

Dear Jim,

1/12/85

Hopefully the antibiotic is begining to "take hold," as the locals say, because last night I got four uninterrupted hours of sleep for the first time in a week. I'd barely gotten to sleep when the coughing got me up, but only that once. I might have gotten a little more than four if the wind had not sucked most of the fire out of the stove so I've stayed up to build it up for -il before my morning therapy. As I sat and thought my mind turned to the en banc petition and to the one you sent me on the homosexual case, which I finished after last night's note to you. It fortifies what I'd thought earlier, in general and about this specific case.

I have no way of knowing how the traditionalist minority has done in other cases as panelists but their en banc dissents have been excellent and aside from their thinking as responsible judges they are doing as I say we (others) must do, saying what must be said and making a record for history. Something you history majors and professionals do not have in mind often enough. Like war, can't be left to the generals.

They would really have been armed and could and I believe would have had a much more powerful legal indictment of the Reaganite activists if there had been a good lawlerly preparation of what I said. And that would have been drawn together as I did not, really could not do. Too tired and weak, so + let the draft got to be sure something got filed.

The embittered Wilkey and the activist Scalia and the timid Wald were much more careless and much less judicial in their decision. They are in sharp contradiction of all earlier cases in search, aside from the many other considerations, and on that alone they'd have clobbered the activist majority. I have not entirely abandoned hope that they still might, but it will ~~xxx~~ be much more difficult for them and therefore much less likely. The chances would have been better, too, if there had been a lawyer's argument about judicial legislation.

Lynch, who has remained totally silent, was intimidated and afraid, or he'd have seen this. I do not know what is in his mind, but I remain convinced that to a degree embarrassment figures in it because as I told you, all the things, factual matters, I wanted him to include when he had more than 30 additional pages of space he didn't use, are what the activists did not have in front of them and misused. They might well have done as they did, but 1) Lynch made it easier for them and 2) the briefing is lacking for the minority of judgeliike judges to use. This may be more of a problem than the shortcomings of what I did. The judges who might want to do something would have to do first the work that Lynch did not do in his briefing.

Given the political situation in the appeals court now, a real lawyer's argument of the perjury case would have prepared the decent minority to tee off on that, and even if they'd have remained a minority and the petition had been rejected, what good that could have done in other cases and for the future before the same court.

Nothing is more crippling than fear and nothing helps reaction more. As I remind you often, Santayana was correct, if you don't remember the past expect to relive it.

And although I said that no lawyer could hope to survive doing what + did, that isn't so. Rather is it two other things, first, that no lawyer afraid to do it or unwilling to do the work required would jeopardize himself, and no lawyer feeling and thinking this way could hope to succeed. I was certain that Lynch not only would refuse to think this way and was self-intimidated but from what he refused to do in his briefing would have seriously inhibited him if he'd tried to.

Try to think about this and not negatively, not discouraged. Take, for example, what he could have done on burdensomeness, given my age, health, financial situation and the truly enormous amount of information I had already provided, and the total lack of attestation to any need for discovery. This alone required a lawyer who is a true adversary to get eloquent and emotional, and there is a proper place in briefing, as before juries, for emotion. It is, as Ecclesiastes says, true that there is a time and a place for everything, and in terms of what I've referred to as intellectual judo, this was that time and place. More in context. This is not a military homosexual case, with the special kinds of prejudices built in. This is a designated historical case, the most subversive of crimes, and the most basic withholdings of what the attorney general himself required maximum possible disclosure.

On specifics, think now what the situation would be if Lynch had included the half dozen of so specifics I gave him and asked him to use. What you've just gotten on the Hosty flap in Mark's case and what Huff just wrote me about the police broadcast recording. How powerful! And how seriously embarrassing to the activists who despite their hard front are subject to embarrassment, especially among their peers. And how significant just these two things are in terms of the utter falsity of any claim to need discovery, with what provided and was ignored!

It is getting toward the time when I can safely leave for the therapy and I must work on the fire more so I'll let this wait and probably end here. I doubt I'll think about it during the therapy because I'll be taking the paper for use in my rest periods and when I get home there will be other things.

What I'm really addressing is not so much this case as what fear makes more possible, how it helps reaction, how it is self-defeating.

Think, too, how academic thinking combined with timidity and self-defeating fear wrecked what Hitchcock could have done for you if he had argued Stanton, as I tried to get Lynch to do and tried to get you to get him to do. There was not much I could do with it but there was so much that a lawyer, representing a lawyer and all lawyers, could and should have done! And as a wise, informed, knowing and understanding lawyer would have done on his own.

All of you people must learn not to be defensive or you assure your defeat. This is always true and it is much more so in today's climate. As I've been trying to get you to see for years, with my story about Foch at the Marne. I think him and there!

You people make a Merlin of me, but I do not remember the future - I remember the past. And if I can, anybody willing can.

AT or after therapy: This card in today's mail from Les Whitten: "Dear Hal, It is well done, better than the lawyers do - - you'd have made one in the C. Darrow style. But I can't crank a column item out of it. And it is probably not much help to you for me to stand on the sidelines and cheer one who is hanging in there longer than the effete Eastern snob who is undersigned, Best ..."

Best from me, too.