

Dear Jim, Halperin v. State, C.A. 75-0674; No. 76-1528 9/16/77

If I can see what you report, the disappointment of the Ellsworths in this remand, I can also see other possibilities as in the minds of the appeals judges than the Ellsworths appear to have perceived.

He, Halperin and others believe it was not necessary to remand for in camera inspection.

I suggest an exploration of why it was remanded for in camera inspection. It says. Which is also to ask if this, while stated, is necessarily the actual purpose of remand.

There may be a hint in the footnote on p. 13. Of course I am not familiar with the records in this case so my comment is limited to what is stated and indicated in the remand decision.

I find no reason for the appeals court to say anything about recovering the costs of litigation and to go farther and refer to the "possibility of disciplinary proceedings." If Halperin sought both it is not stated. If he sought recovery of costs only then the court merely threw in the suggestion of disciplinary action.

It would appear that in this the appeals court has separated out what relates to (4)(E) and seen to it that regardless of other considerations it has ruled on this. Or, unless there is a separate appeal by State the decision is final with regard to (4)(E). This means not only recovery of costs but the possibility of punishment.

I think it is possible that the appeals court had in mind the possibility of an appeal to the Nixon-packed Supreme Court if it merely affirmed Green's decision. Under this presumption could it have remanded to plug what it could anticipate the Nixonians might regard as a defect?

In evaluating this consider the 10-month delay in handing down the decision and the extent if not the extreme to which the decision goes not to criticize Green if not to praise her.

I suggest that this has importance to you also, and that the appeals court has become aware of the public service done by those of us who file and those who without fee argue political cases, those wealthy corporations do not finance.

This is not a certainty but I would be interested in knowing if the (4)(E) question was before the court. If it was not the n I believe an effort to read significance into this is indicated. Especially because it also means that Halperin and Shattuck are in effect having future proceedings underwritten to the degree permitted.

Of course I do not see most decisions. But of those I do see I think the appeals court has been saying much since the amendments and was saying much in the spectro remand.

I find it perhaps significant that the decision clobbers the government for deliberate misrepresentation and dishonest citation (10). I do not recall courts doing this much.

In this context I think it was saying Green you did fine but we want to perfect the record for any eventuality.

At this point there are quotations that are handled in a manner that leads me to believe Halperin and Shattuck may have overlooked a bet. This is in the paragraph quoted from the Vest deposition. It twice used the words "national interest" as a controlling determination under FOIA. Not so since 1966. They should read the conference and the house and Senate reports on the 1966 Act. One of these sources is specific in stating that the use of this kind of ambiguous language was one of the means of frustrating the intent of the Administrative Practice Act. Since then those words have been without any FOIA meaning. This is consistent with the adding of (B) to Exemption 1 in the 1974 amendments.

If State is talking and arguing only in terms of "national interest" on that point alone, without in camera inspection, Halperin should prevail. It might be a telling argument to have before Green at the time of in camera inspection. There is going to be in camera inspection.

If you agree with me and want to suggest this to Shattuck, I ask that you make it a point to tell him it is my idea. I'll not forget easily what the yellowbelly did to me. I wish I knew more about the record in this case because if this decision reflects it fairly there are the kinds of oversights I'd not expect of either Halperin or Shattuck. One is can there be harm from the official acknowledgement of what is unofficially known.

Best,