

Notes

THE INSTITUTIONAL SPEECH OR DEBATE PROTECTION: NONDISCLOSURE AS SEPARATION OF POWERS

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ABSTRACT

*The Speech or Debate Clause encompasses certain privileges that inure to the benefit of legislators. But its nondisclosure protection secures legislative—not legislators’—independence. This nondisclosure protection provides Congress as an institution the procedural right to assert its interests prior to the executive branch’s compelling the disclosure of legislative acts and corresponding documentary materials. Reading the opinion of the U.S. Court of Appeals for the D.C. Circuit in *United States v. Rayburn House Office Building* as a separation-of-powers case distinguishes this institutional, procedural protection from a so-called “nondisclosure privilege” against any compelled disclosure, which was rejected by the U.S. Court of Appeals for the Ninth Circuit in *United States v. Renzi*. The D.C. Circuit’s construction of the Speech or Debate Clause in *Rayburn* leaves executive-branch officials considerable latitude to investigate Members of Congress, subject to procedural constraints. Because the value the Clause protects is democratic representation, rather than legislative independence per se, the question of nondisclosure is one of protective procedure, not of privilege: Congress, not the executive branch, gets to make first determinations as to privilege.*

INTRODUCTION

James Madison wrote in *The Federalist* that after defining the three classes of constitutional power—“legislative, executive, and

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judiciary”—“the next and most difficult task” was “to provide some practical security for each against the invasion of the others.”¹ Originally written in outlining the American constitutional scheme for separation of powers, these words assumed new significance 218 years later when, on May 20, 2006, Federal Bureau of Investigation (FBI) officials entered, sealed, and searched the congressional office of then-Congressman William Jefferson, the first time an executive agency had ever searched without permission the Capitol Hill office of a sitting Member of Congress.²

A few months later,³ federal prosecutors opened an investigation of then-Congressman Richard Renzi for honest services wire fraud in connection with his allegedly bribed promises to sponsor federal public-land-exchange legislation.⁴ In the course of the investigation and pursuant to a Title III order,⁵ the FBI tapped the Congressman’s personal cell phone.⁶ The FBI also reviewed documents Congressman Renzi’s aide took from the Congressman’s office.⁷

Congressmen Renzi and Jefferson both challenged the respective investigations as violating Article I, Section 6, Clause 1 of the Constitution (the Speech or Debate Clause),⁸ which provides that “for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned.”⁹ The D.C. Circuit’s holding

1. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

2. David Stout, *Ex-Louisiana Congressman Sentenced to 13 Years*, N.Y. TIMES, Nov. 14, 2009, at A14.

3. Max Blumenthal, *Porn Cop vs. US Attorney*, NATION, Apr. 9, 2007, at 6.

4. *United States v. Renzi*, 651 F.3d 1012, 1031 (9th Cir. 2011).

5. *See Omnibus Crime Control and Safe Streets Act of 1968*, Pub. L. No. 90-351, tit. III, 82 Stat. 197, 221 (codified as amended at 18 U.S.C. §§ 2510–2522 (2012)) (establishing procedures for obtaining warrants to authorize wiretapping by government officials).

6. *Renzi*, 651 F.3d at 1018 n.6.

7. *Id.*

8. U.S. CONST. art. I, § 6, cl. 1.

9. *Id.* The full text of the Clause is as follows:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They 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.

Id. (emphasis added). Throughout this Note, the word “they” is replaced with “Senators and Representatives,” as “they” most naturally reads as referring to the direct object of the paragraph, “The Senators and Representatives.” *Cf.* Wells Harrell, Note, *The Speech or Debate Clause Should Not Confer Evidentiary or Non-Disclosure Privileges*, 98 VA. L. REV. 385, 396 (2012) (“[The Clause] has a direct object: ‘they,’ the ‘Senators and Representatives’ who are questioned.”).

in *United States v. Rayburn House Office Building*¹⁰ that “the compelled disclosure of privileged material to the Executive during execution of the search warrant . . . [for Congressman Jefferson’s office] violated the Speech or Debate Clause”¹¹ set off a firestorm of commentary, as it was the first time a federal court of appeals had construed the Clause to encompass a “nondisclosure privilege.”¹² The Ninth Circuit in *United States v. Renzi*¹³ declined to follow the D.C. Circuit, refusing to recognize this “grandiose, yet apparently shy, privilege of non-disclosure,”¹⁴ which “would jeopardize law enforcement tools that have never been considered problematic.”¹⁵

The Speech or Debate Clause (the Clause) “protect[s] against possible prosecution by an unfriendly executive and conviction by a hostile judiciary.”¹⁶ The paradigmatic abuse against which the Clause protects is an executive-branch official harassing a legislator and that harassment influencing the legislator’s vote, thus frustrating democratic representation.¹⁷ As such, the Clause safeguards

10. *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007).

11. *Id.* at 656.

12. In many instances, this Note refers to the Clause’s protection of Members from executive-branch-compelled disclosure of legislative-act material as a “nondisclosure privilege”—a turn of phrase introduced by the *Renzi* court—despite the Note’s conclusion that the term is a misnomer, as the Clause is better thought of as encompassing an institutional nondisclosure *protection*. See *infra* note 200 and accompanying text. The latter terminology avoids conflating the evidentiary privileges the Clause affords individual Members with its protection of Congress as an institution.

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

14. *Id.* at 1032.

15. *Id.* at 1034 (quoting *Rayburn*, 497 F.3d at 671 (Henderson, J., concurring in the judgment)).

16. See *United States v. Johnson*, 383 U.S. 169, 178–79 (1966) (discerning this purpose from the Clause’s role in English constitutional history prior to the Glorious Revolution). The Clause’s history is outlined in much greater and more critical detail elsewhere. See generally Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973). For a discussion of the Clause’s origin in Article IX of the English Bill of Rights, see *infra* Part III.C.1.

17. See 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, 492–95 (1981) (demonstrating the potential for the executive branch to control legislators’ behavior). For discussion of what I have chosen to call the Clause’s *representation principle*, see *infra* notes 160, 202 and accompanying text. Cf. generally Anita Bernstein, Note, *Executive Targeting of Congressmen as a Violation of the Arrest Clause*, 94 YALE L.J. 647 (1985) (arguing that executive-branch targeting of Members, as in the ABSCAM investigation, violates the Arrest Clause and ultimately harms constituents by preventing their full participation in the legislative process); Robert H. Jackson, U.S. Attorney Gen., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 24 J. AM. JUDICATURE SOC’Y 18, 19 (1940) (“With the law books filled with a great assortment of

democratic representation and legislative independence by endowing Members with certain privileges.¹⁸ This Note argues, however, that the Clause does not vest in each individual Member an absolute privilege against the compelled disclosure of legislative acts and corresponding documentary materials (so-called *legislative-act materials*).¹⁹ Instead, it provides Congress *as an institution* the right to assert its institutional interests—often through House or Senate Counsel—prior to the executive branch’s compelling the disclosure of legislative-act materials. Although the Clause allows Congress to resist the executive branch as a matter of political power, it leaves prosecutors considerable room to investigate individual Members’ alleged wrongdoing, subject to procedural constraints.

Since the D.C. Circuit’s decision in *Rayburn*, much scholarship analyzing the Speech or Debate Clause has relied on the separation-of-powers doctrine—or the balance of powers generally²⁰—to support both broad and narrow constructions of the Clause’s scope.²¹ The most persuasive of these explanations and critiques of the *Rayburn* court’s construction of the Clause suggest a wholesale scaling back of

crimes, . . . law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.”).

18. See *infra* Part I.

19. This Note refers throughout to “legislative acts and corresponding documentary materials” as “legislative-act materials.” See Petition for a Writ of Certiorari at i, *Renzi*, 651 F.3d 1012 (No. 11-557) (referring to “legislative-act materials”). For a discussion of protected “legislative acts,” see *infra* notes 48–51 and accompanying text.

20. See generally, e.g., Emily E. Eineman, Note, *Congressional Criminality and Balance of Powers: Are Internal Filter Teams Really What Our Forefathers Envisioned?*, 16 WM. & MARY BILL OF 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 (2012). Although ultimately misguided, these notes cite to the Supreme Court’s statement, “Our task . . . is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.” *United States v. Brewster*, 408 U.S. 501, 508 (1972); cf. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1952 (2011) (“[F]unctionalists view the Constitution as emphasizing the balance, and not the separation, of powers.”).

21. For a broad construction, see generally, for example, Steven F. Huefner, *Congressional Searches and Seizures: The Place of Legislative Privilege*, 24 J.L. & POL. 271 (2008) (referring throughout to the “proper separation of powers”); and Reinstein & Silverglate, *supra* note 16 (calling for separation-of-powers concerns to define the scope of the Clause, which should be construed in light of Members’ present-day responsibilities). For a narrow construction, see, for example, Harrell, *supra* note 9 at 388, 404 (balancing a “structural interest in anti-corruption” against legislative independence on a separation-of-powers theory that counsels “balancing the powers of the federal branches”).

the Supreme Court's Speech or Debate Clause jurisprudence,²² a qualified privilege in criminal investigations,²³ or a presumption against search warrants for documentary evidence in congressional offices.²⁴ These approaches err, however, in how they apply the Court's separation-of-powers cases to the Speech or Debate Clause context. They appeal to the separation-of-powers doctrine in the abstract²⁵ or solely in support of leading arguments about the scope of the Speech or Debate Clause. And they are not alone—portions of the D.C. Circuit's opinion in *Rayburn* belie *Rayburn*'s effect as a separation-of-powers case.²⁶

This Note aims to refocus the discussion about the Clause's nondisclosure protection from the current focus on *legislators'* independence to a proper focus on *legislative* independence. To do so, it recasts the D.C. Circuit's analysis in *Rayburn* through separation-of-powers analysis, emphasizing both the Clause's institutional value and the case's outcome: the *Rayburn* court returned to Congressman Jefferson the *right to make a first determination* as to which materials were legislative in nature.²⁷ This recasting underscores the limited nature of *Rayburn*'s holding,²⁸ situates *Rayburn* within the Supreme

22. One note argues that the evidentiary privilege recognized in *United States v. Johnson*, 383 U.S. 169 (1966), “lacks basis in text or prior precedent,” as does the recognition of a nondisclosure privilege in *United States v. Rayburn*. See Harrell, *supra* note 9 at 385–88. The gravamen of its argument is the claim that courts have erred in “failing to weigh the (admittedly important) interest in preserving separation of powers against the federal government’s significant interest in combatting bribery among federal legislators.” *Id.* at 404 (emphasis added). This Note responds directly to that argument by outlining the separation-of-powers argument with greater precision in Parts III–IV, which are responsive to that note’s approach of purporting to “weigh” the executive branch’s interest in policing corruption against Congress’s interest in the prior assertion of its privilege. See *infra* note 227 and accompanying text.

23. See generally Recent Case, *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007), 121 HARV. L. REV. 914 (2008) (arguing by analogy to *United States v. Nixon*, 418 U.S. 683 (1974), that a qualified privilege in criminal investigations of Members would satisfy separation-of-powers concerns).

24. See generally Huefner, *supra* note 21.

25. For a summary of Professor Manning’s criticism of analysis that relies upon such a freestanding separation-of-powers principle, see *infra* Part IV.A.

26. See *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 655 (2007) (“[Resolution of this case] requires . . . a balancing of the separation of powers underlying the Speech or Debate Clause and the Executive’s Article II, Section 3 law enforcement interest in the seized materials.”).

27. *Id.* at 658.

28. Congressman Jefferson prevailed in his claim “only that the warrant procedures . . . were flawed because they afforded him no opportunity to assert the privilege before the Executive scoured his records.” *Id.* at 662.

Court's separation-of-powers jurisprudence,²⁹ and provides the basis for concluding that the Ninth Circuit in *Renzi* not only misconstrued the Clause, but also mischaracterized the “nondisclosure privilege” that it declined to recognize. The nondisclosure protection is a matter of procedure, not privilege: Congress, not the executive branch, gets to make first determinations as to the applicability of its privilege.

Part I provides a brief overview of the Supreme Court's Speech or Debate Clause cases, before Part II describes the facts of *Rayburn* and *Renzi* and summarizes each court's holding in each case. Part III reinterprets *Rayburn* through the lens of formalist separation-of-powers analysis.³⁰ Part IV then turns to functionalist analysis: Part IV.A provides a framework for functionalist separation-of-powers analysis. Part IV.B demonstrates that this functionalist analysis would reach the same conclusion as the formalist analysis on the facts of *Rayburn*. Part IV.C uses the difference between *Rayburn*'s outcome and that of the Supreme Court's bribery cases to address the arguments of some commentators who would “weigh” or “balance” Congress's interest in the prior assertion of its privilege against interests of the executive branch—like policing corruption. Finally, Part IV.D argues that the *Renzi* court erred in failing to critically define the nondisclosure protection it refused to recognize.

I. THE SUPREME COURT'S SPEECH OR DEBATE CLAUSE CASES

This Part provides a brief overview of the Supreme Court's Speech or Debate Clause cases. The next Part builds on the context provided here in summarizing the holdings in *Rayburn* and *Renzi*. For ease of reference, this Part breaks these cases into the categories of legislative-immunity cases, bribery cases, and oversight cases, and highlights the importance of each kind of case to executive-branch investigations of alleged congressional wrongdoing.

29. See *United States v. Johnson*, 383 U.S. 169, 178 (1966) (“In the American governmental structure the [Speech or Debate] [C]lause serves the . . . function of reinforcing the separation of powers so deliberately established by the Founders.”). The separation of powers is explicitly invoked in the Court's other Speech or Debate Clause cases, too. *E.g.*, *United States v. Helstoski*, 442 U.S. 477, 491–92 (1979); *Doe v. McMillan*, 412 U.S. 306, 334 (1973) (Blackmun, J., concurring in part, dissenting in part); *Gravel v. United States*, 408 U.S. 606, 618 (1972); *United States v. Brewster*, 408 U.S. 501, 525 (1972).

30. The Supreme Court's separation-of-powers cases can be read as existing along a formalist/functionalist dichotomy. See Manning, *supra* note 20, at 1942–43.

A. *The Legislative-Immunity Cases*

The Speech or Debate Clause received relatively little attention during the Constitutional Convention,³¹ but early judicial decisions recognized that the Clause conferred immunity from prosecution for legislative acts. An 1808 case in the Supreme Judicial Court of Massachusetts, *Coffin v. Coffin*,³² was the first American case to interpret the scope of legislative privilege, construing the Massachusetts Constitution—which contained a provision similar to the Speech or Debate Clause³³—not to protect the slanderous speech of Representative Micajah Coffin.³⁴ *Coffin*'s legacy, however, is not its narrow holding but its broad dicta, with Chief Justice Parsons writing for the court:

[T]he article ought not to be construed strictly, but liberally . . . 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 everything 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 am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber.³⁵

During the first 177 years of the Constitution's life, the Supreme Court construed the Clause only twice. In the first federal case to interpret the Speech or Debate Clause, *Kilbourn v. Thompson*,³⁶ the Court quoted *Coffin*'s dicta with approval.³⁷ It held that Members of the House of Representatives were not liable for their vote

31. For a discussion of the Clause's drafting history, see *infra* Part III.C.1.

32. *Coffin v. Coffin*, 4 Mass. 1 (1808).

33. The Massachusetts Constitution 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." MASS. CONST. of 1780, pt. I, art. XXI, *reprinted in* 3 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS 1892 (1909).

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

35. *Id.*

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

37. *See id.* at 203–04 ("It seems to us that the views expressed in the authorities we have cited are sound and are applicable to this case.").

improperly holding a private citizen in contempt of the House because the Speech or Debate Clause protects “things generally done in a session of the House by one of its members in relation to the business before it,” including voting.³⁸ The Court next discussed the Clause seventy-one years later in *Tenney v. Brandhove*,³⁹ holding that the predecessor statute to 42 U.S.C. § 1983⁴⁰ did not create civil liability for acts done within the sphere of legitimate legislative activity.⁴¹ It also observed that the Clause’s protection attaches—when it attaches—absolutely.⁴² The Court later relied upon this absolute protection in *Dombrowski v. Eastland*,⁴³ holding that legislators engaged “in the sphere of legitimate legislative activity” are protected “not only from the consequences of litigation’s results, but also from the burden of defending themselves.”⁴⁴ This absolute protection would form the basis of the absolute testimonial privilege upon which the D.C. Circuit based its decision in *Rayburn*.⁴⁵

B. The Bribery Cases

The substance of the circuit split between *Rayburn* and *Renzi* largely stems from a series of prosecutions for bribery. These bribery

38. *Id.* at 204–05. This was not a necessary conclusion textually; the Court could have construed the Clause’s protections to encompass solely words spoken in debate. Indeed, this definition would seem to accord better with the deletion of the words “or proceedings” from the text of Article IX of the English Bill of Rights. See Craig M. Bradley, *The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption?*, 57 N.C. L. REV. 197, 206–10 (1979) (“[I]t is more reasonable to assume that the phrase [‘or proceedings’] was omitted for the purpose of narrowing the privilege.”). But see Reinstein & Silverglate, *supra* note 16, at 1130 (drawing no meaning from the omission of the word “proceedings” from the Clause).

39. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

40. 42 U.S.C. § 1983 (2006). The predecessor statute was 8 U.S.C. § 43 (1946).

41. *Tenney*, 341 U.S. at 376, 379. William Brandhove, an unsuccessful mayoral candidate in San Francisco, alleged that state legislators sitting on the California Legislature’s Senate Fact-Finding Committee on Un-American Activities had deprived him of due process and equal protection by reading into the legislative record statements—including Brandhove’s “alleged criminal record”—meant “to intimidate and silence [him] and deter and prevent him from effectively exercising his constitutional righ[t] of free speech.” *Id.* at 371.

42. See *id.* at 377 (“The claim of an unworthy purpose does not destroy the privilege. . . . The holding of this Court in *Fletcher v. Peck*, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.” (citation omitted)). But see Note, *The Bribed Congressman’s Immunity from Prosecution*, 75 YALE L.J. 335, 340 (1965) (noting that applying the holding from *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)—against questioning the motives of the legislature—does not fairly apply to the motives of legislators).

43. *Dombrowski v. Eastland*, 387 U.S. 82 (1966) (per curiam).

44. *Id.* at 85.

45. See *infra* notes 98–99 and accompanying text.

cases largely defined the role of the Clause in interbranch investigations and litigation, as the Court (1) interpreted the scope of the Clause as providing an evidentiary privilege at trial, (2) determined that investigations into bribery rest within the purview of executive-branch scrutiny rather than solely congressional self-discipline, and (3) repeatedly declined to address whether Congress might waive its Members' privileges. The next three subsections address each of these holdings in turn.

1. *The Clause as an Evidentiary Privilege.* The Court construed the Clause as providing an evidentiary privilege in its first bribery-related Speech or Debate Clause case, *United States v. Johnson*.⁴⁶ There, it held that Representative Thomas F. Johnson's conviction for accepting a payment in exchange for giving a speech on the House floor was properly set aside, as a prosecution dependent on inquiries into the "legislative acts" of the Member and his motives for undertaking them necessarily violated the Clause.⁴⁷

Six years later, the Court in *United States v. Brewster*⁴⁸ bounded the scope of this evidentiary privilege, delimiting the definition of the "legislative acts" protected in *Johnson* to include only "those things generally said or done in the House or the Senate in the performance of official duties and [inquiries] into the motivation[s] for those acts."⁴⁹ It reasoned that a prosecution for bribery does not necessitate any inquiry into legislative acts or their motivation, as taking a bribe is not a legislative act.⁵⁰ In the Court's words, "To make a prima facie case [of bribery], the Government need not show any act . . . subsequent to the corrupt promise for payment, for it is *taking* the bribe, not performance of the illicit compact, that is a criminal act."⁵¹

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

47. *Id.* at 184–85. A Maryland savings-and-loan institution had allegedly paid the Congressman to make a speech favorable to it, which it planned to distribute in print form to allay the fears of potential investors. Though Representative Johnson's criminal liability for his related attempt to influence the Department of Justice to dismiss the pending indictments of the savings-and-loan institution and its officers was not before the Court, *id.* at 171, 186 n.16, the Court opined that the Clause would not protect conduct so unrelated to the "due functioning of the legislative process," *id.* at 172.

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

49. *Id.* at 512.

50. *Id.* at 526.

51. *Id.* This holding is consistent with the Court's holding in *Johnson*. The Court's inquiry in *Brewster* was whether any case could possibly be made without contravening the Speech or

2. *The Role of the Executive Branch in Bribery Investigations.* Resolving the controversy in *Brewster* also required rejecting Senator Daniel Brewster's contention that alleged bribery was punishable only by Congress—rather than by courts—in accordance with Congress's Article I, Section 5 power.⁵² Writing for the majority, Chief Justice Burger rebuffed this contention with two counterpoints. First, he reasoned by analogy to the Court's past construction of the Arrest Clause⁵³ that Members' facing accountability for bribery solely in nonjudicial forums would "render Members of Congress virtually immune from a wide range of crimes."⁵⁴ Second, he pointed out that

Debate Clause, whereas its inquiry in *Johnson* had been whether the Speech or Debate Clause had in fact been violated upon its review of Representative Johnson's conviction. *See supra* note 47 and accompanying text.

52. *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."). A number of commentators have argued that investigations of and punishment for bribery may *only* be carried out by Congress. *See, e.g.,* Sam J. Ervin, Jr., *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175, 183 (1973) (arguing that the Constitution requires that discipline of Members of Congress take place within Congress or by recourse to the vote, rather than by process of criminal law). *See generally* 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 (1968). These arguments were effectively precluded by the Court's strained historical analysis in *Brewster*, discussed within. *See infra* note 54; *cf. Brewster*, 408 U.S. at 547 (Brennan, J., dissenting) ("[I]t does not follow that the Framers went further and authorized Congress to transfer discipline of bribe takers to the Judicial Branch.").

53. U.S. CONST. art. I, § 6, cl. 1.

54. *Brewster*, 408 U.S. at 520. A historical point is worth making here because the distinction between the respective constitutional provenances of the Arrest Clause and the Speech or Debate Clause matters to the analysis within. *See infra* Part III.C.I. Though the Court recognized in *Brewster* "that the privilege against arrest is not identical with the Speech or Debate privilege," it nevertheless proceeded to reason from the arrest privilege by analogy because, in the Court's words, "[i]t can hardly be thought that the Speech or Debate Clause totally protects what the [Arrest Clause] has plainly left open to prosecution, *i.e.*, all criminal acts." *Id.* at 521.

This step is problematic: at least two reasons suggest that the privileges differ in coverage. First, and most pragmatically, the two privileges were subject to entirely different forms of abuse in the seventeenth and eighteenth centuries. *Compare* THEODORE F.T. PLUCKNETT, *TASWELL-LANGMEAD'S ENGLISH CONSTITUTIONAL HISTORY* 196, 580 (11th ed. 1960) (noting parliamentary abuse of the privilege from arrest, which had extended to protect "not only [Members'] persons, but their property, their servants, and their servants' property, and even to protect their game from poaching"), *with Brewster*, 408 U.S. at 516 ("[The speech or debate privilege] has enabled reckless men to slander . . . others with impunity . . ."). As indicated below, these different forms of abuse led to circumscription of the privilege of arrest, but not of the privilege of speech and debate. *See infra* notes 161–67 and accompanying text.

Second, and supporting the first point's distinction between the privileges, is that the two privileges are different in origin and served different functions historically. The arrest

“[t]he [American] system of divided powers was expressly designed to check the abuses England experienced in the 16th to the 18th centuries.”⁵⁵ Accordingly, in considering the Clause’s functional

privilege has roots in the old English *curia regis*, and it originally protected the king’s courtiers in their travel to his side. See 1 WILLIAM R. ANSON, *THE LAW AND CUSTOM OF THE CONSTITUTION* 156 (4th ed., reissue rev. 1911); PLUCKNETT, *supra*, at 196; 3 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 512 (Oxford, Clarendon Press 5th ed. 1896). In this regard, the arrest privilege was derivative of monarchical supremacy. The privilege of speech and debate, on the other hand, was born in the sixteenth and seventeenth centuries in the context of growing legislative power in the face of monarchical opposition. See PLUCKNETT, *supra*, at 247–49, 319–27, 331–464. Thus, one might persuasively argue that the privilege of speech and debate, but not the privilege of arrest, is properly the subject of solely legislative construction. See *supra* note 52. The Court’s flawed analysis in failing to recognize these differences between the privileges does not change the analysis within, however, which does not question the Court’s conclusion that punishment and/or process for bribery should take place in the courts rather than in Congress.

55. *Brewster*, 408 U.S. at 523. A further historical point is worth making here because it reinforces a major thrust of the argument in this Note—that the Clause is important to promoting democratic representation. Beyond failing to disaggregate the above two components of English parliamentary privilege (the arrest privilege and the speech-and-debate privilege), the *Brewster* Court supplemented its reasoning by attributing to Parliament’s judicial origins Parliament’s power to judge the privileges of its own members. *Id.* at 518 (citing CARL WITKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE*, in *OHIO ST. U. BULL.*, Aug. 30, 1921, at 1, 14).

This attribution glosses over disagreement regarding the origins of the speech-and-debate privilege. The historical account upon which the *Brewster* Court relied suggests that “the idea that Parliament exercised and enforced its privileges as ‘the High Court of Parliament’ . . . was firmly rooted for centuries in the minds of Parliament men, lawyers, and judges, and prevailed to modern times.” WITKE, *supra*, at 10. This viewpoint—that the privilege is an “ancient and undoubted right, and an inheritance received from [Parliament’s] ancestors,” see PLUCKNETT, *supra* note 54, at 357 (documenting this viewpoint and the disagreement)—has been refuted. See Reinstein & Silverglate, *supra* note 16, at 1121 & nn.41, 44 (citing J.E. Neale, *The Commons’ Privilege of Free Speech in Parliament*, in 2 *HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT* 147, 147–76 (E.B. Fryde & Edward Miller eds., 1970)) (noting and refuting this same argument that the privilege was judicial in nature and existed since before the beginning of the reign of King Henry IV in 1399).

A proper understanding of the privilege focuses not on its purported judicial origins, but instead on the privilege’s importance to democratic representation. The speech-and-debate privilege grew with Parliament’s expanding legislative powers throughout the sixteenth and seventeenth centuries. See *infra* notes 159–60 and accompanying text. The House of Commons’s assertions of privilege throughout the sixteenth and seventeenth centuries may indeed have rested their justifications for the privilege in Parliament’s judicial nature. See, e.g., *Proceedings Against Sir John Elliot* (K.B. 1629), in 3 *HOWELL’S STATE TRIALS* 293, 296 (London, R. Bagshaw et al. 1809) (“Words spoken in Parliament, which is a superior court, cannot be questioned in this court, which is inferior.”). As demonstrated elsewhere, however, these claims by the House of Commons were *aspirational*. E.g., PLUCKNETT, *supra* note 54, at 249; see Neale, *supra*, at 157–58 (documenting the earliest assertions of privilege and concluding that “[i]t is clear that [Sir Thomas] More did not consider his petition a petition of right: free speech [was] not yet a formal privilege”). To the extent the claims relied upon history, they were factually inaccurate, revisionist accounts of the case of Member Richard Strode, who was convicted in a

purpose of “preserv[ing] the independence and thereby the integrity of the legislative process,” the Chief Justice reasoned that “[d]epriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence.”⁵⁶

3. *Refusal To Consider Waiver.* As it had in *Johnson*, the Court in *Brewster* declined to consider whether Congress might waive its individual Members’ privileges by enacting the bribery statute.⁵⁷ In *United States v. Helstoski*,⁵⁸ the Court refused once again to find a waiver by Congress—in enacting the bribery statute—or by Congressman Henry Helstoski, who had testified about the legislative acts in question before a grand jury.⁵⁹ This question of waiver is tied to the constitutional propriety of executive-branch investigations and prosecutions of Members: if Congress can waive its Members’ privileges, then perhaps only congressional approval is required before the executive branch investigates a Member using techniques that expose it to legislative-act materials.

local Stannary Court in 1512 of obstructing tin mining. PLUCKNETT, *supra* note 54, at 248–49. The act annulling Strode’s conviction, Strode’s Act, 1512, 4 Hen. 8, c. 8, *reprinted in* 3 THE STATUTES OF THE REALM 53 (photo. reprint 1963) (London, Dawson’s of Pall Mall 1817), was understood in 1512 to vindicate *only* the freedom of parliamentary speech from interference *from local tribunals*, *not* to stand for any general principle of legislative privilege, PLUCKNETT, *supra* note 54, at 249.

As noted elsewhere, this difference in the understanding of the origin of the privilege has practical significance. *See* Lederkramer, *supra* note 17, at 470 (noting this conflict of interpretation among commentators and that “[t]he dispute is not academic”). An ancient judicial privilege might be discounted as a contingent peculiarity of English constitutional history. Indeed, perpetuation of the *Brewster* Court’s flawed analysis in this regard has the potential to affect the analysis of those commentators who would “weigh” or “balance” the respective interests of the three branches of government by reference to the differing British and American compositions of government. *See, e.g.*, Harrell, *supra* note 9, at 410–12 (relying on the *Brewster* Court’s analysis to discount “the English understanding of its legislative speech protection”). Recognition that the privilege reflects democratic representation, rather than judicial origins, precludes such summary distinction from the English legislative experience; the American legislative experience, too, is one characterized by democratic representation.

56. *Brewster*, 408 U.S. at 524–25.

57. *Id.* at 529 (Brennan, J., dissenting). It appears that the first time the government presented the argument ultimately adopted by the Court was in its Supplemental Memorandum on Reargument. *See* Bradley, *supra* note 38, at 221 n.144.

58. *United States v. Helstoski*, 442 U.S. 477 (1979).

59. *See id.* at 490–92. In *Helstoski*, the Court stated that waiver by a Member would require “explicit and unequivocal renunciation of the [Clause’s] protection.” *Id.* at 491.

C. The Oversight Cases

Prosecutions of Members of Congress also resulted in a series of cases in which the Court defined the extent to which the Clause protects Congress's oversight function. These oversight cases are significant in two regards. First, the *Rayburn* majority relied on the Court's holding in *Gravel v. United States*⁶⁰ that the Clause encompassed a testimonial privilege.⁶¹ Second, the oversight cases secured congressional oversight as existing within the bounds of the Clause's core protected activities, thus providing protective space for congressional investigations.⁶²

In *Gravel v. United States* and later cases—*Doe v. McMillan*⁶³ and *Hutchinson v. Proxmire*⁶⁴—the Court distinguished between Congress's claimed *informing* function and Congress's *oversight* function. The Court held in these cases that although the Clause protects Members acting pursuant to the oversight function (including Senator Mike Gravel's reading the Pentagon Papers into the Congressional Record⁶⁵), it does not protect the publication of classified materials to the public,⁶⁶ defamatory comments in constituent mailings,⁶⁷ or the public distribution of congressional reports.⁶⁸ These "informing" activities are "political," as they are not part of the legislative function or the deliberations that make up the legislative process.⁶⁹ The basis for this distinction was the Court's distinction in *Brewster* between "purely legislative activities," which

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

61. *See id.* at 616 ("We have no doubt that Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting.").

62. Others have written about the constitutional values promoted by vigorous congressional oversight; values including Congress's very ability to legislate. *See generally, e.g.,* Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915; Ervin, *supra* note 52.

63. *Doe v. McMillan*, 412 U.S. 306 (1972).

64. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

65. The *Gravel* prosecution resulted from Senator Gravel's reading the Pentagon Papers into the Congressional Record during a hastily convened meeting of the Senate Subcommittee on Public Buildings and Grounds and his alleged arrangement for their publication by Beacon Press. *Gravel*, 408 U.S. at 609. His efforts received relatively little attention due to the Supreme Court's decision the next day in *New York Times Co. v. United States*, 403 U.S. 713 (1971), protecting the *New York Times*'s publication of the Pentagon Papers.

66. *Gravel*, 408 U.S. at 626.

67. *Hutchinson*, 443 U.S. at 132, 136.

68. *Doe*, 412 U.S. at 324–25.

69. *Hutchinson*, 443 U.S. at 132–33.

the Clause protects, and “legitimate ‘errands’ performed for constituents,” which it termed “political in nature rather than legislative.”⁷⁰ Congressional oversight of executive-branch agencies is important to democratic representation, particularly in the face of both expanding executive-branch power⁷¹ and the executive branch’s increasing overclassification of information.⁷²

II. THE CIRCUIT SPLIT: *RAYBURN* AND *RENZI*

Rayburn and *Renzi* produced a split in authority among the federal courts of appeal as to whether the Clause protects Members

70. *United States v. Brewster*, 408 U.S. 501, 512 (1972). Harvey A. Silverglate, who represented Senator Gravel in the Pentagon Papers litigation, and Professor Robert J. Reinstein sharply criticize this aspect of the Court’s analysis, arguing that the Clause’s protections must extend to a range of activities that reflects modern understandings of political representation, rather than the static understanding at the time of the Clause’s adoption. *See generally* Reinstein & Silverglate, *supra* note 16. Similarly, Senator Sam Ervin, Jr., wrote that the Court’s labeling “political” activities “‘errands’ and assuming that they are performed for base political reasons . . . demeans many legitimate acts performed by Congressmen in their representative capacities.” *See* Ervin, *supra* note 52, at 186.

71. *E.g.*, *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?: Hearing Before the H. Comm. on the Judiciary*, 109th Cong., 32–33 (2006) [hereinafter *Reckless Justice*] (statement of Jonathan Turley, Professor, George Washington University Law School).

72. Justice Douglas discussed this concern regarding overclassification in his *Gravel* dissent:

The secrecy of documents in the Executive Department has been a bone of contention between it and Congress from the beginning. . . . [A]s has been revealed by such exposés as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin “incident,” and the Bay of Pigs invasion, the Government usually suppresses damaging news but highlights favorable news. In this filtering process the secrecy stamp is the officials’ tool of suppression and it has been used to withhold information which in “99½%” of the cases would present no danger to national security.

Gravel, 408 U.S. at 637, 641–42 (Douglas, J., dissenting). Many would argue that control over and access to information has contributed to the expansion of executive-branch power. *See, e.g.*, Ervin, *supra* note 52, at 191 (“Viewed in the context of the increasing difficulty that Congress has in getting necessary information from the administration, [*Gravel* and *Brewster*] not only limit the effective functioning of the legislative branch, but further increase the dominance of the executive.” (footnote omitted)); *see also* *Reckless Justice*, *supra* note 71, at 32–33 (documenting the expansion of executive-branch power in the early 2000s); *cf.* ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CENTER FOR JUSTICE, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY 4 (2011) (“Overclassification is a perennial problem, and one that causes serious harm.”).

A possible counterargument to the possibility of impeding the oversight function is simply that courts can cross that bridge when they reach it. *Cf., e.g.*, *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1927) (Holmes, J., dissenting) (“The power to tax is not the power to destroy while this Court sits.”). Impeding the oversight function, however, is not a mere possibility: the bridge is arguably in the rearview mirror and fading fast. *See infra* notes 223–24 and accompanying text. *See generally* Clark, *supra* note 62.

from the executive branch's compelling the disclosure of legislative-act material; that is, whether the Clause encompasses a "nondisclosure privilege." This Part outlines the facts of each case and discusses how the D.C. and Ninth Circuits addressed whether the Clause encompasses a "nondisclosure privilege."

A. Congressman William Jefferson

1. *The Facts in Rayburn.* In March 2005, the FBI began investigating Congressman William Jefferson, a nine-term representative from Louisiana's Second District, for bribery.⁷³ Jefferson, who served as the cochair of the Africa Trade and Investment Caucus and the Congressional Caucus on Nigeria, was suspected of both promising to undertake official acts on behalf of business interests in the United States, Nigeria, and Ghana, and of conspiring to bribe foreign officials.⁷⁴ In a much-publicized aspect of the investigation, a jilted investor-turned-informant approached Jefferson wearing a wire and solicited his assistance in bribing a Nigerian official with \$100,000 cash, which Jefferson accepted and placed in the trunk of his car.⁷⁵ Days later, FBI agents raided Jefferson's car⁷⁶ and his house in Washington, D.C., where they found \$90,000 in his freezer.⁷⁷

One notable detail in this initial search was the role played by the House Office of General Counsel (House Counsel) in securing Congressman Jefferson's car, which the search warrant had indicated would be parked at the Congressman's house.⁷⁸ When the FBI determined that the vehicle was located in the garage of the Rayburn House Office Building—within the Capitol Hill complex—FBI agents

73. *United States v. Jefferson*, 674 F.3d 332, 335 (4th Cir. 2012).

74. *Id.* at 335–36, 340.

75. *E.g.*, Allan Lengel, *FBI Says Jefferson Was Filmed Taking Cash*, WASH. POST., May 22, 2006, at A1.

76. Memorandum of Points and Authorities of the Bipartisan Legal Advisory Group of the U.S. House of Representatives as Amicus Curiae at 4, *In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d 100 (D.D.C. 2006) (N. 06-231 M-01).

77. Affidavit of Timothy R. Thibault at 10, *In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d 100 (N. 06-23 M-01), available at http://www.npr.org/documents/2006/may/sw_redacted.pdf. Ironically, while Jefferson and the informant passed notes back and forth to one another over a dinner during which Jefferson solicited a kickback, he commented, "All these damn notes we're writing to each other as if we're talking, as if the FBI is watching." *Id.* at 21.

78. Memorandum of Points and Authorities of the Bipartisan Legal Advisory Group, *supra* note 76, at 4.

and Capitol Police officers jointly secured the vehicle.⁷⁹ The Capitol Police notified House Counsel through the House Sergeant at Arms, who then notified Jefferson, who ultimately cooperated with the search.⁸⁰

On the same day as the raid, a grand jury issued a subpoena duces tecum for documents in Congressman Jefferson's office in the Rayburn House Office Building.⁸¹ After Jefferson took steps to preserve documents potentially responsive to the subpoena,⁸² House Counsel arranged to secure those documents with Jefferson's staff.⁸³ Six months later, as an appeal was pending in the Court of Appeals for the Fourth Circuit from the District Court for the Eastern District of Virginia's sealed ruling on Jefferson's challenge to the subpoena,⁸⁴ the FBI applied to the District Court for the District of Columbia for a search warrant for Jefferson's Rayburn office.⁸⁵ The affidavit in support of the search warrant described special procedures designed to safeguard materials protected by the Speech or Debate Clause:⁸⁶ most importantly, agents with no substantive role in the Jefferson investigation were to conduct the physical search, after which a

79. *Id.*

80. *Id.*

81. *Id.* at 4–5; *see also* 151 CONG. REC. 15, 20,448 (2005) (statement of Rep. Jefferson) (notifying the House of his being served with a subpoena). For a discussion of the requirements of Rule VIII of the House, which requires these announcements, *see infra* notes 188–94 and accompanying text.

82. Memorandum of Points and Authorities of the Bipartisan Legal Advocacy Group, *supra* note 76, at 5.

83. *Id.* The documents were locked in a drawer in the office of Jefferson's Chief of Staff, while emails were preserved by the office of the Chief Administrative Officer. Letter from Mark D. Lytle, Assistant U.S. Attorney, to David Plotinsky, U.S. House of Representatives Assistant Counsel, "Grand Jury Investigation 05GJ1318" (Sept. 16, 2005). That Jefferson's Chief of Staff controlled the items could be legally relevant, as such an arrangement would avoid a situation in which the act of Jefferson's compelled production would have testimonial significance. *See United States v. Hubbell*, 530 U.S. 27, 28 (2000). Yet, even if Jefferson himself controlled the documents, to the extent that his control would have been in a custodial capacity, he almost certainly would not have had a Fifth Amendment claim in the absence of an overbroad or indefinite request. *See Braswell v. United States*, 487 U.S. 99, 100 (1988); *cf. United States v. Hubbell*, 530 U.S. 27, 43–46 (2000) (affirming dismissal of an indictment on Fifth Amendment grounds in the face of an overbroad subpoena because the defendant's act of production had a testimonial aspect).

84. This process, which took place under seal, would have occurred *ex parte*, but was reported to the *Washington Post* under condition of anonymity. Shailagh Murray & Allan Lengel, *Return of Jefferson Files Is Sought*, WASH. POST, May 25, 2006, at A1.

85. *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 656 (D.C. Cir. 2007); Affidavit of Timothy R. Thibault, *supra* note 77, at 72.

86. Affidavit of Timothy R. Thibault, *supra* note 77, at 74–82.

“Filter Team” would review the files for responsiveness to the warrant and “determine if they may fall within the purview of the Speech or Debate Clause privilege.”⁸⁷

The District Court for the District of Columbia found probable cause for the search warrant, directing the warrant to be executed within three days and the U.S. Capitol Police to “provide immediate access” to Congressman Jefferson’s office.⁸⁸ The search occurred on Saturday, May 20, 2006, and lasted eighteen hours, during which time the FBI excluded from the office Jefferson’s personal counsel, House Counsel,⁸⁹ and the Capitol Police.⁹⁰ Jefferson challenged the constitutionality of the search warrant four days later, claiming that the issuance and execution of the search warrant violated the Speech or Debate Clause.⁹¹ The district court denied this motion,⁹² as well as the Congressman’s emergency motion for a stay pending appeal.⁹³ The D.C. Circuit immediately reversed the latter denial, requiring in a remand order⁹⁴ that the district court provide copies of the seized materials to the Congressman, hear his privilege submissions *ex parte*,

87. *Id.* at 76. The noncase agents would also image the Congressman’s computer. *Id.* at 73–74. The Filter Team was comprised of an Assistant U.S. Attorney, an attorney from the Department of Justice, and a non-case agent from the FBI. *Id.* at 75–76. It was to provide a log of “potentially privileged paper records” and a copy of the records to Jefferson’s counsel, forwarding the originals to the district court for a determination of privilege; it was then to return copies of the paper records it determined were nonprivileged to the Congressman while forwarding the original paper records to the prosecution team. *Id.* at 77–78. The computer image was to be forensically processed by the FBI using approved search terms, the results of which would be reviewed by the Filter Team using the same procedure as for the paper files. *Id.* at 76–82. This digital aspect of the search deserves commentary by someone with greater technical expertise than I, and is thus outside the scope of this Note.

88. *Rayburn*, 497 F.3d at 657.

89. *In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d 100, 106 (D.D.C. 2006), *rev’d sub nom.* *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007).

90. Memorandum of Points and Authorities of the Bipartisan Legal Advocacy Group, *supra* note 76, at 7.

91. *Rayburn*, 497 F.3d at 657. Jefferson filed a motion pursuant to Federal Rule of Criminal Procedure 41(g) for the return of his property and an injunction against review of the seized materials. *Id.* President George W. Bush immediately “directed the Attorney General, acting through the Solicitor General, to preserve and seal the records” until July 9, 2006. *Id.*

92. *In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d at 119.

93. *Rayburn*, 497 F.3d at 658.

94. *United States v. Rayburn House Office Bldg.*, No. 06-3105 (D.C. Cir., July 28, 2006) (remand order).

and determine in camera which materials were “legislative in nature.”⁹⁵

2. *Congressman William Jefferson in the D.C. Circuit.* Ruling over a year after its interim remand order, the D.C. Circuit in *United States v. Rayburn House Office Building* held that “the compelled disclosure of privileged material to the Executive during execution of the search warrant . . . violated the Speech or Debate clause.”⁹⁶ The search constituted “compelled disclosure” because it necessarily involved and contemplated the executive branch’s exposure to legislative materials, as “FBI agents had to review all of the papers in the Congressman’s office.”⁹⁷

The majority reasoned that under D.C. Circuit precedent in *Brown & Williamson Tobacco Corp. v. Williams*,⁹⁸ the Clause’s testimonial privilege extends to protect written legislative-act materials absolutely, and that this privilege includes a protection from compelled disclosure.⁹⁹ Accordingly, the search was unconstitutional because it “denied the Congressman any opportunity to identify and assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents.”¹⁰⁰ The court denied Jefferson’s requested recovery and—in an aspect of the case that is easy to overlook but of central importance to understanding its holding—it left its interim remand order in place,¹⁰¹ opining that the appropriate accommodation of both the Speech or Debate protection and the executive branch’s enforcement interests are “best determined by the legislative and executive branches in the first instance.”¹⁰²

95. *Id.* Following oral argument in this interlocutory proceeding in the D.C. Circuit, a grand jury in the Eastern District of Virginia returned a sixteen-count indictment against Jefferson. Indictment, *United States v. Jefferson*, 562 F. Supp. 2d 695 (E.D. Va. 2008) (No. 1:07cr209), 2007 WL 1686486.

96. *Rayburn*, 497 F.3d at 656. It also held that “the Congressman [was] entitled to the return of documents that the [district] court determine[d] to be privileged under the Clause.” *Id.*

97. *Id.* at 661.

98. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995).

99. *See Rayburn*, 497 F.3d at 660 (“As ‘discovery procedures can prove just as intrusive’ as naming Members or their staffs as parties to a suit . . . ‘a party is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen’” (alterations and citations omitted)); *see also infra* note 122 and accompanying text.

100. *Rayburn*, 497 F.3d at 662.

101. *Id.* at 663. For a description of the order, *see supra* notes 94–95 and accompanying text.

102. *Rayburn*, 497 F.3d at 663.

Judge Henderson, concurring solely in the judgment,¹⁰³ challenged the majority's reliance on *Brown & Williamson*, which had upheld two Members' challenge to a civil subpoena obtained by private parties who sought files in possession of a congressional subcommittee.¹⁰⁴ She opined that *Brown & Williamson* had included an internal constraint that "the Clause's 'testimonial privilege might be less stringently applied when inconsistent with a sovereign interest,' such as the conduct of criminal proceedings."¹⁰⁵ Emphasizing in a footnote that Congressman Jefferson had invoked his Fifth Amendment right against responding to the earlier subpoena,¹⁰⁶ she reasoned that unlike a subpoena, the execution of a search warrant is not unconstitutional "question[ing]" protected by the Clause because it requires no affirmative response.¹⁰⁷ In her view, "[T]o conclude that the Clause's shield protects against *any* Executive Branch exposure to records of legislative acts would jeopardize law enforcement tools that have never been considered problematic."¹⁰⁸

B. Congressman Rick Renzi

1. *The Facts in Renzi.* Congressman Rick Renzi of Arizona served on the House Natural Resources Committee, "the committee responsible for, among other things, approving of any land-exchange legislation before it can reach the floor of the House."¹⁰⁹ Ostensibly in connection with this committee service, Renzi twice sought to induce private parties seeking land-exchange deals to purchase property

103. Judge Henderson agreed with the majority's judgment affirming the district court's denial of Congressman Jefferson's Rule 41(g) motion, but she did "not agree with the majority's reasoning," and sought to distance herself from what she considered to be its dicta. *Id.* at 667 (Henderson, J., concurring in the judgment).

104. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421–23 (D.C. Cir. 1995).

105. *Rayburn*, 497 F.3d at 671 (Henderson, J., concurring in the judgment) (quoting *Brown & Williamson*, 62 F.3d at 419–20). Judge Henderson noted that the internal constraint in *Brown & Williamson* was consistent with the Supreme Court's observation in *Gravel* that "the Clause 'does not purport to confer a general exemption upon Members of Congress' from criminal process." *Id.* at 668 (quoting *Gravel v. United States*, 408 U.S. 606, 626 (1972)).

106. *Id.* at 668 n.7; *cf. supra* note 83.

107. *Rayburn*, 497 F.3d at 669 (alteration in original) (quoting U.S. CONST. art. I, § 6, cl. 1).

108. *Id.* at 671 (quotation marks omitted); *see also In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d 100, 110 (D.D.C. 2006) ("Carried to its logical conclusion, this argument would require a Member . . . to be given advance notice of any search of his property . . . and further that he be allowed to remove any material he deemed to be covered by the legislative privilege prior to a search.").

109. *United States v. Renzi*, 651 F.3d 1012, 1016 (9th Cir. 2011) (footnote omitted). "Federal land exchanges involve the exchange of privately held land for federal land." *Id.* at 1016 n.4.

owned by Renzi's former business partner, James Sandlin, who owed the Congressman money.¹¹⁰ At one point Renzi allegedly stated in soliciting a bribe, "no Sandlin property, no bill."¹¹¹ Despite his alleged promises, Renzi never introduced the land-exchange bill.¹¹²

The government's investigation of Congressman Renzi presented multiple means of possible exposure to legislative-act materials: "[I]t interviewed Congressman Renzi's aides, reviewed documents provided by those aides [without the Congressman's consent], wiretapped Congressman Renzi's personal cell phone in accordance with a Title III order, and searched, pursuant to a warrant, the office of Patriot Insurance," where the payments were made to Renzi.¹¹³ A grand jury returned an indictment against Renzi charging "[forty-eight] criminal counts related to his land exchange 'negotiations,' including public corruption, charges of extortion, mail fraud, wire fraud, money laundering, and conspiracy."¹¹⁴

2. *Congressman Rick Renzi in the Ninth Circuit.* In *United States v. Renzi*, the Ninth Circuit considered, among other things, whether the "district court erred by refusing to hold a *Kastigar*-like hearing" regarding the government's exposure to and reliance upon legislative-act materials in obtaining indictments.¹¹⁵ Congressman Renzi's appeal on the issue, to be successful, would have required two conceptual steps: First, it would have required the court to recognize an absolute "nondisclosure privilege," as the D.C. Circuit had in *Rayburn*, such that the executive branch's exposure to legislative-act materials would constitute a violation of the Speech or Debate Clause.¹¹⁶ Second, it would have required this "grandiose, yet apparently shy, privilege of

110. *Id.* at 1016–17.

111. *Id.* at 1030. The first time he simply offered to introduce the bill, whereas the second time—"following the collapse of 'negotiations' with [the first party]"—he also offered the second private party a "free pass" for the bill through the Committee. *Id.* at 1017. The second party made a \$1 million deposit to Sandlin, who used the money to pay his outstanding debts to Renzi. *Id.*

112. *Id.* at 1018.

113. *See id.* at 1017, 1018 n.6.

114. *Id.* at 1018 & n.7.

115. *Id.* at 1032. In *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court held that the government may compel an individual's testimony over a Fifth Amendment claim upon granting use and derivative-use immunity. *Id.* at 462. At a so-called "*Kastigar* hearing," the government must prove that its case does not rely upon any evidence derived from the prior compelled testimony. *See Fifth Amendment at Trial*, 38 ANN. REV. CRIM. PROC. 616, 632 & n.1923 (2009).

116. *Renzi*, 651 F.3d at 1033.

non-disclosure that the Supreme Court has not thought fit to recognize” to “preclude[] even the use of derivative evidence.”¹¹⁷

The Ninth Circuit sided with Judge Henderson’s concurring opinion in *Rayburn*, “disagree[ing] with both *Rayburn*’s premise and its effect and thus declin[ing] to adopt its rationale.”¹¹⁸ It concluded that “the Clause does not incorporate a non-disclosure privilege as to any branch,”¹¹⁹ excoriating what it stated was the D.C. Circuit’s reasoning that “*distraction alone* serves as the touchstone for the absolute protection of the Clause.”¹²⁰ The court concluded that the D.C. Circuit’s precedent—based on the protection of legislators from “the burden of defending themselves”¹²¹—conflicted with cases in which the Supreme Court allowed exposure to legislative acts.¹²² Despite explaining at great length its disagreement with the D.C. Circuit as to the scope of the Clause, the Ninth Circuit disposed of the case by holding that although some legislative-act evidence was improperly presented to the grand jury, it did not *cause* the grand jury to indict; rather, non-legislative-act evidence of bribed promises caused the indictment.¹²³

117. *Id.* at 1032 & n.21. Note the alternative not taken: the court could have rested its analysis having concluded that *even if* the Clause did encompass a “nondisclosure privilege,” it would not preclude the derivative use of evidence obtained in violation thereof. *See infra* note 123; *cf., e.g.,* *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring) (outlining avoidance principles).

118. *Renzi*, 651 F.3d at 1034; *see id.* at 1037 n.28 (agreeing that the execution of a search warrant “falls far short of the ‘question[ing]’ required to trigger the Clause” (alteration in original) (quoting *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 669 (D.C. Cir. 2007) (Henderson, J., concurring in the judgment)) (quotation marks omitted)).

119. *Id.* at 1039.

120. *Id.* at 1036 (emphasis added).

121. *Id.* at 1035 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam)).

122. *See id.* at 1034, 1036–39. The Ninth Circuit zeroed in on the *Rayburn* court’s “distraction” rationale by noting that it provided the only basis for the preclusion of civil discovery in *Brown & Williamson*. *Id.* at 1034 (citing *Brown & Williamson*, 62 F.3d 408, 418, 421 (D.C. Cir. 1995); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988)). It reasoned that this aspect of the D.C. Circuit’s precedent extended the holding in *Eastland* too far and that civil *discovery* is precluded only when the underlying civil *action* is itself precluded. As such, the Ninth Circuit concluded that it was *unnecessary* distraction, rather than distraction alone, that was precluded in *Eastland*. *Id.* at 1034–35. For criticism of this aspect of the court’s holding, *see infra* notes 153–54, 201–03 and accompanying text.

123. *Id.* at 1031. The circuit split identified here largely concerns dicta. *See supra* note 117. Accordingly, *Renzi* would not necessarily have come out differently on the analysis discussed in Parts III and IV of this Note. The Ninth Circuit was probably right in implying that the Speech or Debate Clause does not confer derivative-use immunity. *See Renzi*, 651 F.3d at 1032 n.21. The Supreme Court has treated the Clause more like the Fourth Amendment than the Fifth Amendment. It has applied the Clause’s evidentiary protection as a fairly narrow exclusionary

* * *

Having discussed the Supreme Court's Speech or Debate Clause cases and the D.C. and Ninth Circuits' opinions regarding whether the Clause encompasses a "nondisclosure privilege," this Note now recasts *Rayburn* through separation-of-powers analysis, which will underscore the limited nature of *Rayburn*'s holding and will situate the case within the Supreme Court's separation-of-powers jurisprudence.

III. NONDISCLOSURE AS SEPARATION OF POWERS: A FORMALIST READING

In deciding *Rayburn*, the D.C. Circuit faced a narrow question: Does the executive branch or does Congress get to make a first determination as to the applicability of the Speech or Debate Clause, given that the executive branch has a law-enforcement interest in the materials to be seized?¹²⁴ This question is readily framed as one which formalist separation-of-powers analysis can answer:¹²⁵ Is one branch exercising a power it does not have the authority to exercise?¹²⁶

This Part's contribution to Speech or Debate Clause scholarship is methodological. It analyzes the separation-of-powers claim without

rule, permitting prosecutions following the exclusion of any offending evidence, *see supra* Part I, rather than requiring the government to meet anything comparable to the Fifth Amendment *Kastigar* burden to avoid the exclusion of evidence. *Cf.* *United States v. Kurzer*, 534 F.2d 511, 516 (2d Cir. 1976) ("Determining whether evidence is tainted as the fruit of an unconstitutional search or seizure or whether the taint is attenuated presents many of the same problems as deciding whether the evidence used against [a defendant] is derived from . . . prior immunized testimony. However, the two situations are distinguishable . . . [I]t serves little deterrent purpose to exclude evidence which is only indirectly and by an attenuated chain of causation the product of improper police conduct." (citations omitted)).

124. *See United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 659 (D.C. Cir. 2007) ("The Executive acknowledges, in connection with the execution of a search warrant, that there is a role for a Member of Congress to play in exercising the Member's rights under the Speech or Debate Clause. The parties disagree on precisely when that should occur and what effect any violation of the Member's Speech or Debate rights should have. *The Congressman contends that the exercise of his privilege under the Clause must precede the disclosure of the contents of his congressional office to agents of the Executive . . .*" (emphasis added)). For a description of the search procedure in *Rayburn*, *see supra* notes 86–87 and accompanying text. The executive branch's competing interest is its duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

125. *See supra* note 30.

126. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (finding unconstitutional the Article I Comptroller General's exercising Article II powers); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76, 88 (1982) (Brennan, J., plurality opinion) (finding unconstitutional an Article I court's exercising Article III powers).

falling back upon any “freestanding separation of powers principle.”¹²⁷ Instead, in considering whether the executive branch has the authority to make the first determination as to the applicability of the Speech or Debate Clause, this Part looks to the text of the Speech or Debate Clause, judicial precedent construing the Clause, and past interbranch practice. This methodology provides analytical content to a claim that a Speech or Debate Clause case violates (or does not violate) the separation of powers—or at least more analytical content than simply claiming that *any* interbranch exercise of power violates the separation of powers, or invoking the appropriate “balance of powers.”¹²⁸ Without concluding that *Members* have an absolute “nondisclosure privilege,” this Part concludes that the Clause affords *Congress* a right of prior assertion—that is, the right to assert its institutional interests prior to the compelled disclosure of legislative-act material.

A. *The Text*

Turning first to the text,¹²⁹ the only part of the Clause that might on its face encompass a Member’s and/or Congress’s right to assert legislative privilege prior to compelled disclosure is the Clause’s prohibition on “question[ing].” Used as a verb in 1787, “to question” had several possible meanings, including (1) “to enquire,” (2) “to debate by interrogatories,” (3) “to examine one by questions,” (4) “to doubt; to be uncertain of,” and (5) “to have no confidence in; to mention as not to be trusted.”¹³⁰ Definitions four and five do not fit the Speech or Debate Clause, as Senators and Representatives would not *themselves* be doubted “for any Speech or Debate in either House;” and it is equally untenable to suggest that the Framers constitutionalized a prohibition against the public’s losing trust or confidence in their representatives. The other definitions have

127. See generally Manning, *supra* note 20. For a brief summary of Professor Manning’s article, see *infra* Part IV.A.

128. See *supra* notes 20–26 and accompanying text.

129. For ease of reference, the text of Article I, Section 6 is reprinted here:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They 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.

130. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 6th ed. 1778).

functionally identical meanings—the same dictionary defines “interrogatory” as “a question; an enquiry.”¹³¹ Together, these definitions roughly approximate the following definition: “to examine by interrogation.”¹³² Although this definition fits within the Speech or Debate Clause framework, it does not identify the point in an investigation at which this protection against examination by interrogation first applies—that is, whether it applies at the point of disclosure to investigators or whether it only applies at trial. Thus, the plain meaning of the text does not reveal whether, during an investigation, executive-branch officials may make the first determination as to whether the Clause’s protection attaches.

The legal meaning in 1787 of the formulation “shall not be questioned” is not particularly illuminating either.¹³³ Most examples of contemporaneous legal usage are inapplicable—for instance, prohibitions on the questioning of legal instruments¹³⁴ or the right to bear arms.¹³⁵ Other examples fail to resolve whether a prohibition on questioning is solely a trial protection: Aside from *Coffin v. Coffin*, which construed the Massachusetts analogue to the federal Speech or Debate Clause,¹³⁶ state courts used the formulation “shall not be questioned” in reference to natural persons in two circumstances. First, in *Commonwealth v. Myers*,¹³⁷ the General Court of Virginia construed a statute that read,

That if any person charged with any crime or offence against the commonwealth shall be acquitted or discharged from further

131. 1 JOHNSON, *supra* note 130.

132. By comparison, the Supreme Court in *Helstoski* indicated that *questioning* has a broader meaning than *offering*, and implied that the textual hook—the prohibition on “question[ing]”—is triggered any time information about a legislative act is revealed. *United States v. Helstoski*, 422 U.S. 477, 489–90 (1979).

133. See Harrell, *supra* note 9, at 396–97 (discussing contemporaneous usage and concluding that “[t]hese usages fail to illuminate the Speech or Debate Clause’s original meaning”).

134. Several state cases employed the phrase “shall not be questioned” in reference to “the validity of prizes,” *Glass v. Sloop Betsey*, 3 U.S. (3 Dall.) 6, 11 (1794), “legal title,” *M’Nitt v. Logan*, 16 Ky. (1 Litt. Sel. Cas.) 60, 69 (1808), and the decisions of “a court of competent jurisdiction in one nation . . . in the court of another,” *Cheriot v. Foussat*, 3 Binn. 220, 250 (Pa. 1810).

135. See KY. CONST. of 1792, art. XII, § 23 (1792), *reprinted in* 3 THORPE, *supra* note 33, at 1275 (“[T]he right of the citizens to bear arms in defense of themselves and the State shall not be questioned.”); PENN. CONST. of 1790, art. IX, § 21, *reprinted in* 5 THORPE, *supra* note 33, at 3101 (“[T]he right of citizens to bear arms, in defence of themselves and the State, shall not be questioned.”).

136. See *supra* notes 32–35 and accompanying text.

137. *Commonwealth v. Myers*, 3 Va. (1 Va. Cas.) 188 (1811).

prosecution by the court of the county or corporation in which the offence is or may by law be examinable, he or she *shall not* thereafter *be* examined, *questioned* or tried for the same crime or offence, but may plead such acquittal or discharge in bar of any other or further examination or trial for the same crime or offence, any law, custom, usage or opinion to the contrary in any wise notwithstanding.¹³⁸

The wording of this statute indicates that questioning was not solely a trial protection, as its use of the word “questioned” in a series including “examined” and “tried” suggests that these words had different meanings.¹³⁹ Moreover, the *Myers* court referred in several instances to “the examining court,”¹⁴⁰ suggesting that “examination” contemplates official judicial process. Thus, the court’s pronouncement that “if his *examining* court discharges him, he can never afterwards be *questioned* for the same crime”¹⁴¹ specifically indicates that *questioning* would happen at an earlier procedural posture in an investigation than would any official, in-court *examination*.

Second, another series of cases stands for the principle that “[a] judge shall not be questioned in a civil suit for doing, or neglecting, or refusing, to do a particular official act, in the exercise of judicial power.”¹⁴² The most illuminating of these cases is *Yates v. Lansig*,¹⁴³ which examined the concept of judicial immunity in some depth, and concluded that the scienter of a judge undertaking judicial activities “can never be averred or shown, but under process of impeachment.”¹⁴⁴ *Yates* is analogous to *United States v. Johnson* in that it held that judges could not be responsible for—nor could

138. Act of Jan. 24, 1804, ch. 95, § 3, in 3 STATUTES AT LARGE OF VIRGINIA 75 (Richmond, Samuel Shepard 1836) (emphases added).

139. Cf. *Chapman v. Turner*, 5 Va. (1 Call.) 280, 287 (1798) (“It is an universal rule of interpretation, that that construction shall be preferred which will reconcile and give effect to the whole instrument without rejecting any part.”).

140. E.g., *Myers*, 3 Va. (1 Va. Cas.) at 236.

141. *Id.* at 245 (emphases added).

142. *Armstrong v. Campbell*, 4 S.C.L. (2 Brev.) 259, 260 n.1 (1808); see *Phelps v. Sill*, 1 Day 315, 329 (Conn. 1804) (holding that “a judge is not to be questioned in a civil suit” “for error of judgment, in doing an act . . . in the exercise of judicial power”); *Yates v. Lansing*, 5 Johns. 282, 297 (N.Y. Sup. Ct. 1810) (ruling in favor of a chancery judge who, acting in his official capacity, was alleged to have committed trespass in recommitting an individual to prison who had been discharged upon habeas corpus, because judges neither were nor could “be responsible in civil suit”).

143. *Yates v. Lansing*, 5 Johns. 282 (N.Y. Sup. Ct. 1810).

144. *Id.* at 298.

judicial inquiry be had into the motives for—actions undertaken in the course of a judge’s judicial duties.¹⁴⁵ It does not foreclose a meaning of “to question” that encompassed pretrial protections. Thus, contemporaneous legal usage does not speak to the meaning of the word “question” in a way that resolves whether the legal meaning of the verb “to question” encompassed a right to assert legislative privilege prior to compelled disclosure during an investigation.

Nor do inferences from other parts of the Constitution help. The formulation “shall not be questioned” also appears in the Fourteenth Amendment,¹⁴⁶ which was not ratified until 1868, and which denotes a clearly inapplicable meaning of “treating a particular legal issue as settled.”¹⁴⁷ Although it is tempting to infer from the Clause’s placement within Article I, rather than Article II, that it must be within Congress’s sole function to make a first determination of privilege, such reasoning fails to resolve the question at hand; this structural inference speaks only to *which branch* the Clause protects, rather than whether the Clause protects against compelled disclosure.

For the sake of argument, one might put aside the previous four paragraphs’ analysis and assume that compelled disclosure to investigators does not categorically fall within the Clause’s prohibition of “question[ing],” such that investigators *may* “question” Members. Even with this assumption in hand, the text of the Clause is unclear as to whether investigators from the executive branch—as opposed to legislative-branch officials—may question Senators and Representatives, or whether they may question them *in* the House. Put otherwise, whether questioning is permissible might depend on who is doing the questioning and where, geographically, they are doing it. The best possible argument proceeding from the assumption that investigatory questioning is permissible might seek to infer that the Clause’s prohibition on questioning Senators and Representatives “in any *other Place*” should be read in conjunction with the prefatory

145. For discussion of *Johnson*, see *supra* notes 46–47 and accompanying text. The New York Supreme Court of Judicature indicated that judges could only be liable for actions taken “in a mere ministerial capacity,” as such acts are “not . . . judicial act[s].” *Yates*, 5 Johns. at 297. This reasoning is similar to the reasoning in *Brewster*, in which the Supreme Court held that taking a bribe is not a legislative act. See *supra* note 49–50 and accompanying text.

146. U.S. CONST. amend. XIV, § 4, cl. 1 (“The validity of the public debt of the United States, authorized by law, . . . shall not be questioned.”). For mention of the inapplicability of similar state-constitution provisions, see *supra* note 134.

147. Harrell, *supra* note 9, at 396; see *id.* at 397 (noting that such usage “fails to illuminate the Speech or Debate Clause’s original meaning” because “the object of ‘shall not be questioned’ is a legal concept, not a natural person”).

clause's "in either House," leading to the conclusion that Senators and Representatives *may* be questioned *in either House*. This is not a necessary inference, however; the imperative phrase ("they shall not be questioned in any other Place") could very well stand alone.¹⁴⁸ But why did the Framers not write that "they shall not be questioned in any Place" or simply that "they shall not be questioned" and thereby avoid this confusion? A probable answer is that such phrasing would conflict with Article I, Section 6, Clause 2, which allows questioning of Senators and Representatives *by each House*—as opposed to questioning by executive-branch officials—in punishing and/or expelling its Members.

In sum, the Clause does not, on its face, speak to whether it is constitutional for executive-branch officials to make a first determination during an investigation as to its protections.

B. Precedent

Judicial precedent also does not resolve whether executive-branch officials may make the first determination during an investigation as to the Clause's applicability. As expressed by the Court in *United States v. Nixon*,¹⁴⁹ Congress and its Members do not have the exclusive right to determine the *scope* of their own privileges, as this would be inconsistent with judicial review.¹⁵⁰ The Court has not, however, spoken explicitly to whether the legislative branch—rather than the executive branch—has the exclusive right to determine the *applicability* of the Speech or Debate protection in the first instance.¹⁵¹

Whether the Supreme Court has implicitly held that non-legislative officials may make first determinations as to the applicability of the Clause merely begs the question of the Clause's scope. The Ninth Circuit reasoned in *Renzi* that the scope of the

148. Indeed, this is how the Court read the imperative phrase in *Brewster*, reasoning that in adopting the proclamation of *Coffin v. Coffin* that "[a Member] is entitled to this privilege . . . when not within the walls of the representatives' chamber," the Court in *Tenney v. Brandhove* had construed the Clause to protect "legislative acts . . . which take place outside the physical confines of the legislative chamber." *United States v. Brewster*, 408 U.S. 501, 514–15 (1972) (alteration in original) (quoting *Coffin v. Coffin*, 4 Mass. 1, 28 (1808)).

149. *United States v. Nixon*, 418 U.S. 683 (1974).

150. *See id.* at 704 ("[T]his court has consistently exercised the power to construe and delineate claims arising under [the Speech or Debate Clause] . . .").

151. *See United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 659 (D.C. Cir. 2007) (concluding that there was no Supreme Court case on point).

Clause could not include nondisclosure because the Supreme Court's past actions are inconsistent with a "nondisclosure privilege."¹⁵² It pointed to instances in which the Court required Members to turn over legislative-act material, concluding that the Clause prohibits only the introduction of legislative-act material at trial rather than the disclosure of these materials to investigators.¹⁵³ Yet the Ninth Circuit's reasoning is based on a flawed premise: namely, it assumes an inaccurate conception of the so-called "nondisclosure privilege." If—as this Note argues—the nondisclosure protection is solely *Congress's* right to assert privilege prior to compelled disclosure, rather than a right of individual *Members* to do so, then contrary to the Ninth Circuit's assertion, the Clause does not "blindly preclude disclosure and review by the Executive of documentary 'legislative act' evidence."¹⁵⁴

In sum, judicial precedent does not resolve the constitutionality of executive-branch officials' making a first determination of the Clause's protections.

C. *Past Practice*

Unlike the text of the Clause and judicial precedent, past interbranch practice speaks directly to the question of whether executive-branch investigators may make the first determination as to the Clause's applicability. Reference to past practice to interpret constitutional provisions can take the form of either reference to practice at the time the Constitution was framed or to historical gloss.¹⁵⁵ This Section first refers to practice at the time the Constitution was framed, concluding that the Clause incorporates the institutional protection of its English antecedent, Article IX of the English Bill of Rights. It then considers historical gloss, which indicates that the Clause's institutional protection is one of nondisclosure.

1. *Past Practice as Codification.* Questions of original meaning often boil down to whether the text *codified* or *modified* historical practice. In short, one might infer either that (1) the Speech or Debate Clause modified contemporary practice at the time of

152. See *United States v. Renzi*, 651 F.3d 1012, 1037–39 (9th Cir. 2011).

153. *Id.*

154. *Id.* at 1037.

155. *E.g.*, *Boyd v. United States*, 116 U.S. 616, 622 (1886).

ratification, or that (2) the Clause codified the ratifying generation's background understanding of legislative privilege, an understanding informed by the English experience. In England, Parliament as *an institution* controlled the speech-and-debate privilege.¹⁵⁶ The scope and understanding of the preratification parliamentary speech-and-debate privilege are probative of the meaning of the Speech or Debate Clause—*codifying* this past understanding of institutional control of the privilege—in the absence of contradictory evidence from which to draw an inference of modification.¹⁵⁷ At first glance, a textual comparison of the Clause to Article IX of the English Bill of Rights might appear to support a modifying inference, specifically in the Clause's omission of the word "proceedings."¹⁵⁸ As this Section makes clear, however, the Framers' intent of circumscribing parliamentary privilege *generally* is not probative of their excising from the English speech-and-debate privilege *specifically* its institutional protection of the legislative branch—in the form of nondisclosure—against the other branches.

156. See, e.g., THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 23 (Washington, Joseph Milligan & William Cooper 2d ed. 1812) ("The privilege of a member is the privilege of the House." (citations omitted)); Bradley, *supra* note 38, at 223 ("The British courts have always maintained 'that the privilege of Parliament is the privilege of Parliament as a whole and not the privilege in any individual member.'" (quoting Church of Scientology v. Johnson-Smith, [1972] 1 Q.B. 522, 528)); see also JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 5, 69–77 (2007) (characterizing the speech-and-debate privilege in England before and at the time the U.S. Constitution was drafted as "Blackstonian" and "geographical" in its protection of the institution of the House of Commons against outside interference); Bernstein, *supra* note 17, at 660 ("When the monarch attempted to intrude into the legislature, Parliament deployed its privilege as a shield; in times of more peaceful interbranch relations, the private protection dominated.").

157. The Supreme Court has often engaged in the same interpretive exercise briefly undertaken here. See, e.g., Crawford v. Washington, 541 U.S. 36, 54 (2004) ("The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the right . . . is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." (quotation mark omitted)); Kilbourn v. Thompson, 103 U.S. 168, 189, 202 (1880) (finding Parliament's exercise of its contempt power irrelevant to whether Congress possessed such power, as Congress "is in no sense a court," but then interpreting with regard to the Speech or Debate Clause that "it may be reasonably inferred that the framers of the Constitution meant the same thing by the use of the language borrowed from" the English Bill of Rights).

158. Article IX reads: "That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament." 1 W. & M. 2, c. 2, § 9 (1689) (Eng.), reprinted in 6 THE STATUTES OF THE REALM, *supra* note 55, at 143. For a discussion of the Framers' omission of the word "proceedings," see *supra* note 38.

Article IX of the English Bill of Rights, which was adopted in the wake of the Glorious Revolution, did not incorporate a privilege unchanged since the early medieval period; rather, the privilege codified as Article IX reflected changing social and political circumstances.¹⁵⁹ Without recounting the entire clash between parliamentary privilege and royal prerogative under the Tudors and Stuarts, it suffices to note here that the speech-and-debate privilege was of central importance to England's realizing democratic representation.¹⁶⁰

In the century following the codification of the speech-and-debate privilege as Article IX of the English Bill of Rights, Members

159. See Reinstein & Silverglate, *supra* note 16, at 1128–29. The account of legal historian Theodore Frank Thomas Plucknett paints a comprehensive picture of the connection between parliamentary privilege and political power within a broader account of English constitutional history. See generally PLUCKNETT, *supra* note 54. To summarize: Parliament's eventual assertion of the speech-and-debate privilege took place against the backdrop of, and contributed to, a four-century ascendancy of representative government. During these centuries, the House of Commons's power and its role oscillated, as monarchs came to the throne with different understandings of royal prerogative concerning matters of political sensitivity—especially foreign affairs and religion. See generally *id.*

160. Professor Josh Chafetz advances this view in his book, *Democracy's Privileged Few*. See generally CHAFETZ, *supra* note 156.

Two key aspects of the history of the privilege merit emphasis here. First, the clashes between privilege and prerogative overlapped substantively with the passing from the Crown to Parliament of the initiative for instituting legislation concerning matters of national importance. See PLUCKNETT, *supra* note 54, at 190 (noting the passing of the initiative from the government to the governed via their representatives). The fact of the popularly representative House of Commons initiating legislation would have been virtually incomprehensible to early English monarchs, who originally called upon the third estate for the limited purposes of securing taxes, loyalty during times of internal rebellion, and support for foreign conquest. See PLUCKNETT, *supra* note 54 at 129, 133, 140–41, 145. Cf. generally Neale, *supra* note 55 (documenting the shift from the *practice* of free speech under conditions of monarchical sufferance to the *privilege* of free speech as right).

Second, these clashes also overlapped with the House of Commons's emerging understanding that its privileges were significant as a matter of political representation. See, e.g., SIMONDS D'EWES, THE JOURNALS OF ALL THE PARLIAMENTS DURING THE REIGN OF QUEEN ELIZABETH 175 (London, Paul Bowes 1682) (“[H]e was not now a private man, but . . . person and place of a multitude specially chosen”); PLUCKNETT, *supra* note 54, at 313 (“This proceeding [the barring of William Strickland from attending Parliament in 1571] was noticed in the House as being in violation of parliamentary privilege, and an injury not merely to himself *but to his constituents whom he represented*.” (emphasis added)). This representation principle also appeared in the Apology of the Commons. *A Form of Apology and Satisfaction To Be Delivered to His Majesty* (1604), reprinted in J.R. TANNER, CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I 217–31 (1931) (“[O]ur privileges and liberties are our right and due inheritance no less than our very lands and goods [T]hey cannot be withheld from us, denied, or impaired, *but with apparent wrong to the whole state of the realm*.” (emphasis added)).

of Parliament abused other aspects of legislative privilege, most notably selling the benefits of their privilege from arrest and systemically accepting bribes.¹⁶¹ These abuses were demonstrably within the collective conscious of America's founding generation.¹⁶² Indeed, the colonists seized upon the 1763 prosecution for seditious libel of John Wilkes—by some accounts, the sole Member of Parliament who was *not* corrupt¹⁶³—as evidence of the dangers of parliamentary overreach to democratic representation.¹⁶⁴

Many have taken the founding generation's evident distrust of the legislative branch as reason to construe the Speech or Debate Clause narrowly.¹⁶⁵ Yet the inclusion of the speech-and-debate privilege in the Constitution stands in stark contrast with the other privileges of Parliament, many of which—like the privilege from arrest, the contempt power, the privilege to determine Members' qualifications, and the privileges of exclusion and expulsion—were either limited or excluded altogether.¹⁶⁶ Indeed, that the privilege survived strengthens the inference that the Framers intended to narrow *other* privileges without changing the speech-and-debate privilege, as “none of the abuses discussed [during the Convention] was directly attributable to the free speech privilege, and none of the reservations expressed by the Framers was applicable to that privilege.”¹⁶⁷

161. See Bradley, *supra* note 38, at 210 (noting the myriad abuses of parliamentary privilege).

162. See, e.g., *United States v. Brewster*, 408 U.S. 501, 546 (1972) (Brennan, J., dissenting) (discussing the prosecution of the English parliamentarian John Wilkes and noting that “the Framers, aware of these abuses, were determined to guard against them”).

163. See *Powell v. McCormack*, 395 U.S. 486, 527–28 (1969) (discussing the prosecution of Wilkes and his subsequent campaign for reinstatement).

164. Bradley, *supra* note 38, at 221–22.

165. The ratifying generation undoubtedly aimed to guard against legislative excess. See *Brewster*, 408 U.S. at 516–21 (construing the Clause narrowly by analogy to the privilege from arrest); THE FEDERALIST NO. 48, *supra* note 1, at 309 (“The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”); Bradley, *supra* note 38, at 211 (“[I]t is . . . clear that a rather narrow view of legislative privileges in general was the order of the day.”). For a discussion of the problems with this aspect of the *Brewster* Court's analysis, see *supra* note 54.

166. Reinstein & Silverglate, *supra* note 16, at 1137.

167. Bradley, *supra* note 38, at 211; see Reinstein & Silverglate, *supra* note 16, at 1139 (“[T]he fact that the other legislative privileges were curtailed gives no warrant to dilute the speech or debate privilege, which had been molded by history as vital to the independence and integrity of the legislature. The argument to the contrary . . . expressed by Chief Justice Burger in *Brewster*[] depends upon an historical construction that is more creative than descriptive.”).

Two aspects of the American Clause's text seem particularly problematic in the search for a textual hook for the preratification understanding of an institutional nondisclosure protection. The lesser problem is the Clause's placement in Article I, Section 6, which lists the privileges of and restrictions upon Senators and Representatives, rather than in Article I, Section 5, which lists Congress's institutional prerogatives and requirements. This placement is ultimately of no moment because Members only enjoy these privileges *as Members of Congress*. As Thomas Jefferson noted: "The privilege . . . is restrained to things done in the House in a Parliamentary course. For [the Member] is not to have privilege contra morem parliamentarium, to exceed the bounds and limits of his place and duty."¹⁶⁸

The bigger problem is the shift from Article IX's absolute passive prohibition—that "Freedom of Speech and Debates or Proceedings in Parlyament *ought not to be impeached or questioned*"¹⁶⁹—to the apparent vesting of this protection in "Senators and Representatives."¹⁷⁰ This change was made, without explanation, in the Committee of Style and Arrangement.¹⁷¹ Yet one can infer from a preliminary draft of the Clause that the specific limitation of legislative privileges in Article I, Section 6 to "Senators and Representatives" was directed at past abuses of the arrest privilege, rather than at the speech-and-debate privilege. That draft reads:

Freedom of speech and debate in the Legislature *shall not be impeached or questioned* in any Court or place out of the Legislature; *and the members of each House* shall, in all cases, except treason[,] felony and breach of the peace, be privileged from arrest during their attendance at Congress, and in going to and returning from it.¹⁷²

This earlier draft of the Clause was adopted by the Convention without contradiction.¹⁷³ Notably, it leaves the speech-and-debate privilege as a passive prohibition, whereas it specifically vests the privilege *from arrest* in Senators and Representatives. Reading the

168. JEFFERSON, *supra* note 156, at 23–24 (citations omitted).

169. *See supra* note 158.

170. *See supra* note 9.

171. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 593 (Max Farrand ed., 1911); Reinstein & Silverglate, *supra* note 16, at 1136 n.122.

172. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 171, at 180 (alteration in original) (emphasis added).

173. *Id.*

Committee on Style and Arrangement's change of the Clause as a stylistic revision, rather than a substantive one, is consistent with the limits upon that Committee's authority.¹⁷⁴ It also makes sense given that parliamentary abuse of *the arrest privilege* involved its extension beyond Members.¹⁷⁵ Of course this reasoning is speculative, as the only recorded debate on the Clause involved two proposals—one from Charles Pinckney and the other from James Madison—neither of which was adopted.¹⁷⁶ As noted elsewhere, though, “The Supreme Court has relied expressly on this limitation on [the] authority [of the Committee on Style and Arrangement] when interpreting the text of the Constitution.”¹⁷⁷

* * *

Given the absence of compelling contradictory evidence from which to draw an inference of modification, it seems that the Speech or Debate Clause is best thought of as codifying the institutional protection of its English antecedent. Indeed, the Supreme Court has never recognized the privilege as vesting in legislators rather than in Congress,¹⁷⁸ and the distinction between *legislators'* and *legislative* privilege appears to have held salience with the founding

174. The Committee on Style and Arrangement lacked authority to substantively change the Constitution's draft provisions. *Id.* at 553; Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 288 (1998).

175. Members extended the arrest privilege to protect their property and servants and sold “protections” to “complete outsiders.” Reinstein & Silverglate, *supra* note 16, at 1137 n.128; see *supra* notes 54, 161 and accompanying text.

176. Lederkramer, *supra* note 17, at 470.

177. Jonathan Turley, *The Executive Function Theory, the Hamilton Affair, and Other Constitutional Mythologies*, 77 N.C. L. Rev. 1791, 1813 n.99 (1999) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 792 n.8 (1995); *Nixon v. United States*, 506 U.S. 224, 231 (1993); *Powell v. McCormack*, 395 U.S. 486, 538–39 (1969)).

178. The Supreme Court stated in dicta in *Gravel v. United States* that the Speech or Debate Clause was the “privilege of the Senator, and invocable only by the Senator or the aide on the Senator's behalf,” but it did so in the course of considering whether the Clause's protections extend to a Senator's aide when the Senator would be protected by the Clause. *Gravel v. United States*, 408 U.S. 606, 622 (1972). Similarly out of context is the statement of the Massachusetts Supreme Court in *Coffin v. Coffin*:

[I]t appears . . . that the privilege secured by [the Massachusetts Constitution's speech or debate provision] is not so much the privilege of the house . . . as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house, but derives it from the will of the people

Coffin v. Coffin, 4 Mass 1, 19 (1808). Professor Craig Bradley notes that *Coffin* is “an ambiguous precedent at best,” Bradley, *supra* note 38, at 223 n.156, and the Supreme Court has never adopted this language from *Coffin* in construing the federal Speech or Debate Clause.

generation.¹⁷⁹ Moreover, the Clause was written at a level of generality that allowed for tailoring to the American experience.¹⁸⁰ The ensuing historical gloss evinced this tailoring in action.

2. *Past Practice as Historical Gloss.* The Supreme Court has repeatedly made reference to historical gloss in deciding separation-of-powers cases.¹⁸¹ Independent of its potential relevance in ordinary questions of constitutional interpretation, the history of past accommodation between two branches has special significance in the separation-of-powers context as evidence of the two branches' settled understanding of where a constitutional line lies.¹⁸² Reference to past practice indicates that "since the first service of a subpoena for documents by the executive branch on a House committee," Congress has reserved the right to make an "initial determination of the Speech

179. For instance, the Virginia Constitution of 1776 provided, "That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services . . ." VA. CONST. OF 1776, Bill of Rights, § 4, *reprinted in* 7 THORPE, *supra* note 33 at 3813. Similarly, the Massachusetts Constitution of 1780 provided, "No man . . . ha[s] any other title to obtain advantages, or particular and exclusive privileges distinct from those of the community, than what rises from the consideration of services rendered to the public . . ." MASS. CONST. OF 1780, pt. I, art. VI, *reprinted in* 3 THORPE, *supra* note 33, at 1890. Though further consideration of colonial parliamentary practice is outside the scope of this Note, it is discussed in greater detail in Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221 (2003).

180. Thus, the level of generality at which the Convention adopted the Clause—as with other generally worded clauses in the Constitution—reflects a compromise to defer certain constitutional questions to future generations. *See* Manning, *supra* note 20, at 1945 ("Like many bargained-for texts, the Constitution's structural provisions . . . leave many important questions unanswered."); *cf.* Lederkramer, *supra* note 17, at 471 ("The framers, by rejecting the proposals of Madison and Pinckney, chose to fashion a loosely defined privilege and to leave its construction to the courts, not Congress."). This Note does not follow the assumption that the courts must define all aspects of the boundary between the executive and legislative branches. *Cf.* Manning, *supra* note 20, at 1974 ("[R]espect for legislative supremacy requires interpreters to hew closely to the level of generality at which Congress has spoken."); H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 379 (1998) ("It is . . . the province and duty of the political departments, within their respective spheres, to say what the law of the Constitution is.").

181. *See, e.g.,* *Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("Traditional ways of conducting government . . . give meaning to the Constitution." (quotation mark omitted)); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.").

182. *See* *Youngstown*, 342 U.S. at 610 (Frankfurter, J., concurring) ("[T]he way the framework has consistently operated fairly establishes that it has operated according to its true nature.").

or Debate privilege . . . subject to court review.”¹⁸³ This history suggests that *legislative* independence is not coterminous with *legislators’* independence—and it is the former, rather than the latter, that requires absolute protection.

The executive branch did not first seek to compel the production of documents from Congress until 1876, when it sought documents from the Committee of the House of Representatives on Expenditures in the War Department relating to the Committee’s investigation of Secretary of War William Belknap for bribery.¹⁸⁴ Upon that Committee’s notification to the House that it had complied with the subpoena, the House, after a lengthy debate, resolved that such compliance absent its approval was in breach of the House’s privilege.¹⁸⁵ Later that month, Members notified the House of their receipt of a grand jury summons, prior to seeking the House’s consent to comply with the summons.¹⁸⁶ Thus developed the practice, acquiesced in by the executive branch for the next one hundred years, that “subpoenas for documents . . . or testimony . . . could be complied with only by permission of the House by passage of a resolution to that effect.”¹⁸⁷

The House modified this practice in 1977,¹⁸⁸ clarifying its procedures three years later in a precursor resolution to Rule VIII of

183. Memorandum from Morton Rosenberg, Jack H. Maskel & Todd B. Tatelman, Legislative Attorneys, Cong. Research Serv., Legal and Constitutional Issues Raised by Executive Branch Searches of Legislative Offices 13 (June 13, 2006), *available at* <http://electionlawblog.org/archives/Jefferson%20GD%20Memo.pdf>. Others have written on this subject at greater length. *See generally, e.g.*, David Kaye, *Congressional Papers, Judicial Subpoenas and the Constitution*, 24 UCLA L. REV. 523 (1977) (concluding that the House’s institutional interest in approving requests for documents is only in protecting the original copies).

184. 3 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2661 (1907).

185. *See id.* (“Whereas the mandate of said Court is in breach of the privilege of this House: Resolved, that the said committee and the members thereof are hereby directed to disregard said mandate until the further order of this House.”).

186. *Id.* § 2662. This practice accorded with the House’s decision in 1846 not to grant Members a blanket permission to comply with subpoenas ad testificandum, but rather to grant permission to the Representative in the instant situation. *Id.* § 2660.

187. Memorandum from Morton Rosenberg, Jack H. Maskel & Todd B. Tatelman, *supra* note 183, at 13, 14–16

188. H.R. Res. 10, 95th Cong., 123 CONG. REC. 73 (1977) (enacted). This procedural modification did *not* change the House practice of making a first determination in applying its privilege. *See* Memorandum from Morton Rosenberg, Jack H. Maskel & Todd B. Tatelman, *supra* note 183, at 16–17.

the House.¹⁸⁹ Rule VIII requires a Member to notify the Speaker of the House upon the receipt of a subpoena and the Speaker to lay such notification before the House.¹⁹⁰ After this,

the Member . . . shall determine whether the issuance of the judicial or administrative subpoena or judicial order . . . is a proper exercise of jurisdiction by the court, is material and relevant, *and is consistent with the privileges and rights of the House*. Such Member . . . shall notify the Speaker before seeking judicial determination of these matters.¹⁹¹

As noted elsewhere, “The second notification . . . provides the institution the opportunity to adopt a resolution prohibiting the release of the documents or testimony to be taken.”¹⁹² Indeed, the Rule requires that a “Member . . . shall comply with the . . . subpoena” *except as “otherwise ordered by the House,”*¹⁹³ a requirement that also contemplates the possibility of Congress adopting a resolution prohibiting disclosure. This understanding is not limited to Congress—the U.S. Attorney’s Manual also acknowledges the practice.¹⁹⁴

These changes initiated in 1977 corresponded with the shift from Congress’s representation in litigation by the Department of Justice to the development of House and Senate Counsels Offices in 1977¹⁹⁵

189. H.R. Res. 722, 96th Cong., 126 CONG. REC. 25,777 (1980) (enacted). This resolution was adopted as Rule L of the House Rules, H.R. Res. 5, 97th Cong., 127 CONG. REC. 98 (daily ed. Jan. 5 1981), which itself was subsequently recodified, H.R. Res. 5, 106th Cong., at 23 (1999), as Rule VIII of the House Rules. THOMAS J. WICKHAM, CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 112-161, at 408 (2013).

190. For an example of the pro forma notification the rule generates, see 151 CONG. REC. 20,448 (2005) (statement of Rep. Jefferson).

191. WICKHAM, *supra* note 189, at 409 (emphasis added).

192. See Memorandum from Morton Rosenberg, Jack H. Maskel & Todd B. Tatelman, *supra* note 183, at 18.

193. WICKHAM, *supra* note 189, at 410 (emphasis added).

194. U.S. DEPT OF JUSTICE, U.S. ATTORNEY’S MANUAL: TITLE 9, CRIMINAL RESOURCE MANUAL § 2046 (rev. ed. 1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02046.htm. For further documentation of the executive branch’s acquiescence in Congress’s maintenance of a right of prior assertion of privilege, see generally David Kaye, *Congressional Papers and Judicial Subpoenas*, 23 UCLA L. Rev. 57 (1975). Professor David Kaye concludes that Congress has a valid claim of absolute privilege as to the production of its original papers. *Id.* at 76.

195. See generally Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Client*, 61 LAW & CONTEMP. PROBS. 47 (1998) (documenting the shift to institutional representation in the House and Senate).

and the establishment of those offices in the following two years.¹⁹⁶ In the preceding decade, Congress's institutional interests frequently diverged from those of the executive branch, as the executive branch resisted with increasing frequency the investigative demands of congressional committees¹⁹⁷ and prosecuted several Members of Congress.¹⁹⁸ That Congress—in altering its procedures during a time when its institutional interests were at the forefront of its concerns—explicitly reinforced its understanding of its prerogative to make the first determination of privilege lends additional support to such a right falling within the scope of the Speech or Debate Clause. When Congress takes specific action to guard its prerogatives, these actions have real, constitutional importance,¹⁹⁹ especially given the executive branch's continued acquiescence in that understanding—continued, that is, from the 1800s until 2006.

* * *

196. Congress statutorily created the Office of the Senate Legal Counsel, Ethics in Government Act, Pub. L. No. 95-521, § 701, 92 Stat. 1824, 1875 (1978) (codified as amended at 2 U.S.C. § 288–288n (2012)), whereas “[h]istorically, the functions of the House General Counsel were performed by the Counsel to the Clerk of the House,” whose position was “renamed House General Counsel in 1979,” MATTHEW E. GLASSMAN, CONG. RESEARCH SERVICE, RS22890, HOUSE OFFICE OF GENERAL COUNSEL 1 (2008). For a discussion of the differences between the House and Senate Legal Counsel offices, see generally Tiefer, *supra* note 195. In particular, the offices differ in their approaches to criminal matters. *Id.* at 59–60. The statutory authorization of the Office of Senate Counsel provides only for the Office's representation of Senators in civil actions. 2 U.S.C. § 288c (2012). The Senate office, however, may appear (and has appeared) “in criminal matters by representing document custodians and staff witnesses, or by representing the institution or its leadership as *amici*.” Tiefer, *supra* note 195, at 59 n.60; see also S. REP. NO. 95-170, at 88, reprinted in 1978 U.S.C.C.A.N. 4216, 4301 (“[T]he Counsel may be directed to defend [Senators] if the case is civil or criminal in nature but only if the subpoena arises from the performance of official duties.”). The office has appeared as *amicus* in support of at least one Senator's defense of a criminal matter. Tiefer, *supra* note 195, at 60 n.65 (citing *United States v. Durenberger*, No. 3-93-65, 1993 WL 738477 (D. Minn. Dec. 3, 1993)). House Counsel has generally been much more willing to represent the House's institutional interests in criminal proceedings. See *id.* at 59–60.

197. See Memorandum from Morton Rosenberg, Jack H. Maskell & Todd B. Tatelman, *supra* note 183, at 20–22.

198. See *supra* Parts I.B–C. See generally, e.g., Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008).

199. Here, Professors Curtis Bradley and Trevor Morrison's article, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012), provides theoretical support. The article incorporates political science scholarship into the professors' reconceptualization of “acquiescence”-based separation-of-powers arguments, concluding with regard to executive-congressional agreements that putative congressional acquiescence in executive actions should receive less weight due to the shortcomings of the Madisonian model of interbranch relations. It stands to reason that the inverse should be true, too—that executive-branch acquiescence in congressional actions and practices should receive *greater* weight.

Historical gloss suggests that the legislative branch, not the executive branch, has the sole authority to make a first determination as to the applicability of the protections of the Speech or Debate Clause. This ultimately *is* a question of the Clause's scope, but not as framed in *United States v. Renzi*.²⁰⁰ The question is not whether the scope of the clause encompasses an absolute privilege against *any* compelled disclosure, but is rather a question of procedure—Congress, not the executive branch, gets to make first determinations as to privilege.

D. Normative Considerations Support the Formalist Analysis

This tentative conclusion is supported by normative considerations. The Clause's nondisclosure protection is not designed to safeguard legislators' independence. The *Renzi* court's characterization of the *Rayburn* holding—which it described as resting upon nothing more than a “distraction rationale” hinged upon the word “question” and D.C. Circuit precedent—missed the point.²⁰¹ Any court should discount a nondisclosure rule that is based solely on avoiding legislators' distraction.

Instead, the Clause protects democratic representation.²⁰² As in other separation-of-powers contexts, the Clause's institutional protection focuses on practical control.²⁰³ Recognition that the Clause provides an *institutional* protection will ultimately be determinative of whether investigations of congressional criminality take place via subpoenas, which preserve the congressional right of prior assertion,

200. See *United States v. Renzi*, 651 F.3d 1012, 1033 (9th Cir. 2011) (framing the Clause's “nondisclosure privilege” as an extension of a Member's testimonial privilege).

201. For a description of this aspect of the D.C. Circuit's holding, see *supra* note 122.

202. Legislative independence is not primarily constitutionally valuable as an end in itself; its value is the instrumental role it plays in fostering democratic representation. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 503 (1969) (“[The Clause] ensures that legislators are free to represent the interests of their constituents without fear that they will later be called to task in the courts for that representation.”); see also *United States v. Brewster*, 408 U.S. 501, 525 (1972) (discussing the public's right to honest representation). For historical evidence supporting this point, see *supra* note 55.

203. Compare *Gravel v. United States*, 408 U.S. 606, 618 (1972) (“Rather than giving the Clause a cramped construction the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as legislator.”), with *Bowsher v. Synar*, 478 U.S. 714, 726 (1985) (holding that the Comptroller General is part of the executive branch, rather than the legislative branch, because he is removable by Congress, and that “to permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws”).

or via searches, which do not.²⁰⁴ To vest in the legislative branch a privilege to protect it from the other branches while at the same time allowing the executive branch to make an initial determination about which materials the privilege protects fatally undermines that protection, regardless of whether executive-branch officials are acting in good faith. Although a filter team's presumptive determination of the applicability of the Clause might accommodate valuable executive-branch and constituent interests—among them effectively combatting corruption²⁰⁵—“the Framers ranked other values higher than efficiency.”²⁰⁶ Moreover, as this Note proceeds to discuss, executive-branch searches—even those using filter teams—differ functionally from subpoenas in important ways.

IV. NONDISCLOSURE AS SEPARATION OF POWERS: A (MODIFIED) FUNCTIONALIST READING

A formalist rationale suffices to resolve the easier case (*Rayburn*): the executive branch cannot determine the applicability of the Speech or Debate Clause in the first instance.²⁰⁷ Formalist reasoning is insufficient, however, to resolve the issue presented in *Renzi* and future investigations of congressional criminal wrongdoing: namely, how to accommodate “law enforcement tools ‘that have never been considered problematic’”²⁰⁸ given the executive branch's Article II, Section 3 interest to “take care that the laws be faithfully executed.” The Clause does not exempt Members from criminal responsibility generally,²⁰⁹ and discerning the line at which congressionally determined procedural prerequisites become de facto

204. As noted in Judge Henderson's *Rayburn* concurrence, rejecting a nondisclosure protection would favor executive-branch searches over subpoenas, as searches avoid the active response that triggers the Clause's prohibition on questioning. *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 669 (D.C. Cir. 2007) (Henderson, J., concurring in the judgment).

205. See Harrell, *supra* note 9, at 404–08 (arguing that a “Corruption Principle,” similar in constitutional value to federalism, tips the scales in favor of reading out of the Court's jurisprudence that the Clause encompasses any evidentiary privilege). For further discussion of a corruption principle, see Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009).

206. *INS v. Chadha*, 462 U.S. 919, 959 (1983) (Powell, J., concurring); see *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (“[F]ailure of political will does not justify unconstitutional remedies.”).

207. See *supra* Part III.

208. *United States v. Renzi*, 651 F.3d 1012, 1034 (9th Cir. 2011) (quoting *Rayburn*, 497 F.3d at 671 (Henderson, J., concurring in the judgment)).

209. *Gravel v. United States*, 408 U.S. 606, 626 (1972).

substantive immunity under the auspices of protecting legislative independence is the realm of pure functionalism.

This Part demonstrates that functionalist separation-of-powers analysis—as reconceived in Professor John Manning’s article *Separation of Powers as Ordinary Interpretation*—reaches the same conclusion as the above formalist analysis on the facts in *Rayburn*, before applying functionalist analysis to *Renzi*. It first summarizes Professor Manning’s contribution to the understanding of functionalist separation-of-powers analysis,²¹⁰ then outlines the legislative interests courts might weigh against the executive branch’s “take care” interest. Next, it highlights the role of the governmental branches relative to one another, before concluding that interbranch accommodation is best left to Congress and the executive branch in the first instance.

A. *The Functionalist Argument*

In *Separation of Powers as Ordinary Interpretation*, Professor Manning argues that a freestanding separation-of-powers principle cannot negate ordinary means of constitutional interpretation.²¹¹ This means that in interpreting the Constitution, courts should apply principles of statutory interpretation, like “the specific controls the general,”²¹² rather than rule on the basis of separationist or balance-of-powers theories of the separation of powers.²¹³ Manning reasons from a view of the Constitution as a series of political compromises made during the Constitutional Convention, some of which are very specific. He argues that courts should respect not only these specific compromises—like the Bicameralism and Presentment Clauses, which “carefully divide statutemaking power among three institutions”²¹⁴—but also the Constitution’s indeterminacies, which evince a decision to leave certain determinations to future

210. Though I am confident that Professor Manning does not consider himself to be a functionalist, that does not mean that his contributions cannot be appropriated to inform functionalist separation-of-powers theory. See generally Peter L. Strauss, *A Softer Formalism*, 124 HARV. L. REV. F. 55 (2011).

211. Manning, *supra* note 20, at 1944.

212. See *id.* at 2008–11 (citing the decisions in *Chadha* and *Bowsher* as following this principle, as the outcomes were dictated by the specifics of Article I, Sections 1 and 7 and Article III, Section 1, rather than the general Necessary and Proper power).

213. For examples of “balance-of-powers” rationales, see *supra* notes 20–21.

214. Manning, *supra* note 20, at 1982.

generations; determinations to be made by Congress pursuant to the Necessary and Proper power.²¹⁵

The Supreme Court's test for functionalist separation-of-powers claims is whether a challenged action potentially prevents a branch of government from accomplishing its constitutionally assigned functions without that adverse impact being justified by an overriding need to promote objectives within the constitutional authority of another branch.²¹⁶ It is, on its face, a balancing test. Incorporating Professor Manning's insights makes clear, however, that proper functionalist separation-of-powers analysis does not simply balance interests; it also considers whether this balancing is more appropriately done by courts or by Congress.²¹⁷

B. *The Interests at Stake in Rayburn*

Turning to the interests at stake in *Rayburn*, searches of congressional offices compel access to legislative-act material immediately rather than in the due course of a subpoena response. This does more than merely distract legislators, the sole functionalist concern acknowledged by the *Renzi* court.²¹⁸ Searches also (1) deter legislative candor, (2) impede the oversight function, and (3) circumvent Congress's institutional role.

1. *Deter Legislative Candor.* The prospect of compelled disclosure of legislative-act material will deter legislators—including those who themselves will never become the target of investigations—from documenting or expressing their opinions with candor, especially those opinions that are not politically popular.²¹⁹

215. See *supra* note 180.

216. See, e.g., *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (distilling this constitutional test from *United States v. Nixon*, 418 U.S. 683 (1974)).

217. Cf. Manning, *supra* note 20 at 1975 (“[W]hen a court abstracts from the specific to the general, the level of generality at which it enforces statutory policy reflects *judicial*, and not *legislative*, choice.”).

218. Cf. *United States v. Renzi*, 651 F.3d 1012, 1034 (9th Cir. 2011) (characterizing *Rayburn* as based solely on a distraction rationale); *supra* note 122.

219. See *Nixon*, 418 U.S. at 705 (“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”). It is beyond the scope of this Note to document exactly how much of this exchange of ideas takes place in writing, or to hypothesize whether the prospect of easier or more difficult executive-branch exposure to legislative-act material might lead to media shifting (perhaps to verbal-only communication), and whether this would be good or bad for democratic representation.

This basic deterrence effect is compounded because executive-branch officials are often in no position to know what is or is not legitimate legislative activity, and thus will, even in the best of faith, fail to identify legitimate legislative-act materials, resulting in false positives.²²⁰ A right of prior assertion resting solely in the individual Member whose office is being searched will not mitigate this deterrence, because an individual Member is likely to systematically discount the value of protecting legislative materials not pertaining to her own conduct.²²¹

2. *Impede the Oversight Function.* Compelled disclosure of legislative-act material is incompatible with Congress's oversight function, as Congress may be investigating the very agency conducting the search.²²² This nearly occurred in the aftermath of the September 11 attacks, when the FBI began investigating possible leaks from the two congressional intelligence committees, which in turn were investigating "possible mistakes made by the U.S. intelligence agencies, including the FBI, CIA and NSA."²²³ A possible constitutional crisis was avoided by the Department of Justice's working with both Congressional Counsels in developing a request procedure to protect Congress's right to prior assertion of the Speech or Debate privilege.²²⁴ As it becomes increasingly difficult to obtain

220. For example, House Counsel may be called on to respond to a subpoena seeking what would look like nonprotected material to a neutral third party. In one instance, "House Counsel represented a Member who, because of a personal family tragedy, had developed a legislative interest in a particular drug." Memorandum of Points and Authorities of the Bipartisan Legal Advocacy Group, *supra* note 76, at 30 n.21. After screening each document in the Congressman's possession, House Counsel determined that all but a "handful" of the documents were protected legislative-act material; the unprotected materials included "press releases and communications with federal regulatory agencies unrelated to the legislative process." *Id.*; see also Huefner, *supra* note 21, at 324 (suggesting the possible harm to other Members and to the House as an institution from inquiry into documents peripherally related to—but not part of—Congressman Jefferson's alleged corruption).

Offsetting this deterrence mechanism does not require what some have argued is a corollary protection, requiring that the legislature determine the scope of its own privilege and/or punish Members within its Article I, Section 5 power. See *supra* note 52. It does, however, require that Congress have the right to prior assertion.

221. See Tiefer, *supra* note 195, at 59–62 (noting that the interests of Congress as an institution and those of its members often diverge during investigations).

222. For a discussion of the oversight function, see *supra* Part I.C.

223. Memorandum of Points and Authorities of the Bipartisan Legal Advocacy Group, *supra* note 76, at 32–33.

224. *Id.*

classified information from the executive branch,²²⁵ such protective space for congressional investigations is of increasing importance to ensure that the executive branch remains politically accountable and that Congress is able to access the information it needs to fulfill its constitutional responsibilities.²²⁶

3. *Circumvent Congress's Institutional Role.* Despite the above problems, one might argue that, in terms of the balance of powers between branches, executive-branch searches of congressional offices using filter teams are not functionally different than congressional prior assertion in response to subpoenas. One might even argue for their superiority, as searches might enhance legislative independence while furthering the executive-branch interest in policing corruption.²²⁷ The formalist objection to this argument is that such balance-of-power considerations simply do not matter.²²⁸ Even in functionalist terms, however, such searches are emphatically *not* the functional equivalent of subpoenas. Searches for documents render ineffective Congress's ability to retain institutional control over its materials in the face of a subpoena, and they grant access to the

225. See *supra* note 72 and accompanying text.

226. Congress often needs to access information from the executive branch in order to carry out its constitutional responsibilities, including its responsibility to legislate. See *supra* note 62.

227. See *United States v. Renzi*, 651 F.3d 1012, 1036 (9th Cir. 2011) (“[T]he ability of the Executive to adequately investigate and prosecute corrupt legislators for non-protected activity . . . is of paramount importance to the Legislative branch itself. . . . [as] ‘financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation.’ . . . Were we to join the D.C. Circuit . . . we would thus only harm legislative independence.” (quoting *United States v. Brewster*, 408 U.S. 501, 524–25 (1972))); cf. Harrell, *supra* note 9 at 405 (arguing for an “anti-corruption principle”). For a further discussion of whether prosecution or immunity best protects legislative independence, see generally Simon Wigley, *Parliamentary Immunity: Protecting Democracy or Protecting Corruption?*, 11 J. POL. PHIL. 23 (2003).

228. See *supra* note 206 and accompanying text; see also *INS v. Chadha*, 462 U.S. 919, 945 (1983) (“[P]olicy arguments supporting even useful ‘political inventions’ are subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised.”). The formalist might also note that functionalist concerns—if they are appropriate at all—are secondary to formalist analysis; thus, one does not even get to balancing legislative independence against executive-branch enforcement interests. The Supreme Court has suggested that although formalist and functionalist separation-of-powers analyses are not mutually exclusive constitutional arguments, formalist analysis has lexical priority. See *Clinton v. City of New York*, 524 U.S. 417, 448 (1998) (“[B]ecause we conclude that the Act’s cancellation provisions violate [the Presentment requirement], we find it unnecessary to consider the District Court’s alternative holding that the Act ‘impermissibly disrupts the balance of powers among the three branches of government.’” (quoting *City of New York v. Clinton*, 985 F. Supp. 168, 179 (D.D.C. 1998))).

legislative-act materials of other Members and of congressional committees without the benefit of institutional participation in the adversarial process.²²⁹

* * *

Given these interests, the Ninth Circuit was clearly incorrect in its claim that “*Rayburn* rests on the notion that . . . distraction alone can . . . serve as a touchstone for application of the Clause’s testimonial privilege.”²³⁰ *Rayburn* would come out the same under functionalist analysis as under formalist analysis because searches of congressional offices potentially prevent the legislative branch from accomplishing its constitutionally assigned functions, and the impact is not justified by an overriding need to promote objectives within the executive branch’s own constitutional authority.²³¹

A possible objection to this conclusion is that a partisan Congress might interfere with a legitimate prosecution by an executive branch controlled by the opposite political party. At face value, this objection might suggest the need for further refinement of Rule VIII to ensure that it reflects Congress’s institutional interest in the Speech or Debate Clause protection. It more likely understates the measured involvement of House and Senate Counsels in determining the applicability of Speech or Debate protections. Yet it also arguably follows from the very rationale for the Speech or Debate Clause—the ability to resist the executive branch as a matter of political power.²³²

C. *Nondisclosure Contrasted with Bribery Prosecutions*

Each of the above rationales in support of the conclusion that searches of congressional offices violate the Clause applies equally to bribery prosecutions. Bribery investigations deter legitimate legislative activity because the inquiries they necessitate expose candid—potentially impolitic, but legitimate—legislative undertakings.²³³ They present the potential for executive-branch officials to influence or control a Member’s decisions by threat of

229. See *Reckless Justice*, *supra* note 71, at 15–16 (statement of Charles Tiefer, Professor, University of Baltimore Law School) (noting that the difference between subpoenas and searches is the absence of an adversarial process).

230. See *Renzi*, 651 F.3d at 1034.

231. See *supra* note 216 and accompanying text.

232. See *supra* note 160 and accompanying text.

233. Cf. *supra* Part IV.B.1.

indictment,²³⁴ undermining the integrity of the legislative process,²³⁵ potentially compromising the oversight function,²³⁶ and arguably circumventing Congress's institutional role under Article I, Section 5.²³⁷ At first glance, these similarities should seem problematic to the reader, because the Clause permits bribery prosecutions, whereas this Note has argued that it does not permit searches of congressional offices.

This is where the difference between balance-of-powers arguments and separation-of-powers analysis matters: bribery prosecutions do not circumvent the Clause because Congress has authorized the executive branch to investigate bribery.²³⁸ As noted by the Court in *Brewster*, Congress retains the ability to constrain its authorization of bribery prosecutions in a number of ways.²³⁹ Until it does so, it appears that Congress has determined that prosecutions for bribery protect the integrity of the legislative process in a way that enhances, rather than harms, democratic representation.²⁴⁰ Put otherwise, Congress has already done the balancing. Courts' leaving

234. See Ervin, *supra* note 52, at 191 (“[T]he mere threat of government inquiry into a campaign contribution on the grounds of a possible violation of the bribery statutes can act as a powerful political deterrent on Congressmen and Senators. It is a political fact of life that rumors of criminal violations and threats of official investigations can seriously affect the independence of a legislator.”).

235. See Lederkramer, *supra* note 17, at 492–95 (demonstrating the potential for the Executive to control legislators’ behavior); see also *United States v. Brewster*, 408 U.S. 501, 522 n.16 (1972) (acknowledging that “[t]he potential for harassment by an unscrupulous member of the Executive branch may exist” and that “[a] strategically timed indictment could indeed cause serious harm to a Congressman”).

236. Subpoenaing individuals to inform Congress requires knowledge, which, in turn, requires a voluntary source of information—a source that Members cannot protect, as determined in *Gravel*. See *Gravel v. United States*, 408 U.S. 606, 628 (1972). For a description of the Court’s holding in *Gravel*, see *supra* notes 60–69 and accompanying text.

237. See *supra* note 52.

238. The federal bribery statute applies to Members of Congress on its face. See 18 U.S.C. § 201(a)(1) (2012) (“[T]he term ‘public official’ means Member of Congress . . .”). Members are not immunized from criminal prosecution, see *supra* note 209 and accompanying text, and investigations of any number of crimes may find their ways to the feet of sitting representatives.

239. See *United States v. Brewster*, 408 U.S. 501, 524 (1972) (“If we underestimate the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of federal bribery laws, but it has deliberately allowed the instant statute to remain on the books for over a century.”). It stands to reason that any attempt by Congress to exempt its Members from criminal statutes *generally*—rather than from those implicated solely by their exercise of their congressional offices—would raise the specter of an Equal Protection Clause violation. See, e.g., Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105, 116 (1994) (noting this potential constitutional problem).

240. Cf. *supra* notes 217, 227 and accompanying text.

this decision to Congress avoids constitutionalizing this determination on the basis of vague notions about the optimal balance of powers that are subject to change with each generation and/or presidential administration.

D. Accommodating Law-Enforcement Tools That Have Never Been Considered Problematic

Having argued in Part IV.B that *Rayburn* comes out the same under functionalist analysis as under formalist analysis, and then in Part IV.C having distinguished between this functionalist reasoning and balance-of-powers arguments, this Section now applies functional separation-of-powers analysis to offer a basis for distinguishing between procedural prerequisites to investigating Members and de facto substantive immunity.²⁴¹ Reading *Renzi* as a separation-of-powers case demonstrates that it is possible to respect the executive branch's prerogative to investigate Members' criminality without unduly imposing upon legislative independence in violation of the Speech or Debate Clause. *Renzi* is a good prototype for the question of whether the Speech or Debate Clause forecloses "law enforcement tools that have never been considered problematic"—not because the case would have come out differently under the above analysis,²⁴² but because it demonstrates what these law-enforcement tools are.²⁴³

Although individual Members do *not* have an absolute "nondisclosure privilege,"²⁴⁴ the Speech or Debate Clause requires more than ex parte permission from a court to use investigatory methods that will result in necessary exposure to legislative-act materials.²⁴⁵ Like the search in *Rayburn*, investigations that use wiretaps—like the one at issue in in *Renzi*—necessarily result in executive-branch exposure to legislative-act materials. The Clause's nondisclosure protection—Congress's right to the prior assertion of

241. This Section does not engage in the formalist analysis from Part III because of space constraints and because no legacy of executive-branch or congressional acquiescence in an agreed-upon arrangement regarding wiretaps exists. Instead, the executive branch has historically used wiretaps to surveil Members, though such conduct has often been used to secure political gain rather than for legitimate law-enforcement purposes. See Brief for Bipartisan Legal Advisory Group of the U.S. House of Representatives as Amicus Curiae at 27–29, *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011) (Nos. 10-10088, 10-10122).

242. See *supra* note 123 and accompanying text.

243. See *supra* note 113 and accompanying text.

244. See *supra* Part III.

245. For commentary on ex parte access to legislative-act materials, see *supra* notes 84, 229 and accompanying text.

its institutional interests—requires, in addition to a Title III wiretap application, the executive branch's cooperation with Congress to protect Congress's right to the prior assertion of the Speech or Debate Clause; cooperation that can take place through House or Senate Counsel. It is beyond the scope of this Note to articulate exactly how this will work in practice. Instead, *Rayburn* counsels that “how that accommodation is to be achieved is best determined by the legislative and executive branches in the first instance,” and past experience shows that such accommodation works in practice.²⁴⁶

This conclusion is not a wild departure from past practice, nor does it foreshadow de facto congressional immunity. Like seventy Members before him,²⁴⁷ Congressman Jefferson was convicted without reliance upon legislative-act materials.²⁴⁸ Putting aside the fact that both Congressmen Jefferson and Renzi were convicted, conferring with House Counsel about Members' apparent wrongdoing is a desirable first step in any investigation of congressional wrongdoing given the possibility not only of targeted prosecutions and/or intimidation,²⁴⁹ but also of stumbling upon legitimate false positives.²⁵⁰

CONCLUSION

Although the D.C. Circuit did not write its opinion in *United States v. Rayburn House Office Building* as a separation-of-powers case, the opinion should be read as one. This Note has recast *Rayburn* through separation-of-powers analysis to demonstrate the limited nature of *Rayburn's* holding. Had the Ninth Circuit conducted such analysis in *United States v. Renzi*, it could have avoided announcing

246. For examples of such accommodation working in practice, see *supra* notes 78–80, 222–24 and accompanying text.

247. Jonathan J. Cooper, *Members of Congress Charged with a Crime, 1798–2008*, WASH. INDEP., (July 29, 2008, 5:31 PM), <http://washingtonindependent.com/377/members-of-congress-charged-with-a-crime-1798-2008>.

248. Congressman Jefferson was convicted in the Eastern District of Virginia, which declined “the government’s invitation to reconsider the constitutionality of the search” of his congressional office as determined in *Rayburn*. See *United States v. Jefferson*, 615 F. Supp. 2d 448, 451 (E.D. Va. 2009). Congressman Renzi was also convicted. Aaron Blake, *Ex-Rep. Rick Renzi Sentenced to Three Years in Prison*, WASH. POST (Oct. 28, 2013, 3:56 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/10/28/ex-rep-rick-renzi-sentenced-to-three-years-in-prison>. At the time this Note was published, his appeal was still pending. Defendant Richard G. Renzi’s Notice of Appeal, *United States v. Renzi*, No. 13-10588 (9th Cir. Nov. 8, 2013).

249. See *supra* notes 16 and 235 and accompanying text.

250. See *supra* note 220 and accompanying text.

misleading dicta regarding the nature of the Speech or Debate Clause's nondisclosure protection. *Renzi's* dicta holds the potential to confound law-enforcement personnel, magistrate judges, and other federal courts of appeal, and to forge a new path of least resistance toward the use of search warrants, rather than subpoenas, in congressional investigations.

Procedural protections and criminal prosecutions both have a place in protecting political representation, and recognizing the limited nature of the holding in *Rayburn* is essential to accommodating both the Speech or Debate protection and the executive branch's enforcement interest. The D.C. Circuit's construction of the Speech or Debate Clause in *Rayburn* leaves executive-branch officials considerable latitude in investigating Members of Congress, subject to procedural constraints, which they may choose to navigate by coordinating with their legislative-branch counterparts. The Speech or Debate Clause protects legislative—not legislators'—independence. Its nondisclosure protection provides Congress the right to assert its institutional interests prior to the executive branch's compelling the disclosure of legislative-act materials.