In the

Supreme Court of the United States

RONALD R. HUTCHINSON,

Petitioner,

v. No. 78-680

WILLIAM PROXMIRE AND MORTON SCHWARTZ,

Respondents.

Washington, D. C.
April 17, 1979

Pages 1 thru 63

Hoover Reporting Co., Inc.

Official Reporters
Washington, D. C.
546-6666

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Washington, D. C.

Tuesday, April 17, 1979

The above-entitled matter came on for argument at 10:19 o'clock 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 PAUL STEVENS, Associate Justice

APPEARANCES:

MICHAEL E. CAVANAUGH, ESQ., Fraser, Trebilcock, Davis & Foster, 1018 Michigan National Tower, Lansing, Michigan 48933; on behalf of the Petitioner

ALAN RAYWID, ESQ., Cole, Zylstra & Raywid, 1919 Pennsylvania Avenue, N. W., Washington, D. C. 20006; on behalf of the Respondents

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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 will hear arguments first this morning in Hutchinson v. Proxmire and others.

Mr. Cavanaugh, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF MICHAEL E. CAVANAUGH, ESQ.,

ON BEHALF OF THE PETITIONER

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

I am Michael Cavanaugh, of Lansing, Michigan, appearing on behalf of the petitioner, Dr. Ronald Hutchinson. This is a civil action by Dr. Hutchinson, a research scientist, against a United States Senator, William Proxmire, and his aide, Morton Schwartz, seeking damages for libel, slander, interference with contractual relations and invasion of privacy and intentional infliction of mental anguish.

The basis of federal jurisdiction is diversity of citizenship. In March of 1975, Senator Proxmire launched a series of monthly press releases which were designed, according to Senator Proxmire, to focus national attention upon what he considered as the greatest waste of taxpayer money that could be located that month.

QUESTION: Mr. Cavanaugh, could I interrupt you for a moment?

MR. CAVANAUGH: Yes, sir.

QUESTION: You said the basis of jurisdiction is diversity of citizenship. I take it then that it is state law of some state that forms the substantive basis for your claim of libel and slander?

MR. CAVANAUGH: Yes, Your Honor, ultimately state law will be applied.

QUESTION: What state, Wisconsin?

MR. CAVANAUGH: Your Honor, there are three possible choices, Wisconsin, the District of Columbia, and the State of Michigan. We believe that the appropriate state law to be applied would be the State of Michigan. The petitioner resides in the State of Michigan, the publication was nationwide but the greatest impact would be in the State of Michigan and we think under the Wisconsin choice of law provisions that it would look to the impact of the tort and that Michigan law would be applied.

QUESTION: But it would be a question of Wisconsin choice of law?

MR. CAVANAUGH: That is correct, Your Honor.

It is our contention, Your Honors, that a review of the press releases issued by Senator Proxmire that are contained in this record, along with the evidence that relates to them, will show that the press releases typically will take a small part of a research project, distort it and then indicate that the full amount of the research grant was

granted for that project. The press releases are typically filled with sarcasm and humilitates the researcher involved.

In April of 1975, Dr. Hutchinson was selected for the Golden Fleece of the Month Award. The Golden Fleece issued for Dr. Hutchinson contained inflammatory and untrue statements. The following statements, among others, were made: "The Government paid a half million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching. All of this money was given to Dr. Hutchinson, of Kalamazoo State Hospital. In fact, the good doctor has made a fortune from his monkeys, and in the process made a monkey of the American taxpayer."

The press release also stated that Dr. Hutchinson's research work was perhaps duplicative.

In the course of the depositions, the respondents have admitted that prior to issuance of the press release, they knew that the $500,000 did not go to Dr. Hutchinson personally but, rather, was paid to the State of Michigan and used by the State of Michigan to pay salaries, to pay for supplies, overhead and similar expenses.

As far as the statement that in fact the good doctor has made a fortune from his monkeys, the respondents contended in deposition that this was merely a reflection of Dr. Hutchinson's status and power as a researcher and a reflection of his income which they claim is among the highest

percentages of income in the United States. In fact, at the time the Fleece was issued, Dr. Hutchinson's salary from the State was $30,000, which was the highest at any time covered by the Fleece. The period of time he served as a college professor, his salary would have been considerably less.

In depositions, the respondent also admitted that prior to the issuance of the press release, they received statements from the funding agencies that gave the true nature of Dr. Hutchinson's work. The Office of Naval Research and the National Aeronautics and Space Administration particularly gave statements to the respondents which indicated that Dr. Hutchinson had for the first time given those agencies an accurate method of detecting and measuring aggression. The Navy hoped to use that research in training and selecting submarine crews. NASA hoped to use that research in selecting crews for long-range space missions.

In addition to the press release, the respondents issued a newsletter in April of 1975 which repeated many of the same defamatory statements. This newsletter was sent to over 100,000 persons, some of whom resided in the Senator's home State of Wisconsin and some of whom did not. A second newsletter was issued in February of 1976 which also referred to Dr. Hutchinson.

In addition, Senator Proxmire made statements regarding Dr. Hutchinson's work on radio and television,

including the Mike Douglas Show, where the Senator referred to Dr. Hutchinson's work as "the most outrageous example of wasteful, extravagant and stupid spending."

In addition to these activities --

QUESTION: On that broadcast, am I correct in remembering that Dr. Hutchinson's name was not mentioned?

MR. CAVANAUGH: Your Honor, his name was not mentioned but his work was --

QUESTION: So your answer is yes?

MR. CAVANAUGH: That's correct. His work was specified in such detail that he could be identified from what was said. In fact, there are affidavits in the record, Your Honor, which indicate that people did recognize that Dr. Hutchinson was being referred to. The prior press release issued by Senator Proxmire certainly aided in the identification later of Dr. Hutchinson.

QUESTION: Isn't there some question about whether or not there was more than one broadcast? I know you say there were at least two.

MR. CAVANAUGH: We know of one other for certain, is the Bob Barry Show, which is referred to in the record. In addition, there may have been other ones. The Senator indicated in his deposition that he could not recall if there were other ones. I believe there are some affidavits in the record which we filed from people who indicated that they

believed that they heard mention of this sort of thing on other entertainment-type television shows.

In addition to these actions, after the press release was issued the Senator's aide made telephone calls to the various funding agencies. During some of those calls, defamatory statements were made and pressure was apparently exerted on those agencies to cause them to cease funding Dr. Hutchinson's work.

Dr. Hutchinson filed suit and the defendants moved for summary judgment on the basis of the speech or debate clause in the First Amendment. The District Court granted summary judgment. The Seventh Circuit Court of Appeals affirmed, holding, one, that the press release and the newsletters were absolutely immune under the speech or debate clause, even though they may have contained defamatory material. Secondly, the Court of Appeals held that the radio and television interviews and the calls to the funding agencies to seek termination of the research grants were not immune under the speech or debate clause but they were protected under the First Amendment.

QUESTION: Didn't the District Court make that same conclusion?

MR. CAVANAUGH: Your Honor, the District Court would have extended speech or debate I believe to those items as well, but it is correct that the District Court in addition

found that petitioner Hutchinson was a public figure and therefore there was protection under the First Amendment.

QUESTION: So the Court of Appeals affirmed that part of the District Court's judgment.

MR. CAVANAUGH: The Court of Appeals narrowed the District Court's finding. The Court of Appeals found that some activity --

QUESTION: I am talking about the First Amendment part of it.

MR. CAVANAUGH: Yes, that is correct, Your Honor.

QUESTION: Well, when you talk about findings and so forth, this case went off on summary judgment against your client.

MR. CAVANAUGH: That is correct, Your Honor.

QUESTION: So we are not talking about a finding of fact on a disputed issue where the Court of Appeals affirms on a clearly erroneous basis.

MR. CAVANAUGH: That is exactly right, Your Honor. In fact, one of our contentions is that Dr. Hutchinson is entitled to a trial on the merits so that a jury or other trier of the facts can consider this evidence and any inferences that can be drawn from it.

QUESTION: Can I ask you, as I read the District Court's opinion, the District Court also reached the state law question of whether these remarks were defamatory.

MR. CAVANAUGH: That is correct, Your Honor.

QUESTION: And ruled that they were not.

MR. CAVANAUGH: That is correct.

QUESTION: Now, this is a state law issue, I take it, isn't it?

MR. CAVANAUGH: Your Honor --

QUESTION: Isn't it?

MR. CAVANAUGH: Yes.

QUESTION: You told Mr. Justice Stewart that it was going to be local law that would govern this case.

MR. CAVANAUGH: That is correct.

QUESTION: And if these remarks were not defamatory, what excuse is there for ever reaching the First Amendment issue at least? I am not talking about speech or debate.

MR. CAVANAUGH: Your Honor, the Seventh Circuit Court did not reach the state law issue. It would appear that --

QUESTION: I know, but isn't it the usual rule you reach non-constitutional issues first?

MR. CAVANAUGH: Yes, Your Honor, I would think that if --

QUESTION: Well, what if the Court of Appeals had affirmed the District Court on the ground that these remarks were not defamatory, would there be any constitutional issues in the case?

MR. CAVANAUGH: Your Honor, to speak frankly, I think the Court's decision in Paul v. Davis would indicate that the torts involved do not invade constitutional rights.

QUESTION: Well, Paul v. Davis is a 1983 case. This is a case based upon state tort law, isn't it?

MR. CAVANAUGH: Yes, Your Honor, it is. Your Honor, in Paul v. Davis, the Court considered whether invasion of privacy could rise to a constitutional level, and Justice Rehnquist writing for the Court indicated that there are only certainly limited areas in which an invasion of privacy would rise to a constitutional level. Therefore, while we would hope to view this as a constitutional issue, I think realistically the Court has discussed that at least in dicta in Paul v. Davis if not in --

QUESTION: Well, why should we reach either the First Amendment issue or the speech or debate clause if the District Court is right, that this wasn't defamatory anyway?

MR. CAVANAUGH: Your Honor, we believe that the District Court was clearly erroneous in not --

QUESTION: That may be so, but the Court of Appeals hasn't said so and we rarely disagree with lower courts on what the state law is.

MR. CAVANAUGH: That is correct, Your Honor. The Court of Appeals did not reach the issue and we would hope that the Court would remand for a determination on that issue

after the Court would rule on the --

QUESTION: Why would we rule on the constitutional issue?

MR. CAVANAUGH: Your Honor --

QUESTION: Because we granted certiorari? That may be a good answer.

(Laughter)

MR. CAVANAUGH: Your Honor, that was an answer I was embarrassed to give.

QUESTION: Yes.

MR. CAVANAUGH: I think the other answer is that the District Court clearly was erroneous on the state law.

QUESTION: I suppose you contend that you are entitled to have the Court of Appeals pass on the question of state law just the way you would in any other appeal from the District Court to the Court of Appeals, even though the constitutional question shouldn't be reached?

MR. CAVANAUGH: That is correct, Your Honor, the petitioner has a right to review and that review should encompass at least the threshold issue.

Your Honor, I would like to in my remarks today speak to two issues. The first is speech or debate, and the second is the public figure issue. Article I, Section 6 of the Constitution provides that Senators and Representatives for any speech or debate in either House shall not be

questioned in any other place.

QUESTION: Before you get on to that, is there in your position the notion that whether or not he is a public figure, is a jury issue which cannot be resolved by the court?

MR. CAVANAUGH: Your Honor --

QUESTION: Summary judgment.

MR. CAVANAUGH: Your Honor, that would be our position. Our position is that a jury should be allowed to review the facts and the inferences that can be drawn from those facts to decide whether or not the petitioner is a public figure.

QUESTION: Then you must mean that, among other things, that is an issue which cannot be resolved, is a factual issue which cannot be resolved on affidavits, only by a trial of the issues, is that it?

MR. CAVANAUGH: Yes, Your Honor, it would appear appropriate to reverse the lower decisions and permit the petitioner to have a trial on the issue.

In understanding our speech or debate position, it is as important to understand what we do not challenge as it is to understand what we do challenge. We do not challenge any speech by Senator Proxmire. We do not chablenge the insertion of a speech in the Congressional Record. We do not challenge any vote or any action taken in Congress or in committee.

We do challenge the defamatory press release that was given massive publicity, two defamatory newsletters that were given similar dissemination, radio and TV appearances and the telephone calls to the funding agencies to seek termination of Dr. Hutchinson's funding.

QUESTION: Did you say there were 100,000 of these press releases sent out?

MR. CAVANAUGH: Yes, that's correct, Your Honor. Each press release was sent to over 100,000 persons.

QUESTION: All in Wisconsin?

MR. CAVANAUGH: No, Your Honor, some were in Wisconsin and some were in other states.

QUESTION: Does the record show what the spread was on the --

MR. CAVANAUGH: No, Your Honor. The only statement I believe is in Senator Proxmire's deposition, where he indicated that some of those press releases were sent to Wisconsin and others were sent outside of the state.

QUESTION: Were those press releases or newsletters?

MR. CAVANAUGH: I'm sorry, newsletters. All of the press releases were sent to the media.

QUESTION: Right.

MR. CAVANAUGH: This Court in the recent past has said on at least three occasions that publications or republications outside of Congress are not protected by the speech or

debate clause. In United States v. Brewster, a criminal bribery case, the Court pointed out that Congressmen engage in many activities that are political in nature rather than legislative. Specifically mentioned were newsletters, news releases and speeches outside of Congress. The Court then commented that it has never seriously been contended that these political matters are protected by the speech or debate clause.

In Gravel v. United States, private publication of the Pentagon Papers was found not to be essential to the deliberations of the Senate and not part and parcel of the legislative process, hence it was not protected by speech or debate.

In Doe v. McMillan, it was held that committee members who compiled and voted to publish a report were immune under the speech or debate clause, but the Court made it very clear that the speech or debate clause does not protect a private republication of documents introduced and made public at a committee hearing. The Court went so far as to say that if a member of Congress republished libel by reading from a record, from a congressional committee record in his home district, he would not be immune under the speech or debate clause.

And these recent statements by the Court comply with the historical understanding of the speech or debate

clause. Justice Story, 145 years ago, in the Commentaries on the Constitution of the United States, stated that if a Congressman republished a defamatory statement that was originally made in Congress, he would not be immune.

I think it is worth noting how far the defendants have gone in this case beyond the conduct in Doe. In Doe, the defendants acted as a congressional committee and they did nothing more than prepare the report and vote along with the rest of the House for its publication.

Here we have one Congressman issuing his own press release and his own newsletters. In Doe, the publication was very limited. It was limited to 1,682 copies that were sent to other Congressmen and to the usual offices that receive printings.

QUESTION: Mr. Cavanaugh, what would you say if they just mailed out the Congressional Record?

MR. CAVANAUGH: Your Honor, I think then we would have a question of how wide was the dissemination. If the dissemination --

QUESTION: The same mailing list you have got here.

MR. CAVANAUGH: Your Honor, I would think it would not be protected. I think that that is dissemination beyond a legitimate needs of Congress and therefore would not be protected.

QUESTION: But if the Congress for some reason or

other sent the same copy of the Congressional Record out --

MR. CAVANAUGH: Your Honor, if it was an action taken by Congress, I believe that it would be immune.

QUESTION: Or a committee?

MR. CAVANAUGH: Yes, sir. But if the action is taken by an individual Congressman and it is disseminated beyond legitimate legislative needs, then it would not be immune.

In Doe, in addition to the publication being limited, there was no effort to call attention to it. In the present case, every possible effort was made to call attention to the news release. In short, in the present case, we do not have Congress taking action or a committee taking action, we have one Senator issuing a press release, issuing a newsletter and giving it the widest possible dissemination. This is not immune under the speach or debate laws.

If I may, I would like to turn to the public figure issue. This Court in Gertz v. Welch indicated that there are two types of public figure. First there was the all-purpose public figure, which was described as a person with pervasive power and influence, pervasive fame and notoriety. The Court of Appeals and the parties in this case are in agreement that Dr. Hutchinson does not satisfy that definition.

QUESTION: Now, before you get into this public figure business or public official, those concepts have been

deemed important in the decisions and opinions of this Court when the alleged false defamatory material has been published by some instrumentality of the public news media, isn't that correct?

MR. CAVANAUGH: That's correct.

QUESTION: Is there any case here that holds that the so-called New York Times rules are applicable when the defamatory statement has been made by an individual person, human being?

MR. CAVANAUGH: No, Your Honor. In fact, that is an issue that we have specifically not conceded. The respondents in their brief indicated in a footnote that apparently we had conceded the point that the same standard applies to public or to private defendants as would apply to a member of the media. Your Honor, we do not think that is correct, the Court has not yet addressed that issue. Chief Justice Burger in a recent concurring opinion pointed that out, that the Court had not yet squarely faced that issue, and there is considerable speculation in the legal commmunity that perhaps different standards do apply --

QUESTION: Well, there are some decisions in state courts the other way, aren't there?

MR. CAVANAUGH: Yes, Your Honor, there are.

QUESTION: So it may be that whether or not your client is a public figure is totally irrelevant.

MR. CAVANAUGH: It may well be that way, Your Honor.

QUESTION: You don't brief or argue this basic question?

MR. CAVANAUGH: No, we have not, and the reason we have not is simply this: The New York Times involved both media defendants and non-media defendants.

QUESTION: Yes.

MR. CAVANAUGH: It would appear from the ruling in New York Times that there was an assumption that the same rule would apply to both types of defendants. Now, since that time in Gertz and in the other public figure cases, the court seems to rather carefully indicated that the defendant was a media defendant. But, Your Honor, for purposes of argument we have assumed that the same standard would apply but I think that the Court has not foreclosed the possibility that different standards would apply to the two types of defendants.

QUESTION: And although you have assumed it, you reserve the privilege of arguing that it doesn't.

MR. CAVANAUGH: That is correct.

QUESTION: But you are not arguing it here.

MR. CAVANAUGH: That is correct, Your Honor.

The Court of Appeals held that Dr. Hutchinson fell within the second category of public figures, the limited public figures. These were described as people who have voluntaril thrust themselves into the forefront of a particular

public controversy in order to influence the resolution of the issue involved. In other places in the opinion, these persons were referred to as persons who had voluntary injected themselves into an issue, persons who had assumed special prominence in the resolution of a particular dispute.

The Court of Appeals relied on four factors in finding that Dr. Hutchinson was a limited public figure. First, the court relied upon his solicitation of federal funds; second, the published articles about Dr. Hutchinson's work; third, about the stories that appeared about Dr. Hutchinson in local newspapers; fourth, the court relied upon the fact that it believed Dr. Hutchinson had sufficient access to the media to reply to the statement. To these four grounds, the respondents would add a fifth, which is that Dr. Hutchinson's research department was the subject of a public audit in the State of Michigan after the press release, apparently after the first newsletter and after the telephone calls to the funding agencies but prior to some of the other publications.

QUESTION: Well, that is almost like going back to the plurality opinion in Metro Media v. Rosenberg, isn't it? If you say something bad about a person and it is published, that makes him a public figure.

MR. CAVANAUGH: I think that is exactly right, Your Honor. It is a bootstrap argument, that anyone who is

defamed by a United States Senator is going to become a public figure and there is going to be a --

QUESTION: By the very fact of his defamation.

QUESTION: Right.

MR. CAVANAUGH: Yes, sir, and he is going to have some access to the media because the media will call him for his response. So the very public defendant such as a Senator could make anyone a public figure if that were the test.

QUESTION: Well, the media always could.

MR. CAVANAUGH: That's right, Your Honor.

In regard to Dr. Hutchinson's publications, his publications have consisted of four or five chapters in books and several articles that he has published. All of those were scholarly articles setting forth the results of his research. They did not advocate a position of public funding, they did not seek to thrust him to the forefront of any issue involving the continuation of public funding.

It is important to note that in Gertz the Court noted that Mr. Gertz had published many articles and many books, yet he was shown not to be a public figure.

In regard to the articles that appeared in the local papers, in fact there was only one local paper, and out of the seven stories that appeared, only one can be called a true story, the other six were simply notices indicating that Dr. Hutchinson had been promoted at the university or something

of that nature.

The publication that there was about Dr. Hutchinson prior to this release was limited solely to one newspaper in Kalamazoo. This is in startling contrast to the publication in Firestone. Justice Marshall in his dissent pointed out that Mrs. Firestone had been the subject of over 80 newspaper articles during the course of the divorce proceedings, yet she was found not to be a public figure.

The last item mentioned by the Court of Appeals was the receipt of federal funding. As the brief of the amicus curiae, the American Psychological Association, points out, over 72 percent now of research that is related to universities is funded by the United States Government. If that were the test, we would be making virtually every researcher a public figure.

But more importantly than that, merely by seeking public funds, a researcher does not thrust himself into the forefront of any public issue, so we would submit that that cannot be the test.

QUESTION: Mr. Cavanaugh, if he is going to ask for -- what did he get, $900,000 or something like that, according to the footnote in Judge Leighton's opinion, shouldn't he be prepared to defend in a public forum the appropriateness of that kind of spending by the government?

MR. CAVANAUGH: Your Honor, the $900,000, as I

mentioned earlier, $900,000 is a high figure. It was something less than that. It was in the neighborhood of $700,000 or $800,000. But at any rate, the money was paid by the federal agencies to the State of Michigan or to the other sponsoring authority. The research before it is funded is carefully evaluated by the funding agencies in a peer review of --

QUESTION: Well, it may have been entirely proper, I don't suggest that, but when you do get involved in seeking public funds of that magnitude, isn't it appropriate to consider that you must be prepared to defend publicly the expenditure of that kind of money? Doesn't that seem reasonable?

MR. CAVANAUGH: Your Honor, I think while the researcher should be prepared to defend his funding he should not be given the status of public figure so that he has to rise to the high level of meeting actual malice before he can maintain an action. Because in addition to the researcher defending the action, the agencies themselves that fund it can defend the action, and that is where I think the public or a Congressman should look for justification, rather than the researcher.

QUESTION: But doesn't he know that this is the kind of thing that is typically a subject of public debate and newspaper articles and there might be careless comment

on where it goes, when you get into the appropriations area?

MR. CAVANAUGH: Your Honor, if we accepted that standard we would be back to the Metro Media standard which is that it is a matter of general interest to the public and therefore anyone who happens to be involved in it can be slandered and you must show actual malice before you can recover. The Court has left that --

QUESTION: It was just more of a public issue than the public person.

MR. CAVANAUGH: Yes, sir.

Your Honor, I would like to reserve whatever time I have remaining for rebuttal. Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Cavanaugh.

Mr. Raywid.

ORAL ARGUMENT OF ALAN RAYWID, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

A proper assessment of this case we maintain requires some examination of the facts of how Congress actually operates. I would like to review a few pertinent facts. In the year of the filing of this suit, President Ford had submitted a budget to the Congress of just short of $400 billion. In that budget was some $25 billion allocated for research and development. That year proved to be an all-time high of $76

billion in deficits.

The competitors for research and development funds included such national interest topics as energy research, national defense, environment, and health. It is an annual ritual when this budget is submitted to the Congress that a review take place which spans most of the legislative year. That review process is the responsibility first of the Appropriations Committee and many of its subcommittees. It conducts hearings, along with a formal review process and a report to the Congress and legislation submitted to the Congress is an informal review process that goes on continually throughout that year. That is, the budget officers in each of these various agencies contact the Appropriations staff and they exchange information and they are asked to give more support for some particular items, to eliminate some items, and to get the budget into what the Congress deems to be a proper shape. That same process is going on in the House in parallel committees similarly structured.

QUESTION: Now, are these observations directed at the speech or debate clause, the First Amendment issue, or what?

MR. RAYWID: Principally the speech or debate issue. It also touches upon First Amendment but principally speech or debate, Mr. Chief Justice.

QUESTION: Mr. Raywid, could you comment just

briefly on why we should reach that issue here if the Court of Appeals could have disposed of the case on a state law ground?

MR. RAYWID: Well --

QUESTION: I take it the Court of Appeals didn't deal with the state law ground at all?

MR. RAYWID: That is correct. When the speech or debate immunity is raised by a Senator, and it was in this case on behalf of the Senator and his aide, it requires a preliminary investigation or preliminary determination by the court as to whether or not it appropriately applies, whether legitimate legislative activity is involved. Once that has been raised and there is --

QUESTION: You say where speech or debate is involved, it is a threshold issue because the Senator shouldn't even be in court at all?

MR. RAYWID: That is correct. The court should proceed no further when it makes such a determination.

QUESTION: Shouldn't reach the local law issue at all?

MR. RAYWID: Should not reach the local law, should not reach First Amendment. It is an obligation on the part of the court to first reach that examination.

QUESTION: So under your hypothesis a court, say the District Court here in Madison would have addressed first

speech or debate, then local law, then First Amendment?

MR. RAYWID: That would be the appropriate order, but in order to reach local law it might first have to determine First Amendment issues.

QUESTION: Why?

MR. RAYWID: Well, certainly if there is no libel then it need not address First Amendment.

QUESTION: Well, suppose a complaint in its terms alleged only that the defamatory statements were made in a speech on the floor of the House or the Senate on a given day and then gave the content of that speech, would there be anything in that case except speech or debate clause?

MR. RAYWID: There would be nothing in that case, Mr. Chief Justice, that would be a simple determination and the --

QUESTION: A demurrer type of response to it by the Senator.

MR. RAYWID: It would need no evidentiary showing whatsoever, a demurrer type operation would be sufficient, merely need to plead the speech or debate clause on the avermence in the complaint.

QUESTION: On your approach on that hypothetical, the Senator or Congressman may write a letter rather than file a formal answer, saying on the face of the complaint against me I am not required to answer in any place other

than the Senate or the House itself, and that would suffice in your view?

MR. RAYWID: Perhaps it might, but I would think that the Senator would observe legal procedure like any other litigant and raise that issue preliminarily. But he might choose not to answer at all, and it would then be incumbent upon the court to examine that complaint and see whether or not it was immune.

I have been describing an annual ritual of some rather major proportions in the Congress. I want to emphasize that that is the principal business of the Congress and takes up most of its legislative year.

Now, turning to Senator Proxmire, Senator Proxmire is a member of the Senate Appropriations Committee and he serves on five of its subcommittees. Those five subcommittees have control or at least pass upon 60 percent of the national budget. They pass on 75 percent --

QUESTION: Mr. Raywid, as I understood your brief, you make precisely the same argument if Senator Proxmire was not a member of any of these committees, is that right?

MR. RAYWID: That is correct, that any member has this right. But it is certainly more particularized in his responsibilities, and if there is to be any examination made of his --

QUESTION: Presumably every Senator has an interest

in avoiding waste of government funds, so I don't understand what the committee membership has to do with the case.

MR. RAYWID: The committee membership was one of the findings below, it certainly explains if any examination is to be made of Senator Proxmire. But I agree with you, Mr. Justice Stevens, that that right rests in all Congressmen and it is one that the Congress protects.

In addition to these committee assignments though, I would like to mention one additional assignment he has. All of these subcommittee assignments span the particular agencies which received the Fleece. But in addition to that, he has an assignment on the Joint Economic Committee and he is Chairman of its Priorities and Economy in Government. That committee curiously may not propose any legislation. It has purely an informational function. It publishes a number of reports, but its most popular one is its montly Economic Indicators. It is widely circulated and, as I say, has an informative function only.

Senator Proxmire has been in the Senate for 21 years. It has been a hallmark of his representation that he has always criticized waste and government inefficiency. After 16 years in Congress, he made the decision that he could be much more effective in that criticism if he narrowed his focus and made some particular or dramatic representation of waste in government. Billions have no relation or have no sense to

the public as a whole or even for that matter to economists. But some particular item that the government has paid twice the amount of its retail value does have a lot of meaning.

He has chosen a pattern of making a speech and also issuing a simultaneous press release for the widest possible coverage. He has explained in his deposition the reason why he does this, is that debate and speaking on the floor is not a debating process in the modern Congress. Senators do not attend speech and debates, they do not read the Congressional Record or they are not apt to generally, but they do read the newspapers about what has occurred in Congress, and they do listen to their constituents about what their constituents are concerned about in Congress. It is in that manner that he feels he can be most effective in his criticism of spending.

Now, these have been characterized as defamatory or mischaracterized I believe as defamatory, but before we reach that issue I would like to show how each of these --

QUESTION: Well, it is your position that he could defame?

MR. RAYWID: That is correct, if he is properly executing the legislative function which has been authorized by the Congress.

QUESTION: He certainly could in his speech on the floor of the Senate.

MR. RAYWID: Without question.

QUESTION: What if he made a commencement speech at the University of Michigan where Dr. Hutchinson was employed and said the same things?

MR. RAYWID: Possibly yes, probably not.

QUESTION: Probably not protected?

MR. RAYWID: Probably not protected. We draw a distinction in this case and I think you, Mr. Chief Justice, put your finger on or at least our element of the case, our major emphasis, when you asked Mr. Cavanaugh whether he would concede as to whether a publication authorized by the Congress would be protected. He said in his view it would be. It is our position that this particular release through newsletter and through press release is a matter specifically authorized by Congress.

QUESTION: Well, that is in general. That is in general, I take it, because Congressmen and Senators are authorized to frank their communications to their constituents. Is that what you mean? I mean this particular release wasn't approved by Congress.

MR. RAYWID: That is correct.

QUESTION: Or by any committee, for that matter.

MR. RAYWID: That is not correct.

QUESTION: Why?

MR. RAYWID: A procedure has been established in

1973 after this Court's opinions in its 1971-72 session, a procedure was established for mailings. That is in 39 U.S.C. 3210. The first thing that was placed in that statute was first to express the intent of Congress. It was the intent of Congress to inform the public and that that was part of its legislative process. Then it said Congressmen may mail certain items.

QUESTION: Right.

MR. RAYWID: They may not mail political items, they may not put in personal information. Then it established a procedure for complaints and it also established a procedure for review. As the petitioner has pointed out, they don't review them for the accuracy of the statements, but --

QUESTION: What I am asking, was this particular publication approved as it was written by a committee?

MR. RAYWID: It was approved because it was mass mailed, it was sent to the Senate service department for approval as to whether it conforms to these statutory rules that were enacted in 1973. In that manner, we maintain that this has been conduct that has been authorized by Congress and for that matter it is protected. Now, it would --

QUESTION: Do you think that matter is entirely in the hands of Congress, that Congress could have passed the statute saying that anything that a Congressman or a Senator

wants to mail anywhere at any time is protected, regardless of how defamatory it is?

MR. RAYWID: That would be too braod. What we do maintain is that this Court should give due deference to Congress in the way Congress operates, in the way Congress says it operates. Congress understands best how to perform its functions. The Court is willing and has frequently given due deference to legislative schemes that the Congress establishes. When the Congress itself defines how it is to operate, we say that a substantial amount of deference should be given to Congress. It may be some determination initially by this Court in its authority to review all acts of Congress, even its own functions as to whether --

QUESTION: Do I understand you to suggest that Congress by legislative enactment can broaden, expand the scope of the speech or debate clause?

MR. RAYWID: The speech or debate clause is broad but Congress helped to define that and Congress helps to --

QUESTION: Who defines it finally?

MR. RAYWID: Well, certainly this Court must pass on the scope of speech or debate. But in arguing due deference, it seems to me that the Court should give wide latitude to Congress in its explanation of its functions. As I said, it understands what its obligations are best, and some review process is necessary.

QUESTION: But when you are talking about deference basically, this is a case that could have been for all practical purposes for the issues here been brought in the state court in Wisconsin, and so the ultimate question is whether the state of Wisconsin in enforcing its libel policy or its slander policy is foreclosed from enforcing it by the speech and debate clause of the United States Constitution. It isn't a question of this Court giving due deference to the Senate or the House.

MR. RAYWID: Well, this Court, of course, is the ultimate authority on defining legitimate legislative activity.

QUESTION: It is up to us in this case to decide the question that my Brother Rehnquist accurately I think says is posed by this case.

MR. RAYWID: That is correct.

QUESTION: Can the State of Wisconsin enforce its policy expressed in its tort law in this diversity case in defamation and slander cases in these circumstances, despite the speech or debate clause, and that is a question that this Court has to answer in this case.

MR. RAYWID: That is correct.

QUESTION: But your submission is, I take it, that the Senator may in his newsletter to his constituents tell knowing and deliberate falsehoods about other people and be immune, that even if this is the grossest kind of defamation

under Wisconsin or local law, that the Senator is immune from distributing these statements in his newsletters, that is your submission?

MR. RAYWID: Certainly that is viewing it in its harshest light, but I would agree.

QUESTION: Yes, that is the basis on which we must review the case, isn't it?

MR. RAYWID: Well, not entirely since the Court --

QUESTION: Well, why isn't it?

MR. RAYWID: -- since the Court has held that it was not defamatory material, that could --

QUESTION: Who held that?

MR. RAYWID: The District Court.

QUESTION: Well, that is the end of the case then, if we accept that, it shouldn't even be here.

QUESTION: That wasn't reviewed by the Seventh Circuit?

MR. RAYWID: No, it was not.

QUESTION: So we must on the speech or debate issue -- you certainly can't object to our viewing the case on the basis that this is the grossest kind of defamation.

MR. RAYWID: I would have to agree, and that is the issue posed when speech or debate has been raised.

QUESTION: I agree with. And would you say the Senator is immune at the rostrum in his home district if he

gets out his newsletter and reads it?

MR. RAYWID: We would make a distinction between what has been authorized by Congress, what is in the means and how Congress has defined its particular function.

QUESTION: Well, what do you say about the radio and television broadcasts?

MR. RAYWID: We have advocated to what is specifically authorized a per se approach, that TV appearance was not authorized by Congress. In that instance, an ad hoc approach might be necessary, a more thorough examination of the material of that television broadcast. Was the Congressman or was the Senator in that program serving legitimate legislative needs?

QUESTION: And is it your position that it not be determined by us -- is it your position that that staff person that this was handed to decides as to whether this is congressional action or not?

MR. RAYWID: Well, I --

QUESTION: Is that your position?

MR. RAYWID: In a sense, yes.

QUESTION: Well, do you think Congress can give to a person that is neither a Congressman or anything else that authority?

MR. RAYWID: If there are disputes, it is supposed to be referred to the Rules Committee, but quite frequently the Senate Service Department returns mail or returns

newsletters and says that does not conform to our rules. Now the --

QUESTION: And where are their rules? Where are their rules?

MR. RAYWID: The rules are contained --

QUESTION: The only rule is that if nobody complains it goes out, isn't that what the rule says?

MR. RAYWID: No. The Senate rules --

QUESTION: Says what?

MR. RAYWID: Rule 25 and Rule 48 --

QUESTION: Says what?

MR. RAYWID: -- places authority, screening authority --

QUESTION: Where is that? May I see the rules?

MR. RAYWID: First of all, the

QUESTION: Do you have anything that was filed here?

MR. RAYWID: Yes, it has been cited in our briefs.

QUESTION: Where?

MR. RAYWID: Well --

QUESTION: I'll find it. Never mind. I will find it.

MR. RAYWID: We have a portion there on how Congress actually operates. I don't want any misconception about this. There is no --

QUESTION: Well, we do know, don't we, that any Congressman can insert a piece of paper in the Congressional Record and nobody objects, we know that, don't we?

MR. RAYWID: Well, I --

QUESTION: Don't we?

MR. RAYWID: -- I know of no limitation on that.

QUESTION: Right.

MR. RAYWID: He may put it in the Congressional Record and --

QUESTION: Is that Congressional approval?

MR. RAYWID: There is no censorship imposed on members.

QUESTION: That's right.

MR. RAYWID: Before I leave that, Mr. Justice Marshall, I don't mean to represent that the Senate Service Department does the censoring to screen out information. It does --

QUESTION: Does anybody?

MR. RAYWID: Yes.

QUESTION: The question is --

MR. RAYWID: Yes, there is --

QUESTION: -- does anybody in the Senate pass upon what goes out?

MR. RAYWID: -- a self-policing policy. First, there is the screening and --

QUESTION: By whom?

MR. RAYWID: By the Senate Service Department.

QUESTION: Right, as employees.

MR. RAYWID: That is correct, and they are employed by the Rules Committee. Then there are two other restraining forces, it seems to me, and that is the Ethics Committee, complaints may be referred to the Ethics Committee for disciplinary action. The statute that I referred to in 1973 establishes a whole procedure for due process and screening of any material that may be defamatory. So there is a self-policing process and, of course, the major process with a legislator is supposed to be, the major restraining force is supposed to be the ballot box.

QUESTION: So Dr. Hutchinson should have gone to the committee, the Ethics Committee or some place in the Senate to complain?

MR. RAYWID: Yes, he could have done that, as could any citizen.

We have urged that the speech or debate clause must take into account how Congress actually operates. We have mentioned due deference. In the investigations conducted by Congress, this Court has seemed to have shown the greatest amount of deference, even though that investigation might not be specifically authorized by Congress. Once an investigation has been determined that it is a matter upon which legislation may be had, this Court has said it will not

examine any further the conduct and that it is immune. We would say that the same principle ought to apply with respect to the informing function.

QUESTION: But hasn't that generally been applied to committee chairmen or committee activities, rather than individual members of Congress?

MR. RAYWID: No, Mr. Justice Rehnquist, I would not say that it has been. Most frequently it is exercised by committee chairmen, but there has been no restraint on investigation by a particular member. In the Gravel case, in the investigation in that case, there was to be no investigation or the court ruled there would be no further investigation as to the motives of that member in preparing himself for the committee hearing.

Now, also a distinctive feature in Gravel from this case -- and it has been relied upon by the petitioner -- is that conduct, that is, secret material was specifically proscribed by Congress, both its collection and its distribution. The distinction we believe that should be apparent in this case is that this particular material has been generally authorized by Congress and the newsletters and press releases have been specifically facilitated --

QUESTION: But you have already said that no one checks the content, then how do you authorize the contents of a letter which the Congress has carefully, very carefully,

you said they would not censor, was the term you used?

MR. RAYWID: It would not try to muzzle a particular member. That might be an abuse that this Court would ask to be resolved in the member's favor, but it does attempt to screen for facilitation or that the particular proscriptions in the 1973 Act have not been violated.

QUESTION: You are not suggesting that Congress could by legislative enactment authorize a libel, as I think Mr. Justice White put it to you in different terms, extend the speech or debate immunity to something which it does not cover within the reach of that clause?

MR. RAYWID: It may frequently and has in the past concerned libel.

QUESTION: Well, Mr. Raywid, what if Senator Gravel's newsletter had contained the so-called "secret information" referred to?

MR. RAYWID: Then I expect the screening process might have stopped its distribution.

QUESTION: But you said it doesn't censor.

MR. RAYWID: I said it screens for conformance with its rules.

QUESTION: Well, what if something in the newsletter would violate Wisconsin law or local law?

MR. RAYWID: So long as it serves the legitimate legislative need and so long as Congress has made that

determination, it seems to me that due deference should be made to that determination and immunity would follow and the Wisconsin law would have to give way.

QUESTION: So you think Congress did intend to authorize Seators intheir newsletters, to give them immunity, absolute immunity for the grossest kind of defamation, you think that was their intention in this legislation?

MR. RAYWID: It sought to protect their communication with their constituents --

QUESTION: Yes or no, I suppose my question could be answered yes or no.

MR. RAYWID: In the extreme situation that you pose, yes. But there is broad definition there as that the matter should relate to business before the Congress, to matters of broad public interest, to only state information where it bears upon the impact of national legislation.

QUESTION: What about the letters, the newsletters that went outside of Wisconsin, Senators don't have constituents in the technical sense outside of their own states, do they?

MR. RAYWID: That is true. However, each Senator, of course, has their national impact and votes on national issues. The actual facts there and what Proxmire explained was that he mails to his constituents, he also mails to those persons who have requested to be placed on his mailing list.

QUESTION: That may include quite a few newspapers, for example, and radio and television broadcasters.

MR. RAYWID: That determination is made entirely separately, and those are the press releases. They are broadly distributed and are not confined to his state by any means. The petitioner has properly represented that they went to news media throughout the country. Constituents are another matter -- the newsletters are another matter and they are not sent as a matter of routine to the press or the media.

There has been reliance placed on Story's interpretation of the Constitution and his early pronouncements as to whether or not speech or debate immunity would cover republication.

On the very issue that you raised, Mr. Chief Justice, Story has an extended comment. I don't know whether we read different editions, but in the Fifth Edition, in section 866, and there is an extended footnote in which he says that Congress may have an immunity when they write to their constituents, report to their constituents, and he treats the very issue that you raised, that constituency should not be confined to his particular state, he ought to be able to reach and influence legislation beyond that state, and his immunity is perhaps so far as he accurately reports and does not defame.

Now, Story goes on in the quote that has been cited in the reply brief, and then there is a caveat at the end of

his long examination of speech or debate which was not included in that quote, and he says that there are legal scholars that disagree on my interpretation of the English Law and make a distinction in American Law that because the Congress has mandated that all of its speeches and all of its proceedings, unlike the English Law or Parliament, be made public, then the argument follows that speech or debate should follow a republication of official congressional business, whether it be from speaking on the floor or whether it be publication or distribution by that Congressman of what he said on the floor.

QUESTION: Mr. Raywid, if gross defamation is not redressable because of speech or debate in a judicial proceeding, what can the Senate do about it?

MR. RAYWID: I missed part of your --

QUESTION: If gross defamation is not to be, because of speech or debate, addressable in a judicial proceeding, is there anything the Senate can do?

MR. RAYWID: The Senate can discipline its members. The Senate can --

QUESTION: That is all?

MR. RAYWID: That's all. It cannot award damages, but it can --

QUESTION: It can't even vindicate the person's reputation, can it?

MR. RAYWID: Well, I would say --

QUESTION: There wouldn't be a trial or a hearing or anything?

MR. RAYWID: Yes, there has been established in the Ethics Committee a rather detailed procedure of due process.

QUESTION: For participation by the victim of a libel, for example?

MR. RAYWID: It does not specifically call for that, no, it does not. But his views might be expressed through committee counsel, and that would be in a sense --

QUESTION: Mr. Raywid, how many members have been subject to that procedure?

MR. RAYWID: I do not know. In the early history of the Congress --

QUESTION: Are you speaking of --

MR. RAYWID: -- the disciplinary practice was quite common and it certainly is increasingly so, not as to the particular issue raised by Mr. Justice White.

QUESTION: Wasn't the last one -- was the last one about twenty years ago?

MR. RAYWID: I do not know how frequent it has been. Of course, the 1973 Act is rather new.

QUESTION: Mr. Raywid, what law of libel would you apply in the Senate?

MR. RAYWID: None.

QUESTION: I mean you couldn't choose between Michigan

and Wisconsin, you would just have to get one --

MR. RAYWID: We have argued that it is somewhat akin to judicial immunity.

QUESTION: Right.

MR. RAYWID: The Senators --

QUESTION: So you don't get to whether or not there is a libel.

MR. RAYWID: Right.

QUESTION: I think when you get to whether or not there is a libel you are going to be in trouble.

MR. RAYWID: Well, I disagree with you and the District Court --

QUESTION: But you don't mind if we go the other way and say you don't touch it at all? You don't mind us going that way, do you?

MR. RAYWID: Well --

QUESTION: But it is correct, isn't it, Mr. Raywid, that in the disciplinary proceedings, for example, of Senator McCarthy, that the victims of his comments did have an opportunity in some cases to testify and to a certain extent vindicate their reputation?

MR. RAYWID: Well, I think they had an opportunity. I think they were called by committee counsel and a careful bill of particulars was prepared.

QUESTION: Whether it was an adequate opportunity

is another issue, of course.

MR. RAYWID: Excuse me?

QUESTION: I say whether it was an adequate opportunity is another issue, of course.

MR. RAYWID: Well, it certainly was not an open trial, but it was due process and it was --

QUESTION: In any event, that is the remedy that you say is available under this sort of --

MR. RAYWID: Yes.

QUESTION: But they were invited, they had no right to appear there.

MR. RAYWID: Well, I am quite certain they sought appearance.

QUESTION: Yes, but they were there at the sufferance of the committee.

MR. RAYWID: At the sufferance of the committee.

QUESTION: Mr. Raywid, you haven't -- or if you have, I missed it -- mentioned the language in the court opinion in the Brewster case that explicitly and unambiguously held -- said that newsletters and press releases are simply not covered by the speech or debate clause. Have you mentioned that?

MR. RAYWID: I certainly have mentioned it extensively in the brief.

QUESTION: Yes, but I mean --

MR. RAYWID: I certainly mentioned it to the courts below. What --

QUESTION: It wouldn't be up to you, I suppose, to emphasize it.

MR. RAYWID: Well, what we tried to point out in the courts below, and successfully so, is that that issue was not posed to the Brewster court, that that was not contained in the Brewster case. They were talking about bribery. It might have been helpful in explaining the scope of legislative immunity in that particular case. We are not maintaining for unlawful conduct here or any activity proscribed by the Congress itself should speech or debate immunity apply.

QUESTION: Criminal conduct. When you said unlawful conduct, you meant criminal conduct, did you?

MR. RAYWID: Well, principally criminal conduct, but in light --

QUESTION: Because if the allegation is that the Senator's conduct was unlawful as a matter of civil law --

MR. RAYWID: Well, I am talking about a prosecription imposed by Congress itself.

QUESTION: Federal law.

MR. RAYWID: Yes. But also in the Doe case, when the Court was considering whether it was necessary to make a legitimate legislative need, in order to meet the Brewster language we made an elaborate evidentiary showing, rather

than the mere halting of immunity by simply the letter, as the Chief Justice suggested might be filed. We made an extensive evidentiary showing to try and explain how Congress operates, how Congress conceives its own function, and in that manner hope to overcome that dicta and show that this was necessary to a legitimate legislative function.

QUESTION: The statements in the Court's opinion in the Brewster case are clear and unambiguous, aren't they? They are, as you suggest perhaps, dicta, that the Court would certainly have to modify or amend those views, wouldn't they, if you are correct --

MR. RAYWID: Well, the --

QUESTION: -- to accept your submission?

MR. RAYWID: Well, we believe that a majority of the Court has. The Brewster majority turned out to be the Doe minority and they were talking in the Doe minority of the rights of Congress or the necessary function of Congress to inform. We think that seven members of this Court have given more than adequate treatment to the informing function.

QUESTION: In Doe, the committee had authorized the publication, had it not?

MR. RAYWID: Yes, it had, and to that --

QUESTION: The informing function of -- excuse me, I'm sorry, I didn't mean to interrupt. You can complete your answer.

MR. RAYWID: Well, I merely wanted to say, yes, and to that extent we would say that in our per se application that Doe should be extended. It was only, of course, the majority opinion there which was written by only two Justice and joined by an additional three. I think the critical factor in Doe, the influential factor that made up the majority is that this was exposure for the shear sake of exposure in violation of Watkins, and the Court was offended by it. In this particular case, it is so intimately tied to public spending and how these agencies, and given to these particular agencies and authorized by Congress, those are distinguishing elements. But to the extent that we are contra to Doe, we would ask the Court to modify it.

QUESTION: Are you suggesting that in order to explain unwise public expenditures that it is necessary to libel someone in order to get attention? Is that a justification for the libel?

MR. RAYWID: No. But as Mr. Justice White said -- I believe I am properly paraphrasing him -- that we may make the assumption that it was libelous. No, I wouldn't say that was necessary, but neither does the Court, it seems to me, want to get into the examination of each -- the exercise of each Congressman, how he feels he will reach the public, how he will influence legislation, how he will garner votes. If it is, it will be havoc. It will be placing the legislature

under the heel of the judiciary, and it will remove to a substantial degree the representation of Congress.

QUESTION: You say of the judiciary. Basically it is a question of Wisconsin tort law unless the Constitution prohibits it. It isn't certainly up to this Court to kind of pull something out of the sky and say, yes, you can, and, no, you can't.

MR. RAYWID: Well, that issue may never come to this Court, it is true, but I would put no less weight on a possible hostile judiciary in the State of Wisconsin or any other state as curbing the activity of a Congressman. It is equally important it seems to remove that from all courts.

QUESTION: Even for openly illegal activities?

MR. RAYWID: Not for unlawful activity or activity proscribed by Congress. But where it is authorized --

QUESTION: Because of criminal libel law in a state and this publication, anybody within his right mind would think it is criminal libel. You say he is immune?

MR. RAYWID: Yes, I would say he is immune. It sounds very much like sedition laws.

QUESTION: The law of libel sounds like sedition --

MR. RAYWID: It would be criminal to prosecute a Congressman in issuing a letter in the manner proscribed by Congress and make that subject to a criminal libel law, yes, it seems to me akin to a sedition law.

QUESTION: Well, sedition I thought was criticism of the government.

MR. RAYWID: Yes, and I have stated in every one of these instances where the conduct under review here is conduct of criticism of the government.

QUESTION: Well, suppose a Senator goes back to his home state and says the guy who lives next to me in Madison is a real s.o.b.

MR. RAYWID: He should bring an action against that Congressman and he should be prosecuted in those local courts, without question.

QUESTION: So your doctrine would not extend that far?

MR. RAYWID: It certainly would not.

QUESTION: That isn't sedition?

MR. RAYWID: No, that is not sedition, the same as if he ran over someone.

QUESTION: Do you rely -- I would like to ask this question, I perhaps have been too deferential -- do you rely a great deal in your brief on what you call the informing function of Congress to justify bringing the newsletters and press releases within the speech or debate clause? That function which was exercised by Woodrow Wilson and has been by many, many others, I had always understood to be largely the function of Congress to inform itself in order to

intelligently legislate. You rather understand it as a function of informing the public.

MR. RAYWID: I don't believe or certainly not my reading, Mr. Justice Stewart, of all of those treatises as narrowed to Congress. It seems to me the nature of --

QUESTION: You mean the justification for congressional investigations by its various committees and subcommittees, the basic justification is the informing of the members of Congress so that they can act intelligently in deciding whether or not to vote for or against proposed legislation or even in framing the proposed legislation.

MR. RAYWID: I think Mr. Justice Blackmun has best articulated our position on the informing function in his dissent in Doe. He characterizes that informing function in four different stages. He talks about the public, getting word back from the public, and the participation of the public with their Congressman and how that influences legislation. I would say --

QUESTION: With all respect to my Brother Blackmun, that was a dissenting opinion, correct?

MR. RAYWID: It was a dissenting opinion, but as I have tried to point out, it seems to me that a number of dissenters in the varying opinions of the Court have been very much conscious of the informing function and they would make up -- or which I invite a new majority in recognizing

the informing function --

QUESTION: The informing of the public, not the informing of the members of Congress.

MR. RAYWID: Most definitely.

QUESTION: It is both, at least, you would concede that, wouldn't you?

MR. RAYWID: Oh, certainly. Other members play a definite part and that was what Senator Proxmire said was important.

QUESTION: I read Woodrow Wilson's essays as putting the emphasis on informing and educating the public, but that was a function of the Congress through its committees, not 100 individual Senators and 435 individual Congressmen running off on their own as having any immunity.

MR. RAYWID: In the tier and the hierarchy and structure of the Senate, the members' rights have been protected and encouraged.

QUESTION: By --

MR. RAYWID: By the Senate rules. No one attempts to muzzle an individual Senator. And in the investigative phase, it was pointed out by the Court of Appeals in the McSurely case. Some information must start with a particular Senator. He receives some information, he asks an executive official, and that starts the process. It cannot all be formalized through subpoena by a committee or by the chairman

of a committee, otherwise nothing really gets started except the most popular items.

MR. CHIEF JUSTICE BURGER: We have detained you long enough now, counsel. We will see if Mr. Cavanaugh has anything further.

ORAL ARGUMENT OF MICHAEL E. CAVANAUGH, ESQ.,

ON BEHALF OF THE PETITIONER--REBUTTAL

MR. CAVANAUGH: Your Honors, Mr. Raywid just commented that this case does not involve a case of exposure for the sake of exposure. We would vigorously disagree with that. That appears to us to be exactly what occurred here. Senator Proxmire's avowed purpose was to award the Golden Fleece to funding agencies for the funding that they had granted. There was no need to name Dr. Hutchinson by name. There was no need to ridicule and humiliate Dr. Hutchinson. There was no need to send this press release in addition to every newspaper and member of the media in the United States, to members of the press in Japan, Italy, Britain, and Canada.

A Senator's press releases may be entertaining to read and they may be entertaining on television talk shows, but to the people in Kalamazoo, Michigan, to the victims in Madison, Wisconsin, and the victims in the other places in the United States, they are devastating, they humiliate, they ridicule and they emotionally cripple.

What can a man who has been a victim of one of these

releases say to his children when he comes home? What can his children tell their school mates? The Court has always attempted to balance the interests of the individual and his reputation.

QUESTION: Well, you can tell them who to vote for, I guess.

(Laughter)

QUESTION: In Michigan, they don't allow citizens to vote in other states, do they?

MR. CAVANAUGH: That's right, nor do they do to those unfortunate people in Japan who receive these newsletters or the press releases.

QUESTION: Well, isn't the real damage that you are talking about in the academic community and his professional reputation as a scientist either within the country or out of the country, who has a wide enough reputation?

MR. CAVANAUGH: That certainly is a major element, but there is also damage just to the people who know Dr. Hutchinson as a person. In fact, a press release like this calls a man a charlitan or a fraud, accuses him of taking government money for doing worthless work. You could take the same approach and describe a scientist discovering penicillin as some charlitan taking money to watch bread mold. It is simply unfair and what the Senator is asking us to do in this case is to totally disregard the balancing process

that has occurred in the past and to grant Senators absolute immunity for anything they say at any time, in any place, no matter how widely it is disseminated.

QUESTION: Mr. Cavanaugh, in your principal argument, I asked you about the public figure issue and you helped me out there. What about the public official problem which the court below did not reach? Wasn't your client a public official, has that term been used in the case or not?

MR. CAVANAUGH: No, Your Honor, I don't believe he is. A public official has already been defined as a person who occupies a high public position who would be the subject of interest without the controversy. In this case, Dr. Hutchinson was the Director of Research of Kalamazoo State Hospital. He had ten or eleven employees under his supervision. He could not hire, he could not fire. He had very little discretion. He could respond to a contract request from a federal agency, but he would respond through his employing department. He was no different in the type of position that he had, really, than someone who was director of nursing at an institution or director of physical facilities. He is not the type of public official that I think the Court had in mind in the cases where public official is spoken of. He was not an elected official.

QUESTION: Could you measure it by the number of persons under his supervision, is that the test, or is it the

importance of his responsibilities?

MR. CAVANAUGH: Your Honor, I don't think that there is any one test. The number of people under him is a measure of his responsibility. If responsibility is the test, Dr. Hutchinson had no authority to spend the money that Senator Proxmire has referred to. It was sent to the State of Michigan and the most that Dr. Hutchinson could do was to submit a purchase request or a voucher for payment of salaries. The people who controlled the funding were the funding agencies in Washington and then the agencies in Michigan that received the funds. Dr. Hutchinson was merely another civil service employee.

QUESTION: He was an officer of the state, wasn't he?

MR. CAVANAUGH: An officer of the state, sir?

QUESTION: Usually they are. Professors are usually officers of the state.

MR. CAVANAUGH: He was an employee of the state. Your Honors --

QUESTION: How does a Senator or a Congressman who is focusing on some particular problem, how do you say he should inform his constituents or the broad constituency, which is the country?

MR. CAVANAUGH: Your Honor, he can inform without defaming. He should not need absolute immunity to say the

boldest lie. It should be enough that he can tell the truth to his constituents or the other members of the nation. He certainly can say anything to other Congressmen and have absolute immunity.

QUESTION: Well, if he issued a press release, even a great many of them, simply stating all of these facts that "X" hundreds of thousands of dollars were being spent and reciting factually and accurately the nature of the research, how many members of the media would pay any attention to it?

MR. CAVANAUGH: Your Honor --

QUESTION: It would be pretty dull stuff, wouldn't it?

MR. CAVANAUGH: It is difficult to say how many members of the media pay attention to one of his Golden Fleeces two weeks after it is issued. It is certainly sensational when it is issued, and it gets coverage simply because it is sensational because of the witty things that it says. But, Your Honor, I am not sure that that ultimately is given any more attention than would a factual truthworthy or truthful newsletter or press release.

QUESTION: What do you say about the protection of a Senator from having to go before a court on the Island of Maui in the Hawaiian Islands and defend a statement that he made?

MR. CAVANAUGH: Your Honor, if he makes a statement,

it is his obligation to defend it.

QUESTION: To go to Maui and defend it?

MR. CAVANAUGH: Your Honor, I would disagree with Mr. Raywid's statement that he does not even have to file an answer. I believe the law is that the Senator does have to file an answer. He could raise speech and debate then if it is legitimate activity and he certainly could ask to have the case moved to some other forum. But if the Senator makes a defamatory statement and broadcasts is to widely that it reaches Hawaii, then I don't think it is unfair to initially require him to appear or through counsel to defend it.

QUESTION: If it is within the clause, the clause says he may not be questioned. That literally means they can't even ask him a question on a deposition, on the witness stand in the court room, or anywhere else.

MR. CAVANAUGH: If it is within the privilege, yes, Your Honor.

QUESTION: Congress could forbid any federal court from taking jurisdiction over a claim such as this against a member of Congress, could it not?

MR. CAVANAUGH: Your Honor, I don't believe Congress could because if you said that Congress could do that, then you are saying that Congress has the power to rewrite the Constitution, and the Congress has the power to say how broad the protection is afforded by the speech or debate clause.

QUESTION: They are not rewriting the Constitution. They are simply saying that courts which they create, lower federal courts shall not entertain particular types of actions.

MR. CAVANAUGH: Then, Your Honor, I assume our cause of action would be in a higher court, perhaps in front of this Court as an original action.

QUESTION: Under Article III Congress has the power to create any inferior federal courts that it wants to and to allocate to them any jurisdiction it wants to, that is all that my Brother Rehnquist is talking about.

MR. CAVANAUGH: But I don't think that that would deprive the victim of his right to appear in some court, perhaps state court or perhaps a higher federal court that Congress has not created.

QUESTION: They surely would have no jurisdiction under Article III, any power under Article III to decline state court jurisdiction.

MR. CAVANAUGH: That's right, Your Honor. That is absolutely correct.

QUESTION: And when a federal court sits on a state case diversities, it is surrogate for a state court, is it not?

MR. CAVANAUGH: Yes, Your Honor.

QUESTION: Congress could repeal diversity

jurisdiction tomorrow.

MR. CAVANAUGH: Yes.

QUESTION: Congress has been urged to do it.

(Laughter)

MR. CAVANAUGH: Your Honor, we would respectfully ask that the Court reverse the lower decisions and permit Dr. Hutchinson to have his day in court so that he may vindicate his reputation.

QUESTION: Is a newspaper publishing a quote from the Congressional Record liable to the victim?

MR. CAVANAUGH: No, Your Honor, generally there is a privilege for the media to --

QUESTION: So if the media takes the Congressional Record in which this Golden Fleece Award has been placed and publishes it in full, it is immune?

MR. CAVANAUGH: It would be, Your Honor.

QUESTION: The Senator, though, if he mails it in in his newsletter, the very same thing, a copy of the Congressional Record, you say he is not immune?

MR. CAVANAUGH: That is correct, Your Honor. There are two separate immunities. The Senator's immunity is under the speech and debate clause, the press's immunity is the common law that has been developed and the common law has revognized a qualified privilege for members of the media to accurately report what has taken place in Congress or in a

court. But there are two separate immunities. With the Senator, I think under Doe if he publicizes the action taken or the speech made wider than is necessary for legitimate legislative need, he has exceeded the speech or debate clause and there is liability.

QUESTION: The submission is, though, that newsletters are an ordinarily way of legislating.

MR. CAVANAUGH: Your Honor, we would respectfully disagree with that, that a newsletter to 100,000 people in Wisconsin and outside of Wisconsin is not within the legitimate legislative needs of Congress. It is a personal political act.

Thank you very much.

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

(Whereupon, at 11:39 o'clock a.m., the case in the above-entitled matter was submitted.)

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