

A Legal Demurrer to the Report of the Warren Commission*

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In Boston, Massachusetts, rumors are rife that a man presently detained in a mental institution will be put on trial as the Boston Strangler, at a propitious moment, so that an attorney-general may become a United States Senator. In DuPage County, Illinois, the American Civil Liberties Union has complained that a 27-year-old teacher cannot get a fair trial because of publicity surrounding the alleged murder of a 10-year-old school-girl. In Miami, Florida, Candace Mossler and Melvin Powers were tried and found wanting by columnist Jimmy Bishop and his syndicated newspapers. The result was a great surprise when the jury's acquittal indicated that trial by mass media is not always successful.

It is against this sort of backdrop that the Warren Commission came into being, and against which its work was evaluated. It would appear that the report was prepared to fill a political need caused by the unrest of the general public, and that it is aimed at allaying the fears of society. It has evidently fulfilled that need. But by many of those dedicated to the discovery of truth through scientific disciplines, the commission's findings cannot be accepted. For, in truth and in fact, the major conclusions of the commission are lacking in probative weight.

At the outset it must be stated that it is not presupposed that the commission has wrongly concluded. It is merely contended that the conclusions have not been proved. Central to this thesis is the contention that the failings of the commission

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and the agencies it relied upon are the result of common errors in law enforcement work, which are normally tolerated if not encouraged by the society. In the extremes of publicity surrounding the assassinations of President Kennedy and Lee Harvey Oswald, the errors are apparent. We would fail to learn our lesson if we did not demand serious change in the day-to-day operation of our prosecuting agencies and criminal courts.

The first major failing of the commission is that its very existence constitutes a contradiction of the well established tenet of American jurisprudence that the accused shall not be tried *in absentia*. Despite its disclaimer, the commission did so try Lee Harvey Oswald, and convicted him with these words:

“The shots which killed President Kennedy and wounded Governor Connally were fired by Lee Harvey Oswald.” (1)

From a legal point of view, then, the commission arose in a society which does not adhere to its articulated disdain for political trials. While it is recognized that some compromise with the principal of allowing the accused to confront his accusers, avail himself of counsel, cross-examine those who would testify against him, examine the evidence relied upon by the trier of fact, and present such facts as might tend to exculpate him is expedient in the instance of the assassination of the President of the United States, and the demise of the man accused of the crime, it is difficult to justify the composition of the panel chosen to gather the evidence, make the accusation and sit in judgment. The panel is a “blue ribbon” panel. It is certainly not composed of the peers of the accused. Three panel members are truly representative of the Southern electorate and rely upon it exclusively for the perpetuation of their careers. They are Senators Russell (2) and Cooper (3) and Congressman Boggs (4). Of the others, one was the Republican minority leader in the House of Representatives (5), and another the former head of the Central Intelligence Agency (6). Both of these men have bottomed their careers upon the expression of the conservative point of view. The Chief Justice of the Supreme Court (7), and Mr. John J. McCloy completed the panel (8). All seven of the commission's members have risen to high offices of public trust through conformity to a way of life which Oswald had never known. It is, therefore, very doubtful that

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any of the members of the commission could approach his task with an open and fair mind. It is doubtful that the commission contained the insight to conclude:

"Out of these and the many other factors which may have molded the character of Lee Harvey Oswald there emerged a man capable of assassinating President Kennedy." (9)

The commission's conclusion was based upon: 1) Psychological examinations of Lee Harvey Oswald made at the age of thirteen; 2) The gossip of Marguerite Oswald, Marina Oswald and a host of other persons who had passed through his life, all of which would probably be held inadmissible in a court of law.

Our society has readily accepted the composition of the commission and its findings just as it accepts the fact that men like Judge Brown try criminal cases every day, sentence men to confinement, and in many instances are allowed to sentence the accused to death. There is a common theory that appeal can correct the errors of the trial court. But the costs and rigors of appeal often cause a denial of this avenue of redress. Nevertheless, the public remains apathetic to the problems of judicial selection, and accepts, as in this instance, whatever tribunal happens to pass judgment.

The mixed functions of the commission cast a shadow over its conclusions. It was established to perform tasks normally reserved for law enforcement agencies. Executive Order 11130, issued by the President on November 29, 1963 stated:

"Pursuant to the authority vested in me as President of the United States, I hereby appoint a Commission to ascertain, evaluate and report upon the facts relating to the assassination of the late President John F. Kennedy and the subsequent violent death of the man charged with the assassination. . ."

"The purposes of the Commission are to examine the evidence developed by the Federal Bureau of Investigation and any additional evidence that may hereafter come to light or be uncovered by Federal or State authorities; to make such further investigation as the Commission finds desirable; to evaluate all the facts and circumstances sur-

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rounding such assassination, including the subsequent violent death of the man charged with the assassination, and to report to me its findings and conclusions." (10)

The commission's objective was, in the first instance, the responsibility of the Dallas police department but no informed person could have faith in such a report, after the breakdown of law enforcement which had occurred in that city.

Clearly, the Federal Bureau of Investigation had made a study of the events of November 22nd and 23rd but the announcement of the existence of the report created such a cynical hue and cry that the commission was created to erase the doubts of the FBI expressed by the populace. The public doubt may well have been justified in that, as the commission found:

"... the FBI took an unduly restrictive view of its responsibilities in preventive intelligence work prior to the assassination" (11)

and, further, in light of the charge made by members of the Dallas police department that James P. Hosty of the Dallas Office of the FBI had told officer Revill of the Dallas Police Department that the FBI knew of Oswald and that he was "capable of committing the assassination" (12). This information had not been passed on to any person or agency by the FBI prior to the assassination.

One of the underlying causes for the creation of the commission was a need to provide a cloak of dignity for the agencies primarily responsible for the investigation. It was asked to examine certain evidence in the possession of the FBI and to make additional search. It did not *examine* the FBI evidence, but instead, *relied* upon it, although the commission did go through the motions of a large scale investigation to provide window dressing for the report which was already deemed unacceptable by the public.

"Because of the diligence, cooperation and facilities of Federal Investigative agencies, *it was unnecessary for the Commission to employ investigators other than the members of the Commission's legal staff.*" (13) (Emphasis added.)

"(We find) of principal importance . . . the five volume report of the F. B. I. which summarized the results of the investigation conducted by the Bureau immediately after the assassination." (14)

Those members of the general public who would not accept the FBI report originally had to settle, after all, for the same report in a different cover. Those persons who articulate a theory of conspiracy involving members of the FBI (this writer is not among them) have not been answered by this report. As a result, the commission, by failing to investigate independently of the FBI has done that organization a grave disservice, and allows it to remain suspect.

In its composition, its purpose and its method, the Warren Commission was unsuited to make a scientific evaluation of the evidence in consonance with our standards of justice. It is quite clear, however, that Oswald could not have achieved a fair trial in the city of Dallas under the prevailing climate, so that the previous criticism may be academic. It should be noted that the prevailing climate in the city of Dallas did not bar the conviction of Jack Ruby. Significantly, the death of Lee Harvey Oswald did not foreclose a conviction. Clearly, we have not been able to insulate the accused from community prejudice. It runs through the Warren Commission as boldly as it did through the trial of Jack Ruby. The failures of the commission are not limited to failures in its creation and design. It chose to rely heavily on the existing investigations by law enforcement, and as a result it inherited the evidentiary weakness of those investigations. Some examples follow.

By early afternoon of November 22, 1963, federal authorities had removed most of the crucial evidence from the jurisdiction responsible for the apprehension and prosecution of the assassin. The most important single piece of evidence was the body of the late President, itself. The Government's entire case against Lee Harvey Oswald rests upon the body. Its removal from Dallas was contrary to law, although in fairness it must be said the removal of the President's body is understandable in light of the circumstances. There was, however, no justification for the removal of the limousine from Dallas and the sloppy exam-

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ination which ensued. The federal government had no use of such pressing importance for the automobile that its examination and the subsequent discovery of important bullet fragments by the Secret Service had to occur "after the Presidential car was returned to Washington on November 22, 1963," with more fragments still awaiting discovery by the FBI on November 23, 1963 (15), when all of the fragments should have been found by the Dallas police department after thorough examination of the automobile. It should be noted that key witnesses were removed from the Dallas area before local authorities had had the opportunity to examine them. The commission never evaluated the effect of this untimely removal of the evidence even though it is quite possible that a chain of evidence could not have been maintained by the Government, thus barring the introduction into evidence of the bullet fragments, the limousine itself, and most important of all, the opinions of the autopsy surgeons at Bethesda Naval Hospital at a subsequent trial of the accused. After all, the body was found, at Parkland Memorial Hospital, to have contained a "small penetrating wound of Ext. neck in lower $\frac{1}{3}$." (16) (Emphasis added.) The doctor described the wound on the right occipitoparietal region as "the other wound." (17) When the body was autopsied, the penetrating wound became "the wound presumably of exit." (18) The President's body had also gained a wound "presumably of entry . . . in the right posterior thorax." (19)

While the commission did not attempt to establish a chain of evidence to discover whether or not the body arrived at the Bethesda Naval Hospital in largely the same condition it left Dallas (as any court would be required to do before accepting the opinions of the three doctors at Bethesda), and while it failed to attempt to evaluate the handling of this evidence in terms of making recommendations for the successful prosecution of future would-be assassins, it nevertheless did find that: "The findings of the doctors who conducted the autopsy were consistent with the observations of the doctors who treated the President at Parkland Memorial Hospital." (20) With all due respect to the commission, that finding is patently untrue. It is true that in subsequent testimony Dr. Carrico modified

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his position somewhat (21), but his recorded observation on the scene clearly contradicts the findings of the doctors who conducted the autopsy.

At the time of the assassination the same confusion existed among Dallas law enforcement officials as to the direction of the source of the shots:

"At 12:34 p. m., the Dallas police radio mentioned the depository building as a possible source of the shots. . ." (22)

"The radio log of the Dallas County Sheriff's Office shows that Sheriff Decker came on the air at 40 seconds after 12:30 p. m. and stated: 'Stand by me. All units and officers vicinity of station report to the railroad track area just north of Elm—Report to the railroad track area just north of Elm.'" (23)

The depository building was located to the rear of the Presidential limousine at the time of the shooting, while the railroad area referred to was directly ahead at the triple overpass.

Evidence is in existence which could clearly resolve the apparent conflict between the observations of the Parkland doctors, and those at Bethesda, and the conflict which existed between Sheriff Decker and Chief Curry.

"PHOTOGRAPHY: Black and white and color photographs depicting significant findings are exposed but not developed. These photographs were placed in the custody of Agent Roy H. Kellerman of the U. S. Secret Service, who executed a receipt therefore (attached)."

"ROENTGENOGRAMS: Roentgenograms are made of the entire body and of the separately submitted three fragments of skull bone. These are developed and were placed in the custody of Agent Roy H. Kellerman of the U. S. Secret Service, who executed a receipt therefore (attached)." (24)

"During the course of this examination seven (7) black and white and six (6) color 4 × 5 inch negatives are exposed but not developed (the cassettes containing these negatives have been delivered by hand to Rear Admiral George W. Burkely, MC, USN, White House Physician)." (25)

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The crucial evidence which would corroborate with unquestioned detail the commission's findings was, in fact, created. Here is the scientific evidence which could dispel all doubt by the glance of a well trained observer. It is to the credit of Drs. Humes, Boswell and Finck that this valuable evidence was created. It is surprising, therefore, that the commission's records show a complete absence of the pictures and X rays from their studies. Confusion still exists, charges and countercharges are still hurled in argument over the direction of the bullets in a situation where five well spent minutes of the commission's time could have permanently resolved these questions forever. It is disappointing that the five minutes were either not spent, or not recorded.

Nowhere are the traditional weaknesses in law enforcement more apparent, and nowhere has greater damage been done to the task of discovering truth than is found in the handling of the accused, Lee Harvey Oswald.

We can pass over without comment the unfortunate conduct of the president of the Dallas Bar Association in pronouncing Oswald rational to the assembled world press. It must be understood that as many lawyers believe themselves to be psychiatrists, as there are psychiatrists who believe themselves to be lawyers. Let us also pass over the antics of District Attorney Wade, who felt the obligation to begin the prosecution before the mass media while he still had a live defendant.

The accused in the most important murder proceeding in our time was interrogated for a period of twelve (12) hours. No less than twenty-five persons participated in the interrogation. The Dallas Police Department, the FBI, the Secret Service, a United States Marshal, a post office inspector and occasionally other officials participated at various times (26). The interrogation took place in a room 14' \times 9½' in size. As many as seven or eight people crowded into the small office. More than one person participated in the interrogation. The interrogators differ on whether the confusion prevailing in the main third floor corridor penetrated into the office. Chief Curry said: "We were violating every principle of interrogation . . . it was just against all principles of good interrogation practice" (27). Significantly,

the commission makes no finding as to the admissibility or probative weight of any of the statements made under these circumstances.

For all of this combined effort no stenographic record was maintained, no tape recording was created, and the only participant who made any notes did not submit them to the commission (28). It should be noted that the use of stenographic reporters or tape recorders is common in the investigation of the most petty of crimes. It would appear to be unpardonable not to have some record of the proceedings made by any of the law enforcement agencies which felt the need to participate in the interrogation. At any rate the Warren Commission could not properly rely on any of the statements of the accused made under the circumstances described.

What had not been destroyed by virtue of the lack of restraint exhibited in the interrogation of Lee Harvey Oswald, was certainly destroyed by the complete lack of restraint in the handling of pretrial publicity, which among other things resulted in the death of the accused himself. Central to the accusation of Lee Harvey Oswald is his possession of the Mannlicher-Carcano rifle. The facts surrounding the ownership and location of the weapon would have been easily proved, were it not for the fact that law enforcement authorities in the city of Dallas had announced that they had taken possession of the murder weapon, and that it was a Mauser. (29) From that point on, the credibility of the evidence surrounding the probative weight of the Mannlicher-Carcano is subject to serious attack. This attack, coupled with the uneasy handling of the Presidential limousine, and the fact that two separate federal agencies came up with separate fragments of shells fired from the weapon on two separate days after two separate searches conducted two thousand miles from the scene, make the Warren Commission embarrassingly dependent upon embarrassingly inept law enforcement activity.

The embarrassment is caused in large part by law enforcement attempts to convict through the mass media: The commission fully discusses this problem at pages 231-240 of Volume 1 of its report.

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The commission itself has stretched some evidence to the limits of credulity. We are asked to believe that Oswald, a "marksman" (30) in the military having limited experience with a rifle since his discharge from the service (31), and a man who has missed a setup shot at General Walker (32), was the equivalent of an excellent shot in civilian circles (33). It is possible, but not probable. We are asked to believe that one of the projectiles entered the President, exited through his throat, entered Governor Connally's back, exited through his chest, broke his right wrist and lodged in his left thigh (34), before bouncing out on a stretcher and being found on the floor of Parkland Memorial Hospital some half hour after its entrance into the hospital in virtually an undamaged and unfragmented condition (35). It is possible, but not probable, and no eyewitness testified in support of this finding, including the governor himself (36). We are told that Oswald could not have known the parade route in advance of his accepting employment in the book depository (37), and we are told that the parade route taken was the traditional parade route in the city of Dallas (38). Other serious weaknesses exist in the report, but time and space limitations require the limitation of subject matter herein.

Some lessons are to be learned from the commission report however, and one very important one is, that we must begin to insist upon the full ramifications of the presumption that a man is innocent until proven guilty.

The government case is weak because it cannot establish a chain of evidence. It is weak because it spoke before it was ready. It is weak because it failed to maintain its original notes, and it is weak because it relies upon faith in the personalities and institutions involved as opposed to evidence and reason.

If we as a society could bring ourselves to practice the belief that the accused, standing before the bar of justice, has dignity and rights that are not to be summarily dismissed because he is some sort of social irritant, our law enforcement will of necessity become more proficient and our tribunals will sift and winnow for truth.

The commission did calm the public clamor for information. It successfully achieved its prime political purpose. Its intellectual conclusions however, leave much to be desired.

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Summary

The Warren Commission has failed to establish that Lee Harvey Oswald singly assassinated the President of the United States, on November 22, 1963. The commission's failure grew out of weaknesses which are typical rather than atypical in the administration of criminal justice in our society.

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