
Books for Lawyers

INQUEST. By Edward Jay Epstein. New York: Viking Press. 1966. \$5.00. Pages 224.

WHITEWASH. By Harold Weisberg. Published by the author at Hyattstown, Maryland. 1966. \$4.95 (paperback). Pages 208. Reviewed by Arthur John Keeffe, professor of law at Catholic University Law School.

From *Brown* at his first term to *Miranda* at his latest, I admire Earl Warren. But, along with what I understand to be the opinion of many of his Associate Justices and what I know to be the opinion of many lawyers, I felt at the time that it was a grave mistake for him to investigate the assassination of President Kennedy for the very reasons he himself so eloquently stated to Senator Keating as to why it was improper for sitting Justices to accept membership on a Presidential inability commission (46 A.B.A.J. 324 (1960)).

The sitting Justice who accepts extracurricular duty invariably lives to regret it. Chief Justice Stone opposed Justice Jackson's acting as prosecutor at Nuremberg, feeling he should have resigned, as Justice Byrnes did when asked to assist F.D.R. (Alpheus T. Mason, *Harlan Fiske Stone*, 1956). Justice Roberts told Whitney North Seymour that if he had it to do over he would have never investigated Pearl Harbor. In a beautiful piece (38 *University of Detroit Law Journal* 150 (1960), see 47 A.B.A.J. 431 (1961)), Sister Marie Carolyn Klinkhamer, O.P., tells how, after voting for Hayes over Tilden for President, Justice Bradley was hanged in effigy with Justices Strong and Miller in four places. Sister Marie says it was such a "devastating experience" that Bradley did not read a paper or open his mail for

months and was known the rest of his life as "Aliunde Joe".

I regret to say that I have concluded from my reading of these books not only that the procedures of the Warren Commission leave a lot to be desired, but also that there is so much reason to doubt the validity of the commission's conclusion that the public interest demands a new investigation or at minimum a reasoned rebuttal by the commission.

Mr. Epstein is the more effective because he is so "nice", writes so beautifully, and, as Richard H. Rovere says in the preface, understates "with an economy of language not easy to match". He has two objects: *first*, to demonstrate "that this great investigation was carried out by men who could not give their full attention to it" and, *second*, to establish that Lee Harvey Oswald could not alone have done the dastardly deed. Both get equal billing.

In the case of Harold Weisberg, who says he could not get anyone here or abroad to publish his book and does it himself, we have a painstaking, analytical attack. Adversely reviewed because it unwisely questions the motives of the commission, which were none but the best and noblest, it is nonetheless well written. Because of its factual material, I recommend reading Epstein first, then Weisberg and then Epstein again.

What is it that Mr. Epstein, graduate student at Cornell University, says was wrong with the way the distinguished Warren Commission did its work? It is that the seven commissioners—Chief Justice Warren, Senators Richard B. Russell and John Sherman Cooper, Representatives Hale Boggs and Gerald R. Ford, John J. McCloy and Allen W. Dulles—and virtually all the senior lawyers on the staff were men too busy to do the job, that their investigation

was not exhaustive (lasting "less than ten weeks") and that its capable staff, headed by J. Lee Rankin, former Solicitor General, Norman Redlich of the New York University Law School and Howard P. Willens of the Justice Department, was held by the commission to ground rules that prevented their doing the job.

Mr. Epstein argues that the Warren Commission should have had its own investigators and not used the Federal Bureau of Investigation, the Central Intelligence Agency and the Secret Service. Moreover, the FBI reported in writing. This resulted in the commission's reading tons of irrelevant paper, "quantity" not "quality". "One FBI document . . . is over 1,200 pages long and even contains descriptions of dreams." Wesley J. Liebler of the staff, "a former Wall Street lawyer" who was "recommended" to Mr. Willens "by the Dean of the University of Chicago Law School" and who seems to be Mr. Epstein's primary source, contends that "the CIA was so secretive that it was virtually useless", citing his difficulty in obtaining a picture the CIA took in Mexico City when Oswald was there on September 27, 1963, by means "of a secret camera located across the street from the Cuban Embassy". In the case of the Secret Service, "it had neither the manpower nor the facilities to conduct a general investigation".

Whereas our courts rely for the establishment of truth on the fire of cross-examination, the commission made the mistake of holding private ex parte hearings at which Oswald was tried *in absentia* without counsel. It denied Mark Lane's application to act as defense counsel for Oswald and failed to appoint a public defender.

Mr. Epstein claims Chief Justice Warren made the mistake in February, 1964, of believing Marina Oswald even though Norman Redlich said she had "lied to the Secret Service, the FBI and this commission repeatedly on matters which are of vital concern". You will recall she once had Oswald plotting to assassinate Richard Nixon. Because the commission sustained the Chief, the staff referred to Marina as "Snow White and the Seven Dwarfs". It was

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only after William Coleman of the Philadelphia Bar threatened to resign that she was recalled and gave contradictory testimony.

Perhaps the good Chief Justice would have been as kind to Marina Oswald anyway, but it seems to me his position as a sitting Supreme Court Chief Justice was in large part to blame. Mr. Epstein says he forbade use of the lie detector, as a device "the courts have ruled illegal", and that he refused to permit the commission to use the power Congress gave it to compel testimony by granting immunity because "the question of 'double jeopardy' (resulting from immunity) was before the courts and Warren did not want to prejudice his position".

Time pressure was the worst. Not only was the Chief Justice anxious to complete the investigation and get back to the Court, but members of Congress wanted the report to be released "well before election". Mr. Liebler told Mr. Epstein that Mr. Rankin "received frequent calls from McGeorge Bundy of the White House staff". Although not permitted by the commission (because of Ruby's trial) to investigate in Dallas until March, nevertheless the staff was given a June 1, 1964, deadline. To meet it, "lawyers in some instances, were forced to leave important problems unresolved". The time factor alone forced a concentration on the few aspects that could be concluded. Only eighty-eight of the 244 hours of hearings between February 3 and September 6, 1964, concerned the assassination.

What Mr. Epstein argues is that the commission had a dual purpose, one to "expose the facts" and the other to "protect the national interest by dispelling rumors", and the second got in the way of the first.

For instance, Texas Attorney General Waggoner Carr and Dallas District Attorney Henry Wade "met secretly" with Chief Justice Warren and Mr. Rankin to say that Alonzo Hudkins had told them "that Oswald was on the FBI payroll at \$200 a month". The commission referred this to the FBI, which said it had no record of his being an informant. Ten agents filed affidavits they had not used him. However, one agent, Warren DeBruey, said

by both Messrs. Epstein and Weisberg to be in charge for the FBI of Cuban espionage in New Orleans where Oswald was at one time active, did not file any affidavit.

Fletcher Knebel in *Look* (July 12, 1966) contends Hudkins denies saying this but, as Mr. Epstein points out, whether Oswald was or was not a paid informant for the FBI or the CIA, there is a conflict of interest in asking an intelligence agency to reveal its informants.

Both these books reason from the Warren Commission report itself that Oswald alone could not have assassinated President Kennedy. Granted Oswald had the rifle and was on the sixth floor of the Texas School Book Depository Building at the fatal hour, which both writers doubt, there is no question but that Oswald was not a crack shot. Scoring 212 in the Marines, a "fairly good shot", in 1959 he scored 191, a "rather poor shot". Nelson Delgado, a fellow Marine, said he shot "a lot of 'Maggie's drawers' [complete misses]".

You recall from the pictures in *Life* that Abraham Zapruder, a manufacturer of women's dresses and an amateur photographer, took an 8-mm. movie film of the assassination. At frame 225 President Kennedy put "his hands to his throat"; at frame 235 "Governor Connally slumps forward"; and at frame 313 a "bullet strikes the President's head". Mr. Epstein writes: "Medical experts, including Connally's doctors, established with certainty and the commission agreed, that Connally was not in a position to be hit after film frame 240." Since "the minimum time in which the assassination weapon could be fired twice was 2.3 seconds (or 42 film frames)", the "maximum time that could have elapsed between the times both men were first shot was thirty-three film frames or about 1.8 seconds".

For this reason, Professor Redlich told Mr. Epstein: "To say that they were hit by separate bullets is synonymous with saying there were two assassins." The proximity of these two shots raised doubts as to whether an assassin could possibly fire a bolt-action rifle two times in one and a half seconds.

In a Quantico, Virginia, test at a stationary target with the alleged murder weapon, Robert Frazier, "FBI ballistics expert", failed to equal Oswald's alleged shooting time of 5.6 seconds (using 5.9 minimum), and all his shots were inaccurate "due to an uncorrectable mechanical deficiency in the telescopic sights".

Oswald shot from the sixth floor of the School Book Depository Building, and the Warren Commission found that "the bullet was traveling downward and was undeflected" entering the "rear of the neck", exiting through the throat. An artist, not allowed to use photographs of the President's body (said by Mr. Epstein to be in the custody of Robert F. Kennedy, but *Newsweek* (August 15, 1966) says their "whereabouts" is "one of Washington's most puzzling mysteries"), made drawings "on the basis of the verbal instructions of Commander Humes", who performed the only autopsy at Bethesda on November 23, 1963. Commander Humes's conclusion, accepted by the commission, that the bullet exited through the neck "was based mainly on the fact that 'the wound in the anterior portion of the neck' was physically lower than the point of entrance posteriorly".

Mr. Epstein states that "although Commander Humes testified in March that the entrance wound was above the throat wound, during the autopsy he marked the entrance wound below the throat wound". Two Secret Service agents saw the opening in the President's back, one "six inches below the neck line", the other "four inches down". Since "human observations are often inaccurate", Epstein concedes the Secret Service men may be in error but lays stress on two FBI reports.

The first, as of November 22, 1963, states that: "Medical examination of the President's body revealed that one of the bullets had entered just below his shoulder to the right of the spinal column at an angle of 45 to 60 degrees downward, that there was no point of exit, and the bullet was not in the body." The second FBI supplemental report's photographs ("omitted from the Warren Report and the twenty-six volumes of supporting evidence") "show that the bullet hole in the jacket

is 5 and $\frac{3}{8}$ inches below the collar", confirming the FBI report. Mr. Epstein recognizes that "It is possible that President Kennedy's jacket was in some manner raised more than six inches, so that the hole in it coincided with the purported entrance wound in the 'back of the neck'", but he points out that the FBI photograph of the President's shirt shows the bullet hole in it to be "5 and $\frac{1}{4}$ inches below the collar".

Mr. Epstein, relying on Milton Halpern, Chief Medical Examiner of the City of New York, contends "it is a *sine qua non* law of forensic pathology that if a bullet passes through a body, it leaves a discernible path"—a 6.5 mm. bullet "a track approximately $\frac{1}{4}$ inch in diameter". Yet Commander Humes testified that "the autopsy surgeons were unable to find a path for the bullet".

They did not see the throat wound "because a tracheotomy operation, performed in Dallas immediately after the shooting had obliterated the outlines of the wound". Dr. Malcolm O. Perry, who performed it, "described the wound as a small puncture wound approximately 5 millimeters in diameter". All the Dallas doctors who saw the President's throat wound "agreed that it could have been either an entry or an exit wound".

Secret Service Agent Roy Kellerman, "who was in the front seat of the President's limousine", testified "that he distinctly heard the President say, 'My God, I am hit' after the first shot". Since the projectile that caused the throat wound also punctured the windpipe, Mr. Epstein contends "it is medically highly improbable that the President could speak after he received the throat wound".

"According to the single-bullet hypothesis, the first bullet went through the President and Connally, the second bullet missed the car completely, and the third bullet hit the President's head and fragmented." Bullet 399, "nearly intact" and "ballistically matched to the murder weapon", was found on a stretcher at Parkland Hospital. Following its one-bullet theory, the commission concluded the stretcher was Connally's, whereas both Messrs. Epstein

and Weisberg maintain there is no evidence that "precludes" the possibility that Bullet 399 had come from Kennedy's stretcher. Unfortunately, the bullet itself was cleaned before ballistic examination.

Governor Connally suffered extensive injuries in the chest, wrist and thigh and still has bullet fragments in his body. Lieutenant Colonel Pierre A. Finck, an "expert on forensic medicine" whose testimony "was fully supported by other doctors", cannot "be dismissed". His "categorical statement", which was "never challenged", is that Bullet 399 "could not have caused Connally's wrist wound" because "there are too many fragments" in Connally's wrist.

From all of which one must conclude that these books raise very disturbing doubts about the so-called one-bullet theory.

Greatly to their credit, Senators Russell and Cooper and Representative Boggs expressed so much doubt about the single-bullet theory that a protective paragraph was inserted saying that "Governor Connally's testimony and certain other factors have given rise to some difference of opinion", but that all were agreed that "all shots" were fired from the sixth floor window of the Texas School Book Depository.

Both these authors (as many commentators before and since) suggest that "the grassy knoll" was probably where the shots came from, rather than the School Book Depository Building, and both suggest, as others have, that Oswald had a double who did the deed. This argument is bolstered by the Warren Commission's lack of time, staff and proper procedures to do the job it undertook. Therefore, it is not surprising, that its one-bullet theory is open to such serious question and that it is also accused of not pursuing thoroughly and independently the many leads open to it.

From the point of view of the lawyer, I fear the Warren Commission is not a good advertisement. When the report was published, Dwight Macdonald in the March, 1965, *Esquire* said: "The trouble with the Warren Report is that it was written by law-

yers." Since he then agreed with its conclusions, I shudder to think what he'd say now.

Whether Oswald acted alone or in concert with others, in my judgment it was a bad day at Black Rock for the legal profession when Chief Justice Warren accepted the job, but an even worse one when he and his fellow lawyers elected to conduct their inquiry without building into their procedures the protections that our Anglo-American judicial system possesses for discovery of truth. In my judgment, the Warren Commission was a tragedy not only for the nation but especially for the legal profession.

—ARTHUR JOHN KEEFFE

HANDBOOK OF EVIDENCE FOR CRIMINAL TRIALS. By Henry R. Rothblatt. Englewood Cliffs, New Jersey: Prentice-Hall, Inc. 1965. \$15.00. Pages 315. *Reviewed by Alexander Holtzoff, United States District Judge for the District of Columbia.*

The title of this book is likely to convey a wrong impression as to its contents. It is not a textbook or a treatise on the law of evidence as it applies to criminal cases. It is a series of disconnected chapters, or briefs, on selected topics in the field of criminal procedure as well as evidence. In fact, the major portion of the book deals with procedure rather than evidence.

The book is somewhat unusual in its construction. It does not consist of a continuous text or discussion. Each chapter is a skeletonized brief on a specific topic. Most of the text consists of statements of rulings in specific cases in capsule form, somewhat akin to a digest. Practically no discussion of the topics or of the authorities is contained in the book.

The author deals with the various topics as though the law were uniform throughout the United States. No attempt is made to differentiate the law among the various states and among the several circuits of the federal judicial system. In fact, in citing state cases, the author frequently fails to indicate the state in which the decision was rendered, and in referring to fed-