

Warren Report

Case for the Prosecution

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We are the only appellate court the ghost of Lee Oswald will ever know, and so it becomes our duty to cast the coldest eye we can upon a version of the life of Lee Oswald and the death of John F. Kennedy that has been produced by men who have sifted through the memories of 552 witnesses. It is no consolation under these circumstances to read, in the Warren Commission's Report, page after page of ratiocination on the source of Lee Oswald's interior quarrel, and then to look in the appendix and discover that the Commission hired for its staff two Army historians and no psychiatrists. It heard only two witnesses who were psychiatrists, one of whom saw Oswald last when he was 13 and the other of whom saw only Jack Ruby. The Commission has acted faithful to the great tradition of a nation of persons who practice psychiatry without a license; we then can go forward with less shame to practice the Commission's profession without a license.

The report destroys most of the assumptions which fed speculations about conspiracy in Mr. Kennedy's murder. Those assumptions were always irresponsible, largely because government was irresponsible. You cannot, as an instance, usefully discuss the source of the wounds of the victim of a murder unless you have an autopsy report. But speculation is unavoidable, and it was hardly responsible of government to give speculation a broader excuse than it deserved by withholding any information so routine - however dreadful to read in this special case. Now, late in the tenth month, the Warren Commission releases the autopsy the Naval Hospital at Bethesda performed on Mr. Kennedy the night of his assassination. Hereafter it will be unreasonable to doubt that the shots came from the general area of the Texas School Book Depository, where Oswald was working. We have the ballistics tests which make it hard to believe that Mr. Kennedy was not killed by shots from the rifle found by the Dallas police in that Depository. We have a history of that rifle which persuades that Oswald was its owner. We have

a chronicle of Oswald's day which destroys any reasonable basis for not believing that he could have done all the things he was accused of doing in all the places the police said he had been, and with such ease as to have no need of an accomplice. It is hard to believe that Oswald did not kill John F. Kennedy, and that he did not act alone.

This report then has drastically narrowed the area of doubt. What doubts remain turn out to be less about Oswald's guilt than about the method of his judges.

Once Oswald was dead, could any established institution give him a fair trial? The Warren Commission began with certain handicaps. It was, if not an established institution, at least a composite of established persons, sharing the commitments of their institutions. Most of its members were insiders examining the claim of that most absurd of all outsiders, a young man who alive had never been able to belong for any respectable period of time to anything, and who dead lay under the heaviest evidence that he had committed the ultimate act of alienation. The Commission, like most of us, had to want Lee Oswald to be guilty and guilty alone. We can then only test the Commission, not by its findings, which were in the main the findings of law enforcement agencies before the Commission staff came to Washington, but by how it went about its business.

There was the danger that the Commission, Oswald's lone guilt accepted, might, in its concern to set all doubts to rest, tidy up its case with evidence that is not evidence at all. Failure to avoid that danger is demonstrated by a particularly conspicuous exercise in argument from evidence which it seems to have gathered on its own.

The Commission has decided that Lee Oswald must have shot Mr. Kennedy twice, once in the neck at a range of 175 or so feet and then in the head at 265 feet. Oswald fired three shots and missed one entirely. If the first hit the President's neck and the second missed and the third hit the President's head, the report says, Oswald would have had no more than 5.6 seconds

to fire all three. If either the first or third had missed, Oswald would have had as many as eight seconds to complete the series.

One problem has always been whether Oswald was capable of firing that distance with that accuracy at that speed with a bolt-action rifle. Oswald was an average marksman when he left the Marines; he had fired only twice for record and never in combat. That is not a history of elaborate training; and what experience Oswald had in the service must have been entirely with semi-automatic weapons. In Russia, he does seem to have hunted with a shotgun; in Texas, he hunted occasionally with a .22. But no witness the Commission would accept testified that Oswald had practiced firing this rifle to any special extent, although Marina Oswald reported that she saw him on occasion with the rifle on his knee, opening and closing its bolt; and that could have improved his firing speed.

The Commission insists, from all this, that Oswald was an excellent rifleman by civilian standards. That is a statement without much meaning. At least 15 million adult males have been through the services in the last 20 years and most of them made the marksman's score, which was Oswald's rating the last time he fired for record.

But, in terms more concrete, the Commission accepts Marina Oswald's story that her husband fired a shot at Major-General Edwin Walker in April of 1963. That judgment strengthens assumptions about Oswald's bent for homicide, but it clearly damages assumptions about his skill with a gun. Walker was shot at while sitting at a table before an open window in his home. Oswald in that case would have fired into a lighted room at a stationary target with his rifle steady on a fence at a range less than a quarter of the distance from which he later killed Mr. Kennedy. And Oswald missed. His performance on November 22 can only be explained in terms of the one day of the golfer's life when he cuts 10 strokes off his normal score. The best argument is that such a rise over his ordinary level is implausible but by no means impossible.

The Commission, of course, cannot accept any explanation both so real and so irrational; it must offer us evidence that, on any normal day, Oswald could have shot the way he did. To fortify this proposition, the Ballistics Research Laboratory had three marksmen, using Oswald's rifle, fire at targets set at each of the three distances from which Oswald is thought to have shot Mr. Kennedy.

The Commission's three specimens were all certified by the National Rifle Association as Master Marksmen, the highest of the NRA's five gradations of skill and three rungs above Oswald's last-known rating on the ladder. That amounts to judging the probable performance of a golfer whose usual score is 85 by testing

the course with men who regularly shoot near 70. Even so these Master Marksmen missed the target on five of their 18 shots, which is not much better than Oswald's average. One missed two of his three targets, a performance worse than Oswald's.

The Masters were instructed to shoot as fast as they could, which, of course, diminished their accuracy as it would have Oswald's. As the times turned out, if Oswald had had only 5.6 seconds to fire all three shots, he was faster with his rifle than these Masters were in four cases and slower only in two. If he had had eight seconds, he would still have accomplished the series in less time than one Master took.

And yet the Commission accepts without question the judgment of Ronald Simmons, its ballistics expert, that "on the basis of these results the probability of hitting the target . . . was relatively high."

If these tests indicate anything, it is that the probability of Oswald's hitting the target was rather low.

In the face of all the other evidence, I am ready to concede that Oswald might just this once have been functioning over his head. But it is hardly fair to his ghost for his judges to employ such a test standard for no better purpose than to elevate the implausible to the probable. That is the kind of thing we expect, not from judges, but from prosecutors of the better sort. In this instance we begin to see the Warren Report not as a judicial finding but as a presentation of a highly responsible prosecutor of the evidence gathered for him by a police force. It is to test such cases that we have an adversary system of criminal justice; with the best will in the world it is hard for courts to function without the minatory presence of a defense counsel.

Testimony of Eyewitnesses

Most of the speculation which has afflicted public discussion about the Kennedy assassination can be blamed on—or perhaps credited to—the refusal of many of us to accept the absurd. But the Warren Report, when it most persuades, is a recital of a series of accidents which ends by convincing us that the absurd really does explain it all, and that Mr. Kennedy really might as well have been killed by a bolt of lightning. Thinking of that, it is possible to sympathize with those who cannot accept such chaos except as the result of the work of a highly rationalized conspiracy.

There was always the danger that the Warren Commission, having accepted the only persuasive theory, would feel some duty to convince the unpersuaded by the desperate sort of carpentry which trims every piece to make it neat, even though the whole is untidy. The case against Oswald badly needs an unimpeachable direct eyewitness; and the Commission functioned in continual peril of losing its balance in the strain to

find the person whose testimony is indisputable.

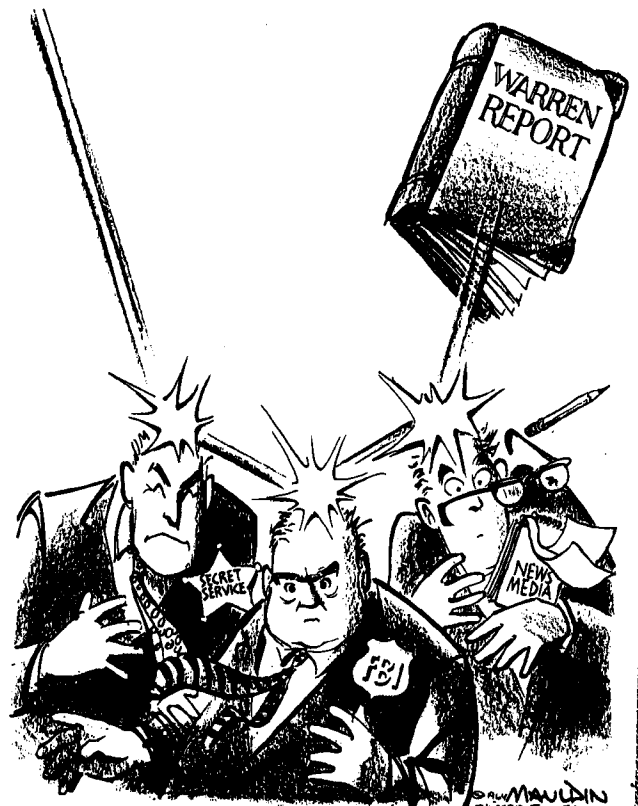
Most of the eyewitnesses have untidy memories, because all witnesses have untidy memories, and because the disorder is worse in this case because they are all persons who were living through an hysterical moment. The first reports of their testimony produced conflicts which are the strongest reason why doubts of Oswald's guilt have until now persisted. The Commission, like the rest of us, had to pick and choose whom to believe among hundreds of clouded witnesses.

It gives special confidence to three witnesses to the Kennedy murder. The most important is Howard Brennan, a steamfitter who claims he saw a man firing a rifle from a sixth-floor window of the Texas School Book Depository. His description of that man seems to have been given to a policeman a few minutes after the shooting and is assumed by the Commission to have been the basis for the first police broadcast warning all patrols to look out for a suspect who would have looked very like Lee Oswald.

After Oswald's arrest, Brennan was taken to a police line-up where he said that Oswald looked like the man he had seen in the window, but that he could not make a positive identification. Brennan explained four weeks later that he had been sure that Oswald was the man but had refused to say so outright because he was afraid the Communists might kill him too. He told the Commission finally that he was sure that he had seen Oswald in the window.

Even so and quite properly, the Commission concludes its summary of his testimony with the statement that it could not base its conclusion that Oswald was the assassin on any identification by Brennan. But then, 100 pages later, Brennan enters again with the flat reminder from the Commission that "Howard L. Brennan made a positive identification of Oswald as being the person in the window." The best of prosecutors tidy up matters that way between the day the witness testifies and the day they sum up to the jury; that is why we have defense attorneys.

The Commission is also impressed with the testimony of Ronald Fischer and Robert Edwards, who were standing in the street and also saw the man in the window. Fischer looked at him for 15 seconds - "he appeared uncomfortable . . . [he] was just there transfixed." The Dallas police do not seem to have found out about Fischer until a week after the assassination. Then they showed him a picture of Oswald, and Fischer said "that could have been the man," but he was "not sure." The Commission concedes that Fischer and Edwards did not see this suspect "clearly enough or long enough to identify him." That is an odd finding, set against Fischer's recollection that he watched the man intently for 15 seconds and saw enough of his expression to reach a judgment on the state of his nerves.



Carom Shot

But the Commission seems rather to appreciate high color when it is offered by a supporting witness. Mrs. Mary Bledsoe, Oswald's former landlady, saw him on the bus in which he began his errant progress from the Book Depository. "He looked," she said, "like a maniac . . . he looked so bad in his face, and his face was so distorted." No other witness who saw Oswald between the assassination of Mr. Kennedy and the murder of Tippit remembers him in any such state of frenzy, and only one remembers him in an unusual hurry; Mrs. Bledsoe is a precise witness, but we have to assume that high romance is her little weakness, and that the Warren Commission offers her description of Oswald with the fit upon him with the indulgence good prosecutors render to good witnesses.

William Whaley, the taxi-driver who drove Oswald after he left the bus, remembered that he was in a state so oddly calm under the circumstances that he even offered to give up the cab to a woman passenger who said she was in a hurry. The Commission is not too content with Whaley; he was an untidy witness, even though his misrecollections offered small substantial support to any case for Oswald.

Whaley picked Oswald out of the line-up with ease, although his reflections on that scene might explain

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why any good prosecutor would find him untrustworthy. In that line-up, Whaley said, "You could have picked him out without identifying him by just listening because he was bawling out the policemen, telling them it wasn't right to put him in line with those teenagers." Whaley said that the line-up consisted of five young teenagers, all handcuffed together, and Oswald. That is the only account of Dallas police line-up techniques to be found in the report and the Commission is careful to correct it.

"Whaley's memory of the line-up," it says, "is inaccurate. There were four men altogether, not six men, in the line-up with Oswald." Two of these men were 18 and one was 24; Whaley may have exaggerated a little, but the truth, as provided by the Dallas authorities, is hardly a model of police practice.

There are, incidentally, strange gaps in the Commission's selection of witnesses. After he saw his man fire from the sixth floor, Brennan quickly "reported his observations to police officers." While he was talking to them, three more witnesses came out from the Depository. Brennan heard them tell the police that they had been on the fifth floor, that there had been three blasts directly overhead, and that they had even heard the ejected cartridge cases fall on the floor above them. This last detail is extraordinary, when we remember it was recorded by ears still ringing with a muzzle blast overhead. However, the Commission favors us with the results of detailed tests proving that it could have happened.

Yet it neglects to follow through on a detail much more important. Brennan's description, the Commission decides, was the source for the 12:45 police alarm describing a suspect very like Oswald. Brennan told a number of policemen. One of them, if the Commission is correct, must have called headquarters and given the material for the alarm. The way to find out whether the Commission is correct would be to find out who that policeman was. But Brennan's story, which I assume is true, is nowhere supported by the printed testimony of any of the policemen with whom he talked. The three witnesses who were on the fifth floor and heard the shots on the sixth wander in the same vacuum. Instead of going to the sixth floor to investigate, they sensibly went down to the street to find a policeman. Brennan says he heard them tell their story to a group of policemen. No policeman is cited to confirm this story either.

It is possible to guess why none is. We have every reason to believe that, no later than 12:40, a group of Dallas policemen had been told that the shots came from the sixth floor. "Around 1 p.m.," the Commission tells us, "Deputy Sheriff Luke Mooney noticed a pile of cartons in front of the window in the southeast corner of the sixth floor. Searching the area he found,

at approximately 1:12 p.m., three empty cartridge cases on the floor near the window." Now that, if it means anything at all, describes a man who is searching blind and who has to depend on luck and patience to find what he does not know he is looking for. Mooney happened upon the assassin's ledge 25 minutes after Brennan had told a policeman precisely where it was, and he happened upon the cartridge cases 32 minutes after three witnesses had told a policeman where they heard them fall.

The Dallas Police

We come, by way of the Commission's fixed solicitude for the Dallas police, to the worst danger the Commission faced.

On November 29, Mr. Johnson appointed the Warren Commission and instructed it "to satisfy itself that the truth is known so far as it can be discovered" and to report its conclusions to him, "to the American people and to the world." The mention of the "world" rather gives the game away; the Commission was charged from the beginning with custody not just of the truth but also of the nation's reputation. At the time of the assassination, the Dallas Police Department was custodian of the national tradition of orderly justice, and the national reputation can hardly be served by too indignant recollections and too forceful strictures upon the Department's conduct. The Commission is disturbed by the disorder which ruled the Dallas jail all that weekend; it is far harsher on the news media than it is on the police. I confess a bias for the reporter over the cop; even so, the reporter is a private man and the cop is the representative of the public order and his conduct is what must be judged. The Commission says that Police Chief Curry may have erred out of his fixed belief in the public's right to know. That is a terrible excuse; the reporters who badgered Oswald could also claim that they were serving the public's right to know. The only policemen of my acquaintance who respect the public's right to know have been publicity hounds. That is what Chief Curry and Sheriff Decker give every evidence of being; lust for public notice was their only motive. The reporters should not have baited Lee Oswald; but, much more fundamental, the police should not have brought him out to be baited. Reporters go as far as society will let them; it was the duty of those cops to throw the reporters out. And the Commission has to be harsher on private citizens who were doing their job than it can be on policemen who refused to do theirs.

The Commission, in the most moderate terms, makes one revelation at which, I should think, Chief Justice Warren would normally climb walls.

For two days, Chief Curry had been blatting to the

papers any piece of evidence he thought useful to his image. After Oswald was murdered, J. Edgar Hoover called Curry and told him to shut up. Thereafter the chief stopped talking to reporters. On Sunday night District Attorney Henry Wade came to Curry, said the world was full of rumors that Oswald died an innocent victim and that he proposed to go before the press and set the record straight with full details of the case assembled by the police.

Curry, with the wrath of Hoover still hot upon him, refused to give Wade any of the police case. Wade went doggedly ahead from what he remembered hearing around the corridors over the prior two days and appeared on television to reassure the public that Oswald was guilty beyond any possible debate.

"Unfortunately," the Commission says, "he lacked a thorough grasp of the evidence and made a number of errors . . . [which] provided much of the basis for the myths and rumors that came into being soon after the President's death." Oswald was a defendant who had been executed without trial, and Wade saw fit to pillory his yet-unburied body for no higher need than the public relations of a law enforcement office whose public relations were beyond repair. And the Warren Commission can find nothing larger for criticism in this spectacle than that it was poor public relations.

The Commission, one supposes, has to be gentle with these people because it thinks that so much of the case against Oswald depends on belief in the findings of the Dallas Police Department. And that brings us to a final danger the Warren Commission could hardly have entirely avoided.

Under Surveillance

The Commission is a creation of the President and therefore responsible to him. Only persons possessed by the notion of some great public conspiracy could demand that the Commission appoint its own investigators and pursue its inquiry as though the Dallas police and the Federal Bureau of Investigation were suspect institutions.

The Department of State gave the Commission what it chose to; what it gave was useful to enlighten those of us who wondered how Marina Oswald got out of Russia and how Oswald got his passport in 24 hours, two puzzles which the Department's explanations suggest most satisfactorily were not puzzles at all. The Commission also mentions the surmise that Oswald had some connection with the Central Intelligence Agency; it might better have left the subject alone than attempt to rebut with the single piece of testimony which is here cited:

"Director McCone stated unequivocally that Oswald was not an agent, employee or informant of the CIA,

and that the Agency never communicated with him in any manner or furnished him any compensation."

There is, of course, the tangential matter of the Commission's criticism of the Secret Service and of the FBI for failing to spot Oswald in advance. It seems strange that the Secret Service could report that its files did not contain the name of a single person in the whole Dallas-Fort Worth area who might shoot the President of the United States. But it is even stranger to find Earl Warren's name attached to a suggestion that police surveillance of private persons needs to be tightened in this country. The FBI seems to have underrated Oswald's potential for violence; but it kept him under surveillance rigorous enough to shock any of us at this invasion of personal privacy.

Here is a summary of Special Agent James P. Hosty's handling of the FBI's Oswald file from March, until November, 1963: Hosty had closed the Oswald file, but, in March, he went to Oswald's last-known address to see Marina for the routine check-up the FBI makes on Russian émigrés. The Oswalds had moved; their former landlady told Hosty that Oswald drank and beat his wife. That was enough to make Hosty reopen the file.

In April, New York informed him that Oswald was subscribing to the *Daily Worker*. Later New York informed him of the contents of a letter Oswald had written to the Fair Play for Cuba Committee. The FBI then found Oswald in New Orleans. A confidential informant told its agents that Oswald was not engaged in Communist activities. On October 10, the CIA informed the FBI that Oswald had visited the Russian Embassy. Early in November, Hosty learned that Oswald was back in Dallas and living with Mrs. Ruth Paine in Irving, Texas. Hosty conducted a limited survey of the Paines, decided that she seemed trustworthy, went to see her, was told that Oswald had gone to work at the Book Depository, made sure it was not a sensitive industry and decided to let Oswald go for awhile.

So the FBI keeps a check on subscribers to the *Daily Worker*, it has ways of opening letters to the Fair Play for Cuba Committee, its underground informants keep an eye on Oswald, and the CIA reports to it when Americans visit the Russian Embassy. That seems to be surveillance quite intensive enough for a man who seems rather to have bored the FBI. For compelling reasons, I wish the FBI had gone farther with Oswald, but, in general, it would seem to me to have gone if anything too far with anyone else. I should think Mr. Justice Warren would normally find this sort of thing excessive. But for the moment he worries over whether our police methods are strong enough. In sum, he has given us an immense and almost indisputable statement for the prosecution. *END*