

Mr. William Safire  
New York Times  
229 W. 43 St.,  
New York, N.Y. 10036

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Dear Mr. Safire,

Many thanks for your excellent essay captioned "Free Speech v. Scalia" in the syndicated copy I've just received from a friend who'd just heard of some of his outrages in my FOIA litigation. Under any circumstances your essay would have been important but because of the situation in the courts that a conservative denounced extremist judicial activism makes it ever so much more important.

From my own extensive, painful, costly and perhaps soon dangerous experiences you in fact understated the realities. Scalia is far from alone on that court and thus the danger to freedoms and the judicial system itself is much greater than you indicate.

The federal agencies, particularly the Department of Justice and the FBI, hate me because I am responsible for the 1974 amending of the investigatory files exemption of FOIA to open FBI and CIA files and thus they hold me responsible for the airing of their incredible anti-American activities. Scalia's court does not love me because my persistence in defense of FOIA led Congress to overturn its decision against me and *its* rewriting of the Act to do so.

Because as a matter of law there is not the "institutional privacy" Scalia seeks to legislate I have FBI records in which they actually plotted to "stop" me and my writing, which they do not like but cannot fault on factuality. They began by scheming to have a special agent front for the FBI in a spurious libel suit but in the end he chickened out. (When I learned of that I wrote him a waiver of the statute of limitations and offered to pay his filing costs. He has not responded.) Then DJ actually assigned six lawyers to a "Get Weisberg" crew and when they failed officialdon switched to uninhibited and frequently open mendacity, including under oath, ~~to~~ to the courts. But they still had to disclose what they did not want known so, before a rubber-stamp judge, John Lewis Smith, they demanded "discovery" to be able to prove they had complied with requests they hadn't even searched to comply with. Can you imagine what it means to FOIA requesters to have to provide "discovery" to the government under an Act which places the burden of proof on the government?

It happens, however, that because the then appeals officer is a history buff and I have unique subject-matter knowledge, when he asked me to I provided DJ with an enormity of information, what is relevant in the case about which I write filling not less than two file drawers and what I provided in all filling two entire file cabinets in my copies of it. That without refutation I swore, subject to the penalty of perjury, that I had already provided all the information of which I know was immaterial to both the district and Scalia's appeals courts.

It happens that I have suffered serious circulatory illness since 1975. These limited me more in 1977 and after arterial surgery in 1980 I suffered two serious complications, the second not infrequently fatal. As a result I am seriously limited in what I am able to do. DJ and FBI were well aware of my medical conditions and they appear to have decided to exploit them. One of the recognized and respected grounds for declining to provide legitimate discovery, which is not what was demanded of me, is burdensomeness. At the time of this demand I was suffering a series of additional illnesses, included recurrent pneumonia, pleurisy, other respiratory infections, internal hemorrhaging and was exceptionally weak. When they filed sneering comment by counsel instead of evidence I provided the court with copies of all my medical records. It made no difference.

The government demanded and the rubber-stamp Smith awarded, without hearing or even finding of fact, costs claimed, without supporting records of any kind, in seeking the alleged "discovery." DJ counsel began by telling my lawyer he'd have me charged with contempt. When my reply was to dare him to go to trial he switched to collecting these alleged costs from an aging (72) and ill writer whose Social Security check has since risen to \$356 a month. I sought to appeal promptly and was refused by Smith, so we could not go up on appeal promptly. When it was possible was not until after the government moved and again without even a finding of fact Smith rubber-stamped assessing the same costs against my lawyer. That is, we both had to pay them for one set of claimed costs in an FOIA case.

In the government appeals brief it actually sought more severe sanctions against my lawyer. In order to do this it had to allege serious misconduct to him and vaguely it did. In so doing, and my quotation is approximate but accurate, it said that Smith had "closely observed" this alleged evil influence I had on my lawyer "throughout the five years of the litigation." The case record establishes beyond question that I was not once with him in that case before Smith and that because of my illnesses it was a physical impossibility. Moreover, nothing at all transpired in that litigation before Smith for four of those five years because the government had been granted what time it said it needed to comply and it spent four years at it without, to this day, making and attesting to the required initial searches.

There was other significant lying to the <sup>appeals</sup> ~~Scalia~~ court by the government and after it, too, rubber-stamped the government brief I filed an en banc petition spelling out and proving these and other significant lies, some under oath. But because of what it means to lawyers when they are subjected to sanctions without any offense at all, I emphasize this particular deliberate lie to you as I did in my petition. Not a single member of that appeals court voted to consider that petition. It thus sanctified official perjury, by special agents, and the rottenest kind of lying by government counsel. In addition to rewriting FOIA for all practical purposes. Some supposed liberals are on that court and some supposed conservatives who by reputation are not extremist activists, but they have all accepted being lied to and when without dispute it is proven they have been lied to. I do not have to spell out what this means henceforth, particularly to FOIA litigants.

However, the potential precedents are much broader. They can be misused against any civil litigants, including the wealthiest corporations and their most prestigious counsel. Counsel are whipsawed. If they refuse to take proper and legal steps asked by their clients they are subject to sanctions that in the District of Columbia recently, in a case I cited, meant loss of license. If they do, as my lawyer did, and file an appeal, they can thereby be charged with "obstruction," as in the latest government filing my lawyer is, and subject to sanctions, as my lawyer is. Whatever he does or does not do, he is subject to sanctions.

The majority of that appeals court in another case asserted that it has both the right and the obligation to rewrite Supreme Court decisions. With that and other outrageous decisions, I wonder how much remains of what was once a great judicial system. Meanwhile, the claimed costs against my counsel and me are about \$109000 and will grow, and without some change in this incredible and entirely unreported situation, I may soon have to decide whether my health will permit what patriotism indicates should be my course, opting jail. The deep subversions by Scalia and his fellows - they are no longer judges - must be opposed if we are to retain the kind of society into which, as a first-generation American, I was born.

Scalia is a monstrosity in robes, but alas, he is not the only one. And again many thanks for an excellent and important essay.

Sincerely,

Harold Weisberg  
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