The Burger Court Opinion Writing Database

McAdams v. McSurely

438 U.S. 189 (1978)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

April 7, 1978

Re: 76-1621 - McAdams, etc. v. McSurely

Dear Lewis:

I am in general agreement with your memo of April 6. I am not prepared to open the door to harassment of Members of the House and Senate. Interviews with some of the best of those who retired from Congress in the past few years reflect their unwillingness to put up with not only "slings and arrows" from the media but from brigades of "causists", many of them bent on tearing the entire system apart.

Members of Congress and Judges should have at least the comprehensive immunity we have given the press -- and a lot more. People can "fire" Congress Members -- they can't "fire" newspapers!

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

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

ADMINISTRATIVE ASSISTANT TO
THE CHIEF JUSTICE

June 6, 1978

Re: 76-1621 - McAdams v. McSurely

MEMORANDUM TO THE CONFERENCE

In light of Lewis' memo of June 5, I propose we discuss this case "one last time" at Thursday's Conference. My records parallel Lewis' as to the respective stances of each of you who have responded. Depending upon Potter's, Thurgood's and Harry's views, a reassignment, or assignment, as the case may be, might be necessary.

Regards,

WEB

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

From: The Chief Justice

Circulated: JUN 23 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1621

Herbert H. McAdams, III, as Executor of the Estate of John L. McClellan, et al., Petitioners, *v.* Alan McSurely et ux.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1978]

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 6, 1978

RE: No. 76-1621 McAdams v. McSurely

Dear Byron:

After reading the most interesting exchange between Lewis and yourself in the above, as one who has been "uncharacteristically silent up to now", I think your approach has the better of the argument and I'd be inclined to join an opinion along those lines.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 20, 1978

RE: No. 76-1621 McAdams v. McSurely

Dear Byron:

Please join me.

Sincerely,

Bill

Mr.Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 23, 1978

RE: No. 76-1621 McAdams v. McSurely, et al.

Dear Chief:

I agree.

Sincerely,

Bill

The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 7, 1978

Memorandum to the Conference

Re: 76-1621, McAdams v. McSurely

My views in this case parallel those expressed by Bill Rehnquist in his letter of April 11 to Lewis Powell.

P.S.

P. S.

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 16, 1978

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

Dear Bill,

Please add my name to your concurring opinion.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 23, 1978

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

Dear Chief,

I agree with the Per Curiam you circulated today.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 4, 1978

Re: 76-1621 - McAdams v. McSurely

Dear Lewis,

This is an initial effort to respond to your Memorandum in this case and in so doing to arrive at my own conclusions. At the outset, it is important to recall that the questions presented in the petition for certiorari filed by the United States did not include an attack on the judgment of the Court of Appeals that because the record sufficiently supported a claim of a Fourth Amendment violation by Brick, his motion for summary judgment was properly overruled insofar as it rested on a denial of any constitutional violation. Assuming the constitutional infraction by Brick, however, the United States nevertheless insists that he and all of those alleged to be in concert with him are absolutely immune from liability under the Speech or Debate Clause for any damages caused by the constitutional wrong.

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The Court of Appeals agreed with the Government that investigative activity in the field, as well as the more formal processes of hearings and subpoenas, may properly be deemed legislative and within the protection of the Speech or Debate Clause. But the court went on to hold that the employment of unlawful means to implement otherwise proper legislative objects is not essential to legislating and that if Brick violated the Fourth Amendment, neither he nor anyone who conspired with him in such illegal conduct was immune.

I am not completely sure how much practical difference it makes, but I prefer the view that the Speech or Debate Clause does not cover field investigations at all. Although I see no reason why Brick would not enjoy the protection of official immunity while engaged in his investigative duties--and that defense still remains open to him in this case--I resist extending the Speech or Debate Clause beyond the formal investigative mechanisms. Perhaps it is tenable to construe the Clause as reaching investigative activities in the field but to stop short of protecting illegal conduct; however, this is not the line this Court has drawn in other cases, and it does not appear to be the line the Court of Appeals adhered to in this case when it reversed the judgment of the District Court and entered summary judgment with respect to the internal use made by the Committee of the documents delivered by Brick.

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It may be difficult to imagine many kinds of unlawful conduct that might be deemed a protected part of the legislative process, but it is clear that a Senator guilty of such otherwise illegal activity would be immune. Under Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), the Clause protects formal means of investigation such as hearings and the use of subpoenas to require the attendance of witnesses and the production of evidence. Senators and their staffs are immune from liability for damage that may be inflicted by such procedures. If a witness refuses to appear or answer or to produce the specified documents and then successfully defends a contempt proceeding on the grounds that the subpoena or the questions propounded exceeded the power of Congress under the controlling statute or resolution, or under the Constitution, his subsequent damage suit should be immediately dismissed once it is determined that the complaint charged seeks to impose liability for a legislative act. It is also pertinent to recall that Senator Gravel was not subject to prosecution for having put into the public record a classified document, the publication of which the law forbade.

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I do not think that informal investigations have such inherent connections with the legislative process and would prefer not extending legislative immunity to congressional investigators. I see no reason for their having any more immunity, or any less, than that enjoyed by other federal investigators. If a Senator or his aide is sued for breaking into a house and seizing evidence for use in an otherwise proper investigation authorized by the appropriate committee, he is entitled to an early ruling on his Speech or Debate Clause claim, if such a claim is presented, as it was here. But if it is then decided that he is not immune---as on such facts I think it should be, because the Clause does not protect investigative conduct--the policy of the Clause has been fully vindicated and has no further role to play in the case.

Under the view of the Court of Appeals, however, the determination of the Speech or Debate Clause immunity issue depends on whether there was a Fourth Amendment violation. The issues at least overlap, if they are not wholly congruent. (The same would be true in this case of the defense of official immunity if the conference vote in Butz v. Economou stands up.) I take it that neither you nor the court of appeals would grant judgment on the motion of any defendant as to whom the record

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demonstrates a genuine issue of fact with respect to the constitutional violation. But you would insist, and so would I, that if the defendant's summary judgment affidavits contain adequate denials of the alleged conduct (and I don't think it inconsistent with immunity policies to require the defendant to at least deny the conduct that would remove his immunity and subject him to liability), the plaintiffs must respond with first-hand proof in affidavit form that lends more than colorable substance to the claim of constitutional wrong. This amounts to nothing more than a careful application of F. R. Civ. P. 56. The Court of Appeals thought this standard had been satisfied with respect to Brick; but because the proceedings had concentrated on "whether or not the Speech or Debate Clause erects a complete barrier to this action," the court was unable to rule that the other federal defendants were entitled to summary judgment. The court left it to them to "make a renewed motion for summary judgment on the ground that the McSurelys have failed to adduce substantial facts 'which afford more than colorable substance'---to the assertion of concert with Brick in conduct that survives the legislative immunity bar." 553 F.2d, at 1299.

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The argument becomes very fact-bound at this point; but to get the matter on the table, I would for two reasons be content with the Court of Appeals' conclusion that at this juncture none of the federal defendants were entitled to summary judgment. Because you would affirm as to Brick, my remarks will be directed to the other three federal defendants.

First, it is doubtful that plaintiffs were ever on notice that they had to present evidence that the Senator, Alderman, and O'Donnell were accessories to Brick's actions or risk dismissal of the action. This is because the Government's argument and affidavits were to the effect that the undisputed facts demonstrated that all of the defendants were acting within the scope of their legislative functions which, in the Government's view, encompassed even the inspection and transportation of documents in violation of the Fourth Amendment. There is nothing in the documents filed by the Government in support of its motion which should have put plaintiffs on notice that they had to meet the additional point that even assuming that Brick was not engaged in legislative acts, the Senator and the other defendants nevertheless were not in any way responsible for their commission. This was the primary reason given by the Court of Appeals for this aspect of its judgment.

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Secondly, even assuming that the Government's motion did put in issue the factual basis for plaintiffs' allegations concerning the roles of the Senator, O'Donnell and Alderman, these defendants still were not entitled to summary judgment because they failed to present facts which would constitute a defense to the charges. See Adickes v. S. H. Kress Co., 398 U.S. 144, 159-160 (1970). No affidavits of any kind were submitted in support of the motion by O'Donnell, Alderman or Brick. The only affidavit was that of Senator McClellan, and it basically did no more than state that the acts complained of were done as part of a properly authorized investigation. Significantly, the Senator did not dispute plaintiffs' allegations that he was responsible for and involved in Brick's allegedly illegal inspection and transportation of the relevant documents as well as the subsequent dissemination of copies of the documents. All that he denied was "any conspiracy, collaboration or any other participation of any sort in the allegedly illegal police raid allegedly planned and conducted by defendant Ratliff." App. at 49, ¶ 11. As a result of the Court of Appeals' decision, however, no question concerning the federal defendants' complicity in the initial police seizure of the documents remains in the case, but only issues relating to their complicity in the subsequent

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inspection, transportation, and dissemination of the documents. As to these matters, Senator McClellan was completely silent. Nor does Senator McClellan's affidavit say anything concerning the involvement of Alderman or O'Donnell.

As I understand your Memorandum, you would construe the Senator's denial of any activities outside the scope of legislative authority as encompassing a denial of plaintiffs' allegations of Fourth Amendment violations or other illegal conduct. But it has been the contention of the federal defendants throughout this action that all the misdeeds charged in the amended complaint were within the scope of their investigative functions and accordingly, under this erroneous view of the law, protected by the Speech or Debate Clause. Thus, the Senator's assertion that he acted within the scope of his legislative functions is consistent with the commission of Fourth Amendment violations charged by plaintiffs. Against this background, I would not read his broad assertion of immunity for illegal acts occurring in a field investigation as a denial that any of the alleged conduct actually occurred. Furthermore, since the entry of summary judgment precludes further factual development and clarification by means of examination of witnesses, I am not sure that affidavits submitted in support of such motions should be so broadly construed. In ordinary summary judgment practice they are not so read.

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

From: Mr. Justice White

Circulated: 6/19/78

Recirculated: _____

No. 76-1621 - McAdams v. McSurely

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

This is an interesting study of the Supreme Court at work.

The petition for certiorari which we granted pressed two claims: first, even if Brick violated the Fourth Amendment (which petitioners concede that he did for the purposes of this case), petitioners are immune from liability under the Speech or Debate Clause, and second, that the Clause also protects them from liability for disseminating to other branches of the Government.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 21, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1621 — McAdams v. McSurely

I am replacing pages 3 and 4 of my circulation in the above case. These slightly changed pages are attached. Footnote 1 on page 3 is not a new footnote but only footnote 6 repositioned.

Sincerely,

Byron

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As I shall explain later, MR. JUSTICE POWELL's ground for reversal is not fairly included in or subsumed by the questions presented here.[1/] Indeed, the Court of Appeals, having ruled that the Speech or Debate Clause did not protect against constitutional transgressions, remanded the case to the trial court, among other things to permit the petitioners to make a new motion for summary judgment, if they cared to do so, addressed to the very issue of whether petitioners were sufficiently implicated in the alleged transgressions.[2/] Petitioners never claimed in the District Court or in the Court of Appeals that if they were wrong on their Speech or Debate Clause argument they were nevertheless entitled to judgment. As for the official immunity ground for reversal, that issue is not raised by either of the questions presented in the petition, has not been briefed or argued in any meaningful sense and, as MR. JUSTICE REHNQUIST concedes, it is a novel question that has never been decided or dealt with by this Court.

Of course, this Court has the power to reach and eliminate plain error appearing in the record, even though not raised by the petition for certiorari. But the disposition of this case is all the more remarkable because the position espoused by MR. JUSTICE POWELL and those who join him, which leads him to deal with the summary judgment issue, is rejected by a

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 23, 1978

Re: 76-1621 - McAdams v. McSurely

Dear Chief,

I join.

Sincerely yours,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 8, 1978

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

Dear Byron:

I am with you.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 23, 1978

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

Dear Chief:

I agree with your Per Curiam.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 7, 1978

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

Dear Lewis:

If it gives you any comfort, prior to tomorrow's conference, this is to let you know that generally I lean toward your proposed disposition of the case. There are some bumps along the way for me, but you also encountered some.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 23, 1978

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

Dear Chief:

I shall go along.

Sincerely,

HAB

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 24, 1978

No. 76-1621 McAdams, Executor v. McSurely

MEMORANDUM TO THE CONFERENCE:

This is the Speech or Debate clause case that we discussed at length in our March 3 Conference.

As you will remember, there was no "Court" for any final resolution of the case. Indeed, the last entry in my notes reads as follows: "We discussed this case for nearly two hours without any two of us agreeing as to a basis for its disposition". Against that background, I was not enchanted when the Chief asked me to write a Per Curiam. But someone had to write something.

In the absence of anything approaching a consensus, I concluded that it was best for me to write a memorandum that reflected my own considered judgment after a more careful examination of the opinions below, the record, and briefs. For the reasons stated in footnote 8, I think there is no serious question of appealability. In Part II-A, I address, and dispatch with brevity, the Solicitor General's rather remarkable argument - indeed his principal one - that even murder is protected under the Speech or Debate clause. We all were in accord on this issue.

In Part II-B, I consider the Solicitor General's fall-back position - it really should have been his primary position - that summary judgment should have been granted for failure to make "more than a merely colorable" claim of liability. Further study fully confirms (at least for me) the view I expressed at Conference to the effect that the case should have been dismissed as to McClellan, Alderman and O'Donnell. I think Dombrowski compels this in view of the fact that the only substantive allegations against these three defendants were made solely on "information and belief".

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As to Brick, I reached a different conclusion. Although I think the question is quite close, there appears to be sufficient evidence in the record to justify an affirmance of CADC with respect to him. Putting it differently, there is enough to carry respondents across the Dombrowski threshold.

I had difficulty with respondents' belated claim of improper dissemination of material to the IRS. It is unclear, from reading the several opinions, exactly what CADC held with respect to the dissemination claim. I concluded, without expressing any opinion on the merits of the claim, that we should vacate the judgment of affirmance with respect to it, and remand this issue to CADC for further consideration.

* * *

There was some sentiment at the Conference to DIG this case. This controversy commenced in 1967; this is the third case arising out of the seizure of McSurely's documents; it has been in litigation since 1969, and already several of the parties have died (leaving questions of survival, as well as problems in the settlement of estates). It therefore is desirable to settle as much of the law of the case at this time as we can, rather than allow CADC's judgment to stand with the consequent remand for continued litigation as to all parties.

In any event, the memorandum reflects my views. If they are not received hospitably the case should be assigned to someone else.

L.F.P.

L.F.P., Jr.

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

1st DRAFT

From: Mr. Justice Powell

SUPREME COURT OF THE UNITED STATES

Circulated: 24 MAR 1978

No. 76-1621

Recirculated: _____

Herbert H. McAdams, III, as Executor of the Estate of John L. McClellan, et al., Petitioners, *v.* Alan McSurely et ux.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1978]

Memorandum to the Conference from MR. JUSTICE POWELL.

I

In 1967, Alan and Margaret McSurely were field organizers for the Southern Conference Educational Fund, Inc., in Pike County, Ky. Alan McSurely also had served as a field organizer for the National Conference of New Politics and distributed literature for Vietnam Summer. On the night of August 11, 1967, under authority of a warrant charging seditious activities against the Commonwealth of Kentucky and the United States in violation of Ky. Rev. Stat. § 432.040 (19—), Pike County officials arrested the McSurelys and seized a quantity of books, pamphlets, and letters found in their home. Shortly after the raid, Thomas Ratliff, Commonwealth Attorney for Pike County, announced publicly that the seized material would be made available to any Congressional Committees interested in the McSurelys.

On September 14, 1967, a three-judge District Court for the Eastern District of Kentucky, one judge dissenting, declared the Kentucky sedition statute unconstitutional on its face and enjoined state prosecution of the McSurelys. *McSurely* v. *Ratliff*, 282 F. Supp. 848 (ED Ky. 1967). The court ordered that all the seized material "be held by [Ratliff] in safekeeping

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 5, 1978

McAdams v. McSurely, No. 76-1621

Dear Byron:

Thanks for your thoughtful memorandum of April 4. You have touched upon several of the more troubling aspects of this case, and I will take this opportunity to amplify my analysis of them.

I

You express the view that the Speech or Debate Clause does not cover field investigations at all. If we had a case that clearly presented that issue I would be inclined to go along with you. In this case, however, I have thought it unnecessary to go beyond the "facially proper means" approach, which essentially was that of Judge Leventhal below. As you observe, there probably are few cases in which your approach and mine would produce different results, but I am reluctant to embrace the broader rationale without clear need to do so or a clear idea of the implications of such a conclusion. I do not think the principle emerges clearly from Gravel or Doe v. McMillan.

I will add a footnote stating that because of my proposed disposition of this case, it is unnecessary to determine whether even properly conducted field investigation would fall outside the protection of the Speech or Debate Clause.

II

As you correctly stated it, the argument concerning the disposition of the Fourth Amendment claims against McClellan, Adlerman, and O'Donnell is "very fact-bound." We simply seem to view the facts differently, but I will attempt to set out in greater detail the reasons for my views.

You offer two reasons for accepting the Court of Appeals' judgment that the defendants other than Brick were

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not entitled to summary judgment. The first reason is that "it is doubtful that plaintiffs were ever on notice that they had to present evidence that the Senator, Adlerman, and O'Donnell were accessories to Brick's actions . . . ." (Your Memo at 6.) It seems to me that the record clearly shows the contrary. At page 13 of my Memorandum to the Conference, in the footnote, I quote a colloquy at the summary judgment hearing in which defense counsel states that the burden is upon plaintiffs "to come forward with any evidence they may have to suggest and demonstrate that these defendants were not acting within the scope of their legislative duties." (Emphasis added.)

Further, I cited in the same footnote several documents filed by defendants in support of their motion that appear quite clearly to call upon plaintiffs for whatever evidence they have with respect to each defendant. For example, in their Supplemental Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, Nov. 23, 1971, at 5, it is stated:

> "The affidavit of Senator McClellan filed in support of the pending motions fully establishes the circumstances by which the Senate Committee conducted its investigation and served the subpoenas out of which this litigation arises. Again, nothing in the McSurelys' affidavit furnishes any facts to demonstrate that Brick, Adlerman, or O'Donnell were acting outside the perimeter of their legislative functions." (Emphasis added.)

I cannot see how defendants could have put plaintiffs on notice more specifically that they had to come forward with whatever "more than merely colorable" evidence they had with respect to each defendant.

Your second reason for accepting the Court of Appeals view on the summary judgment issue is that the three "Washington" defendants failed to present facts which would constitute a defense to the charges. (Your Memo at 7.) I think our disagreement here highlights one of the most unusual aspects of this case - one that is not made clear by the briefs. In the Court of Appeals, and in my Memorandum to the Conference, Brick was kept in the case because plaintiffs were held to have alleged a second, separate violation of the Fourth Amendment by Brick in inspecting the documents in Pikeville. As I

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noted in footnote 22 of my Memorandum, however, this "second violation" theory of the case apparently did not emerge until the matter was before the Court of Appeals.

I say this because my examination of the District Court record did not disclose any suggestion that Brick's activity in and of itself amounted to a separate violation of the Fourth Amendment. Instead, plaintiffs argued that since the Kentucky search and seizure had been ruled unconstitutional at the time of the Subcommittee takeover of the documents, the rule of Dombrowski v. Eastland did not apply and that the subpoenas were the fruit of the original Kentucky seizure. This is the only Fourth Amendment theory set forth in the amended complaint. App. 32-33. Thus, in the District Court the theory was not that Brick's inspection of the documents in Pikesville was a second violation of the Fourth Amendment, rendering the Calandra doctrine inapplicable (the view of Judge Leventhal and my Memorandum); rather, the theory there was that Brick's inspection, the takeover, and the subsequent subpoenas were the fruits of the original illegal search and seizure. The first mention of a separate Fourth Amendment violation by Brick appears to have been in the Court of Appeals opinion in the contempt case, which came down after the filing of all the documents in the District Court. Apparently, plaintiffs developed this theory during the contempt appeal and introduced it in this case for the first time before the Court of Appeals.

In these circumstances, it could hardly be expected that McClellan's affidavit would declare specifically that there had been no Fourth Amendment violation by Brick. Defendants had never been presented with that theory of the case. Since the amended complaint was viewed expansively (perhaps more so than it merited), it would seem unduly harsh to read the defense affidavit narrowly as failing to negate a theory not then advanced. Rather, I think it must be taken as putting in issue all the allegations that subsequently were read into the amended complaint. It denies, on behalf of all the defendants, any activity outside the scope of legislative authority. App. 50. In my view, that denial is sufficiently explicit in view of McSurleys' theory of the case at the time.

I do not think that the failure of the other defendants to file affidavits is of any importance. As McClellan's affidavit covers them, separate affidavits would be repetitive.

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III

As to the dissemination claim, I still think my reading of Judge Leventhal's footnote 25 is correct. It seems to me that the Court of Appeals was contrasting those claims that were in the complaint with the IRS allegation which was not. Judge Leventhal's opinion on this point is far below his usual standard of clarity.

I nevertheless agree that your reading is a plausible one. Indeed, the original draft of my Memorandum came out exactly that way. I therefore would have no objection to reading the Court of Appeals opinion in that manner, but my disposition still would be different from yours. If we read the amended complaint as alleging dissemination outside of the Subcommittee, then we are faced with Brick's testimony that the copies were all returned to Kentucky officials before the earliest date when any information exchanges between the Subcommittee and the IRS could have begun, as well as the denial by both Brick and McClellan that any copies were retained. (My Memo at 19-20 n.26) Under the analysis used in Part II of my Memo, these denials cast upon plaintiffs the burden of coming forward with something more than mere information and belief concerning dissemination of their materials outside of Congress. Since they failed to do that, even in the Court of Appeals (Pet. at 14a n.25), summary judgment must follow under Dombrowski.

* * *

If this were a garden variety law suit I would have taken far less interest in the questions we are now discussing. This Court normally is reluctant to review arguably close decisions below as to whether summary judgment motions should have been sustained. But this is no garden variety litigation between private parties. This is an example of legal warfare, conducted now for a full decade, against a Subcommittee of the United States Senate. As stated on page 17 of my Memo (circulated March 24), the purposes served by the Speech or Debate Clause are intended to protect members and their aides from "the burden of defending themselves against unsubstantiated claims", Dombrowski at 85, and thus the Clause requires that motions founded on legislative immunity be "given the most expeditious treatment by district courts because one branch of government is being ask to halt the functions of a coordinate branch." Servicemen's Fund, at 511 n. 17.

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In our interesting and helpful conversation last Saturday, you questioned whether the Clause - rather than general official immunity - applied to the alleged activities in Pikesville. I am adding a footnote to my Memorandum that for me recognizes this possibility (even though the case has never been so viewed by the parties or courts below), and indicating that it makes no difference as to the proper outcome. The policy reasons identified in Dombrowski and Servicemen's Fund apply in most cases with equal force when a government official is sued for conduct taken within the scope of his authority.

I must say that your memorandum of April 4 gives me more than a little concern as to the position you and I have taken generally in Butz. In my letter to you of February 3, commenting on your circulation in Butz, I referred to Bill Rehnquist's sound observation that "any legal neophyte" can frame a complaint of constitutional dimensions, and unless the courts put such a plaintiff to a degree of specificity not customarily observed on summary judgment motions, substantial interference with the functioning of government officials will result. In my letter to you, I said:

> "Courts should be alert to limit public official exposure to the inhibiting force of a protracted trial by requiring a convincing showing in order to withstand a motion for summary judgment."

I understood then that you were generally in accord. But I am considerably shaken by your apparent disposition to give the McSurelys the benefit of every doubt and deny - at least as I view it - a similar reading to the McClellan affidavit, the colloquy between counsel, and the other indications that at least as to the Senator and the two co-defendants here in Washington nothing of substance has been turned up in the ten-year McSurely crusade.

I have thought that the important public policies served by the Clause and by the doctrine of official immunity require - as the Court has stated in Dombrowski and Servicemen's - a more demanding standard with respect to summary judgment and discovery where these policies are implicated than in the ordinary suit between private

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litigants. I would find it difficult to join a Butz opinion that would not encourage courts to accord more protection of these policies than your letter appears to reflect.

I do appreciate your talking to me and devoting so much thought to my Memo of March 24. Maybe this ventilation of the issues will be helpful to our Brothers who have been uncharacteristically silent up to now.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

cc: The Conference

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12, 14, 17, 18
footnotes renumbered

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

From: Mr. Justice Powell

Circulated: 6 APR 1978

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1621

Herbert H. McAdams, III, as Executor of the Estate of John L. McClellan, et al., Petitioners, *v.* Alan McSurely et ux.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1978]

Memorandum to the Conference from MR. JUSTICE POWELL.

I

In 1967, Alan and Margaret McSurely were field organizers for the Southern Conference Educational Fund, Inc., in Pike County, Ky. Alan McSurely also had served as a field organizer for the National Conference of New Politics and distributed literature for Vietnam Summer. On the night of August 11, 1967, under authority of a warrant charging seditious activities against the Commonwealth of Kentucky and the United States in violation of Ky. Rev. Stat. § 432.040 (19—), Pike County officials arrested the McSurelys and seized a quantity of books, pamphlets, and letters found in their home. Shortly after the raid, Thomas Ratliff, Commonwealth Attorney for Pike County, announced publicly that the seized material would be made available to any Congressional Committees interested in the McSurelys.

On September 14, 1967, a three-judge District Court for the Eastern District of Kentucky, one judge dissenting, declared the Kentucky sedition statute unconstitutional on its face and enjoined state prosecution of the McSurelys. *McSurely* v. *Ratliff*, 282 F. Supp. 848 (ED Ky. 1967). The court ordered that all the seized material "be held by [Ratliff] in safekeeping

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 12, 1978

McAdams v. McSurely, No. 76-1621

Dear Bill:

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

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

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

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In addition, as you would expect, I have some difficulty applying your analysis in Butz to this case. But apart from this more general problem, I am unable to see how taking your approach obviates resort to the sort of summary judgment procedure you wish to avoid.

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

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 12, 1978

No. 76-1621 McAdams v. McSurely

Dear John:

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

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

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

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

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

We disagree also as to the questions fairly raised by the petition and brief of the Solicitor General. I think a fair reading makes clear that he did raise the issue whether a viable Fourth Amendment claim was raised by McSurelys' pleadings and affidavits.

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You have mentioned, rightly, that we seem this Term to be "burying" a number of the Court's prior decisions. In my view Dombrowski, a case similar in many respects to this one, can be added to the list if the Cour concludes that the McSurleys have shown "more than merely colorable substance" to their allegations.

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

Sincerely,

L. Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

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V

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 14, 1978

No. 76-1621 McAdams v. McSurely

MEMORANDUM TO THE CONFERENCE

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

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

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

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

Sincerely,

Lewis

LFP/lab

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 5, 1978

No. 76-1621 McAdams v. McSurely

Dear Chief:

One of your clerks called to inquire whether I had formally "relinquished" the assignment to me of this case.

I suppose the answer is "no", if emphasis is placed on the word "formal". My records indicate you are the only Brother who joined me completely. Bill Rehnquist joined me in the result only. Byron has circulated views differing substantially from mine, and Bill Brennan has joined Byron. John Stevens also has indicated substantial agreement with Byron. I do not have any record of having heard from Potter, Thurgood or Harry.

I think I commented at a Conference sometime ago that in view of this diversity of opinion, I have no idea how to reconcile it. I cannot tell at this point whether there is a majority for any particular judgment.

As to my own position, I remain firm in Parts I and II. I indicated in my letter of April 5 to Byron that I had had considerable difficulty with Part III, and that his reading of Judge Leventhal's opinion was a plausible one. I could modify Part III to accord with Byron's reading of the opinion, but my result still would differ from his because of our difference as to the constitutional burden plaintiffs bore in the summary judgment proceeding under Dombrowski v. Eastland, 387 U.S. 82 (1967).

In any event, in these bewildering circumstances, I am more than happy to relinquish any residual claim to this opinion that may lurk in your records.

Sincerely,

Lewis

The Chief Justice

Copies to the Conference

lfp/ss

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Stylistic Changes Throughout

1, 12, 24

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

From: Mr. Justice Powell

Circulated: 3/8

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1621

Herbert H. McAdams, III, as Executor of the Estate of John L. McClellan, et al., Petitioners, *v.* Alan McSurely et ux.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1978]

MR. JUSTICE POWELL announced the judgment of the Court and delivered the following opinion.*

This case presents important issues concerning the scope of legislative immunity under the Speech or Debate Clause.[1] Specifically, the original petitioners—a United States Senator and three members of a committee staff—contend that the Clause protects them from suits based on the alledegd use of illegal means in the course of field investigations related to congressional inquiries. They also argue that, on this record, respondents have not adduced sufficient evidence connecting them to the alleged illegal actions to lift the cloak of legislative immunity. For the reasons that follow, we reject the first contention, but agree with the second argument as to three of the four petitioners.

I

In 1967, Alan and Margaret McSurely were field organizers for the Southern Conference Educational Fund, Inc., in Pike County, Ky. Alan McSurely also had served as a field orga-

*Part II of this opinion is joined only by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN.

[1] Article I, § 6, cl. 1, provides that "for Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."

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Stylistic Changes Throughout

10,12-13,19

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

From: Mr. Justice Powell

Circulated: _____

Recirculated: 19 Jun 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1621

Herbert H. McAdams, III, as Executor of the Estate of John L. McClellan, et al., Petitioners, *v.* Alan McSurely et ux.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1978]

MR. JUSTICE POWELL announced the judgment of the Court and delivered the following opinion.*

This case presents important issues concerning the scope of legislative immunity under the Speech or Debate Clause.[1] Specifically, the original petitioners—a United States Senator and three members of a committee staff—contend that the Clause protects them from suits based on the alleged use of illegal means in the course of field investigations related to congressional inquiries. They also argue that, on this record, respondents have not adduced sufficient evidence connecting them to the alleged illegal actions to lift the cloak of legislative immunity. For the reasons that follow, we reject the first contention, but agree with the second argument as to three of the four petitioners.

I

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*Part II of this opinion is joined only by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN.

[1] Article I, § 6, cl. 1, provides that "for Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 21, 1978

No. 76-1621 McAdams v. McSurely

MEMORANDUM TO THE CONFERENCE:

I plan to make the attached changes in my opinion at the points indicated.

L.F.P.

L.F.P., Jr.

ss

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LFP 6/20/78

No. 76-1621 McAdams v. McSurely,

Rider, p. 11, after "1966" new footnote 19:

19/ MR. JUSTICE WHITE refers to Gravel as "holding that investigatory activities are normally outside the scope of the Speech or Debate Clause." Post, WangDraft at 9. This reading of Gravel has not yet been adopted by the Court. The Court in that case was careful to speak in terms of illegal activities, not field investigation in general, as falling outside the scope of the Clause. For example, in explaining the reach of prior cases, including Dombrowski v. Eastland, the Gravel Court emphasized the presence of illegal conduct:

> [I]mmunity was unavailable because [congressional aides] engaged in illegal conduct that was not entitled to Speech or Debate Clause protection. The . . . cases reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." 408 U.S., at 620 (emphasis added).

This emphasis would not have been necessary if the Court had been of the view that field investigations simply are not covered by the Clause at all.

MR. JUSTICE WHITE also suggests that the Court in Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), distinguished Gravel on the basis that it involved field investigations outside the scope of the

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 22, 1978

No. 76-1621 McAdams v. Surely

MEMORANDUM TO THE CONFERENCE:

I have concluded that we should give serious consideration to dismissing this case as improvidently granted.

On yesterday, I reviewed the several opinions that have been filed. The Court is about as badly fragmented on the Speech or Debate Clause central issue (Part II) as if we were three separate panels in disagreement on a Court of Appeals, producing a disabling intracircuit split. Our opinions will afford no guidance to other courts, and are not likely to be reassuring to the members of the Congress in terms of their knowing the boundaries of their constitutional privilege.

Moreover, we have Bakke and the capital cases in which the Court also speaks with several voices. But the law will not be left in the same degree of confusion by either of these cases as it will be with respect to Speech or Debate if we bring down McSurely.

I am persuaded that the Court will be disserved institutionally if all three of these cases are brought down at the end of a Term, with divisions among us as sharply divided as they happen to be.

Although I still feel as strongly as ever that the McSurely litigation is wholly without merit as to at least three of the four defendants, and that 11 years in the courts in a frivolous vendetta is enough. Normally, I would think that our first duty, once we take a case, is to do justice to the parties. But I believe that if we DIG this case, the injustice will be limited to one additional final hearing in the District Court. Although I think CADC

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erred in remanding rather than disposing of the case, Judge Leventhal's opinion makes it rather clear that he shares my own view as to the lack of substance to the McSurely claims, at least as to the three Washington defendants. A District Court, on remand, will have this guidance.

In sum, I am motivated to suggest a DIG by genuine concern as to of this Court's duty to afford guidance and stability on major constitutional issues. But I also believe that in the end a just result probably will be reached if we allow this case simply to run its tortuous course.

L. F. P. rdc

L.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 23, 1978

No. 76-1621 McAdams v. McSurely

Dear Chief:

I agree.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 11, 1978

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

Dear Lewis:

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

Unfortunately this would not appear to be a unique case. Congressmen and other governmental officials, because of the nature of their positions, are frequently subjected to unmeritorious

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 17, 1978

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

Dear Lewis:

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

As to the summary judgment point involving Rule 56, I may have expressed myself too strongly, and if so would like to now set the matter straight in the interest of obtaining a consensus if one is possible. I think that the phraseology from Dombrowski v. Eastland, 387 U.S. 82 (1967), to the effect that the plaintiffs must come forward with "more than merely colorable substance to [their] assertions" before a lawsuit can be allowed to proceed against defendants protected by the Speech and Debate Clause is one of those phrases that sounds good until you try to apply it. Since you were not the author of the language in the case, I feel no reluctance in asking "What does it mean?" My impression of the Federal Rules of Civil Procedure is that they were designed to require trial on the merits of all contested actions except where there was no "genuine issue of material fact", and to permit summary judgment with respect to the latter. I think the creation of a hybrid, which you are quite correct in citing Dombrowski v. Eastland as supporting, is inconsistent

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with these rules. If the immunity is absolute there should be no requirement of "more than merely colorable substance to [their] assertions", other than the assertion that the official was acting outside the scope of his official duties, in order to have their case dismissed. If, on the other hand, there is merely a "qualified good faith-reasonable" privilege, then, as I suggested in my earlier memorandum, this is the sort of battle that a defendant asserting such a privilege should never be able to win on summary judgment.

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

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

Sincerely,

WWW

Mr. Justice Powell

Copies to the Conference

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

From: Mr. Justice Rehnquist

No. 76-1621 McAdams v. McSurely

Circulated: JUN 16 1978

Recirculated: _____

MR. JUSTICE REHNQUIST, concurring.

I join Parts I, III and IV of Mr. Justice Powell's opinion. While I also agree that the judgment of the Court of Appeals must be affirmed with respect to the claim concerning Brick's inspection of the documents and transportation of copies, but reversed as to McClellan, Adlerman, and O'Donnell, I reach this result by rationale different from that employed by Mr. Justice Powell in Part II of his opinion. Immunity, whether of a constitutional or common-law origin, is a substantive rather than a procedural doctrine. According by my Brother Powell, congressmen are liable in civil damages for "criminal or otherwise unlawful" activities in the course

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1978

Re: No. 76-1621 McAdams v. McSurely

Dear Byron:

In response to your dissent, I am adding the following to the text of my opinion at page 18 immediately after the quotation from Spalding v. Vilas:

> Our Brother White suggests in dissent, post, at 4, that absolute immunity need never be accorded to "highly placed officials in the Government" because normal adversary processes are not so "unreliable and erratic" that they cannot be trusted to give public officials "the breathing room they require if they are to be effective public servants." We observe that there is an implied proviso

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Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 23, 1978

Re: No. 76-1621 McAdams v. McSurely

Dear Chief:

I acquiesce.

Sincerely,

The Chief Justice

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 12, 1978

Re: 76-1621 - McAdams v. McSurely

Dear Lewis:

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

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

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

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

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

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

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

Respectfully,

John

Mr. Justice Powell

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

From: Mr. Justice Stevens

Circulated: JUN 20 1978

Recirculated: _____

76-1621 - McAdams v. McSurely

MR. JUSTICE STEVENS concurring in part and dissenting in part.

Although I concur in substantially everything in MR. JUSTICE WHITE's opinion, I am uncertain about the proper disposition of a portion of the dissemination claim. The Speech or Debate Clause protects the internal distribution of legislative materials but not their general, public dissemination. Doe v. McMillan, 412 U.S. 306, 317. Distribution is internal, and therefore protected, even when the materials "are available for inspection by the press and by the public." Id. In this case, I am unable to discern from the record whether the materials that were assertedly made available to the Internal Revenue Service are on the protected or unprotected side of the line identified in McMillan. I would therefore leave the issue open to be addressed in the first instance by the District Court. With the understanding that this issue was not foreclosed by the Court of Appeals, I would affirm its judgment.

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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

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 22'78

76-1621 --McAdams v. McSurely

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

Although I join Parts I and II of MR. JUSTICE WHITE's opinion, the dissemination claim raises two troubling issues. The Speech and Debate Clause protects the internal distribution of legislative materials but not their "general, public dissemination." Doe v. McMillan, 412 U.S. 306, 317. Distribution is internal, and therefore protected, even when the materials "are available for inspection by the press and by the public." Id. These defendants might well be immune if they simply made legislative materials "available for inspection" by the Internal Revenue Service. Moreover, even active dissemination to an Executive agency for a proper legislative purpose may deserve different treatment than dissemination to the public. I would not, however, decide these issues on so confused a record. The plaintiffs' efforts to restructure their claim while the case was on appeal so changed the case that I believe the claim should have been returned to the District Court, where the complaint could have been amended and challenged in an orderly fashion. I would instruct the Court of Appeals to remand for that purpose.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 23, 1978

Re: 76-1621 - McAdams v. McSurely

Dear Chief:

Please join me.

Respectfully,

JPS

The Chief Justice

Copies to the Conference