- get copy of Rich memo, anything else needed
- talk w/ Rex

=

THOUGHTS:

1) unclear what Const. means, so we're down to voting
2) clearly, govt. interest is to go in
3) now, question is if we want people to be able to slander freely: can it be cabined. Is there any other downside? If not, would our participation help cabin it, if we say it should be?

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NOTES ON TALK
W/ KUHL, 1/8

Re: thinks prison can't be abrogated
(can't draw line between this
+ letter to CJP).

Thinks ② libel law ~~too much~~ protects
newspapers too much.

Thinks ③ public officials should be
protected.

=
FBI wanted to file; CIV; WH Counsel
= hasn't decided yet.
have 'til 1/20 or 1/24

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Civ worried about discovery
more than the standard
(yes, it's privileged, but still
a pain; balancing; etc.)
FBI wants to hear from malicious
people

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- talk w/ Sam
- a couple of weeks
- not wasting my time

⇒ just ask to help us

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Can't we say our argument
isn't constitutionally
mandated – just
a privilege;
like something to keep them
from unless it constitutional

call Rex + talk w/ him?
2 of 3 results are hard:
const. mandate (hard)
nothing (hard)
no const., but yes privilege: and
then, why not absolute?

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Is there a valid First Amendment theory? (If, if so, is $1001 left intact?) (And if not, shouldn't we file on the other side?)

– Why not just a statute?

Do we need to file to protect $1001?
If it's a close case, we shouldn't say it's mandated by the Constitution.
Can it cabined?
Private and to a public official? But on what theory?

simply because Tiffany possessed that information.

Wallace insisted that in this case the IRS was seeking the clients' identities because that information was relevant to its audit of Tiffany.

Justice Stevens shared Justice White's concern about a summons that plainly sought the identities of unknown taxpayers who will themselves be audited by the IRS. He asked whether a summons that in one paragraph sought records in connection with an audit of the summoned party and in another paragraph sought the identities of other unknown taxpayers was "separable."

Wallace conceded that the IRS may have to comply with §7609(f) as regards the unknown taxpayers. But he hastened to reiterate that the summons to Tiffany was not a third-party summons. If in the course of Tiffany's audit, information is obtained regarding the tax liability of other parties, then the IRS will audit them. It is the business of the IRS to audit taxpayers, he said, and the IRS is not to have a "blind eye" on other information it may obtain in the course of auditing a particular taxpayer.

SUMMARY OF ORDERS

At its November 26, 1984 session, the Supreme Court granted review in six cases on the Appellate Docket and summarily disposed of five others. By other orders, the Court denied review in 79 Appellate Docket cases. Review was also denied in 84 cases in the 5000 series, which is sometimes called the in forma pauperis docket. The Court acted summarily in four 5000-series cases.

Grant of review, as used in the following summary of orders, is evidenced in appeal cases by the Court's action noting probable jurisdiction or postponing the question of jurisdiction to the hearing on the merits; in certiorari cases, by the granting of certiorari. In all cases where review is granted, oral argument will ordinarily follow.

Disposal by summary action is evidenced in appeal cases by a per curiam order affirming, reversing, or vacating the judgment below or dismissing the appeal; in certiorari cases, by a per curiam order granting the petition for certiorari and simultaneously affirming, reversing, or vacating the judgment below.

Denial of review relates principally to certiorari cases and is normally evidenced by denial of certiorari.

The summary below lists the cases on the Appellate Docket in which the Court granted review, took summary action, or denied review. For each case, there is given (1) its number and title; (2) a citation to the lower court's opinion or order; (3) the ruling of the court below; and (4) the principal questions presented if the case has been granted review.

Other orders appear only in the journal of proceedings elsewhere in this issue of Law Week.

Review Granted

AGRICULTURE

84-497 RUCKELSHAUS v. UNION CARBIDE AGRICULTURAL PRODUCTS CO.

Ruling below (USDC SNY, 9/4/84):

Chemical company's constitutional challenge to Federal Insecticide, Fungicide and Rodenticide Act §3(c)(1)(D), under which Environmental Protection Agency may use company's data, without consent but with compensation, in support of other applicants' chemical registrations, and which also provides for binding arbitration, presents live case or controversy, since remaining plaintiff chemical companies face clear threat of same EPA actions towards them; court adheres to its earlier conclusion that §3(c)(1)(D) constitutes unconstitutional delegation of legislative power to arbitrators and, alternatively, violates Constitution by depriving judiciary of its traditional Article III function.

Questions presented: (1) Is constitutional challenge to data compensation and arbitration scheme of FIFRA justiciable when chemical companies fail to show actual injury that would be redressed by requested relief? (2) Assuming issue is justiciable, do FIFRA's data compensation and arbitration provisions violate Article III of Constitution because awards made by arbitrators selected under statute are subject to review by Article III court only on showing of "fraud, misrepresentation, or other misconduct"? (3) Assuming issue is justiciable and provisions violate Article III, are chemical companies entitled to judgment invalidating entire scheme for consideration of previously submitted data rather than judgment striking limitation on judicial review?

CRIMINAL LAW AND PROCEDURE

84-465 BLACK v. ROMANO

Ruling below (CA8, 735 F2d 319):

Due process requires that state sentencing judge consider alternatives to incarceration as sanction for probationer's violation of conditions of probation; record in this habeas corpus case, including judge's imposition of maximum sentence and conclusory way in which decision to revoke probation was announced, demonstrates that state judge did not give any consideration to possible alternatives; district court did not err in concluding that, in view of amount of time that defendant had already served in state custody, he should be released from custody rather than returned to his status as probationer.

Questions presented: (1) Does decision of court below conflict with this Court's decision in Bearden v. Georgia, 461 U.S. 660, 51 LW 4616 (1983)? (2) Does decision of court below create important question of federal law that should be settled by this Court?

84-501 MINTZES v. BUCHANON

Ruling below (CA6, 5/9/84):

Rule 9(a) of Rules Governing Proceedings Under 28 USC 2254, which incorporates equitable doctrine of laches and which provides that habeas corpus petition may be dismissed if state has been prejudiced in its ability to respond to petition by delay in its filing, does not bar Michigan prisoner's claim, filed 23 years after his conviction, that he did not understandingly and intelligently waive his right to assistance of counsel at "degree" hearing and sentencing proceeding; record shows that state has not been prejudiced in its ability to respond to this claim; in view of silence of record as to whether trial court advised defendant at degree hearing and sentencing that he was entitled to assistance of counsel at this critical stage, habeas relief must be granted.

Questions presented: (1) Is equitable doctrine of laches embodied in Rule 9(a) applicable to 25-year-old plea-based conviction of first-degree murder, where state shows prejudice from delay? (2) Is single waiver of counsel constitutionally acceptable for purposes of unitary proceeding to accept guilty plea and ascertain degree of guilt under Michigan's open murder statute?

INDIANS

84-320 NAT'L FARMERS UNION INSURANCE COS. v. CROW TRIBE OF INDIANS

Ruling below (CA9, 736 F2d 1320):

Neither Constitution nor Indian Civil Rights Act provides basis for federal cause of action to review civil default judgment entered by Crow Tribal Court against allegedly negligent school district and school district's insurer.

Questions presented: (1) Is there federal claim for relief against Indian tribal governments that unlawfully assert civil jurisdiction over non-Indians? (2) Does Tribal Court of Crow Indian Reservation have jurisdiction over claims that involve state of Montana (or its subdivisions), that arise on state owned land, and that occur in connection with activities that are compelled or encouraged by state and federal law or policy?

LIBEL AND SLANDER

84-476 McDONALD v. SMITH

Ruling below (CA4, 737 F2d 427):

District court properly ruled that individual who sent letters to President suggesting that person seeking appointment as U.S. attorney was not fit for position was not entitled to defense of absolute privilege in that person's susbsequent libel action against him.

Questions presented: (1) Does Petition Clause of First Amendment provide absolute defense to action for libel, even if plaintiff alleges knowing falsity, when: (a) allgedly defamatory statements are contained in private letters from individual citizen addressed solely to President with copies to a few other federal officials, and (b) statements concern qualifications of candidate voluntarily seeking presidential nomination and appointment to high federal office? (2) In those circumstances, if Petition Clause does not provide absolute defense, does it at least require increased procedural protections, including judicial discretion to award costs and legal fees to uninsured defendant if he ultimately prevails?

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I wonder what the qualified immunity (vs. absolute immunity) test would be here?

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: McDonald v. Smith, S. Ct. No. 84-476, cert. granted, Nov. 26, 1984

TIME LIMIT

Should we file an amicus brief in support of petitioners, it will be due on January 10, 1985.

RECOMMENDATIONS

We have not yet received a recommendation from the Counsel to the President.

The Federal Bureau of Investigation recommends filing a brief in support of petitioner. The Tax Division orally recommends against participation. We have not received recommendations from the Antitrust or Lands Division or the Office of Legal Policy.

I recommend filing an amicus brief in support of petitioner.

CONSTITUTIONAL PROVISION INVOLVED

The Petition Clause of the First Amendment to the Constitution provides:

> Congress shall make no law abridging . . . the right to petition the Government for a redress of grievances.

QUESTION PRESENTED

Whether the Petition Clause of the First Amendment provides absolute immunity from civil liability for allegedly libelous statements made by a private citizen in letters to the President, with copies to a few other federal officials, concerning the qualifications of another citizen seeking appointment as a United States Attorney.

STATEMENT

Respondent David I. Smith, a citizen of North Carolina, was actively seeking appointment as a United States Attorney

following the election of President Reagan in 1980 (Pet. App. 7a). Petitioner Robert McDonald, a resident of Virginia who has business interests in North Carolina, wrote two letters to the President recommending that Smith not be appointed, making detailed negative comments on Smith's conduct as an attorney and former judge, inter alia (Pet. App. 2a, 8a; letters attached). Smith claimed that copies of the letters were sent to Edwin Meese, Counselor to the President, William Webster, Director of the FBI, and several members of Congress (Pet. App. 8a). McDonald denied that copies were sent to members of Congress (4th Cir. J.A. 32).

The President did not appoint Smith as U.S. Attorney. Smith sued McDonald for libel on July 24, 1981, in a state court in North Carolina (Pet. App. 7a). The action was removed to the United States District Court for the Middle District of North Carolina on the basis of diversity of citizenship (Pet. App. 8a-9a). Smith alleged that McDonald's statements in the letters were false and made with malicious intent to harm him and prevent his appointment as U.S. Attorney (Pet. App. 8a).

Petitioner McDonald filed a motion for judgment on the pleadings, arguing that he was entitled to absolute immunity from suit for libel under the Petition Clause of the First Amendment (Pet. App. 9a). The district court denied the motion, holding that, although McDonald's letters were protected by the Petition Clause, he was only entitled to qualified, not absolute immunity (Pet. App. 13a-24a).

The district court was not persuaded by McDonald's reliance on the principles of the Noerr-Pennington trilogy, which established an absolute immunity from antitrust liability for concerted action to influence public officials, with an exception for sham activities.[1] The court also relied upon White v. Nicholls, 44 U.S. (3 How.) 266 (1845), which held, arguably only on the basis of the common law, that defendants in a libel suit who had written to the President seeking removal of a customs official were only entitled to qualified immunity (Pet. App. 22a-24a).

The district court rejected the reasoning of Webb v. Fury, 282 S.E. 2d 28 (W.Va. 1981), a state case which held that absolute immunity barred a libel suit for petitioning activity. There the defendants had lodged complaints against a coal company with various federal agencies responsible for

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[1] Eastern Railroad President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); UMW v. Pennington, 381 U.S. 657 (1965); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

enforcing environmental protection laws and for publishing a newsletter accusing the company of various violations. The United States filed an amicus brief in that case in support of absolute immunity.

The Fourth Circuit affirmed in this case (Pet. App. 1a-6a), finding it controlled by White v. Nicholls, supra. It also found Noerr-Pennington inapplicable and distinguished or rejected the reasoning of the state and federal cases finding absolute immunity in similar circumstances (ibid.).[2]

On November 26, 1984, the Supreme Court granted certiorari. Petitioner seeks absolute immunity under the Petition Clause of the First Amendment or "increased procedural protections, including judicial discretion to award costs and legal fees to an uninsured defendant if he ultimately prevails" (Pet. i).

DISCUSSION

I recommend filing an amicus brief in support of petitioner's argument for absolute immunity, as the United States recently did in Webb v. Fury, supra. Both the executive and legislative branches depend upon the free flow of comments, criticisms, and complaints from ordinary citizens on myriad matters, from judicial appointments to law enforcement. See FBI Recomm. The availability of criminal prosecutions for perjury and giving false statements under 18 U.S.C. 1001 are sufficient to protect the government from intentionally false statements. The favored position of the Petition Clause and the chilling effect of private libel suits upon petitioning activity make absolute immunity necessary since qualified immunity for all but intentionally false statements will rarely avoid the burden of a trial upon one sued for libel. Thus, while there are substantial arguments in favor of qualified immunity, absolute immunity is more likely to protect the substantial federal interests involved.

The courts below in this case rightly held that McDonald's letters to the President concerning Smith's appointment as a U.S. Attorney were protected under the Petition Clause of the First Amendment. The President, because of his unique office, would be absolutely immune from a civil suit for libel if he had announced he was not nominating Smith for the reasons specified in McDonald's letters. Nixon v. Fitzgerald, 457 U.S. 731 (1982). More importantly, all federal officials have long been absolutely immune from common law damage actions based on the performance of their official duties. Barr v. Mateo, 360 U.S.

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[2] The court of appeals held the order denying absolute immunity was an appealable collateral order (Pet. App. 2a-3a).

564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896). Thus, none of the President's aides or any other federal official acting in the course of their duties could be sued for libel for publishing the same information.

The President is responsible for making numerous nominations for important federal positions throughout the government. It is in the government's best interest for him to get candid information concerning the qualifications of such nominees and, for some important positions, comments from persons outside the government are solicited. For example, the American Bar Association rates possible nominees to the Supreme Court. Individuals involved in that process should not have to worry about defending libel suits as a result of negative evaluations.

In the context of constitutional tort actions against government officials, the Supreme Court has established absolute immunity "[f]or officials whose special functions or constitutional status requires complete protection from suit...," Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982), e.g. for legislators, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); legislative aides, Gravel v. United States, 408 U.S. 606 (1972); prosecutors, Imbler v. Pachtman, 424 U.S. 409 (1976); and executive officials performing adjudicative tasks, Butz v. Economou, 438 U.S. 478 (1978). But see Hutchison v. Proxmire, 443 U.S. 111 (1979) (legislator subject to libel action for non-legislative acts). However, qualified immunity is the norm for executive officials. Harlow, supra. Nevertheless, the Court only recently held that a federal employee cannot sue a supervior for alleged improper discipline for engaging in protected First Amendment activity. Bush v. Lucas, S. Ct. No. 81-469 (June 13, 1983). Accord, Chappell v. Wallace, S. Ct. No. 82-167 (June 13, 1983); see Connick v. Myers, 461 U.S. 138 (1983).

The court of appeals' reliance upon White v. Nicholls, supra, is unpersuasive (Pet. App. 3a-4a). White v. Nicholls discussed the defenses available in a similar libel action in the context of the common law, as the court of appeals recognized, not "on an explicit construction of the petition clause" (Pet. App. 4a). It is questionable whether the defendants in White actually argued for absolute immunity. The reported argument of their counsel largely asserts that the plaintiffs were required to show malice and lack of probable cause for the statements. White, supra, 44 U.S. at 281-283. However, White does seem to preclude any "privileged communications" that would not be actionable where malice is shown. Id. at 287.

The Supreme Court recently discussed White in Briscoe v. LaHue, 460 U.S. 325, 332 n.12 (1983), where it held that a police offficer, like a lay witness, was absolutely immune from a damage action under 42 U.S.C. 1983 for allegedly perjured testimony in a criminal case. It noted that the lengthy

discussion in White concerning "privileged statements in judicial proceeding was purely dictum" and "was not even a reliable statement of the common law. . . ." Ibid. However, the Court described the ruling in White as involving an action for "allegedly defamatory assertions in a petition to the President . . . requesting the plaintiff's removal from office as a customs collector, a statement entitled at most to a qualified privilege." Ibid. (emphasis added). This statement is itself dictum, but may indicate that there is more life in White v. Nicholls than petitioner is willing to admit. See Pet. 20 n. 22.

The court of appeals also failed to give sufficient weight to the Noerr-Pennington cases. The Court in Noerr held that absolute immunity barred a private civil action under the anti-trust laws for bona fide concerted activities to influence governmental action. This ruling was based on a construction of the antitrust laws that was done in part to avoid a serious constitutional problem, as the Court pointed out. Noerr Motor Freight, supra, 365 U.S. at 137-138. But it recognized that the challenged actions were protected by the Free Speech and Petition Clauses of the Constitution and were unwilling to adopt a construction of the antitrust laws that would have infringed those rights. Accord, Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 190); Sherrard v. Hull, 460 A.2d 601 (Md. 1983), aff'g 53 Md. App. 553, 456 A.2d 59 (1983); Webb v. Fury, supra; see Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977), cert. denied, 434 U.S. 975 (1978).

On balance, the interests of the United States appear to favor absolute immunity to encourage the free flow of uncensored petitioning activity to the government.

CONCLUSION

For the foregoing reasons, I recommend filing an amicus brief in support of petitioner on the issue of absolute immunity.

RICHARD K. WILLARD
Acting Assistant Attorney General
Civil Division

Memorandum

IMPORTANT AND URGENT

Subject	Date
McDonald v. Smith, No. 84-476	December 31, 1984

To	From
The Solicitor General	Samuel A. Alito

TIME

An amicus brief in support of petitioner would be due on January 10, 1985.

RECOMMENDATIONS

The Civil Division and the FBI recommend participation in support of petitioner. The Tax Division has orally disagreed. The Antitrust Division has not made a recommendation regarding participation but has requested that any brief avoid all reliance on the chief Supreme Court authority invoked in the petition and in Civil's memo. The Lands Division also requests that Civil's argument be limited.

I recommend AGAINST AMICUS PARTICIPATION.

DISCUSSION

1. Petitioner McDonald wrote letters to the President containing disparaging comments about Smith, a candidate for appointment as United States Attorney in North Carolina. Copies of the letters were also sent to Edwin Meese, Counselor to the President, and FBI Director William Webster. The parties disagree as to whether copies were sent to members of Congress as well. Smith was not appointed and sued McDonald for libel in the North Carolina courts. The case was removed to federal court based on diversity of citizenship. Both the district court and the Fourth Circuit rejected McDonald's claim that he is absolutely immune from suit for libel under the Petition Clause of the First Amendment. The Supreme Court granted certiorari, presumably because of the conflict between the Fourth Circuit's decision in this diversity case and decisions of two of the highest state courts within the circuit. Sherrard v. Hull, 460 A.2d 601 (Md. 1983); Webb v. Fury, 282 S.E.2d 28 (W.Va. 1981).

2. I strongly recommend against amicus participation in support of petitioner. I think that petitioner's claim is wrong and contrary to our interests.

Petitioner contends that he is absolutely immune from suit for libel because he was exercising his right to petition. I find the implications of this argument quite disturbing.

Petitioner has stressed the allegedly private nature of his letters. In practical terms, this undoubtedly makes his immunity claim more palatable. But the Petition Clause does not provide greater protection for private as opposed to public speech. On the contrary, the Petition Clause seems primarily concerned with public speech. The First Amendment links the rights of petition and assembly ("Congress shall make no law * * * abridging * * * the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") A "petition" is by definition a public document. And the Supreme Court's cases have indicated that the Petition Clause applies to public communications. See, e.g., Eastern Railroad Conference v. Noerr Motors, 365 U.S. 127 (1961) ("Noerr") (publicity campaign); Hague v. CIO, 307 U.S.

496 (1939) (distribution of printed matter and holding public meetings). Because the Petition Clause does not prefer private over public communications, I think that petitioner's argument would have to apply with equal force if he had run his letter as a full page ad in the Washington Post.

I think petitioner's argument must go further still. The Petition Clause protects a wide array of communications with all branches and levels of government. See, e.g., Bill Johnson's Restaurants, Inc. v. NLRB, No. 81-2257 (May 31, 1983) (bringing suit); Mine Workers v. Pennington ("Pennington"), 381 U.S. 657 (1965) (efforts to influence Secretary of Labor and TVA); Noerr, 365 U.S. at 130-131 (influencing governor). Indeed, the Petition Clause apparently protects communications that have some bearing on possible future government action but that are not addressed to any specific government official or concerned with any particular government action. See, e.g., Noerr, 365 U.S. at 129, 142 (general publicity campaign including "[c]irculars, speeches, newspaper articles, editorials, magazine articles, [and] memoranda" designed to influence legislation and law enforcement regarding truckers); Hague v. CIO, 307 U.S. 496, 501-502 (1939) ("distribution of pamphlets discussing the rights of citizens under the [NLRA]"). Just where "petitioning" ends and plain political speech begins is not entirely clear. But it would appear that a very broad range of public advocacy--including editorials, opinion columns, and many articles, books, mass mailings, and press releases--may fall within the Petition Clause.

In short, I think that adoption of petitioner's argument would go far toward abolishing libel and slander for political speech. That is not a development that I think we should support. Under New York Times Co. v. Sullivan, 376 U.S. 254 (1964), it is already quite difficult for public officials and figures to obtain redress for defamation, since actual malice must be proved. We should not further diminish the little protection now available.

No Supreme Court authority supports petitioner's argument. Noerr and Pennington, upon which he and the Civil Division chiefly rely, involved the construction of the Sherman Act. I seriously doubt whether they have any application outside the area of antitrust.

2. To say that petitioner is not entitled to absolute immunity under the Petition Clause is not to say that private citizens who furnish important information to the government are never absolutely immune. Witnesses in judicial proceedings enjoy absolute immunity. Briscoe v. Lahue, 460 U.S. 325 (1982). The same rule may apply to testimony before legislative bodies and to "communications preliminary to the proceeding." Restatement (Second) of Torts § 590A (1977); see also Webster v. Sun Co., Inc., 731 F.2d 1 (D.C. Cir. 1984); W. Prosser, Torts 781-782 (4th ed. 1971). The Supreme Court has stated that those who furnish information about law violations are absolutely immune from suit for libel or slander. In re Quarles, 158 U.S. 532, 535 (1895).

None of these immunities, however, are based on the broad ground of the Petition Clause. Rather, they are based upon the government's overriding need for information under narrowly defined circumstances. If there are additional situations in which the government's need for information warrants extending absolute immunity to private citizens who provide that information, we should construct our argument along these lines. In particular cases, we may be able to argue that state defamation laws are preempted by federal laws encouraging the submission of particular types of information. See the memos in Webb v. Fury, supra. If sufficiently broad authorizing legislation has been enacted, agencies may be able to preempt defamation actions in particular situations by regulation. Congress may also be urged to provide immunity in appropriate situations. These approaches are far preferable to petitioner's blunderbuss constitutional argument.

3. On balance, I think the government's programmatic interests would be harmed, not helped, by petitioner's argument. Noerr and Pennington are the chief authorities upon which petitioner relies, but the Antitrust Division recommends against any reliance on those cases, fearing that an expansive interpretation of those decisions might hamper their enforcement efforts. Adoption of petitioner's argument might also hinder our ability to bring civil enforcement actions in other areas, such as civil rights (see Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980)) and labor relations (cf. Sure-Tan, Inc. v. NLRB, No. 82-945 (June 25, 1984), slip op. 9-13; Bill Johnson's Restaurant, Inc. v. NLRB, supra).

On the other side of the balance, acceptance of petitioner's argument would provide few benefits for the government. The Civil Division and FBI have recommended participation in support of petitioner in order to ensure the free flow of information to the government. But the FBI notes that it has "functioned for decades without the protection of absolute immunity for persons who have cooperated with us" and that "[f]or whatever reason, * * * [no lawsuit] has been brought against a person who provided information to the FBI insofar as we are aware" (FBI memo at 2). No other agency with law enforcement responsibilities has recommended participation in this case.

U.S. Department of Justice

MrG

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Washington, D.C. 20530

JAN 7 1985

SUPPLEMENTAL MEMORANDUM FOR THE SOLICITOR GENERAL

Re: McDonald v. Smith, S. Ct. No. 84-476,
cert. granted, Nov. 26, 1984

Petitioner contends that he is absolutely immune for allegedly libelous statements made in private letters sent to the President, with copies to a few other government officials, which urged the President not to nominate respondent Smith as a United States Attorney, a position he was actively seeking.

Because I strongly believe that the United States should participate as an amicus in support of absolute immunity under the narrow circumstances presented in this case, I wish to respond briefly to the memorandum prepared by Mr. Alito. The principal concern of his memo appears to be that "petitioner's argument would go far toward abolishing libel and slander for political speech" and would make it even more difficult for "public officials and public figures to obtain redress for defamation." Alito Memo. 3. This concern greatly exaggerates the position taken by petitioner, ignores the importance of First Amendment petitioning activity to our form of government, and overlooks a very important practical concern which was not mentioned in our initial memorandum -- the fact that discovery in cases such as this will probably involve efforts to probe the deliberative process for the selection of nominees for high office by the President and his advisers -- a result that is obviously not in the government's interest.

1. First, there is the practical consideration which we did not address in our initial memorandum. If libel suits such as this are allowed to proceed, the parties will doubtless move quickly to obtain discovery from the President and other executive officials to probe the nominating and appointment process to determine whether the officials actually read the letters and whether they influenced their deliberations. The government will then quickly become embroiled in problematic issues of executive privilege, a problem that is quickly eliminated if libel suits for such private communications cannot be brought.

In discussing where to draw the line between "fact" and "opinion," Judge Bork, in a thoughtful and provocative concurring opinion, stated that "we ought to accept the proposition that those who place themselves in a political arena must accept a degree of derogation that others need not."

Ollman v. Evans, No. 79-2265 (Dec. 6, 1984) (en banc), conc. op. 20. This is fully applicable to one such as respondent Smith who was actively seeking appointment to an important federal law enforcement position.

2. Second, your staff's recommendation assumes that it would be impossible to draw a line between private communications to the President, such as those involved here, and full page ads in the Washington Post. That assumption is simply incorrect. The Court is almost always drawing lines in First Amendment cases between protected and unprotected speech and there is no reason why a line cannot be drawn here. For example, the Court recently held that, although the Speech and Debate Clause would have provided absolute immunity from a libel suit for one of Senator Proxmire's "Golden Fleece" awards if made on the floor of the Senate, the same statement made in a press release was actionable. Hutchison v. Proxmire, 443 U.S. 111 (1979). We have obtained a working draft of petitioner McDonald's brief in this case and he does draw the line for absolute immunity at private communications to appropriate government officials (a copy has been provided to Mr. Alito). See Pet. Draft Br. 4-6 and note 12. This is a reasonable position which is in the government's interest to support. We should participate, if for no other reason than to urge that the Court not adopt a broader rule.

3. The concern about possible libel of government officials is understandable, but the position urged by petitioner in this case would not make suits for publicized statements concerning such officials more difficult, if the Court draws the line at private communications, where we argue it should. Moreover, it is simply not in the interest of the government to make private communications to government officials about the performance of their subordinates or candidates for appointive office subject to libel suits. See FBI Recomm. The government should be interested in the free flow of comment and criticism about the performance of its officials and office seekers to insure that the best possible work is done and the best people appointed to important positions.

4. As explained briefly in our initial recommendation, p. 4, an absolute privilege for private petitions to government officials is analogous to the absolute privilege accorded citizen participation in government in other contexts, such as testimony before judicial, legislative and administrative bodies and reports of allegedly criminal activity to law enforcement officials. Absolute immunity for citizen participation in governance in the narrow circumstances of this case is also analogous to the absolute immunity accorded various judicial, legislative, and executive officials. See Restatement (Second) of Torts §§ 585-591. We should emphasize the parallels of these immunities to the immunity sought in this case to avoid an overbroad reading of the Petition Clause that might injure our interests in other contexts.

For example, we should seek to avoid any rule that might make it more difficult to bring successful prosecutions for perjury or false statements under 18 U.S.C. 1001. 18 U.S.C. 1001 makes it a felony to make knowing and willful false statements or representations to federal agencies. This statute is designed to protect all federal agencies against such false statements and we should urge the Court not to adopt a rule in this case that might in any way indicate that the Petition Clause might provide a defense to a prosecution under this or other statutes prohibiting false statements to the government.

5. Your staff's recommendation largely ignores the important and ancient lineage of the right to petition. Although we have not had an opportunity to verify all the authorities presented in petitioner's draft brief, he makes a persuasive argument that such direct petitions were absolutely privileged under English common law and provided the context for the petition clause of our First Amendment. Petitioner's Draft Brief explains that at the same time that immunity for official activities of members of parliament was developing, a parallel immunity was established for individuals petitioning parliament or the crown for redress of grievances. Petitioner relies upon an early English case which held that a private libel action could not be brought against one who sent an allegedly libelous petition to an appropriate committee of Parliament "because it is in a summary course of justice, and before those who have power to examine whether it be true or false." Lake v. King, 1 Saund. 131, 132, 85 Eng. Rep. 137, 139 (1680). The facts there were remarkably similar to those in this case. The defendant in that case was an attorney who alleged that the plaintiff, also an attorney, had committed extortion in connection with his position as vicar general to the Bishop of Lincoln. His petition to the committee of Parliament sought an investigation and redress of grievances. This case was followed in an early Vermont case which held that absolute immunity from libel protected a petition to the legislature critical of one up for reappointment as a justice of the peace. Harris v. Huntington, 2 Tyler 129 (Vt. 1802). Similarly, McDonald in this case wrote the President urging him not to nominate Smith to be a U.S. Attorney because of alleged misconduct as an attorney and judge. Petitioner argues that the right of petition was considered extremely important by the American colonists and that the refusal of the crown to respond played an important role in the American Revolution. See Pet. Draft Br. 7-25. Petitioner's argument is certainly consistent with the importance given petitioning activity by the Supreme Court in New York Times and other cases.

The right to petition the English crown dates back at least to 1215, when it was included in the Magna Carta. R. Perry & J. Cooper, Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights 21 (Amer. Bar Fdn. 1952). Significantly, the Magna

Carta specifically referred to the right to petition concerning the failure of the judiciary or various of the king's official's to properly perform their duties or to comply with the law. Ibid. The English Bill of Rights of 1689, 1 Wm. & Mary, st. 2, c. 2, ¶5, reiterated various "ancient rights and liberties," and explicitly provided "[t]hat it is the right of the subjects to petition the King, and all committments and prosecutions for such petitioning are illegal." This provision resulted in part from the Seven Bishops Case of 1688, in which the archbishop and six bishops of the Church of England were prosecuted for seditious libel for sending a petition to the king which had requested that they not be required to distribute and read in the churches a declaration from the king which they considered to be illegal. The bishops were acquitted by the jury, but the fifth clause in the Bill of Rights was included as a result of the case. Sources of Our Liberties, supra at 227-228. See Pet. Draft Br. 12.

According to Perry & Cooper, Sources of Our Liberties, supra at 229-230, it was this right of petition which is incorporated in the Petition Clause of our First Amendment. Indeed, as they point out, this right of petition was employed by the Colonists to communicate their grievances to the English crown and one of the stated reasons for the Declaration of Independence was that "Our repeated Petitions have been answered only by repeated injury." Ibid.

6. The argument for absolute immunity in this case can better be viewed as the logical analogue to Barr v. Matteo, 360 U.S. 564 (1959), than as an abandonment of New York Times v. Sullivan, 376 U.S. 254 (1964). In Barr the Supreme Court held that a federal official was absolutely immune from a common law libel action by former subordinate employees concerning public statements made by the official regarding a terminal-leave payment plan later described by one senator as a raid on the Treasury. Absolute immunity was established by the Court not because there is an interest in protecting maliciously false statements, but because "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of [their] duties . . . ." Barr, supra, 360 U.S. at 571. The problem is that it is impossible to separate the wheat from the chaff without a libel trial, which today is often lengthy, bitter, and extraordinarily expensive. As the Court stated in Barr, ibid., "[t]he matter has been admirably expressed by Judge Learned Hand:"

> 'It does indeed go without saying that an official who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it

> would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties * * *. Gregoire v. Biddle, 177 F.2d 579, 581.

The analysis in Barr is equally applicable to a citizen who communicates directly and privately with a government official to petition for a redress of grievances. Indeed, the Court in New York Times, supra, 376 U.S. at 282, stated that "a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen" (footnote omitted). The Court quoted approvingly from Barr, stating that "[a]nalogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer." Ibid. For its view of citizen petitioning as an aspect of self-government, ibid., the Court relied upon Madison, who stated that "[i]f we advert to the nature of Republican government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress 934 (1794).

6. We are certainly willing to use the Noerr-Pennington cases carefully to accomodate the concerns of the Antitrust Division, but it should not be difficult to articulate a rule distinguishing between bona fide and sham petitioning activity, as the Court has already done. Moreover, the Court itself has already used the concerns it expressed about the constitutional issues in Noerr-Pennington to find certain boycotting activity protected by the Free Speech and Petition Clauses in NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982). Quoting its decision in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961), the Court noted "that the right of the people to petition their representatives in government 'cannot properly be made to depend on their intent in doing so . . . .'" Claiborne Hardware, supra at 913.

7. We understand that some concern was expressed that we did not have "input" from other law enforcement agencies, but the Federal Bureau of Investigation is obviously the largest such federal agency with the most at stake should some broad rule be adopted that might make some of the sources of its information subject to libel actions. Although your staff recommendation correctly points out that individuals furnishing information to law enforcement officials are now protected by absolute immunity under In re Quarles, 158 U.S. 532, 535 (1895), it is significant for the government that that rule was

not specifically grounded in the Constitution. That settled rule could be seriously disturbed should a broad or vaguely worded rule emerge from this case which might encourage libel suits against individuals providing information to the FBI or other law enforcement agencies.

CONCLUSION

For the foregoing reasons, and those set forth in our initial memorandum, I strongly recommend amicus participation in support of a narrow rule of absolute immunity in the circumstances of this case.

RICHARD K. WILLARD
Acting Assistant Attorney General
Civil Division

By:

Carolyn B. Kuhl
Deputy Assistant Attorney General

Memorandum

To : Acting Assistant Attorney General
Civil Division
Attention: Mr. Robert E. Kopp
Director, Appellate Staff

Date December 11, 1984

From : Assistant Director - Legal Counsel
Federal Bureau of Investigation

Subject : McDONALD v. SMITH
(U.S. SUPREME COURT NO. 84-476)

This is to respond to your memorandum to this office dated December 4, 1984. As detailed below, we are of the opinion that the United States should file a brief in the captioned matter as Amicus Curiae and that the United States should support petitioner's request for absolute immunity.

The Federal Bureau of Investigation (FBI), perhaps more than any other Federal agency, depends upon a totally unhindered flow of information from the public. The public provides information to us for a variety of reasons. Some people give us information to meet perceived patriotic or societal duties. Others give information to exact revenge, for business reasons, in exchange for money or, in some cases, simply because they are bored and an interview with an FBI Agent is seen as relief. Frankly, the information provided by those with less than admirable motivation is often more valuable than that given by those acting out of a sense of civic duty.

Not all information received by the FBI is factual. In addition to facts, an FBI Agent is provided with suspicions, gossip, opinions and hearsay. His job is to recognize that such information may not be factual and then, through investigation, to determine whether the information is valid or invalid. Fairly often, an FBI Agent also receives plainly false information. That information may be intertwined, however, with factual information of real value. An Agent must, at times, prolong his relationship with a person providing false information because of the possibility that a piece of true, valuable information will also be provided.

Certainly, the FBI's ability to function would be impaired if members of the public could lie to our Agents with impunity. We would strangle in false information if we had no means of protecting ourselves. Title 18, United States Code, Section 1001 gives us the protection needed, however. Through

FBI/

selective enforcement of this statute, and through well aimed threats of enforcement, the FBI is able to maintain the proper balance between a free flow of information from the public and the required protection from false information. Calling persons to testify under oath before grand juries also aids in the maintenance of this balance.

The availability of defamation actions against persons who have provided information to the FBI could harm the free flow of information on which we depend.*/ Even if such actions are not ultimately successful, the costs and inconvenience of defending against them could discourage others from freely providing information to the FBI. Moreover, the availability of defamation actions against persons providing information to the FBI could lead to subjects of FBI investigation bringing actions against cooperating individuals only to intimidate them. Regardless of the merit of such actions, their defense would cause problems for the cooperating individuals and could deter others from providing information to us.

Therefore, an absolute immunity as to claims of libel and slander for statements and information provided to the FBI in the proper course of its investigative mission is in the public interest. The immunity should cover not only responses to inquiries made by our Agents, but also statements and information given voluntarily and on the initiative of the individual providing the information. Logically, this absolute immunity would extend to the letter apparently sent by the petitioner here to the Director of the FBI.

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*/ In fact, such actions apparently are already available. For whatever reason, though, none has been brought against a person who provided information to the FBI insofar as we are aware. When we speak below of the desirability of absolute immunity for individuals who have provided information to us, we are speaking of what would be the ideal. We have functioned for decades without the protection of absolute immunity for persons who have cooperated with us. Although denial of absolute immunity to petitioner here might spark defamation actions against persons who have provided information to the Government, we believe the FBI's operations will not be devastated if absolute immunity is denied petitioner. Nevertheless, absolute immunity for petitioner is preferrable to qualified immunity.

The need for an unhindered flow of information within the Federal government has been recognized previously. Among the explicit exceptions to the waiver of sovereign immunity created by the Federal Tort Claims Act are the exceptions for claims arising from libel, slander and misrepresentation. 28 U.S.C. § 2680(h). The ruling in Barr v. Matteo, 360 U.S. 564, rehearing denied, 361 U.S. 855 (1959), was based on the need for a free exchange of information in Government. It is not enough, however, simply to protect the Government and the Government employee from defamation actions. As stated, the FBI is dependent upon the public's ability and willingness to provide information to us. The protection afforded the Government and the Government employee should be extended to the other side of the equation --to those who cooperate with the Government.

At common law, absolute immunity from libel and slander actions has been afforded only when the public's welfare demanded it. The decision to afford or withhold absolute immunity, however, has had no relation to constitutional principles. That fact sets the analysis made in those cases apart from the issue presented in the instant case. Absolute privilege has been generally limited to three classes: (1) Proceedings of legislative bodies; (2) Judicial proceedings; and (3) Executive communications. Courts have been very reluctant to extend absolute immunity any further.*/ Courts have held that absolute immunity should extend to every step of a judicial proceeding including information given to a law enforcement officer as part of his investigation. See e.g., Guardian Life Insurance Company of Texas v. Reagan, (Tex. Civ. App. 1941) 155 S.W. 2d 950, Affirmed, (Tex. 1942) 166 S.W. 2d 643; Brewster v. Baker, (Tex. Civ. App. 1940) 139 S.W. 2d 909; Meyer v. Viereck, (Tex. Civ. App. 1926) 286 S.W. 894; Stivers v. Allen, (Wash. 1921), 196 P. 663. Unfortunately, other courts have found that only a qualified immunity should attach. See e.g., Hutchinson v. New England Tel. & Tel. Co., (Mass. 1966) 350 Mass. 188, 214 N.E. 2d 57; Parker v. Kirkpatrick, (Me. 1924) 126 A. 825; Pecue v. West, (N.Y. 1922) 135 N.E. 515; Tanner v. Stevenson, (Ky. 1910), 138 Ky. 578, 128 S.W. 878; Barry v. McCollom, (Conn. 1908) 81 Conn. 293, 70 A. 1035.

The present case could give us a different, possibly more certain approach to this problem. Petitioner's constitutional argument is a new tool which might be used to protect the

*/ But, we note that the U.S. Circuit Court of Appeals for the District of Columbia just this past week extended absolute immunity to "opinions" expressed by Columnists Rowland Evans and Robert Novak.

free flow of information from the public to the Government, including the flow of information to the FBI. Rather than having to convince a court that public policy demands absolute immunity instead of qualified immunity for a particular type of communication to the Government, a person sued because of information provided to the Government could, if petitioner succeeds here, defend himself by arguing that the communication to the Government was petitioning activity as protected by the First Amendment. We believe that in most cases that showing would be more easily attained than convincing a court that public policy requires absolute immunity. Further, regardless of which showing might be simpler to make, we believe that the two arguments could be effectively used in tandem. Again, we believe that the interests of the FBI and the Government as a whole would be best served by absolute protection of communications made to the Government.

The Fourth Circuit ruled that petitioner's letter was petitioning activity as defined by the First Amendment. We believe that the apparent contents of the letter are not at all dissimilar to the information routinely provided to the FBI by members of the public. Basically, petitioner's letter and the information routinely provided to us consist of very negative (defamatory) comments regarding other persons. Plausible arguments can be made that providing information of this nature to the FBI is petitioning activity, whether provided voluntarily and on the initiative of the person providing the information, or, in direct response to inquiries initiated by the FBI. This agency has a central role in protecting society. Citizens must have free access to petition the FBI for that protection.

We do not offer an analysis here of petitioner's chance of success before the Supreme Court. We note only that the question of affording absolute immunity for petitioning activity is one of first impression and will hinge on the Court's interpretation of public policy. The Government clearly has a role in defining public policy. This role provides the Civil Division with a vehicle for an Amicus brief.

Finally, we mention a concern we initially had which now seems resolved. As discussed above, 18 U.S.C. § 1001 is a tool necessary to the operations of the FBI. Whereas a proliferation of defamation actions would certainly harm our ability to acquire necessary information, selective use of 18 U.S.C. § 1001 allows us to maintain the balance that we desire between an unhindered flow of information and the need to exclude

false information. There was concern, however, that if petitioner is successful here and absolute immunity henceforth attaches to petitioning activity, there might be some carry-over to false information that is the subject of Section 1001 investigations and prosecutions. If that false information was provided as part of petitioning activity, there could be argument that the constitutional protections which provide absolute immunity from defamation actions would also act to immunize an individual from a Section 1001 prosecution.

We discussed this concern with Ms. Barbara Herwig of your staff on December 7, 1984 and she pointed out that: (1) The absolute immunity protecting witnesses appearing in judicial and legislative hearings from defamation actions in no way immunizes them from perjury charges; and (2) the rule in Imbler v. Pachtman, 424 U.S. 409 (1976), that while a prosecutor is absolutely immune from a civil action for willfully using perjured testimony at trial and concealing exculpatory information, he may still be criminally prosecuted for the same actions. These analogies seem strong enough that we believe a ruling of absolute immunity in the instant case would not cause lasting problems in enforcing 18 U.S.C. § 1001.

However, we do note that the absolute immunity at issue in those analogous situations had no relation to the constitution, but instead stemmed from common law determinations of how public policy should be shaped. The constitutional basis for the absolute immunity sought here might allow a defendant of a Section 1001 prosecution to distinguish Imbler v. Pachtman and the situation of witnesses being prosecuted for perjury.

We do not wish any harm to be done to the Government's ability to enforce Section 1001. We would rather that petitioner fail here and only qualified immunity be given him. Therefore, if your office has any doubt about the effect of absolute immunity being provided petitioner on the Government's ability to carry out Section 1001 prosecutions, we prefer that you not file the Amicus brief. Furthermore, if you believe that a negative effect would in fact occur, we wish that you file an Amicus brief opposing petitioner. Nevertheless, full absolute immunity and the continued viability of Section 1001 prosecutions would be the best possible result.

Questions in this regard can be made to Special Agent Edward H. Lueckenhoff, telephone number 324-4532.