

Dear Howard, Our Day in Court (75-1996)

9/8/76

When we left the impromptu hearing, called status call, I asked Jim "What will you have taken out in eight days?" There appears to have been no need to remove his appendix and there is no doubt he was magnificent in court today.

They pulled a new one on us, and FBI supervisory agent in FOIA. His affidavit is one of the six Jim had not had a chance to read thanks to the government's dirty tricks.

We had no idea what was going to happen. We were told there would be a witness to testify to compliance.

I'd gone over all the affidavits with care and prepared lengthy responses. I'd had all but one retyped if unread. Fortunately my judgement was good on typing sequence. So while we were sitting in the lawyers' lounge and Jim was making what notes he could I located one essential fact on each one on compliance, especially where they misused statistics. Jim was astounded at their real meaning-deliberate non-compliance called taking everything in order. So Jim made his own notes on them and we went into the courtroom. The rest of the preparation I'd done had him well prepared for what he had to do and did magnificently: ad lib cross examination of a stranger.

It was fantastic! They were all long-faced, the AUSA, a monster from pro football named Mogan barely able to control himself at being so turned around: his star witness ours. The judge wanted none of the other two he had, all from the FBI, said she wanted to hear from people who know and do not say "I don't know" and at this point Jim got up and asked for an evidentiary hearing as soon as possible. Week from tomorrow. Aside from time and jetlag his only problem is mastering what I gave him today. Maybe I'll resume later. Grocery-shopping time.

By simple calculations with their own statistics, something apparently nobody else ever thinks of, I used their affidavit to prove they should have processed my appeal before the March calendar call. This is September. I found my forgotten and unmet 1969 request for the same material, expanded a bit now. Statistics to prove non-compliance after 7 years on a 90-day law? By the time it was over it was a government shambles. It got so bad that this FBI "expert" agent at one point opened his hands, shrugged his shoulders and looked at the AUSA from guidance!

You may recall that I said Open America was a bad case coming from arrogance and anti-democratic Naderian concepts but I'd turn it around. We began by using it. The decision is a good one. The case only is bad. They are in violation of that decision and when Jim alleged it, merely alleging it, the clerk found the place and handed it to the judge. It was so great a day that I'd bought me a brownie (not points, pastry). I felt so good that when Jim said let's have lunch I said let's celebrate. We did, at the Lawyers' Club, of which his is not a member. His father is so he uses his father's card and his father also pays the bill. Second time he's done it. Then I had my supports check (yup, another bad fit) and we went to Jim's to work until my ride home. We have decided on what witnesses to ask them to produce and in general what we want to go onto. We're going to wind up with only one who will claim first-person knowledge and he'll prove he was a perjurer. I've done the preliminary work and I've incorporated the newer work in an affidavit draft.

Our real problem is the judge is intimidated by the amount of work she'll have to do if she gets tough/ it will be enormous. This is why I've been pushing for punishment, what is never dreamed of. There is no other way the judges will get relief. The way we are going is going to be hardest on Jim and will make the least complete record but there are few choices and perhaps as practical matter it is now the only way.

This is going to make a costly transcript. We decided to wait and give the other side time to order it, which reduces the cost to us to a mere 50¢ a page! Next week will cost more because we'll go a whole day. And when the judge knew Jim had been hospitalized

on the other side of the world and had been gone but one day, what a display! Especially when the chief of their appeals unit questions whether I am an investigator or an "expert" or an "authority."

During Dugan's direct I wrote a series of simple notes out for Jim. Maybe 6-10, no more. On special, relevant points, simple and comprehensible. I went up and gave him only one. He began with but a single sheet of his own. And this spectacle resulted.

Before it was over Jim asked this character if it would shock him, when he has sworn and resworn that they take all requests in order, to know that I had about 20 requests going back to 1969 that have not been responded to. What, he asked. Would it shock you, Jim repeated. No, it would not shock me, he admits.

I suggested to Jim that we ask for restricted live testimony from each one who has executed an affidavit and from two others: Pottinger, head of Civil Rights and the one now in charge of general crises in Criminal. Modest, no? Plenty! With relevant records for those who executed affidavits. These guys even swear to statistics and can't say who compiled them, only that they did not. Great affidavit stuff, eh counsellor?

It is a big job with all Jim has to do, beginning with a medical appointment in the a.m. but I think that except for reading what I've done and preparing specific questions in advance it is largely done. I think I've done about all he'll need except to go over what I've ~~shown~~ already given him and make a list of the items he should know. Meanwhile, I'll be prepared with some of what they have masked, and what a display that will be for me to sit there and fill in the gaps of what they have claimed the need to withhold!

By the time we're finished we'll have eviscerated their coming assault on the law. We'll make that kind of record. We've already begun. Jim got this guy to admit that they have included normal press requests as part of their FOIA statistics. And that they accept verbal requests, meaning every phone call.

Jim pulled one that was better than most. They are yakking, the feds, about how they process this stuff. Him says, okay, you are working on Mr. W's in sequence and there comes a time when other agents have cleaned up all the requests older than Mr. W's request. Would you put them on it? No. How many do you have on this kind of work? 150. You take them all in order? Yes. Suppose ten are free, do they take other requests? Yes? Please explain, then, how you process all in order of receipt? Obviously they don't. Meanwhile, after 8 months I got them to admit they don't even number requests in the order of receipt. How can you keep them straight, Jim asked? By filing. Ever get files out of order? He didn't know.

Perhaps you are getting what I think: we have wrecked the entire DJ FOIA system as a sham, a contrivance for non-compliance, and we'll use gold on the lily next week.

We've had so much pressure on them, we two little-knowns, that they began with a fake promise to release papers on a regular schedule, perhaps in batches of 200. They will need some financial help! But they could not answer how long "clearing" would take.

Or, an open end of non-compliance. Now they are pressuring the judge.

I've taken the time because I think you can see what we are doing, expect to do and what it can mean.

Hastily,