

Mr. Bernard Fensterwald
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2/26/85

Dear Bud,

With the break in the weather I've been able to do a bit more outside but not much at a time, so after each relatively slight exertion I sit and rest and when I do I have time to think, a luxury that from my experience with lawyers they do not seem to enjoy. I also find, oddly, that the slight upper-body exercise of typing appears to help recuperation.

With the passing of time I think more and more of the appeals court situation and my pro se en banc petition because I've not heard from the court. Yet it rejected the DJ/FBI petition in the Shaw case promptly. And that was filed after mine. I twice exceeded the page limitation and once was late, yet nothing has been rejected at least as of today's mail. I therefore am inclined to believe that I may have succeeded in my minimum objective, to have what I filed considered en banc. I believed when I did it that I was providing those I regard as the traditionalist judges with what they could use, without the problems connected with such issues as homosexuality in the military. To the degree it is possible to file what the Brooks and Scalias of the court cannot do anything about I believe I've done that, too. Time will tell.

As I think of the possibilities within my limitations they are that I can still be rejected; that the traditionalist minority will remain a minority in this matter (with or without a strong dissent that can embarrass the activist/political judges); and that the court en banc may overturn the panel and remand for any of a number of matters to be resolved.

Because of the conflict created between Jim and me I've not let him know anything in advance but I did inform him after each thing I did. I have also written him several times about what I could see happening and what I might want to do under some circumstances. I know that he was to leave the country a week ago Saturday and I think he said for a week. If he is back or when he returns I'm sure he'll be both busy and tired and not be able to spend much if any time on what I've written him. (I did send some copies around, not many, and I think that for the most part I didn't tell him to whom.)

As best a nonlawyer can have an opinion about it, I think I've created an entirely new situation with what I filed, focusing^{on} and emphasizing a few simple but central issues as Mark Lynch did not want to in his briefing. I am well aware that neither he nor most lawyers could have risked some of what I did. If necessary, I believe that with the present record filing a petition cert may be less of a futility, as once before in the end it wasn't.

But what I'm more concerned about is that nobody appears to be interested in what might and I think ought be done in the event I do not lose. My major interests in persisting in this has been to frustrate rotten precedents relating to lawyers and the Act. You lawyers are in some jeopardy if this monstrosity survives and the Act may for all practical purposes be nullified.

If by any remote chance the court en banc disapproves the official mendacity I made into a central issue and perhaps even if only the minority does, I believe that opens many constructive possibilities.

What I see is those who have most at stake, those who ought be fighting hard, just sitting back and awaiting disaster, intimidated to the point of self-intimidation. Even those of you who ought to perceive the political aspects and possibilities seem not to. Or not to care.

What FDR said about fear is no less true today. And to paraphrase an oldie, 'Tis better to have fought and ~~lost~~ than never to have fought at all.

But the other side concerns me when I am aware of no interest in making use of what two months ago appeared to be impossible and today may not be.

With anything that can fairly be considered a victory the opportunities for what I call intellectual judo do exist and there can be effective results.

Except for the number of my Social Security checks the nogoods would get I have less involved in this than almost anyone else yet those who do have much to worry about in this in the future seem not to be able to even think about what in self interest they should at least think about.

In your own and in many other interests, I do hope you'll give this entire business some thought. It is late but it is never too late.

I'm well aware that the major media is prejudiced, in general and with regard to this. I've been able to make approaches only by mail and even that, for me, was an extravagance. This business has cost me at least a month's income, without phone calls. Whether phone calls would have helped I can only guess, but in general personal contacts are better and, as you know, I cannot get to D.C. The Times, Post and the networks have no interest. The only interest was Les Whitten's and he did a short segment that is slated for Friday. I'll be surprised if the Post does not omit it, as it has in the past. I have no reason to expect any significant followups. But I have a news background and there is more than enough news value involved. Only nobody cared. And what it boils down to is that a real opportunity to accomplish much good is missed because nobody cared.

Sincerely,

