A Qualified Privilege for Defamatory Nontestimonial Communications Made in the Course of Petitioning [In re IBP Confidential Business Documents Litigation, 755 F.2d 1300 (8th Cir. 1985)]

Scott G. Johnson

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A QUALIFIED PRIVILEGE FOR DEFAMATORY NONTESTIMONIAL COMMUNICATIONS MADE IN THE COURSE OF PETITIONING

[Int re IBP Confidential Business Documents Litigation, 755 F.2d 1300 (8th Cir. 1985)]

INTRODUCTION

[The rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights.

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.]

As Justice Black's and Justice Stewart's observations indicate, the right to petition the government for a redress of grievances and the individual's right to the protection of his reputation from defamatory falsehoods are fundamental liberties. Yet, there is an inherent conflict of these two fundamental liberties when defamatory falsehoods are made in the course of petitioning. A common law absolute privilege for defamatory statements made while testifying before legislative bodies has long been recognized. Nontestimonial communications, however, are beyond the scope of the common law privilege.

In the case of In re IBP Confidential Business Documents Litigation, the

1. United Mine Workers of Am. v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967) (Black, J.). The first amendment to the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The provision guaranteeing the right to peaceably assemble and to petition the government was made applicable to the states through the due process clause of the fourteenth amendment. See Hague v. Committee for Indus. Org., 307 U.S. 496, 512-13 (1939); DeJonge v. Oregon, 299 U.S. 353, 364 (1937).


3. See infra notes 8-12 and accompanying text.

4. See id.

5. 755 F.2d 1300 (8th Cir. 1985). This case was one of several cases decided by the federal courts involving the "Bagley Documents." See infra note 85.
Eighth Circuit considered, for the first time, the extent to which the first amendment guarantee of the right of petition limits a court's ability to award damages in a libel action based on defamatory non-testimonial communications made in the course of petitioning. In *IBP*, the Eighth Circuit held that a plaintiff, to recover damages in such a case must prove, by clear and convincing evidence, that statements made in the course of petitioning were made with actual malice.\(^6\) The Eighth Circuit Court of Appeals was the first court to hold that the actual malice standard of liability afforded the media\(^7\) applies to defamatory falsehoods made in the course of petitioning.

The purpose of this Comment is to examine, within the context of the *IBP* decision, the extent to which the right to petition the government for a redress of grievances protects defendants who are charged with expressing defamatory falsehoods in nontestimonial communications made in the course of petitioning. First, the Comment reviews the law existing prior to the *IBP* decision and how it applies to defamation and the right to petition. The Comment then examines the *IBP* decision and argues that although the Eighth Circuit's adoption of a qualified privilege is correct, the court misapplied the privilege to the facts in *IBP*. Specifically, it is suggested that the majority improperly concluded that the plaintiff was a public figure. Finally, the Comment asserts that, even assuming the plaintiff was a public figure, the court erred in not concluding that the defendant in *IBP* abused the petitioning privilege by distributing the defamatory statement to the media and other persons.

I. BACKGROUND

A. Common Law Protection for Defamatory Statements

At common law, an absolute privilege or immunity\(^8\) is recognized

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6. See *IBP*, 755 F.2d at 1315.
8. Immunity may be a more accurate term than privilege because an absolutely privileged communication protects false statements regardless of purpose or motive. Comment, Protecting the First Amendment Right to Petition: Immunity for Defendants in Defamation Actions Through Application of the Noerr-Pennington Doctrine, 31 AM. U.L. REV. 147, 156 (1981); see also W.P. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER AND KEETON ON THE LAW OF TORTS § 114, at 815 n.3 (5th ed. 1984), [hereinafter cited as PROSSER & KEETON].

Defamation is made up of the "twin torts" of libel and slander. PROSSER & KEETON, supra, § 111, at 771. Generally, libel involves written or printed words, while slander concerns oral statements. Id. § 112, at 785. To recover damages in a defamation action at common law, the plaintiff must prove that the defendant "(1) published a statement, (2) defamatory, (3) of and concerning the plaintiff." Id. § 113, at 802. A defamatory statement is one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from
for defamatory statements made during legislative proceedings. The privilege is based on public policy; in order for a government to govern democratically, facts must be freely presented to the legislative bodies. If statements to legislative bodies were not privileged, individuals might be discouraged from addressing the government. The absolute immunity extends to legislators performing legislative functions and to witnesses testifying at legislative hearings.

associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1976). At common law, defamation is a strict liability tort. Thus, a defendant could be held liable for publishing a defamatory statement without any evidence that the defendant believed the statement was false. L. ELDREDGE, THE LAW OF DEFAMATION § 5, at 14-15 (1978); PROSSER & KEETON, supra, § 113, at 804; Bloom, Proof of Fault in Media Defamation Litigation, 38 VAND. L. REV. 247, 249 (1985).


Some courts have extended the legislative immunity to the proceedings of subordinate bodies performing a legislative function. See, e.g., McNayr v. Kelly, 184 So. 2d 428, 432 (Fla. 1966) (board of county commissioners); Larson v. Doner, 32 Ill. App. 2d 471, 473-75, 178 N.E.2d 399, 400-01 (1961) (mayor and city commission-
However, the absolute immunity afforded to defamatory statements made in the course of legislative proceedings does not provide a similar immunity for nontestimonial communications.

A defendant in a defamation action, who does not enjoy absolute immunity, may be protected by a conditional or qualified privilege. A defendant is protected by a qualified privilege if he publishes a defamatory communication in furtherance of his own interests or the interests of the general public. Thus, a defendant may defend his own reputation against the defamation of another. Further, communications made to those who may be expected to take official action for the protection of the public interest are also privileged. A defendant's claim of qualified privilege can be defeated if the defendants fail to publish the communication reasonably necessary for defense.
plaintiff proves excessive publication,\textsuperscript{17} the making of a defamatory statement that is not the basis of the privilege,\textsuperscript{18} or that the statement was made with malice or knowledge of falsity.\textsuperscript{19} These qualified privileges would protect those petitioning the government only in cases where the petitioner made a defamatory statement to defend his own reputation or for the protection of the public interest.

\textbf{B. Constitutional Protection for Defamatory Statements}

In \textit{New York Times Co. v. Sullivan},\textsuperscript{20} the United States Supreme Court held for the first time that the first amendment limits a court's ability to award damages in state defamation actions. In \textit{New York Times}, the Supreme Court held that the first amendment right to freedom of speech requires a public official, who seeks to recover damages for defamation, to prove that the defendant published the defamatory falsehood with "actual malice."\textsuperscript{21} Actual malice was defined as knowledge of falsity or reckless disregard as to whether the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{17} See Prosser & Keeton, supra note 8, § 115, at 832. The privilege does not extend to the publication of defamatory statements to persons other than those reasonably believed to be necessary to further the public interest. \textit{Id.}; see also, Afro-American Publishing Co., 366 F.2d at 656; Preston v. Hobbs, 161 A.D. 363, 365, 146 N.Y.S. 419, 420 (1914).
\item \textsuperscript{18} See Prosser & Keeton, supra note 8, § 115, at 832. The qualified privilege does not extend to the publication of defamatory statements that are irrelevant to the public or private interest which is entitled to protection. \textit{Id.} See generally Comment, supra note 13, at 98.
\item \textsuperscript{19} See Prosser & Keeton, supra note 8, § 115, at 833-35. The privilege is inapplicable if the defamatory communication was made with ill will or spite, or if the defendant knew the communication was false or did not have reasonable grounds to believe it was true. \textit{Id.}; see also General Motors Corp., 27 Md. App. at 129, 340 A.2d at 789; Powers, 117 R.I. at 531, 368 A.2d at 1249 (1977); Zarate v. Cortinas, 553 S.W.2d 652, 655 (Tex. Civ. App. 1977); Phifer, 443 P.2d at 871.
\item \textsuperscript{20} 376 U.S. 254 (1964).
\end{enumerate}
\end{footnotesize}
statement was false or not. The Court also held that a plaintiff must prove "actual malice" by clear and convincing evidence.

The Supreme Court limited application of the constitutional privilege to those defamatory falsehoods involving the "official conduct" of a "public official." Three years after *New York Times*, however,

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22. *New York Times*, 376 U.S. at 280. In St. Amant v. Thompson, 390 U.S. 727 (1968), the Supreme Court clarified the actual malice standard, stating, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. A court thus considers the state of mind of the defendant rather than objective standards to determine the existence of actual malice. *See Herbert v. Lando*, 441 U.S. 153, 160 (1979). Actual malice at common law had a different meaning than the one adopted by the Supreme Court in *New York Times*. Malice at common law meant ill will or spite. *See Prosser & Keeton*, supra note 8, § 115, at 833-34. Common law malice is not the equivalent of actual malice in the defamation context; common law malice alone will not support a finding of actual malice. *Cf. Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (per curiam). However, common law malice is evidence of actual malice. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).


the Supreme Court, in *Curtis Publishing Co. v. Butts*, extended the actual malice standard to defamation actions involving "public figures." Public figures were defined as those "who do not hold public office . . . [but] are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." 

In *Gertz v. Robert Welch, Inc.*, the Supreme Court clarified the first amendment's affect on state defamation actions. The Court in *Gertz* reiterated the previous holdings that public officials and public figures could recover damages in an action for defamation only upon clear and convincing proof that the defamatory statement was made with actual malice. The Court also held that state courts could not
impose liability without fault in cases involving private persons defamed by the news media.\textsuperscript{30} The Court's holding permitted the states to define the level of fault, but required proof of at least negligence.\textsuperscript{31} Finally, recognizing that an award of punitive damages for libel raises first amendment concerns, the Court ruled that states may not award punitive damages in a libel action unless the plaintiff can prove the defendant acted with actual malice.\textsuperscript{32}

The Court in \textit{Gertz} defined two types of public figures — general public figures and limited public figures.\textsuperscript{33} General public figures were those who enjoyed "general fame and notoriety in the community."\textsuperscript{34} A limited public figure could either be a voluntary or invol-

\textit{New York Times} standard should extend to defamatory falsehoods relating to private persons if the statements concerned matters of general or public interest. See \textit{id.} at 43-44. The Court in \textit{Gertz} specifically rejected \textit{Rosenbloom}, concluding that the "extension of the \textit{New York Times} test proposed by the \textit{Rosenbloom} plurality would abridge [the] legitimate state interest [in providing private persons a remedy for defamation] to a degree that we find unacceptable." \textit{Gertz}, 418 U.S. at 346.

\textsuperscript{30} \textit{Gertz}, 418 U.S. at 347-48. The plaintiff \textit{Gertz} was a well known Chicago attorney. \textit{Gertz} represented a family suing a Chicago policeman for damages because the policeman had killed a member of the family. The defendant published a magazine representing the views of the John Birch Society. The magazine published an article accusing \textit{Gertz} of participating in a frame up of the policeman at the murder trial to further a Communist conspiracy against the police. \textit{id.} at 325-26. The Court agreed with the lower court's conclusion that \textit{Gertz} was a private person, but remanded for retrial with instructions to comply with the Court's opinion. \textit{id.} at 352.


\textsuperscript{32} See \textit{Gertz}, 418 U.S. at 348-50. Generally, in civil actions a plaintiff can recover punitive damages when he proves the defendant acted with "malice, ill will or conscious disregard of [the] consequences to others." C. \textit{McCormick}, \textit{Handbook on the Law of Damages} § 79, at 280 (1935). The focus is on the disposition of the defendant toward the plaintiff at the time of the wrongful act. See \textit{Prosser & Keeton, supra} note 8, § 2, at 9-11. In \textit{Gertz}, the Supreme Court recognized that the justifications for awarding punitive damages in libel actions were the same as in other civil cases, namely deterrence and retribution. See \textit{Gertz}, 418 U.S. at 350. However, the Court also recognized that imposing punitive damages in libel actions creates a tension with first amendment freedom of speech. See \textit{id.} at 349. Therefore, the Court adopted the "actual malice" standard of liability to protect the state's interest in awarding punitive damages and to reduce the chilling of speech likely to result from such awards. See \textit{id.} at 341-43. See generally Note, \textit{Punitive Damages and Libel Law}, 98 HARV. L. REV. 847 (1985).

\textsuperscript{33} See \textit{Gertz}, 418 U.S. at 351.

\textsuperscript{34} See \textit{id.} at 351-52. The Court stated, "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." \textit{id.} at 352. An example of this type of public figure would be Johnny Carson. See \textit{Carson v. Allied News Co.}, 529 F.2d 206, 209-10 (7th Cir. 1976) (Johnny Carson held to be "all-purpose" public figure).
A voluntary limited public figure freely injects himself into a public controversy.\footnote{35} In contrast, an involuntary public figure involuntarily is drawn into a particular public controversy.\footnote{36}

The Court in \textit{Gertz} narrowly defined both general public figures and involuntary limited public figures.\footnote{37} Subsequent Supreme Court cases also have narrowly defined voluntary limited public figures.\footnote{38} In these cases, the Court has focused on the specific characteristics and motivations of the individual, rather than the type of controversy in determining limited public figure status.\footnote{39}

The \textit{New York Times} and \textit{Gertz} cases hold that public officials and public figures can recover damages in a defamation action against a media defendant\footnote{40} only upon clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard of the truth.\footnote{41} The standard espoused in these

\begin{itemize}
\item \textit{See Gertz}, 418 U.S. at 345, 351.
\item \textit{Id.}
\item \textit{Id.}
\item The Court in \textit{Gertz} required “clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society” before a person could be deemed a general public figure. \textit{Id.} at 352. On the involuntary limited public figure status, the Court stated: “Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.” \textit{Id.} at 345.
\item \textit{See Wolston v. Reader’s Digest Ass’n, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979).}
\item In \textit{Wolston}, the Supreme Court held that Wolston, who 17 years earlier failed to respond to a grand jury subpoena and subsequently pleaded guilty to criminal contempt, was not a public figure. \textit{See Wolston, 443 U.S. at 166-69. In Hutchinson, the Court held that a recipient of Senator Proxmire’s “Golden Fleece of the Month Award” was not a public figure. Hutchinson, 443 U.S. at 133-36. In Wolston, the Court suggested that a plaintiff must meet all the criteria established in \textit{Gertz} in order to become a limited public figure. See Wolston, 443 U.S. at 166 n.8.}
\item The Court in \textit{New York Times} did not limit its holding to media defendants. In fact, the defendants included four individuals in addition to the New York Times. \textit{See New York Times, 376 U.S. at 256. In Gertz, the Court specifically referred only to the publishing and broadcast media. See Gertz, 418 U.S. at 332 (“The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.”). See generally Watkins & Schwartz, \textit{Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges}, 15 TEX. TECH. L. REV. 823 (1984); Note, \textit{First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants}, 47 S. CAL. L. REV. 902 (1974).}
cases, however, does not provide constitutional protection for those petitioning the government. The Supreme Court has indicated and most lower courts have held, that the Court's standards do not provide constitutional protection for defamation by non-media defendants.44 Citizens who petition the government for a redress of

van to Gertz v. Robert Welch, Inc. and Beyond, 6 RUT.-CAM. L.J. 471 (1975); Yasser, Defamation as a Constitutional Tort: With Actual Malice For All, 12 TULSA L. J. 601 (1977).

43. The Court in Hutchinson noted: "Neither the District Court nor the Court of Appeals considered whether the New York Times standard can apply to an individual defendant rather than to a media defendant. . . . This Court has never decided the question; our conclusion that Hutchinson is not a public figure makes it unnecessary to do so in this case." Hutchinson, 443 U.S. at 133-34 n.16. However, a recent Supreme Court decision indicates that the New York Times - Gertz constitutional protections would apply to a nonmedia defendant. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985), the Court had to decide whether Gertz applied in a defamation action brought by a construction contractor against a credit reporting agency which issued a false credit report to the contractor's creditors. The Vermont Supreme Court had held "that as a matter of federal constitutional law, the media protections outlined in Gertz are inapplicable to nonmedia defamation actions." Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 75, 461 A.2d 414, 418 (1983). The Supreme Court affirmed, but for different reasons. Three justices concluded that the Gertz limitations on presumed and punitive damages were inapplicable to the case because the speech involved a subject of purely private concern and was circulated to an extremely limited audience. See Dun & Bradstreet, Inc., 105 S. Ct. at 2946-47 (opinion of Powell, J.). Chief Justice Burger concluded that Gertz did not apply since the credit report did not "concern a matter of general public importance." Id. at 2948 (Burger, C.J., concurring). Similarly, Justice White concurred, reasoning that the credit report "does not deal with a matter of public importance." Id. at 2954 (White, J., concurring).

Nevertheless, at least five members of the Court agreed that the constitutional protections afforded the media in New York Times and its progeny would also be afforded to a nonmedia defendant. Justice Brennan wrote in his dissent, which was joined by Justices Marshall, Blackmun, and Stevens, that a distinction between media and nonmedia defendants "is irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."" Id. at 2957 (Brennan, J., dissenting) (quoting in part First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978)). Justice White in his concurring opinion expressly agreed with Justice Brennan that there is no distinction between media and nonmedia defendants, noting "that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech." Id. at 2953 (White, J., concurring). Justice Powell's opinion did not expressly reject the media/nonmedia distinction, but expressly declined to apply that distinction to resolve the case. See id. at 2942.

grievances generally are not members of the media. Therefore, citizens who make defamatory statements in the course of petitioning are not protected by the Supreme Court's actual malice standard of liability and thus are vulnerable to defamation suits.

**C. The Right to Petition**

The first amendment to the Constitution guarantees the right of the people to petition the government for a redress of grievances. The Supreme Court has stated that the right to petition the government is “among the most precious of the liberties safeguarded by the Bill of Rights.” As the Court observed, the right to petition the government is imperative “to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.” The right to petition is also considered a part of the preferred position occupied by the other first amendment freedoms. 48

1. *The Noerr-Pennington Doctrine*


45. U.S. CONST. amend. I. The right to petition was first formally expressed in the Magna Carta of 1215. See W. McKECHNIE, MAGNA CARTA 467 (2d ed. 1914); see also J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 1004 (2d ed. 1983). Justice Story concluded that the petition clause was borrowed from the declaration of rights in England after the revolution of 1688 in which the right to petition the King for a redress of grievances was insisted upon. The right to petition parliament was protected by statute in England at that time. See 2 J. STORY, COMMENTS ON THE CONSTITUTION OF THE UNITED STATES 620 (4th ed. 1973); see also 1 B. SCHWARTZ, THE BILL OF RIGHTS - A DOCUMENTARY HISTORY 198 (1971).

46. United Mine Workers of Am. v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967). Justice Story believed that the petition clause was unnecessary in a republican form of government because it inevitably results from the nature of the republican government's structure and institutions. J. STORY, supra note 45, at 619.

47. Dejonge v. Oregon, 299 U.S. 353, 365 (1937). In the Congressional debate on the first amendment, James Madison stated that people “may communicate their will” through direct petitions to the legislature and government officials. 1 ANNAL OF CONGRESS 738 (1789); see also United States v. Cruikshank, 92 U.S. 542, 552 (1876) (the right to petition is implicit in “[t]he very idea of government, republican in form . . .”).

48. In United Mine Workers, the Supreme Court stated that the right to petition was “intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press.” 389 U.S. at 222; see also Thomas v. Collins, 323 U.S. 516, 530 (1945); Dejonge, 299 U.S. at 364. See generally 1 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 263-65 (1968).
for defamatory statements made in the course of petitioning. However, the Supreme Court has established a first amendment protection for the right to petition in the context of antitrust litigation. In a trilogy of antitrust cases, the Court, in what is known as the Noerr-Pennington doctrine, limited the ability of the government to enforce antitrust laws whenever that enforcement inhibits the right to petition.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, a group of trucking companies brought an action against several railroads for conspiring to monopolize long distance freight business. The trucking companies alleged that the railroads violated the Sherman Act by conducting a publicity campaign designed to influence the government to adopt and enforce laws disfavoring the trucking business. The Supreme Court concluded that the Sherman Act did not prohibit the association of two or more persons in an attempt to

49. As early as 1845, the United States Supreme Court recognized that a petitioning privilege might exist in a defamation action. In *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), the Supreme Court recognized a common law qualified privilege for statements made while petitioning the government. *Id.* at 287, 289. In *White*, Nicholls wrote several letters to the President and to the Secretary of the Treasury stating that White was unfit to serve as collector of customs. *Id.* at 267-73. After White was removed from his position, he brought suit against Nicholls for libel. *Id.* at 273. On appeal, the Supreme Court held that the communications were qualifiedly privileged. *Id.* at 287, 291. Although the Court did not expressly advert to the first amendment, it recognized that the letters were privileged communications because they were petitions to an appropriate authority for redress of grievances. *Id.* The Supreme Court recently reaffirmed *White* in *McDonald v. Smith*, 105 S. Ct. 2787, 2790-91 (1985).

For recent decisions recognizing a common law qualified privilege for unsolicited communications to a legislative body, see *Webster v. Sun Co.*, 731 F.2d 1 (D.C. Cir. 1984) (memorandum sent to Congressional Research Service disparaging plaintiff and plaintiff’s invention); *Bradley v. Computer Sciences Corp.*, 643 F.2d 1029 (4th Cir. 1981) (letter sent to Defense Communications Agency claiming plaintiff-employee “misrepresented” intent of defendant’s notes in agency report).


52. The trucking companies alleged that the railroads violated sections 1 and 2 of the Sherman Act. Section 1 of the Sherman Act provides in pertinent part: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1 (Supp. 1986). Section 2 of the Sherman Act provides in pertinent part: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .” *Id.* § 2.

persuade the legislature to take a course of action that would produce a monopoly.\textsuperscript{54} The Court relied, in part,\textsuperscript{55} on the right to petition, noting that a contrary conclusion "would raise important constitutional questions."\textsuperscript{56}

In \textit{United Mine Workers v. Pennington},\textsuperscript{57} the Court discussed the scope of \textit{Noerr}. In \textit{Pennington}, the Supreme Court held that concerted efforts to influence the conduct of executive officials were privileged, even if the intent and purpose was to obtain an anticompetitive result.\textsuperscript{58} Thus, in \textit{Pennington}, the Court extended the reach of the \textit{Noerr} doctrine to administrative and executive decisionmaking.\textsuperscript{59} As in \textit{Noerr}, the Court did not base its holding on the first amendment.\textsuperscript{60}

Ten years after \textit{Noerr}, in \textit{California Motor Transport Co. v. Trucking Unlimited},\textsuperscript{61} the Supreme Court explained the \textit{Noerr} decision as resting in the constitutionally protected right to petition.\textsuperscript{62} The Court concluded that legitimate petitioning activity included attempts to influence administrative and judicial tribunals, as well as executive and legislative proceedings.\textsuperscript{63} The Court also concluded that the right to petition permits persons to petition the government concerning their business interests in addition to political interests.\textsuperscript{64}

The Court in \textit{Trucking Unlimited} also formally recognized the "sham" exception.\textsuperscript{65} In \textit{Noerr}, the Court suggested a possible exception to the right to petition where the alleged petitioning activity was a mere sham, or activity that was actually an attempt to directly interfere with the business relationships of a competitor.\textsuperscript{66} In formally

\begin{itemize}
\item \textsuperscript{54} \textit{Id.} at 136.
\item \textsuperscript{55} The Court in \textit{Noerr} also employed a legislative history analysis. The Court concluded that nothing in the legislative history of the Sherman Act revealed an intent to regulate political activity by restricting the ability of persons to inform the government of their wishes. \textit{Id.} at 137.
\item \textsuperscript{56} \textit{Id.} at 137-38.
\item \textsuperscript{57} 381 U.S. 657 (1965). In \textit{Pennington}, a suit was brought against the United Mine Workers and certain coal companies alleging that the defendants had attempted to persuade the Secretary of Labor to obtain adjustments to the Tennessee Valley Authority coal purchasing policy in order to drive small coal companies out of business. \textit{See id.} at 569-70.
\item \textsuperscript{58} \textit{Id.} at 670.
\item \textsuperscript{59} \textit{Id.} at 669-71.
\item \textsuperscript{60} \textit{See id.}
\item \textsuperscript{61} 404 U.S. 508 (1972).
\item \textsuperscript{62} \textit{Id.} at 510.
\item \textsuperscript{63} \textit{See id.}. In \textit{Trucking Unlimited}, the plaintiffs, a group of highway carriers, brought an action against the defendants, a second group of highway carriers, alleging that the defendants violated the Sherman Act by instituting state and federal administrative and judicial proceedings to prevent the plaintiffs' applications to acquire operating rights. \textit{Id.} at 509.
\item \textsuperscript{64} \textit{Id.} at 511.
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Noerr}, 365 U.S. at 144.
\end{itemize}
recognizing the sham exception in *Trucking Unlimited*, the Court held that if activity fell within the exception, it would not be protected by the first amendment.67

2. Application of the Noerr-Pennington Doctrine to Defamation Actions

Since *Trucking Unlimited*, a number of courts have applied the Noerr-Pennington doctrine to other areas of the law, extending an absolute privilege to petitioning activity that would otherwise be actionable.68 For example, the Noerr-Pennington doctrine has provided defendants with absolute immunity in tort actions such as malicious prosecution69 and interference with prospective advantage.70 In extending an absolute immunity, these courts have concluded that the importance of protecting the right to petition outweighs any potential harm to the plaintiffs.71

In addition, two courts have held that the Noerr-Pennington doctrine provides an absolute privilege in defamation actions arising out of statements made while petitioning the government.72 The first court to extend Noerr-Pennington to the defamation area was the West Virginia Supreme Court of Appeals in *Webb v. Fury*.73 In *Webb*, an en-


68. See, e.g., Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 614-15, (8th Cir. 1980) (claim under federal Civil Rights Act that defendants obtained a zoning change to prevent plaintiffs from building on the property); Weiss v. Willow Tree Civic Ass'n, 467 F. Supp. 803, 817-19 (S.D.N.Y. 1979) (conspiracy to harass and delay plaintiffs' application for zoning permits in violation of their civil rights).


71. See National Org. for Women, Inc., 620 F.2d at 1318; Sierra Club, 349 F. Supp. at 938; Bozek, 31 Cal. 3d at 535-36, 645 P.2d at 141, 183 Cal. Rptr. at 90-91.


73. 282 S.E.2d 28 (W. Va. 1981). Commentators have also argued that the Noerr-
environmentalist and a public interest environmental group sent a series of allegedly defamatory communications concerning the DLM Coal Company to the Environmental Protection Agency (EPA) and the Office of Surface Mining of the Department of the Interior (OSM). DLM brought suit against the plaintiffs for libel and tortious interference, claiming that the submission of false and defamatory information damaged its business reputation. The West Virginia court held that the plaintiffs’ communications with the EPA and OSM were petitioning activities and thus absolutely privileged.

_Sherard v. Hull_ was the second case to apply the _Noerr-Pennington_ doctrine to a defamation action. In _Sherard_, the defendant made allegedly defamatory remarks about the plaintiff, a local businessman, while speaking before a county board of commissioners. In a subsequent suit for slander, the court instructed the jury that if it found that the defendant was petitioning the government for a redress of grievances, the comments before the board were absolutely privileged. On appeal, the Court of Special Appeals of Maryland affirmed the trial court’s instruction, holding that statements made while petitioning a legislative body for a redress of grievances were absolutely privileged.

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_Pennington_ doctrine should be extended to the defamation area. See Comment, _supra_ note 8; Comment, _supra_ note 12.

74. _Webb_, 282 S.E.2d at 31-33. The defendants had requested the OSM to inspect DLM’s mining operations and had requested the EPA to conduct a hearing to reconsider the Agency’s decision to grant DLM’s water pollution control permits. _Id._ at 32.

75. _Id._ at 31.

76. _Id._ at 37-41. The court held: “The people's right to petition the government for a redress of grievances is a clear constitutional right and the exercise of that right does not give rise to a cause of action for damages.” _Id._ at 38-39.


78. _Id._ at 555, 456 A.2d 59.

79. _Id._ at 558, 456 A.2d 60.

80. _Id._ at 555, 456 A.2d 61. In deciding this issue, the court first determined that the defendant’s appearance before the county board of commissioners did not come within the scope of the common law judicial or legislative privileges. _Id._ at 558-60, 456 A.2d at 61-63. The court based its holding of an absolute petitioning privilege on three grounds. First, the court noted that the right to petition was one of the “most precious” of the liberties protected by the first amendment. _Id._ at 561, 456 A.2d at 64 (quoting United Mine Workers v. Illinois State Bar Ass’n, 389 U.S. 217, 222 (1967)). Second, the court concluded that the policy behind the privilege was to promote free communication between the government and its citizens. _Id._ at 573, 456 A.2d at 70-1. Finally, the court concluded that the _Noerr-Pennington_ doctrine provides an absolute privilege in the antitrust area and should be extended to defamation cases. _Id._ at 564-65, 456 A.2d at 66-70.
II. The IBP Decision

In *IBP*, the Eighth Circuit had to decide the extent to which the first amendment right to petition limits a court’s ability to award damages in a libel action based on nontestimonial communications made in the course of petitioning. In *IBP*, the Eighth Circuit reversed a libel judgment in favor of the plaintiff, holding that a defendant is immune from liability unless the plaintiff can prove by clear and convincing evidence that the defamatory statements made in the course of petitioning were false and made with “actual malice.”

A. Factual Background

In 1977, a congressional subcommittee held hearings to determine whether current legislation ensured continued competition in the meatpacking industry. During the hearings, several witnesses provided information about Iowa Beef Processors, Inc. (IBP), a large meatpacking company, specifically charging IBP with anticompetitive conduct. The subcommittee also subpoenaed Hughes A. Bagley, a former IBP vice president, and documents in his possession known as the “Bagley Documents.”

81. See 755 F.2d at 1314-17.
82. The subcommittee involved was the Subcommittee on Small Business Administration and Small Business Investment Company Authority and General Small Business Problems of the United States House of Representatives Committee on Small Business. *Id.* at 1305.
83. *Id.*
85. *IBP*, 755 F.2d at 1305. IBP employed Bagley first as a consultant and later as vice president of retail sales development from 1971-75. *Id.* at 1304. In July, 1975 when Bagley left IBP’s employ, he took with him a number of documents and files he generated while working for IBP. *Id.* Bagley testified that when he changed jobs during his career, he took documents from his previous employment to his new employment to help him with the duties and responsibilities of his new job. Brief for Appellee at 4, *In re IBP Confidential Documents Litigation*, 755 F.2d 1300 (8th Cir. 1985). The documents taken from IBP included the company’s weekly profit and loss statements, monthly reports on production and sales, president’s staff meeting reports, confidential legal memoranda, memoranda describing IBP’s goals, marketing strategy and pricing formulas, and various documents generated by other former IBP employees. *See IBP*, 755 F.2d at 1304 n.8. Bagley and IBP subsequently negotiated and executed a settlement agreement, releasing each other from any liability arising out of the employment relationship and its termination. *Id.* As part of the agreement, Bagley agreed not to provide assistance to any third party in bringing a lawsuit against IBP. However, in 1976 and 1977, Bagley met with several antitrust attorneys concerning IBP’s activities. *Id.* In those meetings, Bagley disclosed information...
Representative Neal Smith, chairman of the subcommittee, invited IBP to send a spokesperson to testify before the subcommittee. Representative Smith informed IBP that proposed legislation would affect the company. Smith also advised IBP that the subcommittee would ask questions about the Bagley Documents. However, IBP did not respond before Bagley testified. In his testimony, Bagley indicated that IBP was involved in anticompetitive practices, and in response to questions by the subcommittee, Bagley identified several instances of attempts by IBP to control and monopolize the meatpacking industry.

Shortly thereafter, IBP declined Representative Smith's invitation to testify. IBP's thirty-one page letter responded to the charges made against it before the subcommittee and in essence called Bagley a liar and a thief. Approximately fourteen pages of the letter pertained to charges made by Bagley, who IBP characterized as "a

about IBP's activities and allowed the attorneys to examine and copy some of the Bagley Documents. Id. at 1304-05.

After IBP became aware of Bagley's activities, it filed suit in federal district court against Bagley, seeking injunctive relief and damages. Id. at 1305. IBP alleged in its complaint that Bagley breached his fiduciary duty to IBP and violated the terms of the termination agreement. IBP later dismissed its claim against Bagley for damages, but continued to seek injunctive relief compelling Bagley to return the Bagley Documents and to honor his contractual obligation. Id. In In re IBP Confidential Business Documents Litigation, 754 F.2d 787 (8th Cir. 1985), the Eighth Circuit vacated the district court's denial of an injunction and held that IBP could recover any of its confidential documents.

86. *IBP*, 755 F.2d at 1305. Representative Smith addressed the letter to IBP's president Robert Peterson. Smith included a copy of the committee rules and informed Peterson that the hearing would be conducted pursuant to these rules. *Id.*

87. *Id.* at 1305-06.

88. *Id.* at 1305.

89. IBP did not respond to Representative Smith's invitation before the subcommittee reconvened on July 23, 1979. *Id.* at 1306.

90. See *id.* Bagely testified that he "found reason to question" some of IBP's marketing practices when he worked for IBP. *Id.* In conclusion, Bagley stated that, "I also believe that the company has in the past become overly zealous in its attempts to control and monopolize the packing industry." *Id.* Bagley's testimony and the subpoenaed documents can be found in *Small Business Problems in the Marketing of Meat and Other Commodities (Part 5 - Anticompetitive Practices in the Meat Industry): Hearings Before the Subcomm. on SBA and SBIC Authority and General Small Business Problems of the House Comm. on Small Business, 96th Cong., 1st Sess. 4-226 (1979).*

91. First, Bagley stated that IBP understated its yield in its pricing formula, thus artificially inflating the price of its boxed beef. *IBP*, 755 F.2d at 1306. Second, Bagley testified that IBP did not charge a large New York supermarket for periodic increases in service fees. *Id.* at 1306-07. Finally, Bagley implied that IBP favored certain customers in its pricing policies. *Id.* at 1307.

92. *Id.* at 1307. IBP declined the invitation by letter. *Id.*

93. IBP's letter also sharply criticized Representative Smith and the subcommittee. IBP accused Smith of "demonstrable prejudice" against IBP and "obvious ulterior motives to make political capital," and "to aid a friend and political crony."
disgruntled ex-IBP employee” who had “stolen IBP documents and misused IBP confidential information to defame and cause problems for IBP.” IBP claimed that Bagley’s statements about the company before the subcommittee were “absolutely false” and constituted “clear perjury.”

IBP sent copies of the letter to each member of the subcommittee. The subcommittee did not enter the letter into the record as IBP had requested, nor did it formally release the letter to the news media. After the media reported IBP’s response, however, IBP sent copies to several members of the media. IBP also distributed copies of the letter to its directors, officers, plant managers, and to other interested parties.

Bagley brought an action against IBP, claiming damages for libel, invasion of privacy, and tortious interference with employment, all resulting from the IBP letter. The jury found IBP liable on all three claims and awarded Bagley $8.75 million in compensatory and punitive damages. After the trial, IBP moved for judgement notwithstanding the verdict, or alternatively for a new trial, arguing that the district court erred in instructing the jury on the libel claims in derogation of its first amendment rights.

B. Holding and Analysis

On appeal, the Eighth Circuit reversed the libel judgment. Adopting the New York Times standard of liability, the Eighth Circuit held

94. Id.
95. See id. at 1307-08. Bagley cited at least 14 defamatory statements in IBP’s 31 page letter. See Brief for Appellee at 13-16, In re IBP Confidential Documents Litigation, 755 F.2d 1300 (8th Cir. 1985).
96. There were 18 members of the subcommittee. IBP, 755 F.2d at 1308.
97. IBP requested that the letter be made a part of the subcommittee’s official proceedings. Id. at 1307. The court concluded that the subcommittee’s refusal to include IBP’s letter in the record was irrelevant for purposes of determining whether IBP exercised its first amendment right to petition the government. Id. at 1310 n.14.
98. Id. at 1308.
99. Id.
100. Id. at 1308-09.
101. Id. at 1302. Bagley also claimed that the suit IBP filed against him in 1977 constituted an abuse of process. The district court, however, ruled that this claim was barred by the statute of limitations. See id. at 1302 n.2.
102. Id. at 1303-04. The jury awarded $1 million compensatory damages and $5 million punitive damages on the libel claim. Id. at 1302 n.3. The jury also awarded $250,000 compensatory damages and $1.5 million punitive damages for invasion of privacy, $150,000 compensatory damages and $500,000 punitive damages for tortious interference with employment, and $100,000 compensatory damages and $250,000 punitive damages for tortious interference with prospective advantage. Id.
103. Id. at 1303.
104. Id. at 1303-04.
that IBP was immune from liability unless Bagley could prove by clear and convincing evidence that the defamatory statements were false and made with "actual malice."105

The court initially held that IBP "unquestionably" was exercising its first amendment right to petition the government when it sent the letter to the subcommittee.106 The court reasoned that the subcommittee had investigated the meatpacking industry, and heard testimony about IBP's activities, some of which charged IBP with improper conduct.107 The court noted that IBP limited the discussion in its letter to the subject matter of the subcommittee's investigation.108 The court further concluded that IBP was within the scope of the first amendment right to petition when it distributed copies of the letter to its directors, officers and plant managers, and to other interested parties.109 The court held that the right to respond to charges of improper conduct necessarily included the right to distribute the response to those who learned of the charges.110

After holding that IBP was exercising its first amendment right to petition, the court addressed the extent to which that right protected IBP from liability for libelous statements made in the course of petitioning. The court first rejected IBP's contention that an absolute privilege should extend to all communications made in the course of petitioning the government.111 The court acknowledged that the Supreme Court of Appeals of West Virginia in *Webb*, relying on the *Noerr-Pennington* doctrine,112 extended an absolute immunity to all communications made in the course of petitioning the government, whether or not the communications were made in the confines of the actual proceeding.113 The court, however, following the dissent in *Webb*, concluded that the extension of absolute immunity in *Webb* was unwarranted by the *Noerr-Pennington* doctrine.114 The *IBP* court

105. *Id.* at 1304.
106. *Id.* at 1309.
107. *Id.*
108. *Id.* at 1309-10. The court stated that IBP responded to the specific charges of improper conduct made by the witnesses who testified before the subcommittee. In its response, IBP explained its position and discredited the witnesses. IBP also questioned the integrity of the subcommittee. *See id.*
109. *Id.* The court observed that the right to petition went beyond the right to communicate directly with the government. According to the court, "[i]t necessarily includes those activities reasonably and normally attendant to effective petitioning." *Id.*
110. *Id.* The court said "[i]f hold otherwise would render the right to respond virtually meaningless, particularly in a case such as this where the governmental body to whom the response was directed chose not to publicize it." *Id.*
111. *See id.* at 1313-14.
112. *See supra* notes 50-67 and accompanying text.
113. *IBP*, 755 F.2d at 1311.
114. *See id.* at 1313.
noted that since the first amendment does not absolutely protect defamatory speech, the Noerr-Pennington doctrine does not provide an absolute privilege for defamatory statements made in the course of petitioning the government.115

Nevertheless, because of the importance of petitioning the government, the Eighth Circuit concluded that defamatory statements made while petitioning the government must be afforded a qualified privilege.116 The court adopted the New York Times "actual malice" standard of liability.117 Under this standard, a public person cannot recover damages for a defamatory falsehood absent clear and convincing evidence of actual malice.118 The court concluded that the "actual malice" standard of liability provides the "necessary insulation" for the first amendment interests at stake in petitioning the government.119 The court further concluded that clear and convincing proof of defamatory statements affords sufficient protection to those petitioning the government.120

The court then held that Bagley was a limited public figure in the context of petitioning the government.121 A limited public figure for purposes of media comment, the court observed, plays an influential role in resolving a public controversy and invites media attention.122 Similarly, the court concluded that Bagley, by playing an influential role in the legislative process, invited comment and attention on matters relevant to his participation.123 The court acknowledged that while Bagley was subpoenaed to appear before the subcommittee, he previously volunteered information about IBP to several antitrust lawyers.124 Thus, the court stated that Bagley could not be

115. See id. at 1313-14. The court also noted that safeguards exist in cases where a witness testifies in person before a legislative committee. Specifically, the court stated that a witness testifies under oath and is subject to prosecution for perjury. These safeguards ensure that the absolute immunity from defamatory liability is not abused. See id.

116. See id. at 1314-15. The court relied, in part, on Webster v. Sun Co., 731 F.2d 1 (D.C. Cir. 1984). In Webster, the District of Columbia Circuit extended a common law qualified privilege to an allegedly libelous intra-office memorandum sent unsolicited to the Congressional Research Service. Id. at 3. The court in Webster granted common law immunity from liability for defamation in nontestimonial communications directed to the government. See id. The IBP court concluded that the common law protection in Webster was inapplicable in IBP because those protections did not extend to republications. IBP, 755 F.2d at 1314.

117. IBP, 755 F.2d at 1314-15.

118. See id. 1314-15.

119. Id.

120. Id. at 1315.

121. Id. at 1316.

122. Id.

123. Id.

124. Id. The court emphasized that Bagley provided this information voluntarily. The court cited his testimony before the subcommittee where Bagley said that
considered "a recalcitrant and unwilling witness." The court concluded that Bagley assumed the risk and was "less deserving of recovery" for injuries caused by a defamatory falsehood. Since the district court did not require Bagley to meet the "actual malice" standard of liability, the Eighth Circuit reversed the libel judgment and remanded the case to the district court.

"somebody somehow had to stand up and be counted, or IBP was going to swallow up all of its smaller competition." Id.

125. Id.

126. Id. The court stated that Bagley had proven access to the forum in which he was defamed and thus had an opportunity to counteract false statements and minimize the adverse affect on his reputation. Id. The court also noted that the defamation occurred in a limited forum which reduced the scope of the injury. Id.

127. In New York Times, the Supreme Court held that an appellate court could make an independent review of the evidence on the issue of "actual malice." See New York Times, 376 U.S. at 285. The Court explained its holding as follows:

This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." We must "make an independent examination of the whole record," so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. Id. (citations omitted) (footnote omitted).

The requirement of independent appellate review as established in New York Times is a rule of federal constitutional law. In Bose Corp. v. Consumers Union of United States, Inc., 104 S. Ct. 1949, 1967 (1984), the Supreme Court held that the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of appellate review on the issue of actual malice in a defamation action governed by New York Times. Instead, appellate courts must exercise independent judgment and determine if the record supports a finding of actual malice with clear and convincing evidence. Id.

The IBP court declined to exercise the right of independent appellate review, concluding that the trial court had a "far superior vantage point" from which to examine the evidence and decide whether Bagley sufficiently proved actual malice. IBP, 755 F.2d at 1317.

128. See IBP, 755 F.2d at 1317. The court also reversed the judgment for tortious interference with prospective employment. At trial Bagley testified that six days after he appeared before the subcommittee, he was discharged, along with 90 other employees, from his position as general manager of a Dubuque Packing Company fabricating plant. Id. at 1317-18. Bagley was unable to obtain subsequent employment despite sending out several hundred applications. Id. at 1318. The court concluded that the only evidence constituting interference with prospective advantage was IBP's publication of the allegedly libelous letter. See id. Therefore, the court held that Bagley's inability to obtain employment was an element of damages for libel and an award on a separate claim would be a duplication of damages. Id. The court, however, affirmed the tortious interference with existing employment. Id. The dis-
C. Judge Fagg’s Dissent

While Judge Fagg agreed that legitimate petitioning activities are entitled to some first amendment protection, he nevertheless dissented. Judge Fagg believed that Bagley retained his status as a private individual.\textsuperscript{129} The dissent disagreed with the majority’s conclusion that Bagley played an “active” and “influential” role in the legislative process.\textsuperscript{130} Judge Fagg reasoned that Bagley made a single appearance under subpoena before the subcommittee\textsuperscript{131} and did not seek a public audience with his other involvement in the IBP controversy.\textsuperscript{132} The dissent characterized as “harsh” the majority’s conclusion that an individual appearing before a legislative committee has “accepted the risk” and is “less deserving of recovery.”\textsuperscript{133} This result, Judge Fagg stated, will discourage citizens from voluntarily providing relevant information to legislative committees.\textsuperscript{134}

III. Analysis

While the Eighth Circuit was correct in holding that the \textit{New York Times} actual malice standard of liability was applicable, the court erred in two important respects. First, the court mistakenly concluded that Bagley was a public figure. Although the majority relied on the \textit{Gertz} public figure criteria, it misapplied these criteria to Bagley because Bagley appeared before the legislative subcommittee involuntarily, and because he avoided the media and public comment. Second, the court did not recognize that IBP’s distribution of the letter to the media and other third persons took them outside the protection of the petitioning privilege. The right to petition is a narrow form of speech involving communications designed to influence governmental decisions. Publications to the media and other individuals not associated with the government should not be considered within the scope of the petitioning privilege.

A. Adoption of the Actual Malice Standard of Liability

The Eighth Circuit court correctly concluded that a qualified privi-
college, rather than an absolute privilege, applied to libelous statements made in the course of petitioning. Prior to IBP, two courts, relying on the Noerr-Pennington doctrine, held that libelous statements made in the course of petitioning were absolutely privileged. Applying an absolute privilege to nontestimonial communications made during the course of petitioning based on the Noerr-Pennington doctrine would have overstated the doctrine's basic rule. None of the Supreme Court's decisions interpreting the right to petition indicate that the right is absolute. The Supreme Court formulated the doctrine through a balancing of the first amendment right to petition against the interest of the government in enforcing the antitrust laws. Similarly, the Court, in developing the actual malice standard of liability for defamation, balanced the first amendment right of free speech and free press against the legitimate state interest in protecting an individual's reputation from defamatory falsehoods.

Since the first amendment right to petition is afforded the same constitutional protection as other first amendment rights, it follows that the right to petition must be balanced against the state's interest in providing a remedy for defamatory falsehoods in the same manner as was done in New York Times and its progeny. If the IBP court concluded that an absolute privilege applied, it would have given greater weight to the first amendment right to petition than the Supreme Court has given to the first amendment right to free speech and press. Further, the Eighth Circuit would have completely ignored the Supreme Court's definitive statement that the first amendment does not absolutely protect defamatory speech.

The Eighth Circuit correctly held that the actual malice standard

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139. See supra note 48 and accompanying text.
140. See Wayte v. United States, 105 S. Ct. 1524, 1532-33 n.11 (1985) ("Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same Constitutional analysis.").
141. See Gertz, 418 U.S. at 340 ("there is no constitutional value in false statements of fact").
provides sufficient protection to the competing interests involved. The Supreme Court in *New York Times* and *Curtis Publishing* held that public officials and public figures must prove the existence of actual malice by clear and convincing evidence to recover damages in a defamation action. The Court in *Gertz*, held that private figure plaintiffs do not have to prove actual malice. The *Gertz* Court concluded that the interest of the state in providing a remedy for defamatory falsehood increases in the case of a private figure plaintiff, because private persons are more vulnerable to injury and do not have the same opportunities for rebuttal as public figures, and because public figures, unlike private figures, invite comment and attention.

The justifications underlying *Gertz*, as the Eighth Circuit concluded, are also applicable when a person or group exercises the right to petition. Therefore, a public person or official defamed by someone in the course of petitioning the government, should be able to recover damages only upon clear and convincing proof of actual malice. Private figures, on the other hand, need not prove actual malice.

Four months after the *IBP* decision, the United States Supreme Court resolved the question of absolute immunity for nontestimonial communications. In *McDonald v. Smith*, the Court held that the right to petition did not provide absolute immunity to a defendant charged with expressing defamatory falsehoods in letters to the President. The Court, in a brief opinion, stated that petitions to the President containing "intentional and reckless falsehoods 'do not en-

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143. See *Gertz*, 418 U.S. at 343.
144. *Id.* at 345-46. The Court stated that unlike the public figure plaintiff who has assumed an influential role in society, the private figure plaintiff "has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Id.* at 345.
145. *Id.* at 344.
146. *Id.* at 345.
147. See supra note 142.
148. 105 S. Ct. 2787 (1985). In *McDonald*, the plaintiff was being considered for the position of United States Attorney. The defendant wrote two letters to President Reagan which accused the plaintiff of "violating the civil rights of various individuals while a Superior Court Judge" and of engaging in "fraud and conspiracy to commit fraud" and "extortion or blackmail." *Id.* at 2789. The defendant sent copies of the letters to other officials in the executive and legislative branches of government. See *id.* The plaintiff commenced a libel action against the defendant. Both the district court and the court of appeals refused to grant the defendant an absolute immunity from liability. *Id.*
149. See *id.* at 2791.
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joy constitutional protection.' "150 The Court further stated that to accept the defendant's claim of absolute immunity would elevate the right to petition above other first amendment rights.151 The Court, however, did not decide whether the actual malice standard of liability applied. The majority merely stated that under North Carolina common law, a plaintiff could recover damages in a defamation action upon proof of malice, which, the Court noted, was defined by the North Carolina courts to be consistent with New York Times.152 Three justices153 concurring in the opinion stated that the New York Times actual malice standard would apply.154

B. Misapplication of Public Figure Criteria

The major shortcoming of the IBP decision, was the court's failure to specify the precise criteria to be employed when classifying plaintiffs as public figures or private persons for purposes of petitioning the government. The classification of a plaintiff as a public figure or private person is crucial in a defamation action because each classification carries a significantly different standard of proof. Indeed, in order to recover damages in a defamation suit, a public figure plaintiff must prove actual malice by clear and convincing evidence.155 A private person, on the other hand, must show only the degree of fault required by state law.156

In adopting the actual malice standard of liability, the Eighth Circuit relied on the reasoning and analysis of the New York Times - Gertz line of cases.157 Relying on the same cases, the majority held that Bagley was a limited public figure for purposes of petitioning the government.158 Although the court relied on the Gertz limited public figure criteria to determine Bagley's status, the court apparently distinguished between limited public figures for purposes of media

150. Id. (quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964)).
151. See id. The Court also stated, "[t]he right to petition is guaranteed; the right to commit libel with impunity is not." Id.
152. See id.
154. See id. at 2791-94 (Brennan, J., concurring). Justice Brennan wrote:

There is no persuasive reason for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States. It necessarily follows that expression falling within the scope of the Petition Clause, while fully protected by the actual-malice standard set forth in New York Times Co. v. Sullivan, is not shielded by an absolute privilege. I therefore join the Court's opinion.

Id. at 2794.
155. See IBP, 755 F.2d at 1315.
156. See Gertz, 418 U.S. at 347.
157. See IBP, 755 F.2d at 1314-16.
158. Id. at 1316.
comment and limited public figures for purposes of petitioning.\textsuperscript{159} The court was careful to note that it was not deciding whether Bagley was a limited public figure for purposes of media comment.\textsuperscript{160} Instead, the court concluded that Bagley was “analogous” to a limited public figure in the context of petitioning the government.\textsuperscript{161}

The majority’s analysis on the limited public figure issue is curious. The \textit{IBP} majority did not suggest any criteria other than those of \textit{Gertz} for determining limited public figures for purposes of petitioning. Furthermore, the majority did not explain if or why the two types of limited public figures are different. The Eighth Circuit, of course, did not have to decide whether Bagley was a limited public figure for purposes of media comment since \textit{IBP} was not a media defendant. Yet, if the court intended the Supreme Court’s criteria for limited public figures for purposes of media comment to apply to persons petitioning the government, the majority erroneously concluded that Bagley was a limited public figure.

The Supreme Court in \textit{Gertz} defined two types of limited public figures for purposes of media comment. The first type is a voluntary limited public figure who voluntarily injects himself into a particular public controversy.\textsuperscript{162} In contrast, an involuntary limited public figure is drawn into a particular public controversy\textsuperscript{163} through no purposeful action of his own.\textsuperscript{164} In \textit{Gertz}, the Court stated that “instances of truly involuntary involvement public figures must be exceedingly rare.”\textsuperscript{165} The Court’s subsequent decisions have all but eliminated the involuntary limited public figure.\textsuperscript{166}

\textsuperscript{159.} \textit{See id.}
\textsuperscript{160.} \textit{Id.} The court stated: “For purposes of this case, we need not decide whether Bagley is a limited public figure within the meaning of \textit{Gertz}—that is, for purposes of media comment.” \textit{Id.}
\textsuperscript{161.} \textit{Id.}
\textsuperscript{162.} \textit{Gertz}, 418 U.S. at 351.
\textsuperscript{163.} \textit{Id.}
\textsuperscript{164.} \textit{Id.} at 345.
\textsuperscript{165.} \textit{Id.}
\textsuperscript{166.} In \textit{Time, Inc. v. Firestone}, 424 U.S. 448 (1976), the Court held that Mary Alice Firestone, ex-wife of Russell Firestone, was not a public figure because of the lack of voluntary involvement. Although the Firestone’s divorce case was highly publicized, the Court stated that Mrs. Firestone did not “freely choose to publicize issues as to the propriety of her married life.” \textit{Id.} at 454. The Court reasoned that “‘[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.’” \textit{Id.} (quoting \textit{Boddie v. Connecticut}, 401 U.S. 371, 376-77 (1971)).

Similarly, in \textit{Wolston}, the Supreme Court held that the plaintiff’s failure to appear before a grand jury investigating Soviet espionage, and thus voluntarily engaging in criminal conduct, did not make him a public figure. \textit{Wolston}, 443 U.S. at 166-69. The Court reasoned that “[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.” \textit{Id.} at 167. Finally, in \textit{Hutchinson}, the Court found that the receipt
Determining who is a voluntary public figure is extremely difficult. As one court stated, "[d]efining public figures is much like trying to nail a jellyfish to the wall." The Supreme Court's decisions demonstrate, however, that visibility or involvement in public events does not make one a limited public figure. For example, in Gertz, an attorney involved in a highly publicized case was held to be a private figure. Similarly, in Time, Inc. v. Firestone, the wife of a

and benefit of public grants did not make the plaintiff a public figure. The Court reasoned that the plaintiff "did not thrust himself or his views into public controversy to influence others." Hutchinson, 443 U.S. at 135.

The involuntary public figure issue has been subject to little litigation in the lower federal courts. The courts, however, agree that the involuntary public figure category has limited application. See Dameron v. Washington Magazine, Inc., 779 F.2d 736, 743 (D.C. Cir. 1985) ("the circumstances in which an involuntary public figure is created will, we are confident, continue to be few and far between"); Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551, 559 (E.D. Mich. 1979) ("continued vitality of this classification is called into serious question by the opinion in Firestone").

Nevertheless, the lower federal courts have indicated situations where the involuntary public figure classification would be applicable. See, e.g., Dameron, 779 F.2d at 743 (air traffic controller was an involuntary public figure for the limited purpose of discussions of the air crash which took place while he was on duty); Marcone v. Penthouse Int'l Magazine For Men, 754 F.2d 1072, 1084 n.9 (3d Cir. 1985) ("The one group of individuals that might truly be considered involuntary public figures are relatives of famous people."); Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1295 n.18 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980) (celebrity who decides to abandon his prominent position in society to return to anonymity, but persistent press attention thwarts the quest for privacy).

167. Much has been written on the private person/public figure issue. See generally Ashdown, Of Public Figures and Public Interest - The Libel Law Conundrum, 25 WM. & MARY L. REV. 937 (1984); Bamberger, Public Figures and the Law of Libel: A Concept in Search of Definition, 33 BUS. LAW. 709 (1978); Christie, Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches, 75 MICH. L. REV. 43 (1976); Daniels, Public Figures Revisited, 25 WM. & MARY L. REV. 957 (1984); Drechsel, Corporate Libel Plaintiffs and the News Media: An Analysis of the Public-Private Figure Distinction After Gertz, 21 AM. BUS. L.J. 127 (1983); LaRue, Living With Gertz: A Practical Look at Constitutional Libel Standards, 67 VA. L. REV. 287 (1981); Schauer, Public Figures, 25 WM. & MARY L. REV. 905 (1984); Note, Defamation Law: Once a Public Figure Always a Public Figure, 10 HOFSTRA L. REV. 803 (1982); Note, Whether the Limited-Purpose Public Figure? 8 HOFSTRA L. REV. 403 (1980); Note, Wolston v. Reader's Digest Association, Inc.: The Definition of Public Figure is Narrowed, 58 N.C.L. REV. 1042 (1980); Note, Libel Becomes Viable: The Narrow Application of Limited Public Figure Status in Current Defamation Law - Wolston v. Reader's Digest Association, Inc. and Hutchinson v. Proxmire, 7 OHIO N.U.L. REV. 125 (1980); Note, Public Figures, Private Figures and Public Interest, 30 STAN. L. REV. 157 (1977); Case Note, The Supreme Court Places Further Limitations on Designation as a "Public Figure" in Libel Actions - Wolston v. Reader's Digest Association, 1980 B.Y.U. L. REV. 450; Comment, Wolston and Hutchinson: Changing Contours of the Public Figure Test, 13 Loy. L.A.L. REV. 179 (1979); 8 HOFSTRA L. REV. 403 (1980).


169. The plaintiff Gertz was an attorney hired to represent the Nelson family in a civil action against Nuccio, a Chicago policeman who shot and killed the Nelson's son. The defendant in Gertz published a magazine representing the views of the John
wealthy manufacturer was not considered a public figure, even though she chose to publicize her divorce suit. In *Hutchinson v. Proxmire*, where a researcher’s work was ridiculed as a result of Senator Proxmire’s “Golden Fleece” award, the Court concluded that while the issue may have become a public controversy, it could not make a public figure out of a private individual. Likewise, in

Birch Society. See *Gertz*, 418 U.S. at 325. The defendant published an article in its magazine accusing Gertz of participating in a frame up of Nuccio at his murder trial to further a Communist conspiracy against the police. Gertz, who was not involved in the Nuccio murder trial, sued for libel. See id. at 327. The defendant argued that Gertz was a public figure because he had served on a Chicago housing committee and appeared at the coroner’s inquest. See id. at 326, 351. The Court rejected the defendant’s argument. The Court noted that while Gertz had been active in community and professional affairs and had published several books and articles on legal subjects, he had not achieved general fame or notoriety in the community so as to be considered a general public figure. Id. at 351-52. The Court also concluded that Gertz could not be considered a limited public figure. The Court observed that he played a minimal role at the coroner’s inquest and that his participation was related to his representation of a private client. See id. at 352. The Court further observed that Gertz took no part in the criminal prosecution of Nuccio and did not discuss the case with the media. Thus, the Court concluded that Gertz “plainly did not thrust himself into the vortex of this public issue, nor did he engage the public’s attention in an attempt to influence its outcome.” Id.


171. The plaintiff, Mary Alice Firestone, was divorced from her husband Russell Firestone. *Time* magazine reported in its “Milestones” section that Russell Firestone was granted a divorce “on grounds of extreme cruelty and adultery.” Id. at 452. *Time* further reported that the “trial produced enough testimony of extramarital adventures on both sides, said the judge, ‘to make Dr. Freud’s hair curl.’” Id. The plaintiff filed a libel action after *Time* refused to issue a retraction. *Time* asserted that the plaintiff was a public figure because her divorce was a highly publicized “cause célébre” and because she held press conferences during the divorce proceedings. See id. at 454-55 n.3. The Supreme Court, however, concluded that the plaintiff “did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.” Id. at 453. Further, the Court concluded that the press conferences did not convert the plaintiff into a public figure. The Court stated that there was “no indication that she sought to use the press conferences as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution.” Id. at 454-55 n.3.


173. Hutchinson, a research behavioral scientist, was the recipient of Senator Proxmire’s “Golden Fleece” award, an award given to publicize examples of wasteful governmental spending. See id. at 114. Hutchinson brought a libel action against Proxmire. Proxmire asserted that Hutchinson was a limited public figure for purposes of comment on his receipt of federal funds for research projects. Id. at 134. The Supreme Court, however, held that Hutchinson was not a public figure because he “did not thrust himself or his views into public controversy to influence others.” Id. at 135. The Court noted that neither Hutchinson’s applications for federal grants nor his publication invited the degree of public attention and comment on his receipt of federal grants essential to be considered a public figure. Id. In addition, the Court stated that “those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.” Id.
Wolston v. Reader's Digest,\textsuperscript{174} the Court found that media attention alone did not create a public figure out of a private citizen even where the plaintiff had previously been alleged to be a Soviet agent.\textsuperscript{175} Thus, the Court has rejected the proposition that mere involvement in public events is sufficient. Instead, the Supreme Court has concluded that a plaintiff becomes a limited public figure by thrusting himself into a public controversy "in order to influence the resolution of the issues involved."\textsuperscript{176}

Applying the Supreme Court's criteria and considering its narrow application of the limited public figure category, a close analysis exposes the IBP majority's error in concluding that Bagley was a public figure. The IBP majority relied on Bagley's overall involvement in the IBP controversy.\textsuperscript{177} The majority concluded that Bagley played an influential role in the legislative process which invited comment and attention on matters relevant to his participation.\textsuperscript{178} The majority acknowledged that while Bagley was subpoenaed to appear before the subcommittee, he previously volunteered information about IBP to several antitrust lawyers.\textsuperscript{179} Thus, the majority concluded that

\begin{itemize}
  \item \textsuperscript{174} 443 U.S. 157 (1979).
  \item \textsuperscript{175} During 1957 and 1958, a federal grand jury conducted an investigation of Soviet intelligence agents. As a result of the investigation, Wolston's aunt and uncle were arrested on, and later pleaded guilty to, espionage charges. \textit{Id.} at 161. Wolston was later subpoenaed to appear before the grand jury. However, Wolston failed to respond to the subpoena. A federal district judge then issued an order to show cause why Wolston should not be found in contempt. These events were reported in the news media. \textit{Id.} at 162. Wolston appeared in court in response to the court's order and offered to testify before the grand jury. The offer was refused, and Wolston then pleaded guilty to the contempt charge after his pregnant wife became hysterical on the witness stand. \textit{Id.} at 163. Wolston received a one year suspended sentence and three years probation. These events were also widely reported in the media. \textit{Id.} In 1974, \textit{Reader's Digest} published a book about Soviet espionage in which Wolston was falsely named as a Soviet agent. \textit{Id.} at 159. Wolston then sued \textit{Reader's Digest} for libel. The lower courts held that Wolston was a limited public figure because he had voluntarily defied the grand jury, thus thrusting himself into a public controversy. \textit{Id.} at 165. The Supreme Court, however, reversed, reasoning that Wolston did not voluntarily thrust himself into the forefront of a public controversy. \textit{Id.} at 166. Instead, the Court observed: "[i]t would be more accurate to say that petitioner was dragged unwillingly into the controversy." \textit{Id.} The Court also emphasized that it must focus on the nature and extent of Wolston's participation in the controversy. \textit{Id.} at 167. The Court noted that Wolston never discussed the matter with the media and "limited his involvement to that necessary to defend himself against the contempt charge." \textit{Id.} Finally, the Court concluded that the fact that the events attracted media attention was not conclusive of the public figure issue. \textit{Id.} The Court stated that "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." \textit{Id.}
  \item \textsuperscript{176} Gertz, 418 U.S. at 345. \textit{See generally} Note, \textit{The Involuntary Public Figure Class of Gertz v. Robert Welch: Dead or Merely Dormant?}, 14 U. Mich. J.L. Ref. 71 (1980).
  \item \textsuperscript{177} \textit{See} IBP, 755 F.2d at 1316.
  \item \textsuperscript{178} \textit{Id.}
  \item \textsuperscript{179} \textit{See} id.
\end{itemize}
Bagley could not be considered “a recalcitrant and unwilling witness.”

Prior case law is incompatible with this conclusion. Limited public figures “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” Such a person voluntarily injects himself into the public controversy. Thus, when determining limited public figure status, a court should look to the nature and extent of an individual’s participation and involvement in the particular controversy. Bagley does not meet these criteria. First, Bagley did not thrust himself into the IBP controversy. Bagley made a single appearance before a legislative subcommittee under subpoena and provided information to the subcommittee. Bagley did not voluntarily provide testimony or attempt to influence the subcommittee; the subcommittee pursued him in its investigation. Second, Bagley avoided the media and made no public comment. Although Bagley did talk to several antitrust attorneys, he never discussed the litigation with the news media. In addition, he did not engage the public’s attention in an attempt to influence the outcome of the IBP controversy. Considering this limited involvement, the majority erred in finding Bagley to be a limited public figure since he did not voluntarily thrust himself into a public controversy in order to influence the resolution of public issues.

In this respect, the IBP case is similar to Wolston. Wolston had been subpoenaed to testify before a grand jury investigating Soviet espionage. He first disobeyed the subpoena, and later offered to testify, but was nevertheless held in contempt. Many years later, Wolston was identified falsely in a book as a Soviet espionage agent. When he sued for libel, the lower courts held that he was a limited public figure because he had voluntarily defied the grand jury, thus thrusting himself into a public controversy. The Supreme Court disagreed. The Court concluded that Wolston did not voluntarily inject himself into anything, stating that “[i]t would be more accurate to say [he] was dragged unwillingly into the contro-

180. Id.
182. See id. at 351.
183. See id. at 352.
184. See IBP, 755 F.2d at 1316.
185. Id. at 1321 (Fagg, J., dissenting).
186. See id.
187. 443 U.S. at 161-62.
188. Id. at 162-63.
189. Id. at 159.
190. Id. at 165.
versy."191 The Court also noted that Wolston had not spoken to the press and had limited his involvement to that necessary to defend himself against the contempt process.192

Bagley, like the plaintiff in Wolston, was "dragged unwilling into the controversy" by reason of the legislative subpoena. Further, Bagley avoided media and public comment, as did the plaintiff in Wolston. Consequently, as in Wolston, Bagley could more accurately be characterized as a private person rather than a limited public figure.

C. Abuse of the Petitioning Privilege

The second shortcoming of the IBP decision was the Eighth Circuit's failure to recognize that IBP's publication of its letter to individuals not associated with the legislative subcommittee constituted conduct beyond the protection of the petitioning privilege. IBP addressed its letter to Congressman Smith and sent copies of the letter to seventeen other members of the subcommittee.193 The subcommittee did not enter IBP's letter into the record, contrary to IBP's request, nor did it release the letter to the news media.194 However, several weeks later IBP, upon request, furnished certain members of the media copies of the letter.195 Additionally, IBP distributed the letter as part of a bound document containing its president's testimony before another legislative subcommittee, to members of the subcommittee, IBP's directors, officers, plant managers, certain members of various agricultural associations, professors at several universities, approximately fifty members of the news media, and "other interested parties."196 The court concluded that IBP was within the scope of the right to petition when it distributed the letter to these "interested parties."197 The court reasoned that the right to petition entails more than merely communicating directly with the government and that IBP's distribution of the letter "did not exceed the bounds of reasonableness."198

191. Id. at 166.
192. Id. at 167.
193. IBP, 755 F.2d at 1308.
194. Id.
195. Id. The court noted that the media had widely reported IBP's response letter. The court does not state how the media became aware of the IBP letter. See id. 196. Id. at 1308-09. The document was prefaced by a letter addressed to "Supplier, Customer or Other Business Friend of IBP" which provided in part:

Since you have a legitimate interest in the subject matter, we are making this document available to you. It is for your personal use . . . and is not intended for republication or distribution to the general public. . . . [W]e want you to know the truth and not be misled by false accusations.

197. Id. at 1310.
198. Id.
The court's conclusion is erroneous. Publication to the media and "other interested parties" is not essential to the right to petition. The first amendment right to petition was included in the Constitution so "that people 'may communicate their will' through direct petitions to the legislature and government officials." In balancing the first amendment right to petition against the state's legitimate interest in redressing wrongful injury to reputation, the Eighth Circuit adopted a qualified privilege for defamatory statements made in the course of petitioning. To maintain that balance, statements made during the course of petitioning should have some relation to the legislative business to which the statements are addressed. Recognizing this necessity, the District of Columbia Circuit Court of Appeals in Webster v. Sun Co., stated that the petitioning privilege protects only statements made to the legislature or its investigative arm. As such, "publication to individuals not associated with the legislature...are not covered by this privilege."

Furthermore, the petitioning privilege should be interpreted to serve only the purposes justifying the privilege. The right to petition is a narrow form of protected speech involving communications designed to influence governmental decisions. Limiting the scope of the petitioning privilege to only those statements made to individuals associated with the legislature ensures that the privilege promotes those statements that it was designed to protect—statements made to inform the legislature or to influence the legislative process. Protecting publication to the media or other interested par-

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199. McDonald v. Smith, 105 S. Ct. 2787, 2790 (1985) (quoting in part 1 ANNALS OF CONGRESS 738 (1789)).
200. See IBP, 755 F.2d at 1314.
201. 731 F.2d 1 (D.C. Cir. 1984).
202. Id. at 5 n.9.
203. Id. In Webster, a Sun Company employee sent an allegedly libelous intra-office memorandum concerning a fuel saving device, developed by the plaintiffs to an employee of the Congressional Research Service who had expressed interest in the device. Id. at 2-3. The Court of Appeals for the District of Columbia Circuit granted a broad common law immunity from liability for defamatory statements made in non-testimonial communications directed to the government. Adopting common law principles, the Webster court concluded that the statements were privileged if the communicator would not have made the statements but for his intention to inform the legislative body on a subject within its jurisdiction and if the statements have some relation to the legitimate business to which it is addressed. Id. at 5.

The IBP court cited Webster, but concluded the common law principles were inapplicable because these principles did not provide protection for republications. See IBP, 755 F.2d at 1314.
204. Comment, supra note 12, at 693; see also Sherrard, 53 Md. App. at 567, 456 A.2d at 71 (right to petition is to be distinguished from freedom of speech). Cf. Asay v. Hallmark Cards, Inc., 594 F.2d 692, 697 (8th Cir. 1979) (judicial privilege held inapplicable when defendant communicated defamatory matter to news media).
205. See Webster, 731 F.2d at 5. Common law privileges are interpreted narrowly.
ties does not serve to promote statements being made to the legislature. In such cases, the state's interest in providing a remedy for defamatory falsehoods outweighs the first amendment right to petition.

Moreover, if publication to the media and other interested parties were protected by the petitioning privilege, the petitioning privilege would provide protection for defamatory statements made under the guise of petitioning. This, in effect, permits defendants to use the Constitution as a sword instead of a shield. This is especially true in cases involving unsolicited statements. Since unsolicited statements are not restricted to the scope of a particular question, they may cover a wide range of issues. Thus, unsolicited statements enhance the potential abuse of the petitioning privilege.206

Finally, republication of a libelous statement is generally not protected even though the initial publication is privileged.207 The protection afforded statements made by Congressional members before Congress by the Constitution's Speech and Debate Clause is analogous.208 The Supreme Court has consistently held that private publications, including newsletters and press releases, of Senate or House deliberations are not protected by the Speech and Debate Clause.209 Similarly, while the initial publication of IBP's letter was

The privilege is lost if the defendant makes a defamatory statement that is not closely tailored to the privilege's purpose or justification. See, e.g., Bradley v. Hartford Accident & Indem. Co., 30 Cal. App. 3d 818, 826, 106 Cal. Rptr. 718, 723 (1973) (witness immunity applicable only if statements are "made in furtherance of the litigation and to promote the interest of justice") (emphasis in original). See generally Prosser & Keeton, supra note 8, § 115, at 832; Restatement (Second) of Torts § 605 (1977).

206. See Webster, 731 F.2d at 5 n.8.
207. At common law, every publication or republication of a libel is a separate tort. See 1 F. Harper & F. James, The Law of Torts § 5.18, at 402 (1956). In Doe v. McMillan, 412 U.S. 306, 314 n.8 (1973), the Supreme Court observed: "The republication of a libel, in circumstances where the initial publication is privileged, is generally unprotected." Id. at 314 n.8.
208. See U.S. Const. art. I, § 6 cl.1. The Supreme Court has held that committee hearings and committee reports are also protected by the Speech and Debate Clause. See Doe, 412 U.S. at 313; Gravel v. United States, 408 U.S. 606, 622 (1972).
209. See Hutchinson, 444 U.S. at 130; Doe, 412 U.S. at 314-15; Gravel, 408 U.S. at 622-26. In Gravel, the Court first recognized that the Speech and Debate Clause did not protect republication, stating: [P]rivate publication by Senator Gravel . . . was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence. Id. at 625. The Court reaffirmed this principle in Doe, where it stated:
A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech and Debate Clause would not protect such an act even though the libel was read from an official committee report. The reason is that republicating a libel under such circumstances is not an essential part of the legislative process and is not
within the petitioning privilege, the subsequent republication to the media and other interested parties was not.

CONCLUSION

The first amendment to the Constitution guarantees the right of the people to petition the government for the redress of grievances. This right is "among the most precious of the liberties safe-guarded by the Bill of Rights" and is inseparable from the other first amendment rights. In *IBP*, a precedent setting case, the Eighth Circuit held that the right to petition limits a court's ability to award damages in a defamation action based on nontestimonial communications made in the course of petitioning. The court held that the *New York Times* actual malice standard of liability applies to statements made in the course of petitioning. The court's analysis and holding on this issue were correct.

The court, however, did not specify the precise criteria to be employed when classifying plaintiffs as public figures or private figures for purposes of petitioning the government. This classification is crucial in a defamation action because each classification has a different standard of proof. Although the majority purportedly relied on the *Gertz* limited public figure criteria, it misapplied these criteria. The claimants' involvement was involuntary and included no media or public comment. The majority's analysis regarding the limited public figure issue provides little guidance.

In addition, the *IBP* court failed to recognize that *IBP*’s distribution of the defamatory letter to the media and other third persons brought them outside the protection of the petitioning privilege. The right to petition is a narrow form of protected speech involving communications designed to influence governmental decisions. Extending the petitioning privilege to publications to the media and other individuals not associated with the government, allows defendants to use the Constitution as a sword instead of a shield. Nevertheless, *IBP* remains a significant decision. Other courts will

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210. See U.S. CONST. amend. I.
211. United Mine Workers of Am., 389 U.S. at 222.
212. See id.


More recently, the Supreme Court, in *Hutchinson*, held that the Speech and Debate Clause did not provide immunity for defamatory statements from a speech made by Senator Proxmire and reprinted in press releases and newsletters. *See Hutchinson*, 443 U.S. at 123-33.
undoubtedly rely on the IBP decision in adopting a similar qualified privilege for statements made in the course of petitioning.

Scott G. Johnson