IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG, Plaintiff-Appellant, v. GENERAL SERVICES ADMINISTRATION, Defendant-Appellee.	No. 77-1631

RESPONSE TO APPELLANT'S OPPOSITION TO APPELLEE'S MOTION TO STRIKE PORTIONS OF APPELLANT'S REPLY BRIEF

In his Opposition to Appellee's Motion to Strike, Appellant accuses the government of perpetrating a fraud on the Court (p. 4) and of seeking "to subvert the integrity of the judicial process by filing false affidavits with the District Court." (p. 5) These are serious accusations, tantamount to charging the government's lawyers with unprofessional conduct and its witnesses with perjury.

To support these charges, Appellant refers this Court to yet another recent magazine article, an article which is no more probative than any of the items contained in his proposed Addendum. Indeed, the allegedly damning excerpt reprinted on p. 4 of the Opposition is a classic example of triple and perhaps quadruple hearsay. It consists of New York magazine's representations as to what Edward Jay Epstein said that James J. Angleton knew that the CIA would do under certain circumstances.

3 I

Such evidentiary problems are characteristic of the extra-record material which Appellant is continually trying to put before this Court. Indeed, evidentiary difficulties may well explain Appellant's reluctance to follow the proper procedures for bringing newly discovered evidence to the attention of the courts, procedures which are clearly spelled out in Fed. R. Civ. P. 60(b) and in a prior decision of this Court. Smith v. Pollin, 90 U.S. App. D.C. 178, 180, 194 F.2d 349, 350 (1951).

Appellant undoubtedly cannot prevail under Rule 60(b) because the vast bulk of his newly discovered "evidence" does not meet the minimum standards of relevance and probative value which the Federal Rules of Evidence impose upon the district courts. He therefore seeks to evade those Rules by urging this Court to enlarge the record on appeal. If anyone is attempting to "subvert the integrity of the judicial process" it is the Appellant, for it is the Appellant who seeks to by-pass the standard fact-finding procedures and to distort the usual relationship between trial and appellate courts.

Appellant offers three wholly unpersuasive reasons for urging this Court to allow him to introduce inadmissible evidence before an appellate tribunal. First, he contends that this Court must do so in order to protect its own integrity. The core of his argument on this score seems to be that the District Court erred in accepting the CIA's sworn affidavit as to the contents of the disputed transcripts instead of Mr. Weisberg's sworn statement that the CIA was conspiring with the Readers Digest to implement a massive "disinformation operation." See

affidavit of Harold Weisberg, JA 366 or Reply Brief 2-4. Appellant fears that this Court will make the same error unless he is permitted to impeach the sworn testimony of the government's affiant and to shore up his own sworn statement with inadmissible hearsay drawn from the Washington Star, the Washington Post and ACB, a book written by a former editor of the Readers Digest. The government submits that this Court's integrity will not suffer if it denies this request. If appellant has any actual evidence that the District Court erred in making its credibility assessment, Rule 60(b) provides him with a perfectly adequate procedure for presenting it to the courts. If, as the government contends, he cannot produce probative evidence of a non-existent conspiracy, he has suffered no harm. There is no right to rely on inadmissible evidence.

Second, appellant argues that an appellate court may enlarge the record "in the interest of justice." He cites three cases for this proposition: Turk v. United States, 429 F.2d 1327, 1329 (8th Cir. 1970), Washington v. United States, 130 U.S. App. D.C. 374, 378-79, 401 F.2d 915, 919-20, n. 19 (1968); Gatewood v. United States, 93 U.S. App. D.C. 226, 230, 209 F.2d 789, 792-3, n. 5 (1953). In all three of these cases, the evidence which was added to the record on appeal consisted of official transcripts of pretrial hearings in criminal cases. Thus, the additional evidence was part of the record either before the U.S. Commissioner or before the district court which, through oversight, was not included in the certified record on appeal. Moreover, it was clearly admissible evidence taken before a court of law in accordance with the Federal Rules of

Evidence. Appellant's attempt to enlarge the record is of a wholly different nature. His proffered "evidence" was never "part of the trial process," Gatewood, 209 F. 2d at 792, nor has it ever been subjected to the guarantees of trustworthiness contained in the Federal Rules of Evidence. It is difficult to see how it could be "in the interest of justice" for this Court to accept such material on appeal, particularly in light of the fact that Rule 60(b) provides a sound procedure for bringing reliable new evidence into the record.

Finally, Appellant argues that this Court can take judicial notice of the materials in his proposed Addendum pursuant to Rule 201 of the Federal Rules of Evidence. However, Rule 201(a) specifically limits the scope of the Rule to "adjudicative facts" and irrelevant facts do not constitute adjudicative facts. See, e.g., Wright and Graham, Federal Practice and Procedure: Evidence § 5104 at 483-84 (1977). The government has argued at p. 2 of its Opposition to Appellant's Motion for Leave to File Reply Brief with Addendum and at p. 2 of its Motion to Strike Portions of Appellant's Reply Brief that much of the material contained in the proposed Addendum and cited in the Reply Brief is irrelevant. For example, whether the Washington Post correctly reported that the CIA hypnotized "peaceable" women in the early fifties can have no bearing on whether the release of two specific Warren Commission transcripts could jeopardize CIA sources and methods. Similarly, internal FBI memoranda cannot shed any light on the issues in this

case. The FBI is not a party to this lawsuit and has no interest in its outcome. Moreover, the GSA has no control over the FBI and is not responsible for its prior altercations with Mr. Weisberg.

In addition, Rule 201(b) states that a judicially noticed fact must be indisputable either because it is generally known within the territorial jurisdiction of the trial court or because it is capable of accurate determination by resort to sources whose accuracy cannot be questioned. The items contained in the proposed Addendum and relied upon in the Reply Brief do not fit into either category.

Appellant's argument that newspaper articles and book excerpts are matters of common knowledge must fail because he does not distinguish between the fact of publication and the factual contents of a given publication. The former is judicially noticeable; the latter is not. The reason for this distinction is clear. The First Amendment allows publication of any erroneous, speculative or biased report whatsoever. The Federal Rules of Evidence seek to insure that only accurate information will affect the disposition of a lawsuit.

Similarly, Appellant's contention that government records are inherently judicially noticeable must fail because it does not distinguish between formal statements of government policy or official compilations of facts (e.g. the census) and informal

memoranda which reflect only the views of their authors and which may or may not influence the ultimate governmental action with regard to a particular issue.

Respectfully submitted,

/s/ Leonard Schaitman
LEONARD SCHAITMAN (202) 739-3321

/s/ Linda M. Cole
LINDA M. COLE (202) 739-5327
Attorneys,
Appellate Section,
Civil Division,
Department of Justice
Washington, D.C. 20530.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 1978, I served the foregoing Response to Appellant's Opposition to Appellee's Motion to Strike Portions of Appellant's Reply Brief upon opposing counsel by causing a copy to be mailed, postage prepaid, to:

James M. Lesar, Esquire
910 16th Street, N.W.
Suite 600
Washington, D.C. 20006

/s/ Linda M. Cole

LINDA M. COLE (202) 739-5327
Attorney.