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Charles W. Johnson IV

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## COMMENTS

### THE DOCTRINE OF OFFICIAL IMMUNITY: AN UNNECESSARY INTRUSION INTO SPEECH OR DEBATE CLAUSE JURISPRUDENCE

The Speech or Debate Clause of the United States Constitution provides members of Congress with absolute immunity from lawsuit for their legislative activities.<sup>1</sup> The United States Supreme Court<sup>2</sup> has construed the protection provided by the Speech or Debate Clause into the current doctrine of legislative immunity.<sup>3</sup> This immunity presently extends only to a congressional member's<sup>4</sup> "purely legislative" activities and not to nonlegislative, official, or political duties.<sup>5</sup> Members of Congress and

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

2. The Supreme Court has never considered an alternate form of immunity in the 11 legislative immunity doctrine cases it has heard. *See Hutchinson v. Proxmire*, 443 U.S. 111, 130 (1979) (denying immunity for alleged defamatory statements made in press releases and newsletters); *United States v. Helstoski*, 442 U.S. 477, 490-91 (1979) (granting immunity for grand jury testimony regarding specific legislative acts); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 507 (1975) (granting immunity to committee members issuing *subpoenas duces tecum*); *Doe v. McMillan*, 412 U.S. 306, 312 (1973) (extending immunity to materials contained in committee hearing report); *Gravel v. United States*, 408 U.S. 606, 622 (1972) (denying immunity to senator's aide for private publication of otherwise protected legislative materials); *United States v. Brewster*, 408 U.S. 501, 528-29 (1972) (denying immunity from prosecution on bribery charges); *Powell v. McCormack*, 395 U.S. 486, 505-06 (1969) (granting immunity to members for passage of illegal resolution excluding a representative-elect); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (extending immunity to senator while denying it to his aide for alleged Fourth Amendment violations); *United States v. Johnson*, 383 U.S. 169, 184-85 (1966) (granting immunity against judicial inquiry into motivations for congressman's speech); *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) (extending immunity analogous to Speech or Debate Clause protection to statements made by state legislators included in the legislative record); *Kilbourn v. Thompson*, 103 U.S. 168, 204-05 (1881) (extending immunity to House members, but not to the Sergeant-at-Arms for false imprisonment of hearing witness).

3. For the history of cases interpreting this Clause, see *infra* notes 43-115 and accompanying text.

4. For purposes of this Comment, the term "members" refers to both United States Senators and Representatives.

5. *See Brewster*, 408 U.S. at 512 (detailing numerous "political" activities that will not receive Speech or Debate Clause protection); see also *infra* notes 78-81 and accompanying text.

some legal commentators decry the Supreme Court's limited view of the legislative immunity doctrine. They argue that the escalating volume of nonlegislative, constituent-related case work warrants the same protection as "purely legislative" functions.<sup>6</sup>

Whether members' nonlegislative functions warrant separate immunity protection is a growing source of controversy in the federal court system.<sup>7</sup> Recently, this debate has ripened through the litigation of defamation suits against members of Congress involving conduct beyond the protected legislative sphere.<sup>8</sup> Members have responded to these suits by reaching outside the Speech or Debate Clause for common law immunity protection.<sup>9</sup> They have relied upon the extra-constitutional doctrine of official immunity,<sup>10</sup> which currently protects executive and judicial

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6. See, e.g., *Constitutional Immunity of Members of Congress: Hearings Before the Joint Comm. on Congressional Operations*, 93d Cong., 1st Sess., pt. 1, at 5 (1973) [hereinafter *Immunity Hearings*] (statement of Rep. Cleveland) ("[T]he Court labors in abysmal ignorance of the real processes of representative government."); *id.* at 7 (statement of Rep. Brooks) ("We are concerned with recent interpretations of legislative immunity by the Supreme Court, interpretations so restrictive as to almost make a mockery of the intent of the constitutional language . . ."); 134 CONG. REC. 10,579 (1988) (statement of Rep. Hughes) ("Exposing legislators to civil liability, for doing things which are unquestionably within the scope of their official duties . . . will undermine the ability of elected officials to exercise oversight of the conduct of Government projects and programs."); Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1146 (1973) (advocating a broad interpretation of the legislative immunity doctrine to preserve the functional independence of the legislative branch); Richard D. Batchelder, Jr., Note, *Chastain v. Sundquist: A Narrow Reading of the Doctrine of Legislative Immunity*, 75 CORNELL L. REV. 384, 402-03 (1990) (positing that a narrow reading of the legislative immunity doctrine will undermine members' informing function).

7. See, e.g., *Williams v. Brooks*, 945 F.2d 1322, 1331 (5th Cir. 1991) (denying immunity protection for statements made in a press conference), *cert. denied*, 112 S. Ct. 1996 (1992); *Chastain v. Sundquist*, 833 F.2d 311, 328 (D.C. Cir. 1987) (denying immunity protection for statements printed in a letter to the Attorney General), *cert. denied*, 487 U.S. 1240 (1988); *McSurely v. McClellan*, 753 F.2d 88, 99-102 (D.C. Cir.) (per curiam) (suggesting that members performing non-legislative official functions, challenged as violating statutory and constitutional law, could receive qualified immunity protection), *cert. denied*, 474 U.S. 1005 (1985); *Walker v. Jones*, 733 F.2d 923, 932-33 (D.C. Cir.) (same), *cert. denied*, 469 U.S. 1036 (1984); see also *United States v. Gillock*, 587 F.2d 284, 291 (6th Cir. 1978) (extending "common law speech or debate privilege" immunity to state legislators only for acts within the Supreme Court's historical definition of legislative activity), *rev'd*, 445 U.S. 360 (1980).

8. See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111, 114-15 (1979) (involving member's private publication of libelous statements); *Doe v. McMillan*, 412 U.S. 306, 308-09 (1973) (involving disparaging remarks about private citizen included in committee report); *Brooks*, 945 F.2d at 1330-31 (involving member's statements made in a press conference); *Sundquist*, 833 F.2d at 312-13 (involving member's statements included in a letter to the Attorney General).

9. See, e.g., *Brooks*, 945 F.2d at 1325; *Sundquist*, 833 F.2d at 316.

10. The official immunity doctrine was judicially created to protect the functions of executive and judicial branch officials in the absence of constitutional protection analogous

branch officials from civil liability.<sup>11</sup> The United States circuit courts of appeals, however, have refused to apply the official immunity doctrine to members' nonlegislative activities and continue to limit Speech or Debate Clause immunity to members' legislative functions.<sup>12</sup> Nonetheless, the thrust of recent legal commentary urges expansion of the legislative immunity doctrine to include official immunity.<sup>13</sup> Although the Supreme Court has chosen not to address the issue directly, both sides of the argument might find support for their positions implicit in the Court's recent legislative immunity decisions.<sup>14</sup>

The possibility of expanding the legislative immunity doctrine raises several important issues. First, will expanding the legislative immunity doctrine to protect a member's nonlegislative functions comport with the intentions of the Constitution's Framers? As construed by the Supreme Court in the few legislative immunity cases that it has heard,<sup>15</sup> the existing legislative immunity doctrine indicates that the Framers intended only to provide immunity for member's legislative tasks.<sup>16</sup> Critics of this tradition argue that the concerns over separation of powers and legislative autonomy that motivated the Framers' broad interpretation of Speech or Debate Clause immunity supports the application of official immunity to members' nonlegislative activities.<sup>17</sup>

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to that afforded members of Congress through the Speech or Debate Clause. See *Spalding v. Vilas*, 161 U.S. 483, 485 (1896) (creating absolute immunity protection for executive branch officials); *Bradley v. Fisher*, 80 U.S. 335, 347 (1872) (same for judges). Nonetheless, members of Congress have attempted to apply this form of immunity to their non-legislative functions. See, e.g., *Brooks*, 945 F.2d at 1325; *Sundquist*, 833 F.2d at 316; Brief for Appellant at 32, *Brooks* (No. 90-2406) [hereinafter *Brooks Brief*]; see also Batchelder, *supra* note 6, at 401 (advocating official immunity protection for Members of Congress); J. Timothy McDonald, Note, *Do Your Jobs and Get Sued for It! What the Future Holds for Representatives*, 40 CASE W. RES. L. REV. 1109, 1121 (1990) (same).

11. See *infra* part I.B. (delineating the scope and development of the official immunity doctrine).

12. See *Brooks*, 945 F.2d at 1331; *Sundquist*, 833 F.2d at 328.

13. See *infra* notes 171-74 (advocating expansion of the legislative immunity doctrine to include official immunity).

14. See *infra* note 171 (noting potential ambiguity in the Supreme Court's historical position that official immunity protection applies only to executive and judicial branch officials).

15. See *supra* note 2.

16. See *Hutchinson v. Proxmire*, 443 U.S. 111, 125-26 (1979) ("The privilege . . . is restrained to things done in the House in a Parliamentary course . . . For [the member] is not to have privilege contra morem parliamentarium, to exceed the bounds and limits of his place and duty.") (quoting THOMAS JEFFERSON, *A Manual of Parliamentary Practice* 20 (1854), in *THE COMPLETE JEFFERSON* 704 (S. Padorer ed., 1943) (alterations in original)); *United States v. Brewster*, 408 U.S. 501, 517 (1972); *Sundquist*, 833 F.2d at 224-25.

17. See *Brooks Brief*, *supra* note 10, at 32 n.21; *Reinstein & Silverglate*, *supra* note 6, at 1136-40; *Batchelder*, *supra* note 6, at 401.

Second, do nonlegislative functions merit official immunity protection? Some scholars note the functional imperative of a member's nonlegislative duties.<sup>18</sup> They contend that because these tasks are within the scope of members' official duties, common law immunity must protect them.<sup>19</sup> The courts, however, generally have ruled that legislators have absolute immunity to make law as prescribed by the Constitution and that the common law extends only to officials who must enforce or interpret the law in the absence of explicit constitutional protection.<sup>20</sup> According to this view, the legislative immunity and official immunity doctrines are mutually exclusive.<sup>21</sup>

Third, should the courts extend the legislative immunity doctrine to accommodate public policy concerns? Critics of the existing legislative immunity doctrine would apply the same policies underlying executive/judicial immunity to members of Congress.<sup>22</sup> To do otherwise, they contend, would stymie the vital legislator/constituent relationship and would result in the executive and judicial branches receiving greater immunity protection than members of Congress.<sup>23</sup> Proponents of the status quo emphasize the functional differences that implicate distinct policy concerns and accountability to the electorate for legislators on the one hand, and executive and judicial officials on the other.<sup>24</sup> According to this view, critics overstate the negative impact of withholding official immunity

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18. See, e.g., *Sundquist*, 833 F.2d at 329 (Mikva, J., dissenting) (discussing the functional necessity of protecting members' non-legislative duties with official immunity). Cf. *Dunlap v. Wahlstrom*, No. 82-184 (E.D. Ky. July 6, 1983), *aff'd*, 783 F.2d 438 (6th Cir. 1984) (providing congressman and caseworker with official immunity); *Adams v. American Bar Ass'n*, 400 F. Supp. 219, 226 (E.D. Pa. 1975) (extending official immunity to federal officials including congresspersons). *But see Benford v. American Broadcasting Cos.*, 502 F. Supp. 1148, 1158 (D. Md. 1980) (order denying motion for summary judgment) (holding that "[a]bsolute official immunity . . . is at most coextensive with the absolute protection afforded by the Speech or Debate Clause").

19. See *supra* note 18.

20. See *Sundquist*, 833 F.2d at 321; *infra* notes 217-38 and accompanying text.

21. See *infra* notes 217-38.

22. See *Sundquist*, 833 F.2d at 332 (Mikva, J., dissenting) (asserting that members' non-legislative duties "need—no less protection than the tasks performed by the vast majority of other government officials"); *Immunity Hearings*, *supra* note 6, at 7-8 (statement of Rep. Brooks) ("If I am acting at my peril everytime I send a news release . . . or make a speech . . . then wisdom might dictate that I not share that information."); Brooks Brief, *supra* note 10, at 37 n.25 (arguing that a denial of official immunity to members "produces the self-contradicting result that the officials whom the Constitution most explicitly protects . . . receive the least immunity"); Batchelder, *supra* note 6, at 401-02 (highlighting as an important policy a members' ability to freely disseminate information to the public); McDonald, *supra* note 10, at 1121-23 (positing that the threat of lawsuits implicating members' nonlegislative tasks would hamper their efficiency).

23. See Batchelder, *supra* note 6, at 404.

24. See *infra* note 270.

from members' nonlegislative duties.<sup>25</sup> The proponents conclude that these obligations will not be frustrated if members adhere to certain clearly articulated rules and traditions.<sup>26</sup>

This Comment addresses these three issues through the context of defamation suits against members of Congress. It argues that, based upon precedent and policy, the doctrine of legislative immunity should remain confined to that protection provided by the Speech or Debate Clause. This Comment traces the historical development of legislative immunity as administered through the Speech or Debate Clause and the varying limits placed upon that Clause by federal courts. Next, it surveys the development of the common law official immunity doctrine through case law. Further, this Comment examines the case law addressing attempts to consolidate the two doctrines and forge a middle ground of immunity between them. It then analyzes the issues raised through attempts to include official immunity in the legislative immunity doctrine. Arguments for expanding legislative immunity also are addressed and critically analyzed. This Comment concludes that, pursuant to the Framers' intentions regarding the extent of legislative immunity, the constitutionally mandated legislative function guiding the Supreme Court's application of the doctrine, and public policy directives, the Speech or Debate Clause should continue to be the only immunity protection afforded members of Congress.

## I. THE DOCTRINES OF SPEECH OR DEBATE AND OFFICIAL IMMUNITY AND A PROPOSED NEXUS BETWEEN THEM

### A. *The Speech or Debate Clause*

#### 1. *Historical Antecedents*

The language of the Speech or Debate Clause is rooted in the English Bill of Rights.<sup>27</sup> Recognition of the need for legislative immunity, however, reaches back nearly to the beginning of the parliamentary system, when the Tudor and Stuart monarchs stifled legislators' power by manipulating the civil and criminal law.<sup>28</sup> The British Parliament's efforts to secure freedom of speech and debate grew out of these royal transgres-

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25. See *Sundquist*, 833 F.2d at 328 ("It is th[e] clear distinction between inherent and elective duties that disqualifies members of Congress for the grant of official immunity.").

26. See *infra* notes 271-77 and accompanying text.

27. In drafting the Speech or Debate Clause, the Constitution's Framers borrowed nearly verbatim from the relevant section of the English Bill of Rights, which states: "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." 1 W. & M., Sess. 2, ch. 2 (1689).

28. *United States v. Johnson*, 383 U.S. 169, 178 (1966).

sions.<sup>29</sup> Not only were Parliament's deliberative powers at stake,<sup>30</sup> but also its basic legislative powers, which the Crown claimed as its own.<sup>31</sup> Parliament responded to the Crown's attempted usurpation of its powers by enacting within the Bill of Rights of 1688 provisions to protect its legislative authority from future infringement by the Crown.<sup>32</sup> The Framers added nearly identical language to the United States Constitution in the Speech or Debate Clause.<sup>33</sup>

Although the English Bill of Rights and the United States Constitution include similar speech or debate wording, the Framers recognized inherent differences between the American and English forms of government that would lead to distinct interpretations of the respective doctrines.<sup>34</sup> While the English Parliament sought to preserve its absolute deliberative and legislative supremacy over the Crown within a balance of powers system, the Framers recognized its application to American federalism in a system of separation of powers.<sup>35</sup>

Despite the marked distinctions between the English parliamentary system and American system of separation of powers, the Framers debated the Speech or Debate Clause only briefly at the Constitutional Convention.<sup>36</sup> Other parliamentary legislative privileges such as immunity from arrest and civil process, the contempt power, and determination

29. Reinstein & Silverglate, *supra* note 6, at 1135.

30. In 1686, King James II prosecuted and fined a member of Parliament, Sir William Williams, for ordering the publication of deliberations made in the House of Commons that alleged misconduct by the King and his family. *Id.* at 1130-31 (citing *Rex v. Williams*, 89 Eng. Rep. 1048 (K.B. 1688)). The King prosecuted Williams based on a restrictive view of speech immunity, defining it to include only those activities occurring inside the House of Commons. *Id.* at 1130. Parliament argued for broader protection, including the publication of its proceedings. *Id.* at 1132-33. By manipulating the judges who were to hear the case, however, King James prevailed. *Id.* at 1133.

31. In 1688, King James II attempted to suspend ecclesiastical penal laws passed by Parliament. *Id.* at 1134. When seven bishops attempted to intervene and petitioned the King to rescind the order, the King charged them with seditious libel. *Id.* at 1135 (citing *Case of the Seven Bishops*, 12 How. St. Tr. 183, 377 (1688)). This time, unencumbered by royal intervention, a jury found the King's actions unconstitutional and the bishop's actions legitimate. *Id.*

32. *See supra* note 27.

33. *See supra* note 1 and accompanying text.

34. Reinstein & Silverglate, *supra* note 6, at 1144.

35. As Chief Justice Burger wrote:

We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.

*United States v. Brewster*, 408 U.S. 501, 508 (1972) (footnote omitted).

36. Reinstein & Silverglate, *supra* note 6, at 1136.

of Members' qualifications were heavily debated and significantly curtailed at the Convention.<sup>37</sup> The Speech or Debate Clause, on the other hand, with only its scope at issue, emerged relatively intact.<sup>38</sup> The Framers initially rejected a proposal by William Pinckney to confer upon each house of Congress the exclusive authority to determine the scope of the privilege.<sup>39</sup> A recommendation by James Madison to define specifically the parameters of the Clause was similarly tabled.<sup>40</sup> Although no explicit reasoning for excluding these suggestions was documented, one might infer from Madison's later statement that "reason and necessity of the privilege must be the guide,"<sup>41</sup> that the Framers intended a broad, functional scope for the Clause with limits naturally developing through its future application.<sup>42</sup> The lineage of Speech or Debate Clause cases reflects this expansive view. As the legislative immunity doctrine has developed, the Supreme Court has given an increasingly flexible interpretation to what constitutes legitimate legislative activity worthy of Speech or Debate Clause protection.

## 2. *The Kilbourn Tradition—Expansive Scope/Limited Interpretation*

The Supreme Court first interpreted the Speech or Debate Clause in its 1881 decision, *Kilbourn v. Thompson*.<sup>43</sup> At issue in *Kilbourn* was whether the House of Representatives possessed the general power<sup>44</sup> to hold a private citizen in contempt for refusing to cooperate with a congressional investigation.<sup>45</sup> The House was investigating a bankrupt real estate firm that had accrued a large pool of real estate in the District of Columbia and had as one of its creditors the United States Government.<sup>46</sup> Hallett Kilbourn, a member of this firm, was subpoenaed by the House to testify.<sup>47</sup> In the process of the investigation, Kilbourn refused to cooperate, was cited for contempt by a resolution and vote of the House, and was taken into custody by the Sergeant-at-Arms.<sup>48</sup> Although the Court found that the House could not itself hold a private citizen in

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37. *Id.* at 1136-37.

38. *See id.* at 1138; *supra* note 1 and accompanying text.

39. *See* Alexander J. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future As a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U. L. REV. 1, 14 (1968).

40. *Id.* at 15.

41. 4 WRITINGS OF JAMES MADISON 221 (1865).

42. 4 *id.*

43. 103 U.S. 168 (1881).

44. *Id.* at 181.

45. *Id.* at 173-74.

46. *Id.* at 171.

47. *Id.* at 173.

48. *Id.* at 174.



contempt and that it had falsely imprisoned Kilbourn, the Court concluded that the Speech or Debate Clause precluded liability.<sup>49</sup>

Writing for the Court, Justice Miller stated that the Speech or Debate Clause must extend to "things generally done in a session of [Congress] by one of its members in relation to the business before it."<sup>50</sup> The Court emphasized the need to maintain legislative independence in a system of separate powers and warned that a literal interpretation of the Speech or Debate Clause would undermine its intent.<sup>51</sup> The Court concluded that legislative activities such as voting and writing reports should join a member's speech and debate as protected activity.<sup>52</sup> Keeping with English tradition, the Court limited its interpretation to those acts performed within the walls of the legislature.<sup>53</sup>

The Supreme Court did not interpret the Speech or Debate Clause again until 1951 in *Tenney v. Brandhove*.<sup>54</sup> In *Tenney*, a witness who had testified before a committee of the California state legislature attempted to sue the committee under the Civil Rights Act of 1871.<sup>55</sup> Although federal construction of the Speech or Debate Clause was not at issue, the *Tenney* Court applied the Clause to determine whether the state legislators had engaged in activity worthy of immunity protection.<sup>56</sup> Specifically at issue in *Tenney* were derogatory statements about the plaintiff in the legislative record.<sup>57</sup> In ruling that the legislators were immune from lia-

49. *Id.* at 205.

50. *Id.* at 204. Justice Miller did not, however, offer the same protection to the Sergeant-at-Arms, John Thompson. Ultimately, Thompson was held liable for Kilbourn's false imprisonment and had to pay a \$20,000 judgment. See *Kilbourn v. Thompson*, 11 D.C. (MacArt. & M.) 401, 432 (D.C. 1883). The Court later expanded the Speech or Debate Clause to protect the aides and staff of members of Congress. *Gravel v. United States*, 408 U.S. 606, 622 (1972). See generally Mark A. Goldberg, Note, *The Speech or Debate Clause Protection of Congressional Aides*, 91 YALE L.J. 961 (1982) (tracing the development of Speech or Debate Clause immunity as it applies to congressional staffers).

51. *Kilbourn*, 103 U.S. at 203.

52. Although the Court had not previously examined the scope of the Speech or Debate Clause, the Massachusetts Supreme Court had considered the issue. *Coffin v. Coffin*, 4 Mass. 1 (1808). Justice Miller's opinion in *Kilbourn* drew heavily from the Massachusetts court's opinion by Chief Justice Parsons in *Coffin*, which stated: "I therefore think that the article ought not to be construed strictly, but liberally . . . to [include] the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office . . ." *Id.* at 27.

53. *Kilbourn*, 103 U.S. at 202 ("[W]hatever is done within the walls of either assembly must pass without question . . ." (quoting *Stockdale v. Hansard*, 122 Eng. Rep. 1112 (K.B. 1839))).

54. 341 U.S. 367 (1951).

55. 42 U.S.C. §§ 1981, 1983 (1988).

56. See Brooks Brief, *supra* note 10, at 27 n.14.

57. The "Tenney Committee," the Senate Fact-finding Committee on Un-American Activities, had made allegations about plaintiff Brandhove's criminal record and had re-

bility, Justice Frankfurter stated that the "sphere of legitimate legislative activity" included discussions in legislative session and inclusions in the written record.<sup>58</sup> Although the scope of what constituted privileged behavior remained broad, the Court's interpretation of "legitimate" activity remained limited to actions performed in furtherance of a member's legislative role.<sup>59</sup>

An important legislative immunity case arising in the 1960s was *United States v. Johnson*,<sup>60</sup> in which the Court, for the first time, extended Speech or Debate Clause immunity to a member's criminal activity.<sup>61</sup> Representative Johnson had delivered a speech on the floor of the House in return for a bribe.<sup>62</sup> Nonetheless, the Court held his activities immune under the Speech or Debate Clause.<sup>63</sup> Because the prosecution based its charges upon the motivations behind, and the authorship and content of the speech itself, liability could not stand.<sup>64</sup> Writing for the Court, Justice Harlan limited this holding to the prosecution of the speech itself.<sup>65</sup> He stated that the Government could proceed with the prosecution if the speech was not imputed to Johnson as a criminal act.<sup>66</sup> The Court enunciated as a central tenet of the Speech or Debate Clause, the foreclosing of executive and judicial inquiry into a member's legislative motivations.<sup>67</sup>

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futed certain charges that Brandhove had made in a petition circulated among members of the state legislature. *Tenney*, 341 U.S. at 371.

58. *Id.* at 376.

59. See Batchelder, *supra* note 6, at 389; see also *Lunderstadt v. Colafella*, 885 F.2d 66, 74 (3d Cir. 1989) (following the *Tenney* holding at the state level for legislative committee chairman's statements made during committee session).

60. 383 U.S. 169 (1966).

61. *Id.* at 184-85.

62. *Id.* at 170-72.

63. *Id.* at 184-85.

64. *Id.*

65. *Id.* at 185.

66. *Id.* On remand, the district court dismissed the conspiracy to commit bribery count, but Johnson was found guilty and convicted on the remaining counts. *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970). Seventeen years later, the Court had the opportunity to consider this issue again and reached the opposite result. See *infra* notes 71-81 and accompanying text (discussing *United States v. Brewster*, 408 U.S. 501 (1972)).

67. *Johnson*, 383 U.S. at 179 ("The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature.").

In another 1960s case, *Dombrowski v. Eastland*, 387 U.S. 82 (1967), the Court held that the use of information alleged to have been illegally gathered for a committee investigation was legitimate legislative activity pursuant to the Speech or Debate Clause. *Id.* at 85. The committee's chief counsel, on the other hand, charged with obtaining the information in violation of the plaintiff's Fourth Amendment rights, was not protected. *Id.* The *Dombrowski* holding perpetuated the *Kilbourn* tradition of protecting the legislative activity

### 3. Gravel, Brewster and McMillan's Legislative/Political Distinction

In the early 1970s, the Supreme Court explored a new means for defining the scope of the Speech or Debate Clause. Although the issue remained whether the action in question was within the sphere of legitimate legislative activity, the Court refined the test applied to make that determination.<sup>68</sup> The new test determines whether the member's activity is "purely legislative"<sup>69</sup> and thus protected, or "political" and thus unprotected.<sup>70</sup>

In the defining case of the modern era of Speech or Debate Clause interpretation, *United States v. Brewster*,<sup>71</sup> the Court again<sup>72</sup> was faced with a member who had taken a bribe in exchange for performing specific legislative acts. Pursuant to its ruling in *Johnson*, the Court held that Senator Brewster had violated a narrowly drawn bribery statute,<sup>73</sup> but that neither his specific legislative act—voting on postal rate legislation—nor his motivations for performing that act formed the basis of the prosecution against him.<sup>74</sup> The Court emphasized that Senator Brewster's illegal conduct was taking the money in exchange for being influenced, not the legislative act itself.<sup>75</sup> Writing for the Court, Chief Justice Burger concluded that immunity under the Speech or Debate Clause is not automatically triggered when a nexus arises between a member's illegal conduct and his legislative functions.<sup>76</sup> Only where member's specific legislative acts or motives are questioned is the member immune from liability.<sup>77</sup>

Essential to this issue, however, was the distinction the Court drew between legislative and political activities.<sup>78</sup> According to Chief Justice Burger, the Speech or Debate Clause protects only those activities that

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itself but leaving exposed to liability illegal activities facilitated by, or resulting from, the legislative activity. See *supra* notes 43-53 and accompanying text.

68. The refined test required that the Clause "be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch." *Brewster*, 408 U.S. at 516.

69. *Id.* at 512.

70. *Id.*

71. 408 U.S. 501 (1972).

72. See *supra* notes 60-67 and accompanying text.

73. 18 U.S.C. §§ 201(c)(1), (g) (1988).

74. *Brewster*, 408 U.S. at 510.

75. *Id.* at 526-27.

76. *Id.* at 516. Chief Justice Burger noted: "[T]here are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process. Admittedly, the Speech or Debate Clause must be read broadly . . . but no more than the statutes we apply . . ." *Id.*

77. *Id.* at 526.

78. *Id.* at 512.

are “clearly a part of the legislative process”<sup>79</sup>—voting for resolutions, debating on the floor or in a hearing, or compiling and subpoenaing records for a committee.<sup>80</sup> Conversely, the Clause does not protect a wide range of activities that, although legitimate, are “political in nature”—“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.”<sup>81</sup>

The Court applied this distinction during the same session in *Gravel v. United States*.<sup>82</sup> At issue in *Gravel* was the private publication of the Pentagon Papers by Senator Gravel and a legislative aide.<sup>83</sup> A federal grand jury was convened to investigate alleged criminal conduct with respect to the public disclosure of these classified documents and promptly subpoenaed Gravel’s aide.<sup>84</sup> Senator Gravel sought to quash the subpoena arguing that the Speech or Debate Clause shielded his aide from questioning.<sup>85</sup> In response, the Court held for the first time that the Speech or Debate Clause would apply with equal force to members and their congressional aides and staff.<sup>86</sup> Writing for the Court, Justice Blackmun referred to congressional staff as members’ “alter egos” whose services are critical to members’ functions amidst a burgeoning workload.<sup>87</sup> The Court concluded, however, that the private publication was not protected speech or debate and that, to the extent that the grand jury investigation related to that publication, Senator Gravel’s aide was not protected by the Clause.<sup>88</sup> Justice Blackmun explained that these conclu-

79. *Id.* at 516.

80. *Id.* at 516 n.10.

81. *Id.* at 512.

82. 408 U.S. 606 (1972).

83. The Pentagon Papers was the popular name for a classified Defense Department study entitled *History of the United States Decision-Making Process on Viet Nam Policy*. *Id.* at 608-09. Senator Gravel introduced and inserted into the public record the entire forty-seven volumes of the Pentagon Papers at a meeting of the Senate Subcommittee on Public Buildings and Grounds. *Id.* at 609.

84. *Id.* at 608.

85. *Id.* at 608-09.

86. *Id.* at 621.

87. *Id.* at 617. Justice Blackmun concluded that “if [aides] are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated.” *Id.* (citing *United States v. Johnson*, 383 U.S. 169, 181 (1966)).

The *Gravel* decision represents the Court’s recognition of the growing complexity of government service and the resulting delegations of official authority from officers of higher rank to those of lower rank. Expansion of the legislative immunity doctrine in *Gravel* closely resembled the Court’s interpretation of executive immunity. See *infra* notes 135-50 and accompanying text.

88. *Gravel*, 408 U.S. at 622.

sions were dictated by the Court's previous holdings in *Dombrowski v. Eastland*<sup>89</sup> and *Kilbourn*.<sup>90</sup> According to these precedents, even if the illegal activities of a legislative aide facilitate or result from an immune legislative act, they will not be protected by the Speech or Debate Clause.<sup>91</sup>

Applying the *Brewster* Court's legislative/political distinction, Justice Blackmun defined legitimate legislative activity as those matters integral to the deliberative and communicative processes that relate to the consideration and passage of legislation.<sup>92</sup> In his view, private publication of the Pentagon Papers was not essential to the deliberations of the Senate or the passage of legislation.<sup>93</sup> Conversely, committee perusal and inclusion in the record of the same materials was essential and protected.<sup>94</sup>

The Court came to a similar conclusion in *Doe v. McMillan*.<sup>95</sup> The controversy in *McMillan* arose after members and staff of a house committee issued a report<sup>96</sup> containing disparaging information about specific District of Columbia public school students.<sup>97</sup> In response to an invasion of privacy suit brought against the members and staff, the Court concluded that inclusion of the offensive material in the Committee report was protected legislative activity under the Speech or Debate Clause.<sup>98</sup> Distribution of the report, however, was not protected.<sup>99</sup> Consequently,

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89. 387 U.S. 82, 85 (1967).

90. *Gravel*, 408 U.S. at 620-21; *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

91. *Gravel*, 408 U.S. at 617-18. It is important to note that in *Kilbourn*, *Dombrowski*, and *Gravel*, the members of Congress were not themselves implicated in the actual criminal conduct that rendered their aides liable. Justice Blackmun noted in *Gravel*, however, that if a member were so incriminated in the future, he would be subject to liability. *Id.* at 619.

92. *Id.* at 625.

93. *Id.*

94. *Id.* Members of Congress strongly rejected the *Brewster* and *Gravel* decisions, and responded by forming the Joint Committee on Congressional Operations to evaluate what they felt should be the proper scope of legislative immunity for members. The Committee concluded that Speech or Debate Clause immunity should include "any activities undertaken within the legislative branch in fulfilling the role of the Congress in the constitutionally defined government of coordinate and coequal branches." *Joint Committee on Congressional Operations on the Legislative Role of Congress in Gathering and Disclosing Information, The Constitutional Immunity of Members of Congress*, S. REP. NO. 896, 93d Cong., 2d Sess. 47, 53 (1974). They argued that anything a member does to represent the interests of his or her constituents must be protected. *Id.*

95. 412 U.S. 306 (1973).

96. H.R. REP. NO. 1681, 91st Cong., 2d Sess. (1970).

97. *McMillan*, 412 U.S. at 308-09.

98. *Id.* at 317-18.

99. *Id.* at 324.

the Superintendent of Documents and Public Printer in charge of distributing the committee report were subject to suit.<sup>100</sup>

The Court also rejected an attempt by the Superintendent of Documents and the Public Printer to raise a common law official immunity defense.<sup>101</sup> Writing for the Court, Justice White noted that the printing office was independent of any other branch of government with no specified statutory or common law immunity attached to it.<sup>102</sup> Therefore, to the extent that the printing office was working for the legislature, it could only claim that form of immunity protection afforded to the legislature.<sup>103</sup> Similarly, if the Printer had printed actionable materials for the executive branch, the Court would have protected its actions only to the extent that the official immunity doctrine protected executive officials.<sup>104</sup> This latter conclusion by Justice White appears to foreclose the application of extra-constitutional immunity via the doctrine of official immunity to members of Congress and poses an obstacle to those scholars who would apply official immunity to members defending defamation suits.<sup>105</sup>

#### 4. *Defamation: Defining the Modern Era*

The *Brewster*, *Gravel*, and *McMillan* holdings are critical in their application to defamation suits against members of Congress, which have dominated the modern era of legislative immunity jurisprudence in the federal courts. In *Hutchinson v. Proxmire*,<sup>106</sup> Senator Proxmire instituted a "Golden Fleece of the Month Award" in an attempt to spotlight wasteful government spending.<sup>107</sup> He had privately published disparaging remarks about an award recipient,<sup>108</sup> who in turn sued Senator Proxmire for libel.<sup>109</sup> In refusing to extend Speech or Debate Clause immunity to Senator Proxmire, the Court reaffirmed its holdings in *Gravel*

100. *Id.*

101. *Id.*

102. *Id.* at 323.

103. *Id.*

104. *Id.*; see also *infra* notes 135-50 and accompanying text.

105. See *Williams v. Brooks*, 945 F.2d 1322, 1328-29 (5th Cir. 1991) (finding that the *McMillan* holding precludes official immunity for members' nonlegislative actions), *cert. denied*, 112 S. Ct. 1996 (1992). But see *McMillan*, 412 U.S. at 319 n.13 ("Both before and after *Barr v. Matteo*, official immunity has been held applicable to officials of the Legislative Branch.").

106. 443 U.S. 111 (1979).

107. *Id.* at 114.

108. The award went to three federal agencies that had funded research into why monkeys clench their jaws under stress and to Ronald Hutchinson, a behavioral research scientist who conducted the research and ultimately brought the suit against Senator Proxmire. *Id.* at 114-15.

109. *Id.*

and *McMillan* that private publication of actionable materials is not activity essential to the legislative deliberations of the Senate.<sup>110</sup> Again, the Court emphasized that “purely legislative” activities would include defamatory statements made on the Senate floor, in a committee hearing, or in a committee report, but not in constituent newsletters, news releases, or speeches delivered outside Congress.<sup>111</sup>

At present, members of Congress are afforded only that immunity provided in the Speech or Debate Clause of the Constitution<sup>112</sup> for their legislative activities.<sup>113</sup> In narrowly tailoring the Clause, the Court claimed to adhere to the spirit of Article I and beliefs of the Framers,<sup>114</sup> despite

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110. *Id.* at 130-31.

111. *Id.* The Court also noted that a member’s “libelous remarks in the follow up telephone calls to executive agencies and in the television and radio interviews are not protected.” *Id.* at 121 n.10.

112. *Doe v. McMillan*, 412 U.S. 306, 324 (1973).

113. *United States v. Brewster*, 408 U.S. 501, 512 (1972). Litigants recently have raised Speech or Debate Clause immunity in response to unlawful discharge suits brought by congressional employees against members of Congress. The circuit courts generally have held that members will receive Speech or Debate Clause immunity only if the discharged employee’s “duties . . . ‘significantly inform[ ] or influence[ ] the shaping of our nation’s laws.’” *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, 928 (D.C. Cir.) (upholding dismissal of unlawful discharge suit brought by House Official Reporter, whose duties were directly related to the legislative process (quoting *Walker v. Jones*, 733 F.2d 923, 931 (D.C. Cir.), *cert. denied*, 469 U.S. 1036 (1984)) (holding that the duties of the House restaurant manager did not implicate Speech or Debate Clause concerns and thus her discharge fell outside its protective scope)), *cert. denied*, 479 U.S. 996 (1986). Other recent litigation involving interpretation of the clause has arisen in the federal courts. *See United States v. Biaggi*, 853 F.2d 89, 102-03 (2d Cir. 1988) (denying constitutional challenge to a member’s Travel Act conviction based on his argument that because he conducted legislative activity while travelling the Speech or Debate Clause protected his illegal conduct), *cert. denied*, 489 U.S. 1052 (1989); *Agromayor v. Colberg*, 738 F.2d 55, 60 (1st Cir.) (applying the *Walker* test in state legislative context), *cert. denied*, 469 U.S. 1037 (1984); *compare United States v. Durenberger*, No. CR3-93-65, slip op. at 3 (D. Neb. Dec. 3, 1993) (order granting motion to dismiss) (holding that member’s submissions of third party affidavits to Senate Ethics Committee constituted protected legislative activity under the Speech or Debate Clause and that their subsequent use in Grand Jury proceedings was unconstitutional) *with United States v. Rose*, 790 F. Supp. 340, 343 (D.D.C. 1992) (order denying motion to dismiss) (rejecting member’s contention—supported by an amicus curiae brief filed by a House bipartisan leadership group—that the Speech or Debate Clause protects from executive branch investigation statements revealed in House Ethics Committee made on financial disclosure reports as mandated by the Ethics in Government Act); *and compare United States v. Swindall*, 971 F.2d 1531, 1546 (11th Cir. 1992) (holding that the Speech or Debate Clause prohibits an inquiry into member’s committee status where the purpose for introducing that status was to draw inferences about member’s legislative acts) *with United States v. McDade*, 827 F. Supp. 1153, 1166 (E.D. Pa. 1993) (order denying motion to dismiss) (distinguishing *Swindall* and holding that a Grand Jury indictment citing member’s committee status did not violate the Speech or Debate Clause where that status was introduced to explain alleged criminal acts of others, not the members legislative acts).

114. *Proxmire*, 443 U.S. at 126-29.

critics' assertions that official immunity should extend to members' non-legislative, political duties.<sup>115</sup>

### B. *Official Immunity*

Although the Constitution provides absolute immunity to members of Congress,<sup>116</sup> it offers little protection to executive or judicial acts.<sup>117</sup> Therefore, the Supreme Court has developed an extra-constitutional body of immunity law to provide officials in the executive and judicial branches with absolute immunity from civil suits.<sup>118</sup> Pursuant to this doctrine, the specific functions of the executive or judicial official determine the protection afforded.<sup>119</sup> In making this determination, the Court will analyze whether the suit deters or distracts an official from his proper functions or unfairly challenges his decisions.<sup>120</sup>

#### 1. *Judicial Privilege*

In 1871, the Supreme Court first considered official immunity for federal judges in *Bradley v. Fisher*.<sup>121</sup> *Bradley* involved a suit against a federal trial judge for disbarring the attorney who represented John Wilkes Booth's attending physician after Abraham Lincoln's assassination.<sup>122</sup> The Court denied this claim, holding that all federal judges were entitled to absolute immunity for their judicial acts.<sup>123</sup> Concerned that judicial discretion and independence remain unencumbered, Justice Field, writing

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115. See *infra* notes 171-73; see also Alexander J. Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 SUFFOLK U. L. REV. 1019, 1040-47 (1974) (suggesting that restrictive holdings in Speech or Debate Clause cases have led to a fundamental misconception of the legislative process by the Supreme Court).

116. *Brewster*, 408 U.S. at 512.

117. The Supreme Court has provided the President with absolute immunity from civil damages in suits challenging his official acts. See *Nixon v. Fitzgerald*, 457 U.S. 731, 749-56 (1982).

118. See *Butz v. Economou*, 438 U.S. 478, 501-02 (1978).

119. *Forrester v. White*, 484 U.S. 219, 224 (1988).

120. See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (holding that although falsely incarcerating plaintiff was regrettable, his arrest by Justice Department officials was within the scope of their duties and thus absolutely protected), *cert. denied*, 339 U.S. 949 (1950); Mayer G. Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 Nw. U. L. REV. 526, 529-30 (1977) (suggesting a policy rationale behind construction of the official immunity doctrine); Edward G. Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 271-72 (1937) (listing justifications for and policy behind absolute immunity protection for judicial officials).

121. 80 U.S. (13 Wall.) 335 (1872).

122. *Id.* at 344; see also LOUIS J. WEICHMANN, A TRUE HISTORY OF THE ASSASSINATION OF ABRAHAM LINCOLN AND OF THE CONSPIRACY OF 1865 354-79 (Floyd E. Risvold ed., 1975) (discussing the belligerence of the physician's attorney at trial).

123. *Bradley*, 80 U.S. (13 Wall.) at 347.



for the Court, stated that a judge must be "free to act upon his own convictions, without apprehension of personal consequences to himself."<sup>124</sup>

After *Bradley*, the scope of judicial immunity protection was enlarged considerably. Similar to the immunity provided to executive officials,<sup>125</sup> federal courts now apply a functional approach to judicial immunity.<sup>126</sup> Under this functional approach, the reviewing court first will consider the range of responsibilities entrusted to an official or class of officials whose actions have been challenged in a lawsuit.<sup>127</sup> Courts then will analyze the effect that exposure to liability will have on those official duties.<sup>128</sup> Given the ease with which a citizen unhappy with a particular ruling could question judicial motives, this inquiry becomes essential to preserving judicial discretion.<sup>129</sup>

The functional approach has expanded judicial immunity both in terms of the classes of officials who are shielded from liability and the official activities that are protected. For instance, courts have extended the judicial immunity doctrine to "quasi-judicial" officials, including prosecutors<sup>130</sup> and grand jurors.<sup>131</sup> Likewise, the Supreme Court has applied the immunity doctrine to activities beyond an official's core responsibilities, such as a judge's administrative employment decisions<sup>132</sup> or a judge's legislative action in implementing and later enforcing a code of conduct for lawyers.<sup>133</sup> Federal courts likewise have followed this expansive trend.<sup>134</sup>

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124. *Id.* Judges will retain absolute immunity even if their actions are malicious, corrupt, or in excess of authority. *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978) (citing *Bradley*, 80 U.S. (13 Wall.) at 351). Only if a judge acts in the "clear absence of all jurisdiction" will he be exposed to liability. *Id.* at 357 (quoting *Bradley*, 80 U.S. (13 Wall.) at 351).

125. See *infra* notes 135-50 and accompanying text.

126. See, e.g., *Forrester v. White*, 484 U.S. 219, 224 (1988) (explaining that under the "functional" approach, courts will examine the effect that exposure to liability will have upon the lawfully entrusted functions of a given official).

127. *Id.*

128. *Id.*

129. *Chastain v. Sundquist*, 833 F.2d 311, 315 (D.C. Cir. 1987) (describing the predictability of civil suits against judicial officials that justifies absolute immunity protection), *cert. denied*, 487 U.S. 1240 (1988); *Freed*, *supra* note 120, at 530 (same).

130. See *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

131. See *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976); see also *Sundquist*, 833 F.2d at 315 ("The immunity was made absolute because of the predictable prospect that individuals subject to a judge, prosecutor, or grand juror's unfavorable decision would bring suit and no lesser protection would suffice.").

132. *Forrester*, 484 U.S. at 219.

133. *Supreme Court v. Consumers Union, Inc.*, 446 U.S. 719, 739 (1980).

134. See, e.g., *Eades v. Sterlinske*, 810 F.2d 723, 726 (7th Cir.) (extending immunity to judge who allegedly provided false information to his clerks regarding plaintiff's special verdict conference), *cert. denied*, 484 U.S. 847 (1987); *Williams v. Wood*, 612 F.2d 982, 985

## 2. *Executive Immunity*

The various levels of delegated authority and official responsibility in the executive branch have complicated the application of the common law immunity doctrine to the executive branch. Nonetheless, the doctrine currently immunizes a vast array of public official functions.<sup>135</sup>

The Supreme Court first extended absolute immunity to executive department heads in *Spalding v. Vilas*.<sup>136</sup> In *Spalding*, the Court denied a defamation claim against the Postmaster General who allegedly distributed divisive information about the petitioner to other postmasters.<sup>137</sup> Adopting the *Bradley* Court's policy analysis,<sup>138</sup> the *Spalding* Court held that an executive department head should not function under the apprehension that his motives will be called into question.<sup>139</sup> Although the communications in *Spalding* were not circulated to the general public, federal courts subsequently provided absolute protection to communications by department heads that were publicly disseminated.<sup>140</sup>

The doctrine of official immunity currently protects all executive officials from civil suits challenging their duties and responsibilities. This modern doctrine evolved from the landmark executive immunity case, *Barr v. Matteo*.<sup>141</sup> *Barr* involved a libel suit brought against the acting director of the Office of Rent Stabilization for an alleged libel contained in a press release issued by the Office.<sup>142</sup> In rejecting the claim, Justice

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(5th Cir. 1980) (extending immunity "for clerks of court acting in a nonroutine manner under command of court decrees or under explicit instructions of a judge"); *Atcherson v. Siebenmann*, 605 F.2d 1058, 1063-67 (8th Cir. 1979) (protecting a judge functioning in an administrative capacity). *But see* *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2616-18 (1993) (holding that prosecutors are not entitled to absolute immunity from suit for manufacturing false evidence used to establish probable cause or for making false statements while announcing an indictment at a press conference); *McCray v. Maryland*, 456 F.2d 1, 4 n.7 (4th Cir. 1972) ("When a judge acts in a non-judicial capacity he *pro tanto* loses his absolute immunity and is subject to liability as any other state official.").

135. *See infra* note 150.

136. 161 U.S. 483, 498 (1896).

137. *Id.* at 485.

138. *See supra* note 124 and accompanying text.

139. *Spalding*, 161 U.S. at 498-99.

140. *See, e.g.*, *Glass v. Ickes*, 117 F.2d 273, 281 (D.C. Cir.) (holding the Secretary of Interior immune from liability for an alleged libel contained in a press release), *cert. denied*, 311 U.S. 718 (1940); *Mellon v. Brewer*, 18 F.2d 168, 172 (D.C. Cir.) (holding the Secretary of Treasury immune from liability where he sent a letter containing an alleged libel to the President and the press), *cert. denied*, 275 U.S. 530 (1927). This form of immunity was later qualified to protect only those communications which related to the official's duties and functions. *See Barr v. Matteo*, 360 U.S. 564, 570 n.8 (1959).

141. 360 U.S. 564 (1959).

142. *Id.* at 565. Joining attacks made by members of Congress, the acting director publicly criticized subordinate officers in the Office of Rent Stabilization for implementing a controversial budgetary plan within the office. *Id.* at 567-68.

Harlan stated that the director's statements were "within the outer perimeter of [the official's] line of duty."<sup>143</sup> He then announced two principles that would guide questions of executive official immunity in the future. First, he reiterated the importance of executive immunity protection,<sup>144</sup> emphasizing an official's need to be free from fear of damage suits that would otherwise impinge upon her time, energy, and the effective administration of governmental policies.<sup>145</sup> Second, Justice Harlan discussed the importance of taking a functional approach to the application of executive official immunity.<sup>146</sup> He admitted that department heads merit broader protection than subordinate officers with less responsibility.<sup>147</sup> He concluded, however, that it is precisely these duties, not the office title, that dictate the breadth of immunity applicable to an officer whose official actions have been called into question.<sup>148</sup> The circuit courts have widely applied the functional approach<sup>149</sup> to protect an array of officials.<sup>150</sup>

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143. *Id.* at 575.

144. *Id.* at 571.

145. *Id.* The words of Judge Learned Hand formed the basis of Justice Harlan's policy argument: "[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (*cited in Barr*, 360 U.S. at 571), *cert. denied*, 339 U.S. 949 (1950).

146. *Barr*, 360 U.S. at 572-73.

147. *Id.* at 573 ("But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails.")

148. *Id.* at 573-74.

149. Circuit courts have given the *Barr* doctrine an expansive reading, ruling that "it is only necessary that the action [of the federal official] bear some reasonable relation to and connection with the duties and responsibilities of the official." *Scherer v. Brennan*, 379 F.2d 609, 611 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967); *see also Currie v. Guthrie*, 749 F.2d 185, 188 (5th Cir. 1984) (holding that a civilian supervisor in a U.S. Naval office was within the outer periphery of her duty and thus immune from liability when she signed an affidavit charging a subordinate with disturbance of the peace). It is this form of immunity that members of Congress argue should be applied to them. *See infra* note 173 and accompanying text.

The Supreme Court also has provided a qualified immunity to executive officials for suits alleging constitutional or statutory violations. *Harlow v. Fitzgerald*, 457 U.S. 800, 807-08 (1982); *Butz v. Economou*, 438 U.S. 478, 507 (1978). According to this doctrine, if an executive branch official has reasonable grounds to believe that his or her conduct did not violate a constitutional or statutory provision, immunity will extend to the conduct. *Id.*

150. *See, e.g., Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1063-64 (11th Cir. 1992) (county commissioners); *Valdez v. City and County of Denver*, 878 F.2d 1285, 1290 (10th Cir. 1989) (police officers); *Williamson v. United States Dep't of Agric.*, 815 F.2d 368, 383 (5th Cir. 1987) (Farmers Home Administration officials); *George v. Kay*, 632 F.2d 1103, 1106 (4th Cir. 1980) (postal inspector), *cert. denied*, 450 U.S. 1029 (1981); *Allred v. Svarczkopf*, 573 F.2d 1146, 1153-54 (10th Cir. 1978) (dog catcher); *Expeditions Unlimited Aquatic Enters. v. Smithsonian Inst.*, 566 F.2d 289, 295 (D.C. Cir. 1977) (*en banc*) (Smith-

### C. Attempts to Apply Official Immunity to Members of Congress

Two recent federal circuit court cases, *Chastain v. Sundquist*<sup>151</sup> and *Williams v. Brooks*,<sup>152</sup> represent attempts by members of Congress to apply the official immunity doctrine to defamation claims filed against them. In both cases, the circuit courts restricted the scope and application of legislative immunity protection to the Speech or Debate Clause and refused to extend official immunity to the members.<sup>153</sup> Likewise, the Supreme Court denied Representative Sundquist's<sup>154</sup> and Representative Brooks'<sup>155</sup> petitions for writ of certiorari.

Both cases involved common law tort claims alleged by private citizens.<sup>156</sup> Representative Sundquist printed allegedly libelous remarks in a two-page letter distributed to the Attorney General and released to the media.<sup>157</sup> Representative Brooks made allegedly defamatory statements in a television interview.<sup>158</sup> In *Sundquist*, the United States Court of Appeals for the District of Columbia Circuit reversed a trial court decision that had extended official immunity protection to the Congressman.<sup>159</sup> The United States Court of Appeals for the Fifth Circuit in *Brooks* affirmed the district court's denial of Congressman Brooks' motion to dismiss on grounds of official immunity.<sup>160</sup>

The *Sundquist* court determined that the communication in question was not a "purely legislative activit[y]"<sup>161</sup> and was thus outside the scope of Speech or Debate Clause immunity.<sup>162</sup> In denying that official immunity protection exists for members of Congress, the court distinguished between a member's constitutional responsibilities and those voluntarily assumed.<sup>163</sup> With the former, the court stated that all of a member's con-

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sonian department chairman), *cert. denied*, 438 U.S. 915 (1978); *Scherer v. Brennan*, 379 F.2d 609, 611 (7th Cir.) (U.S. Treasury officers), *cert. denied*, 389 U.S. 1021 (1967); *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655, 658 (2d Cir. 1962) (contracting officers), *cert. denied*, 374 U.S. 827 (1963).

151. 833 F.2d 311 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1240 (1988).

152. 945 F.2d 1322 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1996 (1992).

153. *Brooks*, 945 F.2d at 1330-31; *Sundquist*, 833 F.2d at 328.

154. *Sundquist v. Chastain*, 487 U.S. 1240 (1988).

155. *Brooks v. Williams*, 112 S. Ct. 1996 (1992).

156. *Brooks*, 945 F.2d at 1324; *Sundquist*, 833 F.2d at 312-13.

157. *Sundquist*, 833 F.2d at 312-13.

158. *Brooks*, 945 F.2d at 1323-24.

159. *Sundquist*, 833 F.2d at 328.

160. *Brooks*, 945 F.2d at 1330-31.

161. *United States v. Brewster*, 408 U.S. 501, 512 (1972). Note also that in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Court held that communications designed to influence executive branch decisions are not protected by the Speech or Debate Clause. *Id.* at 121 n.10.

162. *Sundquist*, 833 F.2d at 328.

163. *Id.*

stitutional responsibilities will receive Speech or Debate Clause protection.<sup>164</sup> For the latter, a member's "elective" duties will be afforded neither Speech or Debate nor official immunity protection.<sup>165</sup>

The *Brooks* court regarded the scope of legislative official immunity as "coextensive" with that provided in the Speech or Debate Clause.<sup>166</sup> Although the court alluded to the separate application of the official immunity doctrine to members of Congress in rulings of other courts<sup>167</sup> and in Supreme Court dictum,<sup>168</sup> it concluded that the scope of the Speech or Debate Clause was conclusive in determining immunity protection for members of Congress.<sup>169</sup>

The present status of legislative immunity, that members of Congress are protected only by Speech or Debate Clause immunity, would appear

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164. *Id.*

165. *Id.* In support of its distinction between what should remain immune behavior and what should not, the court deferred to the words of James Madison:

"[A]ll laws should be made to operate as much on the law makers as upon the people; the greatest security for the preservation of liberty, is for the government to have a sympathy with those on whom the laws act, and a real participation and communication of all their burthens and grievances. Whenever it is necessary to exempt any part of the government from sharing in these common burthens, that necessity ought not only to be palpable, but should on no account be exceeded."

*Id.* (quoting James Madison, *The Militia Bill, House of Representatives* (Dec. 16, 1790), reprinted in 2 THE FOUNDERS' CONSTITUTION 331 (Philip B. Kurland & Ralph Lerner eds., 1987)).

166. *Williams v. Brooks*, 945 F.2d 1322, 1329 n.6 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1996 (1992).

167. The court referred to 14 circuit court cases cited in Congressman Brooks's brief, which allegedly applied the official immunity doctrine to congressmen. *Id.* at 1330 (citing Brooks Brief, *supra* note 10, at 27). The court concluded, however, that only two of these cases (both unreported) specifically held that congressmen were entitled to official immunity. *Id.* at 1330 (citing *Dunlap v. Wahlstrom*, No. 82-184 (E.D. Ky. July 6, 1983) (ruling that a congressman was entitled to official immunity), *aff'd*, 738 F.2d 438 (6th Cir. 1984); *Adams v. American Bar Ass'n*, 400 F. Supp. 219, 226 (E.D. Pa. 1975) (holding that cabinet officers, congressmen, and other federal officials are entitled to official immunity)). Furthermore, one of the 14 aforementioned cases restricted absolute legislative immunity to the application and protective scope of the Speech or Debate Clause. *Id.* at 1330 (citing *Benford v. American Broadcasting Cos.*, 502 F. Supp. 1148, 1158 (D. Md. 1980) (order denying motion for summary judgment)).

168. *See Doe v. McMillan*, 412 U.S. 306, 319 n.13 (1973); *infra* note 171.

169. *Brooks*, 945 F.2d at 1331. Deferring to two federal circuits in support of this conclusion, the court first refuted Congressman Brooks's argument that the Fifth Circuit recognizes official immunity coverage for congressmen, by quoting that circuit: "'The inapplicability of speech or debate protection . . . foreclose[s] [a member] from asserting an absolute official immunity. . . . Speech or Debate protection is coextensive with the need to afford members of Congress absolute immunity.'" *Id.* at 1329 (quoting *Davis v. Passman*, 544 F.2d 865, 881 (5th Cir. 1977)). Second, the court upheld *Sundquist's* conclusion that congressmen are limited to Speech or Debate immunity under the Constitution. *Id.* at 1330 (citing *Chastain v. Sundquist*, 833 F.2d 311, (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1240 (1988)).

explicit in the rulings of the *Sundquist* and *Brooks* courts and implicit in the Supreme Court's refusal to pass on the argument.<sup>170</sup> The Supreme Court's analysis in this regard, however, is not without ambiguity.<sup>171</sup> Furthermore, predominant commentary on the issue urges expansion of legislative immunity to include *Barr*-type, official immunity protection.<sup>172</sup> Likewise, members of Congress have intervened in several cases attempting to revise the status quo.<sup>173</sup> Whether the Supreme Court's lack of clarity on the issue and the external pressure from commentators and members of Congress will alter the course of legislative immunity is presently unclear. The balance of this Comment addresses these various arguments and concludes that altering the present scope of legislative immunity would betray the Framers' intentions, undermine the Speech or Debate Clause and improperly expand the constitutional authority of members of Congress.

## II. AN UNNECESSARY INTRUSION INTO SPEECH OR DEBATE CLAUSE JURISPRUDENCE

Past critics of the scope of legislative immunity advocated expansion of the Speech or Debate Clause to include protection of a legislator's con-

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170. See *Brooks v. Williams*, 112 S. Ct. 1996 (1992). Justices White, Blackmun, and O'Connor voted to grant certiorari in *Sundquist*. *Sundquist v. Chastain*, 487 U.S. 1240 (1988).

171. The Supreme Court articulated a position contrary to the conclusions of *Sundquist* and *Brooks* in an isolated footnote in *Doe v. McMillan*, 412 U.S. 306 (1973): "Both before and after *Barr*, official immunity has been held applicable to officials of the Legislative Branch." *Id.* at 319 n.13. In advocating the extension of official immunity to members of Congress in his dissenting opinion in *Sundquist*, Judge Mikva nevertheless noted the ambiguity and lack of reliability of the *McMillan* footnote. *Sundquist*, 833 F.2d at 331 (Mikva J., dissenting) ("Because it is impossible to discern the precise meaning the Court intended this statement to carry, it cannot be relied upon with great confidence.").

172. See Reinstein & Silverglate, *supra* note 6, at 1113; Batchelder, *supra* note 6, at 403; McDonald, *supra* note 10, at 1109; *supra* notes 141-50 and accompanying text (discussing the functional approach undertaken by the *Barr v. Matteo* Court for evaluating issues of executive immunity protection). Cf. Sam J. Ervin, Jr., *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175, 184-88 (1973) (advocating an expansion of the Speech or Debate Clause itself to protect a member's non-legislative functions).

173. Following the *Sundquist* decision, the House of Representatives adopted a privileged resolution urging the Supreme Court to grant Congressman Sundquist's writ of certiorari. H.R. Res. 446, 100th Cong., 2d Sess., 134 CONG. REC. 10,579 (1988). The resolution stated that "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." *Id.* The Supreme Court nonetheless denied Congressman Sundquist's petition. *Sundquist v. Chastain*, 487 U.S. 1240 (1988).

duct not regarded as “purely legislative.”<sup>174</sup> Recently, however, critics largely have abandoned that argument.<sup>175</sup> In its place, the official immunity doctrine has emerged as a potential vehicle for protecting members’ burgeoning “political” responsibilities,<sup>176</sup> that historically have gone unprotected by the Speech or Debate Clause.<sup>177</sup>

### A. *The Framers’ Intent*

#### 1. *The Cabell Grand Jury Investigation and Resulting Protest*

Critics of the current legislative immunity doctrine argue that the Framers’ vision of an independent legislature commands extension of the official immunity doctrine to members of Congress.<sup>178</sup> In support of their argument, commentators often will refer to the Framers’ responses to the 1797 grand jury investigation of Congressman Cabell of Virginia.<sup>179</sup> Congressman Cabell and other anti-Federalist members of Congress had sent

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174. The most focused criticism arose in reaction to the Supreme Court’s holdings in the *Gravel* and *Brewster* cases. According to critics, these cases represented a betrayal of the legislative independence envisioned by the Framers and undermined legislative authority in a system of separation of powers. See, e.g., Brief for the Senate of the United States at 6, *United States v. Gravel*, 408 U.S. 606 (1972) (No. 71-1026), reprinted in *Immunity Hearings*, *supra* note 6, at 94; Ervin, *supra* note 172, at 177; Reinstein & Silverglate, *supra* note 6, at 1177. The Senate called for expansion of the traditional scope of the Speech or Debate Clause to meet contemporary demands placed on members of Congress. Reinstein & Silverglate, *supra* note 6, at 37. According to these views, *Gravel* frustrated the congressional informing function, while *Brewster* frustrated the immunity from executive and judicial questioning of a member’s legislative motives.

As discussed below with respect to the argument that official immunity should extend to members of Congress, the aforementioned arguments contravene the Framers’ intent for the scope of legislative immunity protection, the constitutionally mandated legislative function that the Supreme Court has decided dictates that scope and the important policy concerns behind the disparate immunity treatment of executive and judicial officials on the one hand and members of Congress on the other. See *infra* parts II.A.-B.

175. Attorneys representing members of Congress in suits filed against them have admitted that the scope of Speech or Debate Clause immunity is limited to protecting only “purely legislative” activity as suggested by the *Brewster* and *Gravel* courts. See, e.g., *Sundquist*, 833 F.2d at 313; Brooks Brief, *supra* note 10, at 25.

176. See *supra* text accompanying note 81.

177. See *supra* note 10.

178. See, e.g., 134 CONG. REC. 10,576 (1988) (statement of Rep. Michel) (suggesting that the Framers acknowledged the official immunity doctrine when constructing the Speech or Debate Clause); Brooks Brief, *supra* note 10, at 36 n.23 (stating that Framers recognized the “need to freely allow Members’ communications to constituents”); Batchelder, *supra* note 6, at 386 (noting that the Framers envisioned legislative immunity “as a bulwark against judicial and executive encroachment on the independence of Congress”); McDonald, *supra* note 10, at 1125 (suggesting that because the Framers—vis-à-vis the Speech or Debate Clause—intended the most immunity protection for members, their increased nonlegislative functions deserve heightened protection via official immunity).

179. See 134 CONG. REC. 10,577 (1988) (statement of Rep. Hyde); Reinstein & Silverglate, *supra* note 6, at 1140-41; Batchelder, *supra* note 6, at 387 n.23.

newsletters to their constituents condemning the policies of President John Adams with respect to the war in France after the French Revolution.<sup>180</sup> In response, the Adams Administration ordered a grand jury investigation of these allegedly “seditious” newsletters.<sup>181</sup> The grand jury in turn handed down indictments against Cabell and the other congressmen.<sup>182</sup>

The grand jury indictments drew a vicious reaction.<sup>183</sup> In their famous protest to the Virginia House of Delegates, Thomas Jefferson, Adams’s Vice President, and James Madison denounced the executive and judicial branches for blatantly violating separation of powers principles and impinging upon legislative authority.<sup>184</sup> Jefferson and Madison<sup>185</sup> warned of the dangerous consequences that would result if the executive and judiciary were permitted to hinder member-constituent communications.<sup>186</sup>

## 2. *Contemporary Adaptation of the “Protest”?*

Members of Congress and some legal commentators argue that the principles articulated by Jefferson and Madison should guide the federal courts in applying the official immunity doctrine to members of Con-

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180. Reinstein & Silverglate, *supra* note 6, at 1140-41 (citing 8 WORKS OF THOMAS JEFFERSON 325 (Paul Leicester Ford ed., 1904) [hereinafter WORKS OF JEFFERSON]).

181. *Id.*

182. *Id.*

183. *Id.* at 1141-42 (citing 8 WORKS OF JEFFERSON, *supra* note 180, at 322-23, 325-27).

184. Thomas Jefferson and James Madison wrote:

[I]n order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any . . . .

Thomas Jefferson (and James Madison), *Protest to the Virginia House of Delegates (1797)*, reprinted in 2 THE FOUNDERS’ CONSTITUTION 336 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter *Protest to the Virginia House*].

185. Although Thomas Jefferson authored the “Protest,” Madison joined in its drafting and offered several minor changes. For instance, Madison suggested that: “It is certainly of great importance to set the public opinion right with regard to the functions of grand juries, and the dangerous abuses of them in the federal courts; nor could a better occasion occur.” Reinstein & Silverglate, *supra* note 6, at 1142 n.153.

186. Jefferson and Madison wrote: “[F]or the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other . . . is to put the legislative department under the feet of the Judiciary . . . .” *Protest to the Virginia House*, *supra* note 184, at 336. Jefferson and Madison also called for the arrest and imprisonment of the grand jurors, which resulted in a quick termination of the investigation. *Id.*



gress.<sup>187</sup> According to this view, private civil actions against members of Congress threaten member-constituent communications in a way similar to the threat posed by the grand jury indictments in the Cabell incident.<sup>188</sup> The argument concludes that extension of the extra-constitutional immunity doctrine to members defending such suits would fulfill the Framers' mandate.<sup>189</sup>

Two problems arise when commentators attempt to apply the Framers' concerns raised in the Cabell case to the modern context of libel suits against members of Congress. First, modern commentators would apply Jefferson's and Madison's argument, which effectively defended long-held Speech or Debate Clause principles,<sup>190</sup> to the official immunity doctrine historically applied only to the executive and judicial branches.<sup>191</sup> The two doctrines are quite different.<sup>192</sup> The Speech or Debate Clause was included in the Constitution to protect the legislative independence of members from civil or criminal suits brought either by the other branches of government or by private citizens.<sup>193</sup> These elements are well depicted in the Cabell protest that arose from attempts by the executive to bring a criminal suit against members for their constituent communications.<sup>194</sup> The official immunity doctrine, on the other hand, neither arises from the text of the Constitution nor applies to criminal suits brought by the other branches of government.<sup>195</sup> On the contrary, this doctrine was judicially created to provide absolute immunity from private civil suits and qualified protection from statutory and constitutional suits to executive and judicial officials who were not otherwise provided with explicit protection in the Constitution.<sup>196</sup> Speech or Debate Clause immunity can scarcely be grafted upon the official immunity doctrine when contrasting origins and applications of these doctrines are construed.<sup>197</sup>

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187. See 134 CONG. REC. 10,577 (1988) (statement of Rep. Hyde) ("I know of few observations so prophetic as Jefferson's, when he says that constituent [communications] are 'the substance of representation.'"); Batchelder, *supra* note 6, at 387 n.23 (quoting Jefferson and Madison's "Protest").

188. 134 CONG. REC. 10,577 (1988) (statement of Rep. Hyde).

189. *Id.* Cf. *Immunity Hearings*, *supra* note 6, at 7-8 (statement of Rep. Brooks) (noting the danger of restricting member/constituent communications).

190. See Reinstein & Silverglate, *supra* note 6, at 1141 ("The significance of [Jefferson and Madison's] eloquent protest goes beyond even the stature of its authors; it is a cogent analysis of the purposes and scope of the speech or debate clause . . .").

191. See *supra* Part I.B.

192. See *Chastain v. Sundquist*, 833 F.2d 311, 330 (D.C. Cir. 1987) (Mikva, J., dissenting) (outlining differences between the two doctrines), *cert. denied*, 487 U.S. 1240 (1988).

193. See *supra* note 35.

194. See *supra* notes 180-86 and accompanying text.

195. See *supra* note 192.

196. See *Sundquist*, 833 F.2d at 330 (Mikva, J., dissenting); *supra* Part I.B.

197. Compare *supra* part I.A. with *supra* part I.B.

Second, the Speech or Debate Clause implicates distinct separation of powers concerns; the official immunity doctrine does not.<sup>198</sup> Nonetheless, some argue that the same separation of powers and member-constituent precepts that characterized the Cabell protest<sup>199</sup> should apply in the context of a published libel.<sup>200</sup> Certainly, grand jury investigations into the circulation of a member's critique of an executive branch policy implicate a violation of separation of powers and encroachment upon legislative authority.<sup>201</sup> The same cannot be said of an inquiry into a member's press releases designed to malign a private individual. On the contrary, exposing such communications to liability neither denies "the will of the people the influence it ought to have" nor exposes the legislature to "coercion of the co-ordinate branches."<sup>202</sup> Consequently, the Framers, the English Parliament before them, and the Supreme Court specifically have excluded private publications of libelous statements by members from Speech or Debate Clause protection.<sup>203</sup> Because it is within the context of private tort suits against members of Congress that some would pro-

198. See *supra* notes 35 and 192.

199. See *supra* notes 183-86 and accompanying text.

200. Related arguments arose generally in the wake of the *Sundquist* decision. H.R. Res. 446, 100th Cong., 2d Sess., 134 CONG. REC. 10,574 (1988); *id.* at 10,574-79 (statements of Reps. Foley, Michel, Gejdenson, Hyde, Ford, Cheney, Schumer, McCollum, Hughes, and Lott); Batchelder, *supra* note 6, at 384; McDonald, *supra* note 10, at 1109.

201. See *supra* notes 183-86 and accompanying text.

202. *Protest to the Virginia House*, *supra* note 184, at 336-37. The *Sundquist* court emphasized that "[n]o barrier" limits a member's ability to communicate with his constituents except that he may not, in a non-legislative capacity, libel others with impunity. *Sundquist*, 833 F.2d at 323.

203. See *Stockdale v. Hansard*, 112 Eng. Rep. 1112, 1156 (Q.B. 1839); see also *Kilbourn v. Thompson*, 103 U.S. 168, 202 (1881). The Court has refused to deviate from this historical tradition. It continually has excluded from legislative immunity protection the private publication of libelous or otherwise actionable information, which, if exposed in a "purely legislative" context, would have been absolutely immune from suit. See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111, 130-31 (1979); *Doe v. McMillan*, 412 U.S. 306, 312 (1973); *Gravel v. United States*, 408 U.S. 606, 625 (1972).

The words of Thomas Jefferson and James Madison likewise are indicative of the Framers' intentions in this regard. Both noted the importance of holding members accountable to the same degree that private citizens would so hold themselves: "[T]he substance of representation, . . . requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be lawful among themselves were they in the personal transaction of their own business . . . ." *Protest to the Virginia Legislature*, *supra* note 184, at 336.

The Supreme Court has held private citizens liable in defamation actions for falsely attacking other citizens. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990) (holding that a statement must contain provable false fact for liability to attach); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (affirming defendant's liability for defamation without a showing of "actual malice"). Consistent with Jefferson's and Madison's observations above, members of Congress should be held liable in defamation actions.

spectively apply the Framers' views, precedent and policy mandate that this application fail.

*B. Applying The Official Immunity Doctrine to Legislators*

*1. Dual Application of Speech or Debate and Official Immunity: The Functional Approach*

Some members of Congress and commentators argue that the distinct protections of the Speech or Debate Clause and the official immunity doctrine both should apply to the diverse functions of legislators.<sup>204</sup> According to this view, the Speech or Debate Clause would provide absolute protection from all civil or criminal proceedings challenging a member's purely legislative activities.<sup>205</sup> The official immunity doctrine, on the other hand, would provide absolute protection from private civil suits implicating a member's nonlegislative duties.<sup>206</sup> Although proponents of this argument recognize that the Supreme Court has never applied official immunity to members of Congress,<sup>207</sup> nevertheless, they assert that because members' official functions include so many nonlegislative duties,<sup>208</sup> occupying the bulk of their time,<sup>209</sup> these activities neces-

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A leading constitutional scholar, Justice Joseph Story succinctly addressed a member's liability for defamation and the Framers' intent:

No man ought to have a right to defame others under colour of a performance of the duties of his office. And if he does so in the actual discharge of his duties in congress, that furnishes no reason, why he should be enabled through the medium of the press to destroy the reputation . . . of other citizens. It is neither within the scope of his duty, nor in furtherance of public rights, or public policy.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 309 (photo. reprint 1987) (1833).

204. See *supra* note 200.

205. *Sundquist*, 833 F.2d at 330 (Mikva, J., dissenting).

206. *Id.*

207. *Id.* The same proponents would argue that the Court also has neither explicitly nor implicitly denied the application of official immunity to members' non-legislative activities. *Id.*

208. See *supra* note 81. Cf. 134 CONG. REC. 10,576-77 (1988) (statement of Rep. Gejdenson). Representative Gejdenson stated:

When you take a look at the volume of our work of the Congress as a whole, some estimate beyond a million cases a year, that is what restores the faith of people in the governmental process . . . Often our role as advocates may be as important as our role as legislators in seeing that this Government serves its people.

*Id.*

209. *Id.* One member of the House stated: "[I]t is a fair estimate that Congress handles over a million constituent cases a year. These include helping constituents on matters of social security, tax, veteran's benefits, immigration, Medicare and Medicaid, and the whole array of problems with the Federal Government." *Id.* at 10,577 (statement of Rep. Gejdenson)

sitate the same flexible protection afforded executive and judicial officials.<sup>210</sup>

Comparing the *Brooks* and *Barr* cases is illustrative of how these legal theorists would expand the legislative immunity doctrine. In *Barr* and *Brooks*, the defendants were similarly sued for defamation as a result of criticisms they had made about other citizens in press statements.<sup>211</sup> In *Barr*, the Court applied the official immunity doctrine to libelous statements made by the acting director of the Office of Rent Stabilization about his subordinates and found that press releases were within the nature of Barr's office and the "outer perimeter" of his official functions.<sup>212</sup> Director Barr was found absolutely immune from suit.<sup>213</sup> In *Brooks*, however, the court refused to apply the official immunity doctrine to statements made by Congressman Brooks during a press conference in his office.<sup>214</sup> The *Brooks* court held that because statements to the press were not legislative activity envisioned by the Speech or Debate Clause, Brooks was without immunity.<sup>215</sup> If the court had applied the official

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In contrast to this account, the actual amount of time spent on constituent matters will often depend on a member's leadership style, the organization and efficiency of his or her office staff, and the amount of time a legislator has served in the Congress. The following anonymous accounts by members of Congress effectively depict the disparities in constituent work. One member explained:

Much of the work that comes across a congressman's desk has absolutely no relationship to legislation. . . . But the fact is that having to deal with these matters takes vital time that a congressman should be devoting to government and requires him to do a lot of housekeeping things for constituents.

CHARLES L. CLAPP, *THE CONGRESSMAN: HIS WORK AS HE SEES IT* 61 (Anchor Books 1964) (1963). Another member asserted: "I think I am in disagreement with some people here who have been more effective in increasing their majorities than I have. . . . [M]uch of my [constituent] work would be handled by my staff. . . . I spend 10 percent of my own time on constituent service and 90 percent on legislation." *Id.* at 60. It apparently cannot be said of all members of Congress that constituent duties overwhelm their agendas and take up most of their time.

210. Demonstrative of this flexibility is the willingness of federal courts to extend official immunity coverage to executive and judicial functions that are peripheral to core duties. *See, e.g.,* *Butz v. Economou*, 438 U.S. 478, 514 (1978) (providing official immunity to an executive official performing adjudicative functions); *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980) (extending official immunity to "clerks of court acting in a nonroutine manner"); *Atcherson v. Siebenmann*, 605 F.2d 1058, 1063-67 (8th Cir. 1979) (recognizing immunity for a judge acting in an executive capacity); *see also* *Claus v. Gyorkey*, 674 F.2d 427, 431 (5th Cir. 1982) (maintaining that "[i]t is only necessary that the action of the federal official bear some reasonable relation to and connection with his duties and responsibilities to be within the scope of his authority").

211. *Barr v. Matteo*, 360 U.S. 564, 565-67 (1959); *Williams v. Brooks*, 945 F.2d 1322, 1323-24 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1996 (1992).

212. *Barr*, 360 U.S. at 575.

213. *Id.*

214. *Brooks*, 945 F.2d at 1330-31.

215. *Id.*

immunity doctrine in the *Brooks* case, however, the suit likely would have been dismissed.<sup>216</sup>

Recognizing the functional differences between the legislative branch and the executive and judicial branches, federal courts have applied mutually exclusive immunity protection to each.<sup>217</sup> It is precisely these fundamental distinctions that should perpetuate the exclusion of official immunity to members of Congress.<sup>218</sup>

The primary function of members of Congress is to legislate as stated explicitly in Article I of the Constitution<sup>219</sup> and implicitly in the Speech or Debate Clause.<sup>220</sup> Legislating entails activities that range far beyond merely making speeches, voting and debating.<sup>221</sup> The Supreme Court has sustained the protection of these constitutionally mandated functions from challenges leveled by private citizens and from the executive and judicial branches through strict application of the Speech or Debate Clause to a member's legislative functions.<sup>222</sup> As a result, members' con-

216. Similarly, Representative Sundquist's letters to the Attorney General, the Legal Services Corporation and the press likely would have been exempted from liability as a legitimate aspect of his job had the court applied official immunity. *Chastain v. Sundquist*, 833 F.2d 311, 329 (D.C. Cir. 1987) (Mikva, J., dissenting), *cert. denied*, 487 U.S. 1240 (1988); *see also* *Batchelder, supra* note 6, at 402 (arguing that "Sundquist and other members of Congress should have the freedom to investigate suspected improprieties in federally funded programs without the fear of potential liability for unwarranted defamation claims").

Most circuit courts have found government officials' statements to the press to be within the scope of their duties and thus covered by the official immunity doctrine. *See, e.g.,* *Hartley v. Fine*, 780 F.2d 1383, 1387 (8th Cir. 1985) (ruling that official immunity forecloses liability for defamation); *Williams v. Collins*, 728 F.2d 721, 727-28 (5th Cir. 1984) (dismissing suit against Army Corps of Engineers investigators for defamatory statements made while performing official functions); *Queen v. Tennessee Valley Auth.*, 689 F.2d 80, 84 (6th Cir. 1982) (extending immunity from defamation suit to TVA officials), *cert. denied*, 460 U.S. 1082 (1983); *George v. Kay*, 632 F.2d 1103, 1106 (4th Cir. 1980) (granting motion to dismiss a defamation suit on official immunity grounds), *cert. denied*, 450 U.S. 1029 (1981).

217. *See supra* part I.A. (analyzing legislative immunity via the Speech or Debate Clause); *supra* part I.B. (discussing the official immunity doctrine as applied to the executive and judiciary).

218. The Supreme Court has said that official immunity will not protect an official unless his functions so dictate. *See Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982); *Doe v. McMillan*, 412 U.S. 306, 319-20 (1973).

219. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . .").

220. *See supra* note 1.

221. The Supreme Court has held that issuing subpoenas, pursuing congressional investigations, and creating reports of committee functions are legislative functions worthy of Speech or Debate Clause protection. *See supra* note 2 (noting the Court's holdings in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 507 (1975), *Doe V. McMillan*, 412 U.S. 306, 312 (1973), and *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)).

222. *See supra* Part I.A.2.-4.

stitutional authority is preserved and their legislative discretion remains unfettered.<sup>223</sup>

The functions of the executive and judicial branches are quite different, as the former must execute,<sup>224</sup> and the latter interpret the laws enacted by Congress.<sup>225</sup> These responsibilities naturally expose executive and judicial discretion to the threat of outside intervention.<sup>226</sup> Nevertheless, the Constitution does not protect essential executive and judicial functions as it safeguards legislative functions. Consequently, the Supreme Court has constructed out of the common law an official immunity doctrine to immunize the essential functions of the executive and judicial branches.<sup>227</sup> This doctrine is exclusive to the executive and judicial branches because their constitutional duties, without textual immunization, are at risk.<sup>228</sup>

Those who urge the cross-application of the official immunity doctrine argue that officials in all branches of government have legitimate duties ranging beyond their core functions and that it is inherently inconsistent to protect from litigation the peripheral activities of the executive and judicial branches while leaving the legislature exposed.<sup>229</sup> On the contrary, it is the inherent differences in the peripheral responsibilities as they relate to constitutional duties of the respective branches that dictate the exclusion of official immunity from the legislative branch.

To ensure that "the Laws be faithfully executed,"<sup>230</sup> for instance, executive officials must perform adjudicative functions when deciding admin-

223. See, e.g., *Gravel v. United States*, 408 U.S. 606, 617 (1972); *United States v. Johnson*, 383 U.S. 169, 177-80 (1966). Similarly, the *Sundquist* court held:

Congress initiates lawmaking activity, an exercise in the art of declaring the general law that will govern the nation. As a general matter, no authority can compel it to act or control the direction of its lawmaking action once engaged, absent a violation of the Constitution. In this respect, members of Congress enjoy a freedom of action vis-à-vis a coordinate branch not shared by executive officials.

*Chastain v. Sundquist*, 833 F.2d 311, 323 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1240 (1988).

224. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.")

225. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . arising under . . . the Laws of the United States . . .").

226. See *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976); *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959).

227. See *Butz v. Economou*, 438 U.S. 478, 501-02 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872).

228. See *supra* note 192; see also *Chastain v. Sundquist*, 833 F.2d 311, 315 (D.C. Cir. 1987) ("The immunity was made absolute because of the predictable prospect that individuals subject to a judge, prosecutor, or grand juror's unfavorable decision would bring suit and no lesser protection would suffice."), *cert. denied*, 487 U.S. 1240 (1988).

229. See *supra* note 200.

230. U.S. CONST. art. II, § 3.

istrative cases and legislative functions when rule making.<sup>231</sup> Likewise, judicial authority must fulfill a legislative function when dictating a code of conduct for attorneys and an executive/prosecutorial function when enforcing that code.<sup>232</sup> More importantly, it is these officials, executing and interpreting congressional enactments through these various means, who must do so directly with the people, and who are most susceptible to their litigious wrath.<sup>233</sup> The legislative mandate, on the other hand, does not require protection of a member's nonlegislative functions. The Supreme Court has made this very clear by consistently construing the Speech or Debate doctrine to the exclusion of these tasks.<sup>234</sup>

The *Barr/Brooks* distinction highlights the functional differences warranting the application of mutually exclusive immunity doctrines.<sup>235</sup> Again, a libel spoken outside the legislative realm will go unprotected because a member's constitutional responsibilities do not include such a function.<sup>236</sup> An executive or judicial official, on the other hand, if acting within the scope of his or her official duties, will be immune from liability for speaking the same libel.<sup>237</sup> Immunity will so attach to preserve the official's constitutional, statutory or delegated authority.<sup>238</sup> Altering this historical distinction would result only in an unconstitutional redefinition of legislative functions.

## 2. *Official Immunity for Legislators: An Equivocal Supreme Court?*

Some argue that the Supreme Court has neither explicitly nor implicitly foreclosed the application of official immunity to members of Congress.<sup>239</sup> In support of this position, advocates put great stock in the ambiguous statement made by the Supreme Court in footnote thirteen of

231. See, e.g., *Butz*, 438 U.S. at 478.

232. See, e.g., *Supreme Court v. Consumers Union, Inc.*, 446 U.S. 719, 739 (1980) (extending immunity to members of Virginia Supreme Court for issuing bar code).

233. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 244 (1974) (stating that "the executive branch . . . is most frequently and intimately involved in day-to-day contacts with the citizenry and, hence, most frequently exposed to situations which can give rise to claims").

234. See *supra* part I.A.

235. See *supra* notes 211-16 and accompanying text.

236. See, e.g., *Doe v. McMillan*, 412 U.S. 306, 314 (1973) ("We do not doubt the importance of informing the public about the business of Congress. . . . [However, a] Member of Congress may not with impunity publish a libel from the speaker's stand in his home district . . .").

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

238. *Chastain v. Sundquist*, 833 F.2d 311, 323 (1987), *cert. denied*, 487 U.S. 1240 (1988).

239. See *id.* at 330-31 (Mikva, J., dissenting). In summation, Judge Mikva stated: "[T]he Supreme Court so far has not discussed in any meaningful way the precise question before us; and it certainly has not closed the door to further examination of the question." *Id.* at 331.

*Doe v. McMillan*: “Both before and after *Barr*, official immunity has been held applicable to officials of the Legislative Branch.”<sup>240</sup> Notwithstanding this dictum, the *McMillan* opinion lends support to the opposite conclusion—that the Supreme Court has refused to apply the official immunity doctrine to members of Congress.

Although in the *McMillan* footnote Justice White, writing for the majority, alluded to the application of the official immunity doctrine to members of Congress, the Court rejected this possibility in its holding.<sup>241</sup> First, the defendants in the case, the Superintendent of Documents and the Public Printer, were neither legislative nor executive officials and were entitled to neither specific statutory nor common law immunity.<sup>242</sup> To the extent that they were to receive immunity protection, the vehicle providing such immunity would have been the doctrine protecting the government branch with which they were working.<sup>243</sup> In this case, the Superintendent and Printer only could claim that scope of immunity protection afforded to legislative officials.<sup>244</sup> Similarly, if the executive branch had delegated them a task, they would have received corresponding official immunity protection equal to that received by executive branch officials.<sup>245</sup> One can infer that although courts may similarly apply the doctrines of official immunity and Speech or Debate in certain situations, the doctrines themselves and the breadth of their protection are dissimilar.<sup>246</sup> Second, Justice White clarified any resulting doubt about this conclusion when he stated specifically that congressmen and their aides are granted no immunity beyond that which protects their legitimate activity.<sup>247</sup>

A more subtle indication that *Barr*-type immunity is inapplicable to members of Congress is found in the absence of any discussion of the doctrine in *Hutchinson v. Proxmire*.<sup>248</sup> The facts in *Proxmire* were agreeable to an official immunity claim by the defendant.<sup>249</sup> Similar to the factual scenarios in the *Sundquist* and *Brooks* cases in which the doctrine

240. 412 U.S. at 319 n.13.

241. *Id.* at 324.

242. *Id.* at 323.

243. *Id.*

244. *Id.* at 324.

245. *Id.* at 323.

246. *Id.* at 322.

247. *Id.* at 324. The Court explained that “Congressmen and aides are absolutely immune when they are legislating. But when they act outside the ‘sphere of legitimate legislative activity,’ they enjoy no special immunity from local laws . . . .” *Id.* (quoting *Tenny v. Brandhove*, 341 U.S. 367 (1951)).

248. 443 U.S. 111 (1979).

249. *Id.* at 114-17; *supra* notes 106-11 and accompanying text.



was raised as a defense, *Proxmire* involved the publication of an alleged libel by the defendant, Senator Proxmire.<sup>250</sup> Furthermore, like the defendant in *Barr*, Senator Proxmire had criticized certain executive practices that resulted in a private citizen filing a civil suit against him.<sup>251</sup> As with Barr's press statements, Senator Proxmire's description of waste in government spending was well within the scope of his official duties.<sup>252</sup> Nevertheless, Senator Proxmire appealed to the Speech or Debate Clause for immunity without mentioning the official immunity defense.<sup>253</sup>

There are two ways of analyzing the conspicuous absence of an official immunity defense in *Proxmire*. First, Senator Proxmire and the Court assumed that Speech or Debate was the only immunity doctrine available to members of Congress, as dictated by the *McMillan* opinion six years earlier.<sup>254</sup> Second, if there had been a nonconstitutional, common law doctrine available to members of Congress, the Court would have avoided the constitutional question and applied the common law doctrine.<sup>255</sup> Under either theory, the Speech or Debate Clause did not apply to the Senator's libelous remarks and official immunity was not available to him.<sup>256</sup>

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250. *Proxmire*, 443 U.S. at 114-17.

251. *Id.* at 130.

252. *Id.* at 133 (calling news and press releases "[v]aluable and desirable").

253. *Id.* at 130.

254. *See supra* notes 95-105.

255. If the Supreme Court had determined that the official immunity doctrine applied to members of Congress, the case could have been remanded to the court of appeals to consider the state law issues. On this issue, the Court has stated that "[o]ur practice is to avoid reaching constitutional questions if a dispositive nonconstitutional ground is available." *Proxmire*, 443 U.S. at 122; *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909). *Cf.* *Chastain v. Sundquist*, 833 F.2d 311, 317 (D.C. Cir. 1987) (commenting on the *McMillan* holding that "[n]or does it seem plausible that a case can be litigated all the way to the Supreme Court without anyone taking notice of a winning defense"), *cert. denied*, 487 U.S. 1240 (1988).

256. Some argue that because courts have applied the qualified immunity arm of the official immunity doctrine to members of Congress, application of the absolute immunity arm of the same doctrine should naturally follow. *See supra* note 149 (discussing the qualified immunity doctrine). Although this Comment specifically addresses the absolute immunity arm of the official immunity doctrine, these arguments warrant some discussion.

Two cases applying the qualified immunity doctrine to members of Congress arise out of the United States Court of Appeals for the District of Columbia Circuit. *See* *McSurely v. McClellan*, 753 F.2d 88, 99-102 (D.C. Cir.) (per curiam), *cert. denied*, 474 U.S. 1005 (1985); *Walker v. Jones*, 733 F.2d 923, 932-33 (D.C. Cir.), *cert. denied*, 469 U.S. 1036 (1984). In both cases, the court suggested that members performing nonlegislative official functions, challenged as violating statutory and constitutional law, could find immunity protection in the qualified immunity doctrine. *See* *McSurely*, 753 F.2d at 99-100; *Walker*, 733 F.2d at 932. Proponents of applying the official immunity doctrine to Congress conclude that the *McSurely* and *Walker* holdings presuppose the extension of absolute official immunity to

### 3. Dispositive Policy

A central argument for critics of the current legislative immunity doctrine is that public policy commands the application of *Barr*-type immunity to members of Congress.<sup>257</sup> First, critics argue that the same principles guiding the application of executive and judicial official immunity must similarly direct implementation of official immunity to members' nonlegislative duties. Such principles include: encouraging the vigorous performance of official duties;<sup>258</sup> encouraging entrance into public service;<sup>259</sup> preventing official inaction and cowardly decision-making;<sup>260</sup> and removing the onus of time-consuming litigation.<sup>261</sup> Second, they maintain that representation involves communication between members and their constituents that cannot be achieved merely through the

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common law torts committed by members. See *Sundquist*, 833 F.2d at 333 (Mikva, J., dissenting).

The *Walker* court itself contradicted this corollary when it said that "the Supreme Court has instructed that absolute immunity for members of Congress does not extend beyond the scope of the Speech or Debate Clause." *Walker*, 733 F.2d at 932. Furthermore, the dissent in *Walker* noted that "[i]n light of the Supreme Court's ruling that Speech or Debate immunity constitutes the sole separation-of-powers barrier to adjudication of such cases, the majority's indication that qualified official immunity might shield defendants from liability in this case is puzzling." *Id.* at 937 n.7 (MacKinnon, J., dissenting). Note also that the *Walker* court refused to apply the qualified immunity doctrine. *Id.* at 933 (majority opinion) ("The blank record and misdirected argument now before us, in short, supply no justification for dismissing this action on a qualified immunity ground.").

Unlike the *Walker* case, the *McSurely* court held the defendant congressman and his aide immune from constitutional and statutory liability. *McSurely*, 753 F.2d at 110. The court, however, assumed the extension of qualified immunity without any discussion of its background or validity. *Id.* Nor was there mention of the absolute immunity doctrine. *Id.* Taking from the opinion's precedential quality, the court did conclude: "The legal world will little note nor long remember the fine lines that have been drawn in this opinion . . . . It will be enough if our opinion finally ends this sorry chapter of investigative excess." *Id.* at 115.

As the preceding discussion reveals, not only is the conclusion that absolute official immunity applies to members specifically denied, but the prospect of qualified immunity for members in these cases stands on shaky legal grounds.

257. See *Sundquist*, 833 F.2d at 331 (Mikva, J., dissenting); *Immunity Hearings*, *supra* note 6, at 7-8 (statement of Rep. Brooks); Brooks Brief, *supra* note 10, at 37; Batchelder, *supra* note 6, at 402; McDonald, *supra* note 10, at 1121.

258. See *Sundquist*, 833 F.2d at 330.

259. See, e.g., Freed, *supra* note 120, at 529 n.19 (highlighting the negative impact that eliminating official immunity protection would have on the qualified employment pool).

260. *Id.*

261. See, e.g., *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (suggesting that the threat of such litigation would unnecessarily hamper executive branch officials in the "unflinching discharge of their duties"), *cert. denied*, 339 U.S. 949 (1950).

passage and enactment of legislation.<sup>262</sup> Third, members must be free to inform their constituents, respond to their needs, and keep them apprised of government activities.<sup>263</sup> Finally, critics emphasize that legislators, the only officials whom the Constitution explicitly protects, actually receive the least amount of immunity protection as a direct result of this textual protection.<sup>264</sup> The executive and judiciary, receiving no constitutional immunity, emerge with broader protection. In their view, this disparity makes no practical sense.<sup>265</sup>

Undeniably, each of the policy arguments would bolster significantly the existing legislative immunity doctrine. Furthermore, maintaining the vitality of members' nonlegislative responsibilities to meet these policy concerns is a realistic and necessary concern. Achieving these goals, however, need not and cannot be accomplished by providing members of Congress with extra-constitutional immunity protection.

First, the duties to which these policy mandates attach historically have been determined by the constitutional and statutory responsibilities of the various officials.<sup>266</sup> Courts have granted common law immunity to judges, prosecutors and grand jurors because performance of their constitutional, statutory, and delegated duties would be impossible without it.<sup>267</sup> The same holds true for executive officials, including both department heads<sup>268</sup> and lower level officials.<sup>269</sup> Courts have never granted this form of immunity to members, as suggested above, because their constitutional functions and the policy concerns that affect these functions are

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262. See 134 CONG. REC. 10,576 (1988) (statement of Rep. Michel) ("If we are unable to speak forthrightly and fairly within the bounds of our official duties, we will be less able to represent the people we are elected to serve.").

263. See Brooks Brief, *supra* note 10, at 37 ("[I]f officials do not receive official immunity, they [will] hesitate to give public statements in their official capacities."); Batchelder, *supra* note 6, at 404.

264. See 134 CONG. REC. 10,576 (1988) (statement of Rep. Michel); Brooks Brief, *supra* note 10, at 37 n.25. *But see* Eades v. Sterlinske, 810 F.2d 723, 725 n.1 (7th Cir. 1987) (noting that "judicial immunity affords less protection than legislative immunity under the Speech or Debate Clause") (citing Dennis v. Sparks, 449 U.S. 24, 30 (1980)), *cert. denied*, 484 U.S. 847 (1987).

265. Eades, 810 F.2d at 725 n.1.

266. See Chastain v. Sundquist, 833 F.2d 311, 321 (D.C. Cir. 1987) (discussing the diverse constitutional functions of the three federal branches of government which dictate separate forms of immunity protection), *cert. denied*, 487 U.S. 1240 (1988).

267. See Imbler v. Pachtman, 424 U.S. 409, 422-23 (1976) (granting grand jurors official immunity); see also Yaselli v. Goff, 275 U.S. (13 Wall.) 503 (1927) (granting prosecutorial immunity); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872) (granting immunity to judges).

268. See, e.g., Spalding v. Vilas, 161 U.S. 483, 498 (1896) (holding that "[t]he interests of the people require that due protection be accorded" to the "heads of Executive Departments when engaged in the discharge of duties imposed upon them by law.").

269. See Barr v. Matteo, 360 U.S. 564, 573 (1959).

absolutely protected by the Constitution itself.<sup>270</sup> Members can lobby their colleagues to push bills through the legislative process; they can direct their staff to gather information or conduct oversight hearings to gain support and momentum for their initiatives; and, whether necessary or not, they can libel anyone with impunity in the House or Senate chamber or in committee. As a result, members can vigorously pursue their legislative agendas without fear of a lawsuit. The populace need not worry about inaction or cowardice of members afraid to pursue policy-making. And potential candidates can rest assured that upon election they will be able to push their constituents' interests forward through legislation without unwanted litigation hampering their efforts.

Second, although communications between members and constituents are an essential ingredient of representative government, refusing to expand legislative immunity to accommodate the official immunity doctrine will not impair members' non-legislative performance. Members' communications with constituents will not suffer. For instance, members may use their franking privileges, news conferences, press releases, and speeches in their home districts to inform, establish strong ties with, and solicit viewpoints from their constituents. Members of Congress need only adhere to the manifest rules of proper official conduct articulated in the limited body of legislative immunity cases,<sup>271</sup> which forbid them from defaming others through nonlegislative, unprotected means.<sup>272</sup>

Members are accustomed to tailoring their legislative and nonlegislative behavior to abide by a wide range of rules<sup>273</sup> and statutes.<sup>274</sup> For

270. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). Underscoring the essential policy requirements satisfied by the Speech or Debate Clause, Justice Frankfurter stated that "[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." Like Justice Frankfurter, Justice Harlan in *Barr* focused on the satisfaction of legislative policy requirements by the Speech or Debate Clause before going on to discuss a comparable nexus between the official immunity doctrine and the various officials protected by it. *Barr*, 360 U.S. at 569-70.

271. See *supra* part I.A.

272. See *supra* text accompanying note 81 text (detailing unprotected, non-legislative activity); *supra* note 203 (discussing historical tradition dictating the scope of protected activity).

273. Pursuant to a federal statute and separate House rules, members of both the House and Senate must abide by recent bans on honoraria. 5 U.S.C. app. 7, § 501(b) (Supp. IV 1992) (adding section 501(b) to the Ethics in Government Act of 1978); House Rule XLIII, cl. 1(a)(1)(B); House Rule XLIII, cl. 5. Accordingly, members are forbidden from receiving compensation for speeches, appearances, or articles subject to certain limited exceptions. See HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, HOUSE ETHICS MANUAL, 102d Cong., 2d Sess. 91 (1992).

274. Federal criminal law prohibits a member from receiving a bribe—something of value in return for being influenced—or from receiving an illegal gratuity—for or because of an official act. See 18 U.S.C. § 201(b) (1988) (bribery statute); *id.* § 201(c) (illegal gratuity statute).

instance, in representing constituent interests before administrative agencies, members may intervene to urge action or reconsideration of a matter, express opinions on pending issues, gather information and status reports, or secure appointments.<sup>275</sup> But to intervene, they must abide by certain standards of conduct. For example, federal law prohibits a member of Congress from communicating with an administrative agency off-the-record on the merits of a particular matter under formal agency consideration—termed an *ex parte* communication.<sup>276</sup> Members have notice of these rules and traditions and should conduct themselves accordingly.<sup>277</sup>

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ities statute); *see also* *McCormick v. United States*, 111 S. Ct. 1807, 1815-17 (1991) (discussing the quid pro quo element of bribery); *United States v. Brewster*, 506 F.2d 62, 71-4 (D.C. Cir. 1974) (construing the bribery and illegal gratuities statute). *See generally* HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, HOUSE ETHICS MANUAL, 102d Cong., 2d Sess. 52-56 (1992) (discussing bribery and illegal gratuity statutes). Federal statutes also prohibit extortion—inducing an action under the color of official right. 18 U.S.C. § 1951(b)(2); *Evans v. United States*, 112 S. Ct. 1881 (1992) (construing the extortion statute).

275. *See, e.g.*, *Sierra Club v. Costle*, 657 F.2d 298, 409-10 (D.C. Cir. 1981) (upholding a member's right to represent constituent's interest before agency despite allegations of impropriety); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1256-62 (D.C. Cir.) (refusing to vacate agency ruling despite alleged improper influence by congressman), *cert. denied*, 405 U.S. 1030 (1972); *Pillsbury Co. v. Federal Trade Comm'n*, 354 F.2d 952, 963-65 (5th Cir. 1966) (vacating administrative adjudicatory ruling as a result of improper intervention by member); *see also* SELECT COMMITTEE ON ETHICS, INVESTIGATION OF SENATOR ALAN CRANSTON, S. REP. NO. 102-223, 102d Cong., 1st Sess. (1991) (analyzing the "Keating Five" investigation). *See generally* HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, HOUSE ETHICS MANUAL, 102d Cong., 2d Sess. 239-59 (1992) (analyzing casework considerations).

276. 5 U.S.C. § 557(d) (1988) (*ex parte* statute); *see also* *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir.) (ruling that *ex parte* communications that produce information relevant to a rulemaking must be disclosed on the record), *cert. denied*, 434 U.S. 829 (1977); HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, HOUSE ETHICS MANUAL, 102d Cong., 2d Sess. 242 (1992) ("The *ex parte* rule is designed to preserve the due process rights of all parties to administrative proceedings.").

277. Congressman Sundquist, for instance, could have levelled the same allegations about petitioner Chastain's harassment of local officials and consorting with felons without going to the press. *Chastain v. Sundquist*, 833 F.2d 311, 313 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1240 (1988). His allegations would have been protected by the Speech or Debate Clause had he spread them in legislative debate, at a committee hearing, or during Special Orders. *See infra* notes 279-83 and accompanying text. Ultimately, and without serious delay, the same message would have reached his constituents. *Id.*

Similarly, Congressman Brooks, with impunity, could have stated that plaintiff Williams was a "'small-time hustler.'" *Williams v. Brooks*, 945 F.2d 1322, 1324 (5th Cir. 1991) (quoting complaint), *cert. denied*, 112 S. Ct. 1996 (1992). It would appear—given that the Continuing Appropriations Bill for Fiscal Year 1987 specifically related to the controversy—that Congressman Brooks instead might have delivered these words in a protected legislative forum. *Id.* at 1323-24.

This analysis involves a considerable amount of hindsight. Nonetheless, both Congressmen Sundquist and Brooks had notice that their activity would not be protected.

Third, members' ability to inform their constituents is not chilled by adherence to these principles.<sup>278</sup> In fact, the advent of nationally televised debate in the House and Senate has mooted most arguments questioning the effectiveness of the informing function.<sup>279</sup> The House of Representatives, for instance, opens its daily sessions with miscellaneous speeches and concludes with a period of "Special Orders."<sup>280</sup> This provides members with an opportunity to address their constituents and the nation on any topic without being constrained by the House's stringent debate rules that apply during regular business. For instance, on September 14, 1992, Congressman Henry Gonzalez stood before the House of Representatives during "Special Orders" and condemned alleged criminal conduct by the executive branch over American foreign policy in Iraq before the Gulf War,<sup>281</sup> and in the process, revealed allegedly classified and contentious materials.<sup>282</sup> Not only were Congressman Gonzalez's orations immune from lawsuit as protected speech under the Speech or Debate Clause, but, as a result of the heavy media coverage of his actions, his home state constituents and the nation presumably gained information regarding activities of the federal government.<sup>283</sup> Thus, critics' fears of a curtailed informing function are misplaced.

Fourth, the unequal apportionment of immunity protection reflects the vulnerability to suit of executive and judicial officials as compared to legislative officials who may pose a threat to the citizenry.<sup>284</sup> The inequality

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278. See *Immunity Hearings*, *supra* note 6, at 7-8 (statement of Rep. Brooks) (suggesting that exposing members' non-legislative conduct to liability would have a "chilling effect" on members' obligation to inform constituents on controversial issues).

279. See generally SULA P. RICHARDSON, U.S. LIBRARY OF CONGRESS, TERM LIMITS FOR FEDERAL LIMITS FOR FEDERAL AND STATE LEGISLATORS: BACKGROUND AND RECENT STATE ACTIVITY 9 (1993) ("A number of the speeches made by Members during televised floor proceedings or hearings are ideally suited for television, in that they can serve as effective 'visual press releases.'") (quoting ILONA B. NICKELS, U.S. LIBRARY OF CONGRESS, ONE-MINUTE SPEECHES: HOUSE PRACTICE AND PROCEDURE 3 (1990)).

280. House of Representatives Rule 14, cl. 2 authorizes the Speaker of House to recognize members who request permission to address the House for up to one hour, whether in one-minute or "special order" speeches. House Rule XIV, cl. 2.

281. 138 CONG. REC. H8349-56 (daily ed. Sept. 14, 1992)

282. 138 CONG. REC. H8738 (daily ed. Sept. 18, 1992) (recording refusal of a majority of the House to investigate Congressman Gonzalez charged in violation of House rules for divulging classified information regarding the Iraqgate controversy during Special Orders).

283. Louis DuBose, *The Scourge of 'Iraqgate'*, CHRISTIAN SCI. MONITOR, Oct. 26, 1992, at 18 (detailing contents of classified CIA letter regarding the BNL bank scandal revealed by Representative Gonzales on the House floor); Elaine Sciolino, *Iraq Policy Assailed in Bank Case*, N.Y. TIMES, Sept. 15, 1992, at D1 (same); Simon Tisdall, *Baker 'Signed Clearance for Iraqi Arms Company'*, THE GUARDIAN, Oct. 19, 1992, at 24 (same); MacNeil/Lehrer News Hour: *Iraqgate Update* (PBS television broadcast, Oct. 8, 1992) (same), available in LEXIS, Nexis Library, Transcript File.

284. See *supra* notes 224-34 and accompanying text.

is inevitable and essential. To fulfill their constitutional, statutory, and delegated responsibilities, executive and judicial officials face daily enforcement decisions that impact directly upon specific individuals.<sup>285</sup> Conversely, it is precisely the impact that members' nonlegislative actions and the "political" motivations underlying them can have upon individual citizens that dictates the foreclosure of official immunity to these functions. Members have nearly unencumbered access to their constituents via the media<sup>286</sup> and the franking privilege. With ease, a member can address his or her constituency under the pretense of official or political necessity and, in the process, personally malign a private citizen or a candidate challenging his or her incumbency.<sup>287</sup> The citizen or nonincumbent candidate, on the other hand, may lack this access to the media and the public and therefore probably has limited ability to rebut such an attack.

Furthermore, members of Congress often will employ nonlegislative aspects of their office to facilitate reelection. Writing for the *Brewster* Court, Justice Burger referred to nonlegislative activities as "political in nature" and "a means of developing continuing support for future elections."<sup>288</sup> Likewise, members themselves have noted the extent to which some of their colleagues abuse their official functions to gain reelection, frequently at the expense of effective lawmaking.<sup>289</sup> Conversely, because executive (below the President) and judicial officials are nonelected, their full range of official activities may not be motivated by political gain to the same extent as legislators. Therefore, the apparent inequity in apportionment of common law immunity to members is justified by the need to

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285. See *Chastain v. Sundquist*, 833 F.2d 311, 321 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1240 (1988).

286. See generally SULA RICHARDSON, U.S. LIBRARY OF CONGRESS, CONGRESSIONAL TERMS OF OFFICE AND TENURE: HISTORICAL BACKGROUND AND CONTEMPORARY ISSUES 40 n.112 (1991) ("Members of Congress can provide their own press coverage; hometown newspapers often print Representatives' press releases, and local television stations use their satellite-forwarded film clips.") (quoting Mark Tushnet et al., *Judicial Review and Congressional Tenure: An Observation*, 66 TEX. L. REV. 967, 973-74 (1988)).

287. See *Williams v. Brooks*, 945 F.2d 1322, 1323 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1996 (1992); *Sundquist*, 833 F.2d at 313.

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

289. One member stated:

I am tremendously concerned about the amount of time congressmen spend in selling their wares to constituents. . . . The real question is whether it has become part of our existence to campaign not so much on whether or not we are doing a good job or representing the basic thinking of our people . . . . If they see the name often enough, they will buy it once more. I think that is one of our real problems.

See CLAPP, *supra* note 209, at 59.

safeguard the electorate from legislators' potential abuse of their public office.

Finally, extending absolute immunity to members' nonlegislative activities would prove problematic for the courts, which ultimately are responsible for maintaining proper immunity protection for members of Congress. Members would call upon the courts to protect their libelous attacks upon private citizens, political opponents, or anyone else personally maligned. To avoid sanctioning such conduct, the courts would have to construct arbitrary limits on what they would consider official functions deserving absolute immunity. For instance, the courts might have to distinguish between member-constituent communications facilitating the informing function and those communications representing a vehicle for personal vengeance or political posturing. This would require the judiciary to affix new standards to the legislative immunity doctrine where no precedent exists to justify the intrusion. The result would be to afflict an historically consistent immunity doctrine designed to protect members' essential legislative functions with an arbitrarily constructed, politically charged expansion of immunized conduct. In turn, augmentation of such a doctrine could impose an immense administrative burden on the courts. Strong public policy mandates avoiding such a burden.

### III. A PROPOSAL: REACHING FORWARD FOR THE STATUS QUO

Despite the volume of commentary to the contrary, the legislative immunity doctrine must not extend beyond the Speech or Debate Clause. The teachings of the Constitution's Framers, the functional distinctions between the duties of legislators and executive and judicial officials, and steadfast public policy standards command this conclusion. The conduit for recent efforts to expand the legislative immunity doctrine has been defamation suits against members of Congress.<sup>290</sup> In response, critics of the status quo have attempted to graft the common law doctrine of official immunity onto the legislative immunity doctrine.<sup>291</sup> The courts must resist these attempts.

First, the courts must adhere to the scope of protection articulated by the Framers. The Framers incorporated the Speech or Debate Clause into the Constitution to insure the independence of the congressional legislative mandate.<sup>292</sup> They did so with the knowledge that private forces and the other two branches inevitably would seek to impact upon that

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290. See *supra* notes 151-69 and accompanying text.

291. See *supra* notes 173 and 200 and accompanying text.

292. See *supra* note 35.



legislative authority.<sup>293</sup> Consequently, the immunity they extended was absolute.

The scope of that immunity, however, was confined to the legislative sphere.<sup>294</sup> Contrary to what critics may argue,<sup>295</sup> the scope of legislative immunity envisioned by the Framers could not have included the modern range of members' nonlegislative activities.<sup>296</sup> Not only did the Framers emphasize legislators' general accountability to the electorate for improper conduct, but they specifically forbade protection of members' libelous statements outside the chambers of Congress.<sup>297</sup> The Supreme Court and the circuit courts have responded to the Framers' intentions by providing legislative immunity only to members' legislative duties and only through the Speech or Debate Clause.<sup>298</sup>

Second, the purpose of both the legislative immunity and official immunity doctrines has been to protect the respective officials' essential functions.<sup>299</sup> It is imperative that executive officials carrying out the laws be able to "legislate" through rulemaking and "adjudicate" through formal agency procedures.<sup>300</sup> Judicial officials must likewise be able to perform the full range of their official functions, which includes rulemaking and enforcement.<sup>301</sup> Courts should protect these varied functions to their "outer periphery" because they impact directly upon private citizens and leave the officials otherwise vulnerable to private civil suits. If, for example, an executive official were to announce publicly allegations of criminal conduct by a specific private citizen in light of an impending investigation, that official would be immune from any defamation suit filed against him or her.<sup>302</sup>

A legislator's primary constitutional responsibility is to consider the enactment of laws. The Constitution will protect absolutely any duty integral to that process from civil and criminal suits filed by the executive, the judiciary, or the citizenry.<sup>303</sup> Courts also have broadly interpreted these legislative actions to ensure a member's absolute discretion. Therefore, if a member chooses to defame a private citizen on the House floor for one

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293. In fact, the Supreme Court has considered suits filed by the private sector and the other branches of government only 11 times. *See supra* note 2.

294. *See supra* notes 187-203 and accompanying text.

295. *See supra* notes 187-90 and accompanying text.

296. *See supra* notes 190-203 and accompanying text.

297. *See supra* note 203.

298. *See supra* parts I.A., I.C.

299. *See supra* notes 217-38 and accompanying text.

300. *See supra* part I.B.2.

301. *See supra* part I.B.1.

302. *See Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927).

303. *See supra* part I.A.

hour during a nationally televised debate, he or she may do so with impunity.<sup>304</sup> For any action falling outside the legislative sphere, however, a member must be held liable to the same extent that private citizens are accountable to one another.<sup>305</sup> Therefore, just as one private citizen may not libel another, neither may a member take advantage of his or her public notoriety and easy access to the national media to libel a private citizen or political opponent beyond the context of congressional debate. Such activity is not legislative, albeit "political" in a more general sense.

Third, public policy traditions further prescribe maintenance of mutually exclusive immunity doctrines. Public policy dictates that members of Congress vigorously perform their legislative functions without the threat of time-consuming litigation that would chill this ability. Speech or Debate Clause immunity provides this protection. By contrast, it is the unencumbered execution and interpretation of the laws that for over a century has fixed the application of the official immunity doctrine.<sup>306</sup> Each of the distinct immunity doctrines meets the policy needs of the officials to whom it applies; neither deserves the intrusion of the other.<sup>307</sup>

Furthermore, although many member-constituent activities are guided by longstanding rules and statutes,<sup>308</sup> it is within the area of direct communications between a member and constituents where specific statutes and congressional rules do not reach and where a member can most injure a private citizen or political opponent. Consequently, the courts simply have refused to extend legislative immunity to nonlegislative communications.<sup>309</sup> Critics of the existing legislative immunity doctrine describe the demise of these networks of communications and with them the informing function. Members are on notice, however, and have a choice. They are aware of what they cannot say in a nonlegislative capacity and are equally cognizant that they can say anything they please in a legislative forum. At a time when societal trust of Congress has declined and citizens are demanding heightened accountability from their elected officials, the courts must not free national legislators to engage in political or personal activity heretofore not immunized from scrutiny.

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304. For a variety of legislative functions, members of Congress will be held immune from liability. *See supra* text notes 79-80.

305. *See supra* notes 165, 203 and accompanying text.

306. *See supra* part I.B.

307. *See supra* notes 266-89 and accompanying text.

308. *See supra* notes 273-76 and accompanying text.

309. *See supra* parts I.A., I.C.

#### IV. CONCLUSION

The doctrine of legislative immunity currently extends only to House and Senate members' legislative activity through the Speech or Debate Clause of the United States Constitution. Critics of the existing doctrine assert that courts must equally protect members' nonlegislative, constituent-related responsibilities. They argue that courts should extend the common law official immunity doctrine, historically applied to the executive and judicial branches exclusively, to these nonlegislative functions. At the core of legislative immunity development and jurisprudence, however, is the goal of protecting the institutional independence of the legislative function, not the attendant political activities that arguably enable individual members to be more "effective" in their roles. Incorporating official immunity as part of the legislative immunity doctrine not only would sabotage this underlying principle, but also would undermine the basic legal and policy tenets articulated by the Framers, the Constitution, and the courts.

*Charles W. Johnson IV*