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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK ALLEN, :
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 Plaintiff, :
 :
 vs. : Civil Action No. 78-1743
 :
 CENTRAL INTELLIGENCE :
 AGENCY, et al., :
 :
 Defendants. :
 :
 - - - - -

Washington, D. C., January 29, 1980

BEFORE THE HONORABLE JOHN LEWIS SMITH, Jr., United
States District Court Judge, Motion for Summary Judgment.

APPEARANCES:

MARK ALLEN, pro se, for Plaintiff.

DENNIS DUTTERER, Esq., for the Defendants.

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Dawn T. Copeland,
Official Court Reporter

PREPARED FOR: *Mr. Lear*
PAGES: 1-11

P R O C E E D I N G S

1
2 THE DEPUTY CLERK: Allen versus the CIA. Civil
3 Action No. 78-1743.

4 Mr. Mark Allen and Mr. Dennis Dutterer.

5 MR. DUTTERER: Good morning, Your Honor. I am
6 Dennis Dutterer, United States District Attorney.

7 THE COURT: Mr. Allen.

8 MR. ALLEN: Good morning, Your Honor.

9 (Argument by Mr. Dutterer.)

10 MR. ALLEN: Your Honor, first with respect to the
11 discovery matters, I did not understand the Court's statement
12 to be -- during the last status conference, to be an oral pro-
13 tective order, and as I recall, Your Honor stated that I was
14 not entitled to discovery at that time and I had hoped at a
15 future time Your Honor would determine that I was. Therefore,
16 I --

17 THE COURT: You determined that you were entitled?

18 MR. ALLEN: That I had hoped that at a later time you
19 would determine that I was entitled to discovery.

20 THE COURT: You are a law student at this time?

21 MR. ALLEN: Yes, I am, Your Honor.

22 THE COURT: What year?

23 MR. ALLEN: The third year.

24 THE COURT: Was there any misunderstanding in your
25 mind as to what I said at the last hearing?

1 Didn't I mention that this case was here for a very
2 limited purpose on remand and that no discovery would be taken?

3 MR. ALLEN: No, Your Honor, I didn't -- I don't
4 recall that.

5 THE COURT: I think the record supports that.

6 In any event, you have got to learn to follow the
7 instructions of the Court.

8 Now, these other filings are completely unnecessary
9 and improper.

10 You may proceed.

11 MR. ALLEN: Your Honor, if I may state one point on
12 that: I did not understand this to be a limited remand because
13 the decision had been vacated.

14 THE COURT: The remand speaks for itself.

15 MR. ALLEN: Very well, Your Honor.

16 There are several genuine issues of material fact
17 in this case, Your Honor.

18 The first one is that there is a genuine issue as to
19 whether the proper procedures were followed pursuant to
20 the Executive Order. That is dealing with the B-1 issue.

21 There is a genuine issue as to whether the material
22 that is presently being withheld would jeopardize CIA sensitive
23 sources and methods.

24 There is a genuine issue as to whether the material
25 that is being withheld under B-2 is subject to a genuine public

1 interest.

2 With respect to the B-1 procedural issue, that is,
3 whether defendants properly classified this document, whether
4 they went through the required procedures of the Executive Order,
5 which ever Executive Order that was, and they haven't told us
6 which one it is.

7 The defendants in their affidavit simply haven't
8 made the showing and what I tried to do through discovery was
9 to determine whether the proper procedures had been followed.
10 That is all I was trying to do and when I submitted the request
11 for production of documents, Your Honor, which I did before
12 the status call, if I recall correctly, I was trying to get
13 the first page of this document because I knew that under all
14 previous classification Executive Orders certain information
15 had to appear on the first page of each document.

16 So I asked for the first page minus any properly
17 exempt material including those classification markings so I
18 could determine if the proper classification markings -- procedure
19 had been followed.

20 Now, as it turns out, the government gave me the
21 first page of the document and then deleted all the markings,
22 Your Honor, so I couldn't determine whether the proper pro-
23 cedures had been followed, and to complicate matters, to make
24 matters worse, they made no exemption claim for this material
25 which you will see in the Owen affidavit, the exemption "F"

1 material. The government made no exemption claim for this
2 material and I needed this material to determine whether the
3 proper procedures had been followed.

4 So just summing up this issue and not to belabor it,
5 the government has not made a showing that proper procedures
6 had been followed. I tried to determine whether they were and
7 I made a good faith effort to determine whether proper pro-
8 cedures had been followed and the government -- this Court
9 decided that I wasn't entitled to find out, but I do think,
10 Your Honor, that is a genuine issue as to whether the proper
11 procedures were followed pursuant to a valid Executive Order.

12 Now, with respect to the B-1 and the B-3 issues, they
13 both amount to the same thing, Your Honor, in that the CIA
14 is contending that the release of the withheld material would
15 jeopardize sensitive sources and methods and they say that
16 qualifies under B-1 because the information would be properly
17 classified if that were the case and it qualifies under B-3
18 because it would lead to the unauthorized disclosure of
19 intelligence source or method.

20 I am sorry, Your Honor. I should have offered this
21 to the Court.

22 THE COURT: What is this?

23 MR. ALLEN: This is my opposition to the motion.

24 THE COURT: This has not been filed.

25 MR. ALLEN: No, it hasn't been. I am sorry. I was

1 just going to go downstairs and file the other two copies. I
2 have already given a copy to Mr. Dutterer.

3 THE COURT: This motion for summary judgment was
4 filed on January 17. This is January 29.

5 MR. ALLEN: Your Honor --

6 THE COURT: You are out of time on any filing of
7 opposition.

8 MR. ALLEN: Your Honor, I didn't receive the govern-
9 ment's motion for summary judgment until almost a week -- I am
10 trying to think when I did receive it.

11 I received it over five days later because of some
12 unknown delay in the mail. It wasn't possible to prepare an
13 opposition as detailed as this until today.

14 THE COURT: This was mailed to you on the 17th of
15 January. I will let it be filed for what it is worth.

16 MR. ALLEN: Thank you, Your Honor.

17 As I was stating, the B-1 and the B-3 claims are
18 the same, that is, that the release of this withheld material
19 would jeopardize sensitive sources and methods.

20 Now, the two facts that should be kept in mind,
21 which I have demonstrated in my brief, and the first is that
22 there are no sensitive sources or methods mentioned in this
23 material and this is stated quite explicitly in the report
24 of the House Select Committee on assassinations which discusses
25 this report in some detail.

1 The second point is that this document was written
2 in a special way so as to protect the sources and methods.

3 The CIA was anxious about even the members of the
4 Warren Commission knowing about -- knowing what these sources
5 were, and so this document was written in a particularly
6 special way so as to protect the CIA's sources and methods.

7 Third, I presented in the brief extensive documentary
8 evidence that this material is already in the public domain
9 in all but form. In other words, substantively all the
10 information is in the public domain and it is in documents
11 which have been previously released with the government's
12 approval and I see no need to go into all the particular
13 documents that I have.

14 One in particular I think the Court should take note of
15 and that is it is a February 14, 1964 Warren Commission internal
16 memorandum and this particular document was written very short-
17 ly after the receipt of the document that is at issue in this
18 particular memo. It was written very shortly after the
19 document in issue and I checked the Commission document listings
20 and at that date -- at the time this memo was written, the
21 Warren Commission had no other information on Lee Harvey Oswald's
22 activities in Mexico City with respect to this contact with the
23 Cuban and Soviet embassies but this document.

24 So this Warren Commission internal memoranda includes
25 information that was taken directly out of the document at issue,

1 and I think if this Court were to ever view this document in
2 camera, you could see that all the information, virtually, in
3 pages 4 through 9 in this document that have been withheld are
4 in this memoranda and the pertinent pages of the memoranda,
5 pages 7 through 10, and that, of course, is included as an
6 exhibit.

7 So when you consider the fact that no sensitive source
8 is mentioned in this document, that the document was written in
9 special ways so as to protect those sources and methods, and when
10 you view the plaintiff's documentary evidence, that this
11 material is virtually, completely, in the public domain, I
12 think that presents a genuine issue of material fact to see
13 whether this document, the release of the withheld materials
14 in this document would jeopardize the CIA's sensitive sources
15 and methods.

16 Moving on to the B-2 issue, I just have a brief
17 comment there and as I stated, I believe, before when we were
18 in the Court, I believe these Warren Commission -- I am sorry--
19 the CIA's filing instructions are particularly of use to the
20 Warren Commission scholars in determining the nature and the
21 extent of the CIA's files on the assassination of President
22 Kennedy.

23 I know they would certainly help me in determining
24 whether there is any material that should be in the public
25 domain on the subject of intent, public interest, and I think

1 because of that this is a matter of genuine public interest
2 and that the B-2 exemption does not apply given the case of
3 the Department of the Air Force v. Rose.

4 Now, I might add there is other material that I
5 mentioned earlier and that is the exemption "F" material
6 where no exemption claim is made, Your Honor, and I feel that
7 this material should be provided me.

8 The Freedom of Information Act provides that material
9 must be released unless it fits into one of the ^{NINE} nonexemption
10 categories and the defendants have made no attempt to claim
11 and I fail to see how they can justify not providing this in-
12 formation to me.

13 I think as far as the exemption "F" material, which
14 will be of considerable use to me in determining whether
15 proper classification procedures were followed, and I think
16 there is certainly a genuine issue of material fact as to
17 whether this material is withheld properly.

18 Now, Your Honor, I have done considerable study on
19 this subject and the study I have done, I think, is as exten-
20 sive as anyone else outside the government has done, and you
21 will see the affidavit of Mr. ^{HOLH} Hoke, who is probably one of the
22 leading Warren Commission scholar's in the country, and he
23 vouches for my expertise in this particular area.

24 Now, I simply have to be taken a back by Mr. Owen's
25 statement that there have been significant events between the

1 time of his first affidavit when he said the document had to be
2 completely withheld and the time of the second affidavit where
3 he released half of it.

4 I have looked at the material and it had been in the
5 public domain for at least three years and most of it for at
6 least eight years, and had I known they were seriously going
7 to contend that anything had happened between June 1979 and
8 today, Your Honor, that would cause this material not to be --
9 not to be released, I would have brought the documents in here
10 today that have been in the public domain for several years
11 and shown that this material has been there.

12 One of the reasons I sued for this document was
13 because I knew this material was in the public domain and I was
14 just appalled that the CIA was continuing to withhold it.

15 The credibility of Mr. Owen, and I certainly don't
16 doubt his honesty, but he has shown that he does not know what
17 information is in the public domain. He is just simply
18 not familiar and does not have the expertise in this subject
19 that some of the Warren Commission scholars in this field does
20 and he doesn't know.

21 What I was trying to do through my most recent discover
22 was to determine the extent of his knowledge of what was in the
23 public domain. That was all I was trying to do and I think if
24 Mr. Owen looked at this February 12 memoranda that I talk about
25 and certain other documents which would only amount to about

1 ten pages, Your Honor, I think his judgment might be changed
2 considerably about whether this information is to be with-
3 held.

4 (Balance of transcript not ordered)

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This record is certified by the undersigned to be the
official transcript of the above-entitled matter.


Dawn T. Copeland, Official Court Reporter