1976

JL: 7/7/76 in FOIA; Open America vs us; the significanace of the Open America decision per se and as it addresses and effects us (esp. in the future;etc. HW 7/17/76

Again, counsellor, you understated, I think the overlyOsubdued euphoria coming from the respressive effects of a law education. There is, without not, no less legal significancein a comparison between the two decisions of the same day than you said. But separately the two decisions are political. Together their political importance is synergized.

Fantastic!

I have read about 20 pages then laid it aside for a ~~mm~~ walk and to get the mail out. I thought more as I walked, I'm offering a few observations and opinions without consultation with the decision. I'll make specific comments on specific language later, after I've finished reading it and Lowenthol's.

I have yet to find a word in Wilkey's decision with which I am not in entire accord. I do not regard it as an anti-FOIA decision. I regard it in the truest democratic sense as an excellent decision. Who the hell do these Naderites think they are, an elite who must be recognised as an elite by the courts?

They are arrogant, stupid, inept and as we know incapble of intelligent political analysis. The refuse to learn and as we have seen before, are ready to sacrifice the rights of all others in thie own selfish interests if not those of their Duce. They are, really, insufferable.

That Wilkey handed down both the same day is I think of enormous potential meaning. I think that he intended them to be considered together can't be avoided. So what is the difference? These poeple took a narrow and entirely unreasonable legalistic approach. If they had prevailed they'd have gutted the law and enable more and longer suppression of the tender and the political. All sorts of other, ordinary people who have had to wait much longer than now. With us Wilkey showed the effect of fact. Citations of law are either non-existent or minor. We made a solid, reasonable factual case and one other thing- a direct assault on "good faith" and "due diligence." He uses these words fairly often from the law, as Dugan has in his arguments with Green. (I suggest there has been orchestration within the offices of the AUSAs and DJ. They show signs of systematizing their campaign against the law, which imposes a heavier burden on us.)

I think it is not unreasonable to go farthur and say that in bracketing these two decisions Wilkey in effect endorsed us and our approach. We come out with a white hat and a mandate. Those cowboys wound up with dunged faces.

The repetition of good faith and due diligence, all in favor of the FBI in the Open America case, makes more important, I think, what I've been proposing: ~~tttttttttttt~~ tackling this head-on with Green. (By the way, Open America's quote of the law itself and the legislative history shows a requirement for the search of field offices and an extra 10 days permitted for that extra time.It is contrary to Dugan's restrictive interpretation.) There is no reasonable question ~~mm~~we can show deliberate bad faith, one of the purposes of the excerpting of the transcripts; deliberate deception of the Court; deliberate lying to us; deliberate stalling of the initial request; and continued, deliberate withholding. We can show long-time discrimination against me and not taking me in order, as they claim. The time is now. We have committed none of the Naderite offenses and our amended request is in a different category without making out the case of urgency you started so effectively with Green. It is actually helpful to their internal investigation, and in any event it coincides with both it and any search at all in compliance with the 4/15/75 request. None of Wilkey's criticisms apply to us. They in gact help enormously, part of what I mean by noting the synergistic effect.

These super-important nuts didn't even know what they were up to unless they were ~~xxxx~~ engaging in more fairies and needles stuff. I think it means that they were off on a cheap quest for political fame, not establishing a principle that would have been a very bad one if established. Really they asked the impossible, too. However, in less than ten minutes with a tape recorder I could have made a real case of urgency out for them. If they had done any work at all, even thought it through, they could at least have alleged a credible one. I'm not about to give them any help now, but could I, with a book-length chapter written have done something for them! They could have established the reasonable point by it. I think we may want to risk an appeal on that alone by carrying the allegation of urgency and need in the national sense further. Do you now see the possibility of further inter-action between the two cases, with Wilkey and us stressing the national interest and speed for us? (If you argue it he does not cite your argument.)

All this is another way of saying that in this we have done more than turn the corner. That plus a giant step or two.

I see remarkable parallels between some of the things Green was saying in court and the C-A decision. She was entirely in accord with it in all aspects, even when she argued against you on precedence to your cases. What your argument did not give her you not unreasonably assumed is inherent. In the actual words it is not. What you were saying is not what C-A said, that once you file you are entitled to automatic priority. What you were saying is that once you have passed the seriatim sequence, where you do not take away the right of another, the case in court is entitled to preference and that it does not deny a right to another. This is more apparent from reading than hearing. But she then, on her own, made Wilkey's argument about relative importances and urgencies. However, we had already gone farther than Wilkey postulates. We had passed their own time arguments.

However, we have the urgency ruling from Green on the record, so if these people refile alleging urgency we want, I think, to assert a priority for ourselves, over them. We can add that there are more retirements pending. (Courtlandt Cunningham later this year. I think he would not be a Frazier or Hilty after retirement and would not lie before it if asked the right questions.)

As you talk to others who have had experience with the law, including the Nader stuffed shirts, ask what provisions there are for us asking an immediate oral argument before appeals if they do contrive an appeal in 1996. We can then make a quick case from what is in the record and what we can readily provide. I think what we'll need is in effect in by reference, as on the markings, with the teletype a marvellous example. I can prepare an affidavit looking forward to that. I think we may want to get the 2052 affidavit in this record so we can use it, too. I recall no response to it.

Lil has just given me an AP story from the local paper on Kelley's firing of Callahan. I did not see it in our edition of the Post. My reading of it confirms my belief in the rightness of my going after Kelley and Wiseman and to a lesser degree Bugan. If and when it comes to a choice, Kelley and Levi will opt for Kelley and Levi. This in part is what I was saying about showing them those they can sacrifice. One such is the cat I suspect is Wiseman who ~~xxxxxxx~~ wrote the letter to you in which he actually said that all of interest to me in the FBI had been supplied when nothing has been. That has Kelley making a material lie in a case before a federal court. We need this in the record and if it is not there the earlier one from which you read, saying everything covered by the complaint was, I think restricted to 4/15/75 but still false. Let a baby-faced bastard like Wiseman be disciplined and there will be fewer willing to do a Wiseman, which is to say do a Hoover. (The current probe is supposedly interested in "abuses of power," too, not just things like kickbacks.)

While I do not think that Wilkey intended some of his concluding language (20-1) to be taken literally as I suggest, I raise two possible interpretations of his handling of good faith and due diligence.

Dugan claims both, I think not in an affidavit but better for us if he has.

Wilkey defines good faith effort and due diligence on the last page.

The court retains jurisdiction when the good faith and due diligence claims are made. Does this preclude them from appealing until they perform in good faith and with due diligence, as the court of current jurisdiction interprets both? I think it does. Dugan himself has interpreted out request to be for everything on the King assassination. He has personally involved himself with a representation of having made a personal review. In combination and especially in the light of this decision, quite apart from any question of urgency, on which Green did rule and Dugan has not provided what he said he would, I think of the questions of fact that the district court must resolve under our 2021 decision is the factual basis for good faith and due diligence so that the appeals court will not be confronted with questions of material fact about which there is at least dispute. I think Green would react favorably to such an argument.

While I commend all of Wilkey's language in the last paragrpah, the part on the last page, to you, in particular what I take to be a definition of good faith and due diligence,"comply with all lawful demands under the Freedom of Information Act in as short a time as is possible by assigning all requests on a first-in,first out basis..." Withs a request of 4/15/76 no such argument of compliance or good faith or due diligence can be made more than 14 months later.

I also note that from the Doyle decision there is no basis for masking from what we were given what is relevant to the amended complaint no matter how the government elects to interpret the amended complaint.

Leventhal's concurring: his quote of Tyler on agreement with speed would be delightful bracketed with his office's letter to you tell you I can appeal eight months after the Complaint is filed and after four status calls.

Under his I on p. 2 he argues more or less as I have on two points; the majority went farthur than was necessary to decide the issue in the appeal, or it wrote case law; and on the district court's retention of the case.

His interpretation on p. 3 is valid for us now: the law was "crafted" to "put a substantial burden on the government to justify to courts any noncompliance with FOIA time limits." Especially applicable in 1996. More relevant on p.11, top.

5: His comment on "lack of trained personnel" strikes me a different way: the spooks knew they'd be flooded. They arranged not ho have the personnel trained to be able to delay and then to argue oppressiveness.

Below this, as with the Doyle decision, he indicate that there could be ongoing compliance as relevant records are retrieved. Instead in 1996 they masked.

6, his forecasting of agency "shortfall," seems to indicate his increased understanding. From some source.

7 his footnote reminds me that I have a number of ignored "non-project" requests pending and we are at or past the time under their own representation. If 1996 represents a "project" classification, Duagan has not indicated it.
He gives no source for his statement that the government is deliberately deferring some requests. Like mine? He does say it.

8, he uses a variant of your ageument on the filing in court. In one sense he says exactly the same thing. It is a "priority-indicating factor of significance."

His self-fulfilling prophesy argument at the bottom of 11 and top of 12 is well taken from our experiences. They do work this way. He is perceptive to see it if it has not been before him in cases/ We may yet see this in 1976.

My impression is that he has a good grasp of the FOIA realities and is worried.

However, I believe his is an academic approach for the most part. It is new and for a while has been true that the agencies have been over-loaded, regardless of the reason(s). Without a showing of urgency speeding up the request of any one applicant means delaying that of another. No matter if the shuildoggery arranged this it is the reality. There thus are competing rights.I'm inclined to think that Lowenthal's view is closer to that which serves business interests. They have the means of filing suits the average person does not. So this can be said to be arguing their right for priority treatment once they file.

Currently I am see no harm for us and possibly much good from the decisions. We have not pushed any request, they have accumulated, the amended complaint, even if there is a question under the rules, had plenty of time and was on a subject viewed like a suit; on remand we are in a 1970 case; in 1440 my request is about eight years old.