

PH, JW

6/15/71

Bud, Jim - memo on possible error in Gesell's decision.

I had time to consider some of the aspects on the way home, especially because a traffic jam provided ample time, and if it seems strange, considering that the judge dismissed the case, I think it will turn out to be a victory, depending on what I can do with it. I do have some plans of which you will eventually learn. I'll think a bit more.

The point at which the judge cut me off could not have been more relevant to his decision. It is an Archives regulation saying that even if the material sought is exempt, unless overwhelming national need or public policy or something like that compels, it ought not be restricted.

He admitted the only evidence on sensational or undignified use from me. Werdig never addressed it. Therefore, my testimony is unchallenged, that what I seek is not susceptible of such use. You may recall that when I read ~~only~~ the first part of that paragraph he said I'd left something out. I said I'd return to it, and I did. This does indicate Jim's perceptiveness in advance of the hearing when he told me he felt it would turn on that contract. However, when he said something was omitted, instead of answering, knowing what it was, I asked him what, and he said it, and I said that was the only reservation and it didn't apply. So, he found against the only evidence. There was none on the other side, in court or in pleadings prior to hearing. You will recall I went into my challenges, to show what other than of this kind could be made of what is available, and showed him the published pictures, and to show how what I asked could possibly be used for such purposes. I have no idea of what the law is, but I do know he did find against 100% of the entirely unchallenged evidence, which tends to confirm another of Jim's observations, that he had made up his mind in advance.

I think he erred in cutting me off and not letting me cite the three Court of Appeals decisions in that jurisdiction. I think that American Mail in particular is in point on this and on his decision, for it says any use waives all exemption rights.

Other things Jim and I discussed briefly, like failure to recognize the prior and unchanging character of what is sought as evidence. It is so described in that contract.

I think he erred in saying he had jurisdiction only under 5 U.S.C. 552 and then reaching a decision outside it. It is clear that he can't do both, and if he held hearing at all he disqualified his own decision. There is no possible provision for it under 5 U.S.C. 552. For him to reach ~~his~~ decision he had to say he had no jurisdiction and throw the case out or find for me, my first argument, that only the exemptions permit any withholding and none was invoked. He was quite specific in saying that under 5 U.S.C. 552 is the only means by which he could have jurisdiction.

He also ruled that I met the other prerequisite of the contract, that I am without doubt a serious scholar, which further narrows what need be argued on appeal.

The argument by Eerdig was so limited and brief I really felt something had gone on behind the scenes. Jim's is a possibly acceptable explanation, that they expected to lose, but with all the crap they alleged in their pleadings, to back down on all but this one thing is, to me, incredible. They could and should have argued jurisdiction, as they did in their Answer, which, in the light of his decision, makes it hard to accept Jim's explanation without question. Now, when of all things, all he had out was the contract, and with that he was quite familiar, I find myself wondering again, not so much about him as about his clerk. But if one were to wonder about him, one could postulate that with all the recent defisions against the government, he might have been looking for one for them. In any event, I feel strongly that his decision is precluded by the law. If I get any other ideas, I'll not them so we can take them up in the future.

HW