§ 8. Speech or Debate Immunity

"[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other place." This principle, articulated in article I, section 6, clause 1[1] of the Constitution, is derived directly from the English Bill of Rights of 1689, which provides "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."[2] Although originally designed to prevent royal interference with parliamentary deliberations, this privilege in the American context plays a similar role in maintaining the independence of the legislative branch against encroachments by the executive or the judiciary.[3]

Although textually limited to "Speech or Debate"[4] this privilege has been interpreted more broadly to encompass all legislative acts.[5] Speeches or debates on the floor of the House during its sitting[6] are obviously covered as one of the most fundamental legislative acts in which a Member may engage.[7] Similarly, voting on measures (and introducing them for consideration) has been held entitled to protection under the Speech or Debate Clause.[8] In a recent circuit court case, the D.C. Circuit Court held that the system of proxy voting instituted by the House in response to the COVID–19 pandemic concerned "core legislative acts" that cannot be questioned due to Speech or Debate immunity."[9] Related activities, such as participating

1. *House Rules and Manual* §§ 92–95 (2021).
2. See Deschler's Precedents Ch. 7 § 16. The Articles of Confederation formulated the same immunity provision as follows: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress." See *United States* v. *Johnson,* 383 U.S. 169, 177 (1966).
3. See § 7, *supra.*
4. For examples of Speech or Debate immunity raised in the context of defamation suits, see Deschler's Precedents Ch. 7 §§ 16.3, 16.4.
5. See, *e.g.*, *Gravel* v. *United States,* 408 U.S. 606 (1972). See also Deschler's Precedents Ch. 7 § 17.
6. *Parliamentarian's Note:* The clause applies not only to words actually spoken in debate, but also remarks inserted into the *Congressional Record* with the consent of the House. See Deschler's Precedents Ch. 7 § 16.3.
7. *Parliamentarian's Note:* It should be noted that the speech of Members is protected from being subject to challenge outside of the House, not within the House. The House is at liberty to adopt rules of decorum that regulate the content of speeches made during its legislative sessions. Such restrictions do not run afoul of the constitutional principle discussed here. See § 8.1, *infra.* See also 3 Hinds' Precedents § 2671. For more on decorum in debate, see Deschler's Precedents Ch. 29 §§ 40–66; and Precedents (_____) Ch. 29.
8. See, *e.g.*, *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880).
9. See *McCarthy* v. *Pelosi,* No. 20–5240 slip op. at 8 (D.C. Cir. 2021) ("Indeed, we are hard–pressed to conceive of matters more integrally part of the legislative process than

in committee meetings and hearings,[10] producing committee reports,[11] conducting investigations and general information–gathering for legislative purposes,[12] have all been considered legislative acts covered by the grant of immunity. Even House and Senate regulations regarding admission to their respective press galleries (despite potential First Amendment concerns) have been held immune from challenge under the Speech or Debate Clause.[13]

A seminal Supreme Court case interpreting the Speech or Debate Clause occurred in 1880.[14] The House had established a special committee to investigate certain real estate transactions, and empowered said committee with the authority to subpoena witnesses and documents. Hallett Kilbourn, a private citizen, was instructed to produce relevant documents, and upon his refusal to do so, the House Sergeant–at–Arms was directed to take Kilbourn into custody. Kilbourn sued both Members of the House and House officers for false imprisonment. The Court held that the Speech or Debate Clause provided the Member defendants with an affirmative defense: that their actions in facilitating the imprisonment of Kilbourn (reporting facts to the House, considering the resolution authorizing the imprisonment, voting in favor of said resolution, etc.) should all be considered activities protected by the Speech or Debate Clause.

In the mid–20th century, a series of cases further defined the scope of the immunity in the context of criminal charges brought against Members. *United States* v. *Johnson*[15] and *United States* v. *Brewster*[16] both involved corruption schemes implicating sitting Members of Congress. In both cases, the Court held that the prosecutions were within the power of the government, but that the Speech or Debate Clause protected Members' legislative acts from being relied upon in that prosecution.[17] Inquiries into the motives or reasons behind a legislative act are similarly precluded.[18] Actions

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the rules governing how Members can cast their votes on legislation and mark their presence for purposes of establishing a legislative quorum.").

10. See, *e.g.*, *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880).

11. See, *e.g.*, *Hentoff* v. *Ichord,* 318 F. Supp. 1175 (D.D.C. 1970).

12. See, *e.g.*, *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975).

13. See *Consumers Union of United States, Inc.* v. *Periodical Correspondents' Association,* 515 F.2d 1341, 1350 (D.C. Cir. 1975) (The Correspondents' Association "was performing delegated legislative functions; in fact these were an integral part of the legislative machinery.").

14. *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880).

15. 383 U.S. 169 (1966). See also Deschler's Precedents Ch. 7 § 16.1.

16. 408 U.S. 501 (1972). See also Deschler's Precedents Ch. 7 § 16.2.

17. See *United States* v. *Johnson,* 383 U.S. 169, 184–85 (1966) ("The indictment itself focused with particularity upon motives underlying the making of the speech and upon its contents . . . [w]e hold that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause.").

18. See *United States* v. *Johnson,* 383 U.S. 169, 177 (1966) ("We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution

tangential or merely related to the legislative process, however, were not protected.[19] In a subsequent case, the Court held that a promise to undertake a legislative act (as opposed to the act itself) is not protected by Speech or Debate immunity.[20]

In other criminal cases, courts have had to balance the immunity conferred on Members by the Constitution with the government's interest in investigating corruption and other illegal acts committed by Members.[21] A case occurred in 2006, when the FBI executed a search warrant at a Member's office in the Rayburn House Office Building. Paper and electronic documents were seized as part of an investigation into alleged acts of bribery, fraud, and other crimes. In the ensuing litigation, the court noted that this was "the first time a sitting Member's congressional office has been searched by the Executive"[22] and that the case had obvious implications for the separation of powers. Ultimately, the court found that the Member was "entitled to the return of all legislative materials (originals and copies) that are protected by the Speech or Debate Clause seized" from his office, and further that the executive branch officials executing the seizure were barred from disclosure and from further involvement in the pending criminal matter.[23] In another case in 2015, the FBI sought a search warrant to inspect a Member's email accounts for evidence in a fraud, extortion and bribery investigation.[24] The Member attempted to quash the search warrant prior

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by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it."). See also *Miller* v. *Transamerican Press, Inc.,* 709 F.2d 524, 530 (9th Cir. 1983) ("Because Steiger's insertion of the article into the Record was privileged, questions about it are prohibited. This proscription includes questions about his motive or legislative purpose.").

19. See *United States* v. *Brewster,* 408 U.S. 501, 528 (1972) (the "Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions.").

20. See *United States* v. *Helstoski,* 442 U.S. 477, 490 (1979) ("[I]t is clear from the language of the Clause that protection extends only to an act that has already been performed. A promise to deliver a speech, to vote, or to solicit other votes at some future date is not 'speech or debate.' Likewise, a promise to introduce a bill is not a legislative act."). Private discussions about potential future legislative acts are similarly not protected. See *U.S.* v. *Renzi,* 651 F.3d 1012, 1025 (9th Cir. 2011) ("[T]he fact that the Court permitted Brewster's prosecution for his alleged purpose in negotiating with private parties, solicitation of a bribe, demonstrates that private negotiations between Members and private parties are not protected 'legislative acts . . .'").

21. See *U.S.* v. *Rayburn House Office Building,* 497 F.3d 654, 664 (D.C. Cir. 2007) ("[T]he remedy must give effect not only to the separation of powers underlying the Speech or Debate Clause but also to the sovereign's interest under Article II, Section 3 in law enforcement.").

22. See *U.S.* v. *Rayburn House Office Building,* 497 F.3d 654, 659 (D.C. Cir. 2007).

23. *Id.* at 666.

24. See *In re Search of Elec. Commc'ns,* 802 F.3d 516 (3d Cir. 2015).

to its execution, claiming Speech or Debate immunity. The court found that the motion to quash was premature, and that the Speech or Debate Clause did not prevent the search: "Permitting an interlocutory appeal of an order denying a motion to quash an unexecuted search warrant based on the Speech or Debate Clause would set bad precedent and insulate Members from criminal investigations and criminal process. This, of course, cannot and should not be the purpose of the Clause."[25] In both cases described here, the courts stressed the importance of utilizing "taint teams"[26] or "filter teams"[27] to screen potentially privileged material before disclosure to executive authorities.

The Court in *Brewster* articulated a distinction between legislative acts and other acts (potentially also undertaken in an official or representative capacity) that are merely "political" in nature, and thus cannot take advantage of the protection afforded by the Speech or Debate Clause.[28] In *Hutchinson* v. *Proxmire* the Court held that press releases, newsletters, and similar constituent communications are not protected legislative acts.[29] Members often travel on official business, but courts have held that such activity does not constitute a legislative act that would prohibit inquiries into other (nonofficial) purposes of the travel.[30]

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25. *Id.* at 531.

26. *Id.* at 530.

27. *United States* v. *Rayburn House Office Building,* 497 F.3d 654, 656–57 (D.C. Cir. 2007).

28. *United States* v. *Brewster,* 408 U.S. 501, 512–13 (1972) ("It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities 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. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature, rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause."). See also Deschler's Precedents Ch. 7 § 16.2.

29. 443 U.S. 111, 133 (1979) ("Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process . . . [a]s a result, transmittal of such information by press releases and newsletters is not protected by the Speech or Debate Clause."). For the formation of a Senate committee authorized to file an amicus brief in the *Hutchinson* case, see 125 CONG. REC. 6080, 96th Cong. 1st Sess. (Mar. 22, 1979).

30. See *U.S.* v. *Biaggi,* 853 F.2d 89, 102 (2d Cir. 1988) ("Travel itself normally lacks the necessary legislative character to trigger speech–or–debate protection.").

The House's investigatory authorities permit the House and its committees to engage in a variety of actions that courts have held to be legislative acts protected by Speech or Debate immunity.(31) Issuing subpoenas and seeking judicial enforcement of those subpoenas are thus considered legislative acts protected under the Constitution.(32) Documents that come into the possession of the House or its committees become part of the legislative process, and the Speech or Debate Clause may preclude inquiries into those documents or their provenance.(33) Preparing, printing, and distributing committee reports have also been held protected legislative acts.(34)

In 1972, the Supreme Court considered the case of a U.S. Senator who had entered the text of the classified "Pentagon Papers" into the record of a subcommittee hearing.(35) The Court held that this action was a legislative act protected by the Speech or Debate Clause. However, the Senator's attempt to publish the same material through a private publishing company was found to be not protected.(36) The Court defined a legislative act as an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to

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31. See Deschler's Precedents Ch. 7 § 17.

32. See *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 507 (1975) ("We conclude that the Speech or Debate Clause provides complete immunity for the Members for issuance of this subpoena."). See also *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880).

33. See, *e.g.*, *Brown Williamson Tobacco* v. *Williams,* 62 F.3d 408, 423 (D.C. Cir. 1995) (The claim "is to a right to engage in a broad scale discovery of documents in a congressional file that comes from third parties. The Speech or Debate Clause bars that claim."); and *Senate Permanent Subcommittee on Investigations* v. *Ferrer,* 856 F.3d 1080, 1086 (D.C. Cir. 2017) (". . . the separation of powers, including the Speech or Debate Clause, bars this court from ordering a congressional committee to return, destroy, or refrain from publishing the subpoenaed documents.").

34. See, *e.g.*, *MINPECO, S.A.* v. *Conticommodity Servs., Inc.,* 844 F.2d 856, 861 (D.C. Cir. 1988) ("As the preparation of the statement for publication in the subcommittee report was part of the legislative process, that is the end of the matter. It is the responsibility of Congress, not of the courts, to assure the integrity of its reports.").

35. *Gravel* v. *United States,* 408 U.S. 606 (1972). See also Deschler's Precedents Ch. 7 § 17.4. For a resolution of the Senate authorizing reimbursement for Senator Gravel's legal fees, see Deschler's Precedents Ch. 7 § 17.5.

36. *Gravel* v. *United States,* 408 U.S. 606, 625 (1972). Although speeches contained in the *Congressional Record* are protected under Speech or Debate immunity, courts have considered whether circulating unofficial reprints of the *Congressional Record* is itself a legislative act that would enjoy similar protection. See Deschler's Precedents Ch. 7 § 16.3 (". . . the absolute privilege to inform fellow legislators becomes a qualified privilege when portions of the *Congressional Record* are republished and unofficially disseminated."). Similarly, dissemination of legislative correspondence (see *Chastain* v. *Sundquist,* 833 F.2d 311 (D.C. Cir. 1987)) or committee reports (see *Doe* v. *McMillan,* 412 U.S. 306 (1973)) may not be protected by Speech or Debate immunity.

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."[37]

In a recent case involving the constitutionality of prayers delivered by the House Chaplain, a circuit court stated that "legislative prayer is not 'an integral part of the deliberative and communicative process.' "[38] Thus, Speech or Debate immunity could not be invoked to terminate the litigation.

The House's own internal disciplinary processes have sometimes come under scrutiny with respect to Speech or Debate considerations. In general, courts have found compliance with the House's ethics requirements to be nonlegislative actions. So, for example, neither reimbursement receipts nor financial disclosure forms have been found to be legislative documents protected under Speech or Debate immunity.[39] Likewise, testimony given before the House's Committee on Ethics has been held nonlegislative in character and therefore may become the subject of inquiries by the judicial branch.[40] However, actions taken by the House to impose disciplinary sanctions on its Members (filing reports by the Committee on Ethics, considering disciplinary resolutions on the floor of the House, voting to impose sanctions, etc.) have been treated as legislative acts, and Members are immune from any liability stemming from such actions.[41]

The courts have addressed whether personnel decisions by Members are "legislative acts" that may be protected by the Speech or Debate Clause. A circuit court in 1986[42] found that such decisions regarding the employment of staff are integral to the legislative process, and thus protected. However, in 2006, the same court (relying on Supreme Court decisions handed down in the interim) partially repudiated that analysis,[43] stating that Speech or Debate immunity should not be viewed as creating a bar to employment discrimination claims under the Congressional Accountability Act.[44] However,

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37. See *Gravel* at 625.

38. *Barker* v. *Conroy,* 921 F.3d 1118, 1127 (D.C. Cir. 2019).

39. See, *e.g.*, *United States* v. *Schock,* 891 F.3d 334 (7th Cir. 2018); and *U.S.* v. *Rose,* 28 F.3d 181 (D.C. Cir. 1994).

40. See, *e.g.*, *U.S.* v. *Rose,* 28 F.3d 181 (D.C. Cir. 1994) (". . . the Supreme Court has never decided if the Speech or Debate Clause protects a Member's testimony given in a personal capacity to a congressional committee. We conclude that it does not . . .").

41. See, *e.g.*, *Rangel* v. *Boehner,* 785 F.3d 19 (D.C. Cir. 2015).

42. *Browning* v. *Clerk,* 789 F.2d 923 (D.C. Cir. 1986). But see *Walker* v. *Jones,* 733 F.2d 923 (D.C. Cir. 1984) ("For the reasons set out below, however, we believe that personnel actions regarding the management of congressional food services are too remote from the business of legislating to rank 'within the legislative sphere.' ").

43. *Fields* v. *Office of Eddie Bernice Johnson,* 459 F.3d 1 (D.C. Cir. 2006).

44. P.L. 104–1, 109 Stat. 3.

as with other types of claims, Speech or Debate immunity may present plaintiffs with evidentiary difficulties, as inquiries related to the claim may be barred by the privilege.(45)

Immunities of Officers and Staff

Courts have also grappled with the question of whether congressional officers, staff, aides, or employees are themselves (at least in some circumstances) protected by the Speech or Debate Clause. The text of the Constitution mentions only Senators and Representatives, and early cases distinguished between protected acts performed by legislators themselves and unprotected acts performed by officers or employees of the House.(46) However, more recent cases have articulated rationales for deeming staff as protected by the constitutional immunity. Such "aides and assistants . . . must be treated as the [Member's] alter ego" if the purpose of the Clause is not to be frustrated.(47) Thus, when officers or employees of the House engage in duties to effectuate the legislative acts of Members of Congress, they are protected under the Speech or Debate Clause on the same basis as Members.

Waivers

As noted earlier, Speech or Debate immunity operates as a procedural defense to judicial process.(48) It is thus incumbent on the affected Member to

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45. *Fields* v. *Office of Eddie Bernice Johnson,* 459 F.3d 1, 14–15 (D.C. Cir. 2006) ("The Speech or Debate Clause therefore may preclude some relevant evidence in suits under the Accountability Act.").

46. See Deschler's Precedents Ch. 7 § 16 ("employees of the House charged with the execution of the resolution could be held personally liable for enforcing an unconstitutional congressional act" (citing *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880)). See also *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967) (". . . the doctrine of legislative immunity is less absolute when applied to officers or employees of legislative bodies."); and *Powell* v. *McCormack,* 395 U.S. 486 (1969) (". . . although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts . . .").

47. *Gravel* at 616, 617. See also *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 507 (1975) ("We conclude that the Speech or Debate Clause provides complete immunity for the Members for issuance of this subpoena. We draw no distinction between the Members and the Chief Counsel."); and *Rangel* v. *Boehner,* 785 F.3d 19, 25 (D.C. Cir. 2015) (plaintiff's argument that two congressional staffers did not enjoy immunity "runs headlong into *Gravel.* . . . [t]he key consideration, Supreme Court decisions teach, is the act presented for examination, not the actor.").

48. For current procedures for responding to service of process under rule VIII (and the ability of Members to waive applicable constitutional protections under those procedures), see § 7, *supra.*

assert that defense as litigation proceeds. Former voluntary compliance with investigatory authorities or judicial orders, or prior waivers of other constitutional protections, does not constitute a waiver of Speech or Debate immunity.[49] The Court in *United States* v. *Helstoski* further held that waivers of the immunity "can be found only after explicit and unequivocal renunciation of the protection."[50]

§ 8.1 In response to parliamentary inquiries, the Chair confirmed that the Constitution's Speech or Debate immunity granted to Members of Congress does not prevent the House from enforcing appropriate decorum standards with respect to debate on the floor of the House.

On May 25, 1995,[51] the Chair reiterated the House's decorum standards with respect to matters pending before the Committee on Standards of Official Conduct (now the Committee on Ethics) and further confirmed that the Constitution's grant of Speech or Debate immunity to Members of Congress does not bar the enforcement of such rules of decorum:

REGARDING THE ETHICS PROCESS IN THE HOUSE

The SPEAKER pro tempore.[52] Under the Speaker's announced policy of May 12, 1995, the gentlewoman from Colorado [Mrs. SCHROEDER] is recognized for 60 minutes as the designee of the minority leader.

Mrs. [Patricia] SCHROEDER [of Colorado]. I thank the Speaker very much for yielding to me. . . .

This letter was addressed to both NANCY JOHNSON and JIM MCDERMOTT, care of the Committee on Ethics, and it is about the issue of the pending matters in front of the Committee on Ethics that appear, according to news printed stores, to be in deadlock. . . .

Well, we still have not heard anything from the Committee on Ethics that this has been approved, and yet today we saw announcements that he was going off on a 35 city tour come August break, sponsored, I assume, by the same company that is doing the book. And there are an awful lot of issues around that. . . .

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49. 442 U.S. 477, 492 (1979) ("The exchanges between Helstoski and the various United States Attorneys indeed indicate a willingness to waive the protection of the Fifth Amendment; but the Speech or Debate Clause provides a separate, and distinct, protection which calls for at least as clear and unambiguous an expression of waiver."). For an insertion into the *Congressional Record* of the text of the *Helstoski* decision by the chair of the Committee on House Administration, see 125 CONG. REC. 15303–306, 96th Cong. 1st Sess. (June 18, 1979).

50. *Id.* at 491.

51. 141 CONG. REC. 14434–36, 104th Cong. 1st Sess. For the parliamentary limits on Speech or Debate immunity described in Jefferson's *Manual of Parliamentary Practice,* see 3 Hinds' Precedents § 2671. See also *House Rules and Manual* § 302 (2021).

52. Danny Burton (IN).

We are also asking questions about, are there any conflicts of interest? Who is paying for the tour and is there any conflict of interest vis-a-vis legislation in front of this body, because we understand, if it is Mr. Murdoch, Mr. Murdoch has some very, very important interests in this body on the telecommunications issues and many others. . . .

PARLIAMENTARY INQUIRIES

Mr. [John] PORTER [of Illinois]. Mr. Speaker, I have a parliamentary inquiry.

Mrs. SCHROEDER. Mr. Speaker, I yield to the gentleman from Illinois [Mr. PORTER] for a parliamentary inquiry.

The SPEAKER pro tempore (Mr. BURTON of Indiana). The gentleman will state it.

Mr. PORTER. Mr. Speaker, I would inquire as to whether this discussion is within the rules of the House or outside the rules of the House?

The SPEAKER pro tempore. Members should not engage in debate concerning matters that may be pending in the Committee on Standards of Official Conduct.

Mr. [Lloyd] DOGGETT [of Texas]. Mr. Speaker, I have a parliamentary inquiry.

Mrs. SCHROEDER. Mr. Speaker, I yield to the gentleman from Texas [Mr. DOGGETT] for a parliamentary inquiry.

The SPEAKER pro tempore. The gentleman will state it.

Mr. DOGGETT. In March of this year, Speaker GINGRICH announced that under the speech and debate clause applying to this Congress that Members were free to speak on any subject at any time. I am wondering if that pronouncement does not control in a situation that applies to the Speaker as well.

The SPEAKER pro tempore. The "Speech and debate" clause does not apply with respect to the subject of the parliamentary inquiry just asked by the gentleman from Illinois.

The Chair will again state that Members should not engage in debate concerning matters that may be pending in the Committee on Standards of Official Conduct.

§ 8.2 A resolution expressing the sense of the House with regard to the scope of the Constitution's Speech or Debate immunity provision, and further requesting that the United States Supreme Court issue a writ of certiorari to review a circuit court decision interpreting such provision, constitutes a valid question of the privileges of the House.

On May 12, 1988,[53] the Majority Leader (Rep. Tom Foley of Washington), on behalf of himself and the Minority Leader (Rep. Bob Michel of Illinois), offered the following resolution as a question of the privileges of the House:

PRIVILEGES OF THE HOUSE—RELATING TO THE DUTIES AND PRIVILEGES OF MEMBERS OF THE HOUSE OF REPRESENTATIVES

Mr. [Thomas] FOLEY [of Washington]. Mr. Speaker, I offer a privileged resolution (H. Res. 446) and ask for its immediate consideration.

53. 134 CONG. REC. 10574, 10576, 10579, 100th Cong. 2d Sess.

The Clerk read the resolution, as follows:

H. RES. 446

Whereas, consistent with the Constitution and the history of parliamentary bodies, the Members of the United States House of Representatives have always considered it to be an integral part of the official responsibilities of Members of Congress to inform the citizens they represent and the agencies of government regarding issues of public importance;

Whereas, the judiciary of the United States has in a long series of decisions established the doctrine of official immunity pursuant to which all public officials are provided certain protections from civil liability when engaged in the good faith performance of their official functions;

Whereas, in 1985 Representative Don Sundquist, a Member of this House, communicated with the Attorney General of the United States, the Federal Legal Services Corporation, and the citizens of the congressional district which he represents, informing them of an ongoing issue of public importance, a controversy relating to the expenditure of federal funds by the Memphis Area Legal Services in that federally funded organization's continuing dispute with the State of Tennessee's judicial branch;

Whereas, Wayne Chastain an attorney with the Memphis Area Legal Services filed suit against Representative Sundquist seeking in excess of one million dollars in personal damages based on Representative Sundquist's official communications with the Attorney General of the United States, the Federal Legal Services Corporation, and the citizens of Tennessee;

Whereas, the United States District Court for the District of Columbia dismissed the suit, holding that Representative Sundquist's actions were official and that for the good faith performance of their official duties Members of Congress, like all other public officials, are protected from civil liability;

Whereas, on November 6, 1987, a divided panel of the United States Court of Appeals for the District of Columbia Circuit, departed from the precedent of that Court and the Supreme Court and reversed the ruling of the District Court holding that the doctrine of official immunity, which provides certain protections from civil liability to all public officials engaged in the good faith performance of their official duties, was not applicable to the official actions of a Member of Congress;

Whereas, despite the expressed desire of a majority of the participating judges of the Court of Appeals for the District of Columbia Circuit to review the decision of the panel's majority by rehearing the case en banc, the en banc Court of Appeals declined to rehear the case;

Whereas, Representative Sundquist, through the Office of General Counsel to the Clerk of the House, is presently seeking a writ of certiorari from the Supreme Court of the United States;

Whereas, the decision of the divided panel of the Court of Appeals raises the most serious concerns for the doctrine of separation of powers provided in the Constitution and for the ancient and historic rights and privileges of the House; and

Whereas, the decision of the divided panel of the Court of Appeals, if left standing, 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: Now, therefore, be it

Resolved, That the House of Representatives considers the informing of citizens and executive branch agencies on matters of public importance to be a part of the official duties of a Member of the House; and be it further

Resolved, That the House of Representatives considers it to be appropriate that Members of the House engaged in the performance of their official duties will be treated by the Courts with the same respect and protection presently afforded by the Courts to all other public officials; and be it further

Resolved, That the House of Representatives views with deep concern the decision of the divided panel of the Court of Appeals of the District of Columbia Circuit in the case of Wayne Chastain v. The Honorable Don Sundquist because of its impact on the necessary and proper functioning of the House of Representatives as a coordinate branch of government and as the elected representatives of the American people; and be it further

Resolved, That the House of Representatives respectfully requests the Supreme Court of the United States to grant a writ of certiorari, so that it may review this matter, and reach a just result; and be it further

Resolved, That the Clerk of the House shall forthwith transmit a certified copy of this resolution to the Honorable Clerk of the Supreme Court.

The SPEAKER pro tempore (Mr. [Charles] SCHUMER [of New York]). The resolution presents a question of privilege, and the Chair recognizes the gentleman from Washington for 1 hour.

Mr. FOLEY. Mr. Speaker, for purposes of debate only, I yield 30 minutes to the distinguished gentleman from Illinois [Mr. MICHEL], pending which I yield myself such time as I may consume.

Mr. FOLEY. Mr. Speaker, on behalf of the Republican leader, Mr. MICHEL and myself, I have introduced this privileged resolution. The resolution expresses, to the Supreme Court of the United States, a respectful request of this House. By adopting this resolution we will be asking that the Court grant a review of a recent decision of the Federal Court of Appeals for the District of Columbia Circuit which impacts on the day-to-day operation of the House and its Members.

The litigation at issue, Chastain versus Sundquist, is a civil action which alleges that Congressman SUNDQUIST, our colleague from Tennessee, included defamatory material in a letter which he sent to a Federal agency discussing an issue of public importance and controversy in the Memphis area. Specifically, Representative SUNDQUIST, in his letters and in his discussions with his constituents, expressed his concerns with respect to the operation of a federally funded program, the Memphis Area Legal Services. . . .

Mr. Speaker, I would ask then to include with my remarks at the conclusion of my opening remarks the text of our "Dear Colleague" letter that the gentleman from Washington [Mr. FOLEY] and I jointly signed to the membership.

I will reserve the balance of my time.

HOUSE OF REPRESENTATIVES,
Washington, DC.

DEAR COLLEAGUE: On Wednesday, May 11, 1988, we will seek floor consideration of a privileged resolution. The resolution requests the Supreme Court to review a recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Chastain* v. *Sundquist.* The Speaker and the Bipartisan Leadership of the House believe that the opinion of the divided panel of the Court of Appeals represents a significant departure from established precedent and seriously threatens the proper functioning of Members of the House as representatives of the American people.

The Court of Appeals has held that Members of Congress do not receive the protections provided to all other public officials under the doctrine of official immunity. This ruling was issued, and permitted to stand, by a sharply divided Court of Appeals in a million dollar lawsuit brought against our colleague, Don Sundquist.

Congressman Sundquist had written letters to the appropriate Executive Branch officials expressing his concern with the allocation of resources, and the manner of operation, of the Memphis Area Legal Services, a federally funded entity. He also brought these concerns on this ongoing public controversy to the attention of his constituents.

A lawyer, who was mentioned in one of the letters, brought suit against Congressman Sundquist alleging that the communications with the Executive Branch and with the public had been defamatory. The suit sought in excess of one million dollars in damages.

Congressman Sundquist was represented by the General Counsel to the Clerk of the House. The District Court dismissed the suit, holding that Congressman Sundquist had been engaged in his official duties and, therefore, was protected by the doctrine of official immunity. Pursuant to that doctrine, all public officials who are engaged in the discretionary performance of their official functions can only be subjected to suit and liability

for violations of clearly established standards of statutory or constitutional law. Since the Plaintiff had not alleged that Congressman Sundquist had violated any statute or constitutional provision, the District Court dismissed the case.

On appeal a three-judge panel ruled, on a two-to-one vote, that Members of Congress engaged in official, but not legislative actions, receive no protection whatsoever. The justification for this treatment, which differs from the treatment accorded every other public official at all levels and in all branches of government, was that the Constitution provides Members with an absolute privilege for legislative actions under the Speech or Debate Clause and that, therefore, no other privilege would apply.

Judge Mikva, a former Member of the House, dissented and wrote a strongly worded opinion which argued for the application of the immunity and pointed out that the two-judge majority was departing from the established precedent of the Court of Appeals.

Congressman Sundquist sought to have the decision reviewed by the full Court of Appeals, but despite the agreement of a six-judge plurality that the panel's decision should be reviewed, the full court declined to rehear the case. Congressman Sundquist is presently seeking a review of the matter by the Supreme Court.

Our resolution simply requests the Supreme Court to review the case. Adoption of the resolution will not ask the Court to rule in any particular fashion on the merits of Congressman Sundquist's argument but will highlight for the Court the extreme importance of this question to all Members of the House. Every one of us is called upon on a daily basis to perform many official functions which are not integral parts of the legislative process. The job of a Congressman extends far beyond the confines of formulating, debating and acting on legislative proposals. 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. It is important that we be able to attend to these responsibilities without unnecessary fear or inconvenience from litigation. The same reasoning that has led the Judicial Branch to provide a degree of protection to Executive and Judicial Branch officials ranging from cabinet officers to local dog catchers should lead the Court to review a decision denying that protection to Members of Congress.

We hope you will support our privileged resolution.

THOMAS S. FOLEY,
Majority Leader.

ROBERT H. MICHEL,
Republican Leader.

. . .

Mr. FOLEY. Mr. Speaker, I yield back the balance of my time, and I move the previous question on the resolution.

The previous question was ordered.

The SPEAKER pro tempore (Mr. [Barton] GORDON [of Tennessee]). The question is on the resolution.

The question was taken; and the Speaker pro tempore announced that the ayes appeared to have it.

Mr. FOLEY. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The vote was taken by electronic device, and there were—yeas 413, nays 0, answered "present" 2, not voting 16, as follows: