In the

Supreme Court of the United States

HERBERT H. McADAMS II, as Executor of the Estate of JOHN L. McCLELLAN, et al., Petitioners,	:	
v.	:	No. 76-1621
ALAN McSURELY and MARGARET McSURELY, Respondents.	:	

Washington, D. C.
March 1, 1978

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Petitioners, : No. 76-1621

v.

ALAN McSURELY and MARGARET McSURELY,

Respondents.

Washington, D. C.

Wednesday, March 1, 1978

The above-entitled matter came on for argument at 10:55 a.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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

FRANK H. EASTERBROOK, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioners.

MORTON STAVIS, ESQ., 744 Broad Street, Newark, New Jersey 07102, for the Respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 76-1621, McClellan against McSurely.

Mr. Easterbrook, you may proceed when you are ready.

ORAL ARGUMENT OF FRANK H. EASTERBROOK

ON BEHALF OF PETITIONERS

MR. EASTERBROOK: Mr. Chief Justice, and may it please the Court: This case is here because ten judges of the United States Court of Appeals for the District of Columbia Circuit, divided five to five on the question whether there was more than merely colorable substance to an allegation that John Brick, a Senate investigator, violated respondents' rights when he took copies of some of their papers in 1967.

We do not pursue here the question that divided the Court of Appeals. We argue instead that the Speech or Debate Clause bars respondents' suit whether or not Brick erred.

QUESTION: Mr. Easterbrook, I don't know whether you were in court yesterday or not when my brother Brennan asked counsel to the preceding case how the appeal came from the district court to the court of appeals. I have the same curiosity here. It seems to me this is really just an appeal from a motion for denial of summary judgment.

MR. EASTERBROOK: It was, your Honor.

The original panel that heard the appeal for denial of summary judgment wrote several pages explaining why this was an interlocutory order within the meaning of Cohen v. Beneficial Finance.

QUESTION: They equated it to kind of double jeopardy?

MR. EASTERBROOK: They equated it -- they essentially followed the analysis that this Court followed in Abney, that is, that since the Speech or Debate Clause creates a right not to be questioned in any other place and since the process of discovery and trial used the kind of question that the Speech or Debate Clause forbids, if it applies here, then there is a right to an interlocutory appeal to have that question resolved before discovery and trial. The en banc court adopted that, and we do not understand the respondents dispute that analysis.

QUESTION: We are not bound, of course, by the parties' stipulations or agreements on the jurisdictional points, I take it.

MR. EASTERBROOK: No, of course not, Mr. Justice Rehnquist, but we think it does follow from Abney.

QUESTION: Under the Abney rationale could we consider any kind of immunity claim other than one predicated squarely on the Speech or Debate Clause?

MR. EASTERBROOK: Probably not, your Honor, not at this stage. And, indeed, that was the basis for our appeal.

This case grew out of the 1967 seizure of respondents' papers by Kentucky officials. Respondents have not contended that the Federal Government or the Congress played any role in the initial seizure.

After the seizure a three-judge district court declared unconstitutional the Kentucky statute pursuant to which the seizure had been made, and it entered an order which I will call the "safekeeping" order directing the Kentucky State's Attorney to keep custody of the documents.

A Senate subcommittee was then investigating urban riots. It acquired information that appears to indicate that respondents had pertinent information. And John Brick, a Senate investigator, went to Kentucky to investigate.

QUESTION: Would you say again what the first district court litigation was?

MR. EASTERBROOK: The three-judge district court litigation concerned the constitutionality of the Kentucky sedition statute.

QUESTION: And held it constitutionally valid?

MR. EASTERBROOK: Held it constitutional.

QUESTION: And as an auxiliary to that, it entered a sequestration order?

MR. EASTERBROOK: It entered an order --

QUESTION: Custody order.

MR. EASTERBROOK: It entered a custody order. There has been a great deal of dispute in this litigation for what that custody order meant, which I don't intend to pursue here. But that order was pending appeal or any further proceedings.

A number of further proceedings, although not an appeal, ensued, including an attempt to subpoena the documents while they were held in Mr. Ratliff's custody.

QUESTION: Whose attempt?

MR. EASTERBROOK: The attempt by the Senate subcommittee to subpoena the documents.

That was resisted by respondents. Several stays were entered by this Court on an appeal that was an attempt to block the subpoena, which this Court eventually dismissed for want of jurisdiction.

An appeal then went into the Court of Appeals for the Sixth Circuit, which held that the district court's custody order should have expired once the time for appeal had lapsed. The papers were then returned to the respondents without prejudice to the enforcement of the subpoena against respondents, and they were then served with the subpoena.

QUESTION: But what happened in this case happened during the life of the custody order, didn't it?

MR. EASTERBROOK Well, the complaint that was

originally filed by respondents challenged not only the fact that Brick looked at the documents and took copies of them back to Washington, it also contended that the Senate subcommittee's subpoena was a violation of their constitutional rights, that the procuring of a citation for contempt of Congress was a violation of their constitutional rights for which they could recover damages, and there were a very large number of other allegations essentially challenging the entire course of conduct, both in the three-judge district court and before the Senate.

QUESTION: On this time spectrum, will you pinpoint just when it was that Mr. Brick and his colleagues came into possession?

MR. EASTERBROOK: Mr. Brick came into possession of the 234 copies in the fall of 1967, and they were immediately taken back to Washington.

QUESTION: He went out to Kentucky in 1967.

MR. EASTERBROOK: And he was given in his motel room copies of 234 documents by --

QUESTION: By the prosecutor.

MR. EASTERBROOK: By the prosecutor and by Mr. Scott, county detective.

QUESTION: Both of them were State agents.

MR. EASTERBROOK: Yes.

He was then allowed to look at the originals, which

were then held in a vault pursuant to the "safekeeping" order. He was not allowed to copy any of the originals and did not. What he took back to Washington with him were the 234 copies that were given to him in his motel room.

QUESTION: Is there any question as to at whose direction he had made that trip to Kentucky?

MR. EASTERBROOK: He made the tirp to Kentucky at the direction of Senator McClellan and the staff counsel of the subcommittee. There is no question about that.

QUESTION: What I want you to pinpoint is on the day that this was handed to him at the motel in Kentucky, what was the status of the three-judge court litigation?

MR. EASTERBROOK: On the day that it was handed to him at his motel in Kentucky, the three-judge district court had already entered an order enjoining the State prosecution relying on Dombrowski v. Pfister as the authority for the injunction.

The final time for appeal of that order had not been expired and there had been no alteration in the "safekeeping" order which had been entered earlier. The "safekeeping" order was entered, I believe, on September 14, 1967. Mr. Brick paid his visit on October 8 and October 9, 1967.

He then returned on October 16, 1967, with a subpoena, with several subpoenas, which were served on Ratliff the custodian, on the United States marshal, and on the McSurelys.

Those subpoenas eventually led to the State proceedings in this Court.

After the documents were finally returned after the Sixth Circuit had ordered that they be returned, a new subpoena was served on the McSurelys. They were called before Congress pursuant to the subpoena and refused either to testify or produce the documents. They were cited for contempt of Congress and they were convicted. That conviction was reversed. The ground for reversal was the subpoena was the fruit of a poisonous tree. The tree was poisonous, the court of appeals ruled, because the initial search was conducted pursuant to an overbroad warrant. The warrant, which appears at page 76 of the Appendix, authorized State detectives to search the McSurelys' home and find therein any seditious literature and seize the same. The court of appeals concluded, quite correctly, that that was overbroad because it didn't specify what was to be seized.

Meanwhile, on the same day they appeared before the Senate subcommittee pursuant to the subpoena, respondents filed this suit seeking damages for alleged violations of their rights. The complaint, as amended, named Senator McClellan, Brick, Ratliff, and two Senate employees as defendants.

The court of appeals found in the complaint seven categories of alleged wrong covering the entire course of conduct through the issuance of the subpoenas and the citations

for contempt of Congress. Only two of those categories concern us here. On the other five, the court unanimously held that the Speech or Debate Clause barred any action by respondents and they have not filed a cross petition from that decision.

The court of appeals ordered further proceedings including discovery and perhaps trial with respect to two types of activity. The first is Brick's looking at and taking to Washington the 234 copies without first obtaining the permission of the three-judge district court.

The second is the allegation that the subcommittee disseminated some or all of the 234 copies to agents of the Internal Revenue Services.

Because the first question, concerning Brick's activities, possessed the most difficult problems, I intend to discuss only those problems during oral argument unless time permits.

QUESTION: Mr. Easterbrook, are you planning to go into the question of whether or not the complaint stated a claim for relief? The reason I ask you that is I read from part of Judge Leventhal's opinion and from part of Judge Wilkey's opinion that all they were treating was whether or not the complaint states a claim for relief, was there immunity here. Or do you believe the two are so inextricably intertwined that you can't discuss one without the other?

MR. EASTERBROOK: The court of appeals found them to be essentially the same question, and I think that is the problem with the court of appeals' decision. But I think it is easier to answer that question if I can set up first what I see as the way both Judge Wilkey and Judge Leventhal approached the question in this case.

I think the court of appeals employed a three-step syllogism. It ran like this: First, the Speech or Debate Clause protects activities that are essential to legislating. Second, the employment of unlawful means is not essential to legislating. Third, therefore, the Speech or Debate Clause does not extend to cases in which a colorable claim of unlawful conduct is made.

The ten judges of the court of appeals, Mr. Justice Rehnquist, then divided equally on the question of whether a colorable claim of wrongdoing had been made --

QUESTION: All ten seemed to agree on your syllogism?

MR. EASTERBROOK: All ten followed that syllogism, I believe.

We start from the same premise, that is, that the Speech or Debate Clause protects activities that are essential to legislating. But our course thereafter is significantly different from that followed by the court of appeals. We believe that gathering information as part of an inquiry into a subject on which legislation could be had is essential to

legislating. We believe Servicemen's Fund held at least that much.

Brick was, concededly, gathering information as part of an inquiry into a subject on which legislation could be had. The court of appeals unanimously agreed with that proposition.

We conclude from this that because Brick was engaged in an activity leading potentially to legislation, that his activities in general are covered by the Speech or Debate Clause. And the fact that he erred, that is, that he may have used unlawful means or violated the Fourth Amendment in obtaining access to the documents is therefore not relevant.

In that sense, Mr. Justice Rehnquist, the statement of cause of action and the speech or debate immunity question are really quite separate. After all, the speech or debate immunity exists only to erect a shield against charges of wrongdoing, even constitutional wrongdoing, as this Court said in Doe. An immunity that protects only when no wrong has been committed would be no immunity at all.

We take the court of appeals to hold that the immunity is dissipated by a colorable claim of wrongdoing. That is the same thing as abolishing the immunity, because otherwise a motion for summary judgment or motion to dismiss the complaint for failure to state a cause of action would be granted and there would be no need for immunity. The

court of appeals, in other words, has held that the immunity pertains only when the complaint would have been dismissed.

QUESTION: Do you agree with Dombrowski v. Eastland?

MR. EASTERBROOK: Dombrowski v. Eastland, your Honor, involves -- first, it's necessary, I believe, to separate the holdings of Dombrowski. There were two allegations of wrongdoing in Dombrowski. The first was that committee counsel Sourwine had taken part in an illegal raid by State officers. The second was --

QUESTION: He was physically present --

MR. EASTERBROOK: He was.

QUESTION: -- in the Dombrowski case, wasn't he?

MR. EASTERBROOK: He was, your Honor.

The second is that the committee --

QUESTION: So was Brick, but you would think that's irrelevant.

MR. EASTERBROOK: No, your Honor, it is quite different. In Dombrowski after the State raid, Sourwine and the committee, including Senator Eastland, then, according to the complaint, took over the documents that had been seized in the raid for use by the Senate subcommittee. With respect to the takeover allegations, this Court held that speech or debate immunity was absolute and that there was no liability.

This, we believe, is a takeover case. The raid

took place without the presence of Brick. The documents were then taken over, out of the hands of Mr. Ratliff by the Senate subcommittee for use by the Senate.

QUESTION: You don't think you are just essentially agreeing with Judge Wilkey?

MR. EASTERBROOK: No, we don't.

QUESTION: That sounds to me like there is an argument there was no colorable violation.

MR. EASTERBROOK: We made that argument in the court of appeals and we didn't press it here because we think that there is solid immunity whether or not there was a colorable violation.

But essentially our approach rests on the contention that the immunity is triggered by the purposes of the activity in which the Senator or the Senate aide was engaged. We believe that this approach was consistent with and indeed required by the considerations that led to the establishment of the constitutional privilege.

QUESTION: How far does that reasoning take you? Let's say its purposes were very clearly to aid the legislative process by aiding the congressional committee, and in pursuance of that pristinely protected purpose he simply burglarized a house and stole things out of a locked drawer or safe. Is he protected under the Speech or Debate Clause for that? I am talking now, by "he" I mean an aide to a committee.

MR. EASTERBROOK: Mr. Justice Stewart, that question raises a number of complexities. My answer to it ultimately is, yes, probably he is protected.

QUESTION: Including murder, I suppose.

Well, maybe not there.

MR. EASTERBROOK: That, too, falls within my yes, probably answer, but I would like, if I can -- this one, the answer is not intuitively appealing, I must concede.

QUESTION: It's not very appealing any other way.

QUESTION: How far down the line will you go on this? If the Senator has a staff member get a copy of a paper in Joe Doake's safe and the staff member hires Joe Doakes who hires a Mafia member, is the Mafia member --

MR. EASTERBROOK: That, of course, is not this case. It would be difficult to say whether the Mafia member was a Senate aide.

QUESTION: Of course not, but I mean a Mafia member getting a paper which the legislator needs for his speech and debate.

MR. EASTERBROOK: I think the answer might be that he is not a proper Senate employee and therefore the question doesn't arise.

But I would like, Mr. Justice Stewart --

QUESTION: Say they put him on the staff.

MR. EASTERBROOK: I would hope thatthe Senate would

have the good sense not to do that.

QUESTION: But suppose it does.

MR. EASTERBROOK: I think in that event, the speech or debate protection applies.

Before I continue along this string of answers --

QUESTION: And it also proves he killed a man who was standing there.

MR. EASTERBROOK: Mr. Justice Marshall, before I continue along this string of answers, I think I ought to develop the background that led me to this answer.

QUESTION: Why do you think you need to go that far?

MR. EASTERBROOK: Mr. Chief Justice, I do not, although I am being pressed to go that far by members of this Court. But I would like --

QUESTION: You can always answer if you want in this Court, as counsel often do, that when you get that case you will argue it, but that you don't have it here. I've done it in your situation.

MR. EASTERBROOK: Mr. Chief Justice, I think it's important to recognize that none of those hypotheticals is this case.

QUESTION: Mr. Easterbrook, you said the controlling factor is purpose, and if that's true, then that case is here.

QUESTION: Suppose the court of appeals said there

was a colorable claim here, that there was a deliberate violation of the Fourth Amendment, in short, a deliberate theft of the papers.

MR. EASTERBROOK: That's right, Mr. Justice White.

QUESTION: And you say that even if it were tried on and proved that he engaged in deliberate theft, he is immune.

MR. EASTERBROOK: I agree. I think I have to deal with that implication in my argument, but I would like to start at the beginning if I might.

The question of deliberate use of force or the question of deliberate violations of the Fourth Amemdnet is, I tnink, the most difficult case for the arguments that we are making. The question poses a culpable abuse of power, that's its assumption. And it is always hard, I suppose, to defend culpable abuses of power.

But not all cases are that clear, and the problem of sorting abuses, even culpable abuses, from ordinary mistakes and the problem of sorting ordinary mistakes from things that are reasonable within the meaning of the Fourth Amendment is not always easy, particularly when dealing with a concept like reasonableness.

The purpose of the immunity, one of the major purposes of the immunity is to deal with the sorting process itself as well as with the liability for the end result once

the sorting process has been completed. The process of litigation and determining whether this was such an intentional abuse, Mr. Justice Stewart, is one of the things to which the Speech or Debate Clause was most closely directed.

The claim of culpable abuse can be made in pleadings or by plaintiffs, but may prove to be false and the process of trying the facts may be difficult and time-consuming. Moreover, an apparent violation may turn out to be quite reasonable within the meaning of the Fourth Amendment. This Court's cases show that quite often. Take, for example, the claim that someone's house was searched without a warrant, which is, at least on its face and presumptively,a violation of the Fourth Amendment. It may turn out that the defense has exigent circumstances and that requires extremely time-consuming, complicated litigation in many cases just to determine whether that was a violation.

Even so, I have to acknowledge that the argument for immunity is an argument for indulgence. It asks for forbearance rather than approval. The claim does not and cannot have an air of just treatment to it. Yet the framers decided that forbearance is the better course and that error is not a reason to overcome the immunity. To the contrary, the fact that error is inevitable, that some men are wicked, that grievances are plentiful, is the reason why there is immunity. This shows, we think, that the allegation of even

a blatant violation cannot lightly pierce the immunity.

But our answer doesn't stop there to your problem. Your question, Mr. Justice Stewart, assumes intentional misconduct. Yet the Speech or Debate Clause forbids scrutiny of intent.

QUESTION: Forbids what?

MR. EASTERBROOK: Forbids scrutiny of intent, of the subjective intent of the actor. Servicemen's Fund said that at pages 508 to 509. This Court said so in the Johnson case; it said so in Tenney v. Brandhove, the common law variant of State legislators' immunity. And therefore it's difficult to treat your hypothetical as a case in which intent can be proved, because it can't be proved. We must treat it for present purposes as an unintentional but apparently very serious violation of the Fourth Amendment. Otherwise the rule simply invites plaintiffs to charge intent and pierce the immunity.

This consideration, too, counsels against easily allowing trials with claims of intentional misconduct.

But beyond that, we think, the claim of intentional misconduct requires consideration of two questions: First -- the question which we think is dispositive here, whether the activity viewed objectively was part of a legislative inquiry. The second question, and the one that led me to answer your question yes, maybe, is whether Article I --

QUESTION: I thought you said yes, probably.

MR. EASTERBROOK: Yes, probably. -- is whether Article I of the Constitution gives Congress the power to conduct such an inquiry; that is, whether what happened was part of the legislative business.

We think clearly that this case involves the first of these questions. The court of appeals held that it was conducting a legislative inquiry. For this purpose, for the purpose of the legislative inquiry question, it should make no difference how serious the Fourth Amendment violation was; if the investigation, seen objectively, was directed toward legislation, then the immunity is absolute.

QUESTION: What Fourth Amendment violation are you, for the purposes of this discussion, attributing to Mr. Brick? Did he break into somebody's house?

MR. EASTERBROOK: He did not. And as we have said, we think it is very difficult to find a Fourth Amendment violation here. Mr. Brick did not --

QUESTION: Someone handed him materials.

MR. EASTERBROOK: We argued, and we still argue, that that is simply a turnover of documents. It's very similar to a turnover of documents from some private person who seized them wrongfully and then turned them over to the Federal Government, in which this Court has held in Burdeau v. McDowell that there is no seizure at all.

What the court of appeals said, what Judge Leventhal said with respect to that question is that this is decisively different from the Burdeau and similar line of cases because of the "safekeeping" order by the three-judge district court.

We would have thought ordinarily that the violation of something like the "safekeeping" order was contempt of court rather than a violation of the Fourth Amendment.

QUESTION: It could be both.

MR. EASTERBROOK: It could be both, or it could be simply an actionable common law tort.

There is the possibility that under District of Columbia or Kentucky law there is a common law tort lurking in the background of this case. That's the reason why we elected not to make strongly here any arguments about the meaning of the Fourth Amendment, precisely because there may be allegations of other bases of liability based on common law.

QUESTION: What if Senator McClellan in the course of an investigation is sitting in his office in the Senate Office Building and suddenly realizes that he has left some important information out at his house, so he goes out, drives out to his house and in the course of driving out there negligently runs over and kills somebody. Is he legislatively immune?

MR. EASTERBROOK: Mr. Justice Rehnquist, I think

probably not. He was engaged in ultimately something with a legislative purpose, but it is difficult to see that driving was itself part of that inquiry.

In this case --

QUESTION: Is there a separate protection for going and returning?

MR. EASTERBROOK: But that's a privilege against arrest.

QUESTION: You don't think that ought to apply to the accident?

MR. EASTERBROOK: It would probably not apply to the accident, but I would prefer not to try to parse that constitutional provision here.

QUESTION: Does that apply when the Senate is not in session or only when it's in session.

MR. EASTERBROOK: I do not know, Mr. Chief Justice.

The final part of my answer to Mr. Justice Stewart, however, and the reason for the qualification "probably" is that the scope of Congress' powers under Article I is considerably more difficult. Those cases in which this Court has held in the past that the Speech or Debate Clause does not protect particular activities have essentially been cases in which the Court concluded that that activity was none of Congress' business.

In the Kilbourn case in which the Sergeant at Arms

in the House went out and made an arrest for the purpose of coercing a witness into testifying, the conclusion of this Court was that Congress had no summary contempt powers, that is, that it was attempting to exercise powers committed by the Constitution to the Judicial Branch.

In the Gravel case and the Doe case, in which this Court held the Speech or Debate Clause did not apply to publicity, the holding was that the Article I power of Congress did not include the power to publicize information for the sake of publicity.

In Powell v. McCormack where it held that the speech or debate immunity did not bar Representative Powell's attemptsto get back in the House, the conclusion was that Article I of the Constitution did not authorize the exclusion of a duly elected Member except for the three qualifications explicitly stated in Article I.

All of those cases are cases essentially holding that Congress was engaged in a pursuit that exceeded the authorization given it by Article I. For that purpose, too, we think it makes no difference whether somebody violated the Fourth Amendment. The Fourth Amendment is not part of Article I, it doesn't tell you how far Congress can go, or for what purpose.

QUESTION: My question, Mr. Easterbrook, however, was hypothesized upon the proposition that a congressional

committee was considering legislation clearly within one of the enumerated powers of Congress under the Constitution, under Article I of the Constitution, clearly specifically delegated to Congress, involving the coining of money, say, and at the direction of the committee chairman, a member of the committee staff, in pursuit of that clearly authorized congressional purpose, broke into a house, killed a couple of people, and broke into a safe to get information clearly relevant to the inquiry being undertaken by the committee in the course of its consideration of clearly authorized legislation.

MR. EASTERBROOK: Mr. Justice Stewart, I am sorry to have taken so long to get to my answer. But the reason why I had to qualify my yes with the probably was because that was the case in Kilbourn. In Kilbourn the reason for --

QUESTION: My question assumes complete and concededly clear congressional power, legitimate congressional inquiry in connection with the legislation, clearly within the delegated powers of Congress.

MR. EASTERBROOK: But there are two kinds of congressional power that I think had to be distinguished. One is the kind about which you were talking about which I think is dispositive in this case because it's also present. The second is the power to engage in the activity to fulfill its power. And that is why we have the problem of Kilbourn in which

Congress was engaged in gathering information for legislation.

QUESTION: But it had no contempt power.

MR. EASTERBROOK: It had no contempt power. And that's why we get to the problem. It is conceivable that Congress has the power to ask for information within Article I but not to take it by force. So that if --

QUESTION: But if it asked for it and it is turned over, then there is no occasion to consider the Speech or Debate Clause because there has been no wrongdoing. Your whole argument is the Speech or Debate Clause only needs to be invoked when there has been wrongdoing on the part of the Congressman or his staff.

MR. EASTERBROOK: Unfortunately this is a case in which Congress asked for something, it was turned over and the lower court has held that nevertheless there is probably wrongdoing.

QUESTION: Aren't you conceding for the purpose of argument that there was wrongdoing?

MR. EASTERBROOK: We are conceding for the purposes of this argument that it was actionable in some way.

QUESTION: That's what I thought.

QUESTION: And also a violation of the Fourth Amendment.

MR. EASTERBROOK: Yes, we are conceding for purposes of this argument. But the qualification I had to put on my

yes answer, which I think is a sound yes answer for the reasons I discussed before I got to this qualification, is that it is at least conceivable that Congress' power under Article I is only the power to ask and not the power to take. So that for purposes of this case, since it clearly has the power to ask, and Servicemen's Fund says it has the power to ask, there is no question.

But if the question about the power to take arises, it's going to be necessary to litigate whether that's within the scope of Article I, and that is the reason for my qualification "probably."

I am sorry, it has taken much too long to get there.

QUESTION: It has been a very interesting tour.

QUESTION: Mr. Easterbrook, before you conclude, would you come back to Dombrowski. It seemed to me on its face it would undercut your argument, certainly to some extent. You distinguished it very briefly, but would you go over it again for me, please?

MR. EASTERBROOK: Yes, Mr. Justice Powell, I can now, having answered Mr. Justice Stewart's question, distinguish it in two ways. One is that the underlying activity in Dombrowski, in which Counsel Sourwine engaged, that is, participating in the State raid, was, we think, not an activity within Congress' power under Article I. Congress has no legislative power to help States gather information for

criminal prosecutions.

QUESTION: Have you by your concession put Mr. Sourwine's actions in the same category as Mr. Brick's actions?

MR. EASTERBROOK: We think Mr. Sourwine's actions are in the category of Mr. Ratliff's actions here, that is, Mr. Sourwine's actions in participating in the raid are the same as Mr. Ratliff's actions.

The second thing Mr. Sourwine did was then take over the documents and carry them back to the committee. In that respect Mr. Sourwine was acting just like Mr. Brick and as to that allegation, the takeover, this Court held in Dombrowski that there was absolute Speech or Debate Clause immunity. So we think ultimately Dombrowski is a case that supports our position; indeed, it's probably our strongest precedent. But that is the reason for it.

QUESTION: Mr. Easterbrook, to use the parlance of the law, isn't there a certain tension between the holding liable of Sourwine in Dombrowski and the Gravel case?

MR. EASTERBROOK: I think there is. The dissenters in the Gravel case said that. But I think that's a tension that may persist.

QUESTION: On the other hand, Gravel said that neither the Senators nor their aides should be immune from liability of questing in such circumstances; namely, if they carry out an illegal arrest or in order to secure information

themselves seize the property.

MR. EASTERBROOK: Mr. Justice White, we ackowledge that that's what the Gravel case said. We think it was based on Kilbourn and on the portion of Dombrowski, the participation in the raid, that were not protected by the Clause because they were outside Congress' Article I power. To the extent it had a broader meaning, we think that language is simply inconsistent with this Court's subsequent holding in Eastland v. Servicemen's Fund, and therefore we would rely on Eastland rather than on the dicta in that case.

QUESTION: Mr. Easterbrook, before you sit down, I'm not quite clear on what the Government's position is on whether we should decide whether these complaints state a claim for relief against the defendant.

MR. EASTERBROOK: We did not present that question in the certiorari petition. We do not believe that this Court needs to decide it.

QUESTION: You don't rely, in other words, at all on -- you may raise below that the complaint is in any event insufficient.

MR. EASTERBROOK: We simply do not rely on the main arguments made by Judge Wilkey.

MR. CHIEF JUSTICE BURGER: Mr. Easterbrook, we will allow you five minutes of rebuttal later and we will enlarge your friend's time now by the same amount.

MR. EASTERBROOK: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Stavis, you may proceed whenever you are ready.

ORAL ARGUMENT OF MORTON STAVIS ON

BEHALF OF RESPONDENTS

MR. STAVIS: Thank you very much, Mr. Chief Justice, and Members of the Court.

I believe that the reason why the interrogation of Mr. Easterbrook has developed as it did and why the Government had to respond to some of the questions as it did is because in fact the Government in its petition, in its brief, has staked out a rather extreme position and seeks an interpretation of the Speech or Debate Clause which is plainly unacceptable. But surprisingly, the Government as it develops its position takes no account of the fact that there is tension, to use the word of Mr. Justice Rehnquist, between the problems of protecting congressional independence while at the same time avoiding abuse. It's a problem which is a thoroughly familiar problem in English constitutional history, and it's a problem with which this Court has dealt time and time and time again.

QUESTION: Do you agree, Mr. Stavis, that all we have here is the question of whether there is Speech or Debate Clause immunity, assuming that the complaint stated a claim for relief?

MR. STAVIS: That is the only question that the

Government presented in its petition.

QUESTION: We don't pass, then, on whether the complaint stated a claim for relief.

MR. STAVIS: That's assumed. It has not been disputed. In the motion papers there is only the question of immunity.

Now, it isn't as if this problem has first come before this Court today or that the Government is writing on a clean slate. The reality is that the Court has always understood that precisely because the speech or debate immunity is absolute, it is not to be so widely handed out. It is limited in scope and limited to the kinds of activities that it applies to. And in case after case in various language formulations what comes out is that the Speech or Debate Clause applies to the core of legislative activity -- Congressmen and Senators making speeches, voting, holding hearings --

QUESTION: Committee reports, too?

MR. STAVIS: Committee reports, issuing subpoenas. But it does not apply to peripheral activities. There is a wide variety of activities Congressmen and Senators engage in to which it simply doesn't apply. And, of course, one of the clearest formulations of that, Mr. Chief Justice, was in your opinion in the Brewster case, in which Senator Brewster came to you and said, "It applies to all matters in relation

to legislative activity." And, of course, the Court held that that wasn't the case.

Now, there is an important and a rather clear line which distinguishes this case from the cases where speech or debate immunity should apply and which is rather confusedly addressed by Mr. Easterbrook when he deals with the Dombrowski case. There is a constant formulation that says that in the Dombrowski case this Court approved the takeover of documents, but that was pursuant to a subpoena. A subpoena was served and the person who was served with the subpoena responded by delivering the documents, and the Court approved that process.

The crucial fact here is that the action complained of occurred without benefit of any subpoena whatsoever.

QUESTION: That act specifically means what? What are you referring to when you say "that action"?

MR. STAVIS: I am talking about the taking of these papers, the reading of all these papers, the bringing of them to Washington, which is the heart of what this complaint is about.

QUESTION: What is the first act? What is the initial --

MR. STAVIS: The initial act was the receipt of the papers.

QUESTION: Receiving them from the State authorities

MR. STAVIS: Actually going down to Pikeville.

taking the papers from the State officials, inspecting all the papers that had been seized, doing this and bringing them back to Washington knowing -- knowing -- that the plaintiffs had gone to court to obtain the return of their papers and the court had agreed that they were entitled to the return of their papers and had given a "safekeeping" order only to give the defendant there -- namely, the prosecuting attorney -- an opportunity to appeal if he chose.

QUESTION: Mr. Stavis, are you conceding when you emphasize the critical fact that if Senator McClellan had caused a subpoena to be served on Ratliff, the custodian of the papers, and pursuant to that subpoena they had been turned over to Brick, Brick had made 234 copies and taken them back, you would have no case?

MR. STAVIS: Well, I am not at all sure of that.

QUESTION: You said it was a critical fact.

MR. STAVIS: Excuse me. I know that Eastland v. Servicemen's Fund is an important argument for the suggestion that you are making, Mr. Justice Stevens, because there the Court held in effect that when the committee issues a subpoena that's a process that the Court would not interfere with at least in a suit against the Senator.

QUESTION: It didn't say anything about what they could do about refusing to turn documents over and resisting a contempt citation.

MR. STAVIS: That's correct. Nor did it say anything as to what could be done to prevent Ratliff from turning over the documents by a suit against Ratliff, which is the same thing as what we did after Ratliff was served with a subpoena. I think it's important to understand that after the acts which we are dealing with here, the Senator did issue a subpoena, the subpoena was served on Ratliff. We then sued Ratliff to prevent his complying with the subpoena, and we succeeded in the Sixth Circuit. So that --

QUESTION: But the case I am hypothesizing is one in which perhaps you didn't find out about the subpoena, the Senator just signed a subpoena and Brick took it down to Ratliff and said, "Turn over the documents," and he had done so. Would you concede that immunity would apply?

MR. STAVIS: I am not so sure. I am not so sure where it had been done in a manner so that we were kept unaware of it.

Fortunately in this case when Ratliff was served with the subpoena, we, the McSurelys --

QUESTION: Then you are backing off from the position that the subpoena is critical. That's what I am asking.

MR. STAVIS: Well, no, I'm not, sir,, may I suggest. I am simply saying that where there is no subpoena, there can be no argument about it. Where there is a

subpoena, I think the problem becomes a little bit more difficult. I think that Servicemen's Fund left open the possibility that the Servicemen's Fund could assume the bank to enjoin them from responding to a subpoena. You are posing me the question of what would happen --

QUESTION: We are just concerned here with the liability of the Senator and his aide, not with what could have been done by way of stopping him.

MR. STAVIS: That's right.

QUESTION: And as you know, sometimes committees proceed by subpoena, sometimes they write a formal letter. The Chairman will write a letter to Mr. Ratliff and say, "We would like to see these documents," and say, "I'm with such a letter," he could have gone down. Would he be in as strong a position as if he had a subpoena?

MR. STAVIS: Well, that might not be very much different from a subpoena.

The thing that I'm driving at is that the process of the subpoena at least gives you a basis for litigating, gives you a basis for litigating.

QUESTION: If you know about it.

MR.STAVIS: If you know about it.

QUESTION: Right.

MR. STAVIS: In Servicemen's Fund they might have just gone to the bank and asked to see the records, and we

don't know anything about it, then I think there is another question as to whether or not the taking of those records constitutes some kind of an invasion of rights of the Fourth Amendment, the privacy rights, or whatever it is. And I am not prepared to answer that question. I am prepared, however, to say that where there was no subpoena, where there was no process at all and a congressional employee or a Congressman or a Senator just proceeds on his own allegedly to engage in investigative activity, then you get exactly the kind of questions that were put by Mr. Justice Stewart and some of the others --

QUESTION: So your submission must be that unless you are talking about a committee hearing or a subpoena, just investigation generally in the field just isn't an essential part of the legislative process.

MR. STAVIS: That's right.

QUESTION: Because you must say that just field investigators must obey the law.

MR. STAVIS: That's right.

QUESTION: Whether it's a law of trespass or is a law of the Constitution.

MR. STAVIS: That's correct. And that comes out of the recognition of this Court from the beginning that you have to circumscribe the Speech or Debate Clause --

QUESTION: So if the FBI are doing what the prosecutor

asks them to do.

MR. STAVIS: Then the same problem.

Unless you circumscribe the areas of activity to which you afford immunity, you have built up a rather large number of people who have the power to snoop around and break the law, engage in a wide range of activities. And just reflect for a moment as to what might even happen if some employee of the Senate Judiciary Committee or the House Judiciary Committee might decide to break into the homes of some judges to find out --

QUESTION: Is there some distinction between Senator McClellan here and the aides?

MR. STAVIS: Not at all, not since the Gravel case. I think the Gravel case made it clear that they were both on the same footing.

QUESTION: Mr. Stavis, if you are right that the immunity that stems from the Speech or Debate Clause is applicable only when there has been no violation of law, State or Federal, then it's a meaningless immunity. You don't need it.

MR. STAVIS: That is not the position.

QUESTION: I thought it was. In answer to my brother White I thought that was precisely what you said.

QUESTION: I thought you just said that investigation isn't within the legislative immunity, field investigation.

MR. STAVIS: That is the point -- the point that I am making is not that the immunity applies only to lost rights. The point that I'm making is that the immunity doesn't apply to mere general investigatory acts. That's the point I am making, that you have to define the nature of the activities we are dealing with. Now, if we are dealing with general investigatory conduct, the general investigatory conduct does not carry with it an immunity.

I am distinguishing there what may happen if you have a subpoena.

QUESTION: How can you separate the claim for relief from the absolute immunity here, the way you and your opponent and everybody in the court of appeals purported to do?

MR. STAVIS: I don't think it was quite separated as your Honor suggests. Judge Wilkey's analysis was that he recognized, with Judge Leventhal, that the Speech or Debate Clause immunity would not apply to unlawful acts, and he then proceeded to analyze it and say, Was there an unlawful act committed? He decided that there wasn't. The Government does not press that position.

QUESTION: Judge Leventhal, too, though, discussed --

MR. STAVIS: That is not the analytical approach that we have taken. The analytical approach that we have taken is that you have to look at the character of the activity to which an effort is being made to immunize it and see

whether that activity is at the core of legislative activity.

I suppose a Senator can get up on the floor of the Senate and make a speech and say anything -- anything -- on the floor of the Senate, possibly even --

QUESTION: Oh, the claim in Gravel said the Senator committed a crime in releasing materials and he was immunized.

MR. STAVIS: That's right, in the committee hearing. That's the point. If he is making a speech on the floor, conducting himself in a committee hearing, I suppose he cannot be committing a criminal act, or he can't be held for a criminal act, nor for a civil liability. I don't think there is any question about that. And again it is precisely because it is a rather extreme immunity, quite an extreme immunity, that the Court has been very careful to say only for that but not for other things. A perfect example is Kilbourn v. Thompson. You've got immunity for voting on the resolution which ordered the Sergeant at Arms to arrest this man.

QUESTION: What would you say if a Senator received stolen property that was very relevant, he thought, to his investigation. I suppose just the possession of it wouldn't make him criminally liable, I don't think.

MR. STAVIS: I would think it would.

QUESTION: Why is that?

MR. STAVIS: Because I do not think that the receipt of property is essential to the legislative process.

QUESTION: Oh, but it's evidence. Say it's written out, it's a writing that is very relevant to the legislative process, and he received it. The only thing is it was stolen.

MR. STAVIS: I would argue that no matter how relevant, that the process of receiving evidence -- and that's the point I am trying to make clear -- as distinguished from having it brought out at a hearing.

QUESTION: Then how -- if a Senator subpoenaed some writings in the hands of somebody and they just happen to be stolen and they produce them, would the receipt of them be --

MR. STAVIS: Not if it was done in response to a subpoena.

I think there is a point at which you have to draw some kind of a line to protect the committee processes by subpoena.

QUESTION: What about the letter that Mr. Justice Stevens mentioned that is frequently the event that triggers turning over material? Would the letter have the same status as the subpoena for the purposes of the Speech or Debate Clause?

MR. STAVIS: I would say not.

QUESTION: Why not?

MR. STAVIS: Well, the reason is that at least by a subpoena -- at least a subpoena is a matter of legislative authority. A Senator was --

QUESTION: Well, a letter of that kind coming from a committee is merely a polite subpoena, isn't it?

MR. STAVIS: Well, it may not be. It may very well be that the committee does not have the power of subpoena in a particular case. I mean, if the Senate thought -- that is done by resolution.

QUESTION: What if the committee issues a subpoena, is that subject to a challenge as being unlawful?

MR. STAVIS: I believe it is. It's certainly --

QUESTION: If the committee has authorized it by resolution?

MR. STAVIS: Well, there have been an infinite number of cases before this Court where the validity of a subpoena has been subject to question. An individual obviously can refuse to comply with a subpoena and then can litigate its validity.

A third party can do so, too. And in this case we sued a third party to prevent his complying with the subpoena.

QUESTION: Suppose the gentleman down in Kentucky instead of handing this material to Mr. Brick had wrapped it up in a package and mailed it to the chairman of the committee in Washington, and he received it, opened it up and did all the other things. What would you say about that?

MR. STAVIS: Well, there are two questions that are

raised by that. One, was it an unlawful act to hold onto that material? We also must realize how this material had been obtained. That's a question as to whether or not that was an unlawful act.

The second question is --

QUESTION: You wouldn't suggest it's an unlawful act to open your mail.

MR. STAVIS: No, but it might well be an unlawful act to hold onto material which you knew you were in no way entitled to. It is a different question from what actually happened here.

But the second question is, is the receipt of that material -- and that's the critical question to put -- is the mere receipt of that material subject to immunity?

QUESTION: Is it any different whether it is received by the Senator or one of the staff?

MR. STAVIS: No, as I suggested in the light of Gravel, since Gravel we can't distinguish between the two.

Again, I am suggesting that the receipt of material as part of a committee investigative function is not at the core of legislative activity.

QUESTION: Mr. Stavis, that's the point that worries me -- core, that word. If we say that has to be at the core, aren't we amending the Constitution?

MR. STAVIS: No, quite the contrary, because --

QUESTION: What is the meaning of core?

MR. STAVIS: I think that the cases --

QUESTION: Can you and I agree as to what the core issue is?

MR. STAVIS: I think we can, I think we can agree.

QUESTION: I doubt it.

MR. STAVIS: We suggest.

QUESTION: Do you know why? We are both lawyers.

(Laughter.)

MR. STAVIS: Let me make a reasonable try at it, Mr. Justice Marshall.

The language of the Constitution, of course, is only speech and debate. Now, the cases have held that it goes beyond speech and debate, that it includes voting, it includes holding hearings, it includes issuance of subpoenas, and I think we are quite able to develop a core of activities from the cases that have been decided, and those are the kinds of things that have been decided upon. Issuance of reports by committees is another.

But no case -- no case -- has held that it includes unlawful investigative activities. And in view of the argument that is made that the lawfulness or non-lawfulness cannot be the test of whether or not immunity applies, we must conclude that no case has held that it includes investigative activity generally of an undefined nature other

than --

QUESTION: Who decides whether it's investigative or not?

MR. STAVIS: Well, that's --

QUESTION: I mean, we've got core and now we've got investigative. We will have about 18 more by the time you get through.

MR. STAVIS: Well, I don't have to decide that, but that's what these people constantly claim.

QUESTION: No, no. We have to decide that.

MR. STAVIS: That's right.

QUESTION: That's why you are going to hand it over, hand it over all wrapped up in a tight little ball named "core."

MR. STAVIS: Well, it's the best word --

QUESTION: And then leave it with us.

MR. STAVIS: It's the best word that I am able to find in trying to define what I think is the range of activities that the Court has said are included within the kinds of legislative conduct for which Congressmen and Senators are entitled to immunity. Now, it clearly does not include distribution of reports. That is the essence of Doe v. McMillan. It clearly doesn't include impressing a constituent's position on an administrative agency. That's United States v. Johnson. It certainly doesn't include taking

money in one form or another. That's United States v. Brewster.

So that the Court has been trying to do its best to develop the meaning of the term "core." And I think that the Court has said in Dombrowski, in Gravel, it has said in both those cases that it does not include general investigatory activities. And I think it's extremely important that I point out that what Mr. Easterbrook said about Dombrowski is simply in conflict with the record.

Mr. Easterbrook said that the Dombrowski case is different from this because there all that Mr. Sourwine was trying to do was to help out the State officials of Louisiana while they made their raids, and he was acting not to assist in a Senate investigation but to assist in enforcement of a State law.

QUESTION: But you say since Gravel you can no longer distinguish between a Senator and his aide.

MR. STAVIS: That's right.

QUESTION: So shouldn't Dombrowski v. Eastland, shouldn't either Senator Eastland have been held liable or Sourwine have gotten off?

MR. STAVIS: No, no. The issue in Dombrowski v. Sourwine, which is again very different from this case, was that there the defendants made a motion for a summary judgment on the ground that there was no substantial issue of fact. And there Senator Eastland supported his position with seven

affidavits which said, "I had nothing to do with this whatsoever." And the court accepted that position and agreed that on the motion for summary judgment, because there was no substantial issue of fact, there is no basis for holding the Senator in.

QUESTION: You say Dombrowski v. Eastland didn't even involve Speech or Debate Clause immunity.

MR. STAVIS: No, sir. It did involve the claim of speech or debate immunity, but the Senator said, "I wasn't involved."

QUESTION: So it didn't turn on the Speech or Debate Clause immunity.

MR. STAVIS: It didn't.

QUESTION: If he wasn't involved, he didn't need speech or debate immunity.

MR. STAVIS: As to Sourwine, he argued speech and debate immunity, but the Court found that there was a tryable issue of fact and that the speech or debate immunity would not protect him.

QUESTION: He lost on that when that was tried out.

MR. STAVIS: That's right. It did not protect him in the kind of conduct in which he engaged.

QUESTION: After Gravel it wouldn't protect Eastland either.

MR. STAVIS: That's right, if there was any basis for holding Eastland in. But Eastland was not held in on

a factual consideration.

QUESTION: In Dombrowski, in the long run it was Sourwine was on his own, he hadn't been ordered to do it or authorized to do it.

MR. STAVIS: That's right. But he still claimed speech and debate immunity, and the Court held speech and debate immunity does not extend to the kind of conduct charged.

QUESTION: After Gravel if the Senator had done what Sourwine had done --

MR. STAVIS: He wouldn't be immune himself.

QUESTION: Yes.

MR. STAVIS: I don't think there is any question about it after Gravel.

But the point that I was pressing on Dombrowski, because I really think it's the critical case, it's the case on which this all turns, is the Government wants to get away from Dombrowski by saying that they were not performing a Senate legislative purpose, they were just helping out colleagues in Louisiana. And I'm simply saying that that was directly contrary -- directly contrary -- to what the Government said in its briefs in Dombrowski where it insisted that Sourwine was carrying out an important legislative purpose and citing all the resolutions that he was supposedly investigating for. And the Government and Sourwine insisted that that's what he was doing. And this Court in Gravel when

it referred to the Dombrowski case said specifically that he was searching and seizing material in preparation for a Senate committee hearing.

So Dombrowski is in all fours with this case, contrary to what Mr. Easterbrook has said, and Dombrowski holds that kind of activity -- that kind of activity -- just is not under the Speech or Debate Clause.

QUESTION: Suppose when Mr. Brick was in the hotel room and the local prosecutor brought the papers over to him, Brick had with him a newspaper reporter he had brought along from Washington or New York or somewhere, and, of course, the First Amendment doesn't inhibit that second man, would his act in receiving those be an unlawful act?

MR. STAVIS: The newspaper reporter? It might very well be. These papers, after all, had been unlawfully seized.

QUESTION: Might be.

MR. STAVIS: Might be.

QUESTION: You say it is an unlawful act for Mr. Brick to receive them.

MR. STAVIS: Mr. Brick is certainly subject to the Constitution. He is a Federal employee. And whether or not --

QUESTION: I'm not talking about the constitutional violation now; I'm talking about what you were referring to, an unlawful act under State law, in the early part of your

argument, I think.

MR. STAVIS: I didn't think I was. But the point is that if the documents had been unlawfully seized and a newspaper reporter takes custody of these documents, there may very well be a violation of the local State law because the documents in effect were stolen.

But that's not the Fourth Amendment issue to which you are referring, obviously. The Fourth Amendment doesn't apply to a private person. But Mr. Brick was not a private person and the Fourth Amendment does apply to him. I don't think there is any question with respect to that.

QUESTION: In any event, it's conceded, at least for the purposes of this argument, by the Government that there was a Fourth Amendment violation here.

MR. STAVIS: That's correct. That's correct. It's conceded that there was a Fourth Amendment violation for this argument.

Now --

QUESTION: Mr. Stavis, let me interrupt with something. Maybe you have argued it, but I missed it if you have. In the Gravel case the Court held that the aide, Rodberg, I guess his name was, could be examined by the grand jury about the source of the Pentagon Papers.

MR. STAVIS: That's correct.

QUESTION: Wasn't that a holding -- and that, I

assume, would be an information-gathering activity by the Senator. You haven't argued, but why isn't that a square holding that informal information-gathering is not a legislative act? I ask you that because I kind of hope Mr. Easterbrook will give us the other side of it.

MR. STAVIS: I do argue that in our brief. We cited that specific holding of Gravel for that purpose.

QUESTION: Why do you need to cite anything else? You have got a long argument. Why isn't that the complete answer to the whole case?

MR. STAVIS: Well, I agree with you.

(Laughter.)

QUESTION: If it's so clear, it's strange to me that you give it such little emphasis. That's why I'm sort of --

MR. STAVIS: The reason I have given more emphasis on Dombrowski v. Eastland is because it's a closer case to this in terms of fact, so far as I know. The story of Dombrowski v. Eastland, which was a Mississippi story, and the story here are the only cases that I know of where a Senate committee or any congressional committee undertook to engage in the kind of activities that were engaged in here, which was effectively to take over documents without --

QUESTION: Again, Mr. Stavis, that only is relevant if the illegality of the conduct is material. And in an

immunity case, it seems to me we have got to assume there is some illegality. It's the nature of the activity which must determine whether the Clause applies, it seems to me. Part of your argument, it seems to me, should be informal information-gathering is not a legislative act.

QUESTION: That's what you argued earlier.

MR. STAVIS: I'm sorry?

QUESTION: You argued that earlier to some extent.

MR. STAVIS: I said -- I didn't cite the Gravel case, because --

QUESTION: Which is the only case that I know of that deals with the question.

MR. STAVIS: Well, Dombrowski v. Eastland, too, Mr. Justice Stevens. It does, really, because that was also information-gathering activity.

QUESTION: Mr. Stavis, when you talk about the core of legislative activity, is there some difference between the actions of a committee chairman acting on behalf of a committee and a single Senator acting by himself?

MR. STAVIS: I wouldn't think so in terms of the application of the Speech or Debate Clause. I don't think that a committee chairman acquires any more immunity than an ordinary Senator.

QUESTION: Yet, assuming the House and Senate act much more through committees than they do -- I mean, the

committees play an important role apart from the votes of the members on the bills before them.

MR. STAVIS: There isn't any doubt that that's the case, but I do not think that there is a distinction in the extent of immunity. All we are dealing with here, really, the only real question, Mr. Justice Rehnquist, is what kinds of activities does the immunity apply to.

QUESTION: That's exactly why I asked you that question.

MR. STAVIS: It may very well be that a chairman of a committee engages in more committee activities than a garden variety Senator. And to that extent he would be more involved with questions of immunity in connection with Senate committee activities. But it's not a greater immunity. That's all I'm saying. This immunity is complete if it applies. And that's why the Court has been so chary about what immunity is to apply to.

I agree that Gravel is dispositive. And with that I would like to conclude my argument unless there are any further questions.

MR. CHIEF JUSTICE BURGER: We will resume at 1 o'clock for Mr. Easterbrook's rebuttal.

(Whereupon, at 12 noon, the oral argument in the above-entitled matter was recessed, to reconvene at 1 p.m. the same day.)

AFTERNOON SESSION

(1:02 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Easterbrook.

REBUTTAL ARGUMENT OF FRANK H. EASTERBROOK

ON BEHALF OF PETITIONERS

MR. EASTERBROOK: Mr. Chief Justice, and may it please the Court: The primary point of respondents during oral argument was that whatever may be the case for situations in which a subpoena has been issued, Congress has no general investigative authority.

We believe that that distinction is incorrect.

QUESTION: You mean investigative authority that's within the --

MR. EASTERBROOK: Within the power of Article I.

QUESTION: That's within the Speech or Debate.

QUESTION: Within the immunity of the Speech or Debate Clause.

MR. EASTERBROOK: We think the two are the same.

QUESTION: But his argument was the latter.

MR. EASTERBROOK: Right.

Let me start with the premise that this Court started with in Servicemen's Fund, which is that Congress must have the power to investigate or it would be unable intelligently to pass legislation. If it can't find out the facts, it simply cannot know how best to regulate the affairs

of the Nation. So the fact-finding process is essential to the functions of Congress. The work simply cannot go on without it. And that was the foundation for this Court's holding in Servicemen's Fund that the Speech or Debate Clause provides absolute immunity to the issuance of a subpoena.

QUESTION: Do you understand Mr. Stavis is challenging, saying there is no investigatory power?

MR. EASTERBROOK: Mr. Stavis seems to contend, I think, that there is no informal investigatory power. It's only when done pursuant to a subpoena. We believe that that cannot be correct.

QUESTION: Or a hearing.

MR. EASTERBROOK: Or a hearing.

The purpose of a subpoena is to provide compulsory process for Congress. That is, it compels someone to respond in a particular way on pain of law for disobedience. But it would be very odd, we think, to say that Congress has the power within the scope of the Speech or Debate Clause to obtain information only when it finds it necessary to compel that information from the hands of persons who may be unwilling to supply it. It may be just as appropriate, and certainly as much within the legislative power, to obtain information from persons who were willing suppliers of information, whether that information is necessary for legislating or whether that information proves to be necessary on which to issue a

subpoena.

That is the kind of thing that happened here. There was no need to compel the documents from the hands of Ratliff. Ratliff was willing to supply them. We think it would be an inversion of the proper ordering of interest to say the Speech or Debate Clause provides immunity only when Congress found it necessary to use compulsion.

But more than that, the question whether to use compulsory process or to use some more informal method is fundamentally within the discretion of Congress. To say that only a subpoena is within the scope of protection essentially tells Congress how to go about its information-gathering function, a function, an essential one, that this Court has held that it has.

Ultimately the harm to persons like respondents is the same whether the information is secured by subpoena or by simple oral request.

QUESTION: Would you think if materials are subpoenaed and the person doesn't respond, he is entitled to litigate whether Congress may secure the documents or not?

MR. EASTERBROOK: Mr. Justice White, the Court has held that in response to a contempt citation he can litigate whether that was within the authority of Congress.

QUESTION: And the courts sit on that sort of proceeding?

MR. EASTERBROOK: Yes, your Honor, they do.

QUESTION: That suggests to Congress that perhaps some of their subpoenas are good and some aren't.

MR. EASTERBROOK: Yes. In much the same way, some of Congress' statutes are good and some aren't, as this Court sits deciding whether statutes that are passed were constitutional, within their power. But that doesn't mean that the process of getting to the statute is defective in any way.

QUESTION: If you are right, as I understand it, whenever somebody didn't comply with a subpoena, a congressional committee could just send some police officers out with guns and break into the house and get the information.

MR. EASTERBROOK: That raises once more -- I have two answers to that. It raises once more the discussion I had in response to Mr. Justice Stewart's question and about the question whether Article I provides to Congress the power to take things by force.

But the second answer is that there is also a problem of distinguishing between what it should do and what the remedy is for it not doing that. We may assume that Congress should not send someone to take it by force, that it is wrong for Congress to do that.

QUESTION: You mean illegally?

MR. EASTERBROOK: Illegally.

QUESTION: Not just by force.

MR. EASTERBROOK: Illegally or by force. But I am willing to accept by force here. When they assume that it's wrong for Congress to do so.

QUESTION: And you are willing to accept illegally.

MR. EASTERBROOK: Yes. But our ressponse is that the remedy lies in Congress' discipline of its own members and in the public's discipline of Congress, rather than in discipline by the Judicial Branch of Congress' errors. That ultimately is our position.

I would like to address for a moment, Mr. Justice Stevens, your question about the Gravel case, about the source of the documents. It is true that the legislative aide in Gravel could be questioned about the source of the documents. But we think that is so for the same reason the Court held that the publication of the Pentagon Papers was not privileged, that is, the essential holding of that case is that generating publicity for its own sake is not something that is within Congress' powers under Article I. Therefore, the obtaining of that document for that purpose was not a legislative act and therefore the immunity did not apply.

But in this case it is clear that Brick was attempting to gather information for the purpose of legislation so that his activities are legislative act and this is therefore quite a different case from Gravel.

QUESTION: If we were to conclude that there was

was Fourth Amendment violation here, what would be the consequence on the case?

MR. EASTERBROOK: Mr. Chief Justice, if there were no Fourth Amendment violation, the judgment of the court of appeals should be reversed and the complaint dismissed, although we have not raised that issue which was the subject of Judge Wilkey's opinion.

QUESTION: Mr. Easterbrook, if we should disagree with your principal argument, what issue, if any, would remain for us to address?

MR. EASTERBROOK: Mr. Justice Powell, we have raised a subsidiary argument about vicarious liability --

QUESTION: Yes.

MR. EASTERBROOK: -- that we believe you can accept without addressing our principal argument.

Our argument about vicarious liability is that --

QUESTION: I'm not suggesting you go into it. I just want to be sure you have not waived it.

MR. EASTERBROOK: We have not waived it. We believe very firmly that it is correct. I just have not had time to cover it.

QUESTION: You argue it in your brief.

MR. EASTERBROOK: We argue it in our brief, and we continue to argue it here.

QUESTION: You are not pressing the position of

the four in the court of appeals, the five in the --

MR. EASTERBROOK: We are not.

QUESTION: Mr. Easterbrook, are any of these defendants still living?

MR. EASTERBROOK: One of the defendants, Donald F. O'Donnell, who was the chief counsel of the subcommittee, is still living. The other three defendants are deceased.

QUESTION: Both the Senator is deceased and Mr. -- what's his name?

MR. EASTERBROOK: Adlerman died in 1975 and Mr. Brick, the investigator, died in 1973.

QUESTION: And what part allegedly did the defendant, the only living defendant, play in this?

MR. EASTERBROOK: He was alleged just to have participated in the conspiracy with the other defendants to carry out these acts. The complaint and the affidavits of the respondents are completely nonspecific on that question. We simply do not know what role he played.

QUESTION: He wasn't on the ground, was he, at the time and place of the delivery?

MR. EASTERBROOK: He was not in Kentucky at any point. One of our principal arguments with respect to him is the argument about vicarious liability. He is simply being asked to answer for the misdeeds of Brick, assuming Brick had any misdeeds.

QUESTION: I suppose we don't have, of course, here any issue of the survival of these actions.

MR. EASTERBROOK: We do not. The Court of Appeals reserved decision on that question and essentially asked the district court to decide it.

QUESTION: It occurred to me that you may be asking us to decide an academic question if these actions do not survive.

MR. EASTERBROOK: If they don't survive, the question that remains open would be an academic question. In the court of appeals, after the deaths, the court of appeals asked the United States for its views, and we conceded that as a matter of law the actions survived the deaths. We have since argued that although they survived, it was necessary for the McSurelys to attempt to substitute the estates or the survivors. The McSurelys did not do so until August 1977. We have argued that that caused the actions to abate.

QUESTION: When you concede something, is personal liability against some of the petitioners being sought which would not be indemnified by the Government?

MR. EASTERBROOK: I believe it would require a private bill to indemnify for these cases, your Honor.

QUESTION: Do you find yourself in any sort of a conflict position, then, when you concede that an action survives?

MR. EASTERBROOK: We consulted with our clients before making that concession.

QUESTION: In other words, Mrs. McClellan, or at least the estate of the Senator, which she or whoever the beneficiaries are of that estate, you have conceded would be liable.

MR. EASTERBROOK: Your Honor, we conceded that in behalf of the estates of Adlerman and O'Donnell. After Senator McClellan died, we consulted with his estate and his estate asked us to reserve that point on his behalf, and in our motion to substitute the estate for the Senator, we explicitly reserved that point, and we believe that it's open for the litigation in the lower courts if that should prove necessary. But there is one very live defendant still.

QUESTION: Yes, but his liability, if any, is asserted on quite a different ground, isn't it?

MR. EASTERBROOK: It's asserted on the general ground of conspiracy with the others, and we believe it's asserted on the same ground as to him as it is asserted with respect to Senator McClellan.

QUESTION: But not with respect to Brick.

MR. EASTERBROOK: Brick's liability may stand on a different footing, yes, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:12 p.m., the oral arguments in the above-entitled matter were concluded.)