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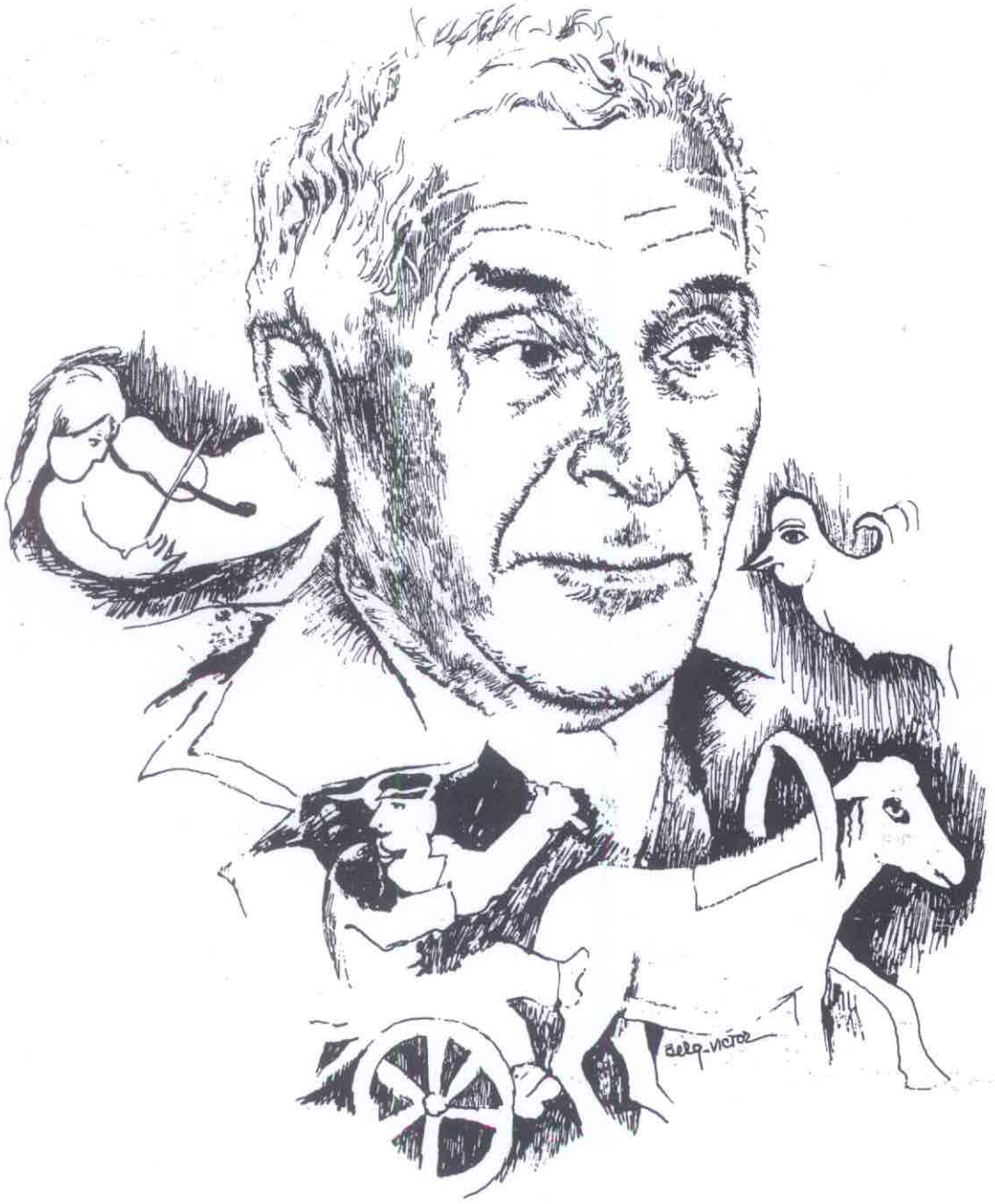


THINKING ALOUD

Oswald's Case Against the Warren Commission

By Leo Sauvage

This is the second of three articles on the Warren Report by Leo Sauvage, chief U.S. correspondent for the French daily, Le Figaro, and author of the book L'Affaire Oswald, published in Paris by Editions de Minuit. The first of these articles, "The Warren Commission's Case Against Oswald" (NL, November 22), examined in detail the proofs of Oswald's guilt cited by the Commission, and finding them unconvincing, concluded: "How, under these circumstances, can the Warren Commission unhesitatingly assert that 'Lee Harvey Oswald was the assassin of President Kennedy'?" Here Sauvage questions the Commission's methods.

DID THE WARREN COMMISSION really carry out President Johnson's directive "to satisfy itself that the truth is known as far as it can be discovered" in the case of John F. Kennedy's assassination? One may argue that it did "satisfy itself," but not that "the truth is known as far as it can be discovered."

From its official Report of September 27, 1963—and especially after studying the 26 volumes of Hearings and Exhibits published two months later—it is clear that the Commission cannot claim to have ascertained all the available facts. Its very methods prevented this: First, it did not demonstrate the concern for impartial research that is vital to any serious inquiry; and second, in gathering evidence and hearing witnesses, it did not recognize established criteria for distinguishing between truth and falsehood.

The United States, to its honor, has always accorded a high place in its judicial process to the right of cross-examination, to the principle that nothing should be accepted as proven until opportunity has been provided for the adversary's presentation. This is not merely a rule of law; it is a tool designed to bring from the darkness the smallest detail that might contribute to an exact knowledge of the facts. In a recent article in the New York University Law Review, Paul L. Freese describes cross-examination as "perhaps the paramount principle of the common law procedure." Supporting this view, he cites the respected American jurist John Henry Wigmore, who maintains that cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth."

Since the Warren Commission was not a court, it was of course not legally required to adhere to the principle of cross-examination. But the Executive Order appointing the Commission expressly permitted it "to prescribe its own procedures." How could "a fact-finding agency committed to the ascertainment of the truth" (as the Warren Commission defines itself in the Foreword to the Report) deliberately deprive itself of such an instrument? Is it because "the real task of the Warren Commission was not to *find* the truth but to *appear to have found the truth* to the satisfaction of the largest number of people here and abroad"? That is Freese's suggestion (the italics are his) in the NYU Law Review, although he does not feel this is any reason to doubt the Commission's conclusions.

To eliminate any question about its determination to seek the truth, the Commission should have followed the rule of cross-examination in all phases of its investigation. Moreover, being empowered "to employ such assistance as it deems necessary," it should not only have allowed but required the presence of a lawyer assigned to represent the interests of the accused as well as those of justice in general: a "devil's advocate" if not an attorney for the deceased Oswald. This idea, indeed, was advanced in the United States by a number of U.S. jurists, and it was even the subject of a formal resolution of the National Association of Defense Lawyers in Criminal Cases. Urging "the wisdom of appointing counsel to represent the late Lee Harvey Oswald in the hearings to be conducted before said Presidential Investigating Commission," the resolution concluded: "It is our con-

sidered judgment that only in an adversary proceeding can a judgment be arrived at by the Presidential Investigating Commission which will satisfy the American public that he, the late Lee Harvey Oswald, was the assassin of the late John Fitzgerald Kennedy, if that was the fact."

In an official release distributed throughout the world by the U.S. Information Service, Warren was quoted as giving "the assurance" that the hearing would be conducted "as nearly like a judicial proceeding as possible, in decorum and for protection of the rights of witnesses." It never occurred to anyone then—including myself, I admit—that this "assurance" by the Chief Justice should be read primarily in terms of what it omitted. Though it spoke of the "protection of the rights of witnesses," the statement did not mention the rights of the accused. Events were to show that the omission was intentional.

On January 14, 1964, Mrs. Marguerite Oswald announced in Fort Worth, Texas, that she was assigning Mark Lane, a New York lawyer, to represent her son's interests before the Commission. Whatever one may think of Lane (or of Mrs. Oswald, for that matter), he was the only qualified representative of Lee Harvey Oswald (his widow, Marina, had become the principal witness for the prosecution). But when Lane informed the Commission that he had been retained by Oswald's mother, he received the following response from its General Counsel, J. Lee Rankin: "This Commission does not believe that it would be useful or desirable to permit an attorney representing Lee Harvey Oswald to have access to the investigative materials within the possession of the Commission or to participate in any hearings to be conducted by the Commission." This disturbing reply was made public by Lane on February 25, 1964, and has not to my knowledge been denied by Rankin.

Actually, Rankin was in effect representing the position already adopted by Warren himself on February 10, 1964, during Marguerite Oswald's appearance in Washington. The Chief Justice's stand can be seen in the following exchange, recorded in the Hearings:

"I implore you, I implore you in the name of justice, to let my son, Lee Harvey Oswald, who is accused of assassinating the President, and I, the mother of this man, who is the accused's mother, be represented by counsel," Marguerite Oswald pleaded. Warren replied that "the Commission is not here to prosecute your dead son," that "if Mr. Lane has any evidence of his own knowledge or has any accumulation of affidavits from others . . . he will have an opportunity to come here," but that "so far as his being here at all times before the Commission to cross-examine or to be present when all witnesses are testifying—that is not in accordance with the procedures of the Commission."

The Report informs us, however, that what was judged by the Chief Justice on February 10 as "not in accordance with the procedures of the Commission" suddenly appeared desirable to him on February 15:

"In fairness to the alleged assassin and his family, the Commission on February 25, 1964, requested Walter E. Craig, president of the American Bar Association, to participate in the investigation and to advise the Commission whether in his opinion the proceedings conformed to the basic principles of American justice. Mr. Craig accepted this assignment and participated fully and without limitation. He attended Commission hearings in person or through his appointed assistants. All working papers, reports, and other data in Commission files were made available, and Mr. Craig and his associates were given the opportunity to cross-examine witnesses, to recall any witness heard prior to his appointment, and to suggest witnesses whose testimony they would like to have the Commission hear. This procedure was agreeable to counsel for Oswald's widow."

Louis Nizer, the renowned lawyer, saw in this passage "an exquisite blend of thorough probing and preservation of the rights of the individual (including even the reputation of the accused slayer) in accordance with the great traditions of Anglo-American jurisprudence"; I see in it an unconscious revelation of the total incoherence of the Commission's basic concepts. To begin with, by discovering three weeks after the hearings started the necessity for "fairness to the alleged assassin and his family," the Commission completely undermined its contention that Oswald was not being prosecuted and therefore had no need of defense. And in describing effusively the various functions of Craig, the Commission showed that it was well aware of the fact that there can be no "fairness" without cross-examination of witnesses, and without opposition scrutiny of all the evidence. To the extent that this passage in the Foreword of the Report represents a commitment of the Commission, it is a repudiation of the earlier declarations of Warren and Rankin. The fact that the commitment was never fulfilled, however, leads to the conclusion that what Nizer considers an "exquisite blend" of justice was merely a public pose.

No one who has read the 888 pages of the Report can have any doubt about the role played by Walter E. Craig: His name does not even appear in the index, nor does it appear in the extended index contained in the 15th volume of the 26 volumes of Hearings and Exhibits. One does find an occasional reference to the presence of an "observer" representing Craig, but none of these "observers" ever poses a question which might illuminate a point in Oswald's favor. An incident which took place March 12, 1964 seems especially

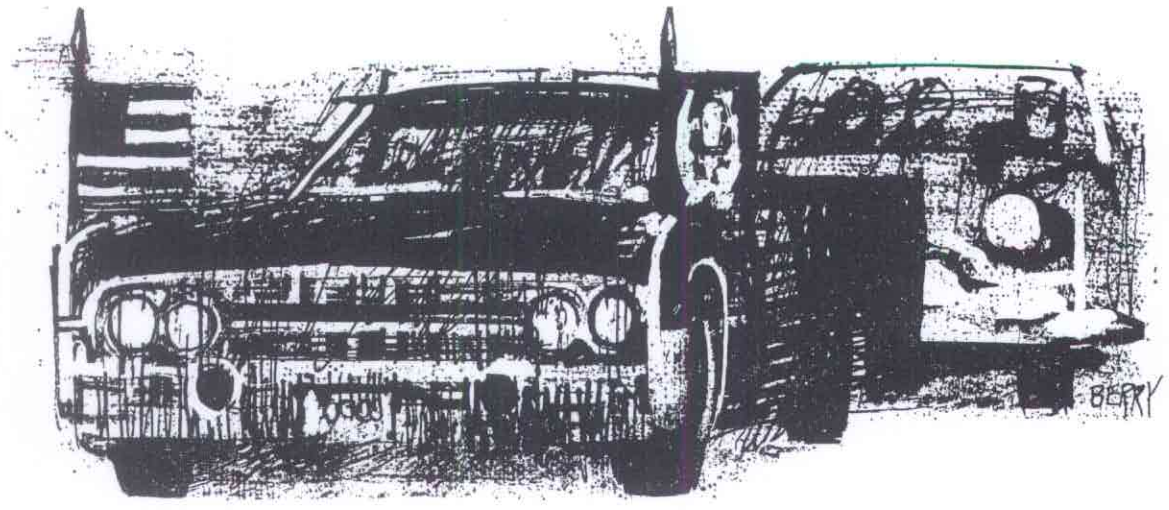
relevant here: Completing his questioning of taxi-driver William W. Whaley, Assistant Counsel Joseph A. Ball declared, "The Witness is excused." Congressman Gerald R. Ford, who was substituting for Warren as Chairman, interrupted to ask a certain Lewis F. Powell Jr. if he had any statement to make. This is Powell's reply: "Mister Chairman, I think I might say just this: I am here representing Mr. Walter Craig, as I think the Commission understands. I have been here the last two days. In a conversation with Mr. Rankin yesterday morning we agreed that rather than my asking questions directly to witnesses, I would make suggestions to Mr. Ball or to one of his associates. . . ."

Whether or not "this procedure was agreeable to counsel for Oswald's widow" ("One would think so!" Nizer says without a trace of irony), the simple mention of her was an insult to the public. At the very least the conditions under which Oswald's widow was endowed with a "counsel" (while she was incommunicado and in the "protective custody" of the Secret Service) left much to be desired. And by no stretch of the imagination could Marina Oswald seriously be considered a representative of the moral interests of Lee Harvey Oswald.

A FEW American journalists have dared to criticize the Warren Commission's methods, sometimes in terms that seem to exclude the possibility of attaching any faith to its conclusions. But after recognizing its obvious partiality, after citing crushing examples of its complacency, omissions and distortions, they nevertheless support the affirmation to which those manipulations were meant to lead: that "Lee Harvey Oswald was the assassin of President Kennedy."

In "A Critique of the Warren Report," published in *Esquire*, Dwight Macdonald set out to demonstrate that it is possible to believe in Oswald's guilt *in spite of* the commission. "Perhaps I can rescue the Warren Report from its authors," he writes after stating flatly: "Partisanship does infect the Report, however, and it won't do to pretend otherwise. In two ways. *The Prosecutor's Brief*: accepting or rejecting testimony according to how it fits into what the Commissioners want to prove. And *The Establishment Syndome*: the reflexive instinct of people in office to trust other officials more than outsiders, and to gloss over their mistakes." The author of *Against the American Grain* does not deny that the "tone" of the Report is that of "the advocate, smoothing away or sidestepping objections to his 'case,' rather than the impartial judge or the researcher welcoming all data with detached curiosity." But he believes that if the Report "obscures the strong points of its case," it remains that "many are very strong."

Macdonald thus joins Murray Kempton who, in the *New Republic* of October 10, 1964, denounced the Warren Report as a "case for the prosecution," yet concluded that the Prosecution's "immense" statement was also "almost indisputable." According to Kempton, the Report "drastically narrowed the area of doubt," and "what doubts remain turn out to be less about Oswald's guilt than about the method of his judges." Kempton is aware that the Report seeks to "elevate the implausible to the probable," and he adds, "that is the kind of thing we expect, not from judges but from prosecutors of the better sort." But if he regrets the absence of defense counsel ("it is to test such cases that we have an adversary system of criminal justice"), he does not believe that the validity of the evidence is thereby weakened. This is undoubtedly because, while reproaching the Commission for having played the role of prosecutor, he is convinced that it was a prosecutor "of the better sort," or again, as he writes a few



lines further on, "a highly responsible prosecutor." The sad truth is that the Warren Commission employed methods that are rarely used by even a moderately responsible prosecutor.

In fact, a moderately responsible prosecutor would hardly have dared to rely on the witnesses the Commission leans on, not only because most of them would not survive 10 minutes of cross-examination, but because the press, in any other case, would ridicule a prosecution based on their testimony. Having excluded all danger of cross-examination (and the American press having excluded itself), the Warren Commission offers us a parade of spurious "eye-witnesses" such as has not been seen in the free world since the Sacco-Vanzetti case. Some of these "eyewitnesses," moreover, are made to figure in the Warren Report

MARGUERITE OSWALD

despite themselves: In several instances, Commission interrogators patiently extracted "identifications" that witnesses were reluctant to make; in some, the Report goes so far as to boldly use "identifications" that were not made.

Let us compare, for example, page 176 of the Report and the photograph on page 164, "Commission Exhibit No. 1968." The text reads as follows: "Two eyewitnesses who heard the shots and saw the shooting of Dallas Police Patrolman J. D. Tippit and seven eyewitnesses who saw the flight of the gunman with revolver in hand positively identified Lee Harvey Oswald as the man they saw fire the shots or flee from the scenes." Two plus seven equals nine. The caption accompanying the photograph claims it shows the "location of eyewitnesses to the movements of Lee Harvey Oswald in the vicinity of the Tippit killing," and printed on the photograph are their names—13 of them. Thus there are four "eyewitnesses" more in the photo than in the text. Where did they come from?

According to the statement of one of the additional four, Mrs. Mary Brock, she saw neither the shooting nor the revolver in the hand, but simply "a white male" going by "at a fast pace with his hands in his pockets." Assuming this "white male" had something to do with the case, was he Oswald? "When interviewed by FBI agents on January 21, 1964 [sic], she identified a picture of Oswald as being the same person she saw on November 22."

Another of the four extra "eyewitnesses" presented in "Commission Exhibit No. 1968" is Domingo Benavides. On the night of November 22 he told the police that "he did not think that he could identify the man who fired the shots," and the police therefore did not even bring him to one of the lineups. Before the Commission, however, "he testified that the picture of Oswald which he saw later on television bore a resemblance to the man who shot officer Tippit." While the Commission did not add Benavides' name to those of Helen Markham and William Scoggins, who "positively identified" Oswald as the murderer of Tippit, it at least recovered him for its "Exhibit."

The third mystery "eyewitness," William Arthur Smith, "told a Commission staff member that he saw Oswald on television the night of the murder and thought that Oswald was the man he had seen running away from the shooting." He had not said so before because "on television Oswald's hair looked blond," but when the FBI later showed him a picture, he said "it looked more like him (Oswald) than it did on television."

Finally, there is L. J. Lewis. Here is what the Report itself tells us about him: "L. J. Lewis said in an interview that because of the distance from which he observed the gunman he would hesitate to state whether the man was identical with Oswald."

WHAT ABOUT the nine "eyewitnesses," cited in the text as having "positively identified" Oswald? Is there more reason to accept their testimony? Remarking that "some did so after seeing him on TV and others weeks later from photographs," Dwight Macdonald calls the Report's claim "an exaggeration." That understatement is too British for an American. In scrupulously asking the witnesses if, before the lineup, the police showed them a picture of the man to be identified, the Commission was mocking itself, not to mention the public. The question may have reflected a healthy suspicion concerning the Dallas police, but what is the difference between a photograph shown by a policeman and a newspaper photograph or a television picture in destroying the validity of an identification? What is more the mockery is still greater when

one views these "positive" identifications in the light of the Report's own admission that they were secured "two months after the shooting" under conditions such as the following:

"Russell and Patterson were shown [by the FBI] a picture of Oswald and they stated that Oswald was the man they saw on November 22, 1963. Russell confirmed this statement in a sworn affidavit for the Commission. Patterson, when asked later to confirm his identification by affidavit, said he did not recall having been shown the photograph. He was then shown two photographs of Oswald and he advised that Oswald was 'unquestionably' the man he saw. Reynolds did not make a positive identification when interviewed by the FBI, but he subsequently testified before a Commission staff member and, when shown two photographs of Oswald, stated that they were photographs of the man he saw."

Equally unconvincing are the "identifications" attributed to Barbara Jeanette Davis ("She was not sure whether she had seen his picture in a newspaper on the afternoon or evening of November 22 prior to the lineup"), and to William Scoggins ("He thought he had seen a picture of Oswald in the newspapers prior to the lineup identification on Saturday"). That leaves us with five down and four to go.

The day after the Report was issued, I stressed in a dispatch for my newspaper in Paris that it was hardly possible to attach much importance to the police lineups in Oswald's case because he was so obviously distinguishable by the famous "smirk" on his face, as well as by the marks from the blows he received in the course of his arrest. In the section titled "Oswald's Legal Rights," where the Commission is occupied solely with proving that the marks on Oswald's face were due to the "scuffle in the Texas Theater" and not to any ill treatment later, the Report unwittingly underlines this point: "These marks were visible to all who saw him during the two days of his detention and to millions of television viewers."

One could scarcely ask the Dallas Police Department to find persons with similar marks to place in the lineup with Oswald, but at least these lineups should not have been allowed—whether intentionally or out of sheer incompetence—to aggravate the suspect's handicap. "The Commission is satisfied that the lineups were conducted fairly," the Report tells us. Yet a study of the Hearings, published 10 months later, shows that the conduct of the lineups was unfair.

Types most unlike Oswald were chosen, including two teen-agers and a Mexican; they wore clothing distinguishing them from the suspect; detectives posing as suspects (but not warned they would have to answer questions) had to improvise names and occupations while Oswald himself, according to the police who were present, told the truth.

There were four such lineups, including one the night after the assassination, and even the first one took place at 4:05 P.M. on the day of the murder—that is, two hours after Oswald's arrest. By this time, except for infants and the very ill, the entire population of Dallas knew that the shots which killed the President had been fired from the Texas School Book Depository, and that the suspect was an employe of the Depository whose name was incessantly repeated over radio and television. How could anyone (even someone having fits of hysteria like Helen Markham) fail to "identify" the man to be identified—a man already marked by his smirk and his bruised face, who in addition was made to state that his name was Oswald and that he worked at the Depository? Yet the Report contends that "the lineups were conducted fairly."

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The Report also tries to hide, through shrewd editing, certain damaging information received by the Commission during its inquiry that is described in the Hearings. Thus there was the incident of the Saturday night lineup. This lineup was ridiculous to begin with because by this time Oswald's features were as well known as President Kennedy's throughout the entire world, and certainly in Dallas. But that does not prevent the Commission from accepting the "identification" made at this lineup by William Scoggins, one of the two *direct* witnesses of Tippit's murder.

Cab-driver Whaley, who had taken Oswald to Oak Cliff on Friday and who attended the same lineup, said that "you could have picked him out without identifying him by just listening to him because he was bawling out the policemen, telling them it wasn't right to put him in line with these teenagers and all of that. . . ."

What does the Report make of this? "Whaley's memory of the lineup is inaccurate," since he was mistaken about the number of people with Oswald (three, of which "only" two were 18 years old) and about Oswald's position in the lineup (he was number three, not two). The implication, of course, is that Whaley was mistaken about Oswald's behavior, just as he was wrong about where Oswald stood in the lineup, and that the "bawling out" of the policemen before witnesses never took place. In Volume VII of the Hearings, though, we find that the essential part of Whaley's testimony—that Oswald made himself known at the lineup by arguing with the police—was confirmed by two detectives of Captain Fritz' Homicide Bureau. I do not see how one can avoid the conclusion that the editors of the Report were intentionally misleading.

IT IS IMPOSSIBLE to close a discussion of this aspect of the case without recalling the fantastic Mrs. Helen Markham. I realize that the New York *Times* preferred to ignore her existence completely in the excerpts from the Hearings that it published as a paperback titled *The Witnesses,* in which it claimed to let the "key witnesses" speak "in dramatic detail." "Journalists are sometimes smarter than Commissioners," writes Dwight Macdonald, and he is right—the Warren Commission did not have the good sense to deprive itself of Mrs. Markham's services: "Addressing itself solely to the probative value of Mrs. Markham's contemporaneous description of the gunman and her positive identification of Oswald at a police lineup, the Commission considers her testimony reliable."

To take only the "contemporaneous description of the gunman" (there is no point any longer in returning to the "positive identification" at a police lineup), the Report tells us that "her description and that of other eyewitnesses led to the police broadcast at 1:22 P.M. describing the slayer as 'about 30, 5'8", black hair, slender' (518)." The number 518 refers to "Commission Exhibit 1974," which appears in volume XXIII of the 26-volume set. One discovers there that a comma, not a period, followed the word "slender," and that the text of the broadcast continued in these terms: ". . . wearing a white jacket, white shirt and dark slacks." In the Report, this part of the broadcast is not given until eight pages later, where there is no longer a question of Mrs. Markham's "reliability," and the first citation of it does not even include the usual three dots to indicate that it is not a complete quotation. Why this maneuver? Because the Commission officially confirmed what anyone could have determined from the picture distributed by the USIS: At the time of his arrest, Oswald wore a dark brown, mottled sportshirt —as difficult to confuse with a white shirt as it is to confuse Helen Markham with a reliable witness.

The Commission, though, "considered certain allegations that Mrs. Markham described the man who killed Patrolman Tippit as " 'short,' 'a little on the heavy side,' and having 'somewhat bushy' hair." And to defend Mrs. Markham's reliability, the Report presents a series of contradictions so ineptly childlike that one blushes for the Commission. The main evidence here against its star witness is a telephone interview of Mrs. Markham by Mark Lane, which the New York lawyer recorded on tape. "A review of the complete transcript has satisfied the Commission that Mrs. Markham strongly reaffirmed her positive identification of Oswald and denied having described the killer as short, stocky and having bushy hair," the Report declares. But exactly seven lines after being "satisfied" that the witness "denied having described the killer as short," the Report states that "in the phone conversation she described the man as 'short'." Exactly two lines after being "satisfied" that the witness "denied having described the killer as . . . having bushy hair," the Report says "she used the words 'a little bit bushy' to describe the gunman's hair."

For the last there is an explanation: "She was referring to the uncombed state of his hair, a description fully supported by a photograph of Oswald taken at the time of his arrest." I ask American readers to believe that it is very unpleasant for me to have to point out to the Commisssion, headed by the Chief Justice of the United States, that the "photograph of Oswald taken at the time of his arrest" shows the alleged killer after the scuffle at the Texas Theater, while Mrs. Markham's description, according to her own "reliable" testimony, was of a man calmly walking on the sidewalk of Tenth Street.

There remains, finally, the fact that Mrs. Markham, testifying under oath, "initially denied that she ever had the above phone conversation." Did the Commission ask itself whether the witness belonged in a psychiatric ward or a jail? Did it at least decide to reject as entirely without probative value the testimony of a person so obviously unbalanced? No. Quite the opposite: It is after all this that "the Commission considers her testimony reliable." The prejury? "She has subsequently . . . offered an explanation for her denial."

The 142,918 purchasers of the Report (in the official Government Printing Office edition) will have to be content with the word of the Commission and suppose that this "explanation," which was not revealed to them, was in fact satisfactory. The 1,684 buyers of the 26-volume set will find in volume VII, pages 499-506, an account of the pitiful exhibition which the Warren Commission, with appaling casualness, calls "an explanation."

Certainly there is reason to wonder who could make the better case: the Warren Commission against Lee Harvey Oswald, or Lee Harvey Oswald against the Warren Commission.