



The Speech or Debate Clause: Constitutional Background and Recent Developments

Alissa M. Dolan

Legislative Attorney

Todd Garvey

Legislative Attorney

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Summary

Members of Congress have immunity for their legislative acts under Article I, Section 6, clause 1, of the Constitution, which provides in part that “for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place.” Even if their actions are within the scope of the Speech or Debate Clause or some other legal immunity, Members of Congress remain accountable to the house of Congress in which they serve and to the electorate. In cases in which the Clause applies, the immunity is absolute and cannot be defeated by an allegation of an improper purpose or motivation. When applicable, the Clause provides both immunity from liability (in civil and criminal proceedings) and a complimentary evidentiary privilege.

Recently, two separate and previously unresolved issues arose with respect to the scope and application of the Speech or Debate Clause. The first case concerned claims of employment discrimination brought against Members’ offices pursuant to the Congressional Accountability Act of 1995. Both the Tenth Circuit Court of Appeals and the D.C. Circuit ruled that the Speech or Debate Clause does not automatically prevent such suits from proceeding. Additionally, an appeal to the Supreme Court was rejected because the Court ruled that it lacked a jurisdictional basis to decide the case. These decisions, however, appear to leave unanswered significant questions about the use and introduction of evidence related to “legislative acts,” which are protected by the Speech or Debate Clause. Such questions could ultimately frustrate the ability of potential plaintiffs to pursue their claims successfully.

In August 2007, the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued its opinion in a case arising from the execution of a search warrant on the Rayburn House Office of Representative William J. Jefferson. The search was conducted as part of the FBI’s investigation of Representative Jefferson to determine whether he was involved in criminal activity, including bribery and other felonies. Such an action by the executive branch appears to be unprecedented. It raised significant constitutional questions about potential intimidation of the legislative branch and threats to its independence, which the Clause is designed to protect. Although Representative Jefferson lost his initial legal challenge, the appeals court subsequently held that the search violated the Speech or Debate Clause. The court ordered the district court to provide Representative Jefferson with copies of the seized materials and a chance to assert his privilege claims *ex parte* and *in camera*. Moreover, the appeals court ordered that the Department of Justice (DOJ) continue to refrain from reviewing any of the seized materials until the privilege claims were evaluated by the lower court.

In 2011, the Ninth Circuit Court of Appeals also weighed in on how to apply the Clause to executive branch criminal investigations of Members. In that case, Representative Richard Renzi was accused of agreeing to support legislation in exchange for a private land purchase agreement benefitting one of his creditors. He was indicted on numerous criminal counts, including extortion and fraud, which he challenged on Speech or Debate Clause grounds. The appeals court determined that his challenged actions were not covered by the Clause. Additionally, the Ninth Circuit appeared to split with the D.C. Circuit analysis in Representative Jefferson’s case on whether the Clause prevents the executive branch from ever viewing protected evidence.

This report examines the constitutional background of the Speech or Debate Clause and these recent developments in jurisprudence. It will be updated as events warrant.

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Constitutional Background

The Constitution provides that “for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place.”¹ Commonly referred to as the Speech or Debate Clause, this language affords Members of Congress immunity from certain civil and criminal suits relating to their legislative acts.² In addition, the clause also provides a testimonial privilege³ that extends not only to oral testimony about privileged matters⁴ but to the production of privileged documents.⁵

Adopted at the Constitutional Convention without debate or opposition,⁶ historically, the Speech or Debate Clause has been clearly understood to protect the “independence and integrity” of the legislature, allowing Members of Congress the freedom of speech, debate, and deliberation without fear of intimidation by the executive branch or the judiciary.⁷ In explaining the purposes of the Speech or Debate Clause, the Supreme Court traced the ancestry of the Clause to the English Bill of Rights of 1689, which was “the culmination of a long struggle for parliamentary supremacy”:

Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature.⁸

¹ U.S. CONST. art. I, §6, cl. 1.

² See e.g., *United States v. Helstoski*, 442 U.S. 477 (1979) (excluding evidence of legislative action in a criminal prosecution of a Member of the House of Representatives); *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491 (1975) (dismissing civil suit to enjoin a Senate Committee investigation) [hereinafter *Eastland*]; *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (dismissing a civil conspiracy claim against members of a Senate committee); *United States v. Johnson*, 383 U.S. 169 (1966) (reversing criminal conspiracy conviction based on Speech or Debate Clause immunity).

³ See generally, *Gravel v. United States*, 408 U.S. 606 (1972).

⁴ *Id.* at 615-16; see also *Dennis v. Sparks*, 449 U.S. 24, 30 (1980) (stating “we have held that Members of Congress need not respond to questions about their legislative acts”); *Miller v. Transamerica Press, Inc.*, 709 F.2d 524, 528-29 (9th Cir. 1983) (denying a motion to compel testimony from a former Member of Congress).

⁵ See, e.g., *Maddox v. Williams*, 855 F. Supp. 406, 413 (D.D.C. 1994) (stating that “the Speech or Debate Clause stands as an insuperable obstacle to [a party’s] attempt to acquire by compulsion documents or copies of documents in the possession of the Congress”) *aff’d sub nom.* *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995); see also *Minpeco, S.A. v. Conticommodity Services*, 844 F.2d 856, 859-61 (D.C. Cir. 1988) (applying a broad reading of the Clause to protect the “integrity of the legislative process itself”); *Hearst v. Black*, 87 F.2d 68, 71-2 (D.C. Cir. 1936) (stating that “[i]f a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded”).

⁶ See *Powell v. McCormack*, 395 U.S. 486, 502 (1969) (citing 5 DEBATES ON THE FEDERAL CONSTITUTION 406 (J. Elliot, ed. 1876); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 246 (M. Farrand, rev. ed. 1966)).

⁷ *Johnson*, 383 U.S. at 181.

⁸ *Id.* at 178 (internal citations omitted); see also *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (stating that

The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could make only a tentative claim. ... In 1668, after a long and bitter struggle, Parliament finally laid the ghost of Charles I, who had prosecuted

(continued...)

The Supreme Court has recognized that the Clause was not intended simply “for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.”⁹ The Court has also expressly noted that “the [C]lause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.”¹⁰ Moreover, the Court has “without exception ... read the Speech or Debate Clause broadly to effectuate its purposes.”¹¹

What Actions Are Protected by the Clause?

In its first decision interpreting the Clause, *Kilbourn v. Thompson*,¹² the Supreme Court read the Clause’s protection expansively, applying it “to things generally done in a session of the House by one of its Members in relation to the business before it.”¹³ However, in *Gravel v. United States* and *United States v. Brewster*, two decisions issued on the same day in 1972, the Court adopted a more limited view of the Clause’s protection. Not all actions taken by a Member in the course of his congressional duties are covered by the Speech or Debate Clause. As the Court explained,

The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an *integral part of the deliberative and communicative processes* by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.¹⁴

Legislative Acts

Since the *Gravel* and *Brewster* rulings, the Clause has only protected a “legislative act,” which is “an act generally done in Congress in relation to the business before it.”¹⁵ The Clause does not protect “political” activities, which include such activities as constituent services and issuing press releases, even if done as part of the Member’s congressional duties. The *Brewster* Court explained that “[a]lthough these are entirely legitimate activities, they are political in nature rather than legislative” and, therefore, are not afforded Speech or Debate Clause protection.

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Sir John Elliot and others for “seditious” speeches in Parliament) (internal citations omitted).

⁹ *United States v. Brewster*, 408 U.S. 501, 507 (1972); *see also* *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1881).

¹⁰ *Johnson*, 383 U.S. at 181.

¹¹ *Eastland*, 421 U.S. at 502.

¹² 103 U.S. 168 (1881).

¹³ *Id.* at 204. The quoted language has been understood as extending immunity to “all ‘things generally done’” in a congressional session by a Member in regard to pending business. Tribe, *American Constitutional Law*, vol. 1, at p. 1015 (3d ed. 2000) (emphasis added). For a similar interpretation of the quoted language, *see Brewster*, 408 U.S. at 509. The *Kilbourn* Court, 103 U.S. at 203-04, in rejecting a “narrow view of the constitutional provision” that would have limited it “to words spoken in debate,” relied on the interpretation of a comparable clause in the Massachusetts Constitution in *Coffin v. Coffin*, 4 Mass. 1 (1808).

¹⁴ *Gravel*, 408 U.S. at 625 (emphasis added).

¹⁵ *Brewster*, 408 U.S. at 512.

This distinction between legislative acts and other legitimate, but non-legislative, acts can be seen in *Hutchinson v. Proxmire*.¹⁶ In *Proxmire*, a Senator argued that the Speech or Debate Clause immunized him from liability for allegedly defamatory statements he made about a federal employee in his efforts to publicize wasteful government spending. The newsletters, press releases, and television interviews he gave to draw attention to the issue of government spending were not essential to the deliberation of the Senate and, therefore, received no Speech or Debate Clause protection. However, the same statements made in “a speech by Proxmire in the Senate would be wholly immune”¹⁷ from defamation liability.

Criminal Acts

Additionally, the Clause does not protect criminal conduct that is not part of the “due functioning” of the legislative process.¹⁸ A Member can still be prosecuted for criminal offenses such as bribery, since for example, accepting a bribe in exchange for voting a certain way is not “an integral part of the deliberative and communicative processes” by which Members participate in legislative activities.¹⁹ However, the Clause’s testimonial privilege will still prevent the introduction of evidence of true legislative acts or the motivation for such acts during such a prosecution.²⁰ As the *Gravel* court summarized, “While the ... clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts.”²¹

The distinction between covered legislative acts and unprotected criminal acts is demonstrated in *Gravel* and *Brewster*. In *Gravel*, the Court held that the Speech or Debate Clause prevented a grand jury from inquiring into the conduct or motives of a Senator or his aides²² at a subcommittee meeting in which the Senator placed classified government documents, the Pentagon Papers, in the public record. However, the Court also held that the Clause did not prohibit the grand jury from probing how the Senator had obtained the Pentagon Papers or considering allegations that the Senator arranged for private publications of the classified materials.²³ The Court explained the distinction by stating, “While the ... clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach, it

¹⁶ 443 U.S. 111.

¹⁷ *Id.* at 130.

¹⁸ *Id.* at 516; *Gravel*, 408 U.S. at 626 (“[The Clause] does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts.”).

¹⁹ *Gravel*, 408 U.S. at 625; see *Brewster*, 408 U.S. at 525-26 (“Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an ‘act resulting from the nature, and in the execution, of the office.’ Nor is it a ‘thing said or done by him, as a representative, in the exercise of the functions of that office ... ’” (internal citations omitted)).

²⁰ *Brewster*, 408 U.S. at 512. The prima facie case for bribery can be satisfied by showing that Member agreed to accept money in exchange for a promise to act a certain way. Since the prima facie case does not require a showing that the Member fulfilled that promise, the Speech or Debate Clause testimonial privilege is unlikely to burden such a prosecution. See *id.* at 525-26.

²¹ *Gravel*, 408 U.S. at 626.

²² See *infra* section “Who Can be Protected by the Clause?”

²³ *Gravel*, 408 U.S. at 609, 622-29.

does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts.”²⁴

Similarly, in *Brewster*, the Court determined that the Speech or Debate Clause did not provide immunity from prosecution for bribery, where a Member allegedly accepted payment in exchange for a promise to vote a specific way. The Court explained that the Clause has never been viewed “as protecting all conduct *relating* to the legislative process.”²⁵ Because bribery was “not, by any conceivable interpretation, an act performed as part of or even incidental to the role of a legislator,”²⁶ it received no Speech or Debate Clause protection. Additionally, the Clause’s testimonial privilege would not fatally harm the prosecution because “no inquiry into legislative acts or motivation for legislative acts is necessary for the Government to make out a prima facie case”²⁷ for bribery.

Overview of Protection

To summarize, the Supreme Court’s interpretations and holdings in cases involving the Speech or Debate Clause indicate absolute protection for Members when speaking on the House or Senate floor,²⁸ introducing and voting on bills and resolutions,²⁹ preparing and submitting committee reports,³⁰ acting at committee meetings and hearings,³¹ and conducting investigations and issuing subpoenas.³²

Conversely, the Clause “does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs” or a Member’s congressional duties, “but not a part of the legislative process itself.”³³ The Court has identified these acts to include speaking outside of Congress,³⁴ writing newsletters,³⁵ issuing press releases,³⁶ private book publishing,³⁷ distribution of official committee reports outside of the legislative sphere,³⁸ and constituent services.³⁹

²⁴ *Id.* at 626.

²⁵ *Brewster*, 408 U.S. at 515 (emphasis original).

²⁶ *Id.* at 526.

²⁷ *Id.* at 525.

²⁸ *Johnson*, 383 U.S. at 184-85; *Gravel*, 408 U.S. at 616; *see also* *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir. 1929), *cert. denied*, 282 U.S. 874 (1930).

²⁹ *Powell*, 395 U.S. at 505 (stating that “[t]he purpose of the protection afforded legislators is ... to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions); *Kilbourn*, 103 U.S. at 204 (stating that “[t]he reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, ... and to the act of voting, ...”); *see also* *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810) (declining to examine the motives of state legislators who were allegedly bribed for their votes).

³⁰ *Doe v. McMillan*, 412 U.S. 306, 311 (1973); *Kilbourn*, 103 U.S. at 204.

³¹ *See McMillan*, 412 U.S. at 311; *see also Gravel*, 408 U.S. at 628-29. In addition, some lower federal courts have also held that the Clause bars the use of evidence of a Member’s committee membership. *Compare* *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1991), *rehearing denied*, 980 F.2d 1449 (11th Cir. 1992) *with* *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994), *cert. denied*, 514 U.S. 1003 (1995).

³² *See Eastland*, 421 U.S. at 507; *see also Tenney*, 341 U.S. at 377 (refusing to examine motives of state legislator in summoning witness to hearing).

³³ *Brewster*, 408 U.S. at 528.

³⁴ *Id.* at 512.

³⁵ *Id.*

Who Can be Protected by the Clause?

The Speech or Debate Clause protection applies not only to Members, but also to their aides, who “are to be ‘treated as one.’”⁴⁰ The Clause protects an aide’s action when the Clause would have protected the same action if it was done by a Member. The Clause is interpreted as extending its protection to aides because the *Gravel* Court recognized

that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members’ performance that they must be treated as the latter’s alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary will inevitably be diminished and frustrated.⁴¹

Furthermore, the Clause affords both an institutional and an individual privilege.⁴² It is uncertain whether, at least in limited circumstances, the institution might be able to waive the privilege of individual Members.⁴³ The Court has assumed, without deciding, that an individual Member could waive the Clause’s protection against criminal prosecution, but has held that such a waiver could “be found only after explicit and unequivocal renunciation of the protection.”⁴⁴

It has been held that the Clause may be asserted not only by a current Member but also by a former Member in an action implicating his conduct while in Congress⁴⁵ and by a Member’s “aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.”⁴⁶ The immunity applies regardless of whether the Member or aide is a party to the litigation or has merely been called to testify or give a deposition.⁴⁷

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³⁶ *Proxmire*, 443 U.S. 111.

³⁷ *Gravel*, 408 U.S. at 625-26.

³⁸ *McMillan*, 412 U.S. at 315-16.

³⁹ *Brewster*, 408 U.S. at 512 (including “the making of appointments with Government agencies [and] assistance in securing Government contracts”).

⁴⁰ *Gravel*, 408 U.S. at 616 (quoting *United States v. Doe*, 455 F.2d 753, 761 (1972)).

⁴¹ *Id.* at 616-17 (internal citations omitted).

⁴² *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978). See also *Helstoski*, 442 U.S. at 492-93.

⁴³ In several cases, the Court specifically has declined to rule on the issue of waiver. See, e.g., *Helstoski*, 442 U.S. at 490; *Brewster*, 408 U.S. at 529 n.18; *Johnson*, 383 U.S. at 185.

⁴⁴ *Id.* at 490-91.

⁴⁵ See *Brewster*, 408 U.S. at 502.

⁴⁶ *Gravel*, 408 U.S. at 618.

⁴⁷ *Miller v. Transamerican Press*, 709 F.2d 524, 529 (9th Cir. 1983); *Tavoulaareas v. Piro*, 93 F.R.D. 11, 18-19 (D.D.C. 1981).

Recent Cases

Employment and Personnel Actions

For some time now, there has been an open question as to whether the Speech or Debate Clause protects a Member from liability in civil actions arising from office personnel disputes. In 1995, with little debate focused on the immunity issue, the House and Senate passed the Congressional Accountability Act (CAA),⁴⁸ which applies several civil rights, labor, and workplace safety and health laws to Congress.⁴⁹ Section 413 of the CAA, however, declares that the authorization to bring judicial proceedings under various provisions of the law does not constitute a waiver of the Speech or Debate privilege of any Member.⁵⁰

Prior to the passage of the CAA, the United States Court of Appeals for the District of Columbia (D.C. Circuit) had held that the Speech or Debate Clause provided Members with immunity from personnel actions brought by at least some congressional employees. In *Browning v. Clerk, U.S. House of Representatives*,⁵¹ it was alleged that the termination of the first African American Official Reporter employed by the House was the result of racial animus.⁵² The court, in dismissing the claims, held that the Speech or Debate Clause protected Members from liability based on personnel actions they took if the impacted “employee’s duties were directly related to the due functioning of the legislative process.”⁵³

However, two years later, the Supreme Court raised doubts as to whether Speech or Debate Clause immunity extended to employment actions. In *Forrester v. White*,⁵⁴ a case alleging sex discrimination, the Court held that a state court judge did not have judicial immunity for the firing of a probation officer. It concluded that the immunity did not extend to “administrative, legislative, or executive functions,” regardless of how important the functions may be to the “very functioning of the court.”⁵⁵ In other words, according to the Court, the employment decision in *Forrester* was administrative, not judicial; therefore, there was no entitlement to judicial immunity.⁵⁶ Subsequently, in *Gross v. Winter*,⁵⁷ the D.C. Circuit, applying *Forrester*, held that common-law legislative immunity did not immunize a D.C. Council Member from suit based on employment-related decisions.⁵⁸ However, the court in *Gross* declined to overturn the reasoning

⁴⁸ Congressional Accountability Act, P.L. 104-1, 109 Stat. 3 (1995).

⁴⁹ The CAA covers the following laws: Fair Labor Standards Act of 1938, Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act of 1990, Age Discrimination in Employment Act of 1967, Family and Medical Leave Act of 1993, Occupational Safety and Health Act of 1970, Chapter 71 of Title 5 of the U.S. Code, Employee Polygraph Protection Act of 1988, Worker Adjustment and Retraining Notification Act, Rehabilitation Act of 1973, and Chapter 43 of Title 38 of the U.S. Code.

⁵⁰ Codified at 2 U.S.C. §1413.

⁵¹ 789 F.2d 923 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 996 (1986).

⁵² *Id.* at 924.

⁵³ *Id.* at 929.

⁵⁴ 484 U.S. 219 (1988).

⁵⁵ *Id.* at 227-28.

⁵⁶ *Id.* at 229-30.

⁵⁷ 876 F.2d 165 (D.C. Cir. 1989).

⁵⁸ *Id.* at 172 (stating that “the functions judges and legislators exercise in making personnel decisions affecting such employees are administrative, not judicial or legislative”).

in *Browning*, preferring instead to distinguish the case on the grounds that it dealt with a common law privilege and not the Speech or Debate Clause.

In light of the passage of the CAA and these previous cases, both the Tenth Circuit Court of Appeals⁵⁹ and the D.C. Circuit⁶⁰ have weighed in on this issue, rejecting arguments that the Speech or Debate Clause protection requires automatic dismissal of employment-related civil cases.

Bastien v. Campbell

In 2002, the United States District Court for the District of Colorado heard the first case applying the Speech or Debate Clause to an employment discrimination allegation brought pursuant to the CAA.⁶¹ The plaintiff, a former district office staffer for Senator Ben Nighthorse Campbell, alleged age discrimination and retaliation for discrimination complaints and sought relief under the CAA. The Senator's office moved to dismiss the claims, arguing that the Speech or Debate Clause immunized the office from the claims because the "[p]laintiff's duties of meeting with constituents, gathering information for the Senator, discussing constituent suggestions and then conveying them to the Senator, constitute actions that directly relate to the due functioning of the legislative process."⁶² The district court found that the plaintiff's duties included "gathering and conveying to Senator Campbell himself, and to the Defendant, information critical to the Senator's legislative agenda."⁶³ As a result, the court dismissed the suit, holding that because the plaintiff's duties were directly related to the due functioning of the legislative process, the Speech or Debate Clause immunity applied.⁶⁴

The Court of Appeals for the Tenth Circuit, however, reversed the lower court's decision, distinguishing between "legislative" acts that are entitled to Speech or Debate immunity and non-legislative acts, which are not.⁶⁵ Senator Campbell argued that the plaintiff's job function constituted a legislative act because the information received from constituents could affect his drafting and support of legislation and his votes. The court disagreed, classifying such functions as "informal information gathering" that is distinct from the type of information gathering performed by legislative committees, which is covered by the Speech or Debate Clause.⁶⁶ Extending the Clause's protection to other forms of information gathering by individual Members would exceed the Supreme Court's interpretation of the Clause's scope.⁶⁷ Therefore, the Clause's

⁵⁹ *Bastien v. Office of Senator Ben Nighthorse Campbell*, 209 F. Supp. 2d 1095 (D. Colo. 2002) (holding that Speech or Debate immunity did apply to employment actions) [hereinafter *Bastien I*], *rev'd*, *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004) [hereinafter *Bastien II*].

⁶⁰ *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1 (D.C. Cir. 2006).

⁶¹ *Bastien I*, 209 F. Supp. 2d 1095.

⁶² *Id.* at 1101.

⁶³ *Id.* at 1104.

⁶⁴ *Id.* at 1103 (stating that "the Speech or Debate Clause provides immunity to Members of Congress and their aides for personnel actions taken with respect to employees whose duties are directly related to the due functioning of the legislative process"); *see also id.* at 1104 (stating that "the personnel actions taken by [the Office] against the Plaintiff are afforded Speech or Debate Clause immunity").

⁶⁵ *Bastien II*, 390 F.3d at 1315.

⁶⁶ *Id.* at 1316 (citing *Gravel*, 408 U.S. at 619-21).

⁶⁷ *Id.* (stating that "[t]o extend protection to informal information gathering ... would be the equivalent of extending Speech or Debate Clause immunity to debates before local radio stations or Rotary Clubs").

protection did not apply because the allegedly discriminatory actions by the Senator were not legislative acts. Additionally, the Clause's testimonial privilege would not hamper this civil action because the "[p]laintiff's discrimination claim does not require proof of any legislative act by Senator Campbell or his staff."⁶⁸

The court did note that even if the Senator's actions were protected, the Senator's office could still be liable for personnel decisions because an office's actions fall outside the scope of the Clause's immunity.⁶⁹ Moreover, the court specifically refused to adopt the D.C. Circuit's reasoning in *Browning v. Clerk*, noting that, in its opinion, *Browning* extended further than the Supreme Court's cases involving the Speech or Debate Clause. However, the court did note that even if it had adopted the *Browning* standard, this employee's case would be entitled to proceed because the duties performed were not central to the legislative process and, therefore, not entitled to the Speech or Debate Clause's protection.⁷⁰

Fields v. Office of Eddie Bernice Johnson and Hanson v. Office of Senator Dayton

The Tenth Circuit's decision in *Bastien* created a conflict between the circuits that led the D.C. Circuit to consolidate two pending cases and hear them en banc.⁷¹ The two cases involved, respectively, the House office of the Honorable Eddie Bernice Johnson and the office of Senator Mark Dayton. The D.C. Circuit examined whether employment suits brought under the CAA must be dismissed because of the Speech or Debate Clause and whether *Browning v. Clerk of U.S. House of Representatives* should remain the law of the circuit.⁷² With 8 of the 10 members of the D.C. Circuit participating, the court unanimously decided that the Speech or Debate Clause does not require the dismissal of suits brought under the CAA.⁷³ The court also unanimously held that the *Browning* framework was no longer consistent with Supreme Court precedent and should be abandoned.⁷⁴

Despite this agreement that automatic dismissal was unwarranted, the court splintered when determining the appropriate scope of Speech or Debate Clause applicability after the plaintiff has established a prima facie case of discrimination. On the one hand, Judge Randolph's plurality opinion focused on the interaction between the judicially created, burden-shifting framework used in employment discrimination cases and the Clause's potential protections.⁷⁵ Under the framework, a plaintiff proves a prima facie case of discrimination, then the employer rebuts by producing evidence that the conduct was nondiscriminatory, and, finally, the plaintiff tries to

⁶⁸ *Id.*

⁶⁹ *Id.* at 1315-16.

⁷⁰ *Id.* at 1319 (stating that "[i]n any event, even under the *Browning* formulation, Plaintiff here prevails, because her job duties do not satisfy the *Gravel* standard for legislative act").

⁷¹ An *en banc* proceeding is one "with all judges present and participating; in full court." BLACK'S LAW DICTIONARY, 546 (7th ed. 1999).

⁷² *Fields*, 459 F.3d at 3.

⁷³ *Id.* at 17; *see also id.* at 17 (Rodgers, J., concurring); *id.* at 25-26 (Brown, J., concurring); *id.* at 18 (Tatel, J., concurring).

⁷⁴ *Id.* at 17; *see also id.* at 17 (Rodgers, J., concurring); *id.* at 25-26 (Brown, J., concurring); *id.* at 18 (Tatel, J., concurring).

⁷⁵ *Fields*, 459 F.3d at 14-16.

demonstrate that the employer's explanation is pretextual.⁷⁶ If the employer's nondiscriminatory reason for taking the adverse employment action is motivated by a legislative act, the Speech or Debate Clause protection may prevent a plaintiff from being able to challenge the Member's assertion,⁷⁷ since Members remain protected from "inquiry into legislative acts or the motivation for actual performance of legislative acts."⁷⁸

Judge Randolph attempts to provide some guidelines for invoking the Clause's protection⁷⁹ and emphasizes that the Clause's application must be determined on a case-by-case basis.⁸⁰

On the other hand, Judge Janice Rodgers Brown, writing for three members of the court, noted that the CAA creates a "legal fiction" by holding the Member's "employing office" liable for employment discrimination claims, not the Member or his aides individually.⁸¹ She concluded that the "employing office," as an "organizational division within Congress," is not entitled to Speech or Debate Clause protection.⁸² Judge Brown did recognize that the Clause's evidentiary privilege would protect the Member from disclosure or discussion of his legislative acts if he was personally implicated.⁸³

Judge Brown appears to suggest a narrower reading of the Speech or Debate Clause than offered by Judge Randolph's plurality opinion. According to Judge Brown's opinion, as long as a Member or potentially protected aide is not directly providing evidence or giving testimony, the Speech or Debate Clause is not implicated; therefore, plaintiffs can potentially pursue more claims under this interpretation.⁸⁴ However, if the suit requires such evidence or testimony, even Judge Brown's interpretation would require a district court to address assertions of Speech or Debate immunity on a case-by-case basis.⁸⁵

Senator Dayton's office filed a petition for writ of certiorari to the Supreme Court, along with a statement of jurisdiction asserting that the CAA afforded his office an appeal by right to the Court.⁸⁶ The Court set oral arguments for April 24, 2007, to address whether the office was

⁷⁶ See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-56 (1981); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁷⁷ *Fields*, 459 F.3d at 15-16.

⁷⁸ *Id.* at 14 (citing *Brewster*, 408 U.S. at 508; *Brown & Williamson v. Williams*, 62 F.3d 408, 415 n. 5 (D.C. Cir. 1995) (stating that "[e]ven when properly subject to suit, members of Congress are privileged against the evidentiary use against them of any legislative act, even if the act is not claimed to be itself illegal, but is offered only to show motive...")); see also *Helstoski*, 442 U.S. at 487-89; *Johnson*, 383 U.S. at 169.

⁷⁹ Judge Randolph's opinion indicates that an affidavit should be submitted from a person eligible to invoke the Clause and that it should indicate the "legislative activity" or integral part of the legislative process the plaintiff's suit will require inquiry into. See *Fields*, 459 F.3d at 15-17.

⁸⁰ *Id.* at 17-18.

⁸¹ *Id.* at 26 (Brown, J., concurring).

⁸² *Id.* at 27 (Brown, J., concurring).

⁸³ *Id.*

⁸⁴ *Id.* at 32 (Brown, J., concurring) (stating that "[b]ecause the members are not defendants, the suits do not burden them with defense costs nor place them at any risk of personal liability, and as long as members and their aides are not themselves 'questioned,' an inquiry into legislative acts does not implicate the Speech or Debate Clause." (internal citations omitted)).

⁸⁵ *Id.* (stating that "[w]e need not explore the precise contours of this privilege today; the district court may address these problems as they arise").

⁸⁶ See Congressional Accountability Act, P.L. 104-1 §412, 109 Stat. 3 (1995) (codified at 2 U.S.C. §1412 (2000)) (stating that "[a]n appeal may be taken directly to the Supreme Court of the United States from any interlocutory or (continued...)

entitled to a direct appeal to the Supreme Court and whether the case was now moot because Senator Dayton's term of office had expired.⁸⁷ The Court issued its decision on May 21, 2007, unanimously holding that it lacked jurisdiction to reach the merits of the case.⁸⁸ Senator Dayton based his request for review on Section 412 of the CAA, which states that "[a]n appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this chapter."⁸⁹ According to the Court, this section cannot serve as the basis for jurisdiction because the D.C. Circuit's "determination that jurisdiction attaches despite a claim of Speech or Debate Clause immunity is best read as a ruling on the scope of the Act, not its constitutionality."⁹⁰ The Court also concluded that there was no basis for exercising its discretionary certiorari jurisdiction as the D.C. Circuit's decision did not conflict with any other circuit with respect to the application of the Speech or Debate Clause in suits challenging personnel actions taken by Members of Congress.⁹¹ Senator Dayton's office went back to the district court after its Speech or Debate Clause argument was rejected and the court denied its motion to dismiss arguing that the claim was moot.⁹² News reports indicate that Senator Dayton settled the claim in February 2009.⁹³ Representative Johnson's office ultimately prevailed on the merits of the employee's discrimination claims in district court⁹⁴ and the subsequent appeal was voluntarily dismissed in 2008.⁹⁵

Executive Branch Criminal Investigations of Members

In recent years, both the D.C. Circuit and the Ninth Circuit have issued opinions addressing the application of the Speech or Debate Clause privilege to executive branch criminal investigations of Members. In both cases, *United States v. Rayburn House Office Building* and *United States v. Renzi*, the underlying criminal investigation concerned bribery, a non-legislative act that was not covered by the Clause. However, the appeals courts had to assess how the Clause's privilege impacted the executive branch's effort to gather evidence throughout its investigations. In part, the courts addressed whether the Clause only prohibited the executive branch from introducing privileged documents into evidence during a court proceeding or whether it also prohibited the executive branch from ever viewing the documents at all. On this last point, the two circuits appear to split. The D.C. Circuit adopted a more expansive interpretation of the privilege, stating that it prevents the executive from viewing privileged documents at any stage. However, the Ninth Circuit interpretation is narrower, determining that the Clause only provided the Member with a non-use privilege at trial.

(...continued)

final judgment, decree, or order of a court upon the constitutionality of any provision of this chapter.").

⁸⁷ See *Office of Senator Dayton v. Hanson*, 549 U.S. 1177 (2007).

⁸⁸ *Dayton v. Hanson*, 550 U.S. 511 (2007). Technically, the Court's decision was by a vote of 8-0 with Chief Justice Roberts not participating, as he had been a member of the D.C. Circuit when it rendered its decision in this case.

⁸⁹ Congressional Accountability Act, P.L. 104-1 §412, 109 Stat. 3 (1995) (codified at 2 U.S.C. §1412 (2000)) (emphasis added).

⁹⁰ *Dayton*, 550 U.S. at 514.

⁹¹ *Id.* (comparing *Fields*, 459 F.3d 1 (case below), with *Bastien II*, 390 F.3d 1301).

⁹² *Hanson v. Office of Dayton*, 535 F. Supp. 2d 25 (D.D.C. 2008).

⁹³ See, e.g., Pat Doyle, *Questions Over Deal in Suit Against Dayton; Suit Involved Firing of Staffer During US Senate Term*, STAR TRIBUNE, October 12, 2010, at 4B.

⁹⁴ *Fields v. Office of Johnson*, 520 F. Supp. 2d 101 (D.D.C. 2007).

⁹⁵ *Fields v. Office of Johnson*, 2008 U.S. App. LEXIS 1107 (D.C. Cir. 2008).

Searches and Seizures of Congressional Offices: *United States v. Rayburn House Office Building*

In March 2005, the FBI began an investigation of Representative William J. Jefferson to determine whether he and other persons had engaged in bribery and/or wire fraud.⁹⁶ The investigation centered on allegations that the Representative used his position to promote the sale of telecommunications equipment and services by a domestic firm to several African nations in return for stocks and cash and that he planned to bribe high-ranking Nigerian officials, amongst others, to obtain the necessary approval for the firm's ventures.

On May 20, 2006, DOJ and FBI agents executed a valid search warrant at Representative Jefferson's congressional offices in the Rayburn Building.⁹⁷ The search lasted approximately 18 hours and resulted in the seizure of two boxes of paper records and electronic copies of the contents of every computer hard drive in the Representative's office. The General Counsel of the House of Representatives and Representative Jefferson's private counsel sought entry to the offices to oversee the search but were prohibited from doing so by the agents.⁹⁸

The warrant's supporting affidavit contained special procedures to guide and confine the search process, recognizing the uniquely sensitive nature of searching a congressional office.⁹⁹ A search team of special agents from the FBI who had no role in the investigation (non-case agents) would examine every paper document in the office and determine which documents were responsive to the list of documents being sought. The non-case agents were forbidden from revealing any non-responsive or politically sensitive information they came across during the search. Responsive documents were then transferred to a "filter team," consisting of two non-prosecution team DOJ attorneys and a non-case FBI agent, who reviewed the documents to determine responsiveness and whether the Speech or Debate Clause protection could apply. Responsive documents not covered by the Speech or Debate Clause were to be transferred to the prosecution team, which had to provide copies to Representative Jefferson's counsel. Papers potentially covered by the Clause were to be recorded in a log to be given, along with copies of the papers, to counsel. According to the warrant, the potentially privileged papers were not to be supplied to the prosecution team until a court so ordered.

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

⁹⁶ Allegations included wire fraud or conspiracy to commit wire fraud and bribery or conspiracy to bribe a public official and a foreign official. These actions would be in violation of 18 U.S.C. §§201, 371, 343, 1346, 1349; 15 U.S.C. §78dd-1.

⁹⁷ Unless otherwise noted, the sources for the factual background herein related are as follows: The Affidavit in Support of Application of Search Warrant, dated May 18, 2006 [hereinafter Affidavit]; the Memorandum in Support of Motion for Return of Property, dated May 24, 2006 on behalf of Representative William J. Jefferson [hereinafter Jefferson Memo]; and the Government's Response to Representative William Jefferson's Motion for Return of Property, dated May 30, 2006 [hereinafter DOJ Response]. The search was authorized by a warrant issued by Chief Judge Thomas Hogan of the United States District Court for the District of Columbia on May 18, 2006.

⁹⁸ Jefferson Memo, *supra* footnote 97, at 3-8; *see also* DOJ Response, *supra* footnote 97, at ¶ 4.

⁹⁹ It appears that no warrant to search a congressional office had ever been sought or obtained before.

along with copies of the documents. The filter team would then request the court to review the potentially privileged records.¹⁰⁰

Speech or Debate Clause Legal Arguments

The purpose of the Speech or Debate Clause protection is to insulate Members and the legislature from intimidation by the executive or the judiciary and reinforce the separation of powers among the co-equal branches. Allowing the FBI, an executive branch entity, to make the initial legal and constitutional determinations of which documents seized from a Member's congressional office are protected by the Clause arguably endangers Congress's autonomy and exposes it to future intimidation by the executive. Therefore, conducting a search of a congressional office following the procedures discussed above could arguably undermine the very purpose of the Speech or Debate Clause, which might not be mitigated even if the documents are later ruled inadmissible in court since the executive has already studied the full contents of the Member's office.

A former Deputy Attorney General in the Reagan Administration testified before the House Judiciary Committee and summarized these concerns:

The Clause is offended the moment the F.B.I. peruses a constitutionally protected legislative document. Even if the document is not seized, memory of its political contents remains in the Executive Branch for use in thwarting congressional opposition or leaking embarrassing political information ... The knowledge by a Member that the F.B.I. can make an unannounced raid on his legislative office to read and rummage through every document or email is bound to discourage Congress from the muscular check against the Executive that the Speech or Debate Clause was calculated to foster.¹⁰¹

Representative Jefferson raised these Speech or Debate Clause arguments when he sought to have the search declared unconstitutional and the seized materials returned to his possession.¹⁰² In addition to raising many of the arguments discussed above, Representative Jefferson argued, *inter alia*, that execution of the search warrant “guaranteed that the executive would be in possession of material that relates to the Member's legislative duties.”¹⁰³ The motion asserted that those actions, coupled with the exclusion of Representative Jefferson's counsel and the House General Counsel from even viewing the search process, violated his Speech or Debate Clause privilege.¹⁰⁴

The DOJ argued in its reply brief that because it was only interested in obtaining non-legislative materials, the use of a filter team provided sufficient protection of the privilege under the Speech or Debate Clause.¹⁰⁵ The DOJ appeared to be arguing that the Clause's language “shall not be

¹⁰⁰ Additional procedures were proposed after Representative Jefferson objected that the filter team might make unilateral determinations about privilege. The additional procedures provided counsel with copies of all material seized from the office and stated that any dispute over privilege would be resolved by the court. *See* DOJ Response, *supra* note 48, at 11-12.

¹⁰¹ *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution*, Hearing Before the House Comm. on the Judiciary, 109th Cong., 2d Sess. (May 30, 2006) (written testimony of Mr. Bruce Fein at 3-4) *available at*, <http://judiciary.house.gov/OversightTestimony.aspx?ID=637>.

¹⁰² The House General Counsel filed as *amicus curiae* on behalf of the House Bipartisan Leadership Council, in support of Rep. Jefferson's claims.

¹⁰³ Jefferson Memo, *supra* footnote 97 at 13.

¹⁰⁴ *Id.*

¹⁰⁵ DOJ Response, *supra* footnote 97, at 14-17 (stating that “the procedures proposed to be used by the Government are (continued...)”).

questioned at any other place” merely protects Members from having information relating to legislative acts used against them in a criminal proceeding.¹⁰⁶ The DOJ’s filing suggested that the past practice of using subpoenas to obtain documents and allowing the House General Counsel’s Office initially to review and assess the privilege was simply a matter of “comity.”¹⁰⁷ The DOJ also argued that Representative Jefferson’s position “would effectively extend Speech or Debate immunity to clearly unprivileged materials by making it impossible to execute a search warrant in any place containing even one privileged document.”¹⁰⁸

The DOJ’s argument seemed to emphasize that the actual prosecution team never had access to any privileged information. Therefore, it argued, the Speech or Debate Clause was not violated.¹⁰⁹ Under this view, the Clause provides nothing more than an evidentiary privilege to be asserted prior to trial, which Representative Jefferson could still raise like a routine motion to exclude improperly seized evidence. To support this argument, the DOJ compared this search to other Member prosecutions where the DOJ made privilege determinations for documents it received pursuant to a subpoena.¹¹⁰

District Court Proceedings

The United States District Court for the District of Columbia rejected Representative Jefferson’s arguments and upheld the search and seizure of materials from his Rayburn House Office as constitutional.¹¹¹ The court adopted an arguably narrow interpretation of the Clause, stating that a broader interpretation “would require a Member of Congress to be given advance notice of any search of his property, including property outside his congressional office ... and further that he be allowed to remove any material that he deemed to be covered by the legislative privilege prior to the search.”¹¹² It also held that the Clause’s testimonial privilege did not apply under the circumstances presented because unlike providing responses to a subpoena, having property

(...continued)

plainly sufficient to protect against any permissible intrusion”).

¹⁰⁶ *Id.* at 17-18 (stating that “even if the Speech or Debate Clause were understood to create a criminal discovery privilege, rather than a privilege protecting legislators against being questioned about privileged information or having such information used against them (a point the Government does not concede), it simply does not constitute ‘discovery’ for a law enforcement agent unconnected with the investigation to make a cursory review of privileged information solely for the purpose of determining whether it is privileged”).

¹⁰⁷ *Id.* at 14. DOJ’s assertion with respect to the development and use of House Rule VIII appears to discount the significant historical precedent and evidence that suggests the House of Representatives have nearly always taken a strong position with respect to the release of information in response to requests and subpoenas by the executive branch. Namely, it appears that the House has consistently defended its right to make the first determination with respect to the application of the Speech or Debate privilege. See CRS General Distribution Memorandum, *Legal and Constitutional Issues Raised by Executive Branch Searches of Legislative Offices*, 13-22, by Morton Rosenberg, Jack H. Maskell, and Todd B. Tatelman (June 13, 2006) (copies available from author on request).

¹⁰⁸ *Id.* at 23.

¹⁰⁹ *Id.* at 17 (arguing that “[b]ecause such officials are under affirmative obligations not to disclose the contents of any documents they see (and to attest that they have not done so), there is no prejudice to Rep. Jefferson as a result of the way in which the search was carried out.” citing *Weatherford v. Bursey*, 429 U.S. 545, 556-58 (1977)).

¹¹⁰ *Id.* at 21 (arguing that “[i]t has never been suggested that the Constitution is offended merely because members of the prosecution team review legislative materials in the course of making privilege determinations”).

¹¹¹ *In Re: Search of the Rayburn House Office Building Room 2113, Washington, D.C. 20515*, No. 06-213, slip op. 1 (D.D.C. July 10, 2006).

¹¹² *Id.* at 12.

searched pursuant to a search warrant is not a testimonial act.¹¹³ In the court’s view, the Speech or Debate Clause merely protects Members from having to “answer questions as to [their] legislative activities”; it “does not prohibit the disclosure of legislative material.”¹¹⁴

The court compared the Speech or Debate Clause privilege to other common law privileged in upholding the filtering procedure employed by the FBI during the search. It rejected the notion that the Clause functionally required advanced notice of a search that might uncover privileged documents, since no other privilege mandated this notice.¹¹⁵ Since Representative Jefferson remained free to assert the privilege at a later point in potential criminal proceedings against him, the search did not violate the Speech or Debate Clause.

After having his request for a stay pending appeal denied by the district court, Representative Jefferson filed notice of appeal to the U.S. Court of Appeals for the District of Columbia Circuit, seeking a stay of the lower court’s order and any DOJ review of the seized documents.¹¹⁶ A three-judge panel of the appeals court issued a two-page order remanding the case back to the district court for further fact finding with respect to claims of legislative privilege and detailing the procedures under which the court is to perform its duties.¹¹⁷

Court of Appeals Proceedings

Following the remand for further fact-finding, the court of appeals heard oral argument on Representative Jefferson’s appeal on May 15, 2007, and issued its decision on August 3, 2007.¹¹⁸ It concluded that the “compelled disclosure of privileged material to the Executive during

¹¹³ *Id.* at 14. The court relied on Fifth Amendment case law for this analysis and concluded that “[j]ust as a search warrant does not trigger the Fifth Amendment’s testimonial privilege, neither does a search trigger the Speech or Debate Clause’s testimonial privilege. *Id.* at 15.

¹¹⁴ *Id.* at 16.

¹¹⁵ *Id.* at 17.

¹¹⁶ The resolution of Representative Jefferson’s appeal appears to have been expedited due to an announcement by the Attorney General that set a July 26, 2006, deadline for investigators to begin reviewing the documents and materials seized from the Representative’s House office. See Kenneth P. Doyle, *DOJ Complying with Appeals Court Order; Review of Jefferson Search Materials Put Off*, BNA MONEY & POLITICS REPORT, 2 (August 1, 2006), available at, <http://pubs.bna.com/ip/bna/mpr.nsf/eh/A0B3B3Y4F0>.

¹¹⁷ See *United States v. Rayburn House Office Building Room 2113, Washington, D.C. 20515*, No. 06-3105 slip op. 1 (D.C. Cir. July 28, 2006). Specifically, the Court of Appeals ordered that the District Court copy all of the paper documents seized by the FBI, as well as provide a list of responsive computer documents to Representative Jefferson for his review. Moreover, the Court of Appeals ordered that Representative Jefferson, within two days of receipt of said documents and records, submit ex parte any claims of privilege under the Speech or Debate Clause. According to the order, the District Court would then conduct an in camera review of the claims and make any and all necessary findings regarding whether the specific documents are legislative in nature and, therefore, privileged. Finally, the Court of Appeals enjoined the DOJ from reviewing any of the documents or materials seized pending further order of the court.

¹¹⁸ See *United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515*, No. 06-3105, slip op. (D.C. Cir. 2007). Merits briefs were filed by both Representative Jefferson and the DOJ. In addition, *amicus curiae* (friend of the court) briefs, supporting Representative Jefferson’s legal position on the Speech or Debate Clause, were filed by the following individuals: Stanley M. Brand, Christopher Bryant, Steven F. Huefner, Thomas E. Mann, Norman J. Ornstein, Steven R. Ross, Thomas J. Suplak, Charles Tiefer, the Honorable Thomas S. Foley, the Honorable Newt Gingrich, the Honorable Robert H. Michel, the Honorable Abner J. Mikva, Scott Palmer, Elliot Berke, and Reid Stuntz. In support of the DOJ, the Washington Legal Foundation, Judicial Watch, and the Citizens for Responsibility and Ethics in Washington each filed *amicus curiae* briefs. The House General Counsel, who filed as *amicus curiae* on behalf of the House Bi-Partisan Leadership Council before the District Court, did not file a brief before the D.C. Circuit.

execution of the search warrant ... violated the Speech or Debate Clause and that the Congressman is entitled to the return of documents that the court determines to be privileged under the Clause.”¹¹⁹ In reaching its conclusion, the court affirmed its holding in *Brown & Williamson Tobacco Corporation v. Williams*,¹²⁰ emphasizing that a critical component of the Speech or Debate Clause is the prevention of intrusions into the legislative process, and that the compelled disclosure of legislative materials is such a disruption, regardless of the proposed use of the material.¹²¹

Applying these principles to the search of Representative Jefferson’s office, the court stated that

this compelled disclosure clearly tends to disrupt the legislative process: exchanges between a Member of Congress and the Member’s staff or among Members of Congress on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity. This chill runs counter to the Clause’s purpose of protecting against disruption of the legislative process.¹²²

The court carefully distinguished between the lawfulness of searching a congressional office pursuant to a search warrant—which the court held was clearly permissible—and the lawfulness of the way the search was executed considering the Member’s potential Speech or Debate Clause protection.¹²³ Thus, it concluded that the Clause was violated because the executive’s search procedures “denied the Congressman any opportunity to identify and assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents.”¹²⁴ The court declined, however, to expressly delineate acceptable procedures that could avoid this violation in future searches of congressional offices, noting only that there appears to be “no reason why the Congressman’s privilege under the Speech or Debate Clause cannot be asserted at the outset of a search in a manner that also protects the interests of the Executive in law enforcement.”¹²⁵ Moreover, the court observed that the precise contours of those accommodations are a matter best left to negotiations between the political branches.¹²⁶

Additionally, the court declined to grant Representative Jefferson’s requested relief, a return of all of the seized documents. Instead, the court determined that its previous Remand Order “affords the Congressman an opportunity to assert the privilege prior to disclosure of privileged materials to the Executive” for electronic files.¹²⁷ With respect to the paper documents, the court concluded that, while the Clause’s testimonial privilege prevents compelled disclosure of privileged documents, it does not prohibit “inquiry into illegal conduct simply because it has some nexus to

¹¹⁹ *Id.* at 3.

¹²⁰ 62 F.3d 408 (D.C. Cir. 1995).

¹²¹ See *United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515*, No. 06-3105, slip op. at 12 (D.C. Cir. 2007) (citing *Brown & Williamson*, 62 F.3d at 419).

¹²² *Id.* at 13.

¹²³ *Id.* at 14.

¹²⁴ *Id.* at 15.

¹²⁵ *Id.* at 16.

¹²⁶ *Id.* at 17 (stating that “[h]ow that accommodation is to be achieved is best determined by the legislative and executive branches in the first instance”).

¹²⁷ *Id.* at 17. The court notes, however, that this conclusion is at least in part based on the assertion of the Executive that no agent of the Executive has seen any of the electronic documents or will see them until claims of privilege have been adjudicated. See *id.* at 17-18.

legislative functions.”¹²⁸ Therefore, according to the court, returning all of the seized documents would be an inappropriate remedy for a violation of the Speech or Debate Clause. Instead, Representative Jefferson was entitled only to a return of legislative documents covered by the Speech or Debate Clause. Non-privileged materials—which may yet be subject to future challenges as the criminal trial proceeds—did not have to be returned at that time.¹²⁹ Furthermore, the court ordered that “the FBI agents who executed the search warrant shall continue to be barred from disclosing the contents of any privileged or politically sensitive and non-responsive items, and they shall not be involved in the pending prosecution or other charges arising from the investigation.”¹³⁰

Representative Jefferson’s specific privilege claims, based on his review of the documents pursuant to the court of appeals’ remand order, were evaluated by the district court. The documents for which Representative Jefferson did not assert privilege were turned over to the DOJ for review. Ultimately, Representative Jefferson was convicted on 11 of the 16 bribery and fraud charges brought against him and received a 13-year prison sentence.¹³¹ Ten of these 11 convictions were upheld by the Fourth Circuit Court of Appeals in March 2012.¹³²

United States v. Renzi

In 2009, Former Representative Richard Renzi was indicted on 48 criminal counts including extortion, money laundering, wire fraud, insurance fraud, and conspiracy related to alleged *quid pro quo* deals he orchestrated while representing Arizona’s first district in the House of Representatives.¹³³ Representative Renzi was accused of making deals with Resolution Copper Mining (RCC) and an investment group led by Philip Aries (Aries), in which the companies agreed to buy property owned by James Sandlin, his former business partner. In exchange, he promised to introduce a land exchange bill, which would propose swapping the Sandlin property for federally owned land for which the companies wished to attain ownership of surface rights, and steer it through the House Natural Resources Committee.¹³⁴ Mr. Sandlin owed Representative Renzi \$700,000 and the purchase of his property would enable him to pay the debt back to Representative Renzi.¹³⁵

During the course of the district court proceedings, Representative Renzi argued that the Speech or Debate Clause entitled him to (1) absolute immunity from prosecution because his negotiations with RCC and Aries were “legislative acts”; (2) dismissal of his indictment because privileged evidence was presented to the grand jury; and (3) a hearing to determine if the government used

¹²⁸ *Id.* at 20 (citing *Brewster*, 408 U.S. at 528).

¹²⁹ *Id.* at 21-22.

¹³⁰ *Id.* at 23 (internal quotations and citations omitted). In light of the fact that Representative Jefferson’s indictment was filed in the Eastern District of Virginia, which is a court in the Fourth Circuit, it is unclear exactly what binding effect the D.C. Circuit’s holdings and remedies will have on that criminal prosecution. Generally speaking, the decisions of one circuit are not binding on the others.

¹³¹ *United States v. Jefferson*, No. 09-5130, slip. op. 8 (4th Cir. March 26, 2012); Jerry Markon, *Ex-Rep. Jefferson (D-La.) Gets 13 Years in Freezer Cash Case*, WASH. POST, November 14, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/13/AR2009111301266.html>.

¹³² *Jefferson*, slip. op. at 64.

¹³³ *United States v. Renzi*, 651 F.3d 1012, 1018 (9th Cir. 2011).

¹³⁴ *Id.* at 1017-18.

¹³⁵ *Id.* at 1017.

evidence protected by the Clause to obtain non-protected evidence.¹³⁶ The district court ruled against Representative Renzi on all three requests and he filed an interlocutory appeal with the Court of Appeals for the Ninth Circuit.

The appeals court affirmed the district court's orders, holding that Representative Renzi's interactions and negotiations with RCC and Aries were not legislative acts, and therefore, were not protected by the Clause.¹³⁷ In coming to this conclusion, the appeals court emphasized that no court has ever "indicated that 'everything that related to the office of a Member was shielded by the Clause.'"¹³⁸ Additionally, the court noted that the Supreme Court has distinguished between completed legislative acts, which are covered by the clause, and promises to perform future legislative acts, which are not covered.¹³⁹ As the *Brewster* Court previously held, pre-legislative negotiations with private parties or constituents are not considered to be legislative acts because the Clause's text and history do not support such a broad reading of the privilege.¹⁴⁰ Furthermore, Representative Renzi's specific acts, his negotiations with RCC and Aries, cannot fall under the Clause's protection because extortion, like the bribery claims at issue in *Brewster*, has no part in the legislative process and is not performed as a part of a Member's role as legislator.¹⁴¹

Next, the Court addressed Representative Renzi's argument that his indictment should be dismissed because the grand jury was presented evidence of protected legislative acts. While generally a court will not inquire into the evidence used to support a grand jury indictment if the indictment is valid on its face, the grand jury is not permitted to violate a valid privilege, like the Speech or Debate Clause privilege. Therefore, other circuits have gone "behind the face of the indictment" when a violation of the Clause is alleged at the grand jury stage. In this case, the appeals court adopted the Eleventh Circuit test, concluding that it should look behind the face of the indictment and only dismiss it if protected "evidence [presented to the grand jury] cause[d] the jury to indict."¹⁴² The court noted that using this test protects the privilege without allowing Members to avoid prosecution for acts that are not protected by the Clause.¹⁴³ The appeals court found that several documents discussed actual legislative acts and should not have been presented to the grand jury. However, the court refused to dismiss the indictment because the protected evidence did not cause the jury to indict. Rather, the indictment relied on evidence of Representative Renzi's interactions with RCC and Aries, negotiations that the court previously concluded were not legislative acts and therefore were not protected.

The appeals court then addressed Representative Renzi's request for a hearing to determine if the government's non-protected evidence was derived from protected evidence, which he argued

¹³⁶ *Id.* at 1018. The hearing Representative Renzi requested was modeled after the type of hearing established in *Kastigar v. United States*, 406 U.S. 441 (1972), which is used to determine if the government has used any immunized testimony or evidence deriving from immunized testimony to further the prosecution of a person who was granted immunity in exchange for testimony in a separate case. *Renzi*, 651 F.3d at 1018.

¹³⁷ *Id.* at 1022-23.

¹³⁸ *Id.* at 1021 (citing *Brewster*, 408 U.S. at 513-14).

¹³⁹ *Id.* at 1022 (citing *Helstoski*, 442 U.S. at 489-90).

¹⁴⁰ *Id.* at 1023.

¹⁴¹ *Id.* at 1023-24. Representative Renzi failed to convince the appeals court that *Brewster* did not control application of the Clause in this case because he was charged with extortion rather than bribery. The court cited a Third Circuit case in adopting the conclusion that *Brewster* applies equally to bribery and extortion charged. *Id.* at 1024 (citing *United States v. McDade*, 28 F.3d 283, 296 n. 16 (3rd Circuit 1994)).

¹⁴² *Renzi*, 651 F.3d at 1029 (citing *United States v. Swindall*, 971 F.2d 1531, 1549 (11th Cir. 1992)).

¹⁴³ *Id.*

could not be used in the proceeding. In addressing this request, the court had to evaluate whether the Speech or Debate Clause privilege is a privilege of non-disclosure, as Representative Renzi maintained, or non-use, meaning the Clause only prevents protected evidence from being introduced in a court proceeding. The court rejected Representative Renzi's argument that the Clause confers a non-disclosure privilege, emphasizing that the Supreme Court has never held that the Clause prevents the use of derivative evidence or "precludes the Government from reviewing documentary evidence referencing 'legislative acts' even as part of an investigation into unprotected activity."¹⁴⁴

This part of the decision puts the Ninth Circuit at odds with the D.C. Circuit decision in *United States v. Rayburn House Office Building*, discussed above, which concluded that the Clause prohibits any executive branch exposure to evidence of legislative acts.¹⁴⁵ The appeals court described the holding in *Rayburn* as founded on reasoning unique to the D.C. Circuit that has not been adopted by the Supreme Court. The court rejected the D.C. Circuit's interpretation that the "'distraction' of Members and their staffs from legislative tasks is a principal concern of the Clause" and, thus, distraction alone can trigger the Clause's protection.¹⁴⁶ Rather, the court stated that the risk of legislative distraction can only prompt the Clause's protection when the underlying investigation being conducted concerns a privileged legislative act. As the court explained, "[w]hen the Clause bars the underlying action, any investigation and litigation serve only as wasted exercises that *unnecessarily* distract Members from their legislative tasks."¹⁴⁷ In its view, this is the type of distraction that the Clause is intended to prevent.

However, when the underlying action is not covered by the Clause, such as the investigations of alleged extortion and fraud in this case and *Rayburn*, other legitimate interests, like the ability of the executive branch to prosecute non-protected activities, outweigh concerns about legislative distraction.¹⁴⁸ The court relied upon the Supreme Court's holding in *United States v. Helstoski*,¹⁴⁹ a 1979 case prosecuting a Member for bribery, as support for its disagreement with the decision in *Rayburn*. In *Helstoski*, the Court held that the government could introduce into evidence documents discussing legislative acts, which it had obtained through compelled disclosure from the defendant Member, as long as the documents were redacted to exclude any references to legislative acts.¹⁵⁰ The appeals court stated that this outcome was irreconcilable with Representative Renzi's argument and the *Rayburn* holding. The Clause must be interpreted as providing a non-use privilege, not a non-disclosure privilege, "because the Executive would be hard pressed to redact a document it was constitutionally precluded from obtaining or reviewing...."¹⁵¹

¹⁴⁴ *Id.* at 1032.

¹⁴⁵ *Id.* at 1034 ("Simply stated, we cannot agree with our esteemed colleagues on the D.C. Circuit. We disagree with both *Rayburn*'s premise and its effect and thus decline to adopt its rationale.").

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1036.

¹⁴⁸ *Id.* at 1036-37. The court also noted that preventing investigations prosecutions for Members who are accused of bribery and similar charges "is unlikely to enhance legislative independence," which is the primary purpose of the Clause. *Id.* at 1036 (quoting *Brewster*, 408 U.S. at 524-25).

¹⁴⁹ 442 U.S. 477.

¹⁵⁰ *Id.* at 488 n.7.

¹⁵¹ *Renzi*, 651 F.3d at 1037.

The court also criticized the *Rayburn* decision for ignoring the fact that “the Speech or Debate Clause is a creature born of separation of powers concerns,” and thus should apply equally to both the executive and the judiciary.¹⁵² It reasoned that if the Clause provided a non-disclosure privilege, then disclosures of privileged documents to the executive branch and the judiciary would constitute independent violations.¹⁵³ Even though the *Rayburn* court adopted a non-disclosure interpretation and ruled that disclosures to the executive branch constituted violations of the Clause, it did not recognize that disclosures to the judiciary could also be violations.¹⁵⁴ Instead, it put the judiciary in charge of viewing and evaluating all of the allegedly privileged evidence.¹⁵⁵ The appeals court in *Renzi* used this internal inconsistency to reinforce its view that a non-disclosure interpretation of the clause was implausible and incorrect.¹⁵⁶

Representative Renzi filed a petition for a writ of certiorari to the Supreme Court following the appeals court decision. His petition was denied in January 2012.¹⁵⁷ The criminal prosecution is still pending in the district court.

Author Contact Information

Alissa M. Dolan
Legislative Attorney
adolan@crs.loc.gov, 7-8433

Todd Garvey
Legislative Attorney
tgarvey@crs.loc.gov, 7-0174

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¹⁵² *Id.* at 1037-38.

¹⁵³ *Id.* at 1038.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1038-39.

¹⁵⁷ *Renzi v. United States*, 132 S. Ct. 1097 (2012).