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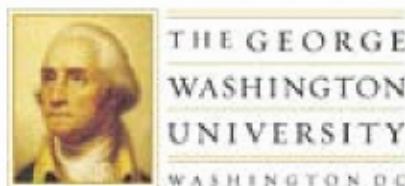
Doe v. McMillan

412 U.S. 306 (1973)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
THE CHIEF JUSTICE

March 7, 1973

Re: No. 71-6356 - Doe v. McMillan

Dear Bill:

I cannot join the proposed opinion in this case
and will await your dissent with interest.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE



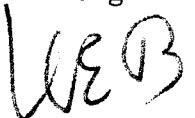
March 7, 1973

Re: No. 71-6356 - Doe v. McMillan

Dear Bill:

I cannot join the proposed opinion in this case
and will await your dissent with interest.

Regards,



Mr. Justice Rehnquist

Copies to the Conference

P.S. In England the public printer has long had the immunity of the Parliament. And with good reason: he prints what he is told to print. To hold him would be equivalent to holding the linotype operator of a newspaper for a libel by the editor. I believe I touched on this in U.S. v. Brewster, 1971 Term.

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

CHAMBERS OF
THE CHIEF JUSTICE

*Personal
File*

March 9, 1973

Re: No. 71-6356 - Doe, et al v. McMillan, et al

Dear Bill:

The "private P.S." I put on my conference memo to you regarding Doe v. McMillan, stemmed in part from some very rough preliminary work I did at home over a weekend.

I am doing some more on my thoughts at the moment but I will surely join yours in any event. I will wait now to see what develops.

Regards,

WCB

Mr. Justice Rehnquist

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE



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To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6356

Circulated: MAY 4 1973

John Doe et al., Petitioners, v. John L. McMillan et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Recirculated: _____

[May —, 1973]

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I cannot accept the proposition that the judiciary has power to carry on a continuing surveillance of what Congress may and may not publish by way of reports on inquiry into subjects plainly within the legislative powers conferred on Congress by the Constitution. The inquiries conducted by Congress here were within its broad legislative authority and the specific powers conferred by cl. 17, § 8, Art. I.

It seems extraordinary to me that we grant to the staff aides of Members of the Senate and the House an immunity that the Court today denies to a very senior functionary, the Public Printer. Historically and functionally the Printer is simply the extended arm of the Congress itself, charged by law with executing congressional commands.

Very recently, in *United States v. Brewster*, 408 U. S. 501, 516 (1972), we explicitly took note of the "conscious choice" made by the authors of the Constitution to give broad privileges and protection to Members of Congress for acts within the scope of their legislative function. As JUSTICES BLACKMUN and REHNQUIST have demonstrated so well, the acts here complained of were not outside the traditional legislative function of Congress. I join fully in the dissenting opinions of MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST, *post*, —.

Supreme Court of the United States
Washington 25, D. C.

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 16, 1972

Memorandum to: Mr. Justice Brennan
Mr. Justice White

I attach hereto a Memorandum which I hastily prepared in No. 71-6356 -
Doe v. McMillan.

I am sending it just to you two to get your ideas and suggestions, and after I have received them I will revise it and circulate among the five who voted to reverse. Apart from you two and myself there were Thurgood and Lewis. At least, I think Thurgood changed his vote because the Chief Justice asked him to write for the Court the other way and he refused and indicated to me he probably would change his views.

I am sending this to you not to sign you up on this Memorandum as an opinion, but merely to get suggestions that will improve it and perhaps make it clear and more palatable to all members of the five.

I will be away for a while, so there is no rush about this. But when I get back, which hopefully will be by the end of next week, if you two are in town perhaps we can have a talk.

W. O. D.

ws
wd

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 22, 1972

Memorandum to: Mr. Justice Brennan
Mr. Justice Marshall
Mr. Justice Powell

I enclose herewith a draft of a Memorandum in
No. 71-6356 - Doe v. McMillan.

Before going to the hospital I wrote out a preliminary
draft and sent off a copy to Mr. Justice White.

Before Byron left for Europe on December 22 he sent
me a Memorandum and talked to me on the phone, making sug-
gestions that came down in substance to this: that the
ultimate opinion have a relatively narrow target.

So I revised the Memorandum in the form in which you
now have it.

Byron has not seen this draft, so whether or not he
agrees I do not know, although I think I met his require-
ment provided, of course, that I had an understanding of
his real position. He was working under great pressure
packing bags and getting off to Europe, so there may have
been some misunderstanding. He suggested that in his
absence I circulate a Memorandum to you three to get your
suggestions, so that by the time he returns on January 6
the views of the majority may well have jelled.

A Merry Christmas and a Happy New Year to each of you.

W. O. D.

and

December 28, 1972

Dear Byron: Re: 71-6356 - Ree v. McMillan

You have the Memorandum which I wrote after your departure, in which I tried to incorporate your ideas in the above case.

I may or may not have succeeded, and I attach a Memorandum just received from Bill Bremner.

I think this is a matter which you and I should discuss and perhaps we can do so at your convenience the week of January 8.

W. C. D.

Mr. Justice White

ω)

January 2, 1973

71-6356

Dear Byron:

We did not get very far in your absence on McMillan. So I assigned it to you.

Perhaps the 5 of us could have a pow-wow next week.

William O. Douglas

Mr. Justice White

WO

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 2, 1973

Dear Chief:

I am assigning 71-6356, Doe v.
McMillan to Byron.

W.O.D.
William O. Douglas

The Chief Justice

cc: Conference

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al., } On Writ of Certiorari to the
Petitioners, } United States Court of Ap-
 v. } peals for the District of
John L. McMillan et al. } Columbia Circuit.

[January —, 1973]

Memorandum from MR. JUSTICE DOUGLAS.

Appellants, proceeding *in forma pauperis* and under petitioners' names to preserve their anonymity, are a class of persons composed of students at Jefferson Junior High School and their parents and guardians suing under 42 U. S. C. § 1983. The appellees are members of the House Committee, members of its staff, the Superintendent of Public Documents and the Government Printing Office, members of the Board of Education and various subordinates in the school system. They sue because damaging statements were made about named students in the Report. As stated by Judge Wright in his dissent below:

"The material included in the Committee report is not, as the majority contends, merely 'somewhat derogatory.' One disciplinary letter, for example, alleges that a specifically named child was 'involved in the loss of fifty cents' and 'invited a male substitute to have sexual relations with her, gapping her legs open for enticement.' Similar letters accused named children of disrespect, profanity, vandalism, assault and theft. Of the 29 test papers published in the report, 21 bore failing grades. Yet appellants seek only to prohibit use of the children's names without their consent. They do not contest the propriety of the investigation generally, nor

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al., Petitioners, v. John L. McMillan et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1973]

Memorandum from MR. JUSTICE DOUGLAS.

Petitioners, proceeding *in forma pauperis* and under assumed names to preserve their anonymity, are a class of persons composed of students at Jefferson Junior High School and their parents and guardians suing under 42 U. S. C. § 1983. The respondents are members of the Committee on the District of Columbia of the House of Representatives, members of its staff, the Superintendent of Public Documents and the Government Printing Office, members of the Board of Education of the District of Columbia and various subordinates in the school system. Petitioners sue because damaging statements were made about named students in a Report¹ of a Special Select Subcommittee on the District of Columbia public school system. As stated by Judge Wright in his dissent below:

"The material included in the Committee report is not, as the majority contends, merely 'somewhat derogatory.' One disciplinary letter, for example, alleges that a specifically named child was 'involved in the loss of fifty cents' and 'invited a male substitute to have sexual relations with her, gapping her legs open for enticement.' Similar letters accused named children of disrespect, profanity, van-

¹ H. R. Rep. No. 91-1681, 91st Cong., 2d Sess. (1970).

WB

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Re
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Jany in agreement
with your memorandum
of December 22nd

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al.,
Petitioners,
v.
John L. McMillan et al. } On Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit.

[January —, 1973]

Memorandum from MR. JUSTICE DOUGLAS.

Petitioners, proceeding *in forma pauperis* and under assumed names to preserve their anonymity, are a class of persons composed of students at Jefferson Junior High School and their parents and guardians suing under 42 U. S. C. § 1983. The respondents are members of the Committee on the District of Columbia of the House of Representatives, members of its staff, the Superintendent of Public Documents and the Government Printing Office, members of the Board of Education of the District of Columbia and various subordinates in the school system. Petitioners sue because damaging statements were made about named students in a Report¹ of a Special Select Subcommittee on the District of Columbia public school system. As stated by Judge Wright in his dissent below:

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¹ H. R. Rep. No. 91-1681, 91st Cong., 2d Sess. (1970).

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 19, 1973

MEMORANDUM TO JUSTICES BRENNAN, WHITE, MARSHALL,
AND POWELL:

In Re 71-6356 Doe v. McMillan

I have not circulated the memo but
am sending it to you four above with the view
that perhaps more discussion among us five
would be helpful.

LL
William O. Douglas

Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell

Enc.
cc: Law Clerks

(3) —
M. joined BWD
He (2/20. of our
agreed with WWD
re his memo on 1/3

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al., Petitioners, } On Writ of Certiorari to the
v. John L. McMillan et al. } United States Court of Appeals for the District of Columbia Circuit.

[February —, 1973]

MR. JUSTICE DOUGLAS, concurring.

I agree with the Court that the issue tendered is justiciable, and that the complaint states a cause of action. Though I join the opinion of the Court, I amplify my own views as they touch on the merits.

I

Respondents, relying primarily on *Gravel v. United States*, 408 U. S. 606, urge that the Report, concededly part and parcel of the legislative process, is immune from the purview of the courts under the Speech or Debate Clause of Art. I, § 6, of the Constitution.¹ In *Gravel* we held that neither Senator Gravel nor his aides could be held accountable or questioned with respect to events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. The immunity in that case attached to the Senator and his aides, and there is no intimation whatsoever that committee reports are sacrosanct from judicial scrutiny. In fact, the Court disclaimed any need to "address issues that may arise when Congress or either

¹ That Clause in relevant part provides:

"... and for any Speech or Debate in either house, [Senators and Representatives] shall not be questioned in any other Place."

—
Wm agreed with Wk
earlier - 1/3

Pls for me
8th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al., Petitioners, v. John L. McMillan et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1973]

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BRENNAN joins, concurring.

I agree with the Court that the issue tendered is justiciable, and that the complaint states a cause of action. Though I join the opinion of the Court, I amplify my own views as they touch on the merits.

I

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 20, 1973

Dear Byron:

Please join me in your opinion in
No. 71-6356 - Doe v. McMillan.

W. O. D.

Mr. Justice White

cc: Mr. Justice Brennan

Mr. Justice Marshall

Mr. Justice Powell

17

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

9th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 71-6356

Circulated: 2-28-73

John Doe et al., Petitioners, *v.* John L. McMillan et al. } On Writ of Certiorari Regulated: _____
United States Court of Appeals for the District of Columbia Circuit.

[February —, 1973]

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring.

I agree with the Court that the issue tendered is justiciable, and that the complaint states a cause of action. Though I join the opinion of the Court, I amplify my own views as they touch on the merits.

I

Respondents, relying primarily on *Gravel v. United States*, 408 U. S. 606, urge that the Report, concededly part and parcel of the legislative process, is immune from the purview of the courts under the Speech or Debate Clause of Art. I, § 6, of the Constitution.¹ In *Gravel* we held that neither Senator Gravel nor his aides could be held accountable or questioned with respect to events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. The immunity in that case attached to the Senator and his aides, and there is no intimation whatsoever that committee reports are sacrosanct from judicial scrutiny. In fact, the Court disclaimed any need to "address issues that may arise when Congress or either

¹ That Clause in relevant part provides:

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 21, 1972

RE: No. 71-6356 Doe v. McMillan

Dear Bill:

The problem as your memorandum of December 16 suggests concerns the juxtaposition of Congress' power to investigate and to publish the results of its investigations, the Speech and Debate Clause, and the Due Process Clause of the Fifth Amendment. Within this context I think that two questions are presented: (1) Whether Due Process requires that an individual be afforded notice and an opportunity to be heard when the Government proposes to stigmatize him publicly for his allegedly unlawful or antisocial conduct; and (2) whether, even if Speech and Debate makes judicially irremediable the unconstitutional denial of a hearing, the same is true when the release of such embarrassing and potentially defamatory information does not further any legitimate governmental interest.

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- 2 -

As you say, although the power of Congress to conduct investigations and to publish its conclusions is broad, it is not exempt from the commands of the Constitution. See, e. g., Barenblatt v. United States, 360 U.S. 109, 126-127 (1959); Watkins v. United States, 354 U.S. 178, 188, 198-199 (1957); Kilbourn v. Thompson, 103 U.S. 168, 199 (1880). The first question, then, is whether Congress, in the course of its investigations, must comply with the basic principle of Due Process to which the States are held, that "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

Of course these children had no hearing, but even assuming that this was a Due Process deprivation but that it was judicially irremediable because Speech and Debate precludes a judicial remedy, it seems clear (answering the second question) that neither the investigatory nor, indeed, the informing function of Congress can be said to establish any "congressional power to expose for

W0

the sake of exposure." Watkins v. United States, supra, 354 U.S., at 200. On the contrary, there is simply "no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress." Id., at 187. The inclusion of the children's names in the challenged report is totally unrelated to the concededly proper legislative goal of investigating the condition of the District of Columbia school system. Indeed, the Government does not contend otherwise. The conclusion is therefore compelled that the inclusion of these names serves no purpose other than the unconstitutional desire to stigmatize these children publicly for their past transgressions.

In that circumstance, I do not think that the Speech and Debate Clause renders the judiciary powerless to afford any relief. I would concede that the clause protects circulation of copies of this report with the names included within the walls of Congress or to those persons on the "official" list. In large part, that question is probably now moot and, in any event, the real concern is with further distribution of the report to the public. (Of course, the trouble is that we are

- 4 -

in the dark as to how extensive a distribution was made.) I would not reach the question whether members of the committee are themselves protected by the Speech and Debate Clause for, under the facts of this case, effective relief may be obtained by enjoining non-Congressional defendants from distributing the report to the public generally. Unlike the situation presented in Gravel v. United States, 408 U.S. 606 (1972), we are confronted here with unconstitutional governmental action. And as I read Gravel, the injection of this additional factor dilutes the protection afforded congressional employees. See id., at 618-621; see also Powell v. McCormick, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); Kilbourn v. Thompson, supra. I expect that the best solution, as you suggest, is to let the determination of which employees may properly be enjoined await a full hearing in the District Court on the facts.

Any time you are ready to talk about this, just let me know. These comments are really only a bare outline.

Sincerely,

Bil

Mr. Justice Douglas

cc: Mr. Justice White

WD

December 21, 1972

RE: No. 71-6356 - Doe v. McMillan

Dear Lewis:

You might be interested in the attached comments on the above case that Bill Douglas asked me to give him.

Sincerely,

WJB

Mr. Justice Powell

WJ

S

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 27, 1972

RE: No. 71-6356 - Doe v. McMillan

Dear Bill:

Reflecting on Doe v. McMillan, after our discussions last week-end and in light of your most recent circulation, I wonder if the way out might be to assign the opinion to either Byron or Lewis. I am just not at all clear exactly what their position is and if either had to write it out we could either learn or they'd have to abandon their approach. In addition, if either was the author that would leave us free to write a concurrence stating more explicitly our reasons for the result we think is correct.

Sincerely,

Bil

Mr. Justice Douglas

WB
WD

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 21, 1973

J.C.

RE: No. 71-6356 Doe v. McMillan

Dear Bill:

As I read your opinion, you suggest two possible bases for decision. First, and as an outgrowth of the debate in Gravel, you take issue with Byron's statement that the question for decision in this case is "whether [public dissemination], simply because authorized by Congress, must always be considered 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings' with respect to legislative or other matters before the House." Rather, you suggest that "[a] legislator's function in informing the public concerning matters before Congress or concerning the administration of Government is essential to maintaining our representative democracy." (P. 4). Nevertheless, you conclude that, since "[t]here are great stakes involved when officials condemn individuals by name, . . . neither the investigatory nor, indeed, the informing function of Congress authorizes any 'congressional power to expose for the sake of exposure.' Watkins v. United States." (P. 7). And although Members of Congress may retain their immunity under the Speech or Debate Clause in such situations, surely the Superintendent of Documents and the Public Printer are not so protected. See Powell v. McCormick; Dombrowski v. Eastland; Kilbourn v. Thompson. In my view, this approach has a sound basis in our prior decisions, and is particularly well suited to the context of this case.

I am troubled, however, by the second suggested ground for decision -- that Constantineau requires that an individual be provided with a hearing before Congress, in the legitimate exercise

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wJ

- 2 -

of its informing function, may publish his name in a derogatory manner. This case is somewhat different from Constantineau, for here we deal with the internal workings of the Congress. Indeed, the adoption of such an approach, I fear, well might impose an overwhelming burden on the informing function. In myriad situations, Congress legitimately uses the names of individuals in the course of informing the public. To require a hearing in each such instance might seriously hamper Congress' legitimate effort to disseminate a stream of valuable information to the public. With this in mind, I think that the prohibition on "exposure simply for the sake of exposure," in and of itself, provides ample check on Congress without unduly hampering its legitimate informing function.

Moreover, the hearing requirement recognized in Constantineau was predicated on the possibility that there might be factual inaccuracies in the derogatory remark. Here, however, petitioners do not in any sense challenge the truthfulness of the examination papers, the absentee lists, or the disciplinary letters. Thus, I do not see why we need reach the Constantineau question at all in this case. I would therefore rest the decision solely upon the Watkins principle.

I've taken the liberty of marking up your draft to indicate the changes (primarily omissions) which would result in an opinion of the kind I think we should circulate.

Sincerely,

B. B. C.

Mr. Justice Douglas

WS
WD

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 22, 1973

RE: No. 71-6356 Doe v. McMillan, et al.

Dear Bill:

Please join me.

Sincerely,

Bill

Mr. Justice Douglas

WQ

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 23, 1973

RE: No. 71-6356 - Doe v. McMillan

Dear Bill:

I agree.

Sincerely,

Bill
W. J. B. Jr.

Mr. Justice Douglas

cc: The Conference

WD

May 25, 1973

RE: No. 71-6356 Doe v. McMillan

Dear Byron:

Having examined your most recent draft in the above, I must confess that I am sorely troubled by the passages marked on pages 5, 7, 8, 9 and 12 of the enclosed copy. Each of these additions to the opinion specifically accepts an interpretation of the Speech or Debate Clause that I'm afraid is directly inconsistent with the approach I staked out for myself in Gravel and Brewster. Since none of these passages seems in any sense essential to the decision, I do hope that they will be deleted.

Sincerely,

WJP

Mr. Justice White

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 14, 1973

Re: 71-6356, Doe v. McMillan

Dear Bill,

I should appreciate your adding the following to your separate opinion in this case:

Mr. Justice Stewart joins the first paragraph and Part I of this opinion.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

WSB, what
this is what
pert to WD
Bob

December 21, 1972

Re: No. 71-6356 - Doe v. McMillan

Dear Bill:

I find this case difficult but I doubt that any constitutional rights of these petitioners were violated in the course of the committee's investigation and hearing processes. It would also seem that the Speech and Debate Clause would immunize the committee and its aides, including the printer and Superintendent of Documents, from liability for printing and distributing the report to fellow committee members and fellow congressmen for legislative purposes.

I had thought, however, that there were limits to the immunity to which otherwise actionable publications were entitled. At this sitting, I discern no Speech and Debate Clause protection for publishing and distributing libelous materials beyond the limits required for legislative ends.

Arguably, if the committee may prepare and publish its report containing names and describing conduct, if

WJ

- 2 -

the press may report it and if it may be lodged in the Library of Congress, should not Congress, the committee of individual congressmen be free to distribute as widely as they wish? There is perhaps no perfect answer to this. But the law of defamation has not protected one who republishes libelous material that has already been made public, and certainly Gravel distinguished between a privileged publication and a later one that was not.

It is thus likely that I could say in this case that publication went beyond strictly legislative boundaries and is unprivileged, which would lead to reversing the District Court's dismissal based on privilege alone.

Whether further publication, though unprivileged, should be enjoined is another question and I am not sure we need reach it. In Constantineau we found a federal right to a hearing to assure that substantive state law standards were satisfied before a harmful official act could take place. But in this case, what right of these petitioners would be protected in requiring notice and hearing before making the report public? The constitutional right not to be injured or exposed? A statutory or common law right of privacy that requires justification for its invasion? And for another thing, does it make any difference that the matter is true or false? If true or not recklessly inaccurate,

WB

- 3 -

a newspaper could republish these materials with impunity. Could a committee chairman or employee claim the same protection under the First Amendment?

In any event, I would afford relief of some kind in this case. Unfortunately, I shall be gone for ten days, but I am sure you won't let that deter progress in this matter.

Sincerely,

BRW

Mr. Justice Douglas

WF

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 22, 1972

Re: No. 71-6356 - Doe v. McMillan

Dear Bill:

I doubt that I can go with your third draft. I would simply declare there are limits to immunity, the limits were excluded here and reverse the judgment. This would leave to the District Court, once immunity is out of the way, to determine whether there is a cause of action asserted. But I am only one vote. Why don't you just circulate to bring the matter to a head?

Sincerely,



Mr. Justice Douglas

WS

WD

Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE BYRON R. WHITE

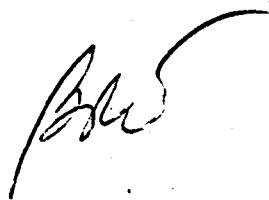
January 29, 1973

Memorandum to: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Marshall ✓
Mr. Justice Powell

Re: No. 71-6356 - Doe v. McMillan

I am distributing this draft to just you four. It won't do much for these particular plaintiffs but it may make committees more careful about what they authorize to be printed and distributed to the public. On the other hand, they may want to immunize the Printer by statute.

The line drawn is not wholly satisfactory. There will be problems about the Congressional Record (a matter left open in Gravel), official judicial reports and the like. Very likely there would have to be special rules for such publications. I do not deal with whether the complaint stated a cause of action nor with the place of the First Amendment in situations like these.



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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 20, 1973

Re: No. 71-6356 - Doe v. McMillan

Dear Bill:

Because I have gotten absolutely nowhere with what I have circulated in this case, and because there should be some progress, I suggest you reassign the matter to someone else on our side who might bring us together.

Sincerely,



Mr. Justice Douglas

Copies to: Mr. Justice Brennan
Mr. Justice Marshall
Mr. Justice Powell

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

From: White, J.

1st DRAFT

Circulated: 2-27-73

SUPREME COURT OF THE UNITED STATES

Recirculated: _____

No. 71-6356

John Doe et al., Petitioners,
v.
John L. McMillan et al. } On Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit.

[February —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the scope of congressional immunity under the Speech and Debate Clause of the United States Constitution, Art. I, § 6, cl. 1, as well as the reach of official immunity, see *Barr v. Matteo*, 360 U. S. 564 (1959), particularly in the legislative context, see *Tenney v. Brandhove*, 341 U. S. 367 (1951).

By resolution adopted February 5, 1969, H. R. Rep. No. 76, 91st Cong., 1st Sess., 115 Cong Rec. 2784, the House of Representatives authorized the Committee on the District of Columbia or its subcommittee "to conduct a full and complete investigation and study of . . . the organization, management, operation, and administration" of any department or agency of the government of the District of Columbia or of any independent agency or instrumentality of government operating solely in the District of Columbia. The committee was given subpoena power and was directed to "report to the House as soon as practicable . . . the results of its investigation and study together with such recommendations as it deems advisable." On December 8, 1970, a Special Select Subcommittee of the Committee on the District of Columbia submitted to the Speaker of the House a

5
1/2. '7
You joined WPS' case

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

From: White, J.

Circulated: _____

Recirculated: 2-28-73

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al.,
Petitioners,
v.
John L. McMillan et al. } On Writ of Certiorari to the
United States Court of Appeals for the District of
Columbia Circuit.

[February —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the scope of congressional immunity under the Speech and Debate Clause of the United States Constitution, Art. I, § 6, cl. 1, as well as the reach of official immunity, see *Barr v. Matteo*, 360 U. S. 564 (1959), particularly in the legislative context, see *Tenney v. Brandhove*, 341 U. S. 367 (1951).

By resolution adopted February 5, 1969, H. R. Rep. No. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784, the House of Representatives authorized the Committee on the District of Columbia or its subcommittee "to conduct a full and complete investigation and study of . . . the organization, management, operation, and administration" of any department or agency of the government of the District of Columbia or of any independent agency or instrumentality of government operating solely in the District of Columbia. The committee was given subpoena power and was directed to "report to the House as soon as practicable . . . the results of its investigation and study together with such recommendations as it deems advisable." On December 8, 1970, a Special Select Subcommittee of the Committee on the District of Columbia submitted to the Speaker of the House a

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 13, 1973

Re: No. 71-6356 - Doe v. McMillan

Dear Lewis:

I shall be happy to make the changes you suggest in the circulating draft opinion in this case.

I see no acceptable way at this time to distinguish between conduct the Speech or Debate Clause protects from private suit and that which it protects from criminal prosecution or other action. In either event, if the conduct is legislative it seems to me that it is immune. Legislators are protected from suit or liability for libeling a person on the floor or in committee, for having the libel printed for legislative use and also for voting to have it publicly distributed. But the cases, see for example Kilbourn, distinguish between the legislative ordering and the doing of the ordered or authorized act that is otherwise vulnerable under the law. The Clause does not protect legislators who themselves participate in ordinary criminal acts. Nor should it, in my view, protect those who publicly distribute libels beyond the environs of the legislative process.

It seems to me that there is constitutional basis for immunity for the Congressional Record and a constitutional and case-law basis for immunizing congressmen and their staffs when they make public records at committee hearings and when they later write and circulate committee reports as in this case. Also, at each of these steps, the press under prevailing law, has a qualified privilege to report. I thus see no lack of opportunity for the interested public to inform itself.

Then why worry about "further" public distribution? Hasn't the good or evil been accomplished and why is not

further publication as immune as the first disclosure in committee or on the floor? If it is, of course, we should be on the other side in this case. But libel and privacy law has been more discriminating than that and has been able to distinguish the privileged from the later unprivileged publication -- all with an eye to preventing gratuitous injury with no countervailing return. That a first publication is privileged or has been sued on and paid for does not excuse a later one, whether by the same or a different publisher.

It may be, as you intimate and as I indicated in an earlier memo, that we are actually accomplishing little in this decision. But I suppose it is not wholly an advisory opinion.

I do appreciate your thoughts.

Sincerely,



Mr. Justice Powell

pp 7, good 2/21
joined conc.

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

From: White, J.

Circulated: _____

Recirculated: 3-14-73

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al., Petitioners, v. John L. McMillan et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the scope of congressional immunity under the Speech and Debate Clause of the United States Constitution, Art. I, § 6, cl. 1, as well as the reach of official immunity, see *Barr v. Matteo*, 360 U. S. 564 (1959), particularly in the legislative context, see *Tenney v. Brandhove*, 341 U. S. 367 (1951).

By resolution adopted February 5, 1969, H. R. Rep. No. 76, 91st Cong., 1st Sess., 115 Cong Rec. 2784, the House of Representatives authorized the Committee on the District of Columbia or its subcommittee "to conduct a full and complete investigation and study of . . . the organization, management, operation, and administration" of any department or agency of the government of the District of Columbia or of any independent agency or instrumentality of government operating solely in the District of Columbia. The committee was given subpoena power and was directed to "report to the House as soon as practicable . . . the results of its investigation and study together with such recommendations as it deems advisable." On December 8, 1970, a Special Select Subcommittee of the Committee on the District of Columbia submitted to the Speaker of the House a

STYLISTIC CHANGES THROUGHOUT.

SEE PAGES: 90-96

You favored non
concur 7/27

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

4th DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

No. 71-6356

Recirculated: 4-12-73

John Doe et al.,
Petitioners, } On Writ of Certiorari to the
v. } United States Court of Ap-
John L. McMillan et al. } peals for the District of
Columbia Circuit.

[February —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the scope of congressional immunity under the Speech or Debate Clause of the United States Constitution, Art. I, § 6, cl. 1, as well as the reach of official immunity in the legislative context. See *Barr v. Matteo*, 360 U. S. 564 (1959); *Tenney v. Brandhove*, 341 U. S. 367 (1951).

By resolution adopted February 5, 1969, H. Res. No. 76, 91st Cong., 1st Sess., 115 Cong Rec. 2784, the House of Representatives authorized the Committee on the District of Columbia or its subcommittee "to conduct a full and complete investigation and study of . . . the organization, management, operation and administration" of any department or agency of the government of the District of Columbia or of any independent agency or instrumentality of government operating solely within the District of Columbia. The committee was given subpoena power and was directed to "report to the House as soon as practicable . . . the results of its investigation and study together with such recommendations as it deems advisable." On December 8, 1970, a Special Select Subcommittee of the Committee on the District of Columbia submitted to the Speaker of the House a

77
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 24, 1973

MEMORANDUM FOR: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Marshall
Mr. Justice Powell

Re: No. 71-6356 - Doe v. McMillan

I have made some changes in the proposed
opinion in this case which I hope don't scare off
the fellow passengers.

Byron
B R. W.

5, 7-15

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al., } On Writ of Certiorari to the
Petitioners, } United States Court of Ap-
 v. } peals for the District of
John L. McMillan et al. } Columbia Circuit.

[May 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the scope of congressional immunity under the Speech or Debate Clause of the United States Constitution, Art. I, § 6, cl. 1, as well as the reach of official immunity in the legislative context. See *Barr v. Matteo*, 360 U. S. 564 (1959); *Tenney v. Brandhove*, 341 U. S. 367 (1951).

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9 pp 5, 7-15

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

5th DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

No. 71-6356

Recirculated: 5-24-73

John Doe et al., Petitioners, v. John L. McMillan et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the scope of congressional immunity under the Speech or Debate Clause of the United States Constitution, Art. I, § 6, cl. 1, as well as the reach of official immunity in the legislative context. See *Barr v. Matteo*, 360 U. S. 564 (1959); *Tenney v. Brandhove*, 341 U. S. 367 (1951).

By resolution adopted February 5, 1969, H. Res. No. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784, the House of Representatives authorized the Committee on the District of Columbia or its subcommittee "to conduct a full and complete investigation and study of . . . the organization, management, operation and administration" of any department or agency of the government of the District of Columbia or of any independent agency or instrumentality of government operating solely within the District of Columbia. The committee was given subpoena power and was directed to "report to the House as soon as practicable . . . the results of its investigation and study together with such recommendations as it deems advisable." On December 8, 1970, a Special Select Subcommittee of the Committee on the District of Columbia submitted to the Speaker of the House a

5,7,8,10

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

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press. —————— White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: 5/25

No. 71-6356

John Doe et al., Petitioners, v. John L. McMillan et al. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the scope of congressional immunity under the Speech or Debate Clause of the United States Constitution, Art. I, § 6, cl. 1, as well as the reach of official immunity in the legislative context. See *Barr v. Matteo*, 360 U. S. 564 (1959); *Tenney v. Brandhove*, 341 U. S. 367 (1951).

By resolution adopted February 5, 1969, H. Res. No. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784, the House of Representatives authorized the Committee on the District of Columbia or its subcommittee "to conduct a full and complete investigation and study of . . . the organization, management, operation and administration" of any department or agency of the government of the District of Columbia or of any independent agency or instrumentality of government operating solely within the District of Columbia. The committee was given subpoena power and was directed to "report to the House as soon as practicable . . . the results of its investigation and study together with such recommendations as it deems advisable." On December 8, 1970, a Special Select Subcommittee of the Committee on the District of Columbia submitted to the Speaker of the House a

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 3, 1973

Re: No. 71-6356 - Doe v. McMillan

Dear Bill:

I am in agreement with your
memorandum of December 22nd.

Sincerely,

T.M.
T.M.

Mr. Justice Douglas

cc: Conference

1/3 only

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

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

February 27, 1973

Lv
M
B

Re: No. 71-6356 - Doe v. McMillan

Dear Bill:

Please join me.

Sincerely,


T.M.

Mr. Justice Douglas

cc: Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 19, 1973

Re: No. 71-6356 - Doe v. McMillan

Dear Bill:

Please join me in your circulation of March 15.

Sincerely,

H.A.B.

Mr. Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Blackmun, J.

Circulated: 3/30/73

No. 71-6356

Recirculated: _____

John Doe et al.,
Petitioners,
v.
John L. McMillan et al. } On Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit.

[April —, 1973]

MR. JUSTICE BLACKMUN, concurring in part and dissenting in part.

I join MR. JUSTICE REHNQUIST's opinion, *post*, —, but add some comments of my own.

Each step in the legislative report process, from the gathering of information in the course of an officially authorized investigation to and including the official printing and official distribution of that information in the formal report, is legitimate legislative activity and is designed to fulfill a particular objective. More often than not, when a congressional committee prepares a report, it does so not only with the object of advising fellow Members of Congress as to the subject matter, but with the further objects (1) of advising the public of proposed legislative action, (2) of informing the public of the presence of problems and issues, (3) of receiving from the public, in return, constructive comments and suggestions, and (4) of enabling the public to evaluate the performance of their elected representatives in the Congress. The Court has recognized and specifically emphasized the importance, and the significant posture, of the committee report as an integral part of the legislative process when, repeatedly and clearly, it has afforded speech or debate coverage for a Member's writing, signing, or voting in favor of a committee report just as it has for a Member's speaking in formal debate on the

1,5,6,7

2nd DRAFT

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Marshall~~
Mr. Justice Powell
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

By: Blackmun, J.

No. 71-6356

Circulated:

Recirculated: 5/5/73

John Doe et al.,
Petitioners,
v.
John L. McMillan et al. } On Writ of Certiorari to the
United States Court of Appeals for the District of
Columbia Circuit.

[April —, 1973]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I join MR. JUSTICE REHNQUIST's opinion, *post*, —, but add some comments of my own.

Each step in the legislative report process, from the gathering of information in the course of an officially authorized investigation to and including the official printing and official distribution of that information in the formal report, is legitimate legislative activity and is designed to fulfill a particular objective. More often than not, when a congressional committee prepares a report, it does so not only with the object of advising fellow Members of Congress as to the subject matter, but with the further objects (1) of advising the public of proposed legislative action, (2) of informing the public of the presence of problems and issues, (3) of receiving from the public, in return, constructive comments and suggestions, and (4) of enabling the public to evaluate the performance of their elected representatives in the Congress. The Court has recognized and specifically emphasized the importance, and the significant posture, of the committee report as an integral part of the legislative process when, repeatedly and clearly, it has afforded speech or debate coverage for a Member's writing, signing, or voting in favor of a committee report just as it has for a Member's speaking in formal debate on the

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

From: Blackmun, J.

Circulated:

No. 71-6356

Recirculated: 5/25/73

SUPREME COURT OF THE UNITED STATES

John Doe et al., Petitioners, v. John L. McMillan et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I join MR. JUSTICE REHNQUIST's opinion, *post*, —, but add some comments of my own.

Each step in the legislative report process, from the gathering of information in the course of an officially authorized investigation to and including the official printing and official distribution of that information in the formal report, is legitimate legislative activity and is designed to fulfill a particular objective. More often than not, when a congressional committee prepares a report, it does so not only with the object of advising fellow Members of Congress as to the subject matter, but with the further objects (1) of advising the public of proposed legislative action, (2) of informing the public of the presence of problems and issues, (3) of receiving from the public, in return, constructive comments and suggestions, and (4) of enabling the public to evaluate the performance of their elected representatives in the Congress. The Court has recognized and specifically emphasized the importance, and the significant posture, of the committee report as an integral part of the legislative process when, repeatedly and clearly, it has afforded speech or debate coverage for a Member's writing, signing, or voting in favor of a committee report just as it has for a Member's speaking in formal debate on the

(file copy)

NaD

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

SUPREME COURT OF THE UNITED STATES

Blackmun, J.

No. 71-6356

Circulated: 5/28/7

Recirculated:

John Doe et al., Petitioners, v. John L. McMillan et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I join MR. JUSTICE REHNQUIST's opinion, *post*, —, but add some comments of my own.

Each step in the legislative report process, from the gathering of information in the course of an officially authorized investigation to and including the official printing and official distribution of that information in the formal report, is legitimate legislative activity and is designed to fulfill a particular objective. More often than not, when a congressional committee prepares a report, it does so not only with the object of advising fellow Members of Congress as to the subject matter, but with the further objects (1) of advising the public of proposed legislative action, (2) of informing the public of the presence of problems and issues, (3) of receiving from the public, in return, constructive comments and suggestions, and (4) of enabling the public to evaluate the performance of their elected representatives in the Congress. The Court has recognized and specifically emphasized the importance, and the significant posture, of the committee report as an integral part of the legislative process when, repeatedly and clearly, it has afforded speech or debate coverage for a Member's writing, signing, or voting in favor of a committee report just as it has for a Member's speaking in formal debate on the

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 20, 1973

Re: No. 71-6356 - Doe v. McMillan

Dear Bill:

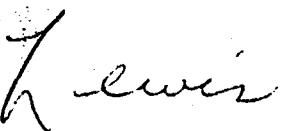
This refers to Byron's letter of February 20.

My failure to respond to Byron's circulation does not mean that I think it should be abandoned.

The truth is, I have been giving priority to other things and have not done the work on this case that I had expected to do. The case is a most puzzling one for me. I was - and still am - dismayed by the result in the Court of Appeals which offers no prospect of relief to persons in the position of these complainants. Yet, I must say that up until now I am not clear in my own mind as to a principled basis for granting relief consistent with our prior decisions.

I may end up agreeing that Byron has the best answer. Certainly I have no better answer. I see no great harm in allowing this case to stay on the "back burner" for a while longer. It is even possible, I suppose, that the Congress itself might grant some of the requested relief.

Sincerely,



Mr. Justice Douglas

LFP, Jr.:psf

cc: Mr. Justice Marshall
Mr. Justice Brennan
Mr. Justice White

March 10, 1973

Re: No. 71-6356 Doe v. McMillan

Dear Byron:

I have recently had an opportunity to get back into the perplexities of Doe v. McMillan, and have reread the circulations. Although I still find the area a real jungle, and continue to have doubts about any formulation of governing principles that I have yet seen or can myself devise, I am now prepared to join your opinion for the Court.

I do have a feeling that your draft may shut the door a bit too tightly on the distribution of material for the purpose of "informing the public concerning matters pending before Congress." On page 7, you say:

"The proper scope of our inquiry, therefore, is whether public distributions of alleged actionable material are legislative acts protected by the Speech or Debate Clause when the distributions are authorized by the Congress."

I assume that some duly authorized public distributions may well be protected in circumstances where there are rational reasons for the public to be informed specifically and directly by the Congress. The text of your opinion recognizes this. I wonder, therefore, whether you might think it appropriate to express the "scope of our inquiry" in somewhat more limited terms, for example:

"The proper scope of our inquiry, therefore, is whether the Speech or Debate Clause affords absolute immunity from private suit to persons who, with authorization from Congress, distribute materials which allegedly infringe upon the rights of individuals."

This places the focus of inquiry on the immunity from private suit rather than whether the distribution is a legislative act.

I attach a copy of page 9 of your second draft opinion on which I have noted a couple of suggested, minor changes. You may also wish to consider the possibility of adding a note on that page (keyed to the sentence in the middle of the paragraph ending with the words "applicable laws", reading substantially as follows:

"We have no occasion in this case to decide whether or under what circumstances, the Speech or Debate Clause would afford immunity to distributors of allegedly actionable materials from grand jury questioning, criminal charges, or a suit by the executive to restrain distribution, where Congress has authorized the particular public distribution."

Although I do not know the answer (which could turn on the facts of a particular case), there may be a significant difference between the right of private citizens to sue as compared with the right of the Executive Branch to attack some distribution which it disapproved. As you point out, the historic purpose of the Speech or Debate Clause is to 'prevent intimidation of legislators by the Executive and accountability before a possible hostile Judiciary.' A private suit for damages or even to restrain further publication of an unnecessary private libel does not threaten the independence of the Legislative Branch.

I have been concerned also as to where your opinion leaves the Public Printer and Superintendent of Documents in terms of personal liability for doing what they are ordered to do. As a practical matter, they will rarely - if ever - be in a position to exercise an independent judgment as to whether some libelous or otherwise actionable material is tucked away in some document which they are directed to print and distribute by the Congress or one of its Committees. It seems unfair to put the Public Printer and the Superintendent of Documents in a more vulnerable position than that of their "bosses". You do suggest - by implication - that the Congress might confer statutory immunity on these parties, but this procedure might enable Congress - if it has the constitutional authority to do so - to make all of its acts and distributions unreviewable by the simple device of immunizing all persons who carry them out. I frankly do not know the answers to this dilemma, and

perhaps all we can do is write narrowly and await future cases. The important point in this case is to record the Court's conviction that there is a point beyond which the reputations of private citizens cannot be smeared with impunity by wide public distribution merely because some congressional committee decides it wishes to "inform the public".

I hope these suggestions may have some merit.

Sincerely,

Mr. Justice White

lfp/ss

bc: Mr. William C. Kelly, Jr.

B

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 14, 1973

Re: No. 71-6356 Doe v. McMillan

Dear Byron:

Please join me.

Sincerely,

Lewis

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

5/29
May 25, 1973

No. 71-6356 Doe v. McMillan

Dear Byron:

I have reviewed the changes in your fifth draft, circulated May 24 and am still with you.

Sincerely,

Lewis

Mr. Justice White

cc: The Conference

lfp/gg

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

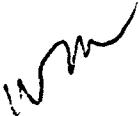
February 27, 1973

Re: No. 71-6356 - Doe v. McMillan

Dear Byron:

I anticipate circulating a dissent from so much of your opinion for the Court in the above case as reverses the judgment of the Court of Appeals.

Sincerely,



Mr. Justice White

Copies to the Conference

AM
Your friend
John R.
To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6356

From: Rehnquist, J.

Circulated: 3/8/73

Recirculated: _____

John Doe et al., } On Writ of Certiorari to the
Petitioners, } United States Court of Ap-
 v. } peals for the District of
John L. McMillan et al. } Columbia Circuit.

[March —, 1973]

MR. JUSTICE REHNQUIST, concurring in part and dissenting in part.

I concur in the Court's holding that the respondent Members of Congress and their committee aides and employees are immune under the Speech or Debate Clause for preparation of the Committee Report for distribution within the halls of Congress. I dissent from the Court's holding that Members of Congress might be held liable if they were in fact responsible for public dissemination of a committee report, and that therefore the Public Printer or the Superintendent of Documents might likewise be liable for such distribution. And quite apart from the immunity which I believe the Speech or Debate Clause confers upon congressionally authorized public distribution of its committee reports, I believe that the principle of separation of powers absolutely prohibits any form of injunctive relief in the circumstances here presented.

I

In *Gravel v. United States*, 408 U. S. 606 (1972), we decided that the Speech or Debate Clause of the Constitution did not protect private republication of a committee report, but left open the question of whether publication and public distribution of such reports authorized by Congress would be included within the privilege. 408 U. S., at 626 n. 16. While there are intimations

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To: The Chief Justice
Mr. Justice Douglas
✓Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Rehnquist J

Circulated _____

No. 71-6356

Recirculated, 3/15/73

John Doe et al., Petitioners, v. John L. McMillan et al. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1973]

MR. JUSTICE REHNQUIST, concurring in part and dissenting in part.

I concur in the Court's holding that the respondent Members of Congress and their committee aides and employees are immune under the Speech or Debate Clause for preparation of the Committee Report for distribution within the halls of Congress. I dissent from the Court's holding that Members of Congress might be held liable if they were in fact responsible for public dissemination of a committee report, and that therefore the Public Printer or the Superintendent of Documents might likewise be liable for such distribution. And quite apart from the immunity which I believe the Speech or Debate Clause confers upon congressionally authorized public distribution of committee reports, I believe that the principle of separation of powers absolutely prohibits any form of injunctive relief in the circumstances here presented.

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Rehnquist, J.

Circulated:

No. 71-6356

Recirculated: 3/20/77

John Doe et al., } On Writ of Certiorari to the
Petitioners, } United States Court of Ap-
v. } peals for the District of
John L. McMillan et al. } Columbia Circuit.

[March —, 1973]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE BLACKMUN joins, and with whom MR. JUSTICE STEWART joins in the first paragraph and Part I, concurring in part and dissenting in part.

I concur in the Court's holding that the respondent Members of Congress and their committee aides and employees are immune under the Speech or Debate Clause for preparation of the Committee Report for distribution within the halls of Congress. I dissent from the Court's holding that Members of Congress might be held liable if they were in fact responsible for public dissemination of a committee report, and that therefore the Public Printer or the Superintendent of Documents might likewise be liable for such distribution. And quite apart from the immunity which I believe the Speech or Debate Clause confers upon congressionally authorized public distribution of committee reports, I believe that the principle of separation of powers absolutely prohibits any form of injunctive relief in the circumstances here presented.

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