was that the commission "satisfy itself that the truth is known so far as it can be discovered." To assure the whole world that the commission's report

would carry the utmost authority, responsibility and credibility, the Chief Justice of the United States was made head of the group and it was rounded out by six other distinguished men from public life.

There was no mystery about what the new President meant or wanted when he charged the commission to bring back "the truth." The shots that killed Kennedy had ricocheted around the world, raising deep fears and doubts. A public-opinion poll taken at about the time the com-

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mission was named reported that a majority of the American people believed that some group or element had worked with the presumed assassin. Many other people reported themselves uncertain as to what to believe. Abroad, there was disquiet and foreboding over the possibility that the act was a step in a right-wing *Putsch*. President Johnson wanted to still the fears and doubts for all time by obtaining indisputable facts about what had happened in Dallas on November 22, 1963, in the days that led up to it, and in the few days following. He wanted the commission to write a report that schoolboys would read as truth in their history books, accepting it forever after as the authentic account of the most calamitous American death since Lincoln's.

And so the Warren Commission began life as the servant of history, dedicated to recording the historical truth about the people and deeds that intersected on November 22-24, 1963, in Dallas, Texas. This was not an event that needed the perspective of time; history in this case could be served up piping hot, for nothing was wanted except the blunt, simple truth about a relatively few stark questions: Did Lee Harvey Oswald kill John F. Kennedy? Did he act alone or were there confederates? Was the assassination a product of political motivation? Was there a plot or conspiracy? When Jack Ruby killed Oswald, was it a mad act of isolated malevolence or again part of a plot?

At the start, the commission thought it had only to "investigate" to establish the truth about those questions. Then coming generations of schoolboys would know the name of the man who shot John F. Kennedy as certainly as they knew that Booth had killed Lincoln.

The lawyers on the commission

and its staff must have reflected that this time, at least, truth was going to be an uncomplicated business. Their job of truth-finding, as they first viewed it, had a plain definition and a vivid model. By building on the FBI's work, and by amassing more photographs, taking more statements, and sifting all the proof, they were to reconstruct the events of November 22 until the picture of what had occurred on that day emerged as clear as the television image of Jack Ruby shooting Lee Oswald. Cameras do not deal in legal judgments and neither would the commission's report.

Regarding the manner as well as the object of the probe, the commission was entirely clear at the start: it was to be an *investigation*, not a *trial*. There was no problem of protecting the rights of any person living or dead, for the commission was unconcerned with accusing or with finding anyone "guilty." In short, there was no call to bring in the elaborate trappings of a jury trial, or the clash of adversary lawyers, or the punctilious legal rules about presumed innocence, improper evidence, confrontation or cross-examination. The commission was to record, in words and retroactively, the truth that a stereophonic sound camera would have reported if it had followed the moves of the President and his killer up to their fatal convergence.

Under its "investigation" concept, the commission had no trouble at all in dealing with the New York lawyer, Mark Lane, when he came forward early in the inquiry with an offer to "protect" the interests of Lee Oswald—presumably, as a trial advocate would. There could be no intention to appoint a lawyer to act on Oswald's behalf, since, as was pointed out by

chief counsel J. Lee Rankin: "The commission is not engaged in determining the guilt of anybody. It is a fact-finding body."

Mr. Rankin made that statement on January 10. A few weeks later, in early February, the Warren Commission took the testimony of Oswald's widow as the first witness, followed by testimony from his mother and brother. Then suddenly, on February 24, the commission did a turnabout and appointed lawyer Walter E. Craig of Phoenix, Arizona, the president of the American Bar Association and a designee for the federal district bench, as an "independent lawyer" to protect Oswald's interests.

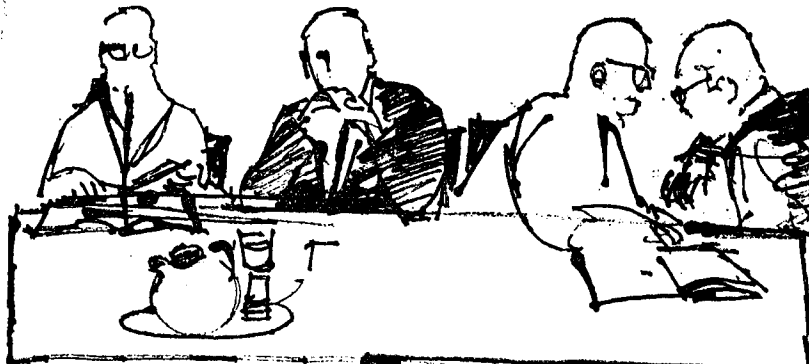
Mark Lane now protested that Mr. Rankin had written him on January 23:

... the commission does not believe that it would be useful or desirable to permit an attorney representing Lee Harvey Oswald to have access to the investigatory materials within the possession of the commission or to participate in any hearings to be conducted by the commission.

Lane also said that in a personal conversation the Chief Justice had told him that "Oswald was not on trial and . . . counsel would not be permitted to represent him." Whether or not the Lane version is completely accurate, there is no doubt that the decision to appoint a lawyer to protect Oswald's interests signaled a drastic change of view by the commission. It must also be true that the shift came in response to some very powerful force, for it was a serious matter for the commission to alter its position after weeks of investigations.

Mr. Craig himself played down the partisan quality of his representation by issuing a statement on March 18, in which he denied he was Oswald's legal protector in the probe. "We are representing the interests of the American people," he said, rather than Lee Oswald's.

Maurice Rosenberg, professor of law at Columbia University, was director of the Columbia University Project for Effective Justice (1956-64). Submitting his piece, Mr. Rosenberg noted that it falls into the dilemma it poses, for it must make assumptions about Lee Harvey Oswald's part in the assassination which can never be decided in a court of law. In a later issue, Herbert Packer, of the Stanford University law faculty, will analyze the substance of the Warren report.



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Harry Moss
Lee Harvey Oswald

He added that his function was to "review" the commission's actions against the possibility of error. Despite Mr. Craig's disclaimer—which may have been prompted in part by sensitivity to his ambiguous role as chief pursuer of Melvin Belli for outbursts in connection with Belli's ill-starred efforts to defend Jack Ruby—the record is clear that the commission did a partial if not a full somersault on the question. The intriguing question is: Why?

The answer is *not* that the commission changed its purpose from neutral probing to prosecuting. Rather, in my opinion, the force that caused the reversal was the subtle but potent pressure of the tradition of adversary trial and due process on the commission's conscience. For the tradition that certain decencies are due a man before he is convicted of crime, even implied or indirectly, is deeply ingrained in American thought. The eminent lawyers who man the commission and its staff are particularly sensitive to the tradition, for they were well schooled in it. As dozens of witnesses took the stand, and as the evidence pointing to Oswald's responsibility mounted higher and higher, the lawyers must have become increasingly aware that "truth" was emerging in a way that to them was at once unaccustomed and uncomfortable. They may well have asked themselves: "Shouldn't there be an advocate for Oswald's innocence? Might he not be able to shake a damaging witness by a searching cross-examination?" Certainly the

staff could not be expected to wield the cudgels for Oswald at the same time that it was busy interrogating potential witnesses, checking their statements, and deciding whether to use them as proof. The commission members could not forsake their places as judges in order to object to improper evidence or to try to punch holes in a witness's story. One day last February there must have been a deep, resigned sigh around the commission's table as the idea took hold that the truth was not to be a simple matter after all; that not only had the inquiry turned up some bits and pieces that didn't quite fit, but that no pieces would really fit unless the commission shifted its course away from investigation and closer to trial.

Perhaps in February the commission came to believe that world-wide concern over the assassination would best be quieted if, as Dean Eugene Rostow of the Yale Law School said, the commission's hearings were conducted "as nearly as possible in the familiar pattern of a trial." This would mean modifying the commission's approach to searching for "legal truth" instead of for historical truth. The shift was a major one.

The truth the law seeks and that lawyers battle for in the courtroom is a very different thing from the reporter's idea of truth. Newsmen try to recapture and record the information that would be reported by an all-seeing, all-hearing witness of events. The law would like if it could to recapture "truth" in that basic sense, but it wants more. In a criminal case it wants to protect the accused in a variety of ways, some of which are constitutional imperatives and others of which are merely well-established common-law procedures. Unlike the camera, the law recognizes diverse social values, some of which it at times regards as more important than getting the naked truth. That is why it does not compel the accused to testify. That is why it bars confessions if they are tainted by force or coercion.

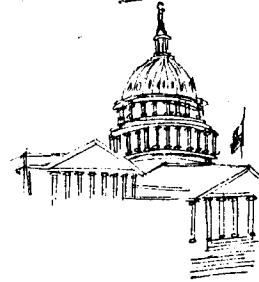
The Warren Commission may have thought at the beginning that it could avoid grappling with these other values and social interests of the law if it resolved that it was not bent on accusing anyone or seeking to prove anyone guilty. However, it soon became apparent that the whole venture was instinct with ac-

cusation; try as one might to be neutral, impartial or merely "fact-finding." As the inquiry went on, the commission realized that the dividing line between fact-finding and accusation was nonexistent when the facts alone might both accuse and pronounce guilt. With that realization, it seems, came the decision to appoint Walter Craig as "independent" counsel to protect Oswald's interests. And so came the shift in direction—from the search for investigator's truth to the search for courtroom truth.

To President Johnson the commission might now say it had come to recognize that there might be essential unfairness in trying to write the truth for the schoolboys' history books without observing the legal rules and safeguards for getting truth. At the same time the members of the commission were aware that in this case legal truth is forever beyond reach. Jack Ruby arranged that when he gunned Lee Oswald down.

The great irony which the Warren Commission's report appears destined to add to the Dallas tragedy is that President Johnson's command to his eminent appointees—root out the "truth" about Kennedy's assassination—became in essence impossible five days before he appointed them. It became impossible when Oswald was killed, for a trial is imperative before guilt for murder can be clamped on a man; and a dead man cannot be made to stand trial. Yes, there can be an *Investigation of the Assassination of President John F. Kennedy*, as the FBI entitled one of the five volumes it delivered to the Warren Commission last December. But the commissioners seem to have found that under American traditions "investigation" by them cannot serve as a satisfactory predicate for pinning guilt on even the most wretched of men. Ruby's trigger finger robbed Oswald of life—and history of justice and truth.

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