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The law hath not been dead, though it hath slept.

—Shakespeare, *Measure for Measure*

EVERY trial lawyer knows the frustration of being unable to present in evidence some important object or testimony which would allow the jury to interpret the actions of his client more favorably. The law, or, more precisely the rules of evidence, stand between him and the jury. Their object is in part the fair and orderly presentation of evidence. In the search for the truth about the assassination they ought to have been observed.

In the United States we have no precedents for safeguarding the rights of the dead, as some European countries do; but neither do we try the dead. This case was the exception. The Commission wrote in its Report:

The procedures followed by the Commission in developing and assessing evidence necessarily differed from those of a court conducting a criminal trial of a defendant present before it, since under our system there is no provision for a posthumous trial. If Oswald had lived he could have had a trial by American standards of justice where he would have been able to exercise his full rights under the law. A judge and jury would have presumed him innocent until proven guilty beyond a reasonable doubt. He might have furnished information which could have affected the course of his trial. He could have participated in and guided his defense. There could have been an examination to determine whether he was sane under prevailing legal standards. All witnesses, including possibly the defendant, could have been subjected to searching examination under the adversary system of American trials. The Commission has functioned neither as a court presiding over an adversary proceeding nor as a prosecutor determined to prove a case, but as a factfinding agency committed to the ascertainment of the truth.¹

I believe that, on the contrary, the Report of the President's Commission on the Assassination of President Kennedy is less a report than a brief for the prosecution. Oswald was the accused, the evidence against him was magnified, while that in his favor was depreciated, misrepresented or ignored. The proceedings of the Commission constituted not just a trial, but one in which the rights of the defendant were annulled. For is it not apparent from the selection quoted above that because he was dead Oswald was presumed to have forfeited the safeguards of an adversary proceeding? Is it not also apparent that a defendant who is absent through no fault of his own is more in need of assistance and protection—and counsel—than one who is present and can participate in his defense? That is a moral consideration, however, and not a legal one, and we shall concentrate—so far as may be relevant to our inquiry—on the dual purpose of due process of law

Before we do so, however, let us note that the Commission made one concession, although belated, to the interests of Lee Harvey Oswald and his family. The Commission wrote:

In fairness to the alleged assassin and his family, the Commission on February 25, 1964, requested Walter E. Craig, president of the American Bar Association, to participate in the investigation and to advise the Commission whether in his opinion the proceedings conformed to the basic principles of American justice. Mr Craig accepted this assignment and participated fully and without limitation. He attended Commission hearings in person or through his appointed assistants. All working papers, reports, and other data in Commission files were made available, and Mr Craig and his associates were given the opportunity to cross-examine witnesses, to recall any witness heard prior to his appointment, and to suggest witnesses whose testimony they would like to have the Commission hear. This procedure was agreeable to counsel for Oswald's widow.²

When Craig was appointed, almost three months after the formation of the Commission,³ the Chief Justice announced that the attorney would serve as counsel for Oswald, despite the fact that Oswald's mother had chosen another lawyer weeks before.⁴ Congressman Ford was later to write that Craig represented 'the ethical conscience of the American bar'.⁵ The press hailed the

appointment with editorial fanfare. 'The Warren Commission's appointment of the president of the American Bar Assn. to represent the interests of Lee H. Oswald, President Kennedy's accused assassin, is a welcome development,' said the liberal *New York Post*.⁶ The editorial added, 'His willingness to undertake the assignment is consistent with a long legal tradition in which men of conservative backgrounds have entered the arena of controversy and undertaken to defend the least popular causes.'⁷

Although this image portrayed him as a Darrow, a fierce advocate for the defense, Craig was somewhat more modest in assessing his role. 'We are not counsel for Lee Harvey Oswald,' he told the Commission.⁸ He explained that he would participate in the hearings to see that 'all facts pertaining to the involvement of Lee Harvey Oswald with the assassination of President Kennedy are fully investigated and fairly presented'⁹ The presumption of innocence, not to say the role of counsel, seems strangely alien to the attitude voiced by the bar's 'ethical conscience'

But however unassuming his assessment may have appeared, it was regrettably an overstatement. If Craig or his associates ever recalled a witness, there is no record of it in the Report. Indeed the Report refers to Craig only in the one passage quoted above,¹⁰ and his contribution may best be illustrated by the fact that his name does not even appear in its index.¹¹ If Craig or his associates ever named a prospective witness whom they wanted to hear after his interview with the FBI or the Secret Service, there is no record of it in the Report. If Craig or his associates ever presented the name of a new witness to the Commission, there is no record of that in the Report. If Craig or his associates ever attended one of the 25,000 interviews,¹² there is no record of that in the Report.

Neither Craig nor his associates participated in that which might be described as cross-examination. On rare occasions, one of them might ask a question or two, but such questions were either of minor importance or were asked solely for the purpose of assisting to fasten the guilt more firmly onto the absent defendant. Yet testimony untested by cross-examination is of limited value: Wigmore described the procedure as 'beyond any doubt the greatest legal engine ever invented for the discovery of truth'¹³ He said, 'If we omit political considerations of broader range,

then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure.¹⁴

Had Craig the very best of intentions, his rare attendance when the evidence was being gathered would have rendered his role as counsel ineffective. One witness¹⁵ whose testimony contained numerous internal contradictions was apparently troubled that he was of so little assistance to the Commission. He said, 'I don't want to get you mixed up and get your whole investigation mixed up through my ignorance, but a good defense attorney could take me apart.'¹⁶ On that occasion, unfortunately, as on so many others, even Craig was not present.¹⁷

When he was there, however, his lack of familiarity with the most elementary facts was quite obvious, and this diminished the value of his already limited participation. For example, the Commission's investigation entailed the taking of precise measurements—in feet and inches—of various distances in Dealey Plaza.¹⁸ These results, complemented by a detailed analysis of the Zapruder film of the assassination, enabled the Commission to determine that the limousine was between 260.6 and 348.8 feet from the railroad overpass while the shots were being fired.¹⁹ When the driver of the Presidential limousine testified, Craig asked him if 'it was less than a mile that the President's car was from the overpass' at the time the shots were fired.²⁰

The denial of counsel to Oswald came less than one year after an important legal decision which, for the first time, interpreted the Sixth Amendment to the United States Constitution as a guarantee of the right to counsel for one charged with the commission of a crime. 'The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours,' said the Court.²¹ An attorney who appeared as *amicus curiae* for the defendant had urged the Court to understand that a fair trial was impossible without counsel for the accused. He reminded the Court of the obligations of the bar: 'Judges have a special responsibility here and so do lawyers.'²² The Court which so clearly enunciated the right to counsel was the United States Supreme Court,²³ whose Chief Justice chaired the President's Commission. The attorney who appeared before it was J. Lee Rankin, General Counsel for the Commission.²⁴

In England the rule of law is perhaps better understood and the role of counsel better appreciated. A Royal Commission engaged in hearings to determine the innocence or guilt of one deceased as a matter of course provides that counsel for the family may participate fully and without reservations, and such counsel would not be heard to disclaim his function as an advocate. Whether the Warren Commission was a prosecuting agency, a special grand jury, an impartial tribunal or an objective trial court—the Chief Justice himself referred to the proceedings as a trial²⁵—its denial of counsel to the deceased was an act both unprecedented and unfair.

One purpose of due process of law is to guarantee the rights of the accused, to which it is objected that here there was no accused. The second purpose is to ascertain the truth. One is in fact insured by the other—that is, the rights of the accused are guaranteed by the fair presentation of all the pertinent evidence; and it may be said that whether this was or was not a trial, whether Oswald was or was not the defendant, fair procedure would have become the President's Commission.

Some rules of evidence obviously do not pertain to the truth alone. For instance, a wife cannot testify against her husband in most jurisdictions, the reason being a desire to safeguard the integrity and sanctity of the family. The Commission—properly, in my opinion—overlooked this rule, feeling no doubt entitled to do so by the grave and momentous nature of the crime it had to consider. Still, it cannot be argued that the Commission was likewise entitled to overlook other rules whose sole object is to facilitate a fair verdict. The very principle of due process, including all the rules of evidence, was implicitly repudiated by the Commission.

A leading question is, of course, one so framed as to suggest a desired answer. It is generally improper during the direct examination of a witness in an ordinary trial; and the leading questions regularly and persistently asked by counsel for the Commission added up, in my opinion, to an improper effort to develop a favorable record—that is to say, a record consistent with Oswald's guilt. Under the circumstances, such a record was especially easy to achieve. We have noted how the magnificence of a tribunal at the head of which sat the Chief Justice of the