NOTES ON PETITION FOR REHEARING EN BANC

Page two of the petition for a rehearing asserts that: " . . . the panel has determined that material from an FBI investigatory file, concededly compiled for law enforcement purposes, must be disclosed . . ." This point was reitereated at the bottom of page three: "Senior Judge Danaher dissented on the ground that there being no dispute that the information sought was contained in an FBI investigatory file compiled for law enforcement purposes, it therefore is exempt from disclosure . . ." On page four, the petition agains beats the same drum: "Exemption 7 by its terms exempts from disclosure 'investigatory files compiled for law enforcement purposes * * *.' It is conceded that the information here requested falls squarely within that description."

Our Brief For Plaintiff-Appellant in the spectro case contained a section III.-A. entitled "The Records Sought Were Not Compiled for Law Enforcement Purposes", a position it argued at pages 15-17 of the Brief. In addition, the spectro Reply Brief for Plaintiff-Appellant contained a section VI: "GOVERNMENT HAS NOT SUBSTANTIATED ITS CLAIM THAT THE FBI INVESTIGATION INTO THE ASSASSINATION OF PRESIDENT KENNEDY WAS CONDUCTED FOR A LAW ENFORCEMENT PURPOSE." Thus, pages 19-24 of the Reply Brief again argued that there was no law enforcement purpose.

Rule 40 of the Federal Rules of Appellate Procedure provides in part: "No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request." Had

we been requested to submit an answer to the petition for rehearing, we would probably have singled out the Government distortion of our position. Since Danher and the Justice Department have emphsized this point, we may yet want to draw attention to this error on re-argument. Catching the Justice Department at this attempt to mis-lead the Court is likely to help us and put Justice more on the defensive than it will be anyway. In addition, pointing this out will deflate the Petition's alarmist representations that Judge Kaufman's opinion is going to cause the sky to fall in, and it will also give the Court of Appeals a basis for distinguishing this case from virtually all other suits for FBI files, including, for example, the suit for the Hiss case documents, should the Court desire to limit its holding to the facts of this particular case and avoid the broader implications.

The basic Justice Department position throughout the rest of the petition is that Congress intended exemption 7 to create a blanket exemption. This is the weakest of all possible arguments. We ought to ridicule it every chance we get. Does this mean that the Justice Department can withhold public court records if it determines that they are within the purview of exemption 7? This is what Mitchell and Kleindienst did with the Ray extradition documents. If the Court has to accept the Justice Department's determination, then Mitchell and Kleindienst can get away with it, can't they?

The petition for rehearing tries to maintain that it is clear "both from the language of Exemption 7 and its legislative history that Congress balanced the need for confidentially against the policy in favor of disclosure and determined that the need for confidentiality of investigatory files was great enough to justify a blanket exemption." This is nonsense. The Senate and the House Reports both state that the purpose of the exemption was to prevent premature discovery, and the plain language of the exemption indicates that rather than blanket immunity, exemption 7 explicitly permits the disclosure of items available under the rules of discovery.

The petition for rehearing goes even further astray, if possible, when it tries to argue that: "Where Congress created a blanket exemption, in camera inspection to determine whether the documents in question should be disclosable because nondisclosure will not further the policy of the exemption is unwarranted," and cites as authority EPA v. Mink. The holding referred to in Mink involved exemption 1, national defense or foreign policy, and that exemption was clearly distinguished from all other exemptions. In fact, Mink held that in regard to exemption 5, in camera inspection could be had, and noted that "Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual-investigative matters on the other."

It is worth noting that the footnote at the bottom of page 4 of the petition lists four "essential reasons" why FBI files should remain confidential. The only one of these which conceivably relates to the spectrographic analyses is the third--"disclosure could reveal investigatory techniques"--but that reason is not among those ennumerated in the affidavit of FBI agent Marion E. Williams. (See spectro Joint Appendix, pp. 50-51)

I note that there is no claim now that any of these relate to the spectro suit. We probably ought to press them to name which ones do apply to spectro. Are they still sticking by the ridiculous Williams' affidavit? If not, what harm is there in releasing it?

At the bottom of page five the petition takes a real slap at judges: " . . . the panel decision would open FBI files to disclosure after inspection by district judges who are not experts in law enforcement techniques and therefore not equipped to determine whether certain information contained in the files might be harmful, . . ." I again note that the Justice Department does not claim that such is the case in the spectro suit. We might press them. Is that the case in the spectro suit? Why? What law enforcement techniques would a District Judge not understand? Do these non-understandable law enforcement techniques include, perhaps, "deep-sixing" government documents? Illicit wire-taps? Handing over FBI documents to the White House a la Patrick Gray? The use of provacateurs to foment civil strife and embarrass political opponents?

The position taken by the Justice Department in the petition for rehearing requires the Circuit Court for the District of Columbia--the most liberal in the nation, especially on freedom of information--to overrule virtually every Freedom of Information Act suit which it has handed down to date, including American Mail Line, Bristol-Myers, and/Getman. It is not likely to do this, particularly given the current political climate regarding government secrecy and deception. This is, after all, the Court which had it decision in Mink reversed. Mink was a far more controversial and dubious case than spectro is. I suspect, however, the Court would like to send a hot one up to the Supreme Court that might force it to reverse what could be the beginning of a very bad set of precedents on the Freedom of Information Act.

That being so, it is unlikely that the Court is going to decide the case on technicalities. The Government position in the petition would gut the Freedom of Information Act by castrating District Judges. The future of the Freedom of Information Act rides on this case. A decision against us pretty much eliminates the Act as a viable tool. My guess is that the Court will stress the intent of Congress to enact a viable act and get away from the old APA act. The Government position would, of course, return us to the days when the APA act was used to justify a refusal to disclose information. It is interesting to note that in other cases, the Justice Department is already trying to use the current FOI Act as a basis for not allowing discovery of documents. (See Verrazano)