12/10/70

Dear Bud,

As you know, I am not now able to do much typing, so what I can prepare for the appeal in 2301-70 cannot be as long as I might perhaps like. Also, I am not familiar with appeals prodcdures, so I may have in mind what is not recognized as proper. In fact, I would go so far as to suggest that with this law trying to extend what is proper may be a good idea.

You said that the Government's factual error is one thing that is important. I begin with such an extension, the fact that they were never once truthful in this or the preceeding case, and in the latter case I have already done enough of this in the papers I filed with Curran and the letters I wrote him and Mitchell, all of which you have. Not a single letter is truthful, not a single representation to the court is factually correct, and Hardley himself, alone, in writing, gave three different versions on one point, the file envelope. Kleindienst's repeated lie is notorious. It is not just in 2301-70 that they began lying. With this law and on this subject, they never tell the truth, going back for years. For example, Vinson told me they were then revising the Ferrie material to see what could be released (you have the letter ) and the Archives said this wasn't so (again, you have the letter).

I have lready given you memos on their factual error in the papers they filed. I think the deliberate falsehood in the Williams affidavit can be treated as what fixed the judge's mind. He said he had read some of the exhibits, so let us assume this to be one he did read.

When they say this kind of thing is never made public, and it is notorious how the FBI "leaks" to the press, I'd attach a stat of that page of Curry's book, with the Hoover letter addressed to him. They went further, and said they allowed use only inside and then on a "need-to-know" basis.

Whether or not the spectrum can be defined as "investigatory files", and you know I believe they cannot be, you also know and I presume remember that there was not and could not have been any such purpose in this case, especially not in the period of the Warren Commission (gentle ridicule of Hardig's argument here would be appropriate). Jeanneau's language on signing, that the whim of public officials couldn't control, can now be augmented in what I told you Tuesday was in the appeals-court hearing on the Sierra Club suit case. There was no showing on any determination of "national interest" by Hardig, the determination be attributed to Mitchell, and this is exactly what, in the President's own words, the law is properly designed to prevent. In the Post's story, Judge Francis L. Van Dusen (3rd circuit)"warned", in Unger's words, "No one is above the law, including the President." I doubt if Justice will argue in public that Mitchell is above the President.

With the motion the Government's, I think it was wrong for the Judge to let Hardig go last. He had the affirmative responsibility of establishin his case, not refuting your argument against what he hadn't yet said.

Your agreement to go along with the time-restriction Sirica imposed (bottom 2) was predicated on the assumption"that you have read the material that is submitted). I some of us caught it when he spoke as he did, but the judge's words are to the contrary, "I have had an opportunity to read the motion in the complaint and some of the exhibits."

On investigatory file, I believe Mallhorn can be interpreted as drawing a distinction between scientific tests and investigatory files.

I believe the cases cited in their papers are all mis-cited.

Perhaps as a matter of curiosity, it was okay for the judge to ask why I

want the spectros, but was we discussed, this is none of his business under the law. Everything is specific on this point: any citizen has the right to any public information for any reason or no reason. This is the one question the judge asked. If he were going to ask any, it should have addressed the factual error you had already indicated in the argument re Williams, if not in the papers he hadn't read, which do specify the factual error repeated in the courtroom.

Werdig's opening argument(11) is in direct conflict with the sworn "need-to-know" falsehood, I think perjury at least in intent, of the Williams affidavit. Werdig says"...we must recognize that the exemptions which are contained in the act are in part discretionary exemptions", to which he adds that "the administrative party may make a determination whether the information sought should not be released because of national security". If this is recognized, then the law is not, for there is no such provision in the law. It is here that he adds the grevous error, "but I believe the President's comments say national interest as well". Here I think I would devote some time to the exact quotation, which means and says exactly the opposite, as he should have known, and to the buttressing of it in Clark's language.

Lower on the page, worthy of special ridicule is the legally specious argument "...there must be some law enforcement purpose to be served by the FBI investigating a cold-blooded murder of an American president". Were there such a law-enforcement purpose, which there was not, it was incumbent upon him to show the law, cite it. As one of the memos I gave you shows, this was not an FBI investigation but the FBI was acting as part of the Warren Commission, which had no such purposes or powers. It is for others that the FBI did the investigating it did-all of it - first for the President, then for the Warren Commission, as Hoover's own testimony shows with respect to both. His argument at the bottom of this page and the top of 12 is particularly worthy of ridicule, "...that there wasn't any law, natural or human, to our basic society that wasn't violated before." 5 U.S.C.552 is not concerned with what Werdig may conceive as "natural" law or "human" law, and the FBI desire to hide its own error is not "our basic society". Moreover, there are many local laws that are regularly violated, but they are not properly the basis for federal xxxxx investigations and do not impart the federal right to suppress.

His next argument is that I am not Oswald. The language of the law says that if Oswald had been entitled to the information, everyone else is.

His crack about you representing Ray at the bottom of the page is a nastiness that should be noted, its purpose being to tell the judge this is nothing but an anti-government troublemaker here having chased another ambulance for the purpose. In any event, you do not represent Ray in any action against the federal government but in a purely State matter and that case came to you after you filed this one.

If, as I think, you want to argue the real reason is to hide the error in the Warren Report and the FBI's work, which made the error or made it possible, the top of 13 provides such a ripe point, where he argued, ",. .that even if the FBI had made these spectrographic analyses (if they didn't, what the hell was he doing there?), even Mr. Oswald would not have been entitled to them had they not been introduced into evidence." Canales took a different position, and I presume Canales was right. He said such things may not be withheld from a defendant. However, the point where I think you can argue the intent to suppress is here because the spectros were basic to all the conclusions of the Warren Commission. They were in paraphrase introduced into evidence as an exhibit and they are in the FBI testimony in paraphrase. With no criminal proceeding, this was the closest equivalent, and they were used against Oswald and his heirs, if not the country. You might here want to use his "national interest" argumentin the proper way, that national interest requires complete disclosure of fact that does not fall within the purview of the specific exemptions provided for such purposes.

His argument at the bottom of 14, which is ridiculous, may also have been countered in the Sierra case before you finish this. The question is not as in Grumman, which was not under this law. When he says he knows that "scientific and factual papers are predisposable" and he says "I am fully aware of the exemption", he has to know there is no such provision in the exemption that permits the withholding of either category of papers, and he is lying to the judge.

To me this entire thing is an exercise in extra-legality, in authoritarianism. Lawyers have a way of accommodating themselves to such things, without which there would be less for lawyers to be busy with. Perhaps most writers also have. But I think otherwise and I would like the brief to be a strong attack on just this, and in the spare spirit and language of the law, which is on the points we raised quite specific and our way.

Today is the last of my now-scheduled treatments on the arm. Its progress seems slow to me, so there may be more trips on it. Whether or not there are, I can come in almost any time you might want and I would like to read the draft.

Sincerely,