Mr. Stephen Rosenfeld
Washington Post
1150 15 St., NW
Washington, D.C. 20005

3/21/84

Dear Mr. Rosenfeld,

Because I do not want to appear to be only critical of the Post I did not write you a week ago after reading the "Public Money for Lawyers' Fees" editorial. Now that from today's radio reports even the Burger court decides in opposition to the thrust of this editorial I do write to make you aware of the mischief that I do not believe the Post intended.

Without doubt all public moneys are not spent wisely. But can you (meaning all who had editorial input) think of many such wastes less significant than what little waste there is in all the proper programs for paying lawyers who handle class-action suits or litigation for those who cannot pay lawyers?

Did you balance this against the public good that has come from the litigation made possible by that 1976 and other such legislative enactments?

Did you begin to understand or even seek information relating to the relatively large amount of public money wasted by the government in both forcing and then stonewalling such litigation, particularly by the Reagan administration? This is where the greater cost to the government is, I believe from my own experience.

Not counting the costs to the courts, which also is tax money, I'd not be a bit surprised if the government didn't waste more than the atypical costs itemized in your editorial in just three of my FOIA lawsuits in which I prevailed and brought to light many thousands of previously-withheld records holding significant information. Each of these lawsuits was forced by the government and its violation of the law and each was enormously stonewalled by it.

FOIA requires disclosure of nonexempt public information and suit cannot be filed until administrative remedies are exhausted. This means that at the least to a very great extent all the costs of FOIA litigation are directly caused by the government's violation of the law.

With regard to lawyers' fees let me give you two examples. In 1969 I filed two FOIA requests for information related to the King assassination. They were entirely ignored, by direct order of the FBI's top echelon. In 1975 I renewed them and when I received no response filed suit. After about 50 calendar calls and hearings extending over a period of years I finally received (and the FBI's public reading room now holds) more than 60,000 pages. Not surprisingly the court held that I had "substantially prevailed," the language of the Act, and awarded some of my lawyer's costs and a minuscule fraction of my costs. The Department of Justice has taken this up on appeal and claims that I did not "substantially prevail," its entire argument based on untruthfulness. Under the 10-day law my 1969 requests are still before the courts - only because of the official determination to not comply with the law.

In 1977 I requested the JFK assassination investigation records of the Dallas and New Orleans field offices and when I received no response I filed suit in 1978. Under FOIA official compliance begins with searches. To this day no searches have been made to comply with my requests. Although FOIA does not provide for or even suggest it, the FBI's Department of Justice lawyers demanded discovery of me and told the rubber-stamping Judge John Lewis Smith that if I provided that discovery it would establish that the FBI had made the searches it still has not made! And that it also would establish FBI "good faith." (This is the same FBI that held that because it does not like me the law does not apply.)

For many reasons one of which is that I would not be party to a precedent that in effect nullifies the Act I refused. These same government lawyers then demanded and received a judgement against me for their litigating costs, which I also refused to pay pending appeal. They then moved for an obtained dismissal as a sanction. When I still did not pay the judgement they had it amended to make my lawyer personally responsible for the judgement, not me, and even though he had counselled me to make some gesture at compliance with the Order as the lesser evil. Still without awaiting the appeals decision. And thus they created a threat against all lawyers willing to handle cases for those who cannot pay them.

Quite aside from the legal issues and principles involved the fact is that for other reasons I had already provided the information demanded on "discovery" and the FBI's lawyers admitted this in a pleading a year ago, before they cooked up this costly scheme for nullifying FOIA before a judge who has a record of being in their pocket.

Can you visualize the costs involved in this and the continuing litigation, the costs in time and money for all parties? And if the government gets away with this, they have turned FOIA entirely around and placed the burden of proof on the requester, despite the specific language of the Act, which places it exclusively on the government. If the government does not prevail, five years of its costs are wasted and it goes back to square 1, and its costs - and mine -begin all over again.

Who is responsible for the costs? More than a year ago, because of seriously impaired health, I offered to dismiss this litigation, subject to the rights of others to request information not provided to me. The FBI and its lawyers refused this offer out of hand, without bothering to consult higher authority.

Some judges also are responsible for some of these costs, Judge Pratt for example. I enclose a copy of the first page of the Daily Washington Law Reporter of 12/9/83. Its reporting of the appeals court decision shows that he persisted in error even after remand in this "attorneys' fees" case. He sent one of my cases to the appeals court for the third time before it was satisfied that the required initial searches were made, and it then was satisfied only on the basis of official mendacity, which in my experience is commonplace in such litigation. And so costly!

How unbiased is he? When I proved that beyond question an FBI agent had perjured himself, Judge Pratt lectured my lawyer and me, telling us we could catch more flies with honey. In the end he accepted three contradictory attestations from a single agent on a single material point and found for the FBI, after the costs of two remands.

If constitutional rights were not violated, if the executive agencies did not violate the law, there would be no need for the litigation in which Congress decided that the plaintiffs' lawyers' costs were to be paid. The relatively small costs of a few atypical cases (and the National Association of Attorneys General is hardly an impartial authority) is insignificant compared with the costs created by the government. Based on my experience I believe the Post would have been more in keeping with its fine past and would better serve a clear and present need if its editorial statement had been in accord with reality. Your editorial lends itself to and I fear will be used to perpetuate the wrongs Congress intended to right.

Sincerely,

Harold Weisberg

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U.S. Court of Appeals for the D.C. Circuit

ATTORNEYS FEES

PREVAILING PARTY

Fee application was improperly denied in voting rights case where court imposed improper standards on applicants.

COMMISSIONERS COURT OF MEDINA COUNTY, TEXAS, ET AL. v. UNITED STATES, ET AL., U.S.App.D.C. No. 82-2416, October 28, 1983. *Order vacated and case remanded per curiam* (Mikva, Ginsburg and Bazelon, JJ. concur). *Norman J. Chachkin* with *William L. Robinson* and *Jose Garza* for appellants. *Keith Rosenberg* for appellees Commissioners Court of Medina County, Texas, et al. Trial Court—Pratt, J.

PER CURIAM: Appellants seek review of the district court's second peremptory rejection of their application for attorneys' fees filed pursuant to 42 U.S.C. §1973*l*(e) (1976) (authorizing fees to prevailing parties in litigation to enforce the voting guarantees of the Fourteenth or Fifteenth Amendments). We vacated the district court's prior order denying the fee application because the district judge had given "determinative weight to an improper factor." *Commissioners Court v. United States*, 683 F.2d 435, 437 (D.C. Cir. 1982).

The same "improper factor" infects the district court's disposition on remand. Moreover, that disposition displays other basic errors. We therefore vacate the district court's order again and remand once more, this time with an explicit instruction to hold a hearing on the application for fees. In a motion for a new trial or to alter or amend the judgment, filed in the district court on October 4, 1982, appellants indicated the evidentiary showing they would make if afforded the opportunity to do so. We further instruct the district court that, if appellants make the proffered showing, they will be entitled to an award of reasonable attorneys' fees.

I.

Our prior opinion sets out the background of this case, 683 F.2d at 437-39, which we summarize briefly here. Appellants are Mexican-American citizens residing and registered to vote in Medina County, Texas. They were defendant-intervenors in a declaratory judgment action brought against the United States by the Commissioners Court of Medina County (County), pursuant to section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c (1976); in that action, the County sought court approval of its 1978 and 1979 redistricting plans. During the pendency of the litigation, the County adopted a new redistricting plan (the 1980 plan) which the Attorney General precleared. Thereafter, the district court dismissed the County's action as moot, but permitted appellants to file an application for attorneys' fees.

Without holding a hearing or awaiting the completion of discovery appellants had initiated, the district court denied the fee application. "Defendant-Intervenors did not prevail," the

(Cont'd. on p. 2365 - Party)

U.S. Court of Appeals for the D.C. Circuit

CONSTITUTIONAL LAW

NATIONAL SECURITY SURVEILLANCE

Attorney General who authorized warrantless national security surveillances is entitled to qualified immunity in civil suit for damages because action did not violate clearly established law at the time.

ZWEIBON, ET AL. v. MITCHELL, ET AL., U.S.App.D.C. No. 82-1626, October 21, 1983. *Affirmed* per MacKinnon, J. (Edwards, J. concurs; Swygert, J. (7th Cir.) dissents). *Nathan Lewin* with *Jamie S. Gorelick* for appellants. *Larry Lee Gregg* with *Stanley S. Harris* and *Barbara L. Herwig* for appellees. Trial Court—Pratt, J.

MacKINNON, J.: This is our fourth foray into this protracted litigation. Past history notwithstanding, this decision should dispose of the matter.

Appellants, members of the Jewish Defense League (JDL), brought this action in 1971 against John N. Mitchell, who as Attorney General authorized warrantless electronic surveillance of the JDL during 1970 and 1971. Appellants now challenge the district court's order, entered after our third remand, which dismissed their complaint pursuant to Fed.R.Civ.P. 37(b) for their refusal to comply with deposition notices. Because we find that Mitchell is entitled to qualified immunity under the Supreme Court's recent decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982), we affirm the decision of the district court without reaching the question whether dismissal was an appropriate sanction.

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Our task after *Harlow*, therefore, is to measure Mitchell's conduct by reference to clearly established law at the time these wiretaps were authorized. The precise contours of what constitutes "clearly established law" for immunity purposes are difficult to delimit, and the Supreme Court has offered little guidance in this regard. *See id.* at 2738 n.32 ("As in *Procunier v. Navarette*, 434 U.S. 555, 565 (1978), we need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the Local District Court.' "). We too are spared that Herculean labor, since we conclude that the illegality of Mitchell's conduct was not "clearly established" by any reasonable definition of the phrase.

As noted above, the Supreme Court issued no pronouncement on the legality of warrantless domestic national security surveillance until a year *after* the JDL wiretaps had been terminated. Even then, in declaring such searches illegal, the Court declined to articulate a crisp distinction between "foreign" and "domestic" threats to national security. *See Keith, supra*, 407 U.S. at 309 n.8. It is not surprising, therefore, that the district court should have reached one conclusion as to the legality of the JDL taps and that this court should have expended six separate opinions and over one hundred

(Cont'd. on p. 2367 - Surveillance)

D.C. Court of Appeals

EVIDENCE

FALSE ARREST

Evidence of disposition of criminal charges improperly admitted in false arrest case was harmless error.

DISTRICT OF COLUMBIA, ET AL. v. COLSTON, D.C.App. No. 81-993, October 24, 1983. *Affirmed* per Newman, C.J. (Kern, J. and Henry Greene, J. concur). *William J. Earl* with *Judith W. Rogers* and *Charles L. Reischel* for appellants. *J. Gordon Forester, Jr.* for appellee. Trial Court—McIntyre, J.

NEWMAN, C.J.: The District of Columbia and Metropolitan Police Officer Charles Aldridge (Aldridge) appeal from a judgment against them on a jury verdict in appellee Johnny M. Colston's (appellee or Colston) action for false arrest and assault and battery. Appellee alleged that during the Farmers' March on Washington in February 1979, Aldridge improperly fired a chemical agent into the cab of Colston's tractor, causing permanent loss of the vision in his left eye. He also claimed that he was then arrested and imprisoned without probable cause on charges of assault on a police officer and of reckless driving. After a four day trial, the jury returned a verdict in favor of appellee, awarding him $400,000.

Following the verdict, the District of Columbia and Aldridge moved for a new trial. They alleged that the trail court erred in three particulars: (1) it failed to declare a mistrial after Colston's opening statement, in which the jury was advised of the disposition of the criminal charges on which Colston was allegedly falsely arrested; (2) it permitted Colston to present evidence of the disposition of those charges during his case; and (3) it permitted a closing argument by Colston's counsel allegedly replete with inflammatory and prejudicial comments regarding the injury to Colston's eye. The trial court denied the motion for a new trial. This appeal followed, raising the same issues as those presented in the new trial motion. We affirm.

On February 5, 1979, a sixteen-mile long procession of farm vehicles arrived in Washington, D.C. The farmers in this procession had come to present their grievances to their elected representatives in Congress. The tractorcade, led by District of Columbia police officers, proceeded east on Independence Avenue toward the Capitol. As it crossed Seventh Street, S.W. through the morning rush-hour traffic, the caravan completely blocked the street and prevented any further movement of traffic. In response, police officers directed the tractors to

(Cont'd. on p. 2366 - Arrest)

TABLE OF CASES

Public Money for Lawyers' Fees

Post 3/16/84

CONGRESS ENACTED legislation in 1976 to encourage class action suits by private parties to establish constitutional rights. In many respects, the law has worked well. Because of it, people who don't have the money to hire attorneys for civil rights suits can go to court confident that good lawyers will be paid to take their cases. Court decisions on broad public policy questions have been the result.

In a recent report, however, the National Association of Attorneys General charges that courts have gone beyond what Congress had in mind and have ordered compensation where it is not justified. They have in mind not only the enormous cost of the fee program to state and local taxpayers but also the volume of litigation involving just the question of contested fees. In one 7th Circuit case, for example, the court devoted 186 hours to the merits of the case and 350 hours to the dispute over the attorney's bill.

While a money judgment is not always the only objective in a lawsuit, the amount of the fee awarded has also often been out of proportion to the damages won for a client. In Illinois, attorneys were paid over $6,000 for winning a jury verdict of $1; in California, lawyers won almost a quarter of a million dollars when the amount in dispute was only $33,350. In another case in that state, a payment of $9,900 was given to a prison inmate who had served as an "adviser" to the plaintiff's lawyers.

The attorneys general have asked Congress to take another look at the way this law is being interpreted by the courts and to clamp down on alleged abuses that are costing taxpayers a lot. They suggest that legal fees be given only in true civil rights cases, not in any case where a plaintiff claims that his due process or equal protection rights have been violated. They want to eliminate the practice of awarding bonuses to lawyers in addition to fees—a payment not specifically authorized in the statute—and to limit fees to a maximum of $75 an hour. They suggest that only parties that actually win these suits against the government be compensated and that lawyers be penalized for failing to settle a case when the ultimate award turns out to be less than the proffered settlement.

Next month, Sen. Orrin Hatch will hold hearings in the Judiciary Committee on these proposals and others concerning fees for lawyers who represent indigents in criminal cases. The recommendations put forth by state officials will be controversial, but the difficulties and expense of the present system really can't be ignored. It is time for a hard look at how this program is working and whether it is enabling some lawyers to do exceedingly well by doing good.