

ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

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DKT/CASE NO. 84-476
TITLE ROBERT McDONALD, Petitioner V. DAVID I. SMITH
PLACE Washington, D. C.
DATE March 20, 1985
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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT MC DONALD, :
Petitioner :
V. : No. 84-476
DAVID I. SMITH :
-----x

Washington, D.C.

Wednesday, March 20, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:16 o'clock p.m.

APPEARANCES:

BRUCE JAMES ENNIS, JR., ESQ., Washington, D.C.;
on behalf of Petitioner.

WILLIAM A. EAGLES, ESQ., Graham, North Carolina; on
behalf of Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Ennis, you may proceed whenever you're ready.

ORAL ARGUMENT OF BRUCE JAMES ENNIS, JR., ESQ.

ON BEHALF OF THE PETITIONER

MR. ENNIS: Mr. Chief Justice and may it please the Court, the question is whether the Federal Government's need to obtain information about candidates seeking appointment to federal office, together with the right of a citizen to provide that information in a petition addressed only to appropriate federal officials, requires the same immunity from common law libel actions this Court has already afforded both citizens and governmental officials in a broad range of other circumstances in which providing only qualified immunity would unduly impair the effective functioning of government.

In each of those other circumstances, the fact that immunity would protect not only truthful and useful communications, but also, on occasion, knowingly false and defamatory communications, has been considered a necessary cost of government.

As Justice Harlan wrote for the Court in *Barr v. Matteo*, affording executive officials immunity from libel actions alleging knowing falsity, "It has been

1 thought in the end better to leave unredressed the
2 wrongs done by dishonest officers than to subject those
3 who try to do their duty to the constant dread of
4 retaliation."

5 QUESTION: Mr. Ennis, do you read any
6 constitutional dimension into Barr v. Matteo?

7 MR. ENNIS: No, Your Honor, I do not. I
8 believe that Barr v. Matteo and other decisions of this
9 Court affording immunity to governmental officials is
10 not based on any specific clause of the Constitution.
11 None was referred to. But I do believe they were
12 constitutional decisions in the sense that the Court
13 felt that the very constitutional structure of our
14 government required such immunity.

15 QUESTION: I never read Barr v. -- I don't
16 think there's a word about the Constitution in Barr v.
17 Matteo. I've always thought it was a District of
18 Columbia doctrine.

19 MR. ENNIS: Your Honor, there is not a word
20 about the Constitution in Barr v. Matteo, but the Court
21 nevertheless thought, even though there was no
22 constitutional right of a governmental official at
23 issue, that the effective functioning of the government
24 itself was sufficient to require the rule of immunity.

25 In this case, we have not only that same

1 governmental interest, but in addition the interest of
2 the citizen critic expressly grounded in the petition
3 clause of the First Amendment.

4 QUESTION: Well, what's the source of the law
5 we're dealing with here? Is it all -- is it just
6 constitutional law? The case was tried under North
7 Carolina libel laws, wasn't it?

8 MR. ENNIS: The case has not yet been tried,
9 Your Honor.

10 QUESTION: Would it be tried under North
11 Carolina libel law?

12 MR. ENNIS: It would be tried under North
13 Carolina libel law as that law is modified and governed
14 by the federal Constitution and also by the needs of the
15 Federal Government to receive information.

16 For example, the Court has also ruled, not
17 relying on any specific constitutional provision, that
18 citizens have a right to provide information about
19 criminal offenses to government; they have a right to
20 testify before legislative and judicial bodies; and they
21 have a right to provide petitions to the judicial branch
22 of government, and they would be absolutely immune from
23 libel actions in each of those circumstances. We seek
24 no more in this case.

25 In our view, there are two separate but in

1 this case coinciding interests which require immunity.
2 The first is the interest of the Federal Government in
3 effective functioning and the second is the interest of
4 the citizen critic in providing the information the
5 government needs to function effectively.

6 The basic facts --

7 QUESTION: Well, you wouldn't say that it's
8 necessary for the essential function of government to
9 operate on false information.

10 MR. ENNIS: Justice White, I know that you
11 have taken pains to concur in several decisions
12 stressing that the Constitution does not directly
13 protect knowingly false information.

14 QUESTION: And the Court has already said
15 that, too.

16 MR. ENNIS: Yes, the Court has agreed with
17 that, Your Honor.

18 QUESTION: Yes.

19 MR. ENNIS: We do not contend that it does,
20 and we do not need to contend that it does.

21 QUESTION: But you have to make some other
22 kind of an argument. You have to make an argument that
23 you have to lie -- you have to accept some lies in order
24 to get enough of the truth.

25 MR. ENNIS: That's exactly the argument that

1 this Court has already accepted.

2 QUESTION: But that may be true on one side of
3 your argument, on the government interest, but what
4 about the individual?

5 MR. ENNIS: They are --

6 QUESTION: Does he have to be able knowingly
7 to lie in order to give decent information to the
8 government? Knowingly lie.

9 MR. ENNIS: Your Honor, we are not seeking
10 protection for the right to knowingly lie.

11 QUESTION: Well, you are. You say absolutely
12 immunity. It doesn't make any difference, you say,
13 whether he's lying or not.

14 MR. ENNIS: Your Honor, we're seeking
15 protection for the right to petition the government and
16 to provide information to the government.

17 QUESTION: And to tell lies in the process.

18 MR. ENNIS: Even if there may occasionally be
19 knowing lies in the process.

20 QUESTION: Well, what about on those occasions
21 when he knowingly lies? Now, what possible excuse --
22 what basis has he got to claim absolute immunity?

23 MR. ENNIS: His basis, Your Honor, is the same
24 basis that the United States itself identified in the
25 case of Webb v. Fury. We don't have to speculate about

1 the federal interest. In Webb v. Fury, the United
2 States formally and explicitly took the position that
3 citizens should be absolutely immune from common law
4 libel actions when they provide petitions to federal
5 agencies, even if those petitions are alleged to be
6 knowingly false.

7 The reason, said the government, was --

8 QUESTION: Alleged to be.

9 MR. ENNIS: Pardon me, Your Honor?

10 QUESTION: Alleged to be.

11 MR. ENNIS: Alleged to be. That is all that
12 is true in this case as well, Your Honor.

13 The reason for that was that any lesser degree
14 of immunity, said the United States, would deprive the
15 government of the information it needs to govern.

16 QUESTION: Because?

17 MR. ENNIS: Because both governmental
18 officials and citizens would be deterred from providing
19 truthful and useful information to the government if
20 they knew that merely upon an allegation that their
21 communications were knowingly false, they would be
22 required to spend literally thousands of dollars in
23 unrecoverable defense costs to defend the truth of their
24 statements.

25 That would silence both governmental officials

1 and citizen critics from providing the information
2 government needs.

3 QUESTION: Webb v. Fury, was that a case in
4 the Supreme Court of West Virginia?

5 MR. ENNIS: That's correct, Your Honor.

6 QUESTION: And what? The government filed an
7 amicus brief?

8 MR. ENNIS: The United States went to the
9 extraordinary length of filing both an amicus brief and
10 an amicus reply brief.

11 QUESTION: Have they filed any brief in this
12 case?

13 MR. ENNIS: No, they have not, Your Honor. I
14 think that the interest of the Federal Government is on
15 its face and, given Webb v. Fury, quite clear. But if
16 there be any doubt about that, the Court could of course
17 invite the Solicitor General to follow through.

18 QUESTION: I think the Solicitor General is
19 usually quite aware when he figures the government's
20 interests are involved.

21 MR. ENNIS: That's correct, Your Honor.

22 QUESTION: Mr. Ennis, if a witness testifies
23 in court, even in a matter of grave concern to the
24 government, if the witness testifies falsely, the
25 witness can be tried for perjury, can he not?

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MR. ENNIS: That's correct, Your Honor.

QUESTION: And yet there certainly is as great an interest in those circumstances in obtaining truthful information, both for the government and from the witness's standpoint. And I take it in those circumstances, the witness isn't deterred from giving the truth, speaking the truth, because -- despite the threat of prosecution for perjury. Isn't that right?

MR. ENNIS: That is correct, Your Honor, and it raises a very important distinction. Witnesses who testify in judicial proceedings are not immune from perjury prosecutions, but they are immune from common law libel actions.

We are not seeking immunity from every possible sanction. For example, the Federal Government has already made it a crime to provide false information to the government, whether it's defamatory of a third party or not.

We are not seeking immunity from that kind of prosecution or from other sanctions. We are only seeking the same immunity from common law libel actions that witnesses in judicial proceedings already have.

QUESTION: But are not witnesses there, other than by their own free will?

MR. ENNIS: Some witnesses, Your Honor, are

1 there other than by their free will. Others are there
2 by their own free will. But the doctrine --

3 QUESTION: Once they are there, they are
4 compelled to answer all relevant questions, are they
5 not?

6 MR. ENNIS: That's certainly correct,
7 Your Honor, but the rule applies not only to witnesses;
8 even persons who simply file complaints with the
9 judicial branch are absolutely immune from common law
10 libel actions based on the statements contained in their
11 complaints, and no one has compelled them to file such a
12 complaint.

13 QUESTION: Mr. Ennis -- oh, excuse me. Finish
14 your answer.

15 MR. ENNIS: I see no compelling justification
16 for affording petitions to the judicial branch of
17 government immunity from common law libel actions, and
18 not affording the same immunity for petitions to the
19 legislative and executive branches, particularly when
20 the petition is directly relevant to an important
21 decision then under consideration by the executive and
22 legislative branches.

23 There is no presumption, if I may say so,
24 Your Honor, that it is more important to protect
25 petitions to the judicial branch than it is to protect

1 petitions the president and to the legislative branch.

2 QUESTION: That's good background for the
3 question I was going to ask you about the scope of your
4 position. Supposing you have somebody who's nominated
5 to the cabinet, or district attorney, somebody like
6 this.

7 MR. ENNIS: I'm sorry. I did not hear.

8 QUESTION: A nominee for some office that
9 requires confirmation of the Senate. And say a large
10 pressure group like one of the big trade associations or
11 the National Rifle Association have decided to oppose
12 him. Could they get together and write literally
13 thousands of false letters accusing him of all sorts of
14 personal wrongdoing and all the rest, and misstating his
15 position and all the rest, get a regular campaign going
16 -- would all those letters be immune from any kind of
17 libel action?

18 MR. ENNIS: Your Honor, so long -- under our
19 theory of the case, so long as the letters were
20 addressed to appropriate officials of the Federal
21 Government --

22 QUESTION: To the chairman of the committee.

23 MR. ENNIS: -- who were then considering a
24 governmental decision, yes, they would be immune, not
25 from all sanctions, but from common law civil libel

1 actions.

2 QUESTION: Which is probably the only sanction
3 that's available for deliberate falsehood of that kind.

4 MR. ENNIS: Well, as I've indicated, there are
5 already on the books statutes making it a crime to
6 provide false information to the Federal Government, and
7 he certainly could be prosecuted for that.

8 It is also conceivable, though I do not
9 concede the point, that a state criminal prosecution for
10 criminal libel could be pursued, though I am not willing
11 to concede that such a prosecution would survive
12 constitutional --

13 QUESTION: What kind of a constitutional
14 immunity is it that just protects you from a civil
15 remedy but not from a criminal remedy?

16 MR. ENNIS: Well, as I say, the federal
17 criminal remedy would be different. It would not be for
18 the crime of providing defamatory information. It would
19 be for the crime of providing false information to the
20 government, whether it was defamatory or not.

21 It is a crime, for example, to provide false
22 information to the FBI.

23 QUESTION: But if the -- I am still a little
24 puzzled. If the communication is constitutionally
25 privileged, notwithstanding its falsity, how can you be

1 satisfied with a rule that would allow the Federal
2 Government to prosecute the person for sending the same
3 communication?

4 MR. ENNIS: Because, Your Honor, I'm making
5 the same distinction I made in response to the question
6 asked by Justice O'Connor, and that is, we are not
7 seeking immunity from every conceivable sanction. We
8 are only seeking immunity from one particular sanction
9 which is particularly likely to silence critics of --

10 QUESTION: Where do you find that distinction
11 in the language of the Constitution?

12 MR. ENNIS: I find that distinction in this
13 Court's decisions. This Court has already ruled that
14 judges, legislators, and executive officials are immune,
15 not from every sanction, but immune from common law
16 libel actions, even if their statements are alleged to
17 be defamatory and knowingly false.

18 The Court --

19 QUESTION: Those are -- as Justice Rehnquist
20 points out, those are not constitutional decisions.

21 MR. ENNIS: I believe they are constitutional
22 in the sense, Your Honor, that they derive from the very
23 structure of a republican form of government. They are
24 like the slaughterhouse cases, like In Re Quarles, like
25 all of the foundation cases on which our Constitution

1 and jurisprudence is based.

2 The Court in every one of those cases said
3 that that kind of immunity, in the circumstances of that
4 case, was necessary in order to ensure the effective
5 functioning of government. That's the literal language
6 used in those cases.

7 I see no distinction here. The government was
8 actively considering an important governmental decision
9 -- whether to appoint Respondent to the office of United
10 States Attorney, the chief law enforcement office in the
11 Middle District of North Carolina.

12 That was obviously an important decision. It
13 required nomination by the President and the advice and
14 consent of the Senate. This was not some low level
15 margin decision. In order to make a responsible and
16 effective decision on that candidacy, the government
17 needed to obtain relevant information.

18 The letters that my client sent to the
19 President are, on their face, highly relevant to the
20 qualifications of Respondent for that office. But if my
21 client knew --

22 QUESTION: Yes, but don't we have to assume
23 that they are also false, and deliberately so, for
24 purposes of deciding the case?

25 MR. ENNIS: Your Honor, I have to concede that

1 the rule I am arguing for would protect not only truthfu
2 communications --

3 QUESTION: No, you have to concede that your
4 client sent deliberately false letters, knowingly -- I
5 mean false letters that he knew were false. That's the
6 allegation which we must accept as true.

7 MR. ENNIS: That's the allegation of the
8 complaint. It is specifically denied in the answer.
9 This case does not arise simply on a motion to dismiss.

10 QUESTION: But for purposes of your appeal,
11 you must assume it's true.

12 MR. ENNIS: I don't want to quibble with you,
13 Your Honor. I do want to make a point, however, that
14 this is not just a motion to dismiss. It's a motion for
15 judgment on the pleadings, which includes the answer as
16 well as the complaint.

17 Nevertheless, I would assume for purposes of
18 this case that even if what my client wrote is knowingly
19 false, it should be absolutely protected because it is
20 the right of the Federal Government to decide for itself
21 how to separate the false from the true. The Federal
22 Government certainly has mechanisms for doing that.

23 This letter was in fact addressed, one copy,
24 to William Webster, the Director of the FBI who has
25 statutory authority to investigate candidates for

1 appointment to this very federal office. And the FBI
2 certainly has enormous resources for ferreting out truth
3 and falsity.

4 QUESTION: Suppose we have a vacancy here in
5 the staff of our Court, the Clerk of the Court or
6 something, and someone applies. Are you suggesting the
7 same freedom would be accorded if a person wrote to the
8 Court, wrote to me and said this fellow is a scoundrel,
9 he's a Communist, he's a bankrobber, unreliable?
10 Absolutely immune?

11 MR. ENNIS: Yes, Your Honor. If you were
12 making a decision whether to hire a certain person, for
13 example, as your law clerk and if a citizen had
14 information concerning the qualifications of that
15 person, I would take the position that the citizen would
16 have the right to send you a letter expressing his views
17 and that those views would be immune from a civil libel
18 action, though not from other possible sanctions,
19 whether they are true or false.

20 QUESTION: So republican form of government.

21 MR. ENNIS: Your Honor, both because --

22 QUESTION: That's the nearest -- I've been
23 listening. I'm quite interested. That's the nearest
24 you've gotten to point to any provision of the
25 Constitution, and you're miles away from that one.

1 MR. ENNIS: Your Honor, both because of
2 republican form of government -- that's the federal
3 interest -- and also because of the petition clause of
4 the First Amendment. The history of the petition
5 clause, I think, is overwhelmingly clear.

6 In fact, the Respondent does not even deny --

7 QUESTION: I think it's one of the clearest
8 puddles of mud I've seen in a long time.

9 MR. ENNIS: Well, Your Honor, I don't wish to
10 seem disrespectful, but in our brief we refer to the
11 fact that in a parliamentary resolution of 1669, in *Lake*
12 *v. King* in 1680, in the *Seven Bishops* case of 1688, in
13 the English Bill of Rights of 1689, in a host of other
14 authorities, English law that was known to the framers
15 provided absolute immunity to British subjects when they
16 petitioned either Parliament or the king.

17 The Respondents do not dispute that history.
18 They also do not dispute that in *Harris v. Huntington*,
19 the first American case to consider the common law --

20 QUESTION: Well, I dispute that as of today,
21 you can write anything you please to any governmental
22 official and have absolute immunity.

23 MR. ENNIS: Well, Your Honor, if I wrote a
24 letter to the government accusing --

25 QUESTION: Is there anything that you could

1 write to the government that you would not be
2 responsible for?

3 MR. ENNIS: I'm not claiming --

4 QUESTION: The point is that you write to a
5 government official, period.

6 MR. ENNIS: Right.

7 QUESTION: That's all you say. If you write
8 to a government official, you have absolute immunity,
9 period. That's the end of your constitutional
10 provision.

11 MR. ENNIS: No. That is a broader rule than
12 we are contending for in this case.

13 QUESTION: How much broader is it?

14 MR. ENNIS: Quite a bit broader. We are only
15 asking the Court to rule in the narrow circumstances of
16 this case, and that involves three important
17 qualifications. The first is that the petition is from
18 a citizen addressed to appropriate officials of the
19 Federal Government, not just to anyone.

20 Second --

21 QUESTION: I said anyone in government.

22 MR. ENNIS: Yes, but we're not -- if Mr. -- if
23 my client --

24 QUESTION: I don't think you can be in
25 government unofficially.

1 MR. ENNIS: No, certainly not, Your Honor.
2 But if my client wrote a letter to some member of the
3 Forestry Department in the State of Wisconsin -- who's a
4 government official -- which was defamatory --

5 QUESTION: Also, I wouldn't assume it would
6 apply to somebody who wrote to the third assistant
7 janitor in the Post Office.

8 MR. ENNIS: That's correct, Your Honor.
9 That's an important qualification.

10 QUESTION: Don't break anything -- bring
11 something that's -- if you write to any governmental
12 official --

13 MR. ENNIS: Yes.

14 QUESTION: Any officer of the United States,
15 you have absolute immunity. Is that correct?

16 MR. ENNIS: That's not the position for which
17 we are --

18 QUESTION: Are you limiting your position to
19 decisionmaking officials?

20 MR. ENNIS: Your Honor, we are limiting the
21 rule we see to appropriate federal officials. That
22 could include certainly those officials who are directly
23 involved in making the decision. For example, as you
24 might be, if you were hiring a law clerk.

25 But it might also include a few more officials

1 who are not directly involved in making the decision,
2 but whom the petitioner could reasonably believe would
3 be influential in that decisionmaking process.

4 The citizen critic should not be forced to
5 guess at his peril, whether the governmental recipients
6 of his petition are the right recipients or not. So
7 long as his decision is not patently unreasonable, as
8 perhaps writing to the third janitor might be, so long
9 as decisions are not patently unreasonable, it should be
10 protected.

11 Let me continue by saying that --

12 QUESTION: Mr. Ennis, isn't there a basic
13 difference in the justification for immunity and libel
14 or defamation actions for witnesses in judicial
15 proceedings, simply because they're subject to
16 cross-examination to get at the truth?

17 Their statements occur in a framework where
18 it's possible to know whether they're speaking the truth
19 or not, at least by our standards. And you're asking
20 for absolute immunity in a situation where someone just
21 submits a letter and is not open to cross-examination
22 for it.

23 And it seems to me to have some basic
24 differences. And I think if you look closely at the
25 common law immunity, you will find that it extended

1 really only to judicial proceedings and witnesses and
2 not as you have described.

3 MR. ENNIS: Well, Your Honor, I must
4 respectfully disagree about the common law history. But
5 on the other question you asked, that is obviously an
6 important point; that witnesses in judicial proceedings
7 are subject to cross-examination.

8 The rule, however, of immunity applies not
9 only to witnesses but also to complainants in judicial
10 proceedings. The complaint itself is immune. And there
11 may or may not be occasion for testing the truth of
12 allegations in a complaint. The complaint may never get
13 served, it may not --

14 QUESTION: Well, they can have the opportunity
15 for a formal response. It's in a setting where it lends
16 itself to a response.

17 MR. ENNIS: Yes, that's right.

18 QUESTION: And in the situation you described,
19 the person about whom the letter is written may never
20 know what was written at all.

21 MR. ENNIS: Yes. Let me respond to that,
22 Your Honor.

23 QUESTION: There's no notice, there's no
24 response.

25 MR. ENNIS: Let me respond to that,

1 Your Honor, because that's very similar to one argument
2 raised by the Respondent that this was a secret
3 petition. In fact, it was not, for four reasons.

4 First, a secret --

5 QUESTION: But the rule you pose would cover
6 something just submitted that the person about whom it's
7 written would never know.

8 MR. ENNIS: The rule I propose is no different
9 than the rule this Court has already adopted in both
10 Quarles and Vogel v. Gruz. This Court has already ruled
11 that the subject of a petition to the Federal Government
12 cannot compel the disclosure of that petition to himself
13 or to anyone else without the "permission or assent" of
14 the Federal Government.

15 Because the Court recognized that the
16 government has such an important need in receiving that
17 information, that the Federal Government should be free
18 to decide for itself whether to pass on a communication
19 to the subject of the communication. That's already the
20 rule this Court has adopted.

21 Third --

22 QUESTION: You mean in criminal cases. Is
23 that what you're talking about?

24 MR. ENNIS: Well, Vogel applies not just in
25 criminal cases, nor does -- but the rule I'm talking

1 about is a petition to Federal Government.

2 The fourth point I'd like to make on that
3 secrecy argument is that the Respondent, I think
4 disingenuously suggests in his answering brief, that he
5 did not have an ample opportunity to respond. In fact,
6 he did. The record in this case is clear, as the
7 deposition of Congressman Johnston makes clear, that the
8 Respondent promptly received copies of both letters from
9 Congressman Johnston, his friend, and Senator Helms, his
10 friend and sponsor, and that on January 19th and
11 February 27th he in fact wrote to Congressman Johnston
12 with enclosures, providing a detailed response to every
13 one of petitioner's allegations.

14 So he did in fact have an ample opportunity to
15 respond, and that's in the record of this case. This
16 was not a secret, however. A secret requires an
17 agreement by both parties to the communications to keep
18 it confidential between themselves.

19 My client did not demand or request that the
20 government keep his petition secret. To the contrary, he
21 offered to testify publicly, where he would have been
22 subject to cross-examination and penalties for perjury;
23 nor did he expect secrecy. He is alleged to have sent
24 copies of his letters to Senator Helms and Congressman
25 Johnston, both of whom were friends and sponsors of the

1 Respondent.

2 QUESTION: Mr. Ennis, would your rule cover
3 the anonymous correspondent as well as one who signs his
4 name?

5 MR. ENNIS: Your Honor, I think that the
6 Federal Government should be free to decide for itself
7 whether it wants to receive and act upon anonymous
8 petitions as well as --

9 QUESTION: So your answer is yes, it would.

10 MR. ENNIS: Yes, it would, but I don't think
11 the Court needs to --

12 QUESTION: Do you think the rule for which you
13 contend would have any tendency to increase the amount
14 of false communication?

15 MR. ENNIS: No more, Your Honor, than the rule
16 this Court adopted in Barr v. Matteo for governmental
17 officials.

18 QUESTION: That's not my question. My
19 question is, do you think the rule for which you contend
20 would have any tendency to increase the amount of false
21 communication?

22 MR. ENNIS: No, I do not think it would,
23 Your Honor, because the petitioner would still be
24 subject to penalties for providing false information to
25 the government. On the contrary, though, I think that a

1 rule granting petitioner's immunity from common law
2 libel actions would tend to encourage citizens to
3 provide truthful and useful information to the
4 government because they would no longer have to fear
5 spending \$20, \$40, \$60, \$80,000 in unrecoverable defense
6 costs if their communication was simply alleged to be
7 knowingly false.

8 Let me respond to one point that has not yet
9 come up, but is -- since the Respondent really says
10 virtually nothing at all about our historical argument
11 that was known to the framers and nothing at all about
12 our functional analysis argument, Respondent talks only
13 about the petitions being secret and misdirected.

14 The argument about misdirected is that
15 petitioner's first letter was misdirected because he
16 sent it to Congressman-Elect Johnston and to
17 President-Elect Reagan before they had been sworn in.
18 But as the record makes clear, in November of '80 the
19 Respondent had applied for the position to
20 Congressman-Elect Johnson and to Senator Helms
21 requesting their assistance in obtaining the
22 appointment. If it was appropriate for the Respondent
23 to seek the assistance of Congressman-Elect Johnston in
24 obtaining the appointment, it was no less appropriate
25 for the petitioner to write to the same

1 Congressman-Elect Johnson to oppose the appointment.

2 It was widely reported in the press that there
3 was a transition team in place, chaired by Ed Meese,
4 that was then actively considering nominations. In
5 fact, the Respondent alleges that he was an active
6 candidate, and that the President would be making
7 appointments as soon after he was sworn in as possible.
8 There is no more appropriate occasion for a citizen to
9 communicate with the Federal Government concerning a
10 candidate for Federal office than when the
11 decisionmaking process is actively underway.

12 Let me conclude -- and then I'd like to
13 reserve a few minutes for rebuttal -- by simply
14 reminding the Court, as I'm sure it's aware, that the
15 deterrent effect we are talking about here is an
16 extraordinarily severe deterrent effect.

17 In fact, the Respondent concedes at page 18 of
18 his brief that the potential cost of defending a libel
19 action is great, to use the Respondent's words. And the
20 relative cost for an ordinary citizen who does not have
21 libel defense insurance is even greater than the cost
22 for a media defendant, such as the New York Times.

23 Let me pose a hypothetical. If North Carolina
24 tomorrow enacted a statute imposing a \$20,000 tax on all
25 petitions to the Federal Government, can anyone doubt

1 that that would silence all petitions to the Federal
2 Government by everyone but the most wealthy or foolhardy
3 citizen?

4 But the \$20,000 tax, though it's not paid to
5 the State of North Carolina, is the same in this case
6 under the common law rule. The petitioner must pay that
7 \$20,000 to his defense lawyers and to court reporters,
8 not to the State of North Carolina directly, but the
9 cost to him is the same and the deterrent effect on him
10 is the same.

11 If this Court does not grant absolute
12 immunity, I think it is clear that the message that will
13 go out to the citizens of this country is that they are
14 no longer free to criticize candidates or to criticize
15 wrongdoing by public officials, and that if they do so,
16 they do so at enormous economic cost to themselves.

17 QUESTION: Of course, the message would always
18 say you certainly are protected, even if you give some
19 false information if you didn't know it was false. But
20 the message might say if you deliberately sent in false
21 information, you'd better watch your Ps and Qs.

22 There would always be qualified immunity,
23 wouldn't there?

24 MR. ENNIS: It's going to cost my client the
25 same amount of money to prove that his allegations were

1 true, and it doesn't matter that they're simply alleged
2 to be false; he has to incur the same costs. I believe
3 I have --

4 QUESTION: Mr. Ennis, what do you think the
5 message was to someone who read White v. Nicholls?

6 MR. ENNIS: Your Honor, I think that White v.
7 Nicholls was, as this Court recognized in Briscoe v.
8 La Hue, an incorrect summary of the common law. White
9 v. Nicholls totally ignores the pre-revolutionary
10 cases. It ignores Harris v. Huntington which was cited
11 here.

12 QUESTION: Do you know of another American
13 case before White v. Nicholls that adopted the Harris
14 Huntington approach? Can you cite one?

15 MR. ENNIS: Your Honor, I don't know because
16 we really stopped our research at the time of the
17 framers --

18 QUESTION: Well, I haven't been able to find
19 one, so I would be interested if you had one. I didn't
20 think there were any.

21 MR. ENNIS: I don't know, and if there were, I
22 don't think it would be relevant because we're inclined
23 to see the case law that would have been familiar to the
24 framers of the petition clause. And cases decided
25 contemporaneously with White v. Nicholls may have been

1 familiar to this Court from White v. Nicholls, but could
2 not possibly have been within the contemplation of the
3 framers.

4 I meant to reserve a couple of minutes, but I
5 guess my time has expired. Thank you very much.

6 CHIEF JUSTICE BURGER: Mr. Eagles.

7 ORAL ARGUMENT OF WILLIAM A. EAGLES, ESQ.

8 ON BEHALF OF THE RESPONDENT

9 MR. EAGLES: Mr. Chief Justice and may it
10 please the Court, over 20 years ago this Court decided
11 New York Times v. Sullivan. In that case the Court set
12 out the protection the Constitution makes available to
13 citizens who criticize public officials.

14 The citizens in question in New York Times
15 were not petitioning the government. They were,
16 however, petitioning the holders of the absolute
17 sovereignty in this country; they were petitioning their
18 fellow citizens.

19 New York Times, addressing the free speech and
20 press clauses, recognized that actual malice must be
21 shown to be the basis of any recovery from a libel
22 action for criticizing a federal official or government
23 official.

24 Now Mr. McDonald comes before this Court and
25 seeks absolute immunity for letters alleged to have

1 contained knowing, malicious defamatory falsehoods. New
2 York Times standard would not protect such intentional
3 lies. Yet, Mr. McDonald really offers only arguments
4 that were addressed, weighed, balanced, and decided in
5 New York Times.

6 QUESTION: Has anyone ever succeeded in
7 getting a recovery from The New York Times since
8 Sullivan that you're aware of?

9 If you don't know, it's --

10 MR. EAGLES: I don't know offhand,
11 Your Honor.

12 We are here denying that malicious lies are
13 afforded a protection under the petition clause; that
14 the same malicious lies would be denied by the free
15 speech and press clauses.

16 Yesterday, this Court affirmed the position
17 that's inescapable under the unified analysis of the
18 speech and petition clauses received by this Court
19 already, stating that while the petition and speech
20 clauses are separate they are related and generally
21 subject to the same analysis.

22 Application of that same analysis is all that
23 we ask, that malicious lies whispered in the ear of a
24 government official receive no greater protection than
25 malicious lies printed in The New York Times.

1 Counsel for the petitioner has indicated that
2 he does not seek protection from every possible sanction
3 that might result from information contained in the
4 petition. They do, however, seek protection, absolute
5 immunity from the only sanction available to Mr. Smith.
6 Mr. Smith is not afforded his day in court that would
7 result from a petition to the judicial branch.

8 The only opportunity that David Smith will
9 ever have to prove the truth or falsity of allegations
10 made against him is in a libel action. He's properly
11 alleged the falsity, he's prepared to proceed under the
12 standard providing, we would say, ample and we believe
13 the Court has already said ample protection of The New
14 York Times standard.

15 The opportunity to respond that counsel for
16 petitioner discussed existed to some extent under the
17 facts of the case before the Court. It did not,
18 however, exist in a forum that resolution of the
19 conflicting positions and facts presented would ever be
20 reached. Presumably, had Mr. Smith in fact been
21 appointed, that resolution would have occurred in the
22 minds of the public. But in the absence of his
23 appointment, for whatever reason, the malicious lies are
24 left and he -- and Mr. Smith has no opportunity to
25 address them.

1 The petitioner's argument, it seems to us,
2 asks this Court to address the question of the petition
3 clause as if there had been no development of
4 constitutional libel law since the drafting of the first
5 amendment. He appears to present a blank slate, or a
6 blank slate for the last 200 years, to the Court.

7 But we would submit that this case not only
8 deals with the petition clause, but also the balancing
9 between the effect of immunities granted under the
10 petition clause and the protections granted under the
11 speech clause, because it is as citizens see those
12 protections that they will decide where discussion of
13 matters of public interest will take place.

14 The First Amendment fundamentally supports the
15 proposition of public, vigorous, wide-open debate of
16 issues important to the public. This Court has said tht
17 many times, and as recently as Monday of this week.

18 It is our position that providing one who
19 would use malicious lies for political gain with an
20 absolute immunity would not only encourage the false
21 information flowing to the Federal Government, but would
22 encourage the discussion of it to be moved out of any
23 guarantee of rebuttal by those not only who were defamed
24 by it, but by those who disagree with it.

25 The discussion of the matters of public

1 interest would be moved into the secrets of private
2 letters and whispered petitions to government officials,
3 carefully chose so that they are the person most -- best
4 in a position to do the most harm to the man who's being
5 defamed.

6 That approach to the questions presented by
7 the petitioner's argument, we believe necessarily draws
8 one back to the protections provided by New York Times
9 and the fundamental precepts of the Constitution
10 supporting and encouraging open -- wide-open, robust
11 debate of public issues.

12 We would submit, further, that while the
13 petitioner discusses in his brief at some length the
14 chilling effect of a potential large libel verdict, that
15 since New York Times there has not been a single libel
16 verdict for more than a half million dollars or as much
17 as a half million dollars affirmed by an appellate
18 court.

19 QUESTION: But don't you think a half million
20 dollars would be quite chilling?

21 (Laughter.)

22 QUESTION: In North Carolina?

23 MR. EAGLES: In Alamass County, North Carolina
24 it would indeed, sir.

25 I point that out, Your Honor -- he talks about

1 the unreasonable inflation of libel verdicts, and that
2 inflation -- before New York Time, John Henry Faulk was
3 awarded over half a million dollars, and there hasn't
4 been an award that large since. So the inflation aspect
5 of it simply doesn't appear from the record of those
6 verdicts which have been affirmed by appellate courts.

7 He discusses the cost of litigation. The cost
8 of litigation is great. And it in fact is something
9 that I guess we all should consider every time we get in
10 an automobile or have an invitee come on our premises.
11 If we live in the world, we risk the cost of
12 litigation. And if we tell malicious lies defaming
13 people, we ought to risk that cost and we ought to risk
14 the threat of large libel verdicts, and we ought to be
15 chilled from malicious lies disrupting the
16 decisionmaking process of the Federal Government.

17 And in New York Times, the chilling prospect
18 was considered, it was weighed, and it was determined
19 that under the speech clause and the press clause, that
20 question was adequately addressed by the malicious
21 falsehood standard: knowingly false, reckless disregard
22 of the truth or falsity thereof.

23 People should be chilled when they're about to
24 tell lies about people that will, on their face, do
25 those people harm and they are intended to do harm by

1 the focus to the recipient that the speaker chooses.

2 QUESTION: Do you agree that there should be
3 immunity for a good faith statement not made
4 maliciously?

5 MR. EAGLES: That's the common law position in
6 North Carolina. It's the position in Ponder v. Cobb
7 which was cited in New York Times, and which the North
8 Carolina general libel law was one of the places looked
9 to by this Court.

10 QUESTION: And the standard which this action
11 would go to trial would be the equivalent of the
12 standard required under New York Times v. Sullivan as
13 you understand it?

14 MR. EAGLES: As I understand it, Your Honor,
15 that's correct. The potential for a public figure
16 question rests in the trial court, I suppose, because we
17 have, for the purposes of the motion from which this
18 appeal was taken, that question was yielded. It has not
19 been yielded for the litigation generally, but except
20 for that question that's exactly the standard. It's a
21 standard that would be required under -- by New York
22 Times, and it's a standard that existed in North
23 Carolina for just this type of -- in Ponder v. Cobb,
24 there was a letter to a state official complaining of
25 local election officials.

1 So it's the same petitioning aspect.

2 QUESTION: Well, do you tend to agree that
3 anything short of that standard certainly would provide
4 a significant chilling effect on people who otherwise
5 might furnish information to public officials?

6 MR. EAGLES: Well, I believe so, Your Honor.
7 If people who acted in good faith and on reasonable
8 grounds, the older cases discuss bona fide and probable
9 cause, use that kind of language, then a common law
10 privilege did exist and should, and chilling would take
11 place in the absence of it.

12 Another point in terms of the cost of
13 litigation that is made by the petitioner in his brief
14 is the comparison between the availability of counsel
15 and the cost of counsel between libel plaintiffs and
16 defendants, pointing out that a contingent fee
17 arrangement is often available to libel plaintiffs.

18 I would disagree. I would think it is seldom
19 available to libel plaintiffs. I would point out to the
20 Court that the use of contingent fee arrangements is one
21 of the strongest deterrents to litigation with no
22 substantial basis because in that situation, a lawyer
23 who is making a decision on the merits of potential
24 cases as presented to him or to her and deciding --
25 before the case is ever filed, there is a tremendous

1 weeding out process that takes place. And that is a
2 protection against frivolous litigation that is
3 substantial and grows out of the same sorts of concerns
4 about costs of litigation that the counsel for
5 petitioner raises.

6 QUESTION: Do you think it's desirable that
7 appointed officials for public positions be made aware
8 of even reasonable rumors that are floating around about
9 people that they might be considering for appointment?

10 Is that desirable?

11 MR. EAGLES: I think it's desirable for
12 government officials who are acting on the basis of some
13 information to the benefit or detriment of a particular
14 individual, to make that individual aware of it and have
15 an opportunity to respond to it in other areas.

16 QUESTION: Well, that's not the question I
17 asked -- what do they do with it.

18 MR. EAGLES: I'm sorry.

19 QUESTION: I'm asking initially if you think
20 that as a matter of public policy, it's desirable that
21 as much information as possible be funneled into
22 appointing authorities, even if it consists only of
23 rumors.

24 MR. EAGLES: Yes, Your Honor, I think it is in
25 fact a valuable -- can potentially be a valuable service

1 for someone to make government officials aware of
2 information of which they cannot themselves be certain.

3 Mr. McDonald, however, did not couch his
4 defamation in those sorts of terms. Rather, he
5 presented them as true and he, as the briefs point out
6 and it's clear from the letters, cites page and verse,
7 name, address, telephone numbers of people that the
8 federal official was told could substantiate these
9 things.

10 And those people are the very witnesses that
11 we intend to call at trial, are the people through whom
12 we intend to prove the falsity and the maliciousness.
13 But the fact of presenting those names and addresses
14 wins this air that's repeated by citation to those in
15 petitioner's brief of credibility that is very difficult
16 to overcome in a process like this one, where any number
17 of candidates for an office exist, any number of whom
18 have good appropriate qualifications, and as to one of
19 whom this mess is presented, this series of allegations,
20 this possible problem.

21 And the effect of that is potentially
22 devastating to a candidate who would be considered
23 equally among others, and could do away with any
24 possibility or any perceived need for checking the
25 reliability and the truth or falsity by the federal

1 official who had available to him other qualified
2 reasonable candidates to choose among.

3 The potential of the FBI doing an
4 investigation that counsel for petitioner discussed
5 clearly existed, except that there is no way to know if
6 the FBI chose to or not, and even if it had, the
7 allegations of that process would not necessarily result
8 in Mr. Smith having an opportunity to present his side
9 of the story.

10 In fact, that argument, it seems to me, raises
11 the government's investigatory process to a -- it puts
12 it on a higher plane than the truth-seeking processes of
13 the courts in which Mr. Smith seeks to have this
14 question determined, to have the fact of the falsity of
15 the information and the malicious nature of its
16 presentation proven.

17 QUESTION: Mr. Eagles, Mr. Smith was not
18 appointed, was he?

19 MR. EAGLES: That's correct, Your Honor. He
20 was not appointed.

21 QUESTION: What is he doing now?

22 MR. EAGLES: He's in private practice of law
23 in Burlington, North Carolina in the community where
24 some copies of these letters were found among the
25 general population and in the community where word of

1 the existence of them reached him from rumor in the
2 streets before opportunity had been -- before he had
3 ever seen a copy of it and the other ways he heard about
4 it.

5 QUESTION: Is that in the record?

6 MR. EAGLES: Well --

7 QUESTION: Well, is it? Is it or not?

8 MR. EAGLES: The only part of that that's in
9 the record, Your Honor, is in depositions that I guess
10 have not yet been filed. The depositions have been
11 taken and --

12 QUESTION: What -- does the complaint allege
13 any specific damage?

14 MR. EAGLES: The complaint alleges that he was
15 damaged in his professional reputation in the community,
16 as well as his reputation --

17 QUESTION: So that alleges that there has been
18 damage in the community.

19 MR. EAGLES: That's correct.

20 QUESTION: Which I take it alleges that the
21 people in the community know about it.

22 MR. EAGLES: Oh, yes. Oh, yes. They knew
23 about it before any action was brought on Mr. Smith's
24 behalf. And that raises another question. And one of
25 the -- the Webb case to which counsel for petitioner

1 made some comment -- in that case, the court of West
2 Virginia determined that the petition clause provided an
3 absolute immunity and made that available to the
4 defendant, even though he published a newsletter with
5 the same information and spread it generally in the
6 community.

7 And that is -- that would enable someone under
8 that decision to avoid any possible defamation action or
9 discussion of public issues and criticism of public
10 figures, public officials, by simply including whatever
11 he put in the paper or to the public generally,
12 including it also in a petition to the government. And
13 that would be, we believe, a remarkable way around the
14 longstanding libel laws of all the states and the
15 decision of New York Times and this Court's view of what
16 New York Times stands for.

17 We believe that an individual's right to
18 protection of his own good name reflects no more than
19 the basic concept of the essential dignity and worth of
20 every human being, and that that concept is at the root
21 of any decent system of ordered liberty.

22 This Court has so said in Gertz, and we
23 believe that if the interest, if that interest is
24 important, it is no less important because it was left
25 to the protection of the state and that it's necessary

1 to make those people who choose to lie maliciously about
2 people and defame them, to be held to answer for their
3 works.

4 And if there are no further questions from the
5 Court, we would urge on that basis for the Court to
6 affirm. Thank you very much.

7 CHIEF JUSTICE BURGER: You have three minutes
8 remaining, Mr. Ennis.

9 ORAL ARGUMENT OF BRUCE JAMES ENNIS, JR. ESQ.

10 ON BEHALF OF THE PETITIONER - REBUTTAL

11 MR. ENNIS: Thank you, Mr. Chief Justice. The
12 respondent raised the point about public debate. First,
13 there is no allegation in the complaint that my client,
14 the petitioner, distributed copies of this letter to any
15 member of the public, only to federal officials.

16 There was a very good reason why he did not
17 distribute his letter to the public and give an
18 opportunity for public debate. He was seeking to
19 exercise his right to petition the Federal Government
20 concerning a decision that was about to be made by the
21 Federal Government, and there was no arguable basis to
22 believe that the public would be able to redress that
23 particular grievance.

24 Second, by limiting his petition to officials
25 of the Federal Government, he obviously limited any

1 damage to the reputational interest that the candidate
2 might have in his local home community. And while I'm
3 on that point, let me simply state that this Court's
4 decisions in Gertz and Monitor and Hutchinson make clear
5 that although reputation is an important interest, the
6 reputationa interest of a candidate for office is
7 greatly diminished because candidates invite scrutiny of
8 their qualifications and reputation.

9 Second, Justice O'Connor asked whether or not
10 a rule of good faith or qualified immunity would be
11 importand and might not be sufficient. Let me simply
12 refer to the position taken by the United States in Webg
13 v. Fury which is quoted at page 40 of our brief, in
14 which the United States said: "To allow a plaintiff to
15 simply plead bad faith would create a chilling effect on
16 the exercise of the right to petition."

17 The United States continued that the right to
18 petition would "lose any real meaning because private
19 citizens will be deterred by the threat of litigation
20 from exercising that right which would deprive the
21 Federal Government of the information it needs to
22 govern."

23 Let me conclude by simply stating once again
24 that we are not seeking absolute immunity from every
25 possible sanction for every communication that could

1 conceivably be deemed a petition. We only seek immunity
2 from common law libel actions and only in the three
3 circumstances of this case. First, the petition was
4 from a citizen to appropriate officials of the Federal
5 Government; second, the petition was relevant to the
6 qualifications of a candidate actively seeking
7 appointment to federal office; and third, the petition
8 was made on an appropriate occasion while the federal
9 decision concerning appointment was still pending.

10 Thank you very much.

11 CHIEF JUSTICE BURGER: Thank you, gentlemen.
12 The case is submitted.

13 We will hear arguments next in Immigration and
14 Naturalization Service v. Rios-Pineda.

15 (Whereupon, at 2:10 o'clock p.m., the case in
16 the above-entitled matter was submitted.)
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#84-476 - ROBERT McDONALD, Petitioner v. DAVID I. SMITH

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