

## Notes and Comments

### CONGRESSIONAL ARBITRAGE AT THE EXECUTIVE'S EXPENSE: THE SPEECH OR DEBATE CLAUSE AND THE UNENFORCEABLE STOCK ACT

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**ABSTRACT**—In early 2012, Congress passed the Stop Trading on Congressional Knowledge (STOCK) Act. The STOCK Act explicitly prohibits members of Congress and their staff from trading on material, nonpublic information received because of their status. The Act leaves enforcement of its provisions to the Executive Branch. However, the Speech or Debate Clause and recent case law interpreting the Clause's legislative privilege create roadblocks to the Executive's ability to effectively enforce the Act against a member of Congress. Given the obstacles to effective enforcement, the STOCK Act creates a risk-free opportunity for political gain by the Legislative Branch while positioning the Executive to pursue hamstrung prosecutions. Congress's arbitrage opportunity thus comes at the expense of the Executive and threatens the balance and separation of powers. This Note argues that if legislative privilege is understood as an institutional privilege of Congress as a body rather than an individual privilege of each member of Congress, the courts may recognize a congressional waiver of all members' legislative privilege as applied to the STOCK Act. Such a waiver would restore the ability of the Executive to effectively enforce the STOCK Act and would alleviate separation of powers concerns.

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INTRODUCTION

On St. Patrick’s Day 2011, Representative Louise Slaughter of New York introduced a bill that she had introduced three times before.<sup>1</sup> Along with Representative Tim Waltz of Minnesota, Representative Slaughter introduced the Stop Trading on Congressional Knowledge (STOCK) Act for consideration by the U.S. House of Representatives.<sup>2</sup> The STOCK Act explicitly prohibits members of Congress and their staff from trading on material, nonpublic information received because of their congressional status.<sup>3</sup>

No more than thirteen members of the House had cosponsored each prior introduction of the bill.<sup>4</sup> The 2011 version of the bill was keeping

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<sup>1</sup> *President Obama Praises Slaughter for Her Work to End Insider Trading in Congress as He Signs STOCK Act into Law*, CONGRESSWOMAN LOUISE M. SLAUGHTER (Apr. 4, 2012), <http://louise.house.gov/press-releases/president-obama-praises-slaughter-for-her-work-to-end-insider-trading-in-congress-as-he-signs-stock-act-into-law/>.

<sup>2</sup> H.R. 1148, 112th Cong. (2011).

<sup>3</sup> *President Obama Praises Slaughter*, *supra* note 1. As enacted, the STOCK Act required disclosure of staff and members’ stock or commodity transactions that exceed \$1000. *Id.* In the spring of 2013, however, Congress passed and the President signed a bill stripping the STOCK Act of its online disclosure requirement as it pertains to congressional staff and Executive Branch employees. The move followed the release of a National Academy of Public Administration report claiming that a searchable disclosure database of congressional and agency employee trading poses a risk to national security, among other things. *See* Eric Yoder, *Federal Employee Financial Disclosures to Remain Offline*, WASH. POST FED. EYE BLOG (Apr. 15, 2013, 4:14 PM), <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/04/15/federal-employee-financial-disclosures-to-remain-offline/>.

<sup>4</sup> *President Obama Praises Slaughter*, *supra* note 1.

pace with its predecessors' cosponsor count until November 13th, when *60 Minutes* aired a segment about the trading activities of members of Congress, including House Speaker John Boehner, House Financial Services Committee Chairman Spencer Bachus, and Minority Leader Nancy Pelosi.<sup>5</sup> The following day, the list of STOCK Act cosponsors more than doubled.<sup>6</sup> By the end of the week, ninety-two members of the U.S. House of Representatives had signed on to the bill, and within three months, 286 members of the House, representing both parties, had cosponsored the STOCK Act.<sup>7</sup> Shortly thereafter, the Senate took up the measure, and in a rare turn of bipartisanship and efficiency for the 112th Congress,<sup>8</sup> the two houses passed the STOCK Act in March 2012.<sup>9</sup> President Obama signed the bill the following month.<sup>10</sup> Call it the power of the media, an ethically reinvigorated Congress, or even the will of the people, but the newly enacted STOCK Act promised consequences for corrupt members of Congress.

The Act's passage was timely. Just months before, members of Congress had been reassured that they would enjoy a more expansive interpretation of legislative privilege in the D.C. Circuit than at any other point in American history.<sup>11</sup> Legislative privilege, which derives from the Speech or Debate Clause of the U.S. Constitution,<sup>12</sup> allows members of Congress to withhold certain information pertaining to legislative acts that could otherwise be used against them in a court of law.<sup>13</sup> In 2007, the D.C. Circuit applied the broad and previously unrecognized legislative privilege of evidentiary nondisclosure in the case of *United States v. Rayburn House*

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<sup>5</sup> *60 Minutes: Congress: Trading Stock on Inside Information?* (CBS television broadcast Nov. 13, 2011), available at [http://www.cbsnews.com/8301-18560\\_162-57323527/congress-trading-stock-on-inside-information/](http://www.cbsnews.com/8301-18560_162-57323527/congress-trading-stock-on-inside-information/); see Carl Hulse, *Lawmakers Look to Rein in Their Investing*, N.Y. TIMES CAUCUS (Nov. 28, 2011, 6:00 AM), <http://thecaucus.blogs.nytimes.com/2011/11/28/lawmakers-look-to-rein-in-trading/>.

<sup>6</sup> See *Bill Summary & Status, 112th Congress (2011–2012): H.R. 1148 Cosponsors*, THOMAS (LIBR. OF CONGRESS), <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01148:@@@P> (last visited Mar. 3, 2014).

<sup>7</sup> *Id.* Boehner, Pelosi, and Bachus were not among the 286 cosponsors. See *id.*

<sup>8</sup> For commentary on the perceived failures of the 112th Congress, see Ezra Klein, *14 Reasons Why This Is the Worst Congress Ever*, WASH. POST WONKBLOG (July 13, 2012, 8:00 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever/>.

<sup>9</sup> *Bill Summary & Status, 112th Congress (2011–2012): S.2038 Major Congressional Actions*, THOMAS (LIBR. OF CONGRESS), <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN02038:@@@R> (last visited Mar. 3, 2014); see also Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, 126 Stat. 291.

<sup>10</sup> See STOCK Act § 19, 126 Stat. at 305.

<sup>11</sup> See *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011), cert. denied, 132 S. Ct. 1097 (2012).

<sup>12</sup> See U.S. CONST. art. I, § 6.

<sup>13</sup> See *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

*Office Building*.<sup>14</sup> Prior to *Rayburn*, legislative privilege was largely understood as a testimonial privilege so members of Congress did not have to testify about their involvement in legislative acts; the privilege did not include the privilege of nondisclosure—the privilege to withhold documents sought under a lawful warrant.<sup>15</sup> The Supreme Court denied the Government’s petition for certiorari in *Rayburn*,<sup>16</sup> and the D.C. Circuit’s holding in *Rayburn* changed the scope of legislative privilege by permitting members of Congress to withhold information even in the face of a valid warrant.<sup>17</sup>

Only two months before the passage of the STOCK Act, the Supreme Court denied certiorari in a case from the Ninth Circuit, *United States v. Renzi*, that if affirmed by the Court could have threatened the new, broad privilege recently granted in *Rayburn*.<sup>18</sup> In *Renzi*, the Ninth Circuit denied former Representative Richard Renzi’s claim that legislative privilege included the privilege of nondisclosure.<sup>19</sup> By denying Renzi’s petition, the Supreme Court declined to consider the first viable, post-*Rayburn* challenge to the legislative privilege of nondisclosure. In other words, two months prior to passage of the STOCK Act, the D.C. Circuit’s unprecedented interpretation of legislative privilege no longer faced any outside threats, and nondisclosure as part of legislative privilege was here to stay.

The question then remains: what happens when congressional members’ expanded legislative privilege to withhold documents sought by prosecutors collides with Congress’s own directive to the Executive Branch to prosecute members for insider trading? This Note explores the post-*Rayburn* tension between the Executive’s enforcement of the STOCK Act and Congress’s legislative privilege. Hampered by the expansive definition of legislative privilege in *Rayburn*, the Executive Branch may face prohibitive barriers to uncovering evidence of an exchange of material, nonpublic information between, for example, a constituent and a member

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<sup>14</sup> 497 F.3d 654 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1295 (2008).

<sup>15</sup> Wells Harrell, Note, *The Speech or Debate Clause Should Not Confer Evidentiary or Non-Disclosure Privileges*, 98 VA. L. REV. 385, 417–21 (2012).

<sup>16</sup> *Rayburn House Office Bldg.*, 552 U.S. 1295.

<sup>17</sup> Harrell, *supra* note 15, at 385.

<sup>18</sup> *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

<sup>19</sup> *Id.* at 1039.

of Congress.<sup>20</sup> Such evidence is critical to bringing and winning a case against a member of Congress for insider trading.<sup>21</sup>

Given the evidentiary obstacles to effective enforcement created by *Rayburn*, the STOCK Act represents a risk-free opportunity for political gain by the Legislative Branch that leaves the Executive to do Congress's bidding and pursue fruitless prosecutions. Congress's arbitrage opportunity thus comes at the expense of the Executive and threatens the balance and separation of powers. This Note argues that if legislative privilege is understood as an institutional privilege of Congress rather than an individual privilege of each *member* of Congress, the courts may recognize an institutional, congressional waiver of legislative privilege for any and all members charged under the STOCK Act. Such a waiver would restore the ability of the Executive to effectively prosecute under the STOCK Act and would alleviate separation of powers concerns.

Part I of this Note identifies the underlying purpose of the Speech or Debate Clause and then distinguishes between the two theoretical interpretations of legislative privilege as either an individual guarantee or an institutional guarantee. A court's understanding of legislative privilege as either an individual privilege of each member of Congress or an institutional privilege of Congress as a body will inform whether Congress can constitutionally waive the privilege's application to its members in a given act.

Part II of this Note examines the doctrine of legislative privilege within the context of bribery. This doctrine reveals that the D.C. Circuit's decision in *Rayburn* represents a move toward a hyperindividualistic understanding of legislative privilege that puts the privilege at odds with the Clause's purpose to maintain a separation of powers. Part III details the passage of the STOCK Act and the arbitrage opportunity created by legislative privilege doctrine. This arbitrage opportunity allowed Congress to enact a risk-free policing measure for its ranks that could potentially use the Executive Branch as a pawn in the game. Finally, Part IV argues that courts should approach legislative privilege as an institutional privilege of Congress. This approach will then allow courts to recognize a waiver of privilege in the STOCK Act in order to prevent what is otherwise congressional arbitrage at the Executive's expense.

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<sup>20</sup> See Paul D. Brachman, Note, *Outlawing Honest Graft*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 261, 293–97 (2013); James Hamilton et al., *Taking Stock of the STOCK Act*, AM. CRIM. L. REV. BLOG (Oct. 19, 2012, 9:40 AM), <http://www.americancriminalallawreview.com/Drupal/blogs/blog-entry/taking-stock-stock-act-10-19-2012>.

<sup>21</sup> Hamilton et al., *supra* note 20.

## I. LEGISLATIVE PRIVILEGE IN THEORY: TO WHOM DOES THE PRIVILEGE BELONG?

Article I, Section Six of the U.S. Constitution states:

The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.<sup>22</sup>

This Section confers both immunity upon members of Congress from arrest arising from legislative acts and a legal privilege protecting information of such acts from being used against members.<sup>23</sup> This Note addresses only the latter guarantee, known as legislative privilege, which is a product of the concluding phrase of Section Six—the Speech or Debate Clause. The Clause descends from a British provision,<sup>24</sup> which by the seventeenth century was primarily understood as a dictate underlying the separation of powers between Parliament and the British Crown.<sup>25</sup>

With the separation of powers as one of the Clause’s primary philosophical underpinnings,<sup>26</sup> a split in the literature emerged over to whom the privilege belongs: the legislature as an institution or the individual legislator. This Part provides an overview of these two theoretical approaches, including each approach’s understanding of the purpose of the Clause, evidence to support that understanding, and finally, the waiver implications that follow the two interpretations. Whether the privilege belongs to Congress as an institution or to individual members of

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<sup>22</sup> U.S. CONST. art. I, § 6.

<sup>23</sup> See *Gravel v. United States*, 408 U.S. 606, 614–15 (1972).

<sup>24</sup> “That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.” *United States v. Johnson*, 383 U.S. 169, 178 (1966) (quoting 1 W. & M., Sess. 2, c. 2 (1689), reprinted in 5 THE FOUNDERS’ CONSTITUTION 1, 2 (Philip B. Kurland & Ralph Lerner eds., 1987)).

<sup>25</sup> See Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1123 (1973). Though the concept of parliamentary privilege originated in the fourteenth and fifteenth centuries, it was only in 1542 that the privilege was incorporated into the Speaker’s Petition (a recorded document that set out the relationship between Parliament and the Crown) and understood to represent the separation of powers between Parliament and the Crown. *Id.* In 1689, following the Glorious Revolution and the exile of James II, a free speech guarantee for members of Parliament was included in the newly drafted English Bill of Rights. *Id.* at 1133. Multiple United States Supreme Court Justices have also detailed the inheritance of the Clause from the British. See *United States v. Brewster*, 408 U.S. 501, 545–46 (1972) (Brennan, J., dissenting); *Johnson*, 383 U.S. at 177–79.

<sup>26</sup> See *Johnson*, 383 U.S. at 178–79; Craig M. Bradley, *The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption?*, 57 N.C. L. REV. 197, 223 (1979); Reinstein & Silverglate, *supra* note 25, at 1145. *But see* JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW* 91 (2007) (proposing that the privilege is best interpreted as facilitating popular sovereignty rather than separation of powers).

Congress carries implications for the constitutionality of an institutional, statutory waiver of such legislative privilege by Congress.

*A. Legislative Privilege as an Individual Guarantee*

The characterization of legislative privilege as an individual guarantee is animated by a textual reading of Article I, early state case law, a concern for the separation of powers, and the rights of the people. First, the theoretical case for legislative privilege as an individual guarantee finds support in the text of the Constitution.<sup>27</sup> In his 1833 *Commentaries on the Constitution of the United States*, Justice Joseph Story articulated a distinction between rights belonging to the body (possibly such as those contained in Article I, Section Five, which refers to “each House” when conferring powers to the institution of Congress<sup>28</sup>) and Article I, Section Six, which addresses “Senators and Representatives.”<sup>29</sup> On the basis of this textual distinction, Story concludes that Section Six’s legislative privilege is an individual right.<sup>30</sup> By considering the text of Article I’s various Sections in relation to one another, Section Five’s repeated reference to the institutions of the House and Senate builds a case for Section Six’s privilege to be understood as an individual one, given Section Six’s multiple references to legislators’ specific titles.<sup>31</sup>

In addition to the text of the Constitution, individual right theorists<sup>32</sup> rely on the frequently cited Supreme Judicial Court of Massachusetts opinion in *Coffin v. Coffin*.<sup>33</sup> As one of the first U.S. cases on record dealing with legislative privilege,<sup>34</sup> *Coffin* provides insight into the judicial understanding of legislative privilege in the early Republic. The 1808 case dealt with the application of Massachusetts’s state legislative privilege provision<sup>35</sup> in a defamation suit brought against a member of the state

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<sup>27</sup> See James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. ON LEGIS. 1, 28–29 (1999).

<sup>28</sup> See *id.* for the suggestion that Justice Story “stressed this distinction” between Section Five and Section Six. Article I, Section 5 powers include the power of each House to be “the Judge of [its] Elections, Returns and Qualifications,” “determine the Rules of its Proceedings,” and “punish its Members for disorderly Behaviour.” U.S. CONST. art. I, § 5.

<sup>29</sup> U.S. CONST. art. I, § 6. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 847, at 317 (Boston, Hilliard, Gray & Co. 1833) (cited in Brudney, *supra* note 27, at 28–29 & n.132).

<sup>30</sup> STORY, *supra* note 29, § 847, at 317.

<sup>31</sup> See Brudney, *supra* note 27, at 28–29.

<sup>32</sup> See *id.* at 29; Reinstein & Silverglate, *supra* note 25, at 1166.

<sup>33</sup> 4 Mass. (1 Tyng) 1, 27 (1808).

<sup>34</sup> See Reinstein & Silverglate, *supra* note 25, at 1172 n.289.

<sup>35</sup> “The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or

House of Representatives.<sup>36</sup> The court held that the privilege did not belong to the legislature as a body, but rather to each individual member, “even against the declared will of the house.”<sup>37</sup> The court reasoned that an individual member of the legislature “does not hold this privilege at the pleasure of the house, but derives it from the will of the people . . . which is paramount to the will of either or both branches of the legislature.”<sup>38</sup> Therefore, the court defined the privilege as an individual privilege in the name of executing the will of the sovereign people rather than immunizing legislators from prosecution for their own benefit.<sup>39</sup>

The Massachusetts court placed the will of the people above, and in this case, against, the desire of the legislative body to waive the privilege. Justice Story’s editors later cited *Coffin* for this same proposition made by Story: “these rights and privileges are in truth the rights and privileges of [the member’s] constituents, and for their benefit and security, rather than the rights and privileges of the member for his own benefit and security.”<sup>40</sup> Justice Story reiterated the Massachusetts court’s reliance on the concept of a sovereign people, and not simply the separation of powers, to justify insulation of individual members of the Legislative Branch.<sup>41</sup>

The individual right theory has found similar support from the academy. Professors Robert Reinstein and Harvey Silverglate, in their seminal 1973 article on the history and development of legislative privilege, concluded that legislative privilege is “guaranteed to each member personally, and its constitutional protection is not subject to collective discretion.”<sup>42</sup> In other words, Congress as a whole cannot waive a privilege that does not belong to it as an institution.

Professors Reinstein and Silverglate contend that in “executive-motivated suits,” the Speech or Debate Clause should be interpreted

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complaint, in any other court or place whatsoever.” MASS. CONST. of 1780, art. XXI (1780), *reprinted in* 1 THE FOUNDERS’ CONSTITUTION, *supra* note 24, at 11, 13.

<sup>36</sup> *Coffin*, 4 Mass. at 1–4.

<sup>37</sup> *Id.* at 27.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 850 & n.b, at 622 (photo. reprint 1994) (Melville M. Bigelow ed., Boston, Little, Brown, & Co., 5th ed. 1891); see Melville M. Bigelow, *Preface to the Fifth Edition of STORY*, *supra*, at v (stating that “[t]he editorial notes have been separated entirely from the notes of the author; the latter run across the page, after numerals, the former are in double columns, after letters of the alphabet”).

<sup>41</sup> See Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389, 435 (1994) (“Even those who consider the privilege to belong to the member are emphatic that its purpose is to benefit the people rather than their representative.”).

<sup>42</sup> Reinstein & Silverglate, *supra* note 25, at 1169–70.



broadly to serve the greater interest of separation of powers.<sup>43</sup> They find that “even well-meaning executive challenges” can have a chilling effect on legislators.<sup>44</sup> In their view, the Executive poses the primary threat to legislative independence despite the Executive Branch’s often-sincere underlying motives.<sup>45</sup> Therefore, the purpose of the Speech or Debate Clause is to preserve legislative independence by preventing Executive encroachment.<sup>46</sup> In order to give effect to this purpose, Professors Reinstein and Silverglate argue that legislative privilege must be observed as an individual guarantee.<sup>47</sup>

### B. Legislative Privilege as an Institutional Guarantee

Consensus has largely coalesced around the purpose of the Speech or Debate Clause to “protect[] the integrity of the legislative process” through an effective separation of powers.<sup>48</sup> To that end, Professor Craig Bradley, whose 1979 work on the Clause is still the primary counterpoint to Professors Reinstein and Silverglate’s work, similarly asserts that the Clause’s basic purpose is to protect the powers of the Legislative Branch from encroachment by the other branches.<sup>49</sup> Among those who conceive of legislative privilege as an institutional guarantee, this purpose is best served by viewing members of Congress as part of the larger legislative scheme.<sup>50</sup>

Given the limited discussion of the Speech or Debate Clause at the Constitutional Convention,<sup>51</sup> Founding Era records from outside the

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<sup>43</sup> *Id.* at 1145–46. Reinstein and Silverglate, however, draw a clear distinction between the scope of the privilege as applied to Executive-brought suits and as applied to private civil suits claiming violations of constitutional rights. *See id.* at 1177 (“It would be a supreme irony if the speech or debate privilege . . . were construed so that courts lend their assistance to the executive in breaching the wall of separation of powers but deny relief for the violation of individual rights.”).

<sup>44</sup> *Id.* at 1145–46.

<sup>45</sup> *Id.* at 1145.

<sup>46</sup> *Id.* at 1145–46.

<sup>47</sup> *Id.* at 1169–70.

<sup>48</sup> Ray, *supra* note 41, at 435.

<sup>49</sup> Bradley, *supra* note 26, at 223.

<sup>50</sup> *See, e.g.,* Ray, *supra* note 41, at 435.

<sup>51</sup> In a 1966 case dealing with legislative privilege, Justice Harlan wrote, “The Speech or Debate Clause of the Constitution was approved at the Constitutional Convention without discussion and without opposition.” *United States v. Johnson*, 383 U.S. 169, 177 (1966); *see* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 166 (Max Farrand ed., rev. ed. 1966). In fact, the Articles of Confederation already contained a virtually identical clause: “Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.” ARTICLES OF CONFEDERATION of 1781, art. V, para. 5. Its constitutional successor was neither questioned nor opposed at the states’ ratification debates or within the press, and three state constitutions already included speech or debate clauses when the U.S. Constitution was drafted. *See Tenney v. Brandhove*, 341 U.S. 367, 373–75 (1951) (quoting the privilege provisions within the 1776

Convention provide much of the support for Professor Bradley and his fellow proponents of the privilege as an institutional guarantee. Numerous sources indicate that the Framers were conscious of British parliamentary abuse of the privilege when adopting it in the United States.<sup>52</sup> Most notably, in an 1832 letter responding to a Virginia congressman, James Madison wrote: “It is certain that the privilege has been abused in British precedents.”<sup>53</sup> He continued that when “difficulties and differences of opinion” arise in privilege cases, “the reason and necessity of the privilege must be the guide.”<sup>54</sup> Thus, Madison conceived of a Clause driven by function rather than form given the latter’s susceptibility to workarounds and abuse.<sup>55</sup>

Thomas Jefferson had articulated his own vision of the privilege in his 1801 work, *A Manual of Parliamentary Practice*.<sup>56</sup> Jefferson wrote that “[t]he privilege of a member is the privilege of the House,” and “[p]rivilege is in the power of the House, and is a restraint to the proceeding of inferior courts.”<sup>57</sup> Jefferson thus asserted the right of Congress as an institution to make decisions as to privilege seven years before the Supreme Judicial Court of Massachusetts held nearly the opposite in *Coffin v. Coffin*.<sup>58</sup> Relying in large part on Jefferson’s understanding of the privilege, Professor Bradley concludes that the Clause “was not intended to protect the minority in Congress” from criminalization by the majority in Congress, but rather to protect the whole Legislative Branch from an encroaching Executive or Judiciary.<sup>59</sup>

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Maryland Declaration of Rights, the Massachusetts Constitution of 1780, and the New Hampshire Constitution of 1784); CHAFETZ, *supra* note 26, at 87–88.

<sup>52</sup> See *United States v. Brewster*, 408 U.S. 501, 517 (1972) (“The history of the privilege is by no means free from grave abuses by legislators.”); *id.* at 545 (Brennan, J., dissenting) (“That the Parliamentary privilege was indeed abused is historical fact.”). *But see* Reinstein & Silverglate, *supra* note 25, at 1139 (“[T]hat the abuses of other privileges can be imputed to the speech or debate privilege, an argument expressed by Chief Justice Burger in *Brewster*, depends upon an historical construction that is more creative than descriptive.”).

<sup>53</sup> 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 221 (Philadelphia, J.B. Lippincott & Co. 1867); see also *Brewster*, 408 U.S. at 546 & n.7 (Brennan, J., dissenting) (citing Madison in THE FEDERALIST No. 48 when noting “that the Framers, aware of these abuses, were determined to guard against them”).

<sup>54</sup> LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 53, at 221; see also Reinstein & Silverglate, *supra* note 25, at 1140 n.142.

<sup>55</sup> Reinstein & Silverglate, *supra* note 25, at 1140.

<sup>56</sup> THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE § III, at 19 (1801) (cited in Bradley, *supra* note 26, at 224).

<sup>57</sup> *Id.* at 25–26; see Ray, *supra* note 41, at 434.

<sup>58</sup> 4 Mass. (1 Tyng) 1, 27 (1808) (holding that the privilege belongs to the individual member and not the legislative house).

<sup>59</sup> Bradley, *supra* note 26, at 223–24.

### C. Institutional Waiver of Legislative Privilege

The character of legislative privilege, be it individual or institutional, ultimately determines the constitutionality of an institutional waiver of the privilege. Such an institutional waiver would apply to a specific statute and would not eliminate legislative privilege across the board; rather, an institutional waiver would prohibit members of Congress from invoking legislative privilege when charged with a crime or facing a liability created under a specific piece of legislation. For scholars who interpret legislative privilege as a guarantee belonging to individual members of Congress, it follows that Congress as a body could not waive legislative privilege through statutory action. As a result, courts cannot read congressional intent for an implied institutional waiver into a given statute. The primary objection is that a constitutionally guaranteed privilege of an individual member should not be waived at the discretion of a majority or even a supermajority.<sup>60</sup> Professor James Brudney argues, to allow institutional waiver would allow “a legislative majority to suppress dissent simply by criminalizing conduct otherwise thought of as legislative.”<sup>61</sup> In light of this tyranny-of-the-majority argument, opponents of institutional waiver reject the concept based on its implication that Congress, as opposed to the courts, would “determine the scope of the constitutional privilege.”<sup>62</sup> In other words, a congressional decision to waive legislative privilege’s individual guarantee may imply that Congress can interpret and limit a constitutional provision rather than the Judicial Branch.

While a member of Congress may always choose to waive her own privilege under the individual privilege theory, the lack of incentive to do so reveals the individual theory as one open to wide abuse by self-interested actors. Professors Reinstein and Silverglate concede this much, but recognize the abuse as a necessary evil in order to preserve the greater purpose of effective separation of powers.<sup>63</sup> Yet the bribery case law that has developed under the individual privilege theory has significantly increased the opportunity for such abuse,<sup>64</sup> and the STOCK Act merely creates another opportunity for corruption to go unpunished in the face of hamstrung attempts by the Executive to hold members of Congress accountable. An institutional approach offers an alternative to this problem.

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<sup>60</sup> See Brudney, *supra* note 27, at 28–30; Reinstein & Silverglate, *supra* note 25, at 1170.

<sup>61</sup> See Brudney, *supra* note 27, at 29. *But see supra* Part I.B (discussing Professor Bradley’s contention that the Clause’s purpose is not the protection of a minority in Congress from the majority, but rather protection of the Legislative Branch as a whole).

<sup>62</sup> Brudney, *supra* note 27, at 29; see Reinstein & Silverglate, *supra* note 25, at 1170.

<sup>63</sup> Reinstein & Silverglate, *supra* note 25, at 1170 (“[I]t must be admitted that in some cases wrongdoing may go unquestioned, uninvestigated, or unpunished . . .”).

<sup>64</sup> See *infra* Part II.

An institutional understanding of legislative privilege implies that an institutional waiver of privilege is constitutional. The Supreme Court has repeatedly and deliberately avoided the question of whether Congress may waive Speech or Debate Clause protection.<sup>65</sup> If, however, the privilege is to serve as an institutional guard against both Executive Branch encroachment and Legislative Branch corruption, institutional waiver may be appropriate and constitutional in certain circumstances.<sup>66</sup> If the intent of the Framers was to protect the legislature as a whole from encroachment by the Executive, as Jefferson and Madison similarly imply, a statute passed by the legislature as a whole may indeed serve as a waiver.<sup>67</sup>

Furthermore, existing safeguards may limit the potential threat that a waiver poses to legislative independence. Institutional waiver, as envisioned by Professors Bradley and Laura Krugman Ray, applies to a particular statute.<sup>68</sup> It therefore can strengthen anticorruption statutes but would be limited to specific pieces of legislation and not eliminate legislative privilege wholesale. An institutional waiver is further limited by Congress's institutional ability to repeal or amend statutes.<sup>69</sup> If an institutional waiver is later determined to allow the Executive to encroach upon the independence of the Legislative Branch, Congress can simply repeal that waiver.<sup>70</sup> Therefore, the legislative process itself provides an additional safeguard on the institutional waiver. In fact, one supporter of the institutional waiver, Professor Ray, argues that in practice, bribery and other corrupt practices have posed a more serious threat to legislative independence than harassment by the Executive Branch.<sup>71</sup> Ultimately, the constitutionality of an institutional waiver will determine the ability of the Executive to access the evidence necessary to build a case against a member of Congress or her staff. In turn, the enforceability of the STOCK Act depends on whether an institutional waiver is constitutional.

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<sup>65</sup> *United States v. Helstoski*, 442 U.S. 477, 490–93 (1979). In *Helstoski*, the Court, assuming *arguendo* that Congress as a body could waive the protection, found no evidence of such a waiver in the statutory text or legislative history of the bribery statute. *Id.* at 492–93. *See infra* Part II.A.

<sup>66</sup> *See* Bradley, *supra* note 26, at 223–25; Ray, *supra* note 41, at 435–36; *see also* David M. Lederkramer, Note, *A Statutory Proposal for Case-by-Case Congressional Waiver of the Speech or Debate Privilege in Bribery Cases*, 3 *CARDOZO L. REV.* 465, 467, 504–10 (1982) (construing a functional analysis of the Speech or Debate Clause that renders waiver constitutional and proposing that Congress as a body pass special legislation waiving legislative privilege after the initiation of a specific case against a member of Congress).

<sup>67</sup> Bradley, *supra* note 26, at 223–25.

<sup>68</sup> *See id.* at 223; Ray, *supra* note 41, at 436.

<sup>69</sup> *See* Ray, *supra* note 41, at 436.

<sup>70</sup> *See id.*

<sup>71</sup> *Id.* at 432.

## II. LEGISLATIVE PRIVILEGE DOCTRINE

The D.C. Circuit's 2007 decision in *United States v. Rayburn House Office Building*<sup>72</sup> revealed a new discord between the understanding of legislative privilege as an individual guarantee and the Speech or Debate Clause's function within the separation of powers. *Rayburn* succeeds a line of twentieth-century Supreme Court bribery cases that defined the contours of legislative privilege in the face of the federal bribery statute.

The twentieth-century bribery cases struggled to balance the privilege with corruption charges based on a federal statute, but *Rayburn* wholly embraced legislative privilege in the bribery context. *Rayburn* expanded the idea of privilege to permit withholding materials pertaining to legislative acts from the Executive Branch in a criminal investigation.<sup>73</sup> The doctrine illustrates the progression of the Clause from a privilege that coexisted with anticorruption statutes to *Rayburn*'s full-throttled construction of legislative privilege as an absolute and powerful individual guarantee. The first step in understanding this doctrine is an examination of the bribery statute case law. Then, a look at *Rayburn*, what it means for the D.C. Circuit, and how Congress views it allows for an understanding of the environment into which the STOCK Act was born.

### A. Bribery

Some of the Supreme Court's most significant legislative privilege jurisprudence developed in reference to the federal bribery statute. Though one of the first post-Ratification laws that Congress adopted dealt with bribery of public officials, Congress did not subject its own members to the sanctions of a bribery statute until 1853.<sup>74</sup> The Act of February 26, 1853<sup>75</sup>

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<sup>72</sup> 497 F.3d 654 (D.C. Cir. 2007).

<sup>73</sup> *Id.* at 662–63.

<sup>74</sup> PETER J. HENNING & LEE J. RADEK, *THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION* 3–4 (2011).

<sup>75</sup> The text of the Act states:

*And be it further enacted*, That if any person or persons shall, directly or indirectly, promise, offer, or give, or cause or procure to be promised, offered, or given, any money, goods, right in action, bribe, present, or reward, or any promise, contract, undertaking, obligation, or security for the payment or delivery of any money, goods, right in action, bribe, present, or reward, or any other valuable thing whatever, to any member of the Senate or House of Representatives of the United States, . . . with intent to influence his vote or decision on any question, matter, cause, or proceeding which may then be pending, or may by law, or under the Constitution of the United States, be brought before him in his official capacity, or in his place of trust or profit, . . . such person . . . and the member, officer, or person who shall in anywise accept or receive the same, or any part thereof, shall be liable to indictment as for a high crime and misdemeanor in any court of the United States having jurisdiction for the trial of crimes and misdemeanors; and shall, upon conviction thereof, be fined not exceeding three times the amount so offered, promised, or given, and imprisoned in a penitentiary not exceeding three years; and the person convicted of so accepting or receiving the same, or any part thereof, if an

criminalized both the offer of a bribe to any federal officer and the acceptance of a bribe by a federal officer.<sup>76</sup> Furthermore, the statute explicitly conferred jurisdiction on the federal courts over charges against members of Congress.<sup>77</sup> The congressional record is silent on the applicability of the Speech or Debate Clause to the Act,<sup>78</sup> and multiple scholars have reasonably understood this silence to mean that legislative privilege was not considered at the Act's passage.<sup>79</sup> A century later, Congress consolidated the various bribery statutes under 18 U.S.C. § 201.<sup>80</sup> The Senate report accompanying the bill made clear that the reorganization and consolidation of the statutes "would not restrict the broad scope of the present bribery statutes as construed by the courts."<sup>81</sup> Therefore, assumptions about privilege under the 1853 statute carried through to § 201.

One of the first modern cases to consider whether legislative privilege may obviate a criminal statute did not involve bribery. The 1966 Supreme Court case of *United States v. Johnson* involved conspiracy and conflict of interest statutes rather than the bribery statute.<sup>82</sup> Yet, Justice Harlan, writing for the Court in *Johnson*, laid the foundation for evaluation of the bribery statute and future statutory delegations of prosecutorial authority over members of Congress.<sup>83</sup> The Court held that because the Government's conspiracy prosecution of a congressman was based on his House floor speech—an inherently "legislative act[]"—and the motives behind the speech, it violated the Speech or Debate Clause.<sup>84</sup> The Court, however, was

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officer or person holding any such place of trust or profit as aforesaid, shall forfeit his office or place; and any person so convicted under this section shall forever be disqualified to hold any office of honor, trust, or profit, under the United States.

Ch. 81, § 6, 10 Stat. 170, 171.

<sup>76</sup> *Id.*; Ray, *supra* note 41, at 418.

<sup>77</sup> See Ray, *supra* note 41, at 418 & n.149.

<sup>78</sup> CONG. GLOBE, 32d Cong., 2d Sess. 288–97 (1853).

<sup>79</sup> See Bradley, *supra* note 26, at 225 n.166; Ray, *supra* note 41, at 418–19 & nn.149–51; Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 341 n.40 (1965). Similarly, Chief Justice Burger cited to the lack of discussion of the Speech or Debate Clause during debates of the Act of July 16, 1862, ch. 180, 12 Stat. 577, which prohibited a member of Congress from accepting anything of value in exchange for procurement of government contract. The Act was later incorporated into 18 U.S.C. § 201, and Chief Justice Burger used the lack of legislative history to conclude that there is no evidence of an institutional waiver of legislative privilege in § 201. *United States v. Helstoski*, 442 U.S. 477, 493 & n.8 (1979).

<sup>80</sup> HENNING & RADEK, *supra* note 74, at 16; see Pub. L. No. 87-849, 76 Stat. 1119 (1962) (codified as amended at 18 U.S.C. § 201 (1964)).

<sup>81</sup> S. REP. NO. 87-2213, at 4 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852; HENNING & RADEK, *supra* note 74, at 16.

<sup>82</sup> 383 U.S. 169, 170–71 (1966).

<sup>83</sup> See *id.* at 185.

<sup>84</sup> *Id.* at 184–85.

careful not to foreclose all criminal prosecutions based on legislative acts.<sup>85</sup> Instead, the Court left “open for consideration” the prohibitive nature of legislative privilege when it pertained to a statute that was “narrowly drawn . . . in the exercise of [Congress’s] legislative power to regulate the conduct of its members.”<sup>86</sup> It remained to be seen whether § 201 was sufficiently narrow.

In 1972, the Supreme Court reviewed the United States’ case against Senator Daniel Brewster, who had accepted a bribe in exchange for his vote on postage-rate legislation.<sup>87</sup> In *United States v. Brewster*, the Court concluded that the illegal act in the case of bribery was the acceptance of the bribe and not the legislative act performed in fulfillment of the bribe, i.e., Senator Brewster’s vote.<sup>88</sup> Therefore, the Court found that an examination of whether § 201 was sufficiently narrow was not of great import, and the Speech or Debate Clause did not prohibit a bribery prosecution.<sup>89</sup>

In the opinion for the Court, Chief Justice Burger distinguished the Speech or Debate Clause from its British predecessor, noting, “Our speech or debate privilege was designed to preserve legislative independence, not supremacy.”<sup>90</sup> With the separation of powers as its principled basis, the Court attempted to balance the “remote” possibility of abuse of Executive investigatory and prosecutorial power with the danger of living in a world with no statute prohibiting members of Congress from accepting bribes.<sup>91</sup> The Court, finding appropriate the delegations of power to the Executive to investigate and prosecute members of Congress, referenced Congress’s limited ability to self-police matters such as bribery given members’ “disinclination” to do so.<sup>92</sup> Though Congress is constitutionally designed to discipline its own members under its Article I, Section 5 authority, Professor Ray has found that “neither branch of Congress has . . . compiled an exemplary record of self-discipline.”<sup>93</sup>

In recognizing that § 201 was an appropriate delegation of power and therefore constitutionally subjected members of Congress to possible prosecution, the Court maintained that no such prosecution could be made

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<sup>85</sup> *Id.* at 185.

<sup>86</sup> *Id.*

<sup>87</sup> *United States v. Brewster*, 408 U.S. 501, 502–03 (1972).

<sup>88</sup> *Id.* at 526.

<sup>89</sup> *Id.* at 510, 528–29.

<sup>90</sup> *Id.* at 508.

<sup>91</sup> *Id.* at 524.

<sup>92</sup> *Id.* at 525.

<sup>93</sup> Ray, *supra* note 41, at 408. For a discussion about the limits of congressional self-policing through internal discipline, see *id.* at 408–18.

on the basis of an inquiry into legislative acts.<sup>94</sup> Thus a distinct space was made for application of the Speech or Debate Clause's legislative privilege: it was not so broad as to protect corrupt members of Congress who would in turn corrupt the legislative process, but it was not so narrow as to threaten the independence of the Legislative Branch.<sup>95</sup>

Seven years later, in *United States v. Helstoski*, the Court concluded that mere passage of the bribery statute did not constitute a blanket waiver of members' Speech or Debate Clause protection.<sup>96</sup> The Government charged Henry Helstoski, a former congressman, with conspiracy to violate the bribery statute when he accepted bribes from alien residents in exchange for introducing private bills that would allow them to avoid deportation.<sup>97</sup> The Court held that the Speech or Debate Clause prevented the Government from admitting evidence of past legislative acts, such as introduction of the bills, to establish its case against Helstoski.<sup>98</sup>

Taking a cue from *Johnson* and *Brewster*, the Court declined to decide whether a member of Congress could be prosecuted for a distinctly legislative act under a narrowly tailored policing statute.<sup>99</sup> Rather, it made clear that mere enactment of § 201 "does not amount to a congressional waiver of the protection of the Clause for individual Members."<sup>100</sup> The Court acknowledged potential problems with an institutional waiver of legislative privilege through statutory enactment.<sup>101</sup> The Court cited both logic and case law to illustrate the plausible argument against such a waiver. Logically speaking, the Court recognized the argument that Congress, as a body, might not be able to deprive individual members of their constitutionally guaranteed privilege.<sup>102</sup> For case law, the Court cited *Coffin v. Coffin* and *United States v. Brewster*, which both found that the privilege operated as an individual guarantee, not an institutional one.<sup>103</sup>

Nevertheless, Justice Burger took the time to rule out the possibility that an institutional waiver existed within the bribery statute. Writing for the Court, he noted, "Assuming, *arguendo*, that the Congress could

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<sup>94</sup> *Brewster*, 408 U.S. at 510.

<sup>95</sup> *See id.* at 525. "Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility." *Id.* at 516.

<sup>96</sup> 442 U.S. 477, 492 (1979).

<sup>97</sup> *Id.* at 479.

<sup>98</sup> *Id.* at 489.

<sup>99</sup> *Id.* at 492.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 490–93.

<sup>102</sup> *Id.* at 492–93.

<sup>103</sup> *Id.* at 493.



constitutionally waive the protection of the Clause for individual Members, such waiver could be shown only by an explicit and unequivocal expression.<sup>104</sup> The Court looked to the language and legislative history of both § 201 and its predecessor acts<sup>105</sup> to rule out the possibility of such an expression.<sup>106</sup> Ultimately, the Court declined to conclude whether such a waiver *could* constitutionally exist.<sup>107</sup> In doing so, the Court allowed for the possibility of an institutional waiver in a future statute,<sup>108</sup> though it did not find one in this case.<sup>109</sup>

After *Brewster* and *Helstoski*, § 201 appropriately applies to members of Congress but not to the extent that it vitiates their protection under the Speech or Debate Clause. Hints of both understandings of legislative privilege—institutional and individual—exist in the case law, and the D.C. Circuit’s subsequent decision in *Rayburn* only serves to further complicate the Speech or Debate Clause doctrine.

#### B. United States v. Rayburn House Office Building and the Nondisclosure Privilege

On a Saturday night in May 2006, more than a dozen FBI agents searched through paper and electronic documents in the Capitol Hill office of U.S. Representative William Jefferson.<sup>110</sup> The agents entered the Rayburn office on suspicion that Representative Jefferson and others had sought and accepted consideration in certain business ventures in exchange for the execution of official acts.<sup>111</sup> Four days after the search, then-Speaker of the House J. Dennis Hastert and Minority Leader Nancy Pelosi issued a “rare”<sup>112</sup> joint statement condemning the search:

The Justice Department was wrong to seize records from Congressman Jefferson’s office in violation of the Constitutional principle of Separation of

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<sup>104</sup> *Id.*

<sup>105</sup> See *supra* text accompanying notes 75–76.

<sup>106</sup> *Helstoski*, 442 U.S. at 493 & n.8.

<sup>107</sup> *Id.* at 493.

<sup>108</sup> Though not dealing with the bribery statute, in *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Court presumed that Congress would not “impinge on a tradition so well grounded in history” as legislative privilege “by covert inclusion” in the general language of a statute. *Id.* at 376. The Court appears to have approached the suggestion of an implied waiver as one that need overcome the rebuttable presumption against it. However, the Court in *Tenney* nowhere stated that a waiver, implicit or explicit, was unconstitutional. Thus, Justice Burger’s inquiry into such a waiver in *Helstoski* was not an abnormal one.

<sup>109</sup> *Helstoski*, 442 U.S. at 492.

<sup>110</sup> Philip Shenon, *F.B.I. Contends Lawmaker Hid Bribe in Freezer*, N.Y. TIMES, May 22, 2006, at A1; see also Carl Hulse, *House Leaders Demand Return of Seized Files*, N.Y. TIMES, May 25, 2006, at A1.

<sup>111</sup> *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 656 (D.C. Cir. 2007).

<sup>112</sup> Hulse, *supra* note 110.

Powers, the Speech or Debate Clause of the Constitution, and the practice of the last 219 years. These constitutional principles were not designed by the Founding Fathers to place anyone above the law. Rather, they were designed to protect the Congress and the American people from abuses of power, and those principles deserve to be vigorously defended.<sup>113</sup>

The Court of Appeals for the D.C. Circuit agreed. The court held that compelled disclosure of documents relating to legislative acts would constitute a distraction from the legislative process and a violation of the Speech or Debate Clause.<sup>114</sup> Ultimately, the court interpreted legislative privilege broadly to permit nondisclosure of covered materials to the Executive Branch or any of its agents, even in a criminal investigation.<sup>115</sup>

The Government sought a writ of certiorari in *Rayburn*, but the Supreme Court denied the petition.<sup>116</sup> The denial came in spite of the petition's obvious yet worthwhile warning that the D.C. Circuit's decision, if left undisturbed, will play a unique and primary role in Congress's understanding of the reach of Speech or Debate Clause protections given the geographic location of the Capitol.<sup>117</sup> As the Government understood the law, the extension of the D.C. Circuit's decision in *Rayburn* could potentially "impede searches of Members' homes, vehicles, or briefcases" and not merely prohibit the "concededly extraordinary event" of searching a member's Capitol Hill office.<sup>118</sup> Consequently, *Rayburn* expanded the individual guarantee that the Supreme Court had established in its bribery cases, and significantly shifted the balance in a corruption prosecution in favor of the legislator-defendant.

In *Rayburn*, the D.C. Circuit did not directly address the criminal statutes in play because the issue was not whether the statute applied but what evidence may be collected. The reaction of those affected by the decision, however, lends *institutional* insight into how Congress understood the relevant statutes to operate. The joint statement by Pelosi and Hastert made clear that the leaders of both parties in the House opposed the steps taken by the Executive as an encroachment on the

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<sup>113</sup> Press Release, Joint Statement from Speaker Hastert and Minority Leader Pelosi (May 24, 2006), available at Lynn Sweet, *Hastert, Pelosi Issue Rare Joint Statement: They Blast FBI Raid on House Member*, CHI. SUN-TIMES BLOG (May 24, 2006, 2:10 PM), [http://blogs.suntimes.com/sweet/2006/05/hastert\\_pelosi\\_issue\\_rare\\_join.html](http://blogs.suntimes.com/sweet/2006/05/hastert_pelosi_issue_rare_join.html).

<sup>114</sup> *Rayburn House Office Bldg.*, 497 F.3d at 656, 660.

<sup>115</sup> *Id.* at 662–63.

<sup>116</sup> *Rayburn House Office Bldg.*, 497 F.3d 654, *cert. denied*, 552 U.S. 1295 (2008).

<sup>117</sup> Petition for a Writ of Certiorari at 11, *Rayburn House Office Bldg.*, 552 U.S. 1295 (No. 07-816), 2007 WL 4458912, at \*11 ("Investigations designed to ferret out congressional corruption (such as bribery) find their nerve center in the Nation's capital. 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.")

<sup>118</sup> *Id.* at 12, 2007 WL 4458912 at \*12.

independence of the Legislative Branch.<sup>119</sup> But their statement should not be read as congressional absolution of Jefferson's sins. Rather, Pelosi encouraged Jefferson to give up his seat on the powerful House Ways and Means Committee, and both Pelosi and Hastert urged Jefferson to cooperate with the Justice Department's investigation once the privileged documents were returned.<sup>120</sup>

In addition to the party leaders' statements, a group of former high-ranking congressional staffers filed an *amici curiae* brief in opposition to the Government's petition for certiorari.<sup>121</sup> The brief makes clear that its aim is not the protection of Jefferson but rather the preservation of the independence of the Legislative Branch.<sup>122</sup> The press release and the *amici* brief illustrate that the Executive Branch exceeded what Congress as an institution, represented by its leadership, understood to be limits on its delegation of the prosecutorial and investigatory function.

Four years later, the Supreme Court similarly denied a petition for a writ of certiorari, this time on behalf of former U.S. Representative Richard Renzi of Arizona.<sup>123</sup> In *United States v. Renzi*, the Ninth Circuit expressly disagreed with the holding of the D.C. Circuit in *Rayburn* and its broad nondisclosure privilege under the Speech or Debate Clause.<sup>124</sup> The Supreme Court chose not to take the case, and the split between the circuits<sup>125</sup> was not resolved.<sup>126</sup> Consequently, *Rayburn* remains settled law in the District of Columbia.

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<sup>119</sup> Hulse, *supra* note 110.

<sup>120</sup> *Id.*

<sup>121</sup> Brief for Amici Curiae in Support of Respondent at 1–4, *Rayburn House Office Bldg.*, 552 U.S. 1295 (No. 07-816), 2008 WL 534800, at \*1–4. The brief's authors include the former Chief of Staff and the former Director of Floor Operations to then-House Speaker J. Dennis Hastert, the former Chief of Staff to House Minority Whip Steny H. Hoyer, the former counsel to Representative F. James Sensenbrenner, and the former Counsel to the House Committee on Energy and Commerce. *Id.* at 2–4, 2008 WL 534800 at \*2–4.

<sup>122</sup> *Id.* at 4, 2008 WL 534800 at \*4.

<sup>123</sup> *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

<sup>124</sup> *Id.* at 1037–39.

<sup>125</sup> It is critical to note that the Government, in its brief in opposition to Renzi's petition, went out of its way to clarify that the question at issue in *Renzi* was not one of whether a legislative privilege to nondisclosure exists. The Government attempted to argue that the dispositive question was whether a nondisclosure privilege would entitle a legislator to a hearing to determine if the privileged evidence was used to procure nonprivileged evidence. Brief for the United States in Opposition at 13–22, *Renzi*, 132 S. Ct. 1097 (No. 11-557), 2011 WL 6370518, at \*13–22.

<sup>126</sup> Denial of certiorari in *Renzi* without additional guidance from the Supreme Court should not be interpreted as Supreme Court approval of the decision in *Rayburn*. See *Darr v. Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting) (“The significance of a denial of a petition for certiorari ought no longer to require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else.”). For a discussion of the merits of the decisions, see, for example, Emily E. Eineman, Note, *Congressional Criminality and Balance of Powers: Are Internal*

III. THE STOP TRADING ON CONGRESSIONAL KNOWLEDGE  
(STOCK) ACT

*Rayburn*'s hyperindividual guarantee created an arbitrage opportunity for Congress: it enabled Congress to pass politically popular laws that delegate enforcement to another branch, even though enforcement of the laws practically could never be carried out. After the Supreme Court declined to consider the most viable attempt to disturb *Rayburn*'s hold on the D.C. Circuit by denying certiorari in *Renzi*, legislative privilege theory and doctrine essentially collided. When the dust cleared, Congress passed the STOCK Act.

In light of legislative privilege's theory and doctrine, the STOCK Act presented an opportunity for Congress to receive an essentially risk-free political gain by delegating a criminal enforcement power to the Executive. The Executive is expected to expend manpower and resources to carry out its duty to enforce the law only to meet the legislative privilege roadblock when the time comes to gather the evidence necessary to successfully prosecute or pursue civil charges under the Act. In other words, Congress could potentially game the system at the expense of the Executive Branch in large part because of *Rayburn*'s nondisclosure privilege. This Part first looks to the STOCK Act's legislative history to determine its purported goals and the extent to which Congress understood the limitations placed on the Act by legislative privilege at the Act's passage. Then, this Part examines the arbitrage opportunity created by the confluence of theory, doctrine, and the STOCK Act.

## A. STOCK Act Legislative History

In 2006, amidst news reports of the dubious stock dealings of Tony Rudy, chief of staff to former Representative Tom Delay,<sup>127</sup>

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*Filter Teams Really What Our Forefathers Envisioned?*, 16 WM. & MARY BILL RTS. J. 595 (2007); A.J. Green, Note, *United States v. Renzi: Reigning in the Speech or Debate Clause to Fight Corruption in Congress Post-Rayburn*, 2012 BYU L. REV. 493; Harrell, *supra* note 15; John P. Moore, Comment, *In Search of Congress: Why an Executive Branch Search of a Congressional Office Violates the Speech or Debate Clause and How Congress Should Respond*, 52 ST. LOUIS U. L.J. 253 (2007); John D. Pingel, Note, *Do Congressmen Still Pay Parking Tickets? The D.C. Circuit's Overextension of Legislative Privilege in United States v. Rayburn House Office Building*, 42 U.C. DAVIS L. REV. 1621 (2009); John C. Raffetto, Note, *Balancing the Legislative Shield: The Scope of the Speech or Debate Clause*, 59 CATH. U. L. REV. 883 (2010); and Brian Reimels, Note, *United States v. Rayburn House Office Building, Room 2113: A Midnight Raid on the Constitution or Business as Usual?*, 57 CATH. U. L. REV. 293 (2008).

<sup>127</sup> The reports detail Rudy's trading of hundreds of stocks from his government computer between 1999 and 2000 and question whether his trades were based on disclosed information or material, nonpublic information. See Matthew Barbabella et al., *Insider Trading in Congress: The Need for Regulation*, 9 J. BUS. & SEC. L. 199, 203-04 (2009); Brody Mullins, *Bill Seeks to Ban Insider Trading by Lawmakers and Their Aides*, WALL ST. J., Mar. 28, 2006, at A1; *President Obama Praises Slaughter*, *supra* note 1.

Representatives Louise Slaughter and Brian Baird of Washington introduced the STOCK Act.<sup>128</sup> The STOCK Act, as originally introduced, prohibited members of Congress and their staff from trading securities based on knowledge obtained because of their status.<sup>129</sup> While the Securities and Exchange Commission (SEC) regulates insider trading pursuant to its authority under the Securities Exchange Act of 1934, Congress never defined insider trading as an offense in the Exchange Act.<sup>130</sup> Rather, an internally promulgated SEC rule, Rule 10b-5,<sup>131</sup> serves to prohibit fraud and calls for violations to either be punished as civil offenses by the SEC or prosecuted as crimes by the Department of Justice.<sup>132</sup> While there are debates as to whether congressional insider trading was already strictly prohibited under the SEC rule,<sup>133</sup> observers have documented the SEC's blind eye towards congressional insider trading.<sup>134</sup> In fact, two years before the reports of Rudy's dealings were published, an academic study found that the stock portfolios of U.S. senators bested the market average by 97 basis points (or nearly 1%) per *month*.<sup>135</sup> And the Rudy scandal was just one of several that created a call for at-large congressional ethics reform.<sup>136</sup> However, the STOCK Act did not gain real momentum in Congress until after the airing of the *60 Minutes* report in November 2011.<sup>137</sup>

By the fall of 2011, congressional approval ratings had fallen to 13%.<sup>138</sup> The Occupy Wall Street movement, which had drawn attention to the inequities between the middle class and the wealthy few—personified by Wall Street bankers—had an approval rating of more than double that of

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<sup>128</sup> *President Obama Praises Slaughter*, *supra* note 1.

<sup>129</sup> *Id.*

<sup>130</sup> Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Enforcement*, 91 B.U. L. REV. 1105, 1109–10 (2011).

<sup>131</sup> Section 10(b) of the Securities Exchange Act of 1934 provided the SEC with authority to promulgate Rule 10b-5. In turn, 10b-5 prohibits insider trading. 10b-5 sets the parameters on the SEC and Department of Justice's enforcement authority. *See id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Compare id.* at 1111 (“[T]he current law . . . works as well for congressional officials as it does for every other person who trades securities in our capital markets.”), with Stephen M. Bainbridge, *Insider Trading Inside the Beltway*, 36 J. CORP. L. 281, 297 (2011) (“As to members of Congress, . . . current law provides a strong argument that their trading cannot be punished under either the classic disclose or abstain or the misappropriation theory.”).

<sup>134</sup> Bainbridge, *supra* note 133, at 303, 307.

<sup>135</sup> Alan J. Ziobrowski et al., *Abnormal Returns from the Common Stock Investments of the U.S. Senate*, 39 J. FIN. & QUANTITATIVE ANALYSIS 661, 675 (2004); *see Nagy*, *supra* note 130, at 1106.

<sup>136</sup> Barbabella et al., *supra* note 127, at 202–05.

<sup>137</sup> *See supra* text accompanying notes 5–7.

<sup>138</sup> Jeffrey M. Jones, *Congressional Job Approval Essentially Flat at 12%*, GALLUP POL. (Mar. 21, 2012), <http://www.gallup.com/poll/153377/congressional-job-approval-essentially-flat.aspx>.

Congress.<sup>139</sup> Then, in January 2012, as President Obama was preparing to run for reelection, he announced in his State of the Union address: “Send me a bill that bans insider trading by Members of Congress, and I will sign it tomorrow.”<sup>140</sup> By March 2012, right before the 112th Congress passed the STOCK Act, approval ratings remained at a dismal 12%.<sup>141</sup> Public opinion and the political climate were ripe for passage of the STOCK Act. The bill passed in the Senate by a margin of 96 to 3, in the House, 417 to 2.<sup>142</sup>

1. *STOCK Act Provisions.*—The heart of the STOCK Act is its prohibition on congressional insider trading.<sup>143</sup> The prohibition affirms that members and congressional employees are not exempt from the Exchange Act’s regulation of insider trading.<sup>144</sup> Significantly, the prohibition recognizes that members and congressional employees have an affirmative duty to the institution of Congress, the United States Government, and the citizens of the United States with regard “to material, nonpublic information derived from such person’s position.”<sup>145</sup> The duty is asserted on the basis of the “trust and confidence owed by each Member of Congress and each employee of Congress.”<sup>146</sup>

The “trust and confidence” language was not in the original text of the bill.<sup>147</sup> It was added as a result of concerns expressed in the bill’s committee hearings and markup in order to “remove any uncertainty about the prohibition on insider trading.”<sup>148</sup> According to Senator Carl Levin of Michigan, “[e]stablishing such a duty removes any doubt as to whether insider trading prohibitions apply to Congress.”<sup>149</sup> If, as Senator Levin has stated, the trust and confidence language serves to “reassure[] the American people that there are no barriers to prosecuting Members and employees of Congress for insider trading,”<sup>150</sup> does a duty of trust and confidence owed to the American populace vitiate legislative privilege?

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<sup>139</sup> See Bill Chappell, *Occupy Wall Street Gets Union Backing; Approval Rating Tops Congress*, NPR BLOG (Oct. 5, 2011, 4:18 PM), <http://www.npr.org/blogs/thetwo-way/2011/10/05/141089001/occupy-wall-street-gets-union-backing-approval-rating-tops-congress>.

<sup>140</sup> *President Obama Praises Slaughter*, *supra* note 1.

<sup>141</sup> Jones, *supra* note 138.

<sup>142</sup> *Bill Summary & Status, 112th Congress (2011–2012): S.2038 Major Congressional Actions*, THOMAS (LIBR. OF CONGRESS), <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN02038:@@R> (last visited Mar. 3, 2014).

<sup>143</sup> See Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, § 4, 126 Stat. 291, 292.

<sup>144</sup> See *supra* text accompanying note 131.

<sup>145</sup> STOCK Act, § 4(b), 126 Stat. at 292.

<sup>146</sup> *Id.*

<sup>147</sup> See H.R. 1148, 112th Cong. (2011) (as introduced to the House on Mar. 17, 2011).

<sup>148</sup> 158 CONG. REC. S141 (daily ed. Jan. 30, 2012) (statement of Sen. Carl Levin).

<sup>149</sup> *Id.* at S142.

<sup>150</sup> *Id.* at S141.

2. *Congressional Knowledge at STOCK Act Passage.*—In *United States v. Helstoski*, the Supreme Court, assuming the constitutionality of an institutional waiver, found that 18 U.S.C. § 201 (the federal bribery statute) did not constitute a waiver of legislative privilege on the basis of its legislative history and the text of the statute.<sup>151</sup> In the absence of a waiver in the statute’s text, Congress’s understanding of the role of legislative privilege in a STOCK Act prosecution is critical to determine whether the Act was meant to include a waiver.

As detailed above, Senator Levin attributed the addition of the trust and confidence language to concerns expressed in committee hearings and bill markup.<sup>152</sup> The Senate Committee on Homeland Security and Governmental Affairs, on which Senator Levin sits, held a hearing on the STOCK Act on December 1, 2011. Of the nonmember witnesses, all five referenced Speech or Debate Clause concerns in their testimony.<sup>153</sup> For example, attorney Robert L. Walker warned “not to minimize the potential practical difficulties of proving an insider case in Congress, [because] proof in some such cases could be impeded by Speech or Debate Clause concerns.”<sup>154</sup> In the same vein, the written testimony of Melanie Sloan, Executive Director of Citizens for Responsibility and Ethics in Washington, stated that the Clause “will have a bearing on the ability of prosecutors to bring charges against members of Congress who trade on information obtained through their positions as legislators.”<sup>155</sup> The transcript of the hearing reflects that Ms. Sloan brought up the issue again in an exchange with Senator Mark Begich, when she said, “[T]he Speech or Debate Clause . . . would not allow prosecution in an awful lot of these

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<sup>151</sup> 442 U.S. 477, 492 (1979); see *supra* Part II.A.

<sup>152</sup> See *supra* Part III.A.1.

<sup>153</sup> See, e.g., *Insider Trading and Congressional Accountability: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 62 n.16 (2011) [hereinafter *Senate Committee Hearing*] (statement of Donna M. Nagy, C. Ben Dutton Professor of Law, Indiana University Maurer School of Law) (citing the D.C. Circuit’s decision in *United States v. Rostenkowski*, 59 F.3d 1291, 1294 (D.C. Cir. 1995), as a rejection of the argument that the Speech or Debate Clause stood as an absolute bar to indicting Congressman Daniel Rostenkowski); *id.* at 134 (statement of Donald C. Langevoort, Thomas Aquinas Reynolds Professor of Law, Georgetown University Law Center) (cautioning that “constitutional issues such as the Speech and [sic] Debate Clause lurk in the shadows”); *id.* at 144 (statement of John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School) (“Any Member of Congress is constitutionally entitled by the Speech and [sic] Debate Clause of the U.S. Constitution to reveal any information—including material nonpublic information—in Congressional debate.”).

<sup>154</sup> *Id.* at 155–56 (statement of Robert L. Walker, Of Counsel, Wiley Rein LLP).

<sup>155</sup> *Id.* at 51 (statement of Melanie Sloan, Executive Director, Citizens for Responsibility and Ethics in Washington).

cases,” and then recommended utilizing both Houses’ ethics committees to punish members insulated by the Clause.<sup>156</sup>

Multiple members of the Senate panel also weighed in on the potential obstacle posed by the Speech or Debate Clause to effective enforcement. Among the senators, Senator Joseph Lieberman—Chairman of the Committee on Homeland Security and Governmental Affairs—followed up with Ms. Sloan and asked for specific recommendations for how to provide the Ethics Committees with jurisdiction to handle insider trading matters.<sup>157</sup> Similarly, the House Committee on Financial Services also debated the challenges posed to STOCK Act enforcement by the Speech or Debate Clause. At several points during the December 6, 2011 House hearing, members of Congress and witnesses alike recognized the potential for Speech or Debate Clause obstruction.<sup>158</sup> Arguably the strongest statement came from Representative Barney Frank who stated, “The narrower the [Speech or Debate Clause] is used, the better it will be. People should not be prosecuted for things they say on the Floor, for libel or for other reasons, but the [Speech or Debate Clause] should not be a shield here.”<sup>159</sup>

It is unclear if these specific cautions were on the mind of Senator Levin when he identified the addition of the trust and confidence duty as a means to upend any potential barriers to prosecution under the Act. The Senate hearing’s witness testimony included a discussion of the failure to create a positive duty as a potential downfall of the Act.<sup>160</sup> The addition of the trust and confidence duty may therefore be understood as merely targeting the witnesses’ technical concerns that the bill include a duty analogous to the duty (such as a fiduciary duty) breached in traditional insider trading cases and not their Speech or Debate Clause concerns. In either case, the Senator’s statement unequivocally asserted “that there are no barriers to prosecuti[on].”<sup>161</sup>

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<sup>156</sup> *Id.* at 27 (opening statement of Sen. Mark Begich, Member, S. Comm. on Homeland Sec. & Governmental Affairs).

<sup>157</sup> *Id.* at 35 (opening statement of Sen. Claire McCaskill, Member, S. Comm. on Homeland Sec. & Governmental Affairs).

<sup>158</sup> See *H.R. 1148, The Stop Trading on Congressional Knowledge Act: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. (2011).

<sup>159</sup> *Id.* at 14 (statement of Rep. Barney Frank). Representative Frank mistakenly referred to the Speech or Debate Clause as the “Full Faith and Credit Clause” throughout much of his statement; however, Mr. Frank realized and acknowledged his mistake moments later and offered the following clarification: “I kept saying ‘Full Faith and Credit.’ I meant ‘Speech and [sic] Debate.’” Committee Chairman Spencer Bachus quipped in reply, “We will give you full credit for saying ‘Speech and [sic] Debate.’” *Id.*

<sup>160</sup> See, e.g., *Senate Committee Hearing, supra* note 153, at 152–53 (statement of John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School) (describing the original bill’s failure to assign a fiduciary duty to members of Congress).

<sup>161</sup> 158 CONG. REC. S141 (daily ed. Jan. 30, 2012) (statement of Sen. Carl Levin).



Committee hearings and floor statements are not the only tools for insight into Congress's view of legislative privilege at the time it passed the STOCK Act. For instance, on December 2, 2011—one day after the Senate Committee hearing<sup>162</sup>—the Bipartisan Legal Advisory Group of the U.S. House of Representatives filed an amicus brief in support of Representative Renzi's petition for certiorari to the Supreme Court.<sup>163</sup> The Group's members included Speaker of the House John Boehner, Majority Leader Eric Cantor, Majority Whip Kevin McCarthy, Minority Leader Nancy Pelosi, and Minority Whip Steny Hoyer.<sup>164</sup> The brief argued that the Ninth Circuit's decision in *Renzi* threatened the protected privilege of nondisclosure under *Rayburn*.<sup>165</sup> This indicates that the same congressional leaders that voted for passage of the STOCK Act had distinct knowledge of the *Rayburn* holding and understood the threat posed to it should the Supreme Court grant certiorari and then uphold the Ninth Circuit's decision in *Renzi*.

Agency input from the beginning of 2012 is also telling. At a February breakfast hosted by the Christian Science Monitor, then-SEC Chairwoman Mary Schapiro spoke publicly about the STOCK Act as a positive tool for SEC enforcement, but forecasted potential difficulties with enforcement due to the Speech or Debate Clause.<sup>166</sup> Of the potential roadblock the SEC would face as a result of the Speech or Debate Clause, Schapiro said, "That's the Constitution. We can't ask Congress to fix that."<sup>167</sup>

### B. An Opportunity for Arbitrage

If legislative privilege renders the STOCK Act unenforceable, how is it different from any other ineffective law that Congress may pass? Consider the following hypothetical<sup>168</sup>: The 112th Congress, feeling political pressure from a populace reeling during an economic downturn, passes a law diminishing the salary of its members. The language of the act suggests immediate implementation. The passage of the law is universally well received, but immediate implementation is undoubtedly unconstitutional given the Twenty-Seventh Amendment's requirement that "[n]o law, varying the compensation for the services of the Senators and

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<sup>162</sup> *Senate Committee Hearing*, *supra* note 153.

<sup>163</sup> Brief of Amicus Curiae the Bipartisan Legal Advisory Group of the U.S. House of Representatives in Support of Petitioner, *Renzi v. United States*, 132 S. Ct. 1097 (2012) (No. 11-557), 2011 WL 6019914.

<sup>164</sup> *Id.* at 1, 2011 WL 6019914 at \*1.

<sup>165</sup> *Id.* at 16–19, 2011 WL 6019914 at \*16–19.

<sup>166</sup> Peter Schroeder, *SEC Head Signs Off on STOCK Act*, ON THE HILL'S FIN. & ECON. BLOG (Feb. 22, 2012, 9:23 PM), <http://thehill.com/212107-sec-head-signs-off-on-stock-act>.

<sup>167</sup> *Id.*

<sup>168</sup> My thanks to Professor Erin Fielding Delaney for posing this hypothetical.

Representatives, shall take effect, until an election of Representatives shall have intervened.”<sup>169</sup> In effect, Congress passed an ineffective law for a short-term political gain that posed no real threat to its ranks. While offensive in its pandering,<sup>170</sup> the passage of the law does not delegate a new task to a separate branch.

Now consider the STOCK Act, passed in 2012 with broad bipartisan support. The STOCK Act does not appear, on its face, unconstitutional. It merely delegates authority to the Executive to prosecute members of Congress for insider trading. However, if the Speech or Debate Clause renders a STOCK Act prosecution or civil proceeding unwinnable, the Executive has nevertheless expended time and resources in its pursuit. All the while, Congress still reaps the political gain from passage of the Act. In effect, Congress as an institution positions the Executive Branch against the individual right interpretation of the Speech or Debate Clause. By delegating authority to the Executive Branch, whether well-intentioned or otherwise, the STOCK Act creates a potential problem for the separation of powers.

In order to determine whether the STOCK Act represents congressional arbitrage, a more thorough examination of the Act’s teeth in light of the Speech or Debate Clause is necessary. Some scholars have concluded that the Clause would not pose a hindrance to STOCK Act prosecution given the Supreme Court’s treatment of previous information-sharing acts—such as publishing information in a press release<sup>171</sup>—as nonlegislative acts that are therefore not protected by the Speech or Debate Clause.<sup>172</sup> From this, the scholars conclude that if the conveyance of information to third parties is not central to the deliberative process, then personal use of information, or the actual trading, “would be even less related to the legislative process.”<sup>173</sup> This argument recalls the distinction made in *United States v. Brewster* between the acceptance of the bribe (a nonlegislative, criminal act) and the performance of the promise (in the case of *Brewster*, the vote for postage-rate legislation, an inherently legislative act).<sup>174</sup> One scholar cites directly to *Brewster* to conclude that

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<sup>169</sup> U.S. CONST. amend. XXVII.

<sup>170</sup> *But see* Brachman, *supra* note 20, at 303 (proposing that the STOCK Act may in time effect positive change if only as an “appearance-generating device”). While Brachman recognizes the evidentiary challenges posed by the Speech or Debate Clause to the Executive Branch’s enforcement of the Act, Brachman does not discuss the legislative manipulation, intentional or not, of the Executive Branch in this appearance-generating process. *See id.* at 293–97.

<sup>171</sup> *See* *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979) (holding that newsletters and press releases are not protected by the Speech or Debate Clause).

<sup>172</sup> *See e.g.*, Barbabella et al., *supra* note 127, at 218–19.

<sup>173</sup> *See id.* at 219.

<sup>174</sup> 408 U.S. 501, 526 (1972).

“[j]ust as the Speech [or] Debate Clause does not prohibit members of Congress from being prosecuted for accepting bribes, it should not bar regulation of congressional insider trading.”<sup>175</sup> These sources, however, do not consider the role of the D.C. Circuit’s decision in *Rayburn*.<sup>176</sup>

The flaw in this argument is the failure to consider the evidence necessary to build a case for insider trading.<sup>177</sup> In *Brewster*, which dealt with the bribery statute, the acceptance of the bribe was both the crime *and* the key evidentiary component of the prosecution, while the legislative act was merely an action taken in furtherance of the bribe.<sup>178</sup> Dissimilarly, in an insider trading case, the actual trading and breach of duty is the crime, but the key evidentiary component is the exchange of material, nonpublic information. The exchange of information, however, is not inherently criminal.<sup>179</sup>

Thus, while the actual trading may not be a privileged activity, the material, nonpublic information was likely received through a legislative act, such as a constituent meeting or a closed-door committee hearing. The Supreme Court has treated committee work as a legislative act for the purposes of the Speech or Debate Clause,<sup>180</sup> and courts and commentators have long construed a broad application of the privilege to locations and functions beyond speeches on the House or Senate floor.<sup>181</sup> In 1808’s *Coffin v. Coffin*, the Massachusetts Supreme Judicial Court held that legislative privilege “ought not to be construed strictly” when the court refused to limit the privilege’s application merely to speech delivered on the floor of a legislative chamber.<sup>182</sup> Meanwhile, Justice Story found that the “privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty.”<sup>183</sup> Yet, Justice Story’s editors later attached a critical footnote following “place” to indicate that a place of duty “includes committee rooms and all authorized places of meeting.”<sup>184</sup> Given the broad definition of a legislative act,

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<sup>175</sup> Bainbridge, *supra* note 133, at 303 (footnote omitted) (citing Barbabella et al., *supra* note 127, at 219).

<sup>176</sup> On the other hand, several of the scholars who have considered the Speech or Debate Clause as a potential threat to STOCK Act enforcement have at least cited *Rayburn* to support their conclusions. See Nagy, *supra* note 130, at 1135 n.177; Hamilton et al., *supra* note 20, at nn.39 & 79.

<sup>177</sup> Hamilton et al., *supra* note 20; see also Brachman, *supra* note 20, at 293–97.

<sup>178</sup> See *Brewster*, 408 U.S. at 526.

<sup>179</sup> See Brachman, *supra* note 20, at 293–97.

<sup>180</sup> See *Tenney v. Brandhove*, 341 U.S. 367, 377–79 (1951) (holding that the Speech or Debate Clause applied to a congressional committee investigation).

<sup>181</sup> See, e.g., Steven F. Huefner, *Congressional Searches and Seizures: The Place of Legislative Privilege*, 24 J.L. & POL. 271 (2008).

<sup>182</sup> 4 Mass. (1 Tyng) 1, 27 (1808).

<sup>183</sup> STORY, *supra* note 29, § 863, at 329.

<sup>184</sup> STORY, *supra* note 40, § 866 n.a, at 630.

*Rayburn*'s nondisclosure privilege creates a considerable, if not complete, obstacle to gathering evidence of the exchange of material, nonpublic information.

In practice, this translates to depriving the Executive "of its investigative and prosecutorial power under *Rayburn* because it makes judicial search warrants practically ineffective by requiring a congressman's consent to execute the search."<sup>185</sup> In a post-*Rayburn* world, the nondisclosure privilege recognized by the D.C. Circuit poses a significant hindrance to the SEC or the Justice Department in an effort to obtain relevant evidence in a STOCK Act proceeding, but not before the Executive will have expended time, manpower, and resources to bring a case in the first place.

The post-*Rayburn* environment created an arbitrage opportunity out of which the STOCK Act was passed. Whether or not Congress *intended* to game the system, the effect of the Act's passage without waiver *will* game the system. It will leverage *Rayburn*'s near-bulletproof individual guarantee of legislative privilege against an institutional delegation of prosecutorial authority understood to apply to all of Congress, and it will use the Executive Branch to do so. In *United States v. Helstoski*, the Court noted that excluding the Government's evidence on the basis of the Speech or Debate Clause would "without doubt . . . make prosecutions more difficult," but allowed the exclusion anyway.<sup>186</sup> Would the Court have so decided if doing so made some prosecutions virtually impossible?

#### IV. AN INSTITUTIONAL WAIVER FOR THE STOCK ACT

Given the STOCK Act's arbitrage opportunity, a move toward an institutional interpretation of legislative privilege would restore an appropriate balance to the separation of powers. An institutional interpretation would remedy the separation of powers conflict that came to life in the STOCK Act by allowing for an institutional waiver of privilege. A waiver, in turn, would ease the tension between the Speech or Debate Clause's purpose of preserving the separation of powers and the extreme individual interpretation of legislative privilege by the D.C. Circuit as articulated in *Rayburn*.

An overextension of the individual theory is problematic whether Congress had good intentions or not when delegating prosecutorial

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<sup>185</sup> Green, *supra* note 126, at 502. Green continues, "Any member trying to evade prosecution for criminal activity would logically never consent if such a search would reveal incriminating evidence. Thus, if disclosure to, or discovery by, the executive branch alone violates the Clause, members effectively enjoy a general exemption from 'process in Criminal cases,' which is explicitly barred by *Gravel*." *Id.*

<sup>186</sup> 442 U.S. 477, 488 (1979).

authority to the Executive through the STOCK Act. First, the individual theory creates a problem for a Congress intent on holding its offending members accountable. By treating legislative privilege as a purely individual guarantee, the intent of Congress and those it represents is obviated in the name of legislative privilege—a difficult proposition to square with *Coffin v. Coffin* and Justice Story’s construction of legislative privilege as a function of popular sovereignty.<sup>187</sup>

A legal landscape that only conceives of the individual right all but eliminates the possibility of the STOCK Act fulfilling the purpose ascribed to it by a well-intentioned Congress. Because the implication of the individual theory is that Congress cannot waive legislative privilege on behalf of its members,<sup>188</sup> it essentially throws the baby out with the bathwater: the baby being popular will, accountability, and an effective legislative process, and the bathwater being fear of encroachment by an Executive Branch forged in the shadow of King George III.

On the other hand, a cynic’s Congress might have intentionally leveraged legislative privilege against its own statute to hold its members accountable, while using the Executive for its own political gain. The individual right interpretation allows this depiction of an ill-intentioned Congress to succeed. It would simultaneously threaten the separation of powers and decimate Congress’s political accountability. Therefore, the individual theory does not allow for effective handling of a STOCK Act passed by either a well-intentioned or ill-intentioned Congress.

An institutional approach in the case of the STOCK Act, however, will balance the scales in the wake of *Rayburn*. By allowing Congress to waive legislative privilege in a particular act, the institutional approach will maintain an effective balance of powers between the branches by protecting the Executive from potential legislative gaming. In *Helstoski*, the Supreme Court held that the federal bribery statute did not constitute an institutional waiver of legislative privilege.<sup>189</sup> Assuming *arguendo* that such a waiver was constitutional, the Court concluded that a “waiver could be shown only by an explicit and unequivocal expression,” and “[t]here is no evidence of such a waiver in the language or the legislative history” of the bribery statute.<sup>190</sup> *Helstoski* therefore left the door open for an institutional waiver, and the STOCK Act now proves it necessary.

The best case scenario for a waiver would entail a congressional amendment of the STOCK Act to include a clear statement waiving Speech or Debate Clause privileges of members and congressional staff prosecuted

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<sup>187</sup> See *supra* Part I.A.; see also CHAFETZ, *supra* note 26, at 90–93.

<sup>188</sup> See *supra* Part I.C.

<sup>189</sup> *Helstoski*, 442 U.S. at 493.

<sup>190</sup> *Id.*

under the Act. In lieu of a legislative amendment to the Act, a court may recognize waiver within the Act under the *Helstoski* framework, utilizing an institutional approach to privilege. If a court were to read in waiver to the STOCK Act, it would have to comply with the *Helstoski* requirement that any such waiver be an “explicit and unequivocal expression,”<sup>191</sup> despite the fact that the text of the STOCK Act nowhere states that members of Congress hereby waive the application of their Speech or Debate Clause privileges.<sup>192</sup> As Professor Bradley suggested in reference to the bribery statute, a court may first look to the statute’s express inclusion of members of Congress within its scope.<sup>193</sup> The STOCK Act states specifically, “Members of Congress and employees of Congress are not exempt from the insider trading prohibitions arising under the securities laws, including section 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5 thereunder.”<sup>194</sup> The inclusion of members of Congress within the Act’s intentional scope is certainly explicit and unequivocal.

Furthermore, the *Helstoski* Court concluded that there was no unequivocal waiver based on the lack of evidence of such a waiver in the language or legislative history of the bribery statute.<sup>195</sup> The same cannot be said for the STOCK Act. The duty imposed on members based on the “trust and confidence” owed to the Congress as an institution and to the American people signals a binding institutional promise, backed by the weight of law (and SEC and Justice Department enforcement).<sup>196</sup> As Senator Levin stated, this language was intended to respond to concerns raised in hearings and bill markup in order to “reassure[] the American people that there are no barriers to prosecuting Members and employees of Congress for insider trading.”<sup>197</sup> Given the extensive discussion of legislative privilege in both the Senate and House hearings, one could reasonably conclude this language—intended to destroy *all* barriers to prosecution—expresses a strong willingness of Congress to forgo its right to legislative privilege in light of its duty to both the institution of Congress and the American people.

Several factors, however, suggest that Congress did not intend to institutionally waive legislative privilege when passing the STOCK Act. These factors include members’ unflagging defense of the expanded privilege under *Rayburn* as evidenced by the Pelosi–Hastert joint

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<sup>191</sup> See *supra* Part II.A.

<sup>192</sup> See Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, 126 Stat. 291.

<sup>193</sup> Bradley, *supra* note 26, at 225.

<sup>194</sup> STOCK Act, § 4(a), 126 Stat. at 292.

<sup>195</sup> See *Helstoski*, 442 U.S. at 493.

<sup>196</sup> See *supra* Part III.A.1–2.

<sup>197</sup> 158 CONG. REC. S141 (daily ed. Jan. 30, 2012) (statement of Sen. Carl Levin).

statement,<sup>198</sup> the high-ranking staffers' amici brief in opposition to the Government's petition for certiorari in *Rayburn*,<sup>199</sup> and the Bipartisan Legal Advisory Group's amicus brief in support of Representative Renzi's petition for certiorari.<sup>200</sup> A court may treat those statements as the understanding of legislative privilege that Congress would have had at the time of STOCK Act passage—that legislative privilege includes a nondisclosure privilege under *Rayburn* in the District of Columbia—and as the rule against which Congress expected the STOCK Act to be enforced. Alternatively, members' awareness of legislative privilege could also play in favor of waiver. These same statements establish the knowledge that Congress possessed when it nevertheless adopted the unequivocal language pertaining to the Act's scope and purpose.

The arbitrage opportunity created by the STOCK Act's passage calls for a reexamination of the individual guarantee interpretation of legislative privilege. With the separation of powers as its underlying purpose, the Speech or Debate Clause is best effectuated through an interpretation of legislative privilege as an institutional guarantee. An institutional waiver is limited in that it would only apply to the act in which it was created—specifically, the STOCK Act. Because it would not apply wholesale to all potential prosecutions of members of Congress, the institutional waiver provides a more measured approach to balancing separation of powers concerns than the all-or-nothing approach of the individual theory. An institutional approach would allow a politically accountable Congress to effectively legislate and hold corrupt members responsible under the STOCK Act. The narrow scope of the Act prevents Executive abuse of its prosecutorial authority, while an institutional waiver would simultaneously prevent the misuse of the Executive Branch by Congress.

#### CONCLUSION

In the wake of *United States v. Rayburn House Office Building*, members of Congress enjoy an expansive legislative privilege of nondisclosure within the District of Columbia. *Rayburn* is one of the broadest interpretations of legislative privilege as an individual guarantee to members of Congress. In developing legislative privilege doctrine, courts have looked to the threat posed to Congress by limiting legislative privilege and the potential danger of allowing for corruption in Congress by broadening privilege, but courts have not openly considered the potential negative effects of broadening privilege on all of the branches.

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<sup>198</sup> See *supra* Part II.B.

<sup>199</sup> See *supra* Part II.B.

<sup>200</sup> See *supra* Part III.A.2.

The reach of legislative privilege has created an incentive structure that allowed Congress to avoid assuming any real risk of criminal or civil sanctions while misusing the Executive Branch in its capacity as enforcer of the STOCK Act. In order to maintain the separation of powers that the Speech or Debate Clause is intended to protect, Congress should amend the STOCK Act to explicitly waive legislative privilege or the courts should read legislative privilege waiver into the STOCK Act under the institutional interpretation of the Speech or Debate Clause. Waiver would restore a proper balance between the branches and ensure that legislative action—and in turn the will of the people—is adequately effected.