

THE NATION

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The Warren Commission

At the time the Warren Commission was appointed, *The Nation* took the position that it would stoutly resist the temptation to enter the ranks of the rapidly expanding army of amateur "private eyes" and miscellaneous free-lance James Bonds who were even then busy as beavers mass-producing conspiracies among unnamed "oil millionaires" and offering each day a new theory of President Kennedy's assassination. We said then (December 28, 1963) that we would not add to the confusion and uncertainty—unless of course we were able to present some new and verifiable facts—nor would we draw any conclusions until an official version of the facts was available. At the same time, we urged that public concern should not abate merely because the Warren Commission had been appointed, and advised that its work be kept under close scrutiny. We also said that we would make an independent assessment of the commission's report when it was issued (see article by Herbert L. Packer, p. 295).

We have had no occasion to regret these decisions. On January 27, we ran an article by Harold Feldman, raising certain questions about the FBI's interest in Oswald. In the same issue we devoted a second editorial to the Warren Commission, expressing our confidence in the staff and the commission and insisting, as we had done previously, that the Chief Justice's integrity in the matter was not to be questioned. At the same time we pointed out that the questions raised about the role of the FBI were addressed to the commission and called for specific findings. The commission did not accept at face value assurances that Oswald had never been an informer for the FBI or any kind of agent for the CIA; it checked the personnel records of both agencies to verify these assurances. This is precisely the kind of specific finding that was needed and the only kind that would be acceptable to a deeply concerned world public.

More recently (September 14), and in anticipation

of publication of the commission's report, we ran an article by Maurice Rosenberg of the Columbia Law School which dealt with an aspect of the commission's work that would not be affected by the report itself.

In our view, then, the commission did its work well; the report is an admirable document, and the Chief Justice, his associates and the staff merit the praise they have received. The report should terminate the wilder speculations and more irresponsible rumor-mongering, but it will not do so. We have had occasion to experience, with more sadness than surprise, the depth and pervasiveness of the will to believe (notably among Left-of-Center groups) that the President's assassination was the result of a sinister conspiracy—the names of the conspirators to be filled in as need, fancy and bias dictate. Of course there are weaknesses and uncertainties in the report, and it may well be that facts still to be uncovered will throw fresh light on this or that aspect of the Dallas tragedy. But on the essential points, we share Mr. Packer's conclusions. On some of the larger implications—the background factors—we have reread with satisfaction Reece McGee's "The Roots of the Agony" (December 21, 1963) and Richard Condon's reflections on a kindred theme (December 28, 1963).

be allowed to return; Molotov and Malenkov, for example? Molotov is 74, and in his case it is doubtful, though his pro-Chinese line might now be regarded as correct. Malenkov is still popular in Russia as the "more-consumer-goods" man, despite Khrushchev's attempts to blacken him as a bloodthirsty villain on a par with Beria. But is Malenkov alive? Nobody knows.

Anyway, the Khrushchev era, the best domestic aspects of which were a far greater personal freedom and "freedom from fear," is over. How far "de-Khrushchevization" will go, and whether it will take on violent forms, it is still too early to say. But even last summer I often heard remarks like this from industrial executives: "Our people are getting lazy; you can say what you like,

but there was more discipline under Stalin."

Kosygin, the able administrator and technician, has been, in the past, very much a Stalin man. For the present, I should hate to prophesy how little, or how much, "re-Stalinization" there is going to be. But one thing is certain: there will be a radical change in Soviet-Chinese relations.

The Warren Report

A Measure of the Achievement . . . Herbert L. Packer

The Warren Commission has admirably fulfilled its central objective by producing an account of the circumstances under which President Kennedy was assassinated that is adequate to satisfy all reasonable doubts about the immediate, essential facts. We now know as much as we are ever likely to know about what happened in Dallas. Why it happened remains, perhaps forever, obscure. If there are minor flaws in the report—some unavoidable, others, as I shall suggest, that might have been corrected—they are thrown into shadow by the conscientious and at times brilliant job that the commission has done. Only those who for whatever reasons of personal or political myopia cannot bring themselves to face reality will continue to think that the tragedy was proximately the work of more than one man and therefore ultimately the outcome of a conspiracy. The fantasists will continue to differ about whose conspiracy it was—Texas oil millionaires or Kremlin operatives—but their central premise will continue to hold. The important difference is that now the supposed factual basis for their premise, as well as for more reasoned doubts about what appeared to be the truth, has been dissolved.

The commission's relations with the outside world during the period of its investigation have not been altogether fortunate. Regrettably, the difficulties have not ceased and must now affect any immediate

judgment on their product. The problem during the investigatory period was one of too much information. There was a series of leaks, some unplanned, others bearing at least the appearance of calculation, that suggested the crystallizing of a "position" long before one could confidently have been arrived at. The most spectacular of these was the revelation, scant weeks after the commission was organized, that the FBI report confirmed the theory that Oswald, acting alone, was the assassin. That leak may well have been beyond the commission's control but, taken in conjunction with others that were not, it created an impression of prejudgment that could not help but detract from the confidence with which the findings would be received. It is the measure of the commission's achievement that qualms of this sort have been, at least in the immediate aftermath, muted. Whether they will continue to be so remains to be seen and will depend to a considerable extent on what happens when the new problem of too little information is rectified.

I refer to the fact that the supporting volumes of transcripts and exhibits, originally slated for release simultaneously with the report volume, are still not available and apparently will not be released for some weeks. This should not have been allowed to happen. Whether the fault lies with the commission or with the White House, it is a grievous one. What it means, very simply, is that there is not at this time an adequate basis for evaluating the quality of the commission's fact-finding process. The

problem is particularly acute in the case of findings that rest wholly or largely on testimony by eyewitnesses. By a careful reading of the report one learns who some of these witnesses were and what the commission thought was established by their testimony. What one cannot learn is how their testimony was probed by the inquiry. Much of that process is doubtless contained in working papers that will never be published, but the public record of the commission will include a good deal of it. One assumes from the quality of the report that the probing was detailed and penetrating; but that remains a surmise until the raw material is available for examination.

It may well be that once the report was in the President's hands he had no alternative but to release it at once. If so, the commission should not have transmitted it until the supporting data could be made publicly available. That kind of reticence may have been rendered difficult by the apparent ease with which the press was able to learn how far along in its work the commission was. If so, it is sufficient answer that this body had unique reason to know that accommodating the press is not the *summum bonum*.

Fortunately, the report and some of its appendices permit evaluation of the central findings. The factual controversies have been so numerous that it is easy to lose sight of the distinction between what is important and what is merely interesting. What is primarily important is the physical facts of the assassination. We now have as reliable

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evidence on that score as we are ever likely to get. That evidence fatally impairs the viability of the various conspiracy, or revisionist, theories that have been advanced in the months since the assassination. I do not propose to analyze the evidence in detail. Readers of this article have presumably read the report. (It should, but probably does not, go without saying that no one who has not read the report, and read it carefully as a whole, should feel himself entitled to hold an opinion about its virtues or defects.) What I shall do is separate out the central core of evidence that demonstrates beyond peradventure that one man, acting alone, fired all shots that were fired at the Presidential limousine and that the man was, beyond a reasonable doubt, Lee Harvey Oswald.

(1) *All of the wounds sustained by President Kennedy and by Governor Connally were inflicted by bullets fired from the rear and above.* This is demonstrated by the medical report on Governor Connally and the autopsy report on the President, as corroborated by (a) examination of the bullet holes in the President's clothing, which showed that the first shot that hit him entered his back and exited through the lower part of his neck; (b) the damage to the inside of the windshield caused by a spent bullet fragment; (c) the absence of any damage that could have been caused by a bullet or bullets fired from the front.

(2) *All of the shots were fired from the sixth-floor window of the Texas School Book Depository (TSBD).* This is demonstrated by (a) the re-enactment of the shooting accomplished with the aid of the motion picture of the actual shooting taken by Abraham Zapruder, which proved consistent with the medical and ballistics evidence with respect to the wounds; (b) the presence of three used cartridge cases on the floor near the window from which the shots were hypothesized to have been fired; (c) the presence of a rifle on the same floor; (d) the absence of any bullets or bullet fragments not accounted for by the fire from the TSBD.

(3) *The shots were fired from the Mannlicher-Carcano rifle found on the sixth floor of the TSBD.* This is demonstrated by the results of the ballistic tests on the bullet and bullet fragments that were recovered, and on the cartridge cases found on the sixth floor of the TSBD.

(4) *Oswald was the owner of*

the rifle used in the assassination. This is demonstrated by (a) identification of the handwriting on the order for the rifle, its envelope and the accompanying money order as Oswald's; (b) the use in ordering the rifle of a false name corresponding to that on spurious identification documents found in Oswald's possession.

(5) *The shots could have been and probably were fired by Oswald.* This is demonstrated by (a) Oswald's admitted presence in the TSBD at the time of the assassination; (b) the presence on the southeast corner of the sixth floor of a homemade paper bag bearing Oswald's left index finger print and right palm print; (c) the presence on the rifle barrel of Oswald's palm print; (d) the presence in a crevice on the rifle of fibers corresponding with samples taken from the shirt worn by Oswald at the time of his arrest; (e) the absence of any evidence pointing to the probability that any other person in the TSBD fired the shots.

That is the minimal case against Oswald. It will be noticed that in no detail does it require the acceptance of eyewitness testimony, disputed or undisputed. It is corroborated by the weight of the available eyewitness testimony, but for our purpose we need not even consider that. It is also corroborated by the physical evidence demonstrating that Patrolman Tippit was killed by bullets fired from a revolver found in Oswald's possession at the time of his arrest, but we need not consider that.

No one has yet suggested any basis for controverting any part of what I have described as the minimal case. Of course, it does not conclusively establish that Oswald killed the President. It is in theory possible that some other person or persons either used Oswald's rifle to shoot the President or used his pistol to shoot Tippit, or both. But in the absence of evidence that it was physically impossible for Oswald to have done both killings, or of evidence strongly pointing to the probability that one killing, or both, were done by someone else, a jury might be expected to conclude on the basis of the minimal case alone that Oswald was the killer. No such discrediting evidence has been adduced, nor has its possible existence been made even remotely plausible.

The minimal case is supported rather than negated by what eyewitness testimony is available. But as

every trial lawyer knows, eyewitness testimony is notoriously unreliable as compared with physical evidence. It is hardly cause for concern in any garden-variety criminal case that eyewitnesses disagree about such matters as how many shots were fired, whether a man was 5' 11" or 5' 8", was wearing a white or a light-colored jacket, had bushy hair or simply needed a haircut. Disagreements on matters of this kind are the everyday grist of the trial courts. The minimal case against Oswald is far stronger than that against many criminal defendants who are with perfect propriety convicted and sentenced every day. So far as eyewitness testimony goes, it needs to be remembered that in most criminal prosecutions there is either none at all or far less than was available here.

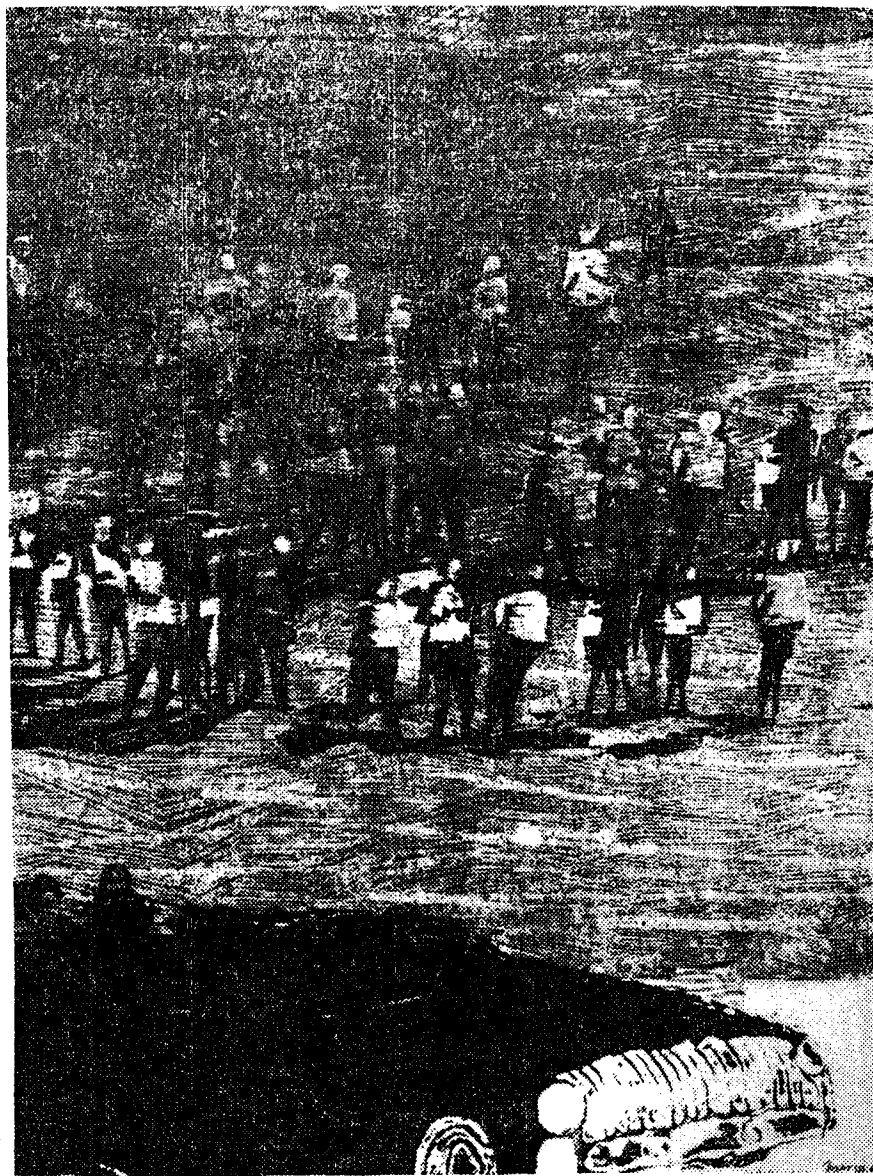
The discrepancies of evidence recorded by the commission are marginal. When there is a conflict of eyewitness testimony, someone has to be believed and someone disbelieved. Other indices of veracity aside, the basis on which choices of this kind are normally made is to ask oneself, consciously or unconsciously, which of the conflicting versions better accords with what is known to be true. There always comes a point in fact finding at which one says to himself: "This is the way it probably happened; now let us see how the hypothesis stands up." In that sense, any fact-finding process always involves at some stage the formation of a hypothesis. Here the hypothesis against which the evidence was tested was, as the weight of the initial evidence compelled it to be, that Oswald acting alone was the killer. The question about the Warren Commission, as about any fact-finding body, is whether it made proper use of its working hypothesis. Did it close its mind to other possibilities? Did it refuse to deal with evidence inconsistent with its hypothesis? Did it suppress evidence? The answer to all these questions revealed by perusal of the report is an emphatic negative. Only someone irrevocably wedded to a contrary hypothesis could honestly (or would dishonestly) say that the Warren Commission was guilty of faults such as these.

One of the revisionists has said that when the full truth is known the Warren Commission report "will rank in history with the finding that

Dreyfus was guilty of treason." The comparison is instructive, for it presents us with a measure of what would have had to be the case for the Warren Commission to suppress or ignore the truth about the President's assassination. The Dreyfus case involved a corrupt conspiracy among a reactionary group of French army officers to promote their own political ends by pinning the theft of certain secret documents on a Jewish army officer and, later, by suppressing evidence of his innocence. It would have required rottenness in an entire caste to achieve its purpose; in the end it failed because even in as monolithic a group as the French officer corps there was a Colonel Picquart who refused to be even a silent party to such degradation. The revisionists would have us believe that a similar conspiracy must have existed among the much more diverse group who made up the commission and its staff. It will take more than vague references to "the Establishment" to demonstrate the common bias of Earl Warren and Richard Russell, or the sinister motives that would unite John J. McCloy and Hale Boggs in a conspiracy to suppress the truth. And, of course, the issue extends beyond the seven members of the commission, on whom most of the revisionist fire has been concentrated. Any conspiracy to suppress evidence must also have included the staff, consisting mostly of outstanding young lawyers, several of them of distinctly liberal political persuasion, one of whom has had the compliment of being denounced on the floor of Congress as unfit to serve with the commission because of his membership in the Emergency Civil Liberties Committee and the American Civil Liberties Union. Only someone deeply ignorant of American society or deeply committed to a belief in its corruption, or both, could seriously maintain that a conspiracy of silence has been maintained by this group.

The commission's report convincingly demonstrates, as I have said, that Oswald, acting alone, was the assassin of the President. Let us consider now the significance of "acting alone." All that has been shown convincingly is that the immediate physical acts were those of Oswald alone. That has been demonstrated beyond reasonable doubt. The commission "found no evidence

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"Dallas, November 22, 1963"

These woodcuts by Antonio Frasconi are part of an exhibition now being shown by the Terry Dintenfass Gallery, New York

that anyone assisted Oswald in planning or carrying out the assassination." We may expect revisionist theories to move now from the discredited assertion that Oswald was not the killer or the sole killer to the much less disprovable assertion that he was the instrument of a conspiracy. We may also expect that the theories will all be variations on the theme that the conspiracy was composed of Texas oil millionaires or of Soviet (or perhaps Chinese or Cuban) agents, depending on the views of the proponent. It is necessary to admit that the commission did not succeed in excluding the possibility that Oswald was the instrument of either a rightist or a Communist conspiracy. Nor did it exclude the possibility that he was

acting as the agent of Revilo P. Oliver or Mark Lane. It is a little difficult to see how the commission, or any other human agency, could have done so. Even their careful review of what could be learned about Oswald's past could not fashion a net so fine that no significant event or acquaintance might slip through. Anyone who supposes that the commission could silence doubts of this order is deluded. We may confidently expect a spate of theories about Oswald's motivation. And it is not beyond the realm of possibility that one of them may turn out to have something to it. The commission's report did not purport to close what is obviously an unclosable door.

The revisionists have already fallen out among themselves. Mr. Leo

Sauvage, who alone among them had the comparative good sense to ask questions rather than propound answers, has scornfully dismissed the third-rate James Bond thriller produced by Mr. Thomas Buchanan. We have yet to see whether Mr. Sauvage wishes to stand by his assertion that the case against Oswald is "a tissue of improbabilities, contradictions, and outright falsifications." The case of which he spoke was, of course, the case made to the press by the incredible antics of the Dallas authorities in the weekend of the assassination. That is not the case made by the Warren Commission. But the revisionists have already demonstrated that they intend to go on flogging a dead horse. Mr. Mark Lane, currently the most active of their number, has produced an appraisal that performs the interesting feat of attacking the report without once confronting its central findings. Instead, he devotes himself to the easy but now irrelevant task of attacking the inaccuracies in District Attorney Wade's oafish public statements. And Mr. Lane has the temerity to assert that he has the name of a witness to the Tippit shooting that the commission does not know about, without vouchsafing an explanation of his refusal to reveal the name when he testified before the commission.

What was merely tiresome in the days before the commission made its report is now mischievous. Mr. Lane and his friends are of course entitled to carry on. But they deserve attention if, and only if, they confront the central findings of the commission and demonstrate their falsity in any regard. These findings, to repeat, are: (1) *All the wounds sustained by President Kennedy and Governor Connally were inflicted by bullets fired from the rear and above.* (2) *All the shots were fired from the sixth-floor window of the Texas School Book Depository (TSBD).* (3) *The shots were fired from the Mannlicher-Carcano rifle found on the sixth floor of the TSBD.* (4) *Oswald was the owner of the rifle used in the assassination.* (5) *The shots could have been and probably were fired by Oswald.* None of these findings depends on resolving conflicts among eyewitnesses of the kind abundantly present in the perception of any disturbing event. This central core of physical evidence is the case against Lee Harvey Oswald. It is the case that would

have had to be discredited in a court of law if Oswald had lived to be tried. It is the case that the revisionists must discredit if they wish us to believe that their a priori view of history happens this time to record a fact rather than an ideologue's fantasy.

So much for the central and so far unshakable core of the commission's findings. It needs to be sharply distinguished from some peripheral aspects that involve either issues of fact upon which judgment must for the moment remain suspended, or issues of opinion upon which controversy will continue for a long time to come. I shall give some examples of each. First, there is the finding that Oswald attempted to kill Maj. Gen. Edwin Walker in April, 1963. This finding rests on evidence very different in quality from that which we have been discussing. First, there is a note in Oswald's handwriting that could have been (but was not proved to be) written just before the attempt on Walker's life and that is consistent with the theory that Oswald intended to make such an attempt. Second, pictures of General Walker's house taken with a camera owned by Oswald were found among his effects. Third, the evidence of ballistics experts tended to show that the bullet allegedly fired at General Walker could have come from Oswald's rifle.

All of this adds up to not a great deal. What persuaded the commission that Oswald was Walker's assailant appears primarily to be the testimony of Oswald's wife. The commission obviously concluded that Mrs. Oswald was a truthful witness. Without studying the transcript of her testimony and, particularly, without evaluating the quality of the commission's examination of her story, one simply has no basis for reaching a judgment as to whether the commission's reliance on Mrs. Oswald's testimony was well founded. This is just one of several instances in which what I have described as the premature release of the report is unfortunate.

A second pair of instances involves the testimony of the principal eyewitnesses to the shootings: Howard Brennan, who observed the assassin at the sixth-floor window and later identified him as Oswald, and Helen Markham, who seems to have

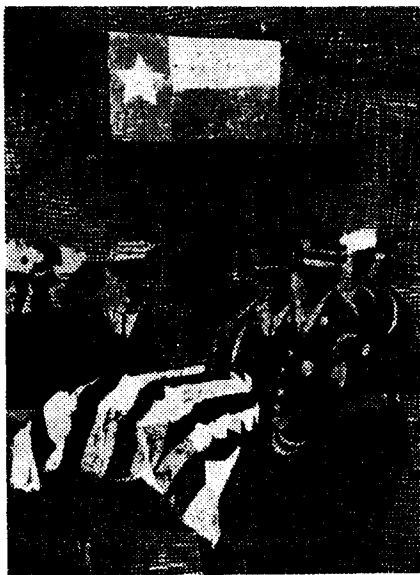
been the main witness to Patrolman Tippit's slaying. While the commission's report appears to contain a fair appraisal of possible inconsistencies in their testimony (particularly Mrs. Markham's), an independent evaluation of their probative value, difficult at best, is impossible without access to the transcript of their examinations. It will be recalled that the commission, in one of several public reversals of its announced policy, decided to appoint counsel to represent Oswald's interests. I disagree with Professor Maurice Rosenberg's appraisal, expressed in these pages a few weeks ago ["The Warren Commission," September 14], that this decision represented an inevitable (and if I read him correctly, a desirable) recognition of the essentially adversary quality of the inquiry. Rather, it seems to me that the commission compromised the integrity of the distinctive fact-finding process for which it was constituted by making the appointment. But that is water over the dam. The question is whether the quality of the commission's process was improved by the participation of the counsel who in some metaphysical sense "represented Oswald's interests." No better evidence on that subject should be available than the quality and extent of the examination by Oswald's counsel of the alleged eyewitnesses to the two slayings. Judgment on that issue will, again, have to await the publication of the transcript volumes.

Finally, there are the portions of the commission's findings that express judgments on matters of policy extrinsic to the central question of what, physically, happened in Dallas between 12:30 and 1:50 on the afternoon of November 22, 1963. Among the several issues of public importance canvassed by the commission, two stand out as calling for critical comment: the implied conclusion that Oswald's custodial treatment by the police was proper, and the absence of any specific condemnatory conclusion about the public statements of Chief of Police Curry and District Attorney Wade. One suspects that these matters gave the commission some difficulty. Chapter V, which deals with Oswald's detention and death, is the only substantive chapter in the report that does not contain in its text separately stated conclusions (aside from Chapter II, which is simply a

narrative of the assassination). Instead, one has to pick out from the text isolated conclusory statements like the one ascribing "primary responsibility" for having failed to control the press to the Dallas Police Department (a statement not picked up in the mild slap on the wrist administered to the Dallas authorities in the introductory statement of Conclusions). The clear implication is that there were irreconcilable views within the commission on either the nature of the value judgments to be made or on the desirability of making them. What will appear to many as an ethical failure on the commission's part is likely, I think, to impair the report's lasting quality as a state paper.

The commission goes to extraordinary lengths to avoid the conclusion that Oswald was effectively deprived of the assistance of counsel during the crucial hours of his interrogation both before and after being formally "arraigned" (or, with technical accuracy, advised of the charges against him) for the two murders. The commission suppresses no facts but it draws (or, perhaps, avoids not drawing) a conclusion quite at variance with the facts. The facts are: (1) on Friday representatives of the ACLU tried to see Oswald; (2) on Saturday he tried unsuccessfully to phone John Abt in New York; (3) on Saturday afternoon he declined an offer of aid from the Dallas Bar Association, saying that he preferred Abt or, as a second choice, an ACLU lawyer; (4) he in fact saw no lawyer. We do not know whether Oswald was ever told that ACLU representatives were prepared to supply him with counsel;

it seems a fair assumption that if he had been apprised of this immediately available assistance and had declined to accept it, that fact would have been disclosed. What emerges, then, is a clear case of deprivation by omission. The Dallas police knew that Oswald wanted a lawyer and knew that one he was prepared to accept was immediately available. Instead of informing him of the availability of immediate aid from a source they knew he trusted, the police chose to play a game of blind-man's buff. If Oswald had lived to be tried, the incriminatory false statements that he made during his interrogation would in all likelihood have been held inadmissible in evidence against him, under recent decisions of the other tribunal over which Earl Warren presides. One suspects that, unlike that other tribunal, the Warren Commission dis-



couraged dissenting opinions and followed a rule of unanimity: nothing was expressed that did not command the assent of all its members. And so the opportunity was lost to affirm standards of police practice that were disgracefully flouted in Dallas.

Equally disappointing is the gingerly treatment of Messrs. Curry and Wade. It is true, as the commission said, that their "sometimes erroneous" statements would have presented "serious obstacles" to a fair trial and that those same statements helped to create "doubts, speculations, and fears" that might otherwise not have arisen. But surely that is not all, or even the gist, of what needed to be said and what the commission should have said: that the conduct of these mountebanks, quite apart from its instrumental consequences, was an ugly and squalid perversion of the law-enforcement process, all the more deplorable because so familiar.

The verdict of history will be a long time coming. We have not seen the end of this affair. What the Warren Commission has done is to refute or render irrelevant the speculations of those who, out of whatever aberrant needs, still refuse to believe that Oswald, Ruby and the Dallas authorities were what they appear to be and not something more sinister. Most of those who on that fatal day leaped to a conclusion about who in Dallas would kill John F. Kennedy have since accepted or will now accept their disappointment. The die-hard revisionists now must start over again. That is the measure of the commission's achievement, and it is no mean one.