Dear Bud,

Happy anniversary?

Jim send me a copy of the government's motion for extension of time for rehearing and "suggestion" for rehearing en banc. It just came and I've read it. I write in haste because we will be going out and I hope near a mail box. I'd like you to have this Monday.

I know that in the work I've been doing it is a curse not to have legal training. However, sometimes I also feel it is a benefit. Those of you who practise the law are too close to the technicalities and have adjusted to its essential corruption. This is another way of saying I think you may have missed something from what Jim told me of the discussion he, you and Bob had. It also is a way of saying I know I can be quite wrong.

I will use some of the language of this contraption styled a "motion" and address it.

"This case presents important questions concerning the scope of the investigatory files exemption to the Freedom of Information Act..."

Bullshit! And I don't want to be in the position of in any way conceding it. The only relevance of this exemption at this point is has the government met the burden of proving its relevance. It has not. Neither the court of appeals as a panel nor en banc, it seems to me, is the forum for this. More, in the footnore nobody seems to have paid attention to, the panel invites me to eviscerate the government on precisely the fiction Sirica accepted, the Williams affidavit. It goes out of its way to do this. It is the only basis for alleging the exemption even might be relevant. Asked by you to cite the law that was being enforced, the government failed to and could not.

So, they are engaging in propaganda and trickery I cannot accept, pretending they have already established the applicability of the exemption to what I seek and pretending further that there is some question of "scope". As both fact and law this is not a question, now or in the past. The sole question is of applicability of the exemption at all. The government knew this, had the opportunity to prove it and the burden, according to the Supreme Court in Mink as well as in the statute. The place to establish applicability is in federal court, not federal appeals court, or am I wrong? If I am right, then the opportunity is again presented by the order remanding and the rehearing or the en banc hearing is not the right place.

The government has never met the burden of proving that a) what I seek is part of an investigatory file rather than a simple, non-secret scientific test and b)if part of an investigatory file, then part of a file as defined in the law, one exclusive for law-enforcement purposes. It was not, Hoover's testimony on this was never challenegd, and even by indirection I do not want to be in the position of seeming to admit it. I think some kind of answer giving the court of appeals a clean shot at Hoover's testimony is not only called for but at this point but invited, unless there is some legal exclusion by a technicality. Hoover is explicit:no law-enforcement purpose or jurisdiction. Let them contend with his ghost and let the court have this without distraction. I think they made a serious mistake not to go directly to the Supreme Court. This gives us a chance to emphasize exactly what Whizzer White went into in Mink, contrivance instead of proof. I have marked the Mink language, emphasized and re-emphasized in that decision, for when we meet on this.

"...consultation with the Federal Bureau of Investigation to determine the extent of the impact upon this Bureau of this Court's decision..."

More bullshit and a bit of terror tactics. There is and can be NO "impact" on any proper Bureau function. In alleging this there are many possibilities, the one I tend to favor being the frontal assault on the Williams affidavit the panels seems to be asking of me and the one I gave you in writing when I first saw it. If it is not perjury and the subornation of perjury, it is gross and deliberate deception, and alleging it here and now

can have distinct legal and political advantages, if not in the press.

1. You may want to go directly to the Supreme Court and if you do you will have narrowed the issues to what Mink addresses, directly and explicitly and inherently. With what I think is the worst that could then happen, we'd go back and start again. But this gives the chance to establish fraud and criminality in attempting that fraud by the government. When I showed you the Jevons affidavit you agreed. This duplicates that. What better perspective for the entire story of the entire investigation of the assassination?

2. You were gentle with Sirica, but with any vision at all and without casting himself in the role as a government adjunct, he should have recognized, as the appeals court surely did, that all the allegations of applicability of the exemption are spurious if not worse. If you go into this now and we ever get back to him, in alleging this now we get him off the hook. Or, here is the time and the place for the strong language. Polite and lawyer-like but unequivocal. No ranting and raving but surgical directness and pointedness. Besides, maybe some of what Sirica said in the Watergate trial is sincere. If so, this could turn him on as well as ease his position, which also means improving ours because he has taken a position. It is much better for us to go back to him with him the position of having been had by feds. Otherwise we'll be in the position of calling him not less than an ignoramus and a fool, which is not good law/politics, is it?

3. An affidavit is not enough. Mink goes into this. Not only is an affidavit not enough (I think it says "mere affidavit") but this affidavit is utterly irrelevant.

I think the way to address this is by providing a xerox of an adequate description of a spectrographic analysis and bracketing it with each and every one of the utterly spurious Williams claims. I really think we here have the opportunity of what I did years ago, when I got a HUAC agent convicted. We can come close by using the opening they have given us and focusing. This is really an imposition on all courts and the most sterile should resent it. Or, Lay on MacFensterwald!

This again presupposes what is false and obligatory, that the government has established the applicability of the exemption. Until it does that, the best that can be said for any hoked-up claim of "impact" on the FBI is that it is, before this court, premature. The place for that is where we were and where this court has sent the case. If they are serious, then they must do as this decision directs. That is one of the purposes of the decision and until they establish applicability, they can't allege it and we can't even by direction concede it. Accepting this is agreeing by indirection. Legally and politically this would be very bad and crippling elsewhere. So, I would like to talk to you about how we oppose this motion.

I do think that by limiting it this way and with the attachments we can use, it can be sharp and clear and with the panel we have, if they rule, exactly what they asked for. I think if you reread their decision with Mink in mind you may decide they had a reason for the long delay. I told Jim then I thought it was political, not legal.

If there can be or is a legal basis for what I propose, they may have delivered themselves to us on the altar. Sharpen that legal knife, friend. The throat is exposed and waits.

I note they seem to have taken this entirely out of the hands of the U.S.Attorney, unless Fleischer is one. Isn't Stein new in this?

If you think other things should be included, like their not addressing our claim that under American Mail they waived by use, fine. Oh, yes, the inside the government and on a need-to-know might call for the inclusion of a xerox of Curry! Perjury? I have in mind a terse, bare-bones thing as hard as you think tolerable and I think at this point it will be rather well received. Reread Footnote 5, please. We really should get together on this. I can be there any day except Wednesday by 10, earlier if necessary, and can stay as long as necessary, if I hate to think of the cost of a cab for Lil. Or at night.

Sincerely,

I simplify their present position and argument:
we don't have to comply with the law and are
asking you to tell us we don't have to. No court should make us comply with the law, either. If they are serious, they have to go back to Sirica and would welcome it.