BOOK REVIEWS

Unmaking History: The Warren Report and its Critics


The assassination of President Kennedy gave rise within a week to a theory of how it had been accomplished. Lee Oswald had a gun like one which was in the hands of the Dallas police as early as the day following the assassination.1 He was placed at a spot on the sixth

1 Specialists, of whom there are now a considerable number, will recognize that this statement is somewhat tendentious. The Report says that the Dallas police "released" the gun they had found to the FBI at 11:45 p.m. on November 22, the day of the assassination. The rifle was examined in Washington "on the morning" of November 23.

This observation will remind the reader of the inevitable defects of any review, particularly a review by a nonspecialist. Selection has been inevitable. The specialists will note the absence from the discussion of the gun of any reference to the palm print or the fibers, and there is no reference at any point to the paraffin tests whose significance has been subject to steadily increasing discount.

These omissions represent a judgment that these materials have little significance. This judgment is, of course, subject to dispute. By way of compensation, materials on which this judgment is partly based have not been discussed or even enumerated.

There are, for example, a considerable number of features of the story which seem to warrant a healthy skepticism in dealing with information furnished only by the Dallas police. There is, for example, the Dallas police readiness to identify the remnants of the chicken luncheon with Oswald's position before the shooting, together with a similarly vulnerable report that a map allegedly found in Oswald's room had crosses which indicated a plan for the assassination. There is still a question whether Oswald had time to go from the room where the shots are thought to have been fired to the room where he was first seen after the assassination, and to appear then unwinded and soon after, at least, with a coke. There is even a question whether the time needed to wipe fingerprints from the gun would not have critically diminished the period needed for his trip from one room to another.

The palm print which was "lifted" from the gun and sent to the FBI in Washington so that it arrived on November 29 is conspicuous both by its history and by its uniqueness, though it is doubtless somewhat more significant than the fibers or the paraffin test. It will be noticed from the start that a reader has not the facilities of either a detective or a juryman. It may be that one who saw and heard the Dallas police testifying would have become either more or less skeptical about their testimony than one is as a
floor of a building, where three empty shells suitable for the gun were reported found, along the course which President Kennedy traveled, in such a position that he could have fired at the President. He reader only. It must be constantly remembered that the safeguards of an ordinary criminal trial were not, and perhaps could not be, provided for in the hearings or the other procedures of the Commission.

Some readers may wish to compare my treatment of this case with my treatment elsewhere of some other controversial cases of our times. I have expressed an unfavorable view of the judgment in the *Sacco-Vanzetti* cases, which has been affected in the interval only slightly and not determinatively by the publication of Mr. Russell's interesting book, *Tragedy in Dedham* (1962). See 28 U. CHI. L. REV. 399 (1961). In the same essay I expressed unfavorable views about the judgments in the *Mooney-Billings* cases, the *Hiss* case, and the *Rosenberg-Sobell* cases. My opinion about the *Rosenberg-Sobell* cases has been strengthened by the publication of Walter and Miriam Schneirs' *Invitation to an Inquest*. See my review in the *Progressive* for January, 1966, at page 40. As I am of counsel for Mr. Sobell in a pending motion, I cannot appropriately discuss this case further, except to say that the motion papers now of public record furnish material, in addition to that in the Schneirs' book, which seems to be of possible interest to historians. On the *Hiss* case, some of the Committee cases, and particularly the Smith Act cases, see further my review of Packer, *Ex-Communist Witnesses*, in 61 Mich. L. Rev. 209 (1962). The comments in the essay review first cited have been further supplemented by developments in the *Anastaplo* case and by the application of doctrines related to Mr. Anastaplo's doctrines expressed in the *Schware* case and in the related and significant case of Shuffling Sam. *In re Anastaplo*, 365 U.S. 82 (1961); cf. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Thompson v. City of Louisville*, 362 U.S. 199 (1960). For a somewhat problematical application of this group of doctrines, see *Garner v. Louisiana*, 368 U.S. 157 (1961). Mr. Anastaplo's position seems now to have received further vindication in the New York teacher's case. *Keyushian v. Board of Regents*, 35 L.W. 4152 (1967). These cases provide the most effective available legal safeguards against the return of a period like the one associated with the theoretical enormities of the loyalty proceedings of the 1950's. They also indicate the extent to which reactions that one is tempted to call paranoiac (not paranoid) may appear under the influence of domestic or international tensions and may in turn contribute to enhancing those tensions.

These cases seem to me for at least four reasons somewhat more readily subject to a useful and decisive judgment than does the Oswald case. First, in these cases issues were to some extent framed and witnesses tested by cross-examination. Second, the problem of Oswald is complicated by an unusually high proportion of evidence which is itself physical or which relates to physical processes. Not only would it be useful to examine exhibits, as it is impracticable for the stay-at-home reviewer to do, but it would presumably be necessary in the end to have those exhibits explained by someone specially equipped to understand them. In the third place, the complicated and various motivations of various law enforcement officers present a peculiar problem in the Oswald case. As far as one can judge from the printed records, some of the Dallas police force, for example, appear to be more conscientious than others. The motivations for the Dallas police force, and for the FBI and Secret Service as well, to convict someone must have been very strong. Not only was the victim of the murder the President of the United States, but in what was treated as a related sequence, a member of the Dallas police force was another victim. The normal tendency to find someone to punish must have been particularly strengthened by the circumstances of this case. In the fourth place, so far as one can sort out what appears to be relatively dependable evidence on both sides of the Oswald case, each side appears to have a case nearly as persuasive as the other, more so than seems to be the case with the other proceedings which I have discussed in print.
was identified by some witnesses as the man who, soon after the President's assassination, murdered a Dallas policeman; and he was arrested in a movie theater not far from where the policeman was killed. Within the week skeptical reporters had observed difficulties with this official theory. Oswald's record for marksmanship in the Marines was not such as to qualify him for such shots with the kind of rifle in question, as the theory required. The only vivid and conceivably spontaneous testimony to the identity of the killer of the policeman described a person markedly different from Oswald as the killer. The circumstances of the arrest cannot be reconstructed today from eyewitness accounts of the event. The murder of Oswald by Ruby has made it more difficult than it might have been to understand the entire story. The President's Commission did its best.

Now its Report and published criticism and discussion, particularly the three books here considered, make possible a more thorough examination of the events. We shall consider first what seems the critical evidence, about whose nature Report and books are not in any simple collision, though they differ in their conclusions.

The principal addition to the evidence against Oswald made by the Report is in an account of the discovery of a bullet in the hospital to which the President was taken, which is said to show that it came from the gun which the Dallas police had as early as the day after the assassination. The principal new evidence against the theory of Oswald's guilt, or at least the theory that he was solely guilty, is a difficulty resulting from an amateur movie film of the shooting of the President and the wounding of Governor Connally of Texas, who was riding ahead of him in the same car. The movie apparently (though not perhaps indisputably) shows that it would not simply have been extraordinary marksmanship to fire two bullets as rapidly as separate shots and hits of the President and Connally would have required, but that it would have been physically impossible to do so with the rifle in question. The result of this film was a one shot–two hit hypothesis about a first shot which wounded both the President and Connally. (A later shot killed the President.) The one shot–two hit hypothesis creates such serious difficulties that it is now a center of controversy about the Report. It is important because if it took two shots for these two hits, it means that someone in addition to Oswald must have been shooting; and the moment that step is taken the official view of the assassination becomes subject to a great range of doubts, including some increase in existing doubts as to whether Oswald did any of the shooting at all. Participation with another assas-
sin is inconsistent with the characterization of Oswald and with every critical feature of the narrative in the Commission's Report. Moreover, it indicates incentives and opportunities for framing which are without any definable limits.

When our doubts are explored, what seems most certain is seen as questionable. Perhaps the most dependable evidence against Oswald is a pair of photographs, of one of which there is a negative said not to have been retouched. It shows him holding a gun like the one to which Dallas police called attention on the day following the assassination.

The identification of this gun as the murder weapon, which at first seemed so well established, is seen now to be doubtful. An order for the gun, thought to be in Oswald's handwriting and leading to an identifying serial number on a gun like that in the hands of the Dallas police with the same serial number, appeared at first to be strong evidence against Oswald. The gun was ordered and shipped in March, before anyone thinks Oswald planned any assassination; and it was ordered to be sent to Oswald's post office box in Dallas but addressed to a man named as "Hidell." It was thought at first that this was a fictitious name, but a Marine Corps acquaintance of Oswald's, Heindel, living in New Orleans, has made an affidavit stating that he was commonly known by way of nickname as "Hidell." Part of Oswald's Dallas post office box application, designed to record authorization for delivery to others than the box holder, was reported destroyed by the post office authorities before the expiration of the two years which regulations required it to be kept. Unneeded cards, apparently signed in the name of "Hidell," were reported by the Dallas police on the day following the assassination to have been found in Oswald's billfold; but a police participant had already said that on his arrest the only clue to Oswald's identity which the billfold revealed was his own name, "Lee H. Oswald."

Marina Oswald, Lee Oswald's widow, said that the gun she was shown was the gun that Oswald owned. Her testimony, given under the influence of a desire to please, seems on all points unreliable. On this point it is a simple and untested assertion.

If Oswald owned and once possessed the gun in question, there is no evidence that he ever bought any ammunition for it or that he ever practiced shooting with it or used it unless it was for taking the shot at General Walker as to which Marina Oswald gave typically unreliable testimony. Attempts were made to find a source of ammunition, but these attempts failed.
If Oswald owned and once possessed the rifle, the evidence offered to show that he had it with him in the building at the time at which and at the point from which he is supposed to have fired it has become subject to the greatest doubt. Testimony that he had a package with him when he came to work the morning of the assassination now seems to indicate that the package was of such a size that it could not have contained the gun either assembled or disassembled. If it is thought to have contained a disassembled gun, it is now recognized that the time which witnesses leave for Oswald to assemble it was brief.

Moreover, the gun which the police first announced they had found at the supposed place of the crime was apparently a German gun of larger caliber than the Italian gun which Oswald is thought to have had and which was like the one which the Dallas police said on the following day that they had. There is, moreover, what is said to be a rather arresting, or at least clear, mark on the Italian gun giving its caliber, with another mark indicating that it was made in Italy.

The identification of the murder weapon as belonging to Oswald and in his possession at the time of the crime is thus seen to be problematical. It is the strongest evidence there is against Oswald, but the supporting testimony surely would have been subject to the most vigorous cross-examination at a true trial of Oswald for the assassination of the President.

The next strongest evidence is the single whole bullet found in the Parkland Hospital in Dallas. Fragments of a bullet were found by the FBI in the President's limousine after its return to Washington immediately after the assassination; and these fragments are said to have indicated that the Italian gun must have fired them. There appears, however, to be grave doubt whether such fragments can afford a satisfactory basis for identifying the gun, and here again the absence of cross-examination makes it impossible to know how far the two experts who testified on the matter were willing to go in supporting their opinion.

The one whole bullet, said to be slightly flattened or deformed, found in the hospital is another matter. So far as one can judge by simply reading books and Report, there is no sufficient reason to doubt that this bullet was fired from the gun which was in the hands of the Dallas police by the Saturday following the Friday assassination. One familiar with the problems raised by the fatal bullet in the Sacco-Vanzetti case knows also that the switching of bullets is a familiar device, and one must wonder about the sources and custody of the bullet in question. The first report was that it came from President
Kennedy's stretcher, and the second that it came from Governor Connally's stretcher. The man who found it, however, an engineer employed by the hospital, has stood fast by this testimony that it came from a third stretcher taken down from the floor where Governor Connally's stretcher had been to a lower floor where the bullet somehow fell out from under a mat. Once a second participant in the shooting is thought to be required by the sequence of shots, the opportunities for planting both gun and bullet are seen to be indeterminate. The person who found the bullet gave it to the Secret Service, and it may be that its custody from then on was irreproachable.

The gun and the bullet are between them quite strong evidence against Oswald. The problems about the shots are, however, so serious as to make it seem very doubtful, as far as one can judge from reading, that Oswald was the sole murderer; and if he was not the sole murderer the presence of another participant reduces our understanding of what went on to such an extent that one cannot feel confident that Oswald was involved at all.\(^2\)

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2 Professor Bickel in his article in the October Commentary has emphasized two points. First, he has shown some favor to a view of the sequence of shots which was persuasively rejected by the Commission. Second, he has been influenced by the tear in the front of the President's shirt, and perhaps by a nick in the necktie, to a much greater extent than was the Commission. The ultimate fatal shot may, it appears, have displaced portions of the President's brain and resulted in fragmentation of both bullet and brain in such a way as to leave obscure the significance of these marks. A clarification of the meaning of the autopsy and of the meaning of the receiving doctors' first observations will be necessary to put these clothing marks in perspective. If one observes the caution of the Commission on these matters, one will be given further occasion for reflection. It may be that the Commission has underestimated the significance of the circumstances here in question. On the other hand, it appears to have been subject to a prosecutor's bias, if any; and that circumstance increases the significance of what appears to be its caution here.

Mr. Bickel's reference to "the wound" suggests that it may not be unduly pedantic to enumerate the number of bullets with which we may be concerned, and to observe that this number is by no means precisely correlated with the number of wounds which may be significant. Every theory contemplates at least two bullets, the one that hit first and the one that is thought to have caused all the final brain damage. In view of the now quite generally recognized difficulties with the one shot—two hit hypothesis as to the first bullet, there is coming to be a fairly widely held opinion that a minimum of three shots is required to explain the events. A fourth shot may be indicated by the Parkland doctors' first report of a wound of entry in the throat, not obviously inconsistent with a fragment or bullet exit in the shirt front tear or the nick in the tie. A fifth shot has not been referred to here, but it has enlisted the interest of some critical students. This is a shot which may have left an identifiable mark on the pavement and may have been connected with the experience reported by some witnesses with what may well have been fragments of a spent bullet. If the difficulties in connecting the first bullet in this sequence—not Professor Bickel's first bullet—with the bullet found in the hospital seem controlling, as they may well do, the bullet found in the hospital will be the sixth in our list. There may well have been more. Not all the bullets are correlated with possible
The original view was that Oswald fired three shots, the first wounding the President, the second wounding Connally, and the third killing the President. The supposed presence of three shells of appropriate make and caliber at the supposed place of the shooting, reported circumstantially by the Dallas police the following day, contributed to this view of the shooting. Within the week following the assassination this view was sharply challenged by persons familiar with the problems of marksmanship involved, and it now appears to be most unlikely. The matter is still a subject of dispute by those defending the Report and those criticizing it. As far as a reader can judge, the critics have much the best of the argument.

The official theory was saved from this difficulty, at the expense of encountering more serious ones, by the moving picture film which appears to be generally regarded as the best evidence in existence about the timing of the hits wounding the President and Connally and killing the President. The first hit to strike the President apparently occurred not more than 1.8 seconds before the hit which struck Governor Connally, and the rifle in question cannot be operated that fast by anyone. The result was the Commission's development of the one shot–two hit hypothesis for this sequence. The hypothesis is that the same shot hit the President high in the back, penetrated his throat, struck Mr. Connally in the back, penetrated his chest, "tumbled" into his wrist and lodged briefly in his thigh. Tests with simulated objects establish that such a sequence was not physically impossible.

These tests are sometimes referred to, even by critical writers, as though they contributed significantly to the theory that such a sequence was probable. They did so, however, only to the extent that they showed it to be possible.

wounds, and wounds not correlated with bullets may well have resulted from fragments of bullet or bone.

Professor Bickel makes other points, as do other students of the case. A review of the present length cannot usefully even enumerate the various points made, and this review does indeed exercise considerable selection. The reader is advised not to accept either this review or any of the other relatively brief treatments of the subject, but to go to the books themselves and to the Report. The reader is advised particularly to discount the frustration which has been occasioned by Mr. Mark Lane's book, and to recall that Mr. Lane spent more time and energy on this problem than any other man. The reader may perhaps be encouraged by my own interest in Mr. Lane's book to consider the possibility that it is the most careful single study we have. Oddly enough, I am not myself much influenced by the introduction to the book written by the English historian, Mr. Hugh Trevor-Roper. Mr. Trevor-Roper's appropriate approval of the book cannot be disassociated in my mind from what I regard as his inaccurate and prejudiced treatment of a controversial book in his field, A.J.P. Taylor's The Origins of the Second World War. Historians, including Professor Bickel, may be as easily misled as lawyers, including Professor Bickel and myself.
The difficulties with the theory are four. First, Governor Connally (like his wife) has said consistently that he thought the sequence just did not occur. He remembers hearing the shot that hurt the President and turning to look at the President before he was hit himself. It may be that things happened too fast for his report to be accurate. Nevertheless, it should be observed at once that three out of the six Commissioners who discussed the matter together took Governor Connally's view of the facts. Senator Russell, Congressman Boggs, and Senator Cooper all declined to be persuaded by the evidence in favor of the one shot–two hit theory. Congressman Ford and Mr. Dulles were persuaded, and it may be that Mr. McCloy was, as one writer says, also persuaded. The quotation from an interview with him upon which Mr. Epstein relies seems to me to indicate some doubt about Mr. McCloy's position. At any rate Mr. McCloy suggested a form of words on the subject to which all Commissioners, including the Chief Justice, subscribed. If one reads the statement carefully, one will see that it says nothing at all, except that the theory is a possible one.

Three lines of evidence in addition to Governor Connally's testimony raise serious doubts about the theory. The sequence of the reports from doctors, including the notes of the doctors who first attended the President, followed by reports from FBI representatives present at the autopsy conducted later, followed by the autopsy report itself, appears to indicate that the physical evidence from the President's body is unintelligible. The Parkland Hospital doctors, who established their competence to deal with the difference between ordinary wounds of entry and wounds of exit, all agreed at first that one bullet entered the President's neck from the front. (This was not the bullet that entered his brain and ultimately effected his death.) Operations designed to save the President were apparently such that they have completely obliterated all characteristics of this wound. The first report from the autopsy, made in two successive FBI reports, was that the first bullet that hit the President penetrated his back rather lightly, and was thought to be the bullet then thought to have been found on his stretcher at the hospital, the relatively intact bullet. These reports have since been discounted as coming from officers who were simply onlookers at the autopsy. The autopsy report, whose first appearance in circulation was some weeks after the FBI reports were made, is quite different. It reports that a bullet entered the President's back and went through him in a course which could be determined only by dealing with the traces of metal which it supposedly left behind. No simple path through the body was reported, a matter which apparently by itself occasions some skepticism on the part of
qualified persons. The autopsy pictures and X-rays were not made available even to the staff of the Commission, and they are said to be now in the United States Archives subject to controls, or limitations on use, required by the Kennedy family. It was thought that Mr. Manchester might throw some light on them, but his second article in Look, touching on the matter, fails to do so.

Another line of evidence said to raise difficulties with the one shot—two hit hypothesis is the evidence from the position of the shot as indicated by a bullet hole in the President's shirt. Unless the shirt was pushed up in a somewhat unusual way, the hole is said to have been too low to permit the bullet, which would have been in a downward course, to exit from the point where it must have made its exit if it was to account for Governor Connally's wound.

Another serious set of difficulties leads us back to the bullet. Some of the tests made to establish the physical possibility of the one shot—two hit theory were made in one case by firing bullets like the supposed first bullet through material made to simulate President Kennedy's neck, and in another case through an anesthetized goat, which, though less thick than Governor Connally's chest, was used to indicate possible rates of penetration of his chest. In the latter case the resulting bullet was described as significantly flattened. It was therefore inferred in the Report that this bullet was going somewhat faster than the supposed first bullet, which was significantly less flattened, or only slightly deformed. (One would of course have to see the exhibits to know just what these words mean.) As a result the lay reader wonders, first, whether a bullet going at this lower rate would have satisfied the standards set by the tests; or, second, why the supposed first bullet was not itself more flattened or deformed than it was. Moreover, a serious doubt has been raised by some observers, who appear to be technically qualified, whether the first bullet would not have shown some effect, or some greater effect, from its loss of metal in colliding with Governor Connally's wrist and in leaving traces of metal in his thigh.

The difficulties with the one shot—two hit theory thus increase the difficulties originally suggested about the identity of the bullet found at the Parkland Hospital.

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3 The report of tests used with material simulating the President's neck may be read as indicating the likelihood of distortion or flattening in the case of a bullet fired through the neck only. The trajectory of even a hard bullet was found to be changed in the process, and the silence of Report and Record on the condition of the bullet used in testing leaves the total account ambiguous.

It may be noticed further that a test bullet used in a simulation of the supposed impact of the first bullet on Governor Connally's wrist was more flattened than the supposed first bullet itself.
The gun, bullet, and shot evidence appears to this reader to be the only significant evidence in the Report. The eyewitness testimony purporting to identify Oswald at the time of the shooting seems to be undependable. The principal identification testimony about the killing of the policeman seems to be worthless. All of Marina Oswald's testimony perhaps should have been excluded from the Report. The inclusion of all these items may have unfairly diminished the credibility of the Report.

A word perhaps should be said about the murder of the policeman. In addition to the eyewitness testimony about which we have spoken, a number of other witnesses placed Oswald near the scene of the shooting with a revolver. The circumstances of this testimony, and particularly the condition under which identifications were made, seem to deprive all of these witnesses of any credibility whatever.  

Four shells of a make and caliber which are said to have been suitable for the revolver said to have been found on Oswald when he was arrested were found in positions near the scene of the shooting. At first picked up by witnesses at the time of the shooting, they were, however, apparently not properly marked, or if marked were replaced. Thus, their identification later by Dallas police force members was not such as would qualify them for serious use in a carefully conducted murder trial. The one bullet furnished promptly by the Dallas police was too mutilated for test purposes, and the three bullets furnished by them somewhat later did not fit the gun exactly, though they could have been fired from it. The result was that aside from one sharply

4 The identification—but not eyewitness—testimony of Callaway is somewhat reassuring, and M. Sauvage speaks well of him. Nevertheless, the testimony of Guinyard, who was with him, discloses the confusion of the circumstances in which Callaway first saw the man he was to identify. Callaway's account of the line-up (conducted the day of the assassination) at which he picked Oswald gives a more favorable account of this line-up than the accounts given of other line-ups. Yet, as M. Sauvage has observed, Oswald's face was by then bruised, and he may well have stood out in other ways from the other three men in the line-up, who are not described specifically. Guinyard indeed says they were not all of the same color, and that he saw the same line-up as Callaway; but there may have been a misunderstanding on this point.

5 It is difficult to take seriously the treatment of the two shells said to have been picked up, one by Jeannette Davis and one by Virginia Davis. Neither finder could later identify either shell. In each of two statements purporting to record FBI conversations with the two Dallas police officers to each of whom one shell is said to have been given, it is said that the police officer recognized "his marking," not otherwise specified or described, on the shell in question. The discussion of the problems about the other two shells indicates that Dallas police officers knew that something more specific about the markings was to be expected. The two FBI memoranda on the supposed Davis shells were undated, unsigned, and unverified, as well as unspecific. They were not testified to, and their condition was not mentioned in the Report.

Like some of the items referred to in note 1 supra, the jacket evidence seems to me inconclusive, but it may perhaps seem persuasive to others.
questioned stronger statement about one bullet, the experts said in this case they could testify only that the bullets could have come from the revolver, not that they must have done so.

It may appear that the condition of some of the evidence about the murder of the policeman suggests an absence of planning and consequently a degree of reliability in the evidence about the assassination of the President. Reflection will indicate a number of explanations for the situation which leave the suggestion inconclusive. For example, a second individual or group participating in the assassination might well have decided to show caution, and not to go too far, in manipulating evidence about the murder.

The circumstances of the arrest in the theater were such that no mutually consistent accounts of it have been given. It should be noticed that even if it had been clearly shown that Oswald had murdered the policeman, this would have had only a problematical bearing on the assassination of the President. The most that the evidence of Oswald's conduct after the shooting can have shown is some kind of "consciousness of guilt" or, better, consciousness of risk of accusation. The New York Court of Appeals, among other courts, has shown an acute awareness of the undependability of this sort of evidence.

As the reader of these observations will have observed, the differences between a trial and the deliberations of the Commission and its staff are striking. The defendant Oswald was dead and in no position, like the ordinary murder defendant, to help his counsel frame a defense or, if he chose, to testify on his own behalf. Every once in a while even a lawyer critic of the Commission observes that some particular testimony that he has considered is hearsay. But this is conceding too much, for everything in the Report is hearsay. It was, that is, not subject to the test of adverse cross-examination.

I have tried to use what seems to me the critical evidence as though it stood by itself, neither helped nor shaken by cross-examination. (It is impossible to make any life-like assumption of this sort about any of the identification testimony or any of the evidence connected with the murder of the policeman.) On this relatively unrealistic assumption about the gun, bullet and first shot evidence, I have come to the conclusion that as presently advised I would not vote as a juryman for conviction. There is, of course, a significant burden of proof for the prosecution in a murder case.

6 The reader will notice at once that it is impossible to come very close to acting as a hypothetical jurymen. Observations throughout this review, including those in the preceding footnotes, are a constant reminder of the limited significance of what is here said. For my views on the burden of proof appropriate for capital cases or cases which carry more than ten year sentences, see Book Review, 25 U. CHI. L. REV. 560 (1958).
The Report is history, and its present significance is primarily political and not legal. The Commission and its staff were indeed composed entirely of lawyers, and the Report is in this respect an interesting legal phenomenon. It must be said, however, that the Commission was quite aware of the limitations of its procedures, though its interest in quieting anxiety and rumors may have led it to understate these limitations.

Now that we have looked at the limitations of the proof, we may turn for a while to the political aspects of the Report.

Two of the members of the Commission and two of its staff are among those contemporary lawyers for whom I have the highest possible respect. One is the Chief Justice, who by his record in dealing with race relations, with crime, and with the legal remnants of the McCarthy period has qualified himself in my judgment as the greatest Justice in the history of the Court. The second is Mr. John McCloy, a schoolmate of the reviewer both in college and in law school, and an eminent and level-headed public servant. The next is Mr. Lee Rankin, general counsel for the Commission, who showed heartening independence in confessing error in the Mesarosh (Pennsylvania secondary leader Smith Act) case, and thereby beginning a tide which—as it turned out—led eventually to the dismissal of all the pending Smith Act cases except the Scales case, involving in the dismissals well over a hundred defendants. The fourth is Mr. Albert Jenner of the Chicago Bar, for whom every member of the Chicago faculty and every member of the Bar must feel the highest respect.

Moreover, the immediate constructive accomplishments of the Commission are much better than the critics of the Report appreciate. My first impression was that the shooting of the President and the accusation of someone associated, however vaguely, with Communist groups threatened us with a revival of overexcitement about the domestic Communist threat. The official theory within a week had alleviated my concern on this subject, and the official theory was in turn strengthened in its effects by the Commission and its staff. At the same time the official theory first and the Commission later legitimately ameliorated the tendency to find Dallas as a community guilty of the offense. Some Dallas citizens had indeed brought discredit on the city by their treatment of Mr. Adlai Stevenson not long before the President's visit. Moreover, the record of the Dallas police in the events surrounding the President's assassination is such, in my judgment, as to deprive them of any claim to respect. General Walker lived in Dallas. Nevertheless, Dallas is a city of some standing, and Texas is as far from Mississippi and Alabama in its attitude toward Negroes as any state in the South.
The Commission had a serious psychological problem with which it had to deal. Moreover, by the time the Commission's deliberations began there was a body of critical writing, beginning with the newspapers from the time of the assassination on and culminating in two or three systematic criticisms of the official doctrine, which gave the Commission something to answer. Some of the critical writing originated abroad, and much of it was received abroad with uncritical acceptance and with prejudice to the reputation of the United States. Mr. McCloy was quoted as saying that the Commission had to see to it that this country was not thought of as a "banana republic."

The Commission would have been on more solid ground if it had made fewer claims. On the basis of the evidence thus far reviewed at any rate, it could have said that the only evidence that it had, however problematical it might be, pointed toward Oswald; and that the evidence indicating participation by anyone else gave no dependable clue to the identity of any other participant or participants. The Commission might indeed have observed that it would have found difficulty in naming other participants under any circumstances. The Commission not only was not a court; it was also not a grand jury. We do not in fact know what encouragement it may have quietly given to police officers, including the FBI, to pursue leads which the critics are now calling to our attention. If the Commission had taken some such position, its record would look better now, but it might have been less effective in quieting anxieties and relieving guilts and hostilities.

What standing the Commission's Report has as history I must leave to the historians. The reputation of Pericles is perhaps not quite as good as the histories would have us think, and in the end the standings of Cleon and Alcibiades were surely better than the histories generally say. Otto of Brunswick, for reasons which were not plainly discreditable to him, incurred the animosity of Hildebrandine Popes and Hohenstaufen Emperors alike, and there is no reason to trust their account of his villainy. It is as likely as not that Richard III, otherwise a good king, was traduced in the matter of the princes by both Sir Thomas More and Shakespeare. Among the events which I have witnessed, I can think of none which has been subject to greater misrepresentation than the history of the NRA in Mr. Schlesinger's account of the New Deal. History may well be made up, in part at least, of hypotheses which are simply less improbable than defined competing hypotheses. Perhaps the historian will want to say something positive about the assassination of the President. It might be better, however, for him to say that not enough is known about the perpetrator or perpetrators to warrant a conclusion.
The question naturally arises as to whether something should be done about it. We have thus far conducted our discussion of the assassination on the basis of testimony about which the three books ostensibly under review are in rather close agreement. M. Sauvage, a conservative correspondent of the conservative Figaro, was from an early time in Dallas among the many skeptical newspapermen, American and European, who—following the best traditions of their profession—refused to accept the official account uncritically. Beyond those of which we have spoken, his book adds a number of criticisms of the official theory. Unfortunately, his book becomes somewhat querulous as it proceeds, and he greatly underestimates the contribution made by Mr. Buchanan before the Report in the central or major hard-headed portions of Mr. Buchanan’s book. He does not indeed fully appreciate the extent to which he is indebted to a number of other journalists, including, for example, Mr. Joesten, whose work has been to some extent answered by the Commission, but whose doubts have contributed to those healthy doubts which currently survive.

Mr. Epstein has specialized in his brief but very thoughtful book on the difficulties with the one shot—two hit hypothesis. He has also given us an excellent clue to the interplay of personalities and the actions and proceedings of the Commission and its staff.

The American reviews that first appeared, mostly defending the Commission, seem to me to have concentrated attention on minor defects in these books, admitting in a somewhat concealed way the force of the principal points which they make. The same observation applies to a published interview by Mr. Specter, a staff member. My treatment of the evidence so far has been based on the Report and on these two books primarily, though at points I have added observations drawn from Mr. Lane’s book.

Mr. Lane’s book has also been subjected to criticism and even vituperation, and it goes much beyond the other two books in its criticism of the Report. What I have already said indicates that I am disposed to discount heavily the somewhat personal criticisms of the Commission and its staff which appear in all three books. But as a reader, not as a juryman who might have looked at exhibits, witnesses, and other evidence, I cannot find any flaws at all in the substance of Mr. Lane’s book. The discussion thus far indicates that in the view of the most

7 Since November 5, when the body of this essay was written, there has been a growing volume of intelligent discussion of the problems raised by the Report. This discussion appears to have created in the minds of the public a proper amount of reasonable and healthy skepticism about the conclusion that Oswald shot the President, or about the conclusion that he was the only one who shot the President. Mr. Lane has contributed
sober critics, and indeed perhaps in the view of a majority of the Commission itself, the difficulties with the one shot–two hit theory make it necessary to suppose one other participant in the shooting besides Oswald. The discussion thus far leaves his identity a complete mystery, and perhaps it must remain so. But once this possibility is admitted, as Mr. Epstein observes, it opens a “Pandora’s box” of possibilities—possibilities which are indeed hypothetical, but of which some may be little more improbable than the official account itself.

Mr. Lane is still convinced that many of the criticisms of the official theory made by others as well as himself before the appearance of the Report, and not repeated by the other two authors, are valid. In particular, he makes a most impressive case for the view that testimony of many persons along the route of President Kennedy at the time of the assassination strongly supports the view that some, if not all the shots, came from a “grassy knoll,” or near it, to the right of the procession. Mr. Lane recalls with emphasis the first reports of the doctors at the Parkland Hospital that the first wound of entry was at the front of the President’s neck. He adds an account of witnesses ready to testify that the impact of the second bullet on the President’s brain was such that it appeared to come from the right and not from behind as the official theory of Oswald’s part in the assassination requires. Mr. Lane with great force calls attention again to some features of the immediate and quick pursuit of Oswald which suggest that there was some preparation for casting him in the part of assassin. M. Sauvage suggests that Ruby may have had reasons for shooting Oswald apart from the not

more than any other person to this healthy doubt, but on these issues he has been helped by the course of journalistic criticism from the time of assassination to the present, including the publication of M. Sauvage’s book. The level-headed criticism of the first one shot–two hit hypothesis by Mr. Epstein and Governor Connally seems to Mr. Lane, and to me, to have implications going beyond those which some of the critics recognize. Nevertheless, the problem of Oswald’s guilt and the related problem of a second possible or probable assassin seem now to appear to the public in a rational perspective.

Mr. Lane goes far beyond the other critics in the detail and the vigor of his criticism of the one assassin theory, and more particularly in his insistence that further investigation might well lead to the discovery of the identities of a number of participants in the assassination and its planning. In particular, as Professor Trevor-Roper observed with emphasis, steps might well have been taken to question Mr. Ruby under circumstances in which he would have been free from any possible influence from the Dallas police. Mr. Ruby’s mental condition might have furnished him a legal defense to the charge of murdering Oswald and may evoke sympathy from the detached observer. His illness would have tended to correct any distortions which might otherwise have resulted from hope of clemency. It may be that he had clues to an alternative explanation of the assassination which should not have been neglected. The issues of the case should not be obscured by the hostilities resulting from Mr. Lane’s courage and pertinacity, or by the vigorous and sometimes understandably hostile tone of some of his observations.
very probable view that these sketchy characters were involved together in a conspiracy. M. Sauvage suggests that it must have been clear to Ruby that his friends on the Dallas police force were somewhat dismayed by the prospect of a trial for Oswald, and he recounts an exchange between Ruby and one of his lawyers which suggests that the lawyer had this view as well.

Mr. Lane suggests another hypothesis about Ruby and also about the casting of Oswald. He recognizes that his principal witness on the subject, a somewhat strange lady, may be unreliable and has not been subject to cross-examination. But he says it is a story that so far as it goes should be investigated, and I agree with him. This lady places Ruby in the gun running business to either Castro or anti-Castro magnates. Mr. Lane leaves it there, but one suggestion that might be examined is the suggestion that anti-Castro magnates engaged Ruby and doubtless others to see to it that Oswald, identified with Castro, should be charged with the murder of the President, who at this particular time at any rate was showing a cautious attitude toward future exploits in Cuba.

Questions about the case, and reflections about its significance occur in profusion. Why is it necessary to have some of the evidence impounded, as it seems to be, until all contemporaries are dead, and other portions restricted in use? The alertness with which the official theory was adopted and proclaimed may be explained by the need for quieting apprehensions or by political motives, but one wonders again whether this quick reaction had something to do with whatever reasons require the impounding and restricting of evidence.

Some of the alternative explanations for the assassination first suggested by critics seemed even then preposterous. Cosa Nostra, like the Teamsters and the really great Texas oil millionaires, seems at once too strong and too cold-blooded to resort to such devices. Mr. Buchanan’s hypothesis about the social and class significance of the assassination was indeed most unpersuasive. The crackpot left or the crackpot right or both seem still the most likely sources of the trouble. Presumably the police, including the FBI, are alert for danger from either crackpot left or crackpot right.

Why should citizens and students of law concern themselves further? Mr. Lane has one answer, and that is that it is a question of justice. Whether it is Richard III or Oswald, a man’s reputation after death, the meaning of his life for others, is a matter of concern, however difficult it may be to devise means of protecting it legally.

Another reason for our interest is our concern for accuracy in statements from the government. However well intentioned, a very large
number of official statements about Vietnam have led to a state of what seems to me legitimate skepticism on the part of the public. Did the various security forces involved mislead the Warren Commission? Did the immense and expensive apparatus of foreign intelligence somehow mislead Secretary McNamara into his manifestly erroneous estimates of the costs of Vietnam? Is our foreign policy now influenced by computer or other inadequacies in estimating hazards as well as simple costs?

These are related questions, and they may lead the observer to hope for future study of the problems created by the assassination of President Kennedy and the Report of the Warren Commission.

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Mr. Babcock begins his book with a description of how the zoning game was and is now played. Next he describes the players—the layman as public and private decision-maker, the planner, the lawyer, the judge. They turn out, by and large, to be weak nonheros. Mr. Babcock then criticizes the purposes and principles of the game. The backers of the sport, who bet heavily on the players, are such interested parties as the landowner, the neighbor, the municipality, the metropolitan area. He concludes with recommendations on rule changes.

Mr. Babcock is entitled to write this book, he says, because he has written a law review article on zoning with 310 footnotes. He is also the pre-eminent land use planning and controls lawyer in private practice. He is a lawyer's lawyer; a planner's confidant; and, due to his interest in the esoteric, an academician's delight. The Zoning Game adds to Mr. Babcock's stature.

The book is witty, honest, and free from planners' and lawyers' jargon and euphemisms. The real world of zoning comes through. Not having read the book, most lawyers would not know, for example, why motels are excluded from zones in which hotels are permitted, or why it is easier to get a rezoning for a supermarket than for a discount store. He makes frequent use of the first person, without becoming