

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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HAROLD WEISBERG, :
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 Plaintiff, :
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 v. : Civil Action No. 75-1448
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 GENERAL SERVICES ADMINISTRATION, :
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 Defendant. :
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TRANSCRIPT OF PROCEEDINGS

Courtroom No. 4
U.S. Courthouse
Washington, D.C.
Friday, March 4, 1977

The above-entitled matter came on for hearing in open court on Motion to Compel at 10:10 o'clock a.m., before THE HONORABLE AUBREY E. ROBINSON, JR., United States District Judge.

APPEARANCES:

JAMES HIRAM LESAR, ESQ.,
appearing on behalf of plaintiff.

MICHAEL J. RYAN, ESQ.,
STEVEN GARFINKEL, ESQ.,
ADRIAN THOMAS, ESQ.,
LAUNIE ZIEBELL, ESQ.,
appearing on behalf of defendant.

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OFFICIAL COURT REPORTER
8822 UNITED STATES COURT HOUSE
WASHINGTON, D. C. 20001

P R O C E E D I N G S

1
2 THE DEPUTY CLERK: Harold Weisberg versus General
3 Services Administration, Civil Action 75-1448.

4 MR. RYAN: Good morning, Your Honor.

5 THE COURT: Good morning, Mr. Ryan.

6 All right, are you ready to proceed?

7 MR. RYAN: Yes.

8 May it please the Court, Your Honor, my name is
9 Michael J. Ryan, Assistant United States Attorney. I represent
10 the defendant General Services Administration in this Freedom
11 of Information Act matter.

12 With me this morning, Your Honor, are three
13 associate counsel in this case, Mr. Steven Garfinkel from the
14 General Counsel's Office, General Services Administration;
15 Adrian Thomas from the National Archives, and Laurie Ziebell
16 from the General Counsel's Office at the Central Intelligence
17 Agency.

18 Your Honor, pending before Your Honor are a motion
19 for summary judgment filed by defendant General Services
20 Administration supported by affidavits of Mr. Briggs of the
21 CIA and Dr. Rhoads of the Archives. Also pending are
22 plaintiff's partial summary judgment motion on two of the
23 three transcripts which are at issue in this proceeding.

24 Your Honor, just to recap in a few seconds --

25 THE COURT: Don't recap because I have read every-

1 thing all over again. I know exactly where we are.

2 MR. RYAN: Fine, Your Honor.

3 We have also a motion to compel answers to
4 interrogatories which, I might say, are the third set of
5 interrogatories which we have answered. We have also
6 responded to two document production requests by plaintiff.

7 If Your Honor wishes, I could address the motion to
8 compel or I could go right on the summary judgment motion,
9 whichever Your Honor prefers.

10 THE COURT: Well, let's put the horse in front of
11 the cart. Let's go to the summary judgment motion.

12 MR. RYAN: Very well, Your Honor.

13 As Your Honor knows, there are three transcripts
14 involved in this FOIA request, and I will deal with each one
15 separately.

16 Your Honor, first of all, there is a transcript --

17 THE COURT: Well, two of the transcripts, the same
18 things apply to two of the transcripts.

19 MR. RYAN: That's correct.

20 THE COURT: The same exemptions you claim.

21 MR. RYAN: That's correct, Your Honor.

22 THE COURT: One and three.

23 MR. RYAN: The January 21, 1964, transcript, pages
24 63 to 73, and also the June 23rd, 1974 transcripts of the
25 executive sessions of the Warren Commission. As to those

1 transcripts, we have claimed Exemption b(1), which exempts
2 national security material; Exemption b(3), which, as Your
3 Honor knows, exempts material otherwise exempted by statute;
4 and Exemption (5), which exempts intra-agency memoranda.

5 Your Honor, those two transcripts, the one transcript
6 and the portion of the other transcript, continue to remain
7 classified Confidential, and at this point I think it's very
8 important --

9 THE COURT: Well, I don't think that we are going to
10 get very far arguing about the Confidential classification
11 because you have some problems about that; don't you?

12 MR. RYAN: Your Honor, I am not sure. Plaintiff has
13 made a motion for partial summary judgment as to one of those
14 transcripts, claiming that it has been declassified, and I
15 would like to clear that up right now.

16 Plaintiff has submitted the cover page of the
17 January 21, 1964 transcript, which shows that that particular
18 edition of the transcript has been declassified and no
19 classification applies. We are talking about ten pages of that
20 transcript which remain Confidential, Your Honor, and in that
21 particular edition of the transcript, those ten pages have
22 been removed.

23 So, obviously, for purposes of researchers and
24 historians and others who wish to look at that transcript,
25 that particular transcript minus those ten pages is declassified

1 Then I think there may be a misunderstanding on plaintiff's
2 part.

3 So, we have submitted affidavits and we also have
4 submitted answers to interrogatories which we feel, Your
5 Honor, justify those transcripts continuing to be classified
6 Confidential; at least that they were properly classified at
7 the time that they were classified and that the agency has
8 followed the proper procedures in downgrading them from the
9 Top Secret classification to their present classification of
10 Confidential.

11 Your Honor, we have also claimed that b(3) exempts
12 disclosure of these particular transcripts as well as
13 Exemption b(5).

14 Your Honor, perhaps it would be easier to deal with
15 Exemption b(5) first.

16 As Your Honor knows, the transcripts of the
17 executive sessions of the Warren Commission reflect the free
18 exchange of opinions, recommendations as to what the final
19 report of the Warren Commission would be. It was on that
20 basis that the agency decided to invoke b(5), which in our
21 opinion, Your Honor, is a permissive exemption; in other words,
22 an exemption which we can invoke but which, absent other
23 exemptions, we could in our discretion choose to release that
24 particular transcript.

25 A great number of the executive session transcripts

1 have been released. I believe these three transcripts are the
2 last ones which have not been released. And there were a
3 great many, thousands of pages in those Warren Commission
4 transcripts.

5 Your Honor, were it not for the continuing applica-
6 tion of the b(1) exemption, I think that it might be the case
7 that we would exercise the permissive discretion to release
8 those transcripts. So, we are really talking about the
9 continued application of the b(1) exemption to those two
10 transcripts. That's primarily what we are discussing.

11 As to the b(3) exemption which we have invoked,
12 Your Honor, that is on account of the application of -- I
13 believe it's Section 403(d) of the CIA statute which requires
14 a director to continue to withhold or try to protect
15 confidential sources and methods.

16 Your Honor, the subject matter of those transcripts
17 does deal with methods employed by the Central Intelligence
18 Agency in a confidential way to protect those particular
19 methods.

20 Your Honor, the May 19th transcript has been sub-
21 mitted to Your Honor for in camera inspection. We are not
22 claiming classification with respect to that transcript; merely
23 that it is exempted under b(5) as an intra-agency memorandum
24 b(6) because its disclosure would constitute a material
25 invasion of privacy of the individuals discussed in that

1 transcript.

2 Your Honor, we have submitted the affidavits. We
3 feel that the affidavits of the government would be entitled
4 to great weight at this point inasmuch as we have pursued the
5 discovery route which Your Honor required back on May 25,
6 1976. We have gone through quite lengthy discovery. We have
7 had three sets of interrogatories, two document production
8 requests.

9 We have not answered every single interrogatory.
10 We filed objections to certain of those interrogatories.

11 Plaintiff has contested our objections with a
12 motion to compel. We have responded to the motion to compel.

13 The most recent motion to compel we argued before
14 Magistrate Dwyer. The Magistrate requested that the motion be
15 re-cast and re-filed. Plaintiff chose not to do that but
16 instead to request a trial in this case. As a result, we did
17 not respond to that motion to compel.

18 But we feel that in view of the fact that we have
19 responded to the interrogatories which are the subject of
20 the motion to compel and have noted our objections, that our
21 position stands on the record.

22 Your Honor, if there are any questions with respect
23 to our position in this matter, I would be happy to try to
24 answer them. I think the matter has been before Your Honor
25 one other time and Your Honor is familiar with our position.

1 THE COURT: Your memorandum clearly states it.

2 MR. RYAN: I have representatives here from the
3 agency. If Your Honor wishes to pose any particular questions,
4 I think we can attempt to answer them.

5 Thank you, Your Honor.

6 MR. LESAR: James Lesar, attorney for plaintiff
7 Harold Weisberg.

8 Your Honor, I will make things very brief since you
9 have stated that you are familiar with what is at issue.

10 The first question at issue with respect to the
11 motion to compel answers to interrogatories is that this
12 Court indicated very clearly nearly a year ago that we were
13 entitled to discovery and that we would be allowed to proceed
14 with it, and if we did not get it, this case would go to
15 trial.

16 It has been one frustration after another for nearly
17 a year trying to get the relevant information, and we don't
18 have it.

19 The defendant has objected to basic questions
20 relating to --

21 THE COURT: Stand up, counselor.

22 MR. LESAR: Yes.

23 -- has objected to basic questions which relate to
24 the credibility of its claims that the transcripts are
25 properly classified.

1 We face in this situation the customary situation of
2 a litigant who must try to counter the authoritative affidavits
3 of persons who have seen documents that we have not. That
4 makes the discovery all the more essential.

5 But in this case they claim, with respect to two
6 transcripts, that they were classified as of a certain date
7 by the CIA at a Top Secret level, and then in a period of
8 less than three months they suddenly plummet to Confidential.
9 They refused to provide any answer as to what event or
10 circumstance caused that plummet in the level of classification.

11 Obviously, that's important for us to know.
12 Obviously, it gives us the basis of attacking the credibility
13 of that classifier.

14 With respect to the two classified transcripts, the
15 most important question is whether or not they were properly
16 classified originally. The uncontradicted evidence is that
17 they were not.

18 The defendant has admitted that the provisions of
19 the executive orders were not followed, that the Warren
20 Commission did not have authority to classify these documents.

21 The affidavit of Mr. Weisberg has been uncontradicted.
22 It states that the transcripts, in violation of the executive
23 classification procedures, were classified routinely without
24 regard to content, and that there were other irregularities in
25 the classification proceedings.

1 They now claim that they have been classified
2 properly by the CIA at a level of Confidential. But they also
3 state in the same breath that there are copies of documents
4 missing -- of classified transcripts missing, and that no
5 search has been made to try and recover these.

6 THE COURT: Well, what's that got to do with it?
7 The ones that we are talking about are not missing.

8 MR. LESAR: There are several copies of each of
9 these transcripts and there are copies missing. They do not
10 know where the original type scripts of these transcripts are.
11 They never made any attempt to search for any of these copies.

12 THE COURT: Well, what has that got to do with this
13 litigation?

14 MR. LESAR: Well, I think --

15 THE COURT: All you want is one copy. It doesn't
16 make any difference if they lost or burned up or threw away
17 ten others.

18 MR. LESAR: What it bears on is the credibility of
19 their claim that the content of this is classified in the
20 interest of national defense. If it were classified in the
21 interest of national defense and were that essential to our
22 national security, I am sure that they would have tried to have
23 recovered any copies or find out where there might be copies
24 missing that someone could make available to someone else in
25 violation of the classification.

1 The other obvious fact is that the basis for with-
2 holding these under Exemption (1) is to protect the confi-
3 dential source or confidential source and methods.

4 At one point in this proceeding, very early on,
5 we addressed a question with respect to the June 23rd
6 transcript as to whether or not Mr. Nosenko was not the subject
7 of that transcript. They refused to answer that on the
8 grounds that it was getting at the information that they were
9 trying to protect under Exemption b(1).

10 We then pointed out that it was public knowledge
11 that Mr. Nosenko was the subject of this transcript, and they
12 admitted it. This bears on the spurious nature of the claims
13 that they are making.

14 Now, there is a transcript, the January 27, 1964
15 transcript, which was the subject of a previous lawsuit. They
16 claimed that it was classified.

17 We now have, as a result of some of the discovery
18 in this case, documents indicating that the CIA instructed
19 that that be withheld to protect sources and methods.

20 That document is now public. There never was any
21 basis for its classification. Mr. Weisberg has so stated in
22 his affidavit, without contradiction.

23 Not only has he stated without contradiction that
24 it was never classified, properly classified, but it reveals
25 no source or method. Yet that was the basis on which the CIA

1 was withholding it.

2 THE COURT: You don't know what it reveals.

3 MR. LESAR: Yes. We have it.

4 THE COURT: Yes. But you don't know really what it
5 reveals. That's the problem that we are faced with in these
6 classifications.

7 MR. LESAR: No. I think you misunderstand me. We
8 have a transcript.

9 THE COURT: I understand what you are saying very
10 clearly. You have the whole transcript. You have read it
11 word for word. You know exactly what it says.

12 MR. LESAR: Yes.

13 THE COURT: And to you it reveals nothing either
14 with respect to source or method.

15 MR. LESAR: Well, we have asked, in one of our
16 interrogatories, the CIA to state what it reveals.

17 THE COURT: Well, that's getting the information;
18 isn't it?

19 MR. LESAR: Well, it seems obvious to me that if
20 it revealed anything, they wouldn't have released it, or if
21 it could have revealed anything.

22 Now, what these transcripts involve are defectors
23 to the Soviet Union.

24 Now, just on the basis of common sense alone, you are
25 not going to get --

1 Who is being protected from the revelation of this
2 information? The Soviet Union is not. They know. So, who
3 is being protected? What national security purpose can
4 possibly be served by withholding this information? And if
5 there is one, why is the agency fighting so hard to answer
6 simple interrogatories?

7 Now, with respect to the May 19th transcript, they
8 have claimed primarily two exemptions, Exemption (5) and
9 Exemption (6). Exemption (5) deals with the protection of
10 policy advice.

11 It is evident that the Warren Commission had as its
12 purpose the evaluation of evidence and not the formulation of
13 policy.

14 Interrogatories have been addressed to the
15 defendants to state what policy was discussed or whether it
16 was made available to anyone, and they have refused to answer
17 that.

18 The obvious reason is because there was no policy
19 that was properly within the purview of the Warren Commission.
20 Their job was to evaluate evidence, and that is disclosable
21 under Exemption (5).

22 In addition, the agency invokes Exemption (5)
23 capriciously because it has released other transcripts to
24 which the same objection would apply. I suggest that is a
25 waiver of their right to claim Exemption (5) in this case.

1 THE COURT: What is that argument? Once they are
2 wrong, every other time that you make a demand is to presume
3 they're wrong?

4 MR. LESAR: No. What I am saying is you have a
5 series of transcripts. All of them are part of the same
6 proceeding. They're all Warren Commission transcripts. Each
7 of these transcripts is of meetings at which the Warren
8 Commission discusses the matter before it: the assassination
9 of President Kennedy.

10 Now, if Exemption (5) applies to one, it applies to
11 all.

12 If they invoke it only for certain ones, then we're
13 back to the point where we have no longer a freedom of
14 information law but we have an exemption which can be used
15 capriciously by the agency to deny a litigant any material
16 that is embarrassing to the government.

17 Exemption (6) is also invoked with respect to the
18 May 19th transcript. That deals with the clearly unwarranted
19 invasion of personal privacy.

20 The affidavit which has been submitted in support of
21 the government's motion for summary judgment does not establish
22 that there was a clearly unwarranted invasion of privacy.
23 It doesn't even come close to it.

24 The most that is alleged -- it doesn't even allege,
25 for example, that there would be grave personal damage

1 resulting to any individuals as a result of the disclosure
2 of these documents.

3 In fact, there are reams of material publicly
4 available which indicate that two Warren Commission staff
5 members were the subject of that transcript, and that the
6 defendant has admitted this in answers to interrogatories.

7 The information that is publicly available is
8 vicious; it is defamatory in the extreme. There is some
9 reason to believe that the transcript in fact clears the
10 two staff members of the vicious and defamatory campaign which
11 is publicly available for the cost of a phone call to the
12 National Archives.

13 So, on what possible grounds can it be contended
14 that any invasion of privacy outweighs the public interest
15 in making this document available?

16 Finally, this is not properly a subject of Exemption
17 (6) because it is not a personnel file. The legislative his-
18 tory quite clearly indicates that Exemption (6) was to be
19 applied to certain types of government personnel files which
20 contained very personal details about a person who was applying
21 for a job or who worked for a government agency.

22 This is not that type of a file, and I think that
23 the Supreme Court decision in Department of the Air Force v.
24 Rose quite clearly indicates that this is not within the
25 purview of Exemption (6).

1 The government has cited one case, *Ditlow v. Schultz*,
2 in which the Court of Appeals in this Circuit did uphold a
3 decision which suppressed the name of individuals on customs
4 declaration forms. But that quite clearly was proper. It
5 quite clearly was the kind of information sought to be
6 protected.

7 In another case, *Goetman v. NLRB*, names and addresses
8 of individuals were released of union members because the
9 court felt that whatever minimal loss of privacy there might
10 be, it was outweighed by the public purpose of the person
11 seeking the disclosure of the information. In this case, even
12 that is not involved because the names of these individuals
13 are known.

14 So, I respectfully submit that there is no ground
15 for withholding the May 19, 1964 transcript.

16 MR. RYAN: Your Honor, I will be very, very brief.

17 Your Honor has, of course, the May 19th transcript.

18 Your Honor, we have asserted the sixth exemption to
19 protect the privacy of the individuals discussed. Your Honor
20 knows well the balancing tests. We will abide by the Court's
21 decision with respect to the application of Exemption (6) to
22 the May 19th transcript.

23 As Your Honor observed with respect to the other
24 two transcripts which remained classified Confidential, Your
25 Honor, plaintiff's questions addressed to the release or the

1 declassification of another transcript, we submit, are totally
2 irrelevant to these two transcripts.

3 The subject matter of those other transcripts in
4 this Warren Commission investigation, which have been de-
5 classified, is different from the subject matter of the two
6 transcripts which continue to remain classified Confidential.

7 Your Honor, we submit that under the standards
8 appropriate for consideration at the time these transcripts
9 were classified, they were properly classified. The agency
10 is simply following its procedures in the declassification of
11 these transcripts. At some time, more than likely, it is
12 inevitable that these transcripts will be completely declassi-
13 fied.

14 THE COURT: Yes. You don't think ten years is
15 long enough?

16 MR. RYAN: Your Honor, there is a schedule for
17 declassification.

18 THE COURT: No. But, you see, that schedule for
19 declassification just is not something that you can rely upon
20 in the face of litigation.

21 MR. RYAN: Your Honor --

22 THE COURT: They will get around to it when they
23 feel like it. Yet, in the meantime, we have got four or five
24 suits pending.

25 MR. RYAN: Your Honor, I might --

1 THE COURT: I think there needs to be, obviously,
2 some real judgment exercised with respect to that. I am
3 talking about the Nosenko business.

4 MR. RYAN: Your Honor --

5 THE COURT: It's all out in the open; isn't it?

6 MR. RYAN: Your Honor, the fact of Mr. Nosenko's
7 name is out in the open. But the subject matter of those
8 transcripts is not out in the open.

9 And we contend that the subject matter goes beyond
10 the discussion of that particular name, Your Honor. It
11 involves other matters which we continue to request that they
12 be kept classified Confidential.

13 Your Honor, I might point out --

14 THE COURT: But it would only be to protect the
15 national security; is that correct?

16 MR. RYAN: That's right, Your Honor. Under b(1),
17 that is the purpose of our continuing to request that it be
18 classified Confidential, and it has been so classified.

19 THE COURT: Well, how do you propose that we test
20 this? You see, this is the problem that's proposed to the
21 Court.

22 MR. RYAN: Your Honor --

23 THE COURT: There is nothing that I can see to
24 prevent an affidavit being constructed by the head of an
25 agency that very carefully -- as it was done here -- that makes

1 it impossible for the Court to exercise any rational judgment.
2 That's the difficulty we have in this thing.

3 I have no desire to second guess anybody in the
4 CIA as to what is or is not in the public interest.

5 But by the same token, we have no assurance in any
6 particular matter that it's any more than just a general desire
7 not to let us have information that should be available.

8 MR. RYAN: Your Honor --

9 THE COURT: I can understand very clearly. I don't
10 think I would have any difficulty if this case were being
11 tried in 1967. But this is 1977, and the affidavit would lead
12 us to believe that the same exact circumstances that existed
13 for the classification in 1964 exist in 1977.

14 MR. RYAN: Your Honor --

15 THE COURT: Now, that's the purport of the affidavit.
16 That's the purport of your argument; is it not?

17 MR. RYAN: Your Honor, we would --

18 THE COURT: Of course, to some extent.

19 MR. RYAN: -- submit that it has been declassified
20 from Top Secret to Confidential.

21 THE COURT: Surely. And in 1987 you might get it
22 down to some other classification. In 1997 you will say,
23 "Here it all is. Nosenko is dead. They have got a new
24 regime in Russia. We have got a new administration here --
25 will have had three or four.

1 MR. RYAN: Your Honor, we would submit that our
2 Court of Appeals has addressed this problem, this problem that
3 the Court is faced with in the case of Weissman v. CIA, and
4 has, in addressing that problem, stated only in the extreme
5 cases would the Court look behind what it considers to be an
6 inadequate affidavit.

7 If the affidavit is not adequate, Your Honor, it
8 seems that the burden would be upon the government to redo the
9 affidavit, to submit a more adequate affidavit for the Court's
10 satisfaction.

11 But I would submit that it's important to keep in
12 mind that the agency does review these documents when a
13 Freedom of Information Act request comes in. It just doesn't
14 rely upon the schedule.

15 As a matter of fact, the case which the plaintiff
16 referred to where a transcript was declassified a short time
17 after a decision in favor of the government was rendered by
18 Judge Gesell, that particular transcript was reviewed as a
19 result of plaintiff's Freedom of Information Act request when
20 it was made. It just so happened that the declassification
21 review took slightly longer than the litigation took to
22 process.

23 So that after Judge Gesell had ruled that the
24 transcript was exempt as an investigatory file under b(7), a
25 short while thereafter the declassification review was

1 completed and the transcript was released.

2 So, these transcripts are looked at a second time
3 again and again, not only according to the schedule, but when
4 a Freedom of Information Act request comes in, Your Honor.

5 So, we submit that there is nothing in the record
6 to derogate from the good faith of the agency in conducting
7 an ongoing review of this transcript.

8 We submit that the decisions will be made at the
9 appropriate time, and we hope that that is a time in the nearer
10 as opposed to the distant future, to continue this de-
11 classification process, and at some time in the future these
12 two transcripts will be declassified.

13 If Your Honor is not satisfied with the affidavits
14 which we have submitted, Your Honor, we can consider that and
15 attempt to provide additional material. I don't know that
16 that is necessary, but we submit that we have made the showing
17 required under the cases for the sustaining of the invocation
18 of the b(1) exemption.

19 So, Your Honor, we would rest on that presentation.

20 If Your Honor has any further questions --

21 THE COURT: No, I don't have any further questions.

22 I understand your position. I understand the plaintiff's
23 position.

24 MR. RYAN: Thank you very much, Your Honor.

25 THE COURT: All right.

1 MR. LESAR: Your Honor, may I just correct a couple
2 of things?

3 First of all, it is not true that the plaintiff's
4 request for the January 27th transcript was reviewed when he
5 requested it. He made that request in 1968. It was not
6 reviewed until 1974.

7 THE COURT: I know. I have had other Freedom of
8 Information Act cases. They don't do anything until they go
9 to court. That's the pattern throughout the government.

10 MR. LESAR: It is also --

11 THE COURT: The presumption is that you are not
12 entitled to it. That's the way they operate. You have got to
13 fight for it.

14 I haven't had a single case yet where they said yes,
15 under the statute you are entitled to it. Not when it gets
16 down to close decisions of any kind. The presumption is very
17 much to the contrary.

18 Now, I cannot take any more time in this matter. I
19 told you, I have read everything that you have submitted. I
20 will take it under advisement. I will issue the appropriate
21 order.

22 Thank you.

23 MR. RYAN: Your Honor, I am advised by counsel that
24 under the terms of Executive Order 11652, the classification
25 order, plaintiff also has a right to seek classification review

1 by the Intra-agency Classification Review Committee. So, that
2 is an alternate route the plaintiff can go. I don't know
3 whether he has exercised that prerogative.

4 THE COURT: Well, he is not required to. I know
5 it's an alternate.

6 MR. RYAN: He is not required to, but it is available

7 THE COURT: Yes. But if he gets the same thing that
8 he has had over the years --

9 MR. LESAR: As a matter of fact --

10 THE COURT: I am not going to hear any more. I told
11 you. This could go on for the rest of the day.

12 I understand your problem. I will wrap it up and
13 you can get it to the Court of Appeals as fast as you can,
14 because that's where it's ultimately going to be decided.

15 All right.

16 (Whereupon, at 10:40 o'clock a.m., proceedings
17 in the above-entitled matter were taken under
18 advisement.)

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20 REPORTER'S CERTIFICATE

21 Certified to be the official transcript of proceedings.

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Official Court Reporter