

Dear Jim,

Re: Frankel v SEC A 4/13/73

I have gone over all the Frankel decisions and pleadings except the Supreme Court's, which I read some time ago, condensed, in Law Week. What I think is already set forth in my memo on the ACLU's suit for the Hiss files. The one other essential thing is the difference between the investigatory-files part of Frankel and ours in the spectro suit. In Frankel what was suit was an investigatory file for law-enforcement purposes. Frankel admits this. What we seek is not by any stretch of any rational imagination such a file.

I have paid little attention to the arguments on the other exemptions because they are not immediately relevant to us.

Like the Hiss one, this was a bad one, in my view. It might be a good thing if the litigants against the crook Armand Hammer were armed for their suit, but this was not the way for them to arm. Perhaps this part would be different if they had been suing SEC, if they were suing over corruption and needed this to prove it.

The language of the exemption is not equivocal and I am in agreement with it. I do not think all law-enforcement files should be available. I think that in this exemption, once we are past the definition of law enforcement, the controlling word is "purposes". If the purpose was law enforcement, whether or not an action was filed is immaterial. There is also a law-enforcement purpose in an investigation that does not turn up enough evidence for indictment.

On the other hand, I do think that all investigatory files not for law-enforcement purposes should be available, assuming that such things as security checks are pursuant to a law-enforcement purpose (whether or not we agree with that law). All the parts of a non-law-enforcement investigatory file that should be withheld could properly be, I think, for other reasons. Like medical.

There is mischief and there is damage for the innocent in some files. Files of which this is true should not be made available. People should not be hurt.

Because of the nature of the Government's arguments, I think that when we have the opportunity we should do more than prove that this is not the kind of material within the exemption that is sought in the spectro suit. I think we can go farther and show that the practise is whimsical, political, sometimes vindictive, and is never consistent.

Valle is but one case of the declassification of what should not have been. Another is, of course, Marina's medical records. Another is personal stuff about Marguerite, like sleeping with Bekdahl without marrying him. I could do on and on. We can even show them voluntarily identifying informants, but this would require Koch's agreement.

As I suggested earlier, when Williams swears "never", Part Gray is the best disproof. Another is Hoover and Johnson and King's personal life. Another is the repeated disclosure of the names of those alleged, I am sure falsely in most cases, to have been Communists.

And, since Justice stupidly made an issue of it and the Court of Appeals asked for it, the gift from Richard the Lyin-Hearted in my King suit. There he called court records an investigatory file for law-enforcement purposes-and said he didn't have it.

Even the argument in the Frankel case was unprincipled and bad. They repeatedly asked for the reversal of good decisions by other circuits. I hope they (we) didn't get this. It is crazy to file cases like this that give Justice a chance to go to the Supreme Court with cases in which they think they can do what they want to do. They'll back down if they don't want to really test. Even when I was pro se they finally offered to take pictures for me when they had been refusing to. The spectro suit is different. What they are trying to protect here is not the security of finks, or of investigatory files, but what disproves that official fiction.

All law-enforcement files, of course, do not have to be withheld. Withholding is optional but permitted. Williams flies into the face of Mitchell in the King case.

The Frankel v SEC FOI CA decision is interesting and can be hurtful, but I think a proper construction does not address most of our interests. It begins describing "a non-public investigation". The contents were neither used nor disclosed, that is, the contents of what was sought. And I think that despite the consent decree, there remained the possibility of further violation that would require SEC to resume its investigation and possible action flowing from it. Or, there remained law-enforcement purposes in the file. And the court emphasized that other remedy was available to the plaintiff under the Federal Rules of Civil Procedure.

I don't think this is a good decision or a helpful one, particularly not because the court below had ordered only in camera inspection.

But the case does not seem to me to parallel the Ray of Warren Commission materials nor any other in which there is either final action or any kind of public use. However, where the plaintiff was denied copies of what was the basis for the suit SEC instituted, that may be bad.

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