MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob

DATE: April 3, 1978

RE: Justice White's Ruminations in McSurely

This afternoon you mentioned to me that Justice White had said that Brick should not be entitled to Speech or Debate immunity, but that he might be entitled to official immunity under a Barr v. Matteo analysis. This did not jibe with my recollection of Justice White's opinion in Doe v. McMillan, 412 U.S. 306 (1973), so I checked back.

Attached is the penultimate page of the White opinion in McMillan. As you can see, it equates the scope of official immunity with that of Speech or Debate immunity, holding that the official immunity -- like Speech or Debate immunity -- applies only when the congressional employees are engaged in protected legislative acts. Hence, I see no basis for a different theoretical approach to McSurely springing from the White opinion in McMillan. From all that appears in that
opinion, the two inquiries are functional equivalents.

It would be possible to declare that informal investigative activity is simply not a legislative act, so that Speech or Debate immunity does not apply. That idea does not find support in anything said in Doe v. McMillan.
Opinion of the Court 412 U.S.

shadow of Board of Regents of State Colleges v. Roth, 408 U. S. 564 (1972), and Wisconsin v. Constantineau, 400 U. S. 433 (1971), where the Court advised caution "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him ...." Id., at 437. We conclude that, for the purposes of the judicially fashioned doctrine of immunity, the Public Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors. See Dombrowski v. Eastland, 387 U. S. 82 (1967). The scope of inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same. The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity," Tenney v. Brandhove, 341 U. S., at 376, they enjoy no special immunity from local laws protecting the good name or the reputation of the ordinary citizen.

Because we think the Court of Appeals applied the immunities of the Speech or Debate Clause and of the doctrine of official immunity too broadly, we must reverse its judgment and remand the case for appropriate further proceedings.13 We are unaware, from this record, of the extent of the publication and distribution of the report which has taken place to date. Thus, we have little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity,

13 With respect to the District of Columbia respondents, the Court of Appeals found that they were acting within the scope of their authority under applicable law and, as a result, were immune from suit. We do not disturb the judgment of the Court of Appeals in this respect.

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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.
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.
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.
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
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.
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
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.
With respect to Part III of your Memorandum, I hold a somewhat different view of the dissemination issue. As I understand it, you would remand the claim of dissemination to the IRS to the Court of Appeals because it failed to pass on the question of whether this claim was within the scope of the amended complaint. But I doubt that Judge Leventhal concluded that such a claim should not be dismissed on grounds of Speech or Debate Clause immunity while at the same time believing that the claim was wholly beyond the scope of the complaint. Although the matter may not be entirely free from doubt, I believe that the opinion below is better read to construe the complaint as including the claim of dissemination to the IRS.

Paragraph 19 of the amended complaint alleges that Brick "exhibited [the McSurely documents] to persons whose names are unknown to the plaintiffs. . . ." Footnote 25 of the Court of Appeals opinion, which I agree with you is the key to the matter, begins by stating that "[t]he claim of dissemination of some or all of the 234 documents to the Internal Revenue Service (IRS) was not made in the amended complaint." I think it is reasonably clear, however, that the court was not stating
that the complaint did not encompass dissemination to the IRS but only that it did not mention the IRS in haec verba. Indeed, this very same footnote goes on to state that "[p]laintiffs' amended complaint also alleges that Brick exhibited copies of the 234 items to unknown persons. . . . The claim of dissemination outside the Halls of Congress apparently rests on access by IRS officials." The conclusion I draw from this, particularly the last sentence, is that the Court of Appeals did not view the claim of dissemination to the IRS as being outside the scope of the complaint, but rather as being the only specific claim pressed by plaintiffs which supported the broad allegation of dissemination set forth in ¶ 19 of the amended complaint. Moreover, I see little point in straining to find that the Court of Appeals acted in a self-contradictory fashion, because there can be no serious doubt that the allegation of dissemination in the amended complaint is broad enough to encompass dissemination to the IRS.

I also have difficulty with your suggestion on p. 22 and n. 29 that the question of whether dissemination to the Executive Branch is protected by the Speech or Debate Clause is an open one. The Court of Appeals unanimously, and in my view,
correctly, concluded that McMillan and Gravel foreclosed any contention that dissemination of materials to an agency of the Executive constitutes a legislative act. United States v. Brewster also leans strongly in this direction. "In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process--only acts generally done in the course of the process of enacting legislation [are] protected." 408 U.S. 501, 515, 514 (1972). Although legislators will have frequent dealings, as they properly should, with the Executive Branch, the fact of the matter is that such contacts are not legislative acts.

I should say that my views are not set in concrete, and it may be that I could join a quite different approach. As presently advised, however, I would affirm.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference
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
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
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 McSurelys’ 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.
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.
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
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,

Mr. Justice White

lfp/ss

cc: The Conference