

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

JOHN NICHOLS,

Plaintiff,

v.

THE UNITED STATES OF  
AMERICA and JAMES B.  
RHOADS, Archivist of  
the United States,  
General Services  
Administration,

Defendants.

Civil Action No. T-4536

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION  
TO DISMISS OR, IN THE ALTERNATIVE,  
FOR SUMMARY JUDGMENT

Statement of the Case

By this action plaintiff seeks to obtain permission to study photographs and X-rays taken at the autopsy of former President John F. Kennedy; temporary custody of Warren Commission exhibits numbered 399, 573, 842, 843, and 856 and apparel worn by former President Kennedy at the time of his assassination, for the purpose of submitting these items to "neutron activation analysis"; measurements of the distance of President Kennedy's and Governor Connally's seats from the floor of the limousine in which they were riding at the time of the assassination; and the results of all spectrographic analyses conducted by the Federal Bureau of Investigation including the test conducted on Warren Commission Exhibit CE 399.

Defendants have moved to dismiss this action or, in the alternative, for summary judgment. An affidavit executed by James B. Rhoads, the Archivist of the United States, has been filed in support of this motion which shows that the clothing, X-rays and photographs sought are specifically exempted from disclosure by statute and that Warren Commission Exhibits Nos. 399, 573, 842, 843, and 856 may be viewed but that their release from his custody is precluded by statute. An affidavit executed by John E. Byrne indicates that plaintiff has failed to exhaust the administrative remedies available to him insofar as he seeks the autopsy X-rays and photographs; the Kennedy clothing; and the Warren Commission exhibits. An affidavit signed by Federal Bureau of Investigation Special Agent Roy H. Jevons establishes that the spectrographic examinations sought are part of investigation file compiled for law enforcement purposes. And an affidavit executed by Phil W. Jordan, Assistant Director (Administration), United States Secret Service, shows that the Secret Service does not have the measurements pertaining to seats in the limousine which are sought by plaintiff.

Defendants contend that plaintiff is not entitled to obtain the items he seeks because this is an unconsented suit against the United States; the items he seeks are not "identifiable records" within 5 U.S.C. 552(a)(3)<sup>\*</sup>; he has failed to exhaust the administrative remedies available to him as to the autopsy X-rays and photographs, the Kennedy clothing, and the Warren Commission exhibits; the autopsy X-rays and photographs, the Kennedy clothing, and the Warren

<sup>\*</sup>/ 1964 edition, supplement III, P.L. 89-487, 80 Stat. 250 effective July 4, 1967, as incorporated by P.L. 90-23, 81 Stat. 54.

Commission exhibits are specifically exempted from disclosure by statute; the autopsy photographs and X-rays are also "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" excluded from the purview of 5 U.S.C. 552 by 5 U.S.C. 552(b)(6); and the spectrographic tests are part of an investigative file compiled for law enforcement purposes not available to a private party which are exempted from 5 U.S.C. 552 by 5 U.S.C. 552(b)(7).

#### Facts

The facts stated below are those established by the affidavits attached to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment and the material facts alleged in the Complaint.

Plaintiff has requested the Archivist of the United States to furnish him the X-rays and photographs made at the autopsy of former President Kennedy; Warren Commission Exhibits Nos. 399, 573, 842, 843, and 856; and President Kennedy's coat, shirt and necktie (Complaint, para. 7). These requests were denied by the Archivist (Rhoads Affidavit, para. 10). Plaintiff has not submitted an appeal of these denials to the Director of Information, Washington, D. C., as is provided by 41 C.F.R. 105-60.404(a) (Byrne's Affidavit). The clothing, X-rays and photographs "were transferred to the United States of America for deposit in the National Archives of the United States by the executors of the estate of the late President John F. Kennedy by Letter Agreement dated October 29, 1966." (Rhoads Affidavit, para. 3.) The Letter

Agreement provides in pertinent part:

The family desires to prevent the undignified or sensational use of these materials (such as public display) or any other use which would tend in any way to dishonor the memory of the late President or cause unnecessary grief or suffering to the members of his family and those closely associated with him. We know the Government respects these desires.

Accordingly, pursuant to the provisions of 44 U.S.C. 397(e)(1), the executors of the estate of the late President John F. Kennedy hereby transfer to the Administrator of General Services, acting for and on behalf of the United States of America, for deposit in the National Archives of the United States, all of their right, title, and interest in all the personal clothing of the late President now in the possession of the United States Government and identified in Appendix A, and in certain X-rays and photographs connected with the autopsy of the late President referred to in Appendix B, and the Administrator accepts the same, for and in the name of the United States, for deposit in the National Archives of the United States, subject to the following restrictions, which shall continue in effect during the lives of the late President's widow, daughter, son, parents, brothers and sisters, or any of them:

I

\* \* \* \* \*

(2) Access to the Appendix A material [the Kennedy clothing] shall be permitted only to:

(a) Any person authorized to act for a committee of the Congress, for a Presidential committee or commission, or for any other official agency of the United States Government, having authority to investigate matters relating to the death of the late President, for purposes within the investigative jurisdiction of such committee, commission or agency.

(b) Any serious scholar or investigator of matters relating to the death of the late President, for purposes relevant to his study thereof. The Administrator shall have full authority to deny requests for access, or to impose conditions he deems appropriate on access, in order to prevent

undignified or sensational reproduction of the Appendix A materials. The Administrator may seek the advice of the Attorney General or any person designated by the Attorney General with respect to the Administrator's responsibilities under this paragraph I(2)(b).

II

(1) None of the materials referred to in Appendix B ("the Appendix B materials") shall be placed on public display.

(2) Access to the Appendix B materials [including the autopsy X-rays and photographs] shall be permitted only to:

(a) Any person authorized to act for a committee of the Congress, for a Presidential committee or commission, or for any other official agency of the United States Government, having authority to investigate matters relating to the death of the late President, for purposes within the investigative jurisdiction of such committee, commission or agency.

(b) Any recognized expert in the field of pathology or related areas of science or technology, for serious purposes relevant to the investigation of matters relating to the death of the late President; provided, however, that no access to the Appendix B materials pursuant to this paragraph II(2)(b) shall be authorized until five years after the date of this agreement except with the consent of the Kennedy family representative designated pursuant to paragraph IV(2). For the purposes of this paragraph, the determination of whether such an expert has suitable qualifications and serious purposes shall be made by the Kennedy family representative. No access shall be authorized pursuant to this paragraph II(2)(b) during the lives of the individuals referred to in the second paragraph of this agreement for any purpose involving reproduction or publication of the Appendix B materials without the consent of the Kennedy family representative, who shall have full authority to deny requests for access, or to impose conditions he

deems appropriate on access, in order to prevent such use of the Appendix B materials.

### III

(1) In order to preserve the Appendix A materials and the Appendix B materials against possible damage, the Administrator is authorized to photograph or otherwise reproduce any of such materials for purposes of examination in lieu of the originals by persons authorized to have access pursuant to paragraph I(2) or paragraph II(2). [Rhoads Affidavit, Exhibit A.]

The Archivist has determined that "[u]nder the restrictions imposed in Paragraph II(2) of said letter agreement, the plaintiff may not be permitted to have access to the X-rays and photographs \* \* \* and custody of said X-rays and photographs, temporary or otherwise, may not be given to the plaintiff for any purpose." (Rhoads Affidavit, para. 6) The Archivist has also determined that the bullets and bullet fragments sought by plaintiff, Warren Commission Exhibits Nos. 399, 573, 842, 843, and 856, may be viewed but may not be handled either manually or with instruments and that he shall retain custody of these items at all times in order "to prevent loss, damage, destruction, or alteration" of these articles in order to secure their preservation (Rhoads Affidavit, para. 8).<sup>1/</sup>

The spectrographic examinations sought by plaintiff "were conducted for law enforcement purposes \* \* \* as a part of the FBI investigation into the assassination." (Jevons Affidavit, para. 2.) The details of these examinations "constitute a part of the investigative file maintained by the FBI concerning the investigation of the assassination which was compiled for law enforcement purposes." (Jevons Affidavit, para. 2.) The file is not disclosed to persons other than Government employees. (Jevons Affidavit, para. 3)

<sup>1/</sup> A copy of the regulations issued for reference service on Warren Commission items of evidence are attached to Dr. Rhoads' Affidavit as Exhibit E.

The United States Secret Service does not have information in any of its files which contains measurements giving the height of the seats in the limousine in which former President Kennedy was riding at the time of the assassination. (Jordan's Affidavit, para. 3).

Argument

The sole basis for the Court's jurisdiction stated in the Complaint is the "Federal Public Records Law" (Complaint, para. 1). The provision to which the Complaint apparently refers is set forth at 5 U.S.C. 552. 5 U.S.C. 552 grants jurisdiction to order release of certain documents only "on request for identifiable records made in accordance with published rules stating the \* \* \* procedure to be followed \* \* \*." 5 U.S.C. 552(a)(3). Plaintiff may not prevail in this action because he has not requested identifiable records as is required by 5 U.S.C. 552(b)(3). He has not followed published rules insofar as he seeks the autopsy X-rays and photographs; the Kennedy clothing; and Warren Commission exhibits. Furthermore, materials sought by plaintiff are exempted from the provisions of 5 U.S.C. 552 by 5 U.S.C. 552(b):

This Section does not apply to matters that are — \* \* \*

- (3) Specifically exempted from disclosure by statute; \* \* \*
- (6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) Investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

I S. SUIT MUST BE DISMISSED AS AN UNCONSENTED SUIT AGAINST THE UNITED STATES BECAUSE PLAINTIFF HAS FAILED TO NAME A PROPER PARTY DEFENDANT.

5 U.S.C.- 552(a)(3) expands the jurisdiction of district courts by providing that under certain circumstances a district court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of agency records improperly withheld from the complainant." This consent to certain suits against Government agencies must, of course, be followed precisely. United States v. Sherwood, 312 U.S. 584, 586 (1941). Indeed, the jurisdiction of the court depends upon exact compliance with the terms of the statutory agreement. United States v. Sherwood; United States v. Mel's Lockers, Inc., 346 F.2d 168 (10th Cir., 1965). 5 U.S.C. 552(a)(3) grants jurisdiction only when plaintiff seeks to enjoin an "agency". It does not authorize suits against the United States eo nomine or against Government officers. Farrell v. Ignatius, 283 F. Supp. 58 (S.D. N.Y., 1968). Since plaintiff has not named any of the agencies whose materials he seeks as defendants in this action, it must be dismissed in that the complaint does not comply with the jurisdictional requisites set forth in 5 U.S.C. 552(a)(3).<sup>2/</sup>

<sup>2/</sup> 5 U.S.C. 552(a)(3) does provide that "the responsible employee" may be punished for contempt for noncompliance with an order of court. This points out Congress' intention to distinguish between proceedings to enjoin withholding of agency records which Congress determined should be filed against the appropriate agency and enforcement proceedings subsequent to an order against the agency. Only at that time did Congress provide for proceedings against officers of the Government.



II PLAINTIFF HAS NOT MADE A REQUEST  
FOR ANY IDENTIFIABLE RECORD AS  
5 U.S.C. 552(a)(3) REQUIRES.

5 U.S.C. 552(a)(3) conditions its grant of jurisdiction to district courts upon plaintiff pursuing a "request for identifiable records made in accordance with published rules stating the \* \* \* procedure to be followed \* \* \*." Thus, "the rather limited grant of power \* \* \* is granted only as to identifiable records." Bristol-Myers Co. v. FTC, 284 F. Supp. 745, 747 (D. D.C., 1968):

It is evident from the emphasis in the legislative history of Public Law 89-487 upon the concept that availability shall include the right to a copy, that the term 'records' \* \* \* does not include objects or articles such as structures, furniture, paintings, sculpture, three-dimension models, vehicles, equipment, etc., whatever their historical value or value 'as evidence.' [Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, p. 23.]

Thus, "records" within the meaning of 5 U.S.C. 552(a)(3) does not include objects such as the bullets and bullet fragments which plaintiff seeks.

Likewise, in connection with the treatment of official records by the National Archives, Congress has provided:

\* \* \* the word 'records' includes all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics \* \* \*. Library and museum material made or acquired and preserved solely for reference or exhibition purposes \* \* \* are not included within the definition of the word 'records' as used in this Act. [44 U.S.C. 366.]

"Records" does not include the autopsy X-rays and photographs; the Kennedy clothing; and the Warren Commission exhibits sought by plaintiff because they were acquired by the Archives "solely for reference \* \* \* purposes", within the meaning of 44 U.S.C.

366. (Rhoads Affidavit, para. 9.) In addition, regulations promulgated by the General Services Administration pursuant to authority granted by 5 U.S.C. 552 and in keeping with the statutory definition in 44 U.S. C. 366 provide that "[t]he term 'records' does not include \* \* \* donated historical materials \* \* \*." 41 C.F.R. 105-61.001-1. Certainly, then, the clothing and autopsy X-rays and photographs donated by the Kennedy family may not be obtained by this action.

Plaintiff also has requested certain measurements which the agency from which the information was sought, the United States Secret Service, Treasury Department, does not have. (Jordan's Affidavit) 5 U.S.C. 552(a)(3) "refers, of course, only to records in being in the possession or control of an agency. The requirement \* \* \* imposes no obligation to compile or procure a record in response to a request. This is evidenced by the fact that the term 'information' in the bill, as introduced, was changed by the Senate to 'identifiable records' and by the legislative history of that change. (S. Rept., 89th Cong., 2.)" Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, pp. 23-24. Finally, the results of the spectrographic test on Warren Commission Exhibit No. CE 399 and the results of all other spectrographic analyses conducted by the Federal Bureau of Investigation are not "identifiable records" within 5 U.S.C. 552(a)(3) because plaintiff has not described the record sought with sufficient precision to determine which particular documents within the classification referred to are desired. Bristol-Myers Co. v. FTC, 284 F. Supp. 745, 747 (D. D.C., 1968). For these reasons, the subject matter of this suit does not involve any identifiable record and 5 U.S.C. 552, therefore, does not give jurisdiction to the Court to grant the relief sought by the Complaint.

III PLAINTIFF HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES IN-SOFAR AS HE SEEKS THE AUTOPSY X-RAYS AND PHOTOGRAPHS, THE KENNEDY CLOTHING, AND WARREN COMMISSION EXHIBITS.

5 U.S.C. 552(a)(3) authorizes district courts to enjoin the withholding of identifiable records only after "request \* \* \* made in accordance with published rules stating the \* \* \* procedure to be followed \* \* \*." The agency regulations pertinent to plaintiff's request for the autopsy X-rays and photographs; the Kennedy clothing and Warren Commission exhibits specify:

(a) After notification that his request for identifiable records has been denied persons submitting the request may appeal the denial. The appeal shall be submitted to the Director of Information, Washington, D. C.  
\* \* \*

\* \* \* \* \*

(c) If the denial is sustained, the matter will be submitted promptly by the Director of Information to the Assistant Administrator for Administration whose ruling thereon will be furnished in writing to the person requesting the records. [41 C.F.R. 105-60.404.]

\* \* \* \* \*

A person whose request for identifiable records has been so denied by the Assistant Administrator for Administration may file complaint, as authorized by 5 U.S.C. 552(a)(3), in a district court of the United States \* \* \*. [41 C.F.R. 105-60.405.]

Mr. Byrne's Affidavit establishes that plaintiff has not followed the procedure provided by 41 C.F.R. 105-60.404 for administrative review of the denial of his requests. Accordingly, he has failed to exhaust his administrative remedies and the Court thus lacks jurisdiction to entertain this suit insofar as it seeks materials from General Services Administration.

IV IN ANY EVENT THE AUTOPTSY X-RAYS  
AND PHOTOGRAPHS AND CLOTHING  
- SOUGHT ARE SPECIFICALLY EXEMPTED  
FROM DISCLOSURE BY 44 U.S.C. 397.

A. The Provisions of 44 U.S.C.  
397 Preclude Disclosure of  
the Autopsy Photographs and  
X-rays.

Section 397 of 44 U.S.C. provides in pertinent part:

(e) The Administrator is authorized \* \* \*  
to accept for deposit —

(1) the papers and other historical  
materials of any President or former  
President of the United States, or of any  
other official or former official of the  
Government, and other papers relating to  
and contemporary with any President or  
former President of the United States,  
subject to restrictions agreeable to the  
Administrator as to their use; and

\* \* \* \* \*

(f)(3) \* \* \* papers, documents, or other his-  
torical materials accepted and deposited under sub-  
section (e) of this section and this subsection  
shall be held subject to such restrictions re-  
specting their availability and use as may be  
specified in writing by the donors or depositors,  
including the restrictions that they shall be kept  
in a Presidential archival depository, and such  
restrictions shall be respected for so long a  
period as shall have been specified, or until they  
are revoked or terminated by the donors or deposi-  
tors or by persons legally qualified to act on their  
behalf with respect thereto: [Emphasis added.]

It is clear that Congress is empowered to provide by legis-  
lation for the acceptance of gifts subject to conditions and  
restrictions specified by a donor, and that such conditions will  
be respected by the courts. Story v. Snyder, 184 F.2d 454, 456  
(C.A. D.C., 1950), cert. denied 350 U.S. 866. <sup>3/</sup>

<sup>3/</sup> The Court's attention is also directed to the considerations  
for non-disclosure stated by Mr. Justice Reed in Kaiser  
Aluminum and Chemical Corp. v. United States, 157 F. Supp.  
939 (Ct. Cls., 1958).

In the case at bar, pursuant to 44 U.S.C. 397, the X-rays and photographs enumerated were accepted subject to limitations. The letter agreement provides:

\* \* \* no access to the Appendix B materials [which include the X-rays and photographs] pursuant to this paragraph II(a)(b) shall be authorized until five years after the date of this agreement except with the consent of the Kennedy family representative designated \* \* \*.

There is no suggestion that the Kennedy family representative has consented to the disclosure of the X-rays and photographs in question, and, accordingly, the Archivist has no authority to produce the articles enumerated in the certificate.

As noted by Dr. Rhoads' Affidavit, the authority of the National Archives and Records Service to accept gifts of papers and other articles subject to whatever conditions of limited access may be requested by the donor ensures that during the period when a degree of sensitivity attaches to discussion of events and personalities, the rights of privacy of the donor and of persons discussed in the papers are fully protected. It also ensures that valuable collections of papers

will be saved, and with the passage of an appropriate period of time will be made available to writers, scholars, and other interested persons for research use. If this protection is removed by order of court or otherwise, the public confidence in the Federal Government to honor its commitments to such donors will be destroyed.

Public figures, no longer assured that their interests will be protected when their papers are deposited in public institutions, will cease to place important and sensitive papers in such institutions. The result will be a drying-up of basic research in history, economics, public administration, and the social sciences generally.<sup>4/</sup>

The letter agreement, page 1, provides that it is expressly entered into "pursuant to the provisions of 44 U.S.C. 397(e)(1)." It is clear from the statutory provisions recited above that

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<sup>4/</sup> The Archivist received the materials covered by the letter agreement of October 29, 1966, as property of the estate of John F. Kennedy, and has never challenged the original ownership of the materials as being in the Kennedy estate. (Rhoad's Affidavit, Para. 3) Under the statute, 44 U.S.C. 397(e)(1), the Administrator has the authority to agree to conditions for the deposit, whether the papers technically belong to the donor or not. Restrictions may be agreed upon with respect to any materials of a President or former President, or "relating to and contemporary with any President or former President." In order to ensure that papers and other invaluable historical materials relating to Presidents will be placed in the Archives, the Archivist accepts such materials subject to restrictions placed on the materials by the persons presenting them to the United States. (Rhoad's Affidavit, Paras. 3, 7) Any requirement that the Archivist demand proof of technical, legal ownership when receiving materials for deposit would serve to defeat, not implement, the purpose of 44 U.S.C. 397 to authorize receipt of such important materials by the United States.

this agreement is "subject to restrictions agreeable to the Administrator as to their use." The statute's legislative history dispels any possible doubt that the restriction in the present case is within the terms and purposes of the statute. The House Report affirms:

[Such materials are to be held] subject to such restrictions respecting their use as may be specified in writing by the donors or depositors, including the restrictions that they shall be kept in a Presidential archival depository, and to enforce such restrictions for so long a period as shall have been specified, or until they are revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf with respect thereto. These provisions make it clear that the Administrator, once having come to agreement with the donor on restrictions as to use, in accordance with subsection (e), has the authority to enforce such restrictions. Authority to agree to, and to enforce, certain restrictions as to access and use is essential if private papers are to come into public custody at all. [House Report 998, 84th Cong., 1st Sess., p. 6.]

B. Similarly, Access to the Kennedy Clothing is Limited by 44 U.S.C. 397.

The October 29, 1966 letter agreement provides:

I

(1) None of the materials identified in Appendix A ("the Appendix A materials") [including the Kennedy clothing] shall be placed on public display.

(2) Access to the Appendix A materials shall be permitted only to:

(a) Any person authorized to act for a committee of the Congress, for a Presidential committee or commission, or for any other official agency of the United States Government, having authority to investigate matters relating to the death of the late President, for purposes within the investigative jurisdiction of such committee, commission or agency.

(b) Any serious scholar or investigator of matters relating to the death of the late President, for purposes relevant to his study thereof. The Administrator shall have full authority to deny requests for access, or to impose conditions he deems appropriate on access, in order to prevent undignified or sensational reproduction of the Appendix A materials \* \* \*.

Pursuant to the authority delegated to him by the Administrator, the Archivist has:

determined that (a) serious scholars or investigators authorized to have access pursuant to paragraph I(2)(b) may view photographs of said articles of clothing, but may not inspect or examine the articles of clothing themselves, and (b) in no event shall said articles of clothing be released to the custody, temporary or otherwise, to any such scholars or investigators for any purpose. [Rhoad's Affidavit, Para. 5]

Since the Kennedy clothing is covered by the October 29, 1966 letter agreement entered into pursuant to 44 U.S.C. 397, restrictions imposed pursuant to the letter agreement must be respected for the same reasons, stated above, that restrictions on access to the autopsy X-rays and photographs must be respected.

**C. Plaintiff may Not Have Access  
to Warren Commission Exhibits  
Contrary to the Provisions of  
P. L. 89-318.**

The Warren Commission exhibits plaintiff seeks were transferred to the National Archives under authority of Public Law 89-318, 79 Stat. 1185 and order promulgated by the acting Attorney General dated October 31, 1966 issued pursuant to P.L. 89-318 and published at 31 F.R. 13968. (Rhoad's Affidavit, Para. 8) Public Law 89-318, after declaring "that the national interest requires that the United States acquire \* \* \* certain items of evidence to be designated by the Attorney General \* \* \* and requires that those items be preserved



by the United States" provides at Section 4 that "[a]ll items acquired by the United States pursuant to \* \* \* this Act shall be placed under the jurisdiction of the Administrator of General Services for preservation under such rules and regulations as he may prescribe." (Emphasis supplied.) The Administrator's authority has been delegated to the Archivist. (Rhoad's Affidavit, Paras. 2, 8) Pursuant to the authority granted by Public Law 89-318, the Archivist has:

determined that (a) three dimensional articles held in the National Archives pursuant to the Act of November 2, 1965, including the bullets and bullet fragments referred to above, may be viewed by researchers but may not be handled either manually or with instruments; (b) none of said articles shall be taken from the Archives building for any reason by anyone except an authorized employee of the Federal Government, subject to my approval; and (c) in no event shall custody of such articles, temporary or otherwise, be given to any other person for any purpose. The foregoing rules with respect to such articles are necessary to prevent loss, damage, destruction, or alteration to which such articles would be subjected if they were permitted to be handled, transported, or tested. Adherence to the foregoing rules and continued, uninterrupted custody of such articles by the National Archives is imperative in order to permit the full discharge of the responsibilities imposed by the Act of November 2, 1965, for the secure preservation of the articles. [Rhoad's Affidavit, Para. 8]

Congress clearly contemplated that regulations such as those set forth in Paragraph 8 of Dr. Rhoad's Affidavit would be promulgated:

The committee is persuaded that the national interest requires that the Attorney General shall be in a position to determine that any of these critical exhibits, which were considered by the President's Commission, shall be permanently retained by the United States. The committee concurs in the view expressed by the Attorney General that in years ahead allegations and theories concerning President Kennedy's assassination may abound. To eliminate questions and doubts the physical evidence should be

securely preserved. A failure to do so could lead to loss, destruction, or alteration of vital evidence and in time might serve to encourage irresponsible rumors undermining public confidence in the work of the President's Commission. [House Report No. 813, 89th Congress, 1st Session, August 19, 1965, page 2.]

Therefore, it must be concluded that Public Law 89-318 exempts materials obtained pursuant to its provisions from disclosure contrary to regulations issued under this statutory provision.

D. Since 44 U.S.C. 397 and Public Law 89-318 Specifically Exempt the Autopsy X-rays and Photographs; the Kennedy Clothing; and the Warren Commission Exhibits Sought From Disclosure, Plaintiff may not Obtain Them by this Action.

5 U.S.C. 552(b) provides:

This section does not apply to materials that are — \* \* \*

(3) Specifically exempted from disclosure by statute;

This exemption "indicates an intention to preserve whatever protection is afforded under other statutes, whatever the terms. For examples of the variety of statement of such provisions compare \* \* \* 44 U.S.C. 397 \* \* \*." Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, pp. 29-30. As has been shown above, the autopsy X-rays and photographs and the Kennedy clothing are specifically exempted from disclosure by 44 U.S.C. 397 and access to Warren Commission exhibits contrary to regulations is precluded by Public Law 89-318. Thus, these materials are "specifically exempted from disclosure by statute." Therefore, 5 U.S.C. 552(b)(3) renders 5 U.S.C. 552 wholly inapplicable to these materials and accordingly, they may not be obtained by plaintiff.

V FURTHERMORE, THE AUTOPSY X-RAYS AND PHOTOGRAPHS ARE "MEDICAL FILES AND SIMILAR FILES DISCLOSURE OF WHICH WOULD CONSTITUTE A CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY."

5 U.S.C. 552(b)(6) exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" from the purview of 5 U.S.C. 552. After examining the legislative history behind this exemption, the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act concludes:

It is apparent that the exemption is intended to exclude from the disclosure requirements all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person, including members of the family of the person to whom the information pertains.

The Letter Agreement entered into by the Kennedy family and the Administrator of General Services Administration evidences the understandably strong feelings of the family of the late President with regard to disclosure of the items covered by the agreement. Indeed the Letter Agreement states:

The family desires to prevent the undignified or sensational use of these materials (such as public display) or any other use which would tend in any way to dishonor the memory of the late President or cause unnecessary grief or suffering to the members of his family and those closely associated with him.

Surely, disclosure of medical files relating to the late President's assassination, such as the autopsy X-rays and photographs sought here, would be precisely the type of unwarranted invasion of personal privacy which Congress intended to avoid when it enacted 5 U.S.C. 552(b)(6).<sup>5/</sup>

5/ The Kennedy family's nonconsent to disclosure of the materials covered by the Letter Agreement is another factor indicating that Exemption 6 is applicable here since the nonconsent evidences that disclosure would be an invasion of privacy. Tuchinsky v. Selective Service System, 37 Law Week 2417 (E.D. Ill., 1969).

VI THE RESULTS OF SPECTROGRAPHIC TESTS  
ARE A PART OF AN INVESTIGATORY FILE  
COMPILED FOR LAW ENFORCEMENT PURPOSES  
NOT AVAILABLE BY LAW TO A PARTY OTHER  
THAN AN AGENCY, EXEMPTED BY 5 U.S.C.  
552(b)(7) FROM 5 U.S.C. 552.

Plaintiff apparently seeks information regarding the results of spectrographic examinations conducted by the Federal Bureau of Investigation (Complaint, para. 9). These laboratory examinations "were conducted for law enforcement purposes \* \* \* as a part of the FBI investigation into the assassination. The details of the \* \* \* examinations constitute a part of the investigative file maintained by the FBI concerning the investigation of the assassination which was compiled for law enforcement purposes." (Jevons Affidavit, para. 2) 5 U.S.C. 552(b)(7) exempts from 5 U.S.C. 552 "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Paragraph 3 of Jevons' Affidavit establishes that the investigative file plaintiff seeks was compiled for use solely by Government personnel and its contents are not disclosed to persons other than employees of the Federal Government. For these reasons its disclosure may not be compelled. Clement Bros. Co. v. NLRB, 282 F. Supp. 540 (N.D. Ga., 1968); Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D. P.R., 1967); Bristol-Myers Co. v. FTC, 284 F. Supp. 745, 747 (D. D.C., 1968).

Conclusion

For the foregoing reasons, the Court is respectfully requested to enter an order dismissing the Complaint, or

in the alternative, granting defendants' motion for summary judgment.

Respectfully submitted,

WILLIAM D. RUCKELSHAUS  
Assistant Attorney General

BENJAMIN E. FRANKLIN  
United States Attorney

KENNETH F. CROCKETT  
Assistant United States Attorney

HARLAND F. LEATHERS

JEFFREY F. AXELRAD  
Attorneys, Department of Justice  
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, \_\_\_\_\_, attorney for defendants, hereby certify that on the \_\_\_\_\_ day of March, 1969, I served the attached Motion to Dismiss or, in the Alternative for Summary Judgment; the attached Affidavits; and Memorandum in Support of said Motion upon plaintiff's attorneys, Sam A. Crow, Esq., 612 New England Building, Topeka, Kansas, 66603; John H. Wilkinson, First National Bank Building, Topeka, Kansas, 66603; and M. C. Slough, St. Mary's Kansas, 66536, by depositing copies in the United States mails, postpaid addressed to each as stated, their last known addresses.

KENNETH F. CROCKETT  
Assistant United States Attorney  
Topeka, Kansas