

Legal Sidebar

The House May Vote to File an Amicus Brief: Is this Unprecedented?

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The House may soon consider [H. Res. 639](#), which would authorize the Speaker to appear as amicus curiae on behalf of the House and file a brief in [United States v. Texas](#), supporting the position that the federal government acted in a manner inconsistent with federal law. The case involves [state challenges](#) to the Obama Administration's expansion of its deferred action program for certain aliens brought to the U.S. as children and unauthorized aliens who are the parents of U.S. citizens or legal permanent resident aliens.

This resolution raises an interesting historical question: has the House ever authorized the filing of an amicus brief? CRS has been able to identify one instance in which the House specifically authorized the filing of an amicus brief on its behalf. In 1981, the House passed [H. Res. 49](#), authorizing the Speaker to intervene or file an amicus brief in [INS v. Chadha](#) to argue in favor of the constitutionality of a legislative veto provision in the Immigration and Nationality Act. In that instance, the House, along with the Senate, intervened in the case and, therefore, an amicus brief was not filed. Two earlier resolutions provide other helpful examples, but with distinguishing characteristics. In 1943, the House passed [H. Res. 386](#), which authorized a committee to “appoint counsel to represent the United States in the Court of Claims” in litigation regarding an appropriations provision barring the payment of salaries for specifically named federal employees. This resolution passed and the committee appointed a counsel. Although the resolution did not specifically authorize him to do so, he appeared as an amicus and filed a brief in the referenced case, [United States v. Lovett](#). Despite the fact that only the House, and not the Senate, had approved his appearance, the Supreme Court accepted him as “argu[ing] the cause for the Congress of the United States, as amicus curiae....” In 1974, a [House resolution](#) authorizing the filing of an amicus brief regarding the production of presidential tapes and documents in the case of John Mitchell, President Nixon's Attorney General was introduced. The House never voted on that resolution.

While it appears the House rarely votes to authorize such activities, the Senate more routinely authorizes its Legal Counsel to serve as amicus on behalf of the Senate and even has a statutory provision contemplating such resolutions. Under 2 U.S.C. §§ [288b](#), [288e](#), Senate Legal Counsel shall appear as an amicus curiae on behalf of the Senate only when directed to do so by resolution. The Senate has authorized such amicus appearances at least five times since 2002. For example, in December 2015, by unanimous consent, the Senate [directed](#) Senate Legal Counsel to appear as an amicus on behalf of the Senate in a case regarding the constitutionality of a provision of the Iran Threat Reduction and Syria Human Rights Act of 2012. The year before, again by unanimous consent, the Senate [authorized](#) the appearance of an amicus on behalf of the Senate in [Zivotofsky v. Kerry](#), [the Jerusalem passport case](#). That brief was styled a “[Brief for the United States Senate as Amicus Curiae Supporting Petitioner](#).”

Even though the House rarely authorizes amicus briefs via resolution, other individuals within the House may file amicus briefs without additional action from the full House. Certainly individual Members of Congress can, and do, [file](#) amicus briefs representing their personal views in cases relating to the constitutionality or implementation of federal statutes. Numerous Members of Congress have signed on to briefs in recent high profile Supreme Court cases such as [King v. Burwell](#), [Fisher v. University of Texas at Austin](#), [Arizona v. United States](#), and [District of Columbia v. Heller](#). Additionally, the House Bipartisan Legal Advisory Group (BLAG), made up of the Speaker and majority and minority leadership, has filed amicus briefs with the authorization of its members but without authorization from a House Resolution. Under [House Rule II\(8\)](#), BLAG “unless otherwise provided by the House... speaks for, and articulates the

institutional position of, the House in all litigation matters.” BLAG often cites this provision in filing its briefs, which seek to vindicate the interests of the House as a whole. For example, it filed a brief in [Dickerson v. United States](#), a case regarding *Miranda* rights, and noted that BLAG “and its predecessors have traditionally represented the institutional interests of the House in judicial proceedings, and have often appeared before this Court where such institutional interests are at stake.” Interestingly, in *Dickerson*, members of minority leadership filed their own amicus brief opposing the position taken by BLAG.

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