

The Burger Court Opinion Writing Database

Herbert v. Lando

441 U.S. 153 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 14, 1979

Re: 77-1105 - Herbert v. Lando

Dear Byron:

I join.

Regards,



Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1105

Anthony Herbert, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
Barry Lando et al. | peals for the Second Circuit.

[January —, 1979]

MR. JUSTICE BRENNAN, dissenting.

Respondents are representatives of the news media. They are defendants in a libel action brought by petitioner, Lieutenant Colonel Anthony Herbert (U. S. Army, Ret.), who is concededly a public figure. Respondents asserted in District Court an "editorial privilege" to shield from discovery information that would reveal decisions involved in their editorial processes. The District Court rejected this privilege, holding that, because of his difficult burden of proof, "a 'public figure' plaintiff in a defamation action is entitled to liberal interpretation of the rules concerning pre-trial discovery." App. to Petition, at 62a.

The Court of Appeals reversed. It grouped the discovery inquiries objected to by respondents into five categories:

- "1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the '60 Minutes' segment and the Atlantic Monthly article;
- "2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
- "3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
- "4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and

Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 22 FEB 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1105

Anthony Herbert, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
Barry Lando et al. | peals for the Second Circuit.

[February —, 1979]

MR. JUSTICE BRENNAN, dissenting in part.

Respondents are representatives of the news media. They are defendants in a libel action brought by petitioner, Lieutenant Colonel Anthony Herbert (U. S. Army, Ret.), who is concededly a public figure. The Court today rejects respondents' claim that an "editorial privilege" shields from discovery information that would reveal respondents' editorial processes. I agree with the Court that no such privilege insulates factual matters that may be sought during discovery, and that such a privilege should not shield respondents' "mental processes." 568 F. 2d 974, 995 (CA2 1977) (Oakes, J.). I would hold, however, that the First Amendment requires predecisional communication among editors to be protected by an editorial privilege, but that this privilege must yield if a public figure plaintiff is able to demonstrate to the *prima facie* satisfaction of a trial judge that the libel in question constitutes defamatory falsehood.

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The Court of Appeals below stated that "the issue presented by this case is whether, and to what extent, inquiry into the editorial process, conducted during discovery in a *New York Times v. Sullivan* type libel action, impermissibly burdens the work of reporters and broadcasters." 568 F. 2d, at 979 (Kaufman, C. J.). The Court grouped the discovery inquiries objected to by respondents into five categories:

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To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

2-6, 8-10, 12

From: Mr. Justice Brennan

Circulated: _____

Recirculated: ~~3/2/79~~

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1105

Anthony Herbert, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Appeals for the Second Circuit.
Barry Lando et al.

[February —, 1979]

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To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

P.15

From: Mr. Justice Brennan

Circulated: _____
8 APR 1979

Recirculated: _____ 5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1105

Anthony Herbert, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
Barry Lando et al. | peals for the Second Circuit.

[February —, 1979]

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P. 15

The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

6th DRAFT

Circulated: _____

23 APR 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1105

Anthony Herbert, Petitioner, | On Writ of Certiorari to the
- v. | United States Court of Ap-
Barry Lando et al. | peals for the Second Circuit.

[February —, 1979]

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Respondents are representatives of the news media. They are defendants in a libel action brought by petitioner, Lieutenant Colonel Anthony Herbert (U. S. Army, Ret.), who is concededly a public figure. The Court today rejects respondents' claim that an "editorial privilege" shields from discovery information that would reveal respondents' editorial processes. I agree with the Court that no such privilege insulates factual matters that may be sought during discovery, and that such a privilege should not shield respondents' "mental processes." 568 F. 2d 974, 995 (CA2 1977) (Oakes, J.). I would hold, however, that the First Amendment requires predecisional communication among editors to be protected by an editorial privilege, but that this privilege must yield if a public figure plaintiff is able to demonstrate to the *prima facie* satisfaction of a trial judge that the libel in question constitutes defamatory falsehood.

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1105

Anthony Herbert, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
Barry Lando et al. | peals for the Second Circuit.

[February —, 1979]

MR. JUSTICE STEWART, dissenting.

It seems to me that both the Court of Appeals and this Court have addressed a question that is not presented by the case before us. As I understand the constitutional rule of *New York Times v. Sullivan*, 376 U. S. 254, inquiry into the broad "editorial process" is simply not relevant in a libel suit brought by a public figure against a publisher. And if such an inquiry is not relevant, it is not permissible. Fed. Rule Civ. Proc. 26 (b).

Although I joined the Court's opinion in *New York Times*, I have come greatly to regret the use in that opinion of the phrase "actual malice." For the fact of the matter is that "malice" as used in the *New York Times* opinion simply does not mean malice as that word is commonly understood. In common understanding, malice means ill will or hostility,¹ and the most relevant question in determining whether a person's action was motivated by actual malice is to ask "why." As part of the constitutional standard enunciated in the *New York Times* case, however, "actual malice" has nothing to do with hostility or ill will, and the question "why" is totally irrelevant.

Under the constitutional restrictions imposed by *New York Times* and its progeny, a plaintiff who is a public official or public figure can recover from a publisher for a defamatory

¹ See Websters New International Dictionary 1367 (2d ed. 1961).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 8, 1979

Re: No. 77-1105 - Herbert v. Lando

Dear Lewis,

I do appreciate your looking my draft over, and I shall give careful consideration to the suggestions you have made. The draft is back from the printer and I shall circulate it without the paragraph in the discovery section that we talked about.

It may be, when I see what you write, that I could accommodate it and provide for a remand, as long as the matter remained a discovery issue involving the federal courts rather than a constitutional requirement that state courts must follow.

Sincerely yours,



Mr. Justice Powell

cmc

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 8 FEB 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1105

Anthony Herbert, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
Barry Lando et al. | peals for the Second Circuit.

[February —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

By virtue of the First and Fourteenth Amendments, neither the Federal nor a State Government may make any law "abridging the freedom of speech, or of the press. . ." The question here is whether those Amendments should be construed to provide further protection for the press when sued for defamation than has hitherto been recognized. More specifically, we are urged to hold for the first time that when a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to the plaintiff's reputation, the plaintiff is barred from inquiring into the editorial processes of those responsible for the publication, even though the inquiry would produce evidence material to the proof of a critical element of his cause of action.

I

Petitioner, Anthony Herbert, is a retired Army officer who had extended war-time service in Vietnam and who received widespread media attention in 1969-1970 when he accused his superior officers of covering up reports of atrocities and other war crimes. Three years later, on February 4, 1973, respondent Columbia Broadcasting System, Inc. (CBS), broadcast a report on petitioner and his accusations. The program was produced and edited by respondent Barry Lando and was narrated by respondent Mike Wallace. Lando later published

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

2,3,13-20,23

From: Mr. Justice White

Circulated: _____

Recirculated: 28 FEB 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1105

Anthony Herbert, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
Barry Lando et al. | peals for the Second Circuit.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
~~Mr. Justice Marshall~~
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

STYLISTIC CHANGES THROUGHOUT.

SEE PAGES:

From: Mr. Justice White

Circulated: _____

3rd DRAFT

Recirculated: 12 APR 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1105

Anthony Herbert, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
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16 APR 1979

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1105

Anthony Herbert, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
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[April —, 1979]

MR. JUSTICE MARSHALL, dissenting.

Although professing to maintain the accommodation of interests struck in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), the Court today is unresponsive to the constitutional considerations underlying that opinion. Because I believe that some constraints on pretrial discovery are essential to ensure the "uninhibited [and] robust" debate on public issues which *Sullivan* contemplated, *id.*, at 270, I respectfully dissent.

I

At issue in this case are competing interests of familiar dimension. States undeniably have an interest in affording individuals some measure of protection from unwarranted defamatory attacks. Libel actions serve that end, not only by assuring a forum in which reputations can be publicly vindicated and dignitary injuries compensated, but also by creating incentives for the press to exercise considered judgment before publishing material that compromises personal integrity. See *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 341-342 (1974); *Rosenblatt v. Baer*, 383 U. S. 75, 86 (1966).

Against these objectives must be balanced society's interest in promoting unfettered debate on matters of public importance. As this Court recognized in *Sullivan*, error is inevitable in such debate, and, if forced to guarantee the truth of all assertions, potential critics might suppress statements believed to be accurate "because of doubt whether [truthful-]

— 1,8
2,3,4,

12 APR 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1105

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Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 22, 1979

Re: No. 77-1105 - Herbert v. Lando

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

cc: The Conference

February 7, 1979

77-1105 Herbert v. Lando

Dear Byron:

I have read with interest your typed draft of 1/30/79, and think I will have no difficulty in joining it.

As I went along, I noted in pencil an occasional editing change - though none of any consequence. See pages 12, 15, 16 and 24. On page 13, I dictated a rider (attached) that is more form than substance. I do not urge any of it on you.

I think your disposition of the constitutional privilege issue is thorough and convincing. I was particularly impressed by your use of Butts, Walker and Hill in footnote 6.

As you anticipated, my only serious question is whether the opinion should address more fully what may be called the "discovery issue", or whether it should be limited substantially to deciding the constitutional privilege issue - as you have written it. I enclose a memorandum to my file dated November 11, 1978 (although I believe I actually wrote it on November 1) that summarized my thinking about the case at that time. You will note that I thought - and am inclined still to think - that the case should be remanded. I appreciate that it would be difficult to give the DC much guidance with respect to discovery, but I may see if something along this line can be written. I would expand somewhat upon your paragraph at the bottom of page 25, instead of striking it. If I write, I would concur in your opinion and simply move briefly into the discovery problem.

Thank you for the opportunity of reviewing your draft, which I think is exceptionally well done.

Sincerely,

Mr. Justice White

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 9, 1979

77-1105 Herbert v. Lando

Dear Byron:

I am glad to join your opinion for the Court that addresses the constitutional privilege issue.

As I indicated at Conference, I thought we might move on after deciding the constitutional question to the scope of discovery on a remand. I appreciate that the question submitted may be viewed as being limited only to the constitutional issue. In any event, I am giving some thought to writing a concurring opinion.

Sincerely,



Mr. Justice White

lfp/ss

cc: The Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Justice Powell

No. 77-1105

Circulated: 28 MAR 1979

Anthony Herbert, Petitioner, | On Writ of Certiorari to the
 v. | United States Court of Ap-
 Barry Lando et al. | peals for the Second Circuit.

[March —, 1979]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and write separately to elaborate on what is said in Part IV of the opinion. I do not see my observations as being inconsistent with the Court's opinion; rather, I write to emphasize the additional point that, in supervising discovery in a libel suit by a public figure, a district court has a duty to consider First Amendment interests as well as the private interests of the plaintiffs.

I agree with the Court that the explicit constitutional protection of First Amendment rights in a case of this kind, as articulated by *New York Times v. Sullivan*, 376 U. S. 254 (1964), should not be expanded to create an evidentiary privilege. With respect to pretrial discovery in a civil proceeding, whatever protection the "exercise of editorial judgment" enjoys depends entirely on the protection the First Amendment accords the product of this judgment, namely published speech. As the Court makes clear, the privilege respondents claim is unnecessary to safeguard published speech.¹ This

¹ I am not in agreement with MR. JUSTICE BRENNAN that the First Amendment requires that discovery into the exchange of views among press employees must be postponed until a preliminary determination of the falsity of the publication is made. See *post*, at 16-17. Nor am I persuaded that court-supervised inquiry into these exchanges is likely to exert a significant effect on future publications. Newsroom conversations are like any other conversations, inasmuch as they enjoy no special First Amendment protection other than what they derive from that accorded to published speech. Moreover, I do not believe the issues of falsity and

To: The Chief Justice
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Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

2nd DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES ~~Received~~: 28 MAR 1979

No. 77-1105

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[March —, 1979]

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12 Apr 1979

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SUPREME COURT OF THE UNITED STATES

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omission

these

¹ Our decisions in *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974), and *Columbia Broadcasting System, Inc. v. Democratic National Committee, Inc.*, 412 U. S. 94 (1973), provide no support for the theory that the prepublication editorial process enjoys a special status under the First Amendment. Rather, decisions rest on the fundamental principle that the coerced publication of particular views, as much as their suppression, violates the freedom of speech.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 8, 1979

Re: No. 77-1105 - Herbert v. Lando

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 12, 1979

Re: 77-1105 - Herbert v. Lando

Dear Byron:

Please join me.

Respectfully,



Mr. Justice White

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