

Federal prosecutor in the dock: the sorry performance of Daniel Small

On February 28, 1986, Boston Assistant United States Attorney Daniel Small, the prosecutor who, for over one year, has conducted a politically vindictive grand jury probe of Lyndon H. LaRouche, Jr. and his political associates and supporters, testified for two hours in the case of *The LaRouche Campaign, et al. v. First National State Bancorporation, et al.*, a breach-of-contract and libel action pending in Federal District Court in New Jersey. The unusual appearance of a federal prosecutor as a witness in a private civil proceeding occurred because Small submitted an affidavit in defense of the Bank, now known as First Fidelity, an act which in itself raised grave issues of prosecutorial propriety. The testimony of Small confirmed beyond any doubt that his grand jury is a political inquisition and nothing else.

The circumstances giving rise to Small's day of infamy began when the magistrate supervising pretrial discovery, Serena Perretti, ordered The LaRouche Campaign (TLC) and Independent Democrats for LaRouche (IDL) to provide interrogatory answers to a third party defendant in the litigation. Since the information could only be obtained from credit card documents (the criminal investigation involves allegations of credit card fraud) which had already been produced to the Boston grand jury, TLC attorney Joel Reinfeld, sent a letter dated Aug. 7, 1985 to Mr. Small's boss, William Weld, informing him of the New Jersey court order. Reinfeld further requested an opportunity to inspect and make copies of the documents.

Small informed Reinfeld and several other attorneys who made inquiries on behalf of the two organizations that all of the records were in Washington D.C. at the FBI Laboratory and would not be made available to TLC and IDL. On Oct. 1, 1985, Magistrate Perretti peremptorily levied a \$500 per day fine against the two campaigns for failure to comply with her court order. TLC and IDL appealed this ruling to Judge Harold Ackerman, the presiding judge on the case.

On December 7, 1985, two days before the appeal was heard by Judge Ackerman, First Fidelity submitted an opposition which contained an affidavit from Daniel Small. In this sworn statement, Small claims the plaintiffs' lawyers never made it clear what they wanted from the grand jury records and why they wanted it. Judge Ackerman, confronted with conflicting statements and accusations of misrepresenta-

tion, ordered Small to appear in his New Jersey court to testify about the entire matter.

The nervous demeanor and equivocating testimony of Mr. Small made it clear from the outset who the guilty party was. The witness's equivocations caused Judge Ackerman to jump into the fray and conduct the cross-examination himself at various key points. Below he begins by asking Small about Reinfeld's Aug. 7 letter:

Q: He wants to inspect the documents and obtain copies of the relevant documents?

Small: Yes, sir.

Q: That is very clear. Is there anything ambiguous about that request, sir?

Small: No, your Honor.

Q: What I cannot understand in my own mind at this time, if that were the request, what was the problem? In other words, he wasn't looking for the originals. He wanted copies. Copies means copies. What was the problem?

Small: Your Honor, if all he had said was he wants to make copies or obtain copies—

Q: That's all he said.

Small: Your Honor, what he specifically said, both in the letter and in every conversation that I had, was to inspect the original documents and obtain copies. It wasn't a matter.

Q: In order to make a copy you have to have the original?

Small: Not necessarily, your Honor. We could make copies of copies.

The judge quickly grows impatient with the little cat-and-mouse game that Small is playing with the Court. He picks up a calendar which had been lying on the bench and says:

Q: But you would make a copy of the original. So he would have access. In other words, I'm holding in my hand a calendar. I don't want to give you this original. You say, "Listen, I want a copy." All I do is go to a Xerox machine. I make a copy. You have a copy of the original. What is the difference?

Small: Well, your Honor, if they had asked me then, then there wouldn't have been a problem. My understanding was, and because there were these credit card type records, it made

some sense that they wanted to inspect, in the words of the letter, the original documents. All I did was tell them that some of the originals were not available.

Q: All right. I'll back up Mr. Small. I'll back up. Did you say to him: "Listen, I don't want to let you see the real McCoy but I'll make copies for you. You pay, for it. You pay for it. I'll make copies of the originals"?

I don't want to get this conversation on an asinine level. I'm trying to think of some reasonable modality to accommodate the interests that you speak of. What I'm asking you is when you received that letter did you say to Mr. Reinfeld, "Listen, I don't want you to see these but we'll get you copies of the originals"? Did you say that to him?

Small: No, your Honor. . . .

Further, in the proceedings, Judge Ackerman realizes that there may be an ulterior motive governing the seemingly irrational conduct of the prosecutor from Boston. He asks Small point-blank:

Q: I know it is never a happy occasion when there are criminal proceedings which are participated in by an AUSA [U.S. Attorney] and certainly a defendant who doesn't look kindly on an AUSA and that sort of thing. Let me put it to you very clearly. Was there bad feeling here on your part with the LaRouche people, putting it as plainly as I can?

Small: I wouldn't say there was bad—well, they've taken a lot of—spent a lot of time insulting my boss, Mr. Weld, calling him a dupe of the dope lobby.

Q: What else?

Small: A Harvard punk and a liar and all kinds—the chants outside every time we have a grand jury. We have little chants outside, "William Weld is a fag." Those kinds of things.

(. . .)

Q: Obviously you were offended by these alleged sayings?

Small: No one had insulted me at that point, your Honor. Not me personally.

Q: I was about to say Mr. Weld was the target of these alleged character assassinations, and the like, right?

Small: That's right.

Q: And you were offended by it, right? Vicariously?

Small: Vicariously, yes.

Q: Now, when you heard that they had problems down in New Jersey, in a civil case, do I detect that you weren't overwhelmed with sympathy for their plight?

Small: I was not overwhelmed either with sympathy or with surprise, your Honor. The pattern was quite familiar to me. . . .

Q: And Mr. Reinfeld asked you previously whether you had said, "Well, it couldn't have happened to a nicer bunch of guys" [referring to Small's reaction upon hearing that the magistrate had levied the \$500 per day fines against TLC and IDL]. Do you deny saying that or you have no recollection of ever saying that?

Small: No. I did not say that, your Honor. Because Mr.

Reinfeld did not tell me at the time there were sanctions.

Q: Did you ever think of that Mr. Small, realistically?

Small: Did I think of it? Probably.

Q: Probably. Okay. Okay. So having thought it—having thought it, let's take this back to August—August, now, they send you this letter. They make this request. You're not going—not having kind feelings toward them. Not only wouldn't you jump through a hoop for them but you're not really going to put yourself out for these people, are you? They've been giving you a hard time?

Small: On the one hand, I was not going to put myself out for these people. On the other hand, they had filed numerous suits in various places against all kinds of banks. And if there was a way, and there is a certain amount of sympathy for the banks who were being used to get discovery in the criminal case, basically—

Q: Oh?

Small: I was not going out of my way for them. But I was not, certainly not going to do anything to interfere with the case.

Q: Let me pursue that a bit further. In other words, when this request was made you were aware of the fact that they had instituted suits in various places against various financial institutions?

Small: Yes, your Honor.

Q: And do I perceive that you viewed this as a pattern of conduct on their part? In other words, this was their MO, in plain language?

Small: Absolutely, your Honor.

Q: Oh. All right. So that in a sense you viewed the plight of the Fidelity Bank somewhat sympathetically in light of your knowledge in what the LaRouche people had been doing, correct?

Small: Correct, your Honor.

Q: And so when they checked in with this request, is it fair for the Court to conclude you weren't too sympathetic toward whatever problems they had?

Small: I wasn't sympathetic to LaRouche. . . .

Finally, under cross-examination by IDL attorney, Arthur D'Italia, Small admitted that his "sympathy" for the Bank was more than abstract. Small confessed to numerous contacts with the law firm of Hanoach, Weisman, the Bank's attorneys in the action, a condition which strongly suggests that the Boston U.S. Attorney is coordinating the civil case in New Jersey. This close relationship between a prosecutor and private litigants is highly improper since it threatens to turn the civil action into a mere arm of the grand jury investigation. The Bank's lead attorney, Albert Besser, admitted as much last fall when he declared, "I am going to make the government's case for it."

If Mr. Besser is serious, he might think about filing a job application in Boston. After the sorry performance of Daniel Small, U.S. Attorney Weld is probably in the market for a new assistant.