

Dear Jim: The Constitutional Issues; the precedents; Bud's fucking up 11/28/74

This also I will not mail until after you have completed and mailed the papers because what was supposed to have been first and it was agreed when you were in Carbondale on 10/13 would be first now has to be last. The filings now must take precedent and with that your uninterrupted capability of tending to it. Also untroubled as much as our circumstances permit.

The last thing I checked with Bill before leaving for the airport 10/16 was were the agreed-to motions prepared. He said based on an ACLU model and he personally had put them in Bud's bag. He also said, as Ehke later did, that he found no decision. Well, there are two. Two from which I have appropriate direct quotes.

Bud would not discuss this in Memphis. Later, he said. But we had agreed to and should have opened with them. You say you will file them when you can. Now this is all you can do. You were and you are powerless in the matter.

You saw the strength of my feeling with Ehke and after I got angry I never discussed that with him again. My strong resentment was not at disagreement. It was at refusing to consider, even listen or respond. Added to Bud and what it now turns out the relevancies are, it was a bit too much.

We had the heavy meal at midday so when we returned I decided to finish Peter Schrag's book on the Ellsberg case, Test of Loyalty. I've one chapter to go.

Checking the NYTimes index would have disclosed what the law books did not. You and I had no time for that. Others did. Bud could and should have had it done beginning the 14th when his books showed no decision.

On the stay, once the surveillance was discovered, Douglas held a hearing and phoned his decision on the stay to the clerk. This is an excerpt from Schrag's excerpt:

"The constitutional right...pressed here is the right to counsel guaranteed by the Sixth Amendment. The guarantee obviously involves the right to keep the confidences of the client from the ear of government, which these days seeks to learn more and more of the affairs of men." (p.212)

Burger polled the court. While Griswold held it would be unprecedented and improper, the polled court declined to convene, thus supporting the stay. (p.213)

Almost everything Byrne said and almost everything the State did to us is as though both were seeking to accommodate. Schrag's chapter Watergate West (pp. 329) has this. And in dismissing his language suits us perfectly. I've marked some of the apt quotations in my copy.

Byrne's demands for information included "any non-official agency." (P.356)

Quotations from Boudin's arguments (we should speak to him, as I think you suggested) begin on p. 345. Lengthy quotations from Byrne's decision begin on p. 352. And it boils down to what Bill and Bud agreed to in my word, irremedial. "At one point, "...precludes the fair dispassionate resolution..."

If anyone argues the difference between a trial and a hearing my belief is the distinction in this case, if legally there is one, is without meaning. Byrne said there was no precedent, Boudin said that as a federal judge he could rule ~~hence~~ on what is before him, Byrne agreed and did and set the precedent, whether or not it is printed in the books. Especially with the 6th circuit's mandate was this all very much in point, too.

I can't explain Bud on this and I'm not going to try. We ~~needed~~ <sup>could</sup> like hell, <sup>while</sup> he was living it up and got the basis. We had the facts, all we needed, and got more. If Bud hadn't kept me from Jimmy for 2 1/2 years we'd have had a hell of a lot more, too. Anyway, I yad it all figured out before they got here. I tried to get Bud to come twice because I was still preparing for the hearing, once for this alone and once for the hearing. They came once, Sunday. In short, he had nothing to do except put the simple thing in simple form. The work, the evidence, the thinking, had all been done and was correct. All he had to do was do it. Instead he copped out again.

In my view this is much worse - a much stronger case - that Ellsberg.

As I'm sure you know we'd agreed before you returned on two approaches. I do not recall whether Bill said they should be incorporated in one or more than one motion. I don't hope you will now be thorough as soon as you file your papers and have Jimmy's affidavit. And in this case let us see to it that there are no problems by holding a press conference as soon as the motions are filed. We have never done it. This is an appropriate time. Once the papers have had time to reach their destination.

We were to have moved on all surveillance on the defense team, current, and all intrusions into Jimmy's communication with counsel and the judge in the past and present. I knew his mail was being opened outside his presence before Memphis.

With both we have proofs.

This alone is pretty hard for me to take without all the personal stuff that goes with it. I'm not interested in the state of Bud's mind. Bill has to know the realities of this. If not they should be spelled out. I don't think they have to be. He saw it immediately when he was here and knows we got more. If he considered it had to be done before we got this more....

I have two suggestions in addition to make. One is that if Kellie turns us down on this we go right to 6th circuit on it alone. Which is to say separately.

and the other is to persuade Dub what the realities of his situation are with this endless fucking up and endless ego-tripping and endless self-indulgences.

I've had it. I'm not taking any more from him and I'm not going to stay silent indefinitely over his at best incompetence and at worst gross negligence.

You are going to be tired once you file Saturday. As soon as you are not too tired thereafter we should get together. You can have my copy of the book. With phone calls Bud can get the transcript of what Byrne said, if he wants it. The NYTimes may have it all. And I'm sure Moudin does. I can't say when or if I can get to DC the 4th. I have to be at a Rockville trial that a.s. and don't know how long it will last. I can give you the book there but I ~~don't~~ don't now know which courtroom.

While I haven't thought through what can be in Bud's mind except resentment and a sick way of expressing it, this suddenly tells me he's nuts not to know that I know and have the workup I gave him and that I'd be doing more once he didn't. Or, he's nuts.

Glad I ate too much or I'd have delayed it!

Disgustedly,