Dear Jim, re oral arguments in 78-1107 HW 3/12/79

Yesterday I reread the government's brief and made the enclosed notes. Rereading it strengthened my belief that it will be necessary to be prepared to respond to antagonistic questions, where possible, with a response against the government. Their brief is too dishonest to address in any other way. I thought about this a little more while shaving this morning and will make a few suggestions.

Howard read me his draft last night. I think it is quite good. I would have preferred a bit more, perhaps angled or emphasized more toward the option of the appeals court accepting the new evidence, even suggesting that more is available. But he has enough in to give them the option if they strongly want to take it.

There are going to be some issues I think you would be well advised to state prior to any questioning about them. They may interrupt you but I'd be prepared.

One is Pratt's unhidden bias. The prejudices ranged from nasty and inappropriate cracks about me allegedly commercializing what in fact has been so costly and unprofitable tom me to sneering references to the appeals court, at least expressions of disregard if not of open contempt. He reached outside the record instead of resolving those questions he appears to have wanted to address and except for my affidavit denied us the opportunity of addressing them. If he wanted such material in the record the proper way was subject to tes imony and cross examination. His interpretations are unjustified, stretched to suit an unhidden preconception. In all his performance was not that of an impartial judge. In particular it was not that of a judge willing to do as directed by the appeals court. He deliberately misrepresented the record before him on essential points, such as the taking of further depistions. He did not ask us if we planned more and there never was a time when we did not, as we told Ryan, who was simply untruthful about this.

You cannot safely ignore the unfaithfulness of the government's representations. They cover thefield, from misrepresenting on depositions to misrepresenting what Kilty's affidavit says and does not say. There are polite lawyerly ways of calling them liars without using the word. Not to do this is to risk disaster after all this effort. Not to do this is to strenthen the adversaries we are likely to find on the panel. Last time Wilkey's preparation did it for us. He turned Spottswood Robinson around at the argument. It was visible. Robinson began with a negative attitude and interrupted you early on. Then Wilkey took over.

While I am not in any way siggesting any but a strictly legal approach I am saying that there are these other issues already raised as smoke screens and existing and that the will dominate the decision unless cleared away.

I would begin with a brief statement that at the outset of this long litigation what I was writing about the FBI was not known. It made me an enemy to the FBI, as records we have obtained reflect explicitly. They even filed my FOIA requests as matters of "internal security." And directed that they not be responded to, which is to say they decided immediately to violate the law and continued on this course. Since then committees or both houses of Congress have decided that what I wrote more than a decade ago is correct, that the FBI and other agencies withheld from the Warren Commission what that Commission had to know to perform its great responsibilities. Consistent with whatever motive caused the FBI to withhold from a Presidential commission they continue to seek to withhold the same kind of information from the public through me. Indeed why withhold at all if they would disclose it voluntarily later? Withholding and misrepresenting in this case is no more than continuing the same policy now a decade and a half old.

I'd begin this way and have no more in what you intend to say but I'd be prepared with a firm response and think it might be best to select the case of my telling the DJ what the country then did not know about and later was exposed as the Cointelpro operations. When I correctly informed DJ the FBI's response was to circularize false commentary that I, a Jew, was conspiring with a notorious racist to defame the FBI. Thus did it hide from DJ that it had this Cointelpro anti-Americanism. If it had not succeeded in that misrepresentation the country could have been saved great suffering and efforts to cleanse the FBI might have been farthur along today.

Legally, aside from all the government's misrepresentations, I think the issues are simple. They still have not met their burden of proof. The Kilty affidavits are all there is.

his affidavit does not describe a good-faith search, if it describes any kind of search when he used only the conditional to describe it. We asked that he state what files he searched. Pratt erred in letting them claim this was burdensome. To make a search requires that records exist. It was not burdensome to provide copies of the requests he made for files to be searched. Given the nature of the remand, this was less than a minimum. The only reason for withholding the existing records which reflect what was searched was to frustrate both the remand decision and compliance.

When forced by the judge and given no choice we made a clear and undisputed record of embarrassment from disclosure. After the case was before the appeals court we obtained and are still obtaining all kinds of confirmations. These range from the Gemberling synopsis, which states clearly that the crub had been patched, to New Orleans records that include the form used for normal searchings. (I'll try to locate some samples and have them with me.) The facts of the case require that other and withheld records exist.

There is no government claim that they do not aside from the "testimony" of counsel. Hilty's affidavits do not state there are no other records or no other places to be searched. There is no response, aside from Pratt's invention, to the testimony that the Office of Origin is the place to search.

What else is in the new evidence discloses that in fact it is FBI pawctise to make explicit statements of evidence exactly as I asked. We have several Tippit spectro records on this. They are explicit in reflecting both qualitative and qunatitative results, both missing in all JFK records provided. This, of course, is the purpose of such tests. If such results are not to be stated there is no purpose in the tests. What knowledge was added by an inadequate record that would tell a Presidential Commission that the present and existing "smear" on the curbstone could have been caused by a vagrant auto wheel weight? It was known and without possibility of question that a bullet hit there and left a visible hole that the FBI refused to find on its own and when forced to an examination by the Commission's persistence misrepresented and withheld the records, now, again without testimony, claiming the plate os the examination was destroyed to save a fraction of an inch in alleged but actually prohibited "housecleaning."

The FBI never disclosed, not even to the Department's appeals authority, that it had a massive subject index at the Office of Origin. I establlished this from records obtained in another case and withheld by all but a single field office of the 59. (This happened in two different cases, in each case with only a single field office slippingnup and FBIHQ never making the disclosure in any of the records it provided.)

Now I have records showing that with the evidence involved in these tests FBI HQ phoned Dallas to get the information, that the information was not in HQ files. I will have a copy of a records marked for indexing "tracing the evidence" and relating to this kind of evidence. I'll also have one showing that to learn what was in a Chicago file FBIHQ also asked Dallas.)

What reasons consistent with abiding by the Act and the mandate of the court can there be for having so massive and detailed an idnex, of 40 linear feet of cards, and not only not consulting it in good faith and as manifestation of minimal diligence but of refusing to when we asked for the proper and necessary Dallas search?

If you get questioned on this throw in that from the Dallas fiels withheld from FBIHQ I learned about a half-dozen photographers whose films the FBI withheld from HQ, even one now known to have shown two moving images where Oswald alone is allaged to have been and the FBI's report says the film does not even show the building. Not having reached FBIHQ this information never reached the Commission.

It was in no sense burdensome to consult an existing index, the FBI's own major subject index.

Existence of the index as a special index only is new. That there are indices in all field offices is not new. I'd dare refer to it to show how the mandate was ignored and because we did, after deposing Frazier, ask for this search.

Bracketed with the vagueness of the conditional in Hilty's affidavits, and I'd focus on their own quotation, "would", this in terms of the mandate is, I think, powerful.

If my recollection is correct this is an issue Howard did not use. If so perhaps you should be alert to proper opportunities because I think there is no answer possible. It is the kind of thing that can crumble the government's lawyer. This is an information request, there is a mandate to determine the existence or non-existence of records and they first keep secret that they have 40 feet of index cards and then refuse to consult them for a search? Undue diligence in non-compliance if not contempt.

I've asked for this in a case in which it is included in the request, asked that it be sent to Washington for use in FOIA compliance and after a year no response. Almost a year, a year since the case was filed ~~xxxxxxxxxxxxx~~ but I guess it was not until about July that I got the first of three shipments of those files, third in August. So six months is conservative.

Obviously the only reason for not using the index in all requests and for wasting the great amount of time and monney is it to be able to withhold what the index would locate.

Either here or with the curbstone may be a good point to make passing reference to the subject matter so that it will not be lost on any adversarial judge.

If there is any question raised about my purposes or role I'd address it square on. I am past the point in my writing where I need this information for it. I published the largest and most extensive book on the subject in late 1975 and will never revise of duplicate it in any way. It is used as a college text. My role is entirely public service and is at the cost of other work I want to do, other books I want to write.

So far as the government slur that I am retrying the Warren Report or Commission is concerned I never address these matters in public. I do not include the suit in my college programs, which are very few or any reference to the issues in this case or its record. It is a fabrication, is not based on evidence, is not even an appropriate conjecture. It is the tradition dodge of the bankrup lawyer. I'm not suggesting that you raise this but that you be prepared to respond with it.

I've already bequeathed all my work, including all records, without any compensation, to university system. I make copies available all along, from individuals to the press to colleges. Hood is copying an entire file drawer of records to be used as the basis of a scholarly paper at a scholar's convention and at my cost I'm having a duplicate set of those made for the copying of other colleges who may want them.

I gave the Post Dispatch the most recent records I obtained without even having read them. They got four page-one stories from them, which certainly is making information public and certaibly puts me in a public role, not a private or selfish one. No pay.

I placed a broad interpretation on the mandate and have lived with it unselfishly.

I could have written several of the books I want to write in the time required by this case since the first Pratt decision. I published then and have no publishing use or possibility since then.

You know about giving away the transcripts before I received them, again at my cost.

This reminds me, the issue of new evidence is not going to go away in FOIA cases. I now have new evidence proving my allegations in the two most recently decided cases, withheld proof of untruthful affidavits relating to compliance. In both cases you may want to recall the date, this past Friday, 3/9/79. In each case a student going over my files, unsupervised, called these records to my attention. I'll have copies for you for those cases, of course, and before the oral arguments I'll give them to you.

The members of the panel may or may not be aware of this situation in 1448 and the Epstein matter. I've received no compliance with my initial requests or my requests made long thereafter but still long ago after Eostein published what was withheld from me and remains withheld despite my undeniedly prior requests.

As I would downplay the subject matter with a single pointed reference to it and the obligations of the FBI because ot it there is a different politcal aspect I would not downplay and would give importance to. This is my role and circumstances. It is hardly possible for anyone to be more unselfish, less self-seeking, than from my records I am. I do and have done this when I am withour any real financial resources and Social Security is my only regular income. When I receive honoraria I spend them on student help getting the records properly identified and in separate, identified file folders. Nobodyelse paid

for anything, from the file cabinets to the file cabinets. I haven't bought a new suit in a decade or more, drive a car I bought in 1964 and by living in a Spartan style manage to finance these things. And all this at a time when I may face the most costly surgery from serious helath problems.

I do not see how anyone could seek to further the purposes of the Act or of the mandate more than I seek or to have done more to accomplish these things. I serve the press, I serve students, I serve college faculties and I provde copies while preserving intact all records precisely as I receive them except for separating them into files and file folders for ready access.

All these records are in an entirely separate area from where I work. I have placed extra lighting and working space there for others.

The Department has credited me with unique subject matter knowledge. I make it available to all - anyone - regardless of agreement or disagreement or any political considerations. Countless reporters and student can attest to this.

Not obly because this so completely and shamelessly conforms to the Act do I consider it important under the proper in-court situation. Nor only in response to thebaseless slurring references by Government counsel. I think it is important as a means by which the coyrts can evaluate my representations. There is no possibility of personal gain for me from any of the information I seek or obtain, for I have already given it all away-free. The uses and interpretations of others are beyond my control, if I wanted to try to exercise any control.

Yet for this there is no Government counsel who eschews the slurs, who does not seek to make political misuse of subject-matter prejudices, of the wide attention given to the nuts.

Mine in fact is the centrist position and I am known in the field as the conservative in it, as in fact I am with regard to the work and its meaning.

I think that with an opportunity to get some of this in the tyoical and omnipresent nastiness of government counsel can kick back with some impact on the court, particularly with the significance of the new evidence that was withheld and the character of the curbstone situation today. Gemberling left nothing of their integrity and their failure to be honest about the missing spectro plate underscores it heavily.

I want to give this a perspective. You may take it as a pep talk but I do not so intend it.

We go back to Footnote 5 in the original panel decision, Kaufman and Bazelon. It directed us to explore any questions of any kind of FBI hanky-panky. We laid a basis for that and the court made what we regarded as proper response. Subsequent disclosures more than justified our presentations to the courts and that footnote. We made some disclosures, the Congress made others, sometimes based on my earlier work. Both Houses have stated what we understated, that the FBI withhled essential information. Since then also we have had some if still incomplete Cointelpro disclosures. We now know, for example, that the FBI filed my information requests under "internal security," of all things and self-disclosures!

That in the end we prevailed and that in the end we influenced the Congress represents an unsual but thereby even more significant demonstration of the American system of self-government in operation. Change was needed; change was made.

Now all over again we are confronted with the same obduracy, the same misrepresentations, the same determination to withhold what cannot properly be withheld. The differences are that now it is more arrogant, more clearly outside the law, more certaibly motived at least in part by fear of serious embarrassment.

Now it becones clear contempt of the laws of the land and the courts before which you will be. This extends to counsel, which characterized minimal consultation with existing records to conform with the mandate as burdensome. Searches in FBI files require requests in writing. Therefore there was no burden at all and this is a kind of fraud upon the court. Both courts, but emphasize this one.

A vaughn v Rosen inventory is burdensome but must be made when ordered. Paying taxes is burdensome but necessary. There are burdensome needs but the one they made claim to is non-existent and directly confronts this court with what I regard as contempt and I would like you to be able to get this before them.

I recall no proof offered for the record at any stage attesting to the burdensome nature of making a xerox and none will be made. There was no appeal from the mandate.

Instead, once again, they stonewalled and are immune, succeeding in the original purpose of more than a decade ago.

This represents the totally unacceptable, for us and for the court and it gets right to the mandate and contempt for it. It also gets to the heart of the Actand the continuing official campaign to kill as much of the Act as possible. The reality is reflected in a number of this court's decisions.

This is a unique case with a unique history. It today provides still another unique opportunity for us, particularly for you because it is your legal work that is responsible for what led to the 1974 amending.

While I have no doubt that you intend to meet this opportunity/obligation I want to remind you of the ordor history and how developments added to it and the means by which we were able to achieve what we did. It was by vigor, enough vigor to inspire Footnote 5.

This does not mean disrespectfulness. But it does mean firmness in the fact of any adversarial, Pratt-like pose by any member of the panel or any such questioning. This is consistent with my instinctive thinking, that the way to address any and all of these is to turn them back on the Government which has not only failed to meet its burden of proof but has failed to meet the minimal requirements of a competent affidavit by its only affiant - the self-contradictor Hilty.

The FBI and its compliant counsel have forced the Government into a very bad position as a matter of law and one that histprically already makes this a very significant case in which we have built a very significant record, one of great historical importance.

We are now going to add to this, I am confident. I'm thinking ahead to a remand and what our first steps are to be. I think a Vaughn v. Rosen covering each and every FBI component - anywhere and including copies of all index cards anywhere.

Accompanied by a request for fees and costs

I'm not going into the full potential of a remand now. It is stupendous.