

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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: **HAROLD WEISBERG,**
:

: **Plaintiff,**
:

: **vs**
:

: **U. S. DEPARTMENT OF JUSTICE,**
:

: **Defendant.**
:
: **----- X**

Civil Action No. 2301-70

TRANSCRIPT OF PROCEEDINGS

**Motion to Dismiss, or for
Summary Judgment**

Monday, November 16, 1970

Pgs. 1-15

Copy for:

**Plaintiff's Counsel
(B. Fensterwald)**

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Monday, November 16, 1970

The above-entitled cause came on for Motion of Defendant to Dismiss or Alternatively for Summary Judgment, at 10:00 a.m., before THE HONORABLE JOHN J. SIRICA, Judge, United States District Court for the District of Columbia.

APPEARANCES:

On Behalf of the Plaintiff:

BERNARD FENSTERWALD, JR., Esq.

On Behalf of the Defendant:

ROBERT M. WERDIG, JR., Ass't. U.S. Attorney

P R O C E E D I N G S

THE COURT: All right, I'll hear you.

I have had an opportunity to read the motion in the complaint and some of the exhibits. Tell me what you think the issue is in the case.

MR. WERDIG: I would preliminarily state, Your Honor, the motion as you recognize is for Summary Judgment or to dismiss for failure to state a claim upon which relief can be granted. Ordinarily, inasmuch as the government filed the motion we would ask that we argue first; however, under these circumstances I believe we can reserve our comments more in the nature of rebuttal and I would like to ask Your Honor if I might have the privilege of having the last word as if I had the opening argument.

THE COURT: This is off-the-record.

(Off-the-record discussion.)

MR. FENSTERWALD: Your Honor, I am Bernard Fensterwald, Jr., counsel for the plaintiff. This is Mr. Jim Lassar with me (phonetic spelling), a member of the Bar of Wisconsin but not of the District of Columbia, and he has been helping with this case.

Your Honor, I will certainly bear with you on the question of time and also with respect to the fact that you have read the material that is submitted,

We bring this case on the grounds that the plaintiff

is entitled to the sought material as a matter of law and not as a matter of grace. However, I would like to take about one minute to explain this is not a frivolous case. On the surface it might appear to be so. He is asking for a technical series of tests, of a case that concluded a long time ago. He is a professional writer but what is at issue here will deeply affect whether the Warren Commission Report continues to be upheld or possibly will be reopened by the government.

Now the reason I say that is that the Commission concluded that there were three shots fired at Dealey Plaza. One of those shots missed the car completely, hit a curbstone and disintegrated. The second bullet went through the President's neck and allegedly went through Governor Connally and was later found on Governor Connally's stretcher. That bullet was more or less intact, there is no fragments off of it, so you have a whole bullet. The third bullet, the fatal bullet that hit the President's brain did fragment.

Now, what we are asking for is the FBI's spectographic analysis of bullet 399, the bullet that hit the curb, and all the fragments. The reason I did not make a cross motion for summary judgment is I think there are questions of fact. They may be mistakes on the part of the government, I don't know. In the first place they said we wanted the spectographic analysis of the bullet and fragments collected on November 23, 1963. Some

of the fragments were collected on November 22, which was the date of the shooting, many of them were recovered after that in places as far apart as Dallas and Bethesda, Maryland. Many were recovered in Maryland. I don't know precisely where the ones taken from the car were recovered, but they were not recovered on November 23 in Dallas. If the government is willing to stipulate that there were errors in their statement on that, that will narrow down what we are talking about.

As to the question of law, the Freedom of Information Act, which is in question here has nine exceptions to it. This is subsection (c) of 5 U.S.C. 552. The seventh one is the one in question and has to do with investigatory files for law enforcement purposes except to the extent that they are available to a party other than an agency. That in fact means to a private party.

Now, there are two basic exceptions. One, the investigative file which is what we are looking for, has to involve law enforcement and I raise the question here if there is law enforcement there has to be some law which is being enforced. There has to be the federal or state. There was no federal law in question. The killing of a president was not made a federal crime until some years after this took place.

Secondly, there was not even any federal jurisdiction to investigate the case. The Director of the FBI stated in his testimony before the Commission that it was done at the request

of the President and there was no federal jurisdiction at that time.

This is also confirmed by the Commission's finding itself that it was not a law enforcement body but a fact-finding body, that what it was concerned with was only the truth and that is what we are concerned with.

The other exception is that it is available by law to a party other than an agency. Now the party other than an agency in this case would be Lee Harvey Oswald, who is not the plaintiff in this case.

The government goes into some length the legislative history of this act. I happened to have been involved in that legislative history as counsel for the Senate committee that drafted it. I think I am familiar with it and I don't think there is much in that except as I will come to in a minute, that bears on this, but the very wording of the statute alone, I believe, is clear enough that you don't need to go into the legislative history at all. It says No. 7 is not effective if the information sought, the records sought, were available to a private party other than an agency.

Now the government cites three cases: Barceloneta case, and it quotes there former Attorney General Clark's memo to the effect that Section 7 was not meant to give private parties other than a litigant any earlier or greater access than the litigants would have. I think that is a correct interpretation. We are

not asking for greater or earlier access than Lee Harvey Oswald would have had.

Clemmons Bros (phonetic spelling) case, they quote there is common sense necessity of protecting investigatory function of federal agencies under certain circumstances. I would certainly agree with that, but certainly there is no blanket coverage of FBI files anymore than other government files unless they fall specifically within one of the nine exceptions.

The third case they state which is Black v Sheraton, which deals primarily with Rule 26 rather than with the statute, I think confirms the fact that there is no blanket exemption because in that case the government had already revealed recordings of the FBI made on the wiretap, the logs of the recordings, much of the technical information involving the taking of the report.

THE COURT: What was the citation of that case?

MR. FENSTERWALD: Black v Sheraton, Your Honor, is - -

THE COURT: --didn't I rule on that? I am pretty sure I did.

MR. WERDIG: Yes, that is your case, Your Honor.

THE COURT: Black v Sheraton Carlton.

MR. FENSTERWALD: Yes. It is a 1970 case. It is 50 F.R.D. 130 -- I don't have the Federal supplement.

THE COURT: I remember the case.

MR. FENSTERWALD: But in that case as Your Honor will remember a great deal of FBI material had already been given to the defendant.

Your Honor, there is a more recent case which I ran across since I filed the complaint. I would like to bring Your Honor's attention to it, it is Welford vs Hardin; it is 315 Fed. Supp. 175. It was decided in the District Court in Maryland on June 26, 1970. I have a copy of the case here if Your Honor would like.

THE COURT: I have it in the office.

MR. FENSTERWALD: This case involves two problems. One, what is an identifiable record, which I don't think is any question here. The other is Exception 7, and it pertains to letters of warning and detention information put out by the Department of Agriculture.

The judge in that case, Judge Northrop, decided the exact issue we have got here. I would like to read a couple quotations from it.

"It is clear this is not a situation as envisaged by the House Report where parties to an enforcement action is seeking to obtain investigatory material prematurely. The fact the parties directly affected by the material sought in this action are fully aware of the content. Disclosure of the material already in the hands of potential

parties to law enforcement proceedings can in no way be said to interfere with the agency's legitimate law enforcement function.

"This conclusion is based on this Court's reading of the legislative history surrounding this exception which reveals its purpose was to prevent premature discovery by defendant in enforcement proceedings. Whatever valid policy reasons there may be for extending this exception to other situations cannot serve to alter this Court's result. Such a judgment must be made by Congress."

Your Honor, just before this was to come to trial the government filed an affidavit by a special FBI agent by the name of Marion E. Williams. I am curious to find out from the government's counsel what qualifications Mr. Williams has. The spectrographic analyses of this case were made by an FBI agent by the name of Gallagher. He testified before the Warren Commission but he gave no testimony as to the spectrographic analyses.

In a similar case in Kansas City another FBI agent named Jeffrey made a similar affidavit to this one. I don't know how either of these gentlemen are qualified unless they were involved in making the analyses themselves.

Now in the paragraph 4 of this affidavit it says:
"The investigative file referred to was compiled solely for the official use of U.S. Government personnel,"

It is difficult for me to see how this is true as the results of the test were sent on November 23, 1963, one day

after the murder to the Chief of Police of Dallas. He has actually published this summary in a recent book. It said: The file is not disclosed by the Federal Bureau of Investigation to persons other than U.S. Government employees on a need-to-know basis." Certainly the results of the analyses if the analyses themselves have not been disclosed.

Then the affidavit goes on and says, "It can lead, for example, exposure of confidential informants." We are not dealing with any informants here, we are dealing with scientific series of tests. It says here it could lead to disclosure out of context names of innocent parties. There are no innocent parties involved here. This is of content of lead bullets and fragments. There are no witnesses involved and no names of suspected persons. It says it could do irreparable damage because of these things; giving to the plaintiff in this case these scientific tests do none of these things.

THE COURT: For what purpose does your client seek this information?

MR. FENSTERWALD: My client is a professional writer, Your Honor. He has written and published up to this point four books on the Kennedy assassination. He has a fifth one which is going to be published soon. This information is key to whether the Warren Commission's conclusions are correct or incorrect. We asked for it as a matter of law but there is

certainly considerable interest and not just pure curiosity on his part.

I have quoted and I think Your Honor has taken note of the fact that former President Johnson and former Attorney General Clark said only national security should require any withholding other than ^{what} the exemptions specified.

Also, there is a statement that if it falls within one of the nine exemptions there is a prohibition against showing it. This too is not true because another case before this Court earlier this year the Attorney General decided as a matter of grace he would give plaintiff in this case some other material. He said whether he was entitled under law or not he as a matter of grace would give it to him, and he did give it to him. We are not asking that in this case.

To get back basically to your question of what is the real reason for withholding this evidence, if the spectographic analyses show what the government contends they do in its summary, all these bullet fragments and bullets come from the same source, this would give considerable backing to the Warren Commission Report. If, however, they do not come from a common source, which is what the spectograph analyses will show, it will merely mean that there have been at least four bullets or more fired, in which case there would have to be at least two assassins which in turn means there was a conspiracy and not a single assassin.

So that the validity of the Warren Commission Report turns at least in part on the spectographic analyses which we think is a legal right, he has the right to them.

THE COURT: All right, I understand your position.

MR. WERDIG: May it please the Court.

Briefly, plaintiff's basis upon which he seeks this information can be broken down into two arguments.

Primarily, however, we must recognize that the exemptions which are contained in the Act are in part discretionary exemptions in that the administrative party may make a determination not whether the information sought should not be released because of national security, but I believe the President's comments say national interest as well. In this instance the Attorney General of the United States has determined that it is not in the national interest to divulge these spectographic analyses.

Plaintiff's argument therefore goes on two points. The first of which is that since there is no statutory law on assassinating presidents nothing that the FBI did subsequent to the assassination could be for a law enforcement purpose. I think that the falacy of the argument is in the statement of the argument, that there must be some law enforcement purpose to be served by the FBI investigating a cold-blooded murder of an American president.

We know now that there is a statutory law, but does that mean basically as we as lawyers understand that because

there wasn't any statutory explication of the crime, that there wasn't any law, natural or human, to our basic society that wasn't violated before. So I say the falacy of the argument is in this statement.

The second premise upon which the plaintiff relies is that this information would be available by law to a private party, to wit, Lee Harvey Oswald. But the problem with that is that Mr. Oswald is not before the Court trying to get the information. A party who has no privity to Mr. Oswald is trying to get the information. And Plaintiff admits it is not an agency, so therefore he is not like the statute provides, a private party to whom this information would be available to under something like the Jencks Act.

The case that Your Honor decided, Black v Sheraton Hotel includes in it the fact that some of the FBI records which were sought were not produced and I think that goes to support the government's position in this case.

Counsel has appended to his opposition a letter from the Attorney General stating that he is going to release certain documents regarding Mr. Earl Ray, who is accused of assassinating Martin Luther King. However, I must also state that based upon my information Mr. Fensterwald is counsel of record to Mr. Ray and I think that takes it a little out of the ambit of the situation here.

I also state further that even if the FBI had made these spectographic analyses, even Mr. Oswald would not have been entitled to them had they not been introduced into evidence against him. I think that the cases which I cited in my memorandum support our proposition. I would submit that the Welford case must deal with a litigant who is in actual adversary proceedings with the Secretary, Mr. Harding, and that takes Mr. Welford's case out of the category that Mr. Weisberg is in. Mr. Weisberg is not in an adversary proceeding with the Attorney General in an administrative hearing.

For those reasons we submit, Your Honor, that the plaintiff is not entitled as a matter of law to the spectographic analyses to which he seeks access in this action.

THE COURT: All right:

MR. FENSTERWALD: Your Honor, I would make one or two comments. One is I don't see how the national interest is possibly served by not having the truth come out of this matter.

Furthermore, I still say that if it is researched that the test is not national interest but national security. However, in the Welford case I fail to read one, I think, rather crucial sentence: Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only those internal working papers in which opinions are expressed and policies formulated and recommended.

As to federal jurisdiction I can do no better than

quote one short paragraph from J. Edgar Hoover's testimony before the Warren Commission. He says:

"When President Johnson returned to Washington he communicated with me within the first 24 hours and asked the Bureau pick up the investigation of the assassination because as you are aware, there is no federal jurisdiction for such an investigation. It is not a federal crime to kill or attack the President or Vice President, or any of the continuing officers who would succeed the presidency. However, the President has the right to request the Bureau to make special investigations, and in this instance he asked that this investigation be made."

THE COURT: All right. Is that all?

MR. WERDIG: In reference to Mr. Fensterwald's citation from the Welford case, that is typically a Grumman Aircraft type of situation in which an administrative agency in an adversary administrative quasi-judiciary proceeding before it refuses to release certain documents in its possession. I am fully aware of the exemption, I am fully aware that scientific and factual reports are produceable, but this is not in this instance an adversary proceeding which they would be entitled to those things such as in the Grumman case, or Boeing Aircraft, I believe was the one who made the submission.

So I still earnestly urge before the Court, Mr. Weisberg

does not come within the ambit of having the privilege of receiving these documents.

THE COURT: From what the Court has read and heard during the arguments this morning, the Court believes that the motion to dismiss should be granted.

Counsel for the government prepare an appropriate order.

MR. WERDIG: Yes, Your Honor.

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CERTIFICATE

It is certified the foregoing is the official transcript of proceedings indicated.

Nicholas Sokal
NICHOLAS SOKAL
Official Reporter