



Case Western Reserve Law Review

Volume 40 | Issue 4

1989

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DO YOUR JOB AND GET SUED FOR IT!: WHAT THE FUTURE HOLDS FOR REPRESENTATIVES*

Members of the legislative branch are the only government officials who are granted any immunity in the Constitution. While the immunity granted in the speech or debate clause is absolute, it does not extend to many acts that the public demands representatives perform. Conversely, the members of the executive and judicial branches receive no constitutional immunity, but have been accorded federal common-law immunity that covers those duties that the public expects of them. The Author assumes the legitimacy of this non-constitutional immunity and argues that it should be applied to representatives as expansively as it is to members of the other branches.

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents The informing function of Congress should be preferred even to its legislative function.

Woodrow Wilson¹

THE CONSTITUTION'S SPEECH or debate clause grants federal congressional representatives² immunity from suit for their actions in "either House."³ These protected actions have been described as the deliberative process,⁴ the legislative process,⁵

* The author would like to thank Professor Karen Nelson Moore for her time, thoughtful criticisms and support.

1. *Gravel v. United States* 408 U.S. 606, 639 (1971) (Douglas, J. dissenting) (quoting W. WILSON, CONGRESSIONAL GOVERNMENT 303-04 (1885)).

2. In this Note, the term "representative" includes both Senators and members of the House of Representatives at the federal level.

3. "[F]or any Speech or Debate in either House [the Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

4. See, e.g., *Doe v. McMillan*, 412 U.S. 306, 314-15 (1972) (Public Printer and Superintendent of Documents not immune from suit for publicly distributing committee report which republished a libel because such an act "is not part of [the] deliberative process").

5. See, e.g., *id.* (stating that republishing a libel is not a part of the legislative process).

or the legislative function.⁶ It is recognized, though, that representatives have other official duties outside the legislative process.⁷ These nonlegislative duties consume much of a representative's workday.⁸ Yet, action taken pursuant to these nonlegislative duties receives no protection.⁹

This Note examines the problems raised by this lack of protection from civil damage suits arising from acts within a representative's official but nonlegislative duties. Part I explains how the United States Court of Appeals for the District of Columbia Circuit has handled this problem.¹⁰ Part II explores the policy reasons behind immunity for officials in the executive and judicial branches and shows how these reasons also support immunity for representatives.¹¹ Support for extending the doctrine to representatives will be garnered from analogous case law and the structure of the Constitution in Part III.¹² And finally, in Part IV, this Note proposes the type of immunity that should be afforded to representatives, and explains how one case, *Chastain v. Sundquist*,¹³ would have fared under the proposed standard.¹⁴

6. See, e.g., *id.* at 316 (stating that the legislative function does not include using and disseminating actionable material).

7. See, e.g., *Gravel v. United States*, 408 U.S. 606, 625 (1971) ("That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature."); *Chastain v. Sundquist*, No. 85-4037 (D.D.C. April 9, 1986) (counsel for Chastain agreeing that letters to Attorney General and Legal Services Corporation were within Member of Congress' duties), *reprinted in* Petition for a Writ of Certiorari, app. 51a, 53a, *Chastain v. Sundquist*, 108 S. Ct. 2914 (1988) (No. 87-1756) [hereinafter Petition]; *Karchin v. Metzenbaum*, 587 F. Supp. 563 (N.D. Ohio 1983) (senator immune from suit when performing official function of dealing with letters from constituents); R. DAVIDSON, *THE ROLE OF THE CONGRESSMAN* 109 (1969) (the job of a member of Congress embraces many roles); *infra* text accompanying notes 82-84, 90.

8. C. CLAPP, *THE CONGRESSMAN AND HIS CONSTITUENTS*, 54-55 (1963). Clapp quotes one Congressman as saying "There are many members who have been here a long time who still devote 90 percent of their time to case work." *Id.* at 54. Another suggested that things were so bad that "[i]t is too bad we don't have two members of Congress for each district, with one having the responsibility for handling constituent requests, the other being free to study legislation and to legislate." *Id.* at 55.

9. See *Chastain v. Sundquist*, 833 F.2d 311 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2914 (1988).

10. See *supra* notes 15-49 and accompanying text.

11. See *supra* notes 50-98 and accompanying text.

12. See *supra* notes 99-120 and accompanying text.

13. 833 F.2d at 311.

14. See *supra* notes 121-138 and accompanying text.

I. A RECENT WORD ON OFFICIAL IMMUNITY FOR REPRESENTATIVES

A. The Congressman, Chastain and Their Litigation

On November 6, 1987, the District of Columbia Circuit, by a vote of two to one, held that “[w]hen (representatives) move beyond the requirements of their legislative responsibilities, they do so . . . at their own risk,”¹⁵ and refused to extend judicially created official immunity to representatives. *Chastain v. Sundquist*¹⁶ originated as an action for “tortious injury” in the Superior Court for the District of Columbia.¹⁷ The plaintiff, Wayne Chastain, a Memphis Area Legal Services (MALS) attorney, based his action on letters that Congressman Donald Sundquist wrote and later submitted to a Memphis, Tennessee, newspaper, the *Commercial Appeal*.¹⁸

Originally, MALS and the Juvenile Court of the City of Memphis and Shelby County, Tennessee, had been involved in a dispute over the collection of child support payments.¹⁹ In performing part of his duty as a Congressman, Sundquist wrote to William French Smith, Attorney General of the United States at the time, noting his concern that the MALS actions may have involved the obstruction of the Child Support Enforcement laws.²⁰ The letter alleged that Chastain was hired “to do nothing but harass” a juvenile court judge and two court referees.²¹ Later, relating similar concerns in a letter to Legal Services Corporation

15. *Chastain v. Sundquist*, 833 F.2d 311, 328 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2914 (1988). The majority consisted of Judges Buckley and Williams with Judge Mikva dissenting. *Id.* at 312.

16. *Id.*

17. Complaint for Damages, *Chastain v. Sunquist*, No. 85-4037 (D.D.C. Apr. 9, 1986) [hereinafter Complaint], *reprinted in* Petition, *supra* note 7, app. at 60a.

18. Petition, *supra* note 7, at 60a-61a, 63a.

19. *Chastain*, 833 F.2d at 312. The MALS claimed “that indigent parents under custodial interrogation for non-payment of support are entitled to counsel” *Id.*

20. *Id.* at 312-13.

21. *Id.* at 313.

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. These individuals and Mrs. Alma Morris, the MALS client counsel chairperson, call frequent press conferences and stage street demonstrations against the Juvenile Court. *Id.* (quoting Letter from Donald Sundquist to William French Smith, January 14, 1985, [hereinafter Letter], *reprinted in* Brief for Appellant at 12, *Chastain v. Sundquist*, 833 F.2d 311 (D.C. Cir. 1987) (No. 86-5386), *cert. denied*, 108 S. Ct. 2914 (1988)).

(LSC) Operations Committee Chairman Michael Wallace, Sundquist did not mention Chastain but did prompt an LSC investigation.²² Following the investigation, Sundquist held a press conference to announce the investigator's findings and stated that it was "even worse" than he had imagined.²³ The letter to the Attorney General and a press release regarding the press conference were released to Memphis area news media, including the *Commercial Appeal*.²⁴

After Chastain filed his complaint, Sundquist successfully removed the action to the United States District Court for the District of Columbia.²⁵ District Court Judge Charles Richey granted a motion to dismiss filed by Sundquist because "those letters . . . are entitled to . . . [protection under] the doctrine of absolute immunity for common law torts under well-established and long-established principles of law. . . ."²⁶ On appeal to the District of Columbia Circuit, Chastain won a reversal on the grounds that the judicially created doctrine of official immunity does not apply to legislators acting outside of their legislative sphere.²⁷ Sundquist then submitted a petition for rehearing with a suggestion for rehearing in banc.²⁸ The petition was denied when a majority of judges in active service did not approve it on January 27, 1988.²⁹

22. *Id.* at 313; Complaint, *reprinted in* Petition, *supra* note 7, app. at 622-632.

23. *Chastain*, 833 F.2d at 313.

24. Complaint, *reprinted in* Petition, *supra* note 7, app. at 61a, 63a. In addition to the *Commercial Appeal*, the press releases were released to five television stations in the Memphis area. *Id.* at 61a.

25. Petition, *supra* note 7, at 4.

26. *Chastain v. Sundquist*, No. 85-4037 (D.D.C. April 9, 1986), *reprinted in* Petition, *supra* note 7, at 54a. The District Court also held that the speech or debate clause protected the letters. *Id.* at 542. In light of the wording of the speech or debate clause, *see supra* note 3, and the holding in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), that the speech or debate clause does not create an absolute privilege from liability or suit for defamatory statements made outside legislative chambers), the part of Judge Richey's decision dealing with the speech or debate clause was clearly in error.

27. *Chastain*, 833 F.2d at 328 ("it is this clear distinction between inherent and elective duties that disqualifies members of Congress for the grant of official immunity.").

28. Petition, *supra* note 7, at 1.

29. *Id.* at 58a. Six judges voted for the rehearing, five voted against it. *Id.* A rehearing in banc, however, will be granted only when

[a] majority of the circuit judges who are in regular active service . . . order that an appeal or other proceeding be . . . reheard by the court of appeals in banc. Such a . . . rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

FED. R. APP. P. 35(a). Chief Judge Wald and Judges Robinson, Mikva, Edwards, Ruth B.

On June 30, 1988, Sundquist's petition for a writ of *certiorari* was denied by the Supreme Court of the United States with three justices dissenting.³⁰ The case was then remanded to the district court for further proceedings according to the court of appeals' ruling.³¹

B. Why Sundquist Lost

The court of appeals based its holding on the issue of official immunity primarily on two Supreme Court cases:³² *Hutchinson v. Proxmire*³³ and *Doe v. McMillan*.³⁴ The *Proxmire* Court was not directly faced with the issue of official immunity.³⁵ The Court held that defamatory statements made outside "either House" were also outside the sphere of the speech or debate clause because they are not involved in the deliberative process.³⁶ In *Doe*, which involved the Superintendent of Documents and the Public Printer, who are not representatives, the Court held that "republishing a libel . . . is not an essential part of the legislative process,"³⁷ and that there was no immunity for acts done outside this process.³⁸ Combining these two cases, the *Chastain* court held that there is no immunity for representatives other than that

Ginsburg and Starr voted to grant the rehearing while Judges Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle voted to deny rehearing. However, at the time there was a twelfth circuit judge in regular active service, Judge Robert H. Bork, and he did not vote. Petition, *supra* note 7, at 582. Judge Bork had been nominated to the Supreme Court of the United States on July 1, 1987. Chicago Daily L. Bull., July 1, 1987, at 1, col. 1. Though the Senate had refused to consent to Judge Bork's selection months before the Sundquist motion to rehear in banc, Judge Bork never returned to the bench, leaving only eleven judges to vote on the rehearing. Judge Bork resigned his post on February 5, 1988. 833 F.2d VII (1988). Therefore, had the vote for rehearing taken place ten days later, Sundquist would have won the motion to rehear. Because Judge Bork would not have been active at that time, the votes of six judges would have been enough to grant the motion.

30. *Sundquist v. Chastain*, 108 S.Ct. 2914 (1988). Justices White, Blackmun and O'Connor voted to grant *certiorari*, while Chief Justice Rehnquist and Justices Brennan, Marshall, Stevens, Scalia and Kennedy voted to deny it.

31. *Chastain*, 833 F.2d at 328.

32. *Id.* at 316-17.

33. 443 U.S. 111 (1979).

34. 412 U.S. 306 (1972).

35. *Chastain v. Sundquist*, 833 F.2d 311, 330 (D.C. Cir. 1987) (Mikva, J., dissenting), *cert. denied*, 108 S.Ct. 2914 (1988). In fact, judicially created immunity was not even raised as a defense by *Proxmire*. See *Proxmire*, 443 U.S. at 118.

36. *Proxmire*, 443 U.S. at 130 (finding newsletters and press releases are not essential to senate deliberations).

37. *Chastain*, 833 F.2d at 317 (quoting *Doe*, 412 U.S. at 314-15).

38. *Id.* at 324.

granted in the speech or debate clause.³⁹ In other words, judicially created official immunity for representatives is coextensive with the speech or debate clause.

The *Chastain* court continued its analysis by exploring the policy reasons behind the speech or debate clause and the doctrine of official immunity.⁴⁰ The court first traced the speech or debate clause to its English origins.⁴¹ The court then examined an English case holding a member of Parliament liable for republication of a libellous speech originally made in Parliament.⁴² This case demonstrated how the English equivalent of the speech or debate clause had not been extended to cover acts that were not legislative in nature, and how no extra-Clause immunity had been granted.⁴³ The *Chastain* court thought that Sundquist had an even weaker position as his remarks were not originally made in Congress.⁴⁴ The majority also contended that the policy reasons that underlie the doctrine of official immunity — the need for efficiency and good government⁴⁵ — do not apply to members of Congress.⁴⁶ Legislative functions, unlike executive and judicial functions they noted, do not include acts that create a risk of suit not already covered by the speech or debate clause.⁴⁷ The court concluded by observing that the constitution protects representatives adequately,⁴⁸ and that no other circuit precedent contradicted its holding.⁴⁹

39. *Chastain*, 833 F.2d at 316 (“[T]he speech or debate clause has been seen as sufficient to protect the functional obligations of elected representatives.”).

40. *Id.* at 319-325.

41. *Id.* at 319-21. An English equivalent to the speech or debate clause has been included in the English Bill of Rights since 1688. *Id.* at 319.

42. *Id.* at 319-20 (citing *The King v. Creevey*, 105 Eng. Rep. 102 (K.B. 1813)).

43. *Id.*

44. *Id.* at 319 (“[T]his case presents a less equivocal claim in that the letter published to the press . . . did not . . . replicate a speech made in congress.”).

45. See *infra* notes 70-71 and accompanying text.

46. *Chastain*, 833 F.2d at 322.

47. *Id.*

48. *Id.* at 324-25.

49. *Id.* at 325-27 (The court refuted the dissent’s argument that the case was controlled by *McSureley v. McClellan*, 753 F.2d 88 (D.C. Cir.), *cert. denied*, 474 U.S. 1005 (1985), and *Walker v. Jones*, 733 F.2d 923 (D.C. Cir.), *cert. denied*, 469 U.S. 1036 (1984).).

II. ALL OF THE OFFICIAL DUTIES OF REPRESENTATIVES SHOULD BE PROTECTED

A. The Current State of Judicially Created Official Immunity

Judicially created immunity⁵⁰ is afforded to judges, prosecutors, members of the executive branch involved in adjudicative functions,⁵¹ the President,⁵² and other members of the executive branch.⁵³ Whether the immunity is absolute or qualified depends on the function of the recipient⁵⁴ and the type of violation alleged.⁵⁵ Underlying these factors are the courts' attempts to balance the availability of remedies for aggrieved parties against the societal costs of litigation against federal officials.⁵⁶

Absolute immunity protects government officials from all lawsuits, providing the officials act within the "outer perimeters of their official duties."⁵⁷ Such officials would be protected from any lawsuits that result from their job, but not from lawsuits that arise from actions that are extraneous to their jobs. Qualified immunity protects government officials from constitutionally or statutorily based actions when the officials have not violated clearly established law.⁵⁸ Here a government official is likely to be protected from charges that are based on ambiguous or new and uninterpreted law, while not being protected from violations of "basic un-

50. While I agree that it should be left to Congress to "legislatively create" immunity, this would be a very easy proposition to hide behind. Instead, recognizing that the *Chastain* court was faced with congressional silence, this Note argues that the reasons that support judicially created immunity for members of the executive and judicial branches apply equally well to members of the legislative branch, and that the courts have been inconsistent in applying *their* own doctrine.

51. *E.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1981).

52. *Id.*

53. *E.g.*, *Chastain v. Sundquist*, 833 F.2d 311, 315 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2914 (1988).

54. *E.g.*, *Harlow*, 457 U.S. at 810. *See generally* Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1986-87) (stating that the Court's evaluation of an officer's claim for immunity may focus on the possible harms that performance of the official function may inflict).

55. *Chastain*, 833 F.2d at 315-16.

56. *E.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1981).

[T]he recognition of [an] . . . immunity defense . . . reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."

(quoting *Scheuer v. Rhodes*, 416 U.S. 232, 506 (1974) (citations omitted)).

57. *Chastain*, 833 F.2d at 315.

58. *Id.*

questioned constitutional rights."⁵⁹

All executive and judicial branch officials receive absolute immunity for common-law tort actions.⁶⁰ Those who perform adjudicative,⁶¹ or extremely sensitive (normally executive branch) functions⁶² also receive absolute immunity for constitutionally or statutorily based actions. Those executive branch officials who do not have absolute immunity are afforded qualified immunity for constitutionally or statutorily based allegations.⁶³ This is the functional division. In determining if a particular official is immune from a specific charge, the official is fit first into one of the two functional categories: those who perform adjudicatory or extremely sensitive functions, and those who do not. If the actor is only eligible for qualified immunity, the harm claimed is rooted in a violation of constitutional or statutory rights, *and* the area of law is clearly established, immunity will not be extended. In all other circumstances it will be extended. Thus, executive and judicial officials have some degree of immunity for all of their official duties.

Representatives, however, enjoy all-or-nothing immunity with respect to civil damage suits arising from their actions, even if they are operating within the scope of their official duties. When they are "legislating," the speech or debate clause⁶⁴ grants repre-

59. *Harlow*, 457 U.S. at 815. Until *Harlow*, as part of the "clearly established law" prong of the qualified immunity test, courts had applied a subjective good faith standard to determine whether the official acted with malicious intention. *Id.* The *Harlow* Court eliminated this part of the test, which was set forth in *Wood v. Strickland*, 408 U.S. 308, 322 (1975). The *Harlow* Court concluded that the subjective element may allow insubstantial claims to get to trial and dilute the effectiveness of the immunity doctrine. *Harlow*, 457 U.S. at 815-19.

60. *E.g.*, *Harlow*, 457 U.S. at 807-08.

61. *See, e.g.*, *Butz v. Economou*, 438 U.S. 478 (1977) (chief hearing examiner and judicial officer of the Department of Agriculture immune for recommending that administrative complaint be sustained); *Yaselli v. Goff*, 275 U.S. 503 (1927) (prosecutor immune from suit for deciding to prosecute); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871) (criminal court judge immune from action resulting from judge's striking of an attorney's name from the role).

62. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731 (1981) (President immune from suit alleging that a departmental reorganization ordered by the President that cost respondent his job was in retaliation to respondent's congressional testimony); *Barr v. Matteo*, 360 U.S. 564 (1959) (Acting Director of the Office of Rent Stabilization given absolute privilege from libel action based on press release announcing employees' terminations); *Spalding v. Vilas*, 161 U.S. 483 (1895) (immunity for Postmaster General for official communications).

63. *E.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 807 ("For executive officials in general . . . qualified immunity represents the norm.").

64. U.S. CONST. art. I, § 6, cl. 1.

sentatives absolute immunity.⁶⁵ Yet, according to *Chastain*, when representatives are airing constituent grievances to administrative agencies, pointing out waste in government or otherwise acting in their representative role, they have no immunity.⁶⁶ When the policies furthered by judicially created immunity are examined and considered in light of the currently non-immune representative role of representatives, the inconsistency in denying representatives this protection becomes apparent.

B. The Reasons Behind Judicially Created Immunity for Executive and Judicial Branch Officials

The Constitution does not provide immunity for members of the executive or judicial branches from suits arising out of their official or unofficial activities.⁶⁷ The Supreme Court, though, has extended immunity to executive and judicial branch officials.⁶⁸ Whether the immunity is qualified or absolute depends on the particular act and the level of the official's responsibility.⁶⁹

There are two veins of policy behind the official immunity doctrine. The first vein addresses the concern that without immunity, suits brought against government officials "would consume time and energies which would otherwise be devoted to governmental service"⁷⁰ This vein will be referred to as "efficiency". The other vein addresses the concern that an official "should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. [This apprehension] would seriously cripple the proper and effective administration of public affairs"⁷¹ This vein will be referred to as "good government." These reasons have been held to outweigh the corresponding loss of a potential damage recovery to individuals who lose

65. *Hutchinson v. Proxmire*, 443 U.S. 111, 125 (1979).

66. See *Chastain*, 833 F.2d at 314.

67. The only immunity granted in the Constitution is that found in the speech or debate clause. U.S. CONST. art. I, § 6, cl. 1.

68. See *supra* notes 51-59 and accompanying text.

69. See, e.g., *Butz v. Economou*, 438 U.S. 478, 508-17 (1978) (examining function of official to determine extent of immunity); *Woolhandler*, *supra* note 54, at 396-97; *supra* notes 60-64 and accompanying text.

70. *Barr v. Matteo*, 360 U.S. 564, 571 (1959).

71. *Spalding v. Vilas*, 161 U.S. 483, 498 (1896); see, e.g., *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871) (immunity for judges based on idea that judges should be as independent as possible from any conceivable source of pressure).

their right to sue. One court has explained this situation as follows: "It has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."⁷²

The efficiency problem in subjecting officials to suit in all cases is self-evident considering the heavy schedules of officials without such time-consuming litigation. Consider the problem as it relates to the judiciary. Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit notes:

All that is clear is that the federal caseload cannot be allowed to grow for long at the extraordinary rates of the past quarter-century without putting an end to the federal court system in its present form. At an annual rate of growth of 5.6 percent - the average rate of growth of the district courts' docket since 1960 - it will take only ten years (from 1983) for their annual case filings to amount to almost 500,000, and by the year 2000 they will be 700,000.⁷³

With such a backlog, if judges were stripped of their absolute immunity the judiciary could well come to a standstill. The additional time that judges would spend with counsel, in depositions and in trial on behalf of their own defense would further burden a beleaguered system.⁷⁴

72. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 438 U.S. 949 (1950).

73. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 94 (1985). Judge Posner continues: "The corresponding figures for the courts of appeals, based on their average growth rate since 1960 of 9.4 percent are 73,000 and 136,236, and for the Supreme Court, based on its rate (3.6 percent) 5,983 and 7,664." *Id.*

Judge Posner's extrapolations are more frightening when one notes that the courts have reacted to burgeoning caseloads by resorting to short-cuts. One of these is the "controversial . . . practices of disposing of some cases without a published decision, a practice that has been adopted to some extent by all federal appellate courts." D. Sienstra, *Unpublished Dispositions: Problems Of Access And Use In The Courts Of Appeals 2* (1985) (unpublished manuscript) *reprinted in* *The Role of the Appellate Opinion: Communicating What to Whom?*, a collection of papers distributed at a panel discussion held at the Federal Judicial Center Conference at the Case Western Reserve University School of Law, October 23, 1989. What would be sacrificed if the judicial branch were not immune from suit?

74. *See, e.g., Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 349 (1871).

If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party-and that judge perhaps one of inferior jurisdiction-that he had

The apprehension problem that could result if officials were not immune from suit when working within the outer-perimeters of their authority was perhaps best described by Judge Learned Hand:

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to 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.⁷⁵

The basis of tort law is that when a person knows that their act may invite suit, they will act much more hesitantly,⁷⁶ and one can argue that this threat of litigation will promote good government. But on the other hand, it is argued that government cannot function properly when officials act hesitantly.⁷⁷ The prioritizing of good government before the normal implication of tort liability is the basis for the second vein of reasoning behind official immunity.

C. The Roles of Representatives

The Constitution lists the housekeeping duties⁷⁸ and the substantive powers⁷⁹ of both Houses as well as the limitations placed

decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

75. *Gregoire*, 177 F.2d at 581.

76. A "generally accepted theory, is that the law began by making a person act at his peril if he caused . . . harm." PROSSER, WADE & SCHWARTZ, TORTS - CASES AND MATERIALS 1 (7th ed.* 1987).

77. "Public officials . . . who fail to make decisions when they are needed to or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices." *Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974).

78. See U.S. CONST. art. I, § 5.

79. See U.S. CONST. art. I, § 3, cl. 6; *id.* art I, § 8; *id.* amend. XIII; *id.* amend. XIV, § 5; *id.* amends. XV-XVI; *id.* amends. XVIII-XX; *id.* amends. XXIII-XXVI.

upon them.⁸⁰ But the Constitution is silent about the roles of the individual representatives.⁸¹ It might be that this lack of a "job description," as much as basic differences of opinion, is why it might be rare to find a clear consensus on how many roles a representative has, what they are and what actions they may include. While the following examination of the legislator's role is not universal, it is a sound frame of reference for this Note.

A role is a person's normal or expected behavior when they are in a particular environment.⁸² By using the acts that representatives undertake as the characteristic that defines their environment, we can define two broad roles. The legislative role is found in the environment that encompasses a representative's writing, researching and voting on legislation. The environment in which a representative deals with constituent problems in a non-legislative (representative or errand-boy)⁸³ manner encompasses the representative role.⁸⁴ If a representative were dealing with an administrative agency because of a constituent's grievance, therefore, the representative would be in the representative role. If the representative were conferring with the administrative agency on pending legislation, the representative would be in the legislative role.

With this background set, the next problem is identifying which actions of representatives should be protected, if any. The answer lies partially in the speech or debate clause⁸⁵ and its most recent interpretation, *Hutchinson v. Proxmire*.⁸⁶ *Proxmire*, like

80. See U.S. CONST. art. I, § 9; *id.* amend. I.

81. See, e.g., U.S. CONST. art. I.

82. See R. DAVIDSON, *supra* note 7, at 73.

83. *Id.* at 109.

84. It could be said that a representative is acting in a representative role even when legislating, because legislating also entails representing constituent's interests. But this would lump all of a representative's functions into one role, and even representatives themselves do not perceive this to be so. An extensive study of the roles of representatives conducted by the Brookings Institution frequently refers to the differences between and trade-offs of the representatives and legislative roles. See C. CLAPP, *supra* note 8, at 50 (stating that legislators spend increasingly more time on representative functions than on legislative functions). It notes that the representative role is often carried out at the expense of the legislative role. *Id.* at 51, 53, 55-56; cf. Clark, *The Wonderful World of Congress*, in STUDIES ON CONGRESS I (1969) (stating that what people expect of congress as a body conflicts with what constituents demand of their individual representatives). The study was based on interviews and roundtable discussions with thirty-six representatives. See C. CLAPP, *supra* note 8, at 102.

85. U.S. CONST. art. I, § 6, cl. 1.

86. 443 U.S. 111, 130 (1979).

the speech or debate clause, discusses only those acts that fall under the legislative role.⁸⁷ Whether any acts within the representative role should be protected and, if so, which ones, are the next questions to be addressed. To answer these questions, the applicability of the reasoning behind immunity to acts within the representative role will be examined.

D. The Reasons for Judicially Created Official Immunity Are Equally Applicable to the Nonlegislative Functions of Representatives

Both of the policy reasons for granting official immunity for executive and judicial branch officials are applicable to representatives. The efficiency problems that would hamper the performance of executive branch officials and members of the judiciary if they were open to suit also affect representatives. After *Chastain*,⁸⁸ representatives would be smart to hesitate before acting outside of the legislative arena, a hesitancy that would be shared by other government officials carrying out their official duties if they were stripped of their immunity from suit for civil damages. Thus, the reasoning that supports judicially created official immunity for the executive and judicial branches also supports official immunity for representatives.

As mentioned previously the Supreme Court has held that absolute immunity from suits emanating from legislative acts by representatives is provided by the speech or debate clause.⁸⁹ As a result, the doctrine of official immunity is needed only to protect representatives from civil suits arising from nonlegislative actions. The representative role, as outlined in the previous section, consumes much of a representative's time. Roger Davidson has found that a number of representatives "emphasize the so-called Errand Boy functions and the other constituency-oriented [representational] tasks."⁹⁰ Official immunity would not just be a token gesture in this area but a doctrine that would cover many activities that could lead to suit.

87. See *supra* text accompanying note 36.

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

89. See *Hutchinson v. Proxmire*, 443 U.S. 111, 130 (1979) (holding that a speech given in the senate would be covered by absolute immunity); *supra* notes 36-38 and accompanying text.

90. R. DAVIDSON, *supra* note 7, at 109.

The workload of Congressmen is already heavy and likely will get heavier.⁹¹ Using the length of Congressional sessions as a measure of workload, it is clear that this is true. Twenty of the twenty-two Congressional sessions that lasted at least one year as of 1986 occurred since 1940.⁹² One commentator notes: "The 1960's seem to have marked the advent of the year-round session as a common fact of Capitol Hill life: . . . Longer sessions were accompanied by longer working days, more bills, more new statutes, more constituent requests, and broader scope of activity - trends that are not likely to be reversed."⁹³ Efficiency is at a premium for representatives. While, as Judge Mikva admitted in his dissent in *Chastain*, "[Congressmen] will not frequently provoke civil actions by angry or resentful persons,"⁹⁴ even the occasional loss of time due to the need to defend civil damage suits by a few representatives will further reduce Congressional efficiency. The impact on the individual representatives will be great. Besides the time put into a trial itself, the amount of time need for pretrial preparation could make it impossible for representatives to maintain their current level of work: one which, as noted above, is growing.⁹⁵ A significant amount of efficiency could be gained by extending official immunity to representative acts of representatives within the outer-perimeter of their duties.

If the *Chastain* reasoning is widely accepted, representatives will think long and hard before performing any nonlegislative acts that are commonplace but unnecessary. Looking into wasteful expenditures⁹⁶ and reports of harassment of judges⁹⁷ are acts that constituents expect of their representatives. Because these acts do not take place within "either House" and therefore are not protected by immunity, representatives faced with the possibility of civil damage suits may avoid looking into these wrongs alto-

91. See *id.* at 66-68 (the Congressional workload has risen and Congressional sessions have lengthened).

92. 1989-90 OFFICIAL CONGRESSIONAL DIRECTORY, 101ST CONGRESS, 520-29. For this calculation, a year is 340 calendar days or more as Congress does its best to take at least three to four weeks between sessions in December and January. *Id.*

93. R. DAVIDSON, *supra* note 7, at 68.

94. *Chastain*, 833 F.2d at 332 (Mikva, J., dissenting).

95. See *supra* text accompanying notes 91-93. The great demand on representatives' time could increase even more if they faced a trial by media.

96. See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (Senator Proxmire publicized examples of wasteful governmental spending).

97. See *Chastain*, 833 F.2d at 311 (Representative Sundquist reporting his belief that a juvenile court judge was being harassed).

gether. Those who do venture to investigate will certainly not do so with the vigor that they should, for the legal threat will "dampen the ardor of all but the most resolute, or most irresponsible" ⁹⁸

The policy justifications for official immunity for the executive and judicial branches have equal force in protecting representatives acting in their representative role. Without this immunity, representatives will be more reluctant to perform representative functions. When they do act, they will be faced with a potential time burden that could paralyze their office. The threat of civil damages may even be enough to keep them out of Congress altogether. Official immunity for representatives is a sound doctrine that will increase representative efficiency and remove the doubts that representatives have about the consequences of their representative actions. This, in turn, will promote good government.

III. OTHER SUPPORT FOR OFFICIAL IMMUNITY FOR REPRESENTATIVES

A. Same Act, Different Immunity

Not only does the reasoning behind the doctrine of official immunity support a similar doctrine for representatives, but some of the decisions favoring immunity involve factual situations that representatives may face also. For example, in *Barr v. Matteo*,⁹⁹ the acting director of the Office of Rent Stabilization issued a press release indicating that he was going to suspend certain agency employees because of their role in formulating a pay plan that would violate the spirit of a law governing these payments.¹⁰⁰ The acting director was sued for libel based on the contents of the press release,¹⁰¹ and the Court held that "petitioner's plea of absolute privilege in defense of alleged libel published at his discretion must be sustained."¹⁰²

There is no material reason why the Court's ruling could not be applied to representatives. *Chastain*, however, indicates that there is no immunity for representatives beyond that granted in

98. *Chastain*, 833 F.2d at 322 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 438 U.S. 949 (1950)).

99. 360 U.S. 564 (1959).

100. *Id.* at 565-67.

101. *Id.* at 568.

102. *Id.* at 574.

the speech or debate clause.¹⁰³ A representative, therefore, could be liable for issuing a press release regarding the firing of a representative's aide who conspired to embezzle funds from the representative's campaign fund. Because the publication would not be a legislative act no speech or debate clause protection would apply.¹⁰⁴ Thus, an elected official, who can be removed directly by the people, would be vulnerable to suit while an appointed official who performs the same act and who cannot be removed directly by the people, is immune.

B. A Middle Ground in the Supreme Court?

In deciding whether or not official immunity should be afforded to representatives when they are charged with criminal violations, the Supreme Court in *Gravel v. United States*¹⁰⁵ hinted that official immunity may be appropriate in civil suits.¹⁰⁶ The United States Court of Appeals for the First Circuit had held that *Barr*-type immunity, which protects executive officials from libel suits,¹⁰⁷ was applicable to representatives to "the extent that a [representative] has responsibility to inform his constituents."¹⁰⁸ The *Gravel* Court opined, "we cannot carry a judicially fashioned privilege *so far* as to immunize *criminal* conduct."¹⁰⁹ The plain language of the opinion indicates that while such immunity cannot foreclose criminal liability, there is a middle ground to which this privilege can apply. That middle ground may well be immunity from civil suits.

The identification of the outer-limit of official immunity as criminal conduct¹¹⁰ is consistent with the proposed immunity for

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

104. *See Hutchinson v. Proxmire*, 443 U.S. 111, 125 (1979) (stating that the objective of the clause is to protect only legislative activities).

105. 408 U.S. 606 (1972) (neither absolute nor qualified immunity extends to protect interference with the criminal process or grand jury investigations).

106. *Id.* at 627 (privilege protecting a congressman from a civil suit, such as libel, cannot extend to immunity from criminal conduct).

107. *See Barr v. Matteo*, 360 U.S. 564 (1959) (petitioner, who was acting director of a government agency, was protected by an absolute privilege against a libel suit); *supra* text accompanying notes 99-102.

108. *Gravel*, 408 U.S. at 627 (quoting *United States v. Doe*, 455 F.2d 753, 760 (1st Cir. 1972)).

109. *Id.* (emphasis added).

110. *See id.*

representatives.¹¹¹ Because neither of the policies behind representative immunity — efficiency or good government — would be served by immunizing criminal conduct, representative immunity would not go so far as to include these actions. *Gravel* is therefore analogous to the proposal in this Note, defining the outer limit of immunity.

C. Constitutional Consistency

The *Chastain* court thought that Sundquist's arguments "would reject the sufficiency of the constitutional schema"¹¹² by forging new immunity for representatives.¹¹³ This ruling makes the doctrine of judicially created official immunity look, at best, very inconsistent.

The immunity that has been previously extended to the executive and judicial branches is judicially created and not constitutionally required.¹¹⁴ Yet, when courts have granted immunity to executive and judicial branch members, the immunity has not been found to be at odds with the constitutional schema.

It does not appear to be a huge logical leap to argue that because only representatives received immunity in the Constitution, the Framers thought they needed the most protection. The *Chastain* court, it seems, has decided that the Framers missed the mark on this point. The current judicially created protections for the other two branches now arguably exceeds that provided for representatives. Apparently, though, inequality in doling out of immunity does fit within the constitutional schema.

111. See *infra* notes 121-29 and accompanying text.

Of course, a situation could probably be imagined where there might be some merit to immunizing criminal conduct. For example, a representative might represent constituents who vigorously oppose a recently enacted anti-flag-burning law which makes it a federal crime to burn an American flag. In order to test the constitutionality of the law, the representative might burn an American flag at a rally with the intent of being convicted to create a test case to challenge the law. While there may be merit in this type of civil disobedience, this behavior would still be unprotected under the proposal in this Note. The author's answer to those who advocate immunization of such conduct would be that the representative could attempt to achieve the same result through other, non-criminal measures (*i.e.*, a declaratory judgment action).

112. *Chastain v. Sundquist*, 833 F. 2d 311, 325 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2914 (1988).

113. *Id.* (the extension of immunity to representatives would "add a novel judicial protection").

114. "[T]he Court has fashioned an extra-Constitutional body of immunity law to supplement the grants of immunity contained in the Constitution." *Id.* at 315.

D. A Forgotten Case?

Aside from the consistency that would be gained, the *Barr*-representative analogy, provides examples of practical application and logic that buoy the case for granting immunity to representatives' representative functions. These points could have been the basis for the holding in a district court case, *Karchin v. Metzenbaum*.¹¹⁵ In that case, official immunity was extended to a Senator for actions which were clearly outside the sphere of the speech or debate clause.¹¹⁶ A disgruntled constituent, Milton Karchin, sued Senator Metzenbaum for the mishandling of a complaint that he had sent to Metzenbaum's office.¹¹⁷ Judge Sam H. Bell of the United States District Court for the Northern District of Ohio, dealt with the immunity issue concisely:

Metzenbaum is immune from suit. He is a United States Senator. He and his staff perform an official function in dealing with letters from constituents. They act within the scope of their discretionary authority.

. . . The immunity defense which may be raised by a government official is limited to protection against challenges to his conduct while performing an official function . . .¹¹⁸

The *Chastain* libel suit, like Karchin's suit, is a common law tort action. The extension of immunity to the type of suit in

115. 587 F. Supp. 563 (N.D. Ohio 1983).

116. *Id.* at 566.

117. *Id.* at 564. Karchin wrote to Senator Metzenbaum on September 19, 1982, explaining that he had tried to secure a promotion in the Defense Logistics Agency, Defense Contract Administration Service Region of Cleveland several times and was denied each time. He then requested the rating sheets for himself and the other applicants from the executive officer of the local Army Recruiting Command Office. Again, he received no response. His letter also complained of questionable promotion practices within the agency and waste in the department.

Karchin enclosed copies of two travel vouchers that he believed should not have been approved. Senator Metzenbaum's staff forwarded the letter and the copies of the travel vouchers to the Secretary of the Army asking for an inquiry. As a result of the inquiry, Karchin received a notice of proposed suspension for reproducing and disclosing travel vouchers, a violation of the agency's standard of conduct. At the time of the decision Karchin was fighting the proposed suspension. *Id.* at 565.

118. *Id.* at 566. The court misinterpreted *Harlow* and only applied qualified immunity. Karchin asserted that his "constitutional rights to petition members of Congress and to be secure in his papers [were] violated [and] that Metzenbaum failed in a duty to warn constituents that mail received by his office might not be kept confidential." *Id.* at 564. The first two charges are constitutionally based, so qualified immunity applies. The last charge, though, stated as a violation of a duty to warn, is a common law allegation to which absolute immunity would apply. It was this charge on which the court dealt with the immunity issue. *Id.* at 564.

Karchin is obviously at odds with *Chastain*. While *Karchin* is not binding but only persuasive authority with respect to *Chastain*, that is to the extent that the District of Columbia Circuit gives any weight to the judgments of the Northern District of Ohio, *Karchin* is one of two cases most similar to *Chastain*; the other being *Barr*.¹¹⁹ Yet, the *Chastain* majority failed even to mention *Karchin* in its analysis.¹²⁰

Had the *Karchin* suit been decided as *Chastain* was, Senator Metzenbaum would have had no immunity because the act complained of was clearly not within the legislative process. In an effort to avoid further liability, Senator Metzenbaum's natural reaction might have been to stamp all future mail "return to sender." This would likely infuriate constituents. Not only would immunity for representatives benefit the representative, but it would benefit the constituents by promoting "good government."

The arguments presented here strongly support the proposition that the *Chastain* majority rejected: the nonlegislative acts of representatives should be protected by the doctrine of official immunity. For no acceptable reason, *Chastain* denies representatives immunity when the policy reasons behind immunity for executive and judicial branch officials also apply to representatives. The following section offers a solution to the problems *Chastain* has created.

E. Proposal: Refining the Official Duties of Representatives

The judicially created official immunity given to executive officials and judges¹²¹ should be extended to representatives. Under this immunity, representatives would be absolutely immune from common-law torts absolutely, as long as "their actions fall within the outer perimeter of their official duties."¹²² They also would be immune from alleged constitutional and statutory violations as long as their actions do not violate "clearly established" law.¹²³

Present definitions of "official duties" that limit representa-

119. *Barr v. Matteo*, 360 U.S. 564 (1959). See *supra* notes 99-104 and accompanying text. *Karchin* is similar to *Chastain* in the immunity to representatives and representative-constituent aspects, while *Barr* is similar as to the allegation: libel by a government official.

120. *Chastain v. Sundquist*, 833 F.2d 311, 311-328 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2914 (1988).

121. See *id.* at 315.

122. See *id.*

123. See *id.*

tives' official duties to legislative acts¹²⁴ should be rejected. The official duties of representatives should include both legislative and representative acts. Because legislative acts already are protected by the speech or debate clause,¹²⁵ changing the scope of the judicially created immunity would extend protection to the representative acts of senators and congressman. The outer-perimeter of representatives' official duties would reach all attempts to inform constituents or represent their grievances. What specific acts would fit under this description would have to be determined on a case-by-case basis, as are the acts that constitute the official duties of members of the executive and judicial branches.

The test proposed for determining when an alleged constitutional or statutory violation is not protected by official immunity — *i.e.*, a violation of "clearly established" law — is the test set forth in *Harlow v. Fitzgerald*.¹²⁶ The Court has articulated the standard as whether an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]."¹²⁷ This rule gives representatives the minimum amount of immunity necessary to carry out their official duties.

A number of examples will bring this proposal into better focus. First, if a representative punched a heckler at a press conference, he would not be immune from suit for two reasons. One reason is that battery is a criminal offense, and no such acts are protected under this proposal. Another is that although a common law tort action exists for battery, immunity would be granted here only if the act leading to the tort was within the scope of the representative's official duties. While the press conference was within the representative's official duties of the representative as part of his informing function, the act of battery does not advance the purpose of the press conference and therefore no immunity would be granted.

A more commonplace example is if a representative issued a press release stating that her staff treasurer had been suspended while being investigated for charges of embezzlement when, in fact, it is discovered later that no embezzlement took place. This statement would expose the treasurer to "contempt, hatred, ridi-

124. *E.g.*, *Doe v. McMillan*, 412 U.S. 306, 314-15 (1972).

125. *E.g.*, *Hutchinson v. Proxmire* 443 U.S. 111, 125 (1979).

126. 457 U.S. 800 (1981).

127. *Id.* at 815 (quoting *Wood v. Strickland*, 420 U.S. 308, 320 (1975)).

cule or obloquy,"¹²⁸ providing a basis for a common-law defamation action. But the announcement was done in furtherance of the operation of the representative's office by letting the representative's constituents know how she is handling an incident that has at least indirectly harmed those who have contributed to her office, an act within the official duties of a representative. Absolute immunity, therefore, would apply.

Next, suppose the same employee sues the representative on constitutional or statutory grounds, alleging that the firing was discriminatory. Because legislators do not perform adjudicatory or extremely sensitive¹²⁹ functions, only qualified immunity would be available here due to the constitutional or statutory nature of the violation. Also, immunity would be extended only if the law is not clearly established, or if the representative did not know or could not reasonably have known about the law. (By definition, a representative would appear to be the last person who could claim not to know of the law!) If the particular provision is fairly settled law, our representative will not be able to cloak herself in immunity. Anti-discrimination laws are well-known and a federal representative would most likely know about them. The representative, therefore, would be held to have known about the law.

The result would be different if the particular provision has been interpreted two different ways by different federal appellate courts, has never been interpreted by the Supreme Court, and is at least arguably ambiguous. Here, immunity would be granted, because it could not be said that the law was clearly established.

IV. APPLICATION OF PROPOSAL TO *CHASTAIN V. SUNDQUIST*

The *Chastain* case itself provides a good example of how this proposal would work. Chastain filed a complaint alleging five counts of libel, all common-law allegations.¹³⁰ No constitutional or statutory violations were alleged.¹³¹ Under this Note's proposal, Sundquist would be granted absolute immunity if the allegedly libelous action was within his official duties. Acts performed in his representative role are within his official duties. Sundquist's ac-

128. BLACK'S LAW DICTIONARY 217 (Ab. 5th Ed. 1983) (defining defamation).

129. Working on a Congressional committee on sensitive matters of national security would arguably rise to the level of an extremely sensitive function, but such a case would probably be handled under the speech or debate clause. U.S. CONST. art I, § 6, cl. 1.

130. Complaint, *reprinted in* Petition, *supra* note 7, app. at 60a-68a.

131. *Id.*

tions were in response to a constituent's concern and therefore were within his representative role.¹³² Chastain even conceded that the letters were within Sundquist's official duties.¹³³ Sundquist's actions, therefore, would be granted an absolute privilege of immunity.

The only question remaining would be whether or not issuing a press release was within Sundquist's official duties. This question has been addressed by the Court in *Barr v. Matteo*.¹³⁴ The published letter in *Barr* was protected even though publication was *not* necessary to complete the officials task.¹³⁵ There had been a great deal of public debate on the plan in question in *Barr*,¹³⁶ and the Court apparently felt that this justified publication.¹³⁷ In *Chastain*, there was similar public uproar, including "statements and counter-statements by public officials, charges in the media, and a number of lawsuits other than this one."¹³⁸ With *Barr* as precedent, the publication also would be privileged and the case dismissed.

CONCLUSION

The doctrine of judicially created official immunity has been selectively applied up to now. Depending on which role they are working in, representatives have not been among the chosen ones. Unlike executive officials or members of the judiciary, representatives are constantly called upon to perform acts on behalf of their constituents that are not protected. To ask representatives to act for constituents and yet subject themselves to litigation in the course of their job is unreasonable. The vigorous representation that our government requires will be stunted if representatives become the targets of lawsuits. To give equal treatment to the offi-

132. While the facts do not specify who complained to Sundquist about MALS, Sundquist's letter to Attorney General William French Smith opened, "It has been brought to my attention that the Memphis Area Legal Service (MALS) is being operated in a highly questionable manner." Letter, *supra* note 21.

133. Petition, *supra* note 7, app. at 53a.

134. 360 U.S. 564, 574 (1958).

135. *Id.* at 575 ("That petitioner was *not required* by law . . . to speak out cannot be controlling in the case of an official of policy-making rank.").

136. *Id.* at 574-75.

137. *Id.* ("We think that under these circumstances a publicly expressed statement of the position of the agency head . . . was an appropriate exercise of [his] discretion.").

138. Petition, *supra* note 7, at 2.

cial of all three branches and grant representatives official immunity is not only fair but necessary.

J. TIMOTHY MC DONALD

