Dear Alan, 3/27/85

In your letter of the 24th you ask what I think of Mark Lynch, for whose call I right now sit and wait. You also say that the courts are moving steadily to the right, a formulation I believe is too general and perhaps too kind to the judges.

I've never met Lynch. Of what I know about him his assuring what amounts to CIA exemption from FOIA troubles me most and perhaps is an accurate reflection of his political position. He did well for me, albeit with timidity, under the circumstances. I have no doubt that he regard himself as principled and that he makes the compromises he believes he ought make. If I can judge a man I've never met, Id say that he is a typical ACLU layer type, not in any sense radical or ground-breaking or legally imaginative.No daring when I believe daring is indicated if not required, and I've no doubt most lawyers would agree with him and his positions in such matters. As lawyersin his role go, solid, I think ehtical, principled, etc.

My problem with all of this is that these are times that require more from cause lawyers, as anyone who has lived through and remembers what I do knows, and that the ACLU's history in such times is of failure, failure that grew into becoming a running-dog for reaction. Which is quite the opposite of what that ACLU intended.

Lynch might never have prevailed in the case in which he represented and again represtd me but if he could have escaped the captivity of academic concepts and ACLU attitudes he could have done what would be memorable, and he might well have succeeded where I largely failed. I qualify my failure because I did serve history at least adequately, perhaps well, depending on what if any use is made in the future of what I did pro se.

Perhaps I have such a failure in my own past, when I refused to do out of conservative thinking what a major publisher of the 60s wanted me to do.

Tge late Giangiacomo Feltrinelli had published my first book, after which I met him by accident in New York City and talked him into publishing Barbara Carson's Macbird in Europe. He told me it was time for me to do a J'Acus, to "cut and clash," but as of that time I did not believe I could responsibly either treat the government that way or theorize about what really happened when JFK was assassinated. I also then had in mind doing something similar but in an entirely different manner and I'm sorry I'll not not be able to. (I planned a book on the JFK presidency tentatively titled Tiger to Ride.) I was not afraid to tackle the government headon, as my subsequent record ought establish beyond question but I didn't believe that on the basis of what I could then honestly say what Feltrinelli wanted me to say. I can visualize Lynch and people like him feeling now as I did then.

However, I can say that I believe that if I then had had what I gave Lynch for his use before the appeals court, I'd have done such a book in 1966 or early 1967. He could have been Aola and Darrow in one, but I guess he is not that kind of person. He could have cut and slashed for justice more than for me, in the interest in the kind of country, not only judicial system, that we have. I knew he would not, perhaps could not, so the first thing I did was release him in writing and then I set about doing what I believe had to be done, making a permanent record of the totality of the mendacity of both the DJ/FBI and the courts. Not impolitely, I'm confident, not by cutting and slashing with words, but with facts, the case record only.

The appeals court sat on it so lonf that I believe'd I'd succeeded in a second purpose, providing the traditionalist minority of once fine judges with what they could use effectively against the political/activist nonjudges of GOP origin. (I've yet to meet a liberal judge not colored yellow - I should say self-colored, and this case is no exception with Wald, as earlier with Tikva, etc.)

I'd like to disringuish right from authoritarian.

I have no problem with conservatism, which is what is usually meant by "right." This describes most of my present friends, for example, and we agree on much more than we disagree. But the Reagan gang is not conservative, it is extremist and with the courts it is driving toward an authoritarianism. The liberals, as they have been in the past, are more afraid than anything else. This was forecast in the last election by the utter incompetence of the Democrats who, despite Reagan's personal popularity, could have won if they'd not been more scared than anything else. Yesterday's MX vote is an illustration. I'm confident that the votes for it are almost entirely from yellow liberals and black reactionaries. Yet even J.J. Kilpatrick was against it. And against any additional neuclear arming of any kind.

Although I'd released him, Lynch did not publicly disassociate himself from me, as Jim Lesar expected him to do once he read what I filed. I sent him copies. And when he learned of the appeals court decision he was in touch with DJ on my behalf promptly. However, also without speaking to me. (He drafted both briefs without speaking to me about what I wanted in them and he then incorporated only a little of what I wanted. I used what he feared to use and the professors praise it eloquently.) Jim expected him to record his separation from me in something he'd file but he didn't.

Comparing him with the Nader people makes him look good. Cornish Hitchcock, who also never met me, drafted a brief for Jim in which he sought to defend Jim by attacking me. Although under compulsion he moved this, it represents his thinking and that is the kind of thinking that assures defeat in political cases. (What both groups and the Reporters Committee have against me is that I was right when they were wrong and Jim and I persevered and thus the FOIA investigatory-files exemption was rewritten by the Congress. They were really political infants back in 1973-4 in a situation so clear that I was able to forecast in detail and with accuracy what would and would not happen, including even Gerald Ford's doublecross when they expected him to keep his word.)

The appeals court did not send me whatever it formulated, although I was pro se, my first knowledge was this past Saturday, when Jim, who'd learned by accident phoned me to tell me that Fink John Lewis Smith had set a calendar call for today, and I'd expected to hear from Lynch or Jim by now, after 12:30. But if Lynch is prepared to do what he told Jim he plans I'm satisfied.

While I agree with just about everything you say to Jim I do not believe that it will come to pass and I believe something else ought be of higher priority. This is preparing for the immediate future of FOIA, defending it. You ask why the right has used it so little. It is because the right has no interest in exposing itself and most of what the government has long been doing that people have an interest in is of the right. They do not want to expose either themselves or their heros, like Hoover. Nor do they want any such exposures in the future. Can you think of any Nixon, Ford or Reagan administration activities that could be exposed under FOIA that would not, at the least, embarrass the right? And how many of Carter's?

My own view is that a catalogue of horrors ought be compiled and available for use to first defend the Act and then (and I agree that there may well be an anti-Reagan Congress after the next election) strengthen it. Can you imagine that those who voted for MX willwant any exposure of what the secret records relating to it reveal? Or those supporting Reagan's nightmare, Star Wars? Or his Latin American policies? etc.

I've made a s much of a record as I could along these lines but I am not optimistic about its use in defense of FOIA.

We face the problem of Reaganism after Reagan failures. There was never any chance that crap he's been spouting for years and he pretends is a national policy could succeed, so what will he do if he has to confront his and its failure before the next election? He' certainly preparing for a Latin American war and he has

already seen to it that nothing meaningful or at all good can come of the Geneva talks with the USSR. He is a political bankrupt who has already bankrupted the nation and the only question is how long he can delay confrontation with his enormous failure, which leads to the question what he will or can do when he has to face it all. In this he is well on his way to alienating most of this actual support, all but the authoritarians of the so-called New Right. History tells us where national leaders go when they face what he will face very soon.

If any pro-FOIA organization is formed, and I certainly agree we need one very much, if it is under the control of professional historians or jaurnalists it will take the ACLU road. I think that peace, environmental and other such groups must be able to, at the very least, prevent the typical liberal copout in any pro-FOIA group.

Only time will tell if, as I believe, the FOIA situation is much worse than you appear to think. We'll have to see what uses the government will make of the corruption of the law validated by the corrupt courts in my recent case. Search and discovery have been redefined and sanctions are available, all in the form of judicial legislation. The government will pick and chose and find the case(s) it wants and soon, for all practical purposes, there will be little left of FOIA.

If my health were better I'm without doubt that I'd risk jail in this. FOIA and decency and principle and the current political situation all need it, but I've a question about surviving it. I'm not going to give it more thought until I've reached the point of decision.

I'm reasonably sure he will or will have by this moment faced strong opposition, but Lynch planned discovery, including deposing the wretched DJ lawyer who was able to pull this off. He told me Monday evening that if it is resisted he will go up on appeal on that alone. It seems that the government is required to have contemporaneous time records and that monster has already attested that he doesn't and substituted estimates.

Best regards,

March 24, 1985
9729 Pinecrest Drive
Sun City, Arizona 85351

Mr. Harold Weisberg
7627 Old Receiver Road
Frederick, Maryland 21701

Dear Harold:

Your letter of the 16th was forwarded to me here, and it was good to hear from you. I'm afraid I have been quite remiss in keeping up correspondence while here, for which I apologize. I came out on December 1 for varied reasons--to convalesce a bit more from my hospitalization, though I was pretty much back to par by the time I left; to visit my mother, whom I hadn't seen in three years; to get some concentrated Galindez and other work done without the distractions of Washington; and, paradoxically, to take the first real break I have given myself in several years. I go back to Washington on April 10, after which mail should be sent to my post office box as usual.

I doubt that I make many more FOIA initiatives in my Galindez case research, if only because I think I have gotten more than enough from the FBI and State and enough from the CIA for extensive and very productive interviewing, and because I have sadly concluded that the law has died in the national security area and won't easily be revived. As things stand now, the FBI has finished releasing all that I want, and though it has more files I could use they are not important enough to wait years for. I may well go through full oral Vaughning of the 63 files they have released, however. Steve Doyle, the Wilmer, Cutler & Pickering partner who is representing me against the CIA, recently filed a motion with the appeals court in Washington for leave to file a Rule 60 motion with Judge Greene below and the latter motion's five or six topics included only one or two likely to be affected by the Supreme Court's Sims decision. Nevertheless, the appeals court (Scalia, Ginsburg, and Edwards, the last not participating) turned the entire motion down without prejudice on March 12, preferring to see what happens in Sims first. As the courts move steadily to the right, it seems clear that nothing further can be expected from them in the FOIA area.

As I see it, basic reform of the FOIA to remove documents of a certain age from control by the agencies and judiciary is the only thing that now makes sense. The enclosed carbon spells my ideas out somewhat more (I couldn't give the letter nearly the time I would have liked), and I would welcome your reactions.

Since you dealt with Mark Lynch, what do you think of him. He successfully represented me in my first suit against the CIA and I am grateful to him for that, but withal I didn't much care for him personally.

Best regards,

Alan

Alan L. Fitzgibbon

March 24, 1985
9729 Pinecrest Drive
Sun City, Arizona 85351

Mr. James H. Lesar
1231 Fourth Street, S.W.
Washington, D.C. 20024

Dear Jim:

This won't be as much of a contribution to FOIA reform thinking as I had hoped to make by now, but I have much else to do before I return to Washington. I'll discuss those matters to which I have given most thought.

Practical considerations. Unless pilot lobbying shows that a historical documents bill can be enacted during the next couple of years, which I doubt, it appears that our efforts until at least 1986 ought to be negative, i.e., blocking further encroachments on the FOIA and related laws. The CIA, feeling its oats after having largely won exemption from the FOIA, is now drafting official secrets legislation (New York Times, March 20, A1) which it will push vigorously, and other agencies including particularly the jealous FBI will undoubtedly also promote their own pet reactionary measures. Fending off such legislation will be stressful and time-consuming enough in the present political climate.

That climate continues unfavorable. In addition to normal bureaucrafic antipathy to disclosure, the two intelligence committees, though now supposedly under more independent chairmen, will continue deferential to the CIA and FBI; the Senate's FOI subcommittee remains under Hatch and the Senate under Republican control; the House's FOI subcommittee has proven itself a weak reed and the House is confused and indecisive; and Reagan is president. And we, meanwhile, are few and unorganized. What worse situation could one ask for?

Two years hence the Senate may be Democratic, the House may be more coherent, Reagan will be a noticeably lame duck, and we, organized and with lots more research under our belts, may be in a better position to do something positive.

Reform. The FOIA is one of the few laws supposedly benefiting the public whose beneficiaries have not formed an organized constituency. If only its national security aspects are considered, its public is scholars and journalists, but they have never banded together to promote and defend the law. This is undoubtedly so because requesters in those categories view the FOIA as a tool to be used briefly, so briefly indeed that they do not take the time to become conversant with it and usually discard it when they find it doesn't work.

That leaves promotion and defense of the law to multi-interest groups and lawyers. Multi-interest groups such as the American Historical Association or

the Society of Professional Journalists give the FOIA short shrift among legislative interests because their members traditionally have not used it much as a tool or realized its potential as such, and their approach to all lobbying is quite genteel. Lawyers, however selfless and able their promotion of the FOIA, have because of their basic professional training given the law the excessively legalistic coloring that is now one of its greatest shortcomings.

Through their own organizations scholars and journalists have never done much to promote FOIA reform, and the same relative indifference can probably be expected from them in the future. But scholars and journalists who have actually tried to use the law would probably be more interested. They wouldn't want to spend much time or money on a reform organization, yet they might readily lend their names, draw in others, and lobby from wherever they are. Why not, therefore, form such people into a single-interest group? Such a group would certainly be a useful counterpoise to the ACLU, the only organization that has pushed for changes in the FOIA with any vigor though it is entirely self-appointed as a representative of the law's users. Another advantage of organizing users would be that they could contribute much research information from their own experience, of which more below.

How define and find users? To preclude taking into a users' group those whose interest in the law is entirely personal, its members ought to have made FOIA rather than FOIA/PA or PA requests. The requests prospective members have made should be for information that will eventually reach the public, and they should be for some yet-to-be worked out minimal amount of information. Identifying users should not be too difficult. One way would be to compile a list of publicized writings based wholly or in part on FOIA releases; another would be to ask the agencies for lists of their users. The latter might require litigation, especially with the CIA.

I have been intrigued for quite some time by the fact that the FOIA is supported by people on the left, not the right. This was clearly noted in the CIA's releases about its relations with the ACLU in passages commenting that Republicans might not favor the CIA relief bill because the ACLU--implicitly a "leftist" organization--supported it. Has anyone given thought to why the right should oppose disclosure? Is it because the right is more statist than the moderate left, even though it opposes "big government" at the same time? Has anyone checked what has been written on the right (possibly Heritage Foundation, AEI) about secrecy and disclosure? Think what a boon it would be if the FOIA could be deideologized.

Research. I have never read a first-rate study of federal secrecy and disclosure in the national security area, nor have I even heard of one. A vast amount of easily available information exists about the history of the FOIA, its implementation (better put, obstruction) by the agencies, its treatment by the courts, its growth in other industrial countries, and the like. Much more information could come from members of a users' organization, and they might also be called on to undertake studies of segments of a general treatment of the law.

A book might be written by one, two, or more people, Its publication could be timed to coincide with the best political weather for major reform legislation, and maximum publicity could be arranged for it. A book is sometimes a catalyst (cf. Silent Spring).

Changes needed in the law. There are many reasons for legislating that documents of a certain age become almost entirely available, and certainly historical documents legislation ought to be a principal plank in any reform program. I continue to be surprised that historical documents have not been singled out for more attention over the years; last fall, for instance, the English subcommittee and ACLU gave them attention only en passant.

Making documents of a specified age--with few but still litigable exceptions --wholly and mandatorily open would save enormous amounts of money and time because it would do away with the cumbersome 10- to 15-page-a-day processing and tortured withholdings that are now the rule at most agencies and spare the coufts the burden of inspecting the agencies' work, a task they have never really undertaken though theoretically obliged to do so. Neither the clerks with high school educations who are the agencies' chief processors nor judges are intellectually equipped to make essentially historiographic judgments. Another advantage of removing a large body of material from the requirements of FOIA processing is that it would be taken away from ultimate disposition by the courts, which are becoming steadily more hostile to the law generally as they become Reaganized.

How old should documents be before they are completely declassified. The general rule seems to be 30 years, for no particular reason, but I would argue for 20 or perhaps 25 years if for just one reason. That is that many researchers would like to use historical documentation as a basis for oral history, and they cannot conduct taped interviews with people who are senile or dead.

Another piece of legislation needed is a statute on classification. As you know, classification has always been governed by executive order and those orders have tended to change according to the whim of each new administration. It is time to call a halt to that tradition.

There is much more I could say on needed legislative changes as well as other topics, but I've got to go.

By the by, do you know anything about the Canadian FOIA? A lot of the Galindez case occurred in Ottawa and Montreal, and I'd like to know what the Canadian government learned about those aspects if I'm not excluded as a foreigner.

Cheers!

Alan L. Fitzgibbon