

Mr. Fred Barbash
Washington Post
1150 15 St., NW
Washington D.C. 20071

3/15/87

Dear Mr. Barbash,

Would that it were true, as you say in your excellent piece on Madison, that, faced with government abuse, it does some good to prove that abuse. Your words are, "Now, government authority is assumed, and it is up to an outraged litigant, or an outraged citizenry, to prove its abuse."

Just before this you say that under the constitution the burden was on the government to justify its acts.

The actuality today is that, thanks to the abdications and corruptions of the judicial system and the silence of the press and the Congress it does absolutely no good at all for any outraged citizen to prove official abuse. If you'd had my personal experiences you would not be able to resent or regard this castigation as in any way excessive.

Not only does the constitution supposedly require government to justify its acts, this language is specific in the Freedom of Information Act. And, going back to what Madison and those other great political thinkers had in mind, under their/our system, the people have a right to know what their government does.

Madison was quite right in the 25th Federalist Paper, where (speaking of the military, as I recall) he said that the people have most to fear from the quarters from which it considered it had ^{least} to fear, government. If you doubt this, and you'll not learn it from the Post's nonreporting of specific instances, try asking for nonexempt information that can be embarrassing to officialdom, particularly the spookeries. You'll wonder no longer how the German people could do the Gestapo's bidding or the Russians that of the KGB. The least you'll learn is that proving official abuses is meaningless and that the courts and media have created this (to me subversive) situation by their tolerance, indeed, rewarding of proven abuses. *Rec p.2)*

In one FOIA case, stonewalled by the government for a decade, it contrived by a series of improprieties a conflict of interest between my lawyer and me. I do not have to worry about retaliation as a lawyer does so, when I got the proof, and it is beyond question and not only unrefuted - it is undenied - I presented this proof of felonious misconduct to both the district and now the appeals courts. With, over a long period of time, copies to two or more dozen in the media, several at the Post.

It also was not worth news attention when, for the first time under this law supposedly assuring the right of the people to know, the government procurrd a money judgement under FOIA. (In my reporting youth of so long ago it would have been what was then called a human interest story that official vengeance was extorted from an an aging (73+) and seriously ill man who had spent more than two decades in bringing to light what the government had hidden.) However, if in the end in this unequal and unreported conflict I somehow manage to prevail, that evil precedent, of which you and the Post and others have more to fear than I do, will be overturned. If not, I would like to think that ^{Madison} Hamilton and those others would have considered it worth the cost. *Rec p.2*

Today their prospects would be poor, this assured by today's press. Nothing personal in this, only ^{unafraid} long experience.

In the event you are interested in what happens when one who is outraged and victimized proves government abuse, there is an odd (to nonlawyer me) silence right now. As so often those impressed by their own power and immunity are tempted to do, the Department of Justice and the FBI made as their first move in response to my appeal an admittedly out-of-order ^o motion for summary affirmance, an effort to avoid

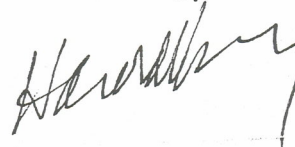
confrontation ^{ING} to my documented and detailed ^{brief} brief. I've had experience with district court motions for summary judgement but never this, which seems to be sort of an equivalent. ~~Before then~~ the appeals court had laid its schedule out and we were to have had oral arguments before Xmas. As I understand it, when there is something like this motion for summary affirmance, it is first considered by the court's own counsel. If ~~so~~, then this counsel is now confronted with undenied and well proven and documented charges of perjury, fraud and misrepresentation by the government. While the courts ~~could~~ and did ignore these undenied proofs of official felonies, there is, I do hope, quite a different situation when the court's counsel is confronted with a question of its own and the court's integrity, something separate from the court's judgement. We'll see, but there has been this rather long silence from both other parties.

Oops, I just remembered: 25 was Hamilton! Sorry. I did quote him and others in our history and tradition in this litigation but as today's government is stranger to these traditions so are the courts impervious to them.

This will be true as long as the major elements of the media also remain impervious to any official misconduct, and with all that gets into today's papers omission of such news is not because there is no space. It is an editorial judgement and, I think, editorial abdication.

Anyway, thanks for a very good and timely ~~piece~~ piece.

Best wishes,



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years later can be a distressing experience. The gap between the quality of political leadership he offered and the discount brand we now suffer through is enormous. It wasn't simply his powerful intellect. It was the political savvy, the guile, the sense of timing, the single-mindedness and the audacity he combined with that intellect that was so stunning. He was an intellectual who got things done, who transformed theory into reality as effectively as any political leader in modern world history.

To be sure, Madison was exceptional even then. So are many of the propositions he stood for, as demonstrated by Watergate, the Iran-contra affair and other scandals as well as the permissive attitude shown by many Americans and the courts to the exercise of governmental authority. But if he was exceptional, his beliefs were not. Madison believed that a government could exercise only that authority granted to it by the Constitution. The burden was on government to justify its acts. Now, the burden has shifted. Now, governmental authority is assumed, and it is up to an outraged litigant, or an outraged citizenry, to prove its abuse.

Was life simpler? Not really. The country was smaller, about 3 million people. But the years between the American revolution and the convention were among the most turbulent in our history. Putting it as succinctly as possible: The national treasury was empty; everyone, rich and poor, was in debt; detachments of the army mutinied; inflation was rampant; the currencies were nearly worthless, and the trade deficit was horrendous. Barbary Pirates preyed on our shipping; the 13 states feuded bitterly, and last but not least, a violent insurrection of farmers, Shays Rebellion, broke out.

We had a Congress—a one house affair established under the Articles of Confederation. But it lacked any real power, including the power to tax, to regulate trade, to enact laws binding on individuals. Often, this Congress could not even muster a quorum to do business. (There was no national executive or national judiciary, because there were no real laws to execute or to interpret.)

The states were king then. For the first (and last) time in our history, they were completely sovereign, with no higher federal authority or crown to overrule their laws. The Congress was kept "imbecilic," as they put it then, by the state governments, which chose and controlled the delegates to the Congress. Any augmentation of Congress' power required the unanimous consent of the states—which never gave it.

Enter James Madison. At the age of 29, in the year 1780, the Commonwealth of Virginia dispatched him to Philadelphia as one of its delegates to the Congress. Reading his correspondence, one almost immediately feels the disillusionment he felt with this once-illustrious body whose direct forebear, the Continental Congress, had brought America the Declaration of Independence and steered her through the war. Madison soon joined a small band of nationalists—among them Alexander Hamilton of New York and James Wilson of Pennsylvania—in several efforts to increase the authority of the national government. All of them failed.

It is difficult to determine exactly when Madison decided the time had come for a total transformation. It might have been on a stifling 90-degree plus day in June 1783, when a rag-tag band of former Revolutionary War troops, muskets at the ready, marched to the statehouse in Philadelphia, where Congress was meeting, surrounded it and threatened to keep everyone hostage until they were paid the months of back wages owed them. Congress asked Pennsylvania for a detachment of militia—and Pennsylvania declined. Shortly thereafter, Madison and the rest of the Congress fled to Princeton, N.J. From that day forward, Congress wandered from city to city like some nomadic tribe, a laughing-stock.

One of the remarkable traits Madison possessed was the ability to see opportunity in a crisis, rather than letting crisis weigh him down and paralyze him. "This picture of our affairs is not a flattering one," he wrote Thomas Jefferson with sublime understatement after the humiliation of 1783. "But we have been witnesses of so many cases in which evils and errors have been the parents of their own remedy, that we cannot but view it with consolations of hope."

Soon he returned to Virginia and

family home in Orange, at the foot of the Blue Ridge, surrounded himself with history books, and began an intensive study of failed confederacies—"ancient and modern."

This immersion in history was, at least in part, in preparation for a gathering of delegates from the states scheduled for Annapolis in September, 1786, to come up with a solution to the country's worsening trade crisis. However, there are many indications that even then, Madison had something much grander in mind.

The study turned out to be merely the first step in his development over the following year of a theory of politics and government for America, and of a plan to bring the theory to life. In brief: The proximate cause of America's troubles lay in the unrestrained power of the states, which declined to cede sufficient authority to a central government to allow America to function as a nation. At the same time, the states trespassed on national prerogatives (he noted that the United States could not even live up to treaty obligations because of state intransigence), abused their neighbors and even oppressed their own citizens by enacting laws breaching property rights and favoring one religion over another. If nothing was done, America would remain a collection of feuding, fussing and thoroughly inconsequential little nations, vulnerable forever to the designs of aggressive foreign powers.

The dynamic that drove the states to these depths, he believed, could be traced to the unique combination of government by majority rule, and factionalism—the inevitable tendency of interest groups, be they creditors, debtors, Anglicans or Baptists, to pursue their own selfish ends.

The solution was not to abandon republicanism, or to stamp out the liberty people enjoyed to pursue their own interests. Republicanism was not the trouble. The trouble was republicanism operating in small spheres where it was too easy for factions to gang up. The remedy was "an enlargement of the sphere," the creation of a much larger political arena, with a new power center, in which there would be so many competing groups that none would dominate and none would be dominated. The factions, their influence dispersed through the branches of the government, would neutralize one another.