10/11/70

Dear Bud,

These comments on the government's motion to dismiss in CA 2301-70 will have to be done in greater haste than I'd prefer in order to get it in the outgoinf mail tonight, which is as close as I can come to your request that you have it tomorrow.

Perhaps it is without significance, but this is the only case of this series in which no single Department of Justice lawyer's name appears. All signatories are from the officeof the U.S.Attorney for the District of Columbia.

While it may be no more than a legal fommality, the motion is spurious in alleging these two things:

> "...there is no claim upon which relief can be granted..." , and
> "there is no issue as to any material fact..."

The claim upon which "relief can be granted" is for the production of the spectrographic analysis. It can be granted because under the law I am entitled to it for reason you know and some which I will set forth below. In addition, even if the subsequent claim to immunity were correct, as it is not, the law does not require withholding-it merely authorizes it, as Mitchell's letter granting access to the Ray affidavits makes explicit and clear, so in even this very restricted sense, relief can be granted.

Among the issues "as to any material fact" are whether this data can be withheld, under the law; whether it meets any of the provisions under which it can be withheld; and even then, whether the government has not already waived its legal right to withhold it (American mail decision).

You raised the question whether the FBI had given the spectrographic analysis to Chief Curry and he had made it public. What had already appeared as a Commission exhibit is printed in Curry's book (90-4). This is not the spectro but a paraphrase of it. It includes many things for which I did not ask and does not include those for which I did ask (as the clothing, curbstone, brushings from windshield, etc.) However, it does refer to some and this, having been made public, waives, I believe, any right to withhold. For your information, the day after Clark's executive order was made public, I appeared at the Archives and asked for the spetros. In my presence, from SW3, Johnson spoke to Cunningham by phone. Cunningham told him this was the spectro. Johnson got it and showed it to me. I immediately showed it to be not the spectro. Johnson called Cunningham back, but he then and since, to the best of my knowledge, got nothing further. Here I am raising a different point, aside from telling you that the FBI represented the spectros to be in the Archives when they wer (and still are) not: under the executive order they are required to be and are not because they were "considered by the Commission". This consideration exists in two forms:

> The results are basic to the conclusions;
> Frazier's testimony about them.

Moreover, any FBI analysis of them was in its Commission function, not as the investigative arm of the Department of Justice.

I gave you a copy of this executive order. It begins with the cited words.

I should add that there was further "consideration" in all the medical testimony, all the ballistics testimony, and all relevant conclusions. There was

by the Commission members through the exhibits prepared for it by the FBI as its arm, not as part of the Department of Justice, in such things in which it is basic as the Gauthier exhibits, for the identification of the fragments with each other and the Connally fragments with 399 is basic to all these things. If all the fragments recovered from the car and brushed from the glass are not identical with both acknowledged fragments recovered from the President's head, all these exhibits and the Commission's basic conclusions are deliberate fraud. This is also true of the Connally fragments and 399. Moreover, the traces from the clothing must be identical with those from 399 and the Connally fragments or the same is again true. And the cubbstone traces must beidentical with both or that part of the story is also false and fraudulent, as is all FBI reconstriction exhibits, of which the Gauthier ones are not all. These exhibits and the relevant expert testimony represent "consideration" by the Commission and are not part of any FBI or other law-enforcement work.

In this connection, you raised the point that possibly the FBI's work was for the Dallas police, hence meets the definition. Whether or not it was given to the Dallas police, it was not done until after Johnson assigned a role to Hoover, defined by Hoover in the photocopy I've given you (5H98-9), wherein he testified"..there is no Federal jurisdiction for such an investigation..." He also added that the President can, and not for "law-enforcement purposes", as the exemption requires, "request the Bureau to make special investigations", which Hoover says is what happened.

This leads to the Statement of Material Fact where, after thinking about it and the question of perjury further, I disagree with you and Jim.

In all other cases of which I know, and the case I showed you, of Jevons' affidavit in the first Nichols suit is in point, there has always been an affidavit establishing, to the defendant's satisfaction at least, that there is a basis for claiming applicability of the exemption. Here, for the first time, that is not done. (It is as though there was a bug in your office and our discussion of this was overheard, for when I showed you these various things, you agreed that either Jevons of Hoover committed perjury.) Perhaps this also may attribute significance to the absence of the signature of any Department lawyer. However, Paragraph 2 does not state that this was an investigation meeting the requirements of the exemption (nor does anything else). It substitutes instead what is without meaning, an opinion (which is not a "material fact"), the quotation from Mitchell's 6/4/70 letter in which he says no more than "we have taken the position that they are part of an 'investigatory file compiled for law enforcement purposes'..." Aside from the fact that this is false, it remains not fact but opinion and no more is claimed.

I think the absence of an affidavit is significant and I still think, now more so, that our first effort should be to get such an affidavit and then charge perjury. Refusal to provide such an affidavot should deliver the decision to us at that point. I suggest an argument that there is no evidence this was such an investigation for law-enforcement purposes is absent from the motion, that the motion therefore is without substance, might do it. If they provide the affidavit we have perjury. If they refuse-how can they?-they surrender their entire defense. Moreover, I think such false swearing or the refusal to provide the minimum evidence would be powerful in any appeal or argument against appeal by them.

In Paragraph 3 Kleindienst's 6/12/70 letter is cited. It is way out, is not responsive, and introduces something else on which we should request sworn proof, that "the work notes and the raw analytical data on which the results of these spectrographic analyses are based are part of the investigative files of the FBI" and thus #specifically exempted" under (b)(7), which is a considerable extension of that exemption.

Moreover, I didn't ask for what Kleindienst refers to. Perhaps I should. If you'd like to try and amend to include what he refers to, I'm all for it. Here I should emphasize that everything considered in these spectrographic analyses was in evidence, public evidence, before the Commission. None of the things for which I asked are other than exhibits in the form from which samples were taken. (When the time comes, we can have a little fun, for they cannot identify the fragment for which Sibert and O'Neil gave the receipt I now have and I think one has disappeared entirely.)

To recapitulate, in what they call a "Statement of Material Fact" the one quintessential thing that must be present is lacking, any statement of fact. There is no more than the quotation of two letters each of which does no more than offer an unsubstantiated opinion (that in each case we know to be false and can so prove in court).

Their "Memorandum on Points and Authorities" begins with an entirely inadequate and incomplete description of what I seek, limiting it to "certain spectrographic analyses of bullets and bullet fragments recovered from the scene of the assassination of President John F. Kennedy in Dallas, Texas on November 23, 1963." In fact, no single part of this inadequacy is in any sense accurate. Every alleged statement of fact is false:

The government says there was but a single close-to-intact bullet, not "bullets".

Neither it(they) nor any of the fragments were "recovered from the scene", the bullet having been "recovered" miles away, at the hospital (assuming they can now prove this to be that bullet, there being no chain of possession- and I have this in writing from the Archives), and the fragments having been gotten from the car on two different examinations, in Washington (after it was first washed in Dallas). The clothing, for example, was not "recovered" from "the scene". The fragments taken from the bodies were not taken in Dealey Plaza, the "scene" the samples taken from the clothing were not taken when the clothing was in Dealey Plaze or, with the President's clothing, while it was in Texas, and the assassination wasm not on November 23, 1963. Moreover, the one sample from the scene, the crubstone, was removed from Dealey Plaza in July of 1964, not November 1963, and the specimen for spectrographic analysis was thereafter taken from it when it was in the possession of the defendant in Washington. I think itemizing these simple, factual errors in the request for an affidavit proving the character of the files would be real appropriate and might just disturb people, from the judge to the Attorney General.

Under II. Discussion, they begin with a citation of the Attorney General's memo. Now it happens that I have (and am not suggesting you here use), a taped conversatoon with Kolapp in which he says the current administration regards this iemo as without meaning, significance or applicability. This, however, hooks them to that memo, and I believe in response to this the photocopies of the President's and Clark's introductory comments are very much in point. In fact, I think that is Jim were not to read this memo he might find other things legally applicable, where my lack of legal background might not make them apparent to me.

I think they misinterpret the underscored provision of the exemption, and there is nothing in cited Barcelona Shoe to support their interpretation.

The language used is "a party". Not "the party", not "thei litigant", the "defendant". It therefore means any litigant. It would have been available to Oswald, for example, even under Jencks. Of course, what is also pertinent here is that this is not a file meeting the exemption to begin with. However, in the sense they emphasize, they reflect neither the language nor the intent of the law. This is given more point in their Barcelona Shoe citation, where there is no rele-

vance to anything like a spectrographic analysis. Concern in this decision is narrowly limited, as quoted, to what "might contain information unfairly damaging to the litigant or other persons." It is only such things that are in reference, and what follows makes this even more clear, referring agin to such statements.

Obviously, spectrographic analyses are not of such character.

Parenthetically, let me add, not necessarily facetiously, that the only possible embarrassment here, the only "damaging to the litigant" can be to the government, and that is specifically excluded in the cited Clark memo.

Here I add anoth point. This decision quotes only part of that paragrpagh on page 38. My non-lawyer's reading of the entire paragraph gives it a meaning opposite that sought to be imparted by the Department of Justice in this citation of an unrelated and irrelevant decision. I suggest you and/or Jim go over this with some care. For example, the earlier and changed requirement was that "the private party" be "in litigation with the agency". The first words of this paragraph say that the change in language make it "very different"/

Of course, other parts of this memo are relevant, and this continued defendant's use of it licenses us to quote it without end.

Not that Barcelona, in the last part cited, continues to refer only to what can cause damage to character, inspection and copying of witnesses statements", which bears no relationship to what is at issue, where there is no possibility of such misuse or such defamation.

The argument here is that the exemption "is to protect from disclosure all files which the government compiles in the course of law enforcement investigations", whether or not they lead "to formal proceedings". This, as Jencks alone proves, is entirely false. There is no blanket immunity (aside from the continuing fact that these are not "law enforcement investigations" files).

What I think you may want to consider in connection with this is the language cited on the next page of the memo, 39, under subsection (f). "The purposes" are there described as "to make clear beyond doubt that all materials of the executive branch are to be available to the public unless specifically exempt from disclosure under subsection (e)..." I think this means that they have to prove that the sought data is part of an investigative file compiled for law enforcement purposes..." which is where I began.

"Concurrence of Clements Borthers Co. in what is irrelevant is next claimed. Here again the only possibility of relevance is for law enforcement, which is neither proved nor true. However, I suggest you read the third quoted paragrpah, for in the sense in which we are using, this seems to support us, not them, in the same way American Mail Line does. To paraphrase, this decision says that if what is sought was used it must be available. It is only "absent such use" that such information is not available. The essence of the spectros sure as hell was used!

Justice's summary of this is false, claiming "since the records the plaintiff seeks have not been made part of any record in any agency proceeding he may not obtain them 'absent such use'." In even the narrow sense applied, this is not what the decision says. It says that if an employee "had been called to testify", then his prior statement would have to be available. The parallel is not the incorporation of the text of the spectros in the Warren Commission record but their use in any form therein. They are basic, therefore there is such use. This also means the opposite of the argument and the allegation, for, if only in the Frazier (and

possibly Shaneyfelt's - I'm not sure on this point) and in the form of the paraphrase (used by Curry), it sure as hell is in the record. Their words are "part of any record in any agency proceeding.

The last paragraph on the third page of this frivolously titled "points and authorities" is inconsistent with the precise language of the exemption to the point where I think Jim should check the omissions (I think all their citations should be checked for other infidelities and misinterpretations). They here claim the exemption "'prevents the disclosure of..'sensitive" Government information such as FBI files...'(emphasis added". There is no such immunity. And this is not a "sensitive" files, not in any appropriate sense, anyway. The only exemption for such files is if they are "investigatory" AND for "Law enforcement".,Their added emphasis amounts to a deception and a deliberate misquotation.

They next cite Black v. Sheraton Corp.The first paragraph is incomplete. As it stands it is a deliberate misquotation of the exemption, for all FBI reports are not automatically exempt and in any event this is not sucha "report" that we seek. It can be argued thatbas qyoted this paragraph is our way, not the way they use it. It refers to the new law "which greatly expanded the information which government agencies must (my emph.) make available to the public..."

The second quoted paragraph is irrelevant because, as it says, it is restricted to "the scope of discovery proceedings in criminal cases", which this is not. "The xxxxxxxxx concern of the Supreme Court for the secrecy and sanctity of the FBI investigative files" is out of context, for that is not at issue. The sole issue is whwther these sought materials are "investigative files", which they are not, they are lab reports, and whether they are for "alw enforcement", xxxxxxx which they neither were nor could have been.

Now, when they start to claim that releasing lab reports about the President's murder as "harmful to the public interest", they are way out, and I'd like to hear them argue this in court, with the press present. This is the last wrongful use of Black. The rest is irrelevant. We do not seek "the results of investigations of alleged criminal activity " (note their added emphasis, which again distorts). We seek only lab reports already used in paraphrase. They can hardly argue in public that this is (and again they underlined for emphasis) "that the public interest requires to be kept secret."

Even their conclusion is false by Mitchell's June 4, 1970 letter, for they argue that the exemption is "a prohibition against the release of the type of document the plaintiff seeks". Mitchell's own interpretation, to get himself off the hook (one of the reasons I like to keep pressing them, so they'll commit themselves to all kinds of foolishness) is that it merely "permits" but does not require. Again, this is not "the type of document plaintiff seeks" in this case. It is no more the lab reports and is not in any sense what these citations refer to as FBI investigative reports of criminal activity/ They repeat the falsehood that this is a "prohibition". The intent referred to has been "interpreted by the courts", ask in American Mail, and is opposite that alleged. Ix thinkx it might be appropriate to belabot the part where they got carried away with their own rhetoric and referr to these decisions being "in unanymity."

And after all this irrelevancy about FBI investigative reports of criminal investigations their last admission is merely that I seek no more than "spectrographic analyses"....There is not but 30 minutes before the mail from the main post office so I must mail this unread. I hope to discuss it in some detail with Jim very soon and would like to be able to with you. Make the appointment and I'll come in again when you are ready, which might better be after Jim and I go over it.

In haste,
Harold Weisberg