CA2301-70, Notes on transcript of hearing (and the hearing itself, 11/16/70)

There was an odd thing about the hearing itself, previously noted: the US Atty (Robert Werdig) did not either appear on time or let the Judge or anyone elseknow that he wouldn't. The judge was heard to say he wanted to get the hearing out of the way or over with, yet when Werdig did appear, instead of going ahead, he recessed until 11:15, which turned out to be a bit later, then said he had to be done and out before 12, giving only about a half hour for the whole thing. During the hearing, unless my recollection is wrong, he asked but a single question, and that an improper one, why did I want the spectro.

I had prepared an entirely different kind of Complaint, documenting why there was need for public disclosure of the spectro and what it had to establish to keep from totally destroying the WR. But had prepared what he called a "bare bones" Compliant. I had agreed to it because, after first saying he'd handle all the suits and then saying he wouldn't but would go over them, he had said he'd handle this one, too, because it would go to the Supreme Court and he'd take it there. Thus, I felt he was entitled to a pretty free hand. He did not discuss the changed approach with me until he showed me his "bare bones" complaint, already written, that is, typed for presentation.

After getting the government's answer and then after getting their supplement, I prepared lengthy commentaries that were, in effect, wasted and, in retrospect, I think represent the kind of things we should have done to make the best possible record and to make the kind of thing Judge Sirica did more difficult for a biased judge to do. Bud did not pay any attention to them. In fact, he prepared and filed his answer without consultation with me, even though I had prepared and delivered these things to his office. (The day we had an appointment for another purpose, but the answer having been received, he didn't keep his appointment with me, having Mrs. Pomerance, Flammonde and Charach in his office. In fact, I had cooled my heel for some time without even getting a copy of the government response to go over (when I did it was by learning, accidently, of its receipt and asking for it). As a consequence, there was simple and glaring factual error in the answer, which tried ineffectually to return to what I had proposed to begin with.

As soon as we received the supplement, with the false Williams affidavit, I wanted to go over it and him, hammer and tongs, because of the factual error that to me is or is the equivalent of perjury, for without this we have permitted the processes of the court to be converted into another WR, but Bud just didn't and did n't discuss that with me, either. These things suggest to me that what the law schools teach of the law and its practise are not what we should depend upon in such actions. We should expect everything to have a dirty purpose and should make a record disproving every false statement, any one of which can adversely influence the thinking of a judge, even one disposed to be impartial. I think that with some judges, the pre-disposition to do what the government prefers should be assumed and all papers and arguments should be calculated not to make this easier for them. Especially when the sacred St. Edgar is involved, for I suppose most of them fear him, particularly if any has prospect of or hope for another appointment that would require an FBI investigation. He can ruin almost any one thereby.

The transcript begins with omission of the delay and the alleged reason for it. Werdig began with an apology that is not included and the judge with the comment about time, to which both lawyers made response. The later can be what is off the record on the first page. I do not recall if there was anything else off the record. The failure of the judge to provide full time should not be off the record.

I believe that with the hearing on a government motion, it was wrong for Bud to agree that the proceeding not begin with the government's affirmative argument in support of its motion, not with his agrumnet against the argument that hadn't been made, especially because the judge opened with the observation that he had <u>not</u> read all the papers ("read the motion in the complaint and <u>some</u> of the exhibitis"). Incredibly, the judge also agreed to the hearing on the government's motion to be reduced to what Werdig described as "more in the nature of rebuttal" and to Werdig "having the last word as if I had the opening argument."

Bud's opening comment discloses misunderstanding of what the judge had actually said, a misunderstanding I also had. Bud said he would "bear with" the judge because he "you have read the material that is submitted". The judge actually said he had read only some of it. The "bear with" had to do with the imposition of the time restriction.

I had asked him to make notes so he'd have the reasons for wanting the spectro straight, esp. after the factual error in his response, but he didn't have it straight and here (3) and elsewhere never made reference to the clothing.

His error on page four is the most serious kind, for he acknolwedged that the spectro is what it is not, "the investigative file, which is what we are looking for." Of it he said that for the exemption to be relevant, it had to be for a law-enforcement purpose, thus there has to be some kind of law that is being enforced, and there wasn't. Nor was there any federal jurisdiction (4). Here did did make minimal but I think adequate use of what I had had in my draft of the complaint, but in the worng context, one that destroyed the reason for handling the spectro separately, that it is <u>not</u> an "investigative file" but is a laboratory study. In the light of the spurious affidavit attached to the frivolous supplementary pleading, I think this becomes more serious, for that unexposed fiction is what I suspect had been prepared to intimidate if not bamboozle the judge.

The kind of thing that can easily happen in off-the-cuff speaking did happen on 6, where Bud misspoke himself, conceding of "Clemmons (phon) "the common sense necessity of protecting investigatory files function of federal agencies under some circumstances. I would certainly agree with that, but there is no blanket coverage of FBI files any more than other government files..." without saying that this is not an investigatory file that is sought, whether or not it otherwise meets the restriction. Thus the basis became "blanket" exemption rather than did this file meet the requirements of the exemtpion, exactly the point the government had so carefully contrived, but false.

When Bud raised "Wellford v Hardin" (not in his papers because the preparation had not been done in time for them, whatbpreparation there was having been by Jim Lesar), he let the judge get away with the irrelevant, "I have it in the office" when he offered the judge a copy. It is immaterial if the judge has it in his office if he is, as he did, going to make his decision before he gets back to his office.

Lack of adequate preparation is again apparent (8) in the inadequate questioning of the competence of the Williams affidavit, which comes out as "what qualifications Mrs. Williams has". The government, as I recall, never answered, and Bud didn't insist upon an answer. He confused Jevons (here Jeffrey), to ask what qualifications he had. Now as I recall it Jevons does work with spectrography, but Williams doesn't claim that. The real thing is why one qualified to offer the opinion in the affidavit did not offer it. Bud also did not understand my point on Jevons, although he did at the time.

In arguing the never-disclosed falsehood of the government's argument, instead of citing American Mail, which says that ever reference to a withheld paper is sufficient to waive the right to the exemption, he says, "certainly the results of the analyses if the analyses themselves have not been disclosed". The fact is that what is represented as a paraphrase had been published, so there was partial disclosure, waiving the exemption. It is here (9) that the Judge asked "For what purpose does your client seek this information?" But tells him I am a writer and want it for my writing, but he fails to cite the law, that <u>public</u> information is the <u>right</u> of <u>all</u> citizens. Under the law the reason for wanting any public information is irrelevant. This, I think, illustrates that the judge could hardly have known the lae or the advance arguments were such as not to have informed him, so he was passing on a law he didn't understand.

Werdig opens (11) with a misquotation (Bud didn't correct him) of the President's statement on signing the law, "but I believe the President's comments say notional interest as well." Now this is not only not what the President said but is contrary to

what the President both said and meant ("I have always believed that freedom of information is so vital that only the national ~~interest~~ security, not the desire of public officials or private citizens, should determine when it must be restricted"-emph added) Without any omission, this is what Werdig next says, "In this instance the Attorney General of the United States has determined that it is not in the national interest to divulge these spectrographic analyses." Now, entirely aside from the fact that there is nothing in the record to warrant this statement and Werdig here offers no new evidence of it, like even a letter from the AG so statting, there is no provision of the law that makes this a possible reason for withholding and, in fact, the entire purpose oa the law ~~is~~ was to prevent just this.

+ No less incredible is Werdig's next argument, which is unrekated to the law or the issues,"...there must be some law enforcement purpose to be served by the FBI investigating a cold-blooded murder of an American President." (11). He says there has been a law enacted since the assassination, "but does that mean basically as we as lawyers understand that because (12) there easn't any ststutory explication (sic) of the crime that there wasn't any law, natural or human, to our basic society that wasn't violated vefore." If this gibberish can have any meaning in a court of law-and go uncorrected- it still does not meet the requirement of the law, that the investigatory file (and I emphasize that we were not seeking an investigatory file but a lab study) be for a specific, law-enforcement purpose.

Werdig next argues contrary to what the law says. He says that because I am not Oswald that provision does not apply. What the law says is "except to the extent available by law to a private party", or, if available to such a person as Oswald, then available to anyone else.

Here Werding, agains without complaint from Bud, makes a dirty crack, "However, I must also state based upon my information Mr. Fensterwald is counsel of record to Mr. Ray and I think it takes a little out of the ambit of the situation here." (12) This is, first of all, irrelevant. But the more serious objection is that it is saying, in a polite way, that Bud and I are but troublemakers, seeking to corrupt the law just to harrass the government, a real nasty way of poisoning the judge's mind.

Next he in effect, denies that the spectrogrpahic analyses were made and that they could have been denied a defendant had they been, which is also in credible:

"I also state further that even if the FBI had made these spectrographic analyses, even Mr. Oswald would ~~have~~ not have been entitled to them if they had not been introduced into evidence against him." I do not believe the law permits the deliberate withholding of such totally exculpatory information from a defendant, which is not the point. However, here we have Werdig arguing that the FBI did not kake the anqlyses while also saying that the Attorney General has determined making them available is not in what he describes as the "national interest". This certainly called for some comment, if not ridicule.

He then argues (13) that "Welford" means I have to be in an adversary position with the Attorney General for it to be applicable, which I believe is hogwash.

Bud's initial response is "I don't see how the national interest is possibly served by not having the truth come out in this matter", which is certainly the truth, but not the necessary legal argument. He tehn does not show the misquotation of what he calls the "test", which it is not, being only the comment of the President, but says "I still says that if it is researched that the test is not national interest but national security". (Here I note that for some reason he had me not go to the counsel table with him, so I didn't argue. I had the AG's memo and would have handed it to him marked. Of course, I had given it to him for his complaint. Whether or not relevant, it would have been effective to show what I had already shown in my analyses of the government's citations, that they are all misquoted or misinterpreted. Here he could have done it effectively and didn't, why I do not know. I think it is also bad to say, "if it is researched". I think the judge is entitled to assume that the lawyer has done his research before the hearing.

Here Bud does quote what he and Jim had missed in "Welford", that scientific papers "cannot be cloaked in secrecy". He then quotes Hoover's testimony before the WC.

Werdig's answer (these being the only points Bud made) is that I had to be in an adversary position for "Weflord" to be relevant". I think the lawyer should point out these irrelevancies to the judge, not have the judge ascertain for himself that they are ireelevancies. In one like the instant case, there was no possibility, and thus the

actuality is that the judge is not going to and not going to have time to reflect and research, for he made a spot decision, and that that very point. And it was the adverse decision.

Entirely aside from the fact that this memo is not intended as criticism of Bud, which is is on the fact (but I also have responsibilities, for I agreed not to sit with him, for example, when I could have asked him why he didn't want me to when I knew he didn't really know the fact—I didn't want any kind of argument in the courtroom). I think this transcript discloses several impirtant things.

One is the indespensibility of proper and complete preparation. Bud was not prepared. He had not done his legal research (even when I supplied him with a memo shpwing the government's citations did not mean what the government's papers said they mean) and hence left the fallacious interpretations and misrepresentations uncorrected, even unchallenged on the record. The judge has to go from the record. Another is a full and proper argument of what the law says and means. That is lacking.

It also shows the total lack of federal scruple. There is no dirty trick they will not pull, no lie they will not tell, no misinterpretation or false statement below them.

Another is Bud's docility, his silent acceptance of the false, the tortured - even the personal insult. Perhaps this is because he is without recent courtroom experience, but I think this record shows that, politely, the governmentUs lawyer should be interrupted every time he lies. The initial effect may be to seem impolite, but that, if it is the case, is minor compared to the alternative. Or, there has to be time for full and adequate response and a means of keeping track ofall the lies and mispepresentations. I think that this brief proceeding shows the latter is never possible, and there must be an interruption to establish truth, and that there must be, in hand and quoted at the proper point, exactly what the law and the precedents really say, not the false meaning given them by government counsel.

We have to stick to strict meaning to words, like "investigatory files" and lab and scientific studies. The record shows what is false, that I sought an investigatory file.

In turn, this points up the urgent needd of full documentation in the complaint. Especially with Bud, who is not what Percy Foreman calls a front-chair lawyer, and is inclined to say little and argue less, do I think it is indispensible for there never to be what he calls a "bare-bones" complaint, for what is not in the complaint may not get into the record.

While I think the judge had made up his mind in advance, and his record indicates a predisposition to side with the government, from what I've been told, we should not havemade it so easy for him to do this. Moreover, there is a collateral value to any assassination suit under the FOI: it makes an official record, in court, whether or not it ever reaches a hearing or adversary stage. Such a record may at any time, now, in the near or distant future, have some value. Also, I think that with the ignorance that can be assumed on the part of whatever lawyer(s) handle the case for the government and the probability of indocrtination by those (in the present and near future) largely responsible for the official fiction, the proffering of an addendum of fact and meaning can serve to inform an honest opposing lawyer and give problems to the dishonest ones.

My thinking has not yet extended to appeals and I have no basis for having a valid opinion of what can or cannot be done by that means, whether by the plaintiff or defendant. This case will be my first experience with an appeal. I hope the machinery makes possible the establishing of a record of false statement, misrepresentation distortion, misquotation and, I think, what amounts to perjury, whether or not it is technically that crime.