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Let Legislators Legislate: The Circuit Split Over Allowing Members of Congress to File Interlocutory Appeals to Avoid Litigation

Matthew Higgins
University of Cincinnati, higginmw@mail.uc.edu

LET LEGISLATORS LEGISLATE: THE CIRCUIT SPLIT OVER ALLOWING MEMBERS OF CONGRESS TO FILE INTERLOCUTORY APPEALS TO AVOID LITIGATION

*Matthew Higgins**

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

- James Madison, President of the United States[1]

I. INTRODUCTION

When an individual is elected to office, voters expect him or her to behave ethically. Furthermore, voters expect their representative to be held accountable if they behave unethically or break the law. American voters have historically held their representatives to a high standard and held firm in the notion that no one is above the law in our system of democracy.[2] The United States government is also based on the notion that avoiding tyranny is best accomplished through a decentralized government.[3]

One way to ensure a decentralized government and avoid the centralization of power is to ensure that each branch of government is armed with self-defense against the other branches.[4] The founders granted each branch of government exclusive powers through the various articles of the Constitution.[5] A nightmare scenario of the framers was that one branch could intimidate the other through the use of the judiciary.[6] For instance, if the Executive could intimidate legislators into following its agenda by indicting individual legislators and burdening them with

* Associate Member, 2018-19, *University of Cincinnati Law Review*

1. James Madison, *The Federalist Papers no.* 51 (1788).

2. *See* United States v. Nixon, 418 U.S. 683, 715 (1974).

3. "[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack." Scalia's dissent in *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (quoting Federalist No. 51, pp. 321–322).

4. *Id.*

5. *See, e.g.*, U.S. CONST. art. I; *id.* art. II; *id.* art. III.

6. *Works of Thomas Jefferson*, 322–23 (1797).

litigation, the founders believed that this would cause a disturbance in the balance of the government.

To avoid this nightmare, the Speech or Debate clause was included in the Constitution.[7] The separation of powers doctrine was also implicit in the structure of the Constitution and explicitly included in provisions such as the Rulemaking Clause.[8] When legislators have been indicted, Courts have traditionally allowed these provisions to permit a Member of Congress to file an interlocutory appeal.[9]

An interlocutory appeal is an appeal of a ruling by a trial court that is made before the trial itself has commenced or concluded. Interlocutory appeals are generally disfavored because they can lead to piecemeal litigation and judicial inefficiency.[10] As an exception, due to weighty policy concerns, *infra*, federal appellate courts have allowed Members of Congress to file pre-trial interlocutory appeals based on either a Speech or Debate Clause argument or a separation of powers doctrine argument.[11]

Nevertheless, the Seventh Circuit recently disallowed a Member of Congress to rely on a separation of powers argument and denied jurisdiction over the interlocutory appeal, creating a circuit split.[12] This is problematic because it limits a Member of Congress's ability to avoid the burdens of litigation. If a Member of Congress is improperly burdened with litigation, he or she is unable to adequately represent his or her constituents.

This Article will discuss the practical effects of each side of the Circuit split's approaches and conclude that Second, Ninth, Eleventh, and D.C. Circuits' approach should be adopted by all Circuit Courts. This Article proceeds as follows: first, Section II of this note will provide a general background of the Speech and Debate Clause and the separation of powers doctrine. Then, Section III will discuss the circuit split in detail which currently consists of the Second, Ninth, Eleventh, and D.C. Circuits agreeing that Members of Congress can seek interlocutory appeal based on both a Speech and Debate Clause argument and a separation of powers argument, whereas the Seventh Circuit only allows an interlocutory appeal based on the explicit "immunity" created by the

7. U.S. CONST. art. 1 § 6, cl. 1.

8. Only the House can interpret its rules and punish its Members under them. U.S. CONST. art. I, § 5, cl. 2.

9. An indictment in this context will likely arise out of alleged unethical or criminal behavior surrounding the duties of Congressmen—charges such as bribery or tax evasion. *See generally* United States v. Myers, 635 F.2d 932, 935–36 (2d Cir. 1980).

10. *See* 28 U.S. Code § 1292.

11. *See* United States v. Myers, 635 F.2d 932, 935–36 (2d Cir. 1980) (citing Helstoski v. Meanor, 442 U.S. 500 (1979)).

12. United States v. Schock, 891 F.3d 334 (7th Cir. 2018).

Speech or Debate clause.[13] After discussing the circuit split, Section IV will provide a more detailed argument of the Seventh Circuit's approach and concludes that the Seventh Circuit's approach is incorrect because it does not consider key policy concerns mentioned by other Circuits, improperly creates a structural versus individual separation of powers doctrine, tarnishes a representative democracy, and lacks judicial restraint.

II. BACKGROUND INFORMATION

A. The Speech or Debate Clause[14]

The inclusion of the Speech or Debate Clause in the American Constitution was influenced by the English legal tradition, or Common Law.[15] The Clause states: "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."[16] The Speech or Debate Clause is a privilege which, in theory, allows elected representatives to best focus on their representative duties by freeing them from coercion by the Judiciary or Executive branches of government.[17] Its key purpose is to "prevent intimidation by the executive and accountability before a possibly hostile judiciary."[18]

Although the Speech or Debate Clause was born from English tradition, the child is not identical to its parent. In the English system of government, Parliament is the supreme authority, rather than a co-equal branch of government.[19] While the English speech or debate privilege preserves legislative supremacy, the American privilege merely ensures the legislative branch remains independent from its coordinate branches.[20]

Therefore, the Supreme Court of the United States has restricted the Speech or Debate Clause privilege to only "legislative acts."[21] Specifically, the privilege applies only to actions related to voting and

13. *See* United States v. Rose, 28 F.3d 181, 185–86 (D.C. Cir. 1994); United States v. Claiborne, 727 F.2d 842, 844–45 (9th Cir. 1984); United States v. Hastings, 681 F.2d 706, 708–09 (11th Cir. 1982); *Myers*, 635 F.2d at 935–36 (2d Cir. 1980).

14. This section was largely guided by *Rose*, 28 F.3d at 181.

15. *See Rose*, 28 F.3d at 187. The English speech or debate privilege is enshrined in the English Bill of Rights. It arose out of a "history of conflict between the House of Commons and the Tudor and Stuart Monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators." United States v. Johnson, 383 U.S. 169, 178 (1966).

16. U.S. CONST. art. I, § 6, cl. 1.

17. *Works of Thomas Jefferson*, 322–23 (1797).

18. *Johnson*, 383 U.S. at 181.

19. United States v. Brewster, 408 U.S. 501, 508 (1972).

20. *Id.*

21. Gravel v. United States, 408 U.S. 606, 625 (1972).

various committee activities.[22] Surprisingly, the Court has held that many activities that are commonly on a representative's schedule, such as communicating with government agencies, assisting in securing government contracts, or delivering speeches outside of Congress are not protected under the Speech or Debate privilege.[23]

As discussed below, Members of Congress facing charges in a federal district court commonly rely on the Speech or Debate Clause to argue immunity from litigation.[24] The common argument presented is that the Judiciary does not have the authority to question the actions done in the legislative branch. Of course, to win on this argument the Member of Congress must persuade the court that his or her actions in question were "legislative acts" and thus qualify for the privilege.

B. Separation of Powers Doctrine

After defeating King George III, The Framers of the Constitution believed decentralization of government through separation of powers to be of the utmost importance to the success of the newly formed Republic.[25] The Separation of Powers doctrine is also referred to as a system of "Checks and Balances." Different articles of the Constitution grant different powers to each branch of government.[26] Article I of the Constitution grants specific powers to Congress which the other branches are not granted.[27] Specifically, it grants each House of Congress the power to regulate its own members: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[28]

Members of Congress commonly argue that another branch of government cannot bring a claim against, or oversee a case against, a member of the legislative branch because such claims encroach on the separation of powers doctrine. Because the Constitution granted Congress

22. Doe v. McMillan, 412 U.S. 306, 313 (1973) (Committee activities such as: "authorizing an investigation, holding hearings, preparing a report, and authorizing the publication and distribution of that report").

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

24. *See supra* note 9.

25. James Madison, *The Federalist Papers no. 47* (1788). ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny"). Also, post-Revolutionary War Americans increasingly viewed the separation of powers as "the most important attribute of the kinds of governments they had fought for." Entin, Jonathan L., "Separation of Powers, the Political Branches, and the Limits of Judicial Review" (1990). *Faculty Publications*. Paper 367 (quoting G. Wood, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 453 (1969).

26. *See, e.g.*, U.S. CONST. art. I; *id.* art. II; *id.* art. III..

27. U.S. CONST. art. I.

28. U.S. CONST. art. I, § 5, cl. 2.

the power to self-regulate its Members, Members of Congress argue that another branch cannot litigate the internal affairs of Congress. [29]

III. AN OVERVIEW

There is a long history of jurisprudence allowing for Members of Congress to file for interlocutory appeal based on arguments claiming immunity under the Speech or Debate Clause or the separation of powers doctrine.[30] The general consensus among the federal circuits was that the policy reasons for normally disallowing interlocutory appeals—mainly judicial efficiency—were outweighed by the policy considerations of Members of Congress facing litigation.[31] The policy concern for legislators is that they cannot properly represent their constituents if they are burdened with litigation. Therefore, the interlocutory appeal situation most commonly arose when a pretrial motion to dismiss a claim based on either the Speech or Debate Clause or a separations of powers argument had been denied by the district court. The denial of the aforementioned claim is not a "final order," but many Circuit Courts grant interlocutory appeal because allowing litigation in the district court to begin would defeat valid policy concerns raised by the Members of Congress and accepted by most federal circuit courts.[32]

Presently, all Circuits are in agreement that the Speech or Debate Clause is a valid argument under which to seek interlocutory appeal.[33] Nevertheless, the Seventh Circuit recently held that while the Speech or Debate Clause argument was valid, the separation of powers doctrine was not a valid argument to seek interlocutory appeal.[34] This decision created a Circuit Split between the Seventh Circuit, and the Second, Ninth, Eleventh and D.C. Circuits which allow a Member of Congress to raise a separation of powers argument in order to seek interlocutory appeal.

A. Courts in Favor of Allowing Congressional Interlocutory Appeals Based on the Separation of Powers Doctrine

The Second, Ninth, Eleventh, and D.C. Circuits are in agreement that individuals can seek interlocutory appeal based on a separation of powers argument.[35] However, only the Second and D.C. Circuit have dealt with

29. *See* cases cited *supra* note 13.

30. *See* cases cited *supra* note 13.

31. *See* cases cited *supra* note 13.

32. United States v. Myers, 635 F.2d 932, 935–36 (2d Cir. 1980).

33. This is because there is Supreme Court precedent on the matter in *Helstoski v. Meanor*, 442 U.S. 500, 506–08 (1979).

34. United States. v. Schock, 891 F.3d 334 (7th Cir. 2018).

35. *See* cases cited s*upra* note 13.

the issue in respect to a Member of Congress raising the separation of powers argument.[36]

In *United States v. Myers*, Congressman Michael O. Myers of Pennsylvania sought an interlocutory appeal from the Second Circuit Court of Appeals after a federal district court denied his motion to dismiss an Ethics in Government Act action brought against him by the Department of Justice ("DOJ").[37] Because the action against him was brought by the DOJ, an entity of the Executive Branch, he claimed immunity based on the separation of powers doctrine and the Speech or Debate Clause.[38] The Court of Appeals relied on Supreme Court precedent in *Helstoski* to determine that the Member of Congress was entitled to a pretrial appeal under the Speech or Debate Clause.[39]

For the same reasoning that the Second Circuit Court allowed the Speech or Debate Clause to be the basis for the interlocutory appeal, it allowed review of the dismissal on the grounds of separation of powers.[40] The Court noted that the separation of powers argument does not provide as precise of a protection as the Speech or Debate Clause, but the underlying policies of the separation of powers doctrine require that a Member of Congress be shielded from standing trial before another branch of government.[41] The Court reasoned that the two arguments were in the same spirit of protecting the independence of the Legislative Branch and ensuring that constituents were fully represented by their Representatives and Senators.[42]

The *Myers* Court went on to weigh the policy concerns of allowing a Member of Congress to avoid litigation versus the interest of judicial efficiency that traditionally precludes piecemeal litigation.[43] The Court found that the following concerns of the Members of Congress outweigh the concern of judicial efficiency: (1) The strain, expense, and injury to reputation resulting from a trial, even if the Member of Congress prevails at trial, will have adverse consequences to a representative democracy; and (2) the opportunity for intimidation by the Executive Branch is reduced by the knowledge that prosecutions encountering valid legal defenses will be promptly terminated by an interlocutory appeal before the trial even commences.[44] The Court opined that "little would be lost in

36. *Claiborne* and *Hastings* dealt with federal judges, not Members of Congress.

37. *Myers*, 635 F.2d at 934.

38. *Id.* at 935.

39. *Id.*; *see also supra* text accompanying note 32.

40. *Myers*, 635 F.2d at 934 ("[T]he Speech or Debate Clause, when applicable, provides the kind of protection that should be vindicated by preventing a trial, rather than setting aside its outcome").

41. *Id.*

42. *Myers*, 635 F.2d at 936.

43. *Id.*

44. *Id.*

the way of judicial efficiency if pre-trial appeals by indicted Members of Congress were to include all legal defenses."[45]

Twenty-four years after the *Myers* decision, the D.C. Circuit Court of Appeals found the reasoning in *Myers* to be "particularly instructive" to its decision in *United States v. Rose*.[46] Like in *Myers*, the DOJ brought an action against a Congressman, Charles G. Rose III. After the district court judge denied the Congressman's motion to dismiss, Rose filed for interlocutory appeal based on the separation of powers doctrine and the Speech or Debate Clause.[47] Rose's case was very similar to *Myers*, but it did have one key difference: *Myers* was a criminal case, while *Rose* was a civil case.[48] The *Rose* Court concluded that the difference was immaterial because the immunity protects legislators from *any* type of litigation.[49]

The *Rose* Court held that it had appellate jurisdiction over both the separation of powers claim, and the Speech or Debate Clause claim.[50] Relying on *Myers*, the Court reasoned that "like the Speech or Debate Clause immunity, separation of powers immunity should protect legislators from the burden of litigation and diversion from congressional duties, whether the litigation be civil or criminal."[51]

Although both Courts of Appeals determined that they had appellate jurisdiction over both the separation of powers and Speech or Debate Clause claim, each affirmed the decision of the district court. Therefore, both Congressmen still faced "the burdens of litigation" after the grant of interlocutory appeal.[52]

B. The Seventh Circuit's Decision in United States v. Schock

Aaron Schock was a United States Representative for the Eighteenth District of Illinois.[53] In March 2015, he resigned from Congress after his

45. *Id.*

46. United States v. Rose, 28 F.3d 181, 186 (D.C. Cir. 1994).

47. *Id.* at 182-183.

48. *Id.* at 186.

49. *Id.* (emphasis added).

50. *Id.* at 185.

51. *Id.* at 186.

52. *Id.* at 190; *Myers,* 635 F.2d at 942. This is an important fact that will be covered more in Part IV. In sum, the separation of powers doctrine gives Congressman a tool to use to *potentially* avoid litigation and enjoy its immunity. The reality, however, is that, in most cases, the court grants the interlocutory appeal but still affirms the district court's dismissal of the claim for immunity from litigation. *See infra* Part IV.

53. Elvia Malagon, *Ex-Rep. Aaron Schock's Trial on Federal Corruption Charges Moved to June*, Chicago Tribune, October 5, 2018, https://www.chicagotribune.com/news/breaking/ct-met-aaron-schock-court-hearing-20181003-story.html. (last visited on November 15, 2018).

constituents took issue with trips he took at the public's expense.[54] Twenty months after his resignation, he was charged in a federal indictment for mail and wire fraud, theft of government funds, making false statements to Congress and the Federal Elections Commission, and filing false tax returns.[55] After being indicted, Shock moved to dismiss the indictment on claims that the charge was inconsistent with the Speech or Debate Clause and the separation of powers doctrine.[56] The district court denied his motion to dismiss and he appealed to the Seventh Circuit.[57]

First, the Seventh Circuit held that interlocutory appeals are permitted under the Speech or Debate Clause, but the immunity granted under the Speech or Debate Clause did not apply to Schock because his actions were not "legislative acts."[58] Then, the Court moved to the principle argument: the rules about reimbursable expenses were adopted under Art. 1, §5, cl. 2 of the Constitution, and only the House can interpret its rules and punish its Members under them.[59] The Seventh Circuit explained its reasoning for not being persuaded by the decisions of other circuits as follows:

> Neither the separation of powers generally, nor the Rulemaking Clause in particular, establishes a personal immunity from prosecution or trial. The separation of powers is about the allocation of authority among the branches of the federal government. It is an institutional doctrine rather than a personal one. The Speech or Debate Clause, by contrast, sets up a personal immunity for each legislator. The Supreme Court limits interlocutory appeals to litigants who have a personal immunity—a "right not to be tried." No personal immunity, no interlocutory appeal.[60]

The Court based its holding on the difference between "institutional" and "personal" rights.[61] Essentially, the Court held that the Speech or Debate Clause created a specific personal immunity from litigation, but the separation of powers doctrine did not. Instead, the separation of powers doctrine merely applied to the branches of government as institutions, not the individuals within them. Finally, the Court affirmed

54. United States v. Schock, 891 F.3d 334, 335-336 (7th Cir. 2018). Some of the alleged expenses were using money from his campaign accounts and his House allowance for personal expenses ranging from an extravagant remodeling of his home office inspired by the British television show "Downton Abbey" to flying on a private plane to a Chicago Bears game. Elvia Malagon, *Ex-Rep. Aaron Schock's Trial on Federal Corruption Charges Moved to June*, Chicago Tribune, October 5, 2018 (last visited on November 15, 2018).

55. *Schock,* 891 F.3d at 336.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 336.

60. *Id.* at 337.

61. *Id.* at 338.

the district court's decision with respect to the Speech or Debate Clause and dismissed the appeal based on a separation of powers argument.[62]

It is important to note that the holding of the *Schock* case applies to interlocutory appeals in criminal cases based on institutional arguments about the separation of powers.[63] However, the reasoning in *Rose* is still compelling because differences between criminal or civil causes of action are immaterial to the underlying policy concerns of protecting legislators from the burdens of litigation, criminal or civil.[64]

IV. DISCUSSION

This section will discuss why the Second, Ninth, Eleventh, and D.C. Circuits are correct in allowing Members of Congress to file interlocutory appeals based on a separation of powers argument. The balancing test given in *Myers* is the correct framework for analyzing the issue regarding whether the policy concerns permitting Members of Congress to avoid the burdens of litigation outweigh the need for judicial efficiency.[65] The answer to this issue is clearly "yes," because the judicial system should not place efficiency above more weighty concerns like the Members' duties to their constituents.[66]

Furthermore, the Seventh Circuit's institutional separation of powers logic is inherently flawed. A clear understanding of the history behind the Speech or Debate Clause and separation of powers doctrine shows the similarity in the underlying concerns which birthed their creation and inclusion in the Constitution. The Rulemaking clause, analyzed as part of the separations of powers doctrine, is proof enough that the separation of powers doctrine does not only apply to each branch of government as an institution, but to the individuals within the institution as well. To say otherwise is non-functional and contrary to any sensible understanding of history.

Moreover, the Seventh Circuit mistakenly reasoned that allowing a Member of Congress to file for interlocutory appeal under a separation of powers doctrine would create Congressional immunity from litigation.[67] An interlocutory appeal for a motion to dismiss does not create immunity, it creates the opportunity for immunity. This is a key distinction because a proper understanding of it negates the argument that allowing the interlocutory appeal would permit Members of Congress to be above the

62. *Id.* at 340.
63. *Id.* at 339.
64. *Rose*, 28 F.3d at 186.
65. United States v. Myers, 635 F.2d 932, 936 (2d Cir. 1980).
66. I.N.S. v. Chadha, 462 U.S. 919, 944 (1983).
67. *Schock,* 891 F.3d at 337.

law. In the two principle cases already described, *Myers* and *Rose*, the district courts' decisions were affirmed, and the Members of Congress still faced litigation after the interlocutory appeal was heard.[68] Allowing an exception to the general rule against interlocutory appeals in this context merely gives the opportunity for immunity if the Member of Congress can persuade the court of his or her argument.

A possible explanation for the Seventh Circuit's split with the other circuits are the facts underlying the charges against Congressman Schock. His alleged misuse of funds was highly publicized because he was deemed a "rising star" in the Republican party and the expenses were outrageous, ranging from personal tickets to the Chicago Bears to remodeling his home office in a style inspired by "Downtown Abbey."[69] Because of these outrageous facts, the Seventh Circuit may not have wanted to allow any additional avenue for the Congressman to escape litigation. By closing the door to the Speech or Debate Clause claim, the court sent the message that no individual is above the law, even Members of Congress. While that motivation may be compelling, especially in Shock's case, it is unnecessary. Allowing an interlocutory appeal based on the Speech or Debate Clause does not automatically create immunity. It is simply a carve-out to the general rule against interlocutory appeals. A court still has discretion to dismiss the interlocutory appeal and affirm the district court's decision, sending a Congressman's case to litigation. If a possible immunity does not apply, then it does not apply. That does not, however, negate the fact that the immunity still exists for other cases and circumstances. Although the Seventh Circuit may have had compelling reasons for its decision, it was an unnecessary and incorrect decision to make.

Using *Myers* as a framework, courts should liberally construe the separation of powers doctrine and the Speech or Debate Clause to allow Members of Congress facing litigation more, not less, tools to avoid the burdens of litigation.

A. The Policy Concerns Allowing Members of Congress to File an Interlocutory Appeal Outweigh the Concern for Judicial Efficiency—Why the Second, Ninth, Eleventh, and D.C. Circuits are Right.

The primary reason for not allowing interlocutory appeals as a general rule is to avoid piecemeal litigation in the interest of judicial efficiency.[70] However, the Supreme Court has stated that "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of

68. *Myers*, 635 F.2d at 942; United States v. Rose, 28 F.3d 181, 190 (D.C. Cir. 1994).

69. Malagon, *supra* note 52.

70. *Myers,* 635 F.2d at 956.

democratic government."[71] Moreover, the rule against interlocutory appeals has other exceptions. For instance, interlocutory decisions, while not final, are appealable if they have a final and irreparable effect on the rights of the parties.[72] While there are exceptions to the general rule against interlocutory appeals, each is narrowly applied.[73]

The *Myers* and *Rose* courts correctly applied a narrow exception to the general rule that stemmed from the Speech or Debate Clause and the separation of powers doctrine. While it is understandable that allowing piecemeal litigation would burden the courts, the reason to allow it in this context outweighs the burden. If a court did not allow a Member of Congress to seek interlocutory appeal, irreparable harm would be done to the Member of Congress's political capital and reputation which in turn hurts his or her ability to represent constituents.[74]

Imagine the following scenario: A Congresswoman is in her second term of office. She has spent years fighting diligently against a pipeline which she believes would ruin the natural beauty of the state she represents. In fact, she ran her campaign heavily on this specific issue and was elected in a landslide. After years of work and political maneuvering, she is finally able to bring a bill to the floor to oppose the construction of the pipeline. Months before the bill is on the floor, the hypothetical Congresswoman is indicted for allegedly misusing federal funds. She files a motion to dismiss based on the Speech or Debate Clause or the separation of powers doctrine. The district court denies her motion. She likely has a stronger argument based on the separation of powers doctrine; however, if the case was in the Seventh Circuit she would be unable to file for interlocutory appeal based on this argument. As a consequence, she is burdened with litigation. Now, instead of whipping votes for her bill, she is preparing for trial.

The consequence of the above hypothetical is clear: an elected official can no longer represent her constituents because of the burdens of litigation. The most frightening result is if she ends up with a favorable outcome at trial because, now, it was a waste of time and a distraction that affected her ability to represent her constituents.

On the other hand, had the Seventh Circuit aligned with the other circuit courts and permitted the appeal to be based on a separation of powers argument, there is a strong chance that she may prevail on appeal and get back to Congress without much wasted time. An appellate court should accept this argument because it addresses the same policy concerns of the Speech or Debate Clause and gives a Congresswoman

71. *Chadha*, 462 U.S. at 944.

72. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545 (1949) (collateral order doctrine).

73. Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100 (2009).

74. *Myers,* 635 F.2d at 936.

additional tools to avoid unnecessary and distracting litigation. If a court is not persuaded by the argument, it can affirm the district court's decision. If a court is persuaded, however, the Congresswoman is now able to continue her work in the House. She will likely still face an internal investigation and hearing, but it will be much less burdensome than a trial. Therefore, if she is guilty or liable, she is still held accountable for her actions through a House ethics investigation.

There are other policy concerns outside of the above hypothetical which are also compelling for permitting the separation of powers doctrine to be the basis of an interlocutory appeal in this situation: deterring the executive from using the courts to intimidate Members of Congress if it is known that they can terminate the action before trial, harming constituents, and diminishing the public's trust in a representative form of government.[75]

For all of the above reasons, the policy concerns of allowing an interlocutory appeal under a separation of powers argument greatly outweigh judicial efficiency. The Seventh Circuit should not have shut the door on the opportunity to uphold these policy concerns. By disallowing an interlocutory appeal based on the separation of powers doctrine, the Seventh Circuit is greatly harming the representative democratic system of our government. The judiciary should show restraint and tread lightly when potentially exercising power over another branch of government.[76]

B. The Separation of Powers Doctrine is More Than a Schoolhouse Rock! Song

The institutional versus personal separation of powers argument the Seventh Circuit utilized is not based in law or reality. As a reminder, the Seventh Circuit used the following reasoning for its holding in *Schock*:

> The separation of powers is about the allocation of authority among the branches of the federal government. It is an institutional doctrine rather than a personal one. The Speech or Debate Clause, by contrast, sets up a personal immunity for each legislator.[77]

The court almost entirely relies on this distinction to reach its conclusion that an interlocutory appeal is not proper under the separation of powers doctrine.

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75. *Id.*

76. Daniel N. Reisman, "Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive, 53 Alb. L. Rev. 49 (1988-1989).

77. United States v. Schock*,* 891 F.3d 334, 337 (7th Cir. 2018).

This distinction seems to be created by the Seventh Circuit judges. In an attempt to prove its reasoning, the *Shock* court lists the other interlocutory appeal cases, discussed above, and points out how none of them address the institutional separation of powers logic.[78] The reason for the omission is that the distinction is a matter of legal fiction created by the Seventh Circuit.

The Framers established a system designed to prevent overreaching by one branch at the expense of another.[79] To ensure a functional government, the Constitution provides officials of each branch with the "necessary constitutional means and personal motives to resist encroachments of the others."[80] Therefore, the separation of powers doctrine is not merely an institutional blueprint, but a living and breathing doctrine that serves to protect against tyranny. To be effective, members of each branch must adhere to only the powers allotted to their respective branch of government.[81] Of course, the Constitution does not contemplate total separation of the branches of government;[82] therefore, the separation of powers doctrine protects against tyranny while simultaneously permitting sufficient interaction between the branches.[83]

The Seventh Circuit failed to realize that the separation of powers doctrine is a functionalist doctrine. To state that it is merely about the allocation of authority among the branches of the federal government is grossly inaccurate. Although the separation of powers doctrine does in fact allocate authority among the branches, that is not the end of its function and intention. The doctrine is not merely a Schoolhouse Rock! description of the federal government; it is a doctrine that is present whenever the branches of government are interacting with each other.[84]

Moreover, branches of government are not only the institutions described in the Constitution, but also the officers within them. Therefore, it is entirely proper for a Member of Congress to raise a separation of powers argument in the judiciary when seeking interlocutory appeal. For the separation of powers doctrine to be effective, it must be invoked aggressively by officials to safeguard the powers enumerated to their

78. *Id.*

79. Entin, Jonathan L., "Separation of Powers, the Political Branches, and the Limits of Judicial Review" (1990). *Faculty Publications*. Paper 367.

80. Entin, Jonathan L., "Separation of Powers, the Political Branches, and the Limits of Judicial Review" (1990). *Faculty Publications*. Paper 367 (quoting THE FEDERALIST No. 51).

81. Entin, Jonathan L., "Separation of Powers, the Political Branches, and the Limits of Judicial Review" (1990). *Faculty Publications*. Paper 367.

82. Buckley v. Valeo, 424 U.S. 1, 121 (1976).

83. *Id.*

84. Schoolhouse Rock! was a popular educational television series which taught various topics to children, including American history and government, through song. One of the most popular songs described how a bill becomes law: https://www.youtube.com/watch?v=H-eYBZFEzf8.

respective branches. The Seventh Circuit's decision to disallow such an argument is in direct conflict with the intention of the Framers.[85] While "immunity" may not be the correct term to use, the separation of powers doctrine does create a level of sovereignty from other branches. To say that applies only to the institution of Congress fails to realize that the institution is run by the officials within it. In certain circumstances, the actions of Members of Congress *are* immune from the powers of the judiciary based on the separation of powers doctrine.

Assuming, *arguendo*, that the Seventh Circuit's reasoning is correct, the policy concerns described in *Myers* should still direct a court to allow a separation of powers argument in this context. The court should be liberal, not restrictive, in allowing Members of Congress the opportunity to avoid litigation when appropriate. A court with judicial restraint understands the consequences of asserting its power over a Member of Congress or the Executive.

C. A Framework for a Coherent Precedent: The Myers Balancing Test

As discussed above, the *Myers* opinion should be used as precedent to resolve the Circuit Split. Moving forward, appellate courts should utilize the following framework when a Member of Congress moves for an interlocutory appeal based on either the Speech or Debate Clause or the separation of powers doctrine.

First, the *Myers* court determined that the Speech or Debate Clause was properly before the court under *Helstoski*.[86] Then, the court applied similar reasoning from *Helstoski* to determine that the Member of Congress was entitled to pre-trial review of his challenges to the indictment grounded on the doctrine of separation of powers.[87]

The court then supported its conclusion by weighing certain policies underlying the separation of powers doctrine against the policy of judicial efficiency of avoiding piecemeal litigation.[88] The main policy concerns that shield a Member of Congress from standing trial are: (1) Members of Congress serve as a vital check upon the executive and judicial branches for the right of the people who elected the Senators and Congressmen; (2) it is not too extravagant that a Member of Congress is entitled to pre-trial review; (3) the interest in avoiding strain, expense, and injury to reputation resulting from a trial on criminal charges even if the outcome is favorable is especially compelling for Members of Congress; (4) vindication on appeal will come after considerable political damage; (5)

85. *See* Jefferson, *supra* notes 17-18.

86. United States v. Myers, 635 F.2d 932, 935 (2d Cir, 1980).

87. *Id.*

88. *Id.* at 935-936.

the Member's capacity to represent his or her constituents is impaired; and (6) it prevents intimidation by the executive and accountability before a possibly hostile judiciary.[89] These six weighty concerns easily tip the balance in favor of allowing an exception to the general rule against interlocutory appeals.

After accepting pre-trial review, the *Myers* court proceeded to analyze the merits of both contentions made by the Member of Congress.[90] After addressing each point of contention, the court determined that the limits of the Constitution and law had not been exceeded. Therefore, it affirmed the district court's order denying dismissal of the indictment.[91]

If a court follows the simple framework of: (1) establishing appellate jurisdiction; and (2) addressing each point of contention to determine whether the limits of the Constitution and the law have been exceeded, it can properly balance policy concerns to ensure both a lack of judicial encroachment and that no one is above the law. If the limits of the Constitution and the law have been exceeded, the Member of Congress will avoid litigation and face the consequences of his or her actions in his or her own House. If the court determines the limits have not been exceeded, as it did in the cases reviewed by this Article, the court simply affirms the district court's decision and the Member must endure the burdens of litigation. This method respects the Constitution and ensures trust in the independence of the Legislature.

V. CONCLUSION

The Seventh Circuit unnecessarily created a circuit split in its decision in *Schock* regarding the question of if Members of Congress can file interlocutory appeal to a federal circuit court based on the separation of powers doctrine. A clear understanding of the underlying history and policy concerns of the separation of powers doctrine, in light of the Speech or Debate Clause, should lead a court to determine that the separation of powers doctrine is a proper basis for an interlocutory appeal when made by a Member of Congress. Concerns of Members of Congress being "above the law" lack merit because a circuit court can still affirm the decision made by a district court allowing the case to proceed. Allowing interlocutory appeals by Members of Congress merely permits an indicted Member of Congress to utilize a narrowly tailored procedural tool supported by valid policy concerns. To hold otherwise could potentially burden elected representatives with litigation when they should be focusing on legislation and representing their constituents.

89. *Id.*

90. *Id.* at 936.

91. *Myers*, 635 F.2d at 942.

Finally, the Supreme Court had the opportunity to resolve the circuit split if it granted Aaron Schock's petition for certiorari filed on October 1, 2018.[92] However, it denied the petition on February 19, 2019.[93] If the Court did grant his petition, it should have relied on settled precedent from the Second, Ninth, Eleventh, and D.C. Circuits to hold that a congressman is able to file for pretrial review under both the separation of powers doctrine and the Speech or Debate Clause.

The efficiency of Congress and the accountability of its Members is important, which is why the Constitution gave Congress the power to discipline its own Members rather than relying on the judiciary to do so. The judiciary should get out of the House and let legislators legislate.

92. Petition filed Oct 01, 2018 (No. 18-406).

93. Petition denied Feb 19, 2019 (No. 18–406).