PETITION FOR REHEARING AND SUGGESTION OF
THE APPROPRIATENESS OF REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Nos. 84-5058 and 84-5201

HAROLD WEISBERG,

Plaintiff-Appellant,

JAMES H. LESAR,

Appellant,

v.

WILLIAM H. WEBSTER, et al.,

Defendants-Appellees.

Nos. 84-5054 and 84-5202

HAROLD WEISBERG,

Plaintiff-Appellant,

JAMES H. LESAR,

Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants-Appellees.

Harold Weisberg
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seriously ill and handicapped Weisberg--and to others with this new Modest Proposal as precedent.

There are other gross injustices, among them being the fact that the initial searches responsive to his requests still have not been made and thus he is denied his rights under FOIA by the agency dedicating itself to wasting as much as it can of what remains of his life and work. The case record, again unrefutedly, reflects that this was approved FBI policy beginning in 1967.

It is grossly unjust for any court to accept deliberate fabrications and overt lies which defame a litigant. Or to accept anything by those who lie to them. The lie that Weisberg's Dallas request does not include the entire text of that request is not lonely. In seeking severe sanctions against Lesar the brief (page 44) states what is utterly and completely false and was known to the FBI and its counsel to have been impossible. In attributing serious misconduct to both it states that "(t)he district court had closely observed plaintiff's counsel's relations with plaintiff in this litigation for more than five years." The one time Weisberg was in the courtroom in this litigation he was not even with his counsel and thereafter, as unrefutedly the case record and transcripts reflect, it was impossible for him to be present and he was not. Five years indeed! For four of those five years nothing at all transpired. The supposedly pro forma first calendar call Weisberg attended was to obtain the court's permission for the FBI to have what Weisberg had agreed to, the time to search, process and comply.

These are the most prejudicial of deliberate lies. The panel was made aware of them, they were neither justified nor withdrawn by the FBI or its counsel, and the panel merely ignored this additional record of agency untruthfulness and instead credited even its entirely refuted conjectures.

This is more than a gross injustice to Weisberg. It demeans the judicial system, surrenders the constitutional independence of the judiciary to the errant executive, and in the course of it all completely rewrites FOIA and the

pertinent regulations. This decision means that no agency henceforth is required to make and competently attest to a good faith search with due diligence; can substitute records of its own preference for thos required; can demand and get the most burdensome and unnecessary discovery, from the poorest to the richest requesters; and can lie and perjure with impunity. This decision creates a great danger for counsel, from pro bono to the most prestigious, by sanctifying a Cointelproing in which whatever they do or do not do they are subject to severe sanctions and by requiring them to waste immeasurable time and limitless costs if their clients decline to take their advice. This decision can mean the end of, as a practical matter, that great American contribution to self-government, the peoples' right to know what their government does; and in this it can end the enormous potential benefit to good government that comes from what the FBI, Department of Justice and other agencies so detest, exposure of error and wrongdoing and enabling correction and improvement of government.

This is an activist political decision. It is not a decision of--or worthy of--a court of law and on this basis, too, Weisberg should be granted an en banc rehearing.

The panel's factual errors are so fundamental they raise serious and disturbing questions. It is apparent that the panel did not even bother to read Weisberg's requests, not even after he informed it that it had been lied to. Consistent with this, it ignored his refutations of other FBI infidelity to fact and accepted what without refutation he showed to be unfactual.

The panel's first sentence under "Background" reads, "Plaintiff filed this suit in 1978 seeking information from the FBI concerning the assassinations of President John F. Kennedy and Martin Luther King." (page 3, emphasis added)

Dr. King is not mentioned in Weisberg's requests. (Nor are his requests for the FBI's information. They are limited to the records of two field offices.)

Yet without even bothering to read the requests, basic as they are in FOIA litigation, it rendered a decision supposedly based upon them. Serious as this is, any other explanation raises even more serious, more perplexing, more entirely unjudicial questions.

Anyone at all familiar with the case record reading the panel's decision cannot avoid the obvious fact that it ignored all the unrefuted evidence and is based on the refuted allegations and conjections of the FBI and its counsel.

If the panel did not read the requests upon which the litigation is based there is no reason not to believe that it began with the determination to decide as it did, regardless of fact, truth and evidence. Fortifying this belief (and skipping over the additional factual errors that follow immediately) in the same paragraph it states, "After several additional requests" attributed to Weisberg. Weisberg made no "additional requests." Any knowledge of the designedly inclusive nature of the requests reveals that on their subject matter no additional requests were necessary, even possible.

The only footnote to all of this most basic unfactuality is to the FBI's brief, thus confirming that the panel restricted itself to the FBI's fictions and fabrications that without exception are refuted in the case record.

Based on long and painful experience, Weisberg expected the FBI's stonewalling that characterizes all his cases to include, indeed be based upon, untruths. So, from the outset--and thus his many affidavits--he decided to serve history, whether or not himself, and address each and every one of the FBI's infidelities to fact under oath, making himself subject to the penalties of perjury if he were not truthful. Weisberg's affidavits begin by identifying what it addresses and then proceeds to do so, page by page, from the top. He has not been proven to be untruthful or in factual error and, despite the FBI's lust for sanctions the procuring of which is much more costly than what they can yield, he has not been charged with perjury. (When FBI counsel threatened him with a contempt charge, Weisberg dared it, knowing full well that the FBI

and its counsel would not permit a trial on the facts or the law.) There thus is nothing unfactual put in the case record by the FBI and its counsel that Weisberg has not refuted under oath. The district court ignored the case record and this panel did, too, flaunting its ignorance of the most basic fact in FOIA litigation and, Weisberg believes, reflecting most seriously upon itself, the entire court and the judicial system.

(Weisberg is prepared to document the prevalence of these tactics in his prior litigation and their influence upon this court in its earlier decisions.)

Such inconceivable ignorance of the requests, upon which everything is based, appears to Weisberg to be not judicial but activist and to reflect more than the reaching of a predetermined decision. It reflects bias and prejudice which, as a layman understands our judicial system, is in itself total disqualification and subverts the judicial system.

With what is quoted immediately above for openers, the panel underscores the significance of its errors by concluding the paragraph: "We engage in a detailed recital of the procedural facts since it is on the lengthy and somewhat complex procedural steps taken by the parties and the District Court that the justification of the District Court's action rests." And for this rendering of alleged facts it cites but a single source, one page of the FBI's brief. Ignoring even Weisberg's response to it.

The panel's unhidden bias and prejudice and determination to reach a preconceived decision is further reflected by the fact that, clear as the case record is on the FBI's failure to make the required initial searches, the decision devotes not a single word to them. It is by this means that the panel bypasses the fact that, admittedly, the required initial searches have never been made and that until they have been, in its own verbal windowdressing (page 9), there is no basis for "discovery" being requested or granted and the FBI was indeed, as Weisberg alleged, engaging in harassment and what the panel itself here refers to as "discovery abuse."

Faced with the obduracy that has characterized all his FOIA requests, most of which remain entirely ignored after as much as 16 years-despite the Department's promise to the Senate they would be taken care of--and because of the severe physical limitations on what he is able to do, before "discovery" was demanded Weisberg offered to dismiss this case and not refile it subject to the protection of the rights of others. The FBI and its counsel rejected this offer on the spot, without consulting the FBI or the Department, and insisted that it wanted to do a costly and time-consuming Vaughn index. The government's costs since and the resultant unnecessary burdening of the courts are ignored by the panel. Why would the FBI insist upon a costly and unnecessary index it might never be called upon to make? Why would it not grab at so fair an offer to end this litigation and not refile it? Ought not these questions have been considered by the panel?

From Weisberg's experience some answers are obvious. The FBI shops around for judges until it is before a court it expects to favor it, as is the record of the district court in this case. Then, without even making the required initial searches, it wanted and got perpetual immunity from disclosure for the records requested but not even searched for, records that are, beyond question, seriously embarrassing to the FBI (as again Weisberg is prepared to demonstrate). And in all of this it succeeds in rewriting if not largely nullifying an Act of Congress.

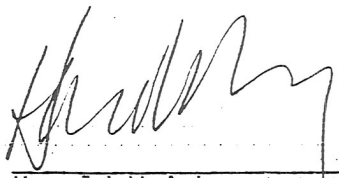
This is precisely what this panel has now done for the FBI. And for its record and shortcomings when it investigated the most subversive of crimes in a society like ours, the assassination of a President.

The panel's decision enshrines the FBI's success in frustrating law and common decency--if not also its felonies of perjury--and appears to grant it total immunity in perpetuity for what the Congress, as is its right and its alone, enacted as the people's right to know.

This panel's political/activist decision, its basic errors, its bias

and prejudices, discredit the judicial system and this court and in the interest of its own integrity and of the judicial system, this court should review the decision en banc.

Respectfully submitted,



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PETITION FOR REHEARING AND SUGGESTION OF
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Harold Weisberg, Plaintiff-Appellant, petitions for rehearing and suggests rehearing en banc.

CONCISE STATEMENT OF THE ISSUES AND THEIR IMPORTANCE

The panel's decision is in conflict with Londrigan v. Federal Bureau of Investigation, No. 79-1403; with Weisberg v. Department of Justice 705 F.2d 1351 and 543 F.2d 308; Perry v. Block 684 F.2d 121,128; Shaw v. Federal Bureau of Investigation, No. 84-5084 and other decisions of this circuit relating to the requirements of and attestations to searches under 5 U.S.C. 552 (FOIA) and en banc reconsideration is necessary to secure and maintain uniformity in

this circuit's decisions. It also conflicts with In Re: John J. Stanton, Respondent, D. C. Court of Appeals No. M-124-82, November 30, 1983.

The consideration of the full court is necessary because of the questions of exceptional importance stated in this petition, including but not limited to the failure of the district court to make pertinent findings of fact and the panel's substitution of its own conjectures for them; because of the unrefuted allegations of agency untruthfulness and false swearing and the panel's dependence on them, especially with regard to searches under FOIA; because the required initial searches have not been made; because the panel's decision transgresses upon the powers reserved to the legislative branch in its de facto revision of 5 U.S.C. 552; because of the panel's factual errors; because of the panel's unhidden prejudice against Weisberg; because the panel ignored the unrefuted evidence in the case record and accepted instead untruthful and gravely prejudicial agency statements after being informed without contradiction that these agency representations were untruthful and prejudicial.

The consideration of the full court is necessary to cure the gross injustice to the ageing, infirm and severely handicapped Weisberg, who without dispute and by agency admission had already provided all of the information and documentation demanded under discovery; and because compliance with the actual and deliberately excessive and entirely unnecessary discovery demanded of him was unrefutedly a physical and financial impossibility for him.

The panel's decision creates a legal Catch-22 for counsel, creating a situation in which whatever counsel does or does not do he is subject to sanctions.

The panel's decision reflects a preconception under which it ignored all the unrefuted fact and points of law provided by Weisberg.

DISCUSSION

FOIA requires agencies to search for records responsive to information requests. In decisions in Weisberg's earlier litigation and in other decisions

this court held that these searches must be made in good faith and with due diligence. No searches to comply with Weisberg's requests have ever been made in this litigation, contrary to the FBI's canard that it made "multi-tiered" searches. Its Dallas office claimed full compliance many months prior to the date of the earliest of the few search slips provided. Those slips are limited to partial subsequent searches directed by the Office of Information and Privacy (OIP). The New Orleans FBI search slips allegedly representing searches made in this litigation are dated almost a year prior to Weisberg's requests, do not represent an identical request, yet do list many responsive records that remain withheld under an assortment of untruthful representations. The Dallas search slips are so phony one in the name of FBI SA James P. Hosty, Jr., is totally blank. It is unreplaced despite Weisberg's unrefuted attestation to many relevant pages pertaining to Hosty's involvement in several major FBI public scandals. Weisberg's documented, unrefuted proofs of the foregoing and much more relating to nonsearching and other withholding remain ignored, as do his many appeals.[1/] The unrefuted evidence in this litigation is that such

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1/ Most by very far of the Dallas and New Orleans records located in the files to which compliance was improperly limited, which is far from all the relevant files, was withheld as allegedly "previously processed" in the earlier FBIHQ general JFK assassination releases. Because many of these FBIHQ records, which were not disclosed in response to FOIA litigation, consist of Dallas and New Orleans records, Weisberg's appeals related to both FBIHQ and field office records. (The FBI itself created the situation in which it is not possible to separate and distinguish the field office appeals from those pertaining to FBIHQ records--and virtually all remain ignored as of today--after up to seven years.) Because the Department requested Weisberg's assistance as a preeminent subject expert, his appeals are lengthy and extensively documented. His copies fill a file cabinet. His King assassination records appeals, where his assistance was requested by a judge, also fill a file cabinet. Weisberg's estimate that in addition to what he provided in his documented affidavits he provided two full file drawers of the very information later requested under the "discovery" subterfuge is undoubtedly conservative. It represents an enormous unpaid, costly and time-consuming effort to provide the government with many thousands of copies of documents and a great amount of information in memo form. These appeals were not acted on during the litigation. After this case was closed, under date of November 13, 1984, OIP informed Weisberg that in the near future it hoped to begin acting on these appeals, which go back to 1978. At the same time it acknowledged that nobody else had ever provided as much information and documentation.

searches were never made or intended to be made.[2/]

Weisberg believes that until the information he provided and is ignored is considered and acted upon, any demand for discovery is premature, is and is intended to be harassment, stonewalling and deliberate frustration of the Act and the agency's responsibilities under the Act.

These facts raise among others two basic questions: is any demand for discovery appropriate in FOIA litigation until responsive good-faith searches are made with due diligence and are competently attested to; and does the panel's decision rewrite FOIA to eliminate this requirement.

Serving to hide the fact that the required initial searches still have not been made the FBI's brief (page 2) represents that Weisberg's Dallas request consists only of its few introductory words whereas the request itself consists of the two paragraphs that follow. By simply, in plain English, lying to this court the FBI sought to eliminate the entire actual request from consideration.

By this dishonest means--and not for the first time--the FBI also misled the court into believing that Weisberg expanded upon his requests ("After several additional requests," page 3) when he did not.

From the first the FBI's attestations to the making of its unmade searches are by SA John N. Phillips, FBIHQ FOIPA supervisor, who neither had nor claimed personal knowledge. Despite Weisberg's insistence that affiants with personal knowledge were available and are required Phillips, throughout the litigation, swore falsely, as Weisberg attested repeatedly, with documentation and without refutation, but the FBI persisted in filing his untruthful, deceptive and

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2/ The FBI's substitutions for Weisberg's requests were not "reasonably calculated to discover all relevant documents" (Weisberg v Department of Justice, 705 F.2d at 1351). These opposed substitutions for searches "do not reflect any systematic approach to document locations" (Weisberg v Department of Justice, 543 F.2d 308). "What the agency must show beyond material doubt is that it conducted a search reasonably calculated to uncover all relevant documents." The issue is "whether the government's search for responsive documents was adequate," quoted from Perry v Block, 684 F.2d 121,128. "(T)o show its compliance with the Act" the government must document "fully" that it made an "adequate search." (No. 82-1022, pp.10-12)

misleading attestations.[3/] Weisberg requested the district court to determine whether or not sworn untruth was presented by the FBI but it refused and in this erred. No system of justice can survive dependence upon and acceptance of false swearing. Weisberg believes that when the sworn truth is by the executive branch it jeopardizes the constitutional independence of the judiciary and is grossly unjust to him.

In Shaw v. Federal Bureau of Investigation, No. 84-5084, decided only two days earlier, Phillips was held (on page 9) to be incompetent for precisely the same reason, he is "only a supervisor" in the FOIPA Section and "his assertions cannot be assumed to have been made upon personal knowledge." In Londrigan v. Federal Bureau of Investigation, No. 79-1403 this court rejected secondhand information attestations (page 3) when those of first-person knowledge are available to the FBI and held that the "requirement of personal knowledge by the affiant is unequivocal and cannot be circumvented." (Page 19)

The panel's finding that the FBI required "discovery" from Weisberg for access to its own files is ludicrous. It has extraordinarily extensive indices. Moreover, when Weisberg provided the correct titles and number identifications of relevant and withheld records he was ignored and they remain withheld. All that was required was for the FBI to make the usual searches that it never made.

In a moment of atypical personal knowledge and aberrational truthfulness Phillips attested that Dallas made no search at all to respond to Weisberg's request but instead sent it to FBIHQ where SA Thomas Bresson decided, without

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3/ Illustrating Phillips' incompetence and dishonesty, the consequences of failing to make the search required and the FBI's deliberate untruthfulness in representing to this court that Weisberg's appeals had been acted upon when they had not been, is the December 31, 1984 letter he received from OIP--three weeks after decision. Phillips had sworn with consistent untruthfulness that the FBI did not have any copies of the recordings of the assassination-period radio broadcasts by the Dallas police. As Weisberg established one untruthfulness Phillips shifted to still another, always insisting that the FBI never had any such recording. In this letter OIP informed Weisberg of partial action on two of these many ignored appeals and the finding of some of these recordings and related records, all of which was sworn by Phillips and others not to exist.

search and without search by him even being possible, to limit Weisberg to the counterparts of the FBIHQ files to which, absent the compulsion of litigation, it had earlier restricted its general releases. The case record establishes that the district court thus knew and ignored the fact that the required initial searches had not been made. But as the case record also reflects, the district court was so prejudiced it tried to dismiss sua sponte the New Orleans part of this combined litigation as duplicative of the Dallas case, which it obviously is not and cannot be. But that was too much even for the FBI, which opposed it.

Despite the clarity of the FBI's admission of not making the required initial searches and despite Weisberg's unrefuted attestations to having provided --and to an unprecedented extent--all the "discovery" information of which he is aware, the district court nonetheless ordered him to provide from more than 200,000 pages--within 30 days, in itself a physical impossibility--"each and every" document and reason relating to the admittedly unmade searches.

If the FBI had any need for any information from Weisberg, which it did not, it did not require "each and every" document and reason in any event.

And had Weisberg in response sworn to anything at all, given the impossible preconditions, he would have sworn falsely and that he would not. He therefore refused to make the pro forma response vigorously urged upon him by his counsel, James H. Lesar, Esq.

The FBI, its counsel and the district court combined to create a Catch-22 for both Weisberg and Lesar. Weisberg could not possibly attest to providing "each and every" relevant document contained in some 200,000 pages and "each and every" reason within 30 days. As the case record reflects, after listening to Lesar at great length, Weisberg decided to appeal, which is his right and is perfectly proper and lawful. If Lesar had refused to pursue Weisberg's lawful interests or if, as the panel conjectures he could have and holds that he should have, he attempted to respond despite Weisberg's objection, he would

have been subject to severe sanctions. There is a District of Columbia case in point.

John J. Stanton had his license to practise law in the District of Columbia suspended because of his "failure to seek a client's lawful objectives." (In Re: John J. Stanton, Respondent, D. C. App. No. M-124-82) If Lesar had refused to do as Weisberg requested, he was subject under Stanton to sanctions and a negligence charge. When he did pursue Weisberg's lawful purposes he was subjected to sanctions by the district court for doing what Stanton required of him. Stanton states that "after a full opportunity to urge his views upon" his client the lawyer is required to accept his client's "decision." Without contradiction the case record reflects that Lesaw did "urge his views upon" Weisberg vigorously and Weisberg wanted to appeal, which the district court declined to expedite. In completely ignoring the unrefuted evidence in the case record and the absence of any finding of fact by the district court and by its own unsupported and unreasonable conjecture the panel created an impossible situation for Lesar and other counsel in this District because, whatever they do or do not do they are subject to sanctions as severe as loss of license.

Substituting Jonathan Swift for the unrefuted case record the panel found this situation "a little less than Brobdingnagian" (page 11) and in its Lilliputian reasoning came up with several Modest Proposals of its own, the fiction that "Weisberg has some system for determining what is in his files (60 cabinets of them) and where" and that "it was feasible for Lesar ... to respond to the FBI's interrogatories."

Weisberg's nonexisting "system" is dependence upon memory severely diminished by his serious illnesses and their consequences and Lesar does not have even that. Lesar would under the panel's decision be required to travel 100 miles daily for an incredible number of days to make his way through some 60 file cabinets of records with which he has no familiarity at all. (The panel's figure of 200,000 pages of records is a large understatement of their actual

volume.)

The panel's Modest Proposal fricassee's Lesar (and as precedent other counsel) by sentencing him, without evidence, trial or any finding of fact, to stew on the highway for an incalculable number of miles and in Weisberg's basement for an incalculable number of days for however long it would take him to find "each and every" document and reason in those 60 file cabinets, all at his personal expense. (If not an absolute impossibility, it was not possible within 30 days.) And after that he would not have been able to provide what, admittedly, Weisberg had already provided, because he lacks the knowledge Weisberg added to the documentation in the vast and unprecedented amount of information that he had provided to the Department and the considerable additional information in his numerous and documented affidavits. Were Lesar both a Brobdingnag and a Merlin it still would not be "feasible" for him to do what the panel has him sentenced to do.

The "gross injustice" to Weisberg is multifaceted. The panel achieved it by totalling ignoring a proper basis for opposing discovery, burdensomeness. The panel makes two passing references to Weisberg's "serious illness" and then entirely ignores this and the other unrefuted facts he presented to establish burdensomeness.

Weisberg's unrefuted affidavits attest to the impossibility of his complying with the demanded "discovery." Prior to the period in question he had arterial surgery that was followed by several serious complications which required emergency surgery and severely limited his physical capabilities. He attested to this in great detail and with full documentation. During the period in question he suffered months-long additional and painful illnesses which even further limited his capabilities. He provided copies of all his hospital and doctor bills detailing the surgeries and this serious of numerous and debilitating illnesses. He attested that without the additional illnesses of the period in question he sometimes is not able to use stairs at all, that under the best

of circumstances is able to use them only a few times a day and that he is under a medical prohibition against standing still, which is required in searching file cabinets. He lives on a high level of anticoagulant and thus a simple fall can be fatal and from his illnesses he is subject to dizziness, more so when using stairs. On this basis alone, he attested without refutation, it was a physical impossibility for him to comply with the demanded and ordered "discovery."

Because it was not possible for the FBI to refute Weisberg's evidence of truly great burdensomeness, its counsel conjectured that because Weisberg filed affidavits he was able to comply with the "discovery." In response Weisberg attested that virtually all the documentation of those affidavits was without file search and was from his cited appeals. He also unrefutedly attested to the actual time required to draft those affidavits. For the time in question it came to only a few minutes a day. The panel (page 10) ignores the totally unrefuted evidence and relies instead on the totally refuted agency conjecture.

Weisberg also attested that he had already provided all the information demanded under "discovery," not merely "much" of it, and that if he were to do the unnecessary to comply--xerox and provide copies of all the appeals and affidavits he had already provided--that would be both physically and financially impossible because it is beyond his physical capabilities to re-xerox two file drawers of appeals plus all those affidavits with their many attachments and because his only regular income was his Social Security check of less than $350 monthly.

That Weisberg had already provided all the information later demanded under "discovery" is not questioned by the agency and it is entirely ignored by both courts. By ignoring the unrefuted evidence both courts penalize him--for not doing what without dispute he had already done. Thus the substitution of Brobdingnag for the case record and thus a gross injustice to the ageing,