

Reports on the Report

JULY 3, 1966

INQUEST. The Warren Commission and the Establishment of Truth. By Edward Jay Epstein. With an Introduction by Richard H. Rovere. 224 pp. New York: The Viking Press. \$5.00.

WHITEWASH: The Report on the Warren Report. By Harold Weisberg. Illustrated. 208 pp. Hyattstown, Md.: Harold Weisberg. Paper, \$4.95.

By FRED GRAHAM

CRITICS of the Warren Commission's report on the assassination of President John F. Kennedy would do well to bear in mind the bard who wrote: "As you go on through life, brother, /Whatever be your goal— /Keep your eye upon the donut/And not upon the hole." For it obscures the truth to search for holes in the Warren Report without viewing it against the background of the Commission's peculiar nature and the possible alternatives to the conclusions it reached.

If President Kennedy had been killed by a disease, it would have been natural to call in the medical profession to clear up any mystery about its nature. Since he died by assassination, which is a crime, lawyers were called upon to arrive at the truth of the case.

But the parallel is not exact. Doctors are trained to discover medical truth, while lawyers are trained in expounding a point of view. (The best ones can believe passionately in every client's case, including the cases of great rascals.) Their truth-finding genius is not individual, it is institutional—the adversary system—and the record of Congressional investigating committees has long since established that the mere presence of skilled lawyers and legal trappings does not produce truth.

Yet when President Lyndon B. Johnson was faced with the need to expose the truth and settle doubts about the assassination, and with no precedents to guide him, he turned instinctively to lawyers and the law. He appointed the nation's most distinguished jurist, Chief Justice Earl Warren, to direct a commission of six leading citizens—all lawyers. In turn, the Commission retained J. Lee Rankin, a former U.S. Solicitor General, and a staff of 22 lawyers, nicely balanced between a few leading private attorneys (to give the staff prestige) and a number of top-ranked recent law graduates (to do most of the

work).

They naturally adopted a forensic method. The witnesses and physical evidence were marshaled so that the story would unfold in a trial-like manner, with witnesses responding to questions and submitting exhibits for the record. Testimony was taken either in deposition form by the staff or before the Commission members themselves somewhat as in a courtroom. The result was a verbatim rec-

ord of 522 witnesses' testimony (94 of these witnesses testified before the Commission), which filled 26 volumes when published and read reassuringly like a trial transcript. Basing their findings on this evidence, the Commission issued its 816-page report, which documented in impressive detail the story of Lee Harvey Oswald's crime.

The report was an immediate popular success. It was persuasive, its conclusion that Oswald acted alone stilled the conspiracy rumors, and it came out before the November, 1964, Presidential election.

Because the Warren Commission had been a body apart in American legal history, this success inspired praise for the commission idea itself as a means of determining the truth in unusual circumstances. Arthur L. Goodhart, the noted authority on British and American law, compared it favorably with the British Royal Commission system and suggested that "a new and more satisfactory system of investigation has been found than ever existed in the past." The American Bar Association Journal carried an article pointing out that the Commission was able to get far more information on Oswald than a trial would have produced because court rules would have precluded Marina Oswald from testifying against her husband. Some observers were so impressed with this that they suggested substituting a Warren Commission type of procedure for trials in certain cases.

In fact, Marina Oswald's testimony was one of the most troubling aspects of the Commission's investigation. She was questioned at length several times, yet as the investigation progressed, she continued to volunteer new and important information about her husband. It did not appear that she wished to mislead the Commission, but rather the opposite—she

seemed too anxious to say what she thought the Commission wanted to hear. When she finally appeared before the Commission itself, her testimony was so contradictory that one staff attorney threatened to quit unless the Commission called her back. When it did, she changed her story on several points.

THERE arises here an important fact about the Commission—it resembled a court, but its procedures lacked the crucial elements of a trial. There was no opposing counsel to cross-examine the witnesses; there was no division of function between investigator, attorney, judge and jury; there was no impending appellate review.

These were a few of the shortcomings that seem to have impressed Edward Jay Epstein as he studied the workings of the Commission for his Master's thesis in government at Cornell. As he delved deeper, he also concluded that the commission members themselves did not devote enough time to their study, that the use of F.B.I. men and Secret Service agents as investigators tended to perpetuate established theories, and that the re-

port was hastily issued to meet the election deadline.

Finally, Mr. Epstein found evidence that led him to doubt the essential premise of the Warren report—that Oswald acted alone. On Jan. 27 the staff had seen for the first time the remarkable color film sequence of the assassination taken by an amateur photographer. It showed that the maximum time that could have elapsed between the first hits of President Kennedy and Governor Connally was only 1.8 seconds. Tests showed that Oswald's bolt-action rifle could not fire two rounds in less than 2.3 seconds, not including aiming time.

This necessitated the "single bullet" theory, because, as one staff lawyer told Mr. Epstein, "To say that they were hit by separate bullets is synonymous with saying that there were two assassins."

According to the written report of the autopsy performed at Bethesda Naval Hospital on the night of the

assassination and the testimony of the doctors who performed it, the first bullet struck President Kennedy on the back of the neck, passed through without striking any bones or major muscles, and came out the front of his throat. Ballistics tests showed it could have retained enough velocity to cause the injuries to Governor Connally. However, Mr. Epstein found in the National Archives two newly declassified F.B.I. reports, dated Dec. 9, 1963, and Jan. 13, 1964. Both state flatly that the first bullet struck President Kennedy in the right shoulder and did not exit at the front. They do not say upon what evidence this conclusion was reached.

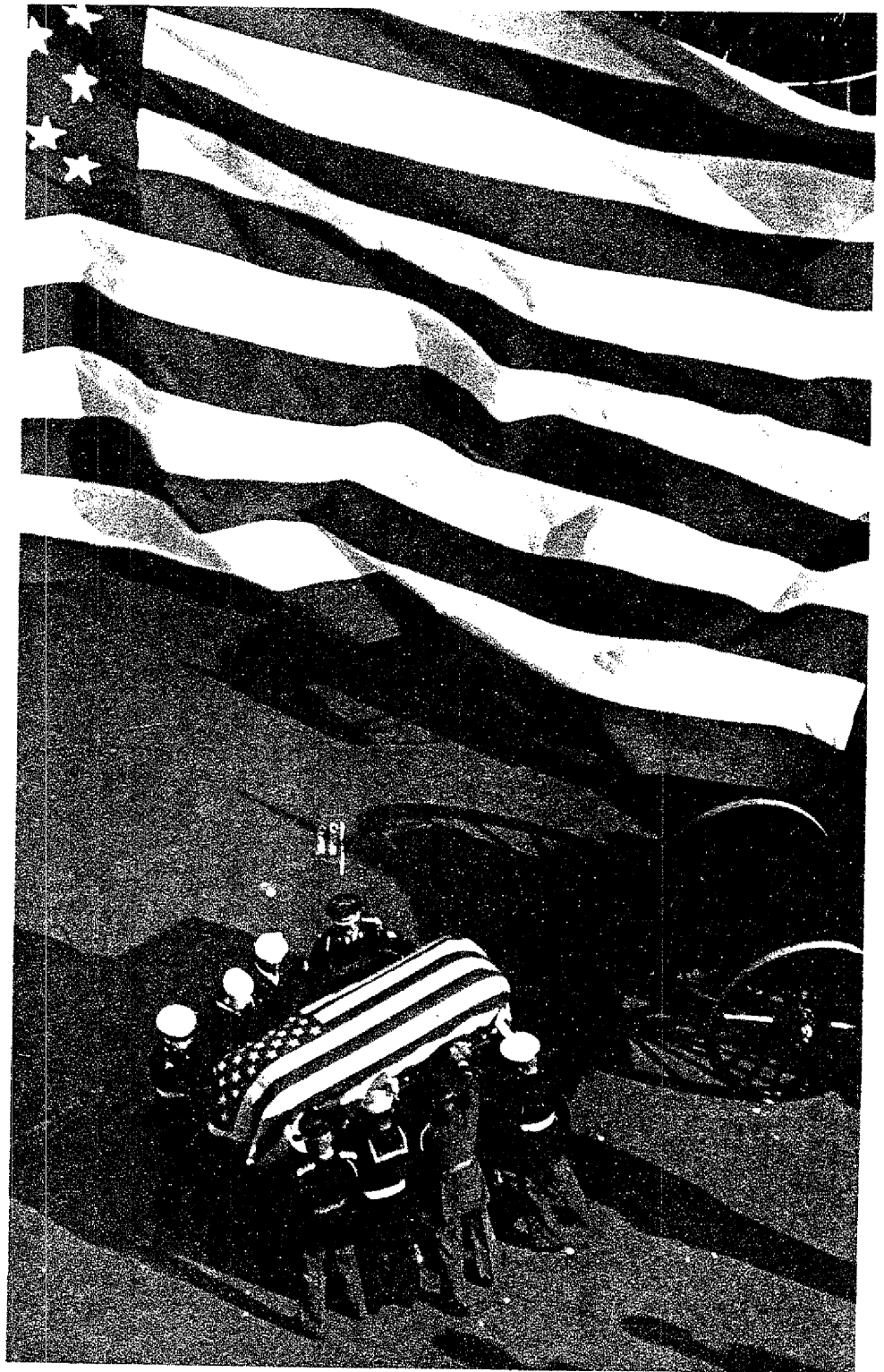
Mr. Epstein analyzes the other evidence (perhaps the most damaging, autopsy photos and X-rays of the corpse, which might prove that the bullet passed through as the doctors testified, are reportedly being held by the Secret Service and have never been released) (Continued on Page 22)

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and concludes that the F.B.I. statement is right. He views the contradictory autopsy report in the Warren Report as "political truth"—a deliberate fraud, although he does not use the word—to conform to the single-assassin hypothesis to which the Commission had somehow become inextricably committed.

This point is also made in his own book by Harold Weisberg, a painstaking investigator who formerly worked for the Senate Civil Liberties Subcommittee. But Mr. Weisberg cites so many flaws in the Warren Report that the impact of the F.B.I. contradiction is lost. In fact, Mr. Weisberg questions so many points made by the report that the effect is blunted—it is difficult to believe that any institution could be as inept, careless, wrong or venal as he implies. Rather, the reader is impressed with the elusiveness of truth and the possibility that the assassination, given Oswald's death, may be inexplicable.

Neither author appears to appreciate the difference between the actions of a court and the much greater task of the Warren Commission. If Lee Harvey Oswald had lived to stand trial, nobody would have expected the prosecution to marshal a case that answered all questions, explained all motives and foreclosed all possibilities. It would have been enough to prove beyond a reasonable doubt that Oswald killed the President, and if some embarrassing loose ends remained, the jury's verdict would have obscured them.



Washington, Nov. 24, 1963.

But the Warren Commission had to do better. Beyond proving that Oswald did it, it had a responsibility to look at the available evidence and conclude whether or not he acted alone. Furthermore, its task was not only to find the truth, but to be seen to have found the truth.

Of course, the "single bullet" theory is porous—but no other explanation makes any sense.

If another assassin fired from the Dallas School Book Depository, he and his rifle came and went without leaving a shred of evidence that the Warren Commission could cite to support a conspiracy theory. In failing to take this into account, and in concluding that the Commission must therefore have prostituted itself for some dark political purpose, the authors detract from their disclosures that the Commission was subject to elements of institutional bias, and that it did fail to correct this by not providing some form of adversary advocacy.

Moreover, Mr. Epstein's book is subject to two criticisms that he levels at the Commission—that it traveled under false pretenses, and that it was superficial. The book jacket describes Mr. Epstein as "a young scholar," and makes much of the academic genesis of the book. It is sprinkled with footnotes, graduate-school style. The United States National Archives are given as a major research source, and the impression is created that this is a definitive scholarly study of the Commis-

sion.

In fact, a major scholarly study is not feasible now because the crucial papers in the archives—the internal memoranda—have not yet been declassified. The available papers—investigative reports submitted to the Commission by the F.B.I. and other agencies—were considered by Mr. Epstein to be of so little value that he spent only two days in the Archives, making a "spot check" on their contents.

Mr. Epstein's book is based largely upon interviews. He talked with five of the seven Commission members and ten of the 27 people on the staff (of the 659 footnote citations, 299 refer to interviews), and the book leans heavily upon information supplied by two of the staff attorneys and a memo file provided by one of them. He did not talk to Comdr. James J. Humes, the doctor who performed the disputed autopsy. He also failed to note a fact that appears in the autopsy file in the National Archives, but not in the published evidence or report. The autopsy report, showing that the first bullet passed through and out of the President's neck, was sent to the Commission by the Secret Service on Dec. 20, 1963—a month before anyone knew a "single bullet" thesis would be necessary to explain Oswald's solitary role.

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