March 14, 1984

Re: Bose Corp. v. Consumers Union, No. 82-1246

Dear John:

I agree.

Sincerely,

WJB, Jr.

Justice Stevens

Copies to the Conference
March 14, 1984

Re: No. 82-1246    Bose Corp. v. Consumers Union of United States

Dear John:

In due course I will circulate a dissent.

Sincerely,

[Signature]

Justice Stevens

cc: The Conference
March 15, 1984

Re: No. 82-1246-Bose Corp. v. Consumers Union of United States

Dear John:

Please join me.

Sincerely,

T.M.

Justice Stevens

cc: The Conference
Dear John:

I have now had an opportunity to read your opinion with some care. I am, of course, with you on the result and certainly with the greater part of your opinion.

My concern is primarily one of emphasis. As you state, in this case "two well-settled and respected rules of law point in opposite directions". It is clear, of course, that in this case where a "public figure is suing a media defendant for libel, New York Times requires proof of actual malice. It also is clear that New York Times, and is precisely, require an appellate court to "make an independent examination of the whole record".

I think Justice Stevens will gladly make the changes you suggest (except perhaps shortening the opinion). The only point I suggest you consider adding is that he needs a discussion of the 2nd prong of the actual malice test. He has addressed the TEs finding of "intentional misleading statements", but what about reckless disregard of truth or falsity.
As you state (p. 13), our "standard of review must be faithful to both Rule 52(a) and the independent review of *New York Times*. My impression, however, as one reads your opinion, is that it leaves little room for the application of Rule 52(a) in any libel suit against the media. At Conference, Bill Brennan drew a distinction between the type of evidence that an appellate court in cases of this kind is obligated to review. It is unnecessary literally to review the "entire record", but only such portions of it as relate to the constitutional facts. In this case, for example, the bench trial lasted 19 days. There must be many facts, irrelevant to the constitutional standard of *New York Times*, that are subject to Rule 52(a). I am sure you would agree. It would be helpful if this were made explicitly clear in our opinion.
My concern is that we should take care not to write this case in a way that weakens the application of Rule 52(a) in other types of cases or even in libel cases with respect to non-constitutional facts. The Court of Appeals characterized its duty as being that of "de novo" review. It is important to state that CAI was incorrect in characterizing the New York Times standard of review as "de novo". Perhaps you have said this, though I do not recall having seen it.

The very last sentence in the opinion states it is the duty of appellate judges, in cases of this kind, to determine whether the record "establishes actual malice with convincing clarity". This will be viewed, I think, as a holding that the standard of review is "clear and convincing" rather than preponderance of the evidence. Is

See 376 U.S. at 285-286. Comment g to §580A of the Restatement (2d) of Torts seems to back up Justice Stevens on this point. (See attachment.)
It clear that New York Times and our other media cases have required this level of proof? If not, should we do so in this case?

I add, John, a personal observation or two. The most frequent criticism that I hear of the Court is that our opinions are unnecessarily long, and that we unnecessarily include footnotes that become matters of concern both for lower courts and the bar. I do not suggest that any of us is free from being "guilty" in both of these respects. I am embarrassed to read some of the opinions I have written in past years by the dilution of clarity that has resulted from how much I wrote and what I put in footnotes. As I read your opinion, interesting and well written as it is, these questions came to mind as they have with respect to a fair number of all of the
understand that I do not say this in criticism. Rather, I merely share thoughts that concern me about my own opinions. Of course, Bose Corp. will be a major First Amendment decision. If you could make the clarifications suggested above, I will be happy to join you.

Sincerely,

Justice Stevens

lfp/ss
§ 580A  Torts, Second  Ch. 24

privilege" of publishing false and defamatory statements regarding a public official or public figure when there is no knowledge of falsity or recklessness regarding truth or falsity. Here it is held that the plaintiff has the burden of alleging and proving that the defendant had knowledge or acted in reckless disregard.

f. Weight of evidence. Not only does the plaintiff have the burden of raising the issue of knowledge or reckless disregard and of proving that the defendant's conduct was outside the scope of the constitutional protection, but the proof must be "with convincing clarity." This requirement, also described as one of "clear and convincing proof," is held to be imposed by the Constitution.

Proof by more than a preponderance of the evidence has not been specifically required for any other factual issue in a defamation action. Some language of the Supreme Court, however, has suggested that this requirement may be imposed on the plaintiff regarding the question of whether the communication was made of and concerning the plaintiff. There may also be other issues on which the Court will decide to impose the obligation of a higher degree of proof.

g. Constitutional standard; appellate review. The issue of whether the defendant acted with knowledge of falsity or in reckless disregard of truth or falsity is usually called one of fact that is submitted to the jury for it to make a determination as to whether the plaintiff has proved his contention with convincing clarity. Actually, however, it involves both a determination of the facts and an application to them of a standard, similar to the determination of whether a defendant was negligent or not. The determination here is one on which constitutional rights stand or fall, and it is analogous in this regard to the classic instance in criminal law of the constitutional guaranty against self-incrimination and the application of a constitutional standard for determining whether a confession was given voluntarily or not. A finding on an issue of this nature is subject to close appellate scrutiny, and an appellate court may declare that the evidence is constitutionally inadequate to sustain the finding. The United States Supreme Court has on several occasions reviewed the evidence to decide whether the evidence justified a finding of knowledge or reckless disregard, and it has not hesitated to hold that the constitutional requirement of proof with convincing clarity has not been met, despite the jury verdict.

The Supreme Court has also stated that the issue of whether the defamatory communication was made "of and concerning"
the plaintiff is one involving constitutional rights. It has held on occasion that the evidence on this issue was constitutionally defective because it was incapable of supporting a jury's finding on this issue.

h. Public and private communications. Most of the Supreme Court cases concerning the constitutional protection covered by this Section have involved freedom of the press—newspapers, magazines or broadcasting. All have involved public statements. It is therefore possible that since the protection applies to statements about public officials or public figures it may be confined to public communications and not be extended to those made in a private fashion to one person or to a small number of persons. But, on principle, there seems no reason to limit the protection in this fashion. Why should one be constitutionally protected if he issues a public statement about the qualifications or character of the mayor of the city and yet not be protected if he makes the same statement in the privacy of his home to his next-door neighbor? Though the issue has not been specifically raised, there would also appear to be little reason to draw a distinction between libel and slander in this regard.

i. Other applications of the Constitution to actions for defamation. This Section sets forth one of the most significant restrictions that the First Amendment to the Constitution has been held to impose upon an action of defamation. After this restriction was established others were also held by the Supreme Court to apply. Thus strict liability for defamation is no longer constitutional (see § 580B); recovery is limited, at least in some cases, to actual harm proved to have been caused to reputation (see § 621); and a defamation action does not lie for the expression of a mere opinion. (See § 566). On the constitutional requirement of fault in the report of an official action or proceeding or a meeting open to the public that deals with a matter of public concern, see § 611. On application of the Constitution to an action for invasion of the right of privacy, see §§ 652D and 652E.

§ 580B. Defamation of Private Person

One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he

See Appendix for Reporter's Notes, Court Citations, and Cross References 221
March 23, 1984

82-1246 Bose Corp. v. Consumers Union

Dear John:

I have now had an opportunity to read your opinion with some care. I am, of course, with you on the result and certainly with the greater part of your opinion.

In light of the Conference discussion today of Dun & Bradstreet (carried over for further consideration at next week's Conference), would it not be well to make somewhat clearer that this case involves only a media defendant? This is implicit throughout your opinion, but I do not recall a specific characterization of Consumers Union. Perhaps all that need be said is to add a few words on page 3. You refer there to the DC having ruled that Bose Corp. is a "public figure", and that therefore New York Times applies. I suggest that in 8th line, after the word "action" you might add: "against a media defendant".

I have delayed joining your opinion also because of some concern as to its emphasis. As you state, in this case "two well-settled and respected rules of law point in opposite directions". It is clear, of course, where a "public figure" is suing a media defendant for libel, New York Times requires proof of actual malice. It also is clear that New York Times, and is progeny, require an appellate court to "make an independent examination of the whole record".

As you state (p. 13), our "standard of review must be faithful to both Rule 52(a) and the independent review of New York Times. My impression, however, as one reads your opinion, is that it leaves little room for the application of Rule 52(a) in any libel suit against the media. At Conference, Bill Brennan distinguished between the types of evidence that an appellate court reviews in a case of this kind. It usually is unnecessary literally to review the "entire record", but only such portions of it as relate to the constitutional facts. In this case, for example, the
bench trial lasted 19 days. There must be many facts, irre­
relevant to the constitutional standard of New York Times,
that are subject to Rule 52(a). I am sure you would agree.
It would be helpful if this were made explicitly clear in
our opinion.

We should take care, I think, not to write this
case in a way that weakens the application of Rule 52(a) in
other types of cases or in libel cases with respect to non­
constitutional facts. The Court of Appeals characterized
its duty as being that of "de novo" review. Should we not
state that CA1 was incorrect in characterizing the New York
Times standard of review as "de novo". Perhaps you have
said this, though I do not recall having seen it.

If modest changes like these are made I will be
happy to join you.

Sincerely,

Justice Stevens

1fp/ss
March 26, 1984

Re: 82-1246 - Bose Corp. v. Consumers Union

Dear Lewis:

Many thanks for your letter. As always, your suggestions make good sense. I propose to add these two footnote:

1) Insert as new ¶ in fn. 8 on p. 6:

We observe that respondent's publication of Consumer Reports plainly would qualify it as a "media" defendant in this action under any conceivable definition of that term. Hence, the answer to the question presented in Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., certiorari granted, ___ U. S. ___ (1983) could not affect this case and we naturally express no view at this time on that question.

2) Insert as fn. 31 on p. 27:

There are, of course, many findings of fact in a defamation case that are irrelevant to the constitutional standard of New York Times v. Sullivan and to which the clearly erroneous standard of Rule 52(a) is fully applicable. Indeed, it is not actually necessary to review the "entire" record to fulfill the function of independent appellate review on the actual malice question; rather, only those portions of the record which relate to the actual malice determination must be independently assessed. The independent review function is not equivalent to a "de novo" review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff. If the reviewing Court determines that actual malice has been established with
convincing clarity, the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact. Although the Court of Appeals stated that it must perform a de novo review, it is plain that the Court of Appeals did not overturn any factual finding to which Rule 52(a) would be applicable, but instead engaged in an independent assessment only of the evidence germane to the actual malice determination.

Do you think these changes will be adequate?

Respectfully,

Justice Powell
March 26, 1984

Re: 82-1246 - Bose Corp. v. Consumers Union

Dear Lewis:

Many thanks for your letter. As always, your suggestions make good sense. I propose to add these two footnote:

1) Insert as new ¶ in fn. 8 on p. 6:

We observe that respondent's publication of Consumer Reports plainly would qualify it as a "media" defendant in this action under any conceivable definition of that term. Hence, the answer to the question presented in Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., certiorari granted, ___ U. S. ___ (1983) could not affect this case and we naturally express no view at this time on that question.

2) Insert as fn. 31 on p. 27:

There are, of course, many findings of fact in a defamation case that are irrelevant to the constitutional standard of New York Times v. Sullivan and to which the clearly erroneous standard of Rule 52(a) is fully applicable. Indeed, it is not actually necessary to review the "entire" record to fulfill the function of independent appellate review on the actual malice question; rather, only those portions of the record which relate to the actual malice determination must be independently assessed. The independent review function is not equivalent to a "de novo" review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff. If the reviewing Court determines that actual malice has been established with
convincing clarity, the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact. Although the Court of Appeals stated that it must perform a de novo review, it is plain that the Court of Appeals did not overturn any factual finding to which Rule 52(a) would be applicable, but instead engaged in an independent assessment only of the evidence germane to the actual malice determination.

Do you think these changes will be adequate?

Respectfully,

Justice Powell