BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 78-1731

HAROLD WEISBERG,

Plaintiff-Appellant

v.

GENERAL SERVICES ADMINISTRATION,

Defendant-Appellee

On Appeal from the United States District Court for the District of Columbia, Hon. Aubrey E. Robinson, Jr., Judge

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CERTIFICATE REQUIRED BY RULE 8(c) OF THE GENERAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned, counsel of record for appellant Harold Weisberg, certifies that the following listed parties and amici (if any) appeared below:

Harold Weisberg

The General Services Administration

The Central Intelligence Agency, an interested nonparty of whom Weisberg sought discovery, appeared at certain conferences and hearings.

These representations are made in order that judges of this Court, inter alia, may evaluate possible disqualification or recusal.

JAMES H. LESAR
Attorney of record for
Harold Weisberg

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BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF ISSUE

Did the District Court abuse its discretion in denying plaintiff's motion for a new trial?

This case has been consolidated with Weisberg v. General Services Administration, No. 77-1831, now pending in this Court.

REFERENCES TO PARTIES AND RULINGS

By order dated May 12, 1978, the United States District Court denied the motion for new trial which plaintiff had filed pursuant to the March 31, 1978 order of this court. In a Memorandum which accompanied this Order, the District Court stated its conclusion that "no newly discovered evidence, fraud or misrepresentation warrants a new trial herein." [App. 118] The District Court noted that in granting defendant summary judgment it had found that the agency had met its burden in demonstrating that the release of the June 23, 1964 Warren Commission executive session transcript and eleven pages of the January 21st transcript "could be reasonably expected to lead to unauthorized disclosures of intelligence sources and methods." It found that plaintiff's newly discovered evidence "in no way vitiates the application of exemption 3 to the transcripts in issue." The District Court went on to declare that however accurate the information contained in plaintiff's newly discovered evidence and whereever it came from "has no bearing on this Court's central inquiry under 5 U.S.C. §552(b)(3) and 50 U.S.C. §403(d)(3) whether disclosure of the Warren Commission transcripts would compromise CIA sources and methods. The Court is satisfied that the Government has established a threat to intelligence sources and methods, and is not persuaded to the contrary by the 'new evidence' which plaintiff has adduced." [App. 118-119]

STATUTES OR REGULATIONS

This case has been consolidated with Weisberg v. General Services Administration, Case No. 77-1831, which sets forth the statutes and regulations involved in both cases. (See Brief for Plaintiff-Appellant, pp. 4-12) Those statutory provisions most pertinent to this particular case are briefly quoted below.

The Freedom of Information Act, 5 U.S.C. §552, provides:

> (b) This section does not apply to matters that are--
>
> (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

50 U.S.C. §403(d)(3) provides:

> [t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

STATEMENT OF THE CASE

I. ORIGIN OF THE CASE

A. Proceedings in District Court

On September 4, 1975, appellant Harold Weisberg filed suit under the Freedom of Information Act for two entire Warren Commission executive session transcripts, those of May 19 and June 23, 1964, and eleven pages of a third, that of January 21, 1964. This suit, Weisberg v. General Services Administration, Civil Action No. 75-1448, was filed only after Weisberg had spent several years trying to obtain copies of them from their custodian, the National Archives and Records Service.

The reasons given for withholding these transcripts varied over the years. Thus, in its June 21, 1971 letter to Weisberg the National Archives cited Exemptions 1 and 6 as grounds for withholding the May 19 transcript. However, when Weisberg filed suit against the General Services Administration (GSA), the GSA added Exemption 5 as a reason for withholding the transcript and dropped its Exemption 1 claim because the transcript had been declassified.

Similarly, the Archives' June 21, 1971 letter to Weisberg claimed that the June 23rd transcript and the withheld pages of the January 21st transcript were immune from disclosure under Exemptions 1 and 7. When Weisberg renewed his request in 1975, the Archives initially added a new claim that both transcripts

are protected by Exemption 5 but did not mention the Exemption 7 claim it had made in its 1971 letter. When Weisberg then appealed this denial, however, Deputy Archivist James E. O'Neill added Exemption 3 to the list of those said to shield the January 21 and June 23 transcripts. The Exemption 3 statute said to specifically require that these transcripts be withheld is 50 U.S.C. §403(d)(3).

On March 26, 1976, the GSA moved for summary judgment. It submitted two affidavits in support of its motion, one by Dr. James B. Rhoads, the National Archivist, the other by Mr. Charles A. Briggs of the Central Intelligence Agency (CIA). In response Weisberg filed a lengthy opposition supported by his counter-affidavit and numerous exhibits.

The motion for summary judgment and Weisberg's opposition to it dealt in large measure with the Exemption 1 claim. At a status hearing held on May 25, 1976, the court also focused on this issue, indicating that it was not convinced by the government's Exemption 1 claim:

> But I don't think that this record as it is now constructed will sustain my hearing the motion for summary judgment. I don't intend to decide the motion for summary judgment because I don't think the plaintiff has had full opportunity to probe, for example, this classification question. It's a weird set of circumstances that have been disclosed in the record to date. (Tr., p. 14)

Before the May 25th hearing Weisberg had attempted to undertake discovery in the form of interrogatories. When two

months passed without response, Weisberg filed a motion to compel. Only then did the GSA respond. The response indicated, however, that the GSA was determined to stonewall discovery to the extent possible. For example, Weisberg's 15th interrogatory inquired whether or not Yuri Ivanovich Nosenko was the subject of the June 23, 1964 transcript. The GSA, in the person of Dr. Rhoads, responded:

> 15. Defendant objects to this interrogatory on the grounds that it seeks the disclosure of information which the defendant maintains is security classified and which the defendant seeks to protect on this and other bases in the instant action.

The truth, as the GSA was later forced to admit under oath, was that this information was already public knowledge. In fact, the National Archives itself had just recently written a letter to The New Republic Magazine in which it identified Nosenko as the subject of the June 23rd transcript.

At the May 25, 1976 hearing, the District Court had stated that the record would not sustain his hearing the GSA's motion for summary judgment. Although he rejected Weisberg's motion that he be allowed to take tape-recorded depositions, Judge Robinson ruled that Weisberg would be allowed to undertake discovery by means of interrogatories, including interrogatories addressed to the CIA, a non-party. He assured Weisberg that if the factual issues could not be resolved through interrogatories, he would hold a trial on the issues and fill his jury room with the witnesses.

On July 28, 1976 Weisberg filed a lengthy set of interrogatories, some to be answered by the GSA, others by the CIA or by both. On October 15, 1976, two and a half months later, there still had been no response to them from either the CIA or the GSA, so Weisberg filed yet another motion to compel. On November 12, 1976, the GSA finally filed a response in which it objected to most of the interrogatories. The CIA made no response whatsoever.

In the interim Weisberg received notice that his October 15 motion to compel would be heard before a United States Magistrate on November 18, 1976. He later learned that in violation of Local Rule 3-9(a)(1) this motion was referred to the Magistrate not by Judge Robinson, to whom the case was assigned, but by Judge Bryant.

What ensued was a series of off-the-record conferences in the chambers of the Magistrate which resulted in one delay and obstruction after another. After three such conferences over a two month period with another set for a month later, Weisberg made an effort to halt the stalling and get the case back in front of the judge who had promised that the case would be handled expeditiously.

As a result, the District Court scheduled a hearing on Weisberg's motion to compel answers to interrogatories. However, at the hearing on March 4, 1977, the Court decided to put the cart before the horse and hear argument on summary judgment first.

The Court continued to focus upon the GSA's Exemption 1 claim and to express doubt that the transcripts had been properly classified. In fact, when the GSA's attorney began to argue that the January 21 and June 23 transcrips were properly classified, he bluntly stated:

> Well, I don't think that we are going to get very far arguing about the Confidential classification because you have some problems about that, don't you? (March 4, 1976 hearing, Tr., p. 4)

However, the District Court did not act on Weisberg's motion to compel. Instead he awarded the GSA summary judgment. Although the focus of his concern had previously been Exemption 1, he ignored that claim and held that the January 21 and June 23 transcripts were protected by Exemption 3.

After in camera inspection of the May 19, 1964 transcript, the District Court held that it was immune from disclosure under Exemption 5. At the time this transcript was submitted to the Court, the argument on whether or not it was exempt had focused upon Exemption 6. Weisberg had consented to the in camera inspection on the condition that he would be allowed to submit materials countering the Exemption claim and the Court promised to get back to him if he had any doubt about the applicability of the exemption. Although Weisberg did submit an affidavit and exhibits which countered the Exemption 6 claim, the Court ruled the transcript exempt on Exemption 5 grounds without allowing him to address that claim.

B. Proceedings in the Court of Appeals

Weisberg appealed the District Court's decision. While that case (Weisberg v. General Services Administration, Case No. 77-1831) was pending, Weisberg sought to present evidence to this court which had not been presented to the District Court. By order dated March 31, 1978, this court directed Weisberg to file a motion for new trial in the District Court. (App. 13) In accordance with this order, Weisberg moved for a new trial pursuant to Rule 60(b)(2), (3) of the Federal Rules of Civil Procedure. (App. 7-104) The GSA opposed the new trial motion, in part on the grounds that the alleged new evidence was of an "unsworn, double hearsay nature." (App. 105) Weisberg sought to counter this objection by taking the depositions of two CIA officials, Mr. Charles A. Briggs and Mr. Gene F. Wilson, who should have personal knowledge of the facts asserted in some of the new evidence materials. However, the District Court quashed the depositions and denied the motion for new trial on the grounds that however accurate the information contained in the newly discovered evidence, it "has no bearing on this Court's central inquiry under 5 U.S.C. §552(b)(3) and 50 U.S.C. §403(d)(3) whether disclosure of the Warren Commission transcripts would compromise CIA sources and methods. The Court is satisfied that the Government has established a threat to intelligence sources and methods, and is not persuaded to the contrary by the 'new evidence' which plain-

tiff has adduced." (App. 118-119)

Weisberg appealed from the May 12, 1978 order denying his motion for new trial, which is how the present case arose.

II. NATURE OF NEWLY DISCOVERED EVIDENCE

Weisberg's motion for new trial was made pursuant to two provisions of Rule 60(b) of the Federal Rules of Civil Procedure which permit a district court to relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

Because the newly discovered evidence bears on several distinct issues, each is discussed separately below.

A. Anti-Weisberg Animus; Conspiracy to Unlawfully Deny Weisberg Access to Government Records

Some of Weisberg's new evidence materials consists of records pertaining to him and his Freedom of Information Act requests which he obtained after the District Court had awarded summary judgment to the GSA. These records reveal a pervasive animus against Weisberg on the part of government officials and that government officials conspired to deny Weisberg access to agency

records which they knew could not be withheld from him lawfully under the provisions of the Freedom of Information Act.

These materials show, for example, that a decision was made at the highest levels of the FBI, presumably by Director J. Edgar Hoover himself, not to respond to Weisberg's April, 1969 request for information on the assassination of Dr. Martin Luther King, Jr. (App. 90) They also show that when the Department of Justice recognized that it could not successfully defend against Weisberg's 1970 suit for disclosure of the documents used in the extradition proceedings against James Earl Ray in England, it told the FBI that it would make copies of these documents "available to the press and others who might desire them" because "the Department did not wish Weisberg make a profit from his possession of the documents." (App. 91-92)

Even more significantly, these materials show that officials of the National Archives and the Secret Service conspired to deny Weisberg access to a record on the assassination of President Kennedy by transferring it from the latter to the former, which then withheld it, even though the Secret Service admitted in correspondence with the Archives that it had no grounds upon which to refuse making it available to Weisberg under the Freedom of Information Act. (App. 94-95) This establishes that GSA officials have in the past conspired with other agencies to contrive a means of denying Weisberg access to non-exempt records and raises a question as to whether the denial of access to the Warren Commission transcripts sought in this lawsuit is equally pretextual.

A further example of this agency's bad faith in responding to Weisberg's Freedom of Information requests is contained in the November 15, 168 memorandum of Dr. James B. Rhoads. Although then-Congressman Gerald Ford had published parts of the January 27, 1964 Warren Commission executive session transcript, the National Archives continued to withhold it in its entirety under the pretext that it was classified Top Secret. However, the Rhoads memorandum reveals a quite different--and illicit--reason for withholding even the published parts of this transcript from Weisberg:

> The quoted material does not consist of a continuous passage, but of various passages chosen from different pages. Only one complete page (page 158) of the transcript is included in the quoted material. We feel that to tell Mr. Weisberg this, or to supply him with a copy of the page that has been completely published, would encourage him to increase his demands for additional material from the transcript and from other withheld records. (App. 93)

B. Credibility of Briggs Affidavits

Some of Weisberg's newly discovered evidence bears directly on the credibility of Mr. Charles A. Briggs of the CIA. In fact, this evidence demonstrates that important parts of Mr. Briggs' sworn statements are false. For example, Mr. Briggs' December 30, 1976 affidavit states that any disclosure of the identity or whereabouts of Yuri Ivanovich Nosenko, the subject of the June

23, 1964 transcript, would put Nosenko in "mortal jeopardy"; and that therefore "[e]very precaution has been and must continue to be taken to avoid revealing his new name and whereabouts." Mr. Briggs also swore in that affidavit that "[t]he manner in which Mr. Nosenko's security is being protected is serving as a model to potential future defectors." (App. 37-38)

Yet Weisberg's newly discovered evidence shows that far from from trying to protect Nosenko from public scrutiny and in a manner appropriate to one whose security is serving as a model for potential future defectors, the CIA has itself sent Nosenko to authors who have written books and magazine articles about him and who in the process have revealed important details about where he resides, what he does, how much he earns, etc. Even more devastating to the credibility of the Briggs' affidavit is the simple fact that the Washington Post printed a photograph of Nosenko on April 16, 1978, notwithstanding Briggs' testimony that any such identification of Nosenko is forbidden on national security grounds. (App. 87)

C. Truthfulness of GSA's Answers to Interrogatories

Some of Weisberg's newly discovered evidence also bears on the truthfulness of the GSA's answers to interrogatories. For example, Weisberg's interrogatory 97 noted that he had recently obtain some 354 pages of Warren Commission records dealing

with "the campaign waged by certain right-wing political groups and congressmen against Warren Commission staff members Norman Redlich and Joseph Ball." It then asked: "Do these publically available materials reflect in essence the subject of the May 19 transcript?" The GSA responded:

> Defendant objects to this interrogatory on the grounds that it seeks the disclosure of information which the defendant seeks to protect pursuant to Exemptions (b)(5) and (6) of the Freedom of Information Act. Defendant states for the record, however, that the materials previously released to plaintiff do not encompass, reflect or restate the essence of the May 19 transcript. Otherwise defendant would have released this transcript to plaintiff.

In view of the materials obtained by Weisberg after the GSA was awarded summary judgment, this answer is at best highly misleading. An April 2, 1975 memorandum by Deputy Archivist James E. O'Neill (App. 97) states:

> The transcript of May 19, 1964, involves a discussion among the Commission members concerning two staff members who were accused of left-wing or Communist-front connections.

Similarly, Weisberg's 84th interrogatory asked whether the January 21, January 22, January 27, May 19, and June 23, 1964 Warren Commission transcripts were validly classified under the procedural or substantive criteria of Executive order 10501 at the time Weisberg first requested them. After a lengthy attempt to explain why it considered these transcripts to have been validly classified even though the Warren Commission had no authority to classify under Executive order 10501, as amended, Dr. Rhoads con-

cluded his answer to Weisberg's 84th interrogatory by stating:

> The National Archives accepts the view that the transcripts at issue were validly classified in their entirety. Subsequent review by the agency of primary subject-matter interest has confirmed this opinion.

Weisberg's newly discovered evidence casts doubt on the adequacy and truthfulness of this answer. An April 4, 1975 memorandum of the GSA's Office of General Counsel states:

> 1. A classification review of all these Warren Commission materials that remain classified should be commenced as soon as possible. Our review of these records in light of Executive Order 11652 (37 F.R. 5209, March 10, 1972) has revealed that they are generally overclassified when classification is at all warranted. This office would be happy to assist the National Archives in such a review. (App. 98)

This is totally inconsistent with claims that the Warren Commission transcripts were validly classified Top Secret in their entirety and suggests that the GSA's assesment of the danger to national security posed by release of these materials may differ significantly from that of the CIA.

D. Bearing on Exemption 5 Claims

Weisberg's newly discovered evidence also bears on the legitimacy of the GSA's use of Exemption 5 to withhold Warren Commission transcripts. The April 4, 1975 memorandum of the the GSA's Office of Legal Counsel lays down an edict that the executive sessions of the Warren Commission are to remain exempt from disclosure on Exemption 5 grounds. (App. 98) This contrasts with the Archives' practice of making these transcripts

available once they have been "declassified", even where they do deal with policy matters. A National Archives memorandum dated March 6, 1973 reveals the GSA's practice of spuriously invoking exemptions even though they will not stand judicial scrutiny. It states:

> Mr. Garfinkel [of the GSA's Office of General Counsel] apparently feels that it is better legal procedure to give all possible reasons for withholding documents in the beginning, even if you withdraw one or more arguments on appeal, than to be in the position of having to produce an additional reason on appeal. (App. 96)

Thus Weisberg's newly discovered evidence brings into question the consistency and legitimacy of the GSA's claim that the May 19 transcript is protected by Exemption 5. It also impeaches the process by which the GSA arrives at its administrative determinations and suggests that factors other than those called for by law, such as animus towards a particular requester, are taken into consideration.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING WEISBERG'S MOTION FOR NEW TRIAL ON GROUNDS OF NEWLY DISCOVERED EVIDENCE

In granting summary judgment to the GSA, the District Court ruled that the January 21 and June 23, 1964 transcripts are protected under Exemption 3 by virtue of 50 U.S.C. §403(d)(3).

However, the only finding made by the District Court with respect to the status of these transcripts was that on the basis of the affidavits filed by the GSA it was clear that the agency had met its burden to demonstrate that their release can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods. (App. 61) As the record clearly shows, the District Court gave no consideration to the affidavits and exhibits which Weisberg filed in opposition to the the GSA's summary judgment motion but instead relied solely upon the affidavits of Mr. Charles A. Briggs of the CIA.

Weisberg's newly discovered evidence assaults the credibility of the Briggs' affidavits. For example, although Mr. Briggs swore that any disclosure of the identity or whereabouts of Yuri Ivanovich Nosenko, the subject of the June 23 transcript, would put Nosenko in "mortal jeopardy" and that therefore "[e]very precaution has been and must continue to be taken to avoid revealing his new name and whereabouts," Weisberg's new trial materials show that the CIA had itself sent Nosenko to authors who have written books and magazine articles about him which reveal important details about his identity and whereabouts. Moreover, Weisbergs' new trial materials also showed that the Washington Post obtained and published a photograph of Nosenko. Although these materials obviously bear on Briggs' credibility, the District Court entirely disregarded this in denying the motion for new trial, ruling that even if the facts alleged in the motion were true, it had no bearing on the Court's inquiry into the applica-

bility of Exemption 3 and 50 U.S.C. §403(d)(3).

In a recent Freedom of Information Act case, National Association of Government Employees v. Campbell (Cases 76-2010, 76-2013, 76-2022, and 76-2023, decided May 9, 1978), this court emphasized the standards which apply to an award of summary judgment:

> A motion for summary judgment is properly granted only when no material fact is genuinely in dispute, and then only when the movant is entitled to prevail as a matter of law. In assessing the motion, all "inferences to be drawn from the underlying facts contained in [the movant's] materials must be viewed in the light most favorable to the party opposing the motion." Indeed, "the record must show the movant's right to [summary judgment] 'with such clarity as to leave no room for controversy,' and must demonstrate that his opponent 'would not be able to [prevail] under any discernible circumstances.'" (Footnotes omitted) (Slip Opinion, pp. 8-9)

The District Court's summary judgment award in this case rests upon its blind acceptance of the expert opinion of a witness never subjected to cross-examination who has an abiding interest in the outcome of the case and is in effect an interested party. In Campbell, supra, this court warned about facilely granting summary judgment under such circumstances:

> But the opinion-evaluation thus necessitated is a task for which a summary-judgment motion is ill-suited. The judicial function at that stage, we repeat, is not factfinding, but rather an ascertainment of whether factfinding is essential to disposition of the litigation, and in no event is summary judgment appropriate unless the movant is entitled to victory as a matter of law. As the Supreme Court has warned, expert opinions "have no such conclusive force

> that there is error of law in refusing to follow them"; to boot, expert witnesses normally should be subject to cross-examination, the best method yet devised for testing trustworthiness of testimony." It follow that "their credibility and the weight to be given to their opinions is to be determined after trial in the regular manner." Particularly when, as is the situation here, experts are not wholly disinterested in the outcome of the litigation, courts must exercise cautious restraint in awarding summary judgments. Nothing in the case before us suggests an occasion unsuited to observance of these wholesome admonitions. (Footnotes omitted) (Slip opinion, pp. 15-16)

Weisberg's newly discovered evidence destroys the credibility of the GSA's expert witness by showing that he has testified falsely. Both the credibility of the GSA's affidavits and the facts to which they attest are material facts in dispute. In view of this, it was an abuse of discretion for the District Court to deny Weisberg's motion for a new trial under Rule 60(b)(2).

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING WEISBERG'S MOTION FOR NEW TRIAL ON GROUNDS OF FRAUD, MISREPRESENTATION OR OTHER MISCONDUCT OF AN ADVERSE PARTY

Weisberg's motion for new trial also cited Rule 60(b)(3), which permits a District Court to vacate a judgment on grounds of fraud, misrepresentation, or other misconduct of an adverse party. In this case it is clear that the Briggs' affidavits misrepresented facts regarding Yuri Ivanovich Nosenko which allegedly support his claim that the June 23rd transcript cannot be made

public without endangering the national security and Nosenko's own safety. Rather than trying to safeguard his identity and whereabouts and the information he has provided U.S. intelligence agencies, the CIA had in fact been sending him to book authors who revealed such information.

In reviewing a district court's denial of a new trial motion for abuse of discretion, Rule 60(b)(3) is subject to less stringent standards than a motion based solely on a Rule 60(b)(2) claim of newly discovered evidence. Thus, where the equities favor the movant, it is sometimes preferred. In line with this, the Fifth Circuit recently held that:

> Under the unique facts of this case, the policy of deterring discovery abuses which assault the fairness and integrity of litigation must be accorded precedence over the policy of putting an end to litigation. Rozier v. Ford Motor Co., 573 F. 2d 1332, 1346. (5th Cir. 1978)

Here the equities strongly favor Weisberg. He has had no opportunity to cross-examine the GSA's expert witness and his newly discovered evidence shows that that witness testified falsely. The GSA's misconduct in submitted affidavits containing false representations obviously subverts the integrity of the judicial process. The philosophy expressed in the previous decisions of this circuit recognized the importance of not allowing judgments obtained by such misconduct to stand. Thus, in United States v. Mills, 149 U.S.App.D.C. 322, 345, 463 F. 2d 268, 271 (1971), this court addressed itself to the doctrine of finality which is usually invoked to uphold judgments and stated:

> Such finality is dominant but not absolute. We assume doctrines deeply rooted in equity jurisprudence permit a recall of an appellate mandate of affirmance to avoid an unconscionable injustice growing out of misconduct undercutting the integrity of the administrative or judicial process.

The Ninth Circuit has held that:

> Judgments obtained through fraud, misrepresentation or other misconduct should be vacated, by use of Rule 60(b) of the Federal Rules of Civil Procedure. That rule is remedial and should be liberally construed. Atchison, Topeka and Santa Fe Railway Co. v. Barrett, 246 F. 2d 846, 849 (9th Cir. 1957)

In Barber v. Tuberville, 94 U.S.App.D.C. 335, 218 F. 2d 34, this court also held that Rule 60(b) is remedial and should be liberally construed.

In addition to the foregoing, it should also be pointed out that considerations which are usually appropriate where the doctrine of finality is invoked are not present here. There has been no "trial" such as has usually been had where questions of newly discovered evidence arise. Nor does the doctrine of finality apply to Freedom of Information Act suits with the same force that it has with respect to other types of litigation. There is, in fact, no finality where the Freedom of Information Act is concerned. The passage of time alone is sufficient in many instances to undermine a previous judicial determination that a record is exempt under the Freedom of Information Act.

Because the integrity of the judicial process is all-important and because it has been subverted in this case by mis-

representations crucial to the award of summary judgment, it was an abuse of discretion for the District Court to deny Weisberg's 60(b)(3) motion.

CONCLUSION

For the reasons stated above the District Court abused its discretion in denying Weisberg's motion for new trial. Accordingly, its denial should be reversed.

Respectfully submitted,

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