

Dear Howard,

9/15/76

It is a joy to me that I can't decide whether pride pleasure predominate in my reactions to your getting the clerkship and earning a 4. while working and doing the other things you do. It is wonder. We are happy for you. I think it is a promising forecast for the future and your future.

I appreciate the call. While I had attributed your silence to being busy, I was still a bit uneasy.

I take time for a letter now because this is the kind of day it is. I'm completed all I can do in preparation for tomorrow's hearing, except for packing a bag as I have in the past for public confrontations and such things as the evidentiary hearing in Memphis, where I not uncommonly had the right records with me in an emergency. I have to expect such an emergency tomorrow for a number of reasons I'll probably come back to.

What I'd like to do is resume working on the King book. But before I can spread those papers out I have to get quite a few others files. That is not easy for me now but during the course of the day I'll get enough of it done. However, I have made some tentative decisions for the immediate future. One is cutting out the quantity of work I've been doing on the FOIA cases. I've written a book in a month and the prospects of any of it getting into the record except with me on the stand are slim. If I'm on the stand I don't need all this stuff on paper.

The last two major preparations are now awaiting Lil's retyping. The second of these is a statement I want to make to the Court. Jim probably won't go for it and the judge will not welcome it but I may still ask. It probably take about 10 minutes to read. I want to get relief for myself and give the judge my rights to contend with while laying out a broad doctrinal attack on the government in FOIA matters and making a record of judicial complicity when at its best moments it is tolerance of the intolerable, an overt systematic campaign against the law by the government. I have enough specifics. The more important is as broad and definitive an assault on the government's claim to words you may recall from the Act and the Open America decision, "good faith" and "due diligence." If there had been a you here to help it would be much better. A student named Scott started the separation of my files on this. It was rather much for him but what he did was valuable and makes what I have done possible. I've isolated a total of 29 separate FOIA requests I've made of Justice in the past decade. In one case there was full compliance- after 8 years I got a press release that had been published in the Times. The one we used in EM. ~~XXXX~~ In two cases there was partial compliance ~~with~~ by other agencies. In one of these, thanks to your earlier work in that file, there was the exchange of not fewer than 44 letters before there was partial compliance. (I counted those you listed and did no more, this being enough.) Directly relevant in 1996, for King materials, are four earlier requests for essentially the same data, in 4/69. What do words mean is the face of this record? And the number of repetitions of these requests, their reformulations, the unresponded to DJ 118 forms, the checks they cashed and for which they sent me nothing. It is quite a story, quite a bit of solid evidence. At one swoop I've demolished all their statistics and all meaning to any statistics.

My problem on this is going to be Jim. Not because he's in any way bad. It is because he is so very good. He is as fine and sweet a person as I know, total decency wrapped in a good, big heart. He is all checks for turning. He doesn't realize it but he just does not really fight in court. He is usually patient (last time I had to hold his coat to keep him from jumping up in excitement) and has a profound faith in subtleties in the record. He is true to a fine character. He is unwilling to escape its limitations. We could and should have turned this case around by June. I don't know what we can do tomorrow in part because we have conditioned the minds and reactions to us of the AUSA and the judge. I'll try to think of that when I walk after daylight.

Last evening he was talking of commencing in advance of need with a proposal I gave

continuing compliance. I want to advance her compromise in the Rosenberg case to reduce the propaganda and stalling capabilities the government has and uses. Jim's reaction was "She won't go for it." Mine is suppose she doesn't? How can that hurt me? On the other hand, if I give a judge a chance to reduce the abuse of judges in all these cases, I've taken a forward step that settling for too little eliminates. I had only two demands over her Rosenberg formula: they first assign someone to prepare a list of all names in the case where there is no real question of privacy and then let me select the items of the requests with which I want compliance first. When they have 200,000 documents in the field offices without something like this there will be three years of the exploring of wastebaskets and I'll still have virtually nothing.

He lets the AUSA behave like a bastard without having a record to cite. I have unanswered letters I'll have with me. As late as yesterday afternoon Jim did not have a return of several calls. Tomorrow we are to confront up to eight adverse witnesses and we don't know whether any will appear. We'll use me, but we'll have to do this without preparations of any kind. It will have to be ad lib. He hasn't even had time to read what I've prepared for him. He says he'll do that today. I hope he can.

There is no alternative to what I've done in every suit, take the heat. I hate to have to do it ad lib but I hate worse not doing what it can mean, with moderate success. I have in mind several things. One is establishing expertise, with which I know he agrees. Then going into what I know is withheld and they know they are withholding and is relevant, with specifics. Then tearing their ~~xxx~~ maskings apart by ticking off all the names. Then with this basis charging and proving perjury, with me under oath and asking for relief from it. Topping it off with the ascribing of motive. With their records to prove it. I want a number of things all requiring a solid record. One is to force the judge to do something other than tolerate government mischief. Another is to have for the appeals court what my affidavits in spectro gave Wilkey - with results you saw. As a by-product I can rescue the law and the prestigious incompetents who have made themselves party to its emasculation. And at the end redress of grievances, a restitution to me of what all of this is costing me. I want to go farther than the strict language of the law and hold individuals responsible, too. I can again specify. I'll try to ease Jim into more agreement tomorrow morning before court. If not I'll be confronted throughout with having to avoid what I will not really be doing, fighting my own lawyer. I would not fight Jim. I love and respect him. Actually, I'll be helping him because he needs to learn how to fight other than on paper, where he does it remarkably well.

With any kind of luck I think at the minimum I'll end part of the ~~xxxx~~ "adrian evil in Open America, and the presumption of good faith and due diligence that automatically accrues to the government despite the language of the law and its legislative history. I also want to show the really abused and overworked judges a way out, a way they fear taking themselves and no other litigant dares go. I want a direct confrontation under oath on the material with all these bastards. My statement solicits it with 8 of them. I include without so saying the AUSA, whom presides over this engine for non-compliance.

I do not know what tomorrow will be or bring or how it will end. When we have had seven status calls and I have not one piece of papers to show for them I can assume we'll not be certain to get to where I want to be tomorrow. In this event any advice or suggestions you have can be helpful. If you have time for thought and writing them.

Here is my basic reasoning: I'm better off losing entirely than continuing to be bogged down. I don't think there is a chance of this with the record we have already. This means that at the worst I'll be able to expect a Rosenberg-type compromise. We can walk through that without taking much time. Jim's time and mine are both more valuable in countless ways than is playing the government's game in this case. There is much he could have done for me and himself that he has not gotten to. Those things are much more important than wasting any time here. Or, I have my kind of no-lose situation as the government has its. Also, they have accomplished their basic purposes already, they've stalled me for either eight years or a year and a half, wherever you begin. Their im-

mediate objective it to extort the time required for a new whitewash, by the OPR. I must at least address this and I think there is a mechanism in terms of compliance, which is the material issue at this stage. I can tick off relevant and mind-blowing illustrations.

My thinking on aspects started taking shape last night. I'm breaking down the contents of my largest attache case that, while limiting what I can carry, will allow a better chance of retrieval on the stand, when I'll be wanting to use the case itself to keep my legs elevated. I'll have one portfolio for their court records I want to destroy, one for what I've gotten from the FBI, one for what I've gotten from the Divisions. I lay abed an hour this morning thinking further. My problem will be laying my hands on the records I need when I need them. But I think that while this will be difficult, sometimes impossible, my recall will be sufficient. I have to keep the originals as they are, which makes a problem. They are provided without identifications. I have kept them as I received them, which is important in terms of compliance.

The area of my greatest doubt is whether I'll be able to make what is or what amounts to direct accusations against named miscreants. I think Jim will be uneasy about this, fearing the judge will be. I could not care less. (In my view one of the most important elements in the record we took on appeal in Spectro is the overt threat Pratt made against us. If you recall how Jim behaves under these conditions, you know I am without concern on that. It is not that he lacks heart. It is that he begins by shunning. Pratt raised that threat, Jim didn't.)

I suppose the area in which I can use advice most is how to not offend Jim, who is really in every way a wonderful person. His really sterling character is the problem. It is utterly unreal in today's practice of law against people like you find in government and against the normal and accepted corruption of the adversary system of justice. This is complicated by what is a serious problem for him. He has done an enormous and superbly work in the Ray case. We want to carry it along and fears what he thinks may jeopardize it. I think he does not recognize this and how it inhibits him. He has plenty of time for this as an academic consideration. I don't. And his overly-cautious way is the one more certain to defeat his objective, with which I am in accord. He had not learned from observing what Bud's similar approach did to us in the Ray case, where even Bud wound up saying he was sorry he had not listened to me. Not quite accurate, he chickened out and told none of us. He really blew that case. Jim has read what I wrote him on this without being influenced at all. This makes a tough problem for me when I'm on the stand, comparable with the one I faced in Memphis where I decided to remain silent in the face of McRae's apparent lack of recognition of what the State was doing. If this situation confronts me it will not be easy.

But if today is relatively uninterrupted I may be able to prepare enough for what I can expect. I've already put duplicates of key records aside for Jim. I'll pack myself and try to make some notes to which I can refer.

When we are in Wisconsin let us figure on having some time alone, just the two of us, for some things I want to talk to you about. One is New Orleans and some people there and the environment of the building in which you will be. It is in the heart of the French Quarter. There are places to avoid and those to enjoy, many things like this I'd like you to know about in advance. Also some people about whom I'd like to tell you. A couple of lawyers in particular.

Again, congratulations!

best,