MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob

DATE: June 19, 1978

RE: Justice White's Draft in McAdams v. McSurely, No. 76-1621

Part I of BRW's opinion is devoted to establishing that field investigations are not within the protection of the Speech or Debate Clause. He reads Gravel v. United States, 408 U.S. 606 (1972), as establishing the principle that field investigation is not within the protection of the Speech or Debate Clause's protection. In actuality, the case never says that. It uses rather hazy language to dance all around the point, e.g.: the immunity is unavailable where legislators "engaged in illegal conduct that was not entitled to Speech or Debate Clause protection." 408 U.S., 620. That language could fit our holding as well as BRW's. We could add a one-line footnote somewhere in our draft stating that Gravel would have been a much easier case if its holding had been that field investigation wasn't covered. All that the case held was that the congressional aide could be questioned about his knowledge of the criminal activity concerning the obtaining of the Pentagon Papers. Certainly the holding of the case does not go beyond our holding in this case.

Part II of the opinion takes on our summary judgment holding and is rather persuasive in that regard. BRW basically makes the same points I unsuccessfully tried to
sell last February. I don't think there is a great deal that we can say to him in reply, since most of the arguments to be made have already been inserted in response to the memo he circulated in March. We do stretch the pleadings in favor of McClellan, and we do read them very narrowly against the plaintiffs, for which BRW takes us to task. Our only answer -- and one that is already made in the opinion -- is that the Speech or Debate Clause dictates those procedures.

In Part III, Justice White argues with our interpretation of the Leventhal opinion insofar as it deals with the dissemination claim. Again, I don't think that there is anything to say that we have not said already. In the second part of Part III, BRW anticipates Justice Stevens' position and argues that there is no privilege for exhibition of these sorts of materials to executive agencies. Since we do not address that issue, we have no need of reply there.
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.
The Court unanimously rejects the claim that the Speech or Debate Clause protects against liability for constitutional infringements by congressional investigators, six of us because field investigations are not legislative acts entitled to Speech or Debate Clause immunity; and three of us because the Clause does not protect against constitutional violations by congressional investigators, the latter ground also being the basis for the judgment of the Court of Appeals. Under any ordinary application of our rules that we do not deal with questions not presented by the petition for certiorari, one would expect that the Court would therefore affirm this part of the judgment of the Court of Appeals, which had also concluded that the Speech or Debate Clause did not protect against constitutional wrongs by congressional investigators.

The judgment of the Court of Appeals is nevertheless reversed as to three of the petitioners. The majority is divided among themselves. As MR. JUSTICE POWELL and two other members of the Court read the record, respondents failed adequately to respond to petitioners' summary judgment motion in the trial court; petitioners are thus entitled to judgment. MR. JUSTICE REHNQUIST, joined by MR. JUSTICE STEWART, reverses because petitioners are absolutely immune from damages liability, not because of the Speech or Debate Clause, but because of common-law official immunity.
As I shall explain later, MR. JUSTICE POWELL's ground for reversal is not fairly included in or subsumed by the questions presented here. 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. 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 the petition, has not been briefed or argued 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 majority
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
majority of the Court: that is, the Speech or Debate Clause is not to be applied, as they would have it, to informal investigations by Congress. A majority of the Court likewise rejects MR. JUSTICE REHNQUIST's position that highly placed officials in the Government should be free deliberately and knowingly to violate the law because the adversary processes are so unreliable and erratic that they cannot be trusted rapidly to distinguish between innocent or negligent mistakes of law or fact and those that are knowing and deliberate and because it would be distracting for high officials to have to defend themselves at all. Although trustworthy enough to sort out those who are subject to the death penalty and those who are not, even though intent and purpose may be critical elements in such determinations, judges and juries are, in MR. JUSTICE REHNQUIST's view, quite inadequate to give the Attorney General, assistant Attorneys General and other Cabinet and sub-Cabinet officers, the breathing room they require if they are to be effective public servants. That position has been rejected in Butz v. Economou, ___ U.S. ___ (1977), but nevertheless forms the basis for two of the determinative votes to reverse in this case.
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In dissent, I shall first state my reasons for concluding that the Speech or Debate Clause does not extend its protections to congressional investigators in the field. As I have said, six members of the Court agree with this result, if not with the reasoning to reach it. I shall then, with all due respect, express my disagreement as to the grounds employed for reversing the investigative phase of the Court of Appeals' judgment. I shall also disagree with the reversal of the judgment as to the dissemination issue.
The initial question posed by this case is whether the gathering of information by means other than the use of formal process is within the scope of the immunity provided by the Speech or Debate Clause. The Court of Appeals for the District of Columbia agreed with the Government that investigative activities conducted in the field, as well as the more formal functions of conducting hearings and obtaining information by means of subpoena, are protected by the Clause. It went on to hold, however, that the employment of unlawful means to perform otherwise proper legislative activities is not essential to legislating and that if Brick violated the Fourth Amendment, neither he nor anyone who acted in complicity with him in such illegal conduct would be immune. 

MR. JUSTICE POWELL agrees with the Court of Appeals that legislative immunity does not shield Members of Congress or their agents from liability for violations of law committed during the course of field investigations, but finds it unnecessary to reach the question of "whether even properly conducted field investigation would fall outside the protection of the Speech or Debate Clause." Ante, at 12 n. 20. Although I agree that the illegal acts alleged by respondents are not protected by the Speech or Debate Clause, I reach this conclusion by a somewhat different analysis. In my view, our past
cases clearly establish that the Speech or Debate Clause immunizes even violations of law committed in the course of performing functions covered by the Clause but that investigatory activities other than by means of formal process are not protected by the Clause.

Our past cases clearly establish that "once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975). It should be obvious that an immunity that would only protect when no illegality was alleged would be absolutely useless. Immunity from suit or criminal prosecution is of assistance only when a Member of Congress or a legislative aide is alleged to have engaged in activities that would violate the law if done by a private citizen. For this reason, we have held that "Congressmen and their aides are immune from liability for their actions within the 'legislative sphere,' Gravel v. United States [408 U.S. 606, 624-625 (1972)], even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." Doe v. McMillan, 412 U.S. 306, 312-313 (1973).
Nevertheless, the allegations that petitioners illegally inspected and transported to Washington the documents seized from respondents clearly relate to conduct outside the coverage of the Speech or Debate Clause. This aspect of the case is governed by Gravel v. United States, 408 U.S. 606 (1972), which held that the informal gathering of information, even at the direction of a Member of Congress for valid legislative purposes, is not itself a legislative act within the meaning of the Speech or Debate Clause. Of course, there can be no doubt that the obtaining of information by informal means for legitimate legislative purposes is a proper and appropriate activity. But as Gravel recognized:

"That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. . . ."

"Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." 408 U.S., at 625.

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), which held that Members and their aides are immune from liability for acts relating to the issuance of subpoenas, did not in any way impair the vitality of Gravel's holding that investigatory activities are normally outside the scope of the Speech or Debate Clause. The Court in Servicemen's Fund carefully distinguished Gravel on the ground that it dealt with investigative activities which, unlike the use of compulsory process, are not essential to legislating. Although Servicemen's Fund probably goes further than any of our cases in protecting activities removed from the actual deliberative processes of Congress, which constitute the core of what the Speech or Debate Clause protects, it did not purport to limit the holding in Gravel that investigatory activities not involving the issuance of formal process are not so essential to legislating as to come within the protection of the Clause.

This distinction between the exercise of the power to obtain information by means of subpoena and the use of other less formal modes of investigation is supported by important considerations which are implicit, though perhaps not fully articulated, in Gravel and Servicemen's Fund. First, the subpoena power, unlike informal investigative methods, is essential to the gathering of information required to enact legislation. If Congress were deprived of all means of acquiring information other than by means of compulsory process, it would still be able to perform its
legislative functions, though perhaps less expeditiously. Without the power to acquire information by means of subpoena, however, the ability of Congress to fulfill its legislative responsibilities would be seriously curtailed. Second, although the use of the subpoena power is subject to abuse, its inclusion within the Speech or Debate Clause does not place it completely beyond judicial control. Unlike the legality of activities such as the seizure of materials involved here, even though Speech or Debate Clause immunity applies, the legality of a subpoena may be judicially tested by its recipient if an effort is made to enforce it against him. If petitioners are immune for the investigatory acts here alleged, however, respondents and those similarly situated would have no means whatsoever of challenging conduct which impinges upon their legal rights. Finally, the issuance of a subpoena is a formal act which generates an official record. It may be expected that these considerations, particularly the fact that the use of the subpoena power will frequently be exposed to the scrutiny of the public and of other legislators, will generally persuade legislators to exercise the subpoena power with restraint. These considerations persuade me that Gravel and Servicemen's Fund drew the appropriate line between investigatory activities which the Speech or Debate Clause does and does not immunize at the point separating the use of the subpoena power and other conduct related to the gathering of information.
The United States makes the additional argument that even if the actual inspection and transportation to Washington of the McSurelys' documents are not legislative acts for Speech or Debate Clause purposes, nevertheless Senator McClellan may not be held liable consistent with the Clause for doing no more than authorizing these acts. It does not question that under the ordinary rules of liability for common law and constitutional torts one who orders or conspires with others to violate the law stands in the same shoes as those who physically commit the violation but urges that legislative immunity shields Members of Congress from liability for directing the actions of others. This conclusion is said to be compelled by Kilbourn v. Thompson, 103 U.S. 168 (1881), which held that although Congress lacked power to punish a witness for contempt and that therefore those who participated in Kilbourn's arrest were liable, the Speech or Debate Clause protected House Members who merely voted for the resolution authorizing Kilbourn's arrest. But the activity it held to be protected in Kilbourn was not that of ordering or authorizing but rather only that of voting. Significantly, the Court predicated its holding upon the assumption that the Members themselves "did not in any manner assist in the arrest of Kilbourn or his imprisonment, nor did they order or direct the same, except by their votes and by their participation as members in the introduction of, and assent to, the official acts and proceedings of the House..." (Emphasis added.) 103 U.S.,
at 200. Indeed, the clear implication of Kilbourn is that the Court would have held House Members liable if they had personally advised or instructed the sergeant-at-arms in connection with the actual making of the arrest.

Subsequent cases have interpreted Kilbourn as standing only for the proposition that voting is so integral to the legislative process as to be, at least absent extraordinary circumstances, privileged regardless of the invasion of rights resulting from it. In Powell v. McCormack, 395 U.S. 486, the Court on the authority of Kilbourn dismissed the action against House Members who did no more than vote for the resolution barring Representative Powell from the House, but held that it could be maintained against those employees of the House who took or threatened to take actions to prevent Powell from taking his seat. Indeed, Powell, like Kilbourn, reserved the question of whether even the act of voting was privileged under all circumstances by declining to reach the question "whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against the Members of Congress where no agents participated in the challenged action and no other remedy was available." 395 U.S., at 506 n. 26. See Kilbourn, 103 U.S., at 204-205.

Even if the matter were previously in doubt, Gravel clearly established that the Speech or Debate Clause does not provide Members with immunity for complicity in illegal actions to which immunity
would not otherwise attach just because they only directed or authorized the actions. First, Gravel held that the Speech or Debate Clause is concerned with activities rather than persons and that Senators have no more immunity than their aides. Secondly, Gravel did not restrict inquiry into conduct by Senator Gravel and his aide to acts of a physical nature or to acts which implemented broad directives. The Court concluded that conduct by a Senator or his aide not integral to the legislative process was outside the protection of the Speech or Debate Clause even if it consisted of no more than the issuance of orders and requests or the entering into of arrangements which were ultimately implemented by others. It specifically held that Senator Gravel's arrangements with Beacon Press to publish the Pentagon Papers was not protected speech or debate and that inquiry could be made into any such arrangement. This holding forecloses the contention that communications between Gravel and Beacon Press or between Gravel and his aides would have been protected if they consisted of no more than orders or requests relating to the publication of the Pentagon Papers which were later carried out by others. Similarly, Gravel permitted inquiry into any activities or knowledge possessed by Gravel or his aide relevant to determining how the Pentagon Papers came into the Senator's possession. Again, it is clear that the Court did not regard any conduct by Gravel relating to the
obtaining of the Pentagon Papers -- even a telephone call from him to a third party requesting their production or an order to an aide to do the same -- as being within the scope of the Speech or Debate Clause. Gravel stands for the proposition that Speech or Debate Clause immunity protects acts integral to the legislative process such as voting and speech during formal proceedings, but does not attach to individual member functions such as authorizing aides and supervising them with respect to an infinite variety of activities. 5/

It is thus sufficiently clear to me that absolute legislative immunity under the Speech or Debate Clause does not attach to investigators such as Brick who are sent into the field to gather papers, evidence or information, or interrogate individuals or representatives of organizations. It is incredible to me that congressional investigators should have absolute immunity under the Clause from any liability for investigative acts in the field, no matter how invasive of privacy or injurious to persons or property, although for the same acts their counterparts in other agencies such as the Federal Bureau of Investigation or the Internal Revenue Service would not be entitled to absolute immunity but only to a qualified immunity.

It also follows for me that Senator McClellan would have been immune if he did no more than subpoena the materials in question from the McSurelys or Ratliff, or if he had merely voted
for a resolution instructing Brick to act as he did. The latter situation would have been analogous to Kilbourn. To hold, however, that field investigations are covered by the Speech or Debate Clause and that Members of Congress who actually order or urge the commission of illegal acts by means other than voting, debating, and otherwise participating in formal floor or committee sessions are therefore immune from liability would represent a major and unwarranted extension of the coverage of the Speech or Debate Clause.
No. 76-1621

II

This conclusion, as I see it, should end the "investigation" phase of this case and to that extent the judgment of the Court of Appeals should be affirmed. Unfortunately, that is not the case.

A

MR. JUSTICE POWELL, and two other Justices conclude that although respondents have alleged conduct on the part of all four petitioners which is outside the protection of the Speech or Debate Clause, the Court of Appeals erred in not entering summary judgment in behalf of petitioners McClellan, O'Donnel, and Alderman. As I have said, I doubt very much that this issue is properly before the Court. First, the issue is not subsumed within either of the questions presented in petitioners' petition for certiorari. Only the first question is remotely related to the claim, and it raises only the issue of whether the Speech or Debate Clause "bars a private suit for damages against a Senator and his aides, alleging that some of their investigatory activities...were improper or unconstitutional." (Emphasis added.) The additional claim now addressed by MR. JUSTICE POWELL that
even if such a suit is not barred three of the petitioners were nevertheless entitled to summary judgment on the basis of the record before the Court of Appeals is not comprised within that question. Secondly, petitioners failed to raise this issue in either the District Court or the Court of Appeals. Their motion to dismiss in the District Court, like Question One presented here, raised only the issue of whether the Speech or Debate Clause afforded absolute immunity. Nor was the present proposition that even on the Court of Appeals view of the Speech or Debate Clause, petitioners were entitled to summary judgment on the basis of affidavits submitted presented in the Court of Appeals. Since three Justices nevertheless are prepared to enter judgment in favor of three of the petitioners on the basis of this contention, however, I proceed to address it.

B

I agree that under Fed. R. Civ. Proc. 56 if a defendant comes forward with affidavits specifically denying the allegations in complaint, the plaintiff must come forward with specific factual allegations which create a material issue of fact, or adequately justify his inability to do so, if he is to avoid the entry of summary judgment. But no principle
is more basic to summary judgment procedures than that a defendant is not entitled to relief unless he demonstrates that he "is entitled to judgment as a matter of law."

Rule 56(e). See Adickes v. S. H. Kress Co., 398 U.S. 144, 159-161 (1970). This is true even if a plaintiff remains silent. On the record before us, the defendants in the trial court, petitioners here, were not entitled to summary judgment because they failed to even allege facts which would constitute a defense to the charge that they had complicity in the inspection and transportation to Washington of the McSurelys' documents.

The only affidavit submitted by any of the petitioners 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 deny respondents' allegations that he was responsible for and involved in Brick's allegedly illegal inspection and transportation of the relevant 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.

MR. JUSTICE POWELL recognizes that the Senator's affidavit fails to specifically deny respondents' allegations of Fourth Amendment violations, but argues that the Senator's general assertion that all actions by himself and the other petitioners in relation to the McSurelys "were taken pursuant to a lawful congressional investigation within the legislative authority of the Senate of the United States as assigned to said Subcommittee," app. 50, ¶ 11, must be read broadly as denying all of respondents' charges because at the time it was filed Senator McClellan could not have been expected to understand the nature of respondents' allegations. Ante, at 17 n. 24. I find this untenable. If Senator McClellan did not understand the nature of respondents' allegations of Fourth Amendment violations, he was hardly in a position to
deny them. There is no support whatsoever for the proposition that a court may enter summary judgment on the basis of speculation concerning what defendant would have denied or alleged under circumstances other than those on the basis of which he filed his sworn statement. In any event, one could as readily speculate that if Senator McClellan had denied the charges, respondents would have come forward with affidavits creating material issues of fact. Furthermore, apart from general principles of summary judgment procedure, Senator McClellan's assertion that he and the other petitioners engaged only in legislative acts cannot be plausibly construed as a broad denial of committing illegal acts, because it has been the position of petitioners at every stage of this proceeding that all of the illegal acts with which they were charged were within the scope of their legislative duties and, under their view of the law, absolutely protected by the Speech or Debate Clause regardless of their legality.

On this record, therefore, I cannot agree that summary judgment should be entered for petitioners. That issue should be first dealt with on remand to the District Court, as the Court of Appeals ordered.
MR. JUSTICE POWELL would remand respondents' claim that petitioners illegally disseminated some of the seized materials to the Internal Revenue Service (IRS) to the Court of Appeals for consideration of whether it is within the scope of the amended complaint. But in my view it is quite clear that the Court of Appeals has already passed upon this matter. Otherwise one must believe that the Court of Appeals unanimously held that the claim of dissemination should not be dismissed on the ground of Speech or Debate Clause even though it "did not believe that the amended complaint encompassed this claim." Ante, at 23. There is nothing in the opinion below which supports such an unlikely supposition.

Paragraph 19 of the amended complaint alleges that Brick "exhibited [the McSurely documents] to persons whose names are unknown to the plaintiffs. . . ." App. 31-32. Footnote 25 of the Court of Appeals opinion, which I agree 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." It is 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 logical conclusion to 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 doubt that the allegation of dissemination in the amended complaint is broad enough to encompass dissemination to the IRS.

On the merits, I agree with the unanimous conclusion of the Court of Appeals that *Gravel v. United States*, 408 U.S. 606 (1972), and *Doe v. McMillan*, 412 U.S. 306 (1973), foreclose the contention that dissemination of materials to an agency of the Executive constitutes a legislative
act within the scope of the Speech or Debate Clause. 18
Gravel held that the dissemination of the Pentagon Papers by means of private publication and the arrangements made with respect to this dissemination were not privileged. Again, the Court did not question that the Senator's dissemination of the Pentagon Papers was related to his official duties and performed in his official capacity but nevertheless concluded that immunity was not available because the dissemination of information outside of Congress is "in no way essential to the deliberations" of Congress. 408 U.S., at 625. Doe v. McMillan went further and held that the Speech or Debate Clause does not immunize from private suit those who, even with the formal authorization of Congress, distribute materials which infringe upon the rights of individuals.

The only conceivable distinction between the disseminations alleged in Gravel and Doe v. McMillan and that alleged here is that the former were directed toward the general public while the latter is directed toward an agency of the Executive. The holding in neither case, however, was limited to public dissemination. Both types of dissemination undoubtedly serve many valuable functions. But Gravel and Doe v. McMillan stand for the proposition that the Speech
or Debate Clause does not generally protect conduct relating to or in aid of the legislative process but only acts integral to the actual enactment of legislation. See also United States v. Brewster, 408 U.S. 501, 514-516. Moreover, I am unable to discern any reason for concluding, and petitioners advance none, that the dissemination of information to agencies of the Executive is more integral to the enactment of legislation than the communication of information to the general public. As Doe v. McMillan explained during the course of its discussion of why the dissemination of information beyond the confines of the Congress was not privileged: "Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct 'though generally done, is not protected legislative activity.'" 412 U.S., at 313, quoting from United States v. Gravel, 408 U.S., at 625.

Accordingly, I would affirm the judgment of the Court of Appeals in its entirety.
Although plaintiffs have alleged Brick's involvement in possible actionable conduct with sufficient factual particularity to permit trial to proceed as to him, the record at present is silent on the involvement of defendants McClellan, Adkerman and O'Donnell "in any activity that could result in liability." Dombrowski v. Eastland, 387 U.S. at 84. Plaintiffs allege that the latter defendants were acting in concert with Brick in the actions that are pertinent. If that is so, they enjoy no greater immunity for conduct not "essential to legislating" than Brick, their agent. Of course, an allegation is not proof. But at this stage of the case, given that the argument of parties thus far has been drawn in terms of whether or not the Speech or Debate Clause erects a complete barrier to this action, we are unable to say on the basis of the undisputed facts that the other federal defendants are constitutionally entitled to summary judgment excusing them from further inquiry, even though Brick is not. The path remains open for these defendants to make a renewed motion for summary judgment on the ground that the McSurelys have failed to adduce specific facts "which afford more than merely colorable substance," Dombrowski v. Eastland, 387 U.S. at 84, to the assertion of concert with Brick in conduct that survives the legislative immunity bar. Since the Speech or Debate Clause acts as an exclusionary rule and testimonial privilege, as well as substantive defense, plaintiffs must prove their case through evidence which "does not draw in question the legislative acts of the defendant Member of Congress [and his aides] or [their] motives for performing them." United States v. Brewster, 408 U.S. at 526, quoting United States v. Johnson, 383 U.S. at 185."
(continued) The Court of Appeals ordered on remand that the District Court, among other things, make the "necessary determination" as to "whether any other federal defendants acted in concert with Brick in action for which he enjoys no legislative immunity."
553 F.2d 1277, 1286-1288, 1303 n. 3

Doe v. McMillan, 412 U.S. 306 (1973), provides no support for petitioners' contention that investigations conducted by means other than formal process are protected by the Clause. In that case, the Court held only that members of a congressional committee and their aides were immune insofar as they engaged in the acts of introducing materials at committee hearings, referring a committee report to the Speaker of the House, and voting for the publication of the report. This conclusion was predicated upon the holding in Gravel that the Senator was immune from the imposition of liability for any actions which occurred during the meeting of a subcommittee, including the reading of the Pentagon Papers. Doe did no more than once again recognize that "'voting by Members and committee reports are protected' and 'a member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the "sphere of legitimate legislative activity."
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\text{Doe, 412 U.S., at 311-312, quoting from Gravel, 408 U.S., at 624. Significantly, Doe also held that the Speech or Debate Clause does not immunize from private suit those who,}
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(continued) even with authorization from Congress, distribute materials which allegedly infringe upon the rights of individuals. See supra, pp. All that Doe immunized were formal proceedings at the core of the legislative process.

The clear implication of Dombrowski v. Eastland, 387 U.S. 82 (1967), is also that Members are not immune from liability for membership in a conspiracy designed to violate the legal rights of others. Although the Court held that the complaint against Senator Eastland should be dismissed, it did so only on the ground that he was entitled to summary judgment because of his lack of participation in the conspiracy alleged. See infra, p.

In Doe v. McMillan, 412 U.S. 306 (1973), the Court held on the basis of Kilbourn and Gravel that House Members and their employees could not be held liable for introducing materials at a committee hearing, referring the report which contained the materials to the Speaker of the House, and voting for publication of the report. Again, however, Kilbourn was interpreted not as protecting Members of Congress from liability for ordering or supervising the commission of illegal acts but rather as immunizing acts
5/ (continued) integral to the legislative function such as voting and other forms of conduct by Members on the floor or during legislative committee hearings, even though such formal actions actually authorized unconstitutional conduct.

6/ The questions presented in the petition, Pet. for Cert. 2., and repeated in petitioners' brief are:

"1. Whether the Speech or Debate Clause bars a private suit for damages against a Senator and his aides, alleging that some of their investigatory activities, in connection with a subject on which legislation may be had, were improper or unconstitutional.

2. Whether the court of appeals properly ruled on an allegation of dissemination of documents that was not presented to or decided by the district court."

7/ App. 45-46.

8/ 553 F.2d 1277, 1285-1286, 1303.