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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1.personal data questionnaire	re Antonin Scalia. (36 pp)	n.d.	~~P6~~ B6 CB 1/3/01

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

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- F-1 National security classified information [(b)(1) of the FOIA].
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- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
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THIS FORM MARKS THE FILE LOCATION OF ITEM NUMBER _____ LISTED ON THE WITHDRAWAL SHEET AT THE FRONT OF THIS FOLDER.

This memorandum seeks to appraise Judge Scalia as a potential nominee for the Supreme Court in light of the profile of an ideal candidate devised by the task force.

I. Philosophy

A. Judicial Restraint

During his tenure on the bench, Scalia has written the most important scholarly work and opinions of anybody writing in this area. He has been especially creative and successful in transforming the common intuition that "courts are running the country" into a set of coherent principles about what courts should not do.

1. Limited role of the courts in our tripartite system/Awareness of the importance of strict justiciability requirements

Scalia has stated his theory about the proper limitations on the role of courts most comprehensively in an article entitled Standing and the Separation of Powers discussed at Law Review Binder Tab 25. In that article, Scalia argues that the doctrine of standing plays a vital part in confining courts to their proper role in our tripartite governmental system. That role, he contends, quoting Marbury v. Madison, is "solely, to decide the rights of individuals." It is not, as Judge Wright suggested in a D.C. Circuit environmental case, "to see that important purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy," Calvert Cliffs Coordinating Commission v. AEC. As Scalia explains, non-enforcement of particular laws may be a mechanism of political correction spurred by a new election in which the "important purposes" were vehemently rejected. Thus, Scalia writes, "Yesterday's herald may be today's bore, although we judges in the seclusion of our chambers may not be sufficiently au courant to notice."

Scalia suggests the following rule of standing as capturing this view of the function of the courts: so long as the law sought to be enforced was enacted for the benefit of everybody, enforcement of the "important legislative purposes" should presumptively be treated as committed to the executive branch. This permits the electoral process to lead, for example, to changes in agency interpretation of transportation legislation from a pro-regulatory to a deregulatory approach--the kind of decision that courts, "selected from the aristocracy of the highly educated, instructed to be governed by a body of knowledge that values abstract principle over concrete result, and (just in case any connection with the man in the street might subsist), removed from all accountability to the electorate," would be terrible at making.

Scalia concludes that a reinvigorated standing doctrine would take more seriously the prudential component of the bar on courts deciding "generalized grievances" so as not readily to infer Congressional intent to create rights of action to enforce such grievances. In some instances a proper standing doctrine would even treat that bar as constitutionally imposed, and thus not repealable by Congress.

In addition to his article, Scalia's most important opinions in the area of judicial restraint (two of which have formed the basis for major Supreme Court revision of the law on this topic) flesh out this general theory into concrete doctrines. In Chaney v. Heckler, Cases Binder II, Tab 24, [1] Scalia revitalized the doctrine of the non-reviewability of prosecutorial-type exercises of discretion by federal agencies. The tradition of the non-reviewability of such decisions, like the standing theory Scalia advocates, is a mechanism for creating political checks on the enforcement of legislative policies. In Chaney the panel majority held that the FDA had erroneously declined to investigate whether drugs used for lethal injections were "safe and effective" for that purpose. Scalia in dissent seized on the peculiarity of the panel's result to advocate radical change in the law of judicial review of agency action. The D.C. Circuit had written many opinions stating that there was a "presumption of reviewability" of all agency action. Scalia argued that nothing in Supreme Court cases compelled that conclusion, and that where core executive functions such as prosecutorial discretion were at issue, the opposite presumption should govern. His view was accepted by the Supreme Court 7-1-1, with Brennan going along halfway and Marshall concurring in reversal on other grounds.

His other major opinion in this area which formed the basis for a Supreme Court change in the law was CNI v. Block, II, 29. The panel held that despite explicit provisions making judicial review of milk marketing orders available to milk handlers and producers, consumers also had standing to challenge those orders. Scalia dissented, arguing that the combination of the narrowly crafted judicial review proceedings with the breadth of the class that would be encompassed by such a grant of standing indicated that no standing on the part of consumers should be implied. The Supreme Court did not reach the standing issue, but concluded for very similar reasons that review was precluded by statute. In doing so it issued a very important modification to the "presumption of reviewability." It stated

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[1] Hereinafter citations to the cases binders will use only the Roman numeral for the volume and the Arabic numeral for the tab number.

that that presumption was not a strict evidentiary presumption, and could be rebutted not only by explicit Congressional statement to the contrary, but "inferences of intent drawn from the statute as a whole." To demonstrate how important that reformulation is, on the basis of it the D.C. Circuit en banc unanimously rejected a suit challenging the non-appointment of Independent Counsel to investigate the "briefing book" affair. It grounded that view on the theory that the complete statutory framework provided for judicial review of other aspects of the appointment process and did not provide for judicial review of a decision not to appoint. It therefore inferred from the statute as a whole that Congress did not intend such review to be available. Before CNI that case would almost certainly have come out the other way.[2]

Another extremely important opinion Scalia wrote on standing and the separation of powers is Moore v. House of Representatives, III, 33. That case involved essentially whether courts should be the arbiters of intra- or inter-branch political disputes. Some Members of Congress sought to challenge the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), on the ground that it had not originated in the House. The majority opinion by Wilkey dismissed on the ground that "equitable discretion" counseled against court intervention in this intra-Congressional dispute. Scalia argued instead that the proper ground for dismissal was that the Congressmen lacked standing, and the court therefore lacked constitutional power to intervene, because the origination clause, like other structural provisions of the Constitution, was intended to create rights not in the Members of Congress but in the people. This proposition later formed the basis for Judge Bork's dissent from a panel opinion finding that it could review and find unconstitutional the President's exercise of the pocket veto. Its importance is difficult to overstate: if the allocation of powers in the Constitution gives rise to private rights on the part of those upon whom they are conferred in the exercise of those powers, the courts will be the arbiter of inter-branch disputes, and will thus be the true sovereign. This issue is pending before the Supreme Court on our petition for certiorari in the pocket-veto case.

Scalia couples his appreciation for the limited role of the courts in our tripartite system with respect for coordinate branches. He has written several very significant opinions

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[2] Scalia also wrote a panel majority opinion applying CNI to preclude review of Veterans Administration regulations in Gott v. Walters, III, 30. The full court granted rehearing en banc in that case, however, and it was subsequently settled.

dealing with the deference due the Executive in foreign affairs. One of these is Ramirez de Arellano v. Weinberger, I, 16a-b. In that case the plaintiff was an American citizen living on a ranch in Honduras. The ranch was owned by several corporations of which the plaintiff was the ultimate sole owner. According to his allegations, the United States had accidentally constructed the training base for Honduran and Salvadoran soldiers on that ranch rather than on publicly owned property. The plaintiff sought an injunction against continuation of the base's operation. Scalia, first writing for a majority of the panel and then in dissent from the en banc court, argued that equitable discretion forbade issuance of any non-monetary remedy, although monetary relief could be sought in the Claims Court. The chief equitable factor counseling against non-monetary relief on which Scalia relied was the intrusion by the courts into the foreign affairs and defense fields as to which the executive is the expert that such a remedy would entail. This analysis strikes the proper balance between the executive and judiciary, and, not coincidentally, as Scalia's standing article explains, between the individual and the state as well. The plaintiff, if he can prove his claims of U.S. responsibility, can recover for the taking of his property, but cannot stop the executive's conduct of defense and foreign affairs for the benefit of all Americans.

Although Scalia did not succeed in establishing his analysis as law of the circuit in that case, [3] he was successful in doing so in a later case, demonstrating another quality that would make him an excellent Supreme Court candidate, i.e. persistence. In Sanchez-Espinosa v. Reagan, I, 16c, Ginsburg and Tamm joined his opinion finding that an injunction against continued funding of the Contras would be improper on equitable discretion grounds. That opinion also was notable for being one of very few court of appeals cases since Bivens to decline to imply a damages remedy for a violation of an alleged constitutional right. Nicaraguans sought damages under the Fourth and Fifth Amendments. Scalia, after assuming without deciding that those Amendments protected non-citizens abroad, held that nevertheless the peculiarity of permitting probably hostile foreign citizens to chill exercise of governmental duties by the threat of a damages action required at least that Congress explicitly create such a right of action.

One other noteworthy point about Scalia in this area: he is extremely aggressive and successful in spotting jurisdictional

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[3] The Supreme Court subsequently vacated the en banc majority opinion and remanded the case for consideration of "later developments."

issues on his own when they are not briefed. In Ramirez de Arellano v. Weinberger, supra, at his instigation the court ordered the Act of State defense briefed. The grounds Scalia used in dismissing the suit also had not been briefed and he also noted a possible standing issue we had not discussed. In Gott v. Walters, supra, he raised the question whether judicial review was precluded by statute when no party had briefed it to the court of appeals. In Maryland People's Counsel v. FERC, III, 37, he raised a standing issue that FERC had completely missed. In ATA v. ICC, III, 42, he raised a ripeness issue ICC had missed. In Northrop v. McDonnell Douglas, III, 47, he asked a question nobody had thought of, i.e. whether third party discovery could be obtained against the government in the absence of an explicit waiver of sovereign immunity.

This is an important ability for two reasons. First, being able to spot that the court is being asked to do something inappropriate even when one is not told demonstrates real depth of understanding of the principle of judicial restraint. Second, even in an administration committed to that principle, as the above list demonstrates, sometimes these arguments are not made, either as a result of client resistance or pure oversight. In the Carter years, the Justice Department political appointees actively resisted jurisdictional arguments. Because administrations' approaches to the role of the courts will differ, it is very helpful for the court to be sensitive to separation of powers problems even if the executive is not. Having a Justice with Scalia's instinct for discovering these issues could be vital in those circumstances.

2. An interpretivist approach to constitutional law

Scalia has been aggressively interpretivist in his approach to constitutional law from the bench, as well as in his scholarly writing and Congressional testimony. His major judicial opinions in constitutional law have mostly been in the First Amendment area. In CCNV v. Watt, I, 1, he argued in a dissent from an en banc decision that the First Amendment's protection of "freedom of speech and of the press" should not be extended to provide equivalent full First Amendment protection for "symbolic speech" such as a demonstration involving sleeping in Lafayette Park to protest the Administration's treatment of the homeless. Although governmental attempts to regulate expressive conduct designed purely to attack its expressive content would receive full First Amendment scrutiny, where the government had a facially plausible reason for such regulation not turning on the conduct's expressive content, that should suffice to pass First Amendment scrutiny. As well as being sensible, the opinion is interpretivist in its focus on the text of the First Amendment in deciding its scope. It is also aggressive in that while it reconciles the results of prior

Supreme Court "symbolic speech" cases, it adopts a very different analysis from that the Court used anywhere.

Scalia has also sought to narrow New York Times v. Sullivan. In that case the Supreme Court for the first time subjected state libel law requirements to First Amendment scrutiny and devised a framework making it much more difficult for "public figures" to recover for libel. The Court held that they must prove "actual malice," that is, intentional or reckless libel, in order to be able to recover. This entire enterprise was conducted with very little grounding in the history of interpretation of the federal or state constitutional protections for freedom of the press. Accordingly Scalia has sought to construe the opinion very narrowly, and has suggested that he thinks it should be overruled.

In Tavoulareas v. Piro, I, 2, he joined a MacKinnon opinion refusing to exclude evidence of editorial process and climate in a libel case on the ground that it would violate the First Amendment to permit such evidence to be considered by a jury. He also wrote a portion of that opinion narrowly construing a later Supreme Court libel case requiring appellate courts to conduct some kind of "independent analysis of the facts found by the trial court." He held that that requirement applied only to the question of "ultimate fact" (which is really a question of law and thus properly reviewable de novo by an appellate court) regarding the reporter's "actual malice".

In Ollman v. Evans, I, 4, he dissented from the en banc court's conclusion that a statement that a professor "had no status" in the academic community was a statement of opinion entitled to absolute constitutional protection against libel suits. That case involves the only sharp exchange between him and Bork, who agreed that it was entitled to absolute protection because it took place in the context of a highly politicized tenure fight. More important than their disagreement over the result in this case is an exchange between Bork and Scalia on whether a "freshening stream of libel suits" justifies finding new First Amendment protections against such suits. Bork contended that it did, and Scalia vehemently disagreed. In my view, there is less to this disagreement than meets the eye; but it nevertheless should be noted. Scalia also pointed out in this opinion that there was no need to devise new protections for the press against libel suits, because it was already "fulsomely [i.e. excessively] protected by New York Times.

That strongly suggests that Scalia believes that decision should be overruled. [4]

Scalia also joined Bork's opinion in Dronenburg v. Zech, I, 5, in which the panel held that the Supreme Court's right to privacy cases should not be extended to include a right to engage in homosexual activity because they stated no coherent principle with boundaries a court could demarcate and should therefore be limited to their facts.

Outside the First Amendment area, Scalia made the interpretivist case against the legislative veto which the Supreme Court struck down on those grounds in INS v. Chadha, Law Review Binder Tabs 12-13. He reasoned that the Constitution created an executive, legislative, and judicial branches, that Congress only had legislative power, and that the only way it could exercise that power was by a vote of two houses subject to Presidential veto. The legislative veto, being a device outside that framework, was unconstitutional. Some conservatives disliked this position on the ground that the veto was a device to bring the bureaucracy under control. Scalia contended that that was not an argument for an extra-constitutional procedure, and that in any event the Framers probably wrought more wisely than the argument presupposed, because the veto probably encouraged Congress to legislate more vaguely and delegate more broadly in the illusion that it could rely on the veto (in fact exercised only once) to block agency action later.

As the above discussion demonstrates, Scalia's interpretivism is not the equivalent of a belief that courts should never find anything unconstitutional. In addition to the legislative veto, even in the speech area, he has criticized the fairness doctrine as constitutionally suspect. See Law Review Binder Tab 20. He also has a strong pro-free-exercise-of-religion record. He testified very strongly in favor of tuition tax credits. See Congressional Testimony Binder at Tabs 11-13. His testimony in this area is not only sensible in policy terms but demonstrates his ability to distinguish between what the Supreme Court has said about the Constitution and what the Constitution says. In particular, he urged Congress to make its own independent evaluation of the constitutionality of such legislation, rather than concern itself with the Court's ahistorical and flawed approach. He also joined Judge Ginsburg's denial of rehearing en banc in Goldman v. Secretary of Defense, I, 6. That case involved an order by the military barring a colonel from wearing a yarmulke after having permitted

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[4] Rehnquist, joined by Burger, dissented from refusal to grant certiorari in Ollman on the ground that the majority's view was incomprehensible.

it for twenty years. The panel upheld the order. Judge Ginsburg's dissent did not state that that result was necessarily wrong, but pointed out that it presented a very difficult question which the court's opinion did not adequately analyze. Judge Bork did not join that dissent.

3. Appropriate deference to agencies

Many of the justiciability doctrines discussed above demonstrate Scalia's commitment to the principle of deference to agencies as well as his commitment to a limited judicial role. That is because one reason for judicial restraint is a belief that other institutions, including agencies, are better (and constitutionally more appropriate) decisionmakers in given areas than the courts. A holding that a court cannot review an agency's decision is in that sense the ultimate statement of deference.

In addition, Scalia has been a consistent advocate of the principle of appropriate restraint in cases where judicial review is required. He wrote a seminal article urging the courts to stop going beyond the Administrative Procedure Act in inventing new procedural hurdles for agencies to clear in decisionmaking. See Law Review Binder, 1.

His behavior on the bench bears out his commitment to the principle of appropriate deference. Not counting cases where he urged dismissal of a petition for review on jurisdictional grounds, in agency cases in which he wrote the opinion, a rough count shows that he advocated affirmance of the agency 21 times and reversal only 8, all of which were justified. E.g., IV, 70 (upholding agency policy choice against substantive challenge but requiring notice and comment); 71 (finding railroads could not charge shippers for costs caused by the railroads' own lack of diligence); 76 (reversing EPA's conclusion that having found a violation, it could refrain from ordering GM to remedy its old cars' noncompliance with Clean Air Act because GM had agreed to have its new cars offset the pollution the old cars would cause; but stating in dictum that EPA could take that into account as a matter of prosecutorial discretion).

Going beyond the numbers, Scalia wrote a very important opinion sustaining NHTSA's revocation of its 5 mile per hour bumper standard and replacement of it with a 2.5 mile per hour standard. Center for Auto Safety v. NHTSA, III, 53. The critical portion of the opinion states that it is sufficient ground for an agency to revoke a regulatory measure that it finds that its original grounds for enacting it were flawed. In addition to making it easier for a court to affirm an agency in general, this standard creates an advantage for deregulation over regulation, since it will be easier to find flaws in prior regulations and revoke them than to justify new regulations.

One last point should be noted about Scalia's judicial behavior in this area. He is very careful in crafting relief not to order agencies to take particular actions, and is frequently willing to leave even actions he finds flawed in place to permit the agency to provide new justifications for them, or figure out how to respond to the finding of illegality. See, e.g., IV, 59, 70.

As an academic, Scalia also advocated the proposition that agencies ought not be allowed to find extensive powers in vague congressional mandates. He advocated a minor revival of the delegation doctrine, see Law Review Binder Tabs 15-16; and principally urged that the only way of accomplishing genuine regulatory reform was by Congress passing clearer statutes, id. at Tabs 3-5. He also enthusiastically endorsed Executive Order 12291, id. at Tab 6.

4. Deference to states in their spheres

This issue does not arise very frequently in the D.C. Circuit. On the one occasion where it came up explicitly, Scalia wrote a strong dissent objecting to the I.C.C.'s attempt to impose deregulation on the States on the ground that the statute did not satisfy the test that a federal statute must "clearly state" its purpose of preempting the States' police powers before a federal court will hold that it does so. Illinois Commerce Commission v. ICC, IV, Tab 67.

5. A disposition toward less government rather than more

Scalia's dispositions on this subject are generally well known. Before becoming a judge, he was Editor of A.E.I.'s Regulation magazine, whose analyses of the consequences of various federal programs were influential in the intellectual and subsequent political movement away from the regulatory approach. He was also a strong supporter of tuition tax credits on the ground that they would increase parental choice regarding their children's education.

These sympathies have manifested themselves in Scalia's work as a judge, although not more than would be proper for a judge committed to neutral principled jurisprudence. The most notable example is Scalia's opinion in Center for Auto Safety v. Peck, the bumper case, III, 53. That opinion is the only D.C. Circuit case to sustain any of National Highway Transportation Administration's deregulatory measures. As discussed in section 3 above, it also lowered the standard of review for deregulation. Finally, it takes NHTSA to task for understating safety benefits of its deregulatory measure by not taking into

account that consumers will be free to choose 5 mile per hour bumpers even if they are not required to do so by regulation, and quotes Adam Smith in answer to the petitioners' claim that NHTSA's conclusions correspond with those of the auto manufacturers. Slip op. at 32 n.11. See also Kansas Cities v. FERC, IV, 57.

B. Basic Principles

1. Recognition that the federal government is one of enumerated powers

Along with the case discussed above in section A 4, Scalia's only writing in this area is a piece in the Harvard Journal of Law & Public Policy, entitled The Two Faces of Federalism, discussed at Law Review Binder Tab 21. While recognizing the strengths of federalism in giving people more choices concerning how much government they want, the article does not endorse local autonomy in all situations. Rather, it notes that the Framers intended to empower the national government to override regulatory measures by the States that impeded interstate commerce. He suggests as possible areas where that might be proper state regulation of cable television, rent control, and product liability. He does not endorse any as necessarily appropriate for this purpose, but argues that they should be considered. He also contends that forces opposing government expansion cannot renounce the use of federal power to promote their ends entirely, or they will end up fighting the pro-government forces on one front while the other side is fighting on both.

2. Appreciation for the role of the free market in our society

See sections A 5, B 1 above.

3. Commitment to strict principles of nondiscrimination

Scalia wrote a scathing article attacking affirmative action, Bakke, Weber, the notion of "voluntary" goals under OFCCP, and the concept of collective restorative justice as racist in principle and promotive of racism in practice. See Law Review Binder at Tab 22.

In Toney v. Block, I, 10, he ruled that in cases where the employee established his prima facie case by showing a "pattern and practice" of discrimination throughout the company, rather than by showing that discrimination was a factor in the particular employement decision regarding him that he challenged, the employer need not rebut that showing by "clear and convincing" evidence. He also joined Bork dissents from

denials of rehearing en banc in two cases. One involved the court's refusal to apply the Supreme Court's Grove City holding concerning the limitations of the Civil Rights Acts' reporting requirements to particular programs to the identical language of the Rehabilitation Act. The other involved the court's finding that employers were strictly and vicariously liable for sexual harassment by one of their employees. I, 15. The Supreme Court has granted certiorari in both cases. He also joined Tamm's opinion in Steele v. FCC rejecting preferences for women in radio licensing decisions. I, 14a.

While rejecting race-conscious remedies and frivolous discrimination claims, Scalia is firmly committed to true non-discrimination.

4. Respect for Traditional Values

Scalia is a strong believer in traditional values. As noted above, he has testified frequently in favor of tuition tax credits. He opposes Roe v. Wade both on jurisprudential and moral grounds. He favors restoration of the status quo ante, in which the issue was left to the States. He has also, however, endorsed the Hatch Amendment, which would have given the States and federal government concurrent power to regulate abortion, on the grounds that it was both substantively better and better in terms of respect for federalism than the current state of affairs created by Roe. See Law Review Binder at Tab 23.

5. Recognition of the importance of separation of powers principles of Presidential authority

Scalia's experience as Assistant Attorney General for the Office of Legal Counsel has undoubtedly given him great understanding of separation of powers principles with perhaps something of a bias in favor of Executive power. His general views on judicial restraint discussed at A 1 above, his deference as a judge to other branches discussed at A 1 above, and his campaign against the legislative veto discussed at A 2 above, make him a very strong candidate in this area.

6. Disposition toward criminal law as a system for determining guilt or innocence

Although this is not one of Scalia's great areas of interest, he has written three major criminal law opinions (not counting Chaney v. Heckler, the lethal injection case discussed at A 1 above). All of these oppose creation of technical obstacles in criminal trials in the name of the Constitution.

In United States v. Cohen, II, 18, he wrote an opinion for the en banc court rejecting an equal protection challenge to a federal law requiring commitment of defendants found not guilty by reason of insanity only if they had committed a crime in the District of Columbia. In United States v. Byers, II, 19, he wrote for a plurality of the court that the Fifth and Sixth Amendments did not forbid compulsory psychiatric examination of defendants pleading insanity, nor did they require a lawyer's presence during the examination. And in United States v. Richardson, II, 20, he dissented from the majority view that a defendant's complaint of double jeopardy could not be adjudicated before completion of the second trial, but rejected the double jeopardy challenge on the merits. The Supreme Court agreed with his views.

In other cases, he has voted fourteen times to sustain convictions or sentences or refusals to suppress evidence, once to reverse a portion of a conviction, justifiably, II, 22 (Lyons case), and once to remand for further consideration of whether the defendant was entitled to discovery of evidence, id. (North American Reporting case). (He subsequently voted in that case to affirm the district court's conclusion that the defendant was not so entitled, id.)

II. Legal Competence

Scalia's background as a private practitioner for six years with Jones, Day, a law professor at University of Virginia, Georgetown, and Chicago, Counsel to the Office of Telecommunications, Assistant Attorney General for the Office of Legal Counsel, and a judge on the U.S. Court of Appeals for the D.C. Circuit, makes abundantly clear his technical qualifications.

He writes superbly, with the kind of flair that helped Holmes, Frankfurter, Black, and Harlan exercise influence even beyond the force of the reasoning in their opinions. See, e.g., Chaney dissent I, 24, slip op. at 901-02, in which Scalia argued that the FDA lacked authority to regulate drugs used for lethal injections because

> the state is as much the ultimate consumer of the drug as it was of the electricity previously used for the same purpose; and the condemned prisoner executed by injection is no more the "consumer" of the drug than is the prisoner executed by firing squad a consumer of the bullets.

See also, at the same tab, his very short dissent from denial of rehearing. His style is fairly combative, but has not given offence to any other member of the D.C. Circuit.

III. Strong Leadership on the Court/Young and Vigorous

As most of the discussion above indicates, Scalia has been the conservative judge the most to be reckoned with on the D.C. Circuit. He also has a very successful record in the Supreme Court. The Court adopted his approach in Chaney, II, 24, and Richardson, II, 20; an approach very similar to his in CNI v. Block, III, 29; and agreed with him in result without reaching his reasoning in CCNV v.Watt, I, 1. It also granted certiorari in a case from which he had dissented, Washington Post v. Department of State, V, 97, but the case was mooted out. Finally, it vacated and remanded the en banc opinion in Ramirez, I, 16b, from which Scalia had dissented, although the Court gave no clear reasons for its action. It has not yet reversed any of his decisions.

Along with writing very strong opinions himself, Scalia has two qualities that, according to Time, have made Brennan the most influential Justice on the current Supreme Court. See Time article in Articles package at ___. First, he has an engaging personality, and can thus persuade judges who do not start out in agreement with him to go along with him or at least make some concessions. See American Lawyer article in Articles package at ___. Second, he has been tireless in chasing down and eliminating bad dictum from his colleagues' opinions, whether in cases where he was on the panel, which he goes over with a fine tooth comb, or in cases where he was not, regarding which he frequently sends memos asking for changes in language.

Two other points not addressed in the profile that seem important to me are a judge's attitude toward precedent and the extent to which he does his own work. First, regarding precedent: In light of some of the Supreme Court's cases, our candidate will need a willingness to depart from previous cases, and a strategic grasp of how to go about doing so. Scalia has a very strong record in this area both on and off the bench as well. On the bench, he suggested in CCNV, I, 1, that the Supreme Court rethink its entire "symbolic speech" theory, while explaining how all its previous cases could be reconciled with his approach. He found a very narrow way of reading an incomprehensible Justice Stevens libel case in Tavoulareas, 2. He indicated that he favored overruling New York Times in Ollman, 4. He joined Bork in mocking the privacy cases in Dronenburg, 5. Undeterred by the full court's vacation of his Ramirez opinion, he reinserted his theory into his opinion in Sanchez-Espinoza, 16c. He led the court with a majority opinion overruling a prior D.C. Circuit case holding D.C. citizens to be a suspect class for equal protection purposes in Cohen, II, 18. He urged the court to depart from its precedents on agency prosecutorial discretion in Chaney, II, 24, and persuaded the Supreme Court to modify its test on the subject. In between the D.C. Circuit and Supreme Court opinions, he meanwhile essentially disregarded the D.C. Chaney majority

opinion onthe ground that it had improperly departed from previous law of the circuit. ICI, II, 28. He gave similar grounds for disregarding circuit precedent in Moore, III, 33. And he gave a powerful argument why "tests" explaining statutory language should not be treated as the last word on the subject in ADAPSO, III, 54.

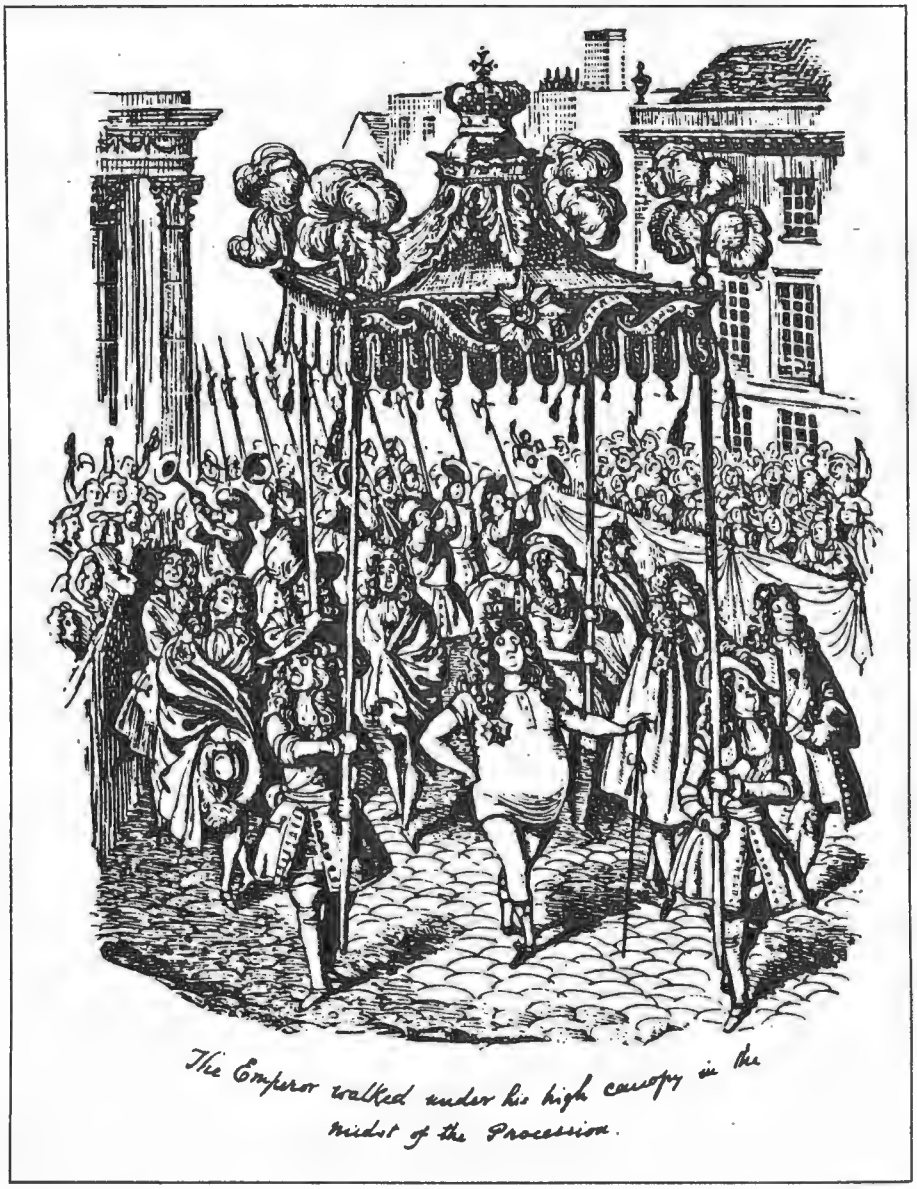
Before becoming a judge, Scalia also expressed strong views against giving the Supreme Court's holdings in the religion cases any significance beyond their particular facts. See Congressional Testimony Binder at Tabs 11-13.

Second, regarding delegation to law clerks: Scalia does more work himself on every opinion than any other judge in the circuit. He writes from clerks' drafts, but reworks them so completely that they are unrecognizable. He also reads every case cited. This approach avoids any possibility that the views of his law clerks rather than his own will determine the outcome of cases.

Conclusion

In my review of Scalia's writings as a judge I did not find a single opinion in which either the result reached on the ground of decision seemed problematic. Furthermore, I only found one he has joined (as opposed to written) about which I had serious reservations. See Hobson, Cases Binder V, Tab 115. Finally, he has written many of the most important opinions written recently by any federal judge.

THE FREEDOM OF INFORMATION HAS NO CLOTHES



The Emperor walked under his high canopy in the midst of the Procession.

ACT

Antonin Scalia

THE FREEDOM of Information Act (FOIA) is part of the basic weaponry of modern regulatory war, deployable against regulators and regulated alike. It differs, however, from other weaponry in the conflict, in that it is largely immune from arms limitation debate. Public discussion of the act displays a range of opinion extending from constructively-critical-but-respectful through admiring to enthralled. The media, of course, praise it lavishly, since they understandably like the "free information" it promises and provides. The Congress tends to agree with the media. The executive branch generally limits its criticism to relatively narrow or technical aspects—lest it seem to be committing the governmental equivalent of "taking the Fifth." The regulated sector also wishes to demonstrate that it has nothing to hide, and is in any case torn between aversion to those features of the act that unreasonably compromise its interests and affection for those that unreasonably compromise the government's. Through the mutually reinforcing praise of many who should know better, the act is paraded about with the veneration normally reserved for the First Amendment itself.

Little should be expected, then, of efforts now under way in both houses of Congress to revise the act. But however dim the prospect for fundamental change, the FOIA is worth examining, if only as an academic exercise. It is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored.

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Almost all of the Freedom of Information Act's current problems are attributable not to the original legislation enacted in 1966, but to the 1974 amendments. The 1966 version was a relatively toothless beast, sometimes kicked about shamelessly by the agencies. They delayed responses to requests for documents, replied with arbitrary denials, and overclassified documents to take advantage of the "national security" exemption. The '74 amendments were meant to remedy these defects—but they went much further. They can in fact only be understood as the product of the extraordinary era that produced them—when "public interest law," "consumerism," and "investigative journalism" were at their zenith, public trust in the government at its nadir, and the executive branch and Congress functioning more like two separate governments than two branches of the same. The amendments were drawn and debated in committee while President Nixon was in the final agony of Watergate, and were passed when President Ford was in the precarious early days of his unelected term. The executive branch managed to make a bad situation worse, by adamantly resisting

The Freedom of Information Act is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored.

virtually all changes in the act, even those that Congress was obviously bent on achieving. By the time it realized the error of its obstinacy, it was too late: the changes had been drafted and negotiated among congressmen and committees without the degree of agency participation and advice that might have made the final product—while still unpalatable—at least more realistic. The extent of the disaster may be gauged by the fact that, barely two months after taking office as a result of the Watergate coverup, President Ford felt he had to veto a bill that proclaimed "Freedom of Information" in its title. It passed easily over his veto.

When one compares what the Freedom of Information Act was in contemplation with what it has turned out to be in reality, it is apparent that something went wrong. The act and its amendments were promoted as a means of finding out about the operations of government; they have been used largely as a means of obtaining data in the government's hands concerning private institutions. They were promoted as a boon to the press, the public interest group, the little guy; they have been used most frequently by corporate lawyers. They were promoted as a minimal imposition on the operations of government; they have greatly burdened investigative agencies and the courts. The House Committee Report estimated that the 1974 amendments would cost only $100,000 a year; a single request under them has cost more than $400,000. There has grown up, since 1974, an entire industry and profession based upon the Freedom of Information Act. An organization has been formed, the American Society of Access Professionals, composed of men and women (mostly government employees) who have made their careers in this field. A two-volume FOIA loose-leaf service, updated monthly, retails at $438 a year; another one, supplemented only semiannually, is somewhat cheaper. Every week the *Legal Times of Washington* runs a page or more of notable new FOIA filings —mostly to enable corporate lawyers to find out what it is that other corporate lawyers are trying to find out. The necessary training for any big-time litigating lawyer now includes not only the cross-examination of witnesses, but use of the Freedom of Information Act. In short, it is a far cry from John Q. Public finding out how his government works.

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WHAT HAPPENED in the 1974 amendments to the Freedom of Information Act is similar to what happened in much of the regulatory legislation and rulemaking of that era: an entirely desirable objective was pursued singlemindedly to the exclusion of equally valid competing interests. In the currently favored terminology, a lack of cost-benefit analysis; in more commonsensical terms, a loss of all sense of proportion.

Take, for example, the matter of costs. As noted above, the 1974 amendments were estimated by Congress to cost $100,000 a year. They have in fact cost many millions of dollars —no one knows precisely how much. The main reason is that the amendments forbid the government from charging the requester for the so-called processing costs. Responding to a request generally requires three steps: (1) searching for the requested documents; (2) reviewing or "processing" them to determine whether any of the material they contain is exempt from disclosure, to decide whether the exemption should be asserted, and, if so, to make the line-by-line deletions; and (3) duplicating them. Before 1974, the cost for all of this work was chargeable to the requester; since 1974, step two has been at the government's expense. In many cases, it is the most costly part of the process, often requiring the personal attention of high-level personnel for long periods of time. If, for example, material in an investigative file is requested, someone familiar with the investigation must go through the material line by line to delete those portions, and only those portions, that would disclose a confidential source or come within one of the other specific exceptions to the requirement of disclosure. Moreever, even steps one and three are at the government's expense "where the agency deter-

mines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public." Even where the agency parsimoniously refuses to grant this waiver, the more generous judiciary sometimes mandates it—which happened, for example, in the case of the FOIA request by the Rosenberg children.

The question, of course, is whether this public expense is worth it, bearing in mind that the FOIA requester is not required to have any particular "need to know." The inquiry that creates this expense—perhaps for hundreds of thousands of documents—may be motivated by no more than idle curiosity. The "free lunch" aspect of the FOIA is significant not only because it takes money from the Treasury that could be better spent elsewhere, but also because it brings into the system requests that are not really important enough to be there, crowding the genuinely desirable ones to the end of the line. In the absence of any "need to know" requirement, price is the only device available for rationing these governmental services—and in many cases a price based on search and reproduction costs is simply not adequate.

Other features of the amendments reflect the same unthinking extravagance and disregard of competing priorities. Although federal agencies carry out a great many important activities, rarely does the law impose a specific deadline for agency action. Yet the FOIA requester is entitled by law to get an answer to his request within ten working days—and, if it is denied, to get a ruling on his appeal within another twenty. (There is a provision for an additional ten days "in unusual circumstances.") So the investigative agent who is needed to review a file must lay aside his other work and undertake that task as his top priority.

It is also rare that a federal official *must* be subjected to a disciplinary investigation—even for malicious baby-snatching under color of law, much less mere negligence. But if he should happen to trifle with an FOIA request, stand back! In a provision unique in the United States Code, the 1974 amendments specify that whenever a court considering an appeal from an FOIA denial

> issues a written finding that the circumstances . . . raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission [now the Special Counsel of the Merit Systems Protection Board] shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding.

In the courts, the statute provides that FOIA appeals shall "take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way." (There is an exception to this preferential treatment for "cases the court considers of greater importance.") And if the requester taking the agency to court "has substantially prevailed," the court is authorized to make the government pay his attorney fees and litigation costs. One would have thought it infinitely more important to pay the attorney fees and litigation costs of persons who are erroneously or even frivolously prosecuted by the government — but of course the law makes no provision for such payment.

The preferred status of the FOIA requester in the courts is also evident in the standard of review. If a federal agency assesses a penalty against you or revokes a certificate that is necessary for your livelihood, it will do you no good to persuade a judge that the agency is probably wrong. The courts cannot reverse the agency merely because they disagree with its assessment of the facts. They can do so only when there is a lack of "substantial evidence" to support its finding. If, however, an agency denies a freedom of information request, shazam!—the full force of the Third Branch of government is summoned to the wronged party's assistance. The denial is subject to *de novo* review—which means that the court will examine the records on its own and come to its own independent decision. And whereas the general rule is that the citizen appealing to the courts must show that the agency acted improperly, in the case of an FOIA denial "the burden is on the agency to sustain its action."

THE FOREGOING DEFECTS (and others could be added) might not be defects in the best of all possible worlds. They are foolish extravagances only because we do not have an unlimited

amount of federal money to spend, an unlimited number of agency employees to assign, an unlimited number of judges to hear and decide cases. We must, alas, set some priorities—and unless the world is mad the usual Freedom of Information Act request should not be high on the list.

Some other effects of the 1974 amendments, however, would be malignant even in a world without shortages. Prominent in this category is the provision which requires the courts to determine (again *de novo*) the propriety of classification of documents on the grounds of national security or foreign affairs. What is needful for our national defense and what will impair the conduct of our foreign affairs are questions of the sort that the courts will avoid—on the basis of the "political question" doctrine—even when they arise in the context of the most significant civil and criminal litigation. Imagine pushing the courts into such inquiries for the purpose of ruling on an FOIA request! This disposition appears even more incredible if one compares it with the provisions of the Foreign Intelligence Surveillance Act. There, for the much more compelling purpose of determining whether secret electronic surveillance will be allowed, the court must accept the certification of a high-level executive official that the information sought is necessary to the national defense or the conduct of foreign affairs unless, on the basis of the accompanying data, that certification is "clearly erroneous."

But the most ironic absolute defect of the '74 amendments was perhaps unintended at the time and seems to have gone virtually unnoticed since. The amendments have significantly reduced the privacy, and hence the autonomy, of all our nongovernmental institutions—corporations, labor unions, universities, churches, political and social clubs—all those private associations that form, as Tocqueville observed, diverse centers of power apart from what would otherwise be the all-powerful democratic state. Some of the activities of these associations should be open to public scrutiny, and prior to 1974 Congress made that judgment on a relatively specific basis, in enacting such disclosure statutes as the Securities Exchange Act, the Public Utility Holding Company Act, and the Labor-Management Reporting and Disclosure Act. Of course, in addition to those particular activities of private institutions that require *publication*, virtually all activities of private institutions may be subjected to *governmental investigation*—and increasingly are, to ensure compliance with the innumerable requirements of federal laws and regulations. By and large, it has been left to the agencies to determine when investigation is appropriate, and the courts have been most liberal in sustaining investigative authority.

The effect of the 1974 amendments to the Freedom of Information Act was to eliminate the distinction between investigation and publication. The "investigative files" exemption in the original act was narrowed so as to permit withholding of documents acquired or produced in a law enforcement investigation only if disclosure would cause specific damage to the investigative process or to particular private interests (for example, reveal the identity of a confidential source). The way things now work, the government may obtain almost anything in the course of an investigation; and once the investigation is completed the public (or, more specifically, the opponents or competitors of the investigated institution) may obtain all that the investigative file contains, unless one of a few narrow exemptions applies. There is an exemption (though the agency has discretion not to invoke it) for confidential commercial information. But there is none that protects an institution's consultative and deliberative processes—the minutes of a university's faculty meetings, for example. It is noteworthy that internal consultation and advice within the government itself is exempted from disclosure since, as the 1966 House Committee Report explained, "a full and frank exchange of opinions would be impossible if all internal communications were made public." But no such exemption exists for the internal communications of private organizations that come into the government's hands. In other words,

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THERE SEEMS LITTLE HOPE, however, that these absolute defects of the Freedom of Information Act, much less its mere extravagances, will be corrected. And once the fundamentally flawed

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premises of the '74 amendments are accepted, as they have been, all efforts at even minor reform take on an Alice-in-Wonderland air. For example: The government is concerned about use of the Freedom of Information Act as a weapon in litigation. Requests by a litigant for judicially compelled production of documents from the opposing party's files (so-called discovery requests) can be kept within reasonable bounds by the court itself. But when the government is the adversary, there no longer is any need to use the judicial discovery mechanism. An FOIA request can be as wide as the great outdoors; and the government must produce the information within ten working days —or, as a practical matter, within such longer period as the requester is willing to negotiate. It is not only a good way to get scads of useful information; it is also a means of keeping the government's litigation team busy reviewing carloads of documents instead of tending to the trial of the case. The story is told of a criminal defense lawyer who negotiated a favorable plea for his client by filing an onerous FOIA request that would have taken weeks of the U.S. attorney's time. And why not? Anyone can file such a request, and surely the attorney is obliged to use all lawful means to serve the interest of his client.

Well, the government's proposed solution for this problem is to forbid FOIA requests by litigants once litigation has commenced. Apart from the practical difficulty of enforcing such a ban, consider the Mad Hatter result it would produce: Absolutely anybody in the world (the FOIA requester does not, by the way, have to be a U.S. citizen) would be able to put the government through the inordinate trouble and expense of the FOIA process *except*—you guessed it—the person most legitimately interested in the requested information.

The defects of the Freedom of Information Act cannot be cured as long as we are dominated by the obsession that gave them birth—that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press. On that assumption, the FOIA's excesses are not defects at all, but merely the necessary price for our freedoms. It is a romantic notion, but the facts simply do not bear it out. The major exposés of recent times, from CIA mail openings to Watergate to the FBI COINTELPRO operations, owe virtually nothing to the FOIA but are primarily the product of the institutionalized checks and balances within our system of representative democracy. This is not to say that public access to government information has no useful role—only that it is not the ultimate guarantee of responsible government, justifying the sweeping aside of all other public and private interests at the mere invocation of the magical words "freedom of information."

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It is possible to save the desirable features of the FOIA—and even to give it teeth it did not have before 1974—without going to absurd extremes. But don't hold your breath. As the legislative debate is now shaping up, a few minor though worthwhile changes may be made, such as exemption of CIA case files. But the basically unsound judgments of the '74 amendments are probably part of the permanent legacy of Watergate. We need not, however, admire the emperor's clothes. ■