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Legal Sidebar

A Tale of Two Immunities: Constitutional Protections for Members of Congress and Presidents When Speaking to the Public

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Presidents and Members of Congress regularly communicate with the American public. When the President speaks directly to the people, he is often either conveying information or using the "bully pulpit"—a term coined by Theodore Roosevelt to describe the persuasive powers of the presidency—to sway public opinion. Individual Members of Congress enjoy a somewhat less conspicuous, but no less significant, public platform that allows them to advocate and keep constituents informed. Elected officials' ability to communicate with those whom they represent, whether to influence or inform, is encouraged under the law, and has been recognized by the federal courts as critical to "maintaining our representative democracy."

Despite the similarities in their public-facing roles, Presidents and Members are treated quite differently by the Supreme Court with respect to efforts to inform or influence the public. On one hand, Presidents (following *Trump v. United States*) appear to enjoy either an absolute or presumptive immunity from liability for nearly any statement to the public that relates to official duties. Members of Congress, on the other hand, though enjoying absolute protection for statements made in congressional proceedings, generally do not enjoy constitutional protection from liability when communicating directly to the public outside of the congressional forum, even when those statements relate to their official duties. Absent constitutional immunity, Members must rely on other protections, including the First Amendment and perhaps other separation-of-powers principles, to defend themselves when executive or judicial authority is used in an effort to punish a Member for public comments.

This Sidebar addresses this contrast in treatment by comparing the President's implicit immunity under Article II with Member immunity under the Speech or Debate Clause.

Presidential Immunity and Public Communications

Article II of the U.S. Constitution does not explicitly provide the President with immunity from legal liability for his actions. A series of Supreme Court cases, however, has recognized that Presidents must enjoy some implicit constitutional protections from both criminal and civil legal action to ensure the

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functioning of government. On the civil side, a President has absolute immunity from civil suits for acts taken "within the 'outer perimeter' of his official responsibility" but no immunity for unofficial acts or acts taken before or after taking office. On the criminal side, the Court held in *Trump v. United States* that Presidents possess absolute immunity from criminal punishment for actions taken while in office that relate to "core" or "exclusive" presidential powers, at least presumptive immunity for all other "official acts," but no immunity for "unofficial" acts.

The presidential immunity cases make clear that distinguishing between official and unofficial activity is central to the immunity analysis. Although that line can be difficult to draw, in *Trump*, the Court confirmed that when the President speaks to the public, that act will often "fall comfortably within the outer perimeter of his official responsibilities." This activity would include not only communications relating to his administration's policies and priorities but also "matters of public concern that may not directly implicate the activities of the federal government." When, however, the President speaks as "candidate for office or party leader," he may be speaking in his personal or unofficial capacity. Even then, differentiating between "personal and official affairs" can be "challenging" and requires a "fact specific" analysis before an immunity determination can be made.

The mode or method of communicating to the public appears to be less relevant to whether the President receives immunity. If the communication relates to official duties, the President would appear to be at least presumptively immune from liability regardless of whether the statement was made in a speech, an exchange with a reporter, a social media message, or some other more traditional presidential communication.

Member Immunity and Public Communications

Unlike the President, Members of Congress enjoy a constitutionally explicit form of legal immunity. The Speech or Debate Clause ensures that, "for any Speech or Debate in either House," Members of Congress "shall not be questioned in any other Place." The Court has interpreted the Clause to promote legislative independence and restrict executive or judicial intrusions into the legislative sphere. Under this broad reading, the Clause provides Members (and staff) with various forms of immunity that extend well beyond "speeches" or "debates" undertaken in the halls of Congress, and instead protects Members from liability for any "legislative act"—which the Court has defined as conduct that is an "integral part of the deliberative and communicative processes" through which Congress implements "matters which the Constitution places within the jurisdiction of either House." The immunity that the Clause provides is absolute, applies in civil, criminal, and administrative proceedings, and, at least in some circuits, protects Members from compelled disclosures in various forms of investigations.

Under the Speech or Debate Clause, the critical threshold question is not whether an act is official, as in the presidential immunity cases, but is instead whether an act is deemed "legislative." As the courts have repeatedly observed, not all official acts are legislative acts, meaning that not all actions taken by Members in the course of their official responsibilities receive protections under the Clause.

The Supreme Court has held that individual Member communications with the public are an example of official, but unprotected (i.e., nonlegislative), conduct. In the 1972 case of *United States v. Brewster*, for example, the Court suggested that "Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include . . . preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." Seven years later, in *Hutchinson v. Proxmire*, the Court denied Speech or Debate Clause protections to a Senator who had been sued for defamation after distributing newsletters and press releases that characterized the plaintiff's government-funded research as an "egregious example of wasteful government funding." In doing so, the opinion concluded that, although the Senator would have been "wholly immune" from suit had he expressed the same sentiments on the Senate floor, statements made in public newsletters and

press releases were not part of Congress's "deliberative process" and thus did not receive the same protection. According to the Court,

> the transmittal of [] information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process. As a result, transmittal of such information by press releases and newsletters is not protected by the Speech or Debate Clause.

As distinct from presidential immunity, the mode or method of informing the public is thus highly relevant to whether a Member receives immunity. Communications to the public through speeches on the House or Senate floor or in a committee hearing are clearly protected, as would be anything entered into a committee report. The Court, however, views other forms of communications differently—including the type of direct communications from a Member to the general public that occur every day through newsletters, press releases, interviews, or social media. These communications, the Court has suggested, "represent the views and will of a single Member" rather than "the collective expressions of opinion within the legislative process" and are therefore not entitled to Speech or Debate Clause protections.

The Court has acknowledged that its holdings are not intended to "disparage either [the] value or [the] importance" of Member communications with the public. Members of Congress have been communicating directly with their constituents since the very first Congress, including through "circular letters"—letters written by individual Members on important matters and distributed throughout their district—and later through the use of the franking privilege (allowing Members to transmit mail matter under their signature without postage). These letters are perhaps the best founding-era evidence of individual Members' long-standing role in engaging with the public. Despite this long history, the Court has not viewed these activities as "legislative" for purposes of the Clause, with the consequence that Members may be subject to liability when engaged in what has sometimes been referred to as Congress's "informing function."

Legislative Immunity and Social Media

Hutchinson was issued in 1979 and centered around a physical newsletter, but the opinion has heavily influenced how courts approach legislative immunity and modern social media use. The U.S. Court of Appeals for the Eleventh Circuit, for example, has relied on *Hutchinson* to hold that a state representative's "official Twitter and Facebook accounts are not legislative in nature" and, therefore, that comments made on those platforms are generally not entitled to legislative immunity. (Although the Constitution's Speech or Debate Clause does not apply to members of state legislatures, state legislators typically possess a similar legislative immunity that has been informed by the Court's Speech or Debate Clause jurisprudence.) In a 2025 case, a federal district court similarly relied on *Hutchinson* to hold that a state senator's post on X (formerly Twitter) did not trigger legislative immunity. In that case, the senator reposted a picture of the plaintiff that inaccurately stated that the plaintiff was an illegal immigrant responsible for the Kansas City Chiefs' Super Bowl Parade shooting. In doing so, the senator added: "@POTUS CLOSE THE BORDER."

The plaintiff sued the senator for libel. Ruling on a motion to dismiss, the court held that, although the senator's post "informed the public and the President of the United States of his position" on a "salient political issue impacting" the senator's constituents, the post was nevertheless akin to the press releases and newsletters in *Hutchinson* and not an "integral part" of the legislative process under the standards established by the Supreme Court. The court also determined that directing the post toward the President did not turn the conduct into protected legislative activity, as the Supreme Court has held that efforts by individual legislators to influence how the executive branch implements or administers the laws are not essential to the legislative function and not protected by the Clause, at least when conducted outside of official legislative avenues. As stated by the Supreme Court: "Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole,

and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity."

Although absolute Speech or Debate Clause immunity may not be applicable when a Member faces legal liability for social media use, they may receive other legal protections, including under the First Amendment right to free speech. Still, the First Amendment would only provide a potential defense to a claim or charge, not outright immunity—meaning the Member would need to expend the time and resources necessary to defend himself. When the Speech or Debate Clause applies, on the other hand, it acts as an "absolute bar," and the Member is protected "not only from the consequences of litigation's results but also from the burden of defending themselves." This strong protection, the Court has reasoned, reflects the Clause's role in the separation of powers and is necessary to shield Members from "intimidation by the executive" or efforts to improperly influence or harass legislators through retaliatory litigation.

Conclusion

As described above, existing Court precedent suggests that, while the President may enjoy absolute or presumptive immunity when he communicates with the public on matters of national interest, Members generally do not receive the same protections, at least not when they speak to the public through social media, press releases, or other forms of direct constituent communications. Congress could, however, alter the current legal framework if it chose. While it cannot supersede the Court's interpretation of constitutional protections under the Speech or Debate Clause or the separation of powers, it is likely that Congress could expand legal protections for Members legislatively, for example by enacting a form of statutory immunity or establishing other legal protections for Members' efforts to either inform or influence the public.

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