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Talking About Speech or Debate: Revisiting Legislative Immunity

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INTRODUCTION

The Speech or Debate Clause of the Constitution states that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other place."[1] Its purpose is to protect the independence and integrity of the legislature.[2] The Framers of the American Constitution incorporated centuries of English history and experience into this Clause, but they left little in the way of specifics about what they intended it to mean.[3] This Article traces the development of how the Speech or Debate Clause has been understood and proposes a new framework for implementing the Clause's protections in view of how Congress works.

Under doctrine announced by the Supreme Court in the 1970s, the intent of the Clause has been turned on its head. The Court has taken such a narrow view of congressional work that the immunity does not adequately protect the independence and integrity of the Congress. On the other hand, the Clause has been deployed to immunize criminal conduct by Members of Congress beyond what is necessary to provide meaningful protection of legislative independence.

Today, the Speech or Debate Clause as interpreted covers only a slice of congressional work: voting, speaking on the floor, and engaging in legislative investigation through committees. For this narrow band of so-called "core" acts, a Member of Congress is cloaked with absolute immunity. But the Supreme Court has held that the Speech or Debate Clause offers no protection at all for other essential congressional work, including communicating with constituents and the press. Given that all Members must engage in official actions beyond exercise of their purely parliamentary duties in order to be effective as a practical matter, the current doctrine fails to serve the purpose of the Clause.

For example, recent disclosures by ex-CIA contractor Edward Snowden of a massive National Security Agency surveillance program raise questions about why Members of Congress were not more active in promoting public debate of intelligence activities. Professor Bruce Ackerman has argued that Senator Ron Wyden, a leading congressional proponent of privacy and civil liberties, should

1. U.S. CONST. art. I, § 6.

2. United States v. Johnson, 383 U.S. 169, 178 (1966).

3. Invocations of the Clause inevitably include some recounting of parliamentary practice dating back to at least seventeenth-century England. The history is made all the more exciting by its connection to the English Civil War and the beheading of a king. *See* MARK KISHLANSKY, A MONARCHY TRANSFORMED 158-86 (1996).

use the Speech or Debate privilege to "let Americans know the truth" about National Security Agency surveillance programs.[4] But under Supreme Court precedents, Wyden could not have disclosed his knowledge in interviews or distributed—republished—any disclosures he made in the congressional record. Wyden told the media that his independence had been curtailed and so, in effect, the protections afforded by the Clause were insufficient to serve their purpose.[5]

A second example of a problem with the current doctrine is a scenario in which a Member of Congress hijacked the judiciary as leverage in an intramural political dispute. In 2007, the Court of Appeals for the D.C. Circuit decided a case arising out of events occurring a decade earlier in which one Member of Congress (John Boehner, then Chair of the Republican Conference) sued another member (Jim McDermott, then Ranking Member of the Committee on Standards of Official Conduct) for acts connected to their representational duties.[6] According to Representative McDermott, this was the first time that one sitting Member of Congress had sued another, commandeering the judiciary for an intra-House dispute.[7] The case concluded with a ruling costing McDermott more than a million dollars plus interest in damages and attorneys' fees.[8] The Speech or Debate Clause serves separation-of-powers values and should be interpreted with sufficient breadth to protect Members from this kind of intervention.

Yet the current stunted interpretation also has a substantial cost to congressional integrity and public trust in the legislative branch. A series of recent criminal cases in the lower federal courts involving Members of Congress who have invoked the Clause to protect themselves from investigation for violating

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4. *See* Bruce Ackerman, *Breach or Debate: It's Time for Congress to Use Its Freedom of Speech Power to Force the Intelligence Debate Out into the Open*, FOREIGN POL'Y, Aug. 1, 2013, http://www.foreignpolicy.com/articles/2013/08/1/breach_or_debate_congress_snowden_prism. Ackerman contended that members "cannot be prosecuted for reading classified material into the public record—and it is up to them, and them alone, to decide what is worth talking about." *Id.*

5. In an interview following Ackerman's post, Senator Wyden said, "There are very significant limits [on what you can and cannot say], and they are very cumbersome and unwieldy." Janet Reitman, *Q&A: Senator Ron Wyden on NSA Surveillance and Government Transparency*, ROLLING STONE, Aug. 15, 2013, http://www.rollingstone.com/politics/news/q-a-senator-ron-wyden-on-nsa-surveillance-and-government-transparency-20130815.

6. Boehner v. McDermott, 484 F.3d 573, 575 (D.C. Cir. 2007).

7. *A History of Boehner v. McDermott*, MCDERMOTT LEGAL TRUST, http://www.mcdermottlegaltrust.org/docs/CaseHistory.pdf (last visited Apr. 29, 2009).

8. McDermott v. Boehner, 552 U.S. 1072 (2007) (denying certiorari); Boehner v. McDermott, 541 F. Supp. 2d 310 (D.D.C. 2008) (granting fee motion); *see* Jennifer A. Dlouhy, *McDermott Loses Appeal, and Must Pay Lawmaker*, SEATTLE POST-INTELLIGENCER, Dec. 3, 2007, http://www.seattlepi.com/local/article/McDermott-loses-appeal-and-must-pay-lawmaker-1257697.php.

the public trust has sparked outrage. Most famously, then-Representative William Jefferson was investigated by the FBI in the mid-2000s for accepting hundreds of thousands of dollars in cash bribes for use of his official position to assist in procuring business contracts in Nigeria.[9] When the FBI raided Jefferson's congressional office in May 2006, it sparked a constitutional clash. In a case known as *United States v. Rayburn House Office Building (RHOB)*, a divided panel of the D.C. Circuit held that the search was prohibited by the Speech or Debate Clause.[10] This attracted broad public interest and media attention, reflecting the sense that the conduct being investigated—bribe-taking for assistance in arranging contracts—was not the type of conduct meant to be protected by the Speech or Debate Clause.[11] It also sparked increased use of the Clause by Members of Congress to slow or stop corruption investigations of them by the Department of Justice—again, surely not the protection intended by the Clause.[12] In a 2011 case, the U.S. Court of Appeals for the Ninth Circuit rejected *United States v. RHOB* as wrongly decided, disagreeing "with both [the decision's] premise and its effect."[13] But so long as the circuit split endures, the Clause will continue to be used to prevent investigation and punishment for severe betrayals of the public trust.

I suggest that the Speech or Debate Clause should be read to protect Members with a two-part immunity more expansive than the status quo. First, Members should remain entitled to absolute immunity for "core" legislative acts. Second, Members should be entitled to a qualified Speech or Debate immunity for all other official acts.[14]

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9. *See* David Stout, *Ex-Rep. Jefferson Convicted in Bribery Scheme*, N.Y. TIMES, Aug. 5, 2009, http://www.nytimes.com/2009/08/06/us/06jefferson.html. The case grabbed public attention when the FBI found $90,000 of cash in Jefferson's home freezer. *Foiled: Cold Hard Cash, and Other Obvious Puns*, ECONOMIST, May 25, 2006, http://www.economist.com/node/6980089 ("The FBI d[id] not think this [wa]s cool.").

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

11. *See, e.g.*, Case Comment, *Constitutional Law—Legislative Privilege—D.C. Circuit Holds that FBI Search of Congressional Office Violated Speech or Debate Clause*, 121 HARV. L. REV. 914, 915 (2008) (stating that the D.C. Circuit would have better protected separation-of-powers values served by the Speech or Debate Clause by limiting the legislative nondisclosure privilege).

12. *See* Jerry Markon & R. Jeffrey Smith, *'Speech or Debate' Clause Invoked in Investigations of House Members*, WASH. POST, Jan. 17, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/01/16/AR2011011604612.html ("A constitutional clash over whether House members are immune from many forms of Justice Department scrutiny has helped derail or slow several recent corruption investigations of lawmakers, according to court documents and sources.").

13. United States v. Renzi, 651 F.3d 1012, 1034 (9th Cir. 2011).

14. This qualified immunity could be seen as grounded either in constitutional interpretation or federal common law. This Article adopts the former view, which

This broader qualified immunity should also be made more permeable by being subject to two caveats, both rooted in *United States v. Johnson*, a landmark Speech or Debate Clause opinion written by Justice John Marshall Harlan in 1966.[15] First, immunity should not preclude prosecutions "which, though . . . founded on a criminal statute of general application, [do] not draw in question the legislative acts of the defendant Member of Congress or his motives for performing them."[16] On this reading, assault and bribe-taking for personal gain would be fair game for investigation and prosecution. Second, the Clause should allow prosecution and investigation "founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members"—effectively giving the executive branch strictly limited enforcement power based on express delegation from Congress.[17]

Despite its importance as the original constitutional fount of free speech, the Speech or Debate Clause has attracted an astonishingly small amount of scholarship—all the more surprising for a named constitutional provision identifiable by most lawyers and law students. In the wake of a series of Burger Court decisions,[18] scholars and practitioners criticized the resulting doctrine as too narrow, leaving Congress impoverished in its public role.[19] Prosecutors have

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provides a powerful rationale for revisiting current doctrine and for limiting immunity expansion to the congressional context alone. Hence, it refers to "qualified Speech or Debate immunity."

15. 383 U.S. 169 (1966).

16. *Id.* at 185.

17. *Id.*

18. Hutchison v. Proxmire, 443 U.S. 111 (1979); United States v. Helstoski, 442 U.S. 477 (1979); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972). A seventh case, *Helstoski v. Meanor*, 442 U.S. 500 (1979), was a companion to one of the above and held that Speech or Debate Clause immunity decisions were appealable as interlocutory questions.

19. *See, e.g.*, LEWIS DESCHLER, 2 DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES 805, H. Doc. 94-661 (1994) ("Many Congressmen viewed those decisions as posing a threat to the independence of congressional speech and of legislative activities."); Alexander J. Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 SUFFOLK U. L. REV. 1019, 1085 (1974) ("Clearly, a more realistic conception and understanding of the nature of the modern legislative process, including a more realistic appraisal of what ought to constitute legitimate legislative activity as an essential part of the process, must be developed."); Sam J. Ervin, Jr., *The* Gravel *and* Brewster *Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175, 175 (1973) (stating that recent cases had restricted Speech or Debate immunity so much "that Members of Congress can no longer independently acquire information on the activity of the executive branch nor report such information to their constituents without risking criminal prosecution"); Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L.

taken the opposite view, complaining that the protection is overbroad.[20] In 2007, Professor Josh Chafetz published a superb book describing the development of legislative privilege in the British and American constitutions.[21] Chafetz concluded that American courts have failed to give effect to the popular-sovereignty rationale for legislative immunity in the form of the Speech or Debate Clause.[22] But the cupboard of legal analysis of the Clause remains relatively bare.

To remedy this deficiency, this Article takes up two related intellectual projects. Parts I and II analyze the history of Speech or Debate Clause immunity and the evolution of this doctrine in the American system. Part III looks at the history of cases addressing republication of congressional proceedings, a privilege that has gained importance as public strategy has become essential to the Congress. These Parts draw heavily on new archival research—from the papers of Justices William Douglas, Earl Warren, John Marshall Harlan, William Brennan, Potter Stewart, Byron White, Abe Fortas, Thurgood Marshall, Harry Blackmun, Lewis Powell, and others—to explain how Speech or Debate Clause doctrine became such a thorny knot. This aspect of the Article leads to conclusions of history rather than of law; to be clear, I do not mean to suggest that evidence of private deliberations among Justices can itself become a source of legal authority.[23] Instead, the history explains and confirms Chafetz's intuitions that the current state of the law is not a faithful implementation of constitutional text and meaning. The final Part addresses problems with the Court's view of the Clause as it ossified in the 1970s and builds out a new framework for applying the Clause's protections. In the whole, this Article responds to the call from Chafetz and other scholars for a general rethinking of the reach of the privilege in the modern political system.

REV. 1113, 1170 (1973) (arguing that the scope of the Speech or Debate privilege "is defined by contemporary legislative functions").

20. *See, e.g.*, Craig M. Bradley, *The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption*, 57 N.C. L. REV. 197 (1979).

21. JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW (2007). Chafetz posits a historical theory of interpretive transition from a "Blackstonian" paradigm to a "Millian" paradigm. *See id.* at 4-8. By his account, the early development of parliamentary privilege was to protect the House of Commons from outside interference at all costs—even at the expense of representational legitimacy (the Blackstonian approach). *Id.* at 4. More recently, in Britain and the United States, parliamentary privilege has been interpreted as facilitating "a tight nexus between the will of the people and the actions of the government"—including through recognition that the courts and the public have important democratic roles in checking congressional behavior (the Millian approach). *Id.* at 9; *see id.* at 48.

22. *Id.* at 109-10.

23. Speech or Debate Clause jurisprudence is unusual in that it has been untouched by the Supreme Court for thirty-five years, and as a result the papers of nearly all the Justices involved are available. The only major exception is Chief Justice Burger's archive, which is closed to researchers until 2026.

I. History of the Speech or Debate Clause

A. *Origins*

The Supreme Court has noted that, "[b]ehind the[] simple phrases [of the Speech or Debate Clause] 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."[24] But the rich history of English practice obscures a critical fact: although the Framers of the American Constitution incorporated centuries of English experience into the Clause, they left little in the way of specifics about what they intended it to mean for the American system of three co-equal branches.

The parliamentary free-speech privilege dates back to the early battles of the English Parliament for independence from the Crown. In his 1921 book, *The History of English Parliamentary Privilege*, Carl Wittke suggested that the Anglo-American privilege had achieved a certain clarity as to speech or debate on the floor of the legislature in that a "representative may speak his mind openly and fearlessly within the walls of Parliament or Congress, and for what he says there he cannot be called to account by the world outside."[25] Yet the underlying principle of free legislative speech was plagued at the outset by serious conflict, beginning with the earliest record of a petition for parliamentary freedom of speech in 1542.[26] Through the reign of Queen Elizabeth I (1558-1603), the strength of the parliamentary privilege remained unsettled—an "unknown quantity to be determined by the clash of personalities."[27] Changes in personalities—the ascension of the Stuart monarchs together with more assertive parliaments—brought this clash to the fore.[28]

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24. United States v. Johnson, 383 U.S. 169, 178 (1966).

25. CARL WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 14 (1921).

26. Wittke chronicled the development of traditional parliamentary privileges as part of the Speaker's Petition, the mechanism by which Parliament claimed privileges beginning with the reign of Henry VIII. These included freedom from arrest, freedom from molestation for members and their servants, freedom of speech in debate, admittance to the royal presence, and favorable construction of all proceedings. *Id.* at 21. Mary Patterson Clarke dated development of parliamentary freedom of speech to between 1523 and 1563, roughly the same period. MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 5-6 (1943). But Chafetz contends that, by 1399, freedom of speech "was already considered a traditional liberty of the House of Commons," and that its contextual origins are therefore lost. CHAFETZ, *supra* note 21, at 22.

27. CLARKE, *supra* note 26, at 10; *see* Josh Chafetz, *"In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation": Late Tudor Parliamentary Relations and Their Early Stuart Discontents*, 25 YALE J.L. & HUMAN. 181, 188-95 (2013) (tracing transformation of parliamentary privilege through Queen Elizabeth's reign "from [a] tool of royalist government to [a] tool of parliament in its own right").

28. *See* CLARKE, *supra* note 26, at 10.

The conflict pitted the Crown's prerogative (derived from the doctrine of divine right) against the Parliament's democratic credentials.[29] Historian Mary Patterson Clarke explains that the rights of Parliament were therefore identified with the rights of the people, not in antagonism to them.[30] As parliamentary rights champion Sir John Eliot framed it, "The heart blood of the commonwealth receiveth life from the privilege of this House."[31]

It was this interpretation of the parliamentary position that traveled to the American colonies by adoption in the colonial assemblies. Clarke suggests that, given the meddling of British monarchs in subjects claimed by Parliament and the reaction to the monarchs' assertion of control over the colonies, "it is not surprising that the leaders of the early colonial assemblies should have started traditions about freedom of speech that grew and developed all over British America."[32]

In 1641, the British Parliament engaged in a defining showdown with King Charles I. Displeased with a bill, the King ordered the seizure of papers belonging to five Members of the House as proof of their treason.[33] In the dramatic seventeenth-century recounting of George Petyt:

> [H]is Majesty in his Royal Person the 4th of Jan., 1641, did come to the House of Commons, with a great Multitude of Men, armed in a warlike manner, with Halberds, Swords, and Pistols . . . and his Majesty having placed himself in the Speaker's Chair, did demand the Persons of divers Members of that House to be delivered unto him. It was thereupon declared by the House of Commons, That the same is a high Breach of the Rights and Privileges of Parliament, and inconsistent with the Liberty and Freedom thereof . . . .[34]

After King James II was overthrown in the Revolution of 1688, the English Bill of Rights of 1689 formally declared "that the freedom of speech, and debates, and proceeding in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."[35] Indeed, the notion of a legislature

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29. *Id.*

30. *Id.*

31. *Id.* at 131.

32. *Id.* at 93.

33. *Id.* at 9.

34. GEORGE PETYT, LEX PARLIAMENTARIA: OR, A TREATISE OF THE LAW AND CUSTOM OF THE PARLIAMENTS OF ENGLAND 168-69 (William & Andrew Bradford 1716). After his bungled attempt to arrest the leaders of the House, King Charles I fled the capital, declaring the leaders of Parliament rebels and traitors and plunging England into the First Civil War of 1642-45 (which Charles lost). Still unwilling to surrender his authority following the peace of 1645, Charles subsequently lost his head on January 30, 1649. *See* KISHLANSKY, *supra* note 3, at 158-86.

35. Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.). Before the development of parliamentary supremacy in the aftermath of the Glorious Revolution and the

with free and full discourse was integral to the view of an ascendant, independent Parliament. "It is called *Parliamentum*," summarized Petyt in his 1689 treatise, "because every Member of the Court should *parler le ment*, speak his mind."[36]

This sense of freedom of parliamentary speech was incorporated into the American Constitution with virtually no discussion.[37] The Articles of Confederation provided: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress . . . ."[38] When the time came to consider a new Constitution, Charles Pinckney's *Draft of a Federal Government* suggested that "Freedom of speech and debate in the legislature shall not be impeached, or questioned, in any place out of it."[39] The Constitutional Convention's Committee on Detail revised the language to read, "Freedom of Speech and Debate in the Legislature shall not be impeached or questioned in any Court or Place out of the Legislature," which the full Convention approved without recorded debate or dissent.[40] The Committee on Style was responsible for the Clause's final wording, which proved uncontroversial in state ratification proceedings and in public debate.[41]

Notwithstanding the limited attention paid to the Speech or Debate Clause at the Convention, several Framers and early commentators amplified their views on its importance to the constitutional design in other writings. James Wilson, an influential Member of the Committee on Detail and later one of the first Justices of the Supreme Court, explained:

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transfer of ministerial responsibility to Parliament in the early-to-mid-eighteenth century, the English governmental structure actually looked a bit more like the American design, with an executive independent from the legislature, but still reliant on the legislature for most revenue and for passing new laws. *See* E-mail from Josh Chafetz, Professor of Law, Cornell Law School, to author (Sept. 20, 2013, 11:05 EST) (on file with author).

36. PETYT, *supra* note 34, at 1. Thomas Jefferson was well-acquainted with Petyt, writing to his son-in-law that, "For parliamentary knowledge the Lex parliamentaria is the best book." Letter from Thomas Jefferson to Thomas Mann Randolph, Jr. (May 30, 1790), *in* THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES (Paul Leicester Ford ed.), Library of Congress Online Edition.

37. CHAFETZ, *supra* note 21, at 87-88.

38. ARTICLES OF CONFEDERATION of 1781, art. V, para. 5.

39. Williamson v. United States, 207 U.S. 425, 437 (1908) (internal quotations omitted).

40. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 166, 180, 254 (Max Farrand ed., rev. ed. 1966).

41. *Id.* at 593; CHAFETZ, *supra* note 21, at 88; *see* United States v. Johnson, 383 U.S. 169, 177 (1966) ("The Speech or Debate Clause of the Constitution was approved at the Constitutional Convention without discussion and without opposition."); *Williamson*, 207 U.S. at 437.

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.[42]

In his *Commentaries on the Constitution of the United States*, Justice Joseph Story described Speech or Debate as a "great and vital privilege . . . without which all other privileges would be comparatively unimportant or ineffectual."[43]

Given the broad impact of the First Amendment, it is striking to consider that the Speech or Debate Clause comprised the entirety of free speech protection in the Constitution as initially written in 1787. Indeed, the Framers of the Bill of Rights looked to parliamentary privilege as embodied in the Speech or Debate Clause to find the principles that animated the First Amendment.[44] Only later, in 1791, was the Bill of Rights submitted and ratified, providing for a direct free speech right in the citizenry.[45] In practice, the free speech aspect of the Speech or Debate Clause has been virtually subsumed by First Amendment jurisprudence—that is, there is little effective legislative speech covered today that is not also protected by the First Amendment.[46] There is, however, no indication that the Framers meant the First Amendment to reduce the Speech or Debate Clause to de facto surplusage by making the First Amendment a broader

42. 2 WORKS OF JAMES WILSON 38 (Andrews ed. 1896).

43. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 866 (1833).

44. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 24-25 & n.* (1998) ("[T]he First Amendment took the British idea of Parliamentary 'freedom of speech and debate' and ultimately extended that freedom to all Americans.").

45. Freedom of speech, together with the personal right to petition the government for a redress of grievances, was not express until ratification of the Bill of Rights. U.S. CONST. amend. I. *But see Cook v. Gralicke*, 531 U.S. 510, 529 (2001) (Kennedy, J., concurring) ("[I]t must be noted that when the Constitution was enacted, respectful petitions to legislators were an accepted mode of urging legislative action.").

46. I suggest this as a practical rather than a logical matter. There is no question that slander in a floor speech in the House or Senate is protected by the Speech or Debate Clause but not the First Amendment. But floor speech *alone* does not sway votes, affect a member's relationship with constituents, or accomplish any other legislative purpose. *See infra* notes 146-147 and accompanying text (discussing how Senator Proxmire thought it necessary to deliver his speech on the floor and then communicate it to constituents for it to have effect); *infra* notes 262-72 and accompanying text (discussing imperatives for the contemporary member of Congress).

application of coextensive protection.[47] Given that the Supreme Court has found "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," the notion of parliamentary space protected by the Speech or Debate Clause deserves a closer look.[48]

B. *Anticipating Broad Legislative Immunity*

Early American commentary on legislative immunity anticipated that the Clause would offer robust protections. From the start, it was understood as broader than the literal language of speech or debate in either chamber. In 1856, Luther Stearns Cushing, a former clerk of the Massachusetts House of Representatives and reporter of the Massachusetts Supreme Judicial Court, published his *Lex Parliamentaria Americana*.[49] Cushing argued for an expansive construction of the privilege (in both state and federal law), explaining that the purpose of legislative freedom of speech was to protect the rights of the people "by enabling their representatives to execute the functions of their office, without fear of either civil or criminal prosecutions."[50] In his view, it was to include speeches, debate, voting, written reports, communications to the House or to a Member, and committee activity on like terms as activity in the full House.[51] He concluded: "[I]n short... the privilege in question secures the Members of a legislative assembly against all prosecutions, whether civil or criminal, on account of any thing said or done by them, during the session, resulting from the nature and in the execution of their office."[52] This comprehensive perspective on immunity was and is the sensible approach.

The Supreme Court first mentioned the Clause in 1881, and the Court has opined on its meaning only infrequently since then.[53] Its single nineteenth-

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47. *See* AMAR, *supra* note 44, at 125 (arguing for the importance of reading the Speech or Debate Clause and the First Amendment together rather than taking a "clausebound" approach).

48. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

49. LUTHER STEARNS CUSHING, LEX PARLIAMENTARIA AMERICANA: ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA (Little, Brown & Co. 1856).

50. *Id.* at 243.

51. *Id.*

52. *Id.*

53. The Massachusetts state case of *Coffin v. Coffin* is much cited as an early interpretation of American parliamentary privilege even as its holding provides limited guidance. 4 Mass. 1 (1808). *Kilbourn v. Thompson* quotes language from the case suggesting an expansive scope for the privilege. 103 U.S. 168, 203 (1881). But later opinions observe that *Coffin* held that the defendant was not exercising official duties in defaming the plaintiff, and therefore was not entitled to immunity. *See, e.g.*, United States v. Brewster, 408 U.S. 501, 515 n.8 (1972).

century Speech or Debate case, *Kilbourn v. Thompson*, gave the Clause a broad reading by adopting Cushing's view.[54]

In *Kilbourn*, a D.C. real estate investor was jailed on order of the House of Representatives for refusing as a witness to the House to answer questions and produce documents about his business interests. Kilbourn, the investor, sued House Sergeant-at-Arms Thompson and several individual Members of the House, contending that the House lacked the power to punish him for contempt.[55] The Court first concluded that the House lacked authority to issue a warrant for imprisonment and then considered whether the defendants were protected by the Speech or Debate Clause.[56] While it allowed the case to proceed against Thompson as an officer of the House, the Court held that the Members themselves were immune. Writing for a unanimous Court, Justice Samuel Miller explained:

> It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.[57]

Following *Kilbourn*, the Supreme Court did not revisit the Speech or Debate Clause until the mid-1960s, when thorny problems arose. The Warren Court sought to ensure that legislative immunity protected congressional business without becoming a general license for improper or obviously criminal conduct.[58] This was the tightrope the Supreme Court would have to walk in

54. *Kilbourn*, 103 U.S. 168.

55. *Id.* at 181.

56. *Id.* at 199-200. *Kilbourn* also stated a restricted view of congressional power to conduct investigations. Although it held sway for several decades, the Court said in a 1927 opinion that *Kilbourn* had simply been misread. *See* McGrain v. Daugherty, 273 U.S. 135, 171 (1927); *see* Gerald D. Morgan, *Congressional Investigations and Judicial Review:* Kilbourn v. Thompson *Revisited*, 37 CALIF. L. REV. 556, 557 (1949) ("[F]or some 46 years following *Kilbourn v. Thompson*, because of the broad sweep of its reasoning . . . the very existence in this country of a power in the Senate and House of Representatives to compel testimony and punish for contempt in aid of the legislative function was in grave doubt.").

57. 103 U.S. at 204. The language—especially the last sentence quoted—is strikingly similar to the Cushing commentary, *supra* note 49 and accompanying text, which suggested an expansive view of the privilege. The author of the *Kilbourn* opinion, Justice Samuel Miller, probably drew on Cushing to find and express his result, especially given the paucity of American sources on the topic. This would also explain some of the opinion's focus on the history of Speech or Debate protections in Massachusetts, Cushing's home jurisdiction.

58. Only three Supreme Court cases even mention the Speech or Debate Clause in the eighty-five years following *Kilbourn*, and they do so in passing fashion. *Williamson*

translating the English principle into the American system. In an opinion by the second Justice John Marshall Harlan, the Court took sensible if tentative first steps before later falling off the wire.[59]

C. *Justice Harlan's Approach in* Johnson

In *United States v. Johnson*, the first criminal case turning on the Speech or Debate Clause to reach the Supreme Court,[60] the Court held that a criminal

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v. United States quoted the Clause in interpreting the companion constitutional provision on members' freedom from arrest in civil cases. 207 U.S. 425, 435 (1908). *Barr v. Matteo* referenced the Speech or Debate Clause in the course of finding an absolute immunity from a damages suit for an Executive Branch official's press release as an action "within the outer perimeter of [his] line of duty." 360 U.S. 564, 575 (1959) (plurality opinion). *Tenney v. Brandhove* relied on the Clause for analogy in finding a federal immunity from civil suit for state legislators. 341 U.S. 367, 372-73 (1951). In *Tenney*, the Court discussed the shared history underlying the Constitution's Speech or Debate Clause and parallel legislative immunity provisions in many state constitutions, but the decision held only that the Civil Rights Act of 1871 did not abrogate the federal common law immunity that attaches to state legislators. *Id.* at 379. *But see* Powell v. McCormack, 395 U.S. 486, 501 (1969) (identifying *Tenney* along with *Dombrowski*, *Johnson*, and *Kilbourn* as cases in which the Court had "been called upon to determine if allegedly unconstitutional action taken by legislators or legislative employees is insulated from judicial review by the Speech or Debate Clause"). Although several other cases since have discussed the Speech or Debate Clause in the context of informing immunities claimed by state legislators, the Court has clearly established that the Speech or Debate Clause protects only members of the United States Congress. *See* United States v. Gillock, 445 U.S. 360, 366 n.5 (1980) (noting that state legislators are not "entitled to the benefits of the Federal Speech or Debate Clause, which by its terms applies only to 'Senators and Representatives.'"); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 404 (1979) ("The Speech or Debate Clause of the United States Constitution is no more applicable to the members of state legislatures than to the members of [a regional planning agency created by interstate compact].").

59. For an analysis of the current state of freedom of speech privilege at Westminster, see WILLIAM MCKAY & CHARLES W. JOHNSON, PARLIAMENT & CONGRESS: REPRESENTATION AND SCRUTINY IN THE TWENTY-FIRST CENTURY 484-89 (paperback ed., 2012).

60. *Burton v. United States*, in which the conviction of a sitting U.S. Senator for public corruption was affirmed, did not implicate the Speech or Debate Clause because the statutory violation at issue was taking compensation to act as counsel to a private company (in an investigation for mail fraud) in a proceeding where the United States was a party. 202 U.S. 344, 372 (1906). For another example of a pre-*Johnson* public corruption prosecution of a Member of Congress where the Speech or Debate Clause was not raised, see *May v. United States*, 175 F.2d 994, 998 (D.C. Cir. 1949).

prosecution based on inquiry into the motives for legislative acts was prohibited by the Clause.[61]

Former Representative Thomas Johnson of Maryland challenged his criminal conviction for accepting "legal fees" and a "campaign contribution" as quid pro quos for a speech he had made on the House floor. That speech had suggested his co-conspirators' innocence in connection with charges being pursued by federal prosecutors and asked the Attorney General to drop pending indictments.[62] The Fourth Circuit panel identified *Johnson* as the first case "squarely raising the question of whether the congressional privilege deprives a court of jurisdiction to try a member on a criminal charge of accepting money to make a speech in the House of which he is a member."[63] The panel concluded that it did and found that immunity attached: "In the case of a congressman, the possibility—even the likelihood—of ultimate vindication in a court proceeding is no substitute for the guarantee held out by the Constitution."[64] It reasoned that only Congress could punish Johnson for the acts he had committed.

The Solicitor General's petition for certiorari claimed that the Fourth Circuit opinion cast doubt on the validity of conflict-of-interest legislation and said that the Court should take the case, even if the decision was correct, to put Congress on notice about any exclusive enforcement jurisdiction.[65] Certiorari was granted, the case was argued in mid-November 1965, and the opinion was assigned at Conference to Justice Harlan.[66]

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61. United States v. Johnson, 383 U.S. 169, 184-85 (1966).

62. *Id.* at 171-72.

63. United States v. Johnson, 337 F.2d 180, 186 (4th Cir. 1964), *aff'd*, 383 U.S. 169 (1966). Until the 1960s, congressional conflicts of interest and personal misbehavior were widely tolerated. *See generally* Richard Baker, *The History of Congressional Ethics*, *in* REPRESENTATION AND RESPONSIBILITY: EXPLORING LEGISLATIVE ETHICS 4 (Bruce Jennings & Daniel Callahan eds., 1985); Todd S. Purdum, *Sex and the Senate: Bobby Baker's Salacious Secret History of Capitol Hill*, POLITICO MAG., Nov. 19, 2013, http://www.politico.com/magazine/story/2013/11/sex-in-the-senate-bobby-baker-99530.html (describing LBJ aide Bobby Baker's oral histories with the Senate historian as reflecting "an age when senators drank all day, indulged in sexual dalliances with secretaries and constituents, accepted thousands of dollars in bribes and still managed to pass the most important legislation of the 20th century"). The growth of public corruption norms, laws, and prosecutions in the 1960s and 1970s created a novel context giving rise to new issues in interpretation of the Speech or Debate Clause.

64. *Johnson*, 337 F.2d at 192.

65. Petition for a Writ of Certiorari at 6-7, *Johnson*, 383 U.S. 169 (No. 65-25).

66. Harlan was among the Justices who saw the significance of the case in advance. His clerk agreed with the Solicitor General's argument that the writ of certiorari should issue, writing in a memo to the Justice that "[a]lthough the case is rather unique, it concerns a very important question that probably should be settled." John Marshall Harlan Papers, Princeton University [hereinafter Justice Harlan

Justice Harlan's law clerk Matthew Nimitz prepared a draft opinion that the Justice took home to Connecticut over the holidays in December. Nimitz wrote that this particular prosecution should be disallowed because it was premised on facts too close to constituent service for the Court to parse, but he would not go as far as the Fourth Circuit in suggesting that bribery prosecutions were generally disallowed. Nimitz evidently was uncomfortable with the Speech or Debate Clause implications of a prosecution premised on the totality of the circumstances, which he equated with the conspiracy charge, presumably in contrast to the specific offense elements that would require proof in a prosecution for violation of a conflicts-of-interest statute.[67] The key passage of his draft read:

> Campaign contributions may be regulated; bribery may be defined and outlawed; but prosecuting a member of Congress in the manner done here, simply because the totality of his actions in connection with the delivery of a particular speech is thought to deprive the United States of his rightful services, is so likely to inhibit lawful legislative activity that the purposes of the Clause, in addition to its precise language, compels affirmance of the dismissal.[68]

Justice Harlan could not have missed the news reported on December 22, 1965, that President Lyndon B. Johnson had pardoned former Representative Frank Boykin. Boykin had been tried and convicted alongside Thomas Johnson but had not appealed his sentence of a fine and term of probation.[69] The Justice Department explained the President's pardon as premised on Boykin's "heart

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Papers], Box 246, Folder "No. 25 – Memoranda, Etc." The Justice annotated the memo in agreement, writing, "This should be heard." *Id.*

67. Justice Harlan Papers, Box 246, Folder "No. 25 – Drafts." ("In affirming reversal of conviction under this count, we do not foreclose a prosecution under a statute making it unlawful to exact or accept a bribe in circumstances similar to those before us. Congress may regulate, as it does, the range of permissible remuneration a Congressman may receive, and it may penalize transgressors. But the case before us is not a straightforward bribery or conflict-of-interest prosecution. Rather, it alleges a broad conspiracy to deprive the United States of its rightful services, the essential elements of which was the giving of a particular speech for a particular purpose. Such a charge invites a defense entailing even more intensive examination of matters which the Clause forecloses from judicial scrutiny. The possible abuses of this sort of prosecution are manifold. Members of the legislature are political figures; by necessity and design they must have contacts with various interest groups that comprise our polity. Their speeches and their votes represent particular viewpoints. Members of Congress receive campaign contributions from their supporters, and these supporters will tend to be those to whose interests the legislator is sympathetic.").

68. *Id.*

69. *Boykin, Former Congressman, Gets Pardon in Influence Case*, N.Y. TIMES, Dec. 22, 1965, http://query.nytimes.com/mem/archive/pdf?res=F00915FF3F54167A93C0AB1789D95F418685F9.

condition" and "high blood pressure."[70] Justice Harlan likely saw the *New York Times* editorial entitled "Pardon for the Unpardonable" that was printed on the same day[71]—both the editorial and the corresponding news story appear in his case file.[72] And so Justice Harlan likely had in mind both the historical importance of legislative immunity and the necessity of ensuring it was not overbroad when he wrote back to Nimitz with his comments on the draft, saying that the "only problem I have with your draft concerns the distinction between conspiracy to defraud and bribery. I find it very difficult to see how the two kinds of prosecution can be distinguished from the standpoint of the Speech or Debate Clause."[73]

In other words, Justice Harlan saw the tension between ensuring meaningful Speech or Debate Clause protection and leaving room for legitimate public corruption prosecutions, but he could not see clear to a full resolution. In his own handwriting, Justice Harlan spelled out what became the key passage of his opinion, replacing the text from Nimitz he had rejected. He suggested that Congress itself should have a role in determining the boundaries of the immunity that protects its Members:

> We hold that a prosecution dependent on such inquiries, and which is conducted under a general criminal statute, necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant legislator or his motives for performing them. And, without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.[74]

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70. *Id.*

71. Editorial, *Pardon for the Unpardonable*, N.Y. TIMES, Dec. 22, 1965, http://query.nytimes.com/mem/archive/pdf?res=FB0815FF3F54167A93C0AB1789D95F418685F9 ("When a Congressman violates the law, he damages the very foundations of trust upon which self-government ultimately rests.").

72. Justice Harlan Papers, Box 246, Folder "No. 25 – Memoranda, Etc."

73. Justice Harlan Papers, Box 246, Folder "No. 25 – Drafts."

74. United States v. Johnson, 383 U.S. 169, 184-85 (1966). This same wording (prior to modest stylistic changes) appears in Justice Harlan's own handwritten draft sent to Nimitz in December 1965. Justice Harlan Papers, Box 246, Folder "No. 25 - Drafts." Subsequent revisions in Chambers added a citation to a student analysis of the Fourth Circuit's *Johnson* opinion published in the *Yale Law Journal* during fall 1965, which likely informed Justice Harlan's key passage. *See id.* at 185 n.15 (citing Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J.

Although Harlan saw that it was essential for the Clause's protections to be broad, he was concerned with the consequences of finding them absolute, and so left open crucial permeability.

Justice Harlan circulated the first printed draft of his opinion to the conference on January 6, 1966, and he quickly commanded the Court. Daniel Levitt, one of Justice Fortas's law clerks, recommended that Justice Fortas sign on to the opinion, quoting from the language Harlan had inserted and applauding the approach:

> Harlan decides only a narrow question—that in a prosecution under a general statute "intensive inquiry" may not be made into the making of a Congressional speech. Perhaps this is a desirable way to proceed, given the paucity of law relating to the Speech or Debate Clause. Let future cases decide how much inquiry can be made, and preferably let Congress pass a statute designed to control its own membership .... I would join this opinion which, although it supplies little in the way of guidelines for future prosecutions under general statutes, suggests that Congress ought to deal with this problem specifically.[75]

All seven voting Justices agreed on the opinion within days of its circulation.[76]

335, 347-48 (1965) ("The possibility of a tight definition of bribery which would sharply reduce discretion afforded under existing statutes indicates that there need not be an absolute immunity to bribery prosecutions.")).

75. Abe Fortas Papers, Yale University Library, Box 12, Folder 279.

76. Justice Fortas sent his join memo on January 10. *Id.* Justice Stewart had already sent his join memo on January 6, the same day the draft was circulated. Potter Stewart Papers, Yale University Library [hereinafter Justice Stewart Papers], Box 219, Folder 2357. Kenneth Ziffren, a law clerk to Chief Justice Earl Warren, focused on the same key language in recommending to the Chief Justice that he join. Earl Warren Papers, Library of Congress, Box 618, Folder "No. 25 – Johnson, U.S. v. – Concurring & Dissenting." The Chief Justice evidently directed his clerk to focus on whether the non-conspiracy substantive counts were properly before the Court, a question which formed the basis of his partial dissent joined by Justices William Douglas and William Brennan. *Id.*; *see also Johnson*, 383 U.S. at 186 (Warren, C.J., concurring in part and dissenting in part). Justice Hugo Black did not participate in the case, perhaps because he had once pursued co-defendant Boykin as a prosecutor and he subsequently had been Boykin's congressional colleague in the Alabama delegation. *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 63-64 (2d ed. 1997). Black nevertheless wrote to Harlan from Miami in February 1966, saying, "I was so much impressed by your opinion that I wanted to let you know that could I participate I would be on your side despite the dissent." Justice Harlan Papers, Box 246, Folder "No. 25 – Memoranda, Etc." Justice Byron White also did not participate, probably because his service as Deputy Attorney General meant he would have overseen the prosecution. *See infra* note 205. Thurgood Marshall, not yet a Justice, participated in the case as Solicitor General—he took office in time to sign the reply brief and supervise the argument—attaching him to the government's position that few if any prosecutions could be barred by the Speech or Debate Clause. This was a position

And so the Court's final opinion stated that "it was undisputed that Johnson delivered the speech; it was likewise undisputed that Johnson received the funds"—the trouble was that the indictment "focused with particularity upon motives underlying the making of the speech and upon its contents."[77] The Speech or Debate Clause prohibited a criminal prosecution based on inquiry into the motives for legislative acts.[78]

But Justice Harlan's opinion was also clear regarding what the Court did not decide. First, it left unaddressed a potential prosecution founded on a criminal statute of general application that did not "draw in question the legislative acts of the defendant member of Congress or his motives for performing them."[79] And second, it left open the possibility of a prosecution based on a "narrowly drawn statute passed by Congress" that delegated to the executive branch the power to regulate conduct of Members of Congress—for example, by giving the Justice Department express authority to investigate and prosecute Members who accepted personal payments in exchange for their speeches or their votes.[80]

D. *State of the Law at the End of the Warren Court*

Although the Warren Court's only major interpretation of the Speech or Debate Clause was its *Johnson* opinion, it did decide one other case on Speech or Debate Clause grounds: *Dombrowski v. Eastland*, in 1967.[81] In a short opinion that was even shorter on legal reasoning, the Court held that the Speech or Debate Clause prohibited judicial inquiry into a powerful congressional committee chairman's alleged harassment of civil rights activists.

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he would later take again while voting on the Supreme Court, to Justice Brennan's great surprise. *See infra* note 99.

77. *Johnson*, 383 U.S. at 184.

78. *Id.* at 184-85. The Court did not upset convictions on separate counts resting on direct attempts to influence the Department of Justice. Justice Harlan's opinion stated, "No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." *Id.* at 172. The result did not ultimately stop criminal punishment for wrongdoing, as Johnson was retried and convicted in 1968, and he served part of a federal prison sentence and paid a $5,000 fine. *See Former Rep. Thomas Johnson of Maryland Dies*, WASH. POST, Feb. 3, 1988, at D8.

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

80. *Cf.* ROBERT S. GETZ, CONGRESSIONAL ETHICS: THE CONFLICT OF INTEREST ISSUE 18 (1966) ("Harlan's words seem to constitute an invitation to Congress to consider the matter.").

81. 387 U.S. 82 (1967).

Dombrowski was a messy case involving a Senate subcommittee's chair and its chief counsel, who allegedly tortiously conspired with state officials to seize records in violation of the Fourth Amendment. Underlying the legal questions at issue in the case was a sorry abuse of federal and state power. James Dombrowski was a New Orleans-based leader in the Civil Rights Movement who served for nearly two decades as Executive Director of the Southern Conference Educational Fund.[82] In October 1963, Louisiana state officials arrested Dombrowski and colleagues on charges of violating the Louisiana Subversive Activities and Communist Propaganda Control Law.[83] By the time *Dombrowski v. Eastland* reached the Court in the 1967 Term, the Justices had two years earlier already decided a landmark case arising from that same arrest and raid: *Dombrowksi v. Pfister*. There, the Court had held that the federal courts should enjoin a state criminal proceeding that would lead to the loss of protected freedoms of expression.[84]

Meanwhile, Dombrowski had also brought the case of *Dombrowski v. Eastland* in federal court in the District of Columbia, pursuing Section 1983 claims against Senator James Eastland, the powerful chairman of the Senate Judiciary Committee and its Internal Security Subcommittee, and J.G. Sourwine, the subcommittee's chief counsel.[85] This suit claimed that Eastland and Sourwine had conspired in the seizure of papers executed by the Louisiana state officials.[86] The Supreme Court held that the Speech or Debate Clause commanded dismissal of the claims against the Senator. The per curiam opinion rather tersely explained that the immunity promised by the Clause was meant to be immunity not merely from liability, but from suit as well.[87]

But the Court also held that the immunity did not attach to Sourwine, the chief counsel. The opinion stated that the doctrine of legislative immunity is "less absolute, although applicable, when applied to officers or employees of a

82. Damon Stetson, *J.A. Dombrowski, Activist, 86*, N.Y. TIMES, May 4, 1983, at D24.

83. *See* Dombrowski v. Pfister, 380 U.S. 479, 481-88 (1965).

84. In *Pfister*, the Court made an except to the general abstention doctrine of federal judicial deference to state court proceedings. *See* RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 1093-94 (6th ed. 2009).

85. *Eastland is Sued by Rights Group: Senator and Sourwine Are Accused of Role in Arrest*, N.Y. TIMES, Nov. 2, 1963, at 12. Eastland, as chair of the Senate Judiciary Committee, was in a position of substantial influence over the federal courts. Eastland was "best known nationally as a symbol of Southern resistance to racial desegregation in most of his years in the Senate" and a "stern enemy of communism, both real and imaginary"; he sometimes described the Supreme Court as "the greatest single threat to our Constitution." Marjorie Hunter, *James O. Eastland Is Dead at 81; Leading Senate Foe of Integration*, N.Y. TIMES, Feb. 20, 1986, at D23.

86. *See* Dombrowski v. Eastland, 387 U.S. 82, 82-83 (1967).

87. *Id.* at 84-85.

legislative body, rather than to legislators themselves."[88] By offering an analogy to *Tenney v. Brandhove*, in which the Court had found a federal common law immunity for state legislators distinct from the Speech or Debate Clause, the Court appeared to suggest that Sourwine was covered by a common law immunity rather than the Speech or Debate Clause itself.[89] Whatever the contours of such an immunity, the *Dombrowski* Court held that it would not protect Sourwine in this case, and it remanded to the district court for further proceedings against him alone.[90] The decision is best viewed as a manifestation of realpolitik.[91]

Setting *Dombrowski* to the side, then, *Johnson* represented the state of the law at the end of the Warren Court.[92] The protections offered by the Speech or

88. *Id.* at 85. At the circuit level, a per curiam opinion for two judges—one of the two being then-Circuit Judge Warren Burger—would have found co-extensive immunity for both Eastland and Sourwine. Dombrowski v. Burbank, 358 F.2d 821, 826 n.11 (D.C. Cir. 1966), *rev'd in part sub nom.* Dombrowski v. Eastland, 387 U.S. 82 (1967).

89. *Dombrowski*, 387 U.S. at 85.

90. *Id.* Sourwine complained to the *New York Times*—with some irony since he had previously and extensively harassed the publication and its employees for alleged association with communism—that the decision rendered him legally naked: "I thought immunity was like pregnancy—either you were or you weren't. If a Government worker can be harassed for years in court, what good is immunity?" Robert Sherrill, *How to Succeed on the Potomac: Be an Investigator*, N.Y. TIMES MAGAZINE, Oct. 8, 1967, at 23.

91. A persuasive Note published in the *Rutgers Law Review* shortly after the opinion strongly advanced this view. Note, Dombrowski v. Eastland—*A Political Compromise and Its Impact*, 22 RUTGERS L. REV. 137, 163 (1967) ("The cryptic and superficial style of the opinion serves a useful purpose—to destroy the case as a precedent—for when other parties urge the Court to accept one or the other of the untenable interpretations, *Eastland* may be conveniently distinguished as being 'limited to the facts of that case.'"). The Note posited that the decision represented a political compromise within the Court to address the civil rights violation perpetrated under Senator Eastland's direction without taking on the Senator himself and without saying anything at all about what the Speech or Debate Clause meant.

92. One final Warren Court case, *Powell v. McCormack*, considered the Speech or Debate Clause in the context of a challenge to exclusion of an elected member and concluded that it did not bar review of the merits of the congressional action at length. 395 U.S. 486, 506 (1969). U.S. Representative Adam Clayton Powell challenged his exclusion from the 90th Congress following his reelection in 1966. *Id.* at 489-90. Chief Justice Warren's opinion held that the Speech or Debate Clause did not bar the suit against the House officers who would be required to deliver on Powell's claims for salary. *Id.* at 501-06. In the D.C. Circuit, then-Circuit Judge Warren Burger would not only have found that the Clause barred the suit; he also suggested that the Court might have a *sua sponte* responsibility to impose

Debate Clause were broad, but potentially subject to some permeability. The Supreme Court should return to this formulation.[93] But even this modest and appropriate recognition of congressional privilege raised the specter that Members of Congress would be super-citizens above the law. After all, Johnson won his appeal. The political dimensions of *Dombrowski* illustrated emerging problems with immunity doctrine in connection with civil rights violations. Early in an era of rising distrust in government, lawyers and non-lawyers alike could easily have seen a new expansive definition of legislative immunity as reaching too far.[94]

II. A Strong Immunity, Too Small for Congress

Since Chief Justice Warren's retirement in 1969, the Supreme Court has issued six merits decisions interpreting the Speech or Debate Clause—the most recent in 1979.[95] Four of the six opinions were written by Chief Justice Burger, who spoke for the Court on broad questions relating to the reach of legislative immunity granted by the Constitution. The remaining two were written by Justice Byron White and dealt with republication and the informing function of Congress. This Part addresses the problems with the general doctrine created by the Chief Justice's opinions, which rapidly departed from the course Justice Harlan had charted in *Johnson.*

Chief Justice Burger believed in a strong separation of powers and in the institutional dignity of each branch. But he did not have personal experience in Congress, and his Speech or Debate Clause opinions show he lacked intuitive or acquired understanding of how the legislative branch really worked. As a result, he developed a doctrine that failed to protect Members of Congress where needed to serve the separation of powers essence that he claimed as his lodestar.

A. *Overcorrecting by Limiting Immunity in* Brewster

Chief Justice Burger took an absolute, even imperial, view of immunity privileges for officials in all three branches of government, but he also took government integrity seriously. Faced with a concrete case of outright corruption by a Member of Congress, he found a way to uphold a criminal conviction in the 1972 case of *United States v. Brewster.*[96] His opinion—particularly some expansive language added in final revisions after his colleagues had signed on—

such a bar. Powell v. McCormack, 395 F.2d 577, 599-602 (D.C. Cir. 1968), *rev'd*, 395 U.S. 486 (1969).

93. This argument is advanced in detail *infra* Part IV.

94. *See* Arthur H. Miller, *Political Issues and Trust in Government: 1964-1970*, 68 AM. POL. SCI. REV. 951, 953 (1974) (showing survey results of increasing cynicism and decreasing trust in government from 1964-1970).

95. *See supra* note 18 (listing Burger Court cases on Speech or Debate Clause).

96. 408 U.S. 501, 528-29 (1972).

created major weakness in the Court's Speech or Debate Clause doctrine by failing to follow up on the question that Justice Harlan had expressly reserved in *Johnson*: could Congress authorize prosecutions by the executive branch under narrowly drawn statutes that delegated the power to regulate conduct of Members?

Brewster, a former Senator, allegedly sold his vote on legislation about postage rates and was criminally charged with accepting a bribe for a promise relating to an official act. Relying on *Johnson*, Brewster challenged the indictment as contrary to the Speech or Debate Clause because it inquired into his motives for voting. The district court issued a short oral ruling in which it held that the Speech or Debate Clause, "particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*," commanded dismissal of the relevant counts of the indictment.[97] The Government appealed directly to the Supreme Court.[98]

Brewster was initially argued on October 18, 1971. The briefing indicates the parties were teed up to position the case in light of *Johnson*, but a question from Justice Thurgood Marshall stole the show:

> Q. [S]uppose a Senator or Congressman accepts $5,000 from A to speak and vote on future legislation, another $5,000 from B to speak against and vote against a piece of legislation, and goes fishing. [Laughter.] Is he up for bribery?
>
> Mr. Ramsey [Counsel for Brewster]: I would certainly say, sir, that both of those actions of his would be subject to discipline in his [H]ouse. I am simply addressing myself in this instance to saying that they should not be questioned in any other place. Which is what the [Speech or Debate Clause] says—
>
> Q. What would he be disciplined in the house for, for going fishing?[99]

Chief Justice Burger assigned the opinion to himself and circulated a memo to the Conference at the end of November with a first draft addressed to this idea. It would allow the prosecution for acceptance of the bribe because the proof did not turn on whether the corrupt congressman *fulfilled* the alleged ille-

97. *Id.* at 504.

98. *Id.* The appeal was taken under a statute providing for direct appeal from a district court to the Supreme Court where an indictment or any count thereof was dismissed "based upon the invalidity or construction of the statute upon which the indictment or information is founded." 18 U.S.C. § 3731 (1970).

99. Transcript of Oral Argument at 35, United States v. Brewster, 408 U.S. 501 (1972) (No. 70-45). Justice Brennan's chambers notes on the Term reflect that the Justice expected to command a majority in *Brewster* that would include Justice Marshall, so he was very surprised when Marshall voted to allow the prosecution. Case History for October Term 1971 at LXXXVII-XCII, Papers of William J. Brennan, Library of Congress [hereinafter Justice Brennan Papers], Box II:6. Perhaps he had not noted that Justice Marshall had been Solicitor General when the Government argued for a minimalist construction of the Speech or Debate Clause in *Johnson*.

gal bargain. The Chief Justice's short cover note stated: "It is an important case and a close question that falls within the express reservation John Harlan carefully carved out in *Johnson*."[100] Justices Stewart, Marshall, and Blackmun replied that they were prepared to sign on to the opinion and urged disposition of the case despite the fact that the Court was operating short-handed pending the confirmations of soon-to-be Justices Powell and Rehnquist.[101] But at the Chief's urging, the case was held over and reargued in March, with the new Justices joining the majority.[102] It is striking in retrospect that the Court had been prepared to decide the case with a quite narrow opinion.

In June 1972, writing for a now-six-member majority, Chief Justice Burger spoke for the Court in holding that accepting money is not a legislative act, and therefore not protected by the Speech or Debate Clause. On this theory, it was irrelevant whether a legislator accepted the money in exchange for a promise to perform a legislative act.[103] This tracked Chief Justice Burger's 1971 draft by carving out bribery from the protection of the immunity granted by the Clause, and it was as far as the Court needed to go to decide the case. But the final opinion did not stop there. In dicta, the Chief Justice invented a category of activity that he called "political matters" or "errands."[104] Without citation, he divided the typical functions of a legislator in two:

> It is well known, of course, that Members of Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. The range of these activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are

100. Byron R. White Papers, Library of Congress [hereinafter Justice White Papers], I:208, Folder 13.

101. *Id.* Justice Marshall wrote humorously to the Chief: "I, too, am ready to join your opinion in this case and see no reason to hold it up unless we split 3 ½ to 3 ½." *Id.*

102. Justice Brennan and his clerks speculated that Chief Justice Burger proposed reargument in this case "to preserve an air of impartiality" in the midst of proposing other cases for reargument in which he was in the minority, even though "this was an un-subtle, and safe, ploy, for there was virtually no chance that the 9-man court, particularly with Powell and Rehnquist added, would come out the other way." Case History for October Term 1971, *supra* note 99; *see* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 176-77 (1979) (discussing process of setting cases for reargument in 1972 following the December 1971 confirmations of Justices Powell and Rehnquist).

103. *Brewster*, 408 U.S. at 526.

104. *Id.* at 512.

> entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.[105]

Justice Blackmun's clerk working on *Brewster* commented in a memo to Justice Blackmun that the Chief Justice had added this language in a new June draft that "launches into what seems to be an extended discussion of his own philosophy of the Clause." He further wrote that "[u]nfortunately, none of it finds any support anywhere."[106] The new passage suggested that a wide range of activity undertaken by Members of Congress was outside Speech or Debate Clause protection. Many courts since have disagreed with this language, finding the "errands" listed in *Brewster* to be an integral part of congressional work.[107]

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105. *Id.* Although the origin of Chief Justice Burger's categories is obscure, the passage's thrust may derive from an exchange at oral argument. There, Solicitor General Erwin Griswold said in his rebuttal:

> It seems to me that [counsel to the Senator] unduly treats "legislative act" as synonymous with, and absolutely the equivalent of, "speech or debate."
>
> There is nothing in the Constitution which refers in any way to legislative acts, and we submit there are many acts which a legislator may do and may properly do as a legislator, which are appropriate for a Congressman or Senator to do, which are customarily done by Congressmen or Senators, which are not speech or debate and which are not within the protection of the speech or debate clause.

Transcript of Oral Reargument at 38-39, *Brewster*, 408 U.S. 501 (No. 70-45).

106. Memorandum from George Frampton, Jr., to Justice Blackmun (June 1, 1971), *in* Harry A. Blackmun Papers, Library of Congress [hereinafter Justice Blackmun Papers], Box 137, Folder 70-45.

107. For disagreements with this language, see, for example, *Council on American Islamic Relations v. Ballenger*, 444 F.3d 659, 665 (D.C. Cir. 2006) ("A member's ability to do his job as a legislator effectively is tied... to the Member's relationship with the public and in particular his constituents and colleagues in the Congress."); *Williams v. United States*, 71 F.3d 502, 507 (5th Cir. 1995) ("[T]he legislative duties of Members of Congress are not confined to those directly mentioned by statute or the Constitution. Besides participating in debates and voting on the Congressional floor, a primary obligation of a Member of Congress in a representative democracy is to serve and respond to his or her constituents."); *United States v. Rostenkowski*, 59 F.3d 1291, 1312 (D.C. Cir. 1995) ("For a Congressman, [the distinction between work and life] is not so clear; service in the United States Congress is not a job like any other, it is a constitutional role to be played upon a constitutional stage."); *Chastain v. Sundquist*, 833 F.2d 311, 332 (D.C. Cir. 1987) (Mikva, J., dissenting) ("In their role as representatives and ombudsmen, members of Congress perform a variety of non-legislative tasks that make this nation's government more responsive to its citizenry and that make this nation's citizenry more attentive to its government. These tasks are entitled to—but more important, these tasks need—no less protection than the tasks

But this dictum has been treated as controlling, leaving Members subject to the threat of harassment by or through the other branches—the very evil the Clause was originally intended to prevent. Seven years later, Chief Justice Burger made the dictum binding by applying it to support his holding in another case.[108]

Justice Brennan complained in dissent that the Court had failed to apply *Johnson*: "That decision is only six years old and bears the indelible imprint of the distinguished constitutional scholar who wrote the opinion for the Court. *Johnson* surely merited a longer life."[109] The three dissenters—Justices Brennan, Douglas, and White—not only challenged the opinion's categories of legislative behavior, but also suggested that finding Brewster's quid pro quo not covered by the Speech or Debate Clause eliminated its protection entirely. They would have treated the Clause as jurisdictional in nature, limiting the discipline of Members to the internal procedures of each chamber, but their view of a total bar to prosecuting criminal conduct was too much for a majority of the Court.[110]

Chief Justice Burger's opinion of the Court followed *Johnson*'s suggestion and allowed prosecutions to go forward so long as they did not question legislative acts themselves. The Court held that bribe-taking was an independent non-legislative act and therefore subject to investigation and prosecution. But *Brewster* became the seminal case in a messy line of precedents that has since complicated efforts to apply the Clause consistent in a manner that is consistent with its purpose.

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performed by the vast majority of other government officials in the exercise of their authority."); *Chapman v. Rahall*, 399 F. Supp. 2d 711 (W.D. Va. 2006) (holding Member's official conduct to include public remarks "necessary to ensure his effectiveness as a legislator and maintain the support of his constituents"); and *Operation Rescue Nat'l v. United States*, 975 F. Supp. 92, 107 (D. Mass. 1997) ("In making the remarks now claimed to be defamatory, Senator Kennedy was informing his constituents and the general public of his view on pending legislation scheduled to be considered by the Senate the next day. Such statements were of the kind he was employed to perform.") (internal quotation marks omitted). Josh Chafetz also disagrees with the *Brewster* dicta. CHAFETZ, *supra* note 21, at 107 ("[M]eeting and talking with constituents—including representatives of interest groups—*is* part of a legislator's official duties and thus ought to be privileged.").

108. *See* Hutchinson v. Proxmire, 443 U.S. 111 (1979), discussed *infra* Subsection III.D.

109. *Brewster*, 408 U.S. at 550 (Brennan, J., dissenting).

110. *Compare id.* (Brennan, J., dissenting) ("I yield nothing to the Court in conviction that this reprehensible and outrageous conduct, if committed by the Senator, should not have gone unpunished . . . [but under the Constitution] alleged misbehavior in the performance of legislative functions was accountable solely to a Member's own House and never to the executive or judiciary."), *with id.* at 525 (opinion of the Court) ("Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence.").

B. *Imposing Immunity Absolutism in* USSF

Three years later, Chief Justice Burger had a second opportunity to apply his philosophy that the Speech or Debate Clause attached absolutely within the narrow category of acts he had defined as core legislative responsibilities.[111] The facts underlying the action also involved a returning cast member: Senator James Eastland of Mississippi. As chairman of the Senate Subcommittee on Internal Security, Senator Eastland had once again employed the congressional subpoena power to harass a left-leaning non-profit organization—this time, the United States Servicemen's Fund (USSF). That organization ran coffeehouses and assisted in publishing newspapers near military bases, creating forums for opposition to the war in Southeast Asia.[112]

In the spring of 1970, Eastland signed a subpoena to a bank where USSF had an account, commanding the bank to produce records that would reveal contributors and associates of the organization.[113] Before the subpoena's return date, however, USSF and two of its Members filed a motion to quash on the grounds that the subpoena was an unconstitutional abuse of the legislative power. In Chief Justice Burger's words, they argued that "the 'sole purpose' of the subpoena was to 'harass, chill, punish and deter [USSF and its members] in their exercise of their rights and duties under the First Amendment and particularly to stifle the freedom of the press and association guaranteed by that amendment."[114] As the Court of Appeals for the D.C. Circuit framed the case, the question was whether "the courts of the United States [have] the power to interfere with the subpoena power as exercised by committees of the [Congress] when the exercise of such power threatens a deprivation of First Amendment rights of freedom of association which can be vindicated in no way other than by court decree?"[115]

The D.C. Circuit said yes.[116] Chief Judge David Bazelon and Judge Elbridge Tuttle saw this as a First Amendment case controlled by precedent.[117] When

111. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501 (1975) ("The question to be resolved is whether the actions of the petitioners fall within the 'sphere of legitimate legislative activity.' If they do, the petitioners 'shall not be questioned in any other Place' about those activities since the prohibitions of the Speech or Debate Clause are absolute.").

112. *Id.* at 493-94.

113. *Id.* at 494-95.

114. *Id.* at 495; *cf.* NAACP v. Alabama, 357 U.S. 449 (1958) (holding that government-required disclosure of membership, where it could chill association, is subject to strict scrutiny).

115. U.S. Servicemen's Fund v. Eastland, 488 F.2d 1252, 1254 (D.C. Cir. 1973), *rev'd sub nom.* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975).

116. *Id.* at 1270.

Judge Tuttle revisited the Speech or Debate Clause issues in the case subsequent to his first draft opinion, he characterized the issue as a line-drawing problem.[118] This approach casts the Speech or Debate Clause as a textual source for the political question doctrine rather than as an immunity for the Members. The third judge on the panel, George MacKinnon, also approached the question as one of justiciability but thought the courts had no power to review the legislative decision or its implications.[119] To him, this precluded reaching the First Amendment question.[120]

Chief Justice Burger, writing for the Supreme Court, sided with Judge MacKinnon and reversed the court of appeals. Despite the limitations on the Clause he had invented in the *Brewster* dicta, he returned to sweeping language in stating the Clause's scope and importance: "[W]e have long held that, when it applies, the Clause provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch."[121] The "power to investigate and to do so through compulsory process" was well-defined and within the "sphere of legitimate legislative activity," reasoned Burger, and so the "Clause provides complete immunity for the Members for issuance of this subpoena."[122]

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117. *See id.* at 1268; *see also* GEM Memo Dictated After Argument (Jan. 15, 1973), George E. MacKinnon Papers, Minnesota State Historical Society [hereinafter Judge MacKinnon Papers], Box 142.B.15.4.F ("Bazelon and Tuttle believe that the matter was originally controlled by *Pollard v. Rogers* and while Judge Tuttle was not completely sure he is going to start an opinion.").

118. *See* Letter from Judge Elbert P. Tuttle to Judge George E. MacKinnon (June 15, 1973), Judge MacKinnon Papers, Box 142.B.15.4.F ("My present very tentative feeling is that the line that is to be drawn is when the committee has authorized and actually directed the issuing of subpoenas. The signing and service of the subpoena may then be an act, which if violative of the constitution, is subject to attack in court under the circumstances here existing."); *see also* Letter from Judge Elbert P. Tuttle to Judges David Bazelon and George E. MacKinnon (June 27, 1973), Judge MacKinnon Papers, Box 142.B.15.4.F ("There is a point before which everything that is done by Members or their aides is protected by the Speech or Debate Clause, regardless or the ultimate determination as to the constitutionality of such acts; however, as is indicated in both of these cases, beyond this point there may be actions taken by either Members or their aides, similar to the action taken by the Sergeant at Arms in the *Kilbourn* case, which are not protected.").

119. *See* GEM Memo Dictated After Argument, *supra* note 117.

120. *Id.* ("I distinguish *Pollard* because that subpoena was issued in a court proceeding and did not involve any separation of powers."); *see* U.S. Servicemen's Fund v. Eastland, 488 F.2d 1252, 1284 (D.C. Cir. 1973) (MacKinnon, J., dissenting) ("The majority opinion pays lip service to the constitutional doctrine of the separation of powers but then refuses to adhere to its tenets.").

121. *U.S. Servicemen's Fund*, 421 U.S. at 502-03.

122. *Id.* at 504-07. In a concurrence, Justice Marshall emphasized his view that the congressional subpoena itself is not shielded from "more searching judicial

The Supreme Court's *USSF* opinion holds "without extended consideration" that the suit was barred by the Speech or Debate Clause.[123] Constitutional scholar Rex Lee—then a law school dean and not yet Solicitor General—analyzed the case as clear both in what it decided and what it did not reach. For Lee, the *USSF* Court offered two propositions: (1) that the power to investigate and to subpoena fell within the "legitimate legislative sphere" protected by the Speech or Debate Clause; and (2) that the cloak of protection was inviolable—there would be no balancing of the immunity interest against a plaintiff's First Amendment claim.[124] What it did not decide, Lee wrote, was whether Speech or Debate Clause protection applies where no congressional person or entity is named as a defendant.[125] Thus, Lee had the early insight that the absolute immunity being defined by Chief Justice Burger presented problems of workability if carried to its logical conclusion.[126]

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inquiry"—he reasoned that the Speech or Debate Clause protects Members and their counsel acting in a legislative capacity but does not preclude review of their decisions, whether they take the form of legislation or subpoena. *Id.* at 515 (Marshall, J., concurring).

123. FALLON ET AL., *supra* note 84, at 1007. Indeed, given the unavailability of injunctive relief, the *Hart & Wechsler* casebook authors also question whether the only way to obtain judicial review of the constitutionality of committee process is to risk contempt—an option not available in *Eastland* because the subpoenas were directed at the bank. *Id.* at 1008.

124. Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 BYU L. REV. 231, 245.

125. *Id.* at 244. Lee argued that, although the Court had not decided the question, the Speech or Debate privilege should apply even "where the documents or other information are in the possession of a private party or where the congressional entity participates in the litigation as plaintiff or intervenor." *Id.* at 252.

126. Indeed, the Justices themselves apparently struggled with how the contours of Speech or Debate Clause immunity as they had recently announced them would be applied going forward. During the October 1977 Term, the Justices granted certiorari on a case that had divided the en banc Court of Appeals for the D.C. Circuit. This case involved a claim that a Senate subcommittee chairman and his staff had violated the constitutional rights of private plaintiffs by their participation in the seizure and use of documents from plaintiffs' home. *See McSurely v. McClellan*, 553. F.2d 1277 (D.C. Cir. 1976) (en banc). Judge Frank Easterbrook, who argued for immunity as Deputy Solicitor General, reflected that the "Justices are no fan of absolute immunity for anybody other than judges," and that his challenge in a difficult argument had been to "give limits that were both palatable to the Justices in this case and consistent with my duty to my client not to give away the legislative-immunity store." 15 SCRIBES J. LEGAL WRITING 8 (2013). At the end of the Term, the Justices dismissed the writ of certiorari as improvidently granted. McAdams v. McSurely, 438 U.S. 189 (1978). Judge Easterbrook has said that Justice John Paul Stevens told him the case "was just too hard." 15 SCRIBES J. LEGAL WRITING 9 (2013). In a memo issued to the Conference days before the case was dismissed, Justice Powell proposed that disposition

C. *Finding an Exclusionary Rule in* Helstoski

Four years later, Chief Justice Burger had further occasion to explicate the Speech or Debate Clause in the 1979 case *Helstoski v. United States*, which involved a fact pattern similar to *Brewster* and *Johnson*—a Member of Congress taking bribes for official acts.[127] In *Johnson*, the bribed congressman had agreed to give a floor speech and the Court held that the Clause prohibited an inquiry into the motives for the speech. In *Brewster*, the bribed congressman had agreed to give his vote and the Court held that the Clause did not protect the agreement. In *Helstoski*, the bribed congressman was charged with agreeing to introduce private bills that would suspend the application of immigration laws to particular non-citizens and allow them to remain in the United States.[128]

The novel issue in the case was whether an exclusionary rule applied to testimony that the congressman himself had voluntarily given to a federal grand jury in New Jersey. Helstoski testified ten times before the grand jury, and not until the ninth time did he even mention the Speech or Debate Clause.[129] In his opinion for the Court, Chief Justice Burger decided that "references to past legislative acts of a Member cannot be admitted without undermining the values protected by the Clause."[130] He acknowledged that "without doubt the exclusion of such evidence will make prosecutions more difficult."[131] Only in this case did the Court introduce the idea that the Speech or Debate Clause operates like the Fourth Amendment exclusionary rule, excluding evidence based on its legisla-

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because "[t]he Court is about as badly fragmented on the Speech or Debate Clause central issue . . . as if we were three separate panels in disagreement on a Court of Appeals, producing a disabling intracircuit split. Our opinions will afford no guidance to other courts, and are not likely to be reassuring to the members of the Congress in terms of their knowing the boundaries of their constitutional privilege." Case File, 76-1621 McAdams v. McSurely, Lewis F. Powell, Jr. Archives, Washington & Lee Univeristy [hereinafter Justice Powell Papers]. He also argued that the Court would be disserved institutionally by yet another divided opinion given other forthcoming end-of-Term decisions "in which the Court also speaks with several voices." *Id.*

127. 442 U.S. 477 (1979).

128. *Id.* at 479. Private bills were once a common last resort for administrative relief, reaching their peak in use for immigration purposes during the 1960s, but they have become substantively and procedurally disfavored in recent decades. *See generally* Margaret Mikyung Lee, CONG. RESEARCH SERV., RS20449, PRIVATE BILLS FOR CITIZENSHIP OR PERMANENT RESIDENCY: A BRIEF OVERVIEW (2000).

129. *Helstoski*, 442 U.S. at 483-84.

130. *Id.* at 489.

131. *Id.* at 488. In a separate opinion, Justice Stevens wrote that the better view would be to look to the purpose for which evidence is being offered in determining whether speech or debate is being questioned, rather than looking at the nature of the evidence itself. *See id.* at 496 (Stevens, J., concurring in part and dissenting in part).

tive provenance rather than simply providing immunity from suit to a Member of Congress based on the cause of action. It sowed the seeds of a construct of "Speech or Debate Clause material"—that is, evidence excluded because it was created by a Member, regardless of whether the Member was acting in an official capacity.[132]

Helstoski is noteworthy because it is the only one of three criminal cases decided by the Court (*Johnson*, *Brewster*, and *Helstoski*) in which the defendant did not end up with a conviction. But Helstoski did lose his seat. When the *New York Times* reported on his indictment in June 1976, then-Representative Helstoski called the indictments "politically motivated" and the result of a "five-year effort on the part of the United States Attorney, who is out to get me."[133] That fall, Helstoski was defeated in his bid for a seventh congressional Term.[134] Four years later, after the Supreme Court case was decided, the last charges against Helstoski were dismissed and he was a free man.[135] Helstoski lost his office as a result of the indictment, while he escaped criminal liability by virtue of having held office. In dismissing the final charges after the Supreme Court's decision, the district judge said his ruling did not in any way "suggest that the speech or debate clause was a license to conspire or undertake to obstruct the process of the grand jury by means of perjury or otherwise."[136] But in this case, that is what it seemed to be.[137] Chief Justice Burger observed in a footnote that nothing immunizes a Member from punishment by the House or Senate.[138] Yet the practical structure of each chamber of Congress makes a strong enforcement regime exceedingly unlikely because they are organized as collegial bod-

132. *See* United States v. Rostenkowski, 59 F.3d 1291, 1298 (D.C. Cir. 1995).

133. Ronald Sullivan, *Helstoski Indicted in Extortion Cases on Alien Admissions*, N.Y. TIMES, June 3, 1976, at 77.

134. Joseph F. Sullivan, *Senator Williams Wins 4th Term, but Helstoski Is Defeated in Jersey*, N.Y. TIMES, Nov. 3, 1976.

135. Alfonso A. Navarez, *U.S. Judge Clears Helstoski of Last Counts in '76 Case*, N.Y. TIMES, Feb. 28, 1980, at B2.

136. Navarez, *supra* note 135.

137. In a handwritten annotation to his bench memo for *Brewster*, Justice Powell observed that the "threat to legislative independence from potential bribes is at least as great as from a hostile Executive or Judiciary." Case File 70-45 U.S. v. Brewster, Justice Powell Papers. Justice Powell sat out *Helstoski* due to colon surgery, and so did not have the opportunity to consider the issue as applied to this case. Case File, 70-349 U.S. v. Helstoski, Justice Powell Papers.

138. Helstoski v. United States, 442 U.S. 477, 488 n.7 (1979). The slip opinion suggested that exclusion was among the range of possible punishments. Stan Brand, then General Counsel to the House of Representatives, wrote a letter to the Clerk of the Supreme Court following the opinion's release, flagging the fundamental conflict this created with *Powell v. McCormack*. Chief Justice Burger had to circulate an embarrassing memorandum to the Conference after the fact, changing the word "exclusion" to "expulsion." Justice Stewart Papers, Box I:348, Folder 4250.

ies.[139] In any event, Helstoski's (involuntary) exit from the Congress made congressional discipline of him impossible.

On the other hand, assuming arguendo that Helstoski was innocent, the case would resemble the kind of executive harassment that ancient parliamentary free-speech principles were designed to prevent. Helstoski not only claimed that the charges were without foundation, but he also accused the U.S. Attorney of political motivation.[140] Helstoski filed suit for damages against the prosecutor, alleging "abuses of the grand jury process, deliberate leaks to the press of false information, and illegal seizures of bank records."[141] He also asked the House Ethics Committee to investigate the prosecutor, whom he alleged "has for many years been involved in a political vendetta and persecution of me, my friends, my family and more recently my attorneys."[142]

The problem with Chief Justice Burger's opinion—again—was the absoluteness of Speech or Debate Clause protections where they did attach. The following week, Burger wrote for the Court in another case, *Hutchinson v. Proxmire*, which demonstrated the problem with his narrow view of what was protected.

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139. *See* ROBERT S. GETZ, CONGRESSIONAL ETHICS: THE CONFLICT OF INTEREST ISSUE 113 (1966) ("[T]he combination of historical precedent, the fear of partisan motivations, and the requirement of functioning within an atmosphere of mutual respect and cooperation has given rise to the view that Congress is not the forum before which the membership should be disciplined."); DENNIS F. THOMPSON, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION 132-36 (1995) (describing structural deficiencies of congressional self-discipline); Amy Gutmann & Dennis Thompson, *The Theory of Legislative Ethics*, *in* REPRESENTATION AND RESPONSIBILITY, *supra* note 63, at 167, 195-96 ("The theory of legislative ethics therefore requires a companion theory of journalistic ethics. The prospects for practice of legislative ethics, even more so than that of journalistic ethics, depends ultimately upon the active support of citizens."). *See generally* JACOB R. STRAUS, CONG. RESEARCH SERV., RL30764, ENFORCEMENT OF CONGRESSIONAL RULES OF CONDUCT: A HISTORICAL OVERVIEW (2013) (describing history of fits and starts in mechanisms of congressional self-discipline). The fact that members are occasionally censured or expelled for criminal conduct—often after an independent law enforcement investigation and proceeding—does not demonstrate a structurally effective internal enforcement regime.

140. *See* Sullivan, *supra* note 133.

141. Helstoski v. Goldstein, 552 F.2d 564, 565 (3d Cir. 1977). Ironically, although the district court initially dismissed the case based on a prosecutor's absolute immunity, the court of appeals held that Helstoski's allegations involved conduct beyond any proper performance of a prosecutor's job and remanded for further proceedings. *Id.* at 565-66.

142. Sullivan, *supra* note 133.

D. *Setting Definite Limits in* Proxmire

As *Brewster* recognized, absolute immunity must attach to the functions undertaken by Members in the exercise of core legislative acts of either body. It subverts the constitutional design to have the protection stop there. Yet that is what the Court confirmed it had done in *Hutchinson v. Proxmire*.[143]

In 1975, Senator William Proxmire created the "Golden Fleece of the Month Award" to spotlight extreme examples of wasteful government spending.[144] His second "honoree" was Ronald Hutchinson, a research behavioral scientist at the Kalamazoo State Mental Hospital who was studying emotional behavior by measuring jaw clenching in monkeys when they were exposed to various stresses.[145] Proxmire ridiculed the research as "monkey business" in a speech on the floor of the Senate, saying, "In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking of the taxpayer."[146] Proxmire repeated the essence of the claim in a newsletter mailed to one hundred thousand people and during an interview on a television program.[147] Hutchinson sued Proxmire for defamation.

The Court held that the Speech or Debate Clause immunized Proxmire from suit for his speech on the floor of the Senate but did not protect his newsletters and press releases because they were not "part of the deliberative process."[148] Chief Justice Burger, writing again for the Court, relied extensively on the dicta from his own opinion in *Brewster* in concluding that Members' efforts to tell the public about their activities, "[v]aluable and desirable as [they] may be in broad terms[,] . . . [are] not a part of the legislative function or the deliberations that make up the legislative process."[149]

What animated eight members of the Burger Court, covering the ideological spectrum from Justice Rehnquist to Justice Marshall, to reach this conclusion?[150] Or, as Peter Shane and Harold Bruff ask students of the separation of

143. 443 U.S. 111 (1979).

144. *Id.* at 114.

145. *Id.* at 114-15.

146. *Id.* at 116 (quoting 121 CONG. REC. 10,803 (1975)).

147. *Id.* at 117.

148. *Id.* at 130.

149. *Id.* at 133.

150. Justice Stewart dissented in part, stating that he would have found telephone calls to agency officials covered as an "essential part of the congressional oversight function." *Id.* at 136 (Stewart, J., joining all but footnote 10 of the Court's opinion and dissenting in part). Justice Brennan dissented alone.

powers: "[W]hy can't a Senator have a little fun?"[151] Shane and Bruff point to Proxmire's predecessor from Wisconsin, Senator Joseph McCarthy, who "blast[ed] careers and lives with his reckless charges that various individuals in and out of government had Communist affiliations."[152] While the Army-McCarthy hearings had taken place in 1954, a quarter of a century before *Proxmire*, they continued to shade the Court's view of legislative free speech.[153] As it happens, Proxmire was first elected to the Senate in 1957 to fill McCarthy's unexpired term. Against the background of a very real and still-fresh example of unfair and irresponsible legislative speech destroying the lives of Americans, the Court declined to recognize the kind of bedrock principle that animates First Amendment jurisprudence.[154] Under our system of parliamentary free speech, however, it should be up to Members of Congress—not the courts—to determine where to draw the lines in legitimate issue advocacy.[155]

Essentially, the Supreme Court's Speech or Debate Clause jurisprudence was frozen with *Proxmire* in 1979. The fact that the Court has not taken a Speech or Debate case in thirty-five years might suggest that *Proxmire* represents the correctly calibrated interpretation of a constitutional norm. A better view, however, is that *Proxmire*'s bright line regime simply precluded as-applied challenges. Senators and Representatives can do almost nothing to advance the interests of their constituents on the floor of their chamber that does not require them to do something related outside of it—one of the "political matters" or "errands" denigrated by Chief Justice Burger in *Brewster*.[156] Yet the 1970s Supreme Court

151. PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 249 (3d ed. 2011). More than two decades after Proxmire left the Senate, the merits of his Golden Fleece award were still being debated. Supporters and imitators argued it had a serious purpose while critics charged that it was demagoguery and easy political target practice that undermined serious scientific research. *See, e.g.*, Editorial, *Of Geese and Fleece*, N.Y. TIMES, Apr. 30, 2012, http://www.nytimes.com/2012/05/01/opinion/of-geese-and-fleece.html.

152. SHANE & BRUFF, *supra* note 151, at 250; *see* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 394 (4th ed. 2007) ("[R]epublication of legislative reports may also chill freedom. During the Cold War, members of Congress sometimes made lavish allegations about the loyalty of Americans who criticized our government, and their accusations would be republished, often to the ruin of those accused.").

153. Indeed, *Eastland v. U.S. Servicemen's Fund* showed the costs of congressional abuse of Speech or Debate Clause protections. 421 U.S. 491 (1975); *see supra* Section II.C.

154. *Cf.* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

155. For a discussion of how this would work in practice, *see infra* Section IV.B.

156. A Speech or Debate question contemporary to the *Proxmire* case involved Congressman William Steiger of Wisconsin. When he passed away of a heart

precedent made so unambiguously clear that only a narrow and well-defined category *was* protected that no room remained for lower-court litigation to map out the borders of immunity on the basis of experience.

III. Republication and the American Constitutional Scheme

A second series of 1970s cases addressed the question of Speech or Debate Clause protection in the context of republication of the congressional record. Chief Justice Burger had defined the Clause's immunity grant to be narrow but absolute. In the only other two Supreme Court opinions interpreting the Clause, Justice Byron White eliminated the most important free speech right naturally covered by the Clause: the right to republication of congressional proceedings.

In the nearly four decades since these opinions, moreover, public strategies have become essential to advancing the goals of every Member of Congress.[157] In a context in which representatives and senators view websites and social media feeds as integral to achieving their political *and* legislative objectives, the constitutional privilege to communicate the work of the two chambers takes on ever-greater importance. Member speech on the floor is addressed to congressional colleagues in name only and is almost always geared toward the press, the cameras, and increasingly to direct, unmediated communication with constituents. The 1970s precedents do not adequately address the implications of the Speech or Debate Clause for this new congressional world. But even at the time they were written, the role of informed public opinion in the American system had been well articulated by the Court.[158]

The question of whether the Speech or Debate Clause provided a congressional right to republication was not settled by the Framers. Justice Story took the view that following British practice, member speech beyond the House or Senate itself had no special protection.[159] But even writing in 1833, he acknowl-

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attack at the age of forty in 1979, Steiger was defending against a suit by the State of Wisconsin that sought to obtain from him the names of three students who had told Steiger they had voted twice on an election day. Steiger claimed Speech or Debate protections on the theory that the conversations were investigative in aid of future legislation. *See generally* John R. Bolton et al., *The Legislator's Shield: Speech or Debate Clause Protection Against State Interrogation*, 62 MARQ. L. REV. 351 (1979) (reviewing the Steiger litigation).

157. *See* GARY LEE MALECHA & DANIEL J. REAGAN, THE PUBLIC CONGRESS: CONGRESSIONAL DELIBERATION IN A NEW MEDIA AGE 26 (2012).

158. *See, e.g.*, Barr v. Matteo, 360 U.S. 564, 577 (1959) (Black, J., concurring) ("The effective functioning of a free government like ours depends largely on the force of an informed public opinion.").

159. STORY, *supra* note 43, at § 866 ("No man ought to have a right to defame others under color of a performance of the duties of his office. And if he does so in the actual discharge of his duties in congress, that furnishes no reason why he should

edged that this was disputed "by very distinguished lawyers" on the basis of an "important distinction arising from the actual differences between English and American legislation."[160] He concluded: "This reasoning deserves a very attentive examination"—one which it never received.[161]

When the Supreme Court finally had occasion to consider the question, Justice White applied a Cold War understanding of government secrecy and a pre-Watergate understanding of government transparency that misread constitutional history and its implications for interpretation of the Speech or Debate Clause. A close examination of the inconsistencies between the two cases—*Gravel v. United States*[162] and *Doe v. McMillan*[163]—demonstrates their weak foundations and the need for revisiting some of their results.

A. *A New Informing Function in the Constitution*

The conception of Speech or Debate protection inherited from England did not include a right to publish. Until 1971, it was technically forbidden in Great Britain to privately publish what had transpired in the House of Commons because Parliament claimed a right "to exclude strangers from its proceedings and to debate behind closed doors."[164] A Member was protected from action for libel when speaking in Parliament, no matter how offensive the subject, but "if he should proceed to publish his speech, his printed statement will be regarded as a separate publication, unconnected with any proceeding in Parliament."[165] The theory posited that, because Parliament technically prohibited publication of debates, its Members could not claim protection for the same thing that the institution had declared a breach of its privilege.[166]

In the 1794 case of *R. v. Abingdon*, the King's Bench decided that a Member would have no protection in reprinting verbatim a speech that he had delivered

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be enabled, through the medium of the press, to destroy the reputation and invade the repose of other citizens.").

160. *Id.* ("It is proper, however, to apprise the learned reader, that it has been recently insisted in congress, by very distinguished lawyers, that the privilege of speech and debate in congress does extend to publication of the speech of the member.").

161. *Id.*

162. 408 U.S. 606 (1972).

163. 412 U.S. 306 (1973).

164. J.P. JOSEPH MAINGOT, PARLIAMENTARY PRIVILEGE IN CANADA 40 (2d ed. 1997).

165. MAINGOT, *supra* note 164, at 41.

166. *Id.* As a result, in parliamentary systems like Canada's, it is a frequent practice for one member to dare another to repeat a purported slander off the floor of the chamber. *See, e.g.*, Allison Cross, *'Take It Outside,' Tories Ask Liberal Who Accused Dean Del Mastro of Filing Forged Documents*, NAT'L POST, June 15, 2012, http://news.nationalpost.com/2012/06/15/take-it-outside-tories-ask-liberal-who-accused-dean-del-mastro-of-filing-forged-documents/.

under the protection of Parliament.[167] Finding Lord Abingdon guilty of criminal libel for doing just that, the court said that "a Member of Parliament had certainly a right to publish his speech, but that speech should not be made a vehicle of slander against any individual . . . ."[168] In the landmark case of *Stockdale v. Hansard*, the court went further by sustaining a libel suit by a book publisher against the official reporter of the House of Commons. The publisher was alleged in the report to have printed, published, and sold a book "of a most disgusting nature; [in which] the plates are indecent and obscene in the extreme."[169] Thereafter, Parliament passed the Parliamentary Papers Act of 1840, giving full protection to publication and republication of any full report, paper, votes, or proceedings of Parliament, together with qualified protection for an extract or abstract of the same.[170]

Stockdale (and *Abingdon*) would go on to be quoted approvingly by the Supreme Court of the United States.[171] Yet can the Speech or Debate Clause really be illuminated by an English case, decided after the Framers' adoption of English legal principles was merged into the U.S. Constitution, that turned on the basis of peculiar English parliamentary practice (the fiction of closed parliamentary proceedings) and that was itself statutorily overruled the following year? The Constitution expressly repudiated closed parliamentary proceedings by requiring that each House "keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy. . . ."[172] James Wilson explained at the Constitutional Convention that "[t]he people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceed-

167. (1794) 170 Eng.Rep. 337 (K.B.).

168. *Id.*

169. (1839) 48 Rev. Rep. 326 (K.B.) (Eng.).

170. 3 & 4 Vict., c.9 (Eng.); *see* MAINGOT, *supra* note 164, at 63-75. Note that the Parliament of Canada Act imports the Parliamentary Papers Act to Canada, but that constituent mailings permitted by the Canada Post Corporation Act are deemed published by the member rather than the House, and so fall outside the protection of the Parliamentary Papers Act. *Id.* at 71-75; *see* Pankiw v. Canada (Human Rights Commission), [2007] 4 F.C.R. 578, *aff'd*, [2007] F.C.A. 386 (Can.) (holding that constituent mailings are not protected by parliamentary privilege).

171. *See* Gravel v. United States, 408 U.S. 606, 618 (1972) (discussing *Stockdale*); *id.* at 623 n.14 (citing *Abingdon*); Kilbourn v. Thompson, 103 U.S. 168, 202 (1880).

172. U.S. CONST. art. I, § 5, cl. 3; *see* CHAFETZ, *supra* note 21, at 52-53 (discussing debate over Journal Clause at the Constitutional Convention and its emphasis on preventing congressional proceedings being kept secret, and quoting James Madison's statement at the Virginia ratifying convention that the Congress was much more limited in what it was permitted to keep secret than the British House of Commons).

ings."[173] The House opened its doors to the public just eight days after it convened in 1789, following the example of most colonial assemblies, Continental Congresses, and the Constitutional Convention.[174] Although the Constitution did not expressly require congressional proceedings to be made public, newspaper reporters published notes of congressional proceedings from that time.[175] And the House itself has treated the Journal Clause as a source of both power and responsibility.[176]

Stockdale, decided in England after American independence and in light of English parliamentary peculiarities not carried into the Constitution, should be disregarded.[177] To do otherwise is to use foreign law to interpret the U.S. Con-

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173. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 260 (Max Farrand ed., 1911).

174. *See* ROBERT V. REMINI, THE HOUSE 12-16 (2006). The Senate's first six years of proceedings were closed but that chamber, too, was opened to the press and the public in 1795. *See* ROBERT C. BYRD, THE SENATE, 1789-1989, at 312 (1991). For a short history of the congressional record, see *Gregg v. Barrett*, 771 F.2d 539, 540-41 (D.C. Cir. 1985).

175. *See* REMINI, *supra* note 174, at 16. The Supreme Court also treated congressional journals as an important public source of legislative information. From its earliest days, both lawyers and Justices cited the journals. *See* VICTORIA NOURSE, MISREADING LAW: LEGISLATIVE PROCEDURE, DECISION THEORY, AND STATUTORY INTERPRETATION (forthcoming 2014) (manuscript at ch.4) (on file with author). Thomas Jefferson, in a 1787 letter to James Madison, asked "whether peace is best preserved by giving energy to the government, or information to the people," and then answered, "[t]his last is the most certain and the most legitimate engine of government." Gravel v. United States, 408 U.S. 606, 641 (1972) (Douglas, J., dissenting) (quoting 6 WRITINGS OF THOMAS JEFFERSON 392 (Memorial ed. 1903)). Justice Story explained that the purpose of the Journal Clause was "to insure publicity and responsibility in all the proceedings of Congress, so that the public mind may be enlightened, as to the acts of the members." JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES CONTAINING A BRIEF COMMENTARY 92 (New York, Harper & Bros. 1847).

176. For example, when in 1970 a district court sought to prohibit a congressional committee's publication of a report on honoraria given to guest speakers at colleges and universities on the grounds that it interfered with the listed speakers' exercise of free speech rights, the whole House passed a resolution ordering the report printed, laying claim to the authority for congressional committees to determine what information should be published. *See* DESCHLER, *supra* note 19, at 810 n.10 (discussing *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970), and response by the House of Representatives); *see also* Thomas P. Clark & Ronald J. Stites, *The First Amendment: Congressional Investigations and the Speech or Debate Clause*, 40 UMKC L. REV. 108, 119-28 (1971) (discussing *Hentoff*'s implications for Speech or Debate Clause protections).

177. Comparative constitutional law suggests that the historical British publication ban may be inconsistent with principles of parliamentary free speech. *See, e.g.*, Roman Co. v. Hudson's Bay Oil & Gas Co., [1972] 23 D.L.R 3d 292 (Can. Ont. C.A.) (holding that press release issued by minister and telegram sent by the Prime

stitution—not for the persuasiveness of its reasoning, but for a conclusion based on premises that do not exist in the American system.

B. Gravel *and the Leak the Court Could Not Brook*

The first and more important opinion of the two Speech or Debate Clause cases decided by Justice White, *Gravel v. United States*, was a coda to the Pentagon Papers saga that had captivated the nation—including the Court—in 1971.[178] On June 13, 1971, the *New York Times* began publishing excerpts from the secret Defense Department history of decision-making leading to the Vietnam War that had been leaked by Daniel Ellsberg.[179] The Nixon Administration obtained a temporary restraining order from a U.S. district court on June 15 barring further disclosures.[180] On June 18, the *Washington Post* picked up the serial publication.[181] The government sought a restraining order against the *Post*, too, and the cases against the two newspapers reached the Supreme Court on June 24.[182] Four Justices (Black, Douglas, Brennan, and Marshall) saw no need for argument and wanted to dissolve the restraining order; four Justices (Burger, Harlan, White, and Blackmun) wanted to continue the injunction until October and hear argument then.[183] Justice Potter Stewart was the deciding vote and as a result, on Saturday, June 26, the Court heard an emergency argument. On June 29, when the outcome of the cases at the Supreme Court remained unclear, Senator Mike Gravel of Alaska (who had received a copy of the papers from Ellsberg, couriered by a *Washington Post* reporter), convened a midnight hearing of the Senate Subcommittee on Public Buildings and Grounds, which he chaired, and entered 4,100 pages into the record. The next day, the Supreme Court decided *New York Times Co. v. United States* by a 6-3 vote, holding that

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Minister regarding proceedings in Parliament, designed to discourage a corporate transaction in which a foreign company was to purchase Canadian uranium holdings, were protected).

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

179. *See* Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. TIMES, June 13, 1971, at 1.

180. *See* United States v. N.Y. Times Co., 328 F. Supp. 324, 331 (S.D.N.Y. 1971) (granting temporary restraining order).

181. *See* Chalmers M. Roberts, *Documents Reveal U.S. Effort in '54 to Delay Viet Election*, WASH. POST, June 18, 1971, at A1.

182. *See* United States v. Wash. Post Co., 446 F.2d 1322 (D.C. Cir. 1971); DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 259-61 (1996) (describing circumstances of June 24 petition for certiorari).

183. *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 69-70 (2005).

the Government's prior restraint on publication violated the First Amendment—and consigning Senator Gravel's hearing to a historical footnote.[184]

In *New York Times Co.*, Justice Hugo Black had been skeptical from the start that Justice White would vote in the *Times'* favor. Justice Black viewed Justice White as a limited supporter of First Amendment freedoms who was likely to sympathize with the Justice Department, or fear what the papers would say about President Kennedy's role in the Vietnam War.[185] It was apparent that Justice White rather reluctantly joined the Court's judgment, writing that he concur[red] in [the] judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system."[186] He also commented that he was "confident" the disclosure would "do substantial damage to public interests."[187]

Justice White had a second chance to weigh in on the Pentagon Papers leak when *Gravel* came before the Court the following year, in 1972. At Conference following the argument in April, Justice White was assigned the opinion of the Court. And he apparently was animated not so much by an analysis of the Speech or Debate Clause protection that Gravel claimed as by his certainty that the Senator's part in the disclosure was *malum in se.*

His opinion, handed down on the same day as *Brewster* in June 1972, reached several key conclusions. First, the Court affirmed—although it was not a contested issue in the appeal—that "a Member's conduct at legislative committee hearings . . . may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the sphere of legitimate legislative activity."[188] Thus, Senator Gravel's conduct in reading and entering the documents into the record at the hearing was protected.

The Court's second key determination was that Gravel's aide was entitled to the same Speech or Debate Clause protection as the Senator; that is, "for the

184. N.Y. Times Co. v. United States, 403 U.S. 713, 714-15 (1971). Although relegated to a historical footnote because of the Supreme Court's ultimate decision in *New York Times Co.* and the subsequent serial publication, Gravel acted to make the Pentagon Papers public when it remained uncertain whether the national newspapers would be permitted to do so.

185. *See* WOODWARD & ARMSTRONG, *supra* note 102, at 140. For an interesting account of another distinguished jurist who evidently let his passionate pro-government sensibilities drive his legal work in the case, see DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 151-61 (2012).

186. *N.Y. Times Co.*, 403 U.S. at 730-31 (White, J., concurring).

187. *Id.* at 731.

188. Gravel v. United States, 408 U.S. 606, 624 (1972) (internal quotation omitted); *see also id.* at 616 ("We have no doubt that Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at that subcommittee meeting. Our decision is made easier by the fact that the United States appears to have abandoned whatever position it took to the contrary in the lower courts.").

purpose of construing the privilege a Member and his aide are to be treated as one."[189] This was an important but surprising outcome.[190] Gravel had earlier on the day of his hearing added Dr. Leonard Rodberg to his staff to assist him in preparing for and conducting the hearing.[191] Justice Brennan's chambers Term summary reflects that Justice Brennan was surprised when the Conference came out clearly in favor of immunity for the aide.[192] He had expected the "conservative wing" of the court to allow the Government to make whatever inquiries it wanted about the aide's activities.[193] Instead, there was general agreement on this conclusion.[194] Justice White's opinion stated:

> [I]t 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.... [T]he 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 if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive

189. *Id.* at 616 (internal quotation omitted).

190. Although the *Gravel* opinion purported to merely distinguish *Dombrowski v. Eastland*, 387 U.S. 82 (1967), suggesting that decision had to do with different conduct by the Senator and his chief counsel rather than a difference in immunity between them, *Gravel* was in fact an overruling of *Dombrowski*. In *Dombrowski*, the Court had said legislative immunity is "less absolute, although applicable" to a committee chief counsel. 387 U.S. at 85. *Gravel* held that a Senator's aide was entitled to the same immunity as the Senator. 408 U.S. at 616.

191. *Gravel*, 408 U.S. at 609.

192. The Supreme Court of New Zealand came to another conclusion on the liability of an aide in 2011. *Attorney-General v Leigh* [2011] NZLR 106 (SC). It held that where a ministry deputy secretary briefed the minister to answer a parliamentary question, the deputy secretary was protected only by qualified privilege and not absolute privilege. *Id.* The Attorney-General commissioned a report expressly responding to *Leigh* by calling for its legislative overruling and for a substantial statutory expansion of parliamentary privilege. *See* PRIVILEGES COMM. OF THE HOUSE OF REPRESENTATIVES, QUESTION OF PRIVILEGE CONCERNING THE DEFAMATION ACTION ATTORNEY-GENERAL AND GOW V. LEIGH (2013), http://www.parliament.nz/resource/0001871936.

193. Case History for October Term 1971 at XCV, Justice Brennan Papers, Box II:6.

194. *Id.* at XCV-XCVI. Justice Brennan's notes reflect that the Justices had varied reasons for their conclusion. He evidently speculated that Justice Rehnquist's support resulted from his prior experience as a "presidential aide." While Rehnquist had served in the executive branch—he was Assistant Attorney General for the Office of Legal Counsel prior to his appointment to be an Associate Justice—he had not been part of a White House staff. Still, his recent executive branch experience may well have influenced his thinking.

> and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated.[195]

The opinion's third key holding was that neither the Senator nor his aide was immune from "testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act."[196] In other words, the Court found that prosecutors should be able to get at knowledge acquired by the Senator and his aide about how the Pentagon Papers had been leaked. This was a striking blow to congressional investigation power. Where Members and their staffs must worry that investigative activity they undertake may subject them to compelled judicial process, their activity will surely be chilled based on the ability of the other branches to intimidate them.

Gravel's fourth key holding was that the efforts of the Senator and his aide to arrange private publication of the Pentagon Papers were not protected legislative activity even though the documents constituted a committee record as a result of the midnight hearing. Justice White wrote:

> [P]rivate publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence. The Senator had conducted the hearings; the record and any report that was forthcoming were available both to his committee and the Senate. . . . We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process.[197]

Justice Brennan, although he took the broadest view of congressional immunity of all the members of the Court through the 1960s and 1970s, had initially agreed with the government that "republication lay outside the scope of protected legislative activity and thus could be subject to grand jury investigation."[198] But "[w]ithin a few days of the Conference," he changed his mind on the issue, concluding that republication "was an integral part of the legislative process, and was entitled to the same immunity as the casting of votes or the delivering of speeches on the House or Senate floor."[199] His dissent as ultimately published, joined by Justices Douglas and Marshall, stated that it made no sense to exclude a "legislator's duty to inform the public about matters affecting the administration of government" from Speech or Debate Clause protection— "a function that I had supposed lay at the heart of our democratic system."[200] He

195. *Gravel*, 408 U.S. at 616-17 (internal citations omitted).

196. *Id.* at 622.

197. *Id.* at 625-26.

198. Case History for October Term 1971 at XCV, Justice Brennan Papers, Box II:6.

199. *Id.* at XCVII.

200. *Gravel*, 408 U.S. at 649 (Brennan, J., dissenting).

was gratified that Justice Douglas had revised an earlier dissent premised on the First Amendment to conclude that Gravel's conduct was instead protected by legislative immunity.[201]

But for Justice White, this was a case about interference with a "grand jury investigating the commission of a crime."[202] In *Brewster*, handed down the same day as *Gravel*, he had declined to sign on to Chief Justice Burger's view of the Clause in its entirety. In his dissent from *Brewster*, Justice White wrote that "[a] corrupt vote may not be made the object of a criminal prosecution because otherwise the Executive would be armed with power to control the vote in question, if forewarned, or in any event to control other legislative conduct."[203] In a *Brewster* footnote, he also discussed the distinction he saw between *Brewster* and *Gravel*:

> In *Gravel*, it is held that the Speech or Debate Clause does not immunize criminal acts performed in preparation for or execution of a legislative act. But the unprotected acts referred to there were criminal in themselves, provable without reference to a legislative act and without putting the defendant Member to the task of defending the integrity of his legislative performance. [In *Brewster*], as stated, the crime charged necessarily implicates the Member's legislative duties.[204]

The distinction was circular, and essentially the same one that Justice Harlan had thought impossible to make when deciding *Johnson*.[205] Justice White, the former Deputy Attorney General of the United States, could not brook the breach of government secrecy orchestrated by Senator Gravel. Rejecting the arguments of a group of senators who filed an amicus brief and argued before the Court in the case, Justice White said this conduct was not "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."[206] For White,

201. Case History for October Term 1971 at XCVIII, Justice Brennan Papers, Box II:6.

202. *Gravel*, 408 U.S. at 613.

203. United States v. Brewster, 408 U.S. 501, 556 (1972) (White, J., dissenting).

204. *Id.* at 555 n.*.

205. *See supra.* text accompanying note 73. And recall that Justice White had recused himself from *Johnson*, presumably because of his involvement in the prosecution while serving at the Department of Justice. If White was following the recusal guidance provided to him for use at his confirmation hearing by Nicholas Katzenbach, then Assistant Attorney General for the Office of Legal Counsel, White would only have recused himself from the case if he had personal involvement. Justice White Papers, Box 71, Folder 3.

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

Gravel's legislative work concluded with the hearing; any arrangements for private republication "were not part and parcel of the legislative process."[207]

Justices Brennan and Stewart visited Justice White to try to dissuade him from the portion of the opinion that allowed questioning of the Senator as to sources but, in Brennan's account, "White steadfastly refused, sticking to his view that the Clause could not shield criminal conduct, even by a Senator, from grand jury inquiry."[208] To Justice Brennan's chambers, White's engagement with *Brewster* was inexplicable: he had joined an early draft of Brennan's dissent on January 20 and then, after the *Gravel* case, declined to sign it.[209] But Justice White's *Gravel* decision is best illuminated by his vote in the original Pentagon Papers case the year before rather than by *Brewster*. Justice White was deeply skeptical of any right to publicize government secrets, but had gone along with the Court's vindication of First Amendment freedoms "only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system."[210] In *Gravel*, there was no principle similar to prior restraint to limit his willingness to restrict the speech protection being claimed. And so—with the supporting votes of the two Justices remaining on the Court who voted against the result in *New York Times Co.* (Burger and Blackmun), as well as two new Justices (Powell and Rehnquist), Justice White achieved the holding in *Gravel* that a Member of Congress had no right to republication.[211]

Note that Justice White, dissenting in *Brewster*, argued that Chief Justice Burger had failed to account for "[t]he realities of the American political system," and that his distinctions were illusory.[212] Reasoning instead that

207. *Id.* at 626.

208. Case History for October Term 1971 at XCVII-XCVIII, Justice Brennan Papers, Box II:6.

209. *Id.* at XCIII ("Not even White's clerk could explain his unexpected refusal.").

210. N.Y. Times Co. v. United States, 403 U.S. 713, 730-31 (1971) (White, J., concurring).

211. Although the historical veracity of the claim is uncertain, Justice Brennan's chambers Term summary reflects that Justice Powell told Justice Brennan on the day *Brewster* and *Gravel* were announced that, "if he had had more time to study the case, he would probably have joined the Brennan dissent, but as it was he was simply too pressed to give the case the extended attention it deserved." Case History for October Term 1971 at CI, Justice Brennan Papers, Box II:6. Strikingly, this would have swung the part of the opinion's holding on grand jury testimony, adopting Justice Brennan's view that the Senator and his aide could not be compelled to testify (because Justice Stewart dissented as to that portion of the decision, giving Justice Powell a controlling vote). Justice Powell's notes do not reflect equivocation—although apparently concerned with the grand jury issue, he marked "Gosh!" next to a key sentence in Justice Brennan's draft dissent and indicated on the cover, "Reviewed 6/20 (I'm still with White)." Case File, 70-45 U.S. v. Brewster, Justice Powell Papers.

212. United States v. Brewster, 408 U.S. 501, 556 (1972) (White, J., dissenting).

"[s]erving constituents is a crucial part of a legislator's ongoing duties," he rejected the Chief Justice's categories of activity that might preclude a legislator's maintenance of "a working relationship with his constituents not only to garner votes to maintain his office but to generate financial support for his campaigns."[213] Had Justice White's opinion of the Court in *Gravel* been animated by this principle, he may have reached a very different outcome. Instead, the opinion reflected the offense Justice White took to Gravel's act of publishing classified executive papers and White's sense that such an act was inconsistent with the proper legislative role.

Such a vision of Congress is consistent with the broader political milieu of 1972, when American politics was still in the early days of what Samuel Kernell has termed the transition "from institutionalized to individualized pluralism."[214] In other words, *Gravel* was decided at a time when a divide in Congress between show horses and work horses was accelerating—and the value of media-focused Members was not yet understood by the establishment.[215] Justice White's sense of legislative appropriateness happened to track the peculiar history of publication in parliamentary debates, but the Conference notes do not give any indication that his initial instinct regarding the outcome of the case was premised on *Stockdale* and the British parliamentary publication doctrine. In his *Gravel* opinion, Justice White briefly noted the Journal Clause, observing merely that it "ha[d] not been the subject of extensive judicial examination."[216] Hurrying past that point, he relied on *Stockdale* to suggest that the Speech or Debate Clause was not meant to protect republication.[217] But Justice Blackmun's Conference notes suggest that most of the Court's internal discus-

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213. *Id.* at 557.

214. SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP 33 (4th ed. 2006). Kernell defines "individualized pluralism" as the end state of a shift from a closed political world dominated by insiders to a politics with a broader number of participants but few leaders, heightening the importance of focusing on public opinion rather than traditional backroom bargaining among repeat players. *Id.* at 33-38.

215. *Compare* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 147 (1974) ("Thus the hero of the Hill is not the hero of the airwaves. The member who earns prestige among his peers is the lonely gnome who passes up news conferences . . . in order to devote his time to legislative 'homework.'"), *with* SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP 214 (1ST ed. 1986). ("Increasingly . . . politicians throughout Washington are coming to adopt aspects of going public as part of their own repertoire."). *See also* DONALD R. MATTHEWS, U.S. SENATORS AND THEIR WORLD 94 (1960) (quoting Senator Carl Hayden's widely-cited advice to new members that "[t]here are two kinds of Congressmen—show horses and work horses. If you want to get your name in the papers, be a show horse. If you want to gain the respect of your colleagues, keep quiet and be a work horse"); HEDRIK SMITH, THE POWER GAME 134-35 (1988).

216. Gravel v. United States, 408 U.S. 606, 626 n.16 (1972).

217. *Id.* at 622-23 & n.14.

sion focused on the extent to which the Senator's aide shared the Senator's immunity (which required an important correction to *Dombrowski*).[218] Indeed, this topic occupied much of Justice White's opinion. As to the act of publication, Justice Blackmun simply noted in Conference that "legislative actions do not reach republication."[219] Justice Brennan's dissent took the opposite view, stating that republication informed "the public about matters affecting the administration of government," which he deemed "a function that [he] had supposed lay at the heart of our democratic system."[220]

The unprotected nature of publication of congressional proceedings is, at bottom, an obsolete perspective on congressional function and one to which the law has no reason to hew.[221]

C. Doe *and the Privacy Invasion the Court Could Tolerate*

The Justices were already looking ahead to new issues as they were deciding *Brewster* and *Gravel* during the 1971 Term.[222] The D.C. Circuit had recently decided *Doe v. McMillan*, a case involving the House Committee on the District of Columbia's printing and distribution of a report on the District's failing schools. The Report included forty-five pages of student absentee lists, records of student disciplinary problems, and student test papers.[223] The students sued, claiming that the disclosures violated their constitutional and common law rights to privacy.[224]

While preparing the *Gravel* opinion, Justice White had already told Justice Brennan that he distinguished the cases because the *McMillan* publication was

218. Justice Blackmun Papers, Box 147, Folder 2, Case File 71-1017, ("But legis acts do n reach repub.—as to this I agree [?] 6/1."); *see* THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 162-65 (Del Dickson ed., 2001).

219. Justice Blackmun Papers, Box 147, Folder 2, Case File 71-1017.

220. *Gravel*, 408 U.S. at 649 (Brennan, J., dissenting).

221. Chafetz has written that Justice White simply got the case wrong. *See* CHAFETZ, *supra* note 21, at 100 ("[H]e failed to take into account that communication with the public—with the sovereign masters, of whom Senator Gravel and his colleagues were merely representatives—*is* an integral part of the job that the Constitution assigns to Members of Congress."). Justice White's dissent in *Brewster* indicates that he understood this, which suggests that he was simply unwilling to consider congressional disclosure of executive branch secrets to be part of the job.

222. Case History for October Term 1971 at XCIX, Justice Brennan Papers, Box II:6.

223. Doe v. McMillan, 459 F.2d 1304, 1307-08 (D.C. Cir. 1972), *rev'd in part*, 412 U.S. 306 (1973).

224. *Id.* at 1308.

institutionally authorized by Congress, while the *Gravel* publication was not.[225] In *McMillan*, Justice White delivered the opinion of the Court with the backing of four Justices—Douglas, Brennan, Marshall, and Powell—very different from the lineup that joined him in *Gravel*. The opinion appeared straightforward: Justice White wrote that because the report and its authorized publication and distribution were "integral" parts of the legislative process, "the acts were protected by the Speech or Debate Clause."[226]

Justice White's opinion then turned to the question of the liability of the public printer. Citing his conclusion in *Gravel* that republication is not an essential part of the legislative process, he concluded that the printer had no Speech or Debate Clause immunity.[227] Remarkably, he wrote that internal publication was sufficient to serve the "informing function" of Congress. Internally published materials "are available for inspection by the press and by the public," Justice White reasoned, and that should be enough—no matter that the press and the public were effectively gagged.[228] For Justice White, the liability of the public printer would therefore turn on whether more than the usual 1,682 copies were printed.[229] The Court has not revisited the congressional right of republication since *McMillan*. Given that it is uncertain what *McMillan*—where liability turned on how many copies were printed—would mean in the Internet era, a new look at the question is needed.

Justice Powell's files reveal that he and his clerks wavered over whether to sign onto the Court's opinion. Justice White circulated his first draft on January

225. Case History for October Term 1971 at XCIX, Justice Brennan Papers, Box II:6. Justice White had added a footnote to his *Gravel* opinion stating that "[w]e need not address issues that may arise when Congress or either House, as distinguished from a single Member, orders the publication and/or public distribution of committee hearings, reports, or other materials." *Gravel*, 408 U.S. at 626 n.16. According to Brennan, White was anticipating *McMillan*. Case History for October Term 1971 at XCIX, Justice Brennan Papers, Box II:6.

226. *McMillan*, 412 U.S. at 313.

227. *Id.* at 315.

228. *Id.* at 317. That is, if a reader repeated or reprinted the content of the congressional report, the reader would be subject to suit for violation of the students' right to privacy—just as though the reader had stolen the files from the school, regardless of Congress's decision to publish the content.

229. *Id.* at 320-21. On remand, the three-judge panel of the court of appeals apparently found this remarkable, too. *See* Post-Conference File Memo, Judge MacKinnon Papers, Box 142.B.17.7.B ("Our real concern was why did the court send it back. My own thought was that there had been so much emphasis on the liability of the congressional individuals that we had overlooked placing the same emphasis on the liability of the printers and distributors to the public and had more or less concluded that since they were acting pursuant to legislative direction in the informing process, that they shared the immunity of the speech or debate clause."). It affirmed summary judgment for the public printer. *See* Doe v. McMillan, 566 F.2d 713, 719 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 969 (1978).

29, 1973, and he was sufficiently frustrated by the lack of response from his colleagues that on February 20, he wrote to Justice Douglas who, as the senior justice in the majority, had assigned White the opinion. White suggested to Douglas that he reassign the opinion because White had "gotten absolutely nowhere with what [he had] circulated in [the] case."[230] Justice Powell owned up as the source of delay because he was not yet "clear in [his] own mind as to a principled basis for granting relief consistent with [the Court's] prior decisions."[231]

In a February 2 memo to his clerk, Justice Powell had expressed a "reluctance to hang a potential liability on the Public Printer and the Superintendent of Documents when they are not the real culprits."[232] In a February 10 reply, the clerk observed:

> At the outset, I should mention that Justice White does not seem to be at all concerned about this. . . . The reason he voted the way he did was, I think, that he simply wanted to slap the hands of Congress for doing such a stupid and insensitive thing.[233]

In the same memo, the law clerk advocated a line drawn based on where the injury is to individuals rather than the other branches of government. He conceded: "I acknowledge that this cuts somewhat against the grain of *Gravel*'s theme that the Clause has the same meaning for all persons in all contexts, but you did not write *Gravel* and few people seem to be able to understand it."[234] Justice Powell proposed to Justice White language to "place[] the focus of inquiry on the immunity from *private suit* rather than whether the distribution is a legislative act,"[235] and Justice White incorporated the amendment verbatim into the final opinion.[236]

Chief Justice Burger dissented, calling it unacceptable that the judiciary would have the power "to carry on a continuing surveillance of what Congress may and may not publish by way of reports on inquiry into subjects plainly within the legislative powers conferred on Congress by the Constitution."[237] Citing his own opinion in *Brewster* for the proposition that Speech or Debate

230. Case File, 71-6356 Doe v. McMillan, Justice Powell Papers.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Doe v. McMillan, 412 U.S. 306, 314 (1973) ("The proper scope of our inquiry, therefore, is whether the Speech or Debate Clause affords absolute immunity from private suit to persons who, with authorization from Congress, distribute materials which allegedly infringe upon the rights of individuals.").

237. *Id.* at 331 (Burger, C.J., concurring in part and dissenting in part).

Clause immunity is rightfully broad, the Chief Justice made no attempt to reconcile his dissent in *McMillan* with his majority vote in *Gravel*.[238]

It is hard to escape the conclusion from *Gravel* and *McMillan* that the congressional privilege of republication turned on whether Justice White saw the particular material as suitable for public disclosure. The question is who—institutionally—should be making that judgment.

The constitutional answer must be that the authority is vested in the Congress. Senator Gravel exercised the authority delegated to him as a subcommittee chair by the Senate to place the Pentagon Papers in the Congressional Record. The House Committee on the District of Columbia exercised the same delegated judgment in the material it included in a public report. Whether or not these delegations or the exercises of them were wise, Justice White's opinions did not provide a basis for ignoring the constitutional vesting of them. In a Congress where the ability to shine a light on issues is the most important tool in every Member's individual toolbox, the implication of the Speech or Debate Clause must be that congressional power to tell the public what Members think it needs to know is subject to review only by each Member's own chamber.

IV. A Guide to Repair

The Supreme Court regularly receives petitions for certiorari on Speech or Debate Clause issues.[239] Given a live split among the courts of appeals on the extent of the non-disclosure privilege that attaches to congressional work product, it will no doubt continue to receive invitations to revisit its Speech or Debate Clause jurisprudence.[240] The Court should accept that invitation, given the

238. *See id.*

239. *See, e.g.*, Petition for Writ of Certiorari at 2, Renzi v. United States, 132 S. Ct. 1047 (2011) (No. 11-557), 2011 WL 5189106 ("The Ninth Circuit significantly restricted the scope of the Speech or Debate Clause in a manner flatly inconsistent with the decisions of other courts of appeals."); Petition for Writ of Certiorari at 3, Jefferson v. United States, 556 U.S. 1236 (2009) (No. 08-1059), 2009 WL 434747 ("Whether the Clause requires dismissal of an indictment because of the use of privileged legislative evidence in the grand jury is a question that will recur in investigations of other Members of Congress."); Petition for a Writ of Certiorari at 12, United States v. Rayburn House Office Bldg., Room 2113, 552 U.S. 1295 (2007) (No. 07-816), 2007 WL 4458912 ("The court of appeals' absolute rule against compelled disclosure of Speech or Debate material to the Executive Branch calls vital investigative techniques into immediate and serious question with respect to public corruption probes."); Brief for Appellant at 15-16, Office of Senator Mark Dayton v. Hanson, 550 U.S. 511 (2007) (No. 06-618), 2007 WL 621862 ("[T]he Court should grant certiorari because of the importance of the Speech or Debate Clause in our constitutional scheme and because the D.C. Circuit's decision . . . violates the Speech or Debate Clause[] . . . .").

240. *Compare* United States v. RHOB, Room 2113, 497 F.3d 654, 655 (D.C. Cir. 2007) ("Our precedent establishes that the testimonial privilege under the Clause extends to non-disclosure of written legislative materials."), *with* United States v.

right vehicle, to answer important legal questions about the reach of Speech or Debate Clause protection and to resolve conflicts among the circuits in its application.[241]

Absolute immunity should continue to attach to so-called "core" legislative functions, such as speaking and voting in committees or on the floor of either chamber.[242] But to fulfill the purpose of the Speech or Debate Clause, qualified immunity should attach much more broadly, covering all of a Member's official conduct. To sustain a lawsuit against a Member for an act the Member undertook in an official capacity, a plaintiff would have to make a threshold showing that the Member acted in violation of clearly established constitutional rights.

But the immunity should be limited in two important ways. First, contrary to the holdings in *Johnson* and *Brewster*, immunity should not cover receipt of bribes—the taking of funds for personal gain by a Member of Congress. In answer to a question that has split the circuits but that the Supreme Court has not addressed, the Speech or Debate Clause should not impair investigations into such behavior by creating physical sanctuaries for evidence based on implied evidentiary or non-disclosure privileges.

Second, the Speech or Debate Clause should be interpreted to allow delegation of enforcement power from the Congress to the executive branch based on a narrowly drawn statute.[243] Despite Justice Brennan's hopes that Congress could be organized to police itself, experience has proven that the chambers are not capable of mustering an appropriate investigative and prosecutorial capacity.[244] Congress could, if necessary, reserve to itself some final decisional authority—much as it does for impeachments and removal of judicial officers, where the executive branch undertakes the underlying prosecutorial work.

Renzi, 651 F.3d 1012, 1034 (9th Cir. 2011) ("[W]e 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.").

241. The right vehicle would most likely be a case like *United States v. RHOB* or *Renzi*. Some signaling from the Court that it is prepared to more broadly revisit Speech or Debate Clause questions would break the freeze created by *Proxmire*, which is discussed *supra* note 156 and accompanying text.

242. Although insufficient to give full effect to the Speech or Debate Clause, absolute immunity for purely parliamentary acts is both necessary and correct, and should be maintained going forward. In the words of the Tenth Circuit, absolute immunity from suit extends to Representatives and Senators for "all formal actions in the official business of Congress, including voting, conducting hearings, issuing reports, and issuing subpoenas." Bastien v. Office of Sen. Ben Nighthorse Campbell, 390 F.3d 1301, 1314 (10th Cir. 2004).

243. *See* United States v. Johnson, 383 U.S. 169, 185 (1966).

244. *See* THOMPSON, *supra* note 139. When Congress "investigates, charges, and disciplines a member . . . [i]t is not in the best position to reach an impartial judgment on the merits, treat members with fairness, and maintain public confidence in the process." *See id.* at 135. But, like Odysseus, Congress may be in a position to bind itself to the mast by narrowly delegating enforcement powers.

A. *Add Qualified Immunity for Other Official Acts*

The trouble with protecting only "purely legislative activities" is that every realistic conception of the Member's role—analytically and colloquially—is much broader.[245] Constituents speak with Members and their staffs—at home in their districts and in Washington offices—and expect action; they are not interested in hearing from a Member that he or she acts only by voting in the chamber.[246] The Framers intended Members to have ongoing relationships with their voters, and limiting the Speech or Debate privilege to core legislative acts gives short shrift to this essential constitutional function.[247] A broader immunity is necessary to ensure that Members of Congress have the freedom to vindicate their offices in critical circumstances. They have not been given sufficient protection under the Burger Court interpretation of the Clause.

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245. The design of our system anticipates that members will be responsive to the electorate in ways that extend beyond a trusteeship theory of voting. For example, political theorist Hanna Pitkin explains representation as "a kind of two-way correspondence." HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 106 (1967); *see id.* at 210-215 (stating that "when people are being represented, their claim to have a say in their interest becomes relevant" and that where the represented person's interest is not remotely discernible by a representative, the consultation itself has substantive value); *see also* RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 168-69 (1978) ("The ability to explain and to have his explanation accepted by his supportive constituencies, is the regulator of a congressman's voting leeway in Washington .... The explanatory process helps link Congress and the citizenry, through its legitimating and its educational aspects."). *See generally* BRUCE E. CAIN ET AL., THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE (1990); DAVID E. PRICE, THE CONGRESSIONAL EXPERIENCE (TRANSFORMING AMERICAN POLITICS) (2004); NEAL RIEMER, THE REPRESENTATIVE: TRUSTEE, DELEGATE, PARTISAN, POLITICO? (1967). Some Members of Congress go so far as to treat this as the largest part of the job. *See, e.g.*, Richard Simon, *Lawmaker Reaches Out to His Constituents About 100 Times a Day*, L.A. TIMES, Aug. 25, 2010, http://articles.latimes.com/2010/aug/25/nation/la-na-congressman-calls-20100825 (describing then-U.S. Representative Tim Johnson's constant telephone engagement with his constituents).

246. *See* Sierra Club v. Costle, 657 F.2d 298, 409 (1981) ("Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws."). *See generally* MAYHEW, *supra* note 215; DONALD G. TACHERON & MORRIS K. UDALL, THE JOB OF THE CONGRESSMAN 95-96 (2d ed. 1970) (describing the "wider implications for the democratic process" of constituent contact).

247. I mean here only the modest claim that the Framers chose a two-year term to yoke members to the voters who elected them. *See* THE FEDERALIST NO. 51 (James Madison). *But see* Fred A. Bernstein, Op-Ed., *A Congress for the Many, or the Few?*, N.Y. TIMES, Sept. 9, 2012, http://www.nytimes.com/2012/09/09/opinion/sunday/a-congress-for-the-many-or-the-few.html (contending that modern constituent service could not have been intended by the Framers).

So what, if any, Speech or Debate protection should apply to other representational functions engaged in by Members of Congress? These "legitimate errands" include "the making of appointments with Government agencies, assistance in securing Government contracts, [and] preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress."[248] To maximize Members' personal incentives (or at least minimize their disincentives) to dutifully discharge representational responsibilities, they ought to be protected by qualified Speech or Debate immunity for the things they do beyond what is directly incident to their functions on the floor of either chamber.[249]

1. Analogy to Presidential Immunity

The *Brewster* Court determined that these other representational functions fall outside the protection of the Speech or Debate Clause.[250] The jurisprudence of presidential immunity, however, reveals that this position is unsupportable both as a matter of consistency in the doctrine of immunity and as a matter of textual interpretation. The Court has found absolute and qualified immunity for government actors in other contexts through reasoning by analogy.[251]

Consider first how sophisticated understandings of the presidency have informed the immunity to which the President is entitled. Richard Neustadt's famous presidential power thesis posited that "[p]residential power is the power to persuade."[252] He argued, in brief, that the President's formal powers—that is, the "legal or customary 'authority' and power" guarantee only that the President will be a clerk; instead, a President's leadership—true presidential power—

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

249. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (defining qualified immunity as shielding government officials from suit "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

250. *Brewster*, 408 U.S. at 512; *cf.* Barr v. Matteo, 360 U.S. 564, 575 (1959) (Stewart, J., concurring) ("It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty."). Justice Stewart nevertheless joined the opinion of the Court in *Brewster*.

251. Ironically, most immunity decisions ignore the only immunity expressly provided in the Constitution—the Speech or Debate Clause—and instead reason by extension from other "found" immunities. (For example, if Presidents have immunity, must cabinet officials also be protected by it?) *See, e.g.*, Butz v. Economou, 438 U.S. 478, 508 (1978) (stating that "qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations").

252. RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS 11 (1990 ed.).

depends on personal influence.[253] Neustadt later framed his own line of inquiry: "[H]ow should a person think about the possible effects of his own choices on his own prospects for influence within the institutional setting of his office?"[254] Neustadt's work transformed political science centering on the presidency by filling in the gap between the institution in form and in fact.[255] Once Franklin D. Roosevelt had created the modern presidency, it was impossible to categorize a President's acts.[256] Almost everything the President did was presidential—and the least formal actions could be among the most important.

The expansive perspective on the presidency that developed from Neustadt's scholarship informed the Supreme Court's analysis of immunity available to the President in *Nixon v. Fitzgerald*.[257] In *Nixon*, the Court held that a President was entitled to absolute immunity from "damages liability predicated on all of his official acts."[258] Though defining only loosely what constituted an official act, the Court thought "it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility."[259]

Nixon, decided nearly a decade after *Brewster*, grants protection to an unconstrained set of presidential actions. Under it, covered conduct includes not just the exercise of formal powers, such as those of nomination and of treaty submission, but also a much wider range of official acts, such as the alleged involvement in a personnel decision internal to the Department of Defense that gave rise to the case.[260] The Court developed its view of presidential immunity with reference to the practical operation of the modern presidency rather than to the absolutist view of separation of powers, unlike what it did for the legislative branch in *Brewster* and its progeny.

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253. *Id.* at 7.

254. Charles O. Jones, *Scholar-Activist as Guardian: Dick Neustadt's Presidency*, *in* GUARDIAN OF THE PRESIDENCY 35, 43 (Matthew J. Dickinson & Elizabeth A. Neustadt eds., 2007).

255. *Id.* at 49 ("Research and writing about the Presidency would never again be the same."). *But see* Louis Fisher, *Teaching the Presidency: Idealizing a Constitutional Office*, PS: POL. SCI. & POL. MAG. 17, 29 (2012) (criticizing scholars of the Neustadt school for "attribut[ing] to the presidency highly romantic qualities of integrity, honesty, and competence rarely seen in those who sit in the Oval Office").

256. *See* THEODORE J. LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED 57 (1985) (describing the President-centered nature of the post-FDR federal government).

257. 457 U.S. 731 (1982).

258. *Id.* at 749.

259. *Id.* at 756.

260. Although the Supreme Court held in *Nixon* that conduct by the President while in office is protected by immunity from suit seeking damages, it later held that a President could be sued while in office based on alleged acts prior to becoming President. *See* Clinton v. Jones, 520 U.S. 681 (1997).

Just as the Court took an as-applied view of the presidency, so it should take an as-applied view of congressional office. As the Court noted in *Nixon*, inquiries into the "'inherent' or 'structural' assumptions of our scheme of government" as "illuminated by our history" have been essential to determining the extent of immunity from civil damages liability for government officials.[261] Technologies from the telegraph to air travel have transformed the role of Members of Congress and their work in both legislating and providing constituent service.[262] The modern Congress is characterized by structures, procedures, and leadership of increasing entanglement and intricacy.[263] Members become leaders and gain and exercise legislative power precisely through the informal actions that the *Brewster* opinion cast as "legitimate" but "political." In order for Members to position themselves to wield the kind of legislative power that the Speech or Debate Clause envisions protecting, they must spend years and years relationship-building with constituents and colleagues, fostering their public reputations, assembling interest group coalitions, and conducting many other non-voting activities.[264] In place of the disfavor of this activity shown by *Brewster* and its progeny, the natural doctrinal substitute is *Nixon*'s conclusion that the courts ought to be highly deferential in the business of policing it.[265]

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261. *Nixon*, 457 U.S. at 747-48 & n.26.

262. *See* REMINI, *supra* note 174, at 131 (stating that the telegraph "marked the beginning of a new relationship between representatives and senators and the press"); *id.* at 498-99 (describing changes to the congressional work week influenced by "jet air flights"). Today, the Internet is "the primary source for learning about and communicating with Congress." KATHY GOLDSCHMIDT & LESLIE OCHREITER, CONG. MGMT. FOUND., COMMUNICATING WITH CONGRESS: HOW THE INTERNET HAS CHANGED CITIZEN ENGAGEMENT 9 (2008).

263. ROGER H. DAVIDSON ET AL., CONGRESS AND ITS MEMBERS 30 (11th ed. 2008) ("The result is ever more complex networks of give-and-take relationships in which less-informed members seek cues from better-informed colleagues, issue by issue."); *see* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (4th ed. 2012).

264. Political scientist David Mayhew famously argued that congressional behavior is best explained by an overriding desire to be reelected. To this end, members must engage in "advertising," "credit claiming" (including through casework), and "position taking." DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 49-73 (1974). These activities depend on contact with constituents, directly and through media channels.

265. *See Nixon*, 457 U.S. at 756 ("Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which of the President's innumerable 'functions' encompassed a particular action.... Inquiries of this kind would be highly intrusive."). In support of the notion that courts are at least as poorly positioned to parse what constitutes the representational function of a member of Congress as the executive function of a President, consider one political scientist's suggestion that defining a member's representational function is just as tough as Justice Stewart found defining

Concurring in *Nixon*, Chief Justice Burger wrote that "Presidential immunity derives from and is mandated by the constitutional doctrine of separation of powers."[266] In a system of separated institutions sharing powers, this reasoning should apply to Members of Congress just as it applies to the President.[267]

Immunity from suit ought to protect the full universe of official acts of Members of Congress because it is the best interpretation of the Speech or Debate Clause. The policy rationale for such extensive coverage tracks the explanation in *Nixon* of "the prospect that damages liability may render an official unduly cautious in the discharge of his duties."[268]

2. Express Nature of Immunity to Address Slippery Slope

One inevitable lawyer's challenge to expanding Speech or Debate Clause immunity from suit is that it would create a slippery slope. Justice Byron White, dissenting in *Nixon*, raised this specter in questioning whether absolute immunity for the President would lead to the same being extended to all government officers, state and federal.[269] But even if the slope were greased as a policy matter, the text of the Constitution provides a unique rationale for including Members of Congress in the ambit of absolute immunity and going no further. Un-

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obscenity: that is, the best one could say would be, "I know it when I see it." EDWARD I. SIDLOW, FRESHMAN ORIENTATION: HOUSE STYLE AND HOME STYLE 83-84 (2007); *cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (Stewart, J., concurring).

266. *Nixon*, 457 U.S. at 758 (Burger, C.J., concurring).

267. As Richard Neustadt explained, ours is not so much a system of "separated powers" as "a government of separated institutions *sharing* powers." NEUSTADT, *supra* note 252, at 29. *But see* Fisher, *supra* note 255, at 23 (challenging Neustadt's framing of separation of powers as contrary to his urging of presidents "to take power, not give it or share it").

268. *Nixon*, 457 U.S. at 752 n.32. The Court went on to quote Judge Learned Hand's canonical explanation for limiting damages liability: "[The] justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute . . . ." *Id.* (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)); *see also* Powell v. McCormack, 395 U.S. 486, 503 (1969) ("Our cases make it clear that the legislative immunity created by the Speech or Debate Clause performs an important function in representative government. It insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation."). *But see* Clinton v. Jones, 520 U.S. 681, 695 (1997) ("As our opinions have made clear, immunities are grounded in 'the nature of the function performed, not the identity of the actor who performed it.'") (quoting Forrester v. White, 484 U.S. 219, 229 (1988)).

269. *Nixon*, 457 U.S. at 784 (White, J., dissenting).

like for presidents, judges, cabinet officers, or prosecutors, the Constitution expressly gives immunity to Members of Congress.[270]

In *Nixon*, the Court found unpersuasive the *expressio unius* argument that, because the Speech or Debate Clause expressly provides for congressional immunity, the Framers must have rejected any similar grant of executive immunity.[271] But in *Nixon* the Court created presidential immunities not expressly set forth in the Constitution that were much broader than congressional immunities found plainly in the Constitution's text. This makes for an odd result. It would seem to imply that, although the Framers wrote only congressional immunity into the text of the Constitution, they intended it to be a rarely relevant historical relic while anticipating that the Court might find more extensive immunity for other officials.[272]

On the other hand, qualified immunity rather than absolute immunity suffices for the extended universe of Members' official acts because it follows the Supreme Court's announced principle of providing only the minimum immunity necessary to ensure that a government official can carry out the official's public role without fear of suit for private damages.[273] Under qualified immuni-

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270. *See id.* at 731 (opinion of the Court) (absolute immunity of Presidents); Butz v. Economou, 438 U.S. 478, 506-07 (1978) (qualified immunity of executive branch officials for violation of constitutional rights); Stump v. Sparkman, 435 U.S. 349, 355-56 (1978) (absolute immunity of judges); Imbler v. Pachtman, 424 U.S. 409, 418-23 (1976) (absolute immunity for prosecutors).

271. *Nixon*, 457 U.S. at 750 n.31; *see* Akhil Reed Amar & Neal Kumar Katyal, *Commentary: Executive Privileges and Immunities: The* Nixon *and* Clinton *Cases*, 108 HARV. L. REV. 701, 703 (1995) (stating that it would be clumsy and mechanical to apply the legal maxim *expressio unius* to the immunities granted by the Speech or Debate Clause).

272. *See* Louis Fisher, *Congress as Co-Manager of the Executive Branch*, *in* THE MANAGERIAL PRESIDENCY 300, 315 (James P. Pfiffner ed., 2d ed. 1999) ("Through this reasoning, executive officials have greater immunity under judge-made law than Members of Congress have under their constitutional grant of immunity."). *Cf.* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107-08 (2012) (stating that although it is too much to say that the negative-implication canon is just "a description of the result gleaned from context," context does matter and common sense is required in determining what is negatively implied).

273. *See* Harlow v. Fitzgerald, 457 U.S. 800, 810-11 (1982) ("[I]n general our cases have followed a 'functional' approach to immunity law.... [T]his protection has extended no further than its justification would warrant."); *see also* Chastain v. Sundquist, 833 F.2d 311, 332 (D.C. Cir. 1987) (Mikva, J., dissenting) ("I would therefore hold that a member of Congress performing official but non-legislative functions is entitled to ... qualified immunity from damage suits charging a statutory or constitutional tort."). Justice Brennan and more recently Josh Chafetz have made strong arguments for simply making absolute immunity coextensive with the official conduct of a member of Congress. This approach is an analog to Justice Hugo Black's First Amendment absolutism in that it is intellectually

ty, a Member of Congress could defeat a suit by showing that the challenged conduct was undertaken in a representational capacity and did not violate clearly established constitutional rights.[274]

3. Insufficiency of Westfall Act Immunity

In practice, Members of Congress and their staffs are taught that the Speech or Debate Clause provides an interesting but impractical constitutional protection for their legitimate activities. Instead, they are told that their conduct is protected by the Westfall Act, part of the Federal Tort Claims Act of 1988, which provides absolute immunity from suit for damages where the Attorney General certifies that the federal employee was acting within the scope of employment.[275] The primary catalyst for enactment of the Westfall Act was the Supreme Court's decision in *Westfall v. Erwin*, which limited immunity of all federal employees from state tort actions, and the result is a statute of general applicability to federal employees.[276] But Members of Congress were also moti-

important but presents workability problems. History and political economy indicate that Congress would not respond to the extended absolute immunity approach by improving discipline of individual members. Qualified immunity remains immunity from suit—and when coupled with the special interlocutory right to appeal a Speech or Debate Clause immunity decision, which the Court announced in Helstoski v. Meanor, 442 U.S. 500 (1979), even a qualified immunity is extremely powerful as a practical matter.

274. My proposal here reaches only federal legislators. The Court has long recognized the importance of legislative privilege in the states and adopted a presumption against its abrogation by federal statute. *See* Tenney v. Brandhove, 341 U.S. 367, 376 (1951) ("We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."). It has also, however, rejected the idea that any state legislative privilege is derived from or coextensive with the Speech or Debate Clause protection for members of Congress. *See* United States v. Gillock, 445 U.S. 360, 374 (1980) ("The Federal Speech or Debate Clause . . . by its terms is confined to federal legislators."). At least one federal court of appeals panel recently ruled that the Constitution-based federal free speech protection applicable to state legislators is the First Amendment. Rangra v. Brown, 566 F.3d 515 (5th Cir. 2009) ("The First Amendment's protection of elected officials' speech is full, robust, and analogous to that afforded citizens in general."), *rev'd on other grounds*, 584 F.3d 206 (5th Cir. 2009).

275. *See* Federal Employees Liability Reform and Tort Compensation (Westfall) Act of 1988, Pub. L. No. 100-694 (codified as amended at 28 U.S.C. § 2679(d) (2012)).

276. *See* Westfall v. Erwin, 484 U.S. 292, 297-98 (1988) (holding that a federal officials are entitled to absolute immunity from state tort claims "only when the conduct of federal officials is within the scope of their official duties *and* the conduct is discretionary in nature."), *superseded by statute*, Westfall Act; *see* Anthony v. Runyon, 76 F.3d 210, 212-13 (8th Cir. 1996) (reciting short history of Westfall Act).

vated by events that they thought strongly demonstrated the need to protect the legislative branch.

In 1985, Representative Don Sundquist of Tennessee wrote to Attorney General William French Smith, alleging that an attorney was harassing three judicial officers of a Memphis juvenile court and obstructing the administration of federal child-support laws.[277] The attorney then sued Sundquist for libel.[278] Although the district court held that the act was protected by the Speech or Debate Clause, the D.C. Circuit applied *Proxmire* and reversed.[279] The House of Representatives subsequently adopted (413-0) an unusual resolution introduced by the Speaker, which stated that the House viewed the decision of the Court of Appeals in *Sundquist* "with deep concern" and urged the Supreme Court to grant review in the case "and reach a just result."[280]

When Representative Barney Frank introduced the Westfall Act around the same time, he incorporated a provision extending the Tort Claims Act's protection to the judicial and legislative branches.[281] The Deputy Assistant Attorney General who testified at the House hearing on the bill observed that all Members were familiar with the *Sundquist* case and explained: "You do not want all these lawsuits against Members of Congress being tried under the Federal Tort Claims Act, and the Government in a position where it cannot use the Speech or Debate Clause."[282] The *Washington Post* noted that the proposed legislation responded to both *Westfall* and *Sundquist*.[283]

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277. *Sundquist*, 833 F.2d at 313.

278. *See generally* Fisher, *supra* note 272, at 314-17 (discussing *Sundquist* in detail).

279. *Sundquist*, 833 F.2d at 312. Note that there is no question Sundquist would have been entitled to absolute immunity from suit had his statement been made only on the floor of the House. *See* United States v. Brewster, 408 U.S. 501, 516 (1972) (stating that the Speech or Debate Clause "has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers").

280. H. Res. 446, 100th Cong. (May 12, 1988) (enacted). The Court denied certiorari, with a note that three Justices (White, Blackmun, and O'Connor) would have granted it. Sundquist v. Chastain, 487 U.S. 1240 (1988). The cert pool memo, written by one of Justice Blackmun's clerks, Alan C. Michaels, had recommended a grant. Justice Blackmun Papers, Box 1125, Folder 1, 87-1746 to 87-1765 ("In my view, the question whether members of Congress are entitled to qualified official immunity for their official but not legislative acts, is one that merits review by this Court.").

281. H.R. 4358, 100th Cong. § 3 (1988) (as introduced).

282. *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, and H.R. 3083 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 60, 132 (1988) (statement of Robert L. Willmore, Deputy Assistant Att'y Gen., Civil Division, Department of Justice).

283. *See* Daniel B. Moskowitz, *Congress May Undo Civil Servants' Vulnerability to Suits*, WASH. POST, May 30, 1988, at BF11.

In most garden-variety cases, there is no practical difference between the protection now provided by statute and the protection that should be provided by a properly robust interpretation of the Speech or Debate Clause.[284] Yet the gap, where it does exist, presents serious separation-of-powers concerns.[285]

First is a problem of process. The Westfall Act gives the executive branch the primary role in determining when a Member of Congress is entitled to the immunity—surely not the intent of the Speech or Debate Clause. Under the general process for claiming Westfall Act immunity, the Attorney General (or his or her designees—in practice the U.S. Attorneys) must certify to the court that the federal employee's challenged conduct fell within the scope of his or her official duties. Upon this certification, the United States is substituted as defendant.[286] The employee may challenge a negative determination by the Attorney General and the determination (positive or negative) is subject to judicial review.[287] Thus, the structure of the Westfall Act makes Members of Congress dependent on benevolent defense by the executive branch for the special public speech protections they are given by the Constitution.

This is anomalous at best and dangerous at worst. By embedding this principle of congressional independence in the founding document, the Framers were responding to centuries of executive overreaching.[288] Given the reservation

284. In *Council on American-Islamic Relations v. Ballenger*, the Council sued North Carolina Representative Cass Ballenger for calling it the "fund-raising arm for Hezbollah." 444 F.3d 659, 662 (D.C. Cir. 2006). The D.C. Circuit affirmed dismissal of the case under the Westfall Act, engaging in a D.C. law-based respondeat superior analysis to determine whether Ballenger had been acting in his official capacity by making the statement during a media interview about his divorce. *Id.* at 664-66; *see* Operation Rescue Nat'l v. United States, 147 F.3d 68, 71 (1st Cir. 1998) (rejecting argument that Congress could not legislatively broaden its immunity beyond constitutional minimum, holding that "the Speech or Debate Clause is a ceiling rather than a floor" and that the Westfall Act immunized Senator Edward M. Kennedy from libel suit based on remarks at a press conference); DeMasi v. Schumer, 608 F. Supp. 2d 516, 522 (S.D.N.Y. 2009) (upholding certification by a U.S. Attorney in garden-variety lawsuit against a member of Congress).

285. This issue was noted in testimony on the Westfall Act given to the House Judiciary Committee. *See Hearing on H.R. 4358*, *supra* note 281, at 178, 186 (testimony of Lois G. Williams, Director of Litigation, National Treasury Employees Union) ("[I]t would seem that the certification procedure could pose a separation of powers problem if the Attorney General had to certify whether an employee acted within the scope of employment in a case involving an employee of the Judicial or Legislative branch.").

286. 28 U.S.C. § 2679(d)(1) (2012).

287. *Id.* § 2679(d)(3) (expressly permitting employee challenge); Gutierrez v. Lamagno, 515 U.S. 417, 436-37 (1995) (holding as matter of statutory construction that affirmative official capacity determination is likewise reviewable).

288. *See, e.g.*, *supra* note 42 and accompanying text.

to the Court of the final determination of the scope of its protection, the Westfall Act may not be constitutionally defective as applied in protecting a Member of Congress. At a minimum, however, it puts the executive branch in an uncomfortable position from a separation-of-powers point of view in making the initial determination about the scope of a Member's official duties and might induce undue caution in Members who are forced to depend on the executive branch for protection from liability.

The second problem with the sufficiency of the Westfall Act is that its immunity is not fully coextensive with the protections that Members of Congress need. Recent years have seen the first personal capacity suit by a sitting Member of Congress against another, ending in a judgment of more than a million dollars in favor of the plaintiff.

In March 1998, then Republican Conference Chairman John Boehner sued Representative Jim McDermott in federal court alleging that McDermott had "knowingly disclosed an unlawfully intercepted communication in violation of [a] federal wiretapping statute and a Florida wiretapping statute."[289] McDermott, a Democrat from Washington who was ranking Member of the House Committee on Standards of Official Conduct (popularly known as the Ethics Committee) obtained a tape of an illegally recorded conference call among Boehner (more than a decade before he became Speaker), then-Speaker Newt Gingrich, and other Members of the Republican Party leadership.[290] Gingrich had just cut a deal with the Ethics Committee to accept a reprimand and pay a fine in exchange for termination of hearings and congressional investigations of Gingrich's possible tax violations in the financing of his political projects.[291] Published accounts describe the content of the call—and its significance—in greater detail.[292] On the same day that Gingrich accepted a formal reprimand in a deal that included his promise "not to orchestrate a political response to the

289. Boehner v. McDermott, 332 F. Supp. 2d 149, 152 (D.D.C. 2004) (internal citations omitted). This was a civil suit and not a criminal prosecution because McDermott engaged only in an unauthorized disclosure. It was undisputed that McDermott had no involvement in the original wiretap.

290. Boehner v. McDermott, 484 F.3d 573, 575 (D.C. Cir. 2007). The call in question was a party leadership conference call, not an official proceeding of the House. It was taped illegally by a couple in Florida who eavesdropped on the conversation as then Republican Conference Chairman John Boehner was participating nearby via cell phone. The eavesdroppers later delivered the tape to McDermott.

291. *Id.* The call in question was a party leadership conference call, not an official proceeding of the House. It was taped illegally by a couple in Florida who eavesdropped on the conversation as then Republican Conference Chairman John Boehner was participating nearby via cell phone. Boehner v. McDermott, 332 F. Supp. 2d 149, 151 (D.D.C. 2004). The eavesdroppers later delivered the tape to McDermott. *Id.*

292. *See, e.g.*, Adam Clymer, *Gingrich is Heard Urging Tactics in Ethics Case*, N.Y. TIMES, Jan. 9, 1997, http://www.nytimes.com/1997/01/10/us/gingrich-is-heard-urging-tactics-in-ethics-case.html.

reprimand," Gingrich was heard on the tape "discussing how to handle the political fallout."[293] Thus, the tape "bore on whether Mr. Gingrich was abiding by his agreement."[294] It was a page one story.[295]

McDermott's legal team raised (and lost) an as-applied constitutional challenge to the wiretap statute, contending that it violated his First Amendment rights.[296] As the en banc Court of Appeals for the D.C. Circuit ultimately framed it, the question was "whether Representative McDermott had a First Amendment right to disclose to the media this particular tape at this particular time given the circumstances of his receipt of the tape, the ongoing proceedings before the Ethics Committee, and his position as a Member of that Committee."[297] The court assumed that McDermott lawfully obtained the tape but observed that the disclosure was nevertheless plainly prohibited by Ethics Committee rules.[298] Under the Constitution, the House has the power to make its own rules and punish or expel its Members.[299] The court concluded that the non-disclosure rule at issue was reasonable and raised no First Amendment concerns, and that, given McDermott's concession that "the First Amendment does not protect [him] from House disciplinary proceedings, it is hard to see why it should protect him from liability in this civil suit."[300]

By allowing one Member to sue another for plainly political conduct connected to their congressional offices, the court of appeals permitted a single Member of Congress to commandeer the judiciary in service of an intramural dispute. Such judicial refereeing violates the separation-of-powers principles underlying the Constitution and animating the Speech or Debate Clause.[301] The

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293. Editorial, *Disclosure of a Conversation*, N.Y. TIMES, Mar. 11, 1998, http://www.nytimes.com/1998/03/11/opinion/disclosure-of-a-conversation.html.

294. *Id.*

295. *See, e.g.*, Clymer, *supra* note 292.

296. Boehner v. McDermott, Case No. 98-594, 1998 WL 436897, at *3 (D.D.C. July 28, 1998) ("[McDermott] asserts that the government may not restrict individuals disclosing truthful information about a matter of public significance that is lawfully obtained, absent a need to further a state interest of the highest order [that is not present here under strict scrutiny].").

297. Boehner v. McDermott, 484 F.3d 573, 577 (D.C. Cir. 2007).

298. *Id.* at 577-79 ("Committee members and staff shall not disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee.") (quoting House Committee on Standards of Official Conduct Rule 9).

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

300. *Boehner*, 484 F.3d at 579.

301. True, the English origins of the protection were rooted in concerns about an overreaching Crown. But, as Chief Justice Burger himself articulated, two

decision punished representational speech and will chill the mechanisms by which Members serve their constituents in the future. Under the constitutional allocation of informing and disciplinary powers, it was up to McDermott and the Congress itself to determine what to disclose, and to enforce any limitations as necessary.

Applying a Speech or Debate Clause qualified immunity would have yielded a better result: McDermott could have invoked Speech or Debate protection on the initial suit. Plainly, the challenged conduct was not a core legislative act, and so absolute immunity would not attach. Nevertheless, under qualified immunity analysis, there was no clearly established federal constitutional right that Boehner could have shown McDermott violated—instead, his allegations were based on state wiretapping statutes. So the court would have dismissed Boehner's case—leaving any discipline to the House of Representatives itself.[302]

4. Protection of Meaningful Legislative Speech

The purpose of a robust Speech or Debate Clause protection is to give Members of Congress the independence and the fearlessness to serve as an effective check on the executive branch.[303] The combination of public disclosures

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rationales for Speech or Debate protections exist in the American system: the insurance of legislative independence *and* a broader separation of powers. United States v. Gillock, 445 U.S. 360, 369 (1980); *see* Brief of Representatives Howard Berman, Barney Frank, Zoe Lofgren, & George Miller as Amici Curiae Supporting Petitioner at 8, McDermott v. Boehner, 552 U.S. 1072 (2007) (No. 07-439), 2007 WL 3231562 ("[T]he D.C. Circuit disregarded more than a century of jurisprudence that circumscribes inviolable spheres of legislative activity and requires judges to exercise great caution before injecting themselves into internal legislative affairs.").

302. One view of *McDermott* in the sweep of American history is that while members of Congress with personal disputes used to assault each other in physical fights when they disagreed, they now resolve such differences in the courts. *Cf.* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861, at 212-19 (2005) (describing congressional uncertainty on whether and how to punish Representative Preston Brooks for beating Senator Charles Sumner "within an inch of his life" at his desk in the Senate chamber); Andrew Glass, *Griswold-Lyon Fight Erupts on House Floor, Feb. 15, 1798*, POLITICO (Feb. 15, 2011, 4:29AM), http://www.politico.com/news/stories/0211/49518.html ("Rep. Roger Griswold of Connecticut took up a wooden cane to attack Rep. Matthew Lyon of Vermont on the House floor . . . ."). It is surely a constructive development that inter-Member physical attacks would now be punishable by the courts (and left unprotected by the Speech or Debate Clause), but it *is* also problematic that the courts today offer a substitute venue for members to prosecute what constitutionally should be intramural political and/or disciplinary disputes.

303. *See, e.g.*, Steven Nelson, *Former Sen. Gravel: NSA Leaks Should Have Come from Senators*, U.S. NEWS & WORLD REP., July 9, 2013, http://www.usnews.com/news/blogs/washington-whispers/2013/07/09/former-sen-gravel-nsa-leaks-should-have-come-from-senators (quoting former Sen. Mike Gravel arguing that members of

around a (formerly secret) national security apparatus and a changing media landscape make vindication of this structure especially important today.

In June 2013, the media began to report on a series of unauthorized disclosures by Edward Snowden, a former government contractor, including most notably a program to collect millions of phone records.[304] The Privacy and Civil Liberties Oversight Board probably understated the resulting hullabaloo in observing that "the[se] disclosures caused a great deal of concern both over the extent to which they damaged national security and over the nature and scope of the surveillance programs they purported to reveal."[305]

Columbia Law School Professor David Pozen has recently unveiled and described a structure in which a leaky national security apparatus benefits the executive branch.[306] He also suggests that it has advantages for the Congress: in particular, by providing "a low-cost mechanism for monitoring and disciplining the executive and for providing transparency."[307] Even as Pozen notes that this particular claim requires further investigation, there is a strong political economy literature that supports the implications for the Congress that he posits.[308]

But a rationally passive Congress and a legally clipped Congress are quite different things. Josh Chafetz has responded to Pozen's narrative by contending that "secrecy determinations are matters for interbranch politics like any other."[309] To that end, I agree with Chafetz (and Pozen) that the Congress should not—and constitutionally cannot—be disarmed.

To be effective in oversight, Members of Congress must have not only the power to know and understand executive branch secrets, but also to disclose and expose them.[310] A full Speech or Debate Clause privilege has a role to play

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Congress should use the Speech or Debate Clause to disclose security information that they think the public should see).

304. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 1 (2014).

305. *Id.*

306. *See* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 515 (2013) (explaining that "the executive's toleration of these disclosures is a rational, power-enhancing strategy").

307. *Id.* at 584 (arguing that Congress benefits from a system of executive leakiness, obviating the need for members to make their own disclosures of government secrets).

308. *See id.* at 582-83 & n.331 (citing Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984)).

309. Josh Chafetz, *Whose Secrets?*, 127 HARV. L. REV. F. 86, 92 (2013).

310. For an excellent exposition of this idea, see Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 749-53 (2012).

in ensuring, for example, that the ranking Member of the Senate Intelligence Committee does not feel "unable to fully evaluate" a national security program because of his "inability to consult with staff or counsel of [his] own," as Senator Jay Rockefeller told Vice President Cheney he felt in 2003.[311] Professor Kathleen Clark has explained that the Speech or Debate Clause has an important role in guaranteeing Congress a right to the advice of staff lawyers in intelligence oversight.[312]

This is not, to be clear, a proposal that every Member of Congress should effectively become an independent declassification authority. Pozen notes the institutional incentives that discourage such hyperactivity, and Chafetz observes that the House and the Senate both have rules preventing it.[313] The public is best served, however, by a Congress that could organize itself to allow such disclosures—and by an executive branch made more cautious and contemplative by knowledge of such a congressional power.[314]

A dispute between the Senate and the Central Intelligence Agency that became public as this Article was in the final stages of publication vividly illustrates the important separation-of-powers implications of the Speech or Debate Clause. In a floor speech, Senator Feinstein accused the CIA of having removed a key document from a secure facility designed for use by the staff of the Senate Intelligence Committee in its oversight operations. She also accused the agency of having referred matters involving committee staff action to the Department

311. *See* Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 11 U. ILL. L. REV. 915, 917-18 (2011) (describing use limitations imposed by the executive branch in sharing classified information with Congress and recounting the circumstances of Sen. Rockefeller's complaint to the Vice President).

312. *Id.* at 951-55 (analyzing application of Speech or Debate Clause to staff counsel).

313. *See* Chafetz, *supra* note 309, at 90. Senator Saxbe, arguing for the Senate as a whole, said, "I am in agreement with every Senator who thinks [Gravel] did an outrageous thing. But I believe it is for the Senate to decide whether he be punished and to inquire as to the conduct which would necessitate punishment." Transcript of Oral Argument at 20, Gravel v. United States, 408 U.S. 606 (1972) (No. 71-1017).

314. Pozen has suggested the Speech or Debate Clause could be viewed as the "original whistleblower protection." Email from David Pozen, Professor of Law, Columbia Law School, to auhor (March 12, 2014, 11:18 EST) (on file with author). He adds that at a time when the executive branch dominates the classified information space, reinvigoration of the Speech or Debate Clause may be even more important. To the extent that Speech-or-Debate-Clause-protected disclosures by members of Congress supplant leaks by rogue executive employees, greater use of the Speech or Debate Clause may indirectly support the goals of the executive branch (for example, if Senator Wyden had felt free to say more about the National Security Agency activities he believed to be unlawful, Edward Snowden might not have disclosed everything about it). *Id.* Chafetz has assembled an account of the public disclosure procedures of the intelligence committees, but has also noted that information about their use is unavailable. Chafetz, *supra* note 309, at 90-91.

of Justice for criminal investigation and prosecution.[315] She expressed concern that the CIA had "violated the separation of powers principles embodied in the U.S. Constitution, including the speech and debate clause" and also that the criminal referral had been undertaken to intimidate committee staff and obstruct a committee report on the CIA's "interrogations using so-called enhanced techniques."[316] CIA Director John Brennan denied "the allegation of CIA hacking into Senate computers."[317] Ultimately, however, this is a specific (but important) factual dispute, answerable by forensics rather than law. The issue of constitutional moment is the alleged attempt by the executive branch to use criminal enforcement authority to intimidate Members of Congress from doing their job.

Pozen has explained why Congress may be rational in its general passivity regarding intelligence oversight, but a different question—on which Pozen, Chafetz, and I all agree—is that robust interpretation of the Speech or Debate Clause in this area is essential to meaningful checks and balances. Although this principle has general subject matter applicability, it is especially true in the national security space, where the executive branch is structurally the dominant actor.

B. *Exclude Bribes and Evidence of Them*

The Speech or Debate Clause should not be read to immunize bribe-taking. In *Johnson*, Justice Harlan's opinion noted that a Member of Congress is not protected by the Clause for criminal prosecutions based on laws of general application where "legislative acts" and the Member's "motives for performing them" are not implicated.[318] In *Brewster*, Chief Justice Burger's opinion held that "[t]aking a bribe is, obviously, no part of the legislative process or function."[319] This makes sense and leads to a simple rule: where money (or something else of value) ends up in a Member's personal pocket, no Speech or Debate Clause protection attaches.[320]

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315. 160 CONG. REC. S1490 (daily ed. Mar. 11, 2014) (statement of Sen. Dianne Feinstein).

316. *Id.* at S1487-90.

317. *CIA Director Brennan Denies Hacking Allegations: A Conversation with John O. Brennan, Council on Foreign Relations*, COUNCIL ON FOREIGN RELATIONS (Mar. 11, 2014), http://www.cfr.org/intelligence/cia-director-brennan-denies-hacking-allegations/p32553.

318. *See* United States v. Johnson, 383 U.S. 169, 185 (1966); *see also supra* Section I.C.

319. *See* United States v. Brewster, 408 U.S. 501, 526 (1972); *see also supra* Section II.A.

320. Bribe-taking should not be the only activity unprotected by the Speech or Debate Clause, although it presents the most likely recurring problem. While the definition of covered legislative activity should be expansive and cannot turn on prosecutorial whim, it equally cannot be unlimited or impermeable. Senator Gravel conceded that if he personally had "stolen" the Pentagon Papers, and that

The quid pro quo is the chargeable (and unprotected) offense. As the Justices explored in the *Brewster* oral argument, it does not matter to the corruption prosecution whether or not the Member of Congress stays bought: the sale (which is not protected) rather than the delivery (which is shielded by Speech or Debate Clause immunity) is the offense.[321]

That much is now settled law, but the Supreme Court has not expressly addressed the question of whether it implies any evidentiary privileges (bars to introducing evidence in court) or disclosure privileges (effectively, bars to investigation).[322] The circuits have divided on those important questions.[323] The Third Circuit found a relatively narrow evidentiary immunity, which put the burden on the Member of Congress to show that putative evidence was related to legislative business.[324] The D.C. Circuit in particular took stronger views of congres-

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act were a crime, he could be prosecuted. Gravel v. United States, 408 U.S. 606, 621 n.12 (1972). Presumably theft or physical violence (such as Representative Brooks' beating of Senator Sumner on the Senate floor), even if claimed to be in furtherance of congressional work, should also be judicially recognized as within the reach of criminal process. Courts are capable of analyzing claims of immunity to determine the capacity in which the challenged behavior was taken. For example, a member participating in a public demonstration should probably be immune from arrest, while a member engaged in ordinary trespass in a domestic dispute should have no immunity. This need not prevent a member from declining to invoke immunity so that he or she could be arrested with a larger group to make a political point. *Cf.* Julia Preston, *8 Lawmakers Arrested at Immigration Protest*, N.Y. TIMES, Oct. 8, 2013, http://www.nytimes.com/2013/10/09/us/8-lawmakers-arrested-at-immigration-protest.html.

321. At oral argument in *Brewster*, Solicitor General Erwin Griswold commented that the case reminded him of the prosecution of United States Circuit Judge Martin T. Manton, in which the judge had argued that "although he took the bribe it didn't influence his decisions at all if the cases were decided right." Transcript of Oral Argument at 40, *Brewster*, 408 U.S. 501 (No. 70-45); *see also* United States v. Manton, 107 F.2d 834, 846 (2d Cir. 1939) (holding, via a three-judge panel including Justices Sutherland and Stone, that "judicial action, whether just or unjust, right or wrong, is not for sale"); Benjamin Weiser, *Hang Him Up? The Bad Judge and His Image*, N.Y. TIMES, Jan. 27, 2009, http://www.nytimes.com/2009/01/28/nyregion/28portrait.html (offering an amusing account of a battle over remembering Judge Manton among federal judges in New York).

322. *See, e.g.*, United States v. McDade, 28 F.3d 283, 290 (3d Cir. 1994) ("[T]he Speech or Debate Clause [does] not prohibit proof that the defendant had solicited, agreed to receive, or accepted money for or because of official acts that had already been performed.").

323. PETER J. HENNING & LEE J. RADEK, THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION: THE LAW AND LEGAL STRATEGIES 406 (2011).

324. *See In re* Grand Jury Investigation into Possible Violations of Title 18, etc., 587 F.2d 589, 595-97 (3d Cir. 1978) (holding that telephone toll records of a member's office are not protected en bloc, even though some calls will invariably entail legislative business that is protected). Note that although this case predated *Helstoski*, a later

sional privilege. In a 1988 case, for example, Judge and former U.S. Senator James L. Buckley wrote about the importance of interpreting the Speech or Debate Clause broadly, adopting for the D.C. Circuit the Ninth Circuit's view that "[a]ny questioning about legislative acts... would 'interfere' by having a chilling effect on Congressional freedom."[325]

The landmark case finding an absolute disclosure privilege was decided by the D.C. Circuit in 1995. In the early 1990s, a paralegal at a Kentucky law firm stole copies of documents belonging to the Brown & Williamson tobacco firm that showed the firm had known tobacco was addictive and carcinogenic as early as the 1960s.[326] Following a famous April 1994 House committee hearing in which seven tobacco company executives testified that they did not believe nicotine was addictive, the *New York Times* published a front-page story describing the internal documents and reporting that two Members of Congress, Representative Henry Waxman and then-Representative Ron Wyden, had copies of them.[327] In a Kentucky state suit by Brown & Williamson against the wayward law firm employee, the tobacco firm sought and received subpoenas from the Superior Court of the District of Columbia against Waxman and Wyden for their testimony and for document production.[328] The U.S. District Court for the District of Columbia granted an application by the Members to quash the subpoena, and the U.S. Court of Appeals for the D.C. Circuit subsequently affirmed.[329]

Surely, the Court of Appeals was correct in stating in that case that the Speech or Debate privilege "permits Congress to conduct investigations and obtain information without interference from the courts" and that "a corollary... is Congress' privilege to use materials in its possession without judicial interfer-

district court opinion found that *Helstoski* did not change the analysis. *See* United States v. Eilberg, 507 F. Supp. 267, 285-86 (E.D. Pa. 1980).

325. Minpeco v. Conticommodity Servs., 844 F.2d 856, 860 (D.C. Cir. 1988) (quoting Miller v. Transamerican Press, Inc., 709 F.2d 524 (9th Cir. 1983)) (holding that a nonparty former Congressman was entitled to invoke Speech or Debate Clause privilege as to a question about the source of material he inserted into the *Congressional Record*).

326. *See* Myron Levin, *Merrell Williams? Tobacco Firm Wishes It Never Heard of Him—Former Legal Staffer Sued Over Leak of Files on Nicotine*, L.A. TIMES, May 17, 1994, http://community.seattletimes.nwsource.com/archive/?date=19940517&slug=1910965.

327. *See* Philip J. Hilts, *Tobacco Company Was Silent on Hazards*, N.Y. TIMES, May 7, 1994, http://www.nytimes.com/1994/05/07/us/tobacco-company-was-silent-on-hazards.html.

328. *See* Maddox v. Williams, 855 F. Supp. 406, 407 (D.D.C. 1994), *aff'd*, Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408 (D.C. Cir. 1995). On appeal, Brown & Williamson dropped its request to depose the members of Congress. *Brown & Williamson*, 62 F.3d at 412.

329. *Brown & Williamson*, 62 F.3d at 412.

ence."[330] But it unnecessarily concluded that the testimonial privilege is "absolute" in all contexts except the sovereign interest in trials or grand jury proceedings involving third-party claims.[331]

Brown & Williamson became the basis for a D.C. Circuit ruling involving a search in connection with an investigation of a corrupt congressman that took Speech or Debate Clause protection too far by transforming "written legislative materials" into an impermeable physical bunker of non-disclosure.[332] This is an area unmoored from history or Supreme Court precedent. It does not serve the purpose of the Speech or Debate Clause and it is not commanded by prior decisions of the Supreme Court.

This ruling came in a well-reported case involving then-Representative William Jefferson. In May 2006, U.S. District Judge Thomas Hogan approved a warrant permitting FBI agents to search Rayburn House Office Building Room 2113, Representative William Jefferson's congressional suite.[333] The warrant application included a lengthy affidavit from an FBI agent, the "Thibault Affidavit," describing "how the apparent victim of a fraud and bribery scheme who had come forward as a cooperating witness led to an investigation into bribery of a public official, wire fraud, bribery of a foreign official, and conspiracy to commit these crimes."[334] In detail, it explained that, roughly ten months earlier, the FBI had videotaped Jefferson accepting from an informant a briefcase with $100,000 in cash intended to procure Jefferson's assistance with certain business opportunities in Nigeria.[335] When a search warrant was executed at Jefferson's house, the FBI recovered $90,000 of that cash concealed in Jefferson's freezer "in $10,000 increments inside various frozen food containers and wrapped in aluminum foil."[336]

The Thibault Affidavit established probable cause to believe that evidence related to the criminal investigation was located in Jefferson's congressional office, and it proposed special search procedures in recognition of the Speech or Debate Clause privilege. Specifically, the procedures proposed by the government and approved by Chief Judge Hogan called for a "filter team" of agents

330. *Id.* at 416.

331. *Id.* at 419-420.

332. United States v. RHOB, 497 F.3d 654, 657 (D.C. Cir. 2007) ("Our precedent establishes that the testimonial privilege under the Clause extends to non-disclosure of written legislative materials.").

333. *Id.*

334. *Id.* at 656.

335. Timothy Thibault Affidavit in Support of Application of Search Warrant at para. 55, *In re* Search of the Rayburn House Office Bldg. Room No. 2113, 432 F. Supp. 2d 100 (D.D.C. 2006) (No. 06-231 M-01), http://www.dcd.uscourts.gov/dcd/sites/dcd/files/06-231M%20application%20and%20affidavit%20for%20search%20warrant.pdf

336. *Id.* para. 57.

and attorneys who would be firewalled from the investigation to review all seized material and to return privileged or non-responsive files and documents without disclosure to the prosecution team.[337] FBI agents raided Jefferson's office pursuant to the warrant, reviewed every paper record, and copied all hard drives and electronic media in the space—the first time a sitting Member's congressional office had ever been searched by the executive branch.[338] Jefferson challenged the constitutionality of the search and moved for return of the seized materials.[339] A Bipartisan Legal Advisory Group consisting of the five senior leadership Members of the House filed a brief as amicus curiae in support of Jefferson.[340]

Chief Judge Hogan rejected Jefferson's challenge. He concluded that the Speech or Debate Clause was not violated "by permitting congressional offices to be searched pursuant to validly issued search warrants, which are only available in relation to criminal investigations, are subject to the rigors of the Fourth Amendment, and require prior approval by the neutral third branch of government."[341]

The court of appeals reversed Judge Hogan's decision by extending the non-disclosure privilege of the Speech or Debate Clause. The opinion explained that compelled disclosure tends to disrupt the legislative process by threatening to "chill the exchange of views with respect to legislative activity."[342] It reasoned that "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."[343] Rejecting the procedure approved by Judge Hogan, the court held that "a search that allows agents of the Executive to review privileged materials without the Member's consent violates the Clause."[344] Judge Karen LeCraft Henderson concurred in the judgment. She pointed to the government's statement that Jefferson's position would require that a Member be given advance notice of any search and be permitted to remove material that *he* deemed covered by legislative privilege prior to the search.[345] In Judge Henderson's view, the majority's limitation on applying standard law enforcement tools to criminal investigations of Members of Congress undermined "the 'legitimate needs of the judicial process,' specifically, the

337. *RHOB*, 497 F.3d at 656-57.

338. *Id.* at 657.

339. *Id.*

340. *In re Rayburn Search*, 432 F. Supp. 2d at 105 n.2.

341. *Id.* at 113.

342. *RHOB*, 497 F.3d at 661.

343. *Id.*

344. *Id.* at 663.

345. *Id.* at 671-72 (Henderson, J., concurring in the judgment).

'primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions.'"[346]

The question animating the circuit opinions is whether, under the Constitution, any threat to separation of powers from a subpoena like the one covering Jefferson's office must trump the ordinary interests of criminal investigation. There is no good argument that a Member is entitled to hide potential evidence in a congressional workspace. As Professor Akhil Amar put it, "Last time I checked, taking bribes isn't part of ordinary legislative work. And the Constitution doesn't say explicitly [that Members] are somehow immune from the ordinary processes of criminal investigation."[347] The concern is that the executive might cook up an investigation of a difficult Member to interfere with his role in constitutionally privileged legislative deliberation—just the reason why parliamentary privilege originally arose.[348]

The Constitution in any event does not offer an absolutist prohibition against the search of a Member's property—wherever it may be located—with a judicial warrant. The court of appeals majority in the Jefferson case identified the correct question: whether any such warranted search would improperly "chill the exchange of views with respect to legislative activity"—that is, whether it would chill protected speech or debate.[349] It did not engage in an analysis of this question, however. After all, the possibility of a warranted search in the course of a criminal investigation is not absolutely barred by the First Amendment, which contains rights of expression that were modeled on parliamentary privilege.

At least two reasons favor a practical analysis of the "chill" imposed upon speech or debate over the absolutist view. First, the Court has sketched the actual contours of legislative immunity as having their "roots" in the Speech or Debate Clause rather than being expressly defined there.[350] Therefore, in expounding the Clause, courts are obligated to ask whether their rulings practically effectuate the Clause's purpose. As the government explained in its *United States v. RHOB* petition for certiorari, the D.C. Circuit invented a nondisclosure privilege for confidentiality at odds with the Clause's purpose of pro-

346. *Id.* at 672 (quoting United States v. Nixon, 418 U.S. 683, 707 (1974)).

347. *World News Tonight* (ABC television broadcast May 30, 2006).

348. *See* Memorandum of Points and Authorities of the Bipartisan Legal Advisory Group of the U.S. House of Representatives as Amicus Curiae at 32, *In re* Search of the Rayburn House Office Bldg. Room No. 2113, 432 F. Supp. 2d 100 (D.D.C. 2006) (No. 06-231 M-01) ("If the Court declines to hold unconstitutional the warrant and its execution, it will reduce Congress to a subordinate branch of government by opening the door to unchecked executive branch overreach and abuse that could, among other things, obstruct and chill Congress' oversight function, and impair the normal and healthy process of information exchange between the branches through accommodation and negotiation.").

349. *RHOB*, 497 F.3d at 661.

350. *See* Dombrowski v. Eastland, 387 U.S. 82, 85 (1967).

tecting public acts.[351] Second, the Court has said that the touchstone of the Speech or Debate Clause is "legislative independence" and that depriving the executive and judiciary of their roles in investigating, prosecuting, and punishing bribery "would gravely undermine legislative integrity and defeat the right of the public to honest representation."[352] In suggesting that the Speech or Debate Clause was not meant to have the cost of generally immunizing Members for their personal misconduct, the Supreme Court has approvingly cited the comments of Lord Mansfield shortly before the American Revolution: "The laws of this country allow no place or employment as a sanctuary for crime, and where I have the honor to sit as judge neither royal favor nor popular applause shall over protect the guilty. . . ."[353] If the Speech or Debate Clause is read to "make Members of Congress [into] super-citizens, immune from criminal responsibility," then the lower courts are getting it wrong.[354]

Other courts have looked at *United States v. RHOB* and found the result absurd. In *United States v. Renzi*, the Court of Appeals for the Ninth Circuit expressly disagreed with *United States v. RHOB*'s "premise and its effect," stating that the *United States v. RHOB* holding would "only harm legislative independence."[355] Renzi, a Member of the House from Arizona, was accused of offering private parties quid pro quos for legislative favors. He contended that relevant evidence against him should be suppressed on an exclusionary principle based on incidental divulging of information (or even questioning) about legislative acts.[356] The Ninth Circuit disagreed. It condemned as faulty the D.C. Circuit's theory in *United States v. RHOB* about the "distraction" of legislators, holding that where an underlying legal action is not precluded by the Clause, evidence that touches on legislative business is not barred because the Supreme Court had identified "that other legitimate interests exist, most notably the ability of the Executive to adequately investigate and prosecute corrupt legislators for non-protected activity."[357]

But *Renzi* presents its own problems. What does it leave of the historic protection against an executive harassing a member of the legislature based on made-up charges?

351. Petition for Writ of Certiorari at 12, *RHOB*, 497 F.3d 654 (No. 07-816).

352. United States v. Brewster, 408 U.S. 501, 524 (1972).

353. Williamson v. United States, 207 U.S. 425, 439 (1908).

354. *Brewster*, 408 U.S. at 516.

355. United States v. Renzi, 651 F.3d 1012, 1036 (9th Cir. 2011).

356. United States v. Renzi, 692 F. Supp. 2d 1136, 1154 (D. Ariz. 2009). Renzi was found guilty on seventeen federal corruption charges in 2013. John Bresnahan, *Former Rep. Rick Renzi Convicted in Corruption Trial*, POLITICO (June 12, 2013, 9:41 AM), http://www.politico.com/story/2013/06/rick-renzi-guilty-on-17-counts-92619.html.

357. *Renzi*, 651 F.3d at 1036 (9th Cir. 2011).

C. *Invite Narrowly-Drawn Delegations to the Executive Branch*

The answer harkens back to Justice Harlan's opinion in *United States v. Johnson*. In cases like *United States v. RHOB*, the best solution is not for the courts to put corrupt Members beyond the reach of justice, but rather to put the burden on Congress to develop legislation providing for the enforcement of rules that Members themselves may have broken.[358]

I argue above that the Justice Department's search of Jefferson's congressional office was probably constitutional, but I do not wish to suggest it was a good idea. As former Deputy Attorney General Philip Heymann recognized in another conflict, the investigations of the type involving Jefferson implicate political responsibility as well as a lawyer's traditional obligations of professional responsibility. In public corruption cases more than anywhere else, the Department of Justice must not just "get" wrongdoers, but do so in a manner that increases popular confidence in the process. Its legal analysis, which would have been important background information in a negotiation with congressional leadership, was used to foreclose inquiry into its political responsibility and to force an unnecessary confrontation with the Congress. The Department's action made every government actor look bad and fuelled national suspicion of public corruption.[359] And the bad case made bad law when it reached the court of appeals.

Justice Harlan left open the question of prosecutorial power pursuant to "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members."[360] A search like the one at issue in the Jefferson case should be a multi-branch initiative requiring a warrant in addition to executive action. Indeed, involving all three branches would be ideal.[361] If the Justice Department had sought executive-congressional agreement to in-

358. Thomas Jefferson saw a tension between necessity for expansion in the scope of parliamentary privilege on the one hand and its unlimited advance on the other, and he proposed to resolve it by requiring extension to take place by statute. *See* Charles Robert, *Book Review of* Democracy's Privileged Few, J. AM. SOC'Y OF LEG. CLERKS & SECRETARIES (2009), at 33 (citing THOMAS JEFFERSON, JEFFERSON'S MANUAL § 298).

359. *See, e.g.*, Margaret Talev, *Results Mixed for Democrats*, SACRAMENTO BEE, Aug. 4, 2007, at A8 ("Democrats blame Republicans for the public's contempt for Congress, saying that the minority party obstructed Democrats from acting. Republicans counter that the Democrats are more interested in scoring points with their base supporters than getting things done.").

360. Johnson v. United States, 383 U.S. 169, 185 (1966).

361. *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 169 (5th ed. rev. 2007) (stating that if FBI agents could get a warrant and search any room on Capitol Hill, the "damage done to Congress as a coequal branch would indeed be severe" and calling for "clear protocols to ensure that congressional leaders are notified in advance of any attempt to search a legislative office and to devise procedures that will safeguard institutional interests").

volve the Capitol Police in any such search, it would have been a much more politically astute approach.

Compare this with the state of the law on executive investigation of judicial misconduct. The standard interpretation of the constitutional provision that judges shall hold office during "good behavior" makes Congress responsible for policing the "good behavior" of judges.[362] In practice, Congress exercises this power on a structured cooperative basis with the Judicial Conference, which makes referrals to the House when impeachment may be warranted. This is not merely a theoretical process: in 2010, impeachment proceedings were instituted against two sitting U.S. district judges leading in one case to a resignation and another to a completed impeachment and removal.[363]

A narrowly tailored delegation of enforcement authority from Congress would also address the problem of "corruption confusion," in which Members are alleged to have engaged in prohibited political trades rather than personal enrichment. As Stanford political scientist Bruce Cain explains, it can be hard "to determine the line between appropriate and inappropriate parochialism."[364] For example, if a Member of Congress works to secure public funding for particular bridges, roads, and public buildings in her district—which may specially benefit her family, friends, and campaign donors—is the action corrupt or merely parochial?[365]

It should be up to Congress to provide definition and clarity about what kinds of activities should be subject to investigation and prosecution by the executive branch.[366] A line of cases in the D.C. Circuit on the question of what ev-

362. U.S. CONST. art. 3, § 1 (providing for good-behavior tenure of judges); *id.* art. 1, § 2, cl. 5 (giving the House sole power of impeachment); *id.* art. 1, § 3, cl. 6 (giving the Senate sole power to try all impeachments).

363. As Assistant Attorney General for the Office of Legal Policy, William H. Rehnquist authored a memo advising Attorney General John Mitchell that the Justice Department could prosecute a sitting Supreme Court Justice. *See* JOHN W. DEAN, THE REHNQUIST CHOICE 5-8 (2011). Former White House Counsel John Dean criticized the memo decades later for omitting background about a 1790 bribery law showing that it was meant to provide a prosecutorial remedy for judicial misconduct only *after* removal from office. *Id.* But the memo nevertheless played a critical role in pushing Justice Abe Fortas to resign from the Supreme Court in 1969. *See id.*; *see also* JOHN A. JENKINS, THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST 91-93 (2012). For an account of the referenced judicial impeachments, see Josh Smith, *Chamber Hears Case Against Judge Porteous in Rare Trial*, NAT'L J., Dec. 6, 2010, http://www.nationaljournal.com/member/daily/chamber-hears-case-against-judge-porteous-in-rare-trial-20101206 (discussing Porteous and Kent impeachments).

364. BRUCE E. CAIN, THE DEMOCRATIC IMPERATIVE AND AMERICAN POLITICAL REFORM (forthcoming 2014) (manuscript at ch.2) (on file with author).

365. *Id.*

366. This could entail both bicameral and unicameral action. Legislation delegating *power* to the Department of Justice would be subject to ordinary lawmaking

idence given to a congressional ethics committee may be used in courts further illustrates both the problem and its potential resolution.

In a 2009 case, *In re Grand Jury Subpoenas*, the D.C. Circuit reviewed a district court's denial of a motion to quash a grand jury subpoena served on lawyers who had represented a sitting Member of Congress before the House Committee on Standards of Official Conduct.[367] Although it determined that the subpoena should have been quashed, the court applied a confusing test asking whether the member was giving testimony about private conduct or conduct "in his legislative capacity."[368] The Court primarily relied on two of its precedents. In *Ray v. Proxmire*, the plaintiff sued a senator over an allegedly libelous statement made in a letter submitted to the Senate Ethics Committee, and the D.C. Circuit held the letter protected by the Speech or Debate Clause.[369] In *United States v. Rose*, the government sought a congressman's testimony before the House Ethics Committee in connection with a civil charge for knowingly filing false disclosure statements, and the D.C. Circuit said the testimony was not protected because there was no inquiry into the exercise of the congressman's official powers.[370]

In a concurrence to *In re Grand Jury Subpoenas*, Judge Brett Kavanaugh rejected the "*Ray/Rose*" test as "fine slicing," that would, at best, create great uncertainty.[371] The uncertainty would be "especially problematic in this context because the scope of a privilege must be clear and predictable for the privilege to serve its purpose."[372] This calls to mind Justice Harlan's concern in *Johnson* about seeking distinctions between cases that the Speech or Debate Clause cannot bear.[373] Judge Kavanaugh called for the D.C. Circuit to revisit the *Ray/Rose* test and to replace it with an absolute protection from use of a Member's testimony in a congressional ethics committee proceeding.[374]

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constraints and the requirements of the Presentment Clause. But unicameral accommodations for investigation could be made independently by each chamber exercising its constitutional power to make its own rules.

367. *In re* Grand Jury Subpoenas, 571 F.3d 1200 (D.C. Cir. 2009). The subject of the inquiry and the criminal investigation was then-Representative Tom Feeney's 2003 golfing trip in Scotland that was funded by, and on which he was accompanied by, now-disgraced lobbyist Jack Abramoff. *See* Recent Case, *Constitutional Law—Speech or Debate Clause—D.C. Circuit Quashes Subpoenas for Congressman's Testimony to the House Ethics Committee*, 123 HARV. L. REV. 564, 564-65 (2009).

368. *In re Grand Jury Subpoenas*, 571 F.3d at 1202 (citing United States v. Rose, 28 F.3d 181 (D.C. Cir. 1994)); Ray v. Proxmire, 581 F.2d 998 (D.C. Cir. 1978).

369. *Ray*, 581 F.2d at 1000.

370. *Rose*, 28 F.3d at 188-89.

371. *In re Grand Jury Subpoenas*, 571 F.3d at 1206 (Kavanaugh, J., concurring).

372. *Id.*

373. *See supra* text accompanying note 73.

374. *In re Grand Jury Subpoenas*, 571 F.3d at 1207 (Kavanaugh, J., concurring).

Allowing Congress to selectively delegate the Clause's enforcement to the executive and judicial branches would be the best approach. If a statute or resolution provides for the availability of certain ethics committee materials as the basis for certain kinds of prosecutions (such as knowingly filing false financial disclosure statements), then there can be no confusion about what may be introduced in a criminal case—by the Members of Congress who submit and receive the materials, by the executive branch prosecutors who seek to use them to punish public corruption, or by the courts that supervise the criminal process.[375]

CONCLUSION

The Speech or Debate Clause ought to operate in service of the representational values it was meant to protect, but it has been read down by the Supreme Court to offer little of value. Revisiting and reinvigorating the doctrine—keeping absolute immunity for parliamentary functions, extending qualified immunity to the full range of a Member's official acts, excluding bribery prosecution *and* investigation from its sweep, and providing for delegations of enforcement authority to the executive branch—would restore and embody the separation-of-powers principles of the Constitution.

The late U.S. Representative John P. Murtha, Jr., a Pennsylvania Democrat who served in the House from 1974 until his death in 2010, provides a one-person case study in the under- and over-inclusiveness of existing Speech or Debate Clause jurisprudence. On the one hand, prevailing interpretation of the Clause failed to protect Murtha the good legislator: He was a thought leader among Democrats on national defense policy, creating the first serious political conversation on redeployment of U.S. forces from Iraq in November 2005.[376] But the Speech or Debate Clause did not immunize him from a lawsuit by a U.S. Marine whom Murtha claimed had murdered Iraqi civilians.[377]

375. *Cf. id.* at 1207 ("The *Ray/Rose* test has caused all three Branches great difficulty. One can hardly fault the esteemed District Judge or the Legislative and Executive Branch parties in this case for their efforts to make sense of our conflicting precedents.").

376. *See* David Rogers, *John Murtha Dies at 77*, POLITICO (Feb. 9, 2010, 1:55 PM), http://www.politico.com/news/stories/0210/32691.html ("[W]hen the time came, [Murtha] stepped out of the backroom in 2005 as no one else could to forcefully challenge the war in Iraq and become a folk hero to anti-war liberals who had previously dismissed him as déclassé."); Trudy Rubin, *Murtha's Call a Turning Point in War*, TIMES UNION (Albany, N.Y.), Dec. 1, 2005, at A15 ("When historians look back at the Iraq war, they will divide it into the pre- and post-Murtha eras.").

377. Murtha was protected by the Westfall Act, discussed *supra* Part IV.B.3, but the certification required for its immunity was denied at the district court level and had to be contested on interlocutory appeal, illustrating the weakness of the statutory regime. *See* Wuterich v. Murtha, 562 F.3d 375, 384-85 (D.C. Cir. 2009) (concluding that Murtha's challenged conduct "is unquestionably of the kind that Congressman Murtha was employed to perform as a Member of Congress"). As it

On the other hand, current interpretation of the Clause enabled and protected Murtha's murkier activities, shielding him from accountability for likely corrupt practices for which he had been under FBI scrutiny for years prior to his death, such as steering defense contracts to companies that did little or no actual work.[378]

These outcomes turn the Speech or Debate Clause on its head. The constitutional system anticipates genuine and substantive debate in the Congress. In service of this priority, and in light of parliamentary history, the Framers equipped Members of Congress with special privileges protecting their speech. The Speech or Debate Clause provides protection for legislators to ensure open discussion of national issues and their public work, free of undue interference from the judiciary or the executive. Conversely, the Constitution was never meant to shield Members from prosecution for their criminal acts. It is nonsense to argue over whether Speech or Debate prohibits inquiry about the cash stashed in Jefferson's freezer.[379] Thirty-five years after the Supreme Court last heard a case turning on the Speech or Debate Clause, it is time for the Court to take another look.

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was, the litigation surely consumed the time and energy of Murtha and his staff—a tying down that immunity doctrines seek to prevent. *Cf.* Cheney v. U.S. District Court for the District of Columbia, 542 U.S. 367, 382 (2004) (explaining that presidential immunity doctrine is grounded in part on the need for protection "from vexatious litigation that might distract [the executive branch] from the energetic performance of its constitutional duties").

378. *See* Carol D. Leonnig, *FBI Was Investigating Murtha for Corruption, New Records Show*, WASH. POST, Oct. 18, 2011, http://www.washingtonpost.com/politics/fbi-was-investigating-rep-murtha-for-corruption-new-records-show/2011/10/18/gIQAtZ8PvL_story.html.

379. It is similarly nonsense to argue over whether the Clause prohibits inquiry about the bribe menu prepared on congressional letterhead by former Representative Duke Cunningham specifying that he required a houseboat in exchange for sixteen million dollars in government contracts. *See* Charles R. Babcock, *Prosecutors Urge 10-Year Sentence for Cunningham*, WASH. POST, Feb. 18, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/02/17/AR2006021702508.html. Or the expensive meals and luxury travel improperly taken in exchange for official acts by former Representative Robert W. Ney. *See* Susan R. Schmidt & James V. Grimaldi, *Ney Pleads Guilty to Corruption Charges*, WASH. POST, Oct. 14, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/10/13/AR2006101300169.html.