STATEMENT OF HAROLD WEISBERG, Route 8, FREDERICK, MARYLAND, on the NOMINATION OF MR. LEWIS F. POWELL TO BE A JUSTICE OF THE SUPREME COURT

Lewis Powell once acted as defense counsel for Lee Harvey Oswald. It is little known - almost entirely unknown - but it is a fact.

At that time, all proceedings of the President's Commission on the Assassination of President Kennedy were expected to remain secret. Even today parts are still classified "Top Secret". Thus, Mr. Powell and his associates then had every reason to expect their participation or lack of it, their functioning as defense for the man accused of the "crime of the century", never to be subjected to public scrutiny. To this day it has not been except to the limited attention to that part of it I exposed in a book some years ago and now forgotten.

That the federal government felt there was need for such a proceeding was possible only because of rough and forcible federal violation of the rights and obligations of the State of Texas, for the offenses were against its laws only. There was no federal jurisdiction. My insistence that the corpse of the President should not have been kidnapped, that the laws of Texas should have been respected and permitted to function, has earned me the criticism of some styled as "eastern liberals".

The fact that the federal proceedings were secret imposed a greater obligation on defense counsel, in the interest of their own integrity, in consonance with the principles and duties of their calling, and perhaps most of all in the interest of the national honor and integrity. This was the official investigation of the assassination of an American President.

For these reasons and others in this day of great concern for individual rights, respect for the law and the Constitution, and particularly when interpretations of both are what control the meaning of both and interpret the rights of any and all, I think it important that this committee consider the secret record of this nominee's performance as Oswald's defender, the upholder of his rights, which are really those of all Americans, and decide for itself what it discloses of the nominee's concept of the law, justice and the role and obligations of defense counsel - especially when he expected his record to remain secret.

Mr. Powell assumed this thankless task under the unusual conditions of the Commission's operations and self-imposed restrictions. One of the more exceptional was the calling of the wife of the accused as the "star witness". She, in fact, was a witness to nothing but she

was converted into her husband's chief accuser. Obviously, Fifth Amendment questions arose immediately, as did others. There resulted a study by staff counsel, the conclusions of which were ignored by the Commission. Evidence it disclosed to be inadmissible evidence became prejudicial main evidence. The opening words of the summary of this legal study, a copy of which is attached as Exhibit A, are:

> In most jurisdictions, including Texas and federal courts, Marina would not be allowed to testify against her husband in a criminal prosecution.

This, of course, was not a criminal prosecution. If it was, perforce, an ex parte proceeding, it also was one that should have imposed upon itself the highest concepts of the law and of the rights of the accused who otherwise could be given no meaningful defense, especially because his defense and this investigation addressed the national honor and integrity.

In passing, I note that this legal summary was addfessed to another staff counsel, Mr. David Belin, who I believe was one of the unnamed others considered for the nominations now under the consideration of this Committee. Mr. Belin will interest us further.

Defense counsel, including Mr. Powell, had no objection to any of this. They raised no Fifth-Amendment questions or objections and left a record of agreeing with this procedure.

The wife/accuser/star-witness became a witness only because she was threatened and intimidated into it, then bribed. She confessed intimidation under oath before the Commission, again without troubling Mr. Powell. Here are a few brief citations of her precise words, from the first volume of the printed hearings, pages 79 and 80 (1H79-80):

> ... if I didn't want to answer they told me that if I wanted to live in this country, I would have to help in this matter ... He even said it would be better for me if I were to help them.
>
> ... there was a clear implication that it would be better if I were to help.

These are all polite understatements. The widow was told that if she did not say what it was desired that she say, which was contrary to her first statements she was then persuaded to characterize as lies (example in Exhibit B, copy of 1H14), she would be deported. To assure that she was persuaded, local officials of the Immigration and Naturalization Service were not trusted. One was sent from New York to intimidate her (1H80).

The late, able and respected Senator Richard Russell ultimately entertained the most serious doubts about this wife/witness/accuser.

During the Commission's active days, this busy public servant had felt impelled to give most of his attention to other ma tters. He participated only slightly in the Commission's work. But after the final Report was written and in page proof, because of his doubts and those of other members, a secret hearing was held beginning at 3:20 p.m. on Sunday, September 6, 1964, in the U.S. Naval Air Station at Dallas (5H588-620). Under his questioning and that of Senator John Sherman Cooper and Congressman Hale Boggs, she changed her story in fundamental ways, but too late to influence the Report.

Without protest or complaint from defense counsel.

With the wife (who was immediately and officially taken into illegal "protective custody" lasting three months) in the role of accuser, the mother of the accused engaged counsel to represent him. This was forcefully rejected by the Commission. The chairman represented the situation with something less than complete fidelity (2H57, attached as Exhibit C): "Lee Oswald left a widow. She is his legal representative. She is represented by counsel." This suggests that the widow's counsel was acting as counsel for the accused or that she had made a different and voluntary election, which is not true.

Five days earlier (1H471, attached as Exhibit D), her counsel was introduced to those selected by the Commission, not by the widow, allegedly to protect the interest of the accused, in a manner also not completely faithful:

> Mr. Craig is the President of the Bar Association and was asked to act in order to protect or advise the Commission as to any interests of Lee Harvey Oswald ...

The former and succeeding presidents of the bar association, Mr. Charles Rhyne and Mr. Powell, were co-counsel with Mr. Craig.

The truthful representation was buried in the Commission's files. It is in a memorandum by the staff director, Howard P. Willens, loaned to the Commission by the Department of Justice. In it he says of the bar presidents, "they are to work as defense counsel for Lee Harvey Oswald."

In an exhaustive search of an enormous record, I can find no single case where one ever did.

The Commission compiled an index of the proper names mentioned in its hearings (15H753-801). Its editor saw fit to delete the names of all counsel for the accused. Thus, it cannot be asserted with certainty how many times Mr. Powell appeared in this capacity. The Commission took evidence from 552 witnesses (Report, "List of Witnesses",

pp.483-500, R483-500). In all the proceedings in which evidence was taken, as best I can determine, counsel were present on but nine occasions. Mr. Powell participated only three times, March 11, 12 and 31, 1964 (2H210ff,253ff;3H390ff).

Should it question my interpretation, this committee can have a competent criminal lawyer examine this testimony to determine whether, as I believe, it was exculpatory, not incriminating, in even this ex parte form. I doubt any jury would not have found at least "reasonable doubt".

In all cases, those who were "to work as defense counsel" were silent.

In one case, March 11, all the witnesses produced to "prove" that Oswald took a rifle into his place of employment the morning of the assassination testified that it was impossible. This is 100 per cent of the testimony. Mr. Powell was present and silent; and the Commission merely assumed 100 percent of its evidence was wrong.

Here the national integrity, too, was being defended, and this is how, including by the nominee whose philosophy of the law this committee is now considering.

To keep my presentation as short as possible and yet undertake to make the record of the nominee as clear as possible, I will restrict myself to his record during the examination of two of the witnesses said to have transported the accused, two of those used to describe his alleged flight from the "crime of the century". Cecil McWatters was a bus driver. William Whaley drove a cab. The fact, known to defense counsel, that the last positive identification of Oswald prior to his arrest had him waiting for a bus going in the opposite direction, was ignored in this investigation. Had it not been, the second killing, that of the policeman J. D. Tippit, could not have been attributed to the accused.

It is the official account that Oswald, his alleged killing of the President having just created a monumental traffic jam, walked several blocks in the wrong direction, into this traffic jam, and there entered McWatters' bus. This committee may remember the immediate and extensive "leaked" accounts of this as well as of Whaley's alleged identification, all as prejudicial to the discovery and establishment of truth as it was to the cause of justice. The identifications (if such they can be called and considered) by these witnesses thereby assume considerable importance. Seven pages (2H270-1,277,280-3) of

McWatters' testimony are attached as Exhibit E.

Immediately after publication of Oswald's picture in newspapers and on TV, after an alleged dramatic and incriminating conversation in which Oswald is claimed to have known the President had been shot, McWatters was taken to a police lineup. In all of them it required an extraordinary intelligence not to pinpoint Oswald to the exclusion of all others. He was crying bloody murder. We shall see some of the many ways he was distinguished, such as being the only bruised and disheveled man in any lineup. About such evidence there was no protest from Mr. Powell and associated defense counsel.

McWatters' is self-contradictory testimony, , that he made no identification and that he identified the wrong man.

Asked, "Anyway, you were not able to identify any man in the lineup as the passenger?" he responded, "No, sir." (2H270)

Yet he also testified (2H281) to a wrong identification, of a "teenage boy who had been grinning" on his bus, his own private candidate for assassin.

Another means of placing Oswald on McWatters' bus was a transfer. McWatters swore that of the two he issued, both misdated, one was to a woman. When asked a perceptive question by the House Minority Leader, that as of the time Oswald allegedly entered the bus, "was the man to whom you issued the transfer on the bus at that time", McWatters answered, "Yes, sir." (2H271) Having thus and for the second time sworn that he had given the transfer to the teenager, McWatters also disputed himself twice, saying "I didn't know who was who or anything" (2H270), and, [illegible] with less lucidity, that it was the man later presumed to have been Oswald (2H271ff).

If Mr. Powell was not disturbed by this "testimony", Senator John Sherman Cooper was. He asked a long series of questions that in one respect was not fruitless. He established the source of McWatters' information and testimony: The Dallas police told him!

The Senator asked (2H277), attached in Exhibit E) if it was "the passenger that you later have testified about who told you that the President had been shot in the temple?" (This is an X-ray-like perception for the man alleged to have been several hundred feet behind the President while shooting.)

McWatters said, "Well, they told me later that it was, but at that time they didn't tell me." The Senator asked, "Who didn't tell you?" To which McWatters replied, "The police didn't."

Incredible as was the testimony of this witness, of whom Mr. Powell asked no single question, he is resplendent as the soul of probity when compared with Whaley.

Whaley testified on two different days. His March 12, 1964, appearance was interrupted for McWatters to be heard (2H253-62;2H292-4). He testified again on April 8 (6H428-34). On the second occasion he was questioned by the same Mr. Belin I understand was another considered for the Supreme Court. After the first fiasco, Mr. Powell was not present at the second. He did have the transcript available and he did take a position at the end of the first appearance. Attached as Exhibit F are 10 pages of Whaley's testimony (2H256,260-1,294;6H428-33).

His is history's most unique account of a fleeing assassin. He describes Oswald as sauntering unconcernedly down the street, getting into the cab and then, like a Boy Scout, attempting to surrender it to "an old lady" (2H256):

> Mr. Whaley. He said, "May I have the cab?"
> I said, "You sure can. Get in." And instead of opening the back door he opened the front door, which is allowable there, and got in.
> Mr. Ball. Got in the front door?
> Mr. Whaley. Yes, sir. The front seat. And about that time an old lady, I think she was an old lady, I don't remember nothing but her sticking her head down past him in the door and said, "Driver, will you call me a cab down here?"
> She had seen him get this cab and she wanted one, too, and he opened the door a little bit like he was going to get out and he said, "I will let you have this one," and she says, "No, the driver can call me one."
> So, I didn't call one because I knew before I could call one one would come around the block and keep it pretty well covered.

Whaley's self-portrait is less flattering.

Shown the lighter-colored of two jackets Oswald owned (2H260), Whaley identified it as the jacket Oswald wore in his cab. Then, shown a dark jacket and asked, "does this look like anything he had on?" Whaley got the hint and said, "He had this one on or the other one." Commission Counsel Joseph Ball approved, saying, "That is right."

But it wasn't. Oswald could not have been wearing <u>either</u>. One was found at his place of work, the other at his residence.

Apparently dissatisfied at having satisfied, Whaley immediately gave still another account, in which the jacketless Oswald was wearing <u>both</u> at one time" "... he had this coat here over top of that other jacket, I am sure, sir." He thus gave every possible version but the truth.

All of this and much more in Mr. Powell's silent presence.

Whaley then described being prepared for a lineup identification by the former assistant district attorney, Bill Alexander. There were also "two or three who were FBI men" (2H260). (Alexander's departure from that office seems to have been related to the sale of some of Oswald's property. In one case, where I can establish an involvement of approximately $25,000 from records also available to Mr. Powell, it was traced to Alexander.)

This Whaley followed with an account of making an "identification" like none other in a lineup as unique. Painful as this is (2H260-1), his most painful testimony was delayed for the second hearing.

Where the lineups all had four men in them, Whaley counted six. All but Oswald were fully and neatly dressed "teenagers". Oswald, however, wore "a pair of black pants and white T-shirt, that is all he had on".

If this was not enough to make "identification" automatic, Whaley described more:

> But 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 those teenagers and all of that and they asked me which one and I told them.

To eliminate <u>any</u> doubt, the others were "just young kids" and Oswald did "look older". And,

> He showed no respect for those policemen, he told them what he thought about them. They knew what they were doing and they were trying to railroad him and he wanted his lawyer.

Not defense but Commission counsel had a question, "Did that aid you in the identification of the man?" Whaley, naturally, said "No." He then illuminated this with "anybody who wasn't sure could have picked out the right one" from Oswald's protests alone.

Some amplification ensued (2H294), after the interruption in Whaley's testimony, which certainly needed both:

> Mr. Ball. Now, in the police lineup now, and this man was talking to the police and telling them he wanted a lawyer, and that they were trying to, you say he said they were trying to frame him or something of that sort --
>
> Mr. Whaley. Well, the way he talked that they were doing him an injustice by putting him out there dressed different than these other men he was out there with.
>
> Mr. Ball. Now, did anyone, any policeman, who was there, say anything to him?
>
> Mr. Whaley. Yes, sir; Detective Sergeant Leavelle, I believe it was, told him that they had, would get him his lawyers on the phone, that they didn't think they were doing him wrong by putting him out there dressed up.

This official promise that the police "would get him his lawyers

on the phone" followed two things known to the police and later to defense counsel before the Commission but not to Oswald. The lawyer of first choice had announced he would not take the case long before this lineup. Oswald's second choice was the American Civil Liberties Union. The night before this lineup, while Oswald was on TV (only an edited version of which appears in the Report, his appeal for the ACLU to come forward to help him having been edited out), an ACLU delegtion was told on three different occasions by three different Dallas pfficials that Oswald wanted no lawyer at all.

Perhaps this is as good a point as any to cite the record of the Commission's concern plus that of other defense counsel for the rights of the accused (2H42,59-60, Exhibit G, attached). When the mother's counsel testified to "the statement by the National Board of the American Civil Liberties Union that had Oswald lived he could not have secured a fair trial anywhere in this country", the chairman assured him the Commission "has already appointed to act in that direction the President of the American Bar Association with such help as he may wish to have to make an investigation of that very thing" (2H42).

At the very end of that session (2H59-60), former ABA president and father of "Law Day" Charles Rhyne asked, "... you suggested that the Commission make an inquiry into whether his civil rights were denied. Do you have any information on that subject?" Receiving an affirmative response, Mr. Rhyne twice discounted this because the fact "was really in the newspapers". It was not in the testimony only because the Commission had not called the witnesses from the ACLU or like Whaley, whose cited testimony was under oath and was entirely first-person.

When Whaley's testimony was resumed three weeks later, his capacity for identification was so undependable he did not and, despite intensive leading, would not identify Counsel Belin as a man he had met only three weeks earlier, before the Commission (6H428).

Whaley then testified that the fleeing Oswald, who had a room at the opposite end of the 1000 block of North Beckley Avenue, had told him to drive to the 500 block but had left the cab in the 700 block in his great haste to get to 1026 (6H429); that his trip sheet or manifest showed departure in the 500 block (6H433); and that this should not disturb the Commission because his manifest was never accurate and in this case was also inaccurate with regard to the time!

Come hell or high water, the Commission was determined to get Oswald to the rooming house on time to be a cop-killer, so it concluded (R163) that none of this made any difference in the time required of

Oswald. But getting him on time to the scene of the Tippit murder, also attributed to Oswald, presented another problem in which Whaley's testimony, consistently, again is totally destructive. That murder was recorded on the police radio at 1:16 p.m., meaning it had been committed before then (R165). The Commission has Oswald leaving his roominghouse at the earliest not before 1:03 (6H440;R158). This permits a maximum time of less than 13 minutes if one ignores other evidence that this crime was committed before 1:10 (22H202,254).

However, when no direct testimony was adduced on the time reconstruction, again without comment or objection by any of those appointed to "work as defense counsel", while Whaley was on the stand, Mr. Belin himself switched roles and, unsworn, testified to timing Oswald's walk at "17 minutes and 45 seconds", or at least five minutes too late for Oswald to have committed the second murder attributed to him. Whaley was one of the participants in that walking reconstruction. This other prospective Supreme Court nominee, Mr. Belin, "had the record show", with stopwatch and all that, that he had for some obscure reason elected what "is not the most direct route". How he could expect to solve the crime that way is by no means clear. What is clear is that there was no need to go the "wrong" way. And, according to the Commission's own evidence, Exhibit 1119-A, there is no significant time difference whatever route is imputed to Oswald. He could not have been alleged to take any route other than this alleged "wrong" one without destroying all other testimony relating to the Tippit murder. (This testimony, 6H434, and the map, Exhibit 1119-A, are attached as Exhibit H).

Now what was omitted in Whaley's first appearance had to be addressed in his second. Despite his own account of the impossibility of making the wrong identification of Oswald in that police lineup, he did, and under oath, accomplish the impossible.

He freely admitted what was the case in each and every lineup - never protested by defense counsel - that Oswald was always under the number "2" (6H430); and that in a sworn statement he had identified Oswald not as No. 2 but as No. 3.

Having sworn that he "identified" Oswadd in the lineup before he went to the lineup, Mr. Belin's incredulity told Whaley something was wrong with this answer. After protesting that citing the record was "getting me confused" Whaley first claimed, "I made the statement more to Bill Alexander", then assistant district attorney, which cannot explain perjury. Next Whaley switched to not seeing the statement he

signed before going to the lineup; and that he had "identified" No. 2 and No. 3, although his affidavit, saying No. 3, had been read to him and was before him. He wound up with, "I signed my name because they said that is what I said" (6H432).

To this he added disclosure of a pretestimony discussion with Commission counsel, a fruitless one if measured by this testimony (6H431).

Having first sworn to an identification of the No. 3 man, he then (6H432) swore to identification of No. 2, "I will admit he was No. 2."

He reached the No. 3 not because the actual numbers were clearly posted - and he saw and described them - but because "He was the third man out in the line of four as they walked out in a line." He had to that moment sworn there had been six men, not four, which leads to still another wrong identification, of the fourth man.

As if this lily needed gilding, Whaley repeated his account of the self-identifying behavior and protests by Oswald.

Displaying more concern than defense counsel, he explained with superb understatement, "I don't want to get you mixed up and get your whole investigation mixed up through my ignorance, but a good defense lawyer could take me apart."

True.

But it did not happen, which is something the consideration of which I press upon this committee because there is not and can be no doubt that all those, including the nominee, who were to "work as defense counsel for Lee Harvey Oswald" qualify as "good" defense lawyers and neither this nor any of the other incredible, impalpable, manufactured, destroyed and even perjurious testimony or other evidence did any ever "take apart", to the detriment of justice and the national honor and integrity.

It was, I suggest, also to the detriment of the Commission, which entrusted certain functions to these bar association presidents defense counsel.

There came one time when Mr. Powell did speak, at the end of Whaley's first testimony, after sitting in silence to those words so like a legal nightmare, through this outpouring of what should have been the answer to the dreams of one who would "work as defense counsel" (2H294):

> Mr. Powell. Mr. 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 of witnesses, I would make

suggestions to Mr. Ball or to one of his associates, and I have been following that practice yesterday and today, after consulting with Mr. Murray who is also here for Mr. Craig, and Mr. Ball and his associates have followed up these suggestions that we have made.

How in the world Mr. Powell could discharge his responsibilities in advance of the babbling of such incredible testimony by "making suggestions" a day before it bubbled out and how after hearing it, as a dedicated lawyer, he could remain silent and ask no single question, is something to which I would hope careful thought is given before this kind of concern for the law, justice and national honor is enshrined on the Supreme Court.

A strange anomaly inherent in the foregoing and the actual fact is that Mr. Powell was not alone in the abdication of his responsibilites as a lawyer in his part of this official proceeding, the official inquiry into one of the most awful crimes in all of history. His associates and he have all been presidents of the bar association, the same bar association to which the President turned for evaluation of his nominees. All, without exception, not Mr. Powell alone, abdicated their responsibilities in precisely the same manner. They assumed and without qualm served a political role in the guise of defense counsel, preferring acceptance of a dubious political substitute for truth and justice.

Thus it seems that while judicial qualification is one proper precondition to nomination to the Supreme Court, one on which the bar can properly evaluate, it is far from the only qualification and in other areas this record by the bar association's leadership raises questions about its dispassion and detachment.

What this cited record made in secret by Mr. Powell raises, I think, is not technical questions about his competence as a lawyer but the most serious doubts about his philosophy of the law and justice, his concept of the Constitution and its provisions designed for the protection of all Americans, and his willingness to be an arm of government when the obligations of his profession require the opposite of him. I think it flaunts a lack of concern for the friendless, the unpopular, the unimportant and their legal rights.

Is what the nation needs today a Supreme Court of government rubber stamps?

Not if justice is to the be fruit of its labor.