



# 10.

## *Speech or Debate Protection*

### Overview

The Speech or Debate Clause of the Constitution provides that “for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.”<sup>1</sup> The clause seeks to protect and maintain the essential autonomy and integrity of the Congress by “prevent[ing] intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.”<sup>2</sup> It traces its ancestry to a similar provision in the English Bill of Rights of 1689, the culmination of centuries of struggle for parliamentary independence against Tudor and Stuart monarchs who used criminal and civil law to suppress and intimidate critical legislators.

The Supreme Court has construed the clause broadly, beyond matters of pure speech on the floors of both houses, to embrace all activities within the legislative sphere that are

an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.<sup>3</sup>

Protected legislative acts include introducing and voting on bills or resolutions, preparing and submitting committee reports, acting at committee meetings and hearings, conducting formal and informal investigations, and issuing subpoenas.

The Supreme Court has held that, beyond legislative acts, the clause protects against inquiries as to the motivations for such legislative acts. Its protections have also been extended to legislators’ aides as “alter egos” of members for conduct that would be protected if performed by the member. The protections apply to both civil actions and criminal prosecutions. Finally, when the clause is found to apply, its protections are absolute and not subject to qualification or balancing.

The clause, however, does not provide a blanket of immunity for all actions related to the legislative process. The Supreme Court has found that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs or a member’s congressional duties, but are not an integral part of the legislative process itself. These activities include speaking outside of Congress, writing newsletters, issuing press releases, private book publishing, distribution of official committee reports outside the legislative sphere, and constituent services.

The court has also held that solicitation and receipt of bribes as a *quid pro quo* for future legislative actions, and violations of any other otherwise valid criminal laws, are not part of the legislative process.<sup>4</sup>

---

1. U.S. Const. Art I, sec. 6, cl.1.

2. *Gravel v. United States*, 408 U.S. 606, 617, 624-25 (1972).

3. *Id.*; see also *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975).

4. *United States v. Brewster*, 408 U.S. 501, 512, 525-26; *Gravel*, 408 U.S. at 626.

Finally, the Supreme Court has acknowledged the potential costs associated with this broad constitutional protection, which include making prosecutions of legislative malefactors more difficult and creating a potential for abuse. Nevertheless, the court has steadfastly and repeatedly held that the clause must be broadly construed and applied because that was “the conscious choice of the Framers’ buttressed and justified by history.”<sup>5</sup>

## A. The History, Purposes and Protections of the Clause

The Speech or Debate Clause is rooted historically in 16th- and 17th-century English monarchs’ suppression and intimidation of critical members of Parliament by means of criminal prosecutions.<sup>6</sup> Parliament opposed these attempts, and in 1689 it passed a Bill of Rights that stated unambiguously “that the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or any Place out of Parliament.”<sup>7</sup> As a result of the English experience, “[f]reedom of speech and action in the legislature was taken as a matter of course” by the Founders, who included the Speech or Debate Clause in the Constitution with little discussion or debate at the Philadelphia convention or during the states’ ratification proceedings.<sup>8</sup>

The Supreme Court has described the purposes of the clause as: “to insure that the legislative function the Constitution allocates to Congress may be performed independently;”<sup>9</sup> to “prevent intimidation of legislators by the Executive or accountability before a possibly hostile judiciary;”<sup>10</sup> and “reinforcing the [scheme of] separation of powers so deliberately established by the Founders.”<sup>11</sup> It is to be understood as a core institutional protection and “not merely for the benefit of Members of Congress.”<sup>12</sup>

---

5. *Eastland*, 421 U.S. at 510, quoting *Brewster*, 408 U.S. at 516.

6. *United States v. Johnson*, 383 U.S. 169, 178 (1968); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). See also Kelley M. McGuire, *Limiting the Legislative Privilege: Analyzing the Scope of the Speech or Debate Clause*, 69 WASH. & LEE L. REV. 2125, 2154-56 (2012) (discussing the evolution of the English parliamentary speech or debate privilege).

7. *Tenney*, 341 U.S. at 372.

8. *Id.* See also McGuire, *supra* note 6, at 2150-53 (describing the contemporaneous understandings of the clause by James Wilson, Thomas Jefferson and James Madison).

9. *Eastland*, 421 U.S. at 502.

10. *Id.*, quoting *Gravel*, 408 U.S. at 617.

11. *Johnson*, 383 U.S. at 178. See also *Youngblood v. DeWeese*, 352 F.3d 836, 839 (3d Cir. 2003) (“Ensuring a strong and independent legislative branch was essential to the framers’ notion of separation of powers....The Speech or Debate Clause is one manifestation of this practical security for protecting the independence of the legislative branch....”).

12. *United States v. Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980) (“[T]he Speech or Debate Clause...serves as a vital check upon the Executive and Judicial Branches to respect the independence of the Legislative Branch, not merely for the benefit of Members of Congress, but, more importantly, for the right of the people to be fully and fearlessly represented by their elected Senators and Congressmen.”); See also *United States v. Helstoski*, 408 U.S. 477, 492 (1979); *In re grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978); Ethan L. Carroll, *The Institutional Speech or Debate Protection: Nondisclosure As Separation of Powers*, 65 Duke L. J. 1153, 1190-91(2014) (“The Clause’s nondisclosure protection is not designed to safeguard legislators’ independence.... Instead, the Clause protects democratic representation. As in other separation-of-powers contexts, the Clause’s institutional protection focuses on practical control. Recognition that the Clause provides an *institutional* protection will ultimately be determinative of whether investigations of congressional criminality take place via subpoenas, which preserve the congressional right of prior assertion, or via searches, which do not.”).

The court has held that, when applicable, the Speech or Debate Clause provides three distinct protections:

- an immunity from legal challenges to “actions within the ‘legislative sphere,’”<sup>13</sup> which extends to both criminal prosecutions and civil suits;<sup>14</sup>
- a non-evidentiary use privilege that bars prosecutors and parties from advancing their claims against a member or aide by “[r]evealing information as to a legislative act”;<sup>15</sup> and
- a testimonial or discovery privilege against being compelled to testify about legislative matters.<sup>16</sup> With respect to the latter testimonial/discovery privilege, the Supreme Court has recently declined to address a circuit split as to whether privilege extends not only to verbal testimony but also to documentary materials and records that reflect legislative activities. That issue is addressed separately below.

The Supreme Court has not drawn distinctions among the three protections in terms of their effects. Rather, it has held that when the clause applies it is “absolute.”<sup>17</sup> In a civil context the Court has rejected a claim that where constitutional rights are impacted by covered legislative actions, the privilege must be subject to a balancing test against constitutional intrusions on individual rights.<sup>18</sup>

The court has also held that the protections of the clause apply to a member’s “aide insofar as the conduct of the aide would be a protected legislative act if performed by the Member himself.”<sup>19</sup> The court explained that “it is literally impossible, in view of the complexities of the modern legislative process ... for Members of Congress to perform their legislative tasks without help of aides and assistants.” Because “the day-to-day work of such aides is so critical to the Members’ performance ... they must be treated as the latter’s alter egos.”<sup>20</sup> However, because a congressional aide’s privilege derives from the privilege of the member or committee for whom he or she works, “[i]t follows that an aide’s claim of privilege can be repudiated and thus waived” by his or her employer.<sup>21</sup>

A waiver of the Speech or Debate privilege of a member, if possible at all, “can be found only after explicit and unequivocal renunciation of the protection.”<sup>22</sup> The court has not ruled as to whether Congress or either house can waive an individual member’s privilege.

Finally, the court has held that the protections of the Speech or Debate Clause apply “even though the conduct [in question], if performed in other than legislative contexts, would ... be unconstitutional or otherwise contrary to criminal or civil statutes.”<sup>23</sup> In so holding, the court has expressly acknowledged the potential costs associated with this broad constitutional protection. It has stated that “without doubt the exclusion of [legislative act] evidence will make prosecutions more difficult,”<sup>24</sup> that “the broad protection granted by the Clause creates a potential for abuse,”<sup>25</sup> and that

13. *Doe v. McMillan*, 412 U.S. 306, 312 (1973).

14. *Helstoski*, 442 U.S. at 477 (criminal prosecution); *Brewster*, 408 U.S. at 501 (same); *Johnson*, 383 U.S. 169 (same); *Eastland*, 421 U.S. at 502-03 (civil suit); *McMillan*, 412 U.S. at 312 (same); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1973) (same).

15. *Helstoski*, 442 U.S. at 490; *Johnson*, 383 U.S. at 173-77.

16. *Gravel*, 408 U.S. at 615-16.

17. *Eastland*, 421 U.S. at 501, 503, 509-10 n.16; *Gravel*, 408 U.S. at 623 n.14. The protections of the clause do not end when a member or aide leaves his or her position in Congress. *See, e.g.*, *Miller v. Transcamerican Press, Inc.*, 709 F.2d 524, 529 (9th Cir. 1983).

18. *Eastland*, 421 U.S. at 501, 503, 509-10 n.16.

19. *Gravel*, 408 U.S. at 618.

20. *Id.* at 616; *see also Eastland*, 421 U.S. at 507 (Senate committee aide covered).

21. *Gravel*, 408 U.S. at 622 n.13. It has been held that the clause may be asserted not only by a current member but also by a former member in an action implicating his conduct while in Congress, *see Brewster*, 408 U.S. at 502, and by a member’s “aides insofar as the latter would be a protected legislative act if performed by a Member himself,” *Gravel*, 408 U.S. at 618. The immunity applies regardless of whether the member or aide is a party to litigation or has merely been called to testify or give a deposition. *Miller*, 709 F.2d at 529; *Tavoulaireus v. Piro*, 93 F.R.D. 11, 18-19 (D.D.C. 1981).

22. *Helstoski*, 442 U.S. at 491.

23. *McMillan*, 412 U.S. at 512-13.

24. *Helstoski*, 442 U.S. at 488.

25. *Eastland*, 421 U.S. at 510.

it “has enabled reckless men to slander and even destroy others with impunity.”<sup>26</sup> Nevertheless, the court steadfastly and repeatedly has held that the clause must be broadly construed and applied because that was the “conscious choice of the Framers’ buttressed and justified by history.”<sup>27</sup>

## B. Supreme Court Case Law

The Supreme Court has construed the Speech or Debate Clause in only a few cases, the last occurring in 1979.

In the earliest cases, *Kilbourn v. Thompson*<sup>28</sup> and *Tenney v. Brandhove*,<sup>29</sup> the Supreme Court adhered to a broad, liberal interpretation of the Clause with regard to member protections, but denied coverage to non-member legislative officials or aides.

*Kilbourn*, decided in 1881, concerned the House of Representatives’ imprisonment of Mr. Kilbourn for contempt for his alleged perjury before a House committee. Kilbourn sued members who voted for the contempt order and the House sergeant-at-arms who took him into custody. The court found that members of Congress could not be punished for votes or for any of “those things generally done in a session of the House by one of its members in relation to the business before it.”<sup>30</sup> But the sergeant-at-arms who had taken Kilbourn into custody pursuant to the congressional order was held not to be within the ambit of the protection and was liable for damages.<sup>31</sup>

Similarly, in *Tenney*, the court held that state legislators could not be sued under a federal civil rights statute for their conduct of an investigation, based on the same principles underlying the Speech or Debate Clause. The court noted, however, that the protections were narrower when “an official acting on behalf of the legislature” is sued.<sup>32</sup> In *United States v. Johnson*,<sup>33</sup> decided in 1966, the court determined that a speech delivered by a senator on the floor of Congress and the senator’s motivation for delivering it were protected by the clause and could not form the basis of a criminal charge of conspiracy to defraud the government.<sup>34</sup> However, the court went on to hold that the prosecution could still proceed with the conspiracy charge on the condition that the speech itself could not constitute an overt act. This limitation, the court assumed, would purge the prosecution of all elements offensive to the Speech or Debate Clause.<sup>35</sup>

The court continued to decline extending the immunity of the clause to the activities of legislative employees acting under the authority and direction of Congress or one of its committees in its subsequent rulings in *Dombrowski v. Eastland*<sup>36</sup> and *Powell v. McCormack*.<sup>37</sup>

Liberal rationales combined with narrow, restrictive holdings in these early cases made the precise scope of the legislative privilege unclear. None of the court’s opinions, alone or in tandem, defined with any particularity the nature of the legislative activity that would be protected by the clause. A series of decisions in the 1970s brought more clarity, but the court adopted a narrow view of the legislative activities the clause protected.

In *Brewster v. United States*,<sup>38</sup> the court addressed in more detail the question of what constitutes a “legislative act.” *Brewster* involved criminal charges of a senator accepting bribes in return for promises respecting postage rate legislation

---

26. *Brewster*, 408 U.S. at 516 (citing *Coffin v Coffin*, 4 Mass. 1, 28 (1808)).

27. *Id.*

28. 103 U.S. 168 (1881).

29. 341 U.S. 367 (1951).

30. *Kilbourn*, 103 U.S. at 204.

31. *Id.*

32. *Tenney*, 341 U.S. at 378.

33. 383 U.S. 169 (1966).

34. *Id.* at 180.

35. *Id.* at 184-85.

36. 387 U.S. 82 (1967)

37. 395 U.S. 486, 505-06 (1969).

38. 408 U.S. 501 (1972).

while a member of the Senate. He claimed immunity for those actions under the Speech or Debate Clause. The court rejected the claim, holding that the immunity afforded by the clause protects only inquiry into “legislative acts.” It explained that although past cases had defined a legislative act “as an act generally done in Congress in relation to the business before it,” the privilege is not unlimited.<sup>39</sup> The court noted that there are a number of activities that are in some sense related to legislative activity but are not protected under the clause because they are not “clearly a part of the legislative process.”<sup>40</sup> It distinguished legislative acts from what it termed “legitimate ‘errands’” such as securing government contracts or giving speeches outside the Congress. The court stated that “[a]lthough these [errands] are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the court in prior cases.”<sup>41</sup> The court emphasized that a strong link to the legislative process is necessary to prevent legislators from avoiding criminal prosecutions and concluded that Sen. Brewster’s actions were not privileged because accepting bribes was in no way “part of the legislative process or function.”<sup>42</sup> The government only needed to show that the senator accepted a bribe. It did not have to prove he actually fulfilled the illegal bargain.<sup>43</sup>

*Gravel v. United States*,<sup>44</sup> decided the same day as *Brewster*, broadened the clause’s protections to include congressional staff but further narrowed the definition of what was considered a “legislative act.” The case concerned a criminal investigation into Sen. Gravel’s actions in disclosing and publishing top-secret national defense information known as the Pentagon Papers. A grand jury subpoenaed an aide to the senator, who was privy both to the preparation for a subcommittee meeting chaired by the senator at which the documents were read and placed in the public record, and to the arrangements for subsequent republication of the documents by a private publisher.

The court held that the protections of the clause apply “to [a member’s] aide insofar as the conduct of the aide would be a protected legislative act if performed by the Member himself.”<sup>45</sup> In those circumstances the aide is deemed an “alter ego” of the member. The court explained,

it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without help of aides and assistants; that the day-to-day work of such aides is so critical to the Members’ performance that they must be treated as the latter’s alter egos....<sup>46</sup>

However, the court emphasized that “[l]egislative acts are not all-encompassing.”<sup>47</sup> It then provided a test for determining which actions beyond literal speech and debate can be classified as immune legislative acts. To be privileged, a legislator’s action must be “an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.”<sup>48</sup> Under this standard, the court held that the clause protected the events that occurred during the preparation for and conduct of the subcommittee meeting, and it prohibited questioning about “communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator.”<sup>49</sup> The court, however, refused to find that the discussions with the private publisher were “essential to the deliberations of the Senate,” and therefore they were not part of the legislative process protected by the scope of the clause. Thus, the aide could be required to testify about them before a grand jury.<sup>50</sup>

---

39. *Id.* at 512.

40. *Id.* at 512-13, 516.

41. *Id.*

42. *Id.* at 525, 528-29.

43. *Id.* at 526.

44. 408 U.S. 606 (1972).

45. *Gravel*, 408 U.S. at 618.

46. *Id.* at 616. *See also Eastland*, 421 U.S. at 507 (Senate committee aide covered).

47. *Gravel*, 408 U.S. at 624-25.

48. *Id.* at 625.

49. *Id.* at 629. *See also Eastland*, 421 U.S. at 507.

50. *Gravel*, 408 U.S. at 626-27.

In *Doe v. McMillan*<sup>51</sup> the Supreme Court followed the path set by *Gravel*. That case involved a suit by schoolchildren's parents against legislators and their aides who collected sensitive, derogatory information about the children which was published in a committee report. The parents claimed violations of privacy rights protected by the Constitution and local statutory law. The court held that the investigation, the presentation of the information at committee hearings, and the referral of the report to the speaker of the house were all privileged legislative acts.<sup>52</sup> The information remained privileged when it was "distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional and individual legislative functionaries."<sup>53</sup> The court noted that actions within the "legislative sphere" are privileged even if in other situations they would be considered unconstitutional or a violation of local law.<sup>54</sup>

A final issue addressed by the *McMillan* court was whether the clause afforded immunity to legislative officials authorized to distribute the materials that allegedly infringed upon the rights of the children. Applying the *Gravel* test, the court held that in a private suit such as the one before it, the clause affords no immunity to those who, at the direction of Congress, distribute actionable material to the general public. To the extent that the public printer and the superintendent of documents had printed *excess* copies of the report for use other than internally to Congress, a cause of action arose against them. The case was remanded to the district court to determine whether those defendants had acted improperly.<sup>55</sup> The district court granted them immunity on the basis that there had been only a limited distribution of the report,<sup>56</sup> in an opinion which was affirmed by the D.C. Circuit.<sup>57</sup> The appeals court, however, expressly reserved the question of the availability of immunity "in a case where distribution was more extensive, was made in response to specific requests rather than standing orders, or continued for a period after notice of objections was received."<sup>58</sup>

*Eastland v. United States Servicemen's Fund*<sup>59</sup> presented a challenge to the validity of the issuance of a subpoena for documents during the course of an authorized investigation. The Senate committee issued the subpoena to a bank to produce records of an anti-war group, the USSF, under investigation by the committee. USSF, alleging that the contribution lists being subpoenaed were the equivalent of membership lists of their organization, sought an injunction asserting that its First and Fifth Amendment rights were in danger of being irreparably harmed. The court applied the *Gravel* standard and determined that investigations and inquiries qualify as legislative acts because they are "an integral part of the legislative process."<sup>60</sup> The investigation and the subpoena were protected by the privilege because they were connected with a permissible congressional function: a topic that could be the subject of lawmaking. The court concluded that despite the constitutional claims, the legislative privilege protected the legislators who authorized the subpoena, and it had no power to review the subpoena.<sup>61</sup>

The court's last examinations of the Speech or Debate Clause occurred in its 1979 rulings in *United States v. Helstoski*<sup>62</sup> and *Hutchinson v. Proxmire*.<sup>63</sup> In *Helstoski*, the government had charged that a former congressman, while a member of Congress, accepted money in return for promising to introduce (and in fact introducing) private bills to suspend the application of immigration laws. He was indicted under 18 U.S.C. § 201, which makes it a crime for a public official to corruptly ask for or accept anything of value in return for being influenced in the performance of his official duties. The government had attempted to introduce evidence of past legislative acts to prove motive. Relying on prior rulings, the court held that the clause precludes any inquiry into acts that occur in the regular course of the legislative process and into

---

51. 412 U.S. 306 (1973).

52. *Id.* at 312.

53. *Id.*

54. *Id.* at 312-13.

55. *Id.* at 316.

56. *See Doe v. McMillan*, 373 F. Supp. 1313 (D.D.C. 1974).

57. *Doe v. McMillan*, 566 F.2d 713 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

58. *Id.* at 718.

59. 421 U.S. 491 (1975).

60. *Id.* at 504-05.

61. *Id.* at 506-08.

62. 442 U.S. 477 (1979).

63. 443 U.S. 111 (1979).

the motive for those acts. The court acknowledged that while “the exclusion of evidence of past legislative acts undoubtedly will make prosecutions more difficult, nevertheless, the Speech or Debate Clause was designed to preclude prosecution of Members for legislative acts.”<sup>64</sup> Adhering to its ruling in *Brewster*, the court affirmed that “a promise to deliver a speech, to vote, or to solicit other votes is not ‘speech or debate’ within the meaning of the Clause, nor is a promise to introduce a bill at some future date a legislative act.”<sup>65</sup> But the protection does extend to legislative acts already performed.<sup>66</sup> Also, as indicated previously, the *Helstoski* court broadly held that a member’s waiver of the clause’s protections must be shown to be an “express and unequivocal” repudiation of those protections.<sup>67</sup>

The source of Sen. Proxmire’s problems in *Hutchinson v. Proxmire* was not allegations of criminal conduct but an allegedly libelous attempt at humor. The senator regularly bestowed “Golden Fleece” awards for public expenditures of taxpayer money he considered wasteful. The plaintiff received one for his research on anger in animals. Sen. Proxmire presented his comments in the Congressional Record and referred to the award in newsletters to his constituents and others. He also referred to the research in a television interview, and his aide contacted federal agencies that had supported the research.<sup>68</sup> The court denied the senator the support he sought under the clause, holding that while his speech on the Senate floor was wholly protected, “neither the newsletters nor the press release was ‘essential to the deliberations of the Senate’ and neither was part of the deliberative process.”<sup>69</sup> The court acknowledged that it had given the clause “a practical rather than a strictly literal reading” by not limiting the protection to utterances within the four walls of the chambers, but extending it to committee hearings, “even if held outside the Chambers,” and to committee reports.<sup>70</sup> But it held that only legislative activities can be protected and the clause reaches matters that are, quoting *Gravel*, “an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation.”<sup>71</sup> Though press releases and newsletters have a relation to that process, they are not part of the protected legislative function in the manner that “congressional efforts to inform itself through committee hearings are part of the legislative function.”<sup>72</sup>

The cases described above, taken together with lower federal appellate and district court decisions following the Supreme Court’s guidance, indicate that the Speech or Debate Clause absolutely protects as legislative acts speaking on the House or Senate floor;<sup>73</sup> introducing and voting on bills and resolutions;<sup>74</sup> preparing and submitting committee reports;<sup>75</sup> acting at committee meetings and hearings;<sup>76</sup> gathering information, both through formal committee investigations and through

---

64. *Helstoski*, 442 U.S. at 487.

65. *Id.* at 495-96.

66. *Id.* at 490.

67. *Id.* at 491.

68. 443 U.S. at 114-17.

69. *Id.* at 130.

70. *Id.* at 124.

71. *Id.* at 126.

72. *Id.* at 132-33.

73. *Johnson*, 383 U.S. at 18-85; *Gravel*, 408 U.S. at 616, 623 n.14; *Eastland*, 421 U.S. at 501, 503, 509-10, 510 n.16.

74. *Kilbourn*, 103 U.S. at 204 (stating that “[t]he reason for the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, ... and to the act of voting...); *Brewster*, 408 U.S. at 516 n. 10, 520; *Gravel*, 408 U.S. at 617 (“act of voting...covered”).

75. *Kilbourn*, 103 U.S. at 204; *McMillan*, 412 U.S. at 311; *Gravel*, 408 U.S. at 617.

76. *Kilbourn*, 103 U.S. at 204; *McMillan*, 412 U.S. at 313; *Gravel*, 408 U.S. at 628-29. In addition, some lower courts have held that the Clause bars the use of evidence of a member’s committee membership. *Compare*, *United States v. Swindall*, 971 F.2d 1531 (11<sup>th</sup> Cir. 1991), *rehearing denied*, 980 F.2d 1449 (11<sup>th</sup> Cir. 1992) with *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994), *cert. denied*, 514 U.S.1003 (1995).

## 10. Speech or Debate Protection

---

informal fact-finding by members and staff;<sup>77</sup> gathering information from federal agencies and lobbyists;<sup>78</sup> and negotiating and drafting legislative proposals.<sup>79</sup> It also has been held to protect analyses of information that supports, or is gathered to support, legislative functions<sup>80</sup> and preparatory activities that are a normal and routine part of any hearing, speech, meeting, information-gathering effort or other legislative activity.<sup>81</sup>

But that case law clearly does not protect criminal conduct, such as bribery or extortion, which are not part of the legislative process.<sup>82</sup> Additionally, it appears the clause provides no protection for what the court has deemed “political” or “representational” activities, such as direct communications with the public,<sup>83</sup> speeches outside of Congress,<sup>84</sup> newsletters,<sup>85</sup> press releases,<sup>86</sup> private book publishing,<sup>87</sup> or even the distribution of official committee reports outside the legislative sphere.<sup>88</sup> According to the court, these types of activities are not covered because they are not “an integral part of the deliberative and communicative processes” by which members participate in legislative activities.<sup>89</sup> Further, while the clause protects certain contacts by members with the executive branch—such as investigations related to legislative oversight

---

77. *Eastland*, 421 U.S. at 504 (“A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to effect or change.”) (quoting *McGrain v. Daugherty*, 273 U.S.135, 175 (1927)); *United States v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988) (concluding that “informal” legislative fact-finding conducted by a congressman was protected under the Speech or Debate Clause); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) (documents voluntarily delivered to committee by private citizen protected); *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir.1976) (en banc) (“acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the [Speech or Debate] privilege....”); *Gov’t of the Virgin Islands v. Lee*, 775 F.2d 514, 520-21 (3d Cir. 1985) (fact-finding by individual legislator protected); *Miller v. Transamerican Press, Inc.* 709 F.2d 524, 530 (9th Cir. 1983) (concluding that unofficial investigations by a single member are protected from civil discovery to the same extent as official investigations by Congress as a body); *Securities and Exchange Commission v. Committee on Ways and Means, U.S. House of Representatives and Brian Sutter*, 2015 U.S. Dist. LEXIS 154302 (S.D.N.Y. Nov. 13, 2015) (“[T]he applicability of the Speech or Debate Clause’s protections does not hinge on the formality of the investigation.... To the extent that responsive documents reflect communications from Greenberg to Sutter that are part of the subcommittee’s informal information gathering concerning a matter that might be the subject of legislation, such documents need not be produced.”); *Webster v. Sun Co., Inc.*, 561 F. Supp. 1184, 1189-90 (D.D.C. 1983) (Congressional Research Service analyst’s receipt of information from lobbyist protected), *vacated and remanded on other grounds*, 731 F.2d 1 (D.C. Cir. 1983); *Tavoulaeous v. Piro*, 527 F. Supp. 676, 680 (D.D.C. 1981) (acquisition of information by congressional staff, whether formally or informally, is an activity within the protective ambit of the Speech or Debate Clause.). *But see Bastien v. Office of Senator Nighthorse Campbell*, 390 F.3d 1301, 1315-16 (10th Cir. 2005) (holding that clause does not protect informal information gathering by a member or his aides because such acts are not legislative acts).

78. *United States v. Dowdy*, 479 F.2d 213, 223-24 (4th Cir. 1973) (clause protected congressman’s meetings with federal prosecutor and federal housing agency officials where the “Congressman, who was chairman of a subcommittee investigating a complaint [against a construction company], [was] gathering information in preparation for a possible investigatory hearing.”); *Jewish War Veterans v. Gates*, 506 F. Supp. 2d 30, 57 (D.D.C. 2007) (the clause protects legislators’ contacts with “interested organizations and members of the public,” including lobbyists, “[t]o the extent that [legislators’] communications, discussions, or other contacts...constitute information gathering in connection with or in aid of [] legislative acts.”).

79. *Jewish War Veterans*, 506 F. Supp. 2d at 53 (“actual drafting of legislation [and] negotiating with other Members over it” are “indisputably legislative in nature” and therefore covered by the Speech or Debate Clause). *But see Renzi v. United States*, 651 F.3d 1012 (9th Cir. 2011) (petitioner’s conduct was found not to be actually legitimate fact-finding for negotiation over draft legislation, but was rather a criminally extortionate promise to introduce to introduce land-exchange legislation if the potential beneficiaries bought a tract of land from one of his partners who owed the petitioner money).

80. *Gravel*, 408 U.S. at 616, 618; *Pentagon Techs. Int’l Ltd. v. Committee on Appropriations*, 20 F. Supp. 2d 41, 43-44 (D.D.C. 1998) *aff’d* 194 F.3d 174 (D.C. Cir. 1999) (clause protects analytical and investigative reports, related to a federal government program, generated by committee staff).

81. *Gravel*, 408 U.S. at 629; *Johnson*, 383 U.S. at 173-76; *MINPECO, S.A. v. Conticommodity Servs.*, 844 F.2d 856, 861 (D.C. Cir. 1988).

82. See *Brewster*, 408 U.S. at 526; *Helstoski*, 442 U.S. at 489 (holding that evidence can be introduced regarding corrupt agreements on the basis that “promises by a Member to perform an act in the future are not legislative acts”).

83. See *Brewster*, 408 U.S. at 512 (stating that “[a]lthough these are entirely legitimate activities, they are political in nature rather than legislative, in the sense the term has been used by the court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.”).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Gravel*, 408 U.S. at 625.

88. *McMillan*, 412 U.S. at 306.

89. *Gravel*, 408 U.S. at 625.

of the executive—other contacts, like assisting constituents in “securing contracts” and making “appointments with government agencies,” are not protected.<sup>90</sup>

## C. Current Uncertainties as to the Reach of the Clause’s Protections

There are at least two significant unresolved issues under the clause. First, are the testimonial and documentary responses of a member to the investigative inquiries of the House or Senate ethics committees “legislative acts” subject to absolute protection against compelled disclosure to the executive branch? Second, and most importantly, does the clause encompass a “nondisclosure” privilege that provides an absolute protection against the compelled production of documentary materials and records that reflect legislative activities?<sup>91</sup>

### 1. The Nature and Scope of the Member Privilege for Testimony before Ethics Committees

The Constitution, in providing absolute immunity for members from criminal prosecutions and civil suits for certain legislative acts, also empowers “[e]ach House [to] . . . punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.”<sup>92</sup> This authority of each house to discipline a member for “disorderly Behavior” is in addition to any civil or criminal liability that a member may incur for particular misconduct.<sup>93</sup> It is complementary to the Speech or Debate Clause and is an implicit suggestion that the legislature is responsible for effectively policing its protected domain.

There have been few litigated instances of attempts by prosecutors to utilize the testimony and documentary materials disclosed in committee ethics disciplinary proceedings—a total of three in the District of Columbia Circuit in the last 35 years; but those rulings have aroused relevant academic and judicial critical attention.

90. *United States v. McDade*, 28 F.3d 283, 299-300 (3d Cir. 1994) (citing *Eastland*, 421 U.S. at 504-06), *cert. denied*, 514 U.S. 1003 (1995); *see also Brewster*, 408 U.S. at 512. A recent Third Circuit ruling in *United States v. Menendez*, 831 F.3d 155 (3d Cir. 2016), casts some doubt about the protections from prosecutorial use evidence of motivation in the exercise of alleged legislative activities. Senator Menendez was accused of having intervened with an executive agency on behalf of a constituent in exchange for personal gifts and campaign contributions. The senator argued that the Speech or Debate privilege protected “any effort by a Member to oversee the Executive Branch, including informal efforts to influence it,” and could not inquire into the motives behind such legislative activity. The appeals court rejected those claims, explaining that no inquiry into motivation is necessary if the act is “inherently” or “manifestly” legislative or non-legislative. But if the act is deemed by a court as “ambiguously legislative” such an inquiry into motivation is necessary to determine its legislative or non-legislative character. 831 F.3d at 166-73. The ruling raises substantial questions respecting its compatibility with above-noted Supreme Court precedents decrying inquiries into motivations. At this writing a petition for certiorari is pending before the Supreme Court. *See* discussion in Michael Stern, *Should SCOTUS Hear Senator Menendez’s Speech or Debate Case?*, <http://www.pointoforder.com/2016/08/11/should-scotus-hear-senator-menendezs-speech-or-debate-case/>

91. Speech or Debate Clause issues have arisen in the context of civil actions brought by congressional employees seeking to redress alleged adverse employment and personnel actions. The state of the law in that area with respect to the impact of the clause on such litigation is in a developmental stage with a narrow focus on internal employment concerns rather than with this study’s broader focus on inter-branch institutional questions of oversight and investigation, and thus will not be addressed. It may be noted, however, that in 1995 Congress enacted the Congressional Accountability Act (CAA), Pub. L. No. 104-1, *codified* at 2 U.S.C. §§ 1301-1438, that makes applicable to Congress and its agencies Title VII of the Civil Rights Act, and other labor, employment, workplace safety, health and public access laws and requirements, and provides legal process for resolving alleged violations of the CAA either through its Office of Compliance (OOC) or court actions. Under the CAA, a covered employee may, after exhausting specified counseling and mediation requirements, proceed against his or her employing office for the alleged violations of the statutes incorporated in the CAA. An employee has a choice of filing a complaint with the OOC or bringing a suit in a federal district court. Filing a complaint with OOC, if successful, may obtain all the remedies that could be obtained in a federal court action. 2 U.S.C. §§ 1311(b), 1404(1), 1405 (a). Significantly, because the OOC process occurs within the legislative branch, it is not in an “other place,” and therefore Speech or Debate immunities for members and aides is not applicable. A suit brought in federal court, however, will be subject to Speech or Debate claims. *See, e.g.,* *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 14, 17, 18, 30 (D.C. Cir. 2006) (*en banc*), *appeal dismissed and cert. denied sub nom.* *Office of Sen. Mark Dayton v. Hanson*, 550 U.S. 511 (2007). Congress made it clear that it did not intend to waive any protections afforded to members under the Speech or Debate Clause by allowing judicial proceedings. 2 U.S.C. § 1413. An employee’s choice is irrevocable, meaning the plaintiff cannot go back if he or she is dissatisfied with the initial chosen forum. 2 U.S.C. § 1404. Remedial options available to congressional employees and past settlement awards under the internal OOC process may be accessed at [www.compliance.gov](http://www.compliance.gov). The evidentiary difficulties of the judicial option imposed by claims of Speech or Debate immunity by member offices make for an extended and likely unsuccessful litigation experience. *See, e.g.,* *Howard v. Office of the Chief Administrative Officer of the U.S. House of Representatives*, 2015 U.S. App. LEXIS 22290 (D.C. Cir. Dec. 21, 2015), reflecting the final, summary dismissal of a six year litigation effort foiled by evidentiary insufficiency resulting from the inability to overcome immunity claims.

92. U.S. Const. Art. I, Sec. 5, cl. 2.

93. *See* JACK MASKELL, CONG. RESEARCH SERV., RL 31382, EXPULSION, CENSURE, REPRIMAND AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES (2013).

The initial ruling in this series was *Ray v. Proxmire*,<sup>94</sup> a 1978 case that arose out of a Senate Ethics Committee investigation of allegations that a senator allowed his wife to use Senate rooms to assist her tour business.<sup>95</sup> In a response to the committee chairman's request for information regarding the claims, the senator provided a letter that allegedly libeled the appellant and disparaged her business. The appeals court dismissed the libel claim as falling within the ambit of speech or debate protection, holding that since the senator was "responding to a Senate inquiry into an exercise of his official powers, ... [he] was engaged in a matter central to the jurisdiction of the Senate, and '[t]he claim of unworthy purpose does not destroy the privilege."<sup>96</sup> The court added "[t]hat there is no indication that that he disseminated his letter to anyone whose knowledge of its contents was not justified by legitimate legislative needs. Nor is there any suggestion that the statement objected to intimated anything not reasonably spurred by the subject of Chairman Cannon's request."<sup>97</sup>

The *Ray* court's reliance on the senator's "exercise of his official powers" as the foundational rationale for its speech or debate holding was utilized to distinguish it from the situation presented in *United States v. Rose*.<sup>98</sup> That case involved a House Ethics Committee report on a member who borrowed money from his campaign and failed to disclose those liabilities, which violated House rules and the Ethics in Government Act.<sup>99</sup> The report contained transcripts of the member's testimony detailing his explanations for each financial transaction at issue and the committee's assessment of his explanations.<sup>100</sup> The *Rose* court held that the report was not protected by the clause because "Congressman Rose was acting as a witness to facts relevant to a congressional investigation of his private conduct; he was not acting in a legislative capacity."<sup>101</sup> The panel rejected the argument that the member's revelations, if made on the floor of the House, would have been protected, stating that "we rely not on the fact that Congressman Rose testified in a committee room but on the fact that his testimony was given in a personal capacity rather than 'in the performance of [his] official duties'; we focus on what Congressman Rose said, not where he said it."<sup>102</sup> *Ray* was distinguished on the grounds that since the senator allegedly misused Senate rooms and thereby directly touched the institution of the Senate, it raised a possible violation of the rules of the Senate. "Indeed, the *Ray* court pinned its holding on a finding that the Senate inquiry was into the 'exercise of [Sen. Packwood's] official powers.' By contrast, in this case, the House Ethics Committee was probing allegations that Rose failed to report certain personal financial transactions."<sup>103</sup> The *Rose* court also rejected the contention that allowing such testimony to be utilized in future executive prosecutions serves to undermine the efficacy of its constitutional mandate under the Discipline Clause because it would encourage non-cooperation of members in its investigations out of fear of providing ammunition for future lawsuits. It suggested that the possibility of such inhibitions could be avoided by declining to issue reports or by redacting portions of reports, or by amending the Ethics Act to restrict the jurisdiction of the Department of Justice (DOJ) or to exempt members of Congress from its strictures.<sup>104</sup>

The latest precedent from the District of Columbia appeals court appears to have muddled the law in this area still further. *In re Grand Jury Subpoenas*<sup>105</sup> concerned an investigation of a member's private funding by a lobbyist for a trip to Scotland. When media reports publically questioned the inconsistencies in his disclosure statements, the member wrote to the House Ethics Committee to account for the irregularities and asserted that the trip was primarily for legislative fact-finding. The committee opened an investigation and determined that the member had violated House rules, but decided not to censure him when he agreed to donate the cost of the trip to the U.S. Treasury. Thereafter, a grand jury began an investigation of the member's conduct and issued subpoenas to the law firm and the individual lawyers who represented him before the committee. The member intervened to quash the subpoenas on the grounds, among others, that the

---

94. 581 F.2d 998 (D.C. Cir. 1978) (per curiam).

95. *Id.* at 999-1000.

96. *Id.* at 1000, citing *Gravel and Tenney*.

97. *Id.*

98. 28 F.3d 181 (D.C. Cir. 1994).

99. *Id.* at 184.

100. *Id.* at 188.

101. *Id.*

102. *Id.* (citing the formulation in *Brewster*, 408 U.S. at 512, rather than the broader standard put forth in *Gravel*, 408 U.S. at 625).

103. *Id.* at 189.

104. *Id.* at 190.

105. 571 F.3d 1200 (D.C. Cir. 2009).

testimony and documents they called for were protected by the Speech or Debate Clause. The district court denied the motion to quash but an appeals court panel unanimously reversed, holding that the statements made to the committee were protected by the clause.

The majority of the panel rested its ruling on the *Ray* and *Rose* precedents, adopting their distinction between official and personal activity. The *Ray* situation was deemed closely analogous to the case before it because they both involved responses “directly spurred by the [Ethics Committee’s] inquiry into whether [each] had abused his office.”<sup>106</sup> The *Ray* court had found that the senator’s alleged act was an exercise of his “official powers.” In contradistinction, the majority found that *Rose* dealt only with the member’s “personal financial transactions” that were neither “done [nor] claimed to have been done in [the congressman’s] legislative capacity,” whereas in the situation before it the member’s actions were either a use or abuse of his “official powers.”<sup>107</sup> The majority therefore concluded that the clause protected the member’s testimony.<sup>108</sup>

Judge Kavanaugh joined in the result of the majority opinion but issued a concurrence that was a blistering critique of its rationale. He declared that the adoption of the *Ray* and *Rose* distinctions between “official” and “personal” acts had caused “confusion” and “disarray,” “distort[ed] the constitutional text” and “create[d] a host of practical and jurisprudential difficulties.”<sup>109</sup> In his view, testifying before an ethics committee is itself the relevant act, rather than the action under investigation,<sup>110</sup> and therefore such testimony should always be protected.<sup>111</sup> Judge Kavanaugh saw the case as an intersection of the two clauses. He reasoned that the text of the Speech or Debate Clause, which protects “any Speech or Debate in either House,” and that of the Discipline Clause, which grants expansive authority to discipline and sanction members “for violations of statutory law, including crimes; for violations of internal congressional rules; or for any conduct which the House of Representatives finds has reflected discredit upon the institution,”<sup>112</sup> taken together, applies to a member’s statement to a congressional ethics committee as speech in an official congressional proceeding and thus falls within the protection of the clause. Judge Kavanaugh relied heavily on *Gravel’s* statement that “[t]he heart of the Clause is speech or debate in either House,”<sup>113</sup> and on its formulation of the standard identifying covered legislative acts as “matters” that are “integral to the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation *or with respect to other matters which the Constitution places within the jurisdiction of either House.*”<sup>114</sup> Emphasizing the “catch-all” portion of the standard, the judge concluded that a “Member’s speech in an official House disciplinary proceeding qualifies under either prong of the *Gravel* test: Such a Member not only engages in ‘Speech or Debate in either House’ but also, by definition, takes part in communicative processes with respect to matters which the Constitution places within the jurisdiction of the House.”<sup>115</sup> Judge Kavanaugh conceded that his broad reading of the clause’s protection will thwart executive investigations and prosecutions, including lying to Congress, but he countered that the framers understood that consequence was necessary in providing for the essential structural safeguards to maintain the scheme of separated powers. He also noted that lying members do not get a free pass since they are subject to institutional punishments that include expulsion.<sup>116</sup>

---

106. *Id.* at 1203.

107. *Id.*

108. *Id.*

109. *Id.* at 1203-04.

110. *Id.* at 1206 (“The *Ray* court went off the rails, in my judgment, by focusing on the *subject matter* of the underlying disciplinary proceeding—and by applying a test that grants protection only when the investigation concerns a Member’s official conduct, as opposed to his or her personal conduct.”)

111. *Id.* at 1207.

112. MASKELL, *supra* note 93, at 2.

113. *Gravel*, 408 U.S. at 625.

114. *Id.* (emphasis supplied).

115. 571 F.3d at 1205.

116. *Id.* at 1206. See also, *Recent Cases, Constitutional Law—Speech or Debate Clause—D.C. Circuit Quashes Subpoenas for Congressman’s Testimony to the House Ethics Committee*, 123 HARV. L. REV. 564, 569-71 (2009) (agreeing with Judge Kavanaugh’s critique of the D.C. Circuit’s reliance on the “official/personal acts” distinction in dealing with the applicability of the clause but disputing the judge’s broad reading of both the texts of the Speech or Debate and Discipline Clauses and the *Gravel* test for identifying a protected legislative act).

The unresolved nature and scope of member protections under the Speech or Debate Clause for testimony and documentary material supplied during ethics committee proceedings awaits further Supreme Court guidance.

## 2. Does the Clause Afford Members a Nondisclosure Privilege against the Compelled Production of Documentary Materials and Records?

The Supreme Court has held that, when applicable, the Speech or Debate Clause provides members and staff an absolute testimonial or discovery privilege against being compelled to testify about legislative matters.<sup>117</sup> The Supreme Court has never considered whether that protection extends to executive branch search or seizure of documentary materials and records that reflect legislative activities.

The application of the Speech or Debate Clause to legislative records is a matter of utmost importance to the Congress. While legislative work in 17<sup>th</sup>-century England and in the early years of our republic may have been limited to floor speeches and votes that has long since ceased to be the case. The legislative work of the House and Senate is a document-intensive process, with large volumes of written work product generated each day—including, but not limited to, drafts of legislation, reports and floor statements; analyses of legislative proposals in the form of emails and memoranda; correspondence concerning legislative and oversight matters; and materials gathered in response to congressional subpoenas.

Despite the importance of the issue and a clear circuit split, the Supreme Court has declined review in recent cases that raised the question of whether the Speech or Debate Clause includes a nondisclosure privilege. In *United States v. Rayburn House Office Bldg.*,<sup>118</sup> the D. C. Circuit squarely held that an FBI search and seizure of documents and computer hard drives from a congressman's office ran afoul of the nondisclosure component of the clause. This was consistent with a line of D.C. Circuit and D.C. district court case law dating back to 1981.<sup>119</sup> But two other U.S. appeals courts have recently denied the availability of a documentary nondisclosure privilege: the Ninth Circuit, in *United States v. Renzi*,<sup>120</sup> and the Third Circuit, in *In re Fattah*.<sup>121</sup>

The *Rayburn* case involved the first, and, thus far, the only issuance and execution of a warrant to search and seize documents from a congressional office in the more than 135 years since the establishment of the DOJ in 1870. More commonly, the executive branch or a private party issues a subpoena for documents.

### a. Congressional Response to Document Subpoenas

Congress's approach to responding to executive subpoenas has evolved over time, but even as procedures have changed, Congress has demonstrated a consistent understanding that the initial determination of Speech or Debate Clause applicability is to be made by the House or Senate itself, subject to court review. The Justice Department had long acquiesced in this understanding. A DOJ manual for U.S. attorneys states:

---

117. *Gravel*, 408 U.S. at 615-16.

118. 497 F. 3d 654 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1295 (2008).

119. *See, e.g.*, In re Grand Jury subpoenas, 571 F. 3d 1200 (D.C. Cir. 2009) (reversing lower court order that declined to quash a subpoena for member records directed to member's lawyers); *Rayburn*, 497 F. 3d at 654 (execution of search warrant for member records violated Speech or Debate Clause); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F. 3d 408 420 (D.C. Cir. 1995) (clause includes a documentary nondisclosure privilege); *MINPE-CO, S.A. v. Conticommodity Servs., Inc.*, 844 F. 2d 856, 859-61 (D.C. Cir. 1988) (affirming lower court order quashing document subpoena to a House subcommittee); *Pentagen Techs. Int'l, Ltd. v. Comm. on Appropriations*, 20 F. Supp. 2d 41, 45 (D.D.C. 1988) (House committee's "investigative reports are protected from compulsory disclosure by the Speech or Debate Clause"), *aff'd*, 194 F. 3d 174 (D.C. Cir. 1999) (per curiam); *United States v. People's Temple of the Disciples of Christ*, 515 F. Supp. 246, 248-49 (D.D.C. 1981) (quashing document subpoena for House committee records directed to committee chairman and clerk of the House); *Order, United States v. Clemens*, No. 1:10-cv-00223 D.D.C. Apr. 27, 2011) (quashing document subpoena to House committee).

120. 651 F. 3d 1012 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

121. 802 F. 3d 516 (3d Cir. 2015).

[B]oth the House and the Senate consider that the Speech [or] Debate Clause gives them an institutional right to refuse requests for information that originate in the Executive or the Judicial Branches that concern the legislative process. ... The customary practice when seeking information from the Legislative Branch which is not voluntarily forthcoming from a Senator or Member is to route the request through the Clerk of the House or the Secretary of the Senate. This process can be time-consuming. However, bona fide requests for information bearing on ongoing criminal inquiries have been rarely refused.<sup>122</sup>

A brief review of the House's history and practice in responding to subpoenas is instructive.<sup>123</sup> While the House itself cannot expand the constitutional scope of the clause, the *procedures* adopted to deal with the subpoenas can, and they were seen by the *Rayburn* court as a constitutionally appropriate alternative to the executive's execution of a search warrant that precluded the House's ability to conduct and oversee a protective review and make such initial privilege determinations.<sup>124</sup>

Utilizing its constitutional rulemaking power, the House, from the 1876 receipt of the first subpoena until 1980, established that subpoenas for documents were to be handled on a case-by-case basis and could be complied with only with the permission of the House by passage of a resolution to that effect.<sup>125</sup>

In 1980 the House adopted House Resolution 722, which created a new procedure for responding to subpoenas that remains in effect. It is currently incorporated into the House rules as Rule VIII.

According to the legislative history that accompanied House Resolution 722,<sup>126</sup> the resolution was structured around two distinct, constitutionally based principles. First, compliance with properly issued subpoenas should be the ultimate goal. Second, it is the institution of the House of Representatives, through the speaker of the house, which is to remain in control of all determinations with respect to application of the privilege and the protections it affords.<sup>127</sup>

122. See U.S. DEP'T OF JUSTICE, U. S. ATTORNEY'S MANUAL, CRIMINAL RESOURCE MANUAL, § 2046, [www.http://www.usdoj.gov/eousa/foia\\_reading\\_room/usam/title9/crm02046.htm](http://www.usdoj.gov/eousa/foia_reading_room/usam/title9/crm02046.htm).

123. The following discussion of the evolution of House practice is not intended to imply the Senate practice is less protective. Under Senate Standing Rule XXVI.10 (a), all committee records are deemed to be the property of the Senate and may be released only by leave of the Senate by resolution. Senate response to subpoenas occurs on a case-by-case basis and is similar to the House's procedures before the latter were revised in 1980.

124. For a detailed history of the House practice, see MORTON ROSENBERG, JACK MASKELL & TODD TATELMAN, CONG. RESEARCH. SERV., LEGAL AND CONSTITUTIONAL ISSUES RAISED BY THE EXECUTIVE BRANCH SEARCHES OF LEGISLATIVE OFFICES 13-22 (2006), <http://electionlawblog.org/archives/Jefferson%20GD%20Memo.pdf>.

125. See, e.g., 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, ch. 81 § 2661 (1907) ("Whereas the mandate of said Court is in breach of the privilege of the House: Resolved That the said committee and members thereof are hereby directed to disregard said mandate until further order of this House." In 1886 the House passed a resolution detailing the steps in a response to compulsory process that became a paradigm for future actions. See 17 CONG. REC. 1295 (1886).

126. The legislative history of the resolution consists of H. RULES COMM., H.R. REP. NO. 96-1116 (1980), as well as the extensive floor debate. 126 CONG. REC. 25787-790 (1980).

127. H.R. REP. NO. 96-1116 at 3, 8.

By requiring written notice to the speaker and subsequent notification to the House before refusal of compliance with a subpoena, the House has delegated much of the decision-making with respect to subpoenas to the House general counsel's office.<sup>128</sup> These procedures ensure compliance with properly filed subpoenas, but they do not waive, impede, limit or in any way prevent the institution from asserting its position and protecting its interests with respect to intrusions by other branches of the government. Whether the institution asserts its interests through *amicus curiae* filings in the courts, or by adopting a resolution prohibiting compliance, under Rule VIII the House itself has a means of safeguarding its speech or debate privilege.

The above history is important context for understanding the House of Representatives' strenuous objections to the FBI's search in the *Rayburn* case, as well as the D.C. Circuit's ruling.

***b. United States v. Rayburn House Office Building***

In March 2005, the FBI began an investigation of Rep. William J. Jefferson to determine whether he and other persons had engaged in bribery and/or wire fraud. In May 2006, the FBI sought and obtained a warrant to search Rep. Jefferson's office in the Rayburn House Office Building. Previous warrants had been issued to search the congressman's residences in both Florida and Washington, D.C., as well as his automobiles. A videotape of his receipt of \$100,000 in marked bills from a cooperating witness led to the search of his D.C. residence, where \$90,000 of the money was found in the freezer of his refrigerator. The affidavit contained statements from a Jefferson staffer that further evidence of the offenses would be found at his offices, a detailed itemization of evidence that was to be sought, and a description of the government's efforts to exhaust less intrusive approaches to obtain the documents.

No warrant to search a congressional office had ever been sought or obtained before. In apparent recognition of the unique and constitutionally sensitive action the DOJ was about to take, the supporting affidavit contained special procedures to guide and confine the search process, which were approved by the issuing judge. A search team of special agents from the FBI who had no role in the investigation (non-case agents) would examine every paper document in the office and determine which were responsive to the list of documents sought. The non-case agents were forbidden from revealing any non-responsive or politically sensitive information they came across during the search. Responsive documents were then to be transferred to a "filter team" consisting of two non-prosecution team DOJ attorneys and a non-case FBI agent, who would review the documents to determine responsiveness and whether speech or debate protections could apply. Responsive documents deemed not covered by the Speech or Debate Clause were to be transferred to the prosecution team, which had to provide copies to Rep. Jefferson's attorney.

Papers potentially covered by the clause were to be recorded in a log to be given to counsel, along with copies of the papers. According to the warrant, the potentially privileged papers were not to be supplied to the prosecution team until a court so ordered.

---

128. The historical context of the 1980 rule revision is important for understanding its significance. For many years prior to 1980 Congress relied primarily on the Justice Department for its representation in litigation arising out of its constitutional powers, by statute and tradition. Starting in the late 1960s, Congress and the executive became involved in an increasing number of litigation disputes. A Senate committee estimated that between 1970 and 1977 Congress became involved in over 200 legal proceedings, many eventually requiring defense of the institution's constitutional powers. During that period the Justice Department defended members, offices, and committees of the Congress in at least 70 cases; and 60 additional legal matters arose in which the Senate Watergate Committee became involved. It became clear that the Justice Department's representation of congressional interests, and even representation by private counsel, was increasingly problematic and contrary to the effective advocacy of Congress's institutional interests. At approximately the same time, the department made it clear that in cases in which the substantive position of the Congress would, in its view, result in an infringement of presidential powers, or in which a congressional action, in its view, was clearly unsupportable, it could not, and would not, defend it. Often the department's determination of "conflicts of interest" did not occur until well after it had entered an appearance and had taken control of the litigation. These factors led to the creation of a counsel's office to represent Congress's institutional interest in both the House and Senate in the late 1970s. The history of the evolution from Congress's principal reliance on the Justice Department and private counsel for representation of institutional and member interests raised in judicial and administrative proceedings to the virtually exclusive reliance on the Offices of the House General Counsel and the Senate Legal Counsel may be found in the Senate's Report on the Public Officials Integrity Act. *See generally*, S. REP. NO. 95-170, at 8-21 (1977); *see also*, Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing In Court the Institutional Client*, 61 LAW & CONTEMP. PROB. 47 (1988); Rebecca M. Solokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 CONG. & THE PRESIDENCY 131 (1993); FREDERICK TAYLOR ET AL., CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 123-7 (2011).

Finally, a special FBI forensics team would download all the electronic files from the office computers and transfer them to an FBI facility where a search would be conducted using court-approved search terms. Responsive data were to be turned over to the filter team. Responsive, potentially privileged computer documents were to be recorded in a log to be given to counsel, along with copies of the documents. The filter team would then request that the court review the potentially privileged documents.

On May 20, 2006, DOJ and FBI agents executed the search warrant at Rep. Jefferson's offices in the Rayburn Building. The search lasted approximately 18 hours and resulted in the seizure of two boxes of paper documents and the contents of every hard drive in the offices. The general counsel of the House and Rep. Jefferson's private counsel sought entry into the offices to oversee the search, but the agents prohibited them from doing so. Rep. Jefferson immediately filed a motion for return of all the materials seized, arguing that the Speech or Debate Clause permitted him to review his files to segregate protected legislative materials before they could be perused and taken by executive agents.

The district court denied Rep. Jefferson's motion and upheld the constitutionality of the search and seizure. After an expedited appeal, the D.C. Circuit reversed. The appeals court concluded that the "compelled disclosure of privileged material to the executive during execution of the search warrant ... violated the Speech or Debate Clause and the Congressman is entitled to the return of the documents that the court determines to be privileged under the Clause."<sup>129</sup>

In reaching its conclusion, the court rested on its previous case law emphasizing that a critical component of the clause is the prevention of intrusions into the legislative process, and that the compelled disclosure of legislative materials is such a disruption, regardless of the proposed use of the material. The appeals panel noted the D.C. Circuit's prior holding in *Brown & Williamson Tobacco Corp. v. Williams*<sup>130</sup> that the clause includes a nondisclosure privilege for both civil cases and criminal prosecutions, and it rejected the view that the testimonial immunity applies only when members or their aides are personally questioned because "[d]ocument[s] ... certainly can be as revealing as oral communications ... [and] indications as to what Congress is looking at provides clues as to what Congress is doing, or what it might be about to do."<sup>131</sup> Applying these principles to the search of Rep. Jefferson's offices, the court stated that

this compelled disclosure clearly tends to disrupt the legislative process: exchanges between a Members of Congress and the Member's staff or among Members of Congress on legislative matters that may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity. The chill runs counter to the Clause's purpose of protecting disruption of the legislative process.<sup>132</sup>

The court then carefully distinguished between the lawfulness of searching a congressional office pursuant to a search warrant—which the court held was clearly permissible—and the lawfulness of the way the search was executed. It concluded that the clause was violated because the executive's search procedures "denied the Congressman any opportunity to identify or assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents."<sup>133</sup>

The court declined, however, to expressly delineate acceptable procedures that could avoid this violation in future searches of congressional offices, noting only that there appeared to be "no reason why the Congressman's privilege under the Speech or Debate Clause cannot be asserted at the outset of a search in a manner that also protects the interest of the Executive in law enforcement."<sup>134</sup> The court observed that the precise contours of these accommodations were a matter best left to negotiations between the political branches, but noted that Rep. Jefferson stated in his brief that

---

129. *Rayburn*, 497 F.3d at 663, 665.

130. *Id.* at 416.

131. *Rayburn*, 497 F.3d at 660, quoting *Brown & Williamson*, 62 F.3d at 420.

132. *Rayburn*, 497 F.3d at 661

133. *Id.* at 661–62.

134. *Id.*

he is not suggesting advance notice is required by the Constitution before Executive agents arrive at his office ... Rather he contends legislative and executive interests can be accommodated without such notice, as urged, for example by the Deputy Counsel to the House of Representatives: “We’re not contemplating advance notice to the [M]ember to go into his office to search his documents before anyone shows up,” but rather that “[t]he Capitol [P]olice would seal the office so that nothing would go out of that office and then the search would take place with the [M]ember there.”

Finally, the court declined to grant Rep. Jefferson’s request for return of all of the seized documents. Instead, the court determined that its previous remand order “affords the Congressman an opportunity to assert the privilege prior to disclosure of privileged materials to the Executive” for electronic files.<sup>135</sup> With respect to the paper documents, the court concluded that, while the clause’s testimonial privilege prevents compelled disclosure of privileged documents, it does not prohibit “inquiry into illegal conduct simply because it has some nexus to legislative functions.”<sup>136</sup> Rep. Jefferson was only entitled to a return of legislative documents protected by the clause. Non-privileged materials did not have to be returned.<sup>137</sup> Further, the court ordered “the FBI agents who executed the search warrant to be continued to be barred from disclosing the contents of any privileged or politically sensitive and non-responsive items, and they shall not be involved in the pending prosecution or other charges arising from the investigation.”<sup>138</sup>

Judge Henderson concurred in the majority’s judgment denying Rep. Jefferson’s motion to return all the seized documents, but rejected the majority’s doctrinally significant holding that the FBI’s review and seizure of legislative documents violated the Speech or Debate Clause. Judge Henderson charged the majority with over-reading *Brown & Williamson*, which she would have limited to situations involving civil subpoena requests for legislative documents.<sup>139</sup> Unlike subpoenas, she argued, search warrants do not require an affirmative act by the targeted party and therefore do not amount to the “questioning” protected under the clause.<sup>140</sup> Judge Henderson thus argued that *Brown & Williamson*’s nondisclosure rule did not extend to criminal investigations because “it is well settled that a Member is subject to criminal prosecution and process”<sup>141</sup> and because a shield against all disclosure of all materials to the executive branch would “jeopardize law enforcement tools ‘that have never been considered problematic.’”<sup>142</sup> Judge Henderson also argued that since the warrant was directed only at non-legislative documents, the creation of non-case filter teams and the requirement of judicial approval before any sharing with the prosecution team could not be seen as causing a constitutional disruption.<sup>143</sup>

Rep. Jefferson’s specific privilege claims, based on his review of the documents pursuant to the appeals court’s remand order, were evaluated by the district court. The documents for which he did not assert privilege were turned over to DOJ for review. Ultimately, Rep. Jefferson was convicted of 11 of the 16 bribery and fraud charges brought against him and received a 13-year prison sentence.<sup>144</sup> Ten of those 11 convictions were upheld by the Fourth Circuit in March 2012.<sup>145</sup>

### ***c. United States v. Renzi***

In 2009, former Rep. Richard Renzi was indicted on 48 criminal counts including extortion, money laundering, wire fraud, insurance fraud, and conspiracy related to alleged *quid pro quo* deals he orchestrated while representing Arizona’s first district in the House of Representatives. Rep. Renzi was accused of promising to introduce land-swap legislation to ensure the payment of a \$700,000 debt to him.

---

135. *Id.* at 665-66.

136. *Id.* at 665.

137. *Id.*

138. *Id.* at 666.

139. *Id.* at 669 (Henderson, J., concurring).

140. *Id.*

141. *Id.* at 670.

142. *Id.* at 671.

143. *Id.* at 669-70.

144. *United States v. Jefferson*, 674 F.3d 332, 338 (4th Cir. 2012); Jerry Markon, *Ex-Rep. Jefferson (D. La.), Gets 13 Years in Freezer Cash Case*, WASH. POST, Nov. 14, 2012.

145. *Jefferson*, 674 F.3d at 368.

Rep. Renzi moved to dismiss the indictment on three grounds. First, he claimed that the charges were premised on legislative facts based on communications involving “negotiations” and “legislative fact-findings” protected by the Speech or Debate Clause. Second, he argued that the charges of the indictment were based on legislative acts and were the result of the government’s introduction of direct or indirect legislative-act evidence in violation of the clause that tainted the indictments. Third, Rep. Renzi argued that he was denied his right to a hearing in which the government would have the burden of proving that its evidence to support the charges against Renzi were independent of and not derived from evidence of his privileged acts. A district court denied the dismissal motions and a panel of the Ninth Circuit unanimously upheld the lower court’s rulings.<sup>146</sup>

The appeals court rejected the contention that Rep. Renzi’s “negotiations” and other interactions with parties to the proposed land-swap deals were protected “legislative acts.” The court explained that his actions were merely “related to,” but not an integral part of, his participation in House proceedings, noting that the Supreme Court in *Brewster* similarly declined to protect a congressman’s “negotiations with private parties,” in part because extending the clause to all matters similarly “related to the legislative process” would conceivably protect *any* activity by members of Congress and thereby “make [them] super-citizens, immune from criminal responsibility.”<sup>147</sup> It rejected as well his argument that when it comes to land-swapping legislation, the act of negotiating with private parties “is analogous to discourse between legislators over the content of bills and must be a ‘protected legislative act’ under a broad construction of the Clause.”<sup>148</sup> The court further concluded that in any event, since Rep. Renzi’s negotiations were extortionate, they were not part of the “legislative process or function.”<sup>149</sup>

Next, the court addressed Rep. Renzi’s contention that his indictment should be dismissed because the grand jury was presented with evidence of protected legislative acts. The panel observed that normally a reviewing court does not inquire into the evidence used to support a grand jury indictment if it is valid on its face, but will do so to prevent violation of a valid privilege. The appeals court found several documents that should not have been presented but refused to dismiss the indictment because it found the protected evidence did not cause the grand jury to indict.

Finally, the court rejected the claim that Rep. Renzi was entitled to a hearing to determine whether the government used evidence protected by the Speech or Debate Clause to obtain non-privileged evidence, or whether the government could prove its case only with evidence derived from legitimate independent sources. The court recognized that Rep. Renzi’s request was based on the premise that the Speech or Debate Clause provides a nondisclosure privilege that has not yet been recognized by the Supreme Court. Under that view, the appeals court noted, “it would require us to ignore the care with which the court has described the bounds of the clause and to agree that legislative convenience precludes the Government from reviewing documentary evidence referencing ‘legislative acts’ even as part of an investigation into unprotected activity.”<sup>150</sup> The court rejected that view, acknowledging that it “has its genesis” in the D.C. Circuit’s ruling in *Rayburn*,<sup>151</sup> but stating that the court “disagree[d] with *Rayburn*’s premise and its effect and thus decline[d] to adopt its rationale.”<sup>152</sup>

The appeals panel noted that the *Rayburn* court held that the Speech or Debate Clause provides a privilege against disclosure because allowing agents of the executive branch to review privileged materials without a member’s consent would “distract” members and their staffs from legislative work. In the view of the appeals court, “distraction *alone*” cannot “serve as a touchstone for application of the clause’s testimonial privilege.”<sup>153</sup> Instead, the court reasoned, the clause protects against “*unnecessar[y]* distraction, a concern that is not at issue when the executive investigates a member for non-legislative (and therefore non-privileged) criminal activity, even if the investigation involves review of documentary

146. *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011).

147. *Id.* at 1021, quoting *Brewster*, 408 U.S. at 513-14.

148. *Renzi*, 651 F.3d. at 1023.

149. *Id.* at 1023-24.

150. *Id.* at 1032.

151. *Id.* at 1033.

152. *Id.* at 1034.

153. *Id.*

legislative act evidence.”<sup>154</sup> The appeals panel emphasized the practical consequences of a nondisclosure rule when the underlying action is not precluded by the clause. “In that circumstance, the court has demonstrated that other legitimate interests exist, most notably the ability of the Executive to adequately investigate and prosecute corrupt legislators for non-protected activity.”<sup>155</sup>

The appeals court noted that the Supreme Court had repeatedly reviewed “legislative act” evidence, which it could not have done without the disclosure of the evidence to the judiciary. This demonstrates, the court said, “that the Clause does not incorporate a nondisclosure privilege as to any branch.”<sup>156</sup>

The Supreme Court denied Renzi’s petition for certiorari on January 12, 2012.<sup>157</sup> On June 11, 2013, he was convicted on 17 of the 32 felony counts charged.<sup>158</sup>

#### *d. In Re Fattah*

Since *Renzi*, the Third Circuit has joined the Ninth Circuit in rejecting a documentary nondisclosure privilege under the Clause. In *In re Fattah*<sup>159</sup> the appeals court denied a motion to quash a warrant to search the personal e-mail account of Rep. Chakah Fattah, who was under investigation for fraud, extortion and bribery. The Third Circuit held that

while the Speech or Debate Clause prohibits hostile questioning regarding legislative acts in the form of testimony to a jury, it does not prohibit disclosure of Speech or Debate Clause privileged documents to the Government. Instead, as we have held before, it merely prohibits the evidentiary submission and use of those documents.

The court stated that recognizing a privilege against the disclosure of documents would allow members of Congress to “in effect, shield themselves from criminal investigations by simply citing to the Speech or Debate Clause. We do not believe the Speech or Debate Clause was meant to effectuate such deception. . . . [I]t was meant to free ‘the legislator from the executive or judicial oversight that realistically threatens to control his conduct as a legislator.’ . . . It is clear that the purpose, however, has never been to shelter a Member from potential criminal responsibility.”<sup>160</sup>

---

154. *Id.* at 1036.

155. *Id.*

156. *Id.* at 1038.

157. 132 S. Ct. 1097 (2012).

158. See Press Release, U.S. Dep’t of Justice, Former Congressman Richard G. Renzi Convicted of Extortion and Bribery in Illegal Federal Land Swap (June 11, 2013), <https://www.justice.gov/opa/pr/former-congressman-richard-g-renzi-convicted-extortion-and-bribery-illegal-federal-land-swap>.

159. 802 F.3d 516 (3d Cir. 2015).

160. *Id.* at 528-29.

### *e. The Institutional Importance of a Document Nondisclosure Privilege*

The D.C. Circuit's ruling in *Rayburn*, recognizing that the Speech or Debate Clause encompasses a nondisclosure privilege for documentary "legislative act" evidence amongst its absolute protections, has been rejected by two other circuits and widely criticized in the academic commentary.<sup>161</sup> But these arguments downplay the importance of a nondisclosure privilege in fulfilling our scheme of separation of powers. They misinterpret the Supreme Court's holdings and ignore other available vehicles and means for sanctioning members to deter them from abusing their offices. A recent incident in which the CIA searched a Senate committee's computers, discussed further below, illustrates the importance of protecting Congress's documents from executive intrusion.

#### **i. Flaws in the Legal Arguments against a Nondisclosure Privilege**

The Supreme Court has described "the central role of the Speech or Debate Clause" as "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary."<sup>162</sup> At the heart of the design is the provision of immunities for individual legislators from threats of legal retaliation for engaging in legitimate legislative activities. The court has held that clause provides absolute protections for all activities in the legislative sphere that are "an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."<sup>163</sup> It has ruled that regarding such covered acts, the clause grants members and their aides immunity from civil actions and criminal prosecutions, guarantees that they will not be subject to interrogation "in any other place" with respect to such legislative acts, and prohibits the use of testimonial/discovery evidence against them.

These rulings are similar to other structural separation of powers decisions, in which the Supreme Court has invalidated provisions of law or actions that either "accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."<sup>164</sup> The salient characteristics of those rulings are that they derive from express constitutional provisions, admit of no exception, and allow no balancing of interests of need, necessity or convenience. These cases reflect the court's concerns over "encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'"<sup>165</sup>

---

161. See, e.g., Jay Rothrock, *Striking a Balance: The Speech or Debate Clause's Testimonial Privilege and Policing Government Corruption*, 24 *TOURO L. REV.* 739, 771-75 (2008) (The clause does not provide legislators with an absolute exemption from criminal process because that "approach severely undervalues the substantial public, and indeed governmental, interest in policing government corruption," and should be guided by the court's treatment of presidential executive privilege claims, which gave substantial weight to the interests of law enforcement because of its concern that withholding evidence in a criminal matter that is "demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic functions of the courts."); Note, *Recent Cases, D.C. Circuit Holds That FBI Search of Congressional Office Violated Speech or Debate Clause*, 121 *HARV. L. REV.* 914, 918, 919 (2008) ("The [D.C. appeals] court correctly concluded that the clause confers a legislative privilege against the compelled disclosure of legislative materials to executive branch officials, but it incorrectly enshrined this privilege as absolute. Instead, the court should have better respected the separation of powers rationale underlying the Speech or Debate Clause by qualifying the nondisclosure privilege as the Supreme Court qualified the executive privilege in *United States v. Nixon* ... The *Rayburn* court, ignored ... the balancing concerns [the Nixon court found necessary in criminal cases] in narrowly focusing on legislative independence as an end in itself, rather than as a means toward preserving the separation of powers structure established in the Constitution."); Kelly M. McGuire, *Limiting the Legislative Privilege: Analyzing the Scope of the Speech or Debate Clause*, 69 *WASH. & LEE L. REV.* 2125 (2012) ("[T]he Clause should be interpreted in a fashion that only protects as legislative actions statements that could become the basis of a libel suit or speech-based crime."); Note, Wells Harrell, *The Speech or Debate Clause Should Not Confer Evidentiary or Non-Disclosure Privileges*, 98 *VA. L. REV.* 385, 385-86, (2012) (concluding that the Speech or Debate Clause intended to provide legislators only with an immunity from punishment for legislative acts and a privilege from testifying about those acts, and that the Supreme Court erred in extending an evidentiary privilege against use of such legislative acts during a bribery trial, which *Rayburn* further extended by prohibiting the discovery and disclosure of documentary materials containing mention of such acts based on the court's flawed interpretation. The court, by failing to give any "weight to the interest in anti-corruption as a matter of constitutional structure and instead overweigh[ing] the danger of legislative chilling effects," has "needlessly frustrate[d] the enforcement of anti-bribery laws which is necessary to punish and deter abuse of the public trust."); MATTHEW PATRICK DOLAN, *A LESSON IN SPEECH OR DEBATE JURISPRUDENCE* (2013), [http://erepository.law.shu.edu/student\\_scholarship/211](http://erepository.law.shu.edu/student_scholarship/211) (arguing that in order to remain true to the constitutional text, the court should grant more deference to Congress's own disciplinary systems).

162. *Gravel*, 408 U.S. at 617.

163. *Id.* at 617, 624-25.

164. *Mistretta v. United States*, 488 U.S. 361, 382 (1989).

165. *Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

The *Renzi* and *In re Fattah* courts and Judge Henderson's dissent in *Rayburn* would retreat from those absolute protections in one instance: the discovery of documentary materials and records that reflect otherwise covered legislative activities. The rationale is that the Supreme Court did not speak to this issue when it had an opportunity to do so, and that in the absence of that guidance the lower courts must take into account an implied structural interest in the enforcement of the criminal laws of the nation before recognizing a documentary nondisclosure privilege.

But the court in *Helstoski*, *Johnson* and *Gravel* did not discuss the question of document nondisclosure simply because it was not raised as an issue in those cases.<sup>166</sup> Those rulings did unequivocally acknowledge and apply the Speech or Debate Clause's absolute prohibition against the introduction of testimonial evidence of legislative acts against a member. Until the court speaks directly to that issue, the sounder view is that its precedents, which affirm that the clause absolutely protects members "once it is determined that Members are acting within the 'legitimate legislative sphere,'"<sup>167</sup> apply to documentary disclosures. Interpreting the clause to permit the compelled disclosures of legislative materials may also be seen as inconsistent with the court's directive that the clause be read "broadly to effectuate its purposes,"<sup>168</sup> despite the acknowledged possibility that its broad reading will allow legislative malefactors to evade sanctions.

The *Gravel* court recognized that its interpretation of the clause must take into account "the complexities of the modern legislative process."<sup>169</sup> Legislators' and their aides' written communications are an integral part of that process. Both staff and cooperative information sources may become wary about their communications if they are not protected, rendering nugatory the recognized testimonial privilege.

## **ii. There Are Sufficient Alternate Institutional Measures Available to Impose Discipline and Restraint on Potentially Wayward Members**

In addition, the rulings ignore the growing efficacy of internal congressional discipline, the number of successful criminal prosecutions that have not relied on evidence of a member's legislative acts, and elections, all of which monitor and punish misconduct by members. As indicated above, the Constitution provides that "each House may ... punish its members for disorderly Behavior."<sup>170</sup> Each house has an ethics committee to investigate and apply such discipline, and since 2008, the House of Representatives has had an independent office, the Office of Congressional Ethics (OCE), responsible for its self-disciplinary process. That office is designed to carry out initial investigations of allegations against lawmakers and then recommends cases for the House Ethics Committee to pursue in formal actions. It acts almost like a grand jury handing up an indictment that would then be pursued by a prosecutor. At certain points its reviews and recommendations may be made public. It is led by a board of non-House members, is fully staffed and funded, and may consider any conduct involving rules and standards that govern members and staff. Since it began operations in 2009 there has been a dramatic increase in scrutiny and discipline of members, and a large number of cases resulted in referral and criminal prosecution without raising speech or debate concerns.<sup>171</sup> When the process reaches the public stage, there are indications that prospects for re-election may drop or that resignations may ensue. Indeed, its effectiveness arguably may have been demonstrated by the political firestorm that accompanied the revelation that a provision in H. Res. 5—the package of rules that would govern the conduct of the business of the House during the 115<sup>th</sup> Congress—would have gutted the OCE's independence by placing it under the control of the House Ethics Committee and would have prohibited OCE staff from speaking publically without Ethics Committee consent. The provision also would have prevented the office from

---

166. See *Securities and Exchange Commission v. House Committee on Ways and Means and Bruce Sutter*, 2015 U.S. Dist. LEXIS 154302, slip opinion at 61 (S.D.N.Y. Nov. 13, 2015) ("To the extent that *Renzi* asserts that *Helstoski*, *Johnson*, and *Gravel* demonstrate that no non-disclosure privilege exists under the Speech or Debate Clause, this Court disagrees. These cases do not address that issue.")

167. See *Eastland*, 412 U.S. at 324.

168. See *McMillan*, 412 U.S. at 311 (quoting *Johnson*, 383 U.S. at 180).

169. See *Gravel*, 408 U.S. at 618.

170. U.S. Const., art. I § 5, cl. 2.

171. See U.S. H.R. OFF. OF CONGRESSIONAL ETHICS, <https://oce.house.gov/>. See also JACOB R. STRAUS, CONG. RESEARCH SERV., R40760, HOUSE OFFICE OF CONGRESSIONAL ETHICS: HISTORY, AUTHORITY, AND PROCEDURES (2017).

investigating anonymous tips. The public criticism included a comment of displeasure from President-elect Trump. The provision was removed from H. Res. 5 before the January 3, 2017 vote of passage.<sup>172</sup>

Moreover, successful prosecutions of members are not uncommon. *Fattah* and *Renzi* are premised on the notion that the investigation and prosecution of corrupt members would be impossible if a document nondisclosure privilege were adopted.<sup>173</sup> But since 1901 there have been at least 70 successful prosecutions of members of Congress (64 representatives and 6 senators).<sup>174</sup> In many cases the convictions were obtained (and affirmed) though the clause operated to block the introduction of certain evidence. This occurred, for example, in the prosecutions of Reps. Johnson and Jefferson.

### iii. The CIA's 2014 Search of the Senate Select Committee on Intelligence's Computers: An Illustration of the Importance of a Documentary Privilege

A recent confrontation between the Senate Select Committee on Intelligence (SSCI) and the CIA provides a dramatic example of the importance of constitutional limits on the executive branch's ability to access legislative documents. Congress's forceful defense of the documentary nondisclosure privilege is crucial for protecting congressional staff from surveillance or retaliation by the agencies they oversee.

In 2014, the CIA searched Senate intelligence committee computers without notice to the committee or authorization from any court. The CIA filed a crimes report against Senate staff with the Department of Justice, falsely alleging that staffers had "exploited" a vulnerability in an agency computer system to gain unauthorized access to classified documents, in violation of the Computer Fraud and Abuse Act. In fact, staffers had used a CIA-provided search tool to search and read CIA documents relevant to a congressional investigation into the CIA's former detention and interrogation program—in other words, they conducted oversight.

SSCI Chairman Dianne Feinstein publicly disclosed the CIA's actions in a Senate floor speech in March 2014.<sup>175</sup> She said the CIA had improperly searched a SSCI computer network to determine how Senate staff had accessed documents called the "Panetta Review," in which the agency acknowledged "significant CIA wrongdoing" regarding its detention and interrogation program.<sup>176</sup> Feinstein stated,

I have grave concerns that the CIA's search may well have violated the separation of powers principles embodied in the United States Constitution, including the Speech and Debate clause....I have asked for an apology and a recognition that this CIA search of computers used by its oversight committee was inappropriate. I have received neither.<sup>177</sup>

Feinstein alleged that following the search, the CIA's acting general counsel had filed an unfounded crimes report against Senate staff with the Department of Justice. She said that the acting general counsel who filed the referral was "mentioned by name more than 1,600 times in our study" of the detention and interrogation program, which documented how he had

172. See Louis Jacobson, *The House GOP's Ethics Vote: What Was That All About, Anyway?*, POLITIFACT, January 3, 2017, <https://www.politifact.com/truth-o-meter/article/2017/jan/03/house-gops-ethics-vote-what-was-all-about-anyway/>; Norm Ornstein, *The GOP's Ethics Disaster*, THE ATLANTIC, Jan. 3, 2017, <https://www.theatlantic.com/politics/archive/2017/01/the-gops-ethics-disaster/512021>.

173. See *In re Fattah*, 802 F. 3d at 528; and *Renzi*, 651 F. 3d at 1036.

174. See [https://wikipedia.org/wiki/List\\_of\\_federal\\_politicians\\_convicted\\_crimes](https://wikipedia.org/wiki/List_of_federal_politicians_convicted_crimes).

175. Press Release, Senator Dianne Feinstein, Floor Statement on Intel Committee's CIA Detention, Interrogation Report (Mar. 11, 2014), <https://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detention-interrogation-report> [hereinafter Feinstein Floor Statement].

176. The "Panetta Review" was a CIA examination of the documents that the agency provided to SSCI for the committee's investigation. The CIA has characterized the review as "summaries of documents being provided to the [committee] ... highlighting the most noteworthy information contained in the millions of pages of documents being made available." Senators and intelligence committee staff, however, have described it as a crucial narrative document, over 1000 pages long, in which the agency acknowledges flaws in the interrogation program it would later attempt to conceal. See Spencer Ackerman, *A Constitutional Crisis: The CIA Turns on the Senate*, THE GUARDIAN, Sept. 10, 2016, <https://www.theguardian.com/us-news/2016/sep/10/cia-senate-investigation-constitutional-crisis-daniel-jones>; Alex Rogers, *Mark Udall Outlines Secret Torture Review on Senate Floor*, TIME, December 10, 2014, available at <http://time.com/3628132/mark-udall-panetta-review-torture/>.

177. Feinstein Floor Statement, *supra* note 175.

“provided inaccurate information to the Department of Justice about the program.”<sup>178</sup> Feinstein stated that she regarded the criminal referral “as a potential effort to intimidate this staff—and I am not taking it lightly.”<sup>179</sup>

An investigation by the CIA Office of Inspector General (OIG) largely confirmed Feinstein’s allegations. The inspector general found that in January 2014, CIA computer technicians, acting on instructions from attorneys in the CIA general counsel’s office, had improperly searched the computer network that staffers used to review documents for the interrogation study (known as RDINet).<sup>180</sup> CIA personnel had “set up a user profile on RDINet that was configured with the same privileges” as a Senate staffer.<sup>181</sup> They used this dummy account to “run Google queries with the same permissions as a SSCI staffer to see what they were able to view in their search results” and to open some of the documents.<sup>182</sup>

According to the OIG report, these initial searches were conducted after CIA Director John Brennan had authorized attorneys to determine how Senate staffers had gained access to the Panetta Review, but Brennan said he did not “direct anyone to review SSCI systems.”<sup>183</sup> Brennan later instructed CIA personnel to “stand down” on further searches until he spoke to the committee. A few days later, however, the CIA’s Office of Security conducted additional searches of RDINet that included a “keyword search of all and a review of some of the emails of SSCI Majority staff members.”<sup>184</sup>

On February 7, 2014, the CIA filed a crimes report with the Department of Justice, alleging that a SSCI staffer had violated the Computer Fraud and Abuse Act by “exploit[ing] a vulnerability” in the CIA’s computer networks “to retrieve a number of CIA documents . . . to which he or she did not have authorized access.”<sup>185</sup> OIG found that “there was no factual basis for the allegations made in the CIA crimes report,” and that the “report was solely based on inaccurate information provided by” CIA attorneys.<sup>186</sup> The Justice Department declined to criminally investigate Senate staff, but has never provided an explanation for its reasoning.<sup>187</sup>

After receiving the inspector general’s report, Brennan apologized to Sens. Feinstein and Chambliss for the search and convened an “accountability board” to determine whether any CIA employees should be disciplined. The accountability board, however, rejected the OIG’s conclusions and recommended against any form of discipline for any CIA employee.<sup>188</sup> It found that the CIA’s actions had been “reasonable” attempts to balance the need “to ensure that a CIA system containing substantial sensitive material was secure” with the need “to safeguard the prerogatives of the Senate.”<sup>189</sup>

The accountability board report did not mention the Speech or Debate Clause as one of these prerogatives. It is unclear what role, if any, the clause played in DOJ’s decision not to launch a full criminal investigation. The CIA inspector general resigned the same month that the accountability board issued its conclusions, though an agency spokesman said the timing was coincidental.<sup>190</sup>

---

178. *Id.*

179. *Id.*

180. CIA OFF. OF INSPECTOR GEN., REPORT OF INVESTIGATION: AGENCY ACCESS TO THE SSCI SHARED DRIVE ON RDINET (July 18, 2014), <https://www.cia.gov/library/reports/Redacted-July-2014-CIA-Office-of-Inspector-General-Report.pdf> [hereinafter CIA OIG REPORT].

181. *Id.* at 7.

182. *Id.* at 7-8.

183. *Id.* at 10-11.

184. CIA OFF. OF INSPECTOR GEN., SUMMARY OF REPORT (2014), <https://www.fas.org/sgp/othergov/intel/ig-ssci.pdf>.

185. Letter from CIA acting general counsel to Attorney General Eric Holder (Feb. 7, 2014), <https://www.cia.gov/library/reports/Redacted-July-2014-CIA-Office-of-Inspector-General-Report.pdf#page=47>.

186. CIA OIG REPORT, *supra* note 180, at 13.

187. *Id.*

188. CIA, FINAL REPORT OF THE RENDITION, DETENTION AND INTERROGATION NETWORK AGENCY ACCOUNTABILITY BOARD (December 2014), <https://www.cia.gov/library/reports/Redacted-December-2014-Agency-Accountability-Board-Report.pdf>.

189. *Id.* at 30.

190. Mark Hosenball, *Exclusive: CIA Says Its Inspector General is Resigning*, REUTERS, January 5, 2015, <http://www.reuters.com/article/us-usa-cia-inspector-exclusive-idUSKBN0KE1BO20150105>.

Sen. Ron Wyden raised the incident with Brennan at a committee hearing in 2016, asking Brennan: “Would you agree that the CIA’s 2014 search of Senate files was improper?”<sup>191</sup> Brennan replied:

Senator, as you well know, there were very unique circumstances associated with this whole affair ... When it became quite obvious to CIA personnel that Senate staffers had unauthorized access to an internal draft document of the CIA, it was an obligation on the part of CIA officers who had responsibility for the security of that network to investigate to see what might have been the reason for that access that the Senate staffers had to that document.<sup>192</sup>

Brennan acknowledged that CIA officers had “inappropriate access ... to five e-mails or so of Senate staffers” during their investigation, but he characterized this as a “de minimis” error that was “taken as a part of a very reasonable investigative action. But do not say we spied on Senate computers or your files. We did not do that. We were fulfilling our responsibilities.”<sup>193</sup> Brennan also said that the staffers had acted “inappropriately” by accessing the Panetta Review.<sup>194</sup>

Wyden later said that SSCI “can’t do vigorous oversight over the agency if the agency we’re supposed to be overseeing is in fact secretly searching our files.”<sup>195</sup>

This episode vividly demonstrates the potential chilling effect of executive branch access to documentary records of Congress’s oversight and legislative activities, even if the documents are not introduced in court and members of Congress and their staffs are not forced to testify.

---

191. *Worldwide Threats: Hearing before the S. Select Comm. on Intelligence*, 114<sup>th</sup> Cong. (2016). A video of the quoted exchange is available at <https://www.wyden.senate.gov/news/press-releases/watch-wyden-questions-cia-director-on-searching-senate-files-director-of-national-intelligence-on-strong-encryption>.

192. *Id.*

193. *Id.*

194. *Id.*

195. Julian Hattem, *Top Dem: CIA Officials Thought Spying on Senate “Was Flat Out Wrong,”* THE HILL, May 25, 2016, <http://thehill.com/policy/national-security/281291-top-dem-cia-officials-thought-spying-on-senate-was-flat-out-wrong>.