

Oral History of Carl Stern

This interview is being conducted on behalf of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Judy Feigin, and the interviewee is Carl Stern. The interview took place on the terrace at Carl's home in Washington, D.C., on Monday, November 9, 2020. This is the fourth interview.

MS. FEIGIN: When we left off, we were talking about the Supreme Court, and you were sharing some thoughts about some of the justices you had interactions with. One of the points you were making was how they could walk down the street and no one would know who they were; you gave some vivid examples of that. It hasn't been that way for some of them recently, most particularly, it seems to me, Justice Ginsburg and also Justice Scalia. The justices give speeches. They've been out and about more, and I wonder if you have any thoughts about that. Is that a good thing? Is it not?

MR. STERN: Well, I'm a bit old fashioned. I think Justice Ginsburg was probably over-exposed. Occasionally she got into trouble for being too candid. I don't have to recite what those incidents were. Also, as a practical matter, courts have to speak from their written opinions. And I do worry. I mean, I encourage public officials, including justices, public figures, to go out and speak, but for judges there is a difference. I remember one case where Justice Stewart was quoted, giving his interpretation of a case the Supreme Court had just decided. I'm struggling to remember what it was about. It was at an ABA meeting in Montreal. In any event, he was quoted widely in the papers expressing his view as to what the Court's ruling meant. I started to think to myself, when the next case comes up that involves that precedent, are we now going to have this sort of thing where a lawyer says to the court,

“Well, your Honor, Justice So-and-So at a bar meeting in Philadelphia said it meant this.” And the other lawyer leaps to his feet and says, “Now wait a minute. Justice So-and-So was quoted in *Time* magazine as saying it meant that.” Courts really should not and cannot work that way. They can only define the law in their written opinions. Lawyers and judges have to know with certainty where to find the law. The justices can comment about their work in general, but they have to be discreet. When it comes to personal things, Marty’s cooking, whether she liked his beef stroganoff, well fine. Go to it.

MS. FEIGIN: We should say Marty was Justice Ginsburg’s husband.

MR. STERN: Right. We have to use a little judgment. That’s all I’m saying.

I do have to tell you that we once got in a terrible dust-up with Justice Scalia. I say “we” because my wife was with me. We were at a dinner seated next to him, and there had just been an instance in which a federal judge in Wichita had gone on a local television station to explain a ruling that he had made in a case that involved busing or school integration, something of that nature. There had been a community uproar, or at least a small uproar, about the judge’s decree, and the judge felt it appropriate to explain his reasoning and what the law requires, and did so. Well, what I remember is Justice Scalia thought that it was horrible for the judge to go on a local television station to explain what he or she had just done. I thought the judge had acted courageously and inventively in trying to calm the waters. It’s like

anything else. We have to do what we think is right, but do it in moderation and under the right circumstances and for the right reasons.

MS. FEIGIN: One other question I have about the Supreme Court before we leave that topic. You were a member of the Supreme Court bar, I believe.

MR. STERN: Yes.

MS. FEIGIN: Did that make any difference in your work?

MR. STERN: Well, I should tell you, I was never a practitioner, although I am licensed. I always felt it was appropriate to do that, to remain within the discipline of the bar. Once you have been admitted to the bar, it seems to me you have certain obligations, and I think it's appropriate for you to understand what those obligations are and that in fact they can be enforced against you. Bar membership does not give reporters who cover the Court extra privileges. Perhaps it did at one time.

Those of us journalists who were members of the bar could go upstairs and use the Supreme Court library on the third floor. That got cut off under somewhat embarrassing circumstances. One of my colleagues, who was actually a good guy but a little overly ambitious, was caught in the library rummaging through a trash basket looking for notes that the clerks had discarded, thinking that might give him a clue as to what the Court was going to do in particular cases. Needless to say, the Chief Justice was not amused and, even for those of us who were members of the bar, our library privileges were revoked.

MS. FEIGIN: Since you bring up the fact that you felt you should keep up your bar memberships, maybe this would be a good time to discuss what you did as a member. You were a member of which bars and which legal organizations?

MR. STERN: I started as a member of the Ohio bar, and that's a wonderful bar to join because it's relatively easier to become a member. At the time that I took the bar exam, we had to do three full days, all essays; there was no multi-state. We were confronted with fifty scenarios. We had to respond to forty. In any event, the point I wanted to make was it was possible to take the Ohio bar and to answer every question wrong and still pass [laughter].

MS. FEIGIN: How?

MR. STERN: Am I giving away a secret here [laughter]? I presume it's changed. That's because, for each answer you gave, you could get a total of ten points. Up to 7.5 points were awarded for each one for correctly identifying the issue, and 2.5 for resolving it correctly under Ohio law. A passing grade on the Ohio bar was 75, so it was theoretically possible to answer every question wrong under Ohio law and still pass if you correctly identified the issues. And actually, when you think about it, it may make sense, because as you well know as a lawyer yourself, nine-tenths of the battle is to identify the issue – presumably from your point of view the winning issue – then you can always find someone who will dig up the relevant cases.

MS. FEIGIN: Were you also a member of the American Bar Association?

MR. STERN: Oh, of course. I was extremely active in the ABA. I went to bar meetings, the annual and mid-years, for at least twenty years, very often dragging my

wife and kids along with me. I was a founding governor of the ABA Forum Committee on Communications Law. That was back in the late 1960s. I was vice chair of the Criminal Law and Media Committee of the Criminal Law Section. I was a member of the Standing Committee on Strategic Communications. It's a relatively small group within the ABA that advises the ABA president on policy matters. And I was a member of the Working Group on Intelligence Requirements and Criminal Law Reform. So I was very active in the ABA.

I should tell you one meeting stands out over all those years, and that was one in 1973, during the height of Watergate. In the midst of the tumult, the ABA president was Chesterfield Smith from Florida, a wonderful lawyer, a one-time Nixon partisan. But he gave an electrifying, "no man is above the law" speech, impelling the ABA to call for Congress to appoint an independent special prosecutor to investigate the President's conduct. It made headlines and resulted – to some degree gave it impetus – in the establishment of the special prosecutor's office, which, by the way, was headed later by a former ABA president, Leon Jaworski, after Archibald Cox was fired at the order of the White House.

MS. FEIGIN: In addition to your ABA activities, weren't you involved in helping to develop ethical standards for PBS? How did that come to be?

MR. STERN: I was asked to be a member of the committee that revised the ethical standards for the Public Broadcasting Service. I had plenty of extra-

curricular activities. I also was a member of a Department of Transportation task force.

MS. FEIGIN: What did that involve?

MR. STERN: We were asked to develop standards, if you will, protocols, mechanisms for dealing with notification of families and the public in the event of a mass transportation disaster, an accident of some kind. In fact, even to this day, many of the things you're asked to do when you buy an airplane ticket is to provide information about notifying next of kin and that sort of thing, and that was developed by our task force as an advisory body to the Secretary of Transportation.

MS. FEIGIN: How broad-based was this committee?

MR. STERN: Some of the members had a background in aviation disasters, obviously, but it was a broad spectrum, such as people from the travel industry. But they were looking for people with a background in communications as well, and that's why they invited me.

MS. FEIGIN: When was this?

MR. STERN: In the 1990s.

MS. FEIGIN: They didn't have protocols before then?

MR. STERN: Oh sure, they had their own procedures that they had worked out, but they were looking for an outside reviewing body to determine if those standards were adequate and appropriate.

If we are talking about outside activities, I should also tell you I was very active in the labor union that represents the broadcasters. I was a shop

steward at NBC News in Washington for twenty-one years. I was on the local board for I think sixteen years. I served one term on the national board. That's AFTRA, the American Federation of Television and Radio Artists.

MS. FEIGIN: Were there any strikes?

MR. STERN: I was on strike twice, once in Cleveland and once shortly after I got to Washington. I don't think I was here more than six months when I was walking the picket line.

MS. FEIGIN: What was the issue?

MR. STERN: That's too long ago. We were just mad about something [laughter]. But we tried to help maintain standards. I will say it was a lot easier to go on strike in Cleveland than it was in Washington. The first time I went on strike was in Cleveland. I was working in those days for Westinghouse Broadcasting, and there was a labor dispute, and we went out on strike, and we didn't know how long we would be walking the picket line. Well, what we didn't know was, the next morning, after we walked out, your friendly Teamsters Union local sent about 25 guys who looked like fullbacks to demonstrate in front of the station. Of course they couldn't interfere with the people who worked in the building going in and out, but they completely cut off the delivery of things like coffee and bathroom tissue. By that night, the strike was over [laughter].

MS. FEIGIN: That's fascinating. If I could go back for a minute. You said you helped develop ethical standards for PBS. I'm wondering what kind of standards are we talking about? What got changed?

MR. STERN: Our task was to reconsider and clarify standards. Things like what is the level of verification required before you put something out on the air. Ethics and conflicts of interests – the innumerable questions about what to report and how. In fact, I taught a course on ethics at George Washington University where we spent a whole semester considering what was the right thing to do in various situations.

MS. FEIGIN: Was it at all different if you were dealing with this for PBS? Was PBS different from other stations in this respect?

MR. STERN: A little bit, because it was governed by a parent organization, the Public Broadcasting Service. There was a board of governors that had a role. I suppose it's also true that since we were not worried about turning a profit, a profit motive didn't come into it. We were trying not only to define standards but to elevate them. And there were some wonderful people. I sat next to Marvin Kalb from NBC and CBS, whose name I'm sure is familiar to you.

MS. FEIGIN: Indeed.

MR. STERN: So ask me some stuff about covering the law and the legal community. You asked me about bar membership. I was for a while on the *District Lawyer* board, the bar publication in D.C. But other than that, I was not active in the D.C. bar because in D.C. I was classified as an inactive member since I was not in the active practice of law. More fun to preach than to practice.

MS. FEIGIN: [Laughter.] So, back to the law, as you ask. Let's go to some of the big cases you covered because I think there were at least some we should

mention that we didn't. You mentioned the Ford Pinto case last time, just to say it was the first time there had been a criminal prosecution for murder.

MR. STERN: That was the case in which I almost froze to death. There was only one pay phone in the courthouse, and this was long before cell phones. They had the phone company bring in a trailer with phones mounted on an open rack. It was out in front of the courthouse on the lawn. Now it was about six degrees [laughter]. This is Winamac, Indiana, in the depth of winter. I don't know how any of us survived the winter in Winamac having to file on the phones in the middle of the arctic lawn of the courthouse. But quite apart from that, there were other problems, too. For one thing, Indiana -- I think it has changed, but I'm not certain -- Indiana in those days had different time zones county by county. And as fate would have it, our motel was in one time zone but the courthouse was in the next time zone, ten miles away, and we never knew what time it was [laughter]. That makes it harder to get to court on time. I do remember that. Who said it was easy being a reporter?

MS. FEIGIN: Any other special memories of this trial?

MR. STERN: We've been talking about ethics, and there was one ethical issue that troubled me, which was that the prosecutor had at the prosecutor's table a uniformed Indiana state highway patrolman, a big handsome guy, in the most gorgeous state trooper's outfit you've ever seen. I suppose he was there to be a technical advisor to the prosecutor, but it was a jury case and it seemed to me to have a member of the law enforcement community there in uniform would unduly influence the jury. If I were the judge, I don't think I would have

permitted that. To this day that has bothered me. As it turned out, it didn't matter much. The jury found Ford not guilty.

MS. FEIGIN: What were the facts of the case?

MR. STERN: Three teenagers in a 1973 Ford Pinto were killed when the driver stopped on the highway to retrieve a gas cap and a car came up from behind and rammed the back of the Pinto and the gas tank exploded. After a lot of expert testimony about the design of the car and the placement of the gas tank, the jury concluded that the Pinto was no more or no less safe than any other car in its class. I should mention that there were more than one hundred civil suits brought by Ford Pinto owners or their estates, which resulted in substantial civil judgments. But you haven't seen a lot of attempts at using the criminal law against corporations for negligence since. I wonder if that influenced it.

MS. FEIGIN: Another big case you covered, which I would welcome your reminiscences of, is the IBM antitrust case.

MR. STERN: Well, at the time, a professor at Yale by the name of Robert Bork described the IBM case as the Justice Department Antitrust Division's Vietnam, meaning it went on and on to the point of exhaustion. It was filed in 1969 before an iconic judge, David Edelstein, in the Southern District of New York. I decided I would go for the opening of the trial, and we did a piece on the opening day, and I said this is going to take a while. I'll come back for closing arguments. Well, I didn't know what lay ahead. In the first place, the lawyers skirmished pre-trial until 1975. Six years. Discovery primarily. The trial finally began in 1975. When I say "began," it was 30 million pages of documents. One government witness was

on the stand for 78 days. Are you getting the picture? This case ran the tenure of six attorneys general and four presidents. This was an antitrust monopoly case. This was when general use digital computers were becoming very much a driving element in the business machine marketplace, and there was concern that IBM was attempting through various stratagems to monopolize the business. In any event, this trial kept going and going, and it finally reached the point of exhaustion. In 1982, the Antitrust Division took a look at how the landscape of the computer industry had changed in the intervening thirteen years and decided it was time to throw in the towel. And so I never got to go back to New York for the closing argument [laughter]. That was it. I covered a case for thirteen years and I went once, and that was for the opening day [laughter].

MS. FEIGIN: Was this before courtroom use of computers? If you had millions of pages of documents, they probably weren't computerized. Or were they?

MR. STERN: By then it had begun. We certainly had word processing by then. But in any event, I am glad I was not present in court when they tried to have 30 million documents admitted into evidence.

MS. FEIGIN: Any other major cases you want to discuss that were here?

MR. STERN: I forgot entirely to bring to your attention that I actually can claim to be an *international* legal journalist.

MS. FEIGIN: Before we get to that, are there other stateside cases you would like to discuss?

MR. STERN: I think we've done enough.

MS. FEIGIN: Okay, but before we leave these shores, I want to ask you something about stateside courtrooms that is still an issue. I'd like to get your viewpoint on cameras in the courtrooms which began at some point while you were a court reporter.

MR. STERN: With respect to cameras, I'd have to say, again, I'm somewhat in the middle. Initially, in the late 1960s, I was very active in working with others to try to get the courts to consider opening their doors to cameras. I worked very closely with Sandy D'Alemberte, who was the president of the American Bar Association, a lawyer from Tallahassee, a law school dean. For a number of years, he was the president of Florida State University. An absolutely wonderful, marvelous human being, and I think he was largely responsible for the *Chandler* case, which would have been around 1981. Two Miami Beach police officers had been arrested for burglarizing a restaurant. And when it went to trial, the state court agreed to have it open to cameras, thanks to the efforts of Sandy and others, although under certain constraints. The cameras had to be unobtrusive. They were not to cover conferences at the judge's bench and so on. They had to avoid showing the jury. The constraints were numerous but this was the first time that a trial was open to cameras since prohibitions were initiated in the wake of the Lindbergh case in the 1930s. In any event, on appeal Chandler and the other officer contested their convictions on the basis that they didn't get a fair trial. They contended that the cameras might have influenced the lawyers, the judge and the jury. That case went to the Supreme Court. The Supreme Court ruled

unanimously that the defendants had failed to substantiate their claim of a due process violation. That opened the door, and today there are only one or two states that don't allow cameras under any circumstances in the courtroom.

The federal courts did try it as an experiment for a while in some of the Circuits, but they are still mostly closed to cameras. Advances have occurred in hearings in civil cases. The Supreme Court itself now routinely makes audio recordings available after the fact, but no video. To some extent I can understand it. It's the Court's playpen, and I think they like their privacy. I can recall going to the Safeway on Arlington Road and seeing Sandra Day O'Connor pushing her cart and nobody was bothering her because I guess most people didn't recognize her because they hadn't seen her much on television.

MS. FEIGIN: The Court only began to release audio of their arguments I think in the early 1990s, because of efforts by Peter Irons, a University of California San Diego professor.

MR. STERN: When I was there, arguments were being recorded, but you had to go over to the Library of Congress to hear them, and that's as far as the justices would go. Bottom line, like all the things we've discussed, it has to be done with appropriate procedures. I can't think of a single instance in the United States in which a trial has been derailed because of the presence of cameras. It seems to me until and unless it becomes clear that it is affecting the quality of what occurs in our courtrooms, the burden of keeping the cameras out is on

the resisters. That's my middle-of-the-road, average person, reasonable position.

MS. FEIGIN: Okay. So now moving on to international cases.

MR. STERN: I only covered one. In 1979, as you well know, Iranian mobs seized the U.S. embassy in Tehran and held 53 Americans as hostages, and of course the buildings as well. Shortly thereafter, the United States went to the World Court, the International Court of Justice in The Hague, in the Netherlands, to seek the Court's assistance in getting the hostages released and the embassy returned to U.S. custody. I went and actually spent nine days in The Hague. I went for the opening argument and then remained to await the decision. That wasn't necessarily a good thing. I remember when I was checking out of the hotel, my telephone bill was \$800 [laughter]. Of course, some of that was calling home at night to reassure my wife I was being well fed.

MS. FEIGIN: What about the decision?

MR. STERN: The World Court did issue an order to the Iranians to release the hostages and turn over the embassy. But the Iranians did not appear. They did not surrender to the court's jurisdiction. The Americans ended up being held for 444 days. But when President Reagan came into office, as sort of an inaugural gift, the Iranians, as you recall, released the hostages and returned the embassy to U.S. control.

I did have one dramatic incident, which will not go down in the annals of the law, but when I was finally departing The Hague, after having been there nine days, I stopped at the gift shop in the airport and I acquired a 60-pound

chunk of cheese. It was heavy. Maybe it was 40 pounds. It was not just a wedge; it was a whole wheel. I thought my wife would enjoy having some cheese. I received assurances at the duty-free shop that the cheese would not ripen so quickly while I was en route home that it would start to smell. Unfortunately, my flight was cancelled. And I'm sitting there with 60 or 40 pounds of this quickly ripening cheese [laughter], and I don't have a flight. Well fortunately a fellow journalist, Bernard Shaw, who used to be with CNN, was also going home on the next flight. He had privileges in the airline lounge where we could at least refrigerate the cheese [laughter]. So the story ends happily. It had a Hollywood ending [laughter] because I managed to get the cheese home in time before it exploded in unpleasant aromas.

MS. FEIGIN: We should say, because you did television journalism, and we're talking about the hostages, that that was such a huge story that it led to the creation of the TV show *Nightline*.

MR. STERN: Absolutely. Every night they ticked off how many days the hostages had been held.

MS. FEIGIN: I think that show was intended to just cover the hostage situation, but it became such a television staple that it runs still.

MR. STERN: Yes. So that's about the end of all my war stories. There's one chapter left in my journalism career, I suppose, which is FOIA.

MS. FEIGIN: I don't think we're done with your war stories, so let me ask a little more. Speaking of war, did you ever get to Vietnam?

MR. STERN: When I was the backup reporter for NBC at the White House, in 1967 and 1968, I traveled there with Lyndon Johnson.

MS. FEIGIN: Was this on Air Force One?

MR. STERN: No. Usually there are three aircraft. There's the president's plane; there's a plane with all the secret service agents and communications people and so on; and then there's a press plane. There is a press pool aboard Air Force One for a few of the senior journalists, but I was a private in this army. They didn't put me on Air Force One. In any event, I remember going with President Johnson to Cam Ranh Bay in Vietnam. I hope this won't disappoint you, but while spending time at Cam Ranh Bay in Vietnam, I never saw a Vietnamese. They had cleared the entire peninsula of Vietnamese for security reasons. We could just as well have been at an Air Force base in Texas.

MS. FEIGIN: What was the occasion for this trip?

MR. STERN: This was part of an around-the-world trip that I went on with Johnson, which was an experience in itself. It had all started off because Harold Holt, the Prime Minister of Australia, disappeared while swimming a week before Christmas in 1967, and we took off to go to the funeral.

MS. FEIGIN: They found his body?

MR. STERN: I'm not sure they ever recovered his body, not that I am aware of. In any event, Lyndon Johnson decided to go, and I remember it was a difficult trip for a variety of reasons. For one, when we took off to head westward across the Pacific, we all had to line up. A Navy corpsman in the back was giving

us shots, and I don't mean in the arm [laughter]. Furthermore, my wife and I had just returned from a marvelous vacation in southern Spain. We were coming home to Washington at Christmastime and asked the hotel concierge to ship our warm-weather clothing to D.C. to lighten our bags which were stuffed with souvenirs. So we arrived back in Washington and – surprise – I have to go to Canberra. I don't have any summer clothing; it's on a ship somewhere. It's like 106 degrees in Canberra. Off I go to Australia in my heavy woolen suits [laughter].

MS. FEIGIN: Why was the President going around the world?

MR. STERN: He had an idea that, as long as he was out as far as halfway around the world, he might as well keep on going. That led to some strange circumstances. Operating on short notice, the President's staff had to line up places to land to refuel. They thought first of England and France and Germany, but they were all having huge anti-Viet Nam war demonstrations against the U.S., so that was out. The Italian government was having political problems. Portugal might have welcomed Johnson, but there was Salazar, a dictator. Perhaps Spain? But there was Franco. The White House was running out of countries. And here we are, flying at 35,000 feet, ever westward, and we don't have a place to come down. I remember one of the Bundy brothers came to the back of the plane to try to explain the dilemma. Finally they got the Pope to offer to meet with the President, and that obligated the Italian government to let Johnson set down in Rome. The papal invite was the hook for getting permission to land in Rome.

I should also tell you that trip taught me to admire the veteran skills of *The New York Times*. At one point we landed in Karachi and everybody, of course, wanted to get to a phone to file a story. Only *The New York Times* reporter had been given an envelope by his office containing the coins of every country we possibly might pass through. We were not in the terminal where there might be a currency exchange. Only *The New York Times* reporter had coins to make the telephone work [laughter].

MS. FEIGIN: Wow. Well, we should explain for people reading this, now or in the future, that in those days you had to drop coins into the phone to dial it; that won't resonate for people using the modern phone system.

MR. STERN: Absolutely. We're talking about the 1960s.

MS. FEIGIN: Did you ever go on other foreign trips with the President?

MR. STERN: Yes, when Johnson went to El Salvador in 1968 to promote the Central American Common Market. In fact, that trip illustrates another situation journalists confront.

MS. FEIGIN: How so?

MR. STERN: The office decided on the spur of the moment that it wanted an advance piece, a scene-setter, to air on July 6th, the night before the President's arrival. I flew to Miami on the 2nd, stayed over, and arrived in San Salvador on the 3rd. I met NBC's Mexico City camera crew and phoned the American Embassy which the State Department had assured me would give me a briefing, interview subjects, and other help. No answer. It turns out the Embassy was closed, and the next day too, to celebrate the U.S.

Independence Day. I'm not an economist. I don't speak Spanish. I've been about as far south as Tijuana. I knew zilch about the Central American Common Market. This was all in the days pre-Google. My filmed story was supposed to be put on a plane to our feed point in Miami on the afternoon of July 5th.

MS. FEIGIN: So what do you do?

MR. STERN: Well, my cameraman Tony Halik and I go into the hotel bar to commiserate, and as luck would have it, sitting on the next bar stool is a professor from Michigan State University who happens to be the world's leading expert on the Central American Common Market [laughter]. The rest, as they say, is history.

I survived what we call in the news business parachuting into a story. And in those days, as I said, pre-Google, it was a lot harder. I guess the moral of the story is don't try to do a story involving U.S. officials around the date of a national holiday. Or, better yet, be prepared.

MS. FEIGIN: Definitely [laughter]. Okay, you wanted to talk about your FOIA career.

MR. STERN: FOIA made a big difference. The Freedom of Information Act was enacted by Congress in 1966 and became effective in 1967. It wasn't used much in the beginning because it applies only to records of executive branch agencies, not Congress or the President, and there are nine exemptions – exemptions for documents affecting national security, or open investigations, or people's privacy or candid exchanges between government officials. At times there

seems to be a tenth exemption, which is not in the law but is the “We don’t want to give it to you” exemption [laughter].

The primary users in the beginning were people FOIA-ing the Commerce Department, commercial users of FOIA seeking information about what their competitors were up to. That information might have been filed with the government. In any event, I used FOIA as a wedge, a shoehorn, whatever you want to call it, to learn what the government was doing. Not only did I use the spirit of the Act to buttress my daily news quest, I was the litigant in four lawsuits as a reporter and was largely successful. The most far-reaching of those was the Cointelpro case, but I’ll also be happy to tell you, at least in short form, about the others if you want to go into that.

MS. FEIGIN: Absolutely. But let’s start with Cointelpro, and for people who don’t know what Cointelpro stands for, we should begin with that.

MR. STERN: That’s bureaucratic lingo for counter-intelligence program. Counter-intelligence is taking active steps to alter a situation. It’s not just gathering information. It’s using information that you have to try to bring about a result that you would prefer in a given situation. Okay, so that’s what we mean by counter-intelligence. Let’s see if I can give you a short version of this. In March of 1971, a group of antiwar activists in the Philadelphia area broke into an FBI field office, in the suburb of Media, Pennsylvania and stole documents they hoped would be embarrassing to the FBI and force the FBI to stop surveilling them.

MS. FEIGIN: It must be embarrassing to the FBI that their office could be broken into, just for starters.

MR. STERN: Oh, you can bet on that. In any event, the activists then took the documents that they had seized and sent them around to news organizations and to members of Congress. Interestingly enough, because these were documents which had been stolen, no question about it, members of Congress and the news agencies were loath to use them. For example, Senator Kennedy was given a set. He returned it to the FBI unread. *The New York Times*, *The Los Angeles Times* did the same. They turned them over to the Bureau. Maybe the recipients thought it was the appropriate thing to do and perhaps that's what their lawyers told them to do. In any event, one paper did not ignore the documents. *The Washington Post* ran an article by reporter Betty Medsger, who I sat next to at the Berrigan trial in Harrisburg, and who had befriended the anti-war activists. Using the stolen documents, Betty described how the Bureau attempted to unnerve the activists by making them believe there was "an FBI agent behind every mailbox." However, the *Post* didn't dig into what other activities might be revealed by a closer reading of the files.

Fast forward a year. While waiting for an unrelated document at the Senate Judiciary Committee, which I also covered, a staffer asked me if I had ever seen the FBI files from Media? No, I had not. Thumbing through them like reading a magazine in a dentist's waiting room, I saw a caption on a document that read "Cointelpro New Left." Cointelpro? What is that?, I

thought to myself. I looked at the document. It directed agents in the Media field office to send anonymous letters to campus educators at colleges in the vicinity – Swarthmore, Haverford, Villanova – articles and letters telling them there were unpatriotic and un-American extremists on their campuses, such as SDS, Students for a Democratic Society. Some of the letters pretended to be from alarmed parents, urging the schools to kick these organizations and members off their campuses.

MS. FEIGIN: Their own students.

MR. STERN: Yes. The “concerned” letter writers asked why these colleges were recognizing SDS as a campus organization. Well, the word that caught my attention, other than Cointelpro, was “anonymously.” Is that what FBI agents do? I thought they were supposed to be the investigative arm of the Justice Department. Agents are writing anonymous letters to urge action against political organizations whose purposes they disagree with? Is that what FBI agents do? By what authority? *Quo warranto*? One of the old English writs, *quo warranto*. By what authority? And so I rushed off to the Justice Department and started asking questions about it. I won’t tell you all the times I asked in the months that followed, but I was not getting answers. Nobody would tell me what Cointelpro New Left was.

At one point I went to lunch with Pat Gray, the acting FBI director after J. Edgar Hoover died. I asked and Gray said he would look into it. He sent me a letter, this note that I still have, that told me that it would be harmful to the

Bureau's operations and to national security if I persisted in asking about Cointelpro New Left.

Shortly thereafter I saw in the local paper that the National Press Club had joined hands with a Ralph Nader organization, the Center for the Study of Responsive Law, to help reporters use the Freedom of Information Act. To make a long story short, a neighbor of mine, Ron Plessner, now deceased, was a lawyer with the Center. Alan Morrison was the boss. It was around January 3, 1973 that I read this thing in the paper. I had Ron come over and sit in my den and urged him to file a suit by the end of the month. He did – January 31st. It went through all the denials, all the processes. But I'm happy to say that by September, the judge, Barrington Parker, Sr., ruled in my favor.

MS. FEIGIN: What was the case name?

MR. STERN: *Stern v. Richardson*. The FBI was absolutely beside itself at the thought that this was all going to become public – an unauthorized, secret operation like this. It urged Justice Department higher-ups to file an appeal. But someone came riding to the rescue. You may be surprised to learn who it was. It was the Acting Attorney General Robert Bork. Bork said, "No. We're going to lose this one," he predicted. He did not approve taking an appeal.

MS. FEIGIN: Is that because he was the solicitor general and so determined whether the government would appeal?

MR. STERN: No. When Elliot Richardson and Bill Ruckelshaus resigned in the Saturday Night Massacre, Bork had become Acting Attorney General. He rejected the

FBI's plea as AG. In any event, on December 7th, a day that shall live in infamy, I got four pages from the FBI, along with an affidavit that that's all there is. Well, those pages themselves reference other communications. Again, just to jump ahead, I went back to Judge Parker the next day, and in the long run we got 50,000 pages. It showed not only that there was a Cointelpro New Left which was operating against the antiwar movement, but also the civil rights movement, the labor movement, et cetera. The FBI acknowledged that there had been seven Cointelpro operations, including one against Black extremists, and another aimed at disrupting the SWP, the Socialist Workers Party.

The SWP had sued the Justice Department and the FBI, claiming they were harassing and interfering with its activities, but the SWP couldn't prove it. They went in front of Thomas Griesa, a judge in the Southern District of New York, but their evidence was thin. And guess what? In the middle of the case, along comes the papers we obtained showing, among other things, that one of the seven Cointelpros the FBI was operating was the "SWP Disruption Program." Needless to say, the SWP prevailed before Judge Griesa.

I don't know that we have to go much further except to say that those disclosures led ultimately to the Senate Church Committee hearings into the excesses of the FBI and the CIA, and the Pike Committee, Otis Pike, in the House, which was a parallel to Frank Church's hearings in the Senate. It led to the Levi Guidelines, which placed important limits on domestic security

investigations, and even resulted in such things as the ten-year term for an FBI director. That came out of those hearings. So our Cointelpro suit turned out to be a very productive use of FOIA and one that is frequently cited for that.

MS. FEIGIN: And you won an award for that, did you not?

MR. STERN: Well, they give you a lot of awards.

MS. FEIGIN: No, no, no. What award did you win?

MR. STERN: A Peabody I guess was the top one. That's sort of broadcasting's Pulitzer, awarded by the University of Georgia.

Before we leave Cointelpro, I should tell you at least one other story, just to show how weird things are. While Judge Parker had before him the issue of these Cointelpro documents, he asked, as would be appropriate, to see some. He insisted upon having a stack of them, which he then took home and gave to his clerk to read over the weekend. It was a nice, warm weekend. His clerk, who shall remain nameless for the moment, took the documents with him when he went to the swimming pool [laughter] to read by the pool – documents which were under seal, highly secret FBI documents. Sometime later he returned to his apartment. The doorbell rang. At the door was this pretty young woman saying, “Sir, you left these under your seat at the pool” [laughter]. On top of that, there's another twist to the story. That young woman, that pretty young thing that brought the papers back to the judge's clerk, later became the clerk's wife [laughter]. How's that for a back story?

MS. FEIGIN: That's a great back story.

MR. STERN: Okay, so Cointelpro was the biggie, but that wasn't the only FOIA case. I could mention a couple of others, but just in a sentence or two. I did win a case, which is still much cited as a precedent, a case in the Court of Appeals. I should tell you all four cases were heard in the District.

MS. FEIGIN: Let's also mention the judges.

MR. STERN: Okay, in that case Pat Wald, Abner Mikva and Oscar Davis were the judges. Davis was a judge on the Federal Circuit, sitting by designation. This was a case in which some high-level FBI supervisors had been disciplined internally for lying to Congress about black bag jobs. Black bag jobs are cases where FBI agents would burgle a home, frequently the home of a relative of a Weather Underground member. In other words, in trying to find members of the Weather Underground, all of whom were in hiding, the FBI might send agents into the home of a relative of theirs to see if there were letters that had been received, or other evidence that might disclose where these members of the Weather Underground were hiding. The Weather Underground had, as we talked about in an earlier episode, engaged in violent acts, and even experienced deaths of its own members at a bomb factory that they had in Greenwich Village which blew up. In any event, the FBI did engage in unlawful conduct, and these FBI supervisors had lied in a congressional hearing about that fact. They were disciplined internally, but I thought that the public had a right to know who they were. These were high-level people who were likely to rise even higher within the Bureau hierarchy.

To make a long story short, I won most of the case. One of the individuals was very high in the FBI and, as to him, the court said I had a right to know who it was. As to two lesser officials who had been found in an FBI disciplinary proceeding to be guilty only of negligence in their handling of the information, the court said I was not entitled to their names. The court's reasoning was that the right of privacy of the lower-ranking officials outweighed the public's need to know who they were. We can argue about that. But as to the larger principle, I did win and the case is frequently cited in the literature of FOIA and its companion law, the Privacy Act.

MS. FEIGIN: What's the name of that case?

MR. STERN: *Stern v. FBI.*

MS. FEIGIN: And who was the main person who was outed by the lawsuit?

MR. STERN: My recollection is that he was the agent in charge of the Chicago office. The Chicago office was one of the biggest in the Bureau, I think the third largest.

MS FEIGIN: And what were your other two FOIA lawsuits?

MR. STERN: I won a suit involving the Small Business Administration, a case which, again, was important in setting a precedent for FOIA. Some employees of the SBA in the Philadelphia office had been disciplined within the organization for using improper racial criteria for small business loans, and I wanted to know who these people were. The Administrator didn't want to reveal this embarrassing story to the world and simply took the position that as long as he didn't sign off on the discipline, this was a matter in an inter-agency process which was still cooking, and that I wasn't entitled to

information about it until it was over. Obviously, this just gave them license to postpone the reckoning indefinitely – forever -- and Judge Norma Holloway Johnson said, no, no, you can't simply label it pre-decisional and avoid forever having to meet your obligations under the Freedom of Information Act. That case too has been cited many times.

MS. FEIGIN: Do you remember the name of that case?

MR. STERN: *Stern v. Small Business Administration*. That was in 1980.

MS. FEIGIN: And your fourth FOIA case?

MR. STERN: You remember in 1986 there was a horrible booster failure of a Challenger rocket and seven astronauts were killed?

MS. FEIGIN: Yes.

MR. STERN: There came a time when the Justice Department had to approve financial settlements with the families. We were trying to get a handle on how much the tragedy had cost the government and how well the families had been treated. The government wouldn't talk about it, citing the privacy rights of the survivors. The case was before Judge Richey. He ruled that we were entitled to know the figures in the aggregate, which was good enough for our purposes. We didn't need to know exactly what each family received.

MS. FEIGIN: What was that case name?

MR. STERN: *NBC Inc., et al. v. DOJ*.

MS. FEIGIN: You did quite well using the Freedom of Information Act.

MR. STERN: Not every time. I feel an obligation to tell you we didn't always win [laughter]. Sometimes it was very aggravating, and often infuriatingly slow

for those of us in the daily news business. In fact, when I worked later at the Justice Department, one of the most satisfying things I did, along with Dick Huff and Dan Metcalfe in the office that deals with FOIA, was to get expedited FOIA review put into the DOJ regulations so that cases that seem to have some public urgency, or raise questions about the integrity of Department officials, could be moved to the head of the line.

MS. FEIGIN: What length delays might one face?

MR. STERN: Do you remember that President Carter had a brother named Billy? Billy went to visit Colonel Gaddafi in Libya, and rumor had it that Colonel Gaddafi had given him a silver saddle as a gift. So I filed a FOIA with the Treasury Department which handled the Customs stuff, wanting to know whether he declared a silver saddle on his Customs form when he returned. I did not get an immediate answer. In fact, I finally got an answer from the Treasury Department twelve years after my request [laughter] by which time Billy Carter was dead, Jimmy was building houses in Georgia, and who cared anymore [laughter]? I recall the answer was that Billy did not declare a saddle. But who knows if the rumor was true? It wasn't worth pursuing twelve years later.

That wasn't my worst teeth-gnashing experience. In 1982, there was an accident involving the Air Force aerial acrobatics team, The Thunderbirds, which is used by the military as a recruiting tool. At an air show in Nevada, four of the planes crashed and their pilots died. The Air Force customarily records – in those days on film – the performances. I asked for the film. We

had no intention of airing the moments of impact, but wanted to show what preceded the accident. After I submitted an FOIA request for the film, the Air Force officially responded that it didn't exist. Then we learned that in a civil suit in California that had been brought against a manufacturer of the aircraft – specifically the manufacturer of the ejection devices – an Air Force film had been submitted in court. So the Air Force could no longer claim it didn't exist. Well, to get to the end of the story, we were on the verge of getting the film, literally the night before, when the general of the Tactical Air Command, which existed in those days at Langley, the general himself, in the presence of a sergeant, took the film and destroyed it. Now technically, that's a violation of law. Anything documenting a military accident has to go to the Archives and to other agencies, but the federal prosecutor in Norfolk, that's where his office was, was not about to prosecute this general. The Air Force and the Justice Department then moved immediately to close the matter because the subject matter of our request – the film – no longer existed. That's what happened.

MS. FEIGIN: So how would you assess the effectiveness of the Freedom of Information Act overall?

MR. STERN: Much of the time it works. The Freedom of Information Act is still a valuable tool for knowing what the government is doing. Every state, and many cities, have adopted their own FOIAs, sometimes called “open records laws” or “government in the sunshine laws.” Overall, on a report card I'd give our efforts at government transparency at least a B-plus.

MS. FEIGIN: That's pretty high and probably a good place to break, because next we're going to move to your DOJ career, and that's a whole different area.