

## *The Trammeled Consequence*

J. M. L A L L E Y

**Inquest: The Warren Commission and the Establishment of Truth,** by Edward Jay Epstein; introduction by Richard H. Rovere, *New York: The Viking Press, 1966. xix + 224 pp. \$5.00.*

THIS TREATISE, so its author tells us, began as a study of how an officially appointed body functions "in an extraordinary situation in which there are no rules or precedents to guide it." It became, as the reader quickly learns, an exposition of what Mr. Epstein considers the failure of the Warren Commission to dispose of certain puzzling questions arising out of the assassination of President Kennedy in Dallas on November 22, 1963. He ascribes this failure not to any deliberate deception or concealment but to the fact that the commission had set for itself two incompatible tasks: first, the "explicit" task of discovering and revealing all that could be learned of the truth, second, an "implicit" task of dispelling in the interest of public quietude the vast flood of ru-

mor and speculation to which the tragedy had given rise. Gradually, he contends, the second consideration overshadowed the first, with the result that the investigation was hurried to a conclusion, leaving many avenues of inquiry virtually unexplored and at least one "threshold question" wholly unanswered.

Mr. Epstein is at pains to dissociate himself from other commentators on the Warren Commission's Report, whom he divides into what he calls "demonologists" and what he might have called pietists. In the first category are those who insist that "as all the facts were not revealed the Warren Commission must have been a party to a conspiracy to suppress evidence." In this group, presumably, belong not only those who share Mr. Thomas Buchanan's fantasy of a grandiose conspiracy engineered by Texas oil magnates and executed with the collusion of fanatical rightists, the Dallas police and a Chicago-bred gangster,<sup>1</sup> but also those who persist in believing the as-

assassination to have been another Communist plot hatched in Moscow or Havana. The pietists are those who have accepted the commission's conclusions at face value, without bothering to wade through the twenty-six volumes of published testimony, in the "blind faith" that their government would never mislead them about so momentous a matter. Both attitudes, according to our analyst, are based on a common and fallacious assumption of governmental omniscience and omnipotence.

Unlike the pietists Mr. Epstein has not only plowed his way through the twenty-six volumes; he has also examined the various investigative reports filed in the National Archives and believes that many of them were not given the attention they deserved. He has also interviewed five of the seven commissioners, members of their legal and administrative staffs, and several of the legal assistants. Indeed, his labors, says Mr. Rovere, should make the American journalists "envious and ashamed," for it seems that virtually all of them, including Mr. Rovere himself and even such critical historians as Sir Denis Brogan,<sup>2</sup> have accepted the findings of the Warren Report as conclusive.

Mr. Epstein learned that the commissioners were frequently absent from the hearings—the two senators and two representatives on committee meetings, roll calls and other matters of legislative routine, the chairman on business of the Supreme Court, the others, along with the eminent lawyers retained as counsel, on urgent outside affairs—leaving the examination of witnesses largely to the legal assistants, or "junior counsel," for whom the work was at least financially rewarding. This, Mr. Rovere thinks, leaves the commission itself open to the charge of having been little more than a façade. The commission engaged no investigators of its own, leaving this work entirely to the FBI, the Secret Service, and other government agencies. Mr. Epstein also seems to feel that the inquiry was impeded by considerations of security and scrupulous regard for the

rights of witnesses. The proceedings were not conducted according to the "adversary" method employed in the courts; examiners were not allowed to challenge the statements of witnesses, to confront them with contrary evidence, or to cross-examine in any way. A staff lawyer who during a field examination accused a police witness of lying about Jack Ruby's means of admission to the Dallas jail was rebuked by the chairman. The proposal of another lawyer to submit another witness to a polygraph test was peremptorily refused. Thus Mr. Epstein's analysis, whatever else it may show, proves at least that we are still at some distance from an outright police state.

In the course of the inquiry a disquieting rumor arose that the putative assassin, Lee Harvey Oswald, had at one time worked for the FBI as an undercover agent and had periodically received money orders telegraphed from Washington. The rumor was traced to a Dallas newspaper reporter, who told Secret Service investigators that his information had come from an official of the Sheriff's office. A categorical denial of the rumor by J. Edgar Hoover was accepted by the commission, and neither the reporter nor the official was called before it. (The full FBI dossier on the activities of Oswald prior to the assassination was submitted to the commission, but for reasons of security was returned unopened at the direction of the chairman.) The Warren Report does not discuss the rumor, and Mr. Epstein tells us that a Secret Service report of an interview with the Dallas newspaperman has been excluded from the material in the National Archives.<sup>3</sup>

To Mr. Epstein, if not to Mr. Rovere, the important point is not whether the rumor was true, or if so in any way relevant to the assassination; it is merely one of the supports for his thesis that wherever the work of investigation collided with the national interest, the latter naturally prevailed.

If the commission had . . . fully investi-

gated the allegation, the result might very well have heightened doubts and suspicions . . . The surest and safest way to dispel the rumor was *not* to investigate, it, but to keep secret the allegation and publish only the affidavits of denial.

The main question raised by this analysis, however, is whether Oswald committed the crime alone and from motives that now can never be precisely established (as the commission evidently wished to indicate) or whether there was an accomplice in the form of a second assassin. Of Oswald's own guilt Mr. Epstein seems fully convinced. If Oswald had lived to be tried, it is possible that the positive identifications by the witness who saw him from a distance of perhaps 200 feet aim from the window of the Texas Schoolbook Depository and by the witness who saw him kill Officer Tippit could have been seriously shaken if not discredited by cross-examination. It is an axiom of lawyers that circumstantial evidence is generally more trustworthy than direct evidence, and this is especially true in moments of popular excitement or panic, but the circumstantial evidence almost certainly would have sufficed to convict. The shots were fired from Oswald's rifle, his palmprint was found on the gun barrel, he was in the part of the building from which the shots were aimed, paraffin tests made of his hands after his arrest showed traces of nitrate, indicating he had recently handled a firearm. Though Mr. Epstein strives to reduce most of the remaining circumstantial evidence to mere plausible inference, he is obliged to acknowledge that Oswald's actions after the assassination were "certainly not those of an innocent man."

The hypothesis of another assassin hinges upon three questions. The first is whether Oswald could have fired three shots in the space of 5.6 seconds, the time that elapsed between the instant the presidential car became visible from the windows of the book depository and the instant the third and fatal bullet struck the President, as determined from the laboratory analysis of a

movie film of the event taken by Abraham Zapruder. Aside from conflicting evidence concerning Oswald's prowess as a marksman,<sup>4</sup> tests undertaken by experts of the FBI and the Army indicated that this was possible, though somewhat improbable, but only after corrections in the telescopic sight. Then the second question arose, whether it was possible to have fired three shots in approximately 1.8 seconds, representing the last instant at which Governor Connally could have been hit. To this the answer was definitely no; the tests showed the minimum of time required to open and close the bolt would have been 2.3 seconds. Hence the third and crucial question: whether the first bullet to hit the President was also the one that wounded the Governor.

Here the evidence becomes extremely confused. After the autopsy at the Naval Hospital it was suggested that the first bullet might have passed through the President's neck before reaching the Governor. This was evidently deduced from a small wound in Mr. Kennedy's throat and a slit beneath the collar of the presidential shirt. This theory was at first accepted by the commission and included in its autopsy report, although it was in direct conflict with the FBI report of December 9, 1963, that the bullet had entered the President's back just below the shoulder to the right of the spine at a downward angle of from 45 to 60 degrees and that there was no point of exit. A supplementary FBI report after the autopsy stated that the bullet had penetrated to less than a finger's length. Governor Connally testified that he had been struck by a second and separate bullet and this was corroborated by his wife who had been in the car beside him.

Among the champions of the single-bullet theory was Norman Redlich, special assistant to J. Lee Rankin, General Counsel to the commission. He told Mr. Epstein in an interview that to say the President and Governor "were hit by separate bullets is synonymous with saying there were two assassins." This of course is precisely the the-

ory that Mr. Epstein is advancing, without actually espousing, as a *prima facie* case. In further support of it he adduces the statement of a Mrs. Eric Walther, an eyewitness, who told FBI investigators she had seen two men together at an upper window of the book depository, one of whom was holding a rifle. Arnold Rowland, another eyewitness, who told of having seen a rifleman in a sixth-storey window, also told of having seen another person on the same floor. Mrs. Walther was never examined by any of the commission's staff and Rowland's testimony was discounted for lack of corroboration. This was not, Mr. Epstein assures us, because the commission decided to suppress Mrs. Walther's statement, "but most probably because the staff overlooked it."

It is difficult to accept this explanation, that is only because of the common conception that the Warren Commission's investigation was the most massive and thorough in history, and that no stone was left unturned in its quest for truth. This picture, painted so effusively by the mass media... was based not on analysis of the investigation but on faith in the individual members of the Commission. It prevailed most probably because people wanted to believe the investigation was exhaustive and thus that the doubts and uncertainties had been settled once and for all.

In the end the question of a single bullet or separate bullets, evidently because of disagreement among the commissioners themselves, was left open. There was also, despite the elaborate investigation into Oswald's past, stretching back to his childhood and adolescence, some disagreement about his probable motives for the murder, so that the final version of the section of the report dealing with this problem contained in the opinion of one of the legal assistants, "clichés that belonged in a television script." Even the question of possible accomplices was hedged with the statement that although no evidence of a conspiracy had been found "it cannot be rejected categorically."

What we have here then is a *tour de force* of forensic logic. Mr. Epstein seems to have justified his contention that work of the Warren Commission, so far from having been massive and thorough, was in fact, "extremely superficial." In doing so he has awakened many dogs of misgiving that had been lulled by the Warren Commission Report and thereby given encouragement to the "demonologists" of both ultra-left and ultra-right. In law two suffice to make a conspiracy, and though Mr. Epstein of course does not insist there was a conspiracy he does insist that the evidence available to the commission in no way precluded the possibility of it.

Still, the hypothesis of conspiracy, that is to say of more than one assassin or would-be assassin, raises difficulties that neither the most thorough and disinterested investigation nor all Mr. Epstein's analytical logic could have removed. If the person said to have been seen beside Oswald in the window of the book depository was also a sniper, why was not a second rifle found, and why only three cartridge jackets, all identified as having come from Oswald's weapon? If it can be supposed—and it takes a great deal of supposing—that Oswald and a companion took turns at the shooting, the time problem raised by the study of the Zapruder film is aggravated to absurdity. Did the man said to have been seen running from the building immediately after the assassination carry a rifle or shotgun? If so, why was he not apprehended, as it seems likely he would have been, even in the confusion that prevailed? What about the shots that some witnesses thought were fired from the "grassy knoll" between the depository and the underpass below the railroad? Were these optical or auditory illusions as the FBI investigators seemed to believe? If not, why was the gunman not *seen* by any of the many persons who must have been watching the procession from the knoll or the railroad bridge? If it was one of his shots that finished the President, how did the bullet enter the back of his skull? And again, why were no cartridge jackets or

other tangible evidences of the shooting found on the knoll? All in all, it may seem that Mr. Epstein, though he has certainly earned his degree,<sup>5</sup> has roused the dogs to no purpose. The Warren Commission's inquiry, with all its superficiality, inadequacy, and ineptitude, appears to have taken us about as close to the truth of the Kennedy assassination as we are ever likely to get, but enough of mystery remains to permit an infinite number of theories to be spun

concerning it, as doubtless they will be.

King Humbert of Italy when warned of the anarchist plot against his life is said to have shrugged it off with the remark that assassination was simply the occupational hazard of his trade. Mr. Kennedy is said to have made a similar observation to an apprehensive friend shortly before the beginning of the fateful procession.

"So hard a height, so cruel a crown!"

*'Who Killed Kennedy?* by Thomas G. Buchanan. London, 1964. Mr. Buchanan's Marxist imagination leads him to surmise that Oswald was a dupe of the Dallas conspirators, and that to assure his silence afterward Officer Tippit was directed to kill him. When Oswald proved the quicker on the draw, the services of Mr. Ruby were enlisted.

"Death in Dallas," by Sir Denis Brogan. *Encounter*, London, December 1964. Sir Denis was one of the many soothsayers who at the time of the murder, without waiting for evidence, hurried to the microphones to ascribe it to a "right-wing conspiracy." After reading the Warren Commission Report he recanted, saying: "Unlike some people, I can learn."

Mr. Rovere's point seems to be that whether true or false the rumor would necessarily be denied and the commission should have taken this into account.

"Something has been made of the argument that if Oswald could not hit a sitting target like Major General Edwin A. Walker he would have had great difficulty in hitting a moving target, such as Mr. Kennedy was. The identification of Oswald as the person who fired at General Walker rests mainly on the testimony of Marina Oswald. Her testimony contains some contradictions and Mr. Epstein thinks she told the commission what she thought it wanted to hear. After all, she was reared in Soviet Russia. The FBI report stated that because of its "mutilated and distorted" condition it was impossible to say, even after laboratory tests, whether or not the bullet extracted from the wall in General Walker's home had been fired from Oswald's rifle.

The study was undertaken as a master's thesis in government at Cornell University.