ORIGINAL

In the

Supreme Court of the United States

JAMES O. EASTLAND, et al.,
Petitioners,
v.
UNITED STATES SERVICEMEN'S FUND, et al.,
Respondents.

No. 73-1923

Washington, D. C.
January 22, 1975

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Washington, D. C.,

Wednesday, January 22, 1975.

The above-entitled matter came on for argument at 1:26 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

HERBERT J. MILLER, JR., ESQ., Miller, Cassidy, Larroca & Lewin, 1320 Nineteenth Street, N. W., Suite 500, Washington, D. C. 20036; on behalf of the Petitioners.

JEREMIAH S. GUTMAN, ESQ., c/o American Civil Liberties Union Foundation, 363 Seventh Avenue, New York, New York 10001; on behalf of the Respondents.

MS. NANCY STEARNS, c/o Center for Constitutional Rights, 853 Broadway, New York, New York 10003; on behalf of the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 73-1923, Eastland against Servicemen's Fund.

Mr. Miller, you may proceed whenever you're ready.

ORAL ARGUMENT OF HERBERT J. MILLER, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. MILLER: Mr. Chief Justice, and may it please the Court:

The petitioners before this Court are the Internal Security Committee of the Senate, its Chairman, Senator Eastland, and several Senators, along with the general counsel of the Subcommittee, Mr. Sourwine.

There are three additional cases involved in this petition. These petitioners are the Internal Security Committee of the House of Representatives, several individual Congressmen members of that Committee, the general counsel, and the investigator of that committee.

I would like to call to the Court's attention that just recently the House of Representatives has voted to transfer the functions of the Internal Security Committee of the House of Representatives to another committee. However, I do not believe it creates questions of mootness in the case here, for the one reason, if for no other, as I read the complaints in those three cases, as not only asking damages specifically against the general counsel and investiga-

tor of that committee, but also requesting damages against the individual Congressmen members.

In any event, the main case, the United States Servicemen's Fund vs. Eastland, does not have that problem.

The question, the basic question at issue here is another chapter and one that this Court has faced on several occasions, as to the power of a coordinant branch of our government.

Here at issue is a subpoena that was served by the Senate Internal Security Committee,pursuant to a resolution, upon a bank.

QUESTION: Who served it, Mr. Miller?

Or does that -- does that appear in the record?

MR. MILLER: I don't believe the record shows who served the subpoena.

QUESTION: Well, they just didn't mail it --

MR. MILLER: I do not --

QUESTION: They just didn't mail it, and I don't suppose the Chairman took it down there.

MR. MILLER: I have assumed that the Chairman did not. All I can go by is what is alleged in the complaint, Mr. Justice White, which says, as to the third subpoena, which is the only subpoena before this Court, that the defendants, which would be Senator Eastland and the other Senators and defendant Sourwine, quote, "caused the subpoena

to be issued."

I find that in paragraph 16 of the complaint.

QUESTION: Doesn't it say -- it must allege that it was served, doesn't it?

MR. MILLER: As I read the complaint, sir, it does not.

QUESTION: Doesn't? Just says it was issued.

MR. MILLER: I believe the record is silent on that.

QUESTION: Unh-hunh.

And all the allegation is that it was issued.

MR. MILLER: The defendant caused the subpoena, quote, "to be issued".

QUESTION: Well, is that -- and that is what the injury is, apparently just from the issuance? Is that all?

MR. MILLER: The complaint then goes on and alleges that the subpoena is void under the First, Fourth, Fifth, Sixth and Ninth Amendments, and says that -- and the Tenth Amendment -- and that the sole purpose of the subpoena is to chill the First Amendment rights of the United States Servicemen's Fund.

Now, the relief requested in the complaint is that the Chemical Bank, to whom the subpoena was addressed, and the Senators and the staff be enjoined from seeking to enforce the subpoena, and also to have the subpoena declared null and void.

The records sought were, according to the evidence adduced at the preliminary hearing before the District Court, and the record is quite sparse on that, apparently dealt with the normal bank records, cancelled, or copies of cancelled checks, bank statements -- although the record is very, very weak on this point.

Also there is no showing as to the number or amount of the records that were in fact in the hands and the custody of the bank.

It is, however, clear -- it is, however, clear, and I think this is a very important part of this case -- that the plaintiffs below and respondents here were seeking records belonging to the bank, the recipients of the subpoena, and were not seeking to enjoin the production of records which in fact belonged to them.

The respondent here is a non-profit corporation, it has a tax-exempt certificate, and has in fact filed with the Internal Revenue Service returns which specify certain contributors to this organization.

The activity of the United States Servicemen's Fund, as shown by the evidence in the court below, was to establish coffee houses adjacent to military bases and to have discussion with respect to many items controversial or not. There was also a demonstration that the primary function of this committee was -- or of the Fund -- to discuss the Vietnam War

and to take whatever steps they could take, by terms of persuasion, education, and similar steps to demonstrate that the Vietnam War was one which should not be a part of the American effort.

QUESTION: Mr. Miller.

MR. MILLER: Yes, Your Honor?

QUESTION: I don't know whether it's of any importance or not, but since the question arose and you have undertaken to answer it about the subpoena, I had thought, and I find that my memory was correct, that on page 13 of the Appendix there is an allegation in paragraph 9 at the bottom, that the Senate Committee, Subcommittee, caused to be served on the Chemical Bank of New York a subpoena duces tecum.

MR. MILLER: If my memory serves me correctly, Your Honor, that is the first subpoena. There are three subpoenas that were served in this case.

The first was withdrawn. I believe that allegation refers to that subpoena. That subpoena was withdrawn.

QUESTION: We're just concerned with the one on 16, then?

MR. MILLER: We are just concerned with the third subpoena.

The second subpoena was served, but the time to comply was so short that at the request of the Servicemen's Fund the Committee withdrew the second subpoena. And then

the third subpoena issued.

And, as I say, as I read the complaint -- as I read the complaint, the only allegation is that defendants caused the subpoena to be issued, and that, sir, is the third subpoena.

The Court of Appeals ruled that there was no immunity attaching to the conduct of the petitioners in this cause, under the speech and debate clause.

I think that the decisions of this Court clearly demonstrate that there is in fact Senatorial immunity with respect to the authorization of this investigation, with respect to the issuance of the subpoena, and, in fact, I would go one step further, even though the fact is not in the record and say with respect to the service of the subpoena.

This Court, in Gravel and in Doe vs. McMillan, has given a careful and thoughtful consideration to the requirement of the coordinate branch of government, namely, the Congress of the United States, to participate in their legislative proceeding without fear, without fear of either intimidation by the Executive or being called before, as the cases say, a potentially hostile Judiciary.

And they have gone further, the cases have gone further and say: and in addition to that, members of Congress should not be burdened with the difficulty of defending suits which are brought against them for acts performed in the

legislative sphere.

Thus, we already have the fact that voting, committee reports, authorizing committee investigations and receiving materials pursuant thereto, introducing material at committee hearing, referring committee report to the Speaker, distributing and using reports for legislative purposes are all within the legislative sphere and immune from any kind of action under the speech and debate clause.

Furthermore, if we prescind from Doe vs. McMillan and the Gravel case, and go back to the case of Dombrowski vs. Eastland and examine what was held there in the Court of Appeals and, in fact, in the Supreme Court of the United States, and we will find that the allegation in that case was that the defendants tortiously conspired to subpoena records in an illegal manner from a Louisiana un-American Activity Committee who had the record belonging to the plaintiff in that case.

The Court of Appeals flatly held that the actions pursuant to that subpoena, in so far as the Senators and the general counsel of the committee were concerned, were absolutely and totally immune.

The Court of Appeals affirmed -- I mean, the Supreme Court affirmed that part of the decision which dealt with the Senator, pointing out that there was no evidence in the record to connect him with any of the activities, with the

exception of the authorization of the subpoena and authorizing its service:

That case is a flat holding that the conduct here is not subject to review but is totally immune under the speech and debate clause.

The other factor which can be drawn from decisions of this Court, the Doe case and Gravel, is that even unconstitutional conduct by members of the Congress and, reading those cases, their aides, if within the legislative sphere, are not subject to review by this Court or any other forum.

That is the holding of those cases.

Furthermore, prescinding from the speech or debate clause and going to the basis of the coordinate branch of government theory, namely separation of powers, the doctrine which was discussed in the Doe case along with the speech and debate clause, and in the Gravel case, points out that the Judiciary, where there is an immunity such as exists under the facts of this case, may not interfere with the action of Congress.

On this I should emphasize, as this Court did in McGrain vs. Daugherty, that the absolute necessity for an informed Congress is the ability to subpoena individuals and to subpoena documents. And that any inhibition on that power is in effect an inhibition on the ability to legislate wisely.

The Court of Appeals pointed out that the documents subpoenaed in this case were bank records and that the evidence that was adduced before the District Court, District Court Judge Gasch, demonstrated that the -- what the real concern of the respondents here were in fact loss of contributions.

Thus we had testimony by professional fund raisers and by representatives of this organization that there were anonymous contributions, there were contributions by cashier's checks from brokerage accounts, there were contributions from corporations that were, quote, "fronts", unquote, from individuals and, in fact, there was one example -- and I don't know whether it was hypothetical or not -- where the individual testified that the real anonymity was achieved where you had lunch with a donor and took cash at the lunch table.

These were the types of anonymous contributions which the respondents apparently felt would be disclosed should the bank records be made public.

Although, I hasten to add, the record does not show what the bank record in fact contained with respect to the names of contributors or not.

This brings us to a very interesting part of this case because here we have an attempt to equate the raising of funds, the contributing of money, by a non-profit, tax-exempt

-- by a ruling -- organization, and as distinguished from any showing that the membership of that organization is connected with or tied to contributions.

Now, the argument has been made, and I must emphasize to the Court, in the brief filed by respondents, they state at page 41, 42 or 43 that the Speech or Debate Clause was not mentioned by the government, who represented the respondents before the Court of Appeals.

And I think if you will look at the brief that was filed on behalf of these respondents in the Court of Appeals, there is a long and extensive section on the Speech or Debate Clause, citing Dombrowski, Doe v. McMillan, and all of the other cases.

I would not want the Court to think that this issue was one just raised before this Court, because it has been raised in the trial court and in fact before this Court.

But we are now in a position where what the respondents are arguing and have argued is that bank records, which show potentially the source of contributors, if they not be in cash, is something which is covered by the First Amendment, freedom of association.

And I submit to the Court that nowhere has this Court or, to my knowledge, any other court gone so far.

If, in fact, records of a bank which deal with moneys received by an organization, whether it be the United States

Servicemen's Fund or perhaps the Republican or the Democratic Party --

QUESTION: Mr. Miller, this is really a separate argument, then, from your Speech or Debate Clause argument, isn't it?

MR. MILLER: It is, Your Honor.

QUESTION: Because if you win on the Speech or Debate Clause, it doesn't matter whether these records are protected or not.

MR. MILLER: That's correct. That is correct. And that's what --

QUESTION: It's a separate argument from your separation of powers argument too, isn't it? There's a third argument you think.

QUESTION: Well, Mr. Miller, I'm not so sure about that, that if you win on your Speech or Debate Clause issue the case is over.

MR. MILLER: I believe it is, sir.

QUESTION: Well, I would have thought that if the -- let's just assume that the rights of the organizations are violated by the amendment, in the sense that -- and then the -- in order to get off the hook you have to plead legislative immunity, Let's just assume that.

Now, if they send a man out to serve a subpoena or, say, serve a search warrant or to make an arrest, and the

arrest or the search is unconstitutional, I would suppose the fellow they send to do that could be held liable for damages. That was Kilbourn v. Thompson.

MR. MILLER: Under Kilbourn vs. Thompson, that is precisely the situation.

QUESTION: Well, I would suppose then that if the person who is serving the subpoena is committing an unlawful or unconstitutional act, he could not only be held liable for damages but he can be enjoined -- he can be enjoined.

MR. MILLER: If in fact it is beyond the legislative sphere, --

QUESTION: Well, it's a --

MR. MILLER: -- he can be enjoined.

QUESTION: Well, it's --

MR. MILLER: My argument, if the Court please, is that it is not.

QUESTION: Well, I understand. Issuing the subpoena, you say, is in the legislative sphere.

MR. MILLER: Yes, sir.

QUESTION: But if the subpoena itself is -- if it invades some constitutional rights of some others, at somewhere along the line, at least where it actually impinges on somebody, Kilbourn v. Thompson would indicate that courts can intervene. The legislators who order the unconstitutional act cannot be held liable for damages, and they can't be enjoined

from issuing another one. But I would suppose the bank can be enjoined from complying.

MR. MILLER: I would --

QUESTION: I know.

MR. MILLER: That is a part of the equation, if the Court please, where eventually you would end up: Can a third party, who controls the records, in fact be enjoined? But --

QUESTION: I think in Gravel -- in Gravel and the other cases, we had expressly said that a Senator, neither a Senator nor his aide can go out and break into somebody's house to illegally, in order to gather information for a hearing.

MR. MILLER: I remember your language very well.

QUESTION: Yes, I thought you would.

[Laughter.]

QUESTION: You never got to the third-party question here, did you, because the banks were never served.

MR. MILLER: The banks were in fact defendants in this suit, they just did not participate in the appeal.

QUESTION: Well, did you get to the point, according to the record, where the banks were about to produce the records?

MR. MILLER: In one of the House of Representatives cases, one or more, the bank did in fact produce some of the

records.

But those three cases, I want to emphasize to the Court, really are -- while they're a part of this case, they are in effect a tagalong, because everyone has treated the Eastland case as the case that governs all of them, even though, when you get down into the facts, you realize there are some different factors with respect to the other three. But the District Court and the Court of -- well, the District Court did not deal with the House of Representatives cases, they went before other judges and were, the subpoenas were enjoined because the Court of Appeals had entered a temporary restraining order against the Eastland subpoena.

QUESTION: Well, Mr. Miller, let me just ask you: Suppose that the Senators and the Congressmen and the Committee had never been parties to this suit, the only party to the suit was the bank, and the case -- the complaint merely asked -- well, it asked for a declaratory judgment and an injunction against the bank. Declaratory judgment that, being forced to produce these records would violate the constitutional rights of the organizations.

And would you say that -- the bank certainly can't claim legislative immunity?

MR. MILLER: Mr. Justice White, --

QUESTION: Can it?

MR. MILLER: Mr. Justice -- let me -- of course it

cannot claim legislative immunity. But the case you put, it would be fine, and if that is -- if that is the way the Court will treat the opinion below, and leave within the legislative sphere the Senators and the aides, because they were in fact totally immune by their activities under the Speech or Debate Clause, then and only then do we address the question: Does there stand -- can an individual whose records are with the bank file some type of an action against the bank; a motion to quash or subpoena --

QUESTION: But the bank isn't --

MR. MILLER: -- that, sir, is not the case that we have before the Court today.

QUESTION: But the bank isn't off -- doesn't get off the hook just because the Senators might be immune?

MR. MILLER: I would not argue that to the Court, because --

QUESTION: Well, I thought you were a while ago.

MR.MILLER: No, sir, not at all.

What I'm arguing is that under the Speech and Debate Clause, under the concept of separation in powers, the individual Senators and Congressmen and their staff aides and counsel, under the facts of this case, are totally immune from the conduct alleged here under the Speech and Debate Clause.

That is, I think, a flat -- that is my flat position

and it is one that is supported by existing case law, recent and past.

QUESTION: What is the impact, right today, here and now, of the judgment of the Court of Appeals on the Senators?

MR. MILLER: They are -- the Court of Appeals reinstated -- the Senators were dismiseed as defendants by the trial court, the Court of Appeals reinstated them and sent the case back for further proceedings, suggesting that if some type of relief was necessary against the Senators, that perhaps -- and they picked up a suggestion that a declaratory judgment had been requested -- perhaps it would be appropriate to enter a declaratory judgment.

However, there was no requirement, as I read it in the Court of Appeals decision, that it be limited to a declaratory judgment.

QUESTION: Well, Mr. Miller, you said that, I gather, the banks aren't here; they didn't appeal what?

MR. MILLER: They did not appeal.

QUESTION: From what? What did they --

MR. MILLER: They took no steps with respect to --

QUESTION: What was the judgment against the bank?

MR. MILLER: There was no judgment against the bank.

QUESTION: Right.

MR. MILLER: The Court denied the motion for injunc-

tion against the Senate Committee and the Senators.

The Senators appealed. The Court of Appeals reversed and sent the case back.

The banks did not, to my knowledge, participate in the Court of Appeals.

QUESTION: Well, so that, on remand, is there open whatever remedy may issue against the banks?

MR. MILLER: I do not know the answer to that. I would -- I really don't understand quite where the banks fit into this in the trial court.

QUESTION: The one thing is sure, that the Senators are kept in the case and not dismissed by the Court of Appeals?

MR. MILLER: Absolutely.

QUESTION: And there's a judgment -- there is, at least, authorized the judgment to be entered against them.

MR. MILLER: The Court of Appeals decision authorizes a judgment against the Senators. And if I say so myself, it would be the only time, to my knowledge, that any such type --

QUESTION: But if we should reverse that, Mr. Miller, there will still be, in this lawsuit, something that involves the banks?

MR. MILLER: The banks are, as I understand it, are still defendants, and --

QUESTION: So even if you win, this lawsuit is not

completely over?

MR. MILLER: I assume that they could still proceed against the banks, to -- the banks are defendants unless --

QUESTION: And if they do in that circumstance, your victory on the Speech or Debate Clause will not assist the banks any, in their defense of the lawsuit.

MR. MILLER: I would think not, Your Honor. I would think not.

But let me address myself to the -- quickly, to the First Amendment question here, because I don't think -- prescinding from the Speech or Debate Clause, I don't think there is a First Amendment question here.

Because if bank records are covered by the First Amendment to the Constitution, then this Court is going to face that issue when you get to the question of political contributions by your major political parties.

And I would submit, if the Court please, that if you can bar the production of records of contributions, because of associational concepts under the First Amendment, then the reform legislation with respect to campaign contributions is going to be a matter that's going to have to be either separated or going to have to be ruled is not covered.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gutman.

ORAL ARGUMENT OF JEREMIAH S. GUTMAN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GUTMAN: Mr. Chief Justice, and may it please the Court:

The subpoenas in each of these cases were in fact served, and the record is very clear that they were in fact served.

The problem as to the banks is jurisdictional.

A whole series of these actions were begun, the first one is not now before the Court, that was an action in the Southern District of New York, called Liberation News Service, which held that New York was the improper venue for beinging an action to get a determination of the validity of such a subpoena as we have involved in these cases.

Therefore, the matter had to come down to the District.

In the prime case here, U. S. Servicemen's Fund, the bank is a New York City bank, Chemical Bank New York Trust Company, which is not present in the District of Columbia.

Because of the exigencies of time, that is, that the subpoena was served and was returnable so quickly, and the fact that part of the information was in fact delivered by a bank before the depositor had notice of the service of the subpoena, quick action had to be brought, and so an action was immediately brought in the District, without even attempting

to get jurisdiction in the District of Columbia over the New York Bank; was brought on quickly before the trial court, a temporary stay was denied and an emergency stay was granted by the Court of Appeals, and issue was joined in that way.

Because of the -- ine one of the -- in two, rather; in two of the three House cases, the bank is a District of Columbia bank, so there is jurisdiction over those banks in those cases. But that's not so in the prime case, U. S. Servicemen's Fund.

The Chemical Bank New York Trust Company is not before the Court, because it was never properly served.

QUESTION: So, in that case, the only parties are the congressional parties?

MR. GUTMAN: The congressional parties and staff.

QUESTION: Well, I include the staff in that.

MR. GUTMAN: Yes, Your Honor.

QUESTION: So if you lose out here, that's the end of this case?

MR. GUTMAN: Yes, Your Honor.

QUESTION: Right.

MR. GUTMAN: What Judge Tuttle for the Circuit ordered in his remand to the District Court --

QUESTION: Well, I take it, then, if you lose on the immunity question, the case is over?

MR. GUTMAN: We have to win if --

QUESTION: I mean it's over as against these congressional parties?

MR. GUTMAN: If they are immune from declaratory or injunctive relief --

QUESTION: Yes.

MR. GUTMAN: We don't even ask for damages, Mr. Miller misread our complaint --

QUESTION: Yes, I understand.

MR. GUTMAN: -- we didn't ask for damages, and never did.

If there is immunity of the -- either the staff or the Congress members or both, as to execution of process, --

QUESTION: Yes?

MR. GUTMAN: -- with respect to declaration or injunction, we're dead. Sure.

QUESTION: Well, then, you never reach the First Amendment question.

MR. GUTMAN: Well -- right. I have to reach the First Amendment question to show that process -- that I ought to get a declaration or injunction.

QUESTION: Well, I understand that. I understand that.

MR. GUTMAN: Right. But if these people are immune from judicial review of their actions --

QUESTION: For what?

MR. GUTMAN: Enforcing the subpoena. The subpoena --

QUESTION: You mean you think you could get an injunction against a Congress attempting internally to get a contempt declaration?

MR. GUTMAN: No. No. I can't -- I don't believe that this Court could prevent the Congress, the congressional Subcommittee or Committee from voting to refer for contempt up the line, from the Subcommittee to Committee to House, et cetera.

But I do think, as in Stanley v. Willis in Chicago, you could get an injunction against prosecution. And that was done in that case by adding the prosecutor.

Now, what Judge Tuttle did here --

QUESTION: Well, against the Senator?

MR. GUTMAN: In that case the Senators were found not to be necessary parties.

QUESTION: Well, I --

QUESTION: Was that in this Court?

MR. GUTMAN: No.

QUESTION: -- I ask you again, would you -- are you insisting that you're entitled to a judgment like that against the Senators?

MR. GUTMAN: At this point, no, Your Honor. At this point, no.

What I think happened here is when Judge Tuttle

ordered a remand, what he said was: I'm going to put these congressional people back so that there can be a hearing in the District to fashion whatever relief may be appropriate, depending upon what can be developed as to the procedures and responsibilities of the various staff members of the Committee.

And he said the District Court should be generous in adding whatever parties may be necessary in order to give relief.

And those are staff people. And I think complete relief could be granted, once we know the facts.

If the Court please, with the permission of the Court,our arrangement had been that Ms. Stearns was going to deal with Speech or Debate, and I was going to deal with First Amendment and the other issues, but I seem, in response to Your Honor's questions, to be getting into her territory.

So, if I may, I would like to reserve for her the responses in this area.

But, of course, the First Amendment issue is basically the whole thing. If you buy Mr. Miller's argument that bank records of a membership organization are not protected by the Alabama and Louisiana and Florida, and so on, cases, and particularly the Arkansas case, Pollard v. Roberts, well, then, we're finished; we never reach Speech or Debate.

And it seems to us that in contemporary society,

where it is impossible to function without using the facilities of a bank to clear your funds, whether they're cash funds taken at a luncheon table, as Mr. Miller suggests, or they're cashier's checks, brokerage checks or direct checks from individuals that are identifiable, the fact of the matter is that these checks are microfilmed.

And it's these very microfilms which were requested in the very broad subpoena which was served in these cases.

Those bank records, in effect, are the membership lists. And in Pollard v. Roberts, which this Court affirmed, the three-judge court on which Mr. Justice Blackmun sat, it was exactly the case: it was the Republican Party of Arkansas and an attempt was made to subpoena the bank records, and, at a suit of an officer of the Republican Party intervening as the real party at interest, just as U. S. Servicemen's Fund here comes in as the real party in interest, the Court held that indeed the bank records are precisely the equivalent of the NAACP lists in the Alabama and Florida cases. And that they should, the production thereof was enjoined.

And I see no distinction here. And if this kind of thing, this kind of protection is not afforded to bank records, given modern society and the manner in which practically all membership organizations work, you're going to be able to destroy membership organization's anonymity and privacy.

Almost every membership organization must maintain

not only a bank account, in which the depositor's checks are routinely microfilmed, so that the name and address of the drawer of each item is available, but they also maintain their membership lists upon computerized banks for purposes of sending out their promotional mailing, and their dues' notices and whatever else they do.

These things are the functional equivalent of the membership lists which, before modern mechanics of office management, were maintained in a secretary's file drawer in the office of the organization itself.

QUESTION: Of course you've got more than that, too, aren't there, Mr. Gutman? They've got financial information in addition to ways of identifying them.

MR. GUTMAN: Of course, they have.

The problem here is, if the subpoena had been served upon the organization itself and, warranted, broad-raning as it is, we've got a good Fourth Amendment argument against the subpoena, too, of course, the organization would be able to respond and to say: this much we think you're entitled to, and this much we think you're not.

If, as is alleged in the arguments in the lower courts here and as stressed in Judge MacKinnon's dissent below, what they're really after is to find out whether there are subversive contributors or foreign governmental contributors to this plaintiff, or the respondent here, then the

question could be addressed in just that way.

QUESTION: But the one that struck me about the Court of Appeals opinion was the absence from it of any of the balancing type of reasoning that you get in the Barenblatt case and other types of things, where you're saying, basically, what is Congress trying to do? What are the First Amendment interests?

Quite apart from the Speech or Debate Clause, it seems to me the Court of Appeals just concluded your clients did have a First Amendment interest, therefore that -- it was all over.

MR. GUTMAN: Yes, because the burden is on the government.

There was a trial here, there were two trials, there was a trial on the preliminary injunction and then it was remanded with a stay by the Court of Appeals; when that was denied, and the Court of Appeals reversed it, sent it back, it was sustained, and said: Hold a hearing on the ultimate --

QUESTION: But you lost both trials.

MR. GUTMAN: Right. Lost both trials. However, we did make a record in which we put in affirmative, uncontradicted proof as to the First Amendment delicacy and the necessity of protecting these records.

At the end of our case, Judge Gasch said to the government attorneys: Do you have any evidence? Do you have

any witnesses?

And they said no. And they rested.

QUESTION: Mr. Gutman, --

MR. GUTMAN: Yes, Your Honor?

QUESTION: -- are any of these organizations membership corporations under the New York State law?

MR. GUTMAN: No, sir. USSF, the prime respondent here is a Delaware membership corporation. The others, I believe, are unincorporated associations in New York.

QUESTION: I was just thinking, because you can get it -- if you're a membership corporation under New York, all you have to do is be a member, and you can get the whole membership list.

MR. GUTMAN: That's quite different, Your Honor, from a member, who is, after all, entitled under the First Amendment, I would guess, to know with whom he's associating. That's one thing. It's another thing for the Congress of the United States to get that list.

QUESTION: Could a member of the staff join it?

MR. GUTMAN: Sir?

QUESTION: Could a member of the staff join the organization and then get the membership list?

MR. GUTMAN: Could he infiltrate it?

QUESTION: Join!

MR. GUTMAN: [Laughing] If he --

QUESTION: Is it open to the public or not?

MR. GUTMAN: Surely.

If --

QUESTION: Mr. Gutman, I'm confused about -- we have four cases here, don't we?

MR. GUTMAN: Yes, sir.

QUESTION: Now, in any of them has the bank been served? Didn't you mention the District of Columbia --

MR. GUTMAN: Yes.

QUESTION: -- bank?

MR. GUTMAN: In the two -- in two of the three, the House Committee cases, the bank has been served in the District of Columbia.

QUESTION: Well now, will we have to reach the First Amendment issue, at least in that case? Or those two cases?

MR. GUTMAN: Well, I guess you have to reach the First Amendment issue, because if -- if we have to prevail on the First Amendment for you to issue an injunction against the bank.

QUESTION: Well, I know, but it wouldn't make any difference even if you did prevail on the First Amendment grounds if the Senators are immune, as respects the Senators.

MR. GUTMAN: Correct.

QUESTION: But if immunity will not dispose of the issue against the bank, then the First Amendment issue is still

in the case. At least one of these cases it's still in it, I take it?

MR. GUTMAN: Right. That's correct.

We have --

QUESTION: Which one is that?

MR. GUTMAN: I think --

QUESTION: Well, don't waste your time looking --

MR. GUTMAN: I think it's PCPJ and Impact -- People's Commission --

QUESTION: People's Coalition for Peace and Justice?

MR. GUTMAN: Yes. People's Commission and National Peace --

QUESTION: Well, do you agree -- you may not agree at all -- that the case, the House cases are not moot?

MR. GUTMAN: I suspect they are. We argued that before.

For two reasons: the House is not a continuing body. These subpoenas were issued in 1970, there have been two Congresses since then.

QUESTION: And now this Committee's been disbanded, hasn't it?

MR. GUTMAN: Now the Committee doesn't exist at all.

So it seems to me that, indeed, the House cases are moot, though this Court has, on many occasions, --

QUESTION: Well, are you asking, would you suggest

they be dismissed, or what?

MR. GUTMAN: No, I think not, Your Honor, because the issue is the kind of issue that --

QUESTION: Well, if they're moot --

MR. GUTMAN: Well --

QUESTION: If they're moot, it's not for you to tell us whether --

MR. GUTMAN: I understand that. But I can suggest that in those cases where the issue is likely to be repeated, and it is of serious dimension and is the kind of thing that tends to escape review --

QUESTION: Well, not in the House cases.

MR. GUTMAN: Well, that Committee isn't going to issue any subpoenas any more; we know that.

QUESTION: But its powers -- whatever is left of those powers, if anything, they are now what -- to the Committee on the Judiciary?

MR. GUTMAN: Judiciary, I believe, yes. But that's not clear because the House is really not organized yet.

QUESTION: You're talking about a subpoena from the Committee on the Judiciary?

MR. GUTMAN: Well, they'd have to issue a new subpoena, I suppose, or a new resolution, and I guess we'd be back up here. That's why I think it would not be inappropriate to proceed.

All the parties have approached the matter as though the House cases are identical with the Senate cases. And I think they are, except for the fact that the House is not a continuing body.

QUESTION: And the Senate is.

MR. GUTMAN: And the Senate, of course, is a continuing body. So we don't have that issue there.

For all purposes below, and, as a matter of fact, we all agreed it wasn't even worth printing the complaints in the House cases, and they're not even in our Joint Appendix, because everybody agreed that whatever happened in the Senate case would be binding on the House issues.

So even if you --

QUESTION: So we just forget the House cases, then?

MR. GUTMAN: I think they're tagalong cases. No, Your HOnor.

QUESTION: Well, I know, but let's assume that the only case in which you'd have -- let's assume you lost on the immunity case, let's just assume that. Then the Senate case is over.

MR. GUTMAN: If, indeed, there's no way to give us relief in the Senate case, then the Senate case is over. I can't see --

QUESTION: Right. So now what about the House cases?

MR. GUTMAN: That's why I say they should not be

treated as moot, because --

QUESTION: So they are moot, you say, but don't treat them, if you lose under the Senate --

MR. GUTMAN: No, I think they shouldn't be treated as moot in any event, Your Honor, because of the recurrence of the problem. That is, what difference does it make whether the Committee -- a subpoena issued next week bears the imprimatur of the House Internal Security Committee, or its old name, the Un-American Activities Committee, or some new name which they give it next week? The issue will really be the same if they try to get the same kind of issues.

QUESTION: Do you want us to decide for all time whether bodies of the House and Senate may issue subpoenas against bank records, for bank records?

MR. GUTMAN: No, I think -- you don't want that -- the issue tendered isn't that broad, Mr. Chief Justice.

QUESTION: Well, it sounded like it there for a moment. You said that --

MR. GUTMAN: What I'm saying is that a subpoena like this, of a membership corporation, against a membership group, addressed to securing from its bank every bit of paper and every record that that bank has concerning that organization, that should be declared to be a void subpoena.

Now, that doesn't mean that such a subpoena against bank records can't be narrowly drawn and, in the proper case,

appropriately served. If they wanted to know, for instance, are there any foreign government contributors to your organization, they might have asked for that kind of record.

What I'm saying is that the organization itself has the standing to make the assertion and seek the relief, even though it is not the record title owner, so to speak, of the documents at issue.

And I believe they have signaled for Ms. Stearns.

MR. CHIEF JUSTICE BURGER: Ms. Stearns.

ORAL ARGUMENT OF MS. NANCY STEARNS,

ON BEHALF OF THE RESPONDENTS

MS. STEARNS: Mr. Chief Justice, and may it please the Court:

This case is actually part of a long line of cases, which begins with Marbury vs. Madison, moves on to Powell vs. McCormack, and only this past summer includes United States vs. Nixon.

In the most recent of those cases, the Chief Justice, speaking for the Court, reaffirmed that it's emphatically the province and the duty of the judicial department to say what the law is.

Here we have the same kind of problem. We have a Subcommittee of the Senate of the United States seeking to evade judicial scrutiny for its acts, just as the Congress of the United States, the House of Representatives of the

United States had in Powell, and the President of the United States had in United States vs. Nixon.

At issue here is a double attempt to evade judicial scrutiny.

QUESTION: Well, to pursue that analogy, if it's offered as an analogy, the case you referred to seems to me to have held that when the Judicial Branch needs records to perform its function, the Judicial Branch will get them, no matter where they are.

Now, if the Legislative Branch needs certain records to perform its function, certainly an argument could be made that the Legislative Branch shall get them wherever they are.

MS. STEARNS: I would suggest there are at least two distinctions. One, of course, is the fact that the records here are First Amendment material.

Another, however, is the subpoena has to be scrutinized. Is it in fact a constitutional subpoena? Are its limits appropriate constitutional limits?

Our problem here is the subpoena that was issued has no group, no judicial authority scrutinizing whether or not in fact that subpoena is constitutional. Certainly --

QUESTION: Was there power in the District Court or the Court of Appeals to narrow the scope of the subpoena, so as, in its view, to avoid disclosing membership as such?

MS. STEARNS: In this particular case?

QUESTION: Yes.

MS. STEARNS: Well, we of course argue that there would have been that power, but there were two problems: No. 1, the subpoena was not initially served on the real party at interest, the party whose rights were at stake, and that was one of the forms of an attempt to evade judicial scrutiny, rather, the subpoena was served on the bank, a stake holder who could not be expected to brave the whole question of contempt and raise the constitutional rights of its depositors. That was the first problem.

The second problem, of course, is amongst the various defenses the Committee is raising, is the question of the Speech and Debate Clause. If they were correct, then the Court couldn't narrow, because the Court couldn't look at the subpoena.

We, of course, argue that the Speech or Debate Clause does not, in any way, prevent a federal court from looking at a congressional committee subpoena, scrutinizing it and considering and determining whether or not it's constitutional.

But both of those attempts were made by the Subcommittee, to evade judicial scrutiny.

The two reasons that we feel that the Speech or Debate Clause is not appropriate and in fact cannot prohibit the kind of judicial scrutiny that we request and feel is

appropriate, first, is because the Speech or Debate Clause is inapplicable to actions for declaratory injunctive relief.

Secondly, because the very subject matter at issue here, a congressional committee subpoena, is not the kind of subject matter that is barred from judicial review by that clause.

QUESTION: What's your authority for the fact that the Speech or Debate Clause doesn't apply to actions for declaratory relief?

MS. STEARNS: Well, let me start by suggesting that there has never been a case that I have seen that has in fact held that. And if we look to the most recent opinions of this Court, we see very, very sharp distinctions made.

In the opinion of this Court written by Mr. Justice White, in the Gravel case, one looks very closely and sees that although damages are prohibited against a House of Representatives members or a Senator, that the actual actions are not necessarily barred from scrutiny.

Therefore, for example, although the writ issued -- excuse me, the authorizing resolution in Kilbourn vs. Thompson could not lead to a damage action against the House of Representatives member that voted for it, the writ itself could in fact be scrutinized.

I think that's a distinction that was drawn quite carefully in the Gravel case.

QUESTION: Yes, but in the Speech and Debate Clause cases, it seems to me one of the purposes of the clause has been said to be that Senators and Congressmen should not be called into court to even answer complaints, within the scope of the clause.

MS. STEARNS: I think that --

QUESTION: And that's part of the -- that's just to keep them from being bothered so much.

MS. STEARNS: There are several things that have been said, one is that they shouldn't be in a position of bearing the burdens of litigation, fearing the possibilities of liability, either civil or criminal.

Here, we would suggest, there's no such fear. If you talk -- because, of course, there's no personal liability. If you --

QUESTION: I know, but if you're going to have to -- if you're right, you have to answer, you have to hire a lawyer, you have to hire Mr. Miller or somebody and pay them a lot of money, and take your time and energies away from your job.

MS. STEARNS: The reality, Your Honor, is that in this kind of a declaratory and injunctive action, in fact, normally the government represents the Committee, as it did in the two courts below, just as the government is involved in defending the constitutionality of that Committee's sub-

poena if there's a criminal contempt case that arises out of it. It's no different.

QUESTION: Well, isn't there another factor here? You speak of having First Amendment rights chilled, isn't there, perhaps a corollary, that if Senators and Congressmen, who cause subpoenas to be issued, find that district courts are entering injunctions against them, with the threat hanging over them of the contempt power to be asserted against a Senator or a Congressman, that that may chill Senators and Congressmen from the performance of their legislative functions?

MS. STEARNS: Your Honor, I would somehow doubt that they would even consider violating an order of a court, so that the problem of contempt is not a realistic one. At least I would certainly hope not.

But the one thing I'd like to suggest is that this is a very, very narrow case.

QUESTION: Do you think that answers the problem?

MS. STEARNS: Well, I think it's part of the answer.

Another part of the answer, however, is that, in reality, we're not talking about every congressional committee subpoena, First Amendment or otherwise. What we're talking about is a very, very narrow range of cases. Those cases where the parties whose constitutional issues are at stake cannot, himself, raise them, because the subpoena has been

served on the third party.

In all other instances, and this of course would bring me to my next argument, in all of the other instances, the constitutional questions that underlie the action are able to be scrutinized. They are able to be scrutinized in a criminal contempt situation.

Here, however, we have this one narrow range.

QUESTION: That's because Congress then seeks the aid of the courts, in order to enforce its subpoena. Here you haven't waited until that stage, you're asking the Judiciary to intervene before the congressional process has even begun.

MS. STEARNS: We haven't -- of course we haven't waited, Your Honor, because we in fact can't wait.

If we had been the parties receiving the subpoena, we would in fact have appeared, we would in fact have raised our constitutional rights. We may or may not have been held in contempt.

Here, however, we did not receive the subpoena. And I think that that probably brings us to the most basic issue in this case, for we would argue that this is really not a Speech and Debate Clause case; for, in fact, the constitutionality of subpoenas is scrutinized by the courts all the time in these criminal contempt situations.

This really is a question of separation of powers,

and when, as the Court of Appeals below and other Courts of Appeals in parallel concert cases said, how to avoid unnecessarily infringing on the rights of a coordinate branch of government.

QUESTION: But no one would contend that the actions of the Justice Department and the Executive Branch, in prosecuting a defendant who had been cited by the Congress for contempt, is a part of the congressional function; and that's why that never arises in those cases. They're always allowed to challenge the constitutionality.

But you're in quite a different situation here.

MS. STEARNS: What we would suggest, Your Honor, is that the situation isn't quite that different at all, and that, in fact, implicit in the subpoena is the obvious possibility that what will follow is the Executive Branch and the Judicial Branch becoming involved in using the full weight of the government against the party upon whom the subpoena has been served.

But here is the one example, where you can't expect the subpoenaed party to raise all these constitutional rights. Because the subpoenaed party is an uninterested, disinterested third party, here a bank.

And, therefore, in this one very, very narrow range of cases, you must in fact, weighing all these matters and particularly weighing the fact that there's a First Amendment

right involved, permit that party, whose constitutional rights are at stake, to come in and have the constitutionality of the subpoena scrutinized.

We are not, and I repeat, asking for any damages against the Committee members, we are not asking for any prosecution of the Committee members. In fact, as Judge Tuttle pointed out below, even an injunction is not necessary.

Similarly, in Powell vs. McCormack, this Court concluded that an injunction was not necessary because certainly a coordinate branch of the government would obey, would honor the ruling of this Court. So all we're really asking for here is the Court to look at this subpoena. It's no different, we would suggest, than the writ under which Mr. Kilbourn was arrested, it is effectively exactly the same thing, to look at that writ, to look at that subpoena, and determine whether or not it's constitutional.

And if it is not constitutional, why, then, declare it unconstitutional in a declaratory judgment, and we would certainly expect and hold that --

QUESTION: Would your argument be the same if there were no staff members involved, just the Congress -- Committee Chairman had issued the subpoena himself?

MS. STEARNS: Well --

QUESTION: You wouldn't think he was protected?

MS. STEARNS: Frankly, prior to Gravel, I would

have assumed that there was some sort of difference between staff members, but now I would think not.

QUESTION: Well, since --

MS. STEARNS: I would think that the Senator is in exactly the same position.

And the reason I think so --

QUESTION: You mean he could be?

MS. STEARNS: As the staff member would be.

QUESTION: You mean he could be questioned?

MS. STEARNS: There is a distinction between questioning him personally, questioning his motivations and issuing a declaratory judgment, saying that the subpoena he issued and had authorized -- and had enforced, had served, is unconstitutional; that the ruling of that, this Court, in that instance would be not questioning his motivations.

QUESTION: On what basis would it be unconstitutional?

MS. STEARNS: In this instance, on the basis of the First Amendment, perhaps the Fourth and other Amendments. But certainly, as Judge Tuttle held, under the First Amendment.

I think that the important question, and here words are very, very sensitive, I think that there is a great difference between saying that we're questioning the Senator and saying that his action, the subpoena he issued, is unconstitutional. Between asking for liability, either civil

or criminal, against a Senator, or asking that the subpoena he issued, just like the writ in Kilbourn vs. Thompson, is unconstitutional.

Because there's a big distinction between actual speech and debate, and even committee reports, as in Doe vs. McMillan, and the process, the legal process that goes out beyond the Halls of the Senate or beyond the Halls of the House, is not longer an intramural activity, characterized --

QUESTION: Well, this goes to the bank, that's all. It goes out of the Halls, it doesn't go out there, they send the subpoena to the bank and the bank sends them the records.

MS. STEARNS: Well, that's exactly it, it goes beyond the Congress.

QUESTION: I understand.

MS. STEARNS: It goes into the world at large, where --

QUESTION: Well, suppose they issue the subpoena and tell them to bring them.

MS. STEARNS: That's the same thing.

QUESTION: That's the same hing?

MS. STEARNS: You mean if they just call them on the telephone and say, we've got the subpoena, would you please come down?

QUESTION: Right. Brin(them in.

MS. STEARNS: Well, it's exactly the same kind of

thing. It's the --

QUESTION: Can you get an injunction against them bringing them in?

MS. STEARNS: It would be exactly the same thing, Presumably, what we're getting an injunction against -- well, we wouldn't get an injunction against the bank -- pardon me?

QUESTION: The injunction is to the bank to bring your records in.

MS. STEARNS: We would again ask -- well, if we could serve the bank properly in our situation, we couldn't have unless we waited at the door for Chemical Bank to come down and appear. Chemical Bank was kind enough to notify us, so that we could in fact go into court prior to that time. But we could not serve Chemical Bank in New York to make them a party in the first place.

QUESTION: That's all I wanted.

QUESTION: But you suggested something that indicated a limitation, that certain acts had to occur in the Halls of Congress. If the Committee, a Subcommittee holds a meeting in San Francisco or anywhere else in the United States, is that any less protected under the Speech or Debate Clause?

MS. STEARNS: Oh, certainly not. No, that's certainly just the same. I mean, when I say the Halls of Congress I mean when Congress --

QUESTION: Wherever convened.

MS. STEARNS: -- or a congressional committee is in session.

However, that does bring up the distinction that was made in the Doe vs. McMillan case. For example, if a House member or a Senate member is to read a libelous report on the Floor of the House, he is clearly immune. If he takes that same report and goes to his home territory and reads it again, he is no longer immune.

So there is a distinction in internal and external.

QUESTION: Is that because of the four walls and the ceiling, or is that because he's not performing a legislative function?

MS. STEARNS: I think that it's both. It s a concept of what is an internal function and when it loses its internal nature.

QUESTION: I think if you read that case closely, you will see that it relates to the fact that the Congressman might be using that as part of the campaign for re-election, and that that's the distinction.

MS. STEARNS: That, I think, is one distinction, Your Honor; but I think there was also another distinction, when the Court said that in fact the question of republication could be looked into, and whether or not the republication in fact went beyond what would normally be considered an internal function.

We would therefore request that this Court affirm the opinion of Judge Tuttle below, both as to the Speech or Debate Clause and the First Amendment issue.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Miller, do you -- you have a few minutes left.

REBUTTAL ARGUMENT OF HERBERT J. MILLER, JR., ESQ.,
ON BEHALF OF THE PETITIONERS

MR. MILLER: Very briefly, if he Court please.

In the Joint Appendix, in the Court of Appeals case, I found the complaints for the three House of Representatives cases, and I think if the Court will examine those, they will find that damages were in fact requested, $500,000 against defendants Pott and Sanders, as well as the bank.

And additionally, in paragraph 20, it -- sir?

QUESTION: Not this one that's here, that we have before us?

MR. MILLER: Yes, sir, one -- yes, the House of Representatives cases.

QUESTION: I would think that --

QUESTION: I thought we only had one case here.

QUESTION: -- you'd be very satisfied if these cases were moot?

MR. MILLER: Well, if the Court please, depending on what transpires with respect to the Committee, I feel that

the Court should be aware that the status with respect to what Congress has done, and (b) the fact that demages -- I just wanted to clear the record up -- that damages, and there's a general request for damages in paragraph 28(a) of two of the complaints.

QUESTION: But not in the Senate case?

MR. MILLER: Not in the Senate case. No, sir.

QUESTION: Well, is that in the one with the District of Columbia bank in it?

MR. MILLER: Yes, sir.

The other thing I would like to call to the Court's attention with respect to declaratory judgment is that this Court has said that the Speech and Debate Clause protects Congressmen not only from the consequences of litigation's results, but also from the burden of defending suits; indeed, the clause would, quote, "be of little valute if legislatures could be subjected to the cost and inconvenience and distractions of a trial upon the conclusions of a pleading."

I submit that --

QUESTION: In one of these cases, was there not at least a strong intimation that a Member of the Congress served on -- well, a claim directed against an utterance, right within the four walls of the Congress, to make it clear, could totally ignore the process, and that any judgment entered against him would be a nullity. Isn't there some

implication of that kind?

MR. MILLER: I don't recall that, sir. I think it is clear that it would in fact --

QUESTION: That it would be nulled.

MR. MILLER: -- yes, it would be totally -- a nullity, because it would bring into total conflict the Judicial Branch, which has as its --

QUESTION: In other words, it's the literal language of the Speech or Debate Clause that shall not be called to answer, would be braod enough to mean that he didn't have to answer a complaint in a district court proceeding.

MR. MILLER: I would interpret it that way.

On the other hand, there have been decisions which suggest that, at minimum and/or at maximum, the Senator or the Congressman is required to at least file a motion to dismiss.

That's a suggestion, it's not been a holding.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, and thank you, Ms. Stearns.

The case is submitted.

[Whereupon, at 2:25 o'clock, p.m., the case in the above-entitled matter was submitted.]

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