4/28/71

Dear Jim,

XX I'll make the notes you requested on the Government's appeal response in haste, as I read itfor the first time. As I think you realize, I do not expect to be at my sharpest or most detached on so doing. I do it in the hope this will not be the last in a series of futilities, or of the waste of much time.

It may be without significance, but I note the absence of all U.S.Attorneys in DC except Flannery and of the appearance of new names.

ISSUES PRESENTED:

What I have already given you from Hoover's testimony is total refutation of 1. To it might be added the documents on the charges and responsibilities of the Commission and its own interpretation from the Report. There was never any law-enforcement purpose possibl except for the period before LHO's death, when it might be claimed there was an adjunct law-enforcement function, to help the Dallas police. I think it should be pointed out that to make any contrary claim is also to claim

a) that Oswald was not alone and there was a conspiracy;
b) that Oswald was not the assassin;
c) tha t the official position of the Department of Justice is that the case is unsolved and the Warren Report egregious error.

2. I think comes up later in detail, from the table of contents.

Statement of the case:

The first paragrpah is inaccurate. We also seek the spectrography on other things, like clothing, curbstone, windshield and its trim, and it is only "allegedly" connect with the assassination. I think we should add to their definition "and also not given to the Warren Commission", for it is past time for defending it when it is possible, regardless of their complicity in it.

Statute Involved:

The inset paragrpah 1. Is, of course, rubbish, and if it is not handled later, I note that everything, including the part of the statute that authorized seeking relief in federal courts, places the burden of proof of the government. Therefore, this condition must here be met. It has not in the past, and I do not believe we have made sufficient point of it, although my recall may be inaccurate. The allegation is not sufficient, is not the requirement of the law.

The first following sentence begins with a lie:"It is not open to question that the spectrographic analyses sought are part of the file compiled by the FBI..." It is a lie in its incompleteness. It was not compiled only "by the FBI". It was compiled forothers, esp. the Commission, to which it was not given. The FBI had and had no other business on this except as noted above, the legal (money is being spent) certainty of the error of the Commission. The rest of the paragraph is a contrivance. The President neither has nor can ordain or invent law-enforcement purposes, and Hoover's testimony I called to Bud's attention (I think 5H98 ff) is as explicit on this as it can be. I think therefore that if it is at all possible, we should demand best evidence, Hoover's. Precisely because the crime was under the laws of the State of Texas and nowhere else did the FBI not have law-enforcement responsibilities, and they have supplied us with the definitive answer should they elect to claim they were cooperating in the fact that they did not give the spectros to anyone in Dallas, providing instead an incompetent and meaningless paraphrase, what the Commission and Curry published, and no more. In fact, I do not believe

(from recollection, which can be wrong) that they supplied evenn a paraphrase of the later work, as the curbstone. If there is any definition of "law enforcement purposes" as said here "within the meaning of the Public Information Act", I am unaware of it. Nor am I aware of any legal decision warranting this interpretation. Even the spurious argument about the President, which they picked up from us, falls apart with the appintment of the Commission and at the very least entitles us to what was done beginning that day. Meaning curbstone, car, etc.

Johnson did bot give the FBI the represented charge (Hoover addresses this) and the publicly-available information is all in refutation of this, as in the xxx news stories. The first thing Johnson did is contrary, to ask the FBI to report on all the details, not who did the killing, which was never officiallly considered to be other than Oswald, and especially with his death that became moot. Nor does the President have this power, had he attempted to exercise it, as even Hooger says.

The next paragrpah argues against and disputes this. The FBI could not at one and the same time be acting for only the President and only the Dallas police. I have already addressed xxxx the fact that it did not here act for the DPD because it did not give them either the spectro or any meaningful representation of its then results. I was not then complete, not completed until after the FBI was acting as the investigative arm of the Commission (and here I note American Mail and Wellford). This paragrpah again says what I think we must now emphasize as much as possible: that the Department and the FBI insists the Commission was wrong: "to apprehend the assassin or assassins". Oswald had been apprehended before the FBI xxxxxx.

At no point has the government proven that if all the rest of what it alleges is true, that it did its work for law-enforcement purposes, this included the spectros. The burden of proof is on them and they have not met it. They have to show how this narrow request I have made is part of that law-enforcement investigation, the spectros only, and they do not even begin to. But under the Wellford (Wellborn?) decision, the part you missed and I showed you, even if this were the case it is not within the exemption because it is a simple scientific test, and that is not exempt. You'll find this marked on the copy I gave back to you, the end of that decision.

Without checking the quotes in the last paragrpah, two points: they do not say all FBI files, and they do not change the specific language of the law. The law says only what 7b says, no more. This is specious and besides, Mitchell and Kleindienst have already ruled to the contrary, in both the Ray and pictures cases.

II. The possible xxxx Availability, etc

The argument that without the exemption a defendant would not have access is spurious I think on two counts that come to mind immediately: one is the Jencks Act itself and the other is in the AG's memo. You have just phoned, I want to finish this for you, and I therefore do not now take time to get the AG's memo on this. I may be wrong. Hoch thinks so. However, I think on this point there is the waiver of use(Amer. Mail). Hence the controlling elgal interpretation is contrary to their claim. I now see they go into this. First I ask is "litigants" sumonymous with "defendants"? Congress did not say defendants. The quote is incomplete. I think there is relevance in the omission of the language of exemption 5. In any event, this language does not meet the "seems" test of the AG's memo (it is not a definitive interpretation), for there is nothing in what I want that in any way can be defined as netting this language, the same as the fiction in the Williams affidavit. It is not an FBI report, of a witness interview or anything else like that, and it cannot be defamatory, not of anyone. And there is no doubt this would have been available to Oswald.

On the decisions cited, where they used them earlier I gave you a memo saying it was clear these were misused and probably said the opposite. you were to have checked this.

this. In 2468-70 I never found a single faithful or full citation of a single decision, law, regulation or interpretation of any kind. There is no reason to assume it here and now.

The citation of the House Report is redundant and irrelevant and goes into what is not at issue. What it depends upon, in any event, is what is lacking, the burden of proof required even before invocation of the exemption, that this is such a file. In general it is not, and specifically it is not, being no more than a non-priveleged scientific test. Ingeneral Hoover will be hung up on this, for he dare not let his dishonesties in such matters be exposed. I think at some pojt what I had in the draft and I think was omitted should be used: that if this file in any way supported the official mythology, it is to the government's interest, no danger to indviduals, innocent or not; sources; secret processes, etc/, being in any way involved.

The first line on 7 again raises the question of the absnce of proof required by the law that the spectro is such a file, even if investigatory files were to be immune in this instance. It is not such. The labguage twoard the end of the footnote, beginning with "which might unfairly reveal raw date about individuals", met hods of investigation, etc., as I antifipated above, ought be hit hard as a repeated and deliberate deception of the court, and without gloves, but real hard. It should be rwidiculed too. It could not be more irrelvvant, and knowingly so. You might want to get a few pages from a stanrdard text to show it is not in any sense a secret process.

It is incredible to me that you would now ask me about the Williams affidavit after th the very long analysis of it I gave Bud immediately and, unfortunately, was then ignored.

Let me make a few suggestions, some of which may be new. The law requires best evidence. Any FBI man is not. Hoover is on interpretation, or perhaps some recognized deputy. Here it has to ben spectrographer, and Gallagehar, the one who did the work, is available to them and avoided. They had to avoid Jevons because his affidavit in the Nichols case, on which I also gave Bud a memo, is perjurious.But he, at least, claimed knowledge of the test. Frazier, for example, swore than any FBI agent, even an expert on ballistics, is an incompetent witness and that he was incompetent. I referred to this in the draft. There is no knowledge Williams can have that can disclose or make him competent to interpret "for what purpose the file was compiled". That is definitvely done by Hoover and the empowering and limitation on the powers of the Commission and its own expesition of the limitations thereon. However, there is here a confusion that cannot be accidental, between the entire FBI file, which is neither in question nor what is sought, and the spectrographic analyses, which are not as defined and not thus exempt, were the rest of the file to be.

"Common sense" is not a provision of either civil or criminal law. There are many crimes committed, and common sense says they are crimes. But that does not vest the FBI or the federal government jurisdiction. In fact, the law precludes the spending of any federal money (a point I think I'd emphasize, money) on them. Murder is one. The enactment of the new law on Presidential murder takes care of this, for it shows there was no jurisdiction, exactly what Hoover swore.

Aside from what I have already given you on Williams, I think the burden of proof provision here needs use: in the absnce of proof of Williams' competence, the assumption is that he is not a competent witness. They have all sorts of specialists. He is not identifided as of any kind. Suppose his expertise is in forgeries, or tire-tracks. How does that qualify him for this? And why have they avoided the most competent on the method of the spectrp, the man who did it, who is available; or on interpretations, the Attorney General or his surrogate; or Hoover? The answer should be made explicit and in the form of a charge: because it would involve them in the commission of either a

crime, perjury or a gross and deliberate deception and misrepresentation to the courts. Especially in the context of this exceptional day do I believe me should make this charge, explicitly and in as much detail as possible. I did in the 2569-70 responses, now filed almost 2½ months ago. Why else do you think there is this considerable delay in setting the case? Why do you think Werdig suddenly disappeared from all subsequent papers?

Here again official doubt that Oswald was either the assassin or that the assassination was other than a conspiracy. I think all of these should be addressed at a single place and strongly, each case being quoted verbatim and in full, not only for its effect on the judges, but also for the press, which just might see it this way.

Should you feel that what I so long ago did on this Williams affidavit is inadequate, after you read it, apparently for the first time, let me know and I'll go over it again when I return from NY. But this now can't be until after 5/7, when I have a meeting in the judge's chambers in Baltimore. I am, as I would hope you cna understand without my developing the argument, dismayed that I took the time to do all that work only to have it ignored when it should have been used, in the Sirica hearing, and at this late date, after filing of our appeal, apparently unknown to you.

This is one of the so many things like this, in volume grater than a large book, that will not again happen. I may continue to do more such things for you(all), but only when you come up for them and go over them in my presence. I'll not again waste a minute in such futilities. And I do resent all of it, as you would if you were aware of the extent of the writing for which I have completed the research. Or of the suits I could have filed in this time. Or the simple pleasures of life for which I could use a few moments from time to time.