

5-1-2013

A Lesson in Speech or Debate Jurisprudence

Matthew Patrick Dolan

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

Recommended Citation

Dolan, Matthew Patrick, "A Lesson in Speech or Debate Jurisprudence" (2013). *Law School Student Scholarship*. 211.
https://scholarship.shu.edu/student_scholarship/211

A Lesson in Speech or Debate Jurisprudence

Matthew P. Dolan

I. Introduction

The Speech or Debate Clause of the United States Constitution is a powerful grant of legislative immunity that protects members of Congress from inquiry into legislative acts and the motivations behind those acts.¹ The original concept of legislative immunity originated over 400 years ago during struggles over parliamentary power and the creation of the English Bill of Rights of 1689.² The framers of the Constitution, did not adopt the “*lex et consuetudo*”³ of the English Parliament as a whole,” but resolutely adopted the Speech or Debate Clause as an essential provision for furthering their goals.⁴ Indeed, the motivating purpose behind the Clause was to reinforce the deliberately established doctrine of the separation of powers.⁵ By protecting the legislature from a potentially hostile judiciary, the founders assured that the legislature would remain largely autonomous and free from the potential “tyrannical concentration of all the powers of government” that the framers sought to prevent.⁶

¹ U.S. Const. art. I, § 6, cl. 1 (“for any Speech or Debate in either House, [Senators or Representatives] shall not be questioned in any other Place.”); *U.S. v. Brewster*, 408 U.S. 501 (1972) (affirming the holding in *U.S. v. Johnson*, 383 U.S. 169 (1996), that the Clause protected members from inquiry into legislative acts or motivation for actual performance of legislative acts).

² *U.S. v. Johnson*, 383 U.S. 169, 178 (1966) (“[T]he freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament”); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (discussing the prosecution of a member of Parliament for “seditious” speech in 1688 and the events preceding the adoption of the Clause).

³ BLACK’S LAW DICTIONARY (9th Ed. 2009) (law and custom).

⁴ *Kilbourn v. Thompson*, 103 U.S. 168, 201 (1880).

⁵ *Brewster*, 408 U.S. at 547; *Johnson*, 383 U.S. at 178.

⁶ THE FEDERALIST NO. 48 (James Madison) (James Madison remarked during his discussion concerning the Separation of Powers in government “that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”).

Until recently, the Speech or Debate Clause had not been subject to much judicial analysis. In fact the Supreme Court has not addressed the issue in over 30 years.⁷ However, two recent circuit court decisions, *United States v. Renzi* and *United States v. Rayburn*, have brought the issue back to the forefront of public debate.⁸

In *United States v. Rayburn*,⁹ the D.C. Circuit Court of Appeals held that the Speech or Debate Clause provides an absolute bar to the disclosure of written legislative materials.¹⁰ The case resulted from an FBI investigation into charges of corruption and represents the first time in history that law enforcement officials conducted a raid on the office of a sitting member of Congress.¹¹ To reach their holding, the D.C. Circuit Court of Appeals significantly broadened prior Supreme Court precedent and have since drawn fierce criticism from the public, law-enforcement officials and scholars alike.

In *United States v. Renzi*,¹² the Ninth Circuit considered the scope of legislative privilege as applying to what the court describes as “future legislative acts” or negotiations over a future piece of legislation. As a condition of supporting land exchange legislation, Congressman Renzi demanded that those companies involved include in the draft legislation land owned by an associate of the Congressman.¹³ Unbeknownst to them, this associate owed the Congressman a substantial amount of money.¹⁴ The Ninth Circuit Court of Appeals denied relief for the Congressman, holding that his actions fall beyond the protections of Speech or Debate.¹⁵ In reaching their conclusion the court relied primarily on Supreme Court precedent in *United States*

⁷ See *U.S. v. Helstoski*, 442 U.S. 477 (1979).

⁸ R. Jeffrey Smith, WASHINGTON POST (June 23, 2011), http://www.washingtonpost.com/politics/court-allows-prosecution-of-ex-ariz-congressman-renzi-on-corruption-charges/2011/06/23/AGZeZ0hH_story.html.

⁹ 497 F.3d 654 (D.C. Cir. 2007).

¹⁰ *Rayburn*, 497 F.3d at 655.

¹¹ *Rayburn*, 497 F.3d at 659.

¹² 651 F.3d 1012 (9th Cir. 2011).

¹³ *Id.* at 1017.

¹⁴ *Id.*

¹⁵ *Id.* at 1039.

v. Brewster and specifically denounced the broader protection of non-disclosure to the executive upheld by the D.C. Circuit in *United States v. Rayburn*.¹⁶

Renzi and *Rayburn* cannot be reconciled as they both incorrectly applied Supreme Court precedent to reach what the courts deemed an equitable result. The D.C. Circuit's analysis disregarded much Supreme Court precedent, and significantly broadened the Clause beyond its judicially interpreted bounds.¹⁷ The Ninth Circuit, wrongly cited Supreme Court precedent for propositions that the Court never held, and narrowed the Clause's protection to cover only those acts literally conducted on the House or Senate Floor.¹⁸ The shortcomings of these circuit court cases create an inconsistency in Speech and Debate jurisprudence that requires reconciliation.

Part II of this note discusses the Constitutional origins of The Speech or Debate Clause, and its evolution within Supreme Court jurisprudence. Part III of this note details the factual situations presented in both *Renzi* and *Rayburn* as well as each court's analysis behind their decisions. This part will explain why the Ninth Circuit specifically rejected the reasoning of the D.C. Circuit. Part IV analyzes the inherent problems *Renzi* and *Rayburn* present including their departure from Supreme Court precedent and possible solutions moving forward. As it stands Speech or Debate jurisprudence is vague and unclear. The Supreme Court must guide the lower courts with a more certain articulation of the Clause. This note will conclude by arguing that in order to remain true to the Constitutional text, the court should grant more deference to Congress's own disciplinary systems. Rather than forcefully narrowing the clause to envelop activities which would be protected by the Clause, if an activity is beyond the Executive's reach

¹⁶ *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”).

¹⁷ See discussion *infra* part III.

¹⁸ See discussion *infra* part III.

then any investigation of its members regarding activities legislative in nature should be conducted wholly by Congress.

II- History of the Speech or Debate Clause and Supreme Court Jurisprudence

The founding fathers adopted the Speech or Debate clause from within the English Bill of Rights of 1689.¹⁹ The Clause in the English Bill of Rights codified a parliamentary privilege of debate. It's codification stifled fear of criminal and civil charges from the monarchy frequently used to suppress and intimidate legislators.²⁰ In drafting the American Constitution, the founders, with similar concerns of executive abuse, "recognized the Clause as an important protection of the independence and integrity of the legislature."²¹ The drafters of the American Constitution recognized the obviousness of the Clause's inclusion by "approv[ing it] at the Constitutional Convention without discussion and without explanation."²²

United States Courts have recognized the notion of a broad legislative immunity early on. The Supreme Judicial Court of Massachusetts, as the first court to construe the Clause and later cited favorably by the Supreme Court, suggested Speech or Debate should protect "every thing said or done . . . as a representative, in the exercise of the functions of [congressional] office . . . whether the exercise was regular according to the rules of the house, or irregular and against their rules."²³

a. The Supreme Court and the Boundaries of the Speech or Debate Clause

¹⁹ Compare *Johnson*, 383 U.S. at 178 (The original text from the English Bill of Rights of 1689 read: "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament") and U.S. Const. art. I, § 6, cl. 1 ("for any Speech or Debate in either House, [Senators or Representatives] shall not be questioned in any other Place.");

²⁰ ENID CAMPBELL, *PARLIAMENTARY PRIVILEGE* 10 (2003); *Johnson*, 383 U.S. at 178.

²¹ *Johnson*, 383 U.S. at 178.

²² *Johnson*, 383 U.S. at 177.

²³ *Gravel v. U. S.*, 408 U.S. 606, 660 (1972) (Brennan, J., Dissenting) (citing *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)).

The Supreme Court first interpreted the Speech or Debate Clause in 1880 in *Kilbourn v. Thompson*.²⁴ The Court defined a broad privilege, refusing to limit the Clause to words spoken in debate, and concluded that the Clause extends at least so far as to “things generally done in a session of the House by one of its members in relation to the business before it.”²⁵

The Court did not interpret the Clause again for another 71 years, until *Tenney v. Brandhove*.²⁶ The plaintiff, Brandhove brought an action alleging a deprivation of rights under the Constitution against Jack Tenney a California State Senator and others, including the Senate Fact-Finding Committee on Un-American Activities.²⁷ Brandhove had distributed a petition among members of the California state legislature urging the Legislature to discontinue appropriations for Tenney’s Committee.²⁸ Brandhove’s petition alleged that Tenney’s Committee had “used Brandhove as a tool in order ‘to smear Congressman Franck R. Havenner as a ‘Red’ when he was a candidate for Mayor of San Francisco in 1947’”.²⁹ Following this, the Committee asked local prosecutorial officials to institute criminal proceedings against Brandhove and summoned him to appear before the Committee for a hearing. Brandhove alleged that the hearing was not for a “legislative purpose” and to the contrary was designed to intimidate him, “and prevent him from effectively exercising his constitutional right[] of free speech...and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen....”³⁰ The District Court dismissed Brandhove’s claim, while the Ninth Circuit held that the Complaint stated a cause of action against the Committee and its members. The Supreme Court granted *cert.* Reversing the Ninth Circuit

²⁴ 103 U.S. at 204 (1880).

²⁵ *Kilbourn*, 103 U.S. at 204 (1880) (“It would be a narrow view of the constitutional provision to limit it to words spoken in debate.”).

²⁶ 341 U.S. 367 (1951).

²⁷ *Id.* at 369.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

decision, the Court held that legislators are not liable for allegations which arise from acts within the legislative sphere.³¹ To ensure legislative autonomy from outside pressure, the Court held that even “the claim of an unworthy purpose would not destroy the privilege.”³²

In 1966 the Court in *United States v. Johnson*³³ interpreted the scope of the Clause’s protection in connection with criminal conspiracy charges brought against a Congressman.³⁴ As part of the general charges against him, the FBI accused Congressman Johnson of receiving substantial sums of money in the form of “campaign contributions” to deliver a speech on the house floor which was designed to influence the dismissal of pending indictments against a savings and loan institution.³⁵ The prosecution’s case depended on the admissibility of the words included within the speech and testimony regarding the motives behind it.³⁶ The Court dismissed the case, holding that regardless of disgracefulness, violations of the Speech or Debate Clause include evidence of the substance of a speech on the house floor or any motivation behind it.³⁷ The court reasoned that “[t]he essence of such a charge...is that the Congressman's conduct was improperly motivated, and...that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.”³⁸

In 1972 the Supreme Court handed down two decisions on the same day, clarifying *Johnson*. Both cases further attempted to delineate the potentially broad scope of a “legislative

³¹ *Tenney*, 341 U.S. at 379 (“We conclude only that here the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act.”).

³² *Id.* at 378 (“In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed.⁷ Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.”).

³³ 383 U.S. 169, (1966).

³⁴ *Johnson*, 383 U.S. at 171 (FBI claimed as part of conspiracy charges that Congressman read a speech favorable to independent savings and loan associations in the House).

³⁵ *Id.*

³⁶ *Id.* at 177 (The conspiracy theory depended upon a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith, that is, that he did not prepare or deliver the speech in the way an ordinary Congressman prepares or delivers an ordinary speech).

³⁷ *Id.* at 180.

³⁸ *Id.*

act.” In *United States v. Brewster*,³⁹ a United States Senator was indicted for taking a bribe in exchange for a promise to deliver a speech on the Senate Floor.⁴⁰ Writing for the court, Chief Justice Burger began by reciting the power of a broad Speech or Debate Clause: “In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers.”⁴¹

Justice Burger acknowledged a necessarily broad reading of the Clause in order for it to have force, but refused to extend the Speech or Debate privilege to function as a grant of “super-immunity.”⁴² Applying prior precedent, Justice Burger first determined whether the acts in question represented a “legislative act.”⁴³ An inquiry into legislative acts or motivations is prohibited. He then presented a two-part framework, first describing a legislative act as: “An act generally done in Congress in relation to the business before it . . . or things ‘said or done by him, as a representative, in the exercise of the functions of that office.’”⁴⁴ Secondly Justice Burger put forth a number of activities that are political in nature and not considered a legislative act: “a wide range of legitimate ‘errands’ performed for constituents [such as,] the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called ‘news letters’ to constituents, news releases, and speeches delivered outside the Congress.”⁴⁵ The Court, in dismissing the Senator’s appeal and distinguishing *Johnson*, reasoned that the Government only needed to show that the Senator accepted a bribe; the

³⁹ 408 U.S. 501 (1972).

⁴⁰ *Id.* at 502.

⁴¹ *Id.* at 516.

⁴² *Id.* at 516.

⁴³ See *Johnson* 383 U.S. 169.

⁴⁴ *Brewster*, 408 U.S. at 512, 513 (citing *Coffin*, 4 Mass. 1, 27).

⁴⁵ *Brewster*, 408 U.S. at 512.

government need not prove that he actually fulfilled the illegal bargain, therefore the Government did not need to inquire into the protected legislative sphere.⁴⁶

Decided the same day as *Brewster*, the Supreme Court in *Gravel v. United States*⁴⁷ extended the Speech or Debate Clause to legislative acts done by a Senator's aides and assistants. In *Gravel*, the FBI subpoenaed a Senator's aide during an investigation into the alleged release and publication of classified documents (The Pentagon Papers) during a subcommittee hearing.⁴⁸ The Court held that if an act performed by a Congressman personally is privileged then the Clause extends to those same undertakings performed by his aides and assistants as well.⁴⁹ In reaching their holding, the Court recognized that the "modern legislative process" demands an extension of the Clause to further the effective functioning of government.⁵⁰ Extending the reasoning of *Brewster*, the Court provided that the Clause protects "legislative acts" which are "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."⁵¹ Consequently, the court decided the nature of the work done by aides and assistants justifies their treatment as "alter-egos" of the Congressmen they represent.

The Court's most recent examination of the scope of the Speech or Debate Clause occurred in *United States v. Helstoski*⁵². In *Helstoski* a Congressman was indicted on charges of accepting money in return for his influence in the performance of official acts.⁵³ Specifically,

⁴⁶ *Id.* at 526 (an inquiry into a legislative act or the motivation behind it is not necessary for prosecution under 18 U.S.C. § 201(c)(1)).

⁴⁷ 408 U.S. 606 (1972).

⁴⁸ *Gravel*, at 608-609.

⁴⁹ *Id.* at 616.

⁵⁰ *Id.* at 617.

⁵¹ *Id.* at 625.

⁵² 442 U.S. 477 (1979).

⁵³ *Helstoski*, 442 U.S. at 479.

Congressman Helstoski was charged with receiving monies from aliens “for the introduction of private bills which would suspend the application of the immigration laws so as to allow them to remain in this country.”⁵⁴ The prosecution had attempted to introduce evidence of past legislative acts to prove motive. The Court held that any evidence of references to past legislative acts constituted a violation of the Speech or Debate Clause.⁵⁵ Chief Justice Burger reasoned that while “the exclusion of evidence of past legislative acts undoubtedly will make prosecutions more difficult, nevertheless, the Speech or Debate Clause was designed to preclude prosecution of Members for legislative acts.”⁵⁶ Following their holding in *Brewster*, the Court affirmed that “a promise to deliver a speech, to vote, or to solicit other votes is not ‘speech or debate’ within the meaning of the Clause, nor is a promise to introduce a bill at some future date a legislative act.”⁵⁷ However, the protection does extend to legislative acts already performed.⁵⁸

From *Kilbourn* to *Helstoski* the Supreme Court has steadfastly affirmed the purpose of the Clause to promote an autonomous legislature free from “executive and judicial oversight that realistically threatens to control [their] conduct as a legislat[ure].”⁵⁹ Yet even with this broad purpose in mind the Court has recognized the need to safeguard a balance; recognizing the Clause was never meant to “make members of Congress super-citizens immune from criminal responsibility.”⁶⁰ Members of Congress require independence to legislate effectively but it must be tempered enough to prevent occurrences of corruption.

Over time the Supreme Court has limited the scope of the Speech or Debate Clause to only “legislative activities” but how to define the scope of a “legislative activity” remains

⁵⁴ *Id.*

⁵⁵ *Id.* at 487.

⁵⁶ *Id.*

⁵⁷ *Id.* at 495–96 (the Court reasoned that the Government could have inquired into the motivations for accepting a bribe so long as they did not rely upon the motivation in committing an official).

⁵⁸ *Id.* at 490.

⁵⁹ See *Helstoski* 442 U.S. at 492; *Gravel*, 408 U.S. 606; *Johnson*, 383 U.S. 169.

⁶⁰ *Brewster*, 408 U.S. 501.

unclear. As one scholar has noted the Court has held what the Clause does *not* protect: “criminal conduct,⁶¹ political or representational activities,⁶² speeches outside of Congress,⁶³ newsletters,⁶⁴ press releases,⁶⁵ private book publishing,⁶⁶ or the distribution of official committee reports outside the legislative sphere”⁶⁷ (emphasis added). Accepting that the activities listed above would not fall within the protections of the Clause, the standard elicited by the Court remains inappropriately broad: “those things ‘generally done in a session of the House by one of its members in relation to the business before it,’ or things ‘said or done by him, as a representative, in the exercise of the functions of that office.’”⁶⁸ The uncertainty that remains demands further clarity from the Court.

III. *Renzi* and *Rayburn*—a spectrum of Speech or Debate Clause protection

The scope of the Speech or Debate Clause has never been foreclosed to purely literalistic terms. The Clause is “to be read broadly”⁶⁹ and its purpose is expansive: “to preserve the constitutional structure of separate, coequal, and independent branches of government.”⁷⁰ “The importance of the [Clause] was recognized as early as 1808 in *Coffin v. Coffin*, 4 Mass. 1, 27, where the court said that the purpose of the [Clause] was to secure to every member ‘*exemption* from prosecution, for every thing said or done by him, as a representative, in the

⁶¹ MARCUS A. AUGUSTINE, *United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515: A Case of the Fox Guarding the Hen House*, 35 S.U. L. REV. 515, 523 (2008) (citing *United States v. Brewster*, 408 U.S. 501, 528–29 (1972)).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ MARCUS A. AUGUSTINE, *United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515: A Case of the Fox Guarding the Hen House*, 35 S.U. L. REV. 515, 523 (2008) (citing *Hutchinson v. Proxmire*, 443 U.S. 111, 113 (1979)).

⁶⁶ MARCUS A. AUGUSTINE, *United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515: A Case of the Fox Guarding the Hen House*, 35 S.U. L. REV. 515, 523 (2008) (citing *Gravel*, 408 U.S. at 625)..

⁶⁷ MARCUS A. AUGUSTINE, *United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515: A Case of the Fox Guarding the Hen House*, 35 S.U. L. REV. 515, 523 (2008) (citing *Doe v. McMillan*, 412 U.S. 306, 313 (1973)).

⁶⁸ *Brewster*, 408 U.S. at 512, 513 (quoting *Kilbourn*, 103 U.S. 168).

⁶⁹ *Kilbourn*, 103 U.S. at 204.

⁷⁰ *Helstoski*, 442 U.S. at 491.

exercise of the functions of that office.’ (Emphasis added.)”⁷¹ In the alternative, the Court has held that “[t]he immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress.”⁷² The Court has never treated the Clause as protecting all conduct relating to the legislative process.”⁷³ Based upon this tension, the circuit courts have struggled to square two competing results.

A. United States v. Rayburn

a. Facts

On May 18, 2006 the Department of Justice obtained a warrant to search the offices of Congressman William Jefferson in the Rayburn House Office Building.⁷⁴ The warrant arose from an FBI investigation into a fraud and bribery scheme. During their investigation the FBI spoke with a member of the Congressman’s staff who told them of documents relevant to the investigation kept within the confines of the Congressman’s office.⁷⁵ The FBI concluded they had “probable cause to believe that Congressman Jefferson . . . had sought and in some cases already accepted financial backing and or concealed payments of cash or equity interests in business ventures located in the United States, Nigeria, and Ghana in exchange for his undertaking official acts as a Congressman while promoting the business interests of himself and [other] targets.”⁷⁶

The warrant outlined “special procedures” to identify information which could fall within the purview of the Speech or Debate Clause. Among other provisions, the warrant ensured that “non case agents” otherwise not affiliated with the investigation would conduct the physical

⁷¹ *Id.*

⁷² *Brewster*, 408 U.S. at 507.

⁷³ *Id.* at 515.

⁷⁴ *Rayburn*, 497 F.3d at 657.

⁷⁵ *Id.*

⁷⁶ *Id.*

search.⁷⁷ Furthermore, a “filter team” consisting of two Department of Justice attorneys and one FBI agent would review documents obtained to determine whether the Speech or Debate Clause applied to them.⁷⁸ On Saturday night, May 20th, the FBI moved in and “more than a dozen FBI agents spent about 18 hours” in the Congressman’s office.

On May 24, 2006 Congressman Jefferson filed a motion for the return of all materials seized; arguing that the Speech or Debate Clause permitted him to review his files to segregate legislative materials.⁷⁹ On July 10, 2006 the district court denied the Congressman’s motion noting that the warrant “did not impermissibly interfere with Congressman Jefferson’s legislative activities.”⁸⁰ The district court rejected the Congressman’s argument that he had a right to segregate his files prior to the execution of the search when the warrant was preconditioned to obtain only those materials that are outside of the “legitimate legislative sphere.”⁸¹

Congressman Jefferson filed an emergency motion for a stay pending appeal and the D.C. Circuit Court of Appeals on July 20, 2006 “enjoined the United States, acting through the Executive, from resuming its review of the seized materials.”⁸² The D.C. Circuit Court of Appeals then remanded the case to the District Court to make findings as to which materials taken were records of legislative acts.⁸³

On June, 4, 2007 a grand jury returned a sixteen-count indictment against the Congressman with a trial scheduled for January 2008.⁸⁴ To prevent prejudice to the Congressman by letting the decision stand until after trial, the D.C. Circuit Court of Appeals

⁷⁷ *Id.*

⁷⁸ Reply Brief of Congressman William Jefferson at 1-3, U.S. v. Rayburn, 497 F.3d 654 (2007) No. 06-3105.

⁷⁹ *Id.*

⁸⁰ *Rayburn*, 497 F.3d at 657.

⁸¹ *Id.*

⁸² *Id.* at 658.

⁸³ *Id.* at 658.

⁸⁴ *Id.*

agreed to hear an expedited appeal on the constitutionality of the evidence obtained.⁸⁵ The D.C. Circuit Court reasoned that “letting the district court’s decision stand until after the Congressman’s trial would, if the Congressman is correct, allow the Executive to review privileged material in violation of the Speech or Debate Clause.”⁸⁶

b. Court’s Analysis

On expedited appeal, the D.C. Circuit Court sought to resolve whether the Speech or Debate Clause embodies a non-disclosure privilege, specifically whether the contents of Congressman Jefferson’s office must necessarily be precluded from disclosure to the executive.⁸⁷ Congressman Jefferson asserted that if the Speech or Debate privilege exists it is absolute and he must first review the materials, subject to potential judicial review if appropriate.⁸⁸ Jefferson argued that the privilege is breached as soon as DOJ officials analyze and read the contents of each document and file.⁸⁹ The Congressman believed it absurd to assume that DOJ officials could possibly determine which “telephone messages or visits to his office recorded on the seized logs” related to legislative activities.⁹⁰

Conversely, the DOJ asserted the procedures incorporated by the Government and approved by the District Court specifically prevented the review of legislative material by any executive official.⁹¹ They argued that the Government did not seek to punish the Congressman for “legislative acts, to question him about such acts, or to use evidence of such acts against him.”⁹²

⁸⁵ *Id.*

⁸⁶ *Rayburn* at 659.

⁸⁷ *Rayburn* at 659.

⁸⁸ Reply Brief of Congressman William Jefferson at 7, *U.S. v. Rayburn*, 497 F.3d 654 (2007) No. 06-3105.

⁸⁹ Reply Brief of Congressman William Jefferson at 10-16, *U.S. v. Rayburn*, 497 F.3d 654 (2007) No. 06-3105.

⁹⁰ *Id.*

⁹¹ Corrected Brief for the United States at 22 *U.S. v. Rayburn*, 497 F.3d 654 (2007) No. 06-3105.

⁹² *Id.*

Writing for the court, Judge Rogers began with an acknowledgment that although the Supreme Court has held that the Clause encompasses a *Gravel*-like testimonial privilege, to date the Court has not yet spoken on whether the Clause includes a non-disclosure privilege.”⁹³ However, prior precedent within the D.C. Circuit has.⁹⁴ *Brown v. Williamson*, a civil case, held that “documents or other material that comes into the hands of Congressmen may be reached either in a direct suit or a subpoena only if the circumstances by which they come can be thought to fall outside ‘legislative acts’ or the legitimate legislative sphere.”⁹⁵ Thus, the D.C. Circuit created a non-disclosure privilege extending to all documents and materials within the “legislative sphere.” Citing their decision in *Brown*⁹⁶, the D.C. Circuit reasoned that “a key purpose of the Speech or Debate Clause is to prevent intrusions into the legislative process and that the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put.”⁹⁷ Relying primarily on D.C. Circuit precedent and a significant broadening of Supreme Court reasoning, Judge Rogers concluded that all legislative materials protected by the Speech or Debate Clause must be returned to Congressman Jefferson.⁹⁸

B. United States v. Renzi

a. Facts

Recently, the United States Court of Appeals for the Ninth Circuit considered the scope of the legislative privilege as it applies to “future legislative acts” or negotiations over a future

⁹³ *Rayburn*, 497 F.3d at 659, 660

⁹⁴ *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995)

⁹⁵ *Brown & Williamson Tobacco Corp.*, 62 F.3d at 421.

⁹⁶ *Rayburn*, 497 F.3d at 660 (citing *Brown & Williamson Tobacco Corp.*, 62 F.3d 408) (stating that the purpose of the Speech or Debate Clause is to “‘insure that the legislative function the Constitution allocates to Congress may be performed independently,’ without regard to the distractions of private civil litigation or the periods of criminal prosecution.”) (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975)).

⁹⁷ *Rayburn*, 497 F.3d at 660.

⁹⁸ *Rayburn*, 497 F.3d at 666.

piece of legislation.⁹⁹ In November 2002, Arizona voters elected Congressman Renzi to the United States House of Representatives and shortly thereafter he obtained a seat on the House Natural Resources Committee (“NRC”) of which counts among its many responsibilities, the approval of land exchange legislation before it can reach the floor of the house.¹⁰⁰

In 2004 and 2005, Resolution Copper Mining (“RCC”) hired a consulting firm to obtain surface rights from the US government to a copper field on which they already owned mineral.¹⁰¹ The Consulting firm, Western Land Group, “approached Renzi about developing and sponsoring the necessary land exchange legislation.”¹⁰² According to the allegations, Congressman Renzi “met with RCC representatives in his congressional office in February 2005 and instructed them to purchase property owned by James Sandlin if RCC desired Renzi’s support.¹⁰³ Renzi failed to disclose that Sandlin was a former business partner owing over \$700,000 to the Congressman.¹⁰⁴ Negotiations with Sandlin fell through and RCC informed Renzi they would not acquire the Sandlin property to which Renzi replied, “[N]o Sandlin property, no bill.”¹⁰⁵

Renzi then met with another buyer, an investment group led by Philip Aries, assuring Aries that if he “purchased and included [the Sandlin property] . . . the legislation would receive a ‘free pass’ through the NRC.¹⁰⁶ One week later, Aries agreed, purchased the property for \$4.6 million and wired a \$1 million deposit to Sandlin.¹⁰⁷

⁹⁹ *Renzi*, 497 F.3d at 1023.

¹⁰⁰ *Id.* at 1016.

¹⁰¹ *Id.* at 1017.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Renzi*, 497 F.3d at 1017.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Following the receipt of the \$1 million deposit, “Sandlin wrote a \$200,000 check payable to Renzi Vino, Inc., an Arizona company owned by Renzi.¹⁰⁸ Renzi deposited the check into a bank account of Patriot Insurance—an insurance company he also owned—and used \$164,590.68 to pay an outstanding Patriot Insurance debt.”¹⁰⁹ Before closing on the property, Aries asked for assurance Renzi would follow through with the deal, to which Renzi personally assured him that once the sale was complete he would introduce the land exchange proposal.¹¹⁰ The day Aries completed the sale of the property, “Sandlin paid the remaining \$533,000 owed into a Patriot Insurance account.”¹¹¹ Renzi never completed his side of the bargain, failing to introduce “any land exchange bill involving Aries and the Sandlin property.”¹¹² After these events an FBI investigation ensued, eventually resulting in two separate grand jury indictments against Renzi.¹¹³

b. Court’s Analysis

The Court began its analysis with a consideration of whether Renzi’s “negotiations” with RCC and Aries constitute protected “legislative acts.”¹¹⁴ If Renzi’s negotiations are “legislative acts” then he obtains the benefit of 3 protections: (1) the Government could not prosecute Renzi,¹¹⁵ regardless of motivation;¹¹⁶ (2) the Government could not compel Renzi or his aides to testify at trial or grand jury proceedings concerning those acts;¹¹⁷ (3) nor introduce evidence of

¹⁰⁸ *Id.*

¹⁰⁹ *Renzi*, 497 F.3d at 1017.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 1018.

¹¹³ *Id.*

¹¹⁴ *Renzi*, 497 F.3d at 1020.

¹¹⁵ *Id.*; *Gravel*, 408 U.S. 606.

¹¹⁶ *Renzi*, 497 F.3d; *Johnson*, 383 U.S. 169.

¹¹⁷ *Renzi*, 497 F.3d; *Gravel*, 408 U.S. 606.

those acts to any jury.¹¹⁸ If the “negotiations” are not “legislative acts” then the Clause’s protections do not apply.

To determine whether Renzi’s conduct falls within the reach of the clause, the Ninth Circuit first engaged in a review of Supreme Court precedent. Conceding that when the Clause applies it does so absolutely, the court opined that delineating the limits of the Clause requires delicate deliberation.¹¹⁹ The Ninth Circuit recognized that the Clause “should be read broadly to effectuate its purposes”¹²⁰ and prior cases “have included within its reach anything ‘generally done in a session of the House by one of its members in relation to the business before it.’”¹²¹ Although broad, the court went on to acknowledge the limits imposed by prior Supreme Court precedent. Neither activities political in nature¹²² nor promises to perform future legislative acts are afforded protection by the Clause.¹²³ With this framework, the court rejected Congressman Renzi’s assertion that negotiations “over future legislation [is] analogous to discourse between legislators over the content of a bill and must be considered a protected legislative act.”¹²⁴

After affirming the district court’s decision to deny Congressman Renzi’s public corruption charges, the court addressed whether the district court erred in “declining to dismiss the indictment in its entirety for, as Renzi alleges, the pervasive presentment of ‘legislative act’ evidence to the grand jury.”¹²⁵ The Ninth Circuit agreed that they “cannot permit an indictment that depends on privileged material to stand—and burden a member with litigation that

¹¹⁸ See e.g., *Renzi*, 497 F.3d; *Helstoski* 442 U.S.; *Brewster*, 408 U.S.; *Gravel* 408 U.S.

¹¹⁹ *Renzi*, 497 F.3d at 1021

¹²⁰ *Johnson* 383 U.S. at 180

¹²¹ *Renzi*, 497 F.3d at 1021 (citing *Kilbourn*, 103 U.S. at 204).

¹²² See *Brewster* 408 U.S. at 512 (discussing the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called ‘news letters’ to constituents, news releases, and speeches delivered outside the Congress.).

¹²³ See *Helstoski*, 442 U.S. at 489–90.

¹²⁴ *Renzi*, 497 F.3d at 1022 (the court [wrongly] asserted that the argument dismissed by the Supreme Court in *Brewster* is entirely analogous to that put forth by Renzi); see *infra* Part IV.

¹²⁵ *Renzi*, 497 F.3d at 1027.

ultimately cannot succeed—or else the Clause loses much of its teeth.”¹²⁶ However, the “mere fact that some ‘legislative act evidence’ was presented to the grand jury cannot entitle Renzi to dismissal.”¹²⁷ To reconcile this, the court adopted the *Swindall* standard from the Eleventh Circuit; the standard mandates that an indictment should not be dismissed unless the evidence presented to the jury *caused* the jury to indict.¹²⁸ Applying the *Swindall* standard to Renzi, the court held that “the indictment against Renzi does not depend on ‘legislative act’ evidence, [thus]...dismissal is not warranted.”¹²⁹

Lastly, the court addressed Renzi’s claim that the district court erred in failing to hold a “*Kastigar*-like hearing¹³⁰ to determine whether the Government used evidence protected by the Speech or Debate Clause to obtain non-privileged evidence and whether the Government can prove its case with evidence derived from legitimate independent sources.”¹³¹ The court explained that if they granted Renzi’s proposal, it would act as an affirmation of the non-disclosure privilege elicited by the court in *Rayburn*. The Ninth Circuit refused to accept that “legislative convenience precludes the Government from reviewing documentary evidence referencing ‘legislative acts’ even as part of an investigation into unprotected activity.”¹³² Refusing to accept such a broad interpretation of the Clause, the Ninth Circuit then went on to assert their reasons for disagreement with both the premise and effect of *Rayburn*.

¹²⁶ *Renzi*, 497 F.3d at 1028 (citing *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491 (1975)).

¹²⁷ *Id.* at 1029.

¹²⁸ *Id.* (citing *United States v. Swindall*, 971 F.2d 1531, 1543 (11th Cir.1992)).

¹²⁹ *Renzi*, 497 F.3d at 1026.

¹³⁰ See SUSAN R. KLEIN & KATHERINE P. CHIARELLO, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 398 (1998) (“In *Kastigar v. United States* the Court held that a person may be required, consistent with the Fifth Amendment’s privilege against self-incrimination, to testify under a grant of use and derivative use immunity. If that person is thereafter prosecuted for conduct that was the subject of her testimony, the prosecution has the burden of proving that the evidence she intends to use is derived from ‘a legitimate source wholly independent of the compelled testimony.’”).

¹³¹ *Renzi*, 497 F.3d at 1032.

¹³² *Renzi*, 497 F.3d at 1032 (citing *U.S. v. Rayburn*, 497 F.3d at 655–56, 666 (D.C. Cir. 2007)).

The Ninth Circuit disagreed with the D.C. Circuit's holding that distraction of Members from legislative tasks "could serve as the touchstone of the Clause's testimonial privilege."¹³³ Instead they asserted that distraction is only sufficient to foreclose inquiry when the underlying action is precluded first.¹³⁴ The court further supported their position that the Clause does not incorporate a non-disclosure privilege by the fact that the Supreme Court has reviewed "legislative act" evidence on countless occasions and if the Clause applies, it does so absolutely.¹³⁵ A distinction in which the Executive is barred from reviewing evidence that the judiciary has already reviewed cannot exist.¹³⁶ Thus, the Ninth Circuit concluded that the "narrowly drawn limits" imposed by the Supreme Court foreclose an extension of the Speech or Debate Clause to the Congressman Renzi.

IV. Reconciliation

The Speech or Debate Clause is a "very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers."¹³⁷

While the Supreme Court has imposed limits on the broad power of the Speech or Debate Clause, many questions remain; including whether the Clause encompasses a broad privilege of non-disclosure and how to define "those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts."¹³⁸ While the D.C. Circuits' qualified nondisclosure privilege is too broad the Ninth Circuit's limited definition of a legislative act is much too narrow.¹³⁹ Further unsettling, is the Ninth Circuit's skewed

¹³³ *Renzi*, 497 F.3d at 1034.

¹³⁴ *Renzi*, 497 F.3d at 1034, 1036.

¹³⁵ *Renzi*, 497 F.3d at 1038.

¹³⁶ *Renzi*, 497 F.3d at 1038.

¹³⁷ *Brewster*, 408 U.S. at 516.

¹³⁸ *Id.* at 512

¹³⁹ See discussion *supra* part III

justifications for refusing to extend the Speech or Debate Clause to Congressman Renzi's "negotiations." Even attempts to reach the "right" result cannot come at the cost of a dismantling of precedent, presumably leaving protected only those words actually spoken on the House and Senate Floor.

A. *Renzi* is distinguishable from *United States v. Brewster*

The Ninth Circuit, in reaching their holding, found the facts of *Brewster* analogous to the scenario before it.¹⁴⁰ In *Brewster* the Supreme Court refused to extend the protections of the Clause to negotiating with individuals and ultimately promising future legislative acts (a favorable speech on the house floor) in exchange for a bribe.¹⁴¹ The Ninth Circuit held that similar to *Brewster*, Congressman Renzi's "negotiations" are not protected "legislative acts."¹⁴²

However, the Ninth Circuit's reasoning is flawed. Congressman Brewster was charged under, 18 U.S.C. § 201(c), Bribery of Public Officials and Witnesses. 18 U.S.C. § 201(c) provides "that a Member who 'corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value . . . in return for . . . (1) being influenced in his performance of any official act' is guilty of an offense."¹⁴³ In *Brewster* the illegal conduct is "taking or agreeing to take money for a promise to act in a certain way."¹⁴⁴ There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise."¹⁴⁵ The *Brewster* prosecution had to prove that Congressman Brewster accepted a bribe and was aware of the

¹⁴⁰ *Renzi*, 497 F.3d.

¹⁴¹ *Brewster*, 408 U.S. at 502.

¹⁴² *Renzi*, 497 F.3d at 1025.

¹⁴³ 18 U.S.C. § 201(c).

¹⁴⁴ *Brewster*, 408 U.S. at 526.

¹⁴⁵ *Id.*

bribe-giver's corrupt intent.¹⁴⁶ In *Brewster*, to prove an alleged bribery charge the Congressman's motive in connection with the legislative act was of no consequence to the prosecution.¹⁴⁷

Contrarily, Congressman Renzi's motives regarding the land-exchange legislation are *essential* in order for the Prosecution to prevail. Unlike *Brewster*, Congressman Renzi did not simply take a bribe. The *Renzi* indictment alleges that Congressman Renzi "insisted that the Sandlin Property must be included in the land exchange proposal if he was to be a sponsor."¹⁴⁸ It is not illegal for Congressmen to insist on the inclusion of properties in land exchange proposals unless that insistence is motivated by private gain. The indictment was sustained because the court believed Renzi's insistence that the land exchange legislation include the Sandlin property was the result of an improper motive.¹⁴⁹ Consequently, the *Renzi* indictment requires an inquiry into Congressman Renzi's legislative acts and his motives behind them. Indeed, the Supreme Court has held the Speech or Debate Clause precludes any inquiry into the motives behind the crafting of legislation.¹⁵⁰

The Renzi court's desire to achieve the "just" result, that the Speech or Debate Clause cannot protect Congressman Renzi, must not come at the expense of Constitutional

¹⁴⁶ *Id.* ("To make a prima facie case under this indictment, the Government need not show any act of appellee subsequent to the corrupt promise for payment, for it is taking the bribe, not performance of the illicit compact, that is a criminal act."); see Michael Stern, *Renzi and Feeney*, POINT OF ORDER (Aug. 02, 2009, 7:55 PM), <http://www.pointoforder.com/2009/08/02/renzi-and-feeney/>.

¹⁴⁷ *Brewster*, 408 U.S. at 526 ("When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in Johnson, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.'").

¹⁴⁸ http://arizona.typepad.com/blog/files/indictment_renzi_et_al.pdf at 7; Michael Stern, POINT OF ORDER (July 11, 2011, 8:17 AM), <http://www.pointoforder.com/2011/07/11/future-legislative-acts-and-the-ninth-circuits-narrow-reading-of-speech-or-debate/>.

¹⁴⁹ Michael Stern, POINT OF ORDER (July 11, 2011, 8:17 AM), <http://www.pointoforder.com/2011/07/11/future-legislative-acts-and-the-ninth-circuits-narrow-reading-of-speech-or-debate/>.

¹⁵⁰ *Brewster*, 408 U.S. at 538 (the question of whether a Congressman's conduct in engaging in a legislative act was improperly motivated "is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.").

jurisprudence. Although, “the exclusion of evidence of past legislative acts undoubtedly will make prosecutions more difficult, . . . the Speech or Debate Clause was designed to preclude prosecution of Members for legislative acts.”¹⁵¹ Any admitted reference to the legislative acts of a Member undermines the values protected by the Speech or Debate Clause.

B. Congressman Renzi engaged in protected “legislative acts”

The Ninth Circuit refused to characterize Congressman Renzi’s “negotiations” over land-exchange legislation as “legislative acts.” Instead, they construed the negotiations as equivalent to promises to perform future acts, which the Court has held fall outside the protections of the Clause.¹⁵² The Ninth Circuit’s characterization however, is unsound.

The drafting of land-exchange legislation involves extensive negotiations between Members of Congress and private landowners, necessarily private individuals become involved in a large part of the process.¹⁵³ Members who seek to pass land-exchange legislation must reach a consensus with their fellow committee members as well as the landowners involved.¹⁵⁴ Thus, a land exchange proposal is analogous to the drafting of legislation.

The Supreme Court has extended the protections of the Clause to “[c]ommittee reports, resolutions, and the act of voting,”¹⁵⁵ committee investigations and hearings,¹⁵⁶ and information gathering in furtherance of legislative activities.”¹⁵⁷ Accordingly, Congressman Renzi’s negotiations with landowners regarding potential land-exchange legislation are protected as well because they at least represent “information gathering in furtherance of legislative activities.” If the Clause does not even protect negotiations over the terms of potential legislation because

¹⁵¹ *Helstoski*, 442 U.S. at 477.

¹⁵² *Helstoski*, 442 U.S. 477.

¹⁵³ Brief for Appellant at 9, *U.S. v. Renzi*, 651 F.3d 1012 (9th Cir. 2007) Nos. 10-10088, 10-10122.

¹⁵⁴ *Id.*

¹⁵⁵ Brief for Appellant at 18-19, *U.S. v. Renzi*, 651 F.3d 1012 (9th Cir. 2007) Nos. 10-10088, 10-10122; *Gravel*, 408 U.S. at 617

¹⁵⁶ *Eastland*, 421 U.S. at 504-05; *McMillan*, 412 U.S. at 313

¹⁵⁷ *Eastland*, 421 U.S. at 504

those negotiations relate only to “future legislative acts” then it appears the only protection left is for the literal words spoken on the House and Senate floor.¹⁵⁸ A restriction so narrow undermines the purposes of the Clause and renders its existence null.

C. The Privilege of Non-Disclosure and Speech or Debate

The D.C. Circuit in *United States v. Rayburn* premised their holding on the contention that, because one of the primary purposes of the Speech or Debate Clause is to prevent interference with the legislative process, then necessarily any form of executive mandated disclosure is barred. The court specifically relied on prior circuit precedent¹⁵⁹ and a singular statement made by the Supreme Court in *Gravel* that “[t]he Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.”¹⁶⁰ However, the Supreme Court never intended the protections of the Clause to reach so far.¹⁶¹

The *Rayburn* ruling creates two serious implications for Speech and Debate Clause jurisprudence: “first, it denies the FBI and DOJ agents the ability to execute search warrants on congressional offices for non-privileged documents without first obtaining the consent of the member of Congress under investigation; and second, it allows the lawmaker to unilaterally decide which documents are protected by the Clause.”¹⁶² As predicted, in the wake of the *Rayburn* decision, law-enforcement officials have had a much more difficult time bringing

¹⁵⁸ Michael Stern, POINT OF ORDER (July 11, 2011, 8:17 AM), <http://www.pointoforder.com/2011/07/11/future-legislative-acts-and-the-ninth-circuits-narrow-reading-of-speech-or-debate/>.

¹⁵⁹ See *Brown & Williamson Tobacco Corp.*, 62 F.3d (a civil case in which the D.C Circuit held that documents or other material could only be obtained on subpoena if they came to the Congressmen from means outside the legislative sphere).

¹⁶⁰ *Rayburn*, 497 F.3d at 144, *Gravel v. U. S.*, 408 U.S. 606.

¹⁶¹ *Brewster*, 408 U.S. at 516 (“We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process.”).

¹⁶² Marcus A. Augustine, *United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515: A Case of the Fox Guarding the Hen House*, 35 S.U. L. REV. 515, 538 (2008).

public corruption charges against public officials.¹⁶³ But any further narrowing of the scope of the Clause comes at the expense of its purpose. At least one scholar has argued that the *Rayburn* court could have relied on general separation of powers principles alone to justify their decision.¹⁶⁴ Regardless of any protections in place, legislative materials must have necessarily been disclosed to both the FBI and therefore the executive, which creates a conflict.¹⁶⁵ For example, there is an obvious conflict in the FBI seizure of documents that may include materials pertaining to legislation in opposition to the party in which the executive belongs.¹⁶⁶ This fact alone justifies ensuring the protections of Speech or Debate remain in place.

The Speech or Debate Clause provides an absolute privilege of non-disclosure. While a more flexible and nuanced privilege of non-disclosure in *Rayburn* sufficiently balances legislative interests, this approach remains inconsistent with constitutional text and existing Supreme Court jurisprudence. Due to the absolute nature of the Speech or Debate privilege it is difficult to reconcile *Rayburn's* holding in which the judiciary may be able to review documents that they are forbidden from reviewing in the first place.

D. Congressional Discipline

In rejecting the reasoning from *Rayburn*, that distraction alone can justify asserting the privilege of Speech or Debate,¹⁶⁷ the *Renzi* court correctly points out Congressional Members have many times been “distracted by investigations and litigation...in cases in which the

¹⁶³ Carrie Johnson, *Legislators Using Law As Shield In Probes*, WASHINGTON POST (Nov. 1, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/31/AR2008103103925.html?hpid=moreheadlines>

¹⁶⁴ Sarah Letzkus, *Damned If You Do, Damned If You Don't: The Speech or Debate Clause and Investigating Corruption in Congress*, 40 ARIZ. ST. L.J. 1377, 1396 (2008).

¹⁶⁵ *Rayburn* at 661.

¹⁶⁶ Sarah Letzkus, *Damned If You Do, Damned If You Don't: The Speech or Debate Clause and Investigating Corruption in Congress*, 40 ARIZ. ST. L.J. 1396 (2008).

¹⁶⁷ *Rayburn* at 660.

underlying action was *not* precluded by the Clause.”¹⁶⁸ Clearly, interference with the legislative process cannot stand alone in justifying the invocation of the Clause. However, the prevention of intimidation by the executive and accountability before a possibly hostile judiciary can, and should.¹⁶⁹ As political parties in America express an ever-increasing disdain for one another it is not difficult to imagine a situation where the executive branch of one party launches an attack on the Congressional members of the other. Because of this, it is this author’s opinion, that despite the court’s inclination to hold Congressman Renzi’s negotiations as “non-legislative” in nature they should have been held for what they are; “act[s] resulting from the nature, and in the execution, of the office... [or] thing[s] said or done by him, as a representative, in the exercise of the functions of [his] office.”¹⁷⁰ This ruling would be wholly consistent with the Court’s broad articulation of the Clause. Instead of the Executive or Judicial Branch bringing charges against Congressman Renzi, Congress’s internal disciplinary system and ultimately the voters should have handled the issue. While this seems drastic, the greater consequence of executive bullying against disfavored legislators will be avoided and the Clause can remain true to the Constitutional text.

Granting greater power to Congress’ internal disciplinary system would work in Congressman Jefferson’s case as well. The *Rayburn* court reaches the peculiar result that Congressman Jefferson should have first been able to decide for himself which documents were “legislative in nature.” Rather than this process even occurring, the FBI could have contacted a member of the Congressional disciplinary committee to assist them with their search and mark the those files deemed to be legislative in nature. This solution would

¹⁶⁸ *Renzi* at 1037 (citing *Helstoski*, 442 U.S. at 481, *Johnson*, 383 U.S. at 173-177, *Gravel* 408 U.S. at 629 n.18).

¹⁶⁹ *See Johnson* at 181.

¹⁷⁰ *Brewster* at 526 (the court was explaining what a bribe *is not*) (citing *Coffin v. Coffin*, 4 Mass. 1 (1808)) (internal quotation marks omitted).

reconcile the problem of allowing “neutral” members of the executive or the judicial branches to review files they should be precluded from seeing in the first place. If the FBI still has enough evidence for an indictment, which does not involve any actions or materials “legislative in nature”, they may then proceed. However, should the FBI lack sufficient evidence yet there remains the possibility of an offense based on those materials, then the investigation should be left to the disciplinary committees within Congress to conduct on their own.

V. Conclusion

Over the years, the Supreme Court has attempted to provide guidance to the lower courts on the correct way to apply the Speech or Debate Clause. Guided by the Court, lower courts have tended to apply the Clause as a linguistic formula; asking whether an activity is “within the legislative sphere.” Unfortunately, the Court has not provided much guidance on how one makes that determination. A determination of what should be included within that “sphere” will depend on the purpose of the Clause. If the purpose of the Clause is to prevent executive retaliation against disfavored legislators then at least Congressman Renzi’s conduct should be protected. If the purpose is to prevent interference with the legislative process then the broad non-disclosure privilege upheld in *Rayburn* should be upheld. If the purpose is neither of the above, then there really is no purpose for the Clause at all.