A Lawyer's Notes on the Warren Commission Report

Miss Scobey, who was a member of the staff of the President's Commission on the Assassination of President Kennedy, writes that the report of the Commission represents an unusual synthesis of historical, investigative and legal aspects. She views the testimony amassed by the Commission from the standpoint of the lawyer who might undertake the defense of Lee Harvey Oswald, had he lived. What she discovers makes a fascinating story.

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AT LEAST THREE marginal comments are relevant to the published report of the Warren Commission.[1] In the first place it accomplished its original purpose: by assembling and evaluating all ascertainable facts relating to the assassination of President Kennedy it has to a large extent laid the ghost of rumor, both here and abroad. Second, it has made readily available as to a single murder a mass of evidentiary material of greater magnitude than ever before, which will prove to be a happy hunting ground for law students for years to come. Third, it has lent form, depth and historical perspective to the event in a way that catches some of the larger implications of our national society and its Executive Officer, whoever he may be.

The Report Has Historical Significance

Historical consciousness is a late and significant product of human civilization. Only in the last couple of centuries has there been any real philosophical analysis of specific forms of historical thought or comprehension of historical structure. The nature of man has been a subject of investigation from the days of the Stoic philosophers; contemporary interpretation is well summed up in the aphorism of Ortega y Gasset: "Man has no nature; what he has is history."[2] Cassirer maintained that "man is not a rational animal but a symbolic animal"[3]; that is, the forms of his cultural life cannot be compassed by reason alone because the forms themselves are symbolic. While a lawyer might regret the philosopher's decision to omit jurisprudence from the six symbols through which he interprets the evolution of mankind, he cannot quarrel with the inclusion of history as one of the most rewarding.

So viewed, the initiation by executive order[4] of the President's Commission on the Assassination of President Kennedy was more than the creation of another fact-finding administrative agency, for its value lies both in and beyond the ascertainment of factual truth. History is molded not entirely by events but by men's judgment of them; the honest, unbiased, factual report of material plus the analysis and conclusions drawn by trained and diverse minds has not only discovered but in a sense created history in our time.

The commission members, themselves an impressively literate, conscientious and experienced group of men, drew their staff counsel from representative geographical and professional areas, but it is important to remember that the report was not the result of legal thinking alone. The initial organizational weakness which might have resulted from the fact that investigators were not given staff status[5] (doubtless influenced by an early sensitivity to public opinion, in view of rumors that Lee Harvey Oswald might have had prior connections with the Federal Bureau of Investigation) was

1. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY, published by the United States Government Printing Office, $2.20 paperbound, $3.25 clothbound, pages xxiv, 888 (including appendixes and index). This publication is hereafter cited as REPORT.

2. CASSIRER, AN ESSAY ON MAN 172 (1944).

3. *Id.* at 26.

4. Exec. Order No. 11130, 28 Fed. Reg. 12787 (November 30, 1963). This executive order, which is also set forth at REPORT 471, stated: "The purposes of the commission are to examine the evidence developed by the Federal Bureau of Investigation and any additional evidence that may hereafter come to light or be uncovered by federal or state authorities; to make such further investigation as the commission finds desirable; to evaluate all the facts and circumstances surrounding such assassination, and to report to me its findings and conclusions." Senate Joint Resolution 137, 88th Congress (Pub. L. No. 88-202, 77 Stat. 392), granted the subpoena power to the commission and granted immunity to witnesses compelled to give self-incriminating testimony.

5. Except for certain Treasury Department personnel, who did not, however, act in an investigative capacity at that time.

The President's Commission on the Assassination of President Kennedy, which was appointed by President Johnson on November 30, 1963, consisted of seven persons—the Chief Justice of the United States, who was designated Chairman, two members of the Senate, two members of the House of Representatives, and two members from private life.

The Senators were Richard B. Russell of Georgia and John Sherman Cooper of Kentucky. The Representatives were Hale Boggs of Louisiana and Gerald R. Ford of Michigan. All four are lawyers.

The members from private life were Allen W. Dulles, a former member of the United States Diplomatic Service and former Director of the Central Intelligence Agency, and John J. McCloy, a former Assistant Secretary of War, a former President of the World Bank, and former United States High Commissioner for Germany. Both Mr. Dulles and Mr. McCloy are lawyers.

J. Lee Rankin, former Solicitor General, served as General Counsel to the Commission, and he was aided by fourteen assistant counsel and twelve other staff members.

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overcome by liaison between the investigative agencies and staff members, so that fact finding and legal interpretation proceeded harmoniously.

But this alone could not have produced the document that ultimately emerged. Any list of the contributions, other than strictly legal viewpoints, and the rarity, depth and significance of the compendium owes much to the decision to treat the work not only as investigative but also historical and to include on the staff experienced historians whose point of view, approaching the issues from a different path, offered a symbiotic climate in which the story could be developed. The report is thus the first of its kind to be simultaneously accepted as a scholarly historical presentation, a best-seller and a work of literature.[5]

The Evidentiary Aspects of the Report

From a legal standpoint, analysis of the report and particularly of Chapter IV, setting the case against Oswald, is of special interest because of its evidentiary aspects. It has been widely deplored that Oswald was killed before he could be brought to trial. Our basic emotional and intellectual demands that the concepts of due process and fair trial be observed have led both lawyers and laymen to the conclusion that in the absence of such a trial during the lifetime of the accused, carrying with it the defendant's right to procure and present his own side of the story, something will be lacking in the conclusion reached. Had this doctrine been put on to be a brief for the prosecution, that would indeed have been true. Since it is not, the fact is inescapable that the report, although crammed with facts that would not be admissible on the trial of a criminal case, sets out the whole picture in a perspective a criminal trial could never achieve.

Collateral to this subject is the emphasis on the prejudice to the right of fair trial and its effects on the admissibility of evidence of the premature divulgence of material by the press and local law enforcement agents at the time of Oswald's first detention, including statements made by Oswald's wife Marina as to his ownership of the assassination weapons and other facts, the suspect's refusal to take a polygraph test, the results of a thoroughly discredited paraffin test purporting to be proof of the fact that Oswald had recently fired a gun, and the statements of police officers and prosecuting officials that they considered they had a airtight case against him. The report properly concludes that, while there was a legitimate area of inquiry within the scope of the public's right to know, neither the press nor the public had the right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against Oswald. . . . The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime.[6]

What Evidence Would Be Admissible?

Apart from this, and from the well-documented conclusion that Oswald was not denied the right to counsel,[8] the interesting question remains as to the character of the evidence which, from the mass of material set out in the transcript of the commission hearings and in the exhibits, properly could have been adduced against him on trial had he lived to stand trial.

There must first be deleted the testimony of his wife, Marina, for although she testified on three occasions and was questioned by the press and investigative agencies on scores of others, it is difficult to find any statement which would not be more hurtful than helpful to her husband. Under Texas law, "The husband and wife may, in all criminal actions, be witnesses for each other; but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other."[9]

Considering the transcript and exhibits as the "brief of evidence" on a trial, there are many facts which appear only in the uncorroborated testimony of Marina Oswald. Chief among them are facts laying the basis for the admission of other criminal transactions—the attempt on the life of Major General Edwin A. Walker on April 10, 1963, and the reputed threat to make some assault on former Vice President Richard Nixon. Whether either of these transactions would have been ad-

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5. McGraw-Hill Book Company has published the report with an introduction by Harrison E. Salisbury and other material prepared by Tom Wicker, Anthony Lewis and the staff of the *New York Times*, at $4.95 for the hardcover edition and $1 for the paperback Bantam edition. The McGraw-Hill edition was brought out as a separate printing by the Book-of-the-Month Club as a dividend selection.

Doubleday & Company also has published the report printed by offset from photographic plates of the Government version and containing "special analysis and commentary" by Louis Nizer of the New York Bar and an "afterword" by Bruce Catton, the historian. It is priced at $4.95 in hardcovers.

The report first appeared in *The New York Times* Book Review best-seller list on November 8, 1964, and has made the list several weeks since.

7. REPORT 240.

8. REPORT 201, 855.

9. VERNON'S ANN. C.C.P. art. 714.

missible in any event is extremely doubtful.

Under Texas law, distinct criminal transactions are never admissible unless falling within some well-established exception to the general rule. They must tend to connect the defendant with the offense for which he is on trial as part of a general and composite transaction.[10] It might be argued that the Walker and Kennedy incidents both showed a senseless antagonism against public figures and thus lent "credence to otherwise implausible conduct",[11] a sort of extension of the motive exception which is, however, ordinarily confined to sex crimes. System or *modus operandi* is another exception.[12] But sharp differences exist between the two crimes: the extended advance planning and attention given to escape routes in the Walker affair; the differing ideological images of the victims, which make Walker's demise more understandable within the framework of Oswald's known thinking than was the President's; and so on. In any event, it is perfectly obvious that absent his wife's testimony the question is academic, as there is no substantial evidence on which an attempt to introduce the prior attempts could be predicated.

Texas law demands that if evidence of the commission of another crime is otherwise admissible, the rule obtains only when proof of the former may be established beyond a reasonable doubt.[13] The remaining evidence the commission found "of probative value"[14] consisted of: (1) an undated note which in no way refers to Walker, (2) negative testimony of a Federal Bureau of Investigation identification expert that the retrieved but damaged bullet could not be identified as coming from any particular gun, although it "could have been" fired from the rifle used to kill President Kennedy and (3) photographs of the Walker premises. Even as to these, the note was turned over to the investigating officers by Marina and could not in the absence of this testimony be identified with the event, and it is unclear whether the photographs were also delivered by her or were independently found on the premises by officers searching it with her permission.

The Nixon incident, of course, has no other corroboration.

Other Facts Depending on Marina's Testimony

Returning to the case against Oswald itself, it was Marina Oswald who identified the blue jacket found in the Depository Building as belonging to her husband;[15] the shirt, threads from which were found caught in the rifle, as being one she thought he wore to work on the morning of November 22, 1963;[16] the white jacket found in the parking lot along Oswald's reconstructed escape route as belonging to him;[17] the photographs of Oswald with the rifle as being snapshots she took at his request;[18] and a camera found in his effects as the instrument with which they were made.[19] More important, she alone identified the rifle as the one which he owned, and testified that she had seen him practice with it, that it had been moved from New Orleans to Dallas in Ruth Paine's station wagon and that it had been stored in a green and brown blanket in the Paine garage.[20] This is the only eyewitness testimony connecting Oswald with the assassination weapon or definitely identifying his clothing. Other descriptions of clothing show the usual contradictions.

Marina Oswald also is the only source of a wealth of background information, including facts forming the basis of the interpretation of his character on which the "motiveless motive" of his crime depends. The statement that Oswald wanted to hijack an airplane for transportation to Castro Cuba is an example.[21] Connecting Oswald with the name Hidell was important because the murder weapons were purchased in that pseudonym. Mrs. Oswald testified to signing the name on certain cards at his insistence.[22]

Defense counsel would next be interested in the exclusion of physical evidence. The case for the prosecution would show that Oswald had purchased the rifle; that he moved it from New Orleans to Dallas wrapped in a green and brown blanket, which he left with his other belongings in the garage of the Paine residence in Irving; that Oswald took it from the blanket on the night of November 21, placed it in a bag made from paper he had obtained at the school book depository; and that he carried it to work with him the next morning, representing that the package contained curtain rods.

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After the arrest on the afternoon of November 22, the Dallas police obtained a search warrant for the Oswald residence on North Bleckley Street, but no warrant was obtained for the Paine house until the following day. Nevertheless, the police went to the Irving home of Mrs. Paine where Marina Oswald was residing and Oswald spent his weekends and stored his effects.

10. *Medina* v. *State*, 193 S. W. 2d 196 (Tex. Crim. App. 1945); *Morris* v. *State*, 198 S. W. 2d 901 (Tex. Crim. App. 1946).
11. *Head* v. *State*, 267 S. W. 2d 419 (Tex. Crim. App. 1954).
12. *Coston* v. *State*, 268 S. W. 2d 180 (Tex. Crim. App. 1954).
13. *Ernster* v. *State*, 308 S. W. 2d 33 (Tex. Crim. App. 1957).
14. REPORT 187.
15. REPORT 155.
16. REPORT 124.
17. REPORT 175.
18. REPORT 125-127.
19. REPORT 181.
20. REPORT 128.
21. REPORT 299, 412.
22. REPORT 122.

They conducted a search of Oswald's belongings that afternoon without a warrant and without his consent. It is clear from commission documents that permission to be interviewed was given by Mrs. Paine and that Mrs. Oswald, who was present, made no objection. It is not at all clear that she gave consent to a search, however, or that she in any way understood what her rights and those of her husband were.

The most important discovery at this time was the blanket in which the rifle had been wrapped, fibers from which were later identified as being identical in all measurable characteristics with fibers found in the abandoned bag beneath the assassination window.[23] Defense counsel might well wish to raise the question of whether the admission of this evidence would constitute a violation of the guarantees of personal security under the Fourth and Fourteenth Amendments.

In Texas the general rule was that defendant has no standing to object the search of another's premises[24] nd that a wife has implied authority consent to the search of her husnd's premises,[25] provided she underands the nature of her act and is not bject to implied coercion. Slight cirmstances will suffice to void the conent.[26] Since *Mapp* v. *Ohio*, 367 U. S. 3 (1960), however, such cases must reassessed in evaluating the Fourth endment rights of defendants.[27]

The Supreme Court has not taken a eral or mechanical approach to the estion of what constitutes a search seizure. A hotel room, an occupied xicab, as well as a store, apartment automobile, may fall within the proted area. The protection extends to effects of people as well as to the son and houses.[28] Invitation to enfor an interview will not justify a ch after entry.[29] If the search is hout a warrant, the prosecution must show a consent that is unequivocal and specific, freely and intelligently given. An invitation to enter a house extended to armed officers is usually considered an invitation secured by force.[30]

It is doubtful that such consent was extended by either woman. Even if Ruth Paine consented to the examination of property in her garage known to belong to Oswald, it is fairly obvious that Marina Oswald, considering her scanty knowledge of English and Ruth Paine's difficulties with Russian in a crisis, gave no intelligent consent to a search of the garage, although Marina pointed out the blanket in the belief, as she said, that it still contained the rifle. Because of these factors there would seem to be a strong basis for excluding this evidence.

What Might Be Done as to Other Witnesses

Nor would an adroit lawyer be altogether defenseless as to the remaining witnesses. While Oswald was seen on the sixth floor of the Depository Building, from the southeast window of which the shots were fired, thirty-five minutes before the assassination,[31] his duties in filling book orders were primarily on the first and sixth floors. The only eyewitness who ever identified him at the window first refused to make a positive identification, saying only that Oswald looked like the man he saw.[32] Oswald's subsequent departure from the building was reasonably subject to his explanation that with all the commotion he did not think any more work would be done that day.

It would be a fruitless task to attempt to repel evidence of Oswald's subsequent movements (boarding a bus and leaving it; taking a taxicab; changing clothes at his rooming house; walking down certain streets where he was seen entering the Texas Theater; resisting arrest there; possessing and attempting to use a pistol) since conduct of an accused following the commission of a crime may be inquired into generally[33] and flight constitutes circumstantial evidence of guilt.[34] Nor would it be necessary to show Oswald was aware that he was suspected of the crime.[35] While it would be necessary to show, as to the attempt to resist arrest in the theater, that Oswald knew he was being arrested,[36] the evidence on this point is undisputed.

There remains the question of whether the Tippit murder would be admissible. As a subsequent similar offense it would be excluded.[37] As part of a subsequent escape attempt it could not be shown until it first had been shown that an effort was being made to arrest him. Here the prosecution might succeed, on the proposition that the description being circulated of the President's assassin was sufficient to raise an inference that Tippit intended to hold Oswald for questioning.[38] However, the testimony of Mrs. Helen Markham, an eyewitness standing on the street corner, was merely that after the men talked, Tippit got out of the car on one side and Oswald walked forward on the other and shot him.[39]

This witness was hysterical. Her initial description of Oswald, as well as facts she stated regarding the time of the occurrence, was inaccurate. Her original identification of Oswald in a line-up occurred after she had been given sedatives, and she remained hysterical for several hours after the event.[40] The admissibility of the Tippit murder, accordingly, is at least arguable.

Assuming it to be admissible, however, as part of the general flight picture, the transcripts show the usual contradictions which arise to plague the prosecution. Domingo Benavides,

23. REPORT 588-591.
24. *Nagel* v. *State*, 71 S. W. 2d 285 (Tex. Crim. App. 1934).
25. *Brown* v. *State*, 235 S. W. 2d 142 (Tex. Crim. App. 1950).
26. *Jordan* v. *State*, 11 S. W. 2d 323 (Tex. Crim. App. 1928).
27. *Lanza* v. *New York*, 370 U. S. 139 (1962).
28. *United States* v. *Hortze*, 179 F. Supp. 913 (S.D. Calif. 1959).
29. *Robertson* v. *State*, 375 S. W. 2d 457 (Tex. Crim. App. 1964).
30. *Gatlin* v. *United States*, 326 F. 2d 666 (D.C. Cir. 1963); *United States* v. *Roberts*, 179 F. Supp. 478 (D.D.C. 1959).
31. Report 143.
32. Report 183.
33. 23 Tex. Jur. 2d 190.
34. *Vaccaro* v. *United States*, 296 F. 2d 500 (5th Cir. 1961).
35. MCCORMICK & RAY, TEXAS LAW OF EVIDENCE 394.
36. *Chester* v. *State*, 300 S. W. 57 (Tex. Crim. App. 1927).
37. *Gross* v. *State*, 135 S. W. 373 (Tex. Crim. App. 1911).
38. REPORT 165.
39. HEARINGS OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY, Volume 3 (testimony of Helen Markham, page 307). Hereafter these volumes are referred to as HEARINGS.
40. HEARINGS, Vol. 7 (testimony of [illegible] page 292, and James R. [illegible] page [illegible]).

the eyewitness closest to Oswald, refused to identify him.[41] The Davis sisters were confused as to whether they called the police before or after they saw Oswald leave the car and walk across the lawn.[42] William Scoggins, the taxi driver and an eyewitness to the Tippit murder, made his identification at the same line-up with William W. Whaley, the driver in whose taxi Oswald made part of the trip from the Depository Building to his rooming house, and it appears from the latter and other sources[43] that Oswald's remonstrances against being placed with the other persons in the line-up were so pronounced that any person could have picked him out as the accused without ever having seen him before. There are, however, a number of other witnesses who, while they did not see the actual shooting, did see Oswald leave the scene, and who would not be easy to attack.

Importance of Physical and Documentary Evidence

If we assume that our defense counsel was very, very lucky, he would be able, if Oswald stood trial, either to exclude or impeach the testimony of a large number of key persons whose accounts add so much to the strength of the report. This is not to say that what would be left, granting the unlikely event of success in all these endeavors, would leave room for a reasonable doubt of Oswald's guilt, but the surprising fact is that the conviction in such an event would depend to an amazing degree on documentary evidence and its interpretation by experts. In other words, the circumstantial evidence is either more cogent or less subject to attack than the direct.

Both the rifle recovered in the Depository [illegible] the pistol found on Oswald's person were traced to his possession by documents with the aid of handwriting experts.[44] The snapshots which Marina Oswald gave to police officers also are established by expert testimony identifying the rifle and pistol Oswald was holding, proving that the pictures were made with his camera. While testimony that Oswald brought the dismantled rifle to the Depository Building is subject to attack because both the Fraziers many times described the brown package Oswald brought from Irving to Dallas on the day of the assassination as being much smaller than it would have had to be to contain the weapon,[45] the bag itself found at the scene was shown to have been made from materials to which Oswald had access, and the mute testimony of the object overpowers the statements of the witnesses. All fingerprints on the boxes from which the assassin fired were latent; sophisticated criminological procedures were necessary to develop and identify them.[46] Expert testimony further links the rifle with Oswald through the shirt fibers caught on its surface.[47] Other testimony established that the bullet found in the Presidential limousine was fired by the rifle that was recovered,[48] while the autopsy reports[49] and ballistics firing tests[50] make plain the manner in which the shots hit their mark. If the green and brown blanket found in the Paine garage were admitted, expert testimony links fibers from it with those in the brown paper bag,[51] suggesting that Oswald removed the rifle from the blanket and carried it to the Depository Building in the bag, while human hairs found in the blanket itself were linked with body hairs taken from Oswald after his arrest.[52]

To the lawyer and prosecuting attorney, the Warren Report, conceived as a criminal investigation carried to the utmost limits, illustrates the importance of utilizing the laboratory and the expert as sources of the most cogent evidence in criminal proceedings. It also points up the usual difficulties in dealing with the testimony of living witnesses. To the historian, on the other hand, it displays the wealth of detail without which no understanding of the environment and background of the tragedy is impossible.

Report Clears Away the Speculation

The report has both here and abroad cleared away a fog of speculation which could have induced unfortunate international tensions. It has made a real contribution in the difficult area of proving a negative—no foreign Communist state, no internal extremist society, no atmosphere of hate and prejudice for which every American might have to bear a share of guilt, contributed to the event. It has also been helpful in pointing the way toward protection of our standards of fair trial from undue publicity, toward reforms in protective procedures and toward desirable future legislation. It represents a new synthesis which may be followed to advantage in future historicolegal investigations.

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41. REPORT 166.
42. HEARINGS, Volume 3 (testimony of Barbara Jeanette Davis, page 345) and Volume 6 (testimony of Virginia Davis, page 460).
43. HEARINGS, Volume 6 (testimony of William W. Whaley, page 428) and Volume 7 (testimony of Daniel Lujan, page 243).
44. REPORT 569-570.
45. HEARINGS, Volume 7 (testimony of Buell Wesley Frazier, page 531) and Volume 2 (testimony of Linnie Mae Randle, page 245).
46. REPORT 563-566.
47. REPORT 591-592.
48. REPORT 557-558.
49. REPORT 538-546.
50. REPORT 580-586.
51. REPORT 591.
52. REPORT 592.