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# Understanding the Speech or Debate Clause

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## Summary

The Speech or Debate Clause (Clause) of the U.S. Constitution states that “[F]or any Speech or Debate in either House,” Members of Congress (Members) “shall not be questioned in any other Place.” The Clause serves various purposes: principally to protect the independence and integrity of the legislative branch by protecting against executive or judicial intrusions into the protected legislative sphere, but also to bar judicial or executive processes that may constitute a “distraction” or “disruption” to a Member’s representative or legislative role. Despite the literal text, protected acts under the Clause extend beyond “speeches” or “debates” undertaken by Members of Congress, and have also been interpreted to include all “legislative acts” undertaken by Members or their aides.

Judicial interpretations of the Clause have developed along several strains. First and foremost, the Clause has been interpreted as providing Members with general criminal and civil immunity for all “legislative acts” taken in the course of their official responsibilities. This immunity principle protects Members from “intimidation by the executive” or a “hostile judiciary” by prohibiting both the executive and judicial powers from being used to improperly influence or harass legislators. Second, the Clause appears to provide complementary evidentiary and testimonial privileges. Although not explicitly articulated by the Supreme Court, lower federal courts have generally viewed these component privileges as a means of effectuating the purposes of the Clause by barring evidence of protected legislative acts from being used against a Member, and protecting a Member from compelled questioning about such acts.

The testimonial privilege component of the Clause has given rise to significant disagreement in the lower courts. The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has held that the Clause’s testimonial privilege encompasses a general documentary nondisclosure privilege that applies regardless of the purposes for which disclosure is sought. To the contrary, the U.S. Court of Appeals for the Third Circuit and the U.S. Court of Appeals for the Ninth Circuit have rejected that position, holding instead that, at least in criminal cases, the Clause prohibits only the evidentiary *use* of privileged documents, not their mere disclosure to the government for review as part of an investigation.

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[F]or any Speech or Debate in either House, [The Senators and Representatives] shall not be questioned in any other Place.

U.S. CONST. Art I, § 6 cl. 1

## Introduction

The Constitution’s Speech or Debate Clause (Clause) represents a key pillar in the American separation of powers.<sup>1</sup> The Clause, which derives its form from the language of the English Bill of Rights and has deep roots in the historic struggles between King and Parliament,<sup>2</sup> serves chiefly to protect the independence, integrity, and effectiveness of the legislative branch by barring executive or judicial intrusions into the protected sphere of the legislative process.<sup>3</sup> These prohibited intrusions may take various forms, and, judicial interpretation of the Clause’s relatively ambiguous language has developed along several related lines of cases.<sup>4</sup>

First and foremost, the Clause has been interpreted as providing Members of Congress (Members)<sup>5</sup> with general immunity from liability for all “legislative acts”<sup>6</sup> taken in the course of their official responsibilities.<sup>7</sup> This “cloak of protection”<sup>8</sup> shields Members from “intimidation by the executive” or a “hostile judiciary” by protecting against either the executive or judicial powers from being used to improperly influence or harass legislators through retaliatory litigation.<sup>9</sup> This overarching immunity principle has traditionally been viewed as advancing the primary purpose of the Clause: that of preserving the independence of the legislative branch.

The Clause has also been said to serve a good governance role, barring judicial or executive processes that may constitute a “distraction” or “disruption” to a Member’s representative or legislative role.<sup>10</sup> The Court has cited this “distraction” principle, and the Clause’s broad

<sup>1</sup> *United States v. Helstoski*, 442 U.S. 477, 491 (1979) (noting that the Clause’s “purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government.”); *United States v. Johnson*, 383 U.S. 169, 178 (1966) (holding that the Clause “reinforc[es] the separation of powers so deliberately established by the Founders.”); *United States v. Renzi*, 651 F.3d 1012, 1037 (9th Cir. 2011) (noting that the “Speech or Debate Clause is a creature born of separation of powers concerns”); *Fields v. Office of Johnson*, 459 F.3d 1, 8 (D.C. Cir. 2006) (en banc) (“The Speech or Debate Clause reinforces the separation of powers and protects legislative independence.”).

<sup>2</sup> *Johnson*, 383 U.S. at 178 (describing the Clause as “the culmination of a long struggle for parliamentary supremacy” in which “successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators.”). For a thorough discussion of the historical evolution of the legislative privilege associated with the Clause, see JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 201-10 (2017).

<sup>3</sup> See *Helstoski*, 442 U.S. at 491 (“This Court has reiterated the central importance of the Clause for preventing intrusion by [the] Executive and Judiciary into the legislative sphere.”); *Johnson*, 383 U.S. at 181 (noting that the primary purpose of the Clause is to “prevent intimidation by the executive and accountability before a possibly hostile judiciary”).

<sup>4</sup> *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995) (“From this terse prohibition has emerged a somewhat complicated privilege, with several strands.”).

<sup>5</sup> This report will refer generally to “Members,” but as discussed *infra*, the privilege applies to Members and their aides. See “Who Is Protected?” *infra*.

<sup>6</sup> See “What Constitutes a Legislative Act?” *infra*.

<sup>7</sup> *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 502-03 (1975) (“Thus we 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.”); *Gravel v. United States*, 408 U.S. 606, 615-17 (1972).

<sup>8</sup> *Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1085 (D.C. Cir. 2017).

<sup>9</sup> See *Johnson*, 383 U.S. at 181; *Gravel*, 408 U.S. at 617; *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528 (9th Cir. 1983).

<sup>10</sup> *Eastland*, 421 U.S. at 503 (“Just as a criminal prosecution infringes upon the independence which the Clause is (continued...)”).

proscription that Members not be “questioned in *any* other place,” as justification for extending the Clause’s immunity protection beyond criminal actions initiated by the executive branch—which clearly implicate the separation of powers—to private civil suits initiated by members of the public—which generally implicate the separation of powers only to a lesser degree.<sup>11</sup>

Even when absolute immunity is not appropriate—for example, when a charge or claim does not arise directly out of a legislative act but is rather entangled with protected and unprotected acts—the Clause appears to provide Members with complementary evidentiary and testimonial privileges which may be invoked by a Member to protect against the introduction of specific “legislative act” evidence. Although not explicitly articulated by the Supreme Court,<sup>12</sup> lower federal courts have generally viewed these component privileges as a means of effectuating the protections afforded by the Clause by barring the introduction of specific documentary evidence of protected legislative acts for use against a Member and protecting a Member from being questioned<sup>13</sup> regarding those same acts.<sup>14</sup>

Some appellate opinions have recognized that the Clause must also include a broad documentary nondisclosure privilege to protect Members from the perils and burdens of revealing written legislative materials, even when the documents are not used as evidence against the Member.<sup>15</sup> Although this nondisclosure privilege has not been adopted by the Supreme Court, it has been utilized to extend the protections of the Clause to prohibit the compelled disclosure of documents in various circumstances, including during searches conducted as a part of a criminal investigation.<sup>16</sup> Some courts, however, have rejected this reasoning, considering it an undue

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designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function.”); *United States v. Brewster*, 408 U.S. 501, 507 (1972) (noting that the Clause exists to “protect the integrity of the legislative process”); *Powell v. McCormack*, 395 U.S. 486, 505 (1969) (stating that “[t]he purpose of the protection afforded legislators is... to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions”); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (“Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good... The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of trial ...”).

<sup>11</sup> *Eastland*, 421 U.S. at 503; *Brown & Williamson*, 62 F.3d 408, 416 (1995) (“The Clause states, after all, that Members shall not be called to account ‘in any other Place’—not just a criminal court.”). Even civil suits may arguably implicate the separation-of-powers principles that underlie the Clause. Any court order directed at a Member could be viewed as a clash between the judicial and legislative powers. *See Eastland*, 421 U.S. at 503 (“[W]hether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled.”).

<sup>12</sup> *See infra* notes 29-36.

<sup>13</sup> This component of the Clause would appear to apply to questioning that occurs at trial, before the grand jury, or in a deposition. *See Fields*, 459 F.3d at 14.

<sup>14</sup> *See Gravel*, 408 U.S. at 616, 622, 628-29 (reasoning that a Senator “may not be made to answer—either in terms of questions or in terms of defending himself” for legislative acts); *Helstoski*, 442 U.S. at 490 (holding that “[r]evealing information as to a legislative act” to a jury violates the Clause”). Perhaps the chief distinction between the immunity principle and the evidentiary and testimonial components of the Clause is that when a claim is predicated on a legislative act, and therefore triggers immunity, the Clause operates as a “jurisdictional bar.” *See Fields*, 459 F.3d at 13 (2006).

<sup>15</sup> *See, e.g., United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007); *MINPECO, S.A. v. Conticommodity Serv. Inc.*, 844 F.2d 856 (D.C. Cir. 1988). The D.C. Circuit’s jurisprudence holds that the documentary nondisclosure privilege is part of the testimonial privilege. *Rayburn*, 497 F.3d at 655 (“Our precedent establishes that the testimonial privilege under the Clause extends to non-disclosure of written legislative materials.”).

<sup>16</sup> *Rayburn*, 497 F.3d at 655.

expansion of the Clause.<sup>17</sup> These courts have instead held that, at least in criminal cases, the Clause prohibits only the evidentiary *use* of privileged documents, not their mere disclosure to the government for review as part of an investigation.<sup>18</sup>

The Clause has also been interpreted to protect Congress's ability to obtain and use information without interference from the judiciary.<sup>19</sup> These cases tend to emphasize the structural aspects of the Clause's role in the separation of powers and, more specifically, the proper relationship between Congress and the courts.<sup>20</sup> For example, courts have generally read the Clause as prohibiting the judicial branch from invalidating or blocking a congressional subpoena, or from interfering with how Congress, and its Members, choose to use information within the legislative sphere.<sup>21</sup>

## The Core of the Clause: Member Immunity and Component Privileges

In fashioning an evolving interpretation, the Supreme Court has described the Clause as a provision in which the text simply cannot be interpreted literally.<sup>22</sup> “Deceptively simple” phrases such as “shall not be questioned,” “Speech or Debate,” and even “Senators and Representatives” have been the subject of significant debate.<sup>23</sup> While there appears to be much about the Clause that is unclear, it is well established that the Clause seeks to secure the independence of legislators by providing Members with immunity from criminal prosecutions or civil suits that stem from acts taken within the legislative sphere.<sup>24</sup> This general immunity principle forms the core of the protections afforded by the Clause.

The Supreme Court has consistently and repeatedly suggested the Clause's immunity principle should be interpreted “broadly” to effectuate the purpose of maintaining an independent legislature.<sup>25</sup> Once it is determined that the Clause applies to a given action, the resulting

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<sup>17</sup> See, e.g., *In re Fattah*, 802 F.3d 516, 529 (3rd Cir. 2015); *Renzi*, 651 F.3d at 1034 (“We disagree with both *Rayburn*'s premise and its effect and thus decline to adopt its rationale.”).

<sup>18</sup> *Fattah*, 802 F.3d at 529 (“The Speech or Debate Clause does not prohibit the disclosure of privileged documents. Rather, it forbids the evidentiary use of such documents.”).

<sup>19</sup> *Eastland*, 421 U.S. at 501.

<sup>20</sup> *Id.* at 509 n.16 (“Where we are presented with an attempt to interfere with an ongoing activity by Congress, and that activity is found to be within the legitimate legislative sphere, balancing plays no part. The speech or debate protection provides an absolute immunity from judicial interference.”).

<sup>21</sup> See *Ferrer*, 856 F.3d at 1086 (“To circumscribe the committee’s use of material in its physical possession would... ‘destroy[]’ the independence of the Legislature and ‘invade[]’ the constitutional separation of powers.”) (citations omitted).

<sup>22</sup> *Hutchinson v. Proxmire*, 443 U.S. 111, 124 (1979) (noting that the “Court has given the Clause a practical rather than a strictly literal reading ...”). See also, *Bastien v. Office of Campbell*, 390 F.3d 1301, 1305 (10th Cir. 2004) (“[T]he Supreme Court has long treated the Clause as constitutional shorthand for a more extensive protection.”).

<sup>23</sup> *Brown & Williamson*, 62 F.3d at 415.

<sup>24</sup> *Eastland*, 421 U.S. at 510-11 (noting that the Clause should be “construed to provide the independence which is its central purpose”); *Johnson*, 383 U.S. at 182 (“There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause.”).

<sup>25</sup> *Eastland*, 421 U.S. at 501 (“Without exception, our cases have read the Speech or Debate Clause broadly to effectuate its purposes.”).

protections from liability are “absolute,”<sup>26</sup> and the action “may not be made the basis for a civil or criminal judgment against a Member.”<sup>27</sup> Unlike some constitutional provisions, the Clause does not require a court to engage in a balancing of interests.<sup>28</sup>

The Clause’s general immunity principle is perhaps best understood as complemented—and effectuated—by two component privileges that courts have viewed as emanating from the Clause. The evidentiary component of the Clause prohibits evidence of legislative acts from being introduced for use against a Member.<sup>29</sup> Similarly, the testimonial component of the Clause generally may be invoked when a Member is questioned about his legislative acts, either in a trial, before the grand jury, or in a deposition, and, in some courts, to block the compelled disclosure of documents pursuant to a subpoena or a warrant.<sup>30</sup> The Supreme Court has not explicitly framed the protections of the Clause by reference to these two independent component privileges, but has instead used language that implies only their existence.<sup>31</sup> As such, these privileges are neither clearly established nor described, and, especially in regard to the testimonial privilege, relatively unsettled. Nevertheless, in understanding the Speech or Debate Clause, it would seem prudent to describe the Clause as composed of a general immunity principle, complemented by component evidentiary and testimonial privileges.<sup>32</sup>

Although there appears to be some agreement on the existence of the immunity principle and the evidentiary and testimonial privileges, the Supreme Court’s relatively ambiguous treatment of the interactions between the different aspects of the Clause has led to significant disagreement among the lower courts.<sup>33</sup> For example, the Court’s silence on the scope of the testimonial component of the Clause, combined with the inherent confusion<sup>34</sup> surrounding what constitutes a “testimonial”

<sup>26</sup> *Id.* at 503 (“[O]nce it is determined that Members are acting within the ‘legitimate legislative sphere’ the Speech or Debate Clause is an absolute bar to interference.”); *Doe v. McMillan*, 412 U.S. 306, 324 (1973) (“The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating.”). Indeed, the Court has gone so far as to say that legislative acts may not even be the subject of “inquiry” by either the executive or judicial branches. *Brewster*, 408 U.S. at 509 (“The privilege protect[s] Members from inquiry into legislative acts or the motivation for actual performance of legislative acts.”).

<sup>27</sup> *McMillan*, 412 U.S. at 312.

<sup>28</sup> *Eastland*, 421 U.S. at 508 n.16 (“Where we are presented with an attempt to interfere with an ongoing activity by Congress, and that activity is found to be within the legitimate legislative sphere, balancing plays no part.”).

<sup>29</sup> *Helstoski*, 442 U.S. at 487 (noting that the Court’s previous holdings “leave no doubt that evidence of a legislative act of a Member may not be introduced by the Government”); *Brewster*, 408 U.S. at 527 (holding that “evidence of acts protected by the Clause is inadmissible”).

<sup>30</sup> *Gravel*, 408 U.S. at 616 (holding that Members “may not be made to answer—either in terms of questions or in terms of defending himself from prosecution” for legislative acts).

<sup>31</sup> Indeed, the Supreme Court has never used the phrase “testimonial privilege” or “evidentiary privilege” in discussing the Speech or Debate Clause. In *United States v. Gillock*, the Court referenced an evidentiary privilege for state legislators “similar in scope” to the Clause. 445 U.S. 360, 366 (1980).

<sup>32</sup> See, e.g., *Renzi*, 651 F.3d at 1035 n. 27 (“To reiterate, the Court has identified three distinct privileges in the Clause: a testimonial privilege, an evidentiary privilege, and a privilege against liability.”); *Howard v. Office of the Chief Admin. Officer of the United States House of Representatives*, 720 F.3d 939, 946 (2013) (“As a general matter, the Speech or Debate Clause affords three distinct protections: (a) an immunity from ‘a civil or criminal judgment ...’ (b) an evidentiary privilege ... and (c) a testimonial and non-disclosure privilege ...”) (citations omitted).

<sup>33</sup> See *Brown & Williamson*, 62 F.3d at 418 (“Based on the text of the Constitution, it would seem that the immunity from suit derives from the testimonial privilege, not the other way around.”)

<sup>34</sup> See, e.g., *Crawford v. Washington*, 541 U.S. 36, 51-61 (2004) (addressing the meaning of “testimonial” for purposes of the Confrontation Clause); *United States v. Hubbell*, 530 U.S. 27, 34-46 (2000) (discussing the act of production doctrine and the testimonial privilege arising from the Fifth Amendment privilege against self-incrimination). In a Fifth Amendment case, the Court held that “to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.” *Doe v. United States*, 487 U.S. 201, 210 (1988). As (continued...)

disclosure in other areas of federal law, has led to a deep split among the federal appellate courts as to whether the Clause protects against nonevidentiary disclosures of written legislative materials—for example, disclosures made in response to discovery subpoenas or search warrants<sup>35</sup>—or, to the contrary, whether such disclosures are covered only by the evidentiary component of the Clause, and therefore disclosure of such documents is protected only when used for evidentiary purposes.<sup>36</sup>

Despite the doctrinal uncertainty, it would appear that the different aspects of the Clause may be best summarized in the following way. First, the immunity principle of the Clause acts as a jurisdictional bar to legal actions seeking to hold a Member liable, either civilly or criminally, for protected legislative acts.<sup>37</sup> When the claim itself does not require proof of a legislative act, but rather arises from nonlegislative or unprotected activity, the Member is not immune, and the criminal or civil action may go forward.<sup>38</sup> Second, during the course of the litigation, the Member may nonetheless assert the evidentiary privilege to block the introduction of specific evidence reflecting protected legislative acts.<sup>39</sup> Third, the testimonial privilege may be invoked in a variety of circumstances in order to protect the Member from compelled testimony, or in some courts from disclosing documents, about those acts.<sup>40</sup>

Viewing the Clause holistically, it becomes apparent that whether a court chooses to address a Speech or Debate case by reference to the general immunity principle, or the evidentiary and testimonial privileges, in some cases the ultimate result may be the same. For example, a Member may avoid liability that may have otherwise attached to his actions either because the court relies on the Clause's immunity principle, or because the party initiating the legal action is unable to prove his case without resort to evidence and testimony that is protected by the evidentiary and testimonial privilege components of the Clause.<sup>41</sup>

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previously mentioned, the Supreme Court has never directly addressed the testimonial privilege arising from the Clause. Lower federal courts have adopted very different descriptions of what is meant by testimonial, and, in fact, no circuit court has explicitly defined the term “testimonial.” *Compare Brown & Williamson*, 62 F.3d at 421 (describing “testimonial purposes” as “not for use as evidence against Congress or any of its Members.”) *with In re Grand Jury Investigation into Possible Violations of Title 18*, 587 F.2d 589, 596 (3d Cir. 1978) (equating the testimonial privilege to “hostile questioning”).

<sup>35</sup> *Compare Rayburn*, 497 F.3d at 655 (holding that the testimonial component of the Clause includes a documentary nondisclosure privilege), *with Renzi*, 651 F.3d at 1034 (holding that the testimonial component of the Clause does not create the documentary nondisclosure privilege outlined in *Rayburn*).

<sup>36</sup> *Fattah*, 802 F.3d at 529 (“The Speech or Debate Clause does not prohibit the disclosure of privileged documents. Rather, it forbids the evidentiary use of such documents.”).

<sup>37</sup> *Eastland*, 421 U.S. at 502-03 ([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.”); *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 13 (D.C. Cir. 2006) (“The Speech or Debate Clause operates as a jurisdictional bar when ‘the actions upon which [a plaintiff] sought to predicate liability were “legislative acts.”’)” (citing *McMillan* 412 U.S. at 318) (quoting *Gravel*, 408 U.S. at 618).

<sup>38</sup> *Brewster*, 408 U.S. at 525.

<sup>39</sup> *Helstoski*, 442 U.S. at 487 (holding that “evidence of a legislative act of a Member may not be introduced by the Government ...”).

<sup>40</sup> See “Nondisclosure Privilege: A Continued Circuit Split” *infra*.

<sup>41</sup> See Jay Rothrock, *Striking a Balance: The Speech or Debate Clause's Testimonial Privilege and Policing Government Corruption*, 24 *Touro L. Rev.* 739, 751 n. 45 (2008). In this sense, an analogy may arguably be drawn to judicial implementation of the state secrets privilege, an evidentiary privilege that allows the federal government to resist disclosure of information during litigation if there is a reasonable danger that disclosure would harm the national security of the United States. See *U.S. v. Reynolds*, 345 U.S. 1, 7-8 (1953). Dismissal of a claim based on a valid (continued...)



As a result of the breadth of these protections, the Clause seemingly makes it more difficult for the executive branch to prosecute Members for unlawful acts committed in the context of legislative activity, including those offenses directly related to corruption.<sup>42</sup> This impact on executive enforcement of the law was fully understood at the time the Clause was adopted, and considered a necessary consequence of protecting legislators from undue influence or intimidation.<sup>43</sup>

The Clause does not, however, turn Members into “supercitizens” by providing them with a blanket exemption from legal liability for any and all illegal acts.<sup>44</sup> Rather, the Clause immunizes or protects only a certain class of actions, known as “legislative acts,” that are undertaken as part of the legislative process.<sup>45</sup> Not all actions taken by a Member in the course of his congressional duties are considered legislative acts. In fact, many acts that may otherwise be considered “official,” in that they relate to governmental duties, are not covered by the protections of the Clause.<sup>46</sup> The Clause protects only those acts that are an “integral part of the deliberative and communicative processes” through which Members engage either in “the consideration and passage or rejection of proposed legislation” or “other matters which the Constitution places within the jurisdiction of either House.”<sup>47</sup> The legislative act limitation and other aspects of the Clause are discussed in greater detail below.<sup>48</sup>

## Supreme Court Interpretations

A series of decisions from the Supreme Court address the general scope of the Clause and elucidate the distinction between legislative acts, such as voting or debating, which are accorded protection under the Clause and are not subject to “inquiry,”<sup>49</sup> and political or other nonlegislative acts, which are not protected by the Clause and therefore may serve as the basis for a legal action.<sup>50</sup> These cases suggest at least three noteworthy themes. First, despite the text, the

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assertion of the state secrets privilege can either result in an outright bar to the claim, for example when the “very subject matter of the case is a state secret,” *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1083 (9th Cir. 2010), or after it becomes clear that a plaintiff cannot establish a *prima facie* case without privileged evidence. *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998).

<sup>42</sup> *Helstoski*, 442 U.S. at 488 (“[W]ithout doubt the exclusion of such evidence will make prosecutions more difficult.”); *Brewster* 408 U.S. at 516.

<sup>43</sup> *Brewster*, 408 U.S. at 516-17 (“In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers ... The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards.”).

<sup>44</sup> *Id.* at 516 (noting that the purpose of the Clause was not “to make Members of Congress super-citizens, immune from criminal responsibility”).

<sup>45</sup> *Gravel*, 408 U.S. at 625.

<sup>46</sup> *McMillan*, 412 U.S. at 313 (“Our cases make perfectly apparent [] that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause.”); *United States v. McDade*, 28 F.3d 283, 295 (3rd Cir. 1994) (“The Speech or Debate Clause does not immunize every official act performed by a member of Congress.”).

<sup>47</sup> *Gravel*, 408 U.S. at 625.

<sup>48</sup> See “What Constitutes a Legislative Act?” *infra*.

<sup>49</sup> *Gravel*, 408 U.S. at 616.

<sup>50</sup> See, e.g., *Id.* at 613-29; *Brewster*, 408 U.S. at 507-29; *Johnson*, 383 U.S. 174-85; *Kilbourn v. Thompson*, 103 U.S. 168, 201-05 (1881). Additional Supreme Court cases significantly addressing the Clause include *Harlow v. Fitzgerald*, 457 U.S. 800, 810-12 (1982); *Hutchinson v. Proxmire*, 443 U.S. 111, 124-33 (1979); *Helstoski*, 442 U.S. at 484-94 (1979); *Eastland*, 421 U.S. at 501-11 (1975); *McMillan*, 412 U.S. at 311-19 (1973); *Powell*, 395 U.S. at 501-06 (1969); (continued...)

protections afforded by the Clause extend well beyond “speeches” or “debates” undertaken by “Senators and Representatives.”<sup>51</sup> Second, otherwise legitimate political interactions external to the legislative sphere—for example, disseminating information outside of Congress—are generally not considered protected legislative acts.<sup>52</sup> Third, the Clause does not immunize criminal conduct that is clearly no part of the “due functioning” of the legislative process.<sup>53</sup>

The Supreme Court adopted a broad interpretation of “Speech or Debate” from its first assessment of the Clause in the 1881 case *Kilbourn v. Thompson*.<sup>54</sup> In *Kilbourn*, the Court considered whether a civil action could be maintained against Members who were responsible for initiating and approving a contempt resolution ordering an unlawful arrest.<sup>55</sup> The Members defended themselves on the ground that their acts were protected by the Clause.<sup>56</sup> The Court agreed, determining that the Members were not subject to suit for their actions.<sup>57</sup> The Court adopted an interpretation of the Clause that extended protections beyond mere legislative deliberation and argument, holding that “it would be a narrow view of the constitutional provision to limit it to words spoken in debate.”<sup>58</sup> Instead, the Court determined that the Clause applied to “things generally done in a session of the House by one of its members in relation to the business before it,” including the presentation of reports, the offering of resolutions, and the act of voting.<sup>59</sup> Accordingly, the Court concluded that although the arrest itself may have been unlawful, the Members were immune from suit and could not be “brought in question” for their role in approving the resolution “in a court of justice or in any other place,” as that act was protected by the Clause.<sup>60</sup>

The Court only rarely addressed the Clause after *Kilbourn*.<sup>61</sup> It was not until the 1966 case *United States v. Johnson* that the Court embarked on an early attempt to define the protections afforded by the Clause in the context of a criminal prosecution of a Member.<sup>62</sup> In *Johnson*, a former Member challenged his conviction for conspiracy to defraud the United States that arose from allegations he had agreed to give a speech defending certain banking interests in exchange for payment.<sup>63</sup> In prosecuting the case, the government relied heavily on the former Member’s

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Tenney v. Brandhove, 341 U.S. 367, 372-79 (1951).

<sup>51</sup> *Kilbourn*, 103 U.S. at 204 (extending the protections of the Clause beyond speeches and debates); *Gravel*, 408 U.S. at 616-17 (extending the protections of the Clause to acts of aides).

<sup>52</sup> See *Gravel*, 408 U.S. at 625-26.

<sup>53</sup> See *Johnson*, 383 U.S. at 172.

<sup>54</sup> *Kilbourn*, 103 U.S. at 200-05.

<sup>55</sup> *Id.* at 200.

<sup>56</sup> *Id.* at 201.

<sup>57</sup> In reaching its holding, the Court noted that if the Members had ordered the unlawful arrest “in any ordinary tribunal” they would have been liable for the act. *Id.* The Court concluded, however, that the Constitution and the Clause make clear that Congress “is not an ordinary tribunal.” *Id.*

<sup>58</sup> *Id.* at 204.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* 201.

<sup>61</sup> See Philip Mayer, *An Uncertain Privilege: Reexamining the Scope and Protections of the Speech or Debate Clause*, 50 COLUM. J.L. & SOC. PROBS. 229, 233 (2017) (“After *Kilbourn*, the Supreme Court did not substantively address the Clause until almost a century later.”).

<sup>62</sup> *Johnson*, 383 U.S. at 170-85.

<sup>63</sup> *Id.* at 170-73. The Member also allegedly agreed to “exert influence” over Department of Justice enforcement decisions. *Id.* at 171. With regard to that aspect of the claim, the Court suggested that an “attempt to influence the Department of Justice” was not legislative. *Id.* at 172.

motive for giving the speech, introducing evidence that the speech had been made solely to serve private, rather than public, interests.<sup>64</sup> Focusing on the *admission* of this protected evidence, the Court overturned the conviction. “However reprehensible such conduct may be,” the Court concluded that a criminal prosecution, the “essence” of which requires proof that “the Congressman’s conduct was improperly motivated,” was “precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.”<sup>65</sup> The opinion noted that the Clause must be “read broadly to effectuate its purposes,” ultimately concluding that the Clause prohibits a prosecution that is “dependent” upon the introduction of evidence of “the legislative acts” of a Member *or* “his motives for performing them.”<sup>66</sup>

Although overturning the conviction, the Court remanded the case to the district court for further proceedings, holding that the government should not be precluded from bringing a prosecution “purged of elements offensive to the Speech or Debate clause” through the elimination of all references to the making of the speech.<sup>67</sup> The *Johnson* case therefore stands for at least two important propositions. First, the opinion demonstrated that the government is not prohibited from prosecuting conduct that merely relates to legislative duties, but is not itself a legislative act.<sup>68</sup> When a legislative act is not an element of the offense, the government may proceed with its case by effectively “purg[ing]” the introduction of evidence offensive to the Clause.<sup>69</sup> Second, though not explicitly articulating such a privilege, the opinion impliedly introduced the evidentiary component of the Clause by holding that even though a case may go forward, the Clause may be invoked by Members to bar admission of specific protected evidence.<sup>70</sup>

Less than a decade after *Johnson*, the Supreme Court issued two decisions on the same day in 1972 that established important limitations on the types of actions that are protected by the Clause. In *United States v. Brewster*, which involved a Member’s challenge to his indictment on a bribery charge, the Court reaffirmed *Johnson* and clarified that “a Member of Congress may be prosecuted under a criminal statute provided that the Government’s case does not rely on legislative acts or the motivation for legislative acts.”<sup>71</sup> The Court made clear that the Clause does not prohibit inquiry into illegal conduct simply because it is “related” to the legislative process or has a “nexus to legislative functions,” but rather, the Clause protects only the legislative acts themselves.<sup>72</sup> By adhering to such a limitation, the Court reasoned that the result would be a Clause that was “broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members.”<sup>73</sup>

*Brewster* also drew an important distinction between legislative and political acts. The opinion labeled a wide array of constituent services,<sup>74</sup> though “entirely legitimate,” as “political in nature”

<sup>64</sup> *Id.* at 177.

<sup>65</sup> *Id.* at 180.

<sup>66</sup> *Id.* at 185.

<sup>67</sup> *Johnson*, 383 U.S. at 185.

<sup>68</sup> *Id.* at 185.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 173 (“The language of the Speech or Debate Clause clearly proscribes at least some of the evidence taken during trial.”).

<sup>71</sup> *Brewster*, 408 U.S. at 512.

<sup>72</sup> *Id.* at 513, 528.

<sup>73</sup> *Id.* at 525.

<sup>74</sup> These unprotected activities include “a wide range of legitimate ‘errands’ performed for constituents, the making of (continued...)”

rather than legislative.<sup>75</sup> As a result, the Court suggested that “it has never been seriously contended that these political matters ... have the protection afforded by the Speech or Debate Clause.”<sup>76</sup>

Turning to the terms of the bribery indictment, the Court framed the fundamental threshold question for any prosecution of a Member of Congress as: “whether it is necessary to inquire into how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute.”<sup>77</sup> With regard to bribery, the Court reasoned that because acceptance of the bribe is enough to prove a violation of the statute, there was no need for the government to present evidence that the Member had later *voted* in accordance with the illegal promise, “[f]or it is *taking* the bribe, not performance of the illicit compact, that is a criminal act.”<sup>78</sup> Because “taking the bribe is, obviously, no part of the legislative function” and was therefore “not a legislative act,” the government would not be required to present any protected legislative evidence in order to “make out a prima facie case.”<sup>79</sup> In that sense, the Court distinguished the case before it from *Johnson*. Whereas the prosecution in *Johnson* relied heavily on showing the motive for Johnson’s floor speech, the prosecution in *Brewster* need not prove any legislative act, but only that money was accepted in return for a promise.

Finally, *Gravel v. United States* exemplifies that communications outside of the legislative process are generally not protected by the Clause.<sup>80</sup> *Gravel* involved a Speech or Debate challenge to a grand jury investigation into the disclosure of classified documents by a Senator and his aides.<sup>81</sup> After coming into possession of the “Pentagon Papers”—a classified Defense Department study addressing U.S. involvement in the Vietnam War—Senator Mike Gravel disclosed portions of the document at a subcommittee hearing and submitted the entire study into the record.<sup>82</sup> The Senator and his staff had also allegedly arranged for the study to be published by a private publisher.<sup>83</sup> A grand jury subsequently issued a subpoena for testimony from one of Senator Gravel’s aides and the private publisher.<sup>84</sup> Senator Gravel intervened to quash the subpoenas.<sup>85</sup>

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(...continued)

appointments with Government agencies, assistance in securing Government contracts, preparing so-called ‘news letters’ to constituents, news releases, and speeches delivered outside the Congress.” *Id.* at 512. Similarly, in *Hutchinson v. Proxmire*, the Court held that informing the public of legislative activities is not protected by the Clause. 443 U.S. 111, 133 (1979) (“Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process. As a result, transmittal of such information by press releases and newsletters is not protected by the Speech or Debate Clause.”).

<sup>75</sup> *Brewster*, 408 U.S. at 512.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 526.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 525.

<sup>80</sup> *Gravel*, 408 U.S. at 622-27. *Gravel* also exemplifies that the Speech or Debate protections can extend to a Member’s personal aides. *Id.* at 616-22.

<sup>81</sup> *Id.* at 608-10.

<sup>82</sup> *Id.* at 608.

<sup>83</sup> *Id.* at 610.

<sup>84</sup> *Id.* at 608.

<sup>85</sup> *Id.* at 609.

The *Gravel* opinion began by reasoning that “[b]ecause the claim is that a Member’s aide shares the Member’s constitutional privilege, we consider first whether and to what extent Senator Gravel himself is exempt from process or inquiry by a grand jury investigating the commission of a crime.”<sup>86</sup> In addressing the scope of the Senator’s protections, the Court implied the existence of the testimonial component of the Clause, noting that the protections of the Clause protect a Member from compelled questioning.<sup>87</sup> The Court did so by stating, without further discussion, that it had “no doubt” that “Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting.”

The *Gravel* opinion also drew a clear line of demarcation between protected legislative acts and other unprotected acts not “essential to the deliberations” of Congress.<sup>88</sup> Although the Senator was protected for his actions at the hearing, the Senator’s alleged arrangement for private publication of the Pentagon Papers was not “part and parcel of the legislative process” and was therefore not protected by the Clause.<sup>89</sup> In reaching this determination, the Court established a working definition of “legislative act” that remains applicable today, holding that a legislative act is 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.<sup>90</sup>

Private publication, as opposed to publication in the record, was “in no way essential to the deliberations of the Senate.”<sup>91</sup> Thus, the Clause provided no immunity from testifying before the grand jury relating to that arrangement.<sup>92</sup>

## Who Is Protected?

Although the text of the Speech or Debate Clause refers only to “Senators and Representatives,” and therefore clearly applies to actions by any Member of Congress,<sup>93</sup> it is well established that protections of the Clause generally apply equally to congressional staff.<sup>94</sup> In *Gravel*, the Court held that the Clause protects an aide’s action when the Clause would have protected the same action if it were done by a Member.<sup>95</sup> An aide, the Court reasoned, should be viewed as the “alter

<sup>86</sup> *Gravel*, 408 U.S. at 613. Speech or Debate Clause protections for aides are discussed below.

<sup>87</sup> *Id.* at 626. *Brown & Williamson*, 62 F.3d at 418 (holding that “the Supreme Court recognized the testimonial privilege in *Gravel v. United States*”). *Gravel* involved questioning before a grand jury. 408 U.S. at 613. The D.C. Circuit has suggested, however, that the prohibition extends to questions asked “in a deposition, on the witness stand, and so forth ...” *Fields v. Office of Johnson*, 459 F.3d 1, 14 (D.C. Cir. 2006).

<sup>88</sup> *Gravel*, 408 U.S. at 625.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 625.

<sup>91</sup> *Gravel*, 408 U.S. at 625.

<sup>92</sup> *Id.* at 626.

<sup>93</sup> The Clause may be asserted not only by a current Member, but also by a former Member in an action implicating his conduct while in Congress. *See Brewster*, 408 U.S. at 502.

<sup>94</sup> *Gravel*, 408 U.S. at 616-17.

<sup>95</sup> *Id.* at 628 (holding that an aide’s “immunity, testimonial or otherwise, extends only to legislative acts as to which the Senator himself would be immune”).

ego” of the Member he serves.<sup>96</sup> The *Gravel* Court recognized that the Member and his aide must be “treated as one,”<sup>97</sup> noting:

[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; that the day-to-day work of such aides is so critical to the Members’ performance that they must be treated as the latter’s alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated.<sup>98</sup>

At issue in *Gravel* were the actions of a Member’s *personal* staff. Other decisions of the Court have extended the protections of the Clause to *committee* staff, including those in the position of chief counsel, clerk, staff director, and investigator.<sup>99</sup>

However, it should be noted that any protections under the Clause that are enjoyed by congressional staff flow from the Member.<sup>100</sup> They do not inhere personally to the individual. As a result, an “aide’s claim of privilege can be repudiated and thus waived by the [Member].”<sup>101</sup>

## What Constitutes a Legislative Act?

It is apparent that the key determination in Speech or Debate Clause cases is whether the conduct directly in question, or on which evidence or testimony is sought, constitutes a legislative act.<sup>102</sup> If legislative, the Member is exempt from criminal or civil liability that may otherwise have attached to that act, and evidence of the act may not be introduced or testimony by the Member compelled.<sup>103</sup> As the Court has repeatedly stated, Members are “immune from liability for their actions within the ‘legislative sphere,’ even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes.”<sup>104</sup> If the underlying conduct is not legislative, however, the prosecution or civil claim is not barred by the Clause, and evidence of the act is not privileged.<sup>105</sup>

Examining judicial precedent regarding acts that are “legislative,” it would appear that Members enjoy protection under the Clause when:

- speaking or acting on the House or Senate floor;<sup>106</sup>

<sup>96</sup> *Id.* at 617.

<sup>97</sup> *Id.* at 616 (quoting *United States v. Doe*, 455 F.2d 753, 761 (1972)).

<sup>98</sup> *Id.* at 616-17 (internal citations omitted).

<sup>99</sup> See *Eastland*, 421 U.S. at 507; *McMillan*, 412 U.S. at 309. See also, *Rangel v. Boehner*, 785 F.3d 19, 24-5 (D.C. Cir. 2015).

<sup>100</sup> *Gravel*, 408 U.S. at 621 (noting that the “privilege applicable to the aide is viewed, as it must be, as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator’s behalf ...”).

<sup>101</sup> *Id.* at 622 n.13.

<sup>102</sup> *Johnson*, 383 U.S. at 185; *Brewster*, 408 U.S. at 512; *Gravel*, 408 U.S. at 625. See also, *Renzi*, 651 F.3d at 1021 (describing the question of what constitutes a legislative act as “of fundamental importance”).

<sup>103</sup> See *Gravel*, 408 U.S. at 626 (noting that the Clause “recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach ...”).

<sup>104</sup> *McMillan*, 412 U.S. at 312-13.

<sup>105</sup> See *Brewster*, 408 U.S. at 512.

<sup>106</sup> *Johnson*, 383 U.S. at 184-85; *Gravel*, 408 U.S. at 616.

- introducing and voting on bills and resolutions;<sup>107</sup>
- preparing and submitting committee reports;<sup>108</sup>
- speaking or acting at committee meetings and hearings;<sup>109</sup>
- conducting official investigations and issuing subpoenas;<sup>110</sup> and
- engaging in fact-finding and information-gathering for legislative purposes.<sup>111</sup>

Conversely, actions that have not been viewed as “integral” to the legislative process and, therefore, have not been interpreted to be protected legislative acts include:

- speaking outside of Congress;<sup>112</sup>
- writing newsletters and issuing press releases;<sup>113</sup>
- privately publishing a book;<sup>114</sup>
- distributing official committee reports outside the legislative sphere;<sup>115</sup>
- engaging in political activities;<sup>116</sup>
- engaging in constituent services, including acting as a conduit between a constituent and the executive branch;<sup>117</sup>
- promising to perform a future legislative act;<sup>118</sup> and
- accepting a bribe.<sup>119</sup>

The general legal guidance provided by the Court in *Gravel* and other cases does not clearly categorize every type of action in which Members may regularly engage. As a result, determining whether novel conduct, not analogous to past precedent, should be viewed as a legislative act may sometimes be difficult.

One federal appellate court, however, has adopted a two-step analysis for identifying whether certain conduct is protected by the Clause.<sup>120</sup> In *United States v. Menendez*, Senator Robert

<sup>107</sup> *Kilbourn*, 103 U.S. at 204 (holding that the Clause protects “resolutions offered ... and ... the act of voting ...”).

<sup>108</sup> *McMillan*, 412 U.S. at 311; *Kilbourn*, 103 U.S. at 204.

<sup>109</sup> See *McMillan*, 412 U.S. at 311; see also, *Gravel*, 408 U.S. at 628-29. In addition, some lower federal courts have held that the Clause bars the use of evidence of a Member’s committee membership. Compare *United States v. Swindall*, 971 F.2d 1531, 1543 (11th Cir. 1991), rehearing denied, 980 F.2d 1449 (11th Cir. 1992), with *United States v. McDade*, 28 F.3d 283, 291 (3rd Cir. 1994), cert. denied, 514 U.S. 1003 (1995).

<sup>110</sup> See *Eastland*, 421 U.S. at 507; *Tenney*, 341 U.S. at 377 (refusing to examine motives of state legislator in summoning witness to hearing).

<sup>111</sup> *Gov’t of V.I. v. Lee*, 775 F.2d 514, 521 (3rd Cir. 1985); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983); *McSurely v. McClellan*, 553 F.2d 1277, 1286-87 (D.C. Cir. 1976).

<sup>112</sup> *Brewster*, 408 U.S. at 512.

<sup>113</sup> *Proxmire*, 443 U.S. at 130.

<sup>114</sup> *Gravel*, 408 U.S. at 625-26.

<sup>115</sup> *McMillan*, 412 U.S. at 315-16.

<sup>116</sup> *Brewster*, 408 U.S. at 512.

<sup>117</sup> *Id.* (excluding “the making of appointments with Government agencies [and] assistance in securing Government contracts” from the Clause’s protections).

<sup>118</sup> *Helstoski*, 442 U.S. at 489.

<sup>119</sup> *Brewster*, 408 U.S. at 525.

<sup>120</sup> *United States v. Menendez*, 831 F.3d 155, 166-67 (3rd Cir. 2016).

Menendez challenged, on Speech or Debate grounds, an indictment alleging that he solicited and accepted gifts in exchange for his efforts to influence executive branch action for the benefit of a friend.<sup>121</sup> In rejecting the Senator's claim, the U.S. Court of Appeals for the Third Circuit (Third Circuit) laid out its analytical framework, noting that first "we look to the form of the act to determine whether it is inherently legislative or non-legislative."<sup>122</sup> Some acts, the court reasoned, are "so clearly legislative" that "no further examination has to be made."<sup>123</sup> These "manifestly legislative acts" are entitled to absolute protection under the Clause, even if undertaken for an "unworthy purpose."<sup>124</sup> Other acts, the court suggested, are just as clearly nonlegislative, and receive no protection under the Clause.<sup>125</sup> If an act is either clearly legislative or clearly nonlegislative, the Third Circuit has suggested that a court should, at step one, give effect to that clear categorization.<sup>126</sup> If, however, an act does not fall neatly into either category, the court may proceed to the second step of the inquiry where it may consider "the content, purpose, and motive of the act to assess its legislative or non-legislative character."<sup>127</sup> These so-called "ambiguously legislative" acts, the court reasoned, "will be protected or unprotected based on their particular circumstances."<sup>128</sup> In this instance, the court determined that the alleged acts were "outside the constitutional safe harbor" because the Senator was "essentially lobbying on behalf of a particular party...."<sup>129</sup>

This approach may be subject to criticism in light of the Supreme Court's repeated warning that inquiries into the motive or purpose underlying actions of Members are generally not permitted by the Clause.<sup>130</sup> The Court has expressly held that "in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."<sup>131</sup> Other courts have rejected an analytical approach that would empower a court to look beneath an act that appears legislative. For example, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) has held that the Clause not only protects "acts which are manifestly legislative,"<sup>132</sup> but "also forbids inquiry into acts which are purportedly or apparently legislative, even to determine if they are legislative in fact."<sup>133</sup>

While the *Menendez* opinion acknowledged Supreme Court precedent, it nonetheless determined that "only after we conclude that that an act is in fact legislative must we refrain from inquiring into a legislator's purpose or motive."<sup>134</sup> Prior to such a determination, the Third Circuit

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<sup>121</sup> *Id.* at 159.

<sup>122</sup> *Id.* at 166.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Menendez*, 831 F.3d at 166.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 166-67. For example, in *Lee*, the Third Circuit court suggested that it is the content of the conversation, not the purpose, that is determinative. 775 F.2d at 522-24.

<sup>129</sup> *Id.* at 169.

<sup>130</sup> *Johnson*, 383 U.S. at 185.

<sup>131</sup> *Eastland*, 421 U.S. at 508.

<sup>132</sup> *United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973).

<sup>133</sup> *Id.*

<sup>134</sup> *Menendez*, 831 F.3d at 167.



suggested, a court should—and at times must—make such an inquiry to prevent nonlegislative acts from being “misrepresented” as legislative acts.<sup>135</sup>

## Member Interactions with the Executive Branch

A closer look at judicial treatment of Member interactions with the executive branch reveals some of the difficulty in determining whether certain conduct qualifies as a legislative act. While interactions with the executive branch may be viewed as “official” and “legitimate,” they are not always “legislative.”<sup>136</sup> It seems from *Brewster* and *Johnson*, for example, that communicating with an executive branch agency on behalf of a constituent is not a protected legislative act.<sup>137</sup> Interactions with the executive branch intended to “influence” executive policy for nonlegislative reasons are similarly not legislative acts.<sup>138</sup> The *Gravel* opinion further narrowed the class of interactions with the executive branch that could be deemed legislative, holding that:

Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity.<sup>139</sup>

This passage suggests that even communications and interactions with the executive branch pertaining to an agency’s administration and execution of a federal statute, though wholly unrelated to constituent services, are similarly unprotected.

Yet, when the interaction is connected to the conduct of “oversight,” the action may be more likely to be viewed as legislative and subject to the protections of the Clause. For example, in *Eastland v. United States Serviceman’s Fund*, the Supreme Court held that “the power to investigate ... plainly falls” within the definition of legislative.<sup>140</sup> Thus, interactions with the executive branch taken pursuant to an authorized congressional investigation, including those actions taken at hearings, in issuing subpoenas, or pursuing contempt, have all been interpreted to be protected legislative acts.<sup>141</sup>

Less formal oversight contacts with the executive branch (for example, actions taken by individual Members not pursuant to an official committee investigation) have not always received protections under the Clause.<sup>142</sup> In *Menendez*, the Third Circuit held that a claim of conducting “‘oversight’ does not automatically result in Speech or Debate protections.”<sup>143</sup> Instead, the court reasoned that “oversight activities exist along a spectrum” in which some informal actions are unprotected, but other “informal attempts to influence the Executive Branch on policy, for actual

<sup>135</sup> *Id.* at 167.

<sup>136</sup> *See Brewster*, 408 U.S. at 512.

<sup>137</sup> *Id.*; *Johnson*, 383 U.S. at 172.

<sup>138</sup> *See Gravel*, 408 U.S. at 625; *Johnson*, 383 U.S. at 172.

<sup>139</sup> *Gravel*, 408 U.S. at 625.

<sup>140</sup> *Eastland*, 421 U.S. at 504.

<sup>141</sup> *Id.*

<sup>142</sup> *See McDade*, 28 F.3d at 299-300. Confusion among the courts on this topic may be highlighted by comparing *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976) (suggesting a “requirement of congressional authorization of the inquiry” for oversight activity to be protected by the Clause) with *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983) (holding that actions during an unofficial investigation by an individual Member are protected by the Clause).

<sup>143</sup> *Menendez*, 831 F.3d at 166.

legislative purposes, may qualify as ‘true legislative oversight’ and merit Speech or Debate immunity.”<sup>144</sup> Lobbying on behalf of a particular party, the court held, was an action “outside the constitutional safe harbor” created by the Clause.<sup>145</sup>

To the contrary, other courts have held that “the applicability of the Speech or Debate Clause’s protections does not hinge on the formality of the investigation.”<sup>146</sup> “The controlling principle,” one court has asserted, is “whether information is acquired in connection with or in aid of an activity that qualifies as ‘legislative’ in nature.”<sup>147</sup> Consistent with this reasoning, federal courts have found “fact finding,” “field investigations,” and “information gathering” by individual Members to be protected legislative acts.<sup>148</sup>

One way to harmonize these “informal contacts” cases is perhaps that when a Member is seeking to obtain information from the executive branch, the act is “legislative,” but when the Member is attempting to “influence” executive branch policy, the act is not legislative, at least generally.<sup>149</sup> It would appear difficult, however, to draw a distinction between “cajoling” executive branch officials on the “administration of a federal statute,” which is unprotected, and “true legislative oversight.”<sup>150</sup> Oversight often serves many purposes, including a desire to influence executive branch operations. For example, a committee may solely be seeking information, or it may be conducting an investigation for the purposes of pushing the agency to implement the law in the manner that Congress desires.<sup>151</sup> Nevertheless, there remains significant uncertainty concerning what types of Member communications with the executive branch are protected by the Clause.

## Application of the Clause to Employment and Personnel Actions

The Speech or Debate Clause plays a key role in civil actions challenging Members’ employment and personnel actions. These cases generally arise under the Congressional Accountability Act (CAA), which made several civil rights, labor and employment, and workplace safety laws applicable to congressional offices.<sup>152</sup> After seeking confidential<sup>153</sup> counseling and mediation, the CAA expressly authorizes “covered employees” to bring a civil action for violations of the incorporated laws, not against an individual Member, but against the “employing office.”<sup>154</sup> The

<sup>144</sup> *Id.* at 168.

<sup>145</sup> *Id.* at 169.

<sup>146</sup> *SEC v. Comm. on Ways & Means of the United States House of Representatives*, 161 F. Supp. 3d 199, 236 (S.D.N.Y. 2015).

<sup>147</sup> *Jewish War Veterans of the United States of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 57 (D.D.C. 2007).

<sup>148</sup> *United States v. Biaggi*, 853 F.2d 89, 103 (2nd Cir. 1988); *Lee*, 775 F.2d at 521; *Miller*, 709 F.2d at 530; *McSurely*, 553 F.2d at 1286-87.

<sup>149</sup> *See* *Comm. on Ways & Means*, 161 F. Supp. 3d at 246 (noting that documents that reflect a Member “‘cajol[ing]’ or ‘exhort[ing] with respect to the administration of a federal statute,’ they must be produced,” but documents that “reflect the Committee’s or the Subcommittee’s gathering of information to aid in legislating on the issue of Medicare reimbursement rates—whether according to formal congressional processes, [] or informal efforts []—they are protected under the Clause and need not be produced”) (citations omitted).

<sup>150</sup> *Gravel*, 408 U.S. at 625; *Menendez*, 831 F.3d at 168.

<sup>151</sup> *See* CRS Report RL30240, *Congressional Oversight Manual*, by L. Elaine Halchin et al. (describing the various purposes of oversight). *See also*, *United States v. McDade*, 28 F.3d 283, 299-300 (3rd Cir. 1994) (discussing the broad meaning of the term “oversight”).

<sup>152</sup> P.L. 104-1 (1995) (codified at 2 U.S.C. §§ 1301-1438). 2 U.S.C. § 1302(a) provides a list of 11 laws that the CAA makes applicable to the legislative branch.

<sup>153</sup> 2 U.S.C. § 1416.

<sup>154</sup> *Id.* at §§ 1301, 1401-08. A “covered employee” includes employees of the House, Senate, and a number of other (continued...)

CAA also prohibits any employing office from retaliating against an employee for alleging a CAA violation.<sup>155</sup> Settlements and judgments reached under a CAA authorized action are paid out of funds appropriated to the legislative branch.<sup>156</sup> The law, it appears, was “intended to subject the *legislative branch* to liability for violation of federal employment laws, not to subject its [M]embers personally to such liability.”<sup>157</sup> Moreover, the law expressly provides that the authorization to bring a civil suit under the CAA “shall not constitute a waiver ... of the privileges of any Senator or Member of the House of Representatives under [the Clause].”<sup>158</sup> The Supreme Court has held that “[t]his provision demonstrates that Congress did not intend the Act to be interpreted to permit suits that would otherwise be prohibited under the Speech or Debate Clause.”<sup>159</sup>

The judicial framework for analyzing the Clause’s application to Member employment and personnel decisions has evolved over time. Prior to enactment of the CAA,<sup>160</sup> the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) had determined that the Clause immunized Members from claims challenging personnel decisions concerning most of their staff.<sup>161</sup> In *Browning v. Clerk of the United States House of Representatives*, the D.C. Circuit broadly held that “personnel decisions are an integral part of the legislative process to the same extent that the affected employee’s duties are an integral part of the legislative process.”<sup>162</sup> The court, therefore, held that the Clause protected personnel actions taken by Members that impacted any employee whose “duties were directly related to the due functioning of the legislative process.”<sup>163</sup> Thus, the Clause’s application depended on the functions and duties of the impacted employee.

The *Browning* holding, however, was subsequently called into question by two later decisions outside the Speech or Debate Clause context that addressed the “administrative” nature of personnel decisions. First, in *Forrester v. White*, the Supreme Court held that judicial immunity for “judicial acts” did not extend to an employment decision, which the court categorized as an administrative act rather than a judicial act.<sup>164</sup> Second, in *Gross v. Winter*, the D.C. Circuit

(...continued)

legislative branch offices. *Id.* at § 1301(3). “Employing office” includes “the personal office of a Member of the House of Representatives or of a Senator [or] ... a committee of the House of Representatives or the Senate or a joint committee ...,” and other legislative branch offices such as the Congressional Budget Office and the Architect of the Capitol. *Id.* at § 1301(9).

<sup>155</sup> *Id.* at § 1317(a).

<sup>156</sup> *Id.* at § 1415(a).

<sup>157</sup> *Fields*, 459 F.3d at 28 (emphasis in original).

<sup>158</sup> 2 U.S.C. § 1413. *See Fields*, 459 F.3d at 8 (“The [CAA] therefore does nothing to a Member’s Speech or Debate Clause immunity....”).

<sup>159</sup> *Office of Senator Dayton v. Hanson*, 550 U.S. 511, 514, (2007).

<sup>160</sup> Prior to the CAA, an employment-related claim arising from a personnel action that allegedly violated the Constitution could still be brought pursuant to an implied cause of action. *See, e.g., Davis v. Passman*, 442 U.S. 228, 244 (1979) (implying a cause of action for sex discrimination under the Fifth Amendment); *Walker v. Jones*, 733 F.2d 923, 933 (D.C. Cir. 1984) (implying a cause of action for sex discrimination under the Fifth Amendment).

<sup>161</sup> *Browning v. Clerk of the United States House of Representatives*, 789 F.2d 923, 928-29 (D.C. Cir. 1986). *See also, Niedermeier v. Office of Max S. Baucus*, 153 F. Supp. 2d 23, 31 n.5 (D.D.C. 2001) (“It also appears that this [c]ourt lacks subject matter jurisdiction over plaintiff’s amended claim, because the Speech or Debate Clause provides defendant immunity for his legislative acts and this Circuit has defined legislative acts to include personnel actions of members of Congress.”) (citing *Browning*, 789 F.2d at 929).

<sup>162</sup> *Id.* at 928.

<sup>163</sup> *Id.* at 929.

<sup>164</sup> *Forrester v. White*, 484 U.S. 219, 220 (1988).

extended that reasoning to the legislative sphere.<sup>165</sup> In an opinion addressing common law legislative immunity enjoyed by members of the D.C. City Council, rather than Speech or Debate Clause protections enjoyed by Members, the court relied on *Forrester* to hold that the “functions ... legislators exercise in making personnel decisions ... are administrative, not [] legislative.”<sup>166</sup> These cases arguably implied that a Member’s personnel decision should be viewed as nonlegislative, and, therefore, not protected by the Clause.

*Forrester* and *Gross* suggest that the initial shift away from *Browning*’s reasoning predated the enactment of the CAA in 1995. Moreover, the courts have explained that the CAA “does nothing to a Member’s Speech or Debate Clause immunity.”<sup>167</sup> Therefore, it does not appear that the CAA compelled the courts to alter their approach to these types of claims. Yet, after enactment of the CAA, the courts continued to diverge from the course charted by *Browning*, ultimately leading to a rejection of that decision’s determination that the Clause generally acts as a bar to employment-related claims.<sup>168</sup> In the 2004 decision of *Bastien v. Office of Campbell*, the first case addressing how the Clause applies to the CAA, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) “hesitate[d] to embrace” the D.C. Circuit’s reasoning in *Browning*, finding instead that “a personnel decision is not a ‘legislative act,’ ... and is therefore not entitled to immunity.”<sup>169</sup> The Clause provided protections in CAA-related claims, according to the court, only to the extent that other “legislative acts must be proved to establish the claim ...”<sup>170</sup>

Two years later, the D.C. Circuit reconsidered *Browning* in *Fields v. Office of Johnson*.<sup>171</sup> That consolidated case involved CAA claims for racial, gender, and disability discrimination and retaliation brought by a pair of House and Senate staffers.<sup>172</sup> There was no clear majority opinion in *Fields*, but the en banc court was unanimous in deciding both that the Clause does not require automatic dismissal of CAA claims and that the *Browning* framework was no longer consistent with Supreme Court precedent and should be abandoned.<sup>173</sup> The plurality opinion<sup>174</sup> explicitly rejected *Browning*’s test for determining when the Clause protects a Member’s personnel decisions, holding that regardless of the role of the given employee, “many personnel decisions” lack any “nexus” to legislative acts and are, therefore, not protected by the Clause.<sup>175</sup>

The *Fields* plurality, which has been relied upon in subsequent opinions,<sup>176</sup> articulated a new framework for evaluating CAA claims that highlights the distinction between the Clause’s general

<sup>165</sup> *Gross v. Winter*, 876 F.2d 165, 170-72 (D.C. Cir. 1989).

<sup>166</sup> *Id.* at 172.

<sup>167</sup> *Fields*, 459 F.3d at 8. *See also*, 2 U.S.C. § 1413.

<sup>168</sup> *See Fields*, 459 F.3d at 11-13; *Bastien v. Office of Campbell*, 390 F.3d 1301, 1318-19 (10th Cir. 2004).

<sup>169</sup> *Bastien*, 390 F.3d at 1318.

<sup>170</sup> *Id.*

<sup>171</sup> *Fields*, 459 F.3d at 11-13.

<sup>172</sup> *Id.* at 4.

<sup>173</sup> *Id.* at 17; *Id.* at 17 (Rodgers, J., concurring); *Id.* at 25-26 (Brown, J., concurring); *id.* at 18 (Tatel, J., concurring).

<sup>174</sup> Judge Brown’s concurring opinion took a narrower view, suggesting that the CAA creates a “legal fiction” by holding the Member’s office liable for employment discrimination, not the Member or his aides individually. *Id.* at 26 (Brown, J., concurring) The employing office, Judge Brown asserted, should not enjoy the protections of the Clause, only the Member and covered aides if personally implicated. *Id.* at 26-7.

<sup>175</sup> *Fields*, 459 F.3d at 11.

<sup>176</sup> *See Howard*, 720 F.3d at 947 (“Our discussion of *Fields* focuses on Judge Randolph’s plurality opinion because ... it reflects the broadest view of the Speech or Debate Clause.”); *Floyd v. Lee*, 968 F. Supp. 2d 308, 318 (D.D.C. 2013) (applying the *Fields* plurality opinion).

immunity principle and the component evidentiary and testimonial privileges.<sup>177</sup> The plurality determined that the general immunity principle did not “bar” the suit because the personnel actions in question were not themselves legislative acts.<sup>178</sup> However, the plurality reasoned that “when the Clause does not preclude suit altogether, it still ‘protect[s] Members from inquiry into legislative acts or the motivation for actual performance of legislative acts’” through the component evidentiary and testimonial privileges.<sup>179</sup> Thus, although generally not barring a CAA suit altogether, the Clause may “hinder” the suit by “preclud[ing] some relevant evidence.”<sup>180</sup> This was especially so in a claim for discrimination that “rests not on the fact that action was taken ... but on the *reason* that action was taken,” which would likely require the plaintiff to disprove the Member’s proffered motivation for taking the challenged personnel action.<sup>181</sup>

The *Fields* plurality opinion was relied upon in *Howard v. Office of the Chief Administrative Officer of the United States House of Representatives*.<sup>182</sup> That case involved a CAA claim for racial discrimination and retaliation brought by a former House employee.<sup>183</sup> As in the *Fields* plurality, the court determined that the claim itself was not barred, as the personnel action in question was not a “legislative act.”<sup>184</sup> But the court highlighted that “in many employment discrimination cases, proof of ‘pretext’ will be crucial to the success of the claimant’s case,”<sup>185</sup> and those allegations of pretext, the court reasoned, must be proven “using evidence that does not implicate protected legislative matters.”<sup>186</sup> In some cases, the court warned, a plaintiff may not be able to meet the required burden of proof because the Clause bars him “from inquiring into legislative motives ... or conduct part of or integral to the legislative process....”<sup>187</sup> In the instant case, the court remanded to the district court with directions that the plaintiff’s claims be allowed to proceed, under the caveat that “it remain[ed] to be seen” whether, due to the “strictures” of the Clause, the plaintiff would be able to produce sufficient evidence to prove her claim.<sup>188</sup> Indeed, it was ultimately determined that the employee failed to produce sufficient evidence showing the asserted reason for her termination was pretextual.<sup>189</sup>

<sup>177</sup> *Id.* at 13-15.

<sup>178</sup> *Id.* at 13. Nor did the claims seek “to predicate liability on protected conduct.” *Id.*

<sup>179</sup> *Id.* at 14 (citing *Brewster*, 408 U.S. at 508).

<sup>180</sup> *Id.* at 14.

<sup>181</sup> *Id.* at 15-16 (emphasis in original) (“For example, if a Senator claimed to have fired an employee because speeches the employee wrote did not accurately reflect the Senator’s legislative objectives, the Speech or Debate Clause would preclude the employee from proving her case by demonstrating that the speeches she wrote did in fact accurately reflect the Senator’s legislative objectives. In such a case, if the evidence ultimately bore out the affiant’s account of the plaintiff’s discharge, then the very inquiry leading to that conclusion would be unconstitutional.”). The Senate office appealed the D.C. Circuit’s decision directly to the Supreme Court. *Office of Senator Dayton*, 550 U.S. at 511. The Court denied certiorari, while also determining that it lacked jurisdiction under the CAA to hear an appeal of the interlocutory order. *Id.* at 515.

<sup>182</sup> *Howard*, 720 F.3d at 947.

<sup>183</sup> *Id.* at 941.

<sup>184</sup> *Id.* at 949.

<sup>185</sup> *Id.* at 947. In *McDonnell Douglas Corp. v. Green*, the Supreme Court established a framework for certain types of employment discrimination claims in which after a plaintiff proves a prima facie case for discrimination, the employer rebuts by producing evidence of a nondiscriminatory purpose, which the plaintiff then attempts to demonstrate is pretextual. 411 U.S. 792, 802-804 (1973).

<sup>186</sup> *Id.* at 949.

<sup>187</sup> *Id.* at 950.

<sup>188</sup> *Howard*, 720 F.3d at 950.

<sup>189</sup> *Howard v. Office of the Chief Admin. Officer of the United States House of Representatives*, No. 15-5243, 2015 (continued...)

The CAA also authorizes congressional employees to bring sexual harassment claims for violations of Title VII of the Civil Rights Act of 1964,<sup>190</sup> although such claims appear to have only rarely been evaluated by federal courts. In *Scott v. Office of Alexander*, the former scheduler for a Member brought a CAA claim that included counts alleging sexual harassment and retaliation for reporting that harassment in the form of a demotion.<sup>191</sup> The majority of the district court decision focused on the plaintiff’s retaliation claim.<sup>192</sup> Applying *Fields*, the court determined first that the demotion itself was not a legislative act, and thus the claim was not barred by the Clause’s general immunity principle.<sup>193</sup>

However, the court also held that a retaliation claim “operates in the same way” as the discrimination claims brought in *Fields* and *Howard*.<sup>194</sup> Thus, the plaintiff would be required to rebut the Member’s assertion of nonretaliatory reasons for her demotion in order to show that it was pretextual.<sup>195</sup> Through an affidavit, the Member had asserted that Scott was demoted because of scheduling errors that caused him to miss votes and committee hearings.<sup>196</sup> The court concluded that:

Although Plaintiff argues that her “case would not require impermissibly questioning anything that Defendant may have done during the course of an actual vote or hearing,” whether the Congressman missed or attended an actual vote or hearing, and the reasons why he may have attended or missed an actual vote or hearing, are inquiries that impermissibly relate to the legislative process. Accordingly, the Court finds that Defendant has asserted, through the Congressman’s affidavit, legitimate, non-retaliatory reasons for Plaintiff’s demotion that are protected from inquiry by the Speech or Debate Clause.<sup>197</sup>

As a result, the court held that “the evidentiary privilege of the Clause prevents Plaintiff from refuting the Member’s stated reasons for her demotion.”<sup>198</sup> Because the plaintiff had not presented any evidence “unrelated to the Congressman’s stated reasons for Plaintiff’s demotion that would not require an inquiry into [] legislative acts,” the court dismissed the retaliation claim.<sup>199</sup>

With respect to the sexual harassment claim, the court held that the defendant’s argument that the claim was barred by the Clause was not properly before the court.<sup>200</sup> Nevertheless, the court provided some insight into how the Clause may apply to evidence supporting alleged sexual harassment, as opposed to alleged retaliation. Whereas the plaintiff was “precluded from seeking discovery or otherwise inquiring about the Congressman’s reasons for removing Plaintiff as

(...continued)

U.S. App. LEXIS 22290, at \*2 (D.C. Cir. 2015) (“Nor has appellant produced sufficient evidence for a reasonable jury to find that the appellee’s asserted non-discriminatory reason for her termination—that she was insubordinate—was pretextual and that the appellee discriminated against her on the basis of race.”).

<sup>190</sup> 2 U.S.C. § 1302(a)(2); 42 U.S.C. §§ 2000e-2000e-17.

<sup>191</sup> *Scott v. Office of Alexander*, 522 F. Supp. 2d 262, 265 (D.D.C. 2007).

<sup>192</sup> *Id.* at 267-72.

<sup>193</sup> *Id.* at 269 (“Plaintiff’s retaliation claim predicates liability on conduct that does not constitute core legislative activities.”).

<sup>194</sup> *Id.* at 270.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 270-71.

<sup>197</sup> *Scott*, 522 F. Supp. 2d at 271.

<sup>198</sup> *Id.* at 272.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 271.

Scheduler,” the court suggested that “[t]he proper focus of the remaining discovery ... appears to be the conduct that other individuals may have observed at times relevant to the Complaint, and what Plaintiff may have told others about such conduct.”<sup>201</sup> That evidence, it would appear, would not be protected by the Clause’s component privileges.

In sum, the Clause’s general immunity principle does not typically act as an absolute bar to employment-related claims brought under the CAA.<sup>202</sup> However, it would appear that there may be cases in which a CAA claim fails as a result of the application of the Clause’s evidentiary and testimonial privileges, which may effectively block a plaintiff from presenting evidence of related legislative acts necessary to support the claim.<sup>203</sup>

## Nondisclosure Privilege: A Continued Circuit Split

Although the precise scope of the protections afforded by the Clause have not been clearly articulated by the Supreme Court, there appears to be some agreement among the lower courts that the Clause provides immunity from direct liability for legislative acts; prohibits the use of legislative-act evidence in the course of litigation; and protects a Member from being compelled to respond to questioning regarding his legislative acts.<sup>204</sup> There is stark disagreement, however, as to whether the Clause encompasses a general documentary “non-disclosure privilege” that applies unrelated to whether such documents are introduced into evidence.<sup>205</sup> When accepted, this privilege appears to be included within the testimonial component of the Clause, and may apply in a variety of situations, including protecting Members from compelled compliance with an administrative<sup>206</sup> or civil discovery<sup>207</sup> subpoena for legislative-act documents, or from disclosures reflecting legislative acts that occur during a search executed as part of a criminal investigation.<sup>208</sup>

The D.C. Circuit has established the documentary nondisclosure privilege.<sup>209</sup> In a series of opinions, the circuit court determined that the Clause bars any compelled disclosure—not just the evidentiary use—of written materials that fall “within the sphere of legitimate legislative activity.”<sup>210</sup> According to the D.C. Circuit, this privilege is broad and “absolute,” and applies with equal “vigor” as the other aspects of the Clause.<sup>211</sup>

The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) and the Third Circuit have rejected this documentary nondisclosure privilege, considering it an undue expansion of the

<sup>201</sup> *Id.* at 274.

<sup>202</sup> *See Fields*, 459 F.3d at 11.

<sup>203</sup> *See Howard*, 720 F.3d at 949-50.

<sup>204</sup> *See, e.g., Renzi*, 651 F.3d at 1035 n. 27 (“To reiterate, the Court has identified three distinct privileges in the Clause: a testimonial privilege, an evidentiary privilege, and a privilege against liability.”); *Howard*, 720 F.3d at 946 (“As a general matter, the Speech or Debate Clause affords three distinct protections: (a) an immunity from ‘a civil or criminal judgment ...’ (b) an evidentiary privilege ... and (c) a testimonial and non-disclosure privilege ...”) (citations omitted).

<sup>205</sup> *Compare Rayburn*, 497 F.3d at 655 (holding that the testimonial component of the Clause includes a documentary nondisclosure privilege), with *Renzi*, 651 F.3d at 1034 (holding that the testimonial component of the Clause does not create the documentary nondisclosure privilege outlined in *Rayburn*).

<sup>206</sup> *See Comm. on Ways & Means*, 161 F. Supp. 3d at 238-45.

<sup>207</sup> *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856, 857-59 (D.C. Cir. 1988).

<sup>208</sup> *Rayburn*, 497 F.3d at 660.

<sup>209</sup> *See id.* at 660-62; *Brown & Williamson*, 62 F.3d at 420; *MINPECO*, 844 F.2d at 858.

<sup>210</sup> *Rayburn*, 497 F.3d at 660.

<sup>211</sup> *Brown & Williamson*, 62 F.3d at 420-21.

Clause.<sup>212</sup> Instead, these courts have held, at least in criminal cases, that the Clause prohibits only the evidentiary *use* of privileged documents, not their mere disclosure to the government for review as part of an investigation.<sup>213</sup> The disagreement has not been addressed by the Supreme Court.<sup>214</sup>

The D.C. Circuit position is perhaps best exemplified by two cases: *Brown & Williamson Tobacco Corporation v. Williams* and *United States v. Rayburn House Office Building*.<sup>215</sup>

*Brown & Williamson* arose when a former employee of a law firm disclosed to a congressional committee stolen documents that were obtained while the firm was representing Brown & Williamson.<sup>216</sup> The law firm brought an action against the former employee in state court, and during that proceeding, the court issued subpoenas to two Members of the committee requiring the return of the stolen documents.<sup>217</sup> The case was removed to federal court, where the Members sought to quash the subpoenas on Speech or Debate grounds.<sup>218</sup>

The court agreed with the Members, blocking the subpoenas and extending the Clause to include a general nondisclosure privilege.<sup>219</sup> In doing so, the court rejected three conclusions that had been reached by the Third Circuit in an earlier case. First, the court rebuffed the idea that a Member must be named as a party to the suit in order for litigation to “distract them from their legislative work.”<sup>220</sup> “Discovery procedures” in any civil case, the court reasoned, “can prove just as intrusive” as being a party to a case.<sup>221</sup> The court similarly disagreed with the assertion that the testimonial component of the Clause applies only when Members or their aides are “personally questioned,” suggesting instead that “documentary evidence can certainly be as revealing as oral communications.”<sup>222</sup> Finally, the court dismissed the assertion that when applied to documents, the Clause’s protection “is one of nonevidentiary use, not of nondisclosure.” Instead, noting the antidistract purpose of the Clause, the court held that “the nature of the use to which documents will be put ... is immaterial if the touchstone is interference with legislative activities.”<sup>223</sup> The court concluded that “a party is no more entitled to compel congressional testimony—or production of documents—than it is to sue a congressman.”<sup>224</sup>

The D.C. Circuit later extended the nondisclosure privilege to scenarios in which the government executes a search warrant as part of a criminal investigation of a Member.<sup>225</sup> In *United States v.*

<sup>212</sup> *Renzi*, 651 F.3d at 1032-39; *Fattah*, 802 F.3d at 524-29; In re Grand Jury Investigation, 587 F.2d 589, 595-97 (3rd Cir. 1978).

<sup>213</sup> *Fattah*, 802 F.3d at 529.

<sup>214</sup> *Rayburn*, 651 F.3d at 1033 (noting that “to date the Court has not spoken on whether the privilege conferred by the Clause includes a non-disclosure privilege”); *Comm. on Ways & Means*, 161 F. Supp. 3d at 238.

<sup>215</sup> *Brown & Williamson*, 62 F.3d at 411-421; *Rayburn*, 497 F.3d at 659-63.

<sup>216</sup> *Brown & Williamson*, 62 F.3d at 411-12.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 412.

<sup>219</sup> *Id.* at 420 (“We do not accept the proposition that the testimonial immunity of the Speech or Debate Clause only applies when Members or their aides are personally questioned. Documentary evidence can certainly be as revealing as oral communications ...”).

<sup>220</sup> *Id.* at 418 (citing *MINPECO*, 844 F.2d 856.).

<sup>221</sup> *Id.*

<sup>222</sup> *Brown & Williamson*, 62 F.3d at 420.

<sup>223</sup> *Id.* at 421.

<sup>224</sup> *Id.*

<sup>225</sup> *Rayburn*, 497 F.3d at 656.



*Rayburn House Office Building*, a Member sought the return of documents seized by the Federal Bureau of Investigation (FBI) during a search of the Member's office, arguing the search—which was pursuant to a warrant for nonlegislative, unprotected documents—was executed in a way that violated the Clause.<sup>226</sup> In order to distinguish between protected and unprotected documents, the warrant permitted FBI agents to review “all of the papers in the Congressman's office.”<sup>227</sup>

The D.C. Circuit held that the search violated the Clause because the Executive's procedures “denied the Congressman any opportunity to identify and assert the privilege with respect to legislative materials *before* their compelled disclosure to Executive agents.”<sup>228</sup> The court noted that despite the limited scope of the warrant, the FBI's review of the Member's papers to determine which were responsive “must have resulted in the disclosure of legislative materials to agents of the executive.”<sup>229</sup> That compelled disclosure was inconsistent with the protections of the Clause.<sup>230</sup> In reaching this conclusion, the court reaffirmed the nondisclosure privilege articulated in *Brown & Williamson*, and then extended it to the criminal context, concluding that “there is no reason to believe that the bar does not apply in the criminal as well as the civil context.”<sup>231</sup> The court also reaffirmed its view of the absolute nature of the nondisclosure privilege, noting that the “non-disclosure privilege of written materials ... is [] absolute, and thus admits of no balancing.”<sup>232</sup>

The court carefully distinguished between the lawfulness of searching a congressional office pursuant to a search warrant—which the court held was clearly permissible—and the lawfulness of the way the search was executed.<sup>233</sup> The court declined, however, to expressly delineate acceptable procedures that could avoid future violations, noting only that there appears to be “no reason why the Congressman's privilege under the Speech or Debate Clause cannot be asserted at the outset of a search in a manner that also protects the interests of the Executive in law enforcement.”<sup>234</sup>

The D.C. Circuit's legal reasoning in *Rayburn* has been rejected by both the Ninth and Third Circuits.<sup>235</sup> In *United States v. Renzi*, the Ninth Circuit held that the Clause does not prohibit the compelled disclosure of legislative documents to the government in the course of executing a warrant in a criminal investigation, at least when the underlying criminal action is not itself

<sup>226</sup> *Id.* at 655.

<sup>227</sup> *Id.* at 661. This instance was the first time a sitting Member's office was searched by the executive branch. *Id.* at 659.

<sup>228</sup> *Id.* at 662.

<sup>229</sup> *Id.* at 661. The court also held that the FBI's copying of hard drives was permissible, since procedures allowed for the Member to assert privilege prior to FBI review of the drive. *Id.* at 663.

<sup>230</sup> In reaching its conclusion, the court invoked the distraction and disruption rationale, noting that:

[T]his compelled disclosure clearly tends to disrupt the legislative process: exchanges between a Member of Congress and the Member's staff or among Members of Congress on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity. This chill runs counter to the Clause's purpose of protecting against disruption of the legislative process.

*Id.* at 661.

<sup>231</sup> *Id.* at 660.

<sup>232</sup> *Rayburn*, 497 F.3d at 662.

<sup>233</sup> *Id.* at 659.

<sup>234</sup> *Id.* at 662. The court observed that the question of how these searches should proceed “is best determined by the legislative and executive branches in the first instance.” *Id.* at 663.

<sup>235</sup> *Renzi*, 651 F.3d at 1032-39; *Fatah*, 802 F.3d at 524-29.

barred by the immunity prong of the Clause.<sup>236</sup> *Renzi* involved a Speech or Debate Clause challenge brought by a former Member to portions of a 48-count indictment that included charges that he agreed to provide certain legislative favors in exchange for personal benefits.<sup>237</sup> Specifically, the Member relied on the nondisclosure privilege articulated in *Rayburn* to argue, in part, that the government’s unlawful review of privileged documents allowed it to obtain evidence that was used against him.<sup>238</sup> The Ninth Circuit rebuffed *Renzi*’s argument, as well as the reasoning in *Rayburn*, instead finding that the Clause does not encompass a documentary nondisclosure privilege.<sup>239</sup>

After noting that the Supreme Court has not recognized the existence of a general nondisclosure privilege, the *Renzi* court laid out the three principal reasons that led it to disagree with the D.C. Circuit’s reasoning. First, the court objected to the D.C. Circuit’s reliance on the notion that “distraction” from a Member’s legislative duty, on its own, can serve “as a touchstone for application of the Clause’s testimonial privilege.”<sup>240</sup> Instead, the court reasoned that because “legislative distraction is not the primary ill the Clause seeks to cure,” that rationale must be “anchored” to a barred action—for example, an investigation into a protected act—before it can preclude inquiry.<sup>241</sup> In cases where the underlying action is not precluded, the court stated that “other legitimate interests exist” and must be taken into account, most notably “the ability of the executive to adequately investigate and prosecute corrupt legislators for non-protected activity.”<sup>242</sup>

Second, the circuit court indicated that previous decisions by the Supreme Court have suggested that the executive branch *may* review legislative materials as part of an investigation.<sup>243</sup> For example, in *United States v. Helstoski*, the Supreme Court reasoned that the executive branch could redact “legislative” aspects of certain documents so that the “remainder of the evidence would be admissible.”<sup>244</sup> From this language, the circuit court noted that:

Because the Executive would be hard pressed to redact a document it was constitutionally precluded from obtaining or reviewing, we see no tenable explanation for this caveat except that the Clause does not blindly preclude disclosure and review by the Executive of documentary “legislative act” evidence.<sup>245</sup>

Third, the court determined that any interpretation of the Clause that permitted the courts, but not the executive branch, to review protected legislative documents would be inconsistent with the separation-of-powers rationale that undergirds the Clause.<sup>246</sup> The Clause, the court noted, is a “creature born of separation of powers” and thus must apply “in equal scope and with equal

<sup>236</sup> *Renzi*, 651 F.3d at 1032-39.

<sup>237</sup> *Id.* at 1017-18.

<sup>238</sup> *Id.* at 1019. The court also rejected *Renzi*’s assertion that the charges were based on “legislative acts.” *Id.* at 1021-27.

<sup>239</sup> *Id.* at 1032.

<sup>240</sup> *Id.* at 1034.

<sup>241</sup> *Renzi*, 651 F.3d at 1037 (“Concern for distraction alone cannot bar disclosure and review when it takes place as part of an investigation into otherwise unprotected activity.”).

<sup>242</sup> *Id.* at 1036.

<sup>243</sup> *Id.* at 1037.

<sup>244</sup> *Helstoski*, 442 U.S. at 488 n.7.

<sup>245</sup> *Renzi*, 651 F.3d at 1037.

<sup>246</sup> *Id.* at 1037-38.

strength to both the Executive and the Judiciary.”<sup>247</sup> The court specifically criticized the D.C. Circuit’s opinion in *Rayburn* on the grounds that it prohibited “any executive branch exposure to records of legislative acts’ ... while noting that the Judiciary could review evidence claimed to be privileged.”<sup>248</sup> “Such a distinction,” the court stated, “cannot exist.”<sup>249</sup>

The precise holding of *Renzi* appears to be that the Clause does not prohibit the government from reviewing protected legislative documents as part of the execution of a warrant connected to an investigation into nonlegislative acts.<sup>250</sup> However, the opinion suggests that there may be times when the testimonial component of the Clause would create a nondisclosure privilege in response to a *subpoena* for documents. Citing to the concurrence in *Rayburn*, the Ninth Circuit indicated that execution of a warrant has no testimonial aspects since the Member is not required to “respond” in any way.<sup>251</sup> However, the court reasoned that “it is entirely true that sometimes the very disclosure of documentary evidence in response to a subpoena duces tecum may have some testimonial import.”<sup>252</sup> This language would appear to suggest that the Ninth Circuit has not foreclosed the idea of the existence of some form of documentary nondisclosure privilege—for instance, one more intimately connected to the testimonial privilege component—that may apply in situations where a subpoena is issued for legislative documents. The central focus for the court appears to have been whether the disclosure is “testimonial,” and therefore more directly implicating the “question[ing]” prohibited by the Clause.<sup>253</sup>

The Third Circuit similarly rejected the existence of a documentary nondisclosure privilege during criminal investigations in *In re Fattah*.<sup>254</sup> There, a Member challenged a warrant, served on Google, authorizing the government to search his email on the grounds that such a search was barred by the Clause.<sup>255</sup> Specifically, the Member asserted that the privilege created by the Clause was “one of non-disclosure.”<sup>256</sup> The court rejected this argument, holding that “it cannot be ... that the privilege prohibits disclosure of evidentiary records to the Government during the course of an investigation.”<sup>257</sup> The court rested its decision primarily on the effect such a broad privilege would have on criminal prosecutions, noting that a nondisclosure privilege during criminal investigations would “shelter” Members from criminal responsibility and “eradicate the integrity of the legislative process” by “unduly amplify[ing] the protections” of the Clause.<sup>258</sup> The court ultimately refused to extend the testimonial component of the Clause to documentary disclosures, concluding that:

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<sup>247</sup> *Id.* at 1038.

<sup>248</sup> *Id.* (citing *Rayburn*, 497 F.3d at 660).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 1038-39.

<sup>251</sup> *Renzi*, 651 F.3d at 1037 n. 28.

<sup>252</sup> *Id.* at 1037 n. 28.

<sup>253</sup> *Id.*

<sup>254</sup> *Fattah*, 802 F.3d at 524-29. *See also*, *In re Grand Jury Investigation*, 587 F.2d 589, 595-97 (3rd Cir. 1978) (holding that “when applied to records or third-party testimony” the privilege afforded by the Clause “is one of nonevidentiary use, not of nondisclosure”).

<sup>255</sup> *Fattah*, 802 F.3d at 521-22.

<sup>256</sup> *Id.* at 524.

<sup>257</sup> *Id.* at 528.

<sup>258</sup> *Id.* at 529 (“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.”) (quoting *Renzi*, 651 F.3d at 1036).

... while the Speech or Debate Clause prohibits hostile questioning regarding legislative acts in the form of testimony to a jury, it does not prohibit disclosure of Speech or Debate Clause privileged documents to the Government. Instead, as we have held before, it merely prohibits the evidentiary submission and use of those documents.<sup>259</sup>

How, and whether, the Supreme Court resolves this ongoing disagreement over the existence of a documentary nondisclosure privilege could have a significant impact on the protections afforded to Members by the Clause. For example, if the Court were to adopt the position of the Third and Ninth Circuits, that ruling would directly limit a Member’s ability to invoke the Clause as a shield against the disclosure of documents to the executive branch during a criminal investigation. More generally, however, the disagreement between the D.C. Circuit and the Third and Ninth Circuits is one relating to the fundamental purpose of the Clause.<sup>260</sup> The opinions in *Renzi* and *Fattah* appear to have adopted a legal reasoning that minimizes the role of the “distraction” rationale in defining the scope of the Clause. Were the Supreme Court to embrace that reasoning, it could potentially lead to a narrowing of the Clause’s protections, especially in scenarios in which information is sought from a Member in a proceeding to which he is not a party.

## The Acquisition and Use of Information by Congress

A final line of cases relates to Speech or Debate Clause protections for the acquisition and use of information by Congress.<sup>261</sup> These cases typically arise from lawsuits in which a party asks a court to invalidate or block a congressional subpoena, or to direct Congress or its Members in how they may use information that is within their possession. Generally, a court will not interfere with lawful efforts by Congress to exercise its subpoena power, nor will a court act to limit the ability of Members to use or distribute information within the legislative sphere.<sup>262</sup> In some sense, these cases tend to emphasize the structural and institutional aspects of the Clause’s role in the separation of powers.<sup>263</sup>

In *Eastland v. United States Serviceman’s Fund*, the Supreme Court concluded that the Clause acts as a significant barrier to judicial interference in Congress’s exercise of its subpoena power.<sup>264</sup> In this case, a private nonprofit organization filed suit against the Chairman of a Senate subcommittee asking the Court to enjoin a congressional subpoena issued to a bank for the

<sup>259</sup> *Id.*

<sup>260</sup> In some sense, the debate concerns how, under the Clause, the purpose of preventing “distraction” should be weighed against the purpose of preserving “independence.” See *Renzi*, 651 F.3d at 1034 (“*Rayburn* rests on the notion that ‘distraction’ of Members and their staffs from their legislative tasks is a principal concern of the Clause, and that distraction *alone* can therefore serve as a touchstone for application of the Clause’s testimonial privilege ... We disagree with both *Rayburn*’s premise and its effect and thus decline to adopt its rationale.”).

<sup>261</sup> See, e.g., *Eastland*, 421 U.S. at 501-11; *Brown & Williamson*, 62 F.3d at 416-17; *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936).

<sup>262</sup> See *Eastland*, 421 U.S. at 501; *Brown & Williamson*, 62 F.3d at 416 (“The privilege also permits Congress to conduct investigations and obtain information without interference from the courts, at least when these activities are performed in a procedurally regular fashion.”); *Dombrowski v. Burbank*, 358 F.2d 821, 823-24 (1966) (“Since the documents are now held by the Subcommittee ... We cannot prohibit, nor are we asked to prohibit, [their] use of the documents in the course of their official business for the Subcommittee ...”).

<sup>263</sup> See, *Dombrowski*, 358 F.2d at 824 (noting the importance of “considerations resting upon a proper allocation of powers and responsibilities among the co-ordinate branches of the federal system....”).

<sup>264</sup> *Eastland*, 421 U.S. at 501.

nonprofit's account information.<sup>265</sup> The subpoena was issued as part of an investigation into alleged "subversive" activities harmful to the U.S. military conducted by the organization.<sup>266</sup> The Court held that because the "power to investigate and to do so through compulsory process plainly" constitutes an "indispensable ingredient of lawmaking," the Clause made the subpoena "immune from judicial interference."<sup>267</sup> *Eastland* is generally cited for the proposition that the Clause prohibits courts from entertaining preenforcement challenges to congressional subpoenas.<sup>268</sup> As a result, the lawfulness of a subpoena usually may not be challenged until Congress seeks to enforce the subpoena through either a civil action or contempt of Congress.<sup>269</sup>

While it is generally true that courts will not interfere in valid congressional attempts to obtain information, especially through the exercise of the subpoena power, the concurrence in *Eastland* and a subsequent appellate court decision suggests that the restraint exercised by the courts in deference to the separation of powers is not absolute.<sup>270</sup> Justice Marshall's concurrence in *Eastland* clarified that the Clause "does not entirely immunize a congressional subpoena from challenge."<sup>271</sup> Rather, according to Justice Marshall, the Clause requires only that a Member "may not be called upon to defend a subpoena against constitutional objection."<sup>272</sup> Thus, Justice Marshall implied that if a challenge to the legitimacy of a subpoena is directed not at Congress or its Members, it may be permitted to proceed.<sup>273</sup>

Such a claim arose, however, in the case of *United States v. AT&T*.<sup>274</sup> In that case, a congressional subcommittee subpoena was issued to AT&T for all letters sent to the company by the Department of Justice (DOJ) that had identified certain phone lines the DOJ wished to monitor.<sup>275</sup> DOJ filed suit, seeking to enjoin AT&T from complying with the subpoena, citing national security concerns.<sup>276</sup> The subcommittee Chairman intervened in the case, asserting that judicial interference in the subcommittee's investigation was barred by the Clause.<sup>277</sup> After the court's attempts to initiate a settlement between the parties failed,<sup>278</sup> the D.C. Circuit ultimately rejected the Chairman's argument, noting generally that the Clause "was not intended to immunize

<sup>265</sup> *Id.* at 494-96.

<sup>266</sup> *Id.* at 493.

<sup>267</sup> *Id.* at 501.

<sup>268</sup> *In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987) ("The Supreme Court has held analogously that the Speech or Debate Clause shields Congressmen from suit to block a Congressional subpoena because making the legislators defendants 'creates a distraction and forces Members [of Congress] to divert their time, energy, and attention from their legislative tasks to defend the litigation.'") (citing *Eastland*, 421 U.S. at 503.).

<sup>269</sup> *United States v. Ryan*, 402 U.S. 530, 532 (1971) (noting that in the judicial context that "one who seeks to resist the production of desired information [has a] choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal"); *Eastland*, 421 U.S. at 515-16 (Marshall, J., concurring).

<sup>270</sup> *Eastland*, 421 U.S. at 513-18; *United States v. Am. Tel. & Telegraph Co.*, 567 F.2d 121, 129-30 (D.C. Cir. 1977).

<sup>271</sup> *Eastland*, 421 U.S. at 513 (Marshall, J., concurring).

<sup>272</sup> *Id.* at 516.

<sup>273</sup> *Id.* at 517. Justice Marshall did not speculate as to what such a case may look like or "who might be the proper parties defendant." *Id.*

<sup>274</sup> *United States v. AT&T*, 567 F.2d 121, 123-25 (D.C. Cir. 1977).

<sup>275</sup> *Id.* at 123-24.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 124.

<sup>278</sup> In a prior iteration of the case, the D.C. Circuit had requested that the two branches seek a settlement, reasoning that "[b]efore moving on to a decision of such nerve-center constitutional questions, we pause to allow for further efforts at a settlement." *United States v. AT&T*, 551 F.2d 384, 394 (1976).

congressional investigatory actions from judicial review.”<sup>279</sup> Instead, the court concluded, the Clause “is personal to members of Congress” such that when Members or their aides are not “harassed by personal suit against them, the Clause cannot be invoked to immunize the congressional subpoena from judicial scrutiny.”<sup>280</sup> The court went on to establish an exception to the general prohibition on preenforcement interference with congressional subpoenas. When a party is “not in a position to assert its claim of constitutional right by refusing to comply with a subpoena,” because the subpoena was issued to a neutral third party, the Clause “does not bar the challenge so long as members of the Subcommittee are not, themselves, made defendants in a suit to enjoin implementation of the subpoena.”<sup>281</sup>

Once information is in the possession of Congress, courts generally will not curtail the ability of Members to use or distribute that information within the legislative sphere. For example, in *Doe v. McMillan*, a case dealing with the inclusion of specific students’ names in a committee report on the D.C. public schools, the Supreme Court noted that “[a]lthough we might disagree with the Committee as to whether it was necessary, or even remotely useful, to include the names of individual children in the ... Committee Report, we have no authority to oversee the judgment of the Committee in this respect ...”<sup>282</sup>

The D.C. Circuit has also issued a series of opinions protecting Congress’s authority to freely and independently assess and use information within its possession, no matter how it was obtained. In *Hearst v. Black*, the court concluded that it was not within its authority to tell a Senate committee that it was barred from “keeping” or “making any use of” certain unlawfully obtained documents.<sup>283</sup> Similarly, in *McSurely v. McClellan*, a case involving the receipt of documents by a committee that were obtained pursuant to an unlawful search by a congressional investigator, the court noted that “the law is clear that even though material comes to a legislative committee by means that are unlawful or otherwise subject to judicial inquiry the subsequent use of the documents by the committee staff in the course of official business is privileged legislative activity.”<sup>284</sup> Finally, in *Brown & Williamson*, the court suggested that the Clause supplied Congress with the “privilege to use materials in its possession without judicial interference.”<sup>285</sup>

These principles were applied recently in the case of *Senate Permanent Subcommittee on Investigations v. Ferrer*,<sup>286</sup> in which a Senate subcommittee initiated a civil action to enforce a subpoena issued to the Chief Executive Officer (CEO) of an online advertising website for documents relating to sex trafficking.<sup>287</sup> As part of that proceeding, the CEO asked the D.C. Circuit to order that the subcommittee destroy or return certain documents he had produced in response to the subpoena.<sup>288</sup> The court refused to comply with that request, citing to the aforementioned cases, and reasoning that “[t]o circumscribe the committee’s use of material in its

<sup>279</sup> *AT&T*, 567 F.2d at 129.

<sup>280</sup> *Id.* at 130.

<sup>281</sup> *Id.* at 129. This principle builds off the *Perlman* doctrine, which generally holds that a preenforcement challenge to a subpoena may be appropriate when the subpoena is issued to a neutral third party, rather than the party that owns the constitutional privilege. *Perlman v. United States*, 247 U.S. 7, 12 (1918).

<sup>282</sup> *Doe v. McMillan*, 412 U.S. 306, 313 (1973).

<sup>283</sup> *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936).

<sup>284</sup> *McSurely v. McClellan*, 553 F.2d 1277, 1296-97 (D.C. Cir. 1976).

<sup>285</sup> *Brown & Williamson*, 62 F.3d at 416. *See also, Dombrowski*, 358 F.2d at 823-24.

<sup>286</sup> *Senate Permanent Subcomm. on Investigations v. Ferrer* 856 F.3d 1080, 1085-87 (D.C. Cir, 2017).

<sup>287</sup> *Id.* at 1084.

<sup>288</sup> *Id.*

physical possession would ... ‘destroy[.]’ the independence of the Legislature and ‘invade[.]’ the constitutional separation of powers.”<sup>289</sup> The court ultimately held that “the separation of powers, including the Speech or Debate Clause, bars this court from ordering a congressional committee to return, destroy, or refrain from publishing the subpoenaed documents.”<sup>290</sup>

## Conclusions

The Speech or Debate Clause is perhaps the greatest constitutional bulwark against inappropriate executive or judicial intrusions into both the functioning of Congress as an institution and the representative role of individual Members. The Clause seeks to ensure an independent legislature by providing Members with immunity from liability for legislative acts in both criminal and civil cases. That immunity appears to be complemented by both an evidentiary and a testimonial privilege that protects against the compelled disclosure of information reflecting those acts. However, the scope of those privileges, especially with regard to the disclosure of documents for nonevidentiary purposes, is subject to debate among the federal courts. The issue would appear to be ripe for Supreme Court review.

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<sup>289</sup> *Id.* at 1086.

<sup>290</sup> *Id.*