



THE UNIVERSITY OF KANSAS MEDICAL CENTER
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SCHOOL OF MEDICINE
 DEPARTMENT OF PATHOLOGY AND ONCOLOGY

December 3, 1973

Clarence M. Kelley, Esq., Director,
 Federal Bureau of Investigation
 Washington, D. C. 20535

John F. Kennedy

Re: Records and Artifacts of
 the Warren Commission

Dear Mr. Kelley:

Further to my letter to you of November 24, 1973, in which I asked that you take some special pictures for me of CE 573 and some special pictures of a flake of metal fallen from CE 399 and now in custody of the Archivist.

Enclosed is a reprint of my only paper on the assassination entitled "Assassination of President Kennedy" as it appears in the current November issue of The Practitioner 211:625 - 633, 1973. In this on page 632 you will notice the print of CE 895 you kindly provided to me.

Now, I should like to ask you to tell me the results of the neutron activation studies on the several fragments mentioned by Mr. Hoover in his letter to Mr. Rankin of July 8, 1964. Also, I should like to learn when these studies were done, by whom, and where. Shall look forward to hearing from you.

REC-50

62-109060-7103

Sincerely,

John Nichols

John Nichols

DEC 18 1973

cc: Xerox copy of letter from Hoover to Rankin, July 8, '64.
 Reprint indicated supra.

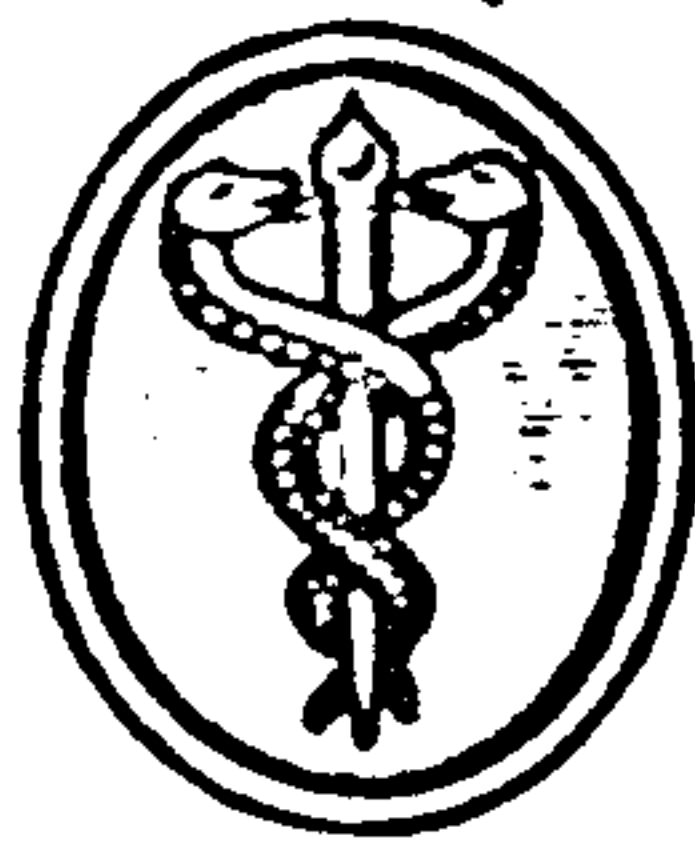
ENCLOSURE ATTACHED

ENCLOSURE

CORRESPONDENCE

ASSASSINATION OF PRESIDENT KENNEDY

By JOHN NICHOLS, M.D., PH.D., F.A.C.P.



Reprinted from *The Practitioner*

November 1973

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ASSASSINATION OF PRESIDENT KENNEDY*

By JOHN NICHOLS, M.D., Ph.D., F.A.C.P.

*Associate Professor of Pathology,
University of Kansas Medical Center*

DESPITE extensive world press coverage and numerous books on the assassination of President John F. Kennedy, scant attention has been given to the medical and scientific aspects of the murder. This brief account is limited to only a few, ignored, facets of the crime.

THE ASSASSINATION

As the motorcade passed through Dealey Plaza, Dallas, Texas (fig. 1), at 12.30 hours Central Standard time [18.30 hours London time] on November 22, 1963, the lead car, containing the President and his wife, and John Connally, Governor of Texas, and his wife, was being photographed at 18.3 frames per second by Abraham Zapruder with a hand-held 8-mm. movie camera. (This film was purchased by *Life* and copyrighted. The Warren Commission copy is now in the Archives but is not available to the public. It may—but only after heroic efforts—be studied by 'serious scholars'. Some key frames, including those mentioned here, were published by *Life* in 1966).

Governor Connally was seated directly in front of the President when, allegedly, three shots were fired by Lee Harvey Oswald, located above, behind, and to the right in a sixth-floor window of the Texas School Book Depository Building. The President was looking slightly to the right, with his right hand raised in a gesture to the crowd, when he was temporarily obscured from Zapruder's camera at frame 218. When he reappeared at frame 224 the President showed pain and was reaching for his throat. (Olson and Turner, 1971, have adducted evidence that the first shot was fired much earlier). Thus the first shot at a depressed angle of $20^{\circ} 23'$ and a distance of 188 feet (57.3 m.) is alleged to have entered from the rear, traversed his neck without striking bone, and emerged from the front in the midline between tracheal rings three and four. By the conclusions of the Warren Commission, the bullet continued without deflection, fractured Connally's fifth rib lateral to the scapula, emerged beneath his right nipple, and fractured his distal right radius to become entangled in his clothing, only later to fall out at Parkland Hospital. The second shot (three empty cartridge cases were found) is presumed to have missed. The third and fatal shot came 5.6 seconds later at frame 313 when the right side of the President's head exploded. (After publication of the Warren Report it was noted that, by superimposing frame 314 on frame 313, the President's head,

* The work reported herein was done at the personal expense of the author and the opinions expressed do not reflect the approval of any other person or organization.

neck and shoulders jerked backwards within this 0.054 second. The author, confirming this observation, testified that this backward movement, also grossly apparent on viewing the movie, is *compatible* with a gunshot from the front.)

Upon arrival at Parkland Hospital, five minutes later, the bullet hole in the front of the neck, then considered to be a hole of entry, was obscured by a tracheostomy incision. The body was not turned over and the bullet hole in the back of the neck escaped notice. It must be remembered that the

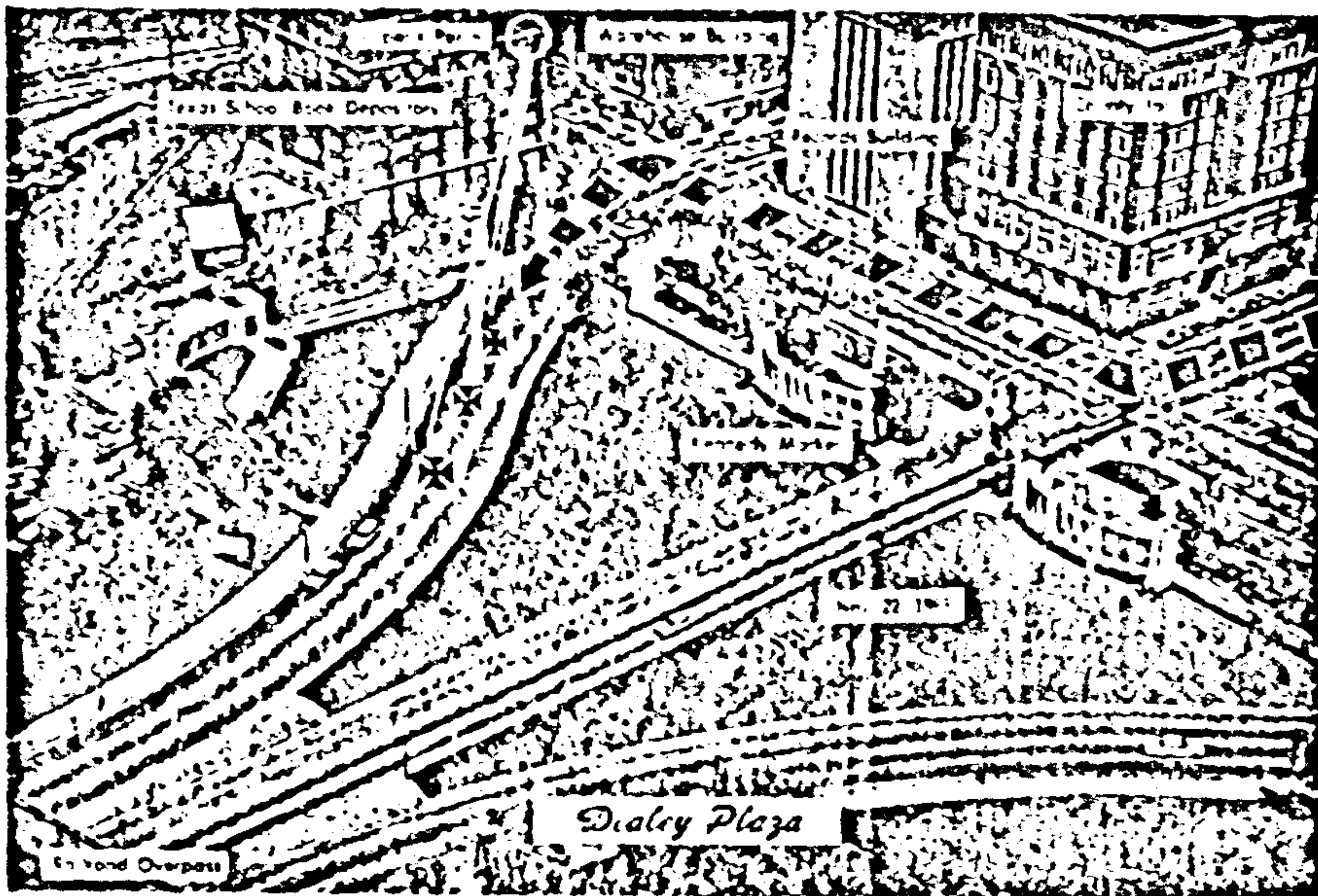


FIG. 1.—Postcard view of Dealey Plaza showing route of the motorcade, alleged position of Oswald and presumed trajectory of three shots.

assassin had not violated any federal law and therefore had not committed a crime against the people of America; he had violated Texas State law and committed a common law crime against the people of Texas. Therefore, all subsequent proceedings would have to be pursuant to Texas law, except any assistance requested by Texas authorities from federal agencies such as the Federal Bureau of Investigation (FBI). The first breach came when the body was forcefully removed by a small group of Secret Service and FBI agents despite the violent physical protests of the coroner of Dallas County, Earl Rose, now Professor of Pathology in the University of Iowa. The body was thus illegally removed 1,375 miles from the State of Texas without the necessary burial-removal permit which is issued only after release by the coroner and after the death certificate has been filed. These requirements are common to all states.

THE NECROPSY

After arrival at the Naval Hospital in Bethesda, Maryland, the necropsy was conducted primarily by two naval pathologists in a crowded room with

a rapidly changing array of admirals, generals, colonels, naval captains, Secret Service and FBI agents, and others, only a few of whom were medically qualified. X-ray films of the head revealed multiple bullet fragments. Before completion of the necropsy Lieutenant-Colonel Pierre A. Finck, a student of missile wounds, arrived in the capacity of an army 'observer' in this naval enclave. His status was such that, in order to examine

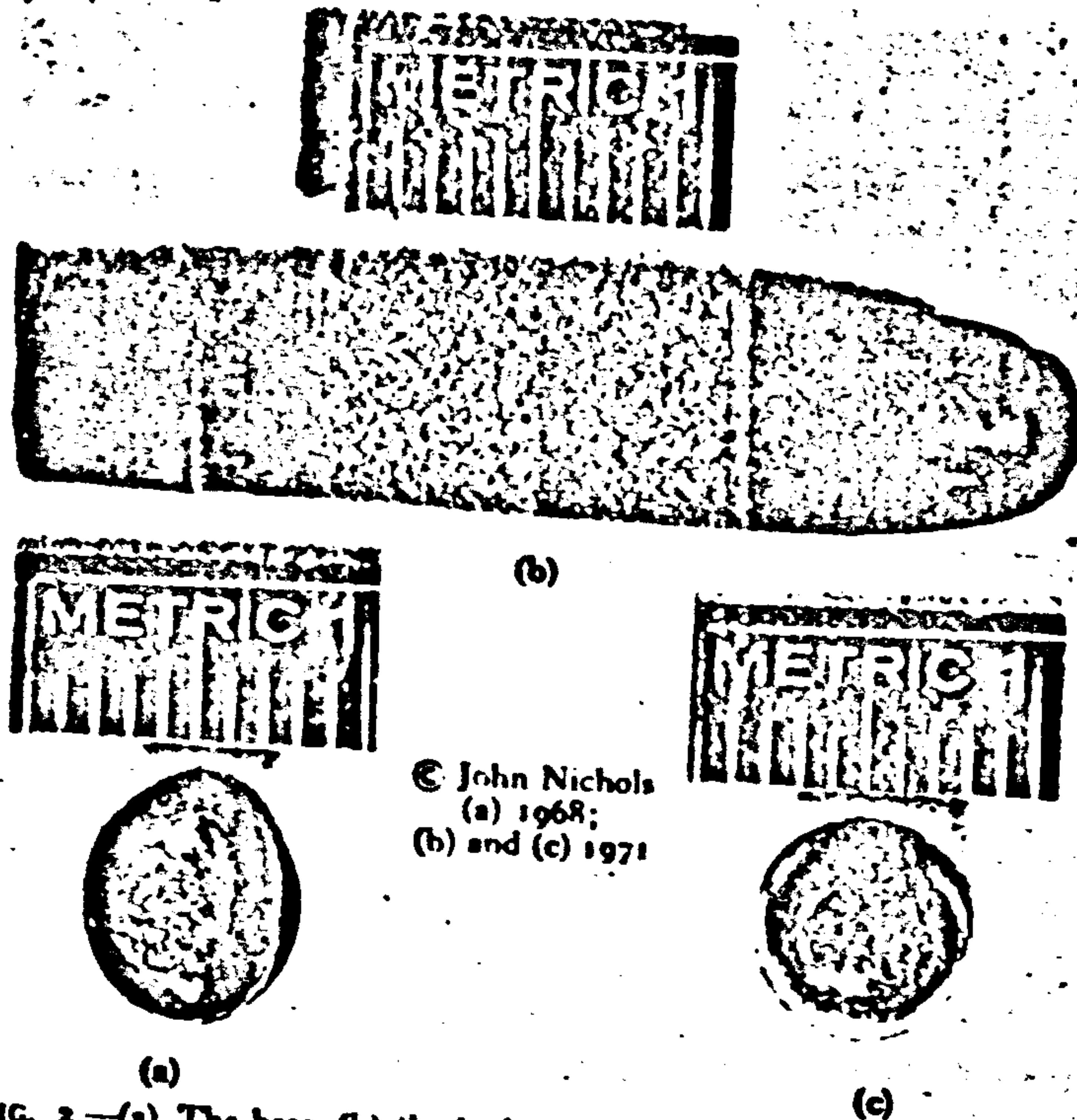


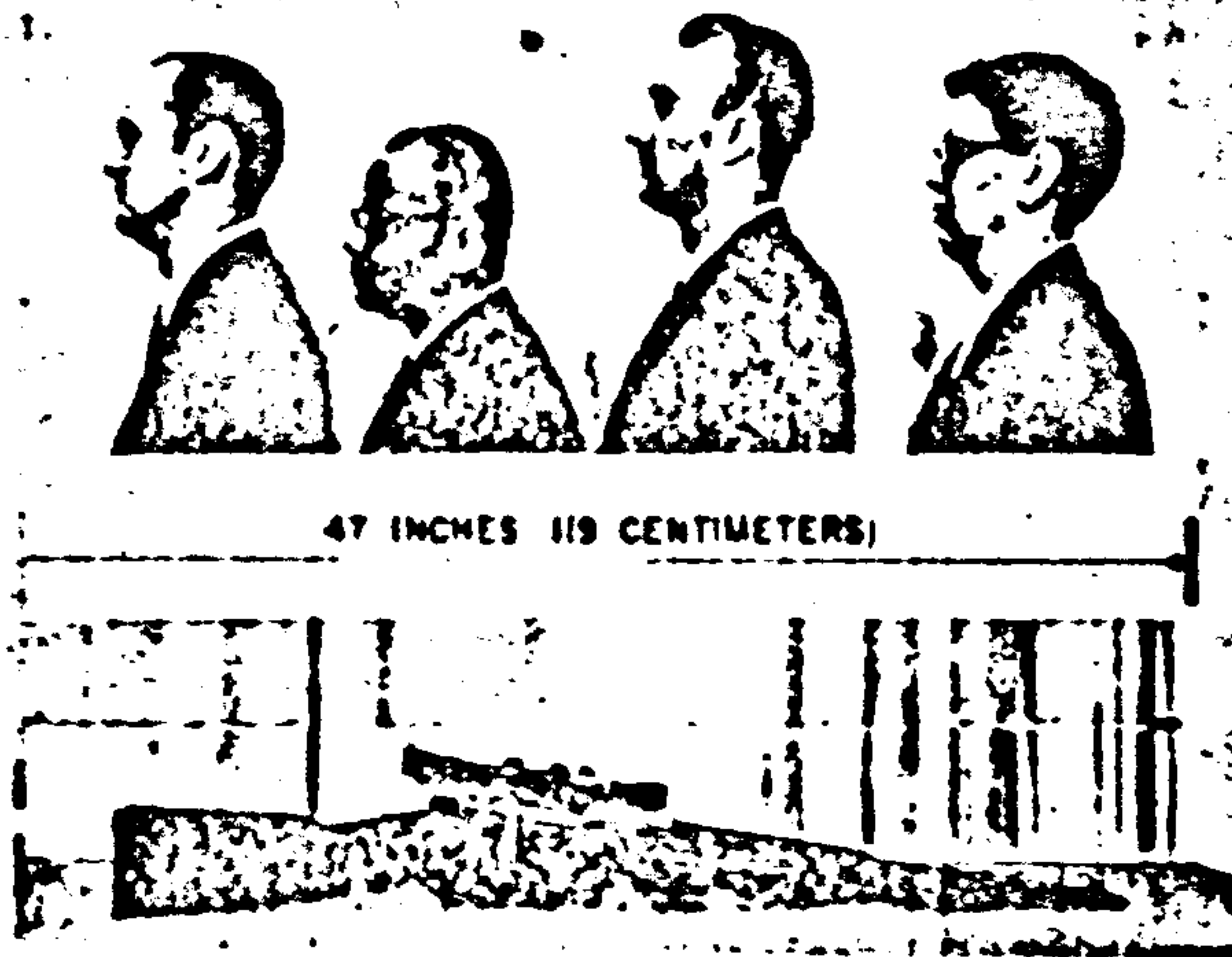
FIG. 2.—(a) The base, (b) the body, and (c) the nose of the bullet (CE 399).

for back wounds, it was necessary for him to obtain permission from an unidentified major-general, a public relations officer. Colonel Finck, however, did have total body x-ray films exposed as well as gross photographs, both black and white and colour. The x-ray films were developed and read by a radiologist but, together with the gross photographs, were not seen by the pathologists during the necropsy or preparation of the protocol.

The history of these x-ray films and photographs is nebulous. In April 1965 they were deposited with the Archivist of the United States with, later, a stipulation that they may be studied only by scholars approved by the executor of the Kennedy estate. I have repeatedly been denied permission to study them, but John K. Lattimer, Professor of Urology in Columbia University, has and concluded that the Warren Commission made no errors (Lattimer, 1972). However, Cyril Wecht, Professor of Medical Jurisprudence and Past President of The American Academy of Forensic Sciences, and E. F. Chapman, Coroner of Wayne County, Michigan, have (separately) studied them, and both decided that there were major discrepancies in the conclusions of the Warren Commission (Wecht, 1972; Chapman, 1973).

THE WARREN COMMISSION

On November 29, 1963, seven days after the assassination, and five days after the murder of the alleged assassin, the new President, Lyndon Johnson, created the 'President's Commission on the Assassination of President Kennedy', popularly known as the Warren Commission from its chairman, Earl Warren, Chief Justice of the United States. The main conclusion of the Warren Commission was that Oswald acted alone and fired, within 5-6 seconds, three shots, the first bullet passing through Kennedy's neck



© John Nichols 1968

FIG. 3.—A bullet from authentic ammunition will penetrate 47 inches of laminated pine before its energy is spent (see text). The first person shown on the left of this illustration has the same measurements and weight as President Kennedy: height 6 feet 1 inch; weight 181 pounds (83 kg.); neck circumference 15½ inches.

without hitting bone and, without deflection, inflicting Connally's wounds, only later to fall from his clothing at Parkland Hospital. This bullet was designated commission exhibit (CE) 399.

EXPERT PANEL

The ensuing furore and criticism of the Warren Commission Report by the public prompted Attorney General Ramsey Clark to convene, in February 1968, an expert panel of three eminent forensic pathologists and a radiologist to review the gross photographs and x-ray films taken at necropsy but not seen by the pathologists before submission of the necropsy protocol. This expert panel reported several important new findings, only three of which will be considered:

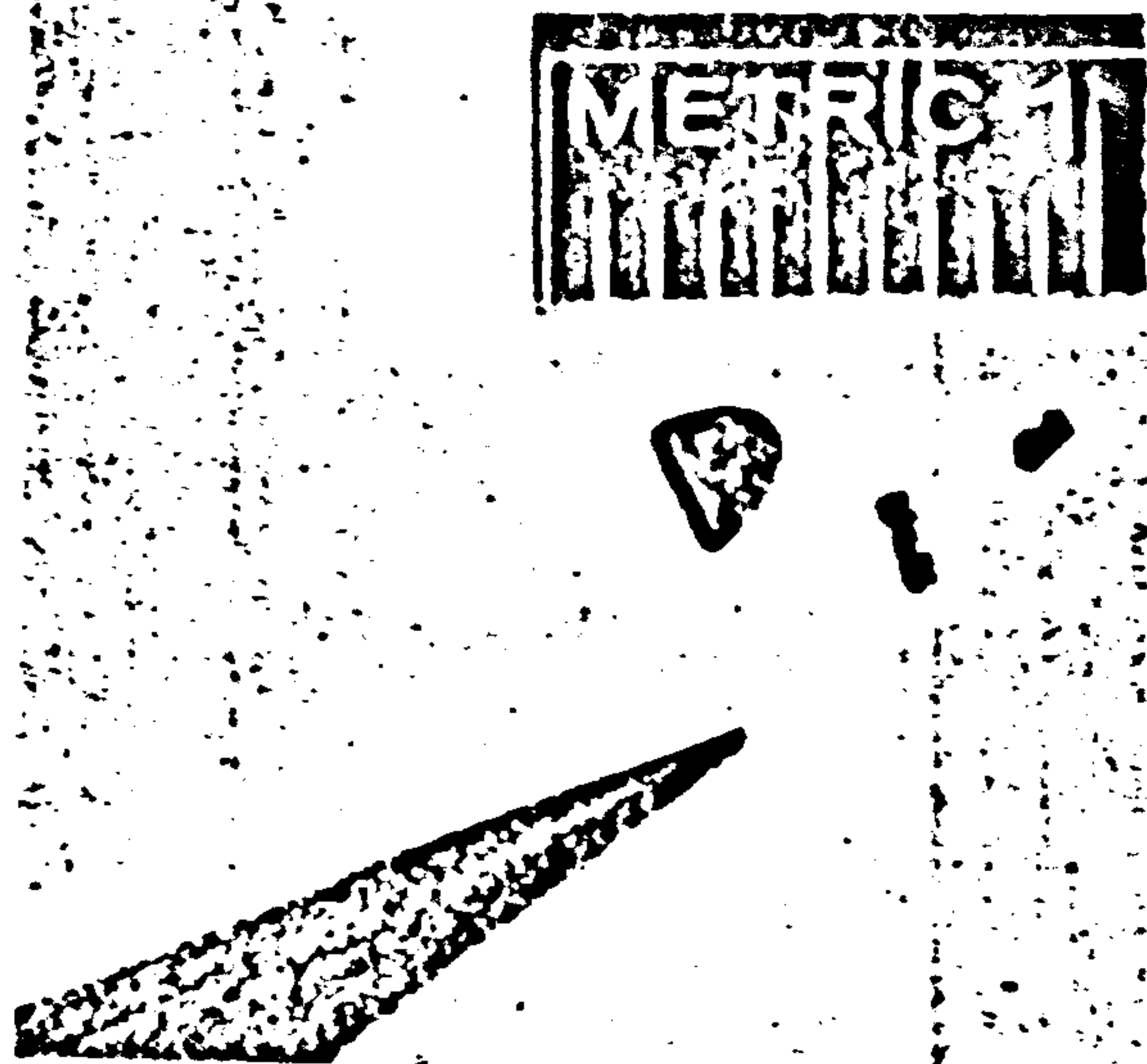
- (1) A bullet hole of entry in the skull 100 mm. above the external occipital protuberance, whereas the pathologists reported a bullet hole *slightly* above and 2.5 cm. to the right of the external occipital protuberance.
- (2) A grey-brown unidentified rectangular object measuring 14 × 20 mm. lying in the base of the brain, not previously noticed.

(3) A delicate tract of metal particles in the soft tissues of the neck region not seen by the radiologist who examined the x-ray films during the necropsy.

CE 399 is a military bullet, fully jacketed, with a 0.64-mm.-thick alloy of 93 per cent. copper and 7 per cent. zinc. Such jacketed bullets usually do not leave particles of metal in soft tissue when bone is not struck (in fact naked lead bullets usually do not leave metal particles in soft tissue when bone is not struck).

PUBLIC DISQUIET

Much of the public disquiet has centred on the fact that, according to his Marine Corps records, Oswald was only a mediocre rifleman, and on the



© John Nichols 1968

FIG. 4.—Three fragments (CE 842) of metal removed from Governor Connally's wrist (see text).

fact that the alleged weapon is a very poor specimen of a war-surplus bolt-action Italian army rifle. It has an inferior 4-power Japanese telescopic sight with an extremely narrow field. Most skilled persons cannot fire three aimed shots from similar weapons within 5.6 seconds. Expert marine corps riflemen, however, were able to fire the required three shots within the allotted 5.6 seconds, but at ground level at a stationary target and not from a height of sixty feet (18.28 m.) at a moving target. My investigations, and attempted investigations, have included the following studies.

- (1) Identical ammunition fired in an identical weapon through ribs and wrists and other appropriate anatomical specimens and recovered from mattresses.
- (2) The kinetic energy and penetrating power of CE 399.
- (3) The lateral angle of Oswald's line of fire which has never previously been measured or calculated.
- (4) Trace metal content of the margins of bullet holes in the President's coat, CE 399, and fragments CE 842, surgically removed from Connally's wrist.

- (5) The newly found 14 × 20 mm. object in the base of the brain.
 (6) The head wound, by examination of the necropsy photographs and x-ray films.

BALLISTICS

Figure 2 shows the base, body, and nose of CE 399. Ballistic examination established that this bullet was fired from Oswald's weapon. The person who found the bullet, on a stretcher on which Connally was presumed to have been transported, omitted to mark the bullet, which subsequently passed through the custody of at least two additional hospital employees

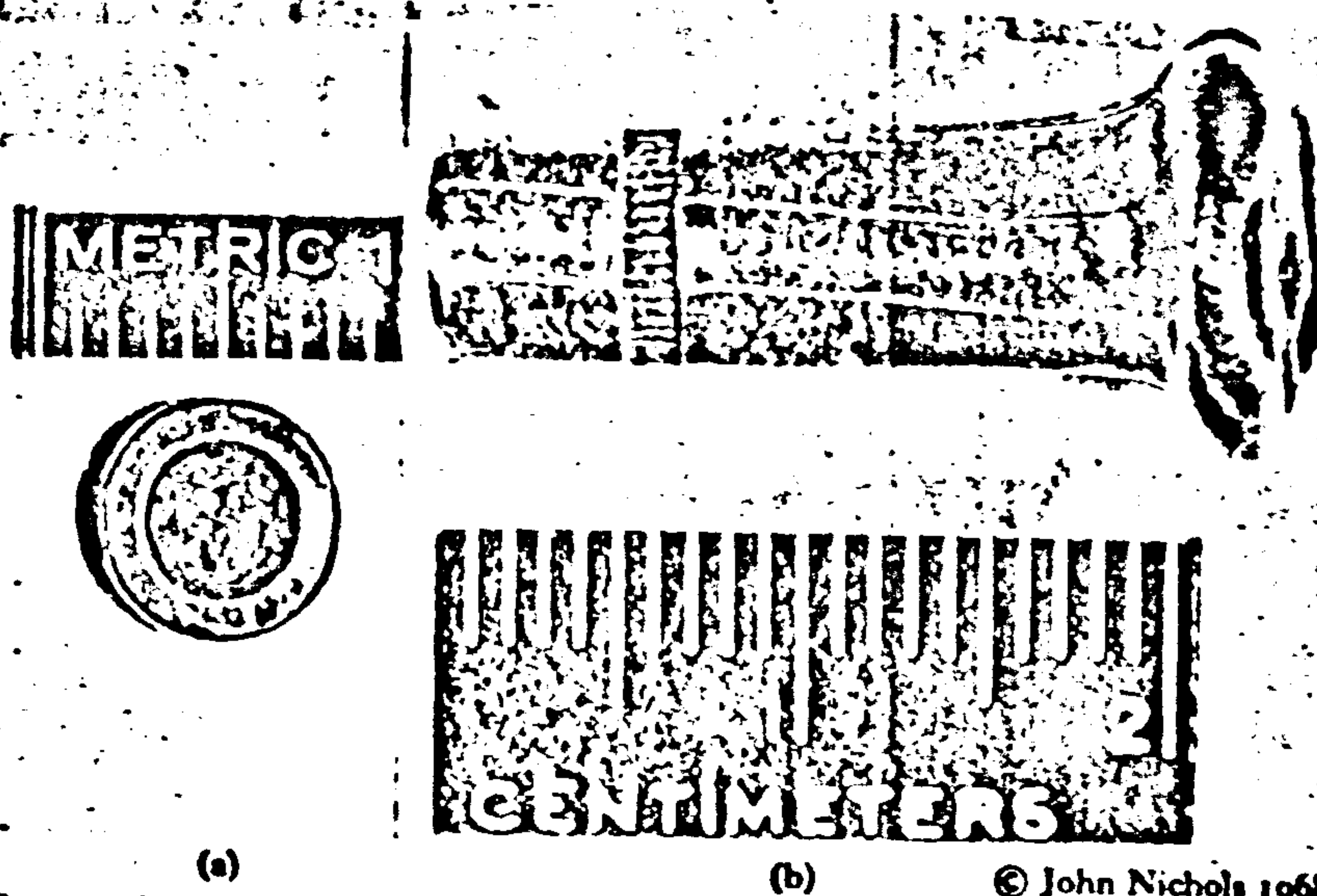


FIG. 5.—Bullet from authentic ammunition shot through a rib and wrist from a recently amputated arm and collected in mattresses showing (a) that the base remains pristine while (b) the nose becomes grossly mutilated.

and two FBI agents before reaching the ballistics laboratory. Receipts were not given and records were not made. This is the only piece of evidence connecting Oswald with the crime, and today the person who found CE 399 refuses to identify it. (Learned counsel opine that CE 399 is not admissible as evidence in an American [Texas] Court.)

The mutilated nature of the base of CE 399 (fig. 2a) is shown here for the first time. This bullet could not have been fired in any gun in this condition. The base of CE 399 therefore became mutilated after firing; I have placed my entire weight (200 pounds [90.7 kg.]) on the base of such pristine bullets without producing deformity. It can also be seen that metal has been shaved from the nose for spectrographic analysis (the results of which the FBI refuse to divulge).

The mutilation of the lead core at the base must account for the loss of 2.5 grains (162 mg.). CE 399 weighs 158.6 grains (10,277 mg.) whereas all bullets removed from identical ammunition by the author before firing weighed 161 grains \pm 0.07 grain (standard error of the mean).

After rescating and firing directly into mattresses the bullets lose about

1 grain (16 mg.) due to friction in the gun barrel and in the mattresses. Apart from this, such bullets are always recovered pristine.

Figure 3 shows that such bullets, with a speed of 1,960 feet per second and 1,373 foot-pounds* of energy, will penetrate 47 inches of laminated pine (*Pinus ponderosa*) before the energy is spent. This, of course, is equivalent to several necks, several ribs, and several wrists. Yet CE 399 is presumed to have become entangled in Connally's clothing. The upholstered partition between the passenger and driver compartments, next in line of fire, was not even scratched.

Figure 4 shows three fragments (CE 842) of metal surgically removed from Connally's wrist. An unfired bullet identical with CE 399 weighs 161.07 grains (see p. 630):

CE 399 weighs	158.6 grains
Large fragment of CE 842 from Connally's wrist weighs	0.5 grain
Two small unweighed fragments of CE 842 from Connally's wrist generously estimated to weigh	0.1 grain
Loss of weight of CE 399 from friction in gun barrel generously estimated to be	0.3 grain
Metal reasonably accounted for	<u>159.5 grains</u>

Therefore the metal unaccounted for is approximately 1.5 grains. If CE 399 inflicted both the neck wound of the late President and Connally's wrist wound the trace metal composition must, perforce, be identical in both exhibits.

Even highly refined metal contains contaminants characteristic of a particular lot. Lead especially contains traces of arsenic, antimony, and bismuth in quantities too small for detection by destructive chemical analysis and destructive spectrographic analysis. Fortunately harmless neutron activation is the most sensitive and most reliable method known for detection of these trace metal contaminants. The specimen returns entirely to its normal condition shortly after removal from the nuclear reactor. Such results have been admitted in several trial courts of the world.

If the trace metal content and ratios of CE 399 are different from those of CE 842 then a fourth shot must have been fired and another person must have participated in the murder because all agree that it is impossible for any person to fire four shots from Oswald's gun in the allotted 5.6 seconds.

Figure 5 shows a bullet which I shot through a rib and a radius of a recently amputated arm and collected in mattresses. The nose of the bullet is grossly deformed and the base remains pristine. Similar results were obtained in all such bullets fired through ribs and wrists.

ANGLE OF FIRE

Figure 6 is the view through Oswald's telescopic sight at Frame 222, showing the depressed angle of 20° 23' prevailing at the first shot as meas-

$$\text{*Foot pounds of kinetic energy} = \frac{(\text{velocity})^2 \times \text{weight in grains}}{(32.16) \times 2 \times 7000} = 1.373$$

(When velocity is 1,960 feet per second and the weight is 161 grains)

ured in the FBI re-enactment. I have both measured and calculated the lateral angle at this frame to be $9^{\circ} 21'$. Elementary anatomy indicated that the minimum lateral angle for the bullet to miss the transverse processes and emerge in the midline is 28° ; this is obviously impossible from Oswald's

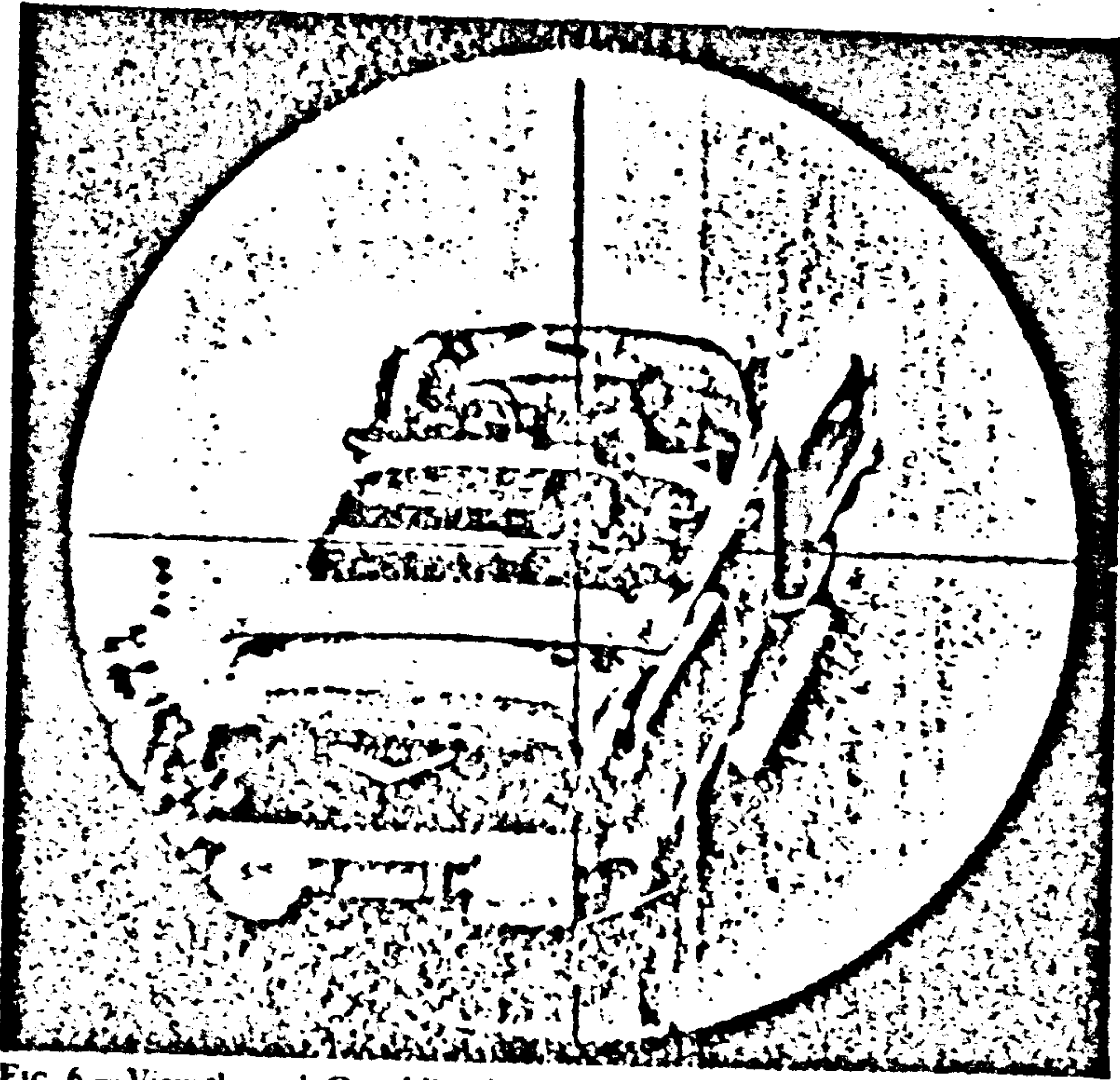
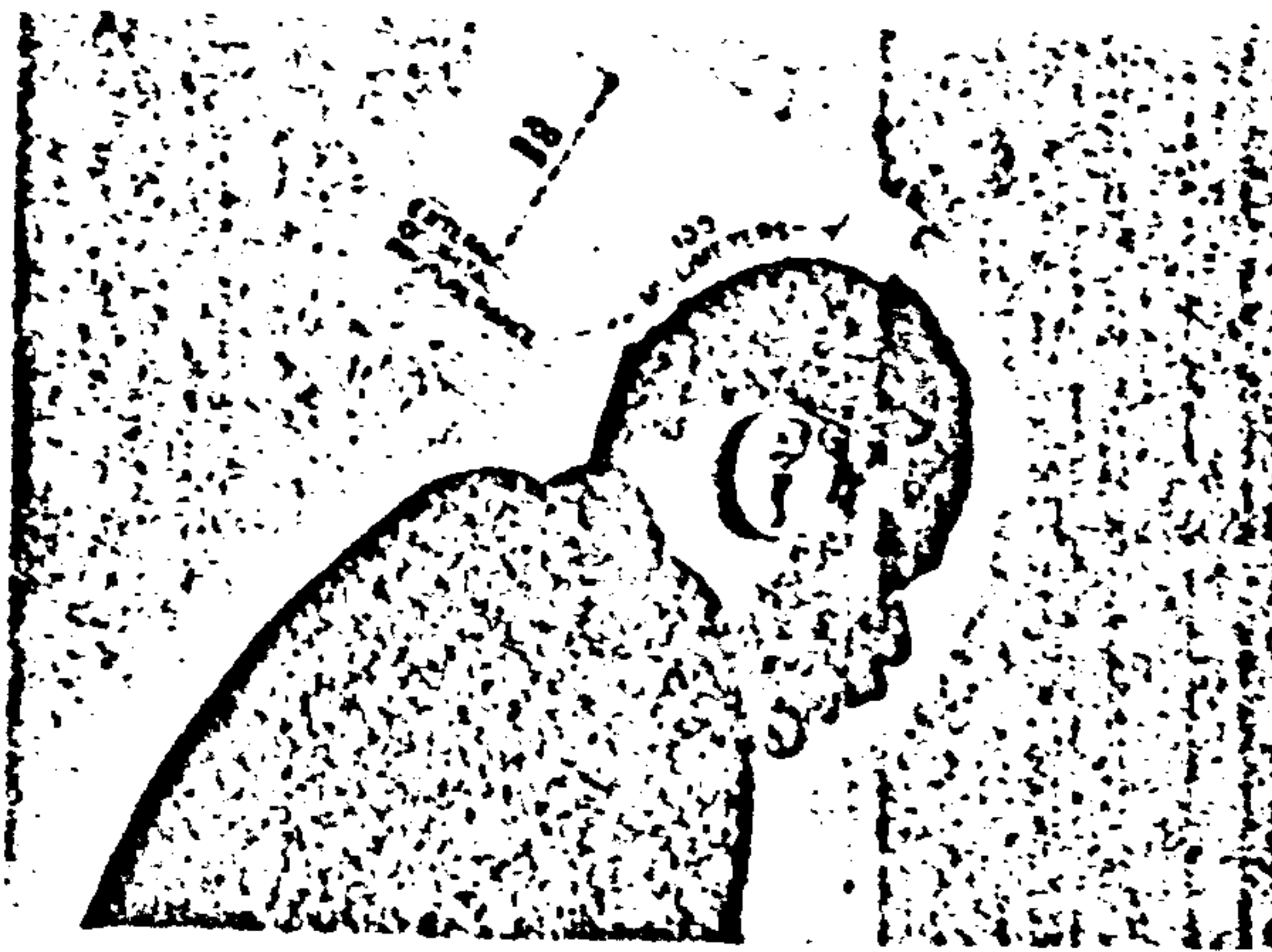


FIG. 6.—View through Oswald's telescopic sight at Frame 222 of film (see text). (CE 895, photograph by courtesy of C. M. Kelley, Director FBI).



© John Nichols 1971
FIG. 7.—Showing required location of a bullet wound in the skull 100 mm. above the external occipital protuberance (see text).

ASSASSINATION OF PRESIDENT KENNEDY 11633

alleged firing position. If the bullet had continued without deflection Connally would have been shot in the left chest rather than the right chest and the bullet would have emerged below the diaphragm.

Figure 7 shows the required location of a bullet wound in the skull 100 mm. above the external occipital protuberance. The expert review panel did not mention if this was measured on the convex surface of the skull or vertically.

CONCLUSION

I have been engaged in efforts to study artifacts of the assassination since January 1964 and in litigation since 1969 for permission to submit the President's coat, CE 399, and CE 842 to harmless neutron activation analysis in the nuclear reactor of the University of Kansas, and to examine the x-ray films and photographs taken at necropsy. The trial judge, on a motion by the defendants to dismiss or for summary judgment, observed, among other things, that there were 'no facts in controversy' and granted summary judgment. The appeal court upheld the trial court and the Supreme Court denied *certiorari* without comment.

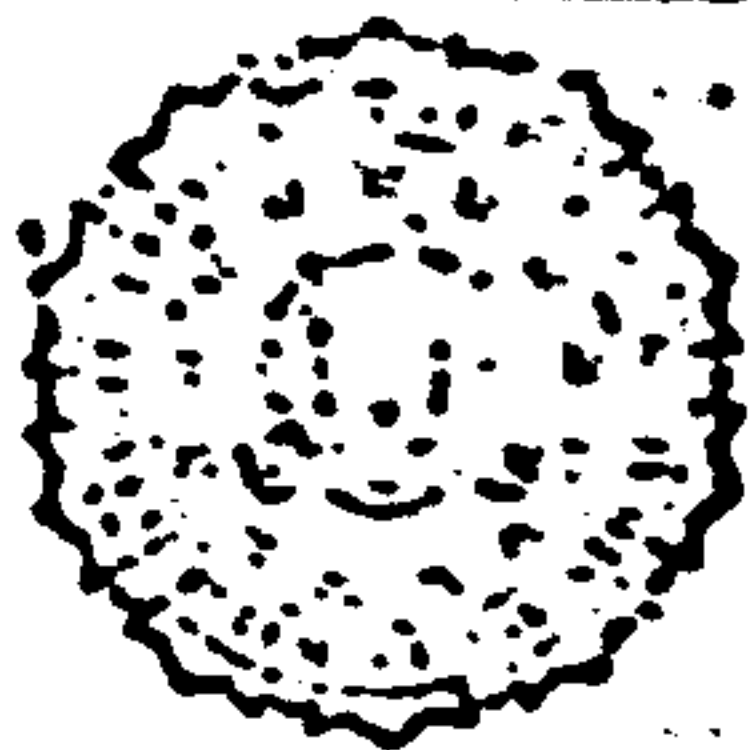
I believe there is reasonable doubt that the President's neck wound was inflicted from Oswald's alleged firing position (as displayed in frames 218 to 224), and reasonable doubt that bullet CE 399 inflicted Connally's wrist injury. If harmless neutron activation analysis should reveal the trace metal content and ratios of the margin of the bullet hole in the coat, CE 399, and CE 842 to be identical the conclusions of the Warren Commission would be supported. If, however, the trace metal content and ratios are different then Oswald could not have acted alone.

References

- Chapman, E. F. (1973): Personal communication.
Finck, P. A. (1969): Testimony in 'Louisiana vs. Shaw', 198-059 1426 (30), Section 'C'; Criminal District Court, Parish of Orleans, Louisiana.
Lattimer, J. K. (1972): *Resident and Staff*, 18, No. 5, May, p. 34.
— (1972): *Med. Tms*, 100, No. 6, June, p. 33.
Life (1966): 'A Matter of Reasonable Doubt', 61, No. 22, November 25, p. 40.
Nichols, J. (1969): Testimony in 'Louisiana vs. Shaw', 198-059 1426 (30), Section 'C'; Criminal District Court, Parish of Orleans, Louisiana.
Nichols vs. United States of America et al. (1969-1972): 325 F. Supp. 130 (1971); 460 F. 2d. 671 (1972); *certiorari denied* U.S. 34 L Ed 2d, 232 (1972).
Olson, D., and Turner, R. (1971): *J. Forens. Sci.*, 16, 399.
Report of Attorney General Ramsey Clark's Expert Review Panel (1968): deposited in 'United States *ex rel.* State of Louisiana vs. James B. Rhoads' (1969); District of Columbia Court of General Sessions, Misc. 825-69A.
'Report of the President's Commission on the Assassination of President John F. Kennedy' (1964); U.S. Government Printing Office, Washington.
Wecht, C. (1972): *Mod. Med.*, 40, No. 24, November 27, p. 28.

Suggested Reading

- Thompson, Josiah (1967): 'Six Seconds in Dallas', Bernard Geis Associates, New York.
Meagher, Sylvia (1967): 'Accessories After the Fact', Bobbs-Merrill, New York and London.



UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

WASHINGTON 25, D.C.

July 8, 1964

By Courier Service

Honorable J. Lee Rankin
General Counsel
The President's Commission
200 Maryland Avenue, Northeast
Washington, D. C.

Dear Mr. Rankin:

As previously reported to the Commission, certain small lead metal fragments uncovered in connection with this matter were analyzed spectrographically to determine whether they could be associated with one or more of the lead bullet fragments and no significant differences were found within the sensitivity of the spectrographic method.

Because of the higher sensitivity of the neutron activation analysis, certain of the small lead fragments were then subjected to neutron activation analyses and comparisons with the larger bullet fragments. The items analyzed included the following: C1 - bullet from stretcher; C2 - fragment from front seat cushion; C4 and C5 - metal fragments from President Kennedy's head; C9 - metal fragment from the arm of Governor Connally; C16 - metal fragments from rear floor board carpet of the car.

While minor variations in composition were found by this method, these were not considered sufficient to permit positively differentiating among the larger bullet fragments and thus positively determining from which of the larger bullet fragments any given small lead fragment may have come.

Sincerely yours,

J. Edgar Hoover

United States Senate

Washington, D. C., December 7, 1973

Respectfully referred to

Federal Bureau of Investigation

Attention: Kathryn Stoltz
Room 353
Ext 225-9118

ASSASSINATION OF JOHN F. KENNEDY

Asst. Dir.:	
Admin.	_____
Comp. Syst.	_____
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Ident.	_____
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Training	_____
Legal Coun.	_____
Telephone Rm.	_____
Director Sec'y	_____

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*12-12-73
L.C. D...
F... ..*

EX-103

REC-57

62-109060-7104

Form No. 8

U.S.S.
16-45102-3 GPO

17 DEC 20 1973

EPICUS

CORRESPONDENCE

810A Hamlin Hall
Oakland University
Rochester, Mich.
Nov. 30, 1973

Sen Robert Griffin
U.S. Senate
Washington, D.C. 20510

Dear Sen. Griffin:

Due to recent mass media attention to the assassination of President Kennedy in 1963, and the alleged conspiracy behind this assassination attempt, I urge you to foster and support measures which would reclassify the files on Lee Harvey Oswald. The reclassification which would allow

them to become public now
or in the immediate future,
rather than 2039 would,
I believe, clarify the cloudy
knowledge of events which
surrounded the assassination.
It would end much public
speculation. If there was
a conspiracy, we the public
should know about it.

Please, act as your conscience
dictates. I hope you share
a similar view as that which
I expressed above.

Sincerely,
Craig A. Zanot

December 12, 1973

62-109060-7104

REC-57

Honorable Robert P. Griffin
United States Senate
Washington, D. C. 20510

EX-105

Dear Senator Griffin:

Your communication of December 7th enclosing correspondence from your constituent, Mr. Craig A. Zanot, has been received.

810A ...
OAKLAND UNIVERSITY, WEST LANSING, MICH.

In reply, please be advised that the FBI conducted, at the request of President Johnson, investigation with respect to the assassination of President Kennedy. The results of our investigation were factually reported to the Warren Commission.

The information was subsequently made available to the National Archives by the Warren Commission and this Bureau has no further information we can furnish regarding this case.

As Director of the FBI, it would be contrary to long established policy for me to comment concerning support for any legislative matters since within the Department of Justice it is the function of the Attorney General to determine the desirability of legislation.

Sincerely yours,

Clarence M. Kelley
Director

DEC 13 1973

- Exec. Dir. _____
- Asst. Dir. _____
- Admin. _____
- Comp. Syst. _____
- Ident. _____
- Files & Com. _____
- Gen. Inv. _____
- Insp. _____
- Intell. _____
- Laboratory _____
- Plan. & Eval. _____
- Rec. Mgmt. _____
- Training _____
- Off. Cong. & Public Affairs _____
- Director Sec'y _____

- Detroit - Enclosures (2)
- Congressional Services Office - Enclosures (2)

NOTE: Bufiles contain no record of Craig A. Zanot. We have had prior cordial correspondence with Senator Griffin (R-Michigan).

RCD:mks (6)

MAIL ROOM TELETYPE UNIT

LV182
DEC 10 1973

JW
RCF

Michael C. Carnahan
50th Combat Support Gro
Box 274
APO New York, N.Y. 0910

Federal Bureau of Investigation
Washington D.C.

Dear Sirs:

I am doing a research paper on the assassination of President John Fitzgerald Kennedy. I would like the following items sent to me. I realize the originals cannot be sent to me, but I would like duplicate copies or reproduction copies. All of these items have been taken out of the FBI Summary Report given to the Warren Commission. In order to aide you I have listed the items as they appear in the report.

Appendix A

I. THE ASSASSINATION

A. ASSASSIN IN BUILDING

Exhibit 1 - Diagram which shows where the three shots rang out.

II. THE EVIDENCE

A. EVENTS PRIOR TO ASSASSINATION

Exhibit 4 - Photograph of the brown wrapping paper in the shape of a long bag found near the window from which the shots were fired on the sixth floor of the Depository building.

C. OSWALD'S APPREHENSION

Exhibit 8 - Photograph of the .38 special revolver recovered from Oswald at the time of his apprehension.

D. INTERVIEW OF THE ASSASSIN

Exhibit 9 - Photograph of Oswald with the rifle and a hand
Exhibit 11 - Card issued to Lee H. Oswald by the "Fair Play for Cuba Committee"

E. THE ASSASSINATION WEAPON

Exhibit 12 - Photograph of the 6.5 m.m. Manlicher-Carcano, bolt action, clip-fed rifle, serial no. C 2764 power Japanese telescopic sight.

Exhibit 13 - Diagram which shows the location of the window from which the fatal shots were fired. Shows location of the rifle found by Dallas Police Officers.

Exhibit 14 - Photograph of the rifle, blanket, and long paper bag

REC-48 62-109060-7105
9 JAN 2 1974
CORRESPONDENCE

Appendix B

I. FBI LABORATORY EXAMINATIONS

A. PRESIDENT'S CLOTHING

Exhibits 59 & 60 - Photograph of the back of President Kennedy's suit coat, showing bullet entrance and exit holes. Photograph of President Kennedy's shirt with close up of bullet entrance hole and the exit hole in the collar and the nick in the tie.

I have only listed the sections which contain the exhibits I wish to have. If you are unable to provide me with this information will you please send me the address of the office where I can obtain such information. I am a High School student living Germany. I am an American citizen. Please send the information to this address:

Michael C. Carnahan
Wiesbaden American High School
Residence Hall Rm # 4
APO New York, N.Y. 09633

This information is very important and needed quickly. I am sending this letter registered. I request you do the same. I will be awaiting your quick reply.

Sincerely

Michael C. Carnahan
MICHAEL C. CARNAHAN

62-00-0033

3

December 26, 1973

AIRMAIL
SPECIAL DELIVERY

REC-48
62-109060-7105

Mr. Michael X Carnahan
Wichaden American High School
Residence Hall Room 4
APO New York 09531
N.Y.

Dear Mr. Carnahan:

Your letter requesting copies of certain exhibits from an FBI report which was furnished to the Warren Commission has been received.

Upon completion of the Warren Report, the President's Commission on the Assassination of President John F. Kennedy sent investigative materials and documentary evidence to the National Archives and Records Service, Seventh and Pennsylvania Avenues, N.W., Washington, D. C. 20540, for permanent preservation. Some of these documents are now available to the public. Therefore, you may desire to direct your request to the National Archives, Attention: NSFC, Area 6W3.

It is noted that you apparently listed the exhibit numbers as they appear in the FBI report. To facilitate the handling of your request, it is suggested that, if feasible, you obtain the Commission numbers for the exhibits you desire.

Sincerely yours,

O. M. Kelley

Clarence M. Kelley
Director

MAILED 3
DEC 26 1973
FBI

- 1 - Office of The Deputy Attorney General - Enclosure
- 1 - Bufile 62-115537 (FOI-REPLIES)

NOTE: Correspondent is not identifiable in Bufiles.

ms:nlm (7)

MAIL ROOM

TELETYPE UNIT

FALLINGTOWN

cc sent: e/mw 5/22/75

UNRECORDED COPY FILED IN 62-115537-11

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- Asst. Dir.:
- Admin. _____
- Comp. Syst. _____
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- Director Sec'y _____

UNITED STATES GOVERNMENT

Memorandum

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 Asst. Dir.
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 Comp. Syst.
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 Intell.
 Laboratory
 Plan. & Eval.
 Spec. Inv.
 Training
 Legal Coun.
 Telephone Rm.
 Director's Sec'y

TO : The Director

DATE: 12/18/73

FROM : Legal Counsel *[Signature]*

SUBJECT: HAROLD WEISBERG v.
U.S. DEPARTMENT OF JUSTICE
FREEDOM OF INFORMATION ACT

Attached is a copy of the decision of the United States Court of Appeals for the District of Columbia Circuit which was decided on 10/24/73 in captioned case.

Plaintiff in this civil action had requested under the Freedom of Information Act material from our investigative file relating to the assassination of the late President John F. Kennedy. Weisberg's request was denied and he subsequently filed a civil action in the United States District Court in Washington. His complaint was dismissed by the District Court and he appealed to the United States Circuit Court. The initial opinion by the Circuit Court was adverse to the Government in that it would require the Government to justify the withholding of information in investigative files on the basis that some ongoing investigative matter would be prejudiced by disclosure. The Government petitioned the Circuit Court for a hearing en banc, which was granted. The decision handed down on 10/24/73, with only Chief Judge Bazelon dissenting, interpreted the seventh exception in the Freedom of Information Act relating to investigatory files compiled for law enforcement purposes as covering all materials in an investigatory file. This decision will permit us to deny access to those materials which are clearly contained in one of our investigatory files.

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RECOMMENDATION:

None; for information.

Enc.

- 1 - Mr. Franck
- 2 - Mr. Mintz
- 1 - Mr. Williamson

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1026

HAROLD WEISBERG, APPELLANT

v.

U. S. DEPARTMENT OF JUSTICE

On Rehearing *En Banc*

Decided October 24, 1973

Bernard Fensterwald, Jr., with whom *James H. Lesar* was on the brief, for appellants.

Walter H. Fleischer, Attorney, Department of Justice, with whom Assistant Attorney General *L. Patrick Gray, III*, at the time the brief was filed, *Thomas A. Flannery*, United States Attorney at the time the brief was filed, *Harold H. Titus, Jr.*, United States Attorney, and *Barbara L. Herwig*, Attorney, Department of Justice, were on the brief, for appellee. *Alan S. Rosenthal*, Attorney, Department of Justice, also entered an appearance for appellee.

Before: BAZELON, Chief Judge, DANAHER,* Senior Circuit Judge, WRIGHT, MCGOWAN, TAMM, LEVENTHAL;

* No. 71-1829, Committee to Investigate Assassinations v. U.S. Department of Justice was argued together with the above entitled case. Senior Circuit Judge Danaher did not participate in the consideration or disposition of 71-1829 and an opinion in that case will be forthcoming.

ROBINSON, MACKINNON, ROBB and WILKEY, Circuit Judges, sitting en banc.

Opinion for the Court filed by Senior Circuit Judge DANAHER.

Dissenting opinion filed by Chief Judge BAZELON at p. 17.

DANAHER, Senior Circuit Judge: Relying upon 5 U.S.C. § 552(a) (3) of the Freedom of Information Act, appellant in the district court sought to compel disclosure of certain materials¹ compiled by the Federal Bureau of Investigation following the assassination of the late President Kennedy. Appellant argued that he is a professional writer who has published four books treating of the Kennedy assassination. The Department of Justice moved that the complaint be dismissed or, alternatively, for summary judgment, predicated its position

¹ The appellant's complaint in paragraph 6 had alleged that after the assassination of President Kennedy on November 22, 1963, the Federal Bureau of Investigation had spectrographically analyzed and compared the following items:

- a) the bullet found on the stretcher of either President Kennedy or Governor John Connally of Texas (Identified as Exhibit 399 of the President's Commission on the Assassination of President Kennedy, hereafter referred to as the Warren Commission);
- b) bullet fragment from front seat cushion of the President's limousine;
- c) bullet fragment from beside front seat;
- d) metal fragments from the President's head;
- e) metal fragment from the arm of Governor Connally;
- f) three metal fragments recovered from rear floor board carpet of limousine;
- g) metal scrapings from inside surface of windshield of limousine; and
- h) metal scrapings from curb in Dealey Plaza which was struck by bullet or fragment.

upon Section 552(b)(7) of the Act which, as here pertinent, provides:

(b) This section shall not apply to matters that are

• • • • •
 (7) investigatory files compiled for law enforcement purposes

The district court without opinion granted the Department's motion to dismiss.² We are satisfied that the record before us clearly demonstrates the desired materials³ were part of the investigatory files compiled by the FBI for law enforcement purposes, and, as such, are exempt from the disclosure sought to be compelled. Accordingly, we affirm.⁴

L

President Kennedy was pronounced dead at 1:00 p.m. on Friday, November 22, 1963. That day, at 2:38 p.m., Lyndon B. Johnson was sworn in as the thirty-sixth

² Following argument of Weisberg's appeal, the respective opinions of a divided court were vacated when we entered our order for rehearing *en banc*.

³ Prior to the institution of this action the Attorney General had denied appellant's application for administrative relief wherein he described as "records" the following:

- "Spectrographic analysis of bullet, fragments of bullet and other objects, including garments and part of vehicle and curbstone said to have been struck by bullet and/or fragments during assassination of President Kennedy and wounding of Governor Connally.

⁴ The appellant chose not to counter the Department's affidavit filed in support of its Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted, or alternatively, for summary judgment. No material issue of fact was presented in any event. See *Irons v. Schuyler*, 151 U.S. App. D.C. 23, 28, 465 F.2d 608, 613, cert. denied, 409 U.S. 1076 (1972); cf. *Carter v. Stanton*, 405 U.S. 669 at 671 (1972); and see *Nichols v. United States*, 460 F.2d 671, 675 (10 Cir.), cert. denied, 409 U.S. 966 (1972).

President of the United States and immediately by plane left Texas for Washington.

Director Hoover testified before the Warren Commission that

When President Johnson returned to Washington he communicated with me within the first 24 hours and asked the Bureau to pick up the investigation of the assassination because as you are aware, there is no federal jurisdiction for such an investigation. It is not a Federal crime to kill or attack the President or Vice President, or any of the continuity of officers who would succeed to the presidency.

Appellant has argued on brief that the FBI materials could not have been compiled for law enforcement purposes since, in 1963 the State of Texas but not United States "had jurisdiction over the crime." He thus contended that he was "entitled to the sought material as a matter of law and not as a matter of grace."

Clearly, in the day and time of it all, the President contemplated collaboration with Texas authorities by agents of the Secret Service and of the Federal Bureau of Investigation looking to the early apprehension and ultimately the conviction of whoever murdered President Kennedy. It was speedily developed that the rifle from which the assassin's bullets had been fired had been shipped to one Lee Harvey Oswald. The latter was placed under arrest and charged with the perpetration of the crime. Two days later, as an investigation of massive proportions got under way, Oswald, then in the custody of Dallas Police, was fatally shot by one Jack Ruby.

* Congress by Pub.L. 89-141 approved August 28, 1965, 18 U.S.C. § 1751, prescribed penalties to apply in cases of assassination of a president and other identified officers and dealt with conspiracies to accomplish any such proscribed offense.

5

Director Hoover further testified before the Warren Commission thus:

However, the President has a right to request the Bureau to make special investigations, and in this instance he asked that this investigation be made. I immediately assigned a special force headed by the special agent in charge at Dallas, Texas, to initiate the investigation, and to get all details and facts concerning it, which we obtained, and then prepared a report which we submitted to the Attorney General for transmission to the President. [Hearings before the Warren Commission, Vol. 5, p. 98.]

To glean some understanding of the magnitude of the investigatory organization which was speedily activated, we may turn to the Foreword of the Warren Commission Report, xii, from which we quote:

The scope and detail of the investigative effort by the Federal and State agencies are suggested in part by statistics from the Federal Bureau of Investigation and the Secret Service. Immediately after the assassination more than 50 additional FBI personnel were transferred to the Dallas office on a temporary basis to assist in the investigation. Beginning November 22, 1963, the Federal Bureau of Investigation conducted approximately 25,000 interviews and reinterviews of persons having information of possible rele-

* By Executive Order No. 11130, 28 Fed. Reg. 12789 (1963), President Johnson appointed a Special Commission under the Chairmanship of Chief Justice Warren "to examine the evidence developed by the Federal Bureau of Investigation and any additional evidence that may hereafter come to light or be uncovered by federal or state authorities." Congress cooperated and passed Public Law 88-202, approved December 13, 1963, authorizing the Commission to require the attendance of witnesses and the production of evidence.

vance to the investigation and by September 11, 1964, submitted over 2,300 reports totaling approximately 25,400 pages to the Commission. During the same period the Secret Service conducted approximately 1,550 interviews and submitted 800 reports totaling some 4,600 pages.

We deem it demonstrated beyond peradventure that the Department's files: (1) were investigatory in nature; and (2) were compiled for law enforcement purposes.* When that much shall have been established, as is so clearly the situation on this record, and the district judge shall so determine, such files are exempt from compelled disclosure.

II.

While the statute speaks for itself in the respect under consideration, we may note that the legislative history additionally explains:

It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.*

* We are not at this point concerned with the "except" clause of subsection (7) which protects the Department's files "except to the extent available by law to a party other than an agency." See the definition of "party" in 5 U.S.C. § 551(3) and note 15, *infra*.

* S. Rep. No. 813, 89th Cong., 1st Sess., at 3 (1965); see also H.R. Rep. No. 1497, 89th Cong., 2d Sess., at 6 (1966). *EPA v. Mink*, 410 U.S. 73, 80, n.6 (1973), *Frankel v. Securities and Exchange Commission*, 460 F.2d 813, 817, (2 Cir.), cert. denied, 409 U.S. 822 (1972); and see *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726, 727 (N.D.Cal. 1971), (where *in-camera* inspection was directed only to ascertain whether or not there was an investigatory file compiled for law enforcement purposes). And see *Evans v. Department of Transportation of United States*, 446 F.2d

In slightly different context to be sure, Judge Hays analyzed the Congressional purpose thus:

If an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered. *The agency's investigatory techniques and procedures would be revealed.* The names of people who volunteered the information that had prompted the investigation initially or who contributed information during the course of the investigation would be disclosed. The possibility of such disclosure would tend severely to limit the agencies' possibilities for investigation and enforcement of the law since these agencies rely, to a large extent, on voluntary cooperation and on information from informants.* (Emphasis added).

There can be no question that 5 U.S.C. § 552 had as its principal purpose that there was to be disclosure to the public of the manner in which the Government conducts its business. Congress additionally was concerned with the dilemma in which the public finds itself when forced to "litigate with agencies on the basis of secret laws or incomplete information."¹⁰ We have repeatedly

821, 824, n.1, (5 Cir. 1971), cert. denied, 405 U.S. 918 (1972) and N.L.R.B. v. Clement Brothers Co., 407 F.2d 1027 (5 Cir. 1969).

* Frankel v. Securities and Exchange Commission, supra, note 8, 460 F.2d at 818.

¹⁰ Bannercrest Clothing Company, Inc. v. Renegotiation Board, U.S. App. D.C., 466 F.2d 345, 352 (1972), cert. granted, 410 U.S. 907 (1973); and see American Mail Line Ltd. v. Culick, 133 U.S. App. D.C. 282, 411 F.2d 696 (1969); see also Grumman Aircraft Engineering Corp. v. The Renegotiation Board, No. 71-1730 (D.C. Cir. July 3, 1973).

made evident our appreciation of the principle that generally disclosure, and not withholding, of information is called for, especially where there is an adversarial posture presented as in *Bristol-Myers Co. v. FTC*, 138 U.S. App. D.C. 22, 25, 424 F.2d 935, 938, *cert. denied*, 400 U.S. 824 (1970.)" But the remedy appropriately provided in § 552(a) (3) is not available in every situation, and as we have previously noted, § 552(b) is explicit that § 552 does not apply to matters that are specifically exempted.

We are not here speaking of trade secrets, or personnel and medical files, or patent information or internal revenue returns, or yet other material which, by statute (*see, e.g.*, 41 CFR § 105-60.604, 1972), had been specifically exempted from disclosure. We are not treating of geological information or matter required by Executive order to be kept secret. We are not discussing any problem except that of compelled disclosure of Federal Bureau of Investigation investigatory files * compiled

" *And see*, generally, our discussion in *Getman v. National Labor Relations Board*, 146 U.S. App. D.C. 209, 218, 450 F.2d 670, 679-680 (1971); *Sterling Drug, Inc. v. Federal Trade Commission*, 146 U.S. App. D.C. 237, 244, 450 F.2d 698, 705 (1971); *Soucie v. David*, 145 U.S. App. D.C. 111, 151, 448 F.2d 1067, 1077 (1971); *Irons v. Schuyler*, 151 U.S. App. D.C. 23, 465 F.2d 608, *cert. denied*, 409 U.S. 1076 (1972); *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 138 U.S. App. D.C. 147, 425 F.2d 578 (1970).

Nothing in the foregoing cases runs counter to the Supreme Court's treatment in *EPA v. Mink*, 410 U.S. 73 (1973).

* Attorney General Richardson, acting pursuant to Title 28 U.S.C. Section 509, by Order No. 528-73, July 11, 1973, 88 Fed. Reg. No. 136, 19029, [and see 5 U.S.C. § 301] has amended earlier regulations relating to materials exempted from compulsory disclosure under the Freedom of Information Act. "Possible releases that may be considered under this section are at the sole discretion of the Attorney General and of those persons to whom authority hereunder may be delegated." The Order provides for access to material within the De-

for law enforcement purposes. Certainly the answer does not depend upon what this appellant desires to accomplish if access be afforded. The Court has told us that the Act does not "by its terms, permit inquiry into particularized needs of the individual seeking the information." *EPA v. Mink*, 410 U.S. at 86. Against the background we have hereinbefore set out, we may appropriately turn, particularly as a frame of reference, to the correspondence between the appellant and the Department prior to the institution of this action.

This appellant, in his letter of May 16, 1970 attached as an exhibit to his complaint, submitted to the Department of Justice the following:

With regard to the spectrographic analysis, if you are not aware of it, not then having been in your present position, I think you should know that if it does not agree in the most minute detail with the interpretation put upon it by the Warren Commission, their Report is a fiction.

Appellant then transmitted the Department's form entitled "Request For Access To Official Record Under 5 U.S.C. 552(a) and 28 CFR Part 16," describing the material set forth in our footnote 3, *supra*. A further exhibit attached to the appellant's complaint discloses that the Department under date of June 12, 1970, wrote:

Spectrographic Analyses: You have asked for access to the spectrographic analyses conducted on certain bullet evidence involved in the assassination.

I regret that I am unable to grant your request in that the work notes and raw analytical

partment's investigatory files compiled for law enforcement purposes "that are more than fifteen years old" subject to certain deletions which include "(4) *Investigatory techniques and procedures.*" (Emphasis added) Compare text quoted *supra*, and identified in *Frankel v. Securities and Exchange Commission*, 460 F.2d at 817-818, n. 9, *supra*.

data on which the results of the spectrographic tests are based are part of the investigative files of the FBI and are specifically exempted from public disclosure as investigatory files compiled for law enforcement purposes. 5 U.S.C. 552(b) (7). The results of the spectrographic tests are adequately shown in the report of the Warren Commission where (Volume 5, pages 67, 69, 73 and 74) it is specifically set forth that the metal fragments were analyzed spectrographically and found to be similar in composition.

Our problem thus stems from what follows under the Freedom of Information Act after the Attorney General's exercise of the decisional process devolving upon him.

III.

The Department of Justice, headed by the Attorney General, 28 U.S.C. § 503, includes the Federal Bureau of Investigation, 28 U.S.C. § 531. The Attorney General is directly charged under 28 U.S.C. § 534 with the duty to acquire, collect, classify and preserve identification, criminal identification, crime and other records, and to exchange such records with and for the official use of authorized officials, not only of the federal government, but of the States and cities. So it was that the Bureau collaborated with the Dallas police.¹²

¹² Such cooperation regularly follows as a matter of duty in aid of law enforcement, indeed the magnitude of the effort, scarcely realized, has been delineated in *Menard v. Mitchell*, 328 F. Supp. 718, 721-722 (D.D.C. 1971), following our remand in that case, 139 U.S. App. D.C. 113, 430 F.2d 486 (1970).

Cf. Public Law 83-215, the Appropriations Act of 1964, providing funds for the Federal Bureau of Investigation for the "protection of the person of the President of the United States; acquisition . . . and preservation of identification and

Further appreciation of the daily activity of the Bureau may be seen in its annual report for 1972. The FBI had developed more than 345,000 items of criminal intelligence which had been disseminated to other Federal, state and local agencies engaged in law enforcement. More than 495,000 examinations of evidence had been conducted by the FBI laboratory to be submitted to law enforcement agencies. Organized crime investigations had ranged throughout the nation. Discretion respecting disclosure of the records in such matters devolved upon the Attorney General by virtue of 28 U.S.C. § 534. Moreover, under subsection (b) thereof, the exchange of records so gathered may be "subject to cancellation if dissemination is made outside the receiving departments or related agencies," Congress provided. It may to some appear *unthinkable* that the criminal investigatory files of the Bureau of Investigation, compiled for law enforcement purposes, are to be thrown open to some "person" as defined in 5 U.S.C. § 551(2) who asserts entitlement in reliance upon § 552(a)(3). Yet our appellant claims his "right" as a matter of law since in November, 1963, it was not a federal crime to kill a President. We need only surmise the consequences to law enforcement if any "person," knowing full well that an investigation has been conducted, can ask some federal court to compel disclosure of the Bureau's files.

Obviously, the statutory scheme of organization, as above referred to, calls for the exercise of discretion by the Attorney General respecting execution of the duties devolving upon him, and through him, upon the Federal Bureau of Investigation. We have no doubt whatever

other records and their exchange with, and for the official use of, the duly authorized officials . . . of States . . . such exchange to be subject to cancellation if dissemination is made outside the receiving departments."

that Congress was fully alive to the problem where investigatory files of the FBI were involved.

Congress knows full well that in the first instance an Attorney General in myriad situations must exercise the discretion conferred upon him by law. He must evaluate the evidence necessary to an informed judgment. He must decide whether to prosecute or not. He must decide whom to prosecute. He must decide when to prosecute. Functions in this area belong to the Executive under the Constitution, Article II, Sections 1 and 3, and, as here, specifically to the Attorney General under 28 U.S.C. § 509. Consider problems such as we find were assessed in *Pugach v. Klein*, 193 F. Supp. 630, 634-635 (S.D.N.Y. 1961), and *Moses v. Kennedy*, 219 F. Supp. 762, 765 (1963), *aff'd sub nom., Moses v. Katzenbach*, 119 U.S. App. D.C. 352, 342 F.2d 931 (1965). As Judge Wright there said

... an investigation as to the adequacy or the execution of these laws is not a matter within the jurisdiction of the judicial branch of this Government.

And see *Newman v. United States*, 127 U.S. App. D.C. 263, 265, 382 F.2d 479, 481 (opinion by present Chief Justice Burger, 1967). The Attorney General's prosecutorial discretion is broad, indeed, and ordinarily at least, is not subject to judicial review. *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380 (2 Cir. 1973); *Powell v. Katzenbach*, 123 U.S. App. D.C. 250, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966); *Tuohy v. Ragen*, 340 U.S. 462, 467-469 (1951); cf. *Adams v. Richardson*, U.S. App. D.C. , F.2d (en banc, June 12, 1973); but we suggested that immunity respecting the exercise of discretion may well be unavailable were the Department to be under investigation by a court or grand jury when fraud or corruption might be involved, *Committee for*

Nuclear Responsibility, Inc. v. Seaborg, 119 U.S. App. D.C. 385, 391, 463 F.2d 788, 791. (1971). But this much is certain, (5 U.S.C. § 301 as part of Pub. L. 89-554, 80 Stat. 379), the Attorney General, like the heads of other Executive departments, was authorized to refuse disclosure under Exemption 7 if he could determine as here that the issue involved investigatory files compiled for law enforcement purposes.

IV

Congress surely realized that disclosure was not to be required in certain prescribed classifications. For example, section 552(b) provided that the section as a whole was not to apply to matters that are (3) "specifically exempted from disclosure by statute." See, as illustrative, the statutes identified in 41 CFR § 105-60.604 (1972).

Again, section 552(b)(1) exempted from disclosure matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." That very language gave rise to an issue which this court first considered, followed by the Supreme Court's definitive pronouncements as to the steps to be taken respecting disclosure of materials coming within section 552(b)(5). Ruling that we misapplied that section,¹² the Court reversed, *EPA v. Mink*, 410 U.S. 73 (1973), observing at 82 after a review of the legislative history,

Rather than some vague standard, the test was to be simply whether the President has determined by executive order that particular documents are to be kept secret. The language of the Act itself is sufficiently clear in this respect, but the legislative history disposes of any possible

¹² *Mink v. Environmental Protection Agency*, U.S. App. D.C. , 464 F.2d 742 (1971).

argument that Congress intended the Freedom of Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them.

Lest there be any doubt as to the Supreme Court's teaching respecting Exemption (b) (1), its opinion, 410 U.S. at 84, emphasized:

What has been said thus far makes wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen.

There was to be no room for challenge, no "balancing" function, no *in camera* inspection. Rather, upon the basis of the "showing and in such circumstances, petitioners had met their burden of demonstrating that the documents were entitled to protection under Exemption 1, and the duty of the District Court under Section 552 (a) (3) was therefore at an end." *EPA v. Mink*, 410 U.S. at 84.

In that very case, strikingly different treatment was prescribed even as to executive materials claimed to be immune from disclosure under Exemption 5. *EPA v. Mink*, 410 U.S. at 85 *et seq.* The applicability of Exemption 7 no less will turn ultimately upon a determination by the district court¹¹ that disclosure is not required—as in the instant case.

Granted that the Attorney General may designate certain investigatory files as having been compiled for law enforcement purposes, his *ipse dixit* does not finalize the matter, for there remains the judicial function of determining whether that classification be proper. Where

¹¹ Cf. *Cowles Communications, Inc. v. Department of Justice*, *supra*, n. 8. See generally the discussion in *Vaughn v. Rosen*, U.S. App. D.C. , F.2d (Aug. 20, 1973).

the district court can conclude that the Attorney General's designation and classification are correct, the Freedom of Information Act requires no more. Here the record overwhelmingly demonstrates how and under what circumstances the files were compiled and that indeed they were "investigatory files compiled for law enforcement purposes." When the District Judge made that determination, he correctly perceived that his duty in achieving the will of Congress under the Freedom of Information Act was at an end.¹³

¹³ This appellant also argued that if Oswald had lived and had been brought to trial, he would have had a legal right to the spectrographic analyses here in question, and accordingly Weisberg must be accorded an equal right. He based this claim upon so much of subsection (b) (7) as appears in the clause "except to the extent available by law to a party other than an agency." Aside from the fact that there was no such prosecution, Oswald's "right" would have been recognized only to the extent that the wanted material could have been "available by law," and then only to himself as a "party" as defined in § 551 (3). This appellant does not come within the definition of "party." The import of this language was discussed in *EPA v. Mink*, 410 U.S. at 86, indeed the Court would have allowed public access only to such materials as "a private party could discover in litigation with the agency." The short answer to appellant's claim in this respect is that he does not come within the terms of the Act. He was not engaged in litigation with an agency, and neither was Oswald.

Thus he ruled that there was no claim upon which relief could be granted, that there was no issue as to any material fact, and that the Department was entitled to judgment as a matter of law." The action was thereupon dismissed.

Affirmed.

"*Cf. Nichols v. United States*, 460 F.2d 671 (10 Cir.), cert. denied, 403 U.S. 966 (1972).

Our appellant had sought to test the spectrographic analyses of materials (listed in car n. 3, *supra*) not unlike certain items listed in note 1 of *Nichols, supra*. There *Nichols* had sought to make his own scientific analysis of the described material, which the court found to be specifically exempted from disclosure by statute, pointing to § 552(b) (3). The opinion cited Pub. L. 89-318, 79 Stat. 1185, November 2, 1965, where the Attorney General acting in "the national interest" designated evidence considered by the Warren Commission to "be preserved." Such evidence pursuant to § 4 of that Act was to be placed under the jurisdiction of the Administrator of General Services for preservation under such rules and regulations as the Administrator might prescribe. (*See generally*, 41 CFR § 105-60.101, §§ 105-60.601, 60.602 and 60.604; and Vol. 11, Part 17, 23,002 Congressional Record, 89th Cong. 1st Sess., Sept. 7, 1965).

The court found—without more—that the rules and regulations are clearly within the grant of authority of Pub. L. 89-318, and that the materials sought by *Nichols* came within the exemption of § 552(b) (3).

[Special "Regulations Concerning Procedures for Reference Service on Warren Commission and Related Items of Evidence," National Archives Record Group 272, provide in subsection 5, in part, that materials which have been subjected to techniques of detailed scientific examination "will be withheld from researchers as a means of protecting them from possible physical damage or alteration and in order to preserve their evidentiary integrity in the event of any further official investigation of the assassination of President John F. Kennedy."]

BAZELON, Chief Judge, dissenting: In *Environmental Protection Agency v. Mink*,¹ Mr. Justice White, writing for a majority of the Court, reviewed the legislative history of one section of the Freedom of Information Act, that which exempts from disclosure "matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."² On the basis of the legislative history and the explicit statutory language, the majority concluded that "Congress chose to follow the Executive's determinations in these matters Rather than follow some vague standard, the test was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret."³

In this case, appellant Weisberg seeks the following information:

Spectrographic analysis of bullet, fragments of bullet and other objects, including garments and part of vehicle and curbstone said to have been struck by bullet and/or fragments during assassination of President Kennedy and wounding of Governor Connally.

In response to Weisberg's request for this information, the Justice Department stated:

. . . that the work notes and raw analytical data on which the results of the spectrographic tests are based are part of the investigative files of the FBI and are specifically exempted from public disclosures as investigatory files compiled for law enforcement purposes. 5 U.S.C. 552(b)(7). The results of the spectrographic tests are adequately shown in the report of the Warren Commission where (Volume 5, pages 67, 69, 73 and 74) it is specifically set forth that the metal fragments were analyzed spectrographically and found to be similar in composition.

¹ 410 U.S. 73 (1973).

² 5 U.S.C. § 552(b)(1) (1970).

³ 410 U.S. at 81-82.

Thus, we deal in this case, not with Section 552(b) (1), but with Section 552(b) (7). The latter provision exempts from disclosure "matters that are . . . Investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." I have no doubt that, as Judge Danaher's majority opinion concludes, the information sought in this case is lodged in a file originally compiled for law enforcement purposes. I cannot, however, agree with the majority that this fact automatically brings the information within the ambit of Section 552(b) (7). There remains the question whether such information is to be considered as resting solely within an "investigative file" when the results of the spectrographic tests have been made public in the Warren Commission report and when there is no indication that the Government contemplates use of the information for law enforcement purposes.

The reasons that support my position are fully stated in Judge Frank Kaufman's* majority opinion for the panel that originally heard this case, an opinion in which I concurred and which was withdrawn when the case was ordered to be reheard *en banc*. I set forth here the central part of Judge Kaufman's opinion:

In *Bristol-Myers Company v. F.T.C.*, 421 F.2d 935, 939-40 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), Chief Judge Bazelon, in reversing the grant of a motion to dismiss the plaintiff's Freedom of Information Act complaint, and in commenting upon the 5 U.S.C. § 552(b) (7) exemption, wrote:

* * * [T]he agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files

* United States District Judge for the District of Maryland; Judge Kaufman sat in this case by designation pursuant to 28 U.S.C. § 292(d) (1970).

* The footnotes of Judge Kaufman's opinion have been renumbered.

with the label "Investigatory" and a suggestion that enforcement proceedings may be launched at some unspecified future date. Thus the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the company are nevertheless discoverable.

In the within case, no criminal or civil action relating to the death of President Kennedy is pending nor is it indicated by the Government that any such future action is contemplated by anyone. Nor is Weisberg the subject of any investigation. He simply asks for information which he alleges he is entitled to have made available to him under 5 U.S.C. § 552 (a) (3). The language of Section 552, supported abundantly by the legislative history of the Freedom of Information Act,⁶ places the burden on the Government to show why non-revelation should be permitted, and requires that exemptions from disclosure be narrowly construed and that ambiguities be resolved in favor of disclosure. See generally *Getman v. N.L.R.B.*, 459 F.2d 670, 672 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971); *Wellford v. Hardin*, 444 F.2d 21, 25 (4th Cir. 1971); *Bristol-Myers Company v. F.T.C.*, *supra* at 938-40; *M. A. Shapiro & Co. v. Securities & Exchange Comm'r*, 339 F. Supp. 467, 469, 470 (D. D.C. 1972); cf. *LaMorte v. Mansfield*, 438 F.2d 418 (2d Cir. 1971) (Friendly, J.). In *Wellford v. Hardin*, *supra* at 25. Judge Butzner commented that 5 U.S.C. § 552(c) provides that the Act "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated" and noted Professor Davis' emphasis upon "[t]he pull of the word 'specifically'" K. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 783 (1967).

⁶S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), hereinafter cited as Senate Report. House Report at 5.

The Court below granted the Government's motion to dismiss, not its motion for summary judgment. Thus, it seemingly accorded no weight to the affidavit of Agent Williams.⁷ But even if that affidavit is given full consideration, it is a document which is most general and conclusory and which in no way explains how the disclosure of the records sought is likely to reveal the identity of confidential informants, or to subject persons to blackmail, or to disclose the names of criminal suspects, or in any other way to hinder F.B.I. efficiency.⁸ The conclusion that the disclosure Weisberg seeks will cause any of those harms is neither compelled nor readily apparent, and therefore does not satisfy the Department's burden of proving under 5 U.S.C. § 552(b)

⁷ Weisberg contends that certain parts of the Williams' affidavit do not qualify for consideration under Federal Civil Rule 56. Those contentions, on remand, should, if Weisberg desires, be brought to the attention of the District Court.

⁸ An F.B.I. investigatory file may generally relate to organized or other crime and may not have been originally intended for use in the prosecution of any named individuals, or, even if so originally intended, may no longer be intended for such use. The data contained in such a file may, however, require the protection of secrecy so as not to dry up future sources of information or to pose a danger to the persons who supplied the information or to prevent invasion of personal privacy. 5 U.S.C. § 552(b)(7) would appear sufficiently flexible to include within its protection such an investigatory file when and if such protection is required. *Frankel v. Securities & Exchange Commission*, 460 F.2d 813 (2d Cir. 1972); *Evans v. Department of Transportation*, 446 F.2d 821, 823-24 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726, 727 (N.D. Calif. 1971). In such instances, *in camera* inspection by the District Court might be appropriate. See discussion *infra* at n.[11].

(7), as the Department must, some basis for fearing such harm." Neither the F.B.I. nor any other governmental agency can shoulder that burden by simply stating as a matter of fact that it has so done, or by simply labelling as investigatory a file which it neither intends to use, nor contemplates making use of, in the future for law enforcement purposes, at

"The burden of proof is placed upon the agency which is the only party able to justify the withholding." House Report at 9. And see the specific wording of 5 U.S.C. § 552(a) (3) While it may be that the introductory words of Section 552(b) make the burden of proof provisions of Section 552(a) (3) inapplicable in determining whether the Section 552(b) exceptions apply (but see the contrary approach taken in all opinions, majority, concurring and dissenting, in *Environmental Protection Agency, et al. v. Mink, et al.*, U.S. — (January 22, 1973), and the Ninth Circuit's seeming assumption to the contrary in *Epstein v. Resor*, 421 F.2d 930, 932 (9th Cir. 1970)), that contention in no way compels any different conclusions than those expressed in this opinion. The underlying philosophy of Section 552 favors disclosure. See Senate Report at 3. Section 552(c) provides that Section 552 "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." See the decision *supra* at pp. 7-8 re *Wellford v. Hardin, supra*. The thrust of Section 552(c) is that exceptions from the disclosure provisions of Section 552 are to be carefully construed. See House Report at 11; Senate Report at 10. To place the burden of proof on the plaintiff to prove the nonapplicability of a Section 552(b) exception when the Government as a rule has knowledge of nearly all the facts relevant to such an exception would be contrary to the disclosure philosophy of all of Section 552 and specifically of Section 552(c). Moreover, placing the burden of proof on the plaintiff would also seemingly run contrary to the underlying philosophy set forth in the House Report which, in explaining why the burden of proof was placed on the agency to justify the withholding of information in Section 552(a) (3), stated (at 9): "A private citizen cannot be asked to prove that an agency has withheld information improperly because he

least not without establishing the nature of some harm which is likely to result from public disclosure of the file. Something more than mere edict or labeling is required if the Freedom of Information Act is to accomplish its "primary purpose, i.e., 'to increase the citizen's access to government records.'"

The above was, of course, written in the context of the facts of this case. In most cases perhaps, the Government may satisfy its burden of proof simply by establishing that the information sought was compiled for investigatory purposes and rests in an investigatory file, none of the contents of which have ever been made public. But that is not the case here.

I continue to agree with Judge Kaufman that the purpose of the Act should not be defeated if there is available a judicial technique for advancing it and at the same time ensuring that no harm comes to the interests Congress intended to protect. *In camera* inspection, as re-

will not know the reasons for the agency action." See also Senate Report at 8. That same reasoning would seem equally applicable in determining the relationship among 552(a)(3), 552(b)(7) and 552(c).

* *Getman v. N.L.R.B.*, 450 F.2d *supra* at 672, in which Judge Wright quoted from Judge Bazelon's opinion in *Bristol-Myers*. See *Philadelphia Newspapers, Inc. v. Department of H & U.D.*, 843 F. Supp. 1176, 1180 (E.D. Pa. 1972); *Cowles Communications, Inc. v. Department of Justice*, *supra* at 727.

"For the great majority of different records, the public as a whole has a right to know *what its Government is doing*" (emphasis supplied), Senate Report at 5-6. And see also the "conclusion" in House Report at 12: "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a political truism needs repeating. * * *"

quired by the remand order of the withdrawn opinion, is such a technique. The fact that, in *Mink*, the Supreme Court determined that the language and legislative history of the Section (b) (1) exemption did not permit the use of *in camera* inspection does not mean that the technique is unsuitable in every case involving the Section (b) (7) exemption." Indeed, its use seems most suitable in this case. Without it, the public will have to rely entirely upon the Justice Department's opinion that "[t]he results of the spectrographic tests are *adequately* shown in the report of the Warren Commission. . . ." I suggest that Congress, in enacting the Freedom of Information Act, did not intend that the public would so have to rely.

Accordingly, I dissent, and continue to adhere to the views on this issue expressed by Judge Kaufman in his majority opinion for the panel.

¹¹ As Judge Kaufman observed in note 8 of the withdrawn opinion,

[I]n this case no Executive order, and no matter of national defense or foreign policy, is asserted to be involved. Further, it is to be noted that in remanding in connection with the application of 5 U.S.C. § 552(b) (5) exempting "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency", Mr. Justice White in the *Environmental Protection Agency* case placed the burden of showing entitlement to the (b) (5) exemption upon the Government.

¹² Emphasis supplied.

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (62-109060)

DATE: 12/28/73

FROM : SAC, EL PASO (89-52) RUC

SUBJECT: ASSASSINATION OF PRESIDENT
JOHN FITZGERALD KENNEDY
NOVEMBER 22, 1963
DALLAS, TEXAS

Enclosed for the Bureau are an original and six copies of a LHM re WILLIAM ALON THOMPSON. LHM is being furnished to Bureau for background information should future inquiries be received regarding THOMPSON.

- (3) - Bureau (Enc. ~~ENCLOSURE~~)
- 1 - El Paso
- RAA:cal
- (4)

ST-111

REC-57

62-109060-707

JAN 8 1974

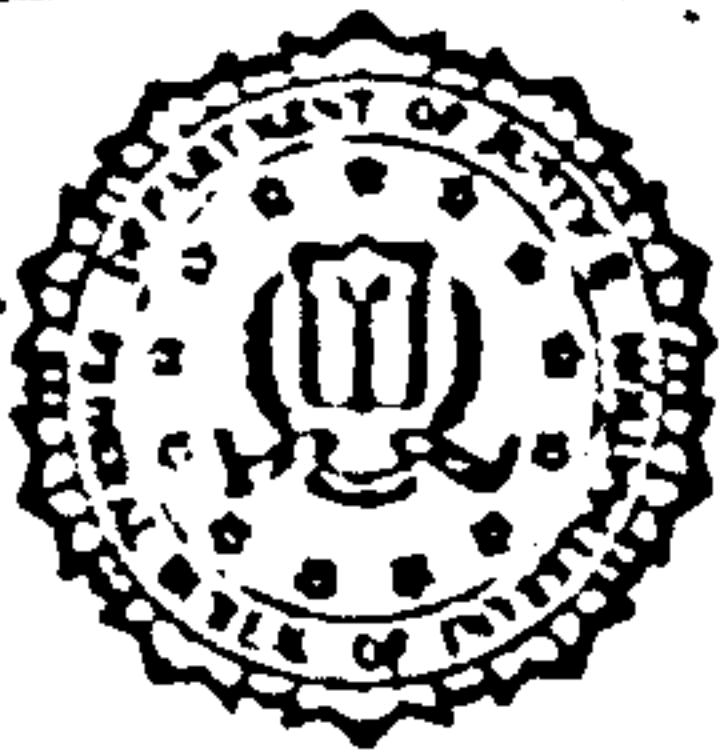
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JAN 18 1974

Handwritten signatures and initials:
SW
HIVEL
B-P





UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to
File No.

El Paso, Texas
December 28, 1973

ASSASSINATION OF PRESIDENT
JOHN FITZGERALD KENNEDY
NOVEMBER 22, 1963
DALLAS, TEXAS

On December 15, 1973, Sergeant Jack Babbitt, El Paso Police Department, telephonically contacted the El Paso Office of the Federal Bureau of Investigation and advised that a confidential source had informed him that a man, known only as Thompson, who was staying in Room 22 of a lower valley El Paso apartment, phone number 772-0371, was bragging about how he helped in the Kennedy assassination.

A check of the El Paso City Directory revealed that telephone number 772-0371 is subscribed to by the Papagayo Motel and Apartments, 5760 Alameda Avenue, El Paso, Texas.

On December 18, 1973, [Ralph Dominguez, Manager of the Papagayo Motel and Apartments, 5760 Alameda Avenue,] was interviewed and advised that the tenant in Room 22 registered as William Thompson, 392 North Sixth Avenue, #8, Phoenix, Arizona, on November 17, 1973. [Dominguez] knew that Thompson had been employed at T. V. Ray Television Sales, Fox Plaza Shopping Center, El Paso, but had recently been fired and was presently looking for employment. Thompson was driving a 1959 Ford Thunderbird with Arizona license plates SKH 735.

[Dominguez] described Thompson as a very talkative man who told some involved story about the assassination of President Kennedy and the three United States Astronauts who were killed in a fire. [Dominguez] stated that he considered Thompson to be "crazy" and had called the El Paso Office of the Secret Service. Special Agent Quinn of the Secret Service had advised [Dominguez] that Thompson was well known to the Secret Service.

On December 26, 1973, Special Agent Mundy Quinn, United States Secret Service, El Paso, Texas, advised that

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

62-109060-7107
ENCLOSURE

Re: ASSASSINATION OF PRESIDENT
JOHN FITZGERALD KENNEDY
NOVEMBER 22, 1963
DALLAS, TEXAS

the Secret Service has known of Thompson since 1954, but that he is not considered dangerous to the people the Secret Service is authorized to protect. The Secret Service maintains an interest in Thompson to determine if he should become dangerous. Quinn talked to Thompson in November, 1973, by telephone and on December 18, 1973, at the Papagayo Hotel. Thompson related to Quinn a theory that the assassination of Martin Luther King, President John Kennedy, Senator Robert Kennedy, the shooting of Governor Wallace and the deaths of the three United States astronauts burned in the space capsule fire, show an evolutionary process which indicates that President Nixon will be assassinated. Quinn advised that Thompson has talked to the Federal Bureau of Investigation several times in the past, the most recent in Phoenix, Arizona in May of 1973.

Quinn provided the following descriptive information regarding Thompson:

Name	William Amon Thompson
Sex	Male
Race	White
Date of birth	September 15, 1916
Place of birth	Portland, Oregon
Height	5'11"
Weight	164 pounds
Hair	Brown, cut short
Eyes	Brown
Driver's license	Arizona, B202915
Social Security	
Account Number	544-09-4418
Secret Service	
Number	C02-35800
Docket number	9352

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (62-109060)

DATE: 1/25/74

FROM : SAC, PHOENIX (89-42) (RUC)

SUBJECT: ASSASSINATION OF PRESIDENT
JOHN FITZGERALD KENNEDY
DALLAS, TEXAS, 11/22/63
MISCELLANEOUS - INFORMATION CONCERNING
OO: DALLAS

Enclosed for the Bureau are four (4) copies of an LHM containing information received from an individual identifying himself as OSCAR LORENZO O'DONNELL.

Two copies of the LHM are enclosed for the information of Dallas.

One copy of the LHM has been furnished to Secret Service, Phoenix, Arizona.

1/16
15

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EX-117

ENCLOSURE

62-109060-7108

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- 2 - Bureau (Enc. 4)
- 2 - Dallas (Enc. 2)
- 2 - Phoenix
(1 - 66-937)

15 JAN 30 1974

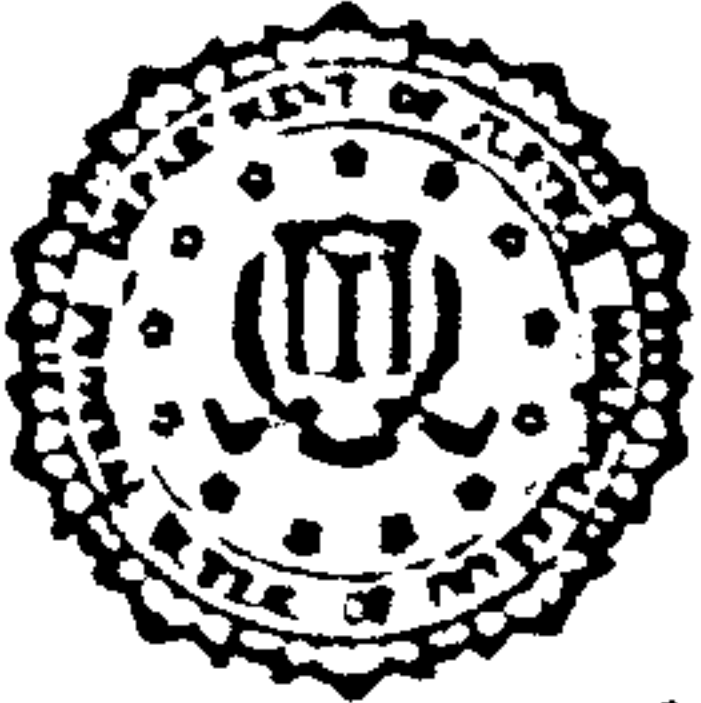
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UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

Phoenix, Arizona 85001

January 25, 1974

In Reply, Please Refer to
File No.

ASSASSINATION OF PRESIDENT
JOHN FITZGERALD KENNEDY
NOVEMBER 22, 1963
DALLAS, TEXAS

[Oscar Lorenzo O'Donnell, 610 North Sixth Avenue, Phoenix, Arizona, telephone number 257-1451] on January 15, 1974, telephonically advised an employee of the Phoenix FBI Office the following information:

[O'Donnell has a renter] named Melvin Perrell, who rents Apartment #4, located to the rear of the above-named property. According to [O'Donnell], Perrell has mentioned on a number of occasions that he killed President Kennedy. Ariz -
3/11/74

[O'Donnell, his wife,] and Perrell] go out socially together, and after a few drinks, Perrell begins talking about the assassination. Perrell claims that he fired the shot that killed President Kennedy, but did not fire the shot that wounded Governor Connally. He has stated that he, Perrell, belonged to a syndicate (not named) and the gun used to shoot the President belonged to the syndicate. At the time of the assassination, Perrell resided just south of Fort Worth, Texas.

[O'Donnell] said that Perrell is a loner, and is described as about 40 years of age. No further descriptive data was obtained of Perrell.

A check was made with Driver's License Records for the State of Arizona, Phoenix, Arizona, without locating a record on Melvin Perrell.

Indices of the FBI Office at Phoenix were negative regarding the name of Melvin Perrell.

Special Agent David Carpenter, U. S. Secret Service, Phoenix, Arizona, was telephonically advised of the above information on January 23, 1974.

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

ENCLOSURE

1*

62-10761-7107

REC'D
22

John Breads
1828 N. James Street
January 12, 1974

Gentlemen:

I am writing this letter knowing the odds are greatly against my getting a reply. I feel I have to write it anyway. It concerns one detail surrounding the assassination of President John F. Kennedy. I am puzzled by the fact that Lee Harvey Oswald had in his possession the name, license and telephone numbers, of an FBI agent. I realize the agent, James P. Hosty, had interviewed Mrs. Oswald, Ruth Paine, and other neighbors, in early November of 1963. If he didn't quizz Oswald himself, I don't see how he could have obtained this information. Could he have possibly been in hiding when the agent came to his home, and have overheard the information? Oswald could have easily copied the license plate number from a ground floor window. This is the only possible explanation I can come up with.

I realize I am asking you to go out of your way, and using your valuable time, but I would deeply appreciate a reply. In this way, I feel much of the remaining doubt concerning the assassination can be cleared up. I thank you very much for even reading my letter.

Sincerely,
John F. Breads, Jr.

Federal Bureau of Investigation
Pennsylvania Avenue at 9th St., N.W.
Washington, D. C.

John F. Breads, Jr.
XXXXXXXXXXXXXXXXXXXX
1828 N. JAMES ST.
ROME, N. Y. 13440

REC-51 62-109060-7169

3 JAN 23 1974

NMI

EX 112

1/14/74

Handwritten signature/initials

January 23, 1974

REC-51

62-109060-7199

EX-112

Mr. John P. Breads, Jr.
1828 North James Street
Rome, New York 13440

John Breads

Dear Mr. Breads:

In reply to your letter of January 12th, as a matter of policy, all Special Agents of this Bureau in connection with investigations identify themselves by name and through a display of credentials. The telephone number of any of our field offices can be easily obtained inasmuch as this information is a matter of public record. In addition, the license number of any vehicle being driven by an FBI employee could be visually observed and obtained in this manner. I trust this information will satisfactorily answer your inquiry.

Sincerely yours,

C. M. Kelley

Clarence M. Kelley
Director

MAILED 23
JAN 23 1974
FBI

NOTE: Bufiles contain no record of correspondent. Reply coordinated with Inspector Jack E. Herington, Office of Legal Counsel.

RCD:cmc (3)

cmc

Handwritten initials and scribbles

Handwritten signature/initials

Handwritten initials in a circle

JAN 23 1974
FEB 4 1974
MAIL ROOM
TELETYPE UNIT

MAIL ROOM TELETYPE UNIT

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