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

Dear Byron:

Please join me.

Sincerely,

[Signature]

Mr. Justice White

cc: The Conference
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:

[Immunity 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
Speech or Debate Clause. Post, at WangDraft 9. The Servicemen's Fund Court, however, referred to Gravel merely as dealing with "actions which were not 'essential to legislating.'" 421 U.S., at 508 (emphasis in original). Nowhere did the Court draw the distinction for which MR. JUSTICE WHITE now contends.
We agree with MR. JUSTICE WHITE, post, at WangDraft 11 and n.4, that a Member of Congress who conspires with aides to violate the constitutional rights of others should stand in the same shoes as those who physically commit the violation. It is precisely this holding, however, which necessitates the rule of Dombrowski requiring that allegations of such conspiracies be supported by facts lending them more than merely colorable substance. In the absence of such a rule, bare allegations of conspiracy would serve to subject Members of Congress and their aides to burdens of litigation, in derogation of the policies of the Speech or Debate Clause.
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.
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
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., 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
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 McGurley 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., Jr.
June 23, 1978

No. 76-1621 McAdams v. McSurely

Dear Chief:

I agree.

Sincerely,

The Chief Justice
lfp/ss
cc: The Conference
SUPREME COURT OF THE UNITED STATES

No. 76-1621


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.

Despite my large investment of time on this case, I think this decision is best for the Court institutionally.
June 23, 1978


Dear Chief:

I agree.

Sincerely,

The Chief Justice

cc: The Conference
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:  

Recirculated:  

1st DRAFT  

SUPREME COURT OF THE UNITED STATES  

No. 76–1621  


Alan McSurely et ux.  

[June —, 1978]  

PER CURIAM.  

The writ of certiorari is dismissed as improvidently granted.  

This was my recommendation to avoid the unsettling effect of these differing opinions as to reach of Speech or Debate Clause  

L78