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THE WARREN COMMISSION AND THE FOURTH SHOT: A REFLECTION ON THE FUNDAMENTALS OF FORENSIC FACT-FINDING

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Social judgments and social action rest on factual data, proven or assumed. The means used to discover and evaluate data are as important a subject of study in the world of governmental action as they are in the world of science. But we tend to take them rather more for granted in the sphere of governmental action. Get the facts, we say, and we will know better how to act. But how good are the processes by which we seek to get the facts?—Packer, Ex-Communist Witnesses: Four Studies in Fact Finding 1 (1962).

Now facts are all very well but they have their little weaknesses. Americans often assume that Facts are solid, concrete (and discrete) objects like marbles, but they are very much not. Rather are they subtle essences, full of mystery and metaphysics, that change their color and shape, their meaning, according to the context in which they are presented. They must always be treated with skepticism, and the standard of judgment should be not how many Facts one can mobilize in support of a position but how skilfully one discriminates between them, how objectively one uses

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This article is concerned mainly with identifying techniques for controlling error in the screening of evidence by a fact-finding body. Despite the rudimentary nature of this problem, it is somewhat ironic that little attention is given to the matter in the schooling of the ordinary law student. Rules of evidence may be examined but little stress is placed on the techniques of gathering, screening and presenting evidence or the structures of fact-finding agencies other than the common law courts. The student probably never examines a trial transcript. Reliance is, typically, from beginning to end, on appellate decisions in which the facts are given. As Mr. Justice Jackson observed in another context: "The difficulty with this is that they [students] are started at the wrong end of the process. Most lawsuits are ended as soon as there is a final settlement of the facts." Jackson, Training the Trial Lawyer: A Neglected Area of Legal Education, 3 Stan. L. Rev. 48, 55 (1950).

An intensive analysis of fact-finding related to an issue of major national concern is found in a special study made by Professor Herbert Packer of Stanford University, Ex-Communist Witnesses: Four Studies in Fact Finding (1962). This study considered the weaknesses—"the pathology of fact-finding processes"—with particular attention to four witnesses who repeatedly testified before various tribunals on the subject of communism. Within this work, Professor Packer made comparative analysis of the weaknesses of congressional investigations, administrative hearings and regular court trials in dealing with broad relational inquires (pp. 227-35). He concluded that a new instrument of government was needed with the following specifications: "its object must be to find facts rather than to apply sanctions; it must be free of political pressures; its results rather than its processes must be given publicity" (pp. 235-36).

The Warren Commission took shape as such an instrument of government with many features foreshadowed by Professor Packer's study. Having made its shakedown cruise, the instrument can now be appraised with a view to improving its mechanism.

them to arrive at Truth, which is something different from, though not unrelated to, the Facts.—Macdonald, Critique of the Warren Report, Esquire, March 1965, p. 61.

What is Truth? said jesting Pilate; and would not stay for an answer.—Sir Francis Bacon, Bacon's Essays (of Truth).

BULLETINS brought the word that three shots directed at John Fitzgerald Kennedy had taken the life of a president of the United States. Following shock and grief came the questions: What type of hate or madness inspired such a crime? If the assassin were rational, what cause or group could he hope to serve? Was this act the extension of some ominous national or international reach for power?

From Dallas came further bulletins—a Dallas policeman had been slain; Lee Harvey Oswald had been apprehended as the suspected assassin.

For forty hours all news media published the incriminating facts linking Oswald to both deaths. But the suspect made no confession, no significant admissions—instead, Oswald asked for an attorney. Far from displaying the symptoms of a lunatic, the suspect appeared rational. Rather than affecting the posture of a martyr for some benighted cause, he insisted upon the "due process" of the government he had just shaken.

To those who had reason to project the implications of Oswald's attitude, there could be no doubt about the nature of the tribunal that would have the responsibility of trying to satisfy the nation's, indeed the world's, demands for the truth. There would be a trial before a state tribunal in Texas.[1] Under constitutional dictates, Oswald's guilt or innocence would be submitted to the common law system of justice before a single judge and twelve of Oswald's peers. Upon two, or perhaps a few more attorneys, adversely positioned, would devolve the responsibility of collecting, selecting, and arguing the significance of evidence bearing on the question of Oswald's guilt or innocence. A well-known machinery established prior to the fact under the rule of law was ready. Methods, principles and standards fashioned and refined through centuries of legal development would define and confine the exposition of fact, and govern the ultimate basis for decision by the jury. With this came the realization that the rights of an accused loomed as a necessary, but bitterly frustrating obstacle to knowledge of the truth and could not be disregarded lest a President's death gravely impair the institutions for which

1. Federal criminal jurisdiction did not attach because of the absence of a law covering murder of the President. Report of the President's Commission on the Assassination of President Kennedy 454 (1964) [hereinafter Report].

he lived. None of the speculations as to possible conspiratorial relationships could properly find its way into Oswald's indictment. Evidence of a specific conspiracy, naming specific people, must first be adduced before the Texas court could serve as a forum of public enlightenment.[2]

Oswald had a right to a public trial, a right to counsel, a right to refuse to testify, a right to have the evidence heard by judge and jury, a right to appeal, and appeal again. All of these rights, and a hundred more, protected him in law whether he, in fact, was innocent or guilty and stood as possible barriers to truth in the state tribunal and obstacles to any other agency seeking the truth.

The failure of the police to secure a confession of guilt through the two days of Oswald's commitment probably never would have been cured in the ordinary course of legal events that would follow. Oswald had already asked for legal counsel and undoubtedly would have secured an attorney before many more hours had elapsed.[3] Certain it is that Oswald's attorney, whether voluntarily engaged or assigned by order of court, would have been duty bound to seek for Oswald every benefit offered by our legal institutions. The brutal, clearly premeditated and deliberate direction of three rifle shots at the head of the President would not allow the possibility of mitigation. Only the ultimate penalty could be expected with a finding of guilt. Therefore, once counsel was engaged, his advice would be to refuse to testify under the constitutional privileges.

The fourth shot in Dallas on the fateful weekend relieved the nation of its commitment to history.[4] Perhaps many responsible officials found a deep sense of relief in the knowledge that now the problem of Oswald's involvement, his motives, and the questions of complicity would not be subject to the jurisdictional claims of the ancient, perhaps antiquated, adjudicative machinery of the common law.

Within a week a press release announced the formation

2. As Henry Wade, District Attorney of Dallas, Texas, explained, allegations in a criminal complaint of a conspiracy to commit the act of murder would be surplusage unless the actual conspirators were named. Oswald could not be charged with being a part of a conspiracy to commit murder, for conspiracy, per se, is not a crime; the charge is murder. Therefore, general proof of conspiracy would be outside the issues. 5 Hearings Before the President's Commission on the Assassination of President Kennedy 230-31 (1964) [hereinafter Hearings].

3. The local bar association and the District Attorney had already felt a great pressure to make sure that Oswald secured counsel. Id. at 239-40.

4. There were many conflicting statements as to the number of shots heard by witnesses to the President's assassination. The Commission concluded that there were three shots fired at President Kennedy. Report 110-11.

of a special tribunal, the Warren Commission.[5] With the Chief Justice of the United States as its Chairman, six other men of national prominence to assist him, an array of talented counsel, ample powers from Congress, and the national and international resources of a host of investigative agencies at its beck and call, a new, very formidable fact-finding machine appeared.

This Commission labored long and diligently into the basic questions of guilt and complicity. With Oswald dead, the Commission did not have to be concerned about interference with the rights of an accused. Moreover, the death of Oswald allowed resort to evidence which otherwise would have been challenged under other protective evidentiary rules and privileges. Oswald's wife testified three times before the Commission.[6] Under Texas law she would have been disqualified from giving testimony against her husband in a criminal proceeding.[7] Perhaps Oswald's efforts to kill General Walker would never have been known.[8] The identification of Oswald's jacket, the photograph of Oswald with the rifle, the identification of it as belonging to him and its storage in the garage were significant facts which might have been lost.[9] Furthermore, the explanation of Oswald's choice of "Hidell" as an alias because it rhymed with "Fidel"[10] and his use of the alias in purchase of the murder weapon were illuminatory facts brought out by a wife rendered incompetent as a witness against her husband under the common law. The search of Oswald's belongings made by the Dallas police might have been invalidated with suppression of all evidence uncovered by the search.[11] In any event, it seems clear that if the Warren Commission had been constituted despite the pendency of a criminal trial involving the central issue of its inquiry, it definitely could not have functioned with the freedom which it actually enjoyed and the speculations and rumors which were sufficiently rife without such a trial, would have multiplied.

The Commission's work has now been completed. From most responsible and knowledgeable critics has come recognition of a job well done. While the Commission worked at its task, a Dallas court, following the conventional procedures which might have

5. App. II, Report 472.

6. 1 Hearings 1-126; 5 Hearings 387-408, 410-20, 588-620; 11 Hearings 275-301.

7. Scobey, A Lawyer's Notes on the Warren Commission Report, 51 A.B.A.J. 39, 40 (1965). This article summarizes many of the evidentiary problems which, because of Oswald's death, the Commission could circumvent.

8. Id. at 40.

9. Id. at 41.

10. Ibid.

11. Id. at 41-42.

been applied to the same questions, addressed itself to the question of Jack Ruby's mental capacity for criminal conduct, illustrating the crusty methods of ages gone by.

The consequences of the old and new tribunal might differ, but their essential fact-finding function remained the same—to review and evaluate the true inferences of direct and circumstantial evidence made available to them. Probably, the findings of both tribunals are regarded by fair-minded, thoughtful men as just and true. But in terms of procedure, without regard to the caliber of personnel staffing the two fact-finding bodies, many may feel that the dignity, decorum, efficiency and therefore reliability of the Warren Commission's approach contrasted sharply with the conduct of the Ruby trial which, in decorum, sometimes had aspects of a charade and mockery of serious inquiry.[12]

In broad outline, the Warren Commission emerges as a fact-finder much different in form and essential approach from the conventional court of law, administrative tribunal, arbitration proceeding, or other adversary fact-finding forums.[13] It can be said, as indeed the Commission itself reported, that it was not functioning as a court of law or as a prosecutor, "but as a fact-finding agency committed to the ascertainment of the truth."[14] To those unschooled in the theories of pragmatic justice which guide the administration of law in our regular courts, the Commission's observation suggested that ordinary tribunals are not committed to the ascertainment of the truth. However, the Commission and its counsel, who were all schooled in our conventional system, did not intend an implied slur upon the objective or earnestness of existing fact-finding tribunals. Rather they meant that ordinary tribunals are not like scientists or philosophers who may not acknowledge findings unless their hypotheses explain all the facts pertinent to a particular question. Ordinary courts functioning in the workaday world are committed to the ascertainment of truth but must, for pragmatic reasons, be content with determining the truth in accordance with the probabilities indicated

12. See Macdonald, A Critique of the Warren Report, Esquire, March 1965, pp. 59, 60: "Judge Joe Brown who presided over Ruby's trial chewing tobacco and occasionally leafing through magazines on the bench . . . ."

13. In essential approach the Commission appears similar to the familiar and ancient rival of the common law, the inquisitorial proceeding. "Continental Europe does not employ the adversary so much as the inquisitorial system; the judge largely conducts the trial as an active inquirer for truth on behalf of society, not merely a receptive and passive moderator between adversaries." Jackson, Training the Trial Lawyer: A Neglected Area of Legal Education, 3 Stan. L. Rev. 54 (1950).

14. Foreword to Report at xiv.

by the available evidence. Thus, allegations of fact are found to be true in accordance with the preponderance of the evidence, or beyond a reasonable doubt.

The true and more interesting connotation of the Commission's statement is the implied assertion, and confidence, that it could find the truth where perhaps other institutions might fail. It is this implication which bears scrutiny.

The Warren Commission was designed and operated as a forensic fact-finding body. As such it invites comparative analysis with other forums. It obviously abandoned the adversary format of the common law. The main inquiry here is the extent to which it might have borrowed fact analysis techniques of the common law to improve its performance. Before trying to identify such techniques, a general review of the forensic fact-finding problem will be attempted.

The Forensic Fact-Finding Problem

The fact-finding task assigned to any forum or agency can be broken down into components for purposes of comparative analysis. The first step is defining the question for inquiry. Second is the matter of gathering apparently pertinent data which either directly or in combination with other data suggests an answer to the question. Third is the process of screening out unreliable data or evaluating the weight of conflicting data. Fourth is the application of rules of logic or common sense to reach a final conclusion based on the collected, accepted data.

The weakness in forensic fact-finding is the need at all stages to rely upon human instrumentalities of perception, interpretation and communication. While the scientist in fact-finding may follow the same logical processes and must rely on human faculties, he can achieve greater reliability through laboratory and other physical controls. However, the forensic fact-finder is engaged in reconstructing occurrences and relationships which are already a part of history. In seeking truth he must rely to a great extent upon human memory, perception, sincerity and other variables of the human make-up. His controls upon reliability must be developed through critical procedures and systems which test, sort out, or control unreliable data.

For general perspective, let us review briefly the general aspects of the fact-finding method illustrated by the experience of the Warren Commission and the typical experience of a conventional tribunal.

In paraphrase, the Commission was asked to determine whether Oswald was guilty and, if so, whether he was abetted by

any other person or group.[15] The Federal Bureau of Investigation and Secret Service primarily, and to some extent the Internal Revenue Service, Department of State and military intelligence agencies served as the basic investigators.[16]

The Commission started with a five-volume investigation report submitted by the F.B.I. in December of 1963.[17] It then requested the materials underlying the report.[18] After receiving this data, it collected special reports from the Secret Service, the Department of State and from the Attorney General of Texas.[19] Its legal staff was then given the task of organizing the facts, determining issues and sorting out unresolved problems.[20] After these initial measures, the Commission addressed specific inquiries and further requests for information to various governmental, investigative or intelligence agencies.[21] Then the respective reports of these agencies were critically assessed by the Commission.[22] The conduct of the F.B.I. and other agencies in gathering information was also reviewed, and responsible officials of the agencies were called before the Commission to explain the work of their departments.[23] The Commission's staff took sworn statements from hundreds of witnesses and the Commission itself summoned ninety-four witnesses to be examined before it.[24]

After completing its fact accumulation through these procedures, the Commission made its report setting forth in great detail many of the premises and much of the evidence upon which its final conclusions were predicated.[25]

The Commission performed several fact-finding functions. It could, and did control the amount and type of data collected; it had freedom to regulate its procedures and could go to basic sources of information.[26] It assumed the responsibility of critically analyzing the evidence and the conduct of the personnel who gathered it. In short, the Commission was its own arbiter of the amount of evidence to be collected, the sources which should

15. Ibid. The involvement of Ruby was subsumed under this general inquiry.
16. Id. at xii.
17. Id. at xi.
18. Id. at xi-xii.
19. Id. at xii.
20. Ibid.
21. Ibid.
22. Id. at xiii.
23. Ibid.
24. Ibid.
25. Id. at xv.
26. The Commission on a number of occasions went to Dallas and apparently, to some extent, made personal inspections of basic files developed by the investigative agencies. Id. at xii, xiii.

be consulted, the standards to be applied, the procedures to be followed and the conduct of the personnel involved.

In contrast, the conventional court would start its inquiry with the presentation of an issue, or issues, framed by pleadings, such as an indictment. The fact-finders (judge or jury) have no direct control over the fact-gathering process. The initial fact-gathering will have been undertaken by the person or agency prosecuting the complaint or charge. The conventional court thus is put into operation when the main task of fact-gathering has been completed. Its function is to evaluate the evidence adduced. In evaluation there is a distinct separation of functions. Under the adversary rules, the proponent bears the burden of selecting and introducing evidence relevant to the charge and admissible under the rules of evidence. The court acts as an arbiter continually reviewing and sometimes rejecting the data offered. The opponent from the outset and throughout the proceeding is given various rights of criticism: to examine, to challenge and to mitigate the effect of any witness or other form of evidence offered. The jury sits as observer and theoretically has been selected on the basis of its unfamiliarity with the controversy. Finally, when the evidence is in, the judge instructs the jury and a decision is made. One or more appellate courts may act as reviewing agencies before the fact-finding results are final.

Comparing the Commission with this type of tribunal, the main observation is the freedom of approach that the former had. The Commission was not inhibited by an elaborate system of evidentiary rules, or procedural restraints.[27] Its freedom to inquire was not limited geographically or psychologically or by prearranged formalisms. Its area of inquiry was not circumscribed and it could continue the search, within, perhaps certain budgetary limits, until it had exhausted all available sources of evidence. Its salient characteristic was capability for massive fact-gathering.[28]

27. The Commission was empowered to prescribe its own procedures. Exec. Order No. 11130, 28 Fed. Reg. 12789 (1963). Congress conferred the power to issue subpoenas and provided immunity to witnesses claiming the privilege against self-incrimination. 77 Stat. 362 (1963).

28. In arriving at its conclusions, the Commission and its counsel lavishly applied investigative effort and equipment to collect a wealth of data which will remain a monumental tribute to the efficacy of its effort. In this article, observations about particular evidence will be made. Assuming the observations are proper, they should not be regarded as indicative of a belief that the Commission was in error with respect to any of its essential findings. It will not be within the scope of this article to review all the proof on any of the major questions of fact. The fifteen volumes of finely-printed transcript and the eleven volumes of exhibits were masterfully summarized and analyzed in the Commission's report. In view of the vast amount of pertinent data collected, any criticisms in this

The main emphasis of the common law, in contrast, is its absorption with fact-screening and review after the evidence has been gathered. In this respect the theme of its structure and procedure is the cautionary note that fact-finding with reference to human affairs is an uncertain matter at best. The more obvious dangers of overt, improper influences such as bribery, coercion or duress may lead to complete fabrication or rejection of the truth by the investigator, witness or the fact-finder. These dangers exist, but they are probably the most readily discovered and least troublesome. It is not the liar or corrupted fact-finder who has absorbed the attention of the common law or induced the subtleties of its adversary procedures. Rather, it is the recognition that men of good will, of education, of good judgment, will unknowingly yield to error or give color to the truth if not harnessed by appropriate checks and balances.

Setting aside the more gross distortive influences, the main concern of the common law is with "bias"—bias of the initial investigator, bias of the one who presents the evidence, bias of the witness and bias of the fact-finder. By "bias" in this broad context, is meant the normal human weakness for predilection, proclivity and prejudice, which we all share because of defects in personal experience, the pressure and pull of crisis, the lure of reward, the fear of punishment or merely because of the human inability to apprehend and comprehend thoroughly all that is relevant and genuine. "Bias" as here used, also includes the propensity of the human mind to gravitate quickly to conclusions from known, but incomplete, facts and inertia of a state of mind which seems to attach to an opinion once formulated.

Implicitly, the structure of the common law procedure shows suspicion of "bias" on the part of everyone who appears before it—bias of parties, of witnesses, of jurors and of judges—and even bias of reviewing judges.

Assuming that such suspicion and the controls prompted by it have foundation in human nature and experience, the inquiry to be put to the Warren Commision is: How well was it equipped, and how effective were its controls in mitigating or destroying the distortive effects of human weakness and "bias"?

As most courts do, the Commission encountered the whole range of witness-failure from outright lying, to lapse of memory, to mistaken impressions. Moreover, bias of its investigators and

article must be qualified with the general admonition to the reader that the chance of oversight or misimpression is great.

Nevertheless, no matter how massive may be the work-product of the Commission, its methodology in collating evidence is susceptible to critical comment and this is the main objective of this article.

staff also appears to have impaired its objectivity and therefore its performance.

For instance, one of the more troublesome questions was the possibility that Oswald had acted on behalf of Cuban conspirators.[29] His defection to Russia,[30] his activities in New Orleans on behalf of the Fair Play for Cuba movement[31] and his correspondence with U. S. Communists[32] all added strength to the likelihood that he might have been employed by agents of Castro or some group seeking to avenge itself of President Kennedy's involvement in the handling of the Cuban crisis. Within eight weeks prior to the assassination, Oswald had been to Mexico City and had visited both the Cuban and Soviet embassies.[33] Shortly after the assassination a young Latin American secret agent identified as "D" visited the U. S. Embassy in Mexico City. He stated that on September 18, 1963 he had been in the Cuban consulate in Mexico City and there saw a man, whom he later recognized as Lee Harvey Oswald, receive $6,500 in cash "to kill an important person in the United States."[34] "D" purported to have seen a tall negro with reddish hair, another white person carrying a Canadian passport and Lee Harvey Oswald talking together. He described each of the three persons in more detail and claims that a tall Cuban joined the group and gave some American currency to the negro who then allegedly said to Oswald, "I want to kill the man" to which Oswald replied "You're not man enough, I can do it."[35] The negro gave Oswald the $6,500 in large bills. After hearing this conversation, "D" allegedly called the U.S. Embassy in Mexico City to report his belief that an important person in the United States was going to be killed. "D" allegedly was discouraged by the Embassy.

About four days after the relation of this story, the U.S. Government learned from the Mexican authorities that "D" admitted that the narrative about Oswald was false.[36] Why did he lie? Apparently because he hated Castro and believed that his

29. The Commission reported generally on the investigation of possible conspiracy in Chapter VI of the Report. The main section concerning Cuban involvement is at pp. 299-310. See also Report 406-14.

30. Report 390-94.

31. Id. at 406-14.

32. See, e.g., Johnson (Arnold) Exhibits Nos. 1, 3, 4, 5, 7, in 20 Hearings 257-75. Exhibits received in connection with depositions or affidavits were indexed separately in alphabetical arrangement according to the last name of the deponent or affiant.

33. Report 299.

34. Commission Exhibit No. 3152, 26 Hearings 857-60; Report 307-08.

35. Ibid.

36. Ibid.

story would help gain admission to the United States and also would cause the United States to take action against Castro.

Another rather extreme illustration of the unreliability of witnesses is provided by the experience with Mrs. "K." Apparently the Federal Bureau of Investigation considered it necessary to investigate whether Ruby was a homosexual. An F.B.I. agent interviewed and "re-interviewed" Mrs. "K" and was told that she had worked at the Carousel Club in Dallas for two weeks, "probably in 1957," and that Jack Ruby had operated the club. She indicated that Ruby frequently came to the dressing rooms where he berated the performers. He allegedly had a male friend and would be particularly mean to the female performers whenever he had a "tiff" with his male friend.[37]

The statement as given by Mrs. "K" is quite detailed and would appear on its face to be supported by ample opportunity to know of Ruby, his characteristics and companions. Moreover, there would seem to be no apparent motive for her to falsify her statement to the F.B.I. If no further statement had been taken from Mrs. "K," the danger existed that her statement might have been given substantial weight if it became important to know the facts which she related. However, a third interview was held in January of 1964 at which time the agent pointed out to her that Ruby had not operated the Carousel Club in Dallas until sometime in January of 1960. She was shown photographs of Ruby and after carefully looking at them stated that she must have been in error and that she must have been confusing Ruby with someone else.[38]

A less colorful illustration appears in connection with the means by which Oswald imported a rifle into the Texas Schoolbook Depository building. The Dallas police had found a hand made bag of wrapping paper and tape near the southeast corner of the sixth floor of the Texas Schoolbook Depository building, near the window from which shots had been fired. The bag apparently had been made for a particular purpose and was suitable in size for transporting a disassembled rifle of the type owned by Oswald.[39] A latent palm print and latent finger print were found on the bag which were identified as the left index finger print and the right palm print of Lee Harvey Oswald.[40] Other tests satisfied the Commission that the wrapping paper and tape for the bag came from the shipping room of the Depository.[41]

37. Commission Exhibit No. 1465, 22 Hearings 844-85.
38. Ibid.
39. 4 Hearings 266-67; Report 134.
40. Report 135.
41. Id. at 135-37.

To fill out its proof, the Commission took the testimony from Buell Wesley Frazier[42] and Linnie Mae Randle.[43] Mr. Frazier had given Oswald a ride to work on the morning of the assassination. When they entered the car that morning, Frazier had noticed a brown paper package on the back seat of the car and asked Oswald what it was.[44] Oswald replied "curtainrods."[45] Frazier also observed Oswald carrying the package into the Depository building.[46] By way of describing the package, Frazier indicated that Oswald had carried it in such a manner that the upper part of the package was under his armpit and that Oswald's right hand was cupped around the bottom of the package.[47] The Commission found that the disassembled rifle was too long to be carried in this manner.[48]

Frazier, in further effort to describe the package, identified the point on the back seat of his car where the bag reached when it was laid on the seat with one edge against the door. The Commission found that the distance between this point and the seat was 27 inches.[49]

Linnie Mae Randle, the sister of Mr. Frazier, had also observed Oswald carrying a "heavy brown bag."[50] She claimed that the bag was "a little bit more than 2 feet" long.[51] However, the wooden stock of the rifle which is the largest component measured over 34 inches.[52] (The bag found on the sixth floor was 38 inches long.)[53]

When shown the bag Mrs. Randle also folded it down at the top because she felt that the bag carried by Oswald was shorter.[54] When measured after the folding, the bag was only 28 and ½ inches long.[55] In view of the scientific evidence linking the bag to Oswald and to the gun, the Commission was compelled to conclude that both Mrs. Randle and Mr. Frazier were mistaken.[56]

The foregoing instances merely illustrate the uncertainty

42. 2 Hearings 210-45.
43. 2 Hearings 245-51.
44. 2 Hearings 224-25.
45. Id. at 226.
46. Id. at 228-29.
47. Id. at 243.
48. Report 134.
49. Ibid.
50. 2 Hearings 248.
51. Id. at 249.
52. Commission Exhibit No. 139, 16 Hearings 512; Commission Exhibit No. 1304, 22 Hearings 480.
53. Commission Exhibit No. 142, 16 Hearings 513; Commission Exhibit No. 626, 17 Hearings 281; Commission Exhibit No. 1304, 22 Hearings 480.
54. 2 Hearings 249.
55. Report 134.
56. Ibid.

of testimonial evidence. In the case of "D" the witness actually fabricated a story to advance his own personal beliefs and ends. In the case of Mrs. "K" it appears that it was a matter of mistaken identity. Mr. Frazier and Mrs. Randle's impressions must have been based on inadequate observation. In each case the Commission succeeded in uncovering the weakness in the testimony.

Throughout the Commission's report will be found instances where the Commission had to make judgments concerning the credibility of eye witnesses. In most instances, it was not the sincerity of the witness that was placed in question. Rather, the susceptibility of the senses to mistake, lack of sufficient opportunity to observe, defective perception and perhaps the failure of memory to distinguish what was observed at the scene from what was subsequently learned through news media or other secondary sources.[57]

In the reported instances of "D," "Mrs. K," Mr. Frazier and Mrs. Randle, and with regard to weaknesses of other witnesses, the Commission's report of the weaknesses shows that it was not deceived. The unknown matter is the extent to which various witnesses testified knowingly about facts without sufficient foundation for their statements.

How far was the Commission misled by its own "bias"? Fact-finding involves inductive and deductive approaches to ultimate findings. Known facts will suggest certain hypotheses. If a methodical approach is to be taken, the more likely hypotheses are

57. A possible illustration of the last fault is found in the statements of Glen A. Bennett, a Secret Service agent, assigned to the presidential motorcade. The Commission relied on his statements as evidence of the sound-sequence and number of shots and also his observation that the shots came from behind the President's car rather than the triple underpass or some other site. Report 111. Bennett wrote out a statement later in the afternoon of the assassination while en route to Washington returning from Dallas. Commission Exhibit No. 2112, 24 Hearings 541-42. The next day Bennett prepared a typed report substantially the same as his handwritten statement. Commission Exhibit No. 1024, 18 Hearings 760.

In the original statement Bennett stated that upon hearing the first shot he drew his revolver and "looked to the rear and to the left . . . ." Commission Exhibit No. 2112, 24 Hearings 541-42. He apparently decided his reference was not sufficiently exact for he inserted the words "high left" after "left" which indicates he focused on this particular part of the statement. His typewritten report of the next day makes no reference to the "left" or "high left." Rather it refers to the same event and time and then states "we peered towards the rear and particularly the right side of the area." Commission Exhibit No. 1024, 18 Hearings 760. His first statement would indicate that he thought the shots came from a direction opposite the place where Oswald was located. By changing his statement to eliminate references to the "left" it appears likely that he was influenced by reports from the news media that the assassin had used the sixth floor of the Texas School Depository Building which was to the high right. See Commission Exhibit No. 876, 17 Hearings 896, for an aerial photo of the scene.

arranged and used as points of departure. In the course of exploring one or more of the hypotheses, new facts will be uncovered which may give one reason to abandon that line of inquiry and start a new one. Perhaps this will lead to another general formulation of investigative hypotheses based upon the certainties created by the preliminary investigation. In any investigation there is a danger that once the investigative efforts are launched along a certain line of inquiry their unchecked momentum may cause accumulation of a mass of data made fairly irrelevant by discoveries which have already destroyed or impaired the hypothesis as a valid working assumption. Consider, for instance, the hypothesis that Oswald, because of his activities in Russia, his apparent allegiance to left-wing theories and the indications of Communist background, might have been schooled in Russia as an agent specially prepared as an assassin. The hypothesis suggests investigation of all of Oswald's activities in Russia, his activities after returning to the United States and of course, in particular, his activities and contacts during the period when the trip to Dallas was first announced. This hypothesis seems to have been diligently explored.[58] However, it appears that very early in the investigation, it was determined that the President's intention to go to Dallas was not announced generally until September 13, 1963.[59] The selection of the particular motorcade route which would take it past the Depository Building was indicated as early as November 15 or November 16, but was not definitely selected until November 18, only a few days before the assassination.[60] On this basis the Commission of course could conclude that Oswald's employment in the Depository Building was unrelated to the President's trip to Dallas.[61] It also could tend to conclude that his background was fairly meaningless except as a source of information bearing on rationality or motive.

But this conclusion also indicated two important principles for further investigation: If Oswald's employment was unrelated to the assassination and if he were the only assassin involved, then the conspiratorial relationship, if one in fact existed, would have been formulated during the few days when it was known that Oswald could be available as an assassin because of his position of opportunity in the Depository building. The investigation would then have centered upon his activities, contacts

58. See, e.g., Report 299-325, 375-404.
59. Report 28-29, 247.
60. Id. at 247.
61. Id. at 246.

and relationships to other people throughout the period of the week preceding the assassination. The other evidence concerning his activities might then provide leads or clues to agencies or groups whose activities during the same period should have been placed under close scrutiny. Lord Devlin, of England, former justice of the High Court, King's Bench Division has already noted the apparent failure to place Oswald's activities during this week under special scrutiny.[62]

Secondly, if Oswald, as it appears, took employment at the Texas School Book Depository building without knowledge of the exact motorcade route, an exploration of conspiratorial relationships should have suggested the possibility that he might have been but one of a number of assassins present that day along likely avenues for the motorcade route. This investigative premise would entail a dragnet operation of considerable size and scope for the purpose of locating other possible assassins along the motorcade route or within buildings along the more probable lines of a motorcade route. It should be noted that Oswald's trip to Cuba in September, following the announcement of the Presidential visit, did receive extensive attention by the investigative agencies in order to determine whether his contacts in that area were related to a conspiracy.[63] However, on the assumption again that other accomplices may have been stationed along the motorcade route at the same time that Oswald was engaged in the actual assassination effort, it does not appear that any methodical study was made to discover the where-abouts or activities of other erratic individuals in Dallas to determine whether they had any relations with Oswald, or whether, perhaps unknown to Oswald, they had been hired as accomplices.

One of the more important inquiries of the tribunal was whether Oswald had an accomplice at the Texas School Book Depository. The shots had been fired from the southeast corner of the sixth floor of the Texas School Book Depository building.[64] In this area of the sixth floor, a number of cartons had been arranged in a manner that shielded the assassin or assassins from the view of anyone on the sixth floor who did not attempt

62. Devlin, Death of a President: The Established Facts, The Atlantic Monthly, March, 1965, p. 116. On the other hand such a hypothesis was developed by the Commission with respect to the conspiratorial relationship of Ruby. The Commission claims it tried "to reconstruct as precisely as possible the movements of Jack Ruby during the period November 21-November 24, 1963." Report 333. It did so "on the premise that, if Jack Ruby were involved in a conspiracy, his activities and associations during this period, would, in some way, have reflected the conspiratorial relationship." Ibid.

63. Report 299-310.

64. Id. at 117.

to get behind them. The cartons had been placed there to clear an area elsewhere on the sixth floor where new flooring was being placed.[65] Four boxes were so situated near the window as to indicate that they might have been arranged as a convenient gun rest.[66] As noted by the Commission, one identifiable palm print on these cartons was not identified. The F.B.I. does not have a filing system for palm prints and accordingly the Commission could not trace the print to any particular person.[67] The possibility of an accomplice was thus left open.

The Commission suddenly was confronted with the testimony of an eye witness which seriously suggested that another person might have been in the southeast corner room shortly before, and perhaps at the same time, that Oswald fired the shots from that location.

On March 10, 1964, Arnold Louis Rowland was questioned before the Commission by Assistant Counsel Arlen Specter.[68] The interrogation began with a number of questions concerning Rowland's personal background, his place of birth, his age, his marital status, the extent of his education, his studies in particular courses, whether he had been in military service, the condition of his health, the condition of his eyesight, the identity of the doctors who had determined that he had good eyesight and the address of the named doctors, and when he had been examined.[69]

The Assistant Counsel proceeded to inquire as to how it came about that Rowland was in the area where the assassination occurred. Rowland explained that after morning classes at school he and his wife intended to do some shopping in downtown Dallas.[70] They went early to see the President's motorcade and took a bus from school arriving in town at approximately 11:45.[71] They tried to find a good vantage point and walked about five or six blocks, eventually locating themselves on Houston Street between Elm and Main, south of the Texas School Book Depository. After moving up and down Houston Street, they eventually took up a position on the west side of Houston between Elm and Main. In this location they were in a position to view the front windows of the Texas School Book Depository building from a straight-on viewpoint.[72] Rowland testified that he and his

65. Id. at 248.
66. Id. at 140.
67. Report 249.
68. 2 Hearings 165-90.
69. Id. at 165-66.
70. Id. at 166.
71. Id. at 166-67.
72. Commission Exhibit No. 354, 16 Hearings 949.

wife were looking around and making note of the policemen on top of the underpass and commenting on the security precautions that were being taken.[73] They talked momentarily about the incidents involving Mr. Stevenson and Mr. Johnson. He noticed about this time that there was a man on the sixth floor "back from the window . . ." "standing and holding a rifle."[74] He noted also that the rifle had a telescopic sight and he could tell that it was larger than a .22 caliber rifle. His impression was that the man was a "security agent."[75] He located this man in the west side of the building, on the same floor but on the opposite side from where other witnesses placed Oswald.[76] He estimated that the man was perhaps 150 feet, "very possibly more" from where he (Rowland) was standing.[77] Rowland was asked about his ability to judge distance and interrogated about the rifle which he described as appearing to be like a ".30-odd size 6, a deer rifle with a fairly large and powerful scope."[78] He observed that the man was standing with the gun in a position "such as port arms in military terms."[79] Rowland's description continued:

> He was rather slender in proportion to his size. . . . He appeared to be fair complexioned, not fair, but light complexioned, but dark hair . . . . either a light Latin or a Caucasian. . . . It didn't appear as if he had a receding hairline but I know he didn't have it hanging on his shoulders . . . . it appeared to me it was either well combed or close cut . . . . He had on a light shirt, . . . white or a light blue or a color such as that. This was open at the collar. I think it was unbuttoned about half way, and then he had a regular T-shirt, a polo shirt under this, at least this is what it appeared to be. He had on dark slacks or blue jeans, I couldn't tell from that.[80]

Rowland only saw a portion of the man's pants. He could see from his head to about six inches below his waist. The man wasn't next to the window—and yet wasn't far back—an estimated three to five feet, from the window. Rowland claimed the entire rifle was in his view, and noted that the man was looking in the general vicinity of "where I was."[81] One hand was "at the gun stock of the rifle, just above the trigger, it was

73. 2 Hearings 168-69.
74. Id. at 169.
75. Ibid.
76. Other witnesses saw the man or at least the rifle protruding from the southeast corner window, directly east from where Rowland placed the man with the rifle. See, e.g., summary at Report 61-68.
77. 2 Hearings 170.
78. Ibid.
79. Ibid.
80. Id. at 171.
81. Id. at 172.

around the rifle. The other was at the other end of the rifle about 4 inches below the end of the stock."[82] Rowland recalls telling his wife that the man appeared "in his early thirties."[83] He estimated the man's weight at about 140 to 150 pounds.[84]

Rowland's wife was nearsighted and was not wearing her glasses at the time. Rowland mentioned seeing the man in the window and "[a]fter she pointed something else out to me she looked in that direction"[85] (the direction indicated by her husband). When he looked back to point the man out, there was nothing in the window. They discussed momentarily the likelihood that it was a security man and that he had a very good vantage point to watch the crowds.[86]

Rowland's wife asked "what did he look like," meaning the person in the window, and Rowland gave her a brief description.[87] "She said something about wishing she could have seen him but he was probably somewhere else in another part of the building watching people now."[88] Rowland said he repeatedly looked back at the window "occasionally trying to find him so I could point him out to my wife."[89]

Then came the testimony which opened up the question of complicity with an unknown accomplice:

Rowland:	Something I would like to note is that the window that I have been told the shots were actually fired from, I did not see that, there was someone hanging out that window at that time.
Representative Ford:	At what time was that?
Rowland:	At the time I saw the man in the other window, I saw this man hanging out the window first. It was a colored man, I think.
Ford:	Was this the same window where you saw the man standing with a rifle?
Rowland:	No, this was the one on the east side of the building, *the one that they said the shots were fired from.*
Ford:	I am not clear on this now. The window that you saw the man that you described was on what end of the building?
Rowland:	The west, southwest corner.

82. Id. at 172.
83. Ibid.
84. Ibid.
85. Id. at 173.
86. Ibid.
87. Id. at 174.
88. Ibid.
89. Ibid.

Ford: And the man you saw hanging out the window was at what corner?

Rowland: The east, the southeast corner.

Ford: Southeast corner on the same floor?

Rowland: On the same floor.

Ford: When did you notice him?

Rowland: This was before I noticed the other man with the rifle.

Ford: I see. This was before you saw the man in the window with the rifle?

Rowland: Yes, my wife and I were both looking and making remarks that the people were hanging out the windows. I think the majority of them were colored people, some of them were hanging out the windows to their waist such as this. We made several remarks about this, and then she started watching a colored boy, and I continued to look, and then I saw the man with the rifle.[90]

He described the person in the southeast window as being an elderly negro.[91] Rowland last observed the colored man at approximately 12:30, perhaps thirty seconds to a minute before the motorcade arrived.[92] As other witnesses, he recalled the time by reference to the Hertz clock on top of the Texas School Book Depository building.[93]

Rowland and his wife watched the motorcade go by and then heard the shots.[94] He did not look back at the building after hearing the shots, but followed a group of other people and police who were converging on the railroad yard,[95] all apparently misled by an echo into believing the shots had come from there.[96]

He noticed a plainclothesman evidently searching the grounds and started to assist him.[97] Upon recalling his observation of the man with a rifle, he reported this to the detective and was then taken by two of Sheriff Decker's deputies to the Sheriff's office where he and his wife were secluded from reporters.[98] A statement was given to the sheriff's stenographer.[99] According to Rowland this statement was translated by an F.B.I. agent to the stenographer.[100]

90. Id. at 174-75. (Emphasis added.)
91. Id. at 176.
92. Id. at 178.
93. Id. at 168. See, e.g., the testimony of Rufus W. Youngblood, a Secret Service Agent, 2 Hearings 151.
94. Id. at 175.
95. Id. at 180.
96. Report 71-76.
97. 2 Hearings 181.
98. Id. at 181-82.
99. Id. at 182; Commission Exhibit No. 357, 16 Hearings 953.
100. 2 Hearings 182.

The Commission indicated to Rowland that neither the statement made in the sheriff's office nor a statement made on the following Sunday contained any reference to another man on the same floor as the man with the rifle.[101] Rowland admitted, but was not asked to explain why he had not mentioned the other man at the sheriff's office, but claimed that the next Saturday and Sunday he was interviewed and did mention the colored man, but the F.B.I. apparently had not been interested.[102] He was interrogated about this:

Senator Cooper: I think you said a while ago that when you told the FBI agents on Saturday that you had seen this Negro man in the window, that they indicated to you that they weren't interested in it at all. What did they say which gave you that impression?

Mr. Rowland: I don't remember exactly what was said. The context was again *the agents—were trying to find out if I could positively identify the man that I saw. They were concerned mainly with this, and I brought up to them about the Negro man after I had signed the statement* and at that time he just told me that they were just trying to find out about, or if anyone could identify the man who was up there. They just didn't seem interested at all. They didn't pursue the point. They didn't take it down in the notation as such.[103]

As a side note, Rowland's assertion that the F.B.I. agents were interested in fixing the identity of Oswald is at least a plausible explanation of their apparent failure to record his statement, if he made it. It conforms to an observable "bias" which attorneys and investigators develop in pursuing a question, well defined in their own minds.[104]

The possibility that Rowland was a witness to the existence

101. Id. at 182-84.
102. Id. at 184.
103. Id. at 184-85. (Emphasis added.)
104. The typical witness has little training in concepts of relevance to specific issues of law or in dealing with impressive investigators such as F.B.I. agents. On the other hand the investigator knows what he is after but may have been entrusted with only one aspect of a problem. The lawyer, especially, is "relevancy" conscious. The annoying amount of irrelevancies offered in an interview ranging from the condition of the witness' family through his personal hardships or problems can lead to curtness on the part of an investigator with a corresponding reaction of the interviewee to adopt an overly attentive and restrictive attitude toward the point of the interview. Insistence on sticking to the point can lead to significant omissions or oversights, particularly, as was the case with the Commission, when a much broader framework for investigative effort is later developed.

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An F.B.I. agent was present when Rowland's first statement was taken—Forrest V. Sorrels.[109] It is probable that he is the agent who translated Rowland's statement to the stenographer.[110] Counsel for the Commission questioned Sorrels about whether Rowland reported any other person on the sixth floor. Sorrels replied that Rowland "may have," but he did not recall it.[111] Sorrels indicated that Rowland appeared truthful and he did not have any reason to doubt him.[112]

Sheriff J. E. Decker was also questioned after Rowland had disclosed the possibility of an accomplice.[113] Decker was one of the persons reportedly present when the witnesses, including Rowland, were assembled at his office on November 22.[114] However, the Commission failed to make inquiry about Rowland.[115]

The stenographer at the sheriff's office, Rosemary Allen, is not listed among the witnesses called before the Commission or deposed. Nor does it appear that any effort was made to obtain her notes, or perhaps drafts, made at the time.[116]

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109. 2 Hearings 182; 7 Hearings 350-51.
110. See text accompanying note 100 supra.
111. 7 Hearings 351.
112. Ibid.
113. 12 Hearings 42-52.
114. 2 Hearings 181-82.
115. 12 Hearings 42-52.
116. Rosemary Allen notarized Rowland's affidavit. Commission Exhibit No. 357, 16 Hearings 963.

The mischief caused by the necessity of relying on interpretative reports translated by an investigator into the distortive format of his office's method is seen in the experience with Rowland. If the testimony of Rowland had been taken verbatim in the same manner that a court reporter takes it, with the obvious hesitations, and the apparent "irrelevancies," perhaps the whole inquiry into his character and schooling would have been unnecessary and the Commission made more secure in its findings. No matter how articulate the interpretative investigator, he cannot give a sketch of all the subtle indicators of conviction or uncertainty which any witness affirms or betrays by his manner.

Criticism has been directed at the Dallas police for not having a tape recorder to capture the words of Oswald; the same criticism can be directed at the F.B.I. Insurance company investigators often use tape recorders or shorthand stenographers rather than rely on the translative shortcomings of the interviewer or his failure to perceive relevant clues dropped by the interviewee.

With respect to the danger of translating or transcribing by one person of another's statements, a serious distortive influence may exist in the inarticulateness of the interviewer. He wants his report to be impressive to his reviewing superiors and if a matter of apparently marginal value is related, rather than try to struggle with its relational problems, he may omit reference or gloss over it. An old joke exists about the Los Angeles policeman called upon to report the existence of a dead horse in the downtown area. Having found that "Figueroa" Street taxed his spelling ability, he moved the horse and reported it dead on First Street.

Perhaps some day in major inquiries it will be economically feasible and electronically possible to videotape the statements of key witnesses as a means of recording their truth telling appearance and of eliminating at least the intermediate use of human interpretation and communication.

The second reason stated by the Commission for rejecting Rowland's testimony was "the lack of *probative* corroboration."[117] The qualification implies that there was unreliable corroboration.

At least one witness tended to confirm directly Rowland's credibility. Deputy Sheriff Roger C. Craig talked with Mr. and Mrs. Rowland a few minutes after the assassination. Craig testified that Rowland told him that two men had been seen walking back and forth on the sixth floor; that one man had a rifle and was located on the west end of the building; that after looking back one man was not in sight and only the man with the rifle was in view.[118] However, Craig added that he asked Rowland whether "they" were white or colored and "he said white."[119]

Craig's testimony insofar as it corroborated Rowland's statements, and on other matters, was rejected by the Commission.[120]

Mrs. Rowland also gave testimony before an assistant counsel.[121] She recalled that her husband had tried to point out a man with a rifle before the motorcade arrived.[122] She is nearsighted and, although she could see the window plainly and saw a man hanging out the window, she did not perceive the man with the rifle. With respect to her husband's comments about other men, she testified that she didn't think he had said anything about "any other people in any other windows."[123] His failure to comment on anyone other than the man with the rifle *before the shooting* has little probative meaning inasmuch as, presumably, there was nothing uncommon or conspicuous about the many other observers of the motorcade.

The Commission then inquired about Rowland's statements *after* the shooting. She claimed to be "fairly certain that he said there were other people looking out the windows."[124] However, she was not certain if he mentioned anyone being on the same floor as the man with the rifle.

In the course of further questioning about other interviews, she mentioned that a written statement (apparently the F.B.I.

117. Report 252. (Emphasis added.)
118. 6 Hearings 263-64, 272.
119. Id. at 272.
120. Report 160.
121. 6 Hearings 177-91.
122. Id. at 181.
123. Id. at 182.
124. Id. at 185. In answer to one question it appeared that she was personally with her husband throughout the time when he gave his first statement to the police. In correcting the transcript, Mrs. Rowland noted that she was in the same room but did not hear everything that was said. Commission Exhibit No. 2783, 26 Hearings 169.

statement signed on November 24) was brought to her husband and they asked him if in general it was what he had said. She was not certain whether he was asked for, or volunteered, any information other than that in the report.[125] Altogether she estimated he had six or eight interviews.[126]

The Commission, in handling Mrs. Rowland, betrayed a desire to discredit her husband rather than confront the implications of his testimony. It cited a response she made that her husband was "prone to exaggerate."[127] Apparently, the Commission reasoned that an eye-witness, prone to exaggerate, would be expected to report the existence of two, rather than one, assassins. Whatever the value of its logic, the interrogation by the Commission's counsel indicates that the characterization was not suggested by her and she qualified the remark by observing that his "exaggerations are not concerned with anything other than himself. They are usually to boost his ego."[128] Moreover she placed the

125. 6 Hearings 188.

126. Id. at 189.

127. Report 251. The statement concerning being prone to exaggerate was really put in her mouth by the examining counsel as indicated by the following excerpt:

> MR. BELIN. Mrs. Rowland, you made a statement toward the beginning part of this deposition that your husband said that he had all A's but that you knew different, because you had seen the report card.
>
> MRS. ROWLAND. He said he had an A average.
>
> MR. BELIN. But that you knew different?
>
> MRS. ROWLAND. Well, he may have had an A average, an overall A average, but some of his cards didn't have A's altogether.
>
> MR. BELIN. Well, you mentioned that he had A's and B's and some C's and some D's?
>
> MRS. ROWLAND. The one I saw.
>
> MR. BELIN. Would you remember what years those would have been for?
>
> MRS. ROWLAND. No, sir.
>
> MR. BELIN. *Sometimes people are prone to exaggerate* more than others, and without in any way meaning to take away from the testimony of your husband as to what he saw in the building at the time, just from your general experience, do you feel that you can rely on everything that your husband says?
>
> MRS. ROWLAND. I don't feel that I can rely on everything anybody says.
>
> MR. BELIN. Well, *this is really an unfair question for me to ask any wife about her husband, and I am not asking you very correctly, but—*
>
> MRS. ROWLAND. At times my husband is prone to exaggerate. Does that answer it?
>
> MR. BELIN. I think it does. Is there anything else you want to add to that, or not?
>
> MRS. ROWLAND. Usually his exaggerations are not concerned with anything other than himself. They are usually to boost his ego. They usually say that he is really smarter than he is, or he is a better salesman than he is, something like that.
>
> MR. BELIN. Anything else you care to add?
>
> MRS. ROWLAND. No sir.

6 Hearings 189-90. (Emphasis added.)

128. 6 Hearings 190.

matter in proper perspective and perhaps reminded the Commission of a noteworthy truism by commenting, "I don't feel that I can rely on everything anybody says."[129]

The third basis for rejecting Rowland's testimony was "serious doubts about his credibility."[130] The Commission reported that the importance of the matter and the inconsistencies they had detected prompted a special investigation of Rowland. The task was assigned to the F.B.I.,[131] a group that might not have the most objectivity, in view of Rowland's claims that he was interviewed several times by special agents who had failed to note the implication of an accomplice.

On March 25, 1964, approximately two weeks after Rowland had testified before the Commission, the F.B.I. checked at Rowland's high school and determined that in 1959 he was given an IQ test and scored 109, and in 1963 he scored 127 on a National Merit Scholarship Qualifying Test.[132] On a third test (Iowa Test of Educational Development), he scored in the ninety-fourth percentile.[133] Apparently the Commission regarded this as impeaching his testimony that in May of 1963 he scored 147 on his IQ test.[134] The F.B.I. interviewed a Mr. Ligon at length concerning Rowland's academic record at the S.H. Adamson High School as well as at Topeka High School, Topeka, Kansas. Grade records were collected and made part of the Commission's record.[135] Thus did they find that he did not have straight A's. They also obtained deprecatory comments from Ligon about Rowland's veracity and general character.[136] The F.B.I. went on to interview other personnel at educational institutions where Rowland had attended or made application. One of these, a Mrs. McKissock, described Rowland as a "lone wolf," and also disparaged his character for veracity.[137]

As noted before, the Commission failed to summon most of the interviewers to obtain notes or recollection of whether Rowland had mentioned another man, and more significantly, thereby obtain evidence of the other man's identity, if he existed. The Commission chose to rely primarily on general credibility factors to quiet its doubt.[138]

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129. Ibid.
130. Report 252.
131. Id. at 251.
132. Commission Exhibit No. 2644, 25 Hearings 903.
133. Ibid.
134. Report 250-51; 2 Hearings 188.
135. Commission Exhibit No. 2644, 25 Hearings 903-06.
136. Id. at 906.
137. Id. at 907.
138. The technique of character impeachment used by the Commission has

In a more direct approach to the problem the Commission claimed to have made an investigation of every person employed

disturbing implications. If an agency hopes to secure the full cooperation of witnesses having valuable knowledge, it must be ready to give regard and protection to their exposure before the fact-finder. With respect to criminal involvement of a witness the Commission was ready to grant immunity from prosecution. However, it is the less serious disgraces which lurk in most people's backgrounds that inhibit free participation in fact-finding procedures. Most people do not desire to be involved and may have to be persuaded or compelled to appear. On the other side, there are the publicity seekers who will inject themselves into matters of public interest. In dealing with the latter type, the fact-finder must be wary lest it establish precedents which will discourage witnesses who would feel most reluctant to testify if their personal backgrounds are to be explored, and, more significantly, given publicity by the fact-finder.

Consider the rejection of evidence by Mrs. Gertrude Hunter. The Commission investigated the possibility that Oswald owned a second rifle. It was reported that during the first two weeks of November 1963 Oswald had a telescopic sight mounted on a rifle at a sporting goods store in Irving, Texas. The evidence consisted of an undated repair tag bearing the name "Oswald" given to the F.B.I. by an employee of the sports shop. Report 315. The Commission had satisfied itself that the telescopic sight on the C2766 Mannlicher-Carcano rifle had already been mounted when shipped to Oswald. Report 119. Therefore a conflict existed which the Commission hoped to resolve. As stated by the Commission, "the possession of a second rifle warranted investigation because it would indicate that a possibly important part of Oswald's life had not been uncovered." Report 315. In checking the employee's credibility the Commission found possible corroboration in the testimony given by Mrs. Gertrude Hunter. Report 316.

A furniture mart was located about one-and-a-half blocks from the shop. Two witnesses, Mrs. Whitworth and Mrs. Hunter, identified Oswald, his wife and two children as having come to the furniture mart. They testified that Oswald, carrying something wrapped in a package, made inquiry about gunsmith work.

Again, the F.B.I. was dispatched to make a special investigation of Mrs. Hunter's credibility. It obtained an interview from a person who thought it necessary to advise the F.B.I. of certain "personality characteristics" of Mrs. Hunter. She advised the agent that Mrs. Hunter had "a strange obsession for attempting to inject herself into any big event which comes to her attention . . . [she] is likely to claim some personal knowledge of any major crime which receives much publicity . . . the entire family is aware of these 'tall tales' Mrs. Hunter tells and they normally pay no attention to her." Commission Exhibit No. 2976, 26 Hearings 456, 457. The disturbing matter is that the Commission considered it sufficiently probative and necessary for its purposes to quote the defamation. Report 318.

Realistically, fact-finders will evaluate character and it may be the sole, and proper, basis for evaluating credibility. That witnesses should be protected from abuse or more serious injury apparently was recognized by the Commission's rule that a witness could have personal counsel when called before the Commission or its counsel. Neither Rowland nor Mrs. Hunter had counsel and, in any event, counsel would have been powerless to forestall the direct resort by the Commission to its investigators' reports.

In these instances, the Commission indicated that it was conscious merely of form. Rightly or wrongly, Rowland and Mrs. Hunter have been publicly attainted in a report that can fairly be described as a historical monument. One wonders if the Commission, in its zeal to publish the full truth, reflected on whether the character evidence was so material as to warrant the humiliation inflicted on Mr. Rowland, Mrs. Hunter, their families and future generations.

In another respect, this problem appears as a consequence of a system in which the fact-finder is charged with developing and defending both facts and conclusions.

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Consider the rejection of evidence by Mrs. Gertrude Hunter. The Commission investigated the possibility that Oswald owned a second rifle. It was reported that during the first two weeks of November 1963 Oswald had a telescopic sight mounted on a rifle at a sporting goods store in Irving, Texas. The evidence consisted of an undated repair tag bearing the name "Oswald" given to the F.B.I. by an employee of the sports shop. Report 315. The Commission had satisfied itself that the telescopic sight on the C2766 Mannlicher-Carcano rifle had already been mounted when shipped to Oswald. Report 119. Therefore a conflict existed which the Commission hoped to resolve. As stated by the Commission, "the possession of a second rifle warranted investigation because it would indicate that a possibly important part of Oswald's life had not been uncovered." Report 315. In checking the employee's credibility the Commission found possible corroboration in the testimony given by Mrs. Gertrude Hunter. Report 316.

A furniture mart was located about one-and-a-half blocks from the shop. Two witnesses, Mrs. Whitworth and Mrs. Hunter, identified Oswald, his wife and two children as having come to the furniture mart. They testified that Oswald, carrying something wrapped in a package, made inquiry about gunsmith work.

Again, the F.B.I. was dispatched to make a special investigation of Mrs. Hunter's credibility. It obtained an interview from a person who thought it necessary to advise the F.B.I. of certain "personality characteristics" of Mrs. Hunter. She advised the agent that Mrs. Hunter had "a strange obsession for attempting to inject herself into any big event which comes to her attention . . . [she] is likely to claim some personal knowledge of any major crime which receives much publicity . . . the entire family is aware of these 'tall tales' Mrs. Hunter tells and they normally pay no attention to her." Commission Exhibit No. 2976, 26 Hearings 456, 457. The disturbing matter is that the Commission considered it sufficiently probative and necessary for its purposes to quote the defamation. Report 318.

Realistically, fact-finders will evaluate character and it may be the sole, and proper, basis for evaluating credibility. That witnesses should be protected from abuse or more serious injury apparently was recognized by the Commission's rule that a witness could have personal counsel when called before the Commission or its counsel. Neither Rowland nor Mrs. Hunter had counsel and, in any event, counsel would have been powerless to forestall the direct resort by the Commission to its investigators' reports.

In these instances, the Commission indicated that it was conscious merely of form. Rightly or wrongly, Rowland and Mrs. Hunter have been publicly attainted in a report that can fairly be described as a historical monument. One wonders if the Commission, in its zeal to publish the full truth, reflected on whether the character evidence was so material as to warrant the humiliation inflicted on Mr. Rowland, Mrs. Hunter, their families and future generations.

In another respect, this problem appears as a consequence of a system in which the fact-finder is charged with developing and defending both facts and conclusions.

The investigative approach followed after Rowland's disclosure was incomplete and the resort to impeachment of character smacks of a prosecutor's approach rather than that of one committed to the ascertainment of the truth.[145] Had the trail become so stale that no systematic search for clues of the location of other acquaintances of Oswald, or of other erratic types, was feasible?

There was other evidence of another person, which apparently was overlooked or rejected without comment. A Mrs. Eric (Carolyn) Walther, in the company of a friend, Mrs. Pearl Springer, had been an observer of the motorcade. She had taken a position on the east side of Houston Street about 50 or 60 feet south of the south curb of Elm Street.[146] From this position she would have had a clear view of the southeast corner of the depository building.[147] She made a statement that she had looked up towards the building and saw a man holding a rifle with the barrel pointed downward. In the same window she observed a portion of another man. However, she believed that these men were on the fourth or fifth floor.[148] Mrs. Walther was not called as a witness and was not questioned on deposition. The only evident check on her observations was an interview of her companion, Mrs. Springer, who stated that Mrs. Walther had not mentioned to her anything about seeing a man standing in a window.[149]

Other evidence included testimony by a young lad,[150] Amos Lee Euins, who had observed Oswald in the actual act of firing. Euins was one of the first to report his observations to the police located near the Texas School Book Depository building.[151] While he was there he heard another man tell the police that he had seen a man running out of the back of the building.[152]

Mrs. John T. (Elsie) Dorman, Mrs. Ronald G. (Sandra Sue) Elerson and Betty Alice Foster. Commission Exhibit No. 1381, 22 Hearings 632.

145. One commentator has characterized the Warren Commission Report as having the form of "The Prosecutor's Brief," manifesting "The Establishment Syndrome." By the first characterization he describes the acceptance or rejection of testimony by the Commission through a desire to prove a particular point. The latter aspect is his term for "the reflexive instinct of people in office to trust other officials more than outsiders, and to gloss over their mistakes." Macdonald, A Critique of the Warren Report, Esquire, March, 1965, p. 62.

146. Commission Exhibit No. 2086, 24 Hearings 522.

147. See Commission Exhibit No. 875, 17 Hearings 870-95, which is a series of photographs showing the reverse perspective—i.e., the view from the southeast window to the street area where Mrs. Walther claims she was situated.

148. Commission Exhibit No. 2086, 24 Hearings 522.

149. Commission Exhibit No. 2087, 24 Hearings 523.

150. 2 Hearings 204.

151. Report 64.

152. 2 Hearings 205-06.

Other testimony fairly established that Oswald left by the front door. Mrs. R. A. Reid, clerical supervisor for the Depository building gave testimony to this effect which was accepted by the Commission.[153] The possibility of an escape by an accomplice through the rear door is supported by F.B.I. Special Agent Sorrels who testified that he returned to the building about twenty minutes after the shooting, saw no police near the rear door and entered through it without identifying himself.[154] Moreover, another witness, James Richard Worrell, who had run away from the front of the building on hearing the shots stopped to rest at a position to the rear of the building.[155] While there, he saw a man of the white race leave the rear entrance and run away. Worrell did not see the man's face.[156]

The treatment of Rowland and the investigation of accomplices at the scene is only a narrow slice of the Warren Commission's work. Whether it is representative or not, in certain aspects it is symptomatic of a bias to defend a conclusion previously made.

In any fact-finding agency the responsibility for investigating and making findings generates a bias to formulate some defensible conclusions.[157] Unconsciously, a partiality for the more obvious hypothesis may lead to uncritical exclusion of others which, were it not for the momentum once given to an inquiry, might later appear more valid. A certain amount of compulsion develops to vindicate one's initial judgment and this can lead to forcing or stretching inferences. This tendency is observable among police investigators charged with the responsibility of investigating a suspect. A television commentary recently collected a number of cases demonstrating the zeal of the police and prosecutor in securing evidence, or neglecting or suppressing evidence, all of which apparently resulted in tragic distortions of the truth.[158] In most, if not all instances, it is improbable that either the police or prosecution were inspired or guided by sinister motives. Probably the only motive at work was the desire to do a good, or at least defensible, job. More probably, they yielded sound judg-

153. Report 154-55.
154. Id. at 156.
155. 2 Hearings 194-95.
156. Id. at 195-96.
157. The compulsion for a resolution of the matter under inquiry was a factor inducing the use of torture by the Spanish Inquisition. The use of the jury system relieved that fact-finder of this pressure for a defensible conclusion. See 3 Lea, A History of the Inquisition of Spain 1 (1906).
158. Television presentation, Oswald and the Law, Channel 4, Los Angeles NBC-TV, February 9, 1965.

ment to an initial suspicion made credible by an unhappy coalescence of circumstances.

As the arbiter of its own procedures, and without any responsible agency or party critically examining its investigative hypotheses or its method of handling witnesses,[159] the Commission was by design made susceptible to error through following any bias existing or developed by its own investigation. And, in the investigation of possible accomplices at the scene, there is evidence that it was a victim of its own bias. It was a victim not in the sense that it failed to find the truth, but in the sense that it blinded itself from making the complete effort and assessment it otherwise attempted on all significant questions.

The Commission is without rival in its display of investigative energy. It gathered a prodigious amount of evidence. Its design and program as a fact-finder, however, not only entailed direct involvement in the formulation of investigative hypotheses, which by itself is a major advantage, but also called for involvement in developing the facts to test the hypotheses and responsibility for critically examining the facts it developed. If there were gaps in its approach to the truth, if it failed to develop methodical approaches in exploring the approaches taken, or if it failed to be sufficiently critical of evidence developed, the errors or omissions might go unnoted until after it reported its task complete.

Assuming, as it appears, that the Warren Commission confronted the same inherent susceptibility to error through "bias" that thwarts, or impairs, the ability of any fact-finder to achieve its ideal objective, could its methodology, and therefore the stature of its work product, have been enhanced by an eclectic resort to the principles of more mature structures? It can be granted that the common law machinery, per se, is completely unsuitable to a task of the type given to the Warren Commission and that it was a blessing not to have exclusionary rules of evidence and disruptive displays by opposing counsel blocking the Commission from its goal. But are the essential principles of common law procedure—cross-examination, critical comment and challenge,

159. Of course, there were sporadic and often erratic criticisms offered by newspapers and a New York attorney, Mark Lane, Esq. The latter was allowed to give testimony. He insisted on a public hearing of his criticisms. See 2 Hearings 32-61; 5 Hearings 546-61. Because of an article in a newspaper insinuating that Ruby and Oswald were friends and that the U.S. Justice Department had blocked their arrests seven months before the slaying, Commission Exhibit No. 837, 17 Hearings 837, the Commission found it necessary to summon J. Edgar Hoover to make inquiry concerning these suspicions. In trying to quiet these and other wild speculations the Commission certainly expended much energy and perhaps, in some degree, suffered loss in method and focus.

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The much maligned hearsay rule is primarily a recognition of the value placed in cross-examination by fact-finders through the ages. It compels production of the witness so his testimonial credentials can be checked.[162] Consider the statements given by Mrs. "K" concerning Jack Ruby.[163] The discrepancy in dates concerning Ruby's business activities apparently led to the retraction of her first two statements. Suppose such an obvious flaw had not existed. The fact that she was a "stripper" (revealed in the statement) might have devalued her statement, but, without a personal appearance, her declarations might have become an acceptable part of the historical record, there to lurk and mislead tomorrow's historians. How many of the volumes of statements in the official record share similar faults? A statement, without a witness, does not convey the personality, character traits, or general competency of a witness. The problem is aggravated when the statements are collected by investigators schooled in the same method. The systematic sameness of written reports can make an archangel sound like a classmate of Mrs. "K."[164]

The Separation of Function—Appearance and Apparatus of Objectivity: The division of functions in the fact-finding process is a feature of the common law procedure illustrated by the varying roles played by investigator, attorney, judge and jury. If nothing more, the involvement of many separate agencies or parties in the process tends to shelter the fact-finders from the paranoid criticism of the conspiratorial mentality.[165] Judge and prosecutor and police may be associated with government but at least there is a private attorney and twelve jurors not on the government payroll who are given respect and dignity to go with their serious responsibility in fact-finding.

This separation of function gives the common law tribunal the appearance of an objective machinery. Separation also provides an apparatus for objectivity. The critical evaluation of

162. 5 Wigmore, Evidence § 1395 (3d ed. 1940).

163. See text accompanying notes 37-38 supra.

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To the casual, or perhaps cynical observer, the whole procedure seems to involve leading the Lady of Justice through a labyrinth of logic only to push her precipitously to a blind conclusion. But the student of Gestalt psychology may detect in the process a more valid approach to truth. The investigator, the lawyer, and the judge can get absorbed in specific theories, refinements, or atomistic analyses in the fact-gathering, screening and presentation processes. In short, they can lose sight of the forest for the trees. The jury is safeguarded from the influence of involvement. As a relatively detached observer, it may see the broad configuration of truth where the more highly trained investigator, lawyer or judge has not. In make-up it has the cross-sectional characteristic which may cancel out the chance that undue emphasis will be given to one phase of knowledge to the distortion of the whole. In this age of hyperspecialization, of learning more and more about less and less, no one person, or group of persons with experience confined to a particular segment of life can hope to take on the medieval philosopher's approach to reconciling "all knowledge." Professional and even scientific minds can develop provincial perspectives. Perhaps the ordinary jury includes an undue number of matronly housewives from the middle class, but it does tend to gather and utilize interpretive skills, knowledge and insights of a broad section of the community. In principle, if not in operation, it suggests a sounder crucible of fact-finding.

The Principle of Review: The common law is not satisfied with an adversary testing of procedure and evidence, or even the fact that twelve men, good and true, have passed independent judgment on a question of fact. It provides for much more scrutiny. First at the trial court level, through a motion for a new trial, the trial judge acting as a thirteenth juror must either give his imprimatur to the finding of the jury (or to his own finding, for that matter), or he may decide, under a broad discretion, that the system failed and a new trial should be ordered.

Assuming he upholds the jury, there is still one, and often

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more, opportunities for review by an appellate tribunal, completely detached from the entire fact-finding process. While, strictly speaking, the appellate courts deal only with questions of law, and profess to confine themselves to searching the record merely to see if each finding is supported by "substantial" evidence, the dichotomy of fact and law is not demarcated by bright red lines and the appellate court therefore exercises significant control over aberrations by the actual fact-finder.

The Rule of Law: Finally, but not last in significance, is the mere existence of a common law court as a machine set in motion and governed by law. The common law may display a rococo ritual in fact-finding, but at least *it's there*. The persons relying upon it may criticize its methods, its delays and its results—but they know it was not conceived *ad hoc* and shaped to wreak an unjust or untrue result. Moreover, the fact-finder is protected and insulated from pressures by the machinery. If the human element has applied itself conscientiously, the result, if wrong, does not focus public spite on the man; the failure can be rationalized to some extent, as *ex machina*.

Pertinence to Warren Commission

To recapitulate, the common law procedure evidences attachment to certain basic methods in fact-finding. As an adversary system it may sometimes seem committed more to gamesmanship than to the truth. But the power to mete out punishment, often entailing life or death, and to ruin or create fortunes was not entrusted lightly to this system.

The Warren Commission's conclusions are accepted by at least most local critics as reflecting the truth, although perhaps not insofar as it can be known. Yet, in large measure it failed to achieve its essential goal. By the time Oswald was shot, fair-minded people were impressed and probably convinced by the evidence of his guilt. When the fourth shot took his life, those of natural conspiratorial mentality gained many allies. Ruby killed Oswald. Oswald was a left-winger, if not a Communist. Oswald resided in Dallas, where incipient violence had been directed at national political figures. The problem of knowing the truth insofar as it could be known did not center on Oswald's individual guilt. This was the threshold question to the overriding concern—was he in league with any domestic political group or foreign power?

Any number of tribunals might have amassed a record to satisfy the objective student of Oswald's guilt, and probably a congressional or Texas legislative committee could have satis-

fied itself and some of the public that there was no complicity.

The real task of the Warren Commission, however, was not to *find* the truth but to *appear to have found the truth* to the satisfaction of the largest possible number of people here and abroad. Despite the eminence of its members, the talents of its staff, and the prodigious factual development of its efforts, it could not escape the necessity of having been created for this assignment. Obviously President Johnson and Congress recognized the desirability of an agency and procedure that would have stature, equipment, and respectability commensurate with the awesome responsibility. Obviously there was no existing machinery having the necessary qualifications. It had to be specially constructed. And, in every stage of its construction it was vulnerable to the "Dreyfus case" suspicion. From the appointment of its members to the way it handled witnesses, it would be suspect to one group or another as staging a grand "cover-up" or "whitewash" of whatever evil each of us, in that minor paranoia we all harbor, see as working its will in the political world.

The need for a regularized fact-finding machinery, preordained and controlled within broad limits by a rule of law is suggested. While, God willing, the specific type of task assigned to the Warren Commission may never exist again, there undoubtedly will be other needs for a suitable tribunal, fashioned and equipped in advance to meet the magnitude and gravity of satisfying the public demands for information on an issue of fact involving vital national or international concern. No tribunal, no matter how well designed to avoid the appearance of bias, will succeed completely. But with its manner of selection controlled within limits by mechanical rules, the validity of its efforts will not be immediately prejudiced.

Let us assume that the recurrence of a similar need is not unlikely. What improvements on the Warren Commission are suggested by the common law system or perhaps other traditional fact-finding agencies, in light of the more prevalent and valid criticisms of the Commission?

A. Personnel

The selection of the Chief Justice of the United States as chairman at first appears as a natural designation. Yet, he may be too involved with the heavy burdens of his office and, if the principle of detached review commends itself, perhaps should be held in reserve with the other Supreme Court Justices to serve as a potential reviewing body. Certainly someone of eminence in judicial circles is indicated. The principle of random selection

from a group of relatively equal status would heighten the appearance of objective selection. The chief judges of the federal judicial circuits might furnish an appropriate group with the choice of a particular judge for chairman being left to lot when the occasion arises.

The cross-section, and chance selection, of a common law jury suggests the designation in advance of a panel from which the remaining members of the commission can be selected. The cross-sectional principle also suggests that the panel ought to be broad enough to include those having eminence in the political, professional, academic and business worlds. The faculties of state universities would provide a pool from which historians, sociologists, engineers, psychologists and other highly trained personnel might be selected. The inclusion of one or more from this source should be a hedge against the danger of a report becoming a "prosecutor's brief" and mitigate the "establishment syndrome." Other prominent associations or agencies such as the United States Chamber of Commerce, private universities and national professional societies could supply members for the list.

The Commission was constituted of men trained as lawyers.[169] It relied primarily on a staff of counsel to develop the record for it.[170] The conventionally trained lawyer is schooled in analyzing specific issues, and primarily questions of law. The more general relational inquiries, such as a sociologist, historian or political scientist must make, are not within the type of analysis for which the lawyer has been professionally trained, nor are they the type of problems which he regularly must confront in ordinary practice. This is not to suggest that the personnel of the Warren Commission were seriously handicapped. But the appropriateness of the bar as a general source of trained manpower does not preclude the desirability of employing men of other disciplines to develop investigative hypotheses and add their special insights to the inductive and deductive tasks made necessary by the inquest.

Moreover, it does appear that there were certain blind spots in the Commission's investigative perspective which perhaps are indicative of the analytical conditioning of the members and its counsel. The question of Oswald's individual guilt or innocence was within the natural domain of a commission having the type of personnel and investigative wherewithall of the Warren Commis-

169. See biographical sketches, Report 475-79.
170. Id. at 479-81.

sion. Also, the suggestion that Jack Ruby in particular might have been the paid silencer of some unknown conspiracy involving Oswald provided the Commission with a task in the form of specific questions and target of investigation for which they eminently qualified. But one wonders if the Commission, when dealing with the more general hypotheses of possible political complicity at large, was as competent or methodical. Certainly the spate of current literature criticizing this aspect of its work indicates that it satisfied neither right nor left at home, nor the conspiratorial or Dreyfus mentality abroad.

B. Powers

If a suitable preordained panel can be established, it must be equipped and empowered in a manner suitable to the task. Unless powers and a source of funds are prescribed, the commission may be crippled or handicapped by the absence of power to compel witnesses' appearances, to confer immunity upon those exposed to criminal prosecution by their own testimony or to secure the necessary or desired scientific or other types of technological assistance demanded by the particular inquiry. The commission will need the assistance of a staff, and must have access to the files of existing agencies.[171] The commission may function over an extended period of time. A change of administrations may occur resulting in the development of a hostile atmosphere and resulting further in the possible closing of federal files. It would seem desirable that the commission once convened should have freedom to fulfill its tasks with all possible assistance from both federal and state agencies. Here the need for preserving state secrets and other information affecting vital national interests may prevail over the desirability of giving the commission full access to all data.

C. Implementation

Someone must press the button to set the mechanism at work. By hypothesis we are dealing with a matter that requires immediate attention because of widespread public concern. By reason of his less insulated status, the President would appear as the logical choice. On the one hand, he is sensitive to the demand for public enlightenment. On the other, as the one person best informed on critical national and international mat-

171. See Packer, Ex-Communist Witnesses: Four Studies in Fact Finding 233-35 (1962).

ters, he is also less likely to yield to such a demand if the tribunal will interfere with or jeopardize existing national relations or policies.[172]

D. Jurisdiction

If a machinery is to be established in advance, the problem of jurisdictional conflict with other agencies, state or national, should be considered. In the case of the assassination, the public outrage ensured the functioning of the Warren Commission without interference by agencies of lesser stature. In matters of less intensity, another commission may be impeded by other bodies jealous of their powers, and therefore the power to preempt the matter under inquiry is needed.

E. A Devil's Advocate

The most desirable principle suggested is the institution of a responsible officer as a critic, with sufficient dignity of position and authority of law to ensure responsible criticism and promote public approbation. The common law procedure is not alone in suggesting the desirability, if not need, for a recognized, responsible critical examiner of proofs. The experience of the Roman Catholic Church in matters of beatification and canonization indicates an unwillingness to regard its eminent officials as without need for controls upon their bias or other weakness to error. It has a high official serve as "Promoter of the Faith."[173] He is charged with the duty of writing all possible arguments, no matter how slight, against the proposed finding; and is further charged to protest failure in procedures and insist upon consideration of any objection.[174]

The general dimensions and powers of a critical examiner suggested by more experienced systems are: an established office, a responsibility to be critical and powers to have the criticism heard. Within the power to criticize should be the right to examine proofs, to call witnesses and to cross-examine witnesses which the commission's staff has indicated it will tender in support of its recommendations to the commission.[175]

Interestingly, the Warren Commission apparently recognized

172. See discussion by Packer, supra note 171, at 243-44, for other suggestions with respect to the appointment problem.

173. Advocatus Diaboli, 1 Catholic Encyclopedia 168 (1907).

174. Ibid.

175. According to Wigmore, "in the Dreyfus trial (1899), the exposure of the conspirators' particular frauds was due almost entirely to Maitre Labori's cross-examination." 5 Wigmore, Evidence § 1367 n.4 (3d ed. 1940).

the need for certain protective features developed by the common law. It gave witnesses a right to counsel.[176] On request it permitted public hearing of evidence,[177] and, belatedly, it requested the President of the American Bar Association to participate in the proceedings.[178] The witness' right to counsel, however, was fairly meaningless except perhaps for criminals and for the Communist Party representatives who might have perceived the risk of incrimination in the conduct of the proceedings. With one notable exception, counsel appearing at the hearings with witnesses added little, and could be expected to add little, in the way of critically challenging its methodology. Mr. Craig, the President of the American Bar Association, was not appointed until nearly three months after the Commission had been constituted.[179] If he felt he had responsibility commensurate with that of a Devil's Advocate, it is not evidenced by the development of the record or report.

F. Detached Fact-Finding

If there is merit to the principles of detachment from, and review of, basic fact-finding as evidenced by the common law procedure, these principles might be adopted without inordinate stress on the flexibility or effectiveness of a commission. The basic leg work has to be entrusted to some agency. Investigative agencies are trained in fact-gathering and the F.B.I., Secret Service and military intelligence agencies should in most instances be appropriate. If provided with a suitable staff of its own, as the Warren Commission had, the commission can give the basic questions to the staff for development or allow the staff to use its investigative powers directly or in conjunction with the services of other appropriate investigative agencies. The critical examiner would participate, not to confine, but to criticize the investigative methods and hypotheses as they are developed. When the staff feels that it has explored the questions to all reasonable limits it could submit tentative conclusions justified by the record it had developed. Again the critical examiner could be available, and charged with the duty of examining the proofs, to make the commission aware of the staff's shortcomings. If the matter turns on the testimony of particular witnesses, then the commission could direct their appearance to satisfy itself directly. If the record is unsatisfactory, the commission might

176. Report 501, 503.
177. See, e.g., 2 Hearings 33-34.
178. Foreword to Report at xiv-xv.
179. Id. at xv.

order the continuation of the inquiry by the staff and critical examiner along specific lines until a record satisfactory to the commission has been developed.

The Warren Commission appears to have entrusted most of the fact-gathering to its assistant counsel. Even many of the important witnesses called before the Commission were often not heard by some members of the Commission. The record indicates that at least three of the members were absent on most of the days when hearings were held before the Commission. It is to be expected that in fact-finding agencies, as with business management, or other structures requiring decisions based on detailed fact-gathering, the decisional group will for pragmatic reasons if nothing else, rely on subordinate agencies to develop the initial record for action. But once the basic data has been developed, the commission's primary responsibility of careful review and deduction should come into play.

In its operations, the Warren Commission did call various witnesses directly before it at scattered intervals. Apparently, the decision was made on a day to day or other periodic basis as to which witnesses should be summoned.[180] At the same time, staff counsel were questioning other witnesses under oath in various parts of the country. It is evident, therefore, that both Commission and staff were engaged concurrently in similar tasks, although, presumably, coordinating efforts. It is this concurrent participation which has questionable value as a technique. The Commission noted that it did not develop a record in logical sequence and apparently was able to withstand public pressure for publication of the record as it developed. It allowed its staff and investigators to develop the great bulk of the evidence. It is only a small step to allow a more complete, and critically screened, tentative record to be prepared for its initial consideration. For, if the commission joins in the task with the staff, it can hardly detach itself from the effects of any bias generated through the fact-collecting proceedings.

It appears that fact-gathering and fact-assessment were too much together, and, as a result, the press and other public commentators, rather than the Commission, fell heir to the first detached review of the basic findings. The critics will always be there to second guess, but at least the Commission might have been free to make a more impartial assessment and then have

180. See, e.g., 6 Hearings 223, wherein the assistant counsel advised the witness that the transcript of her statement would be reviewed by him and his colleagues and that it was possible that the Commission might wish to hear from her directly.

directed remedial work, if it was indicated, before the findings were turned over to the less responsible or able critics.

Conclusion

In the years ahead it is not unlikely that other questions of overriding national importance will create a task which transcends the capability, or suitability, of existing fact-finding or adjudicative agencies. When such a need arises the morphology and *modus operandi* of the Warren Commission should be known.

Whether it is sound or not to enact legislation for a standby machinery, some of the principles of common law procedure may still lend themselves to an improvement of the next similar fact-finding body. Random selection and cross-sectional representation of professions or other qualified analysts certainly seem desirable to mitigate bias in approach or conclusion.

Moreover, a critical analysis of the success or shortcomings of the Warren Commission provides insights into the values or inefficiences of existing procedures, such as are employed by the courts of common law. Because of their numbers and their extensive day to day task of administering justice, conventional tribunals cannot in a practical sense be staffed with the men of preeminence, or be aided so generously by the public and private facilities that worked in, or with, the Warren Commission. The necessity of sound and efficient controls on fact-finding processes is therefore more critical. Conventional courts are entrusted with matters of great gravity and their success or failure in serving justice is dependent upon procedures, or systems, which like habits of human conduct can become inflexible and resistant to change despite revolutions elsewhere in science and technology, and therefore merit continuous, radical assessment.

In any event reflecting upon fact-finding procedures in order to discriminate between the fundamental and the unnecessary is a healthy, if not, indispensable exercise for those of us entrusted with use of the various mechanisms. In doing so, we may find that the common law still has many lessons to teach to those interested in dealing with the limitations of human instrumentalities in the area of forensic fact-finding.