Mr. David Burnham
New York Times
1000 Connecticut Ave., NW
Washington, D.C. 20036

12/13/85

Dear Mr. Burnham,

Jim Lesar was not present when I argued my case before Judge J.L.Smith pro se this past Tuesday but we met afterward. He told me he'd spoken to you and got the impression that you regard it as too complicated. If he tried to convey all that is in the records I've sent Rick Smith, who told me he'd given them to a colleague, I can see that you would regard it as rather complicated. My purpose in writing is to suggest that looked at differently it is not complicated, is newsworthy and that a significant precedent is involved.

Once I was pro se I was able to simplify this greatly. It is now entirely limited to whether or not the judgement DJ/FBI got against me was obtained by fraud, perjury and misrepresentation. I believe that such charges - and I emphasize that they are entirely undenied and undisputed in any way - against the Department and the FBI are not everyday matters. All of this also is quite exceptional in FOIA litigation, the purpose of the law being to let the people know what their government does.

This is the first case in which the government has demanded discovery against an FOIA requester. The law says, "and the burden of proof shall be upon the government to sustain . . . " I understand also that there is no precedent for a judgement against a plaintiff in such matters.

I must be fair to Judge Smith, particularly because in my not inconsiderable experience with him he has been a virtual adjunct of the FBI and DJ. I am almost 73, have serious and severely limiting circulatory ailments, and because I can drive my car for only about 20 minutes and must keep my legs elevated when I'm not walking, I have problems about which I phoned his office, spoke to the secretary who spoke to him and he was simply fine. I had to use my wheelchair to avoid standing and to keep particularly the left leg elevated and he said by all means to do that and if he could not hear me he'd have a mike given to me. Because my walking limit is about a city block he told me what door of the courthouse to go to and when the friend who drove me down started for that door a guard came out and directed her to the space closest to that door, which had been closed off.

There was exceptionally short notice of the hearing and both Jim and Mark Lynch, who represented me on appeal only, were surprised that he'd granted me a hearing. I'm not a lawyer, didn't want either to ramble in ad libbing or forget anything, so as soon as I arranged transportation I sat down and off the top of the head prepared what I wanted to say. I wasn't well, we had a number of medical appointments, so once it was retyped I was able to read it only once, to time it. I then saw something I should have included, wrote that at the bottom of what I intended to say, and made copies of the prepared statement and the documentation, so I could give them to the judge and the DJ attorney, a woman named Wohlenhaus. (She wound up not Portia but Shylock.) Smith told me when I thanked him for his consideration and told him that not to digress in ad libbing I'd prepared a statement that it would be better if I didn't read it but he'd include it in the record and would read it. So, I ad libbed. He didn't interrupt me, which I think Jim will tell you is quite exceptional, and he asked but a single question, about what I concluded with that I'd omitted in the prepared statement. Several years ago he'd suggested that the lawyers try to compromise and end the case and he sent them to a room to discuss this. Jim phoned me and, because I've been trying to end all my litigation for many years, I told him I'd dismiss subject to the right of others to seek information not provided to me. The DJ and FBI people rejected this out of hand and when they returned to court told Smith that they wanted to prepare a ~~Vaughn~~ Vaughn index. I then told Smith that this meant that instead of

letting me dismiss the case, with prejudice to myself, the FBI and DJ insisted on spending, by their own estimate, 123,000 man-hours in a totally unnecessary index. And if they did only a 1/100 index, 1,300 man hours. (Of course, the reason for this is that to this day the required initial searches have not been made and, because my request is inclusive, it would enable them to forever suppress all information relating to the investigation of the JFK assassination once they did a Vaughn and he approved it.) Smith's one question was how many documents did this represent and I responded that the FBI had referred to pages rather than documents because the documents vary in length.

I've got these people nailed firmly and only a lack of attention has kept this from becoming a scandal. They are depending on Smith's past but I suggest he is now in a different position. So, Wohlenhaus spoke only briefly and managed to limit herself to what I'd already proven was false, as fact and even as law. My response to her also was brief but she laid a basis for me to go into some of the scandalous new evidence I used, and I think it makes a good record, whether or not it makes any difference to Smith. As I was taking my wheelchair and myself from near the podium to return to the counsel table to collect my stuff, Wohlenhaus said something and the judge responded and I couldn't make it out. I asked him, he said something and despite my hearing aids I did not make it out, so I told him I'd ask her, and I did, and she said she'd told him the government would, if it prevailed, ask for additional costs and fees. I told her I hoped not to become so infirm and feeble that I could not use the possibilities still available to me and that as long as I live I want to be able to oppose evil. And I left. Later my wife and the friend who drove us down told me that Smith's tone of voice was harsh when he told her she was premature. Jim regards this as significant but I can see it as Smith covering himself, although I hope Jim is right.

Lawyers have to worry about retaliation, against themselves and against other clients but these are not my concerns so, not for the first time, I was not uneasy about tangling with the FBI and the DJ's lawyers. But when I'm not a lawyer and when I felt I had to fight a precedent that can, in effect, gut FOIA, what was I to do? I remembered a similar situation, when the late Mo Waldron and I became good friends. I was James Earl Ray's investigator, Jim was of counsel, Bud Fensterwald was chief counsel, and I'd already conducted the investigation that got him an evidentiary hearing. Bud was abroad and Jim, who had then never been before a jury, and I were down there in enemy turf trying to prepare a case that would show that the most famous criminal attorney in the country, Percy Foreman, had not been effective counsel. How do you do that? Based on my previous work in that case, represented in a book, I conceived of retrying the case as alleged against Ray to show that Foreman had not been effective counsel, and we did, with live witnesses, exculpate Ray. The judge then held that guilt or innocence were immaterial. He was sustained on appeal.

Thinking in these terms, I retried the case on which Smith had ruled against me, but I used only "new evidence," which makes Rule 60(b) operative. And with this new evidence, consisting entirely of FBI information disclosed after the case record at district court was closed, I proved, beyond question, that the FBI had lied and with counsel had pulled a fraud and misrepresented. The new evidence was disclosed to Mark Allen, with two exceptions, a DJ letter to me reporting finding a significant and withheld record involved in this litigation (after a year still withheld) and a joint FBI/Archives report on FBI files and filing. And the FBI agent who disclosed these records to Allen is the same one who swore in my litigation that they did not exist. (The claim in seeking discovery from me is that it would prove compliance and that where it didn't my subject-matter expertise was required by the FBI-to tell it about its own files!)

With Wohlenhaus counsel for Shylock and with Smith's record of accepting and rubber-stamping whatever the FBI has wanted, she made the great blunder of trying to add about $5,000 to the judgement against me and this led Smith, while rejecting that lust for vengeance, to issue a new judgement. Thus the judgement against me is fairly recent and much less than the limitation of a year under the first three clauses of Rule 60(b) for use of "new evidence." (She practically insulted him to his face by insisting that the time had run when the second three clauses are specifically intended to toll that year in other respects.)

As best a nonlawyer can hold an opinion, I think that Smith will not want this record to go up on appeal, not even to the Reaganized appeals court in the District. It is limited to whether or not they crossed the line into criminality in seeking and getting the judgement against me. (That against Jim was dropped after the Nader law group represented him on appeal, and that, too, was without precedent and a great hazard to lawyers in general.) The evidence is so solid that DJ/FBI do not dare contest it and the record is that they have not even made pro forma denial. So, the only evidence before Smith is what I provided and it is unrefuted.

Smith has an out and because I have no blood lust I provided it in earlier "legal" arguments: equity. He can ignore everything else and rule simply that the judgement is no longer equitable. I provided him with this out because my objective is to prevent the de facto gutting of FOIA, which, where the government has motive for withholding, would be inevitable if it could demand "discovery," with sanctions against the requester also established as precedent in this litigation if I do not prevail. If, as I think is not impossible, he takes this road, then I'll have to decide whether I want to do anything further about these undenied felonies. I've made formal complaint about them to the so-called Office of Professional Responsibility and the United States Attorney for the District who, actually, is signatory to the pleadings I allege are felonious. Neither has responded.

Because I also have cataracts I was not able to detect Smith's facial expressions, if any. But I think that another telling and entirely undenied argument I made is that in fact I had voluntarily provided all that was demanded under "discovery" only to have it ignored and that, in extent, it is two full file drawers. This, obviously, is a hell of a lot of information and effort and represents some cost to me. (Quin Shea, when he headed DJ appeals, had asked this of me. He is also a history buff.) I then told Smith that on the two subjects, the JFK and King assassination investigations, I had provided the government with two full file cabinets of information - and I invite inspection of it. I then added that with all of this, they entirely ignored what I had provided and even when they blundered into what I had accurately located in their files, after a year it remains withheld - under a 10-day law. (In the King case, I did what I did at the request of the judge and that 1975 case is till being resisted and stonewalled by DJ on the question of fees. I prevailed. When I was before Smith, Jim was before the judge in that case. She's set a hearing for the near future.)

Dallas is the Office of Origin in the FBI's JFK assassination investigation and New Orleans is virtually a second Office of Origin. This litigation stems from my FOIA requests of both field offices. I didn't go into all the fraud and perjury. I concentrated on that by SA John N. Phillips, case supervisor, juxtaposing his attestations with the FBI records he disclosed to Mark Allen. SAs from both field offices lied under oath in the underlying litigation which is not involved in the present situation.

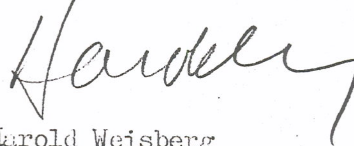
I don't know all the reasons these people hate me but I'm sure that one is their inability to fault anything in my seven books and the other is that I am responsible for the 1974 amending of FOIA to open up all the FBI and CIA dirtywork. They've never been able to find an error in what by now is thousands and thousands of pages of affidavits. And as Mo, a witness to it, said in Memphis, "Hal, you fucked them up."

Because they seem to be consumed by this hatred I am inclined to resist predicting what they now will or will not do if, as I think may be possible, I prevail. It may be that because the perjury case against Phillips is pretty solid they may just let it drop. Even though they've not gotten any of my blood(they sure did get a lot of my time, though) and they do not have an immunity on the undisclosed records. Smith failed to make any Finding of Fact, as is required by Rule 52, and he didn't say a word when I mentioned this. So, in the future, others can't be foreclosed from seeking the records I didn't get or what was withheld from what I did get.

Most of this is for your information. I hope you can see the relatively simple beginning as a relatively simple story, requiring little time and effort and yet of some significance and news value. It isn't often that the FBI and DJ and charged with felonies and don't even deny them to a court of law, and it is without precedent in efforts to restrict what can be known.

My apologies for my typing. I have to keep the legs up and type sort of side-saddle. It is worse when I'm tired. This is the first time I've been to Washington since 1980 surgery except for seeing the surgeon every six weeks and then, with a professional driver, the trip is so tiring that I often fall asleep on the way back.

Sincerely,



Harold Weisberg