WASHINGTON BRIEF

Strange Tale of the Judge and the Hoover Files

DICTA DON'T get any better than this: A federal appellate judge mentioned in a concurrence that, 25 years before, he had read files, compiled by FBI Director J. Edgar Hoover, that were the subject of the suit before his court.

"I find myself in a rather strange situation," Judge Laurence H. Silberman, of Washington, D.C., wrote recently in *Summers v. Department of Justice*, 97-5002, an appeal of the dismissal of an 11-year-old Freedom of Information Act suit. The case was brought by Anthony Summers, author of the 1993 book "Official and Confidential: The Secret Life of J. Edgar Hoover."

At issue are thousands of documents from Mr. Hoover's private files: a hodgepodge of personal and official correspondence, papers the FBI director had plucked from central records and various memorandums—all kept in unexceptional file cabinets just outside Mr. Hoover's office.

The files contained "scandalous material on public figures to be used for political blackmail," Judge Silberman wrote, and "shocking information as to how the FBI had been used by several Presidents, most notably Lyndon Johnson, as a political investigative unit to gather dirt on political opponents."

Tens of thousands of pages of the files already have been released. But the FBI withheld or redacted thousands more pages—which is why Mr. Summers sued.

Judge Jackson's Task Now

Last November, U.S. District Judge Thomas Penfield Jackson granted the government's motion for summary judgment after a hearing that, the appellate panel's April opinion noted, "lasted approximately three minutes."

James H. Lesar, Mr. Summers' attorney, greeted the trial judge's decision saying he "assume[d] that the court will be issuing a written order." But Judge Jackson said no, adding Mr. Lesar was free to "reiterate everything...you've said on the fifth floor," which is where the U.S. Circuit Court of Appeals for the District of Columbia sits. "Let them worry with it for a while," Judge Jackson said.

Instead, the circuit court gave the task back to Judge Jackson, already busy with the Microsoft antitrust case. It ordered him to conduct a page-by-page analysis of a sample set of 500 disputed documents and to make a record explaining his ruling on each document. The justices also let Judge Jackson know they felt that the public interest in uncovering evidence of government misconduct was quite high, while individual privacy interests were relatively low.

Mr. Lesar, who makes his living litigating FOIA requests for journalists, authors and academics, said this decision might prove extremely valuable to plaintiffs in the D.C. Circuit, which is where most FOIA litigation occurs.

The appellate panel that the litigants drew for this case—three Reagan appointees—was not an obvious coup for the document seekers. Judges Silberman, Stephen F. Williams and David Sentelle are all conservative jurists who tend to defer to assertions of government authority. When he saw he had drawn these judges, Daniel S. Alcorn (who argued the case for Mr. Summers when Mr. Lesar suddenly took ill) fretted that his was an impossible task. Mr. Lesar told him not to worry because he knew something Mr. Alcorn didn't: Judge Silberman had read the files already.

James H. Lesar: *He just smiled—because he knew the judge had seen the files.*

He Just Smiled

As Judge Silberman explained in his concurrence, he was deputy attorney general (the Justice Department's No. 2 official) in 1975, when The Washington Post reported the Hoover files' existence, and he read them while preparing to testify at House Judiciary Committee hearings. Ten years later, Mr. Lesar said, the judge mentioned this role as an aside during a hearing in another FOIA case involving Mr. Summers.

Shortly before oral arguments in the current case, Justice Department lawyers also expressed the belief that the panel was conservative and government-inclined.

Mr. Lesar simply smiled.

Melanie Ann Pustay, the government attorney who argued the case, later acknowledged that the first she heard of Judge Silberman's connection with the files was when she read his concurring opinion. The revelation probably helped her understand why the panel had kept her at the podium for an hour when she had been allotted only 15 minutes.

Clearly, Judge Silberman has strong feelings about

the files. His concurrence ripped the FBI for having "the unmitigated gall to claim in an affidavit...that the files 'are of minimal public interest.'"

After describing the files' location, he also suggested ominously in a footnote, "That is not to say that I am confident that all of Hoover's files were in those cabinets." And, he mused, "these files may well cast some light on Watergate's genesis. I suspect that Richard Nixon, who was reputed to have threatened darkly during the Watergate investigation to expose the misdeeds of prior Presidents...was prompted to gather political intelligence through private actors because he wanted what Johnson had obtained, yet did not trust the FBI to provide it."

The Men: *J. Edgar Hoover looks on as President Nixon points to his signature on legislation setting up a council to formulate a national campaign against organized crime.*

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Such speculation can only further endear Judge Silberman to Mr. Lesar, a sole practitioner whose avocation is uncovering government perfidy and subterfuge. He runs the Assassination Archives and Research Center, which he co-founded in 1984 with Bernard "Bud" Fensterwald Jr., general counsel to the House committee that drafted FOIA in 1966.

Their assassination center occupies 2,000 square feet in a building around the corner from historic Ford's Theater, which is across the street from The House Where Lincoln Died (the landmark's official name). The center houses 1,500 books and hundreds of boxes and file drawers stuffed with 2 million pages of records, mostly documents released sporadically during the past 20 years by the FBI and CIA on the assassination of John F. Kennedy. Aside from the National Archives, no other complete collection of these documents exists. Scores more boxes and file cabinets contain papers on the Watergate scandal and the murder of Martin Luther King Jr.

Along with Mr. Lesar, Mr. Alcorn (who is a partner at Vienna, Va.'s two-attorney Fensterwald & Alcorn—the other attorney being Bernard Fensterwald III, Bud Fensterwald's son) feels the *Summers* decision may help reverse the narrower interpretation of the FOIA that developed in federal courts after 1989, when the U.S. Supreme Court decided *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749.

In that case, the high court declared that simple compilations of information about private individuals—such as rap sheets—are generally shielded by FOIA's privacy exemption. In *Summers*, however, the appellate court noted that the court's underlying logic was not that privacy rights always reign, but that mere compilations disclose little about actual government activity, which is the public's key topic of interest.

As Mr. Summers' FOIA request was "designed to disclose misconduct at the highest levels of the FBI," Judge Sentelle's majority opinion declared, "he rightly expects a court to carefully assess that public interest in the balancing process. We expect on remand that the district court will provide a record of having done so."

Bureau Passivity

Judge Silberman indicated that he believed that balancing privacy rights against the public interest should not, in this case, be hard to do. First, he said, while death diminishes an individual's privacy interests, the FBI made little effort to determine which people discussed in the documents were still living.

In his own concurrence, Judge Williams noted that the FBI agents' affidavits indicated that they had been "completely passive on the issue" of the status of the people named in the files, "taking death into account only if the fact has happened to swim into their line of vision."

Moreover, Judge Silberman said, many of the living "might be rather proud to have been targeted" by Mr. Hoover. And, the judge said, people who might be embarrassed for having given Mr. Hoover information on friends are not entitled to any privacy protection.

"The government seems to have taken the position...that anyone, including those in the news media, who gave Hoover or the FBI information about potential political enemies is entitled to protection from exposure," Judge Silberman wrote. "I think that is absurd."

The Justice Department hasn't indicated whether it will appeal the case.

—Harvey Berkman