Dear Jim, 4/2?/74

Because it is necessary to give you a caution, to be certain on your own of what follows, I'd best begin by saying there is nothing to be concerned about, so don't be.

I am intermittently in some pain. It was bad enough for me to go to the hospital last night but it appears to be from something unusual and entirely muscular or neurological. Bed was the most painful place but I was under injunction to stay there, so I spent much of the night stifling the sounds of spasms of pain so Lil would be able to get some sleep. I awakened with it yesterday morning. It was not bad and didn't get bad until after you phoned me last evening. But at the hospital the testing for all the other causes shows up good except for blood pressure, which is elevated for the first time in my life. I was told that could be attributed to concern over the condition. And I am much less uncomfortable standing and sitting at the typewriter than in any other position I've tried. Reclining is worst, so the prospect for rest is not good! I will be getting in touch with GHA for a thorough checkup. Last night's included X-rays and cardiogram and blood.

However, my mind is a bit fuzzy, clear on some things but void on others. I can't find the notes I made while sitting and reading the Defendant's Memorandum and the Rankin affidavit, for example. This and the fatigue from an uncomfortable, sleepless night are the reason for beginning with the caution. By the time you get here I am hopeful this will have eased some if not entirely.

I have done some further checking and before I left for the hospital, on the off chance that there might be something serious, I left my file of executive sessions aside for you with the key one out of sequence, on the top. It is the one I mentioned, I think of 12/16/74. It is the first formal and official one, although several were held earlier. Warren had Stanley Reed there to administer the oaths. At that time they had not had the transcripts of the earlier sessions typed up. It is the session at which they decided to hired Ward & Paul. I think if you read the first 10 pages you'll get all you need. I've gone through the rest and it is not pertinent to your present needs.

They are concerned about security, in two areas: leaks and materials from others which is classified. With State and the military certain to be included, this is not unreasonable. There is mention of Top Secret, but only in connection with this and of the staff, which they expect to come from agencies that will bear the cost, and that to have the requisite clearances. Russell points out that Ward & Paul's people, who take the Military Affairs session, have such clearances and there has never been a leak, a second emphasis on leaks. There is no mention of "national security." And the only specific mention of anyone on the staff who is to be TOP SECRET is on the one in charge of the files. Earlier in the transcript you will find, as I told you, that this person was already assigned by the Archives. They were in charge of the files from before the official organization of the Commission. (It is good to find that my recollections on details after all these years is this dependable!)

Where there would have to be the official decision to classify the transcripts there is not even mention of it. In the discussion of the form and of the taking of verbatims, not even a suggestion of classification of any kind.

As I told you, this was eight days after Rankin became chief counsel. He is listed on the appearances and although these transcripts were typed up much later - none of the earlier ones had been delivered by this date - it is nowhere classified by the WC.

You will also note that there is formal offering of motions and formal voting on all actions, beginning with the decision to rent offices. There is none on classification. There is on hiring W & P. And this is the very last transcript not by Ward and Paul. Rankin there.

Nowhere is there mention or even suggestion of 11052 or any other executive order other than the one establishing the Commission. There is discussion of the need of subpena power.

It is my belief that the results of perjury are intended whether or not the crime is actually committed in Rankin's affidavit. As I allege in the affidavit, for him to have received the order he claims to have received, it would have had to have been by a formal action and that could have been at this session only because the next one is by Ward & Paul and is TOP SECRET. The question was raised in some form several times and there was no decision, not even a hint, that they had the right under the executive order or that they were taking it, whether or not they had the right.

If you can make the allegations I have suggested above and prior to this, a firm but not antagonistic to Gessell attack on this whole affair, the only way they can avoid his wondering if Rankin did perjure himself is for them to produce Warren to swear that outside the formal processes and without regard for the Commission, he gave the instruction. That will still be other than Rankin swore to.

Perjury or not, I see no doubt of their intention, to deceive the judge. (This is why I had some of the history in the first draft of my first affidavit in this case.)

Unless I make a trip to Washington on Tuesday it will not be possible to include this in the draft I sent you. I did not receive these papers until noon yesterday so I did not know what I have to address except in general because I had not spotted the intricacies of their language from hearing it.

Not bear in mind that Rankin is a former solicitor general, so he knew the law and its requirements. Warren was Chief Justice. All the others were both lawyers and experienced in government in the highest and most secure areas, yet not one offered such a motion. Take Dulles, for example. Former head of the CIA. Yet he offered no resolution.

Their real concern from the first was leaking, and there is no executive order on that. One of the two occasions to which I referred earlier, it was no more than the members not wanting others to know the opinions they expressed. And that are not reclassified. I have them.

You will recall the point I made on their using (b)(6) only on the early withheld transcripts. Well, first of all, the Commission was then not organized so anything there is legally meaningless except possible as intent. Now in this one, the first of formal existence, pages 23-32 are withheld and the reason given is (b)(6). It is valid unless Marion Johnson lied. He has a slip sheet saying the pages are withheld because they deal with personnel matters. Or, not what is relevant in this suit.

As I had suspected I find to be the case. Rhoads is the wrong man to have provided the affidavit. There was a reason, to keep Johnson out of a perjury situation. We should move on this, formally. Johnson is the man who did go over the executive session transcripts. I told you his is the handwriting and the initialling where declassification is stamped and filled in. Now I find confirmation that he is the one who decided to withhold. So, I think we should move to hear from him. His is the first-hand knowledge, not Rhoads'. He shakes when he sees me. And he drafts what Rhoads swears to. I have had him admit this and in the past warned him it included the perjurious.

About four hours from now, when you are or normally would be awake, I may phone to discuss this, but I want to keep you in the clear, where if Gessell gets irate he can't take it out on you, while strengthening that part of my affidavit. I went to change it to include the charge of deliberate deception of the judge in an effort to defraud me. The only way Rankin can escape is as above. This is the session he refers to and it is not there. Again I would not include the actual pages, but if I feel better or if I can find someone other than Hil to run the machine I'll have the pages waiting for you. I think our "game plan" should be to keep them having to produce, the ancient way of this ancient devil with the love of scripture! We can thus make a case that really should have Gessell climbing walls, confronting delibe ate misrepresentation to him. I think you might cons

sider an affidavit of your own on two things only: Ayan's telling you that he knows nothing and merely says that he is told to say (a lawyer has greater responsibility and does owe obligations to the court); and his answer that I'd suspected in asking you to ask him which amendment to the executive order he was referring to. The answer was no surprise: none. This also became fraud on the court. They never made any other reference except 10501 as amended. It is not in 10501 and who has the capability of checking all the possible amendments after two decades?

Thus I had suggested this as a discovery item, expecting it to be non-existent.

We've got 'em pretty well figured.

I think I mentioned these things but take no chance. Importantly, let them continue that they have "fully" complied with the judge's order when they don't address it and misrepresent what they do address.

Grad 2, bit hurt at the claim that "as to the subject matter" the Commission "plainly has the authority to classify under 11501 for it did not. More, they do not even allege the existence of proof. As of my request, 11652 did not exist and was irrelevant if that be the right under 11501. They did not exercise it under 11501, and I think this is important. Johnson, when he makes reference at all, refers only to 5 U.S.C. 552. This is a retrospective improvisation. Our complaint exhibit C confirms, as I recall. They did not invoke 11501, as I recall, until now.

But if the claim the "plain" authority, we are the court an opinion to direct quotation. And should ask for it.

Rankin: because the very first of the word around transcripts is classified TOP SECRET and the one I seek is but six days later, he has to have had his authority during these six days and he can't be referring to only the session of 12/16, the only one before the first [illegible] P. And it may even discuss the vacation and the reconvening of Congress (four members on Commission). It would be no trick for the judge to read and see for himself that there is no invocation of 11652, but I would not open with this. Let them misquote or misrepresent once.

He even tightens the noose in the first words of 2. "As agreed to by the Commission." This means a formal act. But it also seems to say that he started it, not they. But what he attaches is not what he says it is. It does not in the first letter request that WCP classify. At most it agrees to their proposal, referred to in what I wrote yesterday.

The only possibility of that formal act is in the 12/16/63 transcript and you will see it is not there.

After you get whatever you decide to do done, would you consider it might be helpful if you agree that this is gross and deliberate deception that borders on the criminal if it is not criminal to discuss it with Plesser? Might there be something in this for them?

This is all off the top of my head. I hope I have forgotten nothing. I do think that if we use the proper approach, we can swing this and hear some Cosellian roars at dishonest government and government lawyers.

It certainly gives material facts that are in dispute that should require a hearing.

And we should insist that Johnson be there and be questioned. He is more likely to commit perjury for himself than for himself. And then Gesell will see why Rhoads' affidavit was drafted as it was.

Lastly,