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Members Only - United States v. Rayburn House Office Building, Room 2113: The Speech or Debate Clause, the Separation of Powers and the Testimonial Privilege of Preemptive Nondisclosure

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“MEMBERS ONLY!” *UNITED STATES V. RAYBURN HOUSE OFFICE
BUILDING, ROOM 2113*: THE SPEECH OR DEBATE
CLAUSE, THE SEPARATION OF POWERS AND
THE TESTIMONIAL PRIVILEGE OF
PREEMPTIVE NONDISCLOSURE

I. INTRODUCTION

Proponents of democracy have long recognized that, to most effectively represent the will of the people, a legislature must be free to govern without fear of retaliatory persecution at the hands of a separate and hostile branch of government.¹ Indeed, the struggle to protect the legislature from politically motivated judicial retribution began in England more than five hundred years ago.² In America, the Framers were so cognizant

1. See Leon R. Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960, 961-62 (1950) (“Absolute freedom of speech for members of legislative assemblies is one of the fundamentals of parliamentary government, accepted as such by all governments which recognize the parliamentary system and seek to ensure its independence.”). Founding Father James Wilson said of the privilege:

In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.

Tenney v. Brandhove, 341 U.S. 367, 373 (1951) (discussing Founding Fathers’ recognition of need for legislative independence). In 1839, English Lord Denman said:

The privilege of having [legislators’] debates unquestioned, though denied when the members [of Parliament] began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be *indispensable and universally acknowledged*.

Kilbourn v. Thompson, 103 U.S. 168, 202 (1880) (emphasis added) (discussing history of privilege of legislative immunity).

The privilege of congressional immunity from suit based on legislative action is recognized as a protection not only for legislators, but also for the people they represent. See *Tenney*, 341 U.S. at 377 (discussing need for uninhibited legislature); see also *Powell v. McCormack*, 395 U.S. 486, 503 (1969) (explaining that immunity ensures that legislators are more freely able to represent will of constituents without fear of reprisal).

2. See, e.g., Craig M. Bradley, *The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption?*, 57 N.C. L. REV. 197, 198 (1978) (referring to legislative independence as result of “five hundred years of struggle between the Crown and Parliaments in England”); see also *Tenney*, 341 U.S. at 372 (discussing history of legislative independence and noting early parliamentary struggles for independence during 1500-1600s); Alexander J. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U. L. REV. 1, 5 (1968) (tracing roots of struggle for legislative independence to fourteenth century British Parliament). For further discussion of Parliament’s struggles for independence from the Crown, and

of the need for legislative rights that they unanimously resolved to include certain legislative protections in the Constitution.³ Those protections exist in the form of a brief couplet known today as the Speech or Debate Clause (the Clause), which states: “[F]or any Speech or Debate in either House, [members of Congress] shall not be questioned in any other place.”⁴

The preservation of an effective and autonomous legislature is the principal justification for legislative immunity.⁵ This end is achieved by employing legislative immunity as a guard against executive retribution for performance of a legislature’s representative duties.⁶ In the context of the American system of checks and balances, the Speech or Debate Clause primarily acts as a procedural safeguard of the separation of powers.⁷

Over time, the Clause gradually expanded to completely immunize members of Congress from suit based on actions within the scope of legislative behavior considered a “speech or debate.”⁸ The judicial expansion

the ways in which those struggles influenced the Framers of the American Constitution, see *infra* notes 23-29 and accompanying text.

3. See *United States v. Johnson*, 383 U.S. 169, 177 (1966) (noting that Speech or Debate Clause was ratified “without discussion and without opposition”); see also *Powell*, 395 U.S. at 502 (describing ratification of Clause); *Tenney*, 341 U.S. at 372 (stating that Founders recognized legislative privilege as “essential” component to Constitution); Cella, *supra* note 2, at 14 (noting absence of opposition among Framers with respect to Clause); Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1136 (1973) (recognizing lack of debate as to need for legislative immunity and hypothesizing that agreement was due to “firm[] root[s]” of Clause). Though the Framers were unanimous in their desire to include a passage conferring legislative privilege, there was debate as to the inclusion of an affirmative recognition of the scope of the Clause. See Reinstein & Silverglate, *supra*, at 1136-38 (discussing Clause’s enactment at Constitutional Convention). For a discussion of the Framers’ debate over the limits of the Clause, see *infra* notes 32 and 35 and accompanying text.

4. U.S. CONST. art. I, § 6, cl. 1.

5. See *Johnson*, 383 U.S. at 182 (explaining that desire for legislative freedom is “predominant thrust” of Speech or Debate Clause).

6. See Sam J. Ervin, Jr., *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175, 175 (1973) (“Since its framing, the Constitution has clothed [m]embers of Congress with the ‘Speech or Debate’ immunity so that they might conduct the public’s business with candor and independence.”).

7. See *Johnson*, 383 U.S. at 182 (referring to separation of powers as “predominate thrust” of Speech or Debate Clause in American government). The Supreme Court has spoken on the issue, stating that “[a]lthough the Speech or Debate Clause’s historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system.” *United States v. Brewster*, 408 U.S. 501, 508 (1972) (discussing principal basis for legislative immunity in America). In *Brewster*, the Court went on to recognize that the separation of powers in the American system addresses the differences between Parliament’s identity as the supreme governing body in England, and Congress’s stature as one of three separate but equal branches of American government. See *id.* (contextualizing legislative immunity in England and America).

8. See *Tenney*, 341 U.S. at 378 (providing immunity from civil suit arising out of legislative act); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (same); see also

of the Clause has been supported by an equally expansive justification of the Clause not merely as a mechanism for the separation of powers, but as a shield against interruption of the legislative process.⁹ Thus, what was substantively conceived as a protection from the judicial retribution of a hostile Executive is today recognized as an absolute procedural roadblock to otherwise legitimate judicial inquiry of any kind.¹⁰ At times, the judicial expansion of the Clause has frustrated courts by providing minimal analysis or justification for the expansion.¹¹ Today, circuit courts disagree about the role of the Speech or Debate Clause as a testimonial privilege against compelled disclosure of legislative materials.¹²

This Note considers the current confusion regarding testimonial privilege of the Clause in the context of a heretofore-unprecedented action: a Justice Department search of the congressional office of a sitting member of the United States House of Representatives.¹³ In particular, it considers the D.C. Circuit Court of Appeal's decision in *United States v. Rayburn*

Brewster, 408 U.S. at 526 (qualifying portion of *Johnson* but affirming Clause as bar to criminal prosecution for legislative acts); *Johnson*, 383 U.S. at 184-85 (recognizing Speech or Debate Clause as bar to criminal prosecution for legislative acts).

9. *See, e.g.*, *United States v. Gillock*, 445 U.S. 360, 369-71 (1980) (discussing dual purposes of Clause). The Supreme Court has referred to the Speech or Debate Clause as possessing two interconnected but separate rationales: (1) to avoid executive or judicial intrusion, and (2) to ensure wholesale legislative independence. *See id.* (same). Compare *Johnson*, 383 U.S. at 180-81 (concluding that Clause guards primarily against executive intimidation), with *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503-04 (1975) (concluding that Clause exists principally to protect against hostile Executive but also to ensure integrity of legislative independence).

10. *Cf. Gravel v. United States*, 408 U.S. 606, 616 (1972) (concluding that Clause prohibits questioning of Senator regarding Senator's use of confidential Pentagon material); *United States v. Dowdy*, 479 F.2d 213, 225 (4th Cir. 1973) (concluding that Clause bars inquiry into defendant legislator's conversations regarding actions of Subcommittee); *Chapman v. Space Qualified Sys. Corp.*, 647 F. Supp. 551, 554 (N.D. Fla. 1986) (holding that Clause prohibits inquiry into actions of investigator working for House Subcommittee).

11. *Cf. Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995) (referring to Speech or Debate Clause as "deceptively simple"). In *Brown & Williamson*, the D.C. Circuit Court recognized the privilege as "somewhat complicated [and having] several strands." *See id.* (discussing Speech or Debate Clause).

12. Compare *In re Grand Jury Investigation into Possible Violations of Title 18*, 587 F.2d 589, 597 (3d Cir. 1978) (recognizing testimonial privilege of Speech or Debate Clause as merely one of nonevidentiary use in regards to privileged documents), with *Brown & Williamson*, 62 F.3d at 420 (recognizing testimonial privilege of nondisclosure regardless of form of legislative material), *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 860-61 (D.C. Cir. 1988) (same), and *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 529 (9th Cir. 1983) (same). For further discussion of the circuit split regarding the testimonial privilege accorded to legislative documents, see *infra* notes 79-106 and accompanying text.

13. *See A. David Pardo et al., Public Corruption*, 44 AM. CRIM. L. REV. 855, 868-69 (2007) (recognizing issue as judicially unresolved).

House Office Building, Room 2113,¹⁴ the first appellate-level case to consider the constitutionality of such a search.¹⁵ The *Rayburn* court deftly applied binding precedent to conclude that the Clause's testimonial privilege prohibited incidental Justice Department review of Congressman William Jefferson's privileged legislative documents.¹⁶ Nevertheless, the *Rayburn* opinion failed to outline a clear method for balancing executive and legislative interests under the Clause, and inadvertently demonstrated the need for Supreme Court review of the testimonial privilege contained therein.¹⁷

Part II traces the parliamentary origins and American developments of the Speech or Debate Clause before examining the current scope of the Clause.¹⁸ Part III recounts the specific facts that gave rise to the D.C. Circuit's decision in *Rayburn*.¹⁹ Part IV sets forth the circuit court's reasoning in determining that a legislator's privilege under the Speech or Debate Clause preemptively bars an uninvited review of legislative documents by the Executive.²⁰ Part V analyzes both the *Rayburn* court's deft constitutional application and the potentially hazardous shortcomings of the court's conclusions.²¹ Finally, Part VI discusses the potential impact of

14. 497 F.3d 654 (D.C. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3349 (U.S. Dec. 19, 2007) (No. 07-816).

15. *See id.* at 659 (recognizing that no appellate court has yet addressed issue of executive search of congressional office).

16. *See id.* at 656-63 (recognizing that testimonial privilege of Speech or Debate Clause barred compelled disclosure of legislative materials pursuant to valid search warrant). The *Rayburn* court applied D.C. Circuit precedent recognizing the testimonial privilege of the Speech or Debate Clause as one of absolute nondisclosure. *See id.* (resolving controversy in accordance with circuit precedent). For a discussion of the D.C. Circuit's consideration of testimonial immunity under the Clause, see *infra* notes 95-107 and accompanying text.

17. *See Rayburn*, 497 F.3d at 662-63 (failing to consider possible remedies for future executive violations of Speech or Debate Clause privileges with respect to congressional offices). The *Rayburn* court referred to its own previously issued remand order as evidence that the Clause could both protect a member of Congress's legislative acts and recognize the Executive's interest in law enforcement. *See id.* at 662 (attempting to reconcile competing legislative and executive interests). Nevertheless, the *Rayburn* court stopped short of advocating its own remand processes to future courts, concluding that the Legislature and Executive could best determine how to satisfy both interests. *See id.* at 663 ("How that accommodation [of legislative and executive interests] is to be achieved is best determined by the legislative and executive branches . . .").

18. For a discussion of historical developments and the current state of the Speech or Debate Clause, see *infra* notes 23-106 and accompanying text.

19. For a further discussion of the facts of *Rayburn*, see *infra* notes 108-20 and accompanying text.

20. For a narrative discussion of the D.C. Circuit Court's reasoning in *Rayburn*, see *infra* notes 121-36 and accompanying text.

21. For a critical discussion of the D.C. Circuit Court's reasoning in *Rayburn*, see *infra* notes 137-71 and accompanying text.

Rayburn on both the privilege of testimonial immunity and the relationship between the three co-equal branches of government.²²

II. BACKGROUND

A. History of the Speech or Debate Clause

1. Historical Development of Legislative Privilege

Conceptually, legislative immunity originated during the centuries of violent and convoluted discord between English Parliament and the Monarchy.²³ Over a period of centuries, Parliament moved beyond its initial role as a judicial body and slowly took the form of a representative legislature.²⁴ During this time, Parliament sought freedom from persecution for

22. For further discussion of the potential impact of the *Rayburn* decision on both the separation of powers and the testimonial privilege of nondisclosure under the Speech or Debate Clause, see *infra* notes 172-83 and accompanying text.

23. See Bradley, *supra* note 2, at 199-200 (tracing roots of Speech or Debate Clause to Middle-Age England); *The Bribeed Congressman's Immunity From Prosecution*, 75 YALE L.J. 335, 336 (1965) [hereinafter *Bribeed Congressman's Immunity*] (discussing history of legislative privilege in context of "continuing constitutional struggle" between Parliament and English Monarchy); see also United States v. Johnson, 383 U.S. 169, 177-78 (1966) (tracing American Speech or Debate Clause to English Bill of Rights of 1689 and referring to that document as "culmination of a long struggle for parliamentary supremacy"); Tenney v. Brandhove, 341 U.S. 367, 372 (1951) ("The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the [p]arliamentary struggles of the [s]ixteenth and [s]eventeenth [c]enturies."); United States v. Rayburn House Office Bldg., Room 2113, 497 F.3d 654, 659 (D.C. Cir. 2007) (recognizing Speech or Debate Clause as descendant of privilege adopted by Parliament after centuries-long conflict with Monarchy), *petition for cert. filed*, 76 U.S.L.W. 3349 (U.S. Dec. 19, 2007) (No. 07-816); Cella, *supra* note 2, at 3-12 (recognizing English roots of American Speech or Debate Clause and providing detailed discussion of evolution of English privilege); Reinstein & Silverglate, *supra* note 3, at 1120-35 (discussing basis for American Clause in English parliamentary history). For further discussion of the historical battle for control of the English governmental system and its influence over the Speech or Debate Clause, see *infra* notes 24-29 and accompanying text.

24. See Cella, *supra* note 2, at 4-6 (discussing maturation of Parliament from judicial to legislative body); see also Reinstein & Silverglate, *supra* note 3, at 1122-29 (discussing changing use and scope of privilege as Parliament matured). Parliament initially formed as a Norman assembly after the Norman Conquest of 1066. See Cella, *supra* note 2, at 3 (discussing initial formulation of Parliament). Parliament was originally the highest judicial body in England, and not only promulgated laws, but also entered judgment on private issues. See Kilbourn v. Thompson, 103 U.S. 168, 183 (1880) (discussing history of Parliament as judicial body). Initially, Parliament's judgments were subject to the approval of the King. See *id.* (explaining early functions of Parliament). After Parliament split into two Houses, the House of Lords conducted review of the judgments of lower courts in Westminster Hall. See *id.* at 184 (explaining divergent roles of Houses of Parliament).

Parliament's original freedom of speech was a function of its judicial identity. See Reinstein & Silverglate, *supra* note 3, at 1122-23 (explaining historical basis for parliamentary immunity). Parliament's early immunities prohibited dissent or divergent opinion from lower courts, but did not protect from the retribution of the

legislative business.²⁵ Nevertheless, the Crown remained hostile to the concept of shared governance and repeatedly subjected members of Parliament to civil and criminal actions arising out of legislative conduct.²⁶

Ultimately, Parliament prevailed over the Crown as the preeminent governmental structure in England after the struggle for political co-existence led to a violent uprising in 1688.²⁷ In the aftermath of the “Glorious Revolution,” Parliament enacted the English Bill of Rights of 1689.²⁸ The

Crown. *See id.* at 1122 (describing scope of Parliament’s immunity, as originally exercised). Parliament’s privileges evolved apace with Parliament itself. *See, e.g., id.* (discussing gradual evolution of legislative immunity in England).

25. *See* Reinstein & Silverglate, *supra* note 3, at 1123 (discussing evolution of Parliament). As early as the fourteenth century, Parliament began each session with a “Speaker’s Petition,” which implored the King to forgo retribution for actions that provoked the Crown during the session. *See* Cella, *supra* note 2, at 5 (discussing Speaker’s Petition); *see also* Reinstein & Silverglate, *supra* note 3, at 1123 (concluding that Speaker’s Petition represented loose definition of relationship between Parliament and Monarchy). Parliament first included a formal request for freedom of speech in the Speaker’s Petition of 1541. *See* Cella, *supra* note 2, at 6 (noting first inclusion of speech or debate privileges in Speaker’s Petition).

26. *See, e.g., Johnson*, 383 U.S. at 178 (discussing history of parliamentary oppression at hands of Tudor and Stuart monarchies). King Charles I used the courts to imprison members of the House of Commons indefinitely on charges of libel and sedition. *See id.* at 181 (detailing Parliament’s persecution by King Charles I). Perhaps the most infamous early example that demonstrated the need for parliamentary rights is that of Richard Strode in 1512. *See* Cella, *supra* note 2, at 6 (discussing “Strode’s Case”). Strode was a member of the House of Commons who was imprisoned by a special miners court after imposing regulation of the tin industry. *See id.* (recounting facts of Strode’s Case); *see also* JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW* 70 (2007) (discussing Strode’s Case and referring to conflict as “famous controversy”). Strode’s ordeal prompted Parliament to create a bill that annulled Strode’s conviction and attempted to prevent similar attacks upon legislators in the future. *See* Cella, *supra* note 2, at 6 (recalling conclusion to Strode’s Case).

In 1629, the Crown imprisoned three members of the House of Commons for speech considered libelous. *See* CHAFETZ, *supra*, at 73 (recalling further harassment of members of Parliament); Cella, *supra* note 2, at 11 (discussing persecution of Elliot, Hollis and Valentine). John Elliot had spoken against what he believed was an improper royal seizure of goods. *See* CHAFETZ, *supra*, at 73 (recalling facts behind case against Elliot). Members Denzil Hollis and Benjamin Valentine had physically restrained the Speaker during Elliot’s speech. *See id.* (explaining basis for charges against Hollis and Valentine); *see also Johnson*, 383 U.S. at 181 (referring to actions against Elliot, Hollis and Valentine as “notorious”). King Charles I encouraged the convictions and though ultimately annulled by a later session of Parliament, the charges profoundly impacted the members of the legislature. *See Johnson*, 383 U.S. at 181-82 (discussing history of royal mistreatment of Parliament).

27. *See Powell v. McCormack*, 395 U.S. 486, 502 (1969) (noting that ordeal between Parliament and King “culminat[ed] in the Glorious Revolution of 1688 and the English Bill of Rights of 1689”); Ervin, *supra* note 6, at 179 (attributing Revolution as response to imprisonment of members of Parliament); David Kaye, *Congressional Papers, Judicial Subpoenas, and the Constitution*, 24 UCLA L. REV. 523, 547 (1976) (noting that English Revolution was prompted by questioning into legislative process).

28. *See Tenney*, 341 U.S. at 372 (documenting enactment of English Bill of Rights as follow-up to “Glorious Revolution” of 1688); Cella, *supra* note 2, at 12

protections of the Bill of Rights permanently shielded members of Parliament from royal molestation for legislative acts.²⁹

2. *American Adoption and Adaptation of the Speech or Debate Clause*

The Speech or Debate Clause is recognizable as both a textual and historical descendant of the British clause included in the Bill of Rights of 1689.³⁰ Though mindful of Parliament's long and troubling history of victimization, the Framers recognized that legislative immunity had the potential for abuse.³¹ The Constitutional Convention was unanimous in its support of a constitutional guarantee of legislative privilege, but the Framers debated the extent of the substantive protections to be afforded.³²

(discussing Revolution of 1688 and subsequent enactment of Bill of Rights of 1689). In 1688, King James II declared his intent to suspend all ecclesiastical courts. See Reinstein & Silverglate, *supra* note 3, at 1135 (discussing facts behind Revolution of 1688). When seven bishops (among them the Archbishop of Canterbury) petitioned the King to reconsider, the King charged them with seditious libel. See *id.* (same). The King's Bench was deadlocked over the King's power to suspend laws, and a subsequent jury trial absolved the King. See *id.* (same). The verdict spurned the "Glorious Revolution," after which Parliament exiled James and abolished the King's suspending powers. See *id.* (discussing outcome of Revolution of 1688).

29. See *Tenney*, 341 U.S. at 372 (recalling that English Bill of Rights of 1689 advanced legislative privilege in "unequivocal language"). The enactment of the English Bill of Rights quelled the final serious threat to parliamentary independence. See Cella, *supra* note 2, at 12 (recognizing that legislative freedom was "never again seriously questioned or denied" after adoption of Bill of Rights (quoting CARL WITTKÉ, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 30 (1921))).

30. See *Tenney*, 341 U.S. at 372-73 (recognizing that American Clause was "quite close" to English clause); CHAFETZ, *supra* note 26, at 87 (referring to Clause as "adaptation - although not a straight importation . . . of the English Bill of Rights"); Reinstein & Silverglate, *supra* note 3, at 1120-21 (opining that Speech or Debate Clause may be section of Constitution most recognizably descendant from battle between King and Parliament). The Founders adopted the Speech or Debate Clause after removing the word "proceedings," so that protections were afforded to only speech or debate. See Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389, 402-03 (1994) (contrasting American Clause with British counterpart). The absence of the word "proceedings" warrants a consideration of precisely what conduct constituted speech or debate and was thus subject to the privileges afforded by the Clause. See *id.* at 403 (hypothesizing that American Clause might be read more strictly in light of Founders' decision to truncate phrase).

31. See Ervin, *supra* note 6, at 179 (noting that Framers were vividly aware of Parliament's struggles at hands of Monarchy); cf. *Tenney*, 341 U.S. at 372 ("Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation."). The Framers were well-aware of Parliament's historical abuse of legislative privilege. See Cella, *supra* note 2, at 15 (discussing Framers' awareness of Parliament's history of abuse of legislative immunity). For a discussion of the American judicial recognition that the potential for abuse is outweighed by constitutional concerns for independence, see *infra* note 40 and accompanying text.

32. See Cella, *supra* note 2, at 14-15 (discussing substance of debate over boundaries of Speech or Debate Clause); see also Bradley, *supra* note 2, at 198-99 (same). According to one scholar, Framer [Charles] Pinckney sought to specify in

American courts historically refer to the British legislative privilege when seeking clarity on the scope and intent of the American version.³³ As with its British ancestor, the primary function of the Speech or Debate Clause is to guarantee the effectiveness and autonomy of the Legislature by protecting that branch from judicial action initiated by the Executive and enforced by an oppressive Judiciary.³⁴

B. *Judicial Interpretation of the Speech or Debate Clause*

For all their debate, the Framers consciously refrained from explicitly limiting the scope of the Speech or Debate Clause.³⁵ Thus, the Judiciary

the Constitution that members of each House were to act as judges of the extent of the privilege. See Cella, *supra* note 2, at 14 (discussing Pinckney's view of bounds of privilege). James Madison opposed the measure and advocated that the specific scope of the privilege be expressly defined. See *id.* at 15 (recounting Madison's desire that legislative privilege have express limits).

33. See, e.g., Coffin v. Coffin, 4 Mass. 9, 15-23, 3 Tyng 1, 9-17 (1808) (looking to history of British privilege of immunity for legislative acts to determine purpose and scope of American Clause); see also United States v. Gillock, 445 U.S. 360, 369 (1980) (same); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 502-03 (1975) (same); Gravel v. United States, 408 U.S. 606, 622-24 (1972) (same); United States v. Johnson, 383 U.S. 169, 181-83 (1966) (same); Tenney, 341 U.S. at 372-75 (same); Kilbourn v. Thompson, 103 U.S. 168, 201-05 (1880) (same); cf. United States v. Brewster, 408 U.S. 501, 507-09 (1972) (contrasting roles of Parliament and Congress to infer difference in role of American Clause). The Supreme Court has distinguished the limited power of the federal government over the states from the absolute power of Monarchy over Parliament, to infer that the Speech or Debate Clause was not intended to provide immunity to state legislators in federal criminal prosecutions. See *Gillock*, 445 U.S. at 370 (denying state legislator's claim of privilege under Speech or Debate Clause).

One commentator lamented the modern Supreme Court decisions of *Brewster* and *Gravel* as the products of "activist" judges, and differentiated those decisions from earlier Supreme Court opinions that looked to the history of the Clause to derive its meaning. See Ervin, *supra* note 6, at 180 (discussing *Brewster* and *Gravel* in context of Court's traditional preference for examining history of legislative immunity when defining scope of Speech or Debate Clause). For a discussion of the Court's holdings in *Brewster* and *Gravel*, see *infra* notes 67-69 and accompanying text, and notes 70-78 and accompanying text, respectively.

34. See, e.g., *Gravel*, 408 U.S. at 616 ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.").

35. See Bradley, *supra* note 2, at 211-12 (discussing debate and final agreement regarding explicit scope of legislative privilege). James Madison opposed a provision that would have allowed the legislature to self-determine the limits of the Clause. See *id.* at 212 (discussing Madison's opposition). Madison believed that such grants of power to the legislature would result in abuses similar to those of Parliament in the years after the Bill of Rights of 1689. See *id.* (same). Ultimately, Madison's view carried the majority. See *id.* (noting Madison's victory in debate over limits to legislative privilege); see also U.S. CONST. art. I, § 6, cl. 1 (leaving scope of protected behavior open for interpretation). One group of commentators hypothesized that the Framers abstained from explicit definition of the limits of the privilege out of fear that a hostile Executive could easily manipulate explicit limits. See Reinstein & Silverglate, *supra* note 3, at 1140 (considering reason for omission of limits to Speech or Debate Clause).

bears the task of interpreting the Clause in a manner that comports with the perceived intent of the Framers.³⁶ In the context of the American separation of powers, the Judiciary plays a unique role in application of the Speech or Debate Clause—both as interpreters of the Constitution and as guardians of legislative independence.³⁷

Judicial interpretation of the Clause traditionally focuses on two issues: the behaviors encompassed by the term “speech or debate” and the immunities provided by the bar against questioning in “any other place.”³⁸ With minimal exception, courts view both issues through a broad lens.³⁹ Despite the potential for abuse of the privilege, such breadth has long been considered necessary to preserve congressional independence from the specter of tyranny considered so repugnant by the Framers and their parliamentary forbearers.⁴⁰

36. *Cf.* Ray, *supra* note 30, at 403 (discussing Judiciary as determinant of scope of protected behavior). One commentator has noted that the Framers’ omission of the word “proceedings” from the British version of the Clause is the basis for the need to employ judicial review of the scope of protected behavior. *See id.* (hypothetizing as to basis for judicial review of Clause).

The Supreme Court has more than once commented on the relative paucity of judicial opinions interpreting the Speech or Debate Clause. *See Kilbourn*, 103 U.S. at 203 (referring to Massachusetts state court case in absence of federal ruling on Speech or Debate Clause as of 1880); *see also Johnson*, 383 U.S. at 179 (attributing deficiency of opinions in part to self-evident nature of Clause).

37. *See* Ervin, *supra* note 6, at 181 (discussing role of Judiciary in interpreting Speech or Debate Clause). The Supreme Court has long recognized the importance of both the constitutional role played by the Clause and the Court’s own role as “the guardian of a truly independent legislature.” *See id.* (discussing role of Clause and Court in constitutional framework).

38. *See* Reinstein & Silverglate, *supra* note 3, at 1145-49 (discussing role of Judiciary in interpreting Speech or Debate Clause).

39. *See Johnson*, 383 U.S. at 180 (“*Kilbourn* and *Tenney* indicate that the legislative privilege will be read broadly to effectuate its purposes.”); *Coffin v. Coffin*, 4 Mass. 9, 30-31, 3 Tyng 1, 27 (1808) (advocating liberal reading of Clause); *see also Gavel*, 408 U.S. at 618 (noting that “the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control [one’s] conduct as a legislator”); *Bradley*, *supra* note 2, at 213 (recognizing American inclination towards broad reading and hypothesizing that scope of judicial review of Clause will not change).

40. *Cf.* *United States v. Brewster*, 408 U.S. 501, 516 (1972) (justifying expansive privilege under Clause as intention of Framers). The Supreme Court has recognized that broad interpretation of the Clause necessarily provides immunity to reproachable behavior by members of Congress. *See id.* (recognizing that Clause has “enabled reckless men to slander and even destroy others with impunity”); *see also Johnson*, 383 U.S. at 180 (precluding investigation into allegations of congressional behavior that Court recognized as “reprehensible”); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (“The claim of an unworthy purpose does not destroy the privilege.”). Commentators speculate as to the propriety of such a broad interpretation. *Cf.* *Bradley*, *supra* note 2, at 213 (arguing that Framers preferred narrow interpretation and lamenting modern judicially-interpreted scope of Clause). Further, one scholar has criticized the Court’s preference for broad interpretation as lacking historical basis. *See id.* at 215-16 (critiquing Court’s interpretation of Speech or Debate Clause). Nevertheless, the Court steadfastly adheres to a broad interpretation of the Clause, and has resigned itself to the lesser evil of intermit-

1. *Speech or Debate: Scope of Protected Behavior*

The words “speech or debate” protect more legislative conduct than the text of the term implies.⁴¹ The Supreme Court demonstrated its preference for broad interpretation of the phrase in *Kilbourn v. Thompson*,⁴² a case of first impression.⁴³ In *Kilbourn*, the Court relied on the British history of legislative privilege and the early Massachusetts case *Coffin v. Coffin*,⁴⁴ and concluded that the privilege applied to “things generally done in a session of the House by one of its members in relation to the business before it.”⁴⁵ Today, the Speech or Debate Clause protects activities “clearly a part of the legislative process—the *due* functioning of the process.”⁴⁶ This protection extends to “motivations” for privileged legislative

tent protection for corrupt legislative acts. *See, e.g.*, *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 510-11 (1975) (recognizing that Clause must protect even unsavory legislative behavior and that broad reading was conscious choice of Framers).

41. *See, e.g.*, *Gravel*, 408 U.S. at 617 (concluding that limiting protection to only speech or debate was “unacceptably narrow view”).

42. 103 U.S. 168 (1880).

43. *See id.* at 204 (concluding that no federal court had yet interpreted Speech or Debate Clause).

44. 4 Mass. 9, 3 Tyng 1 (1808).

45. *Kilbourn*, 103 U.S. at 204. The Court further condemned a literal interpretation of the Clause as “narrow.” *See id.* (justifying preference for broad interpretation of Speech or Debate Clause). The *Kilbourn* court looked to the British case *Stockdale v. Hansard*, in which Lord Drennan explained:

The privilege of having [Parliament’s] debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, *whatever is done within the walls of either assembly must pass without question in any other place.*

See id. at 202 (emphasis added) (quoting *Stockdale* in attempt to glean historical scope of privileged legislative behavior). The Court concluded that the similar wording chosen by the Framers led to a reasonable inference that the Founders “meant the same thing.” *See id.* (explaining policy reasons behind broad interpretation of Clause).

The *Kilbourn* Court relied heavily on *Coffin* in the absence of a relevant federal court opinion. *See id.* at 202-04 (conducting exhaustive analysis of *Coffin*). In *Coffin*, the Massachusetts Supreme Judicial Court concluded that the text of the speech or debate clause of the Massachusetts constitution was to be read “liberally,” and that the protection extended to “every[] act resulting from the nature [of the member’s office], and [done] in the execution of [it].” *See Coffin*, 4 Mass. at 30-31, 3 Tyng at 27 (discussing breadth of interpretation of legislative privilege). The *Kilbourn* Court justified its reliance upon the state court decision in *Coffin* by stating that the temporal proximity of the *Coffin* decision to the framing of the Constitution accorded much weight to the decision. *See Kilbourn*, 103 U.S. at 204 (justifying reliance on *Coffin*). For further discussion of the facts of *Kilbourn* and *Coffin* and analysis of both decisions in the context of a grant of civil immunity under the Clause, see *infra* notes 56-62 and accompanying text.

46. *See United States v. Brewster*, 408 U.S. 501, 515-16 (1972) (setting forth definitional framework of protected legislative activities).

conduct.⁴⁷ The Court has distinguished the legislative process from otherwise legitimate activities deemed “political” in nature and thus outside the scope of the protections of the Clause.⁴⁸ Using that yardstick, the Clause has been interpreted to protect actions taken in congressional committees, as well as speeches made in Congress and actions taken in the course of congressional investigations.⁴⁹

The Clause provides absolute protection for legislative acts and is not balanced against competing interests when applied.⁵⁰ Further, the Clause protects even potentially illegal legislative actions that might otherwise serve as a basis for liability.⁵¹ The modern Supreme Court construes the

47. See *United States v. Johnson*, 383 U.S. 169, 184-85 (1966) (concluding that bribery investigation of former representative was barred by Speech or Debate Clause). In *Johnson*, the Court concluded that the Speech or Debate Clause precluded a criminal investigation into allegations that a former representative had taken money in exchange for making a speech on the House floor. See *id.* (discussing facts of *Johnson* and Court’s holding). The investigation sought to determine whether the representative had made the speech in exchange for the money. See *id.* (same). According to the Court, inquiries into improper motivation were explicitly precluded by the Clause. See *id.* (discussing Court’s treatment of conspiracy charge in *Johnson*).

48. See *Brewster*, 408 U.S. at 512-13 (discussing distinction between legislative and political acts); see also 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 8.8(b) (4th ed. 2007) (discussing legislative-political distinction).

49. See *Kilbourn*, 103 U.S. at 204-05 (recognizing Clause as providing civil immunity for contempt vote); see also *United States v. Helstoski*, 442 U.S. 477, 487 (1979) (holding that Clause prohibits inquiry into any evidence surrounding legislative acts); *Doe v. McMillan*, 412 U.S. 306, 317-18 (1973) (providing civil immunity for House Committee’s decision to include names and descriptions of poorly behaved children in report on D.C. schools); *Gravel v. United States*, 408 U.S. 606, 626 (1972) (granting legislative immunity for preparation for and actions taken during Senate Committee meeting, but withholding immunity for attempts to republish material with national publishing house); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967) (recognizing Clause as bar on subpoena seeking information on Senate Committee plans for raid on citizen); *Johnson*, 383 U.S. at 177 (extending privilege to criminal immunity for speech made on House floor); *Tenney v. Brandhove*, 341 U.S. 367, 378-79 (1951) (extending civil immunity for actions of state legislative committee).

50. See *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975) (“[O]nce it is determined that Members are acting within the ‘legitimate legislative sphere’ the Speech or Debate Clause is an absolute bar to interference.”); see also *United States v. Rayburn House Office Bldg., Room 2113*, 497 F.3d 654, 661-62 (D.C. Cir. 2007) (refusing to balance privilege with governmental interest in conducting investigation), *petition for cert. filed*, 76 U.S.L.W. 3349 (U.S. Dec. 19, 2007) (No. 07-816).

51. See *Doe*, 412 U.S. at 312-13 (recognizing protection for legislative acts even where behavior outside of legislative context would constitute violation of civil or criminal statutes); see also *Eastland*, 421 U.S. at 507 (recognizing Speech or Debate Clause as protection against challenge that subpoena issued by Senate Subcommittee was designed only to harass respondent); *Tenney*, 341 U.S. at 377 (“The claim of an unworthy purpose does not destroy the privilege.”).

bounds of the privilege within the general framework first established in *Kilbourn*.⁵²

2. Any Other Place: Privileges Accorded to Legislative Acts

Both in England and America, the phrase “shall not be questioned in any other place” bars the prosecution of legislators for actions that are a part of the legislative process.⁵³ Conceptually, the Clause exists to shield members of Congress from intimidation by the Executive.⁵⁴ Nevertheless, the Supreme Court has drawn upon both the American preference for broad interpretation and the British history of legislative privilege to conclude that the bar on questioning “in any other place” immunizes legislators from criminal and civil liability for legislative acts.⁵⁵

The Massachusetts case *Coffin v. Coffin*, the earliest recorded judicial review of legislative immunity, recognized the Clause as a bar on private civil suits regarding legislative actions.⁵⁶ *Coffin* concerned the application

52. See, e.g., *Helstoski*, 442 U.S. at 488 (“A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it.”). The Court has narrowed the scope of the privilege for peripheral issues such as the re-publication of legislative documents or actions, but has remained true to its general expansive view. Compare *Gravel*, 408 U.S. at 622 (concluding that re-publication of Pentagon Papers was not legislative activity), with *Helstoski*, 442 U.S. at 488-89 (finding that Speech or Debate Clause forbids judicial investigation into “how [a legislator] acted, voted or decided”).

53. See *Eastland*, 421 U.S. at 502 (noting that legislative immunity “insure[s] that the legislative function the Constitution allocates to Congress may be performed independently”).

54. See *Johnson*, 383 U.S. at 181 (concluding that Clause was developed “to prevent intimidation by the [E]xecutive and accountability before a possibly hostile [J]udiciary”).

55. See *Yankwich*, *supra* note 1, at 966 (recognizing expansion of legislative privilege beyond its initial purpose); see also *Johnson*, 383 U.S. at 184-85 (barring criminal prosecution of Senator for bribery where investigation would require determination of Senator’s motives for making speech in Congress); *Tenney*, 341 U.S. at 369 (providing civil immunity to California state senators accused of harassment in bringing plaintiff before legislative committee); *Kilbourn*, 103 U.S. at 204-05 (providing civil immunity to House members who allegedly committed witness to jail for contempt).

The Clause does not immunize members of Congress for acts that fall outside the ambit of “speech or debate.” See *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995) (“The Clause is not, to be sure, a blanket prohibition on suits against congressmen. It protects only those congressional acts properly . . . within the legislative function”); see also *Davis v. Passman*, 544 F.2d 865, 880 (5th Cir. 1977) (holding that privilege does not extend to legislator’s decisions to fire staff members), *rev’d en banc on other grounds*, 571 F.2d 793 (5th Cir. 1978), *rev’d on other grounds*, 442 U.S. 228 (1979). For a discussion of the Supreme Court’s interpretation of legislative activities protected by the Speech or Debate Clause, see *supra* notes 41-52 and accompanying text.

56. See *Coffin v. Coffin*, 4 Mass. 9, 21-22, 3 Tyng 1, 15-16 (1808) (recognizing Massachusetts speech or debate clause as bar on private civil suits). *Coffin* is widely recognized as the foundation for subsequent judicial interpretation of the scope and application of the Speech or Debate Clause. See *Cella*, *supra* note 2, at 18 (recognizing *Coffin* as “classic American formulation of the scope and extent of the

of the Massachusetts speech or debate clause in a slander lawsuit against a Massachusetts legislator.⁵⁷ After considering the English history of the Clause, the Massachusetts Supreme Judicial Court concluded that legislative privilege existed to protect legislators from fear of liability of any kind.⁵⁸

The Supreme Court affirmed that the Clause bars private civil suits in *Kilbourn v. Thompson*.⁵⁹ *Kilbourn* was a suit for false imprisonment brought by a private citizen who sought damages from members of Congress and congressional personnel after Congress imprisoned the plaintiff for forty-five days.⁶⁰ The Court relied heavily on the *Coffin* analysis and concluded that the Speech or Debate Clause barred private civil suits against legislators.⁶¹

In 1966 the Supreme Court, in *United States v. Johnson*,⁶² formally recognized that the Speech or Debate Clause barred criminal prosecution for legislative acts.⁶³ The defendant in *Johnson* was a former legislator accused of accepting money in exchange for delivering a speech on the floor of the House.⁶⁴ The *Johnson* Court invoked the British history of the Clause and recalled that English monarchs had intimidated members of Parlia-

privilege"); see also X. L. Suarez, *Congressional Immunity: A Criticism of Existing Distinctions and a Proposal for a New Definitional Approach*, 20 VILL. L. REV. 97, 97 (1975) (referring to *Coffin* as "early and authoritative").

57. See *Coffin*, 4 Mass. at 10, 3 Tyng at 1-2 (discussing factual basis for suit). The speech or debate clause of the Massachusetts constitution granted "[t]he freedom of deliberation, speech, and debate, in either house of the legislature." See *id.* at 14, 3 Tyng at 7 (quoting Massachusetts speech or debate clause).

58. See *id.* at 24-25, 3 Tyng at 19 (justifying clause as bar on private civil suit).

59. 103 U.S. 168, 203-05 (1880) (holding that Clause precludes private civil suits against legislators).

60. See *id.* at 193-98 (discussing factual basis for suit). *Kilbourn* involved a bankrupt firm indebted to the government. See Suarez, *supra* note 56, at 101 (explaining facts of *Kilbourn*). The plaintiff in *Kilbourn* refused to comply with a congressional subpoena that compelled testimony regarding the firm. See *id.* (same). The plaintiff was jailed for contempt of Congress. See *Kilbourn*, 103 U.S. at 193 (explaining charges against plaintiff.)

61. See *id.* at 203-05 (adopting *Coffin* rationale for application of Speech or Debate Clause to private civil suit).

62. 383 U.S. 169 (1966).

63. See *id.* at 180 (reviewing English and American precedent and noting absence of case law addressing application of Speech or Debate Clause to criminal proceeding); see also *Bribed Congressman's Immunity*, *supra* note 23, at 344 (noting that Clause had not been recognized as bar to criminal prosecution prior to *Johnson*).

64. See *Johnson*, 383 U.S. at 170-72 (discussing factual basis for trial). The defendant in *Johnson* was a former legislator accused of seven counts of violating the federal conflict of interest statute, and one count of conspiracy to defraud the United States. See *id.* (same). The prosecution alleged that Congressman Johnson and another legislator, in exchange for substantial payments, agreed to pressure the Justice Department to dismiss fraud charges against a Maryland savings and loan bank. See *id.* at 171-72 (describing alleged illegal scheme). Part of the charge stated that Congressman Johnson had received monies dubbed "campaign contributions" in exchange for his actions, which included delivering a speech favorable

ment with the threat of both civil and criminal suit.⁶⁵ Accordingly, the Court held that the Speech or Debate Clause barred any criminal prosecution for legislative acts.⁶⁶ Shortly thereafter, the Court qualified *Johnson's* broad holding in *United States v. Brewster*.⁶⁷ In *Brewster*, the Court rejected the *Johnson* Court's estimation of bribery as a legislative act.⁶⁸ Nevertheless, *Brewster* effectively reaffirmed the *Johnson* Court's bar on criminal prosecutions for legislative acts.⁶⁹

C. Testimonial Immunity

1. *The Supreme Court Recognizes Testimonial Immunity: Gravel v. United States*

In 1972, the Supreme Court recognized that the Speech or Debate Clause includes a testimonial privilege against compelled disclosure of legislative materials.⁷⁰ In that decision, *Gravel v. United States*,⁷¹ the Court considered whether the protections of the Speech or Debate Clause extended to actions taken by a legislator's staff.⁷² The question came before the Court as a challenge to a federal grand jury subpoena that sought the testimony of an aide to United States Senator Mike Gravel.⁷³

to independent savings and loan associations on the House floor. *See id.* at 171-76 (same).

65. *See id.* at 179-84 (discussing Speech or Debate Clause in context of English history of legislative privilege).

66. *See id.* at 184-85 ("We hold that a prosecution under a general criminal statute dependant on such inquiries [into motivation for legislative acts] necessarily contravenes the Speech or Debate Clause.").

67. 408 U.S. 501 (1972).

68. *See id.* at 514-16 (qualifying *Johnson's* bar on criminal prosecution for legislative acts). The *Brewster* Court concluded that congressional misconduct was not protected unless it was part of the "due functioning of the [legislative] process." *See id.* at 516 (same). Specifically, the Court in *Brewster* permitted the prosecution of a former legislator under a bribery statute, concluding that acceptance of a bribe was not related to the legislative process and thus not privileged. *See id.* at 526 (same). Thus, the government was permitted to investigate whether, at the time the legislator accepted money from a conspirator, the legislator was aware that the money was given in exchange for performance of a legislative duty. *See id.* (explaining reasoning in *Brewster*).

69. *Cf. id.* at 515-16 (recognizing that Speech or Debate Clause prevented criminal prosecution for legislative acts but qualifying wholesale ban on such criminal prosecutions set forth in *Johnson*).

70. *See Gravel v. United States*, 408 U.S. 606, 616 (1972) (recognizing tacitly that Senator Mike Gravel could not be made to answer questions regarding legislative process).

71. 408 U.S. 606 (1972).

72. *See id.* at 613 (recognizing principal inquiry as whether Speech or Debate Clause applied to actions of legislative aide to United States Senator).

73. *See id.* at 607 (discussing factual background to suit). A federal grand jury issued a subpoena to compel the testimony of a congressional aide to Senator Mike Gravel regarding reports that the Senator had attempted to publish classified Defense Department documents known as the "Pentagon Papers." *See id.* at 608 (explaining factual basis for action). Senator Gravel intervened to quash the

Before addressing the constitutional issue in controversy, the Court considered whether the activities that were the subject of the subpoena would be privileged with respect to the Senator.⁷⁴ With regards to Senator Gravel, the Court concluded: “[w]e have no doubt that Senator Gravel may not be made to answer—either *in terms of questions* or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting.”⁷⁵ This statement was the Court’s first implicit recognition of a testimonial immunity provided by the Speech or Debate Clause.⁷⁶ A voluminous body of case law has relied upon this dictum as the basis for a testimonial privilege under the Clause.⁷⁷ Nevertheless, the

subpoena, arguing that such compelled disclosure violated the Speech or Debate Clause. *See id.* at 608-09 (explaining procedural posture of issue presented).

74. *See id.* at 613 (considering first whether behavior that was subject of subpoena inquiry was in fact privileged behavior with respect to Senator). The scope of the subpoena focused on the Senator’s procurement and subsequent reading of the Pentagon Papers to a convened session of the Subcommittee on Buildings and Grounds, of which Senator Gravel was chairman. *See id.* at 608-09 (recounting information sought by subpoena of Senator Gravel’s aide); *see also* Suarez, *supra* note 56, at 117 (noting that Government convened grand jury to determine from whom Senator Gravel procured Pentagon Papers). The press subsequently reported that Senator Gravel and his aides had discussed the possibility of publishing the documents in book format. *See Gravel*, 408 U.S. at 609-10 (noting that members of Gravel’s staff were reported to have spoken with national publishers). The subpoena sought to compel testimony of Senator Gravel’s aide with respect to those discussions, pursuant to possible criminal charges relating to the gathering, concealing, converting and transmission of public records. *See id.* at 608-10 (acknowledging purpose and scope of investigation).

75. *See Gravel*, 408 U.S. at 616 (emphasis added) (concluding that Senator Gravel could not be compelled to answer questions nor to defend suit regarding legislative acts).

76. *See id.* (recognizing testimonial immunity); *see also* United States v. Rayburn House Office Bldg., Room 2113, 497 F.3d 654, 659-60 (D.C. Cir. 2007) (citing *Gravel* as precedential authority recognizing testimonial immunity), *petition for cert. filed*, 76 U.S.L.W. 3349 (U.S. Dec. 19, 2007) (No. 07-816); *In re Grand Jury Investigation into Possible Violations of Title 18*, 587 F.2d 589, 596-97 (3d Cir. 1978) (citing *Gravel*, 408 U.S. at 616) (recognizing testimonial immunity).

77. *See* Dennis v. Sparks, 449 U.S. 24, 29-30 (1980) (recognizing that members of Congress are not required to answer questions about legislative actions); Fields v. Office of Eddie Bernice Johnson, 459 F.3d 1, 14 (D.C. Cir. 2006) (recognizing legislative immunity set forth in *Gravel*); Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 418 (D.C. Cir. 1995) (same); MINPECO, S.A. v. Conticommodity Servs., Inc., 844 F.2d 856, 861-62 (D.C. Cir. 1988) (same); Schlitz v. Virginia, 854 F.2d 43, 45-46 (4th Cir. 1988) (citing *Gravel*, 408 U.S. at 616) (recognizing that purpose of Clause is to prevent legislators from forced testimony regarding legislative acts), *overruled on other grounds by* Berkley v. City of Charleston, 63 F.3d 295 (4th Cir. 1995); Miller v. Transamerican Press, Inc., 709 F.2d 524, 529 (9th Cir. 1983) (recognizing legislative immunity set forth in *Gravel*); *In re Grand Jury Investigation into Possible Violation of Title 18*, 587 F.2d 589, 594-95 (3d Cir. 1978) (same); United States v. Craig, 528 F.2d 773, 777 (7th Cir. 1976) (same); Tavoulaareas v. Piro, 93 F.R.D. 11, 18 (D.D.C. 1981) (citing *Gravel*, 408 U.S. at 616) (“It is beyond dispute that the [S]peech or [D]ebate [C]lause confers . . . immunity from judicial process requiring [legislators] to answer questions relating to the performance of their legislative duties.”).

Court has not addressed the precise nature and scope of the Speech or Debate Clause's testimonial privilege.⁷⁸

2. Circuit Split Regarding Privilege of Testimonial Immunity

In the absence of a controlling decision, the Third Circuit has split with the Ninth Circuit and the D.C. Circuit regarding the nature of the testimonial privilege of the Speech or Debate Clause.⁷⁹ The Third Circuit emphasizes the form and purpose of the desired testimony and, in certain instances, recognizes the testimonial privilege as one of mere nonevidentiary use.⁸⁰ Conversely, the Ninth Circuit and the D.C. Circuit effectively recognize that the testimonial privilege bars all forms of questioning regarding privileged legislative acts.⁸¹

a. The Third Circuit's Nonevidentiary Use Doctrine

The Third Circuit, in *In re Grand Jury Investigation into Possible Violations of Title 18*,⁸² concluded that the testimonial privilege of the Speech or Debate Clause did not bar the subpoena and review of congressional office phone records as part of a grand jury investigation.⁸³ The *Grand Jury*

78. Cf. *Gravel*, 408 U.S. at 616 (recognizing testimonial immunity but failing to expound upon nature of privilege).

79. Compare *MINPECO*, 844 F.2d at 862 (recognizing testimonial privilege as one of nondisclosure and holding that discovery by subpoena of congressional committee documents for testimonial use violated Speech or Debate Clause), *Brown & Williamson*, 62 F.3d at 417 (holding that testimonial nondisclosure privilege under Clause precluded subpoena of Subcommittee members to determine how they obtained stolen documents), and *Miller*, 709 F.2d at 529 (barring deposition of former legislator regarding document introduced into *Congressional Record*), with *In re Grand Jury Investigation into Possible Violation of Title 18*, 587 F.2d at 597 (referring to Speech or Debate Clause privilege in certain circumstances as "one of nonevidentiary use, not of non-disclosure").

80. See *In re Grand Jury Investigation into Possible Violation of Title 18*, 587 F.2d at 597 (recognizing testimonial privilege as nonevidentiary use in context of documents and third-party proceedings). For further discussion of the Third Circuit's treatment of the testimonial privilege touched upon in *Gravel*, see *infra* notes 82-89 and accompanying text.

81. See *Miller*, 709 F.2d at 528-30 (recognizing testimonial nondisclosure privilege of Speech or Debate Clause when applied to privileged documents or third-party testimony); see also *MINPECO*, 844 F.2d at 856 (same); *Brown & Williamson*, 62 F.3d at 408 (same).

82. 587 F.2d 589 (3d Cir. 1978).

83. See *id.* at 598 (affirming district court's decision not to quash subpoena). The subpoena duces tecum was filed by a United States Attorney in the Eastern District of Pennsylvania and was served upon the Clerk of the House of Representatives. See *id.* at 591 (recounting issuance and nature of subpoena). The subpoena sought to compel the Clerk to appear before a grand jury and produce phone records for the office of Congressman Joshua Eilberg. See *id.* at 591-92 (same). The subpoena sought the records for phone calls made from the legislator's office from 1973 through March 2, 1978. See *id.* at 591 (same). The subpoena was part of a grand jury investigation into possible criminal conduct relating to the financing and building of a Philadelphia hospital. See *id.* at 592 (same). Congressman Eilberg intervened to challenge the subpoena on three grounds, including that

court recognized that the phone records were at least in part evidence of legislative acts and thus potentially privileged under the Clause.⁸⁴ Nevertheless, the *Grand Jury* court permitted the United States Attorney to participate in judicial review conducted to separate and exclude privileged phone calls.⁸⁵

The Third Circuit differentiated between *Gravel's* testimonial immunity against questioning, and a “use immunity” that barred the introduction of legislative acts into evidence against a legislator.⁸⁶ The court further distinguished legislative immunity from privileges such as the attorney-client privilege, which the court concluded was designed to foster a “socially desirable confidential relationship[] [with another party].”⁸⁷ According to the *Grand Jury* court, the testimonial and use privileges under the Speech or Debate Clause existed to protect legislators from “hostile questioning” and were not implicated in the review of potentially privileged documents.⁸⁸ Citing non-binding circuit precedent, the court concluded that “the privilege when applied to records . . . is one of nonevidentiary use, not of nondisclosure.”⁸⁹

b. The Ninth Circuit and the D.C. Circuit: Doctrine of Nondisclosure

The Ninth Circuit, in *Miller v. Transamerican Press, Inc.*,⁹⁰ recognized the testimonial privilege in a broader framework of wholesale nondisclosure.⁹¹ In *Miller*, the court concluded that the Speech or Debate Clause forbade the subpoena in a civil suit of a non-party former legislator regard-

the Speech or Debate Clause prohibited grand jury review of the phone records. *See id.* (discussing Congressman Eilberg’s challenge of subpoena).

84. *See id.* at 595-96 (recognizing evidentiary value of phone records but concluding that phone calls related to legislation could not be used to incriminate legislator).

85. *See id.* at 597 (“[E]xamination [of the phone records] by the executive branch prior to submission to the Court does not violate the Congressman’s use immunity.”). The *Grand Jury* court concluded that on remand, the legislator should be permitted to submit affidavits identifying those phone calls that he contends are privileged. *See id.* (setting forth procedure for review of phone records). The United States Attorney was permitted to contest the legislator’s assertion of privilege. *See id.* (same).

86. *See id.* at 596 (differentiating between testimonial immunity and use immunity). The *Grand Jury* court observed that use immunity formed the basis for all Speech or Debate Clause privileges. *See id.* (analyzing use immunity in context of broader Speech or Debate Clause discussion).

87. *See id.* (discussing use immunity and contrasting legislative privilege with attorney-client, doctor-patient and priest-churchgoer privileges).

88. *See id.* at 596-97 (interpreting justification for testimonial immunity). The court concluded that the Constitution had a “limited toleration for secrecy” surrounding the legislative process. *See id.* (same).

89. *See id.* at 597 (quoting *In re Grand Jury Proceedings (Cianfrani)*, 563 F.2d 577, 584 (3d Cir. 1977)) (refusing to apply Federal Speech or Debate Clause privilege to state legislator for federal prosecution).

90. 709 F.2d 524 (9th Cir. 1983).

91. *See id.* at 527-29 (quashing subpoena of former legislator as contrary to Speech or Debate Clause).

ing the legislator's inclusion of materials in the Congressional Record.⁹² Employing the justification that the Clause historically assured congressional freedom of speech, the *Miller* court refused to distinguish application of the Clause based on the legislator's retiree status.⁹³ Rather, the court held that any inquiry into even past legislative affairs would have a "chilling effect" on the legislative independence the Clause was designed to preserve.⁹⁴

Ten years later, in *MINPECO, S.A. v. Conticommodity Services, Inc.*,⁹⁵ the D.C. Circuit adopted the Ninth Circuit's reasoning, holding that a subpoena in a civil suit seeking information from a non-party House Subcommittee regarding a committee report violated the Speech or Debate Clause.⁹⁶ The *MINPECO* court drew heavily from the Supreme Court's holding in *Eastland v. U.S. Servicemen's Fund*,⁹⁷ which emphasized that a principal function of the Clause was to protect legislators from the distraction of legal proceedings.⁹⁸ Applying that principle, the *MINPECO* court concluded that discovery proceedings could intrude upon the legislative process just as egregiously as an actual suit.⁹⁹

92. *See id.* (concluding that Speech and Debate privilege applied to former member of Congress). The plaintiff in *Miller* was a union pension fund trustee who filed suit against the defendant press company for libel, arising out of a June 1972 article in *Overdrive Magazine* that accused the plaintiff of misappropriating union pension funds. *See id.* at 526 (recounting factual background and events leading up to lawsuit). Not long after the article was published, Congressman Steiger inserted the article into the *Congressional Record*. *See id.* (same). The plaintiff obtained a subpoena duces tecum to question Congressman Steiger, but the legislator responded by invoking the privileges of the Speech or Debate Clause. *See id.* (discussing Congressman Steiger's assertion of protection under Speech or Debate Clause).

93. *See id.* (applying Speech or Debate Clause privilege to retired member of Congress).

94. *See id.* at 528-29 (providing justification for bar on disclosure of privileged legislative materials).

95. 844 F.2d 856 (D.C. Cir. 1988).

96. *See id.* at 859-60 (affirming district court's decision to quash subpoena as violation of Speech or Debate Clause). *MINPECO* was a civil suit in which the defendants believed that the plaintiffs planned to introduce at trial a sworn statement published by the House Subcommittee on Commerce, Consumer and Monetary Affairs. *See id.* at 857 (discussing factual basis for suit). The defendants asserted that they possessed a congressional stenographer's manuscript of the statement in conflict with the statement entered into publication. *See id.* (same). The defendants sought to compel the subpoena duces tecum of the Congressional Custodian of Records and the Staff Director of the House Subcommittee. *See id.* at 858 (discussing tools of discovery utilized by defendants). The Subcommittee sought to quash the subpoenas under the Speech or Debate Clause. *See id.* (discussing Subcommittee's response to subpoena).

97. 421 U.S. 491 (1975).

98. *See MINPECO*, 844 F.2d at 859 (quoting *Eastland*, 421 U.S. at 503) (discussing Speech or Debate Clause as protection against interruption of legislative process).

99. *See id.* (justifying bar on discovery proceedings regarding privileged legislative documents).

The D.C. Circuit expanded upon this principle in *Brown & Williamson Tobacco Corp. v. Williams*.¹⁰⁰ *Brown & Williamson* involved a plaintiff's subpoena duces tecum of two sitting members of Congress that was issued to review purportedly stolen documents in the possession of the Subcommittee on which the representatives sat.¹⁰¹ The *Brown & Williamson* court rejected the plaintiff's argument that the subpoenas were distinguishable from those in *Miller* and *MINPECO* because the subpoenas did not implicate the representatives in misconduct.¹⁰² The D.C. Circuit in *Brown & Williamson* again relied upon the role of the Speech or Debate Clause as a protection of the uninterrupted functioning of Congress.¹⁰³

The *Brown & Williamson* court categorically rejected the Third Circuit's dissection of the Clause as a testimonial privilege against compelled questioning and a use privilege as applied to documentary evidence.¹⁰⁴ According to the D.C. Circuit, "indications as to what Congress is looking at provide clues as to what Congress is doing."¹⁰⁵ Thus, the *Brown & Williamson* court affirmed the D.C. Circuit precedent set forth in *MINPECO*, recognizing no distinction between oral and documentary evidence and

100. 62 F.3d 408 (D.C. Cir. 1995).

101. *See id.* at 411-12 (discussing factual background of action). The plaintiff in *Brown & Williamson* was a tobacco company involved in a civil suit against a former employee for breach of contract and a variety of tort claims. *See id.* at 411 (same). The employee allegedly copied sensitive tobacco company documents and had been planning to use the documents in a civil suit against a former employer. *See id.* (same). The employee returned the documents allegedly copied. *See id.* (same).

Nevertheless, Congressman Waxman, Chairman of the House Subcommittee on Health and the Environment, subsequently disclosed that, as part of a Subcommittee investigation into the tobacco industry, the Subcommittee had reviewed documents related to a 1960s tobacco company study regarding manipulated nicotine levels in cigarettes. *See id.* at 412 (discussing Congressman Waxman's involvement in case). Congressman Waxman stated that the documents "'were evidently stolen from some law firm . . .'" *See id.* (quoting Congressman Waxman regarding origin of documents sought in subpoena). The tobacco company issued the subpoenas duces tecum to review the documents discussed by Waxman in order to determine if they belonged to the company. *See id.* (explaining purpose of subpoenas).

102. *See id.* at 418-19 (refusing to differentiate attempts to compel disclosure on basis of potential implications of misconduct to be gleaned from discovery). The tobacco company had argued that the recognized goal of preserving the integrity of the legislative process was not effected by the subpoenas because the integrity of the representatives was not in question. *See id.* at 418 (discussing tobacco company's argument for non-application of Speech or Debate Clause).

103. *See id.* at 419 ("The [Speech or Debate Clause] privilege is not designed to protect the reputations of congressmen but rather the functioning of Congress.").

104. *See id.* at 418 ("Discovery procedures can prove just as intrusive [as litigation]." (quoting *MINPECO*, 844 F.2d at 859)).

105. *See id.* at 420 (rationalizing nondisclosure of privileged legislative documents).

providing an absolute bar on both when applied to legislative acts.¹⁰⁶ It was amidst this body of conflicted interpretation that the D.C. Circuit Court considered the constitutionality of an executive-initiated search of a sitting legislator's office in *United States v. Rayburn House Office Building, Room 2113*.¹⁰⁷

III. FACTS: *UNITED STATES V. RAYBURN HOUSE OFFICE BUILDING, ROOM 2113*

In May 2006, the Department of Justice obtained and executed a warrant to search the congressional office of Representative William J. Jefferson.¹⁰⁸ The search was part of an ongoing investigation of Congressman Jefferson regarding a variety of criminal charges related to bribery and fraud.¹⁰⁹ To respect Congressman Jefferson's legislative immunity, the warrant application specified distinct procedures for unaffiliated Justice Department and FBI agents to follow while reviewing all seized documents

106. *See id.* at 421-22 (recognizing that D.C. Circuit precedent precluded distinguishing between oral and documentary testimony and applying principle of absolute nondisclosure to both).

107. *See* 497 F.3d 654, 655 (D.C. Cir. 2007) (addressing issue of whether search procedures violated Speech or Debate Clause), *petition for cert. filed*, 76 U.S.L.W. 3349 (U.S. Dec. 19, 2007) (No. 07-816).

108. *See id.* at 656-57 (describing application for and execution of warrant to search Congressman Jefferson's office). The Justice Department applied for the warrant on May 18, 2006. *See id.* at 656 (noting date of warrant application). The Federal District Court for the District of Columbia approved the warrant that day, and ordered that the warrant be executed on or before May 21, 2006. *See id.* at 657 (discussing district court's approval of search warrant). The Justice Department search began on Saturday night, May 20, 2006, and lasted approximately eighteen hours. *See id.* (discussing date and duration of Justice Department search of Congressman Jefferson's congressional office).

109. *See id.* at 656 (detailing investigation of Congressman Jefferson). The Justice Department was investigating allegations that Congressman Jefferson accepted bribes in exchange for fostering the sale of communications technology and services produced by a Louisville company named iGate to several African nations, including Nigeria and Ghana. *See id.* (explaining that Congressman Jefferson was investigated for "bribery of a public official, wire fraud, bribery of a foreign official, and conspiracy to commit these crimes"); Corrected Brief of Appellee at 4-6, *Rayburn*, 497 F.3d 654 (No. 06-3105) (discussing facts surrounding Justice Department investigation); *see also* TODD B. TATELMAN, CONG. RESEARCH SERV., THE SPEECH OR DEBATE CLAUSE: RECENT DEVELOPMENTS, at CRS-5, *available at* <http://www.fas.org/sgp/crs/misc/RL33668.pdf> (last visited Feb. 28, 2008) (same). The investigation received national attention when a Justice Department search of Congressman Jefferson's Washington, D.C. residence uncovered \$90,000 in cash payments from iGate in the freezer. *See, e.g.*, Allan Lengel, *FBI Says Jefferson Was Filmed Taking Cash*, WASH. POST, May 22, 2006, at A1 (discussing uproar over discovery of money in Congressman Jefferson's freezer); *see also* Corrected Brief of Appellee, *supra*, at 5 (recalling discovery of cash in legislator's freezer). In the course of the investigation, an aide of Congressman Jefferson, who pleaded guilty to bribery charges implicating the legislator, indicated that pertinent documents remained in the legislator's office. *See Rayburn*, 497 F.3d at 656 (discussing facts that led to search of Congressman Jefferson's office).

and returning any documents deemed privileged under the Speech or Debate Clause.¹¹⁰

Shortly after the warrant was executed, Congressman Jefferson challenged the constitutionality of the search of his office under the Speech or Debate Clause.¹¹¹ Pursuant to Rule 41(g) of the *Federal Rules of Criminal Procedure*,¹¹² Congressman Jefferson moved for the return of all documents seized during the search.¹¹³ The district court denied Congressman Jefferson's motions and noted that the warrant sought only materials

110. *See Rayburn*, 497 F.3d at 656-57 (discussing "special procedures" outlined in warrant application designed to avoid violation of Speech or Debate Clause). The warrant provided that FBI agents were to examine and confiscate all paper documents relevant to the scope of the inquiry. *See id.* (same). Further, the warrant required the agents to copy electronic data stored in Congressman Jefferson's office and deliver the data to a Justice Department filter team comprised of two department attorneys and one FBI agent. *See id.* (same). The filter team was to review paper documents and screen electronic documents using an FBI computer analysis program. *See id.* (explaining method of review used by filter team). Finally, the warrant required that any documents deemed either privileged under the Speech or Debate Clause or irrelevant to the scope of the Justice Department inquiry be returned to Congressman Jefferson without prosecutorial review. *See id.* (same).

Agents reviewing the documents were forbidden from being connected to the criminal investigation of Congressman Jefferson. *See id.* at 656 (explaining warrant procedures with respect to agents reviewing privileged material). Further, the agents were barred from discussing any privileged legislative documents encountered during the search. *See id.* (same). The warrant application actively recognized that the aim of the special processes was to avoid executive exposure to privileged legislative material. *See id.* (explaining purpose of special procedures).

111. *See id.* at 657 (discussing Congressman Jefferson's challenge of search). Congressman Jefferson challenged the search on May 24, 2006. *See id.* (noting immediacy of Congressman Jefferson's challenge).

112. FED. R. CRIM. P. 41(g). Rule 41(g), which governs the remedy for improperly seized property, provides:

A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Id.

113. *See Rayburn*, 497 F.3d at 657 (discussing Congressman Jefferson's challenge to search). Congressman Jefferson also moved to enjoin the Justice Department and FBI investigators from further reviewing the documents seized in the search. *See id.* (same). Congressman Jefferson alleged that the search violated the Speech or Debate Clause because it necessarily exposed privileged legislative documents to the Executive without the legislator's consent. *See id.* (explaining Congressman Jefferson's basis for challenge of search and motion for return of documents). In light of the legislator's appeal, the President directed the Justice Department to seal and cease review of the documents for six weeks. *See id.* (discussing President's decision to refrain from examining documents removed from Congressman Jefferson's office until district court ruled on motion for return of documents).

“outside of the legitimate legislative sphere.”¹¹⁴ Immediately thereafter, Congressman Jefferson filed a notice of appeal and moved for a stay of review pending appeal.¹¹⁵ After considering Congressman Jefferson’s emergency motion for a stay pending appeal, the D.C. Circuit Court remanded the question to the district court with instructions to determine which seized documents were privileged under the Clause.¹¹⁶ The district court was to review all seized documents *in camera*, and return any privileged documents to Congressman Jefferson.¹¹⁷

On June 4, 2007, a grand jury indicted Congressman Jefferson for charges related to the ongoing Justice Department investigation.¹¹⁸ In light of the indictment, the D.C. Circuit Court agreed to consider Congressman Jefferson’s appeal under the collateral order doctrine.¹¹⁹ On

114. *See id.* (discussing district court treatment of Congressman Jefferson’s challenge of search). As a result of the district court’s holding, the Justice Department resumed review of the seized documents. *See id.* at 657-58 (discussing Justice Department’s ability to regain possession of documents in light of district court’s ruling).

115. *See id.* at 657 (recounting Congressman Jefferson’s response to district court’s ruling). Congressman Jefferson filed notice and motion on July 11, 2006, one day after the district court announced its decision. *See id.* (same). In response, the Attorney General again ordered a freeze of the Justice Department’s review of the confiscated materials. *See id.* at 657-58 (citing Corrected Brief for Appellee, *supra* note 109, at 13) (noting Attorney General’s order to cease review of documents). The Attorney General’s order compelled the FBI to regain possession of the documents. *See id.* (noting effect of Attorney General’s order). The freeze on review was to remain in place pending judicial review of Congressman Jefferson’s request for stay. *See id.* at 658 (same).

116. *See id.* (discussing remand order).

117. *See id.* (discussing procedures set forth in remand order). In considering the legislator’s appeal, the circuit court enjoined the Justice Department from resuming examination of the documents obtained in the search of the legislator’s office. *See id.* (noting circuit court’s bar on executive review of materials seized in search of Congressman Jefferson’s office). The D.C. Circuit’s remand order provided that the district court was to: (1) copy all seized documents and provide Congressman Jefferson with copies; (2) employ the electronic filter to search seized electronic documents for items relevant to the search warrant; (3) enable Congressman Jefferson to submit claims of privilege with respect to any documents; and (4) review those documents *in camera* to determine whether the documents were in fact privileged under the Speech or Debate Clause. *See id.* (describing remand processes previously ordered by circuit court). The circuit court permitted the United States to examine documents that Congressman Jefferson admitted to be non-privileged. *See id.* (discussing Congressman Jefferson’s concession and district court’s directive to permit executive review of non-privileged documents).

118. *See id.* (discussing grand jury indictment). The sixteen-count indictment charged the legislator with racketeering, money laundering, wire fraud, obstruction of justice and bribery. *See id.* (detailing charges in indictment).

119. *See id.* at 658-59 (explaining circuit court’s jurisdiction for hearing emergency appeal). Noting that trial was scheduled for January 2008, the D.C. Circuit concluded that review of Congressman Jefferson’s appeal was necessary under the collateral order doctrine. *See id.* (explaining need for immediate review). If the case went to trial without judicial determination as to the potentially privileged nature of the seized evidence, Congressman Jefferson could be convicted on nec-

August 5, 2007, the D.C. Circuit concluded that the search and seizure of Congressman Jefferson's paper files violated the Speech or Debate Clause, and ordered the return of all privileged legislative materials.¹²⁰

IV. DISTINGUISHING THE ISSUE AND EXPANDING THE DOCTRINE: A NARRATIVE ANALYSIS

In *Rayburn*, the D.C. Circuit considered whether an executive search of a congressional office violated the testimonial privilege of the Speech or Debate Clause.¹²¹ The court noted that the search of Congressman Jefferson's office was the first such search in American history.¹²² Nevertheless, the *Rayburn* court moved beyond the identities of the parties and examined the search purely for the compelled disclosure of privileged legislative documents.¹²³

The D.C. Circuit recognized that the Supreme Court had not addressed a nondisclosure privilege.¹²⁴ Instead, the *Rayburn* court turned to D.C. Circuit precedent in *Brown & Williamson*, which "ma[de] clear that a key purpose of the privilege is to prevent intrusions in the legislative process and that the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put."¹²⁵ The court distinguished the facts of the search before it from those in *Brown & Williamson*, which involved a civil suit request for privi-

essarily privileged evidence. *See id.* (same). On appeal, Congressman Jefferson recognized that the remand procedures afforded by the circuit court were more respectful of the Speech or Debate Clause privilege than the procedures initially undertaken by the Justice Department. *See* Reply Brief of Congressman William J. Jefferson at 15, *Rayburn*, 497 F.3d 654 (No. 06-3105) (conceding Congressman Jefferson's preference for circuit court's procedures outlined in remand order). Nevertheless, Congressman Jefferson contended that "procedures . . . imposed [by the court after the fact] cannot retroactively validate an illegal action." *See id.* at 13 (rationalizing basis for appeal of search procedures).

120. *See Rayburn*, 497 F.3d at 663 (relating D.C. Circuit Court's holding).

121. *See id.* at 659-63 (considering constitutionality of Justice Department's search of Congressman Jefferson's congressional office pursuant to search warrant).

122. *See id.* at 659 (noting that search of Congressman Jefferson's office was first time Executive had conducted search of office of sitting member of Congress).

123. *See id.* at 662 (analyzing search in context of compelled disclosure of privileged materials rather than separation of powers).

124. *See id.* at 659 ("The Supreme Court has not spoken to the precise issue at hand."). The *Rayburn* court relied on the Supreme Court's conclusion that the Clause served "to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *See id.* at 659 (quoting *Gravel v. United States*, 408 U.S. 606, 616 (1972)) (discussing purpose of privilege afforded by Speech or Debate Clause).

125. *See id.* at 660 (citing *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 419 (D.C. Cir. 1995)) (recognizing D.C. Circuit precedent creating testimonial privilege of nondisclosure of privileged documents).

leged materials.¹²⁶ Nevertheless, the *Rayburn* court cited *Brown & Williamson*'s frequent discussion of the Clause in a criminal context as justification for applying it to the facts in *Rayburn*.¹²⁷

Applying the *Brown & Williamson* framework, the *Rayburn* court quickly concluded that the Justice Department search "must have" exposed the Executive to legislative documents.¹²⁸ The court recognized that because the privileges of the Clause are absolute, even the special procedures outlined in the warrant application did not absolve the violation because the procedures did not prevent preemptive executive review.¹²⁹ Thus, the incidental review of confiscated paper materials violated the Clause, but procedures outlined for the review of confiscated electronic material did not.¹³⁰

126. *See id.* (differentiating between civil suit in *Brown & Williamson* and criminal suit before it in *Rayburn*). For further discussion of the facts and holding of *Brown & Williamson*, see *supra* notes 100-06 and accompanying text.

127. *See Rayburn*, 493 F.3d at 660 (justifying reliance on *Brown & Williamson* in criminal context). In further support of reliance on *Brown & Williamson*, the *Rayburn* court referred to the *Brown & Williamson* analysis as "profound." *See id.* (same).

128. *See id.* at 661 (concluding that search exposed agents to legislative materials). The *Rayburn* court opined that the warrant itself "contemplated" exposure of privileged materials because it proscribed wholesale review of the legislator's documents and return of those deemed privileged. *See id.* (same). Employing judicial notice, the court surmised that some seized materials could be politically embarrassing. *See id.* (concluding that seized documents could contain evidence of "frank or embarrassing statements"). The court concluded that compelled review of such politically sensitive documents could "chill the exchange of views" within the legislator's office, an effect distinctly guarded against by the Speech or Debate Clause. *See id.* (recognizing chilling effect of compelled disclosure upon legislative process and noting that such "chill runs counter to the Clause's purpose of protecting against disruption of the legislative process").

Having reached its analytical determination, the D.C. Circuit then dismantled the arguments of the district court and the Government on appeal. *See id.* (addressing argument of United States and analysis of district court). Notably, the circuit court rejected the contention that the scope of the testimonial privilege was narrowed in the context of a criminal search warrant. *See id.* (considering effect of valid search warrant upon Speech or Debate Clause privileges). The *Rayburn* court emphasized that the issue was not the validity of the Justice Department search warrant under the Fourth Amendment, but whether the search had preemptively exposed the Executive to legislative materials without the consent of the legislator. *See id.* (distinguishing between analysis of constitutionality of search itself and constitutionality of manner in which documents were reviewed).

129. *See id.* at 662 ("The special procedures outlined in the warrant affidavit would not have avoided the violation of the Speech or Debate Clause because they denied the Congressman any opportunity to identify and assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents.").

130. *See id.* at 663 (setting forth holding with respect to Speech or Debate Clause application). Because the electronic documents were to be reviewed with a search engine, the court concluded that the Executive had not actually reviewed privileged documents and was thus not in violation of the Speech or Debate Clause. *See id.* (same). For a discussion of the processes followed by agents executing the warrant, see *supra* note 110.

Significantly, the D.C. Circuit recognized that though absolute, Congressman Jefferson's legislative privilege could potentially be asserted in a way that concomitantly recognized the Executive's interest in law enforcement.¹³¹ On the facts, the circuit court concluded that the *in camera* review provided in its earlier remand order would sufficiently recognize both privileges.¹³² Nevertheless, the court stopped short of advocating for specific balancing mechanisms in future searches.¹³³

Finally, the *Rayburn* court considered the appropriate relief for the recognized violation of the representative's legislative privilege of testimonial nondisclosure.¹³⁴ Specifically, the *Rayburn* court examined whether a violation of Congressman Jefferson's legislative immunity warranted the return of all seized documents.¹³⁵ Ultimately, the D.C. Circuit compelled the return of only privileged paper documents, but not non-privileged documents, as Congressman Jefferson had requested.¹³⁶

131. See *Rayburn*, 497 F.3d at 662 (identifying potential for satisfaction of competing legislative and executive interests). The court correctly observed that Congressman Jefferson's position on appeal was only that legislative privilege preempted the execution of the Justice Department's search warrant. See *id.* (discussing Congressman Jefferson's argument on appeal). Thus, the court distinguished between the absolute application of the Speech or Debate privilege, and the satisfaction of that privilege by allowing it to preempt subsequent review. See *id.* (same).

132. See *id.* 662-63 (expressing satisfaction that processes of remand order could satisfy interest of both legislator and Executive). For a detailed explanation of the document review process outlined in the remand order, see *supra* notes 116-17 and accompanying text.

133. See *Rayburn*, 497 F.3d at 663 (concluding that determination of how to accommodate both interests is "best determined by the legislative and executive branches").

134. See *id.* at 663-66 (analyzing appropriate relief for recognized violation of Clause).

135. See *id.* at 664 (recognizing that Congressman Jefferson sought return of all seized documents, both privileged and non-privileged).

136. See *id.* at 666 (setting forth relief for violation of Speech or Debate Clause). In determining the appropriate relief for the violation of Congressman Jefferson's Speech or Debate Clause privilege, the *Rayburn* court gave special deference to the unique nature of the legislative privilege. See *id.* at 663-64 (citing *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 8 (D.C. Cir. 2006) (noting that Clause preserves legislative function and buttresses separation of federal powers). The court noted that the Clause forbade compelled disclosure of privileged legislative materials only. See *id.* at 664 (distinguishing protections of Clause). The court noted that Congressman Jefferson had been unable to demonstrate that his legislative office would be disrupted if denied the original copies of non-privileged documents. See *id.* at 665 (parsing Congressman Jefferson's appeal). Moreover, the D.C. Circuit recognized the Executive's interest in law enforcement, and concluded that Congressman Jefferson's non-privileged materials might be relevant to the criminal prosecution against him. See *id.* (distinguishing effect of return of non-privileged documents). Thus, the *Rayburn* court ordered the return of only paper documents deemed privileged upon remand. See *id.* at 666 (setting forth appropriate relief for violation of Speech or Debate Clause).

V. BLAZING A NEW PATH, BUT MUDDYING THE TRAIL: A
CRITICAL ANALYSIS

In *Rayburn*, the D.C. Circuit Court was called upon to exercise its unique judiciary function as guardian of the separation of powers under the Speech or Debate Clause.¹³⁷ Indeed, the *Rayburn* court bore additional judicial responsibility in that no federal appellate court had ever ruled upon the constitutionality of an executive search of the office of a sitting member of Congress.¹³⁸ Moreover, no court had ever considered the application of the testimonial immunity of the Speech or Debate Clause in the incidental review of privileged documents pursuant to a valid search warrant.¹³⁹ The *Rayburn* opinion represents not only an astute interpretation of Supreme Court and circuit precedent, but also a conscientious effort to serve the Constitution through rigorous application of its principles.¹⁴⁰ Nevertheless, the opinion avoided several issues that could ultimately prove problematic for future courts.¹⁴¹

A. *Astute Application of the Speech or Debate Clause*

The D.C. Circuit in *Rayburn* deftly walked a constitutional tightrope, recognizing the issue before it not as one of the constitutionality of a search pursuant to a warrant, but of the application of recognized Speech or Debate Clause principles to the Justice Department's review of legislative documents found in a legislator's office.¹⁴² The court's acute disposal of the notion that a warrant qualified the scope of the Clause was both

137. *Cf. id.* at 659-63 (evaluating Speech or Debate Clause as applied to preemptive search of Congressman Jefferson's office).

138. *See id.* at 659 (recognizing that search of Congressman Jefferson's office was first search of its type in American history).

139. *Compare id.* at 659-63 (considering application of Speech or Debate Clause to execution of valid warrant to search office of sitting legislator), with *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995) (applying testimonial Speech or Debate Clause immunity to subpoena duces tecum of legislators regarding whereabouts of reports in possession of committee), *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 861-62 (D.C. Cir. 1988) (applying testimonial privilege concerning subpoena duces tecum of documents in possession of congressional subcommittee), *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 529 (9th Cir. 1983) (applying testimonial privilege in motion to compel deposition testimony of non-party former representative), and *In re Grand Jury Investigation into Possible Violations of Title 18*, 587 F.2d 589, 594-98 (3d Cir. 1978) (applying testimonial privilege to subpoena of congressional phone records).

140. *See Rayburn*, 497 F.3d at 659-60 (expanding upon precedent to recognize applicability of Speech or Debate Clause to incidental review of privileged legislative material in context of criminal search warrant). For further discussion of the groundbreaking extension of the Clause set forth by the *Rayburn* court, see *infra* notes 143-56 and accompanying text.

141. *See Rayburn*, 497 F.3d at 662-63 (extending application of testimonial Speech or Debate Clause privilege but failing to discuss appropriate steps for satisfaction of competing legislator and executive interests in great detail).

142. *See id.* at 661-62 (distinguishing constitutional issues on appeal).

insightful and momentous.¹⁴³ Having moved beyond the historic facts of the suit, the court freed itself to examine the search purely within the issue of executive review of Congressman Jefferson's privileged documents in several important ways.¹⁴⁴

First, the *Rayburn* decision is notable for its application of *Brown & Williamson's* broad nondisclosure framework of the Speech or Debate Clause to search warrants issued in criminal cases.¹⁴⁵ The *Rayburn* court employed a chain of logic that recognized the role of the Clause as an absolute protection against inquiry into privileged legislative conduct or documents.¹⁴⁶ In the eyes of the court, such absolute breadth could not be qualified by the constitutional assurances included in a valid search warrant.¹⁴⁷ Rather, the court properly concluded that criminal investigations into the conduct of legislators will be subject to the same level of judicial scrutiny and concern for the legislative process as private civil suits that either name legislators as parties to the suit or seek discovery of legislative documents.¹⁴⁸

Second, the D.C. Circuit perceptively applied the principle of nondisclosure despite the fact that the search actively sought only non-privileged material.¹⁴⁹ *Rayburn's* extension of the doctrinal assessment of *Brown & Williamson* and its ilk represents the first case to address criminal discovery proceedings that do not target information that is privileged under the Speech or Debate Clause.¹⁵⁰ The circuit court recognized that the abso-

143. *Cf. id.* at 661 (recognizing that constitutionality of search of representative's office pursuant to properly obtained and executed warrant was not at issue on appeal).

144. *Cf. id.* at 660 (examining search in framework of Speech or Debate Clause violation). The *Rayburn* court's analysis focused purely upon the extent to which an outside party forcibly reviewed privileged legislative material. *See id.* at 660-61 (analyzing search in context of Speech or Debate Clause as guard against legislative interruption). Because compelled review by any non-legislator violates the testimonial privilege of the Clause, the court avoided the separation of powers issue. *Cf. id.* (considering search only in terms of compelled disclosure rather than executive overreaching).

145. *See id.* at 660 (analyzing Clause as protection against compelled disclosure of privileged documents in criminal context).

146. *See id.* at 662 (reasoning that because Clause is absolute and does not distinguish between oral or written testimony, *Brown & Williamson* framework must apply regardless of purpose behind compelled disclosure).

147. *See id.* (refusing to balance Speech or Debate Clause against competing interests of Executive in light of absolute nature of Clause).

148. *See id.* at 660 (discussing application of Clause to criminal proceedings). The *Rayburn* court noted that a view of the Clause as narrowing in criminal proceedings was inconsistent with circuit and Supreme Court precedent. *See id.* at 661 (citing *United States v. Brewster*, 408 U.S. 501, 526 (1972)) (adhering to broad reading of Clause in criminal proceeding).

149. *See Rayburn*, 497 F.3d at 661 (applying Speech or Debate Clause protection despite recognizing that search warrant did not seek privileged legislative material).

150. *Compare id.* (applying Speech or Debate Clause protection where warrant sought non-privileged material), *with Brown & Williamson Tobacco Corp. v. Wil-*

lute nature of the privilege necessarily barred any review of privileged material, regardless of the stated scope of the inquiry.¹⁵¹ Thus, the *Rayburn* court's application of legislative immunity in the search of Congressman Jefferson's office represents a conscientious and astute application of the Supreme Court's stated preference for broad interpretation of the Clause.¹⁵²

Finally, the *Rayburn* decision is notable for its attempt to satisfy the competing interests of legislators and the Executive.¹⁵³ The circuit court distinguished between the balancing of an absolute privilege and the potential for satisfaction of both the legislative privilege and the Executive's interest in law enforcement.¹⁵⁴ Thus, the court's analysis concluded that the true violation of the Clause occurred only because the Executive reviewed privileged material prior to the legislator's opportunity to assert the privilege.¹⁵⁵ In so doing, the court effectively recognized that the testimonial privilege is one of absolute, preemptive nondisclosure, regardless of the nature or scope of the inquiry.¹⁵⁶

B. Potentially Hazardous Shortcomings

The D.C. Circuit's deft analysis accurately construed the dilemma before it as a violation of the Speech or Debate Clause through review of privileged documents rather than one of the constitutionality of a warrant to search a congressional office.¹⁵⁷ Regrettably, the court provided only negligible guidance for future courts with respect to the solution chosen

liams, 62 F.3d 408, 421 (D.C. Cir. 1995) (applying Speech or Debate Clause protection from subpoena privileged legislative documents), *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 861 (D.C. Cir. 1988) (same), *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528-29 (5th Cir. 1983) (same), *In re Grand Jury Investigation into Possible Violations of Title 18*, 587 F.2d 589, 594-98 (3d Cir. 1978) (considering testimonial immunity for privileged materials), and *In re Grand Jury Proceedings*, 563 F.2d 577, 580-82 (3d Cir. 1977) (same). For a discussion of the current boundaries of privileged legislative activity, see *supra* notes 41-52 and accompanying text.

151. See *Rayburn*, 497 F.3d at 660 (applying Speech or Debate Clause regardless of purposes for which information was reviewed in violation of privilege).

152. Cf. *id.* (expanding judicial recognition of Clause to include all purposes for which privileged material is reviewed).

153. See *id.* at 662 ("There would appear 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 interests of the Executive in law enforcement.").

154. See *id.* at 662-63 (refusing to balance competing executive and legislative interests but recognizing potential for satisfaction of both in manner that does not violate legislators' Speech or Debate Clause privileges).

155. See *id.* at 663 ("[W]e hold that a search that allows agents of the Executive to review privileged materials without the Member's consent violates the Clause.").

156. See, e.g., *id.* at 662 (discussing nature of Speech or Debate Clause violation).

157. See *id.* (characterizing Congressman Jefferson's argument on appeal and proceeding with analysis of potential Speech or Debate Clause violation).

for the violation.¹⁵⁸ Accordingly, the *Rayburn* opinion could serve as the basis for future challenges not to the application of the Clause, but to the procedures implemented to protect it.¹⁵⁹

First, the court stopped short of advocating for specific procedures that satisfy the Clause while also protecting the interest of the Executive in law enforcement.¹⁶⁰ Instead, the court concluded that the Legislature and the Executive themselves would best determine that question.¹⁶¹ Thus, the court passed on the opportunity to explicitly sanction a procedure that could be both effective and constitutionally appropriate.¹⁶²

Moreover, the court perfunctorily approved the processes set forth in its previous remand order, but did not analyze the remand procedures in the context of a recognized Speech or Debate Clause violation.¹⁶³ First, the court failed to discuss any applicable limit to the legislator's ability to assert the privilege.¹⁶⁴ Indeed, the court did not recognize what, if anything, could prevent a legislator from asserting the privilege with respect to the entire office.¹⁶⁵

Additionally, the court did not specify the extent to which a legislator could challenge the judicial *in camera* designation of documents as unprivileged.¹⁶⁶ Further, the court's process upon remand seems unlikely to dissuade future legislators from quickly attaching a legislative element to

158. *Cf. id.* (briefly addressing satisfaction of both executive and legislative interests in process for review of documents pursuant to valid search warrant).

159. *See id.* (failing to provide detailed analysis of procedure for conducting future searches of congressional offices).

160. *See id.* at 662-63 (recognizing Speech or Debate Clause violation but avoiding recommendation for future courts seeking to correct similar violation). The circuit court recognized that an opportunity to invoke legislative privilege must precede any review. *See id.* (discussing nature of legislative privilege of non-disclosure). Nevertheless, the court recognized only that a legislator's interests might be accommodated by sealing the office to the Justice Department after it had been marked for search until the legislator could assert the privilege. *See id.* (hypothesizing potential for various ways to protect legislative privilege in executive search of congressional offices).

161. *See id.* at 663 (deferring determination of how to satisfy competing interests in execution of Clause to Legislature and Executive).

162. *See id.* (refusing to offer judicial estimation of most effective way for both executive and legislative interests to be satisfied in execution of search warrant in congressional office).

163. *See id.* at 662-63 (concluding that remand order would satisfy all concerns regarding protracted judicial burden in executing *in camera* review but failing to advise on how best to complete that process). The remand order had been issued prior to the circuit court opinion in *Rayburn* demonstrating that the search violated Congressman Jefferson's rights under the Speech or Debate Clause. *See id.* at 657-58 (noting historical timeline of Congressman Jefferson's appeal).

164. *See id.* at 662-63 (discussing burdens of procedure for *in camera* review in remand order).

165. *Cf. id.* at 663 (neglecting to elaborate on process for assertion of legislative privilege for *in camera* review).

166. *See id.* (failing to specify how *in camera* findings might be recognized as final).

documents that may soon become the subject of an executive inquiry.¹⁶⁷ Finally, the *Rayburn* opinion forbore an attempt to differentiate a painstaking *in camera* review from an interruption of the legislative process.¹⁶⁸

The court justified its ambivalence with respect to future execution of similar procedures by citing the historical infrequency of executive review similar to that in the case before it.¹⁶⁹ The court's superficial approval of its own remand order provides little guidance for future courts seeking to apply the *Rayburn* court's analysis.¹⁷⁰ Thus, the court's cursory recognition of effective solutions to the unprecedented search in *Rayburn* may present a complicated qualification to the groundbreaking analysis achieved by the court.¹⁷¹

VI. IMPACT

The D.C. Circuit in *Rayburn* trod considerable amounts of heretofore-unmapped constitutional territory.¹⁷² Indeed, the singularity of the *Rayburn* decision indicates that future courts will likely reference the case when considering similar searches.¹⁷³ Moreover, the fact that the Houses of Congress are situated within the District of Columbia foreshadows *Rayburn's* relevance, inasmuch as future challenges to similar searches of congressional premises will likely take place within the D.C. Circuit's

167. *Cf. id.* (compelling return to Congressman Jefferson of all privileged documents reviewed by Executive without legislator's consent).

168. *See id.* at 660 (recognizing that key function of Clause is to prevent intrusion into legislative process). *But see id.* at 662-63 (authorizing potentially long-term *in camera* review of documents in legislator's office). For discussion of the *Rayburn* court's justification for this potentially protracted review and the burdens it may place on the court, see *infra* note 169 and accompanying text.

169. *See Rayburn*, 497 F.3d at 662-63 (addressing governmental concerns for burden placed on district court and delay produced by exhaustive review of seized material). The circuit court recognized the potentially large burden of review that the *Rayburn* opinion foisted upon the district court and rationalized its decision by concluding that "such a burden will be, at most, infrequent." *See id.* at 663 (justifying burden of review placed on district court).

170. *See id.* at 662-63 (offering minimal guidance for future remand proceedings or how Judiciary can best avoid constitutional Speech or Debate issue in search of congressional offices).

171. *See id.* at 659-63 (analyzing Speech or Debate Clause but providing minimal analysis for procedures to solve recognized violation of Clause on remand).

172. *Cf. id.* at 661 (applying testimonial privilege of nondisclosure to execution of valid search warrant in criminal investigation).

173. *Cf. Pardo, supra* note 13, at 868-69 (discussing potential for Speech or Debate Clause challenge to executive search of congressional office). One group of commentators recognized the issue as "unresolved," but pointed to the appearance of *Rayburn* before the D.C. Circuit as an indication that the issue would soon be considered. *See id.* at 869 (discussing pending appeal in *Rayburn*); TATELMAN, *supra* note 109, at CRS-12 (recognizing issue in *Rayburn* as unresolved and forecasting clarity pending Congressman Jefferson's then-upcoming appeal to D.C. Circuit).

jurisdiction and thus be bound to *Rayburn's* analysis.¹⁷⁴ Given that the public *sturm und drang* associated with allegations of congressional corruption often prompts executive investigation, *Rayburn's* treatment of evidentiary privilege deserves special attention from all who occupy positions within the three branches of federal government.¹⁷⁵

Additionally, *Rayburn's* high profile may draw scrutiny to the long-standing circuit dispute regarding application of Speech or Debate Clause immunity to non-testimonial compelled disclosure.¹⁷⁶ Indeed, application of the Third Circuit's nonevidentiary use doctrine to the facts of *Rayburn* may have produced an opposite conclusion than that of the D.C. Circuit.¹⁷⁷ Thus, the Justice Department may seek Supreme Court review

174. Cf. Brief of Congressman William J. Jefferson at 1, *Rayburn*, 497 F.3d 654 (No. 06-3105) (citing 18 U.S.C. § 3231) (setting forth District of Columbia as appropriate jurisdiction for district court and appellate action in *Rayburn*); see also Petition for Writ of Certiorari, *Rayburn*, 497 F.3d 654 (No. 07-816) (appealing D.C. Circuit's decision in *Rayburn*). On writ of certiorari to the United States Supreme Court, the United States asserted:

Investigations designed to ferret out congressional corruption . . . find their nerve center in the Nation's capital [sic]. Because of that fact, decisions of the United States Court of Appeals for the District of Columbia Circuit have a uniquely important role in defining the Constitution's express protection for legislators: the Speech or Debate Clause.

Petition for Writ of Certiorari, *supra*, at 11 (recognizing need for clarity in D.C. Circuit's application of Speech or Debate Clause).

175. Cf. Gary Langer, *Poll: Americans Support Searches*, ABC NEWS, June 1, 2006, <http://abcnews.go.com/Politics/PollVault/story?id=2025343&page=1> (reporting that eighty-six percent of Americans approved of FBI searches of Congressman Jefferson's office). In addition to Congressman Jefferson, several other recent members of Congress have been subject to investigation and public harangue regarding allegations of corruption. See Phillip Shennon, *Federal Lawmakers From Coast to Coast Are Under Investigation*, N.Y. TIMES, July 27, 2007, at A16 (cataloguing recent indictment and investigation of several members of Congress); see also Laylan Copelin & W. Gardner Selby, *DeLay to Quit Race, Will Resign Seat*, AUSTIN AMERICAN-STATESMAN, Apr. 4, 2006, at A1 (detailing resignation of House Speaker Tom DeLay, who was plagued by allegations of corruption); Chuck Neubauer & Richard T. Cooper, *Senator's Way to Wealth Was Paved With Favors*, L.A. TIMES, Dec. 17, 2003, at A1 (documenting allegations of corruption against Senator Ted Stevens); Jeremy Wallace, *Representative Mark Foley Quits in Disgrace*, SARASOTA HERALD-TRIB., Sept. 30, 2006, at A1 (recalling resignation and public outcry surrounding disgraced Congressman Mark Foley).

176. Cf. Carl Hulse, *F.B.I. Raid Divides G.O.P. Lawmakers and White House*, N.Y. TIMES, May 24, 2006, at A1 (noting widespread attention given to search of Congressman Jefferson's office); Allan Lengel, *Representative Jefferson Wins Ruling Against FBI*, WASH. POST, Aug. 4, 2007, at A1 (reporting on outcome of Congressman Jefferson's appeal to D.C. Circuit).

177. Cf. *In re Grand Jury Investigation into Possible Violations of Title 18*, 587 F.2d 589, 597 (3d Cir. 1978) ("[T]he privilege when applied to records . . . is one of nonevidentiary use, not of non-disclosure."). Presumably, application of Third Circuit construction of the testimonial Speech or Debate privilege would permit the Justice Department to participate in the *in camera* review of the seized documents on remand, or would not have found a violation of the Clause in the incidental review of the documents in the first place. Cf. *id.* (authorizing United States Attorney to participate in *in camera* review of potentially privileged congressional

of the issue, in order to secure the right to conduct incidental review of privileged materials in future criminal investigations of members of Congress.¹⁷⁸ Given the intensity of bi-partisan congressional protest to the search, it is likely that application of the Third Circuit's nonevidentiary use doctrine would have produced a general panic among members of Congress.¹⁷⁹

Despite the district court's concern, the *Rayburn* decision itself is unlikely to transform congressional offices into "taxpayer-subsidized sanctuar[ies] for crime."¹⁸⁰ Indeed, the D.C. Circuit rejected Congressman Jefferson's request to return all seized materials.¹⁸¹ Nevertheless, the gen-

phone records). For a discussion of the facts and holding in *Grand Jury*, see *supra* notes 83-90 and accompanying text.

178. See Posting of Lyle Denniston to SCOTUSblog, Supreme Court of the United States Blog, <http://www.scotusblog.com/wp/uncategorized/partial-violation-of-congressmans-rights-found/> (Aug. 3, 2007, 13:20 EST) (analyzing D.C. Circuit opinion in *Rayburn* and opining that case is "destined for" Supreme Court review). In December, 2007, the United States filed a writ of certiorari with the Supreme Court, appealing the D.C. Circuit court's decision in *Rayburn*. See Petition for Writ of Certiorari, *supra* note 174.

179. Cf. *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Rep. Bruce Fein), available at <http://judiciary.house.gov/OversightTestimony.aspx?ID=637> (chastising Executive branch for conducting search of Congressman Jefferson's legislative office). Members of Congress from both parties reacted harshly to what they perceived as overreaching by the Executive branch. See Hulse, *supra* note 176 (noting bi-partisan congressional outcry over search of Congressman Jefferson's office); Shailagh Murray & Allan Lengel, *Lawmakers Demand FBI Return Raid Files*, B. GLOBE, May 25, 2006, at A2 (same). House Judiciary Committee Chairman F. James Sensenbrenner, Jr., forecasted hearings into the "profoundly disturbing" actions of the Justice Department. See Murray & Lengel, *supra* (noting congressional promise of Committee hearings regarding search).

180. *In re Search of the Rayburn House Office Bldg. Room Number 2113, 432 F. Supp. 2d*, 100, 119 (D.D.C. 2006) (upholding search of Congressman Jefferson's office), *rev'd*, 497 F.3d 654 (D.C. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3349 (U.S. Dec. 19, 2007) (No. 07-816). The D.C. Circuit recognized that the Speech or Debate Clause precluded executive review of only privileged documents, and not all documents in congressional offices. See *Rayburn*, 497 F.3d at 665 (compelling return of non-privileged documents). Thus, the circuit court's reasoning preserved both the role of the Clause and the executive interest in law enforcement. Cf. *id.* (same).

181. See Reply Brief of Congressman William J. Jefferson, *supra* note 119, at 23-26 (arguing that Speech or Debate Clause violation requires return of all seized property). Ultimately, Congressman Jefferson and the Justice Department each claimed the circuit court ruling as a victory for their side. Compare Press Release, Robert Trout, Congressman Jefferson Wins Ruling On Speech or Debate Clause (Aug. 13, 2007), available at <http://www.scotusblog.com/movabletype/archives/TroutStatement8.03.07.doc> (last visited Feb. 14, 2008) ("We are pleased with the DC Circuit's ruling that the unprecedented search conducted by the FBI violated Congressman Jefferson's rights under the Speech or Debate [C]ause . . ."), with Press Release, Brian Roehrkasse, Acting Dir. of Pub. Affairs, U.S. Dep't of Justice, Appeals Court Ruling in the Jefferson Case (Aug. 3, 2007), available at http://www.usdoj.gov/opa/pr/2007/August/07_opa_579.html (last visited Feb. 14, 2008) ("The Department of Justice [is] . . . pleased that the D.C. Circuit opinion allows the prosecutors to retain non-Speech or Debate [C]ause documents."). Indeed,

eral lack of clarity regarding the application of the Clause, exemplified by contrasting *Rayburn* and a hypothetical examination of the facts of *Rayburn* under Third Circuit precedent, demonstrates the need for wholesale Supreme Court review of the nature of the testimonial privilege under the Speech or Debate Clause.¹⁸² Until then, the Capitol building is affixed with a proverbial sign reading “Keep Out! Members Only!”¹⁸³

John D. Friel

the return of non-privileged documents is unlikely to impact Congressman Jefferson’s criminal case in that the indictment was based on materials not recovered by the search of Congressman Jefferson’s office. Cf. Press Release, Brian Roehrkasse, *supra* (“The Department of Justice will continue to prepare for trial, scheduled for January 2008 . . .”).

182. Compare *Rayburn*, 497 F.3d at 663 (prohibiting incidental executive review of privileged legislative documents), with *In re Grand Jury Investigation into Possible Violations of Title 18*, 587 F.2d at 597 (allowing executive review of privileged legislative documents so long as documents are not used for evidentiary purpose).

183. Cf. *Rayburn*, 497 F.3d at 663 (prohibiting preemptive and incidental executive review of privileged legislative documents pursuant to valid search warrant for congressional office).

