Memo to read Howard 3/11/79 and mail to JL on Apectro appeal, 1107

There is another option we should hold open and include, that the appeals ~~court~~ court can and under these exceptional circumstances should accept and consider this new evidence that had been withheld at the district court level.

We should also tell it that since thos case reached it two other cases did and that after the district court level we found, as in an earlier case, that there is substantial reason to believe that the Government's affidavits were not ~~the~~ truthful. (I(ll h ve this ready for Jim, with proofs, before he returns and if they should ask at oral arguments he'll have it. They already know about Epstein and the CIA from the 1448 appeal.)

In other words, the issue is coming back again and again, because of the unique conditions in Freedom of Information cases.

After we spoke yesterday Jim called. I told him you had read Wilkey only and he said you should read McKinnion in Jordan. I think this is what I had in mind but I've not reread yet. He said that they could undee the Jordan condition accept new evidence.

The Congress decided that Freedom of Information cases are of such a nature and importance that they are to be expedited.

Only one party can know with certainty what records exist and where they are located.

This is the party with the record of withholding information that lead the Congress to enact FOIA and to amend it to require greater disclosure.

This is the party with the traditional motive for withholding.

Delay in and of itself frustrates or negates the Act and the purposes of the Congress, both letter and spirit of the Act.

We now have a long history of this, of wothholding and of incomplete compliance and of untruthful affidavits by the Government.

I am an aging and unwell requester/appellant described by the Government itslef as pssessed of unique knowledge. My role has become a public role. I seek to use this unique knowledge and the Act for public interests that are entirely those of the Act itself and have already bequeathed all my records and work to a public archive.

If I am compelled to go back to district court in order for the appeals court to be able to consider this new evidence, which bears on the existence or non-existence of the records sought and on the nature of the search and the truthfulness of the affidavits the spirit and letter of the Act are nullified bedause of the delay and cost.

In this connection I would not that when I first made the request in 1966 the FBI did not write and tell me that the information I asked for did not exist. Instead, then and thereafter, it merely ignored my requests. We have records in which this was stated in the highest FBI echelons and approved by the Director.

In more than 10 years the Government has not used a total defense: that on the basis of a first-person affidavit it stated that the information sought does not exist.

HF

Once again there is a single, inadequate affidavit as in the case over which the Congress amended the investigatory-files exemption, that of Kilty. Kilty swore in contradiction to himself on the existence of non-existence of the records osught and we got still a third version on deposing retired FBI agents who conducted the tests in question. Kilty also did not provide an unequivocal affidavit attesting to the search and compliance. He did not even state that he searched all places where the information shuught could exist or should exist. He did not state that he knew of no other places to search. He did not state that he checked to see if any files had been transferred, as in that period some were to Congressional Liaison of the FBI. His sole affirmation is to where records "would" exist."

In this he did no include what we have proven to be a major repository. The new information reflects that most records in this case are as we alleged at district court, at the office of origin, and that previously withheld records of the office of origin indicte still further reason to believe that there remains relevant withheld information. We were denied any search of those files and we asked for it. We were denied the opportunity to take testimony that could have established this and the failure to search there and elsewhere.

This left no alternative to attempting to present this evidence to the court of appeals because while the case was before the district court all such proofs had been withheld.

If the Government can withhold relevant information until after the district court rules it has successfully negated the Act unless the appeals court accepts and considers such evidence.

Where there is motive for withholding, as in major historical cases there always is and in this case the records is abundant and undisputeda and both House of Congress have already found it to be the fact, thatbthere was such withholding;/ and where the Act requires prompt disclosure; unless this court now accepts this new evidence the Government has a machine for nullification of the Act.

The consequences are greater than nullification of the Act. It means, inevitably, a constant overloading of all courts. And it puts a premium on misleading the district courts.

The "any person" of the Act is effectively denied his rights under the Act if in additional to having to lirigate to obtain withheld information he is required to litigate endlessly when he learns of relevant and withheld information after the district court rules. Few individual Americans can sue to obtain public information. Fewer still can afford to appeal. Of this small minority only a small proportion can afford to return again and again to district court, as I have had to do in this long case to obtain information the Goverbment has not yet denied ahving in any competent and unequiocal affidavit and when it has not yet attested to a good-faith swarch with due diligence.

Issues presented:

"...appellees submotted affidavits stating that no documents existed other than those already produced ..." Not so. No such affidavits presented by appellees.

Their own citation of Kailty (page 2) does not say this. He says only that !I have conducted a review of the FBI files which would contain information that Mr. Weisberg requested... " (emphasis added.)

There is no affidavit to any search and this is conditional and became evasive when we asked what files he had searched.

Language and purpose of remand:

"...for the taking of testimony from those with first-hand knowledge of the original laboratory investigation ..."

This is not thelanguage or the intent and limitation of the remand:

"..of interest not only to him but to the nation. Surely their existence or non-existence should be determined speedily on the basis of the best available evidence. i.e., the witnesses who had personal knowledge of the events at the time of the investigation was made." (Empahasis added.)

This is anything but a limitation to taking the testimony of a few of the lab agents involved - and being foreclosed from others.

The court avoided saying and limiting to "those who had first-hand knowledge of the original laboratory investigation."

In this it recognized that to determine the "existence or non-existence" of the information sought it would be necessary to obtain evidence from 'witnesses! with knowledged "of the events," not ~~just~~ limited to a few Laboratory agents.

From this, for example, we obtained a first-person account by the third man wounded, James Tague, and provided other relevant information reating to the missed shot and the damage to the curbstone. These bear on the need for such records to exist.

We have no statements comparing the laboratory information relating to this shot with any of the other relevant evidence. In fact we have no actual report on this examination and no report on why it did not detect all the ~~minut~~ elements of bullet metal.

The only response to this evidence from the FBI was total silence.

No additional search was reported. No affidavit stating that additional records did not exist was provided. Even when one of the deposed agents testified that the skimpy information we were given could relate to such common street objects as tire wheel weights the FBI remained silent. Spectrographic examination permits explicit quantitative and qualitative statements of the rests of tests and it is to obtain this information that the tests are performed.

"Good faith" pp. 5,7

"...that the affidavits of Kilty were (not) insufficient to show a proper check of the files. ..."

If Kilty's affidavits had been adequate there would have been no need to remand.

When one expert provides mutually contradictory affidavits relating to the issue of compliance no inference of good faith can attach to it.

Footnote 2 on the locating of the retired SAs is not faithful to reality.

There is and was no showing that the addresses are secret, not in the phone book or listed by the society of former agents. We wanted to avoid possibilities of mis-identification of similar names and had no idea if any had left the area, as Heiberger in fact had.

The inference of "harassment" is defamatory and prejudicial. There has been none. Some are going around as paid speakers and expert witnesses in private practise.

The period was not "short" and it was enough to stall us.

This kind of nails and knees law characterizes the case and the records in it.

Thus the allegation of trying to retry the Warren Commission (page 4) where we were seeking indication of the need for records to exist.

Quashing Kilty subpoena as "burdensome" and "covered matters alsready addressed in Kilty's two affidavits."

We have no statement from Kilty on which files he had searched or were searched There is no record on this. But if taking the deposition was in any way "burdensome" given the mandate of the appeals court providing a copy of the FBI form on which search requests are made was in no sense burdensome and as a possible indication of good faith it was not provided to reflect, in a manner other than burdensome, what files had been searched.

One would never know from government counsel that the Act places an affirmative burden of proof on the Government.

We tried to depose Kilty on this after learning on deposing Frazier that Dallas files had to be searched.

Determining what files had been searched is claimed to be "beyond the scope of the remand." (page 5) This means that to the Government determining the existence of non-existence of relevant information is somehow separated from what files were searched for the information, especially when the one affidant does not provide this information relating to what was searched for and where.

All of this assumes other than we told Government counsel, that we did not want to take any more depositions than were necessary and would learn from the first whether others could be dispensed with. We indicated that we might have to take 10 or 12. It also is without consideration of the financial limitations of an indigent requester, who had to pay the costs and even was asked to pay additional "expert witness" fees by the retired SAs.

From the account of the allegedly "highly informal basis" of FBI Lab work one would not know that it was to obtain evidence for a Presidential Commission investigating the assassination of a President. Or that it was asked to perform specific tests by that Commission, results of which have not been provided. The incredible claim that none of the agents "made notes on results they deemed insignificant or insufficient" crumbles on the rock of fact that there are computer printouts on NAAs and non has been provided on Q15. This is the specimen about which Kilty swore both ways. It is Gallagher who said he didn't like the results. But he had to have results first in order to decide he did not like them. These results, from Oak Ridge, remain withheld.

Now we learn that Q15 no longer exists. "Good faith" on the part of the FBI did not extend to telling the court or us that in addition to not having the spectrographic plate relating to the curbstone, which can destroy the official solution to the crime it no longer has a soecimen that can likewise destroy the official solution.

But were none of this true how would tyose agents be able to support their conclusions before the Commission? What evidence did they have? Why not keep their notes and produce them as proof?

The Guinn testimony that is in my affidavit of 1/3/79 is in point in what follows here (on p.7) that allegations of the destruction of evidence are "irrelevant." Now we know that there is no Q15 and no curbstone spectrographic plate although bothexisted and we have no results on both tests, which were made.

The quotation from the district court's opinion (.page 8) amounts to arguing that records could have been destroyed for it is that whether or not records should exist or tests should have been made is not material.

Now it is claimed that some evidence was destroyed and it is admitted that there was NAA on Q15 and those records allegedly do not exist.

FBI regulations preclude the destruction of such records. Establishing that tests were to have been made or were made establishes the fact that records did exist. They could not be destroyed under regulations. Therefore they have to exist today.

Or were deliberately destroyed in violation of regulations and other considerations.

The claim of not preservinf results that the testers did not like also crumbles on the known actualities. They did not like the results of the NAA to determine whether Oswald had fired a rifle but they kept all those records and forced them on me in substitution for the records I did ask for relating to other similar tests, of the evidence of the crime. Q3 and Q15, page 9, depends on Gallagher's allegation that he kept no records because he did not like the results. However, there were computer printouts and other records relating to the performance of the tests, whether or not Gallagher liked the results. These have not been provided. Those I did not ask for and Gallagher also found not to be significant, relating to the paraffin cats tests, were preserved and were provided.

This is more than mere inconsistency. The missing information relates to the basic facts of the crime and is essential to support the official solution.

If Gallagher's conjectures about not preserving the printouts on a selective basis can be credited, this does not explain their absence from the records provided by the other derendant, AEC.

Live round: based on the unsupported allegation of a directive to "preserve" it as historically important. Ridicule. The histoircally important bullets were those fired, not those not fired. No such directive has been provided. However, the alleged directive appears to have been revoked for the House committee, which gave it to Guinnt to test.

As I showed by providing speciments, "posterity" could have been served by taking the minuscule speciments ~~xxxxxxxx~~ after "pulling" the bullet, following which it could have been reassembled. Reloading ammunition is a common practise.

Curbstone: remarkably brief and inaccurate treatment. The FBI did not tell the Warren Commission that ~~xxx~~ any "debris" caused any mark on it.

It is not only that all reports are missing. Not even the tabulations that accompany all other spectrographic examinations was provided.

Only two metals were detected of the dozen in a bullet. Spectrographic examination requesires a much smaller sample for testing and is capable or determining the presence of all those elements.

The absence of most of the elements required a report stating why they were not present as well as what this meant in terms of the test capabilities.

Now we know that the FBI knew that the hole had been patched before it made ~~xxxx~~ this examination. Yet it did not provide any such information to the Warren Commisionx, to any court or to me in this instant cause.

And the spectrographic plate allegedly is missing, without any affidavit so attesting. The unsworn allegation of disposal in saving lab filing space is ridiculous given the negligible amount of space required for preservation and the failure to save the same space by disposing of any othersuch thin plates. Why this one alone?

Regulations forbad this alleged destruction. So also did the testimony of Director Hoover to the Commission, that the FBI would never close tha JFK assassination case.

From 10/31/66 on there was an executive order on this covering the entire Government.

Ahd we were told by Kilty, Frazier and Bresson that they had all theplates in 1975.

Holes in JFK' shirt:

There was no basis for the assumption that Frazier became a hairs-and-fibres expert for the solo purpose of making this examination when as he testified, Stombaugh had that speciality and functioned in that capacity for the Commission.

Calling these damages "bullet holes" is not justified by any of the evidence and is ~~xx~~contradicted by the little-knonw Commission evidence that this damage was done by the

dallas hospital personnel during emergency efforts. There is no denial of this evidence in this instant case. There is confirmation in the spectrographic examination of these portions of the shirt and of the tie. Neither showed any trace of any bullet metal although the hole in the back of the shirt did show such traces on spectrographic examination.

There is no dispute of the evidence I presented, that the holes do not coincide, which is required of bullet holes ~~passing through~~ when a bullet passes through overlapping materials.

Report on NAA (p. 13): This concoction, which begins with the pretense that Frazier did not know the difference between worksheets and a "formal report" includes the magical, that Kilty gave us the worksheets he swore did not exist, on Q15. We have no Q15 NAA worksheet.

And how there is House testimony that Q15 no longer exists. This testimony was from the expert recommended by the AEC and opposed by Gallagher and the FBI. (Gallagher's explanation is that one commerical firm with security clearances would commercialize while another commercial firm would not. The one he suspected, he says, is also the one that had done the pioneering work in the use of NAAs in criminalistics.)

The section concludes with two references to what does not exist in the record in this case: that the records not provided do not exist or that they were destroyed, as "duplicative," with no duplicate remaining; or "as aprt of the regular housecleaning," in which a single spectrographic plate only was "housecleaned" into oblivion.

Regulations, an executive order and the testimony of Director Hoover preclude the possibility of destruction for "housecleanings" and hundreds of thousand of records, including many thousands of actual duplicates, were preserved.

There is no affidavit stating that the records do not exist or were destroyed.

it is counsel's argument that represents no records exist, not the Kilty affidavit. Nor any prior one when that in fact is a total defense and this case would not have been before the courts beginning in 1970 if such an affidavit had ever been presented.

If there had been any "misreading" of the Kilty affidavit that could have been eliminated by providing an unequivocal one, which was not done. (pp. 16-17)

Instead counsel argues that even if he didn't say" all" he really did mean "all" and nobody ever thought of having him say "all" under oath.

Our alleged "assumption" of where records are: no assumption- Frazier's testimony, testimony in C.A.75-1996 and records I've since received, which reflect that Offices or Origin are themajor case repositories. (Importance of new evidence, which includes the Dallas Field Office having the evidence andproviding semi-annual inventories, not FBIHQ.)

They, not we, speculate. Frazier's testimony is explicit.

On page 18 they again pretend that we are betrying the facts of the assassination. Only when we had no alternative to establish that records not provided had to exist. On ~~point~~ point after point what we were forced to do has been confirmed and on not point

is any of xx what they refer to disputed except by coubsel's arguments. There is no refutation of any of the evidence we produced for the sole purpose of establishing the need for the tests to have been made and reports to exist.

But even this is duspited by the record outside the courts - I have never accused the FBI of conspiring, have always said the opposite, and now we have several Congressional committee which do in fact, conclude that the FBI did withhold information resulting in a coverup.

I have no need to use an unpublicized proceeding to show that the Warren Commission's were wrong. I have done this - and included the FBI - extensively and without any refutation or even a protest of inaccuracy.

But why would ~~anyone~~ anyone even think of destroying a small object no more than an eighth of an inch think, like the curbstone spectro plate, while not destroying many hundreds of thousands of pages or records if it confirmed the official story?

Why else would anyone destroy Q15, of minuscule wieht, while preserving the container?

They keep erefrring to "virtually blank worksheets" of the Q15 NAA. I do not recall getting any worksheet, only the record of submission to neutron activation.

If the conjecture (p. 20) that the rprintouts were not kept because they were duplicative, then there was no reason for preserving any worksheets because this can be alleged of all. In fact, there would have been no purpose in making any NAAs.

The FBI had to be pressured into doing them and delayed the beginning for months. If its reason is that they were no more than duplicative then the results and the ~~printouts~~ printouts would have been preserved the confirm the FBI's position. And if they did confirm the FBI there would have been no reason to destroy this minute amount of paper compared with the enormous quantity, most of the entirely irrelevant, that was preserved. Like Mrs. Ruby's and Mrs. Marina Oswald's medical records and each and every communication from the certified and certifiable insane.

It is in fact only where they can be a question about the FBI's performance that any records have ever been ~~destroyed~~ allegedly destroyed.

Here also the new evidence on the regular inventories is important, particularly because there was no search there in Dallas, we did ask it and it was refused.

Thus giving me all of the material I did not seek, on the paraffin cats NAAs, which is by far most of the material I received, is not burdensome buy consulting an index is burdensome. Or providing the form on which any request for FBIHQ records was asked for is burdensome.

Of course all this work in and for court is not burdensome but making a xerox copy to show what was searched is burdensome.

Putting the single word "all" in an affidavit is "burdensome" but making copies of elaborate photographs not asked for is not burdensome.

Other records obtained after the district court's opinion, in C.A.78-0322, report that FBIHQ was not reluctant to phone Dallas to checks its indices for tracing evidende. In fat they disclose such an index notation. But in an FOIA case and more than a decade latter doing this would somehow be "burdensome."

On page 21 they assert that our brief (4102) states that we represented Gallagher as testifying that he had been directed not to take speciments from CE 399. If so we made a mistake. If not they did. Frazier took two samples from 399 and told the commission about takinb one only, the one clearly visible in photographs. It is the unfired bullet Gallagher said he was directed not to test because it alone had this great historical value. Coming from not being used in the crime, no doubt.

We dispited footnote 1 7 under oath in different form. They did not show us any of the NAA material at that conference, refused to let it be taped or to tape it, as the record shows, and then claimed I had asked for the results of NAAs only not to want them and to have dropped that request. What they actually showed us they demanded $50 each for, and that is the spectrographic plates.

When we raised the issue of their not providing any NAA materials they did not then claim to have shown it to us. They then claimed we said we wanted nothing on NAAs.

Footnote 18 does not refer to or describe the reading of a spectrographic plate. The record provided merely states that two metals only were detected, which is not the result of spectrographic examination of traces of bullet.

On the shirt Frazier did not testify that he himself conducted such an examination. Rather did he testify that on viewing the shirt he directed that the hairs-and-fibres expert make the examination. (p.22)

It is obvious that the 11/23/63 Lab letter to Curry cannot include the results of tests not made by that time. Therefore it could not be the "complete" report or the "formal" report. Worksheets are hardly a report of either kind and we did not get all worksheets.