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CA-78-1107

File - FBI + HAB "politics"
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over forensic truth

ment, ruling that the case was moot because the Department had "substantially complied" with Weisberg's request. This ruling was based on the government's claim that it had produced "all available" records sought by Weisberg.

B. Weisberg v. U.S. Department of Justice, et al,
Case No. 75-2021, United States Court of Appeals
for the District of Columbia Circuit

In this appeal Weisberg was represented by James H. Lesar. Justice Department attorney Michael Stein argued the case for the appellees. Assistant Attorney General Rex E. Lee, United States Attorney Earl J. Silbert, and Justice Department attorney Leonard Schaitman were also on the brief for appellees. The case was heard by a three-judge panel comprised of Circuit Court Judges Spotswood W. Robinson III and Malcolm R. Wilkey and United States District Court Judge _____ Jameson.

On appeal Weisberg argued that the government had not met its burden of showing that each document sought had been produced and that there were material facts in dispute, particularly as regarded the existence or nonexistence of certain records, which precluded summary judgment. Weisberg argued that it was essential that he be allowed to undertake discovery on this issue. District Judge Pratt had foreclosed Weisberg's attempts to obtain answers under oath to his interrogatories, labeling them "oppressive."

The case was argued on June 3, 1976. Barely a month later, and just three days after the 10th anniversary of the enactment of the Freedom of Information Act, the Court of Appeals issued its opinion reversing Judge Pratt. The opinion, written by Judge Wilkey, held that there were issues of material fact in dispute,

and that Judge Pratt should not have dismissed Weisberg's interrogatories as oppressive. In remanding the case to the district court, the Court of Appeals declared that, "[t]he data which [Weisberg] seeks to have produced, if it exists, are matters of interest not only to him but to the nation." Saying that the existence or non-existence of these records "should be determined speedily on the basis of the best available evidence," the Court of Appeals stated that on remand Weisberg must take the testimony of live witnesses who had personal knowledge of events at the time the investigation was made." Weisberg v. U.S. Dept. of Justice, 177 U.S. App.D.C. 161, 543 F. 2d 308 (1976).

In addition to its significance as a legal precedent establishing the right of discovery in Freedom of Information Act cases, this decision is important because comparison with its earlier en banc decision reflects a changed attitude towards the Freedom of Information Act and a reversal of the Court's opinion of Weisberg and his work.

C. Weisberg v. U.S. Department of Justice, et al., Civil Action No. 75-0226 (United States District Court for the District of Columbia), Pratt, J.

On remand Weisberg utilized three forms of discovery: interrogatories, depositions, and requests for the production of documents. He took some 400 pages of deposition testimony from four FBI agents who had personally participated in the testing of items of evidence in the assassination of President Kennedy. The evidence developed or remand directly contradicted the affidavit of FBI Agent Kilty in which ^{he} swore that neutron activation analysis had not been performed

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on the presidential limousine windshield. After first testifying that he could not recall whether the windshield scraping had been subjected to neutron activation analysis, FBI Special Agent John F. Gallagher then admitted, when confronted with evidence that the specimen had in fact been submitted to the nuclear reactor, that he had tested it.

Through discovery Weisberg also established that the spectrographic plates and notes on the testing of the curbstone were allegedly missing. This fact had been concealed from Weisberg and the district court when the case had first been before Judge Pratt in 1975. For example, while Kilty's affidavits had asserted that Weisberg had been provided with "all available" records within the scope of his request, they did not provide the essential information that records which had been created had not been provided him because, *it was conjectured* they ~~allegedly~~ were "destroyed" or "discarded" during *allegedly* routine housecleaning."

The discovery materials obtained by Weisberg are significant in a number of respects. If the deposition testimony of the FBI agents can be credited, it discloses a picture of the FBI Laboratory as bungling, uncoordinated, amateurish, inept, and anything but thorough, *precise and reliable.* It is a portrait quite opposite the highly-touted reputation that the FBI Lab has gained in the press and elsewhere.

The deposition testimony reveals ignorance of fundamental facts by the FBI agents who conducted the investigation of the President's murder. For example, FBI Special Agent Cortlandt Cunningham, who did the original ballistics testing of CE399, did not know that it had been wiped clean before it was sent to the FBI Lab. Agent

Gallagher could not remember testing key items of evidence and when asked to circle possible bulletholes on a photograph of the President's shirtcollar, he circled the buttonholes.

The testimony of the FBI agents is suspect at critical points. Their testimony is also marked by extreme personal antagonism towards Weisberg.

In addition to the discovery he undertook, Weisberg also put into the record some important affidavits and exhibits which address both the official version of the President's assassination and the credibiility of the government's claim that he had been provided all the records he sought. This included not only the lengthy affidavits which he himself executed, but an affidavit by an actual witness to the Kennedy assassination, James T. Tague, who apparently received a minor wound on his cheek when a ^{fragment} ~~bullet~~ ricocheted off the curbstone which the FBI tested (seven) months after the fact) by means of spectrographic analysis. The Tague affidavit ties in with the spectrographic plates and notes on the curbstone which the FBI claims were destroyed or discarded and with Weisberg's testimony that the curbstone was patched and that the FBI knew when it tested it that it had been altered from its original state.

Through the affidavits and exhibits which he submitted to the district court, Weisberg also maintained that photographic evidence shows that the alleged bulletholes in the President's shirtcollar do not overlap, and that the tears in the shirtcollar and the nick in the President's tie were caused not by a bullet but by the fact that the tie was cut off by a scapel ^{during emergency medical efforts} ~~at the time of the tracheotomy.~~

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During his deposition, former FBI Special Agent Robert A. Frazier, who at the time of the President's assassination was head of the FBI Laboratory, testified that he had ordered an FBI Agent, he thought it was Special Agent Paul Stombaugh, to conduct an examination of the President's shirtcollar to determine whether the alleged bullet holes overlapped. However, the FBI has not produced any report or records pertaining to any such examination.

After establishing that records had been created which he had not been given, Weisberg noted the deposition of FBI Special Agent John W. Kilty, the agent responsible for conducting the search for such records. However, Judge Pratt quashed Kilty's deposition before Weisberg's counsel had even been served with the motion to quash the deposition. Subsequently, Judge Pratt granting the FBI's motion for summary judgment, again finding that there were no genuine issues of material fact in dispute, and that the FBI had given Weisberg all the documents it had. Weisberg v. United States Dept. of Justice, 438 F. Supp. 492 (D.D.C. 1977).

D. Weisberg v. U.S. Department of Justice, et al.,
Case No. 78-1107, United States Court of Appeals
for the District of Columbia

Case was orally argued before the Court of Appeals on March 20, 1979. James H. Lesar represented Weisberg. John H. Kornis argued the case for the appellees; also on the brief for appellees were United States Attorney Earl J. Silbert and Assistant United States Attorneys, John A. Terry, Michael W. Farrell, and Michael J. Ryan. The Court of Appeals' panel was comprised of D.C. Circuit Judges Spottswood W. Robinson III and David L. Bazelon, and Judge _____ Van Dusen of the United States Court of Appeals for the

Third Circuit.

In asking the Court of Appeals to reverse Judge Pratt for the second time, Weisberg's counsel reviewed the history of the scientific testing of JFK assassination evidence and presented the evidence for the existence of records not provided Weisberg. He contended that summary judgment had been inappropriate because there existed genuine issues of material facts in dispute; namely, whether the records said to have been destroyed or discarded had in fact been destroyed or discarded, and whether there had been a thorough search for allegedly missing records. He pointed out that the the government had not sworn under oath that all revelant files had been searched and that the records provided Weisberg themselves showed that only certain files had been searched. He also asserted that Judge Pratt had violated well-established principles of summary judgment. Thus, instead of evaluating the evidence to see whether material facts were in dispute, Pratt had resolved the factual issues himself. In addition, he had not applied the principle that matters of fact are to be viewed in the light most favorable to the party opposing summary judgment. ^{rule?}

While the case was pending before the Court of Appeals, Weisberg obtained new evidence further discrediting the government's claims that important JFK assassination evidence had been "destroyed" or "discarded" during "routine housecleaning." This evidence, which Weisberg sought to bring to the attention of the Court of Appeals, over the government's vehement protests, showed that the FBI was