

To: Mr. Justice Powell

Date: January 4, 1977

From: Sam Estreicher

Re: No. 76-709, Butz v. Economou

The most difficult part of the proposed memorandum is the discussion of the "press release." The draft relies on an incomplete analogy to the common law privilege for utterances in the course of a judicial proceeding. Contrary to Handler and Klein, there appears to have been no absolute privilege at common law for a neutral republication of a judicial proceeding, as opposed to the statements made during the proceeding itself. The conditional privilege, at least according to the Restatement of Torts, was somewhat more preclusive of liability than the Pierson v. Ray good-faith defense. Nonetheless, it was not an absolute privilege. This applies with equal, if not greater, force to the quasi-judicial immunity for administrative or executive proceedings. (The above statement is based on the leading secondary authorities (Prosser, Harper & James), but I doubt that the primary sources will undercut their conclusion.) Consequently, it is hard to ground a privilege for the "press release" on the common law understanding.

It is possible to argue, however, that the common law's failure to protect absolutely the neutral republication of matters of public record no longer accords with the mandate of the First Amendment. Definite support for this proposition can be drawn from BRW's opinion in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492-96 (1975). See note 19 of my draft. Accordingly, the petitioners in this case may be entitled

to a First Amendment-grounded privilege for neutral, accurate republication of a formal document that was part of the open file of a publicly held, trial-type agency proceeding<sup>\*/</sup>. I would reserve decision as to less formal proceedings and as to the situation where the administrative complaint is filed and then withdrawn before the onset of any action by the tribunal (see note 17 of my draft).

Would you like me to rewrite the "press release" section to rely explicitly on this countervailing First Amendment interest? Or would you prefer simply to soften the discussion, by stating in more tentative terms our discussion of the "press release?" The third alternative would be to avoid all discussion of the point, the tack that WHR takes in his memorandum.

\*/ The Restatement (Second) of Torts recognizes a broad, absolute privilege for reports of official proceedings open to the public which are "accurate and complete or a fair abridgement of the occurrence reported." Malice is irrelevant. The breadth of the privilege is justified on the ground of the public's "right to know."