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**IN SEARCH OF CONGRESS: WHY AN EXECUTIVE BRANCH  
SEARCH OF A CONGRESSIONAL OFFICE VIOLATES THE  
SPEECH OR DEBATE CLAUSE AND HOW CONGRESS SHOULD  
RESPOND**

INTRODUCTION

On May 20, 2006, the Justice Department, warrant in hand, searched the congressional office of Congressman William Jefferson in relation to an ongoing bribery investigation.<sup>1</sup> The search was unprecedented in American history.<sup>2</sup> Members of Congress voiced strong opposition to the search as a violation of the separation of powers.<sup>3</sup> The House Committee on the Judiciary orchestrated an immediate hearing, characterizing the search as a “raid” and unanimously condemning it as a violation of the legislative privilege afforded members of Congress by the Speech or Debate Clause.<sup>4</sup> But, to date, Congress has made no significant effort to assert its legislative privilege and protect itself from future Executive Branch searches.

The case for congressional action is compelling. An Executive Branch search of Congress raises significant separation of powers concerns. More specifically, the scope of protection provided by the Speech or Debate Clause is directly at issue. The Supreme Court decided only one Speech or Debate Clause case in the nation’s first 150 years.<sup>5</sup> Since 1950, that number has increased significantly.<sup>6</sup> In 1966, the Supreme Court announced in *United*

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1. *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. 1–2 (2006) [hereinafter *House Hearing*] (statement of Rep. Sensenbrenner, Chairman, House Comm. on the Judiciary). The facts surrounding the search are discussed in more detail in Part II.A, *infra*.

2. *Id.*

3. John Bresnahan & Paul Kane, *Raid Outrages Both Parties; Propriety of Search Questioned*, ROLL CALL, May 23, 2006, at 1, 30; Ben Pershing, *On Hill, Anger at Raid Grows; DOJ Defends Tactics*, ROLL CALL, May 24, 2006, at 15; Ben Pershing, *Party Leaders Escalate Criticism of Office Raid*, ROLL CALL, May 25, 2006, at 23.

4. *House Hearing*, *supra* note 1. The Speech or Debate Clause provides: “[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.” U.S. CONST. art. I, § 6, cl. 1.

5. *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

6. Some of the more notable cases decided by the Supreme Court include: *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Helstoski v. Meanor*, 442 U.S. 500 (1979); *United States v. Helstoski*, 442 U.S. 477 (1979); *Davis v. Passman*, 442 U.S. 228 (1979); *Eastland v. U.S.*

*States v. Johnson* that the Speech or Debate privilege “prevent[s] intimidation by the executive and accountability before a possibly hostile judiciary.”<sup>7</sup> However, since *Johnson*, the Justice Department has increasingly tested the scope of the Clause’s protection. Justice Department political corruption prosecutions of federal public officials increased fifteen-fold between 1975 and 1995.<sup>8</sup> Thus, the constitutionality of an Executive Branch search of a congressional office, even when sanctioned by the Judiciary, merits Congress’s attention. Congress should not ignore its significant role in determining the answer.

This Comment argues that the search of Congressman Jefferson’s congressional office, though pursuant to a warrant, violated the Speech or Debate Clause. It further argues that the Speech or Debate Clause empowers Congress to ensure that such a search does not recur. Congress should enact a statute to redefine for itself the scope of the Speech or Debate privilege and to require the Executive Branch to use a subpoena to obtain documents from a congressional office. But, in asserting an expanded privilege, Congress must develop a more robust internal disciplinary process to punish and expel its corrupt members.<sup>9</sup>

The Comment proceeds in four parts. Part I discusses the arguments traditionally used to interpret the scope of the Speech or Debate Clause. Because the text of the Clause is ambiguous, the Supreme Court has primarily looked to the Framers’ understanding and its own precedent to interpret the Clause’s meaning. Part II turns to the facts surrounding the Justice Department investigation that culminated in the search of Jefferson’s congressional office. It examines the congressional hearing held in response to the search and the D.C. District Court decision rejecting Congressman Jefferson’s Speech or Debate Clause arguments. Part III then analyzes the merits and shortfalls of the district court’s decision. After determining that an Executive Branch search of a congressional office violates the Speech or Debate Clause, Part III discusses additional constitutional arguments given short, if any, attention by the district court. Moreover, Part III recommends that Congress enact a statute

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Servicemen’s Fund, 421 U.S. 491 (1975); *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Johnson*, 383 U.S. 169 (1966); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

7. 383 U.S. at 181.

8. THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 85 (2006) (“Between 1975 and 1995, the number of prosecutions of federal public officials increased fifteen-fold—that is, by 1,500 percent—during a time when ethics codes were put into place, ethics rules were tightened, and no objective observer of Washington thought that real corruption was actually on the rise.”).

9. U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”).

to protect itself from future incursions by the Justice Department. Finally, the Comment concludes that Congress has an institutional prerogative to reassert itself as a co-equal branch of a separation of powers government.

I. INTERPRETING THE SCOPE OF SPEECH OR DEBATE CLAUSE PROTECTION—  
TEXT, HISTORY, AND MODERN JUDICIAL INTERPRETATION

The text of the Constitution serves as the starting point for its interpretation. But, the text of the Speech or Debate Clause, while clearly bestowing a legislative privilege upon Congress, is relatively inconclusive as to the extent of that privilege. Thus, to interpret the scope of the Clause, the Supreme Court has often turned to the Clause's English origins and to the Framers' understanding.<sup>10</sup> As it has developed its Speech or Debate jurisprudence, the Court has also increasingly turned to its own precedent to determine the Clause's scope.<sup>11</sup>

A. *The Text—What the Constitution Says*

The Speech or Debate Clause provides: “[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.”<sup>12</sup>

The Clause's text, though clearly a statement of legislative privilege, fails to explicitly define the scope of activity encompassed by its critical terms. Indeed, the text raises more questions than it answers. Exactly what is meant by the terms “Speech or Debate,” “questioned,” and “in any other Place” is ambiguous. Clearly, speeches or debates made within the House or Senate are protected. But, what about statements made in committee hearings<sup>13</sup> or between members and their constituents?<sup>14</sup> Arguably, these communications are essential to effective deliberation and debate. Further, is a senator or representative “questioned” only when brought before a court and made to answer for speeches or debates? Or, does a Fourth Amendment search of a congressional office also constitute a type of questioning?<sup>15</sup> Finally, does “in any *other* Place” mean that Congress can question its own members? The ability of each House to punish and expel its members may support such a meaning.<sup>16</sup> But even this is not entirely clear.<sup>17</sup>

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10. *See, e.g., Johnson*, 383 U.S. at 177–79; *Kilbourn*, 103 U.S. at 201–03.

11. *See, e.g.,* cases cited *supra* note 6.

12. U.S. CONST. art. I, § 6, cl. 1.

13. *Kilbourn*, 103 U.S. at 204 (committee hearings protected).

14. *United States v. Brewster*, 408 U.S. 501, 512 (1972) (constituent-representative communications not protected).

15. *See infra* Part III.

16. U.S. CONST. art. I, § 5, cl. 2.

Ultimately, the text of the Clause is unhelpful in deciphering the intended scope of its protection. However, the Framers adopted the text of the Speech or Debate Clause almost verbatim from the English Bill of Rights of 1689.<sup>18</sup> Thus, the Supreme Court has looked primarily to the Clause's English origins and to the Framers' understanding to interpret the meaning of the text.

*B. History—English Origins and the Framers' Understanding*

The Speech or Debate privilege originated in the long struggle for supremacy between English Parliament and the Crown.<sup>19</sup> It arose from judicial origins, Parliament being the highest court in England.<sup>20</sup> The judicial nature of the privilege reflected the idea that, as the highest court, Parliament was not subject to questioning by lower courts or private persons; Parliament answered only to the Crown for its conduct.<sup>21</sup>

In 1541, the Speech or Debate privilege was formally included in the Speaker's Petition to the Crown.<sup>22</sup> Importantly, the initial petition was a request; the Speaker petitioned the King for permission to speak candidly in debate without fear of retribution.<sup>23</sup> The petition was premised on providing candid counsel to the Crown.<sup>24</sup> But, as the House of Commons asserted greater authority over legislation and policy, it began to seek a form of security

17. Compare *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.") with *United States v. Brewster*, 408 U.S. 501, 518 (1972) ("Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process.").

18. Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1121 (1973).

19. See generally CARL WITKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* (1970).

20. J.E. Neale, *The Commons' Privilege of Free Speech in Parliament*, in 2 HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT 147–76 (E.B. Fryde & Edward Miller eds., 1970); Reinstein & Silverglate, *supra* note 18, at 1122. Some accounts credit the privilege's origin to the late-fourteenth century case of Thomas Haxey, a member of the House of Commons, who was condemned as a traitor after offering a bill to curtail the excessive spending by the royal household. The initial death sentence was annulled by Haxey's petition in 1399, claiming that his actions were done in the course of his Parliamentary duties. See Léon R. Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning, and Scope*, 99 U. PA. L. REV. 960, 962 (1951). *Contra* Neale, *supra*, at 149 ("Haxey's case, then, does not prove the existence of a privilege of free speech.").

21. Reinstein & Silverglate, *supra* note 18, at 1122–23.

22. WITKE, *supra* note 19, at 23. However, the privilege was claimed much earlier. *Id.*; see also Neale, *supra* note 20.

23. Neale, *supra* note 20, at 157–58.

24. *Id.*

against retaliation by the Crown.<sup>25</sup> Throughout the late-sixteenth and early-seventeenth centuries, the Crown firmly opposed repeated attempts by members of Parliament to assert the privilege as an “ancient and necessary right.”<sup>26</sup>

The case of Sir William Williams triggered a seismic confrontation between the Crown and Parliament and caused the Glorious Revolution of 1689.<sup>27</sup> Sir Williams, the Speaker of the House of Commons, obtained numerous narratives about King Charles II’s “popish plot” to install Catholicism as the official religion of England.<sup>28</sup> A committee of the House of Commons received the narratives, entered them into the House Journal, and ordered their private republication.<sup>29</sup> In 1686, a year after succeeding to the throne, King James II filed an information against Sir Williams before the King’s Bench.<sup>30</sup> Sir Williams argued that the printing of the narratives served the informing and inquiring functions—allowing members of the House of Commons to inform the nation and solicit further information that may aid in the prosecution of corrupt ministers of state.<sup>31</sup> After James II inserted judges to the King’s Bench who favored an absolute monarchy, Sir Williams’ claim of privilege was denied.<sup>32</sup> The Glorious Revolution ensued, culminating in the English Bill of Rights of 1689.<sup>33</sup> To firmly establish the Speech or Debate privilege, the English Bill of Rights stated: “That the freedome of speech, and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.”<sup>34</sup>

The Speech or Debate privilege successfully survived the journey across the Atlantic to the American colonies. Early colonial assemblies instituted the privilege.<sup>35</sup> State constitutions<sup>36</sup> and the Articles of Confederation<sup>37</sup>

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25. Reinstein & Silverglate, *supra* note 18, at 1123–24.

26. The cases of Peter Wentworth and Sir John Eliot are two such examples. For a full discussion of each case, see Alexander J. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present, and Future As a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U. L. REV. 1, 7–12 (1968).

27. Reinstein & Silverglate, *supra* note 18, at 1129.

28. *Id.* at 1130.

29. *Id.* at 1131.

30. *Id.*

31. *Id.* at 1132–33.

32. Reinstein & Silverglate, *supra* note 18, at 1133.

33. *Id.*

34. Bill of Rights, 1689, 1 W. & M., c. 2, reprinted in THEODORE F.T. PLUCKNETT, TASWELL-LANGMEAD’S ENGLISH CONSTITUTIONAL HISTORY 451 (11th ed. 1960).

35. See MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 12 (1943); Yankwich, *supra* note 20, at 965.

36. Reinstein & Silverglate, *supra* note 18, at 1135–36 (citing MASS. CONST. part I, art. XXI (1780); N.H. CONST. part I, art. XXX (1784)).

37. *Id.* at 1136 (quoting Article 5 of the Articles of Confederation).

incorporated the Speech or Debate privilege. At the Constitutional Convention, the Framers adopted the Speech or Debate Clause with little debate.<sup>38</sup> However, as Reinstein and Silverglate point out, the lack of debate indicates that the Speech or Debate protection was a firmly-rooted concept, not a thoughtlessly included provision.<sup>39</sup> In fact, the Framers, fearing legislative excess, excised or curtailed many other privileges that Parliament had used as instruments of oppression.<sup>40</sup> The Speech or Debate protection alone was left unchanged.<sup>41</sup> Thus, the Framers deemed the protection essential to legislative independence in the separation of powers framework.<sup>42</sup>

The dangers the Framers sought to avoid through the Speech or Debate Clause became apparent early in American history. In 1797, Congressman Samuel Cabell, an anti-Federalist from Virginia, sent newsletters to constituents attacking the Adams administration's war with France.<sup>43</sup> Adams declared the newsletters "seditious."<sup>44</sup> A federal grand jury was impaneled and placed under the supervision of Justice Iredell.<sup>45</sup> Thomas Jefferson, then Adams's Vice President, drafted a petition to the Virginia House of Delegates condemning the grand jury investigation as an overt violation of the congressional privilege and of the doctrine of separation of powers.<sup>46</sup>

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38. *Id.* at 1138–40.

39. *Id.* at 1136–39.

40. *Id.* at 1137.

41. Reinstein & Silverglate, *supra* note 18, at 1138.

42. Many of the Framers stated this much. For example, James Wilson, a prominent member of the Committee of Detail, responsible for the Clause's drafting, stated:

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

1 THE WORKS OF JAMES WILSON 421 (Robert Green McCloskey ed., 1967).

43. Reinstein & Silverglate, *supra* note 18, at 1140.

44. *Id.*

45. *Id.* at 1141.

46. *Id.* Thomas Jefferson's petition, joined by James Madison, is particularly enlightening regarding the importance of a Speech or Debate privilege in the separation of powers context and merits extensive quotation:

[T]hat in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any: that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times

Jefferson saw the indictment of Cabell by the grand jury as “put[ting] the legislative department under the feet of the Judiciary.”<sup>47</sup> In response to Jefferson’s petition, the grand jury withdrew its indictment.<sup>48</sup>

The history presented here, though highly abbreviated, nonetheless demonstrates two essential points. First, the Framers understood the importance of the Speech or Debate Clause to the proper functioning of a representative, deliberative branch of government. Second, the privilege’s history indicates that the privilege is not static, but rather functional, changing over time from its initial judicial origins in Parliament to a legislative privilege in the American constitutional scheme.<sup>49</sup> The Supreme Court has used this history to interpret the scope of the Speech or Debate protection.

### C. *Modern Judicial Interpretation*

The U.S. Supreme Court first interpreted the Speech or Debate Clause in *Kilbourn v. Thompson* in 1880.<sup>50</sup> The Court based its interpretation in large part on *Coffin v. Coffin*, an 1808 Massachusetts Supreme Court case

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until the Representatives could go home to their several countries and confer with their constituents.

....

[T]hat for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties toward each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department under the feet of the Judiciary.

....

[A]nd finally, is to give to the Judiciary, and through them to the Executive, a complete preponderance over the legislature, rendering ineffectual that wise and cautious distribution of powers made by the constitution between the three branches, and subordinating to the other two that branch which most immediately depends on the people themselves, and is responsible to them at short periods.

....

[I]t is left to that house, entrusted with the preservation of its own privileges, to vindicate its immunities against the encroachments and usurpations of a co-ordinate branch.

7 THE WRITINGS OF THOMAS JEFFERSON 158–61 (Paul L. Ford ed., 1896).

47. *Id.* at 160.

48. Reinstein & Silverglate, *supra* note 18, at 1142.

49. *Id.* at 1144–45 (arguing effectively that the Speech or Debate Clause “must be shaped, as it has always been, by the contemporary functions of the legislature in a system of separation of powers”).

50. 103 U.S. 168 (1880).



interpreting the Speech or Debate provision of the Massachusetts State Constitution.<sup>51</sup>

In *Coffin*, a member of the Massachusetts House of Representatives made defamatory remarks about an individual after the vote on a resolution had taken place.<sup>52</sup> Because the accused member's statements were not part of his legislative function, Chief Justice Parsons held that the Speech or Debate privilege offered the member no protection.<sup>53</sup> But, despite its holding, *Coffin* announced the scope of the Speech or Debate privilege:

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber.<sup>54</sup>

The U.S. Supreme Court's earliest Speech or Debate Clause decision adopted *Coffin*'s broad interpretation. The Court, in *Kilbourn*, cited *Coffin* as "the most authoritative case in this country on the construction of the [Speech or Debate Clause], and . . . of much weight."<sup>55</sup> *Kilbourn* alleged false imprisonment against the Speaker and other members of the House of Representatives.<sup>56</sup> The House held *Kilbourn* in contempt and ordered his arrest after he refused to testify and produce documents pursuant to a congressional subpoena.<sup>57</sup> The Court held that Congress did not have the power to order *Kilbourn*'s arrest but recognized that the Speech or Debate Clause precluded the liability of the

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51. *Id.* at 203. Article XXI of the Massachusetts Bill of Rights of 1780 provided: "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 complaint, in any other court or place whatsoever." *Id.*

52. *Coffin v. Coffin*, 4 Mass. 224–25 (1808).

53. *Id.* at 36.

54. *Id.* at 27.

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

56. *Id.* at 170.

57. *Id.* at 175.

members of the House.<sup>58</sup> The Court rejected a narrow interpretation of the Clause limiting its privileges to “words spoken in debate.”<sup>59</sup> Instead, following its discussion of the *Coffin* decision, the Court read the Clause broadly, applying its privileges to “things generally done in a session of the House by one of its members in relation to the business before it.”<sup>60</sup>

The Supreme Court first addressed the applicability of the Speech or Debate Clause in a criminal case in *United States v. Johnson*.<sup>61</sup> Noting the sparse Speech or Debate precedent, Justice Harlan commented, “[i]n part because the tradition of legislative privilege is so well established in our polity, there is very little judicial illumination of this clause.”<sup>62</sup> In exchange for a “campaign contribution” and “legal fees,” Congressman Johnson made a speech on the House floor urging the dismissal of pending indictments against a Maryland savings and loan institution.<sup>63</sup> At trial, the Government extensively questioned Johnson’s motivations for giving the speech and introduced portions of the speech into evidence.<sup>64</sup> Johnson was convicted of conspiring to defraud the United States.<sup>65</sup> On appeal, Johnson argued that the Speech or Debate Clause precluded the use of the motivations for and contents of his speech as evidence against him.<sup>66</sup> The Supreme Court agreed with Johnson, holding that “a prosecution under a general criminal statute dependent on [inquiries into the motivations and contents of a congressman’s speech] necessarily contravenes the Speech or Debate Clause.”<sup>67</sup> The Court explained that the privilege “prevent[s] intimidation by the executive and accountability before a possibly hostile judiciary.”<sup>68</sup>

In a sense, *Johnson* was a fairly straightforward case. At issue was the ability of the Executive and Judicial Branches to inquire into a congressman’s motivations for speeches delivered on the House floor. Such an inquiry is directly precluded by the text of the Speech or Debate Clause.<sup>69</sup> But, *Johnson* is important in significant respects. First, it made clear that the Speech or

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58. *Id.* at 201.

59. *Id.* at 204.

60. *Kilbourn*, 103 U.S. at 204. Beyond “words spoken in debate,” *Kilbourn* specifically recognized the Clause’s application to “written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting.” *Id.*

61. 383 U.S. 169 (1966). The Court decided only one Speech or Debate Clause case between *Kilbourn* and *Johnson*. See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

62. *Johnson*, 383 U.S. at 179.

63. *Id.* at 171–72.

64. *Id.* at 173–76.

65. *Id.* at 170–71.

66. *Id.* at 188.

67. *Johnson*, 383 U.S. at 184–85.

68. *Id.* at 181.

69. U.S. CONST. art. I, § 6, cl. 1.

Debate protection extended to criminal matters.<sup>70</sup> Second, *Johnson* spawned what some consider a more narrow approach to the protection provided by the Speech or Debate Clause in subsequent Court decisions—most notable in the criminal context are *United States v. Brewster*<sup>71</sup> and *Gravel v. United States*,<sup>72</sup> two decisions decided by the Burger Court on the same day.<sup>73</sup>

By its own terms, *Johnson* did not bar a prosecution not implicating the legislative acts of a defendant congressman.<sup>74</sup> In *Brewster*, Chief Justice Burger, writing for the majority, held that such a prosecution faces no Speech or Debate bar.<sup>75</sup> Senator Brewster, a member of the Senate Committee on Post Office and Civil Service, was indicted on charges that he solicited and accepted bribes on four occasions in exchange for promises to influence postage rate legislation that came before him.<sup>76</sup> The district court dismissed the indictment pursuant to *Johnson*.<sup>77</sup> The Government filed a direct appeal to the Supreme Court.<sup>78</sup> In reinstating the indictment, the majority distinguished *Brewster* from *Johnson*. The Court reasoned that “it is *taking* the bribe, not performance of the illicit compact, that is a criminal act.”<sup>79</sup> Therefore, “[i]nquiry into the legislative performance itself is not necessary.”<sup>80</sup> *Johnson* and *Brewster* thus indicate that members of Congress do not enjoy general immunity from criminal prosecution. Consistent with the principle that “no one is above the law,” the Speech or Debate Clause does not protect members

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70. *Johnson*, 383 U.S. at 185.

71. 408 U.S. 501 (1972).

72. 408 U.S. 606 (1972).

73. For a critical commentary on the *Brewster* and *Gravel* decisions, see Hon. Sam J. Ervin, Jr., *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175 (1973). According to Erwin Chemerinsky, the Burger Court systematically decided cases in ways that increased executive and decreased congressional power. See Erwin Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1085 (1987); see also John J. Gibbons, *The Legacy of the Burger Court*, in *THE BURGER COURT* 312–15 (Bernard Schwartz ed., 1998).

74. *Johnson*, 383 U.S. at 185 (“We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.”).

75. 408 U.S. at 528–29.

76. *Id.* at 502.

77. *Id.* at 503–04.

78. *Id.* at 504.

79. *Id.* at 526.

80. *Brewster*, 408 U.S. at 527. In dissent, Justice Brennan clearly disagreed. *Id.* at 530 (Brennan, J., dissenting) (“[T]he indictment . . . certainly laid open to scrutiny the motives for [the Senator’s] legislative acts; and those motives, I had supposed, were no more subject to executive and judicial inquiry than the acts themselves.”).

of Congress from prosecution for illegal acts, so long as inquiry is not made into legislative acts or motivations.<sup>81</sup>

*Brewster* further elaborated on the “legislative activity” test announced in prior decisions.<sup>82</sup> *Brewster* distinguished “purely legislative activities” (protected by the Speech or Debate Clause) from activities that are “political in nature” (not protected by the Clause).<sup>83</sup> Legislative acts are “things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts.”<sup>84</sup> “Political” activities include “a wide range of legitimate ‘errands’ performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called ‘news letters’ to constituents, news releases, and speeches delivered outside the Congress.”<sup>85</sup>

The Court reiterated the distinction in *Gravel*.<sup>86</sup> Senator Gravel read portions of the “Pentagon Papers” during a subcommittee meeting and placed the Papers on the public record.<sup>87</sup> After news reports surfaced that Gravel arranged for the private republication of the Papers, a grand jury investigating potential violations of federal law subpoenaed Gravel’s aide.<sup>88</sup> Gravel intervened to quash the subpoena.<sup>89</sup> The Court held that congressional aides are entitled to Speech or Debate protection to the same extent as a member of Congress.<sup>90</sup> However, the Court found that Gravel’s acquisition of the Pentagon Papers and his attempts to privately republish them were not protected speech or debate; the Senator’s actions were “in no way essential to the deliberation of the Senate.”<sup>91</sup>

The distinction between legislative and political activities, along with other aspects of *Brewster* and *Gravel*, drew immediate criticism as narrowing the scope of the Speech or Debate Clause protection. Senator Sam Ervin criticized the distinction as “arbitrary,” noting especially that the activities left unprotected by *Gravel* are performed everyday by Congress as part of its executive oversight function and informing function.<sup>92</sup> Justice Douglas,

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81. *Id.* at 527 (majority opinion); *United States v. Johnson*, 383 U.S. 169, 185 (1966).

82. *See, e.g., Johnson*, 383 U.S. at 185.

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

84. *Id.*

85. *Id.*

86. *Gravel v. United States*, 408 U.S. 606 (1972).

87. *Id.* at 609. The “Pentagon Papers” was a classified Defense Department study surrounding the decision-making process of the Vietnam War. *Id.* at 608.

88. *Id.*

89. *Id.* at 608–09.

90. *Id.* at 616 (“[F]or the purpose of construing the privilege a Member and his aide are to be ‘treated as one.’”) (quoting *United States v. Doe*, 455 F.2d 753, 761 (1st Cir. 1972)).

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

92. Ervin, *supra* note 73, at 184.

dissenting in *Gravel*, echoed Senator Ervin's criticism: "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. . . . The informing function of Congress should be preferred even to its legislative function."<sup>93</sup> Senator Ervin reiterated the broader scope of legislative activity announced in *Coffin*<sup>94</sup> and adopted in *Kilbourn*.<sup>95</sup> Thus, *Brewster* and *Gravel* are seen as narrowing the scope of the Clause from that of early precedent.

#### D. Summary and Comment

Because the text of the Speech or Debate Clause does not clearly determine the scope of its privilege, the Supreme Court initially turned to the Framers' understanding for its interpretation. Basing its initial interpretation on the Clause's English origins, statements made by the Framers, and the Framers' reactions to the earliest abuses, the *Coffin* court cast the scope of the Clause's privilege in broad terms, encompassing "every thing said or done by him, as a representative, in the exercise of the functions of that office."<sup>96</sup>

Since its decision in *Johnson*, the Court has increasingly used its own Speech or Debate precedent to narrow the privilege. The Speech or Debate Clause continued to be interpreted broadly until the Burger Court's *Brewster* and *Gravel* decisions. Although *Brewster* recited the originalist themes of the Court's Speech or Debate precedent, it based its holding on explicit language found in *Johnson*.<sup>97</sup> In turn, *Gravel* applied *Brewster*'s legislative-political activity distinction in refusing to extend the Speech or Debate privilege to Senator Gravel's activities.<sup>98</sup>

The Burger Court's Speech or Debate Clause decisions are, in some respects, at odds with aspects of an originalist understanding of the Clause's scope.<sup>99</sup> But, originalist arguments are not the only constitutional arguments that favor a more expansive interpretation of the Speech or Debate privilege.

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93. *Gravel*, 408 U.S. at 636 (Douglas, J., dissenting) (quoting WOODROW WILSON, CONGRESSIONAL GOVERNMENT 303 (1885)).

94. See *supra* note 54 and accompanying text. Specifically, Senator Ervin quotes Chief Justice Parsons's claim that legislative activity is "every thing said or done by him, as a representative, in the exercise of the functions of that office; without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules." Ervin, *supra* note 73, at 185 (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)).

95. *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

96. *Coffin*, 4 Mass. at 27.

97. *United States v. Brewster*, 408 U.S. 501, 510 (1972) (noting the narrow scope of *Johnson*'s holding).

98. *Gravel*, 408 U.S. at 622-27.

99. Indeed, in *Gravel*, the Burger Court relegated the representative-constituent communications, part of the informing function, as political, non-legislative activity, a characterization clearly at odds with the views expressed by Thomas Jefferson in response to the 1797 indictment of Congressman Cabell. See *supra* note 46.

Structural, ongoing history and consequential arguments each support the Court's initial broad interpretation of the privilege. To analyze these arguments generally, and the constitutionality of an executive search of a congressional office specifically, this Comment now turns to the facts of the Jefferson case.

## II. THE WILLIAM JEFFERSON CASE

### A. *The Search*

In 2005, the Justice Department began to investigate bribery allegations against Congressman William Jefferson.<sup>100</sup> The allegations centered on whether Jefferson, in exchange for payment, used his position to promote the sale of the telecommunications equipment and services of iGate, a communications firm, to various African countries.<sup>101</sup> In August 2005, after previously videotaping Jefferson receiving \$100,000 cash, the Justice Department searched Jefferson's Washington, D.C. residence.<sup>102</sup> Quite infamously, the Justice Department recovered \$90,000 cash from Jefferson's freezer.<sup>103</sup> In January 2006, former Jefferson aide, Brett Pfeffer, pleaded guilty to aiding and abetting the bribery of a public official.<sup>104</sup> Vernon Jackson, iGate CEO, pleaded guilty to similar charges in May 2006.<sup>105</sup>

In September 2005, the Justice Department subpoenaed records from Jefferson's congressional office.<sup>106</sup> Jefferson failed to comply with the subpoena. On May 18, 2006, the Justice Department sought and received a search warrant from United States District Judge Thomas Hogan.<sup>107</sup> The warrant application outlined "special search procedures" to account for Speech or Debate Clause concerns.<sup>108</sup> A "Filter Team" was to sort the seized documents, shielding privileged materials from prosecutors and

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100. *In re Search of the Rayburn House Office Bldg. Room No. 2113 Washington, D.C.* 20515, 432 F. Supp. 2d 100, 105 (D.D.C. 2006).

101. *Id.*

102. Allan Lengel, *FBI Says Jefferson Was Filmed Taking Cash: Affidavit Details Sting on Lawmaker*, WASH. POST, May 22, 2006, at A1.

103. *Id.*

104. Press Release, U.S. Dep't of Justice, Former Congressional Legislative Assistant Brett M. Pfeffer Pleads Guilty in Bribery Scheme (Jan. 11, 2006), available at <http://www.usdoj.gov/usao/vae/Pressreleases/01-JanuaryPDFArchive/06/20060111pfefferpr.pdf>.

105. Press Release, U.S. Dep't of Justice, Businessman Pleads Guilty to Paying Bribes to U.S. Congressman (May 3, 2006), available at <http://washingtondc.fbi.gov/dojpressrel/pressrel06/wfo050306.htm>.

106. *House Hearing*, *supra* note 1, at 2.

107. *In re Search of the Rayburn House Office Bldg. Room No. 2113 Washington, D.C.* 20515, 432 F. Supp. 2d 100, 105 (D.D.C. 2006).

108. *Id.*

investigators.<sup>109</sup> Any computer files seized could be accessed only through search terms specified in the warrant.<sup>110</sup> On May 20, 2006, the Justice Department and Federal Bureau of Investigation (FBI) searched Jefferson's congressional office.<sup>111</sup> During the search, Justice Department and FBI officials seized a wide range of documents and Jefferson's entire computer hard drive.<sup>112</sup> Justice Department officials also barred counsel for the House of Representatives and counsel for Jefferson from observing the search.<sup>113</sup>

### B. Congressional Response

Members of Congress and other commentators immediately condemned the search as a violation of the separation of powers.<sup>114</sup> James Sensenbrenner, Chairman of the House Committee on the Judiciary, held a hearing on the search.<sup>115</sup> The hearing involved no representatives from the Justice Department and the testimony unanimously condemned the search.<sup>116</sup> Despite being arguably one-sided, the hearing testimony focused on four points.

First, members of Congress are not above the law.<sup>117</sup> No one, not even Jefferson, objected when the Justice Department searched Jefferson's private residence. The objections to the search of a congressional office then are necessarily based on another ground—that is, protecting Congress's institutional interests.<sup>118</sup>

Second, the hearing witnesses unanimously found that the search violated the separation of powers. Because the Speech or Debate Clause “prevent[s] intimidation by the executive and accountability before a possibly hostile judiciary,”<sup>119</sup> the involvement of the judiciary, through the warrant process, does nothing to alleviate the separation of powers concerns.<sup>120</sup> Similarly, the Justice Department “Filter Team” also fails to address Speech or Debate

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109. *Id.* at 105–06. The “Filter Team” consisted of Justice Department attorneys and agents of the Federal Bureau of Investigation otherwise unaffiliated with the Jefferson investigation. *Id.* at 106.

110. *Id.* at 105.

111. *Id.* at 106.

112. *In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d at 106.

113. *Id.*

114. *See supra* note 3.

115. *House Hearing, supra* note 1.

116. *Id.*; *see also* Carle Hulse, *House Plans to Call Gonzalez to Justify Search of Office*, N.Y. TIMES, May 31, 2006, at A17.

117. *House Hearing, supra* note 1, at 2.

118. *Id.* at 23 (statement of Robert S. Walker) (“[W]hat we are discussing today is not about special rights for individual Congressmen, but the inherent rights the Constitution provides for Congress.”).

119. *United States v. Johnson*, 383 U.S. 169, 181 (1966).

120. *House Hearing, supra* note 1, at 26.

concerns, as members of the Justice Department must examine each seized document and determine whether it pertains to a privileged legislative act.<sup>121</sup>

Third, the Speech or Debate Clause protects not only certain “*categories*” of information (legislative acts) from the inquiry of the other branches, but also demands certain “*processes*” for obtaining information from Congress.<sup>122</sup> The Legislative Branch itself, not an executive “Filter Team,” must be allowed to review requested documents to determine their privileged or non-privileged nature.<sup>123</sup> This vetting process would allow Congress to object to the seizure of any documents deemed to involve legislative activities.<sup>124</sup>

Lastly, Congress must take action to protect its constitutional prerogative.<sup>125</sup> Two hearing witnesses recommended that Congress enact a statute similar to the Privacy Protection Act of 1980,<sup>126</sup> enacted in the wake of the Supreme Court’s *Zurcher v. Stanford Daily* decision.<sup>127</sup> Chairman Sensenbrenner echoed the call for a statutory protection and promised immediate action.<sup>128</sup>

On May 25, 2006, in response to growing criticism, President Bush had the seized items sealed and turned over to the Solicitor General for forty-five days until a resolution could be reached.<sup>129</sup> The forty-five day moratorium expired on July 9, 2006.

### C. *The District Court Decision*

On July 10, 2006, Chief District Judge Thomas Hogan held that the search of Jefferson’s congressional office did not violate the Speech or Debate Clause, the general principle of separation of powers, or the Fourth Amendment.<sup>130</sup> In rejecting Jefferson’s separation of powers argument, Judge Hogan stated that the intervention of the judiciary, as a neutral third party,

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121. *Id.* at 3.

122. *Id.* at 10.

123. *Id.* at 8.

124. *Id.*

125. *House Hearing, supra* note 1, at 44 (Professor Jonathan Turley recommending enactment of statute similar to the Privacy Protection Act); *id.* at 48 (statement of Bruce Fein recommending a statute similar to the Privacy Protection Act).

126. *Id.* at 44 and 48 (Professor Johnathan Turley and Bruce Fein, Principal, The Lichfield Group, Inc., recommended enacting a statute similar to the Privacy Protection Act of 1980).

127. *Id.* at 46–47 and 48.

128. *Id.* at 49.

129. *Id.* at 2.

130. *In re Search of the Rayburn House Office Bldg. Room No. 2113 Washington, D.C. 20515*, 432 F. Supp. 2d 100, 119 (D.D.C. 2006). Jefferson’s Fourth Amendment arguments centered on the Justice Department’s barring of his counsel from his Rayburn Building office during the search. *Id.* at 117. Further, Jefferson argued that the warrant falsely stated that all lesser intrusive means had been exhausted. *Id.* These claims were rejected by Judge Hogan, *id.* at 117–18, but are beyond the scope of this Comment.



alleviated separation of powers concerns.<sup>131</sup> However, the primary issue facing Judge Hogan was “whether the Speech or Debate Clause’s privileges and immunities extend so far as to insulate a Member of Congress from the execution of a valid search warrant on his congressional office.”<sup>132</sup>

Judge Hogan’s analysis began by recognizing that the “Speech or Debate Clause provides both a testimonial privilege and immunity from liability for legitimate legislative acts.”<sup>133</sup> Jefferson argued that the testimonial privilege was absolute, citing cases in which executive attempts to enforce subpoenas were denied because the subpoenas sought privileged legislative material.<sup>134</sup> Judge Hogan rejected Jefferson’s argument, distinguishing between a subpoena and a search warrant.<sup>135</sup> Judge Hogan reasoned that producing evidence in response to a subpoena was a testimonial act, whereas having the same evidence seized subject to a valid search warrant involves no testimonial component.<sup>136</sup> Because a search warrant does not involve a testimonial component, its execution does not violate the privilege provided by the Speech or Debate Clause.<sup>137</sup> Judge Hogan supported his decision with four arguments.

First, as a testimonial privilege, Judge Hogan compared the Speech or Debate Clause to the Fifth Amendment, arguing that “[a] party is privileged from producing evidence, not from its production.”<sup>138</sup> “[A] search warrant does not trigger the Fifth Amendment’s testimonial privilege because there is no compulsion to speak or act.”<sup>139</sup> Similarly, because Jefferson was not made to say or do anything as a result of the search, Judge Hogan determined that Jefferson was not “questioned in any way,” and the Speech or Debate Clause was not triggered.<sup>140</sup>

Second, Judge Hogan stated that “legislative material is [not] absolutely privileged from review by or disclosure to either of the co-equal branches of government.”<sup>141</sup> The Speech or Debate Clause does not provide for confidentiality; its purpose is not to promote the secrecy of legislative activity.<sup>142</sup> Therefore, “[t]he Speech or Debate Clause is not undermined by

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131. *Id.* at 116. Indeed, Judge Hogan made short work of the separation of powers argument, disposing of it in three paragraphs. *See id.* at 116–17. Further, Judge Hogan viewed the Legislative Branch’s claim to a unilateral and unreviewable power to invoke an absolute privilege as the only threat posed to the separation of powers. *Id.* at 117.

132. *Id.* at 110.

133. *Id.*

134. *Id.* at 111.

135. *In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d at 111.

136. *Id.*

137. *Id.*

138. *Id.* (citing *Johnson v. U.S.*, 228 U.S. 457, 458 (1913)).

139. *Id.* at 111–12 (citing *Andresen v. Maryland*, 427 U.S. 463, 473 (1976)).

140. *In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d at 112.

141. *Id.*

142. *Id.*

the mere incidental review of privileged legislative material, given that Congressman Jefferson may never be questioned regarding his legitimate legislative activities [and] is immune from civil or criminal liability for those activities.”<sup>143</sup>

Third, to refute Jefferson’s claim that the Speech or Debate Clause mandated advanced notice of an impending search to a Congressman, Judge Hogan cited the Supreme Court’s decision in *Zurcher v. Stanford Daily*.<sup>144</sup> In *Zurcher*, the Supreme Court declined to accommodate First Amendment concerns by requiring the use of subpoenas or advanced notice prior to Fourth Amendment searches of newsrooms.<sup>145</sup> Comparably, Judge Hogan found that no additional preconditions were required to accommodate Speech or Debate Clause concerns.<sup>146</sup>

Lastly, Judge Hogan rejected the claim that judicial review of legislative documents to determine the scope of the Speech or Debate privilege was unconstitutional.<sup>147</sup> He emphasized that members of Congress, like federal judges and the President, lack the power to determine the scope of their own privilege.<sup>148</sup> The Supreme Court, in *United States v. Nixon*, used various Speech or Debate precedents in holding that President Nixon lacked the power to determine the scope of his privilege.<sup>149</sup>

On July 28, 2006, the United States Court of Appeals for the D.C. Circuit subsequently granted Jefferson a modest victory, ordering that the Justice Department refrain from reviewing the seized documents until Jefferson was provided copies and allowed to file objections.<sup>150</sup> On November 14, 2006, the

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143. *Id.* at 114.

144. *Id.* at 113. Judge Hogan’s reliance on *Zurcher*, 436 U.S. 547 (1978), is ironic, *Zurcher* having caused the Congress to enact the Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (codified as amended at 42 U.S.C. §§ 2000aa, 2000aa-5, 2000aa-6, 2000aa-7, 2000aa-11, 2000aa-12), S. Rep. No. 96-874, at 4 (1980), as reprinted in U.S.C.C.A.N. 3950, 3950–51 (“This legislation was prompted by *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) . . .”), which greatly restricted the ability of the government to conduct Fourth Amendment searches of newsrooms and implemented a prior notice requirement. Indeed, in reversing Judge Hogan, the D.C. Circuit found reliance on *Zurcher* to be “misplaced.” *United States v. Rayburn House Office Building*, Room 2113, Washington, D.C., 20515, 497 F.3d 654, 661 (D.C. Cir. 2007); see discussion of *Zurcher*, *infra* Part III.D.1.

145. In re *Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d at 113 (citing *Zurcher*, 436 U.S. at 567).

146. *Id.* at 113–14.

147. *Id.* at 114.

148. *Id.* at 114–15.

149. *Id.* at 115 (citing *United States v. Nixon*, 418 U.S. 683, 703–05 (1974)).

150. *United States v. Rayburn House Office Bldg.*, Room 2113, Washington, DC 20515, No. 06-3105, 2006 U.S. App. LEXIS 19466 (D.C. Cir. July 28, 2006).

Justice Department was allowed to review seized documents Jefferson conceded as non-privileged.<sup>151</sup>

*D. Summary and Comment*

Members of Congress, commentators and Judge Hogan agree on what is at issue. Importantly, what is not at issue is the applicability of the nation's laws to members of Congress—members have no general immunity to the laws of the United States.<sup>152</sup> Indeed, no one, including Jefferson himself, cried foul when the Justice Department searched Jefferson's private residence.<sup>153</sup> All involved understand that no constitutional issue is raised by such a search. Nor has it been argued that there is anything inherently sacrosanct about a congressional office itself. To borrow an extreme example, if a homicide was committed within a congressional office, the entry of Executive Branch officials to perform an investigation and remove evidence connected to the crime would raise no Speech or Debate Clause concerns.<sup>154</sup> But, such a scenario, unlike the William Jefferson case, lacks the elements of executive intimidation of a member of Congress.

Instead, the issue posed by the Jefferson case can be aptly stated as whether a judicially-authorized Executive Branch search of the office of a member of Congress, during a corruption investigation, violates the Speech or Debate Clause.<sup>155</sup> From this point, Congress and Judge Hogan (and the Justice Department) diverge sharply in their respective answers.

### III. ANALYSIS

James Madison wrote in *Federalist No. 51* that “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”<sup>156</sup> Madison's statement importantly suggests that the encroachments of one

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151. *United States v. Rayburn House Office Bldg., Room 2113*, Washington, DC 20515, No. 06-3105, 2006 U.S. App. LEXIS 28335 (D.C. Cir. Nov. 14, 2006).

152. *In re Search of the Rayburn House Office Bldg. Room No. 2113* Washington, D.C. 20515, 432 F. Supp. 2d 100, 104 (D.D.C. 2006); *House Hearing*, *supra* note 1.

153. *In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d at 110 n.6.

154. *Id.* at 110.

155. *See In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d at 110 (“The issue here is whether the Speech or Debate Clause's privileges and immunities extend so far as to insulate a Member of Congress from the execution of a valid search warrant on his congressional office.”); *House Hearing*, *supra* note 1, at 1 (“A constitutional question is raised when communications between Members of Congress and their constituents, documents having nothing whatsoever to do with any crime, are seized by the executive branch.”).

156. THE FEDERALIST NO. 51, at 160 (James Madison) (2d ed., Roy P. Fairfield ed., 1966).

branch on another will be gradual, rather than dramatic, in form.<sup>157</sup> But, the point at which cumulative encroachment by one branch on another violates the concept of separation of powers will not always be clear.<sup>158</sup> One thing is clear, however, as it relates to the Speech or Debate Clause: since the Burger Court's 1972 *Brewster* and *Gravel* decisions, the potential threat posed to Congress has risen sharply.<sup>159</sup> As the Executive Branch investigates members of Congress with increasing frequency, the potential exists for a corresponding increase in (unprecedented) separation of powers issues to occur. The search of Congressman Jefferson's office is the most recent example.<sup>160</sup> But, as Madison also states, Congress was given the constitutional means, through the Speech or Debate Clause, to resist Executive and Judicial Branch encroachments. Originalist, structural, ongoing history, and consequential arguments favor a broader Speech or Debate privilege. Congress, through a statute, can redefine more broadly the scope of protected "legislative activities" and mandate the subpoena method for Executive Branch document requests.

A. *Reversing the District Court*<sup>161</sup>

Judge Hogan wrongly held that the search of Congressman Jefferson's office did not violate the Speech or Debate Clause.<sup>162</sup> Even if "legislative

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157. Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 464 (1991).

158. *Id.* at 476.

Central to [the separation of powers concept] are three simultaneous insights: (1) the very fact of the concentration of political power in the hands of one governmental organ is unacceptable, even absent a showing of misuse of that power; (2) it will, as a practical matter, be all but impossible to determine when the level of concentration of political power has reached the danger point; and (3) the point at which such an unacceptable concentration is actually reached is too late for the situation to be remedied. Separation of powers guarantees are, then, prophylactic in nature. They are designed to avoid a situation in which one might even debate whether an undue accretion of power has taken place. In short, the idea is to provide a buffer zone between government and the accretion of even potentially abusive power.

*Id.* (internal citations omitted).

159. *See supra* note 8 and accompanying text.

160. A Fourth Amendment search of a congressional office is unprecedented in the nation's history. *See House Hearing, supra* note 1.

161. The D.C. Circuit in fact reversed Judge Hogan on August 3, 2007. *United States v. Rayburn House Office Bldg., Room 2113, Washington, D.C., 20515*, 497 F.3d 654, 654 (D.C. Cir. 2007). The footnotes of this Part III.A. include, in relevant detail, the D.C. Circuit's discussion of Judge Hogan's decision.

162. *See In re Search of the Rayburn House Office Bldg. Room No. 2113 Washington, D.C. 20515*, 432 F. Supp. 2d 100, 119 (D.D.C. 2006) (holding the search to be constitutional). The D.C. Circuit disagreed with Judge Hogan's conclusion. *See Rayburn House Office Bldg., 497 F.3d at 663.*

activities” are given the narrow definition afforded by *Brewster*,<sup>163</sup> the *general* search of Congressman Jefferson’s office likely allowed the Justice Department to seize documents and files related to protected legislative activity.<sup>164</sup> Jefferson’s entire computer hard drive and boxes of documents were seized during the search.<sup>165</sup> Drafts of speeches, reports in preparation for debate or committee meetings, and personal notes on pending legislation were likely captured.<sup>166</sup> Judge Hogan made extensive efforts to characterize the search as narrow in scope, noting that the warrant “application described in detail the paper documents to be seized and the precise search terms to be used in examining the computer files.”<sup>167</sup> But, Judge Hogan implicitly recognized that at least some legislative material was seized and reviewed by the Justice Department, merely dismissing such review as “incidental.”<sup>168</sup>

Because the general search of Jefferson’s office exposed or allowed the seizure of legislative materials, the search violated the Speech or Debate Clause if a search of a congressional office constitutes a questioning. Judge Hogan held that a Fourth Amendment search is not a questioning because the search did not compel Jefferson to do or say anything; the Speech or Debate Clause’s testimonial privilege was not triggered.<sup>169</sup> But, limiting the Speech or Debate privilege to a testimonial privilege contradicts the plain command of the Clause’s text and purpose. As Judge Hogan correctly stated, a testimonial privilege (such as the Fifth Amendment) “protects one from being compelled to answer questions.”<sup>170</sup> “A party is privileged from producing the evidence, but not from its production.”<sup>171</sup> Importantly, a testimonial privilege protects a

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163. Under *Brewster*, legislative activities are limited to “things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts.” *United States v. Brewster*, 408 U.S. 501, 512 (1972).

164. *Rayburn House Office Bldg.*, 497 F.3d at 661. (“The search of Congressman Jefferson’s office must have resulted in the disclosure of legislative materials to agents of the Executive. Indeed, the application accompanying the warrant contemplated it.”); *see also House Hearing*, *supra* note 1, at 27.

165. *In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d at 106; *House Hearing*, *supra* note 1, at 27.

166. *See House Hearing*, *supra* note 1, at 27.

167. *In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d at 105.

168. *Id.* at 114. The D.C. Circuit took issue with the characterization of executive review as “incidental.” *Rayburn House Office Bldg.*, 497 F.3d at 661 (“While the Executive characterizes what occurred as the ‘incidental review of arguably protected legislative materials,’ it does not deny that compelled review by the Executive occurred, nor that it occurred in a location where legislative materials were inevitably to be found, nor that some impairment of legislative deliberations occurred.”) (internal citation omitted).

169. *See In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d at 112.

170. *Id.*

171. *Id.* at 111 (citing *Johnson v. United States*, 228 U.S. 457, 458 (1913)).

party from a compelled *response* to a question. Indeed, Judge Hogan emphasized that the search did not compel Jefferson to respond in any way.<sup>172</sup>

But, while a testimonial privilege is certainly inherent in the Speech or Debate privilege, the text of the Clause places its emphasis elsewhere—the Senators and Representatives “*shall not be questioned.*”<sup>173</sup> The Clause places the burden on would-be questioners, demanding that the co-ordinate branches *refrain from inquiring* into legislative acts.<sup>174</sup> The privilege is therefore broader than a testimonial privilege; legislative material is absolutely privileged from review by or disclosure to either of the co-equal branches of government.<sup>175</sup> *Johnson’s* classic statement of the Clause’s purpose, “to prevent intimidation by the executive and accountability before a possibly hostile judiciary,” supports this interpretation.<sup>176</sup> The Executive and Judicial Branches do not enjoy the ability to seize and examine legislative materials at their independent or combined will. Judge Hogan’s dismissal of the Justice Department’s review of legislative materials as “incidental” grossly ignores the central premise of the Speech or Debate protection—to prevent the *intimidation* of the Legislative Branch.<sup>177</sup> Knowledge by members of Congress that the Executive Branch could seize and review their files at any moment is the essence of intimidation and is disruptive to the due functioning of the Legislative Branch.<sup>178</sup> Judge Hogan incorrectly decided otherwise. An Executive Branch search of the office of a member of Congress, even when pursuant to a warrant, violates the Speech or Debate Clause.

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172. *Id.* at 112.

173. U.S. CONST. art I, § 6, cl. 1 (emphasis added).

174. Even in its narrow interpretation, *Brewster* recognized that it is the *inquiry* itself that is prohibited. *United States v. Brewster*, 408 U.S. 501, 527 (1972).

175. Judge Hogan rejected this broader interpretation, noting that the purpose of the Clause is not to promote secrecy in the legislative function. See *In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d at 112. However, the D.C. Circuit recognized that the Speech or Debate Clause in fact includes a “non-disclosure privilege” and “rejected the view that the testimonial immunity of the Speech or Debate Clause applies only when Members or their aides are personally questioned.” *Rayburn House Office Bldg.*, 497 F.3d at 660 (citing *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995)).

176. *United States v. Johnson*, 383 U.S. 169, 181 (1966).

177. *Id.* Judge Hogan mentions “intimidation” only twice in his opinion, but not once in substantive discussion of the validity of the search. See *In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d at 108–16.

178. *Rayburn House Office Bldg.*, 497 F.3d at 661 at \*6 (“[C]ompelled disclosure clearly tends to disrupt the legislative process: exchanges between a Member of Congress . . . on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity. This chill runs counter to the Clause’s purpose of protecting against disruption of the legislative process.”); see also *House Hearing*, *supra* note 1, at 11 (describing elements of executive intimidation embodied by the search).

### B. *Constitutional Arguments for an Expanded Speech or Debate Privilege*

Judge Hogan's decision represents the most recent judicial narrowing of the Speech or Debate Clause protection. An Executive Branch search of a congressional office is an affront to Congress as a co-equal branch of government. The question then becomes whether Congress possesses the constitutional means to protect itself from further encroachment. As previously discussed, an originalist understanding of the Speech or Debate Clause dictates a broader interpretation of the text than currently afforded by the courts.<sup>179</sup> Indeed, history indicates that the Framers understood "Speech or Debate" as a term of art, encompassing a broad range of acts necessary for the legislature to undertake its legislative function.<sup>180</sup> Additionally, other constitutional arguments (often completely or partially ignored by courts) favor an expanded privilege and a greater congressional role in its implementation.

#### 1. The Structural Argument

The Constitution's structure indicates that Congress should control the scope of its Speech or Debate privilege. Congress is the only branch of government granted an express privilege by the Constitution.<sup>181</sup> Neither the Executive nor the Judicial Branch was granted an express constitutional privilege.<sup>182</sup> Further, the Speech or Debate Clause has a clear role in the separation of powers system, as the Supreme Court correctly recognized in *Johnson*.<sup>183</sup> To repeat *Johnson's* apt statement of the Clause's purpose, the Clause "prevent[s] intimidation by the executive and accountability before a possibly hostile judiciary."<sup>184</sup> As a bulwark of the separation of powers, and in light of *Johnson's* express recognition of its purpose, it is unseemly that the determination of the Clause's scope rests with a co-ordinate branch against which the Clause is designed to protect the Congress. Placing the privilege in the hands of the Judicial Branch could ultimately lead to no privilege at all.

Indeed, the Supreme Court has created a curious result. The Court has created extra-constitutional immunity for Judicial and Executive officials that extends immunity to their official acts.<sup>185</sup> In contrast, *Brewster*, while recognizing "political" activities as "entirely legitimate activities," declined to

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179. *See supra* Part I.D.

180. *See supra* notes 38–49 and accompanying text.

181. U.S. CONST. art. I, § 6, cl. 1. In addition to the Speech or Debate privilege, the Constitution also privileges members of Congress from arrest "during their Attendance at the Session of their respective Houses, and in going to and returning from the same." *Id.*

182. *See* U.S. CONST. arts. II, III.

183. *United States v. Johnson*, 383 U.S. 169, 181 (1966).

184. *Id.*

185. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (executive immunity); *Bradley v. Fisher*, 80 U.S. (1 Wall.) 335 (1871) (judicial immunity).

grant them Speech or Debate protection.<sup>186</sup> In *Doe v. McMillan*, the Court declined to extend extra-constitutional immunity to members of Congress for their “political” acts, holding that “[t]he scope of inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same.”<sup>187</sup> Congress should find it odd that its privilege, though the only express constitutional privilege, is narrower in scope than the judicially created immunity for judicial and executive officials. Indeed, the Court’s interpretation of the Speech or Debate privilege since 1972 has been increasingly restrictive. The Constitution’s structure dictates the opposite result. Congress should control the scope of its Speech or Debate privilege.

## 2. Ongoing Practice

While the Supreme Court has often utilized originalist arguments and its own precedent, the Court has often ignored a third type of historical argument—ongoing practice. Ongoing practice most readily shapes the meaning of constitutional provisions involving institutional behavior rather than individual rights.<sup>188</sup> In this regard, it is notable that objections to the search center on Congress’s institutional interests, not the protection of Congressman Jefferson.<sup>189</sup>

The ongoing practice that has developed between the Justice Department and the Congress concerning corruption investigations also favors greater congressional control over the Speech or Debate privilege. During the 1970s, the Justice Department increased its efforts to combat public corruption.<sup>190</sup> Professor Charles Tiefer served as Assistant Legal Counsel to the Senate from 1979 to 1984 and Solicitor and Deputy General Counsel to the House of Representatives from 1984 to 1995.<sup>191</sup> During his hearing testimony, Professor Tiefer recounted the numerous Justice Department investigations that occurred during his tenure.<sup>192</sup> Over the course of those investigations, Congress and the Justice Department established protocols to facilitate Executive Branch investigations, while respecting the Congress’s Speech or Debate privilege.<sup>193</sup> The longstanding practice that developed between Congress and the Justice Department was memorialized in the United States Attorney’s Manual:

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186. *United States v. Brewster*, 408 U.S. 501, 512 (1972).

187. 412 U.S. 306, 324 (1973).

188. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (Marshall, C.J.) (stating that historical practices could be appropriate in cases in which “the great principles of liberty are not concerned . . .”).

189. *House Hearing*, *supra* note 1, at 23.

190. *See supra* note 8 and accompanying text.

191. *House Hearing*, *supra* note 1, at 6.

192. *Id.* at 7–8 (ABSCAM and Reps. Flake, Biaggi, Rostenkowski, Swindall, and McDade).

193. *See id.* at 10.



[B]oth the House and the Senate consider that the Speech and Debate Clause gives them an institutional right to refuse requests for information that originate in the Executive or the Judicial Branches that concern the legislative process. Thus, most requests for information and testimony dealing with the legislative process must be presented to the Chamber affected, and that Chamber permitted to vote on whether or not to produce the information sought. This applies to grand jury subpoenas, and to requests that seek testimony as well as documents. The customary practice when seeking information from the Legislative Branch which is not voluntarily forthcoming from a Senator or Member is to route the request through the Clerk of the House or the Secretary of the Senate. This process can be time-consuming. However, *bona fide* requests for information bearing on ongoing criminal inquiries have been rarely refused.<sup>194</sup>

Although ongoing practice does not definitively interpret the Speech or Debate Clause, such practices “ought not to be lightly disregarded.”<sup>195</sup> Certainly, the ongoing practice between the Justice Department and Congress respected Congress’s role in administering its Speech or Debate privilege.

### 3. The Consequential Argument

Strong consequential arguments raised in *Brewster* weigh both in favor of and against an expanded congressional privilege. In *Brewster*, the Court rejected outright Congress’s ability to punish the misbehavior of its own members.<sup>196</sup> *Brewster* seemingly lies in direct contradiction to Article I, which grants Congress the ability to punish and expel its members.<sup>197</sup>

Two arguments were central to the majority’s determination. The majority first determined that “Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process.”<sup>198</sup> The majority explained that the congressional disciplinary process lacks the procedural safeguards inherent in the judicial process and is vulnerable to partisanship.<sup>199</sup> Moreover, the majority cited

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194. U.S. ATTORNEY’S MANUAL § 2046, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm02046.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02046.htm).

195. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

196. *United States v. Brewster*, 408 U.S. 501, 518–20 (1972).

197. U.S. CONST. art. I, § 5, cl. 2.

198. *Brewster*, 408 U.S. at 518.

199. The *Brewster* majority asserted:

The process of disciplining a Member in the Congress is not without countervailing risks of abuse since it is not surrounded with the panoply of protective shields that are present in a criminal case. An accused Member is judged by no specifically articulated standards and is at the mercy of an almost unbridled discretion of the charging body that functions at once as accuser, prosecutor, judge, and jury from whose decision there is no established right of review. In short, a Member would be compelled to defend in what would be comparable to a criminal prosecution without the safeguards provided by the Constitution.

Congress's widely-acknowledged, poor record of punishing its Members for misbehavior.<sup>200</sup> And, as *Brewster* appropriately stated, "financial abuses by way of bribes, perhaps even more than Executive power, . . . gravely undermine legislative integrity and defeat the right of the public to honest representation."<sup>201</sup>

The *Brewster* majority raises a fairly compelling argument against a broader Speech or Debate privilege. However, the majority's arguments ultimately fall short. For starters, as Justice Brennan pointed out in dissent, "Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."<sup>202</sup> Senator Ervin echoed Justice Brennan's conclusion, noting that the Framers made an explicit choice to leave the punishment of members of Congress to their respective Houses.<sup>203</sup> Therefore, the majority's claims of judicial superiority in the trial of corrupt congressmen, while valid on their face, are moot, the Framers having made a clear textual commitment to the Houses of Congress.<sup>204</sup>

The argument that Congress is a poor punisher of its own members is similarly unavailing. The Justice Department need not refer to legislative acts to prove that a member is guilty of bribery. *Johnson* and *Brewster* draw the line correctly—if bribery makes it a crime to solicit or receive remuneration in exchange for promised legislative acts, it is unnecessary to inquire into a member's legislative acts, and the Speech or Debate Clause should pose no obstacle to the vigorous enforcement of the nation's laws by the Executive.<sup>205</sup>

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Moreover, it would be somewhat naïve to assume that the triers would be wholly objective and free from considerations of party and politics and the passions of the moment. Strong arguments can be made that trials conducted in a Congress with an entrenched majority from one political party could result in far greater harassment than a conventional criminal trial with the wide range of procedural protections for the accused, including indictment by grand jury, trial by jury under strict standards of proof with fixed rules of evidence, and extensive appellate review.

*Id.* at 519–20 (internal citations omitted).

200. *Id.* at 519 ("Congress has shown little inclination to exert itself in this area."); see also HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 283 (2006) (noting Congress's poor self-policing record and citing Congress's tolerance of Sen. Joseph McCarthy as an example); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 *YALE L.J.* 335, 349 n.84 (1965).

201. *Brewster*, 408 U.S. at 524–25.

202. *Id.* at 544 (Brennan, J., dissenting) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951)).

203. Ervin, *supra* note 73, at 183.

204. U.S. CONST. art. I, § 5, cl. 2.

205. *Brewster*, 408 U.S. at 527 (majority opinion); *United States v. Johnson*, 383 U.S. 169, 185 (1966).

To be sure, the Constitution mandates that the Executive enforce the laws.<sup>206</sup> But, the Speech or Debate Clause did not restrain the Justice Department from vigorously fulfilling its constitutional mandate in Congressman Jefferson's case. The Justice Department had compiled witnesses, informants, videotapes, illicit funds, and incriminating statements against Jefferson.<sup>207</sup> The search of Jefferson's congressional office lacked any compelling necessity. Therefore, it does not follow that a broader Speech or Debate privilege will inhibit Justice Department prosecutions of corrupt members of Congress. Still, any consequential argument favoring a more robust Speech or Debate privilege is made stronger by a congressional commitment to an internal disciplinary process to punish and expel its corrupt members. As of yet, Congress has failed to make that commitment. If Congress is to have a greater privilege, it must recognize its greater, corresponding responsibility.

### C. Congress's Statutory Solution

As argued thus far, the Supreme Court's narrow interpretation of the Speech or Debate privilege does not comport with the broader conceptions supported by ongoing practice or originalist, structural, and consequential reasoning. Congress can protect its institutional interests and control its Speech or Debate privilege through statutory means. Any statute enacted to this end must address the categories of "legislative activity" protected by the Speech or Debate Clause. Further, the statute should mandate the subpoena process for Executive Branch document requests from Congress.

#### 1. Redefining the Scope of Protected "Legislative Activity"

Congress's redefining of the scope of protected legislative activities is long overdue.<sup>208</sup> *Brewster* and its progeny have severely restricted the protection available to members of Congress. Restricting "legislative acts" to votes and speeches or debates on the House floor or in committee, and classifying all other activities performed by members as political "errands" borders on insulting Congress.<sup>209</sup>

In fact, Congress has previously tried to define the scope of legislative activity, only to watch its attempt fall victim to poor political timing. In the

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206. U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . .").

207. See *supra* Part II.A.

208. Ervin, *supra* note 73; Reinstein & Silverglate, *supra* note 18.

209. See *United States v. Brewster*, 408 U.S. 501, 512 (1972). It is odd that *Brewster* recognizes "political" activities as "entirely legitimate activities," but then proceeds to label them as "errands." See *id.* During his hearing testimony, Professor Jonathan Turley characterized the search of Jefferson's office as "a profound and almost gratuitous insult to a co-equal branch of Government." *House Hearing*, *supra* note 1, at 25–26.

wake of *Brewster*'s narrow definition of the legislative activity, Senator Ervin proposed a bill redefining "legislative activity" more broadly to mean:

any activity relating to the due functioning of the legislative process and carrying out the obligations a Member of Congress owes to the Congress and to his constituents and shall include, but not be limited to, speaking, debating or voting in Committee or on the floor of Congress, receipt of information for use in legislative proceedings, any conduct in Committee related to the consideration of legislation or related to the conduct of an investigation, speeches, or publications outside of Congress informing the public on matters of national or local importance, and the motives and decision-making process leading to the above activity or leading to the decision not to engage in the above activity.<sup>210</sup>

Senator Ervin's Bill failed to come up for a vote in the aftermath of Watergate; Congress lacked the political ability to argue against President Nixon's claims of executive privilege while bolstering its own legislative privilege.<sup>211</sup> The political situation in the wake of the Jefferson search fares no better for Congress. Polls indicate that a substantial majority of Americans supported the Justice Department's search.<sup>212</sup> There is little doubt that expanding the scope of their legislative privilege is a tough political sell and will subject members of Congress to criticism.<sup>213</sup>

However, Congress has an institutional prerogative to protect itself as a coordinate branch of government. Senator Ervin's proposed definition of "legislative activity" incorporates constituent-representative communications and facilitates the informing function, two areas contested following the Court's *Brewster* and *Gravel* decisions, but entirely consistent with a broader interpretation of the Speech or Debate privilege. Broadening the privilege's scope is an important first step for Congress.

## 2. Mandating the Subpoena Method

But, merely expanding the "categories" of legislative acts falling within the Clause's scope does not sufficiently protect Congress.<sup>214</sup> Instead, as Professor Tiefer testified, Congress must also establish "processes" to prevent potential

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210. 119 CONG. REC. 9089 (1973).

211. See Richard D. Batchelder, Jr., *Chastain v. Sundquist: A Narrow Reading of the Doctrine of Legislative Immunity*, 75 CORNELL L. REV. 384, 407 (1990).

212. Editorial, *Illegal Search*, ROLL CALL, June 7, 2006, at 4 (citing ABC News poll showing that ninety percent of Americans supported the Justice Department's search).

213. *House Hearing*, *supra* note 1, at 5 (statement of Rep. Issa, Member, House Comm. on the Judiciary) ("[T]he American people do not begin to understand why there is a concern. Their assumption, quite rightfully, is no one is above the law. Hopefully today . . . people will begin to understand that it has always been a big deal when one branch of Government . . . cast[s] some question of the sovereignty of the other branch.").

214. *Id.* at 10.

intimidation by the other branches.<sup>215</sup> Echoing a similar theme, two witnesses at the hearing urged the adoption of a congressional version of the Privacy Protection Act of 1980.<sup>216</sup> This Comment endorses that recommendation.

Congress enacted the Privacy Protection Act in response to the Supreme Court's 1978 decision in *Zurcher v. Stanford Daily*.<sup>217</sup> In *Zurcher*, the Palo Alto police, pursuant to a warrant, searched the newsroom of the *Stanford Daily*, a Stanford University student newspaper.<sup>218</sup> The *Stanford Daily* had published photographs of a riot in which nine Palo Alto officers were injured.<sup>219</sup> The police seized the negatives, film, and pictures depicting the assault on the injured officers during their clash with rioters.<sup>220</sup> The Supreme Court declined to accommodate First Amendment concerns by requiring the use of subpoenas or advanced notice prior to Fourth Amendment searches of newsrooms.<sup>221</sup> In response, Congress enacted the Privacy Protection Act to require the subpoena method in the First Amendment context.<sup>222</sup>

Congress should pass a statute similar to the Privacy Protection Act pursuant to the Speech or Debate privilege. Requiring the subpoena method would codify what has long been the practice between Congress and the Justice Department.<sup>223</sup> The statute would mandate that, when investigating a member of Congress, the Justice Department issue a subpoena to the affected House. The House, fully capable of inquiring into all activities of its members, can determine whether the subpoenaed materials are legislative. If the subpoenaed materials are legislative, Congress determines the extent to which it will punish the member. Only Congress may punish its members for their legislative acts.<sup>224</sup> If the subpoenaed materials are not legislative, Congress would provide the requested information to the Justice Department for use in a criminal prosecution. Those skeptical of this arrangement need only recall the

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215. *Id.* Noting that the categories of legislative materials that receive constitutional protection are important, Professor Tiefer testified at length about the important procedural elements demanded by the Speech or Debate Clause. *Id.* Central to Professor Tiefer's testimony was his own experience in developing the subpoena method in cooperation with the Justice Department. *See supra* notes 190–93 and accompanying text.

216. *See supra* note 125.

217. 436 U.S. 547 (1978).

218. *Id.* at 551.

219. *Id.* at 550–51.

220. *Id.* at 551.

221. *Id.* at 566–67.

222. *See supra* note 144.

223. *See supra* Part III.B.2.

224. *See* U.S. CONST. art. I, § 6, cl. 1 (“[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.”); U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”).

Justice Department's own admission that "*bona fide* requests for information bearing on ongoing criminal inquiries have been rarely refused."<sup>225</sup>

#### CONCLUSION

It light of recent scandals,<sup>226</sup> the assertion that Congress is entitled to a broader Speech or Debate privilege, much less one that it controls unchecked by the other branches, may seem entirely backward. To be sure, Congress has much work to do in ridding itself of its corrupt members. Corrupt members of Congress are undesirable because they fail to faithfully and vigorously represent the interests of their constituents and instead bow to special interests.<sup>227</sup>

The Framers envisioned a similarly undesirable result from the intimidation of Congress by the Executive and Judicial Branches.<sup>228</sup> The Speech or Debate Clause was the remedy. But, since the 1970s, Congress's Speech or Debate privilege has been repeatedly narrowed by the courts and tested by the Justice Department. The search of Congressman Jefferson's office represents only the most recent example.

Congress has an institutional prerogative to reassert itself as a co-equal branch of government. Originalist, structural, ongoing history, and consequential arguments favor a broader Speech or Debate privilege. Congress, through a statute, can redefine more broadly the scope of protected "legislative activities" and mandate the subpoena method for Executive Branch document requests. Congress need now only act.

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225. U.S. ATTORNEY'S MANUAL § 2046, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm02046.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02046.htm).

226. The Congress has also been shaken by scandals other than Congressman Jefferson's, most notably the bribery of numerous congressmen by Jack Abramoff.

227. In *Brewster's* words, "[F]inancial abuses by way of bribes . . . gravely undermine legislative integrity and defeat the right of the public to honest representation." *United States v. Brewster*, 408 U.S. 501, 524–25 (1972).

228. *United States v. Johnson*, 383 U.S. 169, 181 (1966). The Speech or Debate Clause was placed in the Constitution "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *Id.*

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