

Mr. Les Whitten  
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12/26/84

Dear Les,

This is something for the near future, so you can think about it. And, because when I'll send you what I'm going to prepare soon, I won't have time for explanations until later. I'm using a few moments while I'm recuperating from a bit to much exertion and do not trust myself to work on what I'm doing, a pro se petition for an en banc rehearing before the appeals court in the case about which you did a columnitem. (The appeals court entirely ignored that particular fabrication. It even has some of its own!)

There is rarely an en banc review granted. In a recent one reported in the Post is became apparent that some of the pre-Reagan judges were in sharp conflict with the Reaganuts, who are activists rather than judges, and they have lawyers terrified. The real judges went public sharply, if unsuccessfully.

What they have done in this case rewrites FOIA and, I'm sure, will be used by the agencies as for practical purposes meaning that. They have created a great threat to all lawyers, particularly pro bono lawyers, but it extends to the very largest corporations and their expensive counsel.

There is a conflict between Jim and me, which led the "aders to represent Jim and Mark Lynch of the ACLU to represent me. But Lynch agreed only to handle the appeal. Perhaps filing what I want to file can be interpreted as within "appeal," but what I think must be said and I will say makes it too dangerous for any lawyer to handle. These activists would ruin any lawyer and his/her clients. So the first thing I did after reading the decision is to write and release Lynch, who I'm also sure is a nice guy even though we disagreed on the exemption of the CIA from FOIA.

Such a petition is limited to 15 double-spaced pages, which is hardly enough for the horrors perpetrated by Mark and Scalise, with ~~Wald~~ Wald a failed and silent "liberal." So, some of what I'll be saying will not be fully explained because there just won't be space. It has to be aimed at the court, not the press. But I hope that it will be comprehensible to reporters.

Despite the odds against an en banc review with Reaganuts in the majority, the effort must be made. And if it impels the pre-Reagan judges to stand up and sound off on principle or inspires those who write about legal and judicial matters to have something to say about judicial activists, it will be worth the effort.

There is concern about how Reagan will pack the Burger court further, but little has been said about his fait accompli in already packing the appeals court, most of whose decisions go no farthur and stand as precedent.

So, when I have the petition completed, duplicated and filed, I'll send you a copy. And hope that Jack can get interested. At my age and in my health I have no real personal interest, but for FOIA and for others and as opposition to galloping reaction and authoritarianism, there ought be interest.

Hope your trip to Europe and holiday were fine and that you have a goo year ahead.

Best,