Re: No. 76-1621 - McAdams v. McSurely

Dear Lewis:

I, too, have in your words been "uncharacteristically silent up to now," but have read with both interest and enlightenment the correspondence between you and Byron in this case. I most certainly agree with you as to the purposes to be served by legislative immunity. As you trenchantly put it, this case "is no garden variety litigation between private parties. This is an example of legal warfare, conducted now for a full decade, against a Subcommittee of the United States Senate."

Unfortunately this would not appear to be a unique case. Congressmen and other governmental officials, because of the nature of their positions, are frequently subjected to unmeritorious
lawsuits. With this background in mind, the Court has said:

"It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution, ... that legislators engaged 'in the sphere of legitimate legislative activity' ... should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." Dombrowski v. Eastland, 387 U.S. 82, 84-85 (1967).

The present difference in our thinking, I guess, is the proper means of achieving the purposes of legislative immunity. As I understand your memoranda, you would protect the legislative official from unmeritorious lawsuits by modifying the summary judgment standard of Fed. Rules of Civ. Proc. 56. In the normal lawsuit, a defendant who seeks summary judgment in his favor must affirmatively show "that there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." Where the defendant is a Congressman or congressional aide, however, you, I gather, would require the plaintiff, once the defendant denies the allegations, to come forward with "evidence affording 'more than merely colorable substance' to the allegations of unimmunized conduct." Though
I agree entirely with your objective, my present feeling is that his "procedural" means of protecting government officials from unmeritorious claims would turn out to be both unworkable and unwise.

To begin with, I am not sure that the announcement of a heightened summary judgment standard will greatly increase the number of unmeritorious claims that will be disposed of on summary judgment. As Byron's disagreement with you demonstrates, "evidence affording more than merely colorable substance" will be interpreted and applied differently by each judge. In your view, this language is a heightened standard for summary judgment and would call for summary judgment here. In Byron's view, however, this language merely represents "a careful application of F.R. Civ. P. 56" and, applied to this case, does not call for summary judgment. Even in a case as seemingly weak as the instant one, many judges are likely to take Byron's view and require the case to be tried.

Your language, as with all broad standards, will be "stretched" according to the proclivity of the particular district court judge before whom it comes. According to Professor Wright, even as Rule 56 is currently written, there is "much confusion" as to the exact showing required to defeat a motion for summary judgment; the necessary showings vary depending on
"the differing views various judges have as to the utility and application of this procedural device." Wright, Law of Federal Courts, 495-496 (1976). I fear that your standard may be even more open-ended in its wording and will be subject to the same varying interpretations.

Even assuming that every lower court judge will apply the standard that you propose with a vigor equal to yours, I wonder how many litigants will find themselves unable to meet it in practice. In my memorandum in Butz, I observed that "any legal neophyte" can frame a complaint of constitutional dimensions; if you give that legal neophyte one or two experiences in the courtroom, I would venture to extend the observation to defeating motions for summary judgment even where a heightened variety of scrutiny is applicable. In this case, the respondents initially offered no affidavits in opposition to the motion for summary judgment. If the case were remanded in line with Byron's thinking, however, I have little doubt that respondents would be able to come up with some form of affidavit lending "more than mere colorable substance" to their claims.
Indulging my inclination to beat a dead horse, I should note my fear that a heightened summary judgment standard may be even less of an answer to a case like Butz, where, if only a qualified immunity is extended, the judgment may well turn on the defendant's state of mind. I assume that even under your heightened summary judgment standard a plaintiff will not have to introduce counter-affidavits on the defendant's state of mind. As Professor Wright notes, usually it simply "is not feasible to resolve on motion for summary judgment cases involving state of mind." Wright, Law of Federal Courts, 493 (1976). See Subin v. Goldsmith, 224 F. 2d 753 (CA 2 1955), relying on cases of this Court. Once it is held that only qualified immunity is to be accorded, public officials will be protected only from payment of damages at the end of the lawsuit, and then only if the jury chooses to believe their account of the facts. A heightened summary judgment standard, combined with an expedited time frame, will be of little, if any, help.

Getting back to the case before us, I cannot dispel my doubts whether your proposal would aid in carrying out the goal of legislative immunity in protecting congressional officials from the time, worry and expense of combatting unmeritorious claims.
But even if I could dispel those doubts, I would be hesitant to create an exception to the normal standard of Rule 56. I think a good case can be made that the entire evolution of the English common law -- from the original forms of action, to the intermediate stage where the forms of action were abolished but code pleading existed in some states and law and equity were separate in most, to the present stage where the Federal Rules of Civil Procedure or their state counterparts govern virtually all civil actions -- has been a monumental change for the better. It has taken hundreds of years to accomplish, and is based on the notion that whatever the substance of the lawsuit may be, procedurally the suit may be litigated by following uniform rules in the form of the Federal Rules of Civil Procedure. If we try to modify those rules in one area of the law, we will inevitably invite modification, or at least claims for modification, in other areas of the law which will be difficult to distinguish from those which we will have already allowed. The result, it seems to me, will be a setback for what is presently a relatively uniform system of procedure through which all of the myriad substantive grist of the legal mill is processed.
Finally, I should note that I simply don't believe that there are the votes for your heightened standard for summary judgment. Byron, with whom Bill Brennan apparently agrees, would only accord petitioners "a careful application of Fed Rules of Civ. Proc. 56" which, of course, is exactly what every federal defendant is entitled to. And, as you might gather from the above, I also would find it very difficult to join an opinion drawn along the procedural line that you suggest, even though I agree completely with the end result which you seek.

My own solution to the problem of protecting congressional officials from the intrusion of unmeritorious legal claims, and a solution that I believe is time honored, not surprisingly parallels my thinking in Butz v. Economou. While, as the above discussion might have already revealed, I have not given this particular case as much thought as either you or Byron, I will hazard my own effort to trace out the resolution of this dispute along those lines. I end up with the same result as you, which must indicate that my thinking is not too far out of line with yours.
I begin by agreeing with Byron that the Speech or Debate Clause protects even illegal activity within its coverage, see Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), but that it probably does not cover as far as field investigations. We have already given a relatively expansive reading to the activities covered by the Speech or Debate Clause; extending its protection to field investigations might be stretching its fabric a step too far.

Because there is no doubt that Congress has the power to carry on field investigations, and because those investigations are in furtherance of Congress' functions, I would also agree with Byron that congressional officials should enjoy common law official immunity in such investigations even where Speech or Debate Clause protection ends. Support for this position can be found in Byron's opinion in Doe v. McMillan, 412 U.S. 306, 318-324 (1972), as you note in fn. 19 of your present draft. Indeed, it would strike me as odd to, as I presume we would, extend official immunity to the investigative activities of cabinet officials, cf., Butz, and state legislators, cf., Tenney v. Brandhove, 341
U.S. 367 (1951), but not to congressional officials. In short, I would limit Speech or Debate Clause protection to conduct which is an "integral part of the deliberative and communicative process," Gravel v. United States, 408 U.S. 606, 625 (1972), but, as with any other governmental official, extend official immunity whenever the defendant is acting within his official authority. (Should I assume from your new footnote 19 that, assuming it is ultimately determined that Brick violated respondents' Fourth Amendment rights, you would not accord Brick even qualified immunity? I assume that the gist of Byron's proposal is that Brick would at least be entitled to a good faith defense.)

Under this framework, resolution of this case would turn on our ultimate disposition in Butz. Analogizing from my position in Butz, I would accord absolute immunity to Senator McClellan, Jerome S. Adlerman (the Subcommittee's General Counsel), and Donald F. O'Donnell (the Subcommittee's Chief Counsel), and remand to the Court of Appeals with directions to dismiss the McSurelys' action as to them. I would accord only qualified immunity, however, to Brick and allow the action as to him to proceed on towards trial. As for the dissemination claim, I agree
with you that it should be remanded for a determination of whether it is embraced in respondents' amended complaint. (If the Court were to conclude that the dissemination claim is embraced in the amended complaint, I would at a minimum direct the Court of Appeals to dismiss as to McClellan, Adlerman and O'Donnell, who as noted above should enjoy absolute official immunity.)

In conclusion, I agree with Parts I, III and IV of your memorandum and the result reached in Part II. I cannot, however, join in your "procedural" answer to the problem of unmeritorious suits against congressional officials. As Learned Hand (Thurgood, I know you won't read past this point) recognized in his famous quotation from Gregoire v. Biddle, 177 F. 2d 579, 581 (1948), a balance of the evils involved in, on the one hand, unpunished truancy of public officials and, on the other, the subjection of honest officials to unmeritorious lawsuits, calls for absolute immunity:

"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. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

While it is tempting to embrace a heightened summary judgment standard as a theoretically more highly tuned solution to this tradeoff, I am convinced for the reasons outlined above that it will fail. Rather than culling the good from the bad, it will merely open up all public officials to unwarranted and burden-
some lawsuits at the benefit of compensating those few plaintiffs who are actually injured.

Sincerely,

MR. Justice Powell

Copies to the Conference
MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob                    DATE: April 12, 1978
RE: Justice Rehnquist's Position in McSurely, No. 76-1621

I do not think that Justice Rehnquist's approach to this case will hold water, even on his own terms. The initial problem is that he starts from his Butz position and assumes that all the federal officials must have absolute immunity for actions within official authority. WHR memo, p. 9. This creates some tension with your views in Butz, since it's not clear what would be the historical justification for cutting the immunity away from its historical mooring in the Speech or Debate Clause. Moreover, it is not clear why the field investigation, to which WHR would accord only qualified immunity, does not fall within this range. He says on p. 8 that field investigations are clearly within the ambit of congressional power.
The more important problem with WHR's analysis is that it does not seem to avoid the very problem it sets out to avoid: an insistence on a relatively stringent summary judgment standard. There is an allegation that the three Washington defendants and Brick were engaged in a conspiracy. Thus, unless the Dombrowski "more than merely colorable" standard is applied to them, they probably cannot hide behind their individual absolute immunities; they are linked to Brick's activity by virtue of the pleadings.

That is why we had to resort to the Dombrowski route in the first place, and WHR does not explain how he is avoiding it. If there is no requirement of a showing of more than merely colorable substance as to the participation of each defendant, then WHR's theory would seem incapable of getting the Washington defendants out of the case. He is merely changing the name of the immunity he is applying; he is doing nothing to the state of the pleadings.
April 12, 1978

Re: 76-1621 - McAdams v. McSurely

Dear Lewis:

Although I still have a good deal of uncertainty about this case, my present views are:

1. That Bill Rehnquist is correct in his unwillingness to bend the summary judgment rule to dispose of this case;

☐ 2. That Bill and Byron are correct in their unwillingness to extend Speech and Debate immunity to include informal information gathering activity;

☐ 3. That we should not create a new absolute immunity for legislators or their aides, beyond that authorized by the Speech and Debate Clause;

☐ 4. That there is no need to venture into the factual thickets explored by Byron and Lewis because the questions presented by the certiorari petition do not embrace the sufficiency of the allegations of the complaint or the sufficiency of an affirmative defense of good faith; and

☐ 5. That the dissemination of information by a legislative committee to the executive should be considered a legislative act entitled to immunity.

In short, except for the dissemination claim, I substantially agree with Byron's views. I also do not think much of plaintiff's lawsuit but I am not sure that defendants' conduct was exemplary either.

Respectfully,

Mr. Justice Powell

Copies to the Conference
Dear Bill:

Thanks for your memorandum in this case. I am glad that we are relatively close on the result, and I can appreciate your concern over the summary judgment rules. I am not sure, however, that I understand why your reliance on absolute official immunity serves to avoid recourse to the heightened summary judgment procedure outlined in Part II-B of my memorandum to the Conference.

Everyone who has spoken so far seems to agree that enough facts have been adduced as to Brick's possible wrongdoing to keep him in the case. The trouble starts with the three Washington defendants - McClellan, Adlerman, and O'Donnell. There is an allegation of conspiracy among Brick and those three to carry on various non-legislative activities in Kentucky and elsewhere. Thus, the Washington defendants are tied into whatever non-legislative actions Brick was performing out in the field, unless there is a requirement - as I believe there is under Dombrowski v. Eastland, 387 U.S. 82 (1967) - that the plaintiffs adduce facts or affidavits tending to establish "more than merely colorable" substance to the charges of wrongdoing as to each defendant.

It seems to me that you have not avoided this problem simply by changing the name of the immunity you are applying to the Washington defendants. Speech or Debate Clause immunity is also an absolute immunity, so that your approach and mine should not differ with respect to the light they cast upon the pleadings. In other words, the problem is not the scope of the immunity, but the posture of the case on summary judgment. Shifting from Speech or Debate to official immunity does not alter this, as I view the case.

April 12, 1978

McAdams v. McSurely, No. 76-1621
In addition, as you would expect, I have some difficulty applying your analysis in Butz to this case. But apart from this more general problem, I am unable to see how taking your approach obviates resort to the sort of summary judgment procedure you wish to avoid.

Nor do I agree, at least as to federal practice, that we cannot influence (if not require) district courts to hold plaintiffs who sue government officials to a stricter standard on summary judgment than in an FELA case — whether the official claims qualified immunity or absolute immunity. The policy considerations identified on p. 17 of my memo, and recognized in our cases, justify this.

Sincerely,

Mr. Justice Rehnquist
lfp/ss
cc: The Conference
April 12, 1978

No. 76-1621 McAdams v. McSurely

Dear John:

I am beginning to feel, in view of the fusillades launched in my direction, that my foxhole is not deep enough, and that I had best keep quiet.

But I will respond briefly to your letter merely to say that as to two of your five points, we are not in disagreement. If it were necessary to decide that Speech or Debate immunity does not include informal information gathering, I would agree. This question was expressly left open in my memo.

Nor would I create any "new absolute immunity" or, indeed, any new immunity of any kind. My point was that an aide (e.g., Brick), if not entitled to invoke Speech or Debate Clause immunity, could rely at least on qualified official immunity. As the case now stands, however, this question is not presented. See note _, in my memorandum.

As to the fifth point in your letter (dissemination to the IRS), I would simply leave that issue open. On the record before us, I am not at all sure that it is in the case.

We are in disagreement as to the duty of a District Court, where Speech or Debate immunity is the issue. The policy considerations identified in Dombrowski and Servicemen's Fund then would require a DC, in my view, to expect a plaintiff to go beyond vague "information and belief" allegations.

We disagree also as to the questions fairly raised by the petition and brief of the Solicitor General. I think a fair reading makes clear that he did raise the issue whether a viable Fourth Amendment claim was raised by McSurely's pleadings and affidavits.
you have mentioned, rightly, that we seem this Term to be "burying" a number of the Court's prior decisions. In my view Dombrowski, a case similar in many respects to this one, can be added to the list if the Court concludes that the McSurleys have shown "more than merely colorable substance" to their allegations.

I do not wish bad luck on any of my Brothers, but I would not be "bitter" - to use the Chief's term if this cat were now put on "someone else's back". I already have spent as much time on this "loser" as Bill Brennan and I did a couple of years ago on Murgia.

Sincerely,

Mr. Justice Stevens

lfp/ss

cc: The Conference
April 14, 1978

No. 76-1621 McAdams v. McSurely

MEMORANDUM TO THE CONFERENCE

Since there were no "takers" of my generous offer this morning to relinquish my interest in McSurely, I will continue the dialogue.

Some of the circulated comments indicate a perception that Part II B of my initial memo would undercut Rule 56. This is neither its purpose nor its effect. Rather, I have attempted, in light of the teaching of Dombrowski v. Eastland, 387 U.S. 82 (1967), to be faithful to the purposes of a constitutional provision -- the Speech or Debate Clause.

It is that Clause that provides for congressional defendants protection from the burdens of litigation. It is that constitutional immunity that requires plaintiffs to come forward with "more than merely colorable substance to [their] assertions" before a lawsuit can be allowed to proceed against such defendants. Id., at 84. A Rule 56 motion is merely the avenue for affording that procedural protection, which actually derives from the Constitution itself. My view of this aspect of the case would be the same if there were no Rule 56.

I would be glad to amend my memorandum, or to add a footnote to this effect, if this is a stumbling block for other Members of the Court.

Sincerely,

LFP/lab
April 17, 1978

Re: No. 76-1621 - McAdams v. McSurely

Dear Lewis:

I think that your willingness to "continue the dialogue" in this case is admirable, and that the case is one of those where additional dialogue might produce a consensus which is not apparent now.

As to the summary judgment point involving Rule 56, I may have expressed myself too strongly, and if so would like to now set the matter straight in the interest of obtaining a consensus if one is possible. I think that the phraseology from Dombrowski v. Eastland, 387 U.S. 82 (1967), to the effect that the plaintiffs must come forward with "more than merely colorable substance to [their] assertions" before a lawsuit can be allowed to proceed against defendants protected by the Speech and Debate Clause is one of those phrases that sounds good until you try to apply it. Since you were not the author of the language in the case, I feel no reluctance in asking "What does it mean?" My impression of the Federal Rules of Civil Procedure is that they were designed to require trial on the merits of all contested actions, where there was no "genuine issue of material fact", and to permit summary judgment with respect to the latter. I think the creation of a hybrid, which you are quite correct in citing Dombrowski v. Eastland as supporting, is inconsistent
with these rules. If the immunity is absolute there should be no requirement of "more than merely colorable substance to [their] assertions", other than the assertion that the official was acting outside the scope of his official duties, in order to have their case dismissed. If, on the other hand, there is merely a "qualified good faith-reasonable" privilege, then, as I suggested in my earlier memorandum, this is the sort of battle that a defendant asserting such a privilege should never be able to win on summary judgment.

I agree absolutely with you as to the result; everybody but Brick should succeed on the immunity defense. I am perfectly willing to call that defense an extension of the Speech or Debate Clause immunity, or another form of the doctrine of official immunity. But I think we ought frankly to recognize that if these defendants are to be released on immunity at the pre-trial stage, their immunity cannot depend on their own good faith or the reasonableness of their belief; the only point in issue can be whether or not they were acting within the outer perimeters of their official duty, and this seems to me so patently clear that a motion for summary judgment would be warranted.

Thus my disagreement with you, to the extent that it may have been expressed in my earlier memorandum, comes not from a disagreement as to result but from a preference for acknowledging that some aspects of the privilege which the defendants claiming in this case, whether it be denominated an extension of the Speech and Debate Clause or a form of official immunity, be recognized as a doctrine of substantive law, rather than just an increased procedural burden. I don't think the quoted language from 
dombrowski v. Eastland is susceptible to the principled application by this Court or by other courts.

Sincerely,

Mr. Justice Powell

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