

Chastain v. Sunquist: A Narrow Reading of the Doctrine of Legislative Immunity

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NOTES

CHASTAIN v. SUNDQUIST: A NARROW READING OF THE DOCTRINE OF LEGISLATIVE IMMUNITY

The doctrine of legislative immunity traditionally has consisted of immunity under the speech or debate clause of the United States Constitution.¹ Until recently, the Supreme Court broadly interpreted the speech or debate clause to cover a wide range of legislative activities.² Since 1972, however, the Court has adopted a more restrictive view of the speech or debate clause.³ The Court has distinguished between “political” and “legislative” activity and has concluded that the speech or debate clause only protects “purely legislative activities.”⁴ The Court has also created an extra-constitutional body of immunity law that now protects virtually all government officials in the judicial and executive branches from civil liability.⁵

*Chastain v. Sundquist*⁶ represents the first case in which a member of Congress has raised the judicially created doctrine of official immunity as a defense. A split panel of the Court of Appeals for the District of Columbia Circuit held in *Sundquist* that “members of Congress are not entitled to immunity for common law torts committed while acting within the scope of their official duties but outside the sphere protected by the Speech or Debate Clause.”⁷ The court placed too much reliance on a speech or debate clause analysis and failed to consider adequately the merits of Representative Sundquist’s defense.⁸ The court’s decision jeopardizes the proper func-

¹ The speech or debate clause provides that “for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.” U.S. CONST. art. I, § 6, cl. 1. For the history of the speech or debate clause, see *infra* notes 12-18 and accompanying text.

² See *United States v. Johnson*, 383 U.S. 169 (1966); *Tenney v. Brandhove*, 341 U.S. 367, *reh’g denied*, 342 U.S. 843 (1951); *Kilbourn v. Thompson*, 103 U.S. 168 (1880); see also *infra* notes 31-48 and accompanying text.

³ See *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Brewster*, 408 U.S. 501 (1972); see also *infra* notes 49-68 and accompanying text.

⁴ *Brewster*, 408 U.S. at 512.

⁵ See *infra* notes 69-95 and accompanying text.

⁶ 833 F.2d 311 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2914 (1988).

⁷ *Id.* at 312.

⁸ Representative Sundquist stated forthrightly in his brief that he based his defense on official immunity, not the speech or debate clause. Brief for Appellee at 10,

tioning of members of Congress as representatives of the American people. The Supreme Court's subsequent denial of Representative Sundquist's petition for a writ of certiorari⁹ leaves members of Congress with a Hobson's choice:¹⁰ either they can speak out on issues important to their constituents and risk liability, or they can remain silent in public and confine their legislative activity to the halls of Congress.¹¹

Part I of this Note reviews the development of the doctrine of legislative immunity. Section A examines the history of the speech or debate clause and judicial decisions interpreting its scope. Section B discusses the judicially created doctrine of official immunity and its application to officials of the judicial and executive branches. Part II describes the facts of the *Sundquist* case and the court's rationale for its opinion. Part III exposes the flaws in the court's decision by focusing particular attention on three issues. First, this Note criticizes the court's narrow definition of legislative activity and describes the implications of this narrow definition on essential legislative functions. Second, this Note addresses the important policy considerations that favor granting members of Congress official immunity. Third, this Note suggests that if courts refuse to expand either the scope of the speech or debate clause or extend official immunity to members of Congress, then Congress should enact a statutory grant of legislative immunity.

I

THE DEVELOPMENT OF THE DOCTRINE OF LEGISLATIVE IMMUNITY

A. Speech or Debate Clause Immunity

1. *Origins of the Speech or Debate Clause*

The concept of immunity for legislators from judicial process arose out of the protracted struggle between the English Crown and Parliament that culminated in the Glorious Revolution of 1688.¹² The Glorious Revolution secured Parliament's independence from the Crown and provided the impetus for the English Bill of Rights

Chastain v. Sundquist, 833 F.2d 311 (D.C. Cir. 1987) (No. 86-5386), *cert. denied*, 108 S. Ct. 2914 (1988).

⁹ *Sundquist*, 108 S. Ct. 2914 (1988).

¹⁰ Thomas Hobson, a seventeenth century English liveryman, required every customer to take the horse nearest the door. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 574 (1988).

¹¹ See 134 CONG. REC. H3193 (daily ed. May 12, 1988) (statement of Rep. Hughes).

¹² Robert J. Reinstein & Harvey A. Silvergate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1120-21 (1973).

of 1689.¹³ The English Bill of Rights specifically guaranteed members of Parliament the privileges of speech or debate: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."¹⁴

The drafters of the United States Constitution recognized the importance of the legislative privilege in our system of government.¹⁵ They viewed the privilege as a bulwark against judicial and executive encroachment on the independence of Congress.¹⁶ The drafters incorporated the privilege in article I, section 6, clause 1 of the Constitution: "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."¹⁷ James Wilson, one of the principal architects of the speech or debate clause, stated:

In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.¹⁸

The first test of the speech or debate clause occurred in 1797. In that year, the Adams administration challenged the freedom of Congress to criticize the executive branch.¹⁹ Several anti-Federalist members of Congress had sent newsletters to their constituents criticizing the President's foreign policy in the undeclared war with France.²⁰ A federal grand jury levied indictments against the congressmen for distributing "unfounded calumnies" against the government.²¹ Thomas Jefferson denounced the grand jury's investigation as a manifest violation of the legislative privilege and of the doctrine of separation of powers.²² Jefferson's protest clearly elucidates the purposes and scope of the speech or debate clause.²³

¹³ See Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 336 (1965).

¹⁴ 1 W. & M., ch. 2 (1689).

¹⁵ See Reinstein & Silvergate, *supra* note 12, at 1139.

¹⁶ *Id.*

¹⁷ U.S. CONST. art. 1, § 6, cl. 1.

¹⁸ 1 THE WORKS OF JAMES WILSON 421 (R. McCloskey ed. 1967) [hereinafter J. WILSON].

¹⁹ Comment, *Brewster, Gravel, and Legislative Immunity*, 73 COLUM. L. REV. 125, 127 (1973).

²⁰ See Reinstein & Silvergate, *supra* note 12, at 1140.

²¹ 8 THE WORKS OF THOMAS JEFFERSON 325 (Ford ed. 1904) [hereinafter T. JEFFERSON].

²² Reinstein & Silvergate, *supra* note 12, at 1141.

²³ See T. JEFFERSON, *supra* note 21, at 322-31:

[F]or the judiciary to interpose in the legislative department between the

Jefferson stated that "representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any" ²⁴

2. *Judicial Interpretation of the Speech or Debate Clause*

The drafters intended the speech or debate clause to preserve the independence and integrity of the legislature.²⁵ The Founding Fathers recognized that the existence of the privilege enabled members of Congress to perform their functions with "firmness and success"²⁶ without fear of retaliatory litigation.²⁷ James Madison advised that "the reason and necessity of the privilege" should guide judicial illumination of the clause.²⁸ The Supreme Court adopted a broad interpretation of the privilege in the few opportunities it had to define its scope prior to 1972.²⁹ Recent decisions of the Court, however, indicate a preference for a more restrictive view of the scope of the privilege.³⁰

a. *Pre-1972 Interpretation*

The first judicial decision interpreting the speech or debate clause concluded that it afforded legislators a broad privilege in the performance of their duties. In *Coffin v. Coffin*,³¹ Chief Justice Parsons of the Supreme Judicial Court of Massachusetts argued that courts should construe the privilege liberally.³² Parsons supported

constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation . . . , is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror of punishment, all but such information or misinformation as may suit their own views

Id. at 322 (emphasis added).

²⁴ *Id.* at 322.

²⁵ *United States v. Johnson*, 383 U.S. 169, 178 (1966); Reinstein & Silvergate, *supra* note 12, at 1121; Comment, *supra* note 19, at 151.

²⁶ See J. WILSON, *supra* note 18, at 421.

²⁷ See *infra* notes 167-70 and accompanying text.

²⁸ 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 221 (Philadelphia 1865).

²⁹ See *infra* notes 31-48 and accompanying text.

³⁰ See *infra* notes 49-68 and accompanying text.

³¹ 4 Mass. 1 (1808).

³² *Id.* at 27. The court stated:

an expansive interpretation of the privilege that extended its protection to activities beyond the walls of the legislative chamber.³³

The United States Supreme Court first interpreted the speech or debate clause in *Kilbourn v. Thompson*.³⁴ *Kilbourn* involved a challenge to the power of the United States House of Representatives to incarcerate a recalcitrant witness for contempt of the House.³⁵ The Court held that the speech or debate clause barred Kilbourn's action for false imprisonment brought against several members of the House.³⁶ The Court adopted the *Coffin* court's liberal construction of the privilege³⁷ and recognized that limiting the application of the speech or debate clause to "words spoken in debate" would unduly narrow its scope.³⁸ The Court also endorsed the view expressed in *Coffin* that the protection of the speech or debate clause extends beyond the geographic confines of Congress.³⁹

Seventy years passed before the Supreme Court again addressed the scope of immunity afforded legislators under the speech or debate clause. In *Tenney v. Brandhove*,⁴⁰ the Court considered the issue of whether the privilege protected members of a state investigative committee against a suit brought under the Civil Rights Act of 1871.⁴¹ Writing for the majority, Justice Frankfurter stated that

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered I would define the article as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office, without enquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules.

Id.

³³ *Id.* ("[T]here are cases, in which [the representative] is entitled to this privilege, when not within the walls of the representatives' chamber.").

³⁴ 103 U.S. 168 (1880).

³⁵ *Id.* at 181. *Kilbourn* arose out of a congressional investigation into the bankruptcy of a firm in debt to the federal government. After Kilbourn refused to answer questions and produce certain documents, the House charged him with contempt and dispatched Thompson, the sergeant-at-arms of the House, to arrest him. Kilbourn spent 45 days in the common jail of the District of Columbia.

³⁶ *Id.* at 205.

³⁷ *Id.* at 204. In his opinion for the Court, Justice Miller described the *Coffin* case as "perhaps the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies . . ." *Id.*

³⁸ *Id.*

³⁹ *Id.* at 203-04.

⁴⁰ 341 U.S. 367 (1951).

⁴¹ 42 U.S.C. §§ 1981, 1983 (1982). Brandhove had circulated a petition in the California legislature calling for an end to the funding of the Tenney Committee on Un-American Activities. The Committee prosecuted Brandhove after he refused to testify before it.

the sole judicial inquiry was whether the defendant legislators had acted "in the sphere of legitimate legislative activity."⁴² The Court held that the speech or debate clause protected the defendants since they were acting in a field where legislators traditionally have power to act.⁴³ The Court's broad interpretation of the privilege buttressed the precedents set in *Coffin* and *Kilbourn*.

The Supreme Court also endorsed a liberal construction of the speech or debate clause in *United States v. Johnson*.⁴⁴ The Court addressed the issue of whether the speech or debate clause barred a criminal prosecution based upon an allegation that a member of Congress had conspired to give a particular speech on the floor of the House of Representatives in return for remuneration from private interests.⁴⁵ Writing for the majority, Justice Harlan explained that "the tradition of legislative privilege is . . . well established in our polity . . ."⁴⁶ He stated that the immunity afforded legislators under the speech or debate clause provides "an important protection of the independence and integrity of the legislature."⁴⁷ The Court concluded that the speech or debate clause extends at least so far as to prevent executive and judicial inquiry into motives underlying the making of a speech.⁴⁸

b. *Post-1972 Interpretations*

Recent Supreme Court decisions have chipped away at the scope of the speech or debate clause. The trend began in 1972 with the Court's decisions in *United States v. Brewster*⁴⁹ and *Gravel v. United States*.⁵⁰ The *Brewster* case involved Senator Brewster's alleged solicitation and acceptance of a bribe.⁵¹ The Court distinguished between "political" and "legislative" activity and held that the speech or debate clause only protected "purely legislative activities."⁵² The Court's dichotomization excluded a wide range of legislative activities from the protection of the speech or debate clause. The Court stated:

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activi-

⁴² *Tenney*, 341 U.S. at 376.

⁴³ *Id.* at 379.

⁴⁴ 383 U.S. 169 (1966). Justice Harlan pronounced "that the legislative privilege will be read broadly to effectuate its purposes . . ." *Id.* at 180.

⁴⁵ *Id.* at 171-72.

⁴⁶ *Id.* at 179.

⁴⁷ *Id.* at 178.

⁴⁸ *Id.* at 180.

⁴⁹ 408 U.S. 501 (1972).

⁵⁰ 408 U.S. 606 (1972).

⁵¹ *Brewster*, 408 U.S. at 502-03.

⁵² *Id.* at 512.

ties protected by the Speech or Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress.⁵³

The Court concluded that, "[a]lthough these are entirely legitimate activities, they are political in nature rather than legislative" and thus fall outside the protection of the speech or debate clause.⁵⁴

The *Gravel* case involved Senator Gravel's conduct at a meeting of the Senate Subcommittee on Public Buildings and Grounds.⁵⁵ At that meeting, Senator Gravel read extensively from a copy of The Pentagon Papers and then placed the entire forty-seven volumes of that study in the public record.⁵⁶ Senator Gravel later arranged for the private publication of the record.⁵⁷ The Court adopted a narrow definition of legislative activity.⁵⁸ It excluded Senator Gravel's acquisition of materials for the committee meeting and his arrangements for the private publication of the record from the protection of the speech or debate clause.⁵⁹

The Supreme Court's restrictive definition of legislative activity in *Brewster* and *Gravel* prompted the Joint Committee on Congressional Operations to initiate an inquiry into the constitutional immunity of members of Congress.⁶⁰ Representative Cleveland noted in his opening statement before the Committee that the Court's definition of the legislative role of a member of Congress suggested

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Gravel*, 408 U.S. at 609-10.

⁵⁶ *Id.* at 609.

The Pentagon Papers was a top-secret study of United States involvement in Vietnam from 1945 to 1967. See THE PENTAGON PAPERS: THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISION MAKING ON VIETNAM (Sen. Michael Gravel ed. 1971). Justice Douglas described the story of The Pentagon Papers as "a chronicle of suppression of vital decisions to protect the reputations and political hides of men who worked an amazingly successful scheme of deception on the American people." *Gravel*, 408 U.S. at 647 (Douglas, J., dissenting).

⁵⁷ *Gravel*, 408 U.S. at 609-10.

⁵⁸ *Id.* at 625:

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

⁵⁹ *Id.* at 622.

⁶⁰ JOINT COMM. ON CONGRESSIONAL OPERATIONS, THE CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS, S. REP. NO. 896, 93d Cong., 2d Sess. 2 (1974) [hereinafter REPORT].

that “the Court labors in abysmal ignorance of the real processes of representative government.”⁶¹ Other members of the Joint Committee expressed similar displeasure with the Court’s recent decisions.⁶² The Joint Committee concluded that legislative activities are not limited to the enactment of laws.⁶³ It defined legislative activities as “any activities undertaken within the legislative branch in fulfilling the role of the Congress in the constitutionally defined government of coordinate and coequal branches.”⁶⁴ The Joint Committee emphasized that the definition of protected legislative activities should include anything a member of Congress does as a representative of a constituency.⁶⁵

The Supreme Court remained impervious to the Joint Committee’s recommendations. In 1979, the Court’s decision in *Hutchinson v. Proxmire*⁶⁶ further narrowed its interpretation of the speech or debate clause. The Court held that the speech or debate clause did not immunize Senator Proxmire from liability for defamatory statements made in newsletters and press releases in connection with his “Golden Fleece of the Month Award.”⁶⁷ Although the Court recognized the importance of informing the public and other Congressmen of wasteful spending, it held that the transmittal of such information is “not a part of the legislative function or the deliberations that make up the legislative process.”⁶⁸

B. The Judicially Created Doctrine of Official Immunity

The Supreme Court has fashioned an extra-constitutional body of immunity law to protect government officials from civil liability.⁶⁹ In this context, the Court has applied a functional approach to immunity questions under which it examines the nature of an official’s functions and determines whether the exercise of those functions

⁶¹ *Constitutional Immunity of Members of Congress: Hearings Before the Joint Comm. on Congressional Operations*, 93d Cong., 1st Sess., pt. 1, at 5 (1973) [hereinafter *Hearings*, pt. 1] (statement of Rep. Cleveland).

⁶² *Id.* at 9 (statement of Rep. Brooks) (“[W]e are not bound to agree when the court so narrowly interprets the clause as to exclude from the immunity it affords, important and substantial functions of the representative role of a Member of Congress.”).

⁶³ REPORT, *supra* note 60, at 53.

⁶⁴ *Id.* See *infra* note 197 and accompanying text.

⁶⁵ REPORT, *supra* note 60, at 47. The Joint Committee stated, “An individual Member of Congress performs many various duties in his or her official capacity. A Member is a legislator; he is a representative of a constituency, as well—an ombudsman for an electorate in the nation’s capital.”

⁶⁶ 443 U.S. 111 (1979).

⁶⁷ *Id.* at 114. Senator Proxmire awarded the Golden Fleece Award to three federal agencies for sponsoring Hutchinson’s research into why a monkey clenches its jaw under stress. *Id.* at 115-16.

⁶⁸ *Id.* at 133.

⁶⁹ See *Sundquist*, 833 F.2d at 315.

necessitates immunity.⁷⁰ The judicially created doctrine of official immunity now protects virtually all officials in the judicial and executive branches from civil liability.⁷¹

1. *Judicial Privilege*

The Supreme Court extended absolute immunity to judges over a century ago in *Bradley v. Fisher*.⁷² In the trial of John Surratt for his participation in the conspiracy to assassinate President Lincoln, the trial judge disbarred Surratt's attorney.⁷³ The attorney filed an action against the trial judge. In denying his claim, the Court held that federal judges were entitled to absolute immunity for their judicial acts.⁷⁴ The Court founded the doctrine of judicial privilege upon the "general principle of highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself."⁷⁵ Judicial privilege applies not only to actual decisions, but also to defamatory statements made in the course of judicial proceedings.⁷⁶ In addition, the protection afforded judges extends to officials who exercise "quasi-judicial" authority.⁷⁷

Two policy considerations support the grant of absolute immunity. First, fear of personal liability would detract from the independence and impartiality of judicial action.⁷⁸ Second, suits against judges might impinge upon their time at the public's expense.⁷⁹ On the other hand, any grant of immunity imposes certain costs. The Supreme Court's recognition of judicial privilege, for example, has eliminated a potential deterrent to irresponsible judicial action and a potential remedy to the victims of judicial misconduct.⁸⁰ Several restraints within the judicial system keep these costs acceptably low, however, and minimize the possibility of injury at the hands of an

⁷⁰ *Forrester v. White*, 484 U.S. 219, 223 (1988).

⁷¹ See *infra* note 90 and accompanying text.

⁷² 80 U.S. (13 Wall.) 335 (1871).

⁷³ *Id.* at 344. The trial judge disbarred Surratt's attorney after he had threatened the judge with "personal chastisement" for allegedly hurling a series of insults at him from the bench. For a complete account of the Surratt trial, see LOUIS J. WEICHMANN, *A TRUE HISTORY OF THE ASSASSINATION OF ABRAHAM LINCOLN AND OF THE CONSPIRACY OF 1865*, at 354-79 (1975).

⁷⁴ *Bradley*, 80 U.S. at 347.

⁷⁵ *Id.*

⁷⁶ See Joel F. Handler & William A. Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44, 53 (1960).

⁷⁷ See *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976) (grand jurors); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927) (prosecutors).

⁷⁸ Handler & Klein, *supra* note 76, at 53.

⁷⁹ *Id.*

⁸⁰ *Id.*

irresponsible judge.⁸¹

2. *Executive Privilege*

In the late nineteenth century, the Supreme Court extended the doctrine of official immunity to protect federal executive officers.⁸² In *Spalding v. Vilas*,⁸³ a defamation action against the Postmaster General, the Court concluded that the head of an executive department possessed absolute immunity for acts taken in his official capacity. The Court stated that the proper and effective administration of public affairs required the extension of the doctrine of official immunity to high-ranking executive officials.⁸⁴

The Supreme Court expanded the doctrine of absolute executive immunity in *Barr v. Matteo*.⁸⁵ A plurality of the Court held that a low-level federal administrative official performing a discretionary act within the scope of his duties enjoyed absolute immunity from liability in a defamation action.⁸⁶ The Court premised its holding on a functional approach to immunity questions.⁸⁷ The outcome in *Barr* sanctions a greatly broadened scope of immunized activity.⁸⁸ The Court clearly stated its intention to expand the parameters of the doctrine of official immunity: "We do not think the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank The privilege is not a badge or emolument of exalted office, but an expression of policy designed to aid in the effective functioning of government."⁸⁹

In the thirty years since the *Barr* decision, lower federal courts have extended the doctrine of official immunity to public officials of virtually every rank.⁹⁰ Even dog catchers enjoy the protection of of-

⁸¹ *Id.* at 54-55. Handler & Klein identified four principal restraints against irresponsible judicial conduct. First, the aggrieved party is entitled to appellate review of judicial decisions. Second, the adversary system affords ample opportunity for the aggrieved party to vindicate himself. Third, procedures exist to disqualify a judge before trial. Fourth, judges recognize the importance of maintaining dignity and fairness in judicial proceedings. *Id.* at 54.

⁸² Mayer G. Freed, *Executive Official Immunity for Congressional Violations: An Analysis and a Critique*, 72 Nw. U.L. REV. 526, 530 (1977).

⁸³ 161 U.S. 483 (1896).

⁸⁴ *Id.* at 498.

⁸⁵ 360 U.S. 564 (1959).

⁸⁶ *Id.* at 574. In *Barr*, employees of the Federal Office of Rent Stabilization had sued the acting director for defamatory statements contained in a press release, which criticized the employees' actions in devising and implementing within the Office a budgetary plan that had come under congressional attack. *Id.* at 565-67.

⁸⁷ *Id.* at 572-73; see also Note, *An Examination of Immunity for Federal Executive Officials*, 28 VILL. L. REV. 956, 964 (1982-83) (authored by Paul J. Kennedy).

⁸⁸ *Sundquist*, 833 F.2d at 321.

⁸⁹ *Barr*, 360 U.S. at 572-73.

⁹⁰ See, e.g., *Bush v. Lucas*, 462 U.S. 367 (1983) (NASA center director); *Strothman v. Gefreh*, 739 F.2d 515 (10th Cir. 1984) (administrative law judges); *George v. Kay*, 632

ficial immunity.⁹¹ Recent decisions of the Supreme Court and the Court of Appeals for the District of Columbia Circuit have confirmed that *Barr* remains good law.⁹² In *Doe v. McMillan*,⁹³ the Supreme Court even mentioned in a footnote that the doctrine of official immunity "has been held applicable to officials of the Legislative Branch."⁹⁴ Nevertheless, in *Chastain v. Sundquist*,⁹⁵ a split panel of the Court of Appeals for the District of Columbia Circuit refused to extend official immunity to members of Congress.

II

DUTY OR DEFAMATION: *CHASTAIN V. SUNDQUIST*

A. Factual Background

The Honorable Don Sundquist has served as the United States Representative for the Seventh District of Tennessee since 1983.⁹⁶ In 1978, a major public controversy developed in Memphis between the Memphis Area Legal Services (MALS) and the Juvenile Court of Memphis and Shelby County.⁹⁷ The juvenile court supervises the collection of child support payments from parents. MALS alleged that the procedures used to collect the child support payments violated the constitutional rights of indigent parents.⁹⁸ In 1985, Representative Sundquist wrote a letter to the Attorney General of the

F.2d 1103 (4th Cir. 1980) (postal inspector), *cert. denied*, 450 U.S. 1029 (1981); *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*, 566 F.2d 289 (D.C. Cir. 1977) (en banc) (Smithsonian department chairman), *cert. denied*, 438 U.S. 915 (1978); *Mandel v. Nouse*, 509 F.2d 1031 (6th Cir.) (Army commander), *cert. denied*, 422 U.S. 1008 (1975); *Sowers v. Damron*, 457 F.2d 1182 (10th Cir. 1972) (Internal Revenue officers).

⁹¹ See *Allred v. Svarczkopf*, 573 F.2d 1146 (10th Cir. 1978) (qualified immunity defense available to Animal Control Officer against dog owner's claim that he violated her civil rights in arresting her for refusing to sign a citation); *Kostiuk v. Town of Riverhead*, 570 F. Supp. 603 (E.D.N.Y. 1983) (qualified immunity defense available to dog catcher against dog owner's claim that one-night impoundment of owner's dog was an unconstitutional deprivation of property).

⁹² See *Harlow v. Fitzgerald*, 457 U.S. 800, 807-08 (1982) (citing *Barr* and *Spalding v. Vilas* with approval regarding officials' "absolute immunity from suits at common law"); see also *McKinney v. Whitfield*, 736 F.2d 766, 768 (D.C. Cir. 1984) (citing *Harlow* as "signalling that *Barr* remains good law").

⁹³ 412 U.S. 306 (1973).

⁹⁴ *Id.* at 319 n.13. See *Sundquist*, 833 F.2d at 331 (Mikva, J., dissenting):

This statement, taken on its face, supports Sundquist's position—indeed, decides this case. But the very brevity of this statement—and its location in a footnote—give some pause. Because it is impossible to discern the precise meaning the Court intended this statement to carry, it cannot be relied upon with great confidence.

⁹⁵ 833 F.2d 311.

⁹⁶ CONGRESSIONAL DIRECTORY: 100TH CONG. 194-95 (1987-88). The seventh district consists in large part of the suburbs of Memphis.

⁹⁷ *Sundquist*, 833 F.2d at 312.

⁹⁸ *Id.*

United States expressing his concern that MALS had launched a concerted effort to discredit a major federally funded child support enforcement program. Sundquist leveled direct criticism at Wayne Chastain, a MALS attorney, for participating in activities designed to obstruct the administration of the Child Support Enforcement Laws.⁹⁹ Sundquist distributed a copy of the letter to the Memphis media. Representative Sundquist reiterated his concern about MALS in a letter to the Legal Services Corporation (LSC). MALS is a federally funded agency under the aegis of the LSC.

B. Trial Court Decision

Chastain filed suit against Representative Sundquist in the Superior Court for the District of Columbia.¹⁰⁰ Sundquist removed the action to the United States District Court for the District of Columbia.¹⁰¹ Judge Richey granted Sundquist's motion to dismiss based on the doctrine of official immunity. Judge Richey held that the speech or debate clause protected Sundquist's communications with the Attorney General and with the LSC.¹⁰² He also held that the release of the letter to the media fell within the grant of absolute immunity to federal officials for common law torts.¹⁰³

Judge Richey recognized that members of Congress deserve at least as much protection as other government officials. He embraced a functional approach¹⁰⁴ and held that both the speech or debate clause and the judicially created doctrine of official immunity entitled Representative Sundquist's letters to absolute immunity.¹⁰⁵ He stated that the "doctrine of immunity is in large measure based on practical considerations designed and existing primarily to pro-

⁹⁹ *Id.* at 313. The court quoted from Representative Sundquist's letter to the Attorney General:

Also, MALS seems to be employing at least one attorney, Wayne Chastain, to do nothing but harass Juvenile Court Judge Kenneth A. Turner and court referees Curtis S. Person, Jr. and William Ray Ingram. Mr Chastain works in concert with two convicted felons, Paul A. Savarin and Richard E. Love. Those individuals and Mrs. Alma Morris, the MALS client council chairperson, call frequent press conferences and stage street demonstrations against the Juvenile Court.

¹⁰⁰ *Id.* The complaint alleged five counts of defamation. Chastain sought \$1,000,000 in monetary damages.

¹⁰¹ *Id.*

¹⁰² Appellant's Petition for a Writ of Certiorari at 54a, *Chastain v. Sundquist*, 833 F.2d 311 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2914 (1988).

¹⁰³ *Id.*

¹⁰⁴ See *infra* notes 148-58 and accompanying text.

¹⁰⁵ Appellant's Petition for a Writ of Certiorari at 45a, *Chastain v. Sundquist*, 833 F.2d 311 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2914 (1988). ("[W]hether those letters were defamatory or not, they are entitled to absolute [speech or debate clause] immunity as official acts, . . . as well as absolute immunity for common law torts under well-established and long-established principles of law . . .").

tect the efficient operation of government.”¹⁰⁶ In conclusion, Judge Richey warned that failure to extend official immunity to members of Congress would have a chilling effect on the exercise of their duties and restrict the informing function of Congress.¹⁰⁷

C. Disposition on Appeal

Chastain appealed the trial court’s decision to the Court of Appeals for the District of Columbia Circuit. Although Representative Sundquist again raised the doctrine of official immunity as a defense, a split panel of the court of appeals reversed the lower court’s decision. The court addressed two major issues in its opinion. First, the court discussed whether the speech or debate clause protected Representative Sundquist’s letters to the Attorney General and the LSC. Second, the court considered whether the judicially created doctrine of official immunity should extend to members of Congress.

The court first addressed the issue of whether the speech or debate clause protected interbranch communications¹⁰⁸ and adopted the Supreme Court’s position that the clause protects only “purely legislative activities.”¹⁰⁹ The court concluded that the speech or debate clause did not shield Representative Sundquist’s letters to the Attorney General and the LSC. The majority also held that Sundquist’s statements to the public did not constitute legislative activity and therefore did not fall within the scope of the clause.¹¹⁰ The court’s resolution of the first issue followed the Supreme Court’s conclusion in *Hutchinson v. Proxmire* that attempts to influence the conduct of executive agencies do not fall within the protection of the speech or debate clause.¹¹¹

The court devoted the rest of its opinion to the official immunity issue. The majority noted that the Supreme Court has fashioned an extra-constitutional body of immunity law to supplement

¹⁰⁶ *Id.* at 54a-55a.

¹⁰⁷ *Id.* at 56a:

[I]f this court were to hold otherwise . . . it would act, in effect, as a restraint on the exercise of the duties by a legislative official in respect to matters with wide public interest and concern, which would be far worse than a favorable expression on such matters and that if Congressman Sundquist, or any other Member . . . , were so restricted as the plaintiff’s kinds of actions here would restrict them, then we would have very little information coming out from the Members of Congress in the way of information involving broad-ranging public policies and, as a result, the public interest would suffer.

See *infra* notes 168-70 and accompanying text.

¹⁰⁸ *Sundquist*, 833 F.2d at 313.

¹⁰⁹ *United States v. Brewster*, 408 U.S. 501, 512 (1972).

¹¹⁰ *Sundquist*, 833 F.2d at 314-15.

¹¹¹ *Id.* (citing *Hutchinson v. Proxmire*, 443 U.S. 111, 121 n.10 (1979)).

grants of immunity found in the Constitution. Furthermore, the court stated that all other public officials receive the protection of the doctrine of official immunity when engaged in official activities.¹¹² Despite these findings, the court concluded that “members of Congress expressly cannot claim immunity from defamatory statements unprotected by the Speech or Debate Clause.”¹¹³ The majority’s conclusion rested on their belief that the doctrine of legislative immunity does not extend beyond the parameters of the speech or debate clause.¹¹⁴

In a vigorous dissent, Judge Mikva sharply criticized the majority opinion. Mikva argued that the majority mechanically read the Constitution as if it were a collection of mutually exclusive boxes.¹¹⁵ He disagreed with the majority’s position that members of Congress cannot qualify for the judicially created doctrine of official immunity simply because the Constitution provides a certain measure of protection under the speech or debate clause.¹¹⁶ The dissent emphasized the importance of a functional approach to immunity questions and the need to assess important policy considerations weighing in favor of extending official immunity to members of Congress.¹¹⁷ In particular, Judge Mikva argued that the majority’s bright line test would have a chilling effect on the effective discharge of a Congressman’s official duties. He concluded that “members of Congress, like other government officials, are entitled to avail themselves of the doctrine of official immunity.”¹¹⁸

Representative Sundquist petitioned the court for a rehearing with a suggestion of rehearing en banc. Sundquist argued that the court’s holding leaves legislators without any protection whatsoever.¹¹⁹ He concluded that the court’s decision would inhibit the effective functioning of the legislative branch.¹²⁰ Although six judges voted in favor of rehearing, the court denied Sundquist’s petition.¹²¹

¹¹² *Id.* at 315.

¹¹³ *Id.* at 316.

¹¹⁴ *Id.* See *infra* notes 150-51 and accompanying text.

¹¹⁵ *Sundquist*, 833 F.2d at 328 (Mikva, J., dissenting).

¹¹⁶ *Id.* at 330 (Mikva, J., dissenting).

¹¹⁷ See *infra* notes 147-82 and accompanying text.

¹¹⁸ *Sundquist*, 833 F.2d at 333 (Mikva, J., dissenting). The majority’s refusal to extend the doctrine of official immunity to members of Congress conflicts with decisions in other circuits. See *Hartley v. Fine*, 780 F.2d 1383 (8th Cir. 1985); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982); *Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975).

¹¹⁹ Appellant’s Petition for a Rehearing at 1, *Chastain v. Sundquist*, 833 F.2d 311 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2914 (1988).

¹²⁰ *Id.* at 5-6.

¹²¹ Rehearing required the vote of a majority of the twelve judges in active service rather than just a majority of the eleven judges voting. Although he was still officially a

D. Aftermath

Following the court of appeals' denial of Representative Sundquist's petition for rehearing, the House of Representatives unanimously passed a privileged resolution requesting the Supreme Court to grant certiorari.¹²² The resolution stated that the divided panel's decision "will have an adverse effect on the performance of important official duties by Members of the House and will deprive citizens of an irreplaceable source of information about the functioning of their government"¹²³ Six weeks after the House expressed its desire to obtain review of the court of appeals decision, the Supreme Court denied Representative Sundquist's petition for a writ of certiorari.¹²⁴

III ANALYSIS

In *Chastain v. Sundquist*, the split panel of the court of appeals gave an unduly restrictive interpretation of the doctrine of legislative immunity. The court's opinion exhibits several flaws. First, the court's narrow definition of legislative activity reflects a "lack of understanding of the essential elements of the legislative process and the representative role of the legislative branch."¹²⁵ Second, the court misconceived the "functional approach" to immunity questions. Third, the court failed to consider adequately the important policy considerations underlying legislative immunity. The court's decision will have a chilling effect on the willingness of members of Congress to tackle controversial matters outside the confines of the legislative chamber. The resultant fear of litigation might dissuade even the most zealous member from fulfilling his constitutional obligations. To counter the harmful effects of *Sundquist*, Congress should enact a statutory grant of legislative immunity.

A. Definition of Protected Legislative Activity

The court's conclusion that the speech or debate clause is the

member of the court, Judge Bork did not participate in the vote. He had already announced his departure from the bench.

¹²² H.R. RES. 446, 100th Cong., 2d Sess., 134 CONG. REC. H3188 (1988).

Privileged legislation receives special status in the Senate and House of Representatives. Specifically, privileged legislation qualifies for immediate debate, thus ensuring prompt consideration and action. JEFFREY ELLIOT & SHEIKH R. ALI, *THE PRESIDENTIAL—CONGRESSIONAL POLITICAL DICTIONARY* 286-87 (1984).

¹²³ H.R. RES. 446, 100th Cong., 2d Sess., 134 CONG. REC. H3188 (1988).

¹²⁴ 108 S. Ct. 2914 (1988). Justices White, Blackmun, and O'Connor voted to grant certiorari.

¹²⁵ Sam J. Ervin, Jr., *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175, 186 (1973).

only source of immunity for members of Congress effectively collapsed the two prongs of the doctrine of legislative immunity into a single, bright line test.¹²⁶ The majority's myopic approach prematurely determined that Representative Sundquist's defense of official immunity was without merit.¹²⁷ It erroneously assumed that the speech or debate clause provides elected representatives with sufficient protection from vexatious litigation. The court's holding thus rested entirely on whether Representative Sundquist acted within the sphere of protected legislative activity.

The court characterized Representative Sundquist's letters to the Attorney General and the LSC as attempts to influence the conduct of executive agencies and concluded that such activities fell outside the ambit of the speech or debate clause.¹²⁸ The majority stated that the clause "does not protect acts that are not 'legislative in nature,' even if they are taken in a member's 'official capacity.'" ¹²⁹ This position ignores the fact that members of Congress are in daily contact with executive agencies in an effort to "bridge the gap between the federal government and the citizens" they represent.¹³⁰ The *Sundquist* decision not only cuts off Congress from the executive, it also cuts off the people from Congress.¹³¹

The court mechanically applied the Supreme Court's distinction between political and legislative activities.¹³² Writing for the majority, Judge Buckley stated, "When [members of Congress] move beyond the requirements of their legislative responsibilities, they do so as volunteers, and at their own risk . . ."¹³³ Judge Buckley's designation of members of Congress as "volunteers" reflects an anachronistic view of the functions of the legislative branch. Members of Congress perform a variety of non-legislative tasks necessary to make the government more responsive to its citizenry.¹³⁴ For example, the court's narrow definition of legislative activity poses a significant threat to the investigative and informing functions of Congress. The legislative process gives Congress the inherent power to investigate.¹³⁵ The investigative function includes congressional inquiry into the executive branch "to expose corrup-

¹²⁶ This Note argues that the doctrine of legislative immunity includes both speech or debate clause immunity and the judicially created doctrine of official immunity.

¹²⁷ *Sundquist*, 833 F.2d at 328 (Mikva, J., dissenting).

¹²⁸ *Id.* at 314.

¹²⁹ *Id.* (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)).

¹³⁰ 134 CONG. REC. H3190 (daily ed. May 12, 1988) (joint statement of Rep. Foley and Rep. Michel).

¹³¹ See Ervin, *supra* note 125, at 188.

¹³² See *supra* notes 52-54 and accompanying text.

¹³³ *Sundquist*, 833 F.2d at 328.

¹³⁴ *Id.* at 332 (Mikva, J., dissenting).

¹³⁵ *Watkins v. United States*, 354 U.S. 178, 187 (1957).

tion, inefficiency or waste."¹³⁶ The informing function of Congress occupies a position of equal importance.¹³⁷ In his classic study of Congress, Woodrow Wilson argued that "[i]t is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees."¹³⁸ The court's narrow definition of legislative activity ignores the value of the investigative and informing functions of Congress.

The Supreme Court's decision in *Gravel v. United States*¹³⁹ illustrates the consequences of a narrow definition of legislative activity on the informing function of Congress. In *Gravel*, the Court held that Senator Gravel's arrangement for private publication of The Pentagon Papers had no connection with the legislative process.¹⁴⁰ Justice Douglas's dissent sharply criticized the Court's reasoning.¹⁴¹ He stated that publication of the Pentagon Papers "was but another way of informing the public as to what had gone on in the privacy of the Executive Branch concerning the conception and pursuit of the so-called 'war' in Vietnam."¹⁴² In a separate dissent, Justice Brennan argued that the Court should not restrict the definition of legislative activity merely because a member of Congress may reveal information which embarrasses the other branches of government or violates their notions of secrecy.¹⁴³

A narrow definition of legislative activity strips members of Congress of immunity for the acquisition and publication of information about the administration's activities.¹⁴⁴ The *Gravel* decision thus insulates the executive branch from congressional and public scrutiny.¹⁴⁵ This result conflicts with the long-standing tradition of unfettered communication between members of Congress and the American people.¹⁴⁶ During his tenure as Attorney General, Ramsey Clark emphasized the importance of this give-and-take between legislators and their constituents: "If government is to be truly of, by, and for the people, the people must know in detail the activities

¹³⁶ *Id.*

¹³⁷ See *Gravel v. United States*, 408 U.S. 606, 652 (1972) (Brennan, J., dissenting) ("The informing function . . . is essential to the continued vitality of our democratic institutions.").

¹³⁸ WOODROW WILSON, CONGRESSIONAL GOVERNMENT 198 (1885).

¹³⁹ 408 U.S. 606 (1972). See *supra* notes 55-59 and accompanying text.

¹⁴⁰ *Gravel*, 408 U.S. at 626.

¹⁴¹ *Id.* at 633-48 (Douglas, J., dissenting).

¹⁴² *Id.* at 633.

¹⁴³ *Id.* at 662 (Brennan, J., dissenting).

¹⁴⁴ Ervin, *supra* note 125, at 187.

¹⁴⁵ *Id.* at 194.

¹⁴⁶ See *United States v. Ford*, 830 F.2d 596, 601 (6th Cir. 1987) (Judicial interference in communications between members of Congress and their constituents "would tend to undermine the representative nature of the democratic process and the legislator's responsibility to the electorate to account for his actions.").

of government.”¹⁴⁷

B. Functional Approach to Immunity Questions

A functional approach to immunity questions requires the application of the doctrine of official immunity to members of Congress. The Supreme Court has consistently applied a functional approach to immunity questions.¹⁴⁸ Under such an approach, courts examine the nature of an official's functions and evaluate whether exposure to liability would inhibit the appropriate exercise of those functions.¹⁴⁹

The *Sundquist* court's reliance on a speech or debate clause analysis ignored the option of extending the doctrine of official immunity to members of Congress.¹⁵⁰ The fact that the Constitution provides members of Congress with absolute immunity for their legislative actions does not compel the conclusion that courts should provide no other immunity.¹⁵¹ This reasoning would leave members of Congress more exposed to litigation than all other public officials.¹⁵²

The *Sundquist* court's decision reflects a basic misconception of the functional approach to immunity questions. All members of Congress must write to Cabinet officers and provide their constituents with information.¹⁵³ Congress handles over a million constitu-

¹⁴⁷ Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, 20 ADMIN. L. REV. 263, 264 (1967), quoted in *Gravel*, 408 U.S. at 641 (Douglas, J., dissenting); see also 134 CONG. REC. H3192 (daily ed. May 12, 1988) (statement of Rep. Schumer) (“The intrusion by the [*Sundquist*] court . . . into this fundamental process of give and take between the Congress and the people must be undone.”).

¹⁴⁸ See *Forrester v. White*, 484 U.S. 219, 224 (1988) (“Running through our cases, with fair consistency, is a ‘functional’ approach to immunity questions”); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982) (“[O]ur cases have followed a ‘functional’ approach to immunity [questions].”).

¹⁴⁹ *Forrester*, 484 U.S. at 224.

¹⁵⁰ See *Sundquist*, 833 F.2d at 330 (Mikva, J., dissenting):

In limiting the application of Speech or Debate Clause immunity to matters within the legislative sphere, the Supreme Court has neither explicitly nor implicitly negated the application of judicially created official immunity to activities outside that sphere. Speech or Debate immunity and judicially created official immunity offer distinctly different protections.

See also *supra* note 115 and accompanying text.

¹⁵¹ See 134 CONG. REC. H3189 (daily ed. May 12, 1988) (statement of Rep. Foley): The majority [in *Sundquist*] reasoned that since the Constitution provides Members with an absolute immunity for their legislative actions, no other immunity should be provided. This reasoning leaves Members, who are the only officials the framers of the Constitution believed required an immunity, more exposed to litigation than all other public officials.

¹⁵² *Id.* See *supra* note 118 and accompanying text.

¹⁵³ See 134 CONG. REC. H3190 (daily ed. May 12, 1988) (statement of Rep. Michel).

ent cases each year.¹⁵⁴ The cases require extensive communication with constituents and agencies.¹⁵⁵ As one member of Congress recently stated, "The help we give constituents is a vital part of their lives, and a major part of our responsibility in holding office."¹⁵⁶ The court's decision not to extend official immunity to members of Congress poses a significant threat to the continuation of this essential function.

Representative Sundquist's efforts to call attention to problems within the MALS were part of his job, and his letters to the Attorney General and the LSC were part of that effort.¹⁵⁷ Sundquist and other members of Congress should have the freedom to investigate suspected improprieties in federally funded programs without the fear of potential liability for unwarranted defamation claims.¹⁵⁸

C. Important Policy Considerations

Compelling public policy considerations provide the infrastructure for both prongs of the doctrine of legislative immunity. Legislative immunity does not represent a personal privilege or perquisite of office.¹⁵⁹ As Justice Frankfurter stated in *Tenney v. Brandhove*,¹⁶⁰ "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their indulgence but for the public good."¹⁶¹

An examination of the proper boundaries of legislative immunity requires a balancing of the public interest in the protection of individuals from attacks upon their reputations "against the public interest in the free dissemination of information about government activities."¹⁶² Although courts traditionally resolved this conflict in favor of absolute protection for officials,¹⁶³ recent cases, such as *Sundquist*, have lessened this protection.¹⁶⁴

¹⁵⁴ *Id.* at H3191 (statement of Rep. Gejdenson).

¹⁵⁵ *Id.* at H3190 (joint statement of Rep. Foley and Rep. Michel) ("Each of us is in daily contact with Executive agencies and with our constituents. Part of our task is to bridge the gap between the federal government and the citizens we represent.").

¹⁵⁶ *Id.* at H3191 (statement of Rep. Gejdenson).

¹⁵⁷ *Sundquist*, 833 F.2d at 329 (Mikva, J., dissenting).

¹⁵⁸ 134 CONG. REC. H3193 (daily ed. May 12, 1988) (statement of Rep. Hughes).

¹⁵⁹ *Hearings, pt. 1, supra* note 61, at 2 (statement of Sen. Metcalf); *see also* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 16, at 109 (5th ed. 1984) (Privilege "signifies that the defendant has acted to further an interest of such social importance that it is entitled to protection, even at the expense of damage to the plaintiff."); *supra* note 89 and accompanying text.

¹⁶⁰ 341 U.S. 367 (1951).

¹⁶¹ *Id.* at 377.

¹⁶² Handler & Klein, *supra* note 76, at 44.

¹⁶³ *See* Note, *Qualified Immunity for Federal Officials: A Proposed Standard for Defamation Cases*, 58 TEX. L. REV. 789 (1980) (authored by Bruce Jones).

¹⁶⁴ *Id.*

The *Sundquist* court's refusal to extend official immunity to members of Congress conflicts with sound public policy.¹⁶⁵ Exposing members of Congress to civil liability undermines the effective functioning of the legislative branch.¹⁶⁶ The court's decision restricts the ability of members of Congress to participate in public debate on controversial issues.¹⁶⁷ It will have a chilling effect on the ability of individual members to represent their constituencies adequately.¹⁶⁸ Constituents "will never know whether the threat of a suit has prevented [their] representative from criticizing executive action or revealing information about executive programs."¹⁶⁹ The threat of litigation might appreciably inhibit the fearless, vigorous, and effective administration of government policies.¹⁷⁰

The *Sundquist* majority failed to recognize the consequences of inviting litigation against members of Congress.¹⁷¹ The social costs of such suits "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of

¹⁶⁵ See *Barr v. Matteo*, 360 U.S. 564, 576 (1959) (emphasis added):

We are told that we should forbear from sanctioning any such rule of absolute privilege lest it open the door to wholesale oppression and abuses on the part of unscrupulous government officials. . . . To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, *but we think that price a necessary one to pay for the greater good.*

¹⁶⁶ Ervin, *supra* note 125, at 191.

¹⁶⁷ 134 CONG. REC. H3193 (daily ed. May 12, 1988) (statement of Rep. Lott); see also *Bond v. Floyd*, 385 U.S. 116, 136 (1966) ("Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed of them . . .").

¹⁶⁸ *Hearings, pt. 1, supra* note 61, at 77 (statement of Sen. Fulbright). Fifteen years ago, Representative Brooks gave a graphic description of the "chilling effect" phenomenon:

If I am acting at my peril everytime I send a news release to my congressional district or give an interview or make a speech in Beaumont, Tex., on a matter of concern in the Congress, then wisdom might dictate that I not share that information.

If, before I speak outside the Halls of Congress, I must first consider whether I may offend someone in the executive branch who may prefer that the public not know how he is botching up his job, or that I may be called to account before a judicial body of inquiry, is it not the better role for me not to say anything?

But what happens then to my representative responsibility to keep my constituents informed about their Government?

Id. at 7-8 (statement of Rep. Brooks).

¹⁶⁹ *Id.* at 77 (statement of Sen. Fulbright).

¹⁷⁰ *Barr v. Matteo*, 360 U.S. 564, 571 (1959); see also *Forrester v. White*, 484 U.S. 219, 233 (1988) (The threat of litigation may induce some members of Congress "to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct.").

¹⁷¹ See 134 CONG. REC. H3193 (daily ed. May 12, 1988) (statement of Rep. Lott) ("I do think [*Sundquist*] is a forerunner of what could be a whole number of this type of lawsuits being brought against Members of Congress to tie us up and to shut us up.").

able citizens from acceptance of public office."¹⁷² The *Sundquist* decision will have a particularly harmful effect on the informing function of Congress.¹⁷³ Members of Congress have a duty to keep the public informed on matters of national or local importance.¹⁷⁴ In our society, where political power resides in the people, an important interest exists in general knowledge of the affairs of the government.¹⁷⁵ The people look to their elected representatives to speak for them. Informing constituents thus represents a vital, basic, and essential function for any member of Congress.¹⁷⁶ If members of Congress cannot speak freely within the bounds of their official duties, they will become less able to represent the people who elected them to serve.

Courts could not grant a measure of official immunity to members of Congress without imposing some costs.¹⁷⁷ Absolute immunity from suits alleging common law claims effectively would leave uncompensated a number of innocent and aggrieved claimants. Nevertheless, the benefits of unrestrained public debate and effective representation outweigh the risk that members of Congress will unjustly damage the reputation of some individuals.¹⁷⁸ Judge Learned Hand summarized the policy reasons underlying the grant of official immunity:

[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officials than to subject those who try to do their duty to the constant dread of retaliation.¹⁷⁹

Sundquist also represents a situation in which sufficient inherent safeguards exist to protect an individual's interest without the collateral remedy of a tort action for defamation.¹⁸⁰ Wayne Chastain even pursued several non-judicial remedies before he brought suit against Representative Sundquist. He wrote a letter to the Attorney

¹⁷² *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); see also *United States v. Helstoski*, 635 F.2d 200, 205 (3d Cir. 1980) (describing effects of bad publicity).

¹⁷³ See *supra* notes 137-47 and accompanying text.

¹⁷⁴ See S. 1314, 93d Cong., 1st Sess. § 2, 119 CONG. REC. 9089 (1973).

¹⁷⁵ Handler & Klein, *supra* note 76, at 61.

¹⁷⁶ 134 CONG. REC. H3190 (daily ed. May 12, 1988) (statement of Rep. Michel).

¹⁷⁷ *Sundquist*, 833 F.2d at 333 (Mikva, J., dissenting).

¹⁷⁸ See Comment, *Legislative Immunity and Congressional Necessity*, 68 GEO. L.J. 783, 798 (1980) (authored by Jeff Turner).

¹⁷⁹ *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

¹⁸⁰ Handler & Klein, *supra* note 76, at 45.

General¹⁸¹ and discussed the underlying dispute between MALS and the juvenile court at the monthly meeting of the Kennedy Democratic Club.¹⁸² He had ample opportunity to redress his grievances outside the judicial system. Constituents in Chastain's position also have the means to hold members of Congress accountable at the ballot box.¹⁸³

D. Need for Congressional Action

Sundquist illustrates the need for congressional action to "re-store itself as a co-equal branch of government . . ." ¹⁸⁴ The court's narrow definition of legislative activity foreclosed the possibility of protection under the speech or debate clause. The court's all-or-nothing approach to immunity questions also blocked the official immunity route. As a result, Congress should enact a statutory grant of legislative immunity. The court even invited Congress to take action if it disagreed with its opinion: "If members of Congress in fact believe they require the protection of official immunity, let them so declare and stand accountable to the people for their action."¹⁸⁵

Congress responded to the court's invitation. In an extraordinary show of bipartisan support, the House of Representatives unanimously passed a privileged resolution requesting that the Supreme Court grant Representative Sundquist's petition for a writ of certiorari.¹⁸⁶ The resolution set forth two primary reasons for the extension of official immunity to members of Congress. First, the House stated that the official duties of a member included informing citizens and executive branch officials on matters of public notice.¹⁸⁷ Second, the House stated that courts should treat members engaged in the performance of their official duties with the same respect and protection as all other public officials.¹⁸⁸ The Court's subsequent refusal to grant certiorari leaves Congress with the difficult task of fashioning a remedy to rectify the decision of the court of appeals.

¹⁸¹ Brief for Appellee at 4, *Chastain v. Sundquist*, 833 F.2d 311 (D.C. Cir. 1987) (No. 86-5386), *cert. denied*, 108 S. Ct. 2914 (1988).

¹⁸² *Id.*

¹⁸³ See Comment, *supra* note 178, at 799; see also *Hearings, pt. I, supra* note 60, at 4 (statement of Sen. Metcalf).

¹⁸⁴ Ervin, *supra* note 125, at 194.

¹⁸⁵ *Sundquist*, 833 F.2d at 327 ("[C]ongressional power could be hypothesized to exist to enact legislation immunizing members of Congress from common law torts.").

¹⁸⁶ H.R. Res. 446, 100th Cong., 2d Sess., 134 CONG. REC. H3188 (daily ed. May 12, 1988).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

Congress faced a similar impasse fifteen years ago.¹⁸⁹ The focus of the Joint Committee's 1973 inquiry serves as an appropriate starting point for the post-*Sundquist* period. Senator Metcalf opened the Committee's inquiry with the question, "What, if anything, can the Congress do to restore the doctrine of constitutional immunity for legislators to its appropriate place in the law, where it serves as the bulwark for the Congress against challenges to its independence and integrity of action?"¹⁹⁰ *Sundquist* reveals the potential consequences of further congressional inaction.

Congress has the power to create a statutory grant of legislative immunity.¹⁹¹ In his testimony before the Joint Committee fifteen years ago, former Justice Goldberg stated that the Constitution "clearly authorize[s] Congress to enact carefully and properly drawn legislation to shield appropriate legislative activities—and to restrict accountability for congressional misconduct in discharging such legislative activities to Congress itself."¹⁹² Professors Alexander Bickel¹⁹³ and Philip Kurland¹⁹⁴ also testified that Congress could statutorily define its immunity on firm constitutional ground, with the caveat that, in the area of immunity from civil proceedings, a limitation exists that any such legislated protection could not infringe on an individual's constitutional rights.¹⁹⁵

In 1973, Senator Ervin introduced a bill¹⁹⁶ in response to the

¹⁸⁹ See *supra* notes 60-65 and accompanying text.

¹⁹⁰ REPORT, *supra* note 60, at 2 (statement of Sen. Metcalf).

¹⁹¹ See Reinstein & Silvergate, *supra* note 12, at 1179:

[A] practical means for effectuating that degree of privilege which is necessary for Congress to function without unwarranted executive and judicial interference would appear to be the passage of an appropriate statute. Since Congress has the undoubted power to define the scope of the criminal law and to regulate the jurisdiction and procedure of the federal courts, it possesses ample power to protect its members from decisions such as *Brewster* and *Gravel*.

¹⁹² See *Hearings*, pt. 1, *supra* note 61, at 57 (statement of former Justice Goldberg):

Article I, section 1, of the Constitution provides: 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Article I, section 8, of the Constitution, in the necessary and proper clause, vests in Congress the power 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.'

¹⁹³ Late Professor of Law, Yale Law School.

¹⁹⁴ Professor of Law, University of Chicago Law School.

¹⁹⁵ *Constitutional Immunity of Members of Congress: Hearings Before the Joint Comm. on Congressional Operations*, 93d Cong., 1st Sess., pt. 2, at 82-83 (1973) [hereinafter *Hearings*, pt. 2].

¹⁹⁶ S. 1314, 93d Cong., 1st Sess., 119 CONG. REC. 9089-90 (1973). Senator Gravel also sponsored legislation in response to the Supreme Court's decisions in *Brewster* and *Gravel*. S. 1726, 93d Cong., 1st Sess., 119 CONG. REC. 14,456-64 (1973). The Senate did not vote on either bill.

Supreme Court's narrow definition of legislative activity. Senator Ervin defined legislative activity as

any activity relating to the due functioning of the legislative process and carrying out the obligations a Member of Congress owes to the Congress and to his constituents and shall include, but not be limited to, speaking, debating or voting in Committee or on the floor of Congress, receipt of information for use in legislative proceedings, any conduct in Committee related to the consideration of legislation or related to the conduct of an investigation, speeches, or publications outside of Congress informing the public on matters of national or local importance, and the motives and decision-making process leading to the above activity or leading to the decision not to engage in the above activity.¹⁹⁷

Political considerations during the Watergate affair explain why the Senate never scheduled a vote on Senator Ervin's bill. The Senate wanted to avoid the politically unacceptable result of expanding the legislative privilege while challenging President Nixon's use of the executive privilege.¹⁹⁸

Legislative immunity is a bipartisan issue that merits the attention of every member of Congress. Nevertheless, Congress can expect to face significant opposition to any statutory grant of legislative immunity. The public's outcry in early 1989 over plans for a 51% pay hike for top government officials, including members of Congress, illustrates the inherent difficulty in securing passage of this type of legislation.¹⁹⁹ Members of Congress fear that voters will interpret a grant of immunity as a license to defame.²⁰⁰ Congressmen, however, should not fear a voter backlash on this issue.²⁰¹ Sound public policy considerations support a statutory grant of legislative immunity.²⁰²

Absent a congressional grant of immunity, the court's decision in *Sundquist* will have an adverse effect on the day-to-day operation of the legislative branch. Congress should therefore enact legislation which will protect fully its "legislative powers and preroga-

¹⁹⁷ S. 1314, 93d Cong., 1st Sess. § 2, 119 CONG. REC. 9089 (1973).

¹⁹⁸ See REPORT, *supra* note 60, at 41-43.

¹⁹⁹ H.R.J. Res. 129, 101st Cong., 1st Sess. (1989). The resolution failed to pass either the Senate (6-94) or the House of Representatives (48-380).

²⁰⁰ See *Sundquist*, 833 F.2d at 324 ("[I]n the heat of political contest, an immunity from suit for common law libel becomes a license to libel.").

²⁰¹ See, e.g., Mike Mills, *Raising Members' Pay: A 200-Year Dilemma*, 47 CONG. Q. 209-12 (weekly ed. Feb. 4, 1989). Mills stated, "[T]he overall record of voter retaliation shows more smoke than fire: With two exceptions [1816 and 1873], it is rare for voters to punish members at the polls solely because of their pay-raise votes." *Id.* at 209.

²⁰² *Hearings, pt. I, supra* note 61, at 57 (statement of former Justice Goldberg); see *supra* notes 159-83 and accompanying text.

tives."²⁰³ Such legislation should include Senator Ervin's definition of legislative activity.²⁰⁴ Representative Sundquist's statements on the MALS controversy would constitute "informing the public on matters of . . . local importance" under the Ervin definition.²⁰⁵ The legislation should also inform the public of the necessity of a statutory grant of immunity. Congress must not create the image of a body trying to place itself in a privileged position above the law.²⁰⁶

A broad interpretation of the doctrine of legislative immunity carries with it the responsibility that Congress "keep its house in order."²⁰⁷ Article I, section 5, of the Constitution provides that "each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and with the Concurrence of two-thirds, expel a Member."²⁰⁸ This power has a broad reach, extending to all cases where, in the judgment of the House or Senate, the offense "is inconsistent with the trust and duty of a member."²⁰⁹ Ideally, Article I, section 5, precludes any member of Congress "from claiming to be above the law because he occupies a position

²⁰³ *Id.* at 56.

²⁰⁴ See *supra* note 197 and accompanying text; see also Reinstein & Silvergate, *supra* note 12, at 1179:

For the purpose of this statute, 'legislative activities' should be defined as any activity relating to the due functioning of the legislative process and the carrying out of a member's obligations to his house and his constituents. The following should be included specifically: speeches, debates, and votes; conduct in committee; receipt of information for use in legislative proceedings; *publications and speeches made outside of Congress to inform the public on matters of national or local importance*; and the decision-making processes behind each of the above.

²⁰⁵ See *supra* note 197 and accompanying text.

²⁰⁶ *Hearings, pt. 1, supra* note 61, at 270-71 (statement of Rep. Cleveland): [A]s Congressmen we don't want the public to feel that what we're trying to do in staking out this legislative immunity is setting ourselves aside as privileged citizens who can drive a car 90 miles an hour through a 35-mile-an-hour-zone.

. . . .
What we're trying to point out is that this is the guts of representative government, and what we're trying to do is insure that if we do our proper job, we're protected

Id. at 270. But see REPORT, *supra* note 60, at 26 (statement of Sen. Helms):

I am deeply disturbed by the present day tendency in many quarters to broaden the scope and make absolute the privilege of immunity from prosecution or proper inquiry. The ultimate effect of this tendency will be to create a certain elite of privileged classes who are above the law and beyond the scope of effective scrutiny and restraint.

²⁰⁷ *Hearings, pt. 1, supra* note 61, at 4 (statement of Sen. Metcalf); see also REPORT, *supra* note 60, at 52 ("Congressional action to define legislative activities to reflect the reasonable scope of activities expected of a Member of Congress carries with it the absolutely essential requirement that the Congress do better than it has to discharge its constitutional self-disciplinary role."); see generally Gerald T. McLaughlin, *Congressional Self-Discipline: The Power to Expel, to Exclude, and to Punish*, 41 *FORDHAM L. REV.* 43 (1972).

²⁰⁸ U.S. CONST. art. I, § 5.

²⁰⁹ *In re Chapman*, 166 U.S. 661, 669-70 (1897).

of trust in an elective, legislative office.”²¹⁰

Congress should exercise this power and hold its members accountable for their legislative misconduct. In his dissent in *United States v. Brewster*, Justice Brennan emphasized the need for self-discipline. He stated:

[W]e are guilty of a grave disservice to both Nation and Constitution when we permit Congress to shirk its responsibility in favor of the courts. The Framers’ judgment was that the American people could have a Congress of independence and integrity only if alleged misbehavior in the performance of legislative functions was accountable solely to a Member’s own House and never to the executive or judiciary.²¹¹

In addition to self-discipline, the discipline of the public referendum remains an effective deterrent to legislative misconduct.²¹²

Congress can not afford to let another fifteen years elapse without taking action.²¹³ If the scope of protected activities is to bear any reasonable relationship to contemporary duties and responsibilities of legislative office, a legislative remedy is required. *Sundquist* magnifies the importance of timely consideration of this significant issue.

CONCLUSION

In *Chastain v. Sundquist*, the Court of Appeals for the District of Columbia Circuit held that the judicially created doctrine of official immunity did not extend to members of Congress. The court’s narrow reading of the doctrine of legislative immunity will have an adverse effect on the performance of important official duties by members of Congress and will deprive citizens of an irreplaceable source of information about the functioning of their government. The majority’s all-or-nothing approach to immunity questions sets a dangerous precedent. The split panel’s position that it cannot consider the question of congressional common law immunity independently of the speech or debate clause ignores the obvious application of the judicially created doctrine of official immunity to the facts in *Sundquist*. Members of Congress acting within the scope of their official authority should have recourse to either speech or debate clause immunity or the judicially created doctrine of official immunity. If the courts fail to provide this necessary safeguard,

²¹⁰ REPORT, *supra* note 60, at 52.

²¹¹ *United States v. Brewster*, 408 U.S. 501, 550 (1972) (Brennan, J., dissenting).

²¹² REPORT, *supra* note 60, at 52.

²¹³ See *Hearings, pt. 2, supra* note 195, at 91 (statement of Prof. Bickel) (“[T]he Court quite properly through the decision threw the ball back to Congress.”).

then Congress must act to protect the citizenry's primary representative in the federal government.

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