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## Cash in the Freezer: Conducting Midnight Raids to Restore Trust in the House

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# CASH IN THE FREEZER: CONDUCTING MIDNIGHT RAIDS TO RESTORE TRUST IN THE HOUSE

MATT KELLY\*

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#### INTRODUCTION

On the evening of Saturday, May 20, 2006, Federal Bureau of Investigation agents raided the Capitol Hill office of Congressman William Jefferson, searching for evidence in connection to a corruption investigation.<sup>1</sup> Several members of a court-ordered filter team accompanied the agents for the purpose of sifting out potentially privileged legislative material.<sup>2</sup> During the search, which lasted through the night and into the early afternoon hours of the next day, agents seized two boxes of paper documents and several computer hard drives.<sup>3</sup> The reason for the relative secrecy and added layer of protocol, represented by the filter team, was because an authorized search warrant had not been executed on a Congressional office in the history of the United States.<sup>4</sup> Outrage soon followed.<sup>5</sup>

On one hand, the indignation following the FBI's search seems confusing; after all, the FBI met the basic requirement of probable cause needed to obtain the warrant.<sup>6</sup> Prior to the raid on his office, \$90,000 in cash had been found in Congressman Jefferson's home freezer, wrapped in

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1. Philip Shenon, *FBI Searches Congressman's Office in Ethics Inquiry*, N.Y. TIMES, May 21, 2006, at A22 (outlining the raid and discussing the underlying accusations of money given to Congressman Jefferson in exchange for using his influence to help a company, iGate, win government contracts).

2. *In re Search of the Rayburn House Office Bldg. Room No. 2113*, D.C. 20515, 432 F. Supp. 2d 100, 106 (D.D.C. 2006) [hereinafter Rayburn] (delineating the filter teams—one for paper documents and one for computer files—to be made up of FBI agents not connected to the investigation or prosecution of Congressman Jefferson).

3. *Id.*; see Shenon, *supra* note 1, at A22 (indicating that at the time the article was written on Sunday, May 21, 2006, FBI agents were still searching the office).

4. See Editorial, *Searching the Congressman's Office*, N.Y. TIMES, May 24, 2006, at A26 (noting that the first search executed on a Congressional office in 217 years riled lawmakers in both parties, and concluding that the explosiveness of the argument could be destructive to other on-going criminal investigations into congressional actions).

5. See David Johnston & Carl Hulse, *Gonzales Said He Would Quit in Raid Dispute*, N.Y. TIMES, May 27, 2006, at A1 (discussing the fact that Attorney General Gonzales and FBI Director Mueller both threatened resignation if the executive returned the materials to Congressman Jefferson because the two men felt an obligation to protect evidence in a criminal investigation); see also Carl Hulse & David Johnston, *House Leaders Demand Return of Seized Files*, N.Y. TIMES, May 25, 2006, at A1 (reporting that Republican and Democratic leaders of the House demanded the return of the files seized in the search, that the search warrant be voided, and that the Justice Department immediately halt its review of the documents in question). But see Gary Langer, *Poll: Americans Support Searches*, ABC NEWS, June 1, 2006, available at <http://abcnews.go.com/Politics/PollVault/story?id=2025343&page=1> (indicating that eighty-six percent of Americans agreed that the FBI should be allowed to search a Congress member's office with a warrant).

6. *Rayburn*, 432 F. Supp. 2d at 105-06 (discussing the government's eighty-three page affidavit in support of its application for a search warrant, and concluding that it established probable cause to believe that evidence of the bribery crime would be found in Congressman Jefferson's office).

aluminum foil and placed in frozen food containers.<sup>7</sup> The FBI also had knowledge about Congressman Jefferson's overseas contacts, and believed that he engaged in legislative acts for the express purpose of helping a company win government contracts.<sup>8</sup>

On the other hand, the outrage over the execution of a search warrant on Congressman Jefferson's office went to the heart of a constitutional provision that, according to Congressman Jefferson and his allies, should have prevented a division of the executive branch from searching legislative offices.<sup>9</sup> At the hearing where Jefferson argued for the return of property taken from his office, his main point emphasized that this constitutional provision—known as the Speech or Debate Clause—prohibits the executive from performing a search on a congressional office.<sup>10</sup> The reason, according to Jefferson, is that the history of legislative privilege—formed in England hundreds of years ago, trailing down through Supreme Court and District of Columbia Circuit Court of Appeals precedent to the present time—precludes exactly the sort of search that occurred on the night of Saturday, May 20, 2006.<sup>11</sup> Congressman Jefferson lost.<sup>12</sup>

This Comment argues that where the executive has probable cause to request a search warrant on legislative offices, the Speech or Debate Clause does not act as a bar. Further, such searches can help restore trust in Congress that is nearing all-time lows. This Comment agrees with the *Rayburn* court's ultimate conclusion allowing the execution of the search warrant to occur, but strongly disagrees with the reasoning supplied by the court.

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7. See Philip Shenon, *Documents Point to Bribes of Nigerian by Congressman*, N.Y. TIMES, June 7, 2006 at A18 (revealing that the FBI had found the money the previous August, and that the money was allegedly to go to a middleman involved in Congressman Jefferson's bribery scheme).

8. See *id.* (detailing the alleged bribery scheme, whereby Congressman Jefferson was to help a technology company win contracts with federal agencies and with governments in Africa, in exchange for money).

9. See *Rayburn*, 432 F. Supp. 2d at 106-07 (outlining Congressman Jefferson's three-part argument, which raised concerns about: (1) the Speech or Debate Clause; (2) separation of powers principles; and (3) the Fourth Amendment).

10. *Id.* at 108-11; see U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

11. *Rayburn*, 432 F. Supp. 2d at 108-10.

12. See *id.* at 119 (denying Congressman Jefferson's motion for the return of property seized during the search of his office, and concluding that the Speech or Debate Clause does not shield Members of Congress from the execution of valid search warrants).

Part II examines the history of legislative privilege, beginning in seventeenth-century England. Part II also reviews Supreme Court and District of Columbia Circuit Court of Appeals precedent showing the extent of the privilege that the Speech or Debate Clause provides. Part III begins by arguing that the *Rayburn* court's analysis of the Speech or Debate Clause is flawed. Although the ultimate conclusion was correct—that the search on Congressman Jefferson's office was constitutional—Chief Judge Hogan misconstrues Supreme Court and District of Columbia Circuit Court of Appeals precedent. Part IV of this Comment proposes a hybrid approach to solving the tripartite concerns of the legislative, executive, and judicial branches. This Comment concludes that the best solution is to allow the judicial branch to authorize searches on congressional offices when presented with probable cause, but only when the search is conducted using, first, a filter team composed of non-executive branch members and, second, a neutral judicial arbiter as the ultimate decision maker as to what constitutes privileged legislative material.

#### BACKGROUND

##### I. THE DEVELOPMENT OF LEGISLATIVE PRIVILEGE IN ENGLAND

The Framers of the Constitution took the text of the Speech or Debate Clause nearly verbatim from the Articles of Confederation.<sup>13</sup> In turn, the idea of legislative privilege can be traced to the English Bill of Rights of 1689.<sup>14</sup> Turmoil reigned in England in the 1600s, with an on-going conflict between the House of Commons and two lines of monarchs.<sup>15</sup> These monarchs “utilized criminal and civil laws to suppress and intimidate” legislators in the House of Commons.<sup>16</sup> Thus, the original understanding of legislative privilege was to protect legislators from intimidation by the executive.<sup>17</sup>

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13. *United States v. Johnson*, 383 U.S. 169, 177 (1966) (noting that the Speech or Debate Clause was approved at the Constitutional Convention without debate or opposition, and further explaining that the language of the Clause was taken from the Articles of Confederation, with merely cosmetic changes made by the Convention's Committee on Style).

14. *Id.* at 177-78.

15. See Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1129-30 (1973) (citing the “cataclysmic confrontation” between Parliament and the monarch as the driving force behind the enactment of the English Bill of Rights and the formation of legislative privilege in that country).

16. *Johnson*, 383 U.S. at 178-79 (arguing that legislative privilege is the first line of defense in the “protection of the independence and integrity of the legislature” from prosecution by an unfriendly executive).

17. See *id.* (concluding that the formation of legislative privilege was the

As noted above, the idea of legislative privilege from executive meddling crossed the Atlantic nearly intact.<sup>18</sup> James Madison argued that the purpose of the privilege was to reinforce the key principle of separation of powers between the three branches of government.<sup>19</sup>

## II. FRAMING SPEECH OR DEBATE: SUPREME COURT AND DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS PRECEDENT

Because the principles behind the Speech or Debate Clause were well established in England and America, the Supreme Court had little occasion to interpret and define the Clause, until a recent spate of cases in the 1960s and '70s.<sup>20</sup> Indeed, the Supreme Court did not initially interpret the Clause until 1881.<sup>21</sup> After that case had been decided, the Court went nearly one hundred years before returning to the issue of legislative privilege under the Clause.<sup>22</sup> Finally, by deciding a number of cases in a short period of time, the Supreme Court enunciated a clearer view of the purpose and limitations of the Speech or Debate Clause.

The Supreme Court initially provided a broad interpretation of the Speech or Debate Clause in *Kilbourn v. Thompson*.<sup>23</sup> Thompson, Sergeant-At-Arms for the House of Representatives, subpoenaed Kilbourn during an

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culmination of a long struggle for legislative independence against a tyrannical executive; the privilege acts as a shield against the resurgence of a dictatorial executive branch).

18. See Reinstein & Silverglate, *supra* note 15, at 1120-21 (articulating that the Speech or Debate Clause, more so than most constitutional provisions, “can be directly traced to historical antecedents” out of England in the 1600s, while arguing that a static interpretation of the Clause “leads to undesirable consequences”).

19. See Richard D. Batchelder, Jr., Chastain v. Sundquist: *A Narrow Reading of the Doctrine of Legislative Immunity*, 75 CORNELL L. REV. 384, 387 (1990) (stating that Madison believed that the purpose behind legislative privilege should guide judicial interpretations).

20. See *Johnson*, 383 U.S. at 179 (attributing the short history of Supreme Court cases on the issue of legislative privilege, and the lack of clear precedent, to the long tradition and well-defined contours of the privilege in England and the United States).

21. See *Kilbourn v. Thompson*, 103 U.S. 168, 204-05 (1881) (limiting legislative privilege under the Speech or Debate Clause to things generally done by a Member of Congress in accordance with the purpose of the position, and noting that this includes writings and speech which may occur outside the representative’s chamber).

22. See Reinstein & Silverglate, *supra* note 15, at 1114 (noting that *Johnson*, decided in 1966, was only the fourth case addressing the Speech or Debate Clause to reach the Supreme Court, and attributing the paucity of decisions to the well-defined understanding of legislative privilege from England, which thereby made it less likely that an appellate court would review legislative privilege cases).

23. See 103 U.S. at 204-05 (holding that an interpretation of the Clause that was too narrow in construction—limited to spoken words in debate—would not make sense given the wide-ranging official duties of Members of Congress); see also Batchelder, *supra* note 19, at 388 (discussing how the *Kilbourn* Court adopted a liberal construction of the privilege, beyond the actual wording of the Clause, which allows the privilege during debate).

investigation into a bankrupt company.<sup>24</sup> Though Kilbourn appeared, he refused to answer any questions and did not tender the requested documents.<sup>25</sup> Thompson subsequently took Kilbourn into custody; when he was released, Kilbourn sued Members of Congress for false imprisonment.<sup>26</sup> The Court concluded that, although Congress exceeded its constitutional authority, its members were privileged from suit for activities within the scope of regular congressional activity.<sup>27</sup>

In 1966, the Supreme Court reinterpreted the Speech or Debate Clause in *United States v. Johnson*.<sup>28</sup> In an effort to exert influence over an ongoing investigation into a Maryland savings and loan institution, Congressman Johnson read a speech on the House floor.<sup>29</sup> In holding that the Clause did protect Members of Congress from prosecution under such circumstances, the Court held the testimonial privilege of the Clause to be absolute.<sup>30</sup> The Court further held that inquiry into the motivations behind a legislative act by a Member of Congress is precisely what the Speech or Debate Clause is supposed to foreclose from executive and judicial inquiry.<sup>31</sup>

In the early 1970s, the Supreme Court had occasion to review and further interpret the Speech or Debate Clause when three cases arose in quick succession.<sup>32</sup> *Gravel v. United States* involved a U.S. Senator who read aloud classified documents to a Senate subcommittee before placing those

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24. See *Kilbourn*, 103 U.S. at 193-96 (questioning why Congress involved themselves in the bankruptcy proceedings when the matter was still working its way through the judicial system).

25. See *id.*

26. See *id.* (concluding that Congress' resolution authorizing Kilbourn's imprisonment was beyond the scope of congressional powers conferred by the Constitution).

27. *Id.* at 204 (holding that the Clause also applies to written reports, resolutions, and acts of voting, *i.e.*, "things generally done" by Congress).

28. See 383 U.S. 169, 171 (1966) (holding that, even where a Member of Congress abuses his position by accepting bribes for giving a speech, such conduct is privileged because the Speech or Debate Clause forecloses inquiry into the motivations behind official congressional conduct).

29. See *id.* at 171-72 (outlining the conspiracy whereby two Congressmen would attempt to influence the Department of Justice to have the indictment dismissed in exchange for "campaign contributions" and "legal fees" that were, allegedly, bribes).

30. See *id.* at 185-86 (affirming the Fourth Circuit's reversal of the Congressman's conviction, after adducing that evidence in the case had been obtained in violation of the Speech or Debate Clause when the prosecutor specifically asked Congressman Johnson questions about the speech he gave on the House floor).

31. *Id.* at 180.

32. See Reinstein & Silverglate, *supra* note 15, at 1114 (noting the increase in Supreme Court cases directly dealing with the Speech or Debate Clause in the 1960s and '70s, after Members of Congress began invoking it as protection against intrusion into official congressional actions).

documents on the public record.<sup>33</sup> A grand jury investigating whether violations of federal law occurred subpoenaed an aide to the Senator.<sup>34</sup> The Court held that the Speech or Debate Clause applied even to legislative aides, but further determined that the Clause did not extend protection to the public realm, because publication of confidential documents did not fall within the legislative sphere.<sup>35</sup>

The Supreme Court decided a companion case to *Gravel* on the same day.<sup>36</sup> The defendant in *United States v. Brewster*, a former Senator, was indicted for accepting bribes in exchange for being influenced in position and voting stance regarding postal rate legislation.<sup>37</sup> The Supreme Court held that the district court improperly dismissed the indictment against the Senator because his actions were not privileged within the sphere of legitimate legislative activity.<sup>38</sup>

A year later, the Supreme Court decided another case dealing with the limits of legislative privilege in *Doe v. McMillan*.<sup>39</sup> The Supreme Court held that congressional committee members were absolutely immune from suit under the Speech or Debate Clause insofar as they engaged in

33. See 408 U.S. 606, 608-09 (1972) (discussing how Senator Gravel released the Pentagon Papers to the public despite the fact that they were classified Defense Department documents concerning the United States' decision-making and policy in Vietnam).

34. See *id.* at 609 (noting that a grand jury subpoenaed Senator Gravel's assistant because the assistant had helped him in preparing for the subcommittee meeting and placing top-secret papers into the public record).

35. See *id.* at 628-29 (including Senator Gravel's motivations, conduct, and comments at the subcommittee meeting as privileged within the "sphere of legitimate legislative actions," while allowing Senator Gravel's aide to be questioned by a grand jury concerning the source of the classified documents).

36. See Reinstein & Silverglate, *supra* note 15, at 1118 (noting the similar central question in *Gravel* and *Brewster*, of what falls within the purview of legitimate legislative activity protected by the Speech or Debate Clause, and the similar conclusion of the Court—that activity falling within the legislative sphere is protected).

37. 408 U.S. 501, 502 (1972).

38. See *id.* at 526 (distinguishing the acceptance of bribes by Senator Brewster—an illegal act not within the sphere of legitimate legislative activity—and Brewster's actions post-acceptance of the bribe, including the influence of his position on the legislation in question). So long as the motivations behind the speech or vote were not questioned, Brewster could be tried on the underlying bribery charge. *Id.* See also *United States v. Rostenkowski*, 59 F.3d 1291, 1300 (D.C. Cir. 1995) (asserting that the remedy for violating Speech or Debate protections is for a court to prohibit the government from presenting privileged material upon objection by the defense).

39. See 412 U.S. 306, 307-10 (1973) (discussing the factual background of the case, wherein parents brought suit on behalf of their D.C. public schoolchildren alleging violation of privacy rights because a Senate subcommittee report used the names of children who were failing out of school); see also Reinstein & Silverglate, *supra* note 15, at 1119 (discussing *McMillan*'s procedural history—noting that it reached the Supreme Court just after *Gravel* and *Brewster* and acts as the third leg in modern legislative privilege jurisprudence).



legitimate legislative activities such as preparing subcommittee reports.<sup>40</sup> *McMillan* is important because it reaffirms the holding in *Gravel*—that the absolute privilege of the Speech or Debate Clause extends to actions within the sphere of legislative activity.<sup>41</sup>

Ten years after deciding *Johnson*, the Supreme Court considered the difference between testimony and subpoena in *Andresen v. Maryland*.<sup>42</sup> The *Andresen* case involved an authorized search of defendant's business premises, where investigators uncovered evidence of the crime of false pretenses, and used the information obtained during the search to help convict the defendant.<sup>43</sup> On appeal, the issue of whether the Fifth Amendment prevented the use of the incriminating papers against the defendant was raised.<sup>44</sup> In determining that the Fifth Amendment did not provide such protection in this case, the Court reasoned that the defendant had not been forced to say or do anything.<sup>45</sup>

Chief Judge Hogan's analysis in *Rayburn* also included three D.C. Circuit cases.<sup>46</sup> *In re Possible Violations of 18 U.S.C. §§ 201, 371* involved a subpoena issued to an administrative assistant to Congressman Richard Kelly.<sup>47</sup> The district court, persuaded by the Third Circuit Court of Appeals, required Representative Kelly to present to the court material he considered privileged under the Speech or Debate Clause.<sup>48</sup> In deciding

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40. See *McMillan*, 412 U.S. at 317-18 (determining that Members of Congress are absolutely immune from suit for the creation of the documents themselves, as this involved legislative activities such as: (1) conducting hearings, (2) preparing the report, and (3) authorizing its publication). The Court further determined that the publication of the document in itself is outside the sphere of legislative activity. *Id.*

41. *Id.* at 324.

42. See 427 U.S. 463, 470-71 (1976) (articulating that the historic function of the privilege provided by the Fifth Amendment was to protect an individual against self-incrimination through compulsory testimony).

43. See *id.* at 469 (indicating that the defendant had been involved with a real estate transaction and had been indicted for fraudulent misappropriation by a fiduciary in connection with the deal).

44. *Id.* at 472.

45. See *id.* at 473 (indicating that the records seized during the search contained statements that the defendant had voluntarily committed to writing, and that the requisite compulsory element necessary to successfully invoke Fifth Amendment protections was absent in this case).

46. See *Rayburn*, 432 F. Supp. 2d 100, 111-15 (D.D.C. 2006) (discussing three cases—two from the D.C. Circuit Court of Appeals and one from the D.C. District Court—dealing with the scope of the privileges provided by the Speech or Debate Clause).

47. See 491 F. Supp. 211, 212 (D.D.C. 1980) (listing what the aide had to bring with him to the Grand Jury hearing, including: (1) Representative Kelly's appointment diary and daily schedule; (2) travel records; (3) guest sign-in book; and (4) files relating to a trip to Israel).

48. See *id.* at 213 (concurring with the requirement in *In re Grand Jury Investigation into Possible Violations of U.S.C. § 201*, 587 F.2d 589 (3d Cir. 1978) of

that the Clause did not protect the confidentiality of the material, the court reasoned that testimony by Congressman Kelly could not be used against him in criminal or civil proceedings, and thus there was no need to protect the confidentiality of the material itself.<sup>49</sup>

The D.C. Circuit Court of Appeals considered the limits of legislative privilege in *MINPECO, S.A. v. Conticommodity Services, Inc.*, which involved a group of defendants that served subpoenas on a congressional subcommittee requiring disclosure of certain information and documents in its possession.<sup>50</sup> The appeals court affirmed the decision of the district court to quash the subpoena, and reasoned that the critical inquiry when determining the extent of the privilege that the Speech or Debate Clause provides is whether the action at issue—even an illegal action—was undertaken within the legitimate “legislative sphere.”<sup>51</sup> Importantly, the court expressed concern over the broad subpoena requested by defendants by noting that the effect would be akin to a “fishing expedition into congressional files.”<sup>52</sup>

More recently, the D.C. Circuit Court of Appeals had occasion to reanalyze the Speech or Debate Clause with respect to legitimate legislative activities in *Brown & Williamson Tobacco Corp. v. Williams*.<sup>53</sup> The case involved subpoenas issued to two Congressmen at the request of a tobacco

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*in camera* review of documents that the Congressman indicated were protected by the Speech or Debate Clause).

49. *Id.* at 214. Other cases and commentators, however, have found an implicit guarantee of confidentiality in legislative material and other privileged arenas. *See, e.g., United States v. Neill*, 952 F. Supp. 834, 840-41 (D.D.C. 1997) (asserting that the government bears the burden of showing that filter team procedures used during the search of a law office sufficiently guarded against intragovernmental communication); *United States v. Ehrlichman*, 389 F. Supp. 95, 97-98 (D.D.C. 1974) (stating that disclosure of transcripts of legislative deliberations were barred under the Speech or Debate privileges because deliberations fall within the sphere of legitimate legislative activity); Note, *Evidentiary Implications of the Speech or Debate Clause*, 88 YALE L.J. 1280, 1286 n.30 (1979) (contending that the privilege provides that confidentiality itself is a legitimate legislative interest that should be protected).

50. 844 F.2d 856, 857-58 (D.C. Cir. 1988) (discussing how defendants sought to show that the wording of sworn statements had allegedly been changed by the staff director of a congressional subcommittee, ostensibly to protect the legality of transactions conducted in the silver market in the 1970s).

51. *See id.* at 860-61 (following Supreme Court precedent in *McMillan* and *Gravel* that, though such acts may be reprehensible, even illegal acts may be protected under the umbrella of legislative privilege).

52. *Id.* at 862-63 (finding the authorization of such subpoenas inconsistent with the Speech or Debate Clause specifically, and separation of powers principles more generally, because it would destroy the comity between the three branches of government, while also running contrary to Supreme Court precedent).

53. 62 F.3d 408, 416-17 (D.C. Cir. 1995) (concluding that the “questionable provenance” of the documents used by the congressional subcommittee did not mean that the subcommittee could not make appropriate use of them).

company during the tobacco hearings and litigation of the 1990s.<sup>54</sup> The court of appeals affirmed the district court's decision to quash the subpoena after determining that the Speech or Debate Clause prevented compelling a Member of Congress from testifying or producing documents.<sup>55</sup>

Chief Judge Hogan, relying on the Supreme Court and D.C. Circuit Court of Appeals cases discussed above, interpreted the Speech or Debate Clause as providing Members of Congress two distinct privileges.<sup>56</sup> The Clause, according to the *Rayburn* court, is read broadly to include "anything generally done" in a session of Congress, including voting, committee reports, hearings, and legislation itself.<sup>57</sup> The *Rayburn* court subdivided this privilege into a testimonial privilege, held to be absolute, and a catch-all category of other actions within the sphere of legitimate legislative activity.<sup>58</sup>

#### ANALYSIS

##### I. FRITTERING AWAY THE SPEECH OR DEBATE CLAUSE: MISINTERPRETING THE PURPOSE OF THE PRIVILEGE

###### *A. The Testimonial Privilege: Absolute, But Inapplicable in Congressman Jefferson's Case*

The *Rayburn* court correctly determined that the testimonial privilege of the Speech or Debate Clause is absolute under certain circumstances.<sup>59</sup> Congressman Jefferson argued that the search of his congressional office unconstitutionally violated his legislative privilege under the Speech or Debate Clause.<sup>60</sup> Jefferson relied on *Brown & Williamson Tobacco Corp.*,<sup>61</sup> arguing that its precedent required the return of the material taken

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54. *Id.* at 411-12.

55. *See id.* at 421 (asserting that documents that come into the hands of Members of Congress may only be reached by a direct suit or subpoena if the circumstances by which the Members of Congress obtained the documents were themselves illegal, thus falling outside the sphere of legitimate legislative acts).

56. *Rayburn*, 432 F. Supp. 2d 100, 109-10 (D.D.C. 2006).

57. *Id.* at 109; *see Doe v. McMillan*, 412 U.S. 306, 311-12 (1973) (reasoning that these types of conduct, originally delineated in *Kilbourn*, are privileged under the Clause because they fall within the sphere of legitimate legislative activity).

58. *See Rayburn*, 432 F. Supp. 2d at 111-13 (dismissing Congressman Jefferson's bipartite argument that both the testimonial privilege and the legitimate legislative activities privilege apply in this case, and holding that the search warrant executed on his office did not conflict with legislative privilege).

59. *Id.* at 111 (concluding that the testimonial privilege that the Speech or Debate Clause provides is absolute because the Clause protects Members of Congress from being questioned about the motivations behind their legislative actions).

60. *Id.* at 108, 112.

61. *Id.* at 111; *see also Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d

from his office.<sup>62</sup>

Chief Judge Hogan correctly rejected Jefferson's argument.<sup>63</sup> *Brown & Williamson Tobacco Corp.* reaffirms the Speech or Debate Clause's testimonial privilege.<sup>64</sup> When subpoenas were issued against two Congressmen requiring them to testify concerning how a package of stolen documents had ended up in Congress' hands, the district court quashed the subpoena because it involved testimony concerning legislative acts.<sup>65</sup> The D.C. Circuit Court of Appeals held that the Congressmen could not be made to answer the subpoena because doing so would necessarily involve testimony about the legislative process in general and about the specific elements of legislative acts that Congress was considering.<sup>66</sup>

The *Rayburn* court's rebuttal to Jefferson's use of *Brown & Williamson Tobacco Corp.* as controlling precedent was that the instant motion and the previous case were discussing two different situations.<sup>67</sup> *United States v. Johnson* explored the testimonial privilege that the Speech or Debate Clause provides to Congress.<sup>68</sup> The search warrant authorized by Chief Judge Hogan in *Rayburn*, however, did not concern testimony.<sup>69</sup> This

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408, 415-16, 421 (D.C. Cir. 1995) (determining that the Speech or Debate Clause confers on Members of Congress immunity from lawsuits even though their conduct, if performed in other than legislative contexts, would in itself be contrary to criminal or civil statutes).

62. See, e.g., FED. R. CRIM. P. 41(g) (providing for a mechanism whereby a person aggrieved by an unlawful search and seizure of property may move for the property's return, so long as the court receives necessary factual evidence concerning the illegality of the search).

63. See *Rayburn*, 432 F. Supp. 2d at 111 (determining that *Brown & Williamson Tobacco Corp.* did not control Jefferson's motion because it addressed civil subpoenas while the issue here concerned the execution of a search warrant in a criminal case).

64. See *id.* at 111 (distinguishing the instant action on the grounds that the execution of a valid search warrant does not bring testimonial privileges into play).

65. *Brown & Williamson Tobacco Corp.*, 62 F.3d at 412 n.2 (asserting that the district court did not follow precedent when it held that the passive receipt of material from outside parties did not constitute a legislative act entitled to protection under the Speech or Debate Clause).

66. *Id.* at 416-17.

67. See *Rayburn*, 432 F. Supp. 2d at 111 (arguing that, because *Brown & Williamson Tobacco Corp.* said nothing about the availability of documents pursuant to a valid search warrant in a criminal investigation, Congressman Jefferson's attempt to use the case as controlling precedent necessarily fails).

68. See 383 U.S. 169, 173 (1966) (proscribing the evidence taken in a trial against a former Congressman, where the prosecutor questioned him about specific sentences in a speech he had given, because the Speech or Debate Clause prevents inquiry into the motivation behind why a Member of Congress engaged in particular legislative activities).

69. *Rayburn*, 432 F. Supp. 2d at 111; see also *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004) (defining "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact," a definition that excludes evidence seized during an authorized search warrant).

distinction between subpoenas and search warrants is important. For example, a subpoena against Jefferson requiring him to testify about certain aspects of a law he drafted would fall into the testimony privilege that the Speech or Debate Clause provides.<sup>70</sup> But, a search warrant requires no testimony.<sup>71</sup> Indeed, Representative Jefferson was not even present at the time of the execution of the search warrant on his office.<sup>72</sup> As Chief Judge Hogan surmised, *Brown & Williamson Tobacco Corp.*'s holding considered only civil subpoenas, not documents obtained pursuant to a search warrant in a criminal investigation, and therefore the case did not form controlling precedent.<sup>73</sup> Because *Brown & Williamson Tobacco Corp.* does not form controlling precedent, the *Rayburn* court's conclusion that the testimonial privilege is inapplicable here is correct.

Supreme Court precedent in *Andresen v. Maryland*, drawing a distinction between the Fifth Amendment's prohibition against self-incriminating testimony and an authorized search of a person's business documents that reveals incriminating writings, supports the key difference between search warrants and subpoenas outlined by Chief Judge Hogan.<sup>74</sup> The Court's focus on whether such testimony was compelled is the key to its reasoning.<sup>75</sup> For example, in *Andresen* the petitioner had not been compelled to say or to do anything—the statements seized during a lawful search had been voluntarily committed to writing.<sup>76</sup> Moreover, an expert, not the defendant, authenticated those notes at trial.<sup>77</sup> The Supreme Court concluded that the Fifth Amendment provides protection for the party

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70. See *Johnson*, 383 U.S. at 173-76 (discussing the problem infecting the prosecution of a Member of Congress when the prosecutor questioned the Congressman's manner and motives for giving a certain speech on the floor of the House, because such examination runs against the testimonial privilege of the Speech or Debate Clause).

71. *Rayburn*, 432 F. Supp. 2d at 112.

72. See *id.* (asserting that Congressman Jefferson could not successfully claim the testimonial privilege because he was not on site during the execution of the search warrant, meaning he could not have been compelled to say or do anything during its administration).

73. See *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 412 (D.C. Cir. 1995) (discussing how the tobacco company obtained a court-order requiring Congressmen Waxman and Wyden to attend a deposition and to produce documents related to the investigation, and concluding that such an order went against the testimonial privilege provided for by the Speech or Debate Clause).

74. See 427 U.S. 463, 472 (1976) (holding that the search of petitioner's office for business records and the subsequent introduction of those records into evidence did not offend the Fifth Amendment, which only protects against compelled self-incrimination, because the records had been written down voluntarily).

75. See *id.* at 475.

76. See *id.* at 473.

77. See *id.* at 472.

producing the evidence, not for the evidence itself.<sup>78</sup>

In comparison, Congressman Jefferson had not been made to say or do anything.<sup>79</sup> By arguing that the testimonial privilege of the Speech or Debate Clause protects documents seized from his congressional office, Congressman Jefferson argued for an extension of the privilege not supported by precedent.<sup>80</sup>

This distinction between testimony and the fruits of a legal search formed the lynchpin of Chief Judge Hogan's analysis of why the testimonial privilege that the Speech or Debate Clause provides is inapplicable in Congressman Jefferson's case.<sup>81</sup> Congressman Jefferson had not been made to answer or testify concerning the findings of the search team, meaning that the *Rayburn* court correctly determined that the testimonial privilege of the Speech or Debate Clause was inapplicable.<sup>82</sup>

*B. The Speech or Debate Clause Privileges "Legitimate" Legislative Materials: Nothing is More Legitimate than the Office Files of a Member of Congress*

In addition to the testimonial privilege, there is a second prong of privilege that the Speech or Debate Clause provides. The D.C. Circuit Court of Appeals explored the limits of this second prong in *MINPECO, S.A. v. Conticommodity Services, Inc.*<sup>83</sup> This case makes clear that the

78. See *Johnson v. United States*, 228 U.S. 457, 458 (1913); see also *Trinity Med. Ctr., Inc. v. Holum*, 544 N.W.2d 148, 156-57 (N.D. 1996) (concluding that the difference between privilege and confidentiality is that privilege addresses a person's right not to testify, while confidentiality addresses the obligation not to disclose information except as part of judicial proceedings).

79. See *Rayburn*, 432 F. Supp. 2d 100, 112 (D.D.C. 2006) (reasoning that the documents seized during the execution of the search warrant on Congressman Jefferson's office cannot be construed as compelled testimony because, unlike a subpoena, no action was required on Congressman Jefferson's part).

80. See *id.* (dismissing Congressman Jefferson's argument that the Speech or Debate Clause's testimonial privilege was applicable to the execution of search warrants in a criminal investigation because the purpose of the Clause is not to promote secrecy in legislative actions; rather, the purpose of the Clause is to protect the independence of the legislative branch by not compelling testimony from Members of Congress for their legitimate legislative activities).

81. See *id.* at 111 (comparing evidence produced in response to a subpoena, which triggers Fifth Amendment protections, with the authorization of a search warrant, which does not trigger Fifth Amendment protections because of the lack of compelled testimony).

82. See *id.* at 112 (dismissing Congressman Jefferson's initial argument concerning the testimonial privilege, and moving on to consider the "legitimate legislative activities" privilege provided by the Speech or Debate Clause).

83. See 844 F.2d 856, 860 (D.C. Cir. 1988) (determining that the critical inquiry in Speech or Debate Clause analysis is whether the action falls within the sphere of legitimate legislative activity; if it does, the action is privileged, and if not, the matter is not privileged).

second touchstone of the Speech or Debate Clause privilege is immunity from liability for legitimate legislative acts.<sup>84</sup> Chief Judge Hogan's analysis on this point is conclusory, reasoning that because the material did not fall within the legitimate legislative sphere this second privilege did not apply in Congressman Jefferson's case.<sup>85</sup> However, it is undisputed that the FBI removed legislative documents from Jefferson's office.<sup>86</sup> If the purpose of the Speech or Debate Clause is to protect the legislature<sup>87</sup> from "fishing expeditions"<sup>88</sup> into legislative materials by an aggressive executive, a better system needs to be in place to provide for the protections of the Clause. Instead, Chief Judge Hogan argues that there is a difference between legislative material incidentally captured during the execution of a judicially authorized search warrant and an unauthorized search by a hostile executive branch into legitimate legislative activities.<sup>89</sup> This represents a misreading of Supreme Court precedent, as one of the primary reasons in support of legislative immunity is the potential abuse by a "hostile judiciary."<sup>90</sup> It does not matter that the judiciary may not

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84. See Matthew R. Walker, *Constitutional Law—Narrowing the Scope of Speech or Debate Clause Immunity*—United States v. McDade, 68 TEMP. L. REV. 377, 386-87 (1995) (discussing the Supreme Court's progressive narrowing of what constitutes legislative acts by using *Johnson*'s holding as an example, and noting that the protection provided by the Speech or Debate Clause only applies in criminal charges, and the Clause protects legislators only in those cases involving close scrutiny of the Member of Congress' actions).

85. See *Rayburn*, 432 F. Supp. 2d at 105 (arguing that, unlike the facts in *Brown & Williamson Tobacco Corp.*, according to the affidavit filed with the court in support of its application for a search warrant, the material the FBI sought in the instant case did not include legislative material).

86. See *id.* at 106 (noting that FBI agents ultimately seized copies of the hard drives of the office's computers, as well as boxes of paper records, during the execution of the search warrant).

87. See *United States v. Johnson*, 383 U.S. 169, 179 (1966) (articulating the view that the overarching purpose of the Clause is the "protect[ion] against possible prosecution by an unfriendly executive and conviction by a hostile judiciary"); see also Michael R. Seghetti, Note, *Speech or Debate Immunity: Preserving Legislative Independence While Cutting Costs of Congressional Immunity*, 60 NOTRE DAME L. REV. 589, 590-91 (1985) (discussing the underlying purpose of the Clause, and arguing that the original reason for the Clause's inclusion in the Constitution was to provide safeguards to protect the independence of each branch of government).

88. *MINPECO*, 844 F.2d at 862-63.

89. See *Rayburn*, 432 F. Supp. 2d at 113 (arguing that Congress' capacity to function is not threatened by permitting congressional offices to be searched pursuant to validly issued search warrants, because of the prophylactic requirement of prior approval by a neutral judicial arbiter).

90. See Seghetti, *supra* note 88, at 590-91 (articulating the view that the Speech or Debate Clause is an important safeguard, which protects the legislative branch as a whole, allowing representatives to perform their lawmaking duties without fear of reprisal); see also Reinstein & Silverglate, *supra* note 15, at 1147-48 (arguing that judicial decisions restricting legislative privilege at the behest of the executive have later been regretted as unfortunate instances of judicial overreaction).

actually be hostile to the interests of the legislative branch.<sup>91</sup> As discussed below, the Supreme Court has held that the central point of the Clause is to assure co-equal branches of government freedom of speech without intimidation or threat.<sup>92</sup>

The original understanding of legitimate legislative acts included actions generally performed by a Member of Congress.<sup>93</sup> Despite the presence of a filter team, the possibility that the executive might have captured legitimate legislative matter in the search remains a concern.<sup>94</sup> In fact, the Supreme Court tangentially touched on this concern in *Johnson*, when it held that the Speech or Debate Clause protected a Congressman who had accepted bribes to give a specific speech. Although this is a form of testimonial privilege absolutely protected under the Clause, it is also an exception to the legitimate legislative acts privilege.<sup>95</sup> The difference between Congressman Johnson's actions and Congressman Jefferson's alleged crime is that one involved a bribe given in exchange for a favorable speech and the other involved a bribe for helping to win contracts for a company.<sup>96</sup> In either case the argument can be made that no privilege should be granted, if it is to be true that legislators ought not stand above the law they create.<sup>97</sup> Or, an argument can be fashioned that the important jobs done by Congressmen necessitate immunity and privilege for "speech or debate" as that term has come to be interpreted.<sup>98</sup> Arguing that because Congressman Johnson's crime was to give a speech in exchange for money—presumably

91. See *Rayburn*, 432 F. Supp. 2d at 116 (noting that federal judges are independent, neutral, and sworn to uphold the Constitution, meaning that, in theory, judges should not favor the executive over the legislative branch).

92. See *Gravel v. United States*, 418 U.S. 606, 616 (1972).

93. *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881); see also Katherine Deming Brodie, *The Scope of Legislative Immunity Under the Speech or Debate Clause and the Rulemaking Clause*, 64 GEO. WASH. L. REV. 1117, 1120 (1996) (arguing that immunity for legislative acts is absolute, but that "legislative acts" is a relatively narrow category and excludes "political acts" outside the scope of the Clause's privilege).

94. See *Rayburn*, 432 F. Supp. 2d at 105-06 (discussing the composition and role of the filter team made up of FBI agents not connected to the investigation or prosecution of Congressman Jefferson, supposedly to assuage concerns about executive intimidation of the legislature).

95. See *United States v. Brewster*, 408 U.S. 501, 526 (1972) (distinguishing the acceptance of bribes by the Senator—an illegal act not within the purview of privileged legitimate legislative activity—and the Senator's actions post-acceptance of the bribe, including influencing his position on the legislation in question). As long as the motivations behind the legislative action were not questioned, the Senator could be tried on the underlying bribery charge. *Id.*

96. See Shenon, *supra* note 1, at A22.

97. See *Gravel v. United States*, 418 U.S. 606, 615-18 (1972) (quoting Thomas Jefferson's sentiment that lawmakers, like ordinary citizens, are bound by the laws they create, while still allowing for legislative privilege to facilitate governance).

98. See Reinstein & Silverglate, *supra* note 15, at 1179.



not the sort of activity in which Congressmen should be engaged—excuses his actions as a necessary compromise in providing an important privilege to members of the legislature.<sup>99</sup> Congressman Johnson’s alleged crime is no more legitimate than Congressman Jefferson’s; either the scope of the Speech or Debate Clause should be narrowed considerably, back to its original understanding of protecting legislators from libel and slander charges,<sup>100</sup> or expanded considerably to include protection of privileged legislative documents from the prying eyes of the executive and judicial branches.<sup>101</sup>

Splitting the difference, however, can work. The best solution to this problem is to hybridize the approach taken by Chief Judge Hogan with the approach taken by the D.C. Circuit Court of Appeals. This is essentially what Chief Judge Hogan was attempting to do with his imposition of a filter team during the execution of the search warrant.<sup>102</sup> Refine Chief Judge Hogan’s approach, and add to it *in camera* review of allegedly privileged legislative material, and splitting the difference becomes the best possible solution.

*C. Lack of Confidentiality of Legislative Material Does Not Preclude  
“Incidental Review”*

The United States District Court for the District of Columbia ruled in *In re: Possible Violations of 18 U.S.C. §§ 201, 371* that the Speech or Debate Clause does not protect confidentiality of legislative material.<sup>103</sup> This is an important point, because it provides a neat remedy—exclusion of the privileged documents—in cases where the executive searches or seizes

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99. See *Johnson*, 383 U.S. at 180 (asserting that, however reprehensible Congressman Johnson’s actions were, the Clause protects him from inquiry into the motivations for giving a speech on the House floor).

100. See JAMES WILSON, *THE WORKS OF JAMES WILSON* (VOL. 1) 421 (Robert Green McCloskey ed., The Belknap Press of Harvard Univ. Press 1967) (asserting that the importance of legislative privilege—and its original purpose—was to enable and encourage a representative to enjoy the fullest liberty of speech, without fear of resentment or retribution).

101. See Reinstein & Silverglate, *supra* note 15, at 1179 (expressing the view that the Clause’s protections should be expanded to include: (1) speeches; (2) debates; (3) conduct in committee; (4) receipt of information used in proceedings; (5) publications and speeches made outside of Congress; and (6) even the decision-making processes behind each of these).

102. See Rayburn, 432 F. Supp. 2d 100, 105-06 (D.D.C. 2006) (suggesting that the purpose of the filter team was to assuage legislative privilege concerns by examining seized documents and listing them for a court to review at a later time).

103. See 491 F. Supp. 211, 214 n.2 (D.D.C. 1980) (arguing that because the material is not confidential there is little reason to exclude it from the executive, considering the fact that such material remains privileged and therefore a prosecutor cannot use it against the Member of Congress).

privileged legislative material.<sup>104</sup>

The *Rayburn* court argued in Congressman Jefferson's case that material incidentally captured during a search did not constitute an unlawful intrusion under the Speech or Debate Clause.<sup>105</sup> The conclusion and remedy, according to the court, is to merely exclude the use of the privileged material.<sup>106</sup> The basis for this argument is that the power to determine the scope of one's own privilege should not be available to anyone.<sup>107</sup> The court, however, misunderstands Jefferson's argument; rather than being able to pull out evidence from the legislative material, Jefferson's point is that the material itself is privileged.<sup>108</sup> Unlike in *United States v. Rostenkowski*<sup>109</sup> or in *Johnson*, where the D.C. Circuit and Supreme Court, respectively, determined that eliminating references to protected material solved the problem,<sup>110</sup> in the instant case the problem is the underlying search itself.<sup>111</sup> If the purpose of the search is to uncover legislative material, what is left for the Speech or Debate Clause to protect once all reference to legislative material is excised?<sup>112</sup>

104. See, e.g., *United States v. Johnson*, 383 U.S. 169, 185 (1966) (allowing the government to proceed with a new trial against Congressman Johnson, so long as evidence offensive to the privileges of the Speech or Debate Clause were excised).

105. 432 F. Supp. 2d at 114 (asserting that the Speech or Debate Clause is not undermined by the incidental review of privileged material, given that even if the executive seized legislative material during the search no privileged material may ever be used against Congressman Jefferson in court; in other words, actions and materials within the legislative sphere are privileged, not the confidentiality of those documents and words).

106. *Id.* at 114 n.8.

107. See *id.* at 115 (noting that even the President of the United States—using former President Nixon as an example—does not have the power to determine the scope of his own privileges, because it is the province of the judicial branch to interpret the law).

108. See *id.* at 110.

109. 59 F.3d 1291, 1300 (D.C. Cir. 1995).

110. See *id.* (placing the burden on the Member of Congress to prove that the government relied on privileged material before the district court has the power to excise the material); see also *United States v. Johnson*, 383 U.S. 169, 185 (1966) (precluding the use of privileged legislative material, but allowing the government to move forward with a new trial once the suspect evidence had been excluded). Applied to Congressman Jefferson's case, such a result would arguably leave nothing for the FBI to proceed with, since the material seized constituted legislative material itself. See *id.*

111. See *Rayburn*, 432 F. Supp. 2d at 114 (dismissing Congressman Jefferson's argument that the executive's viewing of legislative documents during the search rendered it unconstitutional, because even if the documents are privileged as legitimate legislative material, they are nonetheless not confidential).

112. See, e.g., Reinstein & Silverglate, *supra* note 15, at 1157-58 (discussing the problem of "The Bribed Congressman," i.e., what happens in cases where the crime involved is actually a speech given by a Member of Congress in exchange for a bribe, and concluding that the Speech or Debate Clause needs to be construed broadly, less bribery statutes be selectively used against Members of Congress who lack rapport with

In *Johnson*, the Supreme Court determined that the case against Congressman Johnson could proceed once the Speech or Debate material had been excised, leaving the evidence of financial transactions with other conspirators and with the Department of Justice.<sup>113</sup> The nature of the conspiracy allowed such evidence to exist; in contrast, the evidence that the FBI sought against Congressman Jefferson involved looking at and seizing legislative files.<sup>114</sup> The Supreme Court in *Johnson* held that certain evidence was inadmissible as a breach of the Speech or Debate privilege.<sup>115</sup> This included statements given by Congressman Johnson to the prosecutor of the case, concerning the motivation behind giving a speech for compensation.<sup>116</sup> Unlike in *Johnson*, where once the offending material had been excised<sup>117</sup> the Supreme Court allowed the case to go forward, there is no ability to excise offending material in the present case.<sup>118</sup>

The inherent difference between seizing legislative materials as the basis for a corruption probe, as in this case, and seizing financial transaction records, as in Congressman Johnson's case, is that the former flies in the face of the protections provided by the Speech or Debate Clause, while the latter does not involve the legislative process at all.<sup>119</sup> As the Supreme Court held in *Brewster*, the Speech or Debate Clause does not protect against an illegal action in and of itself.<sup>120</sup> Rather, the illegal actions are

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the White House).

113. See *Johnson*, 383 U.S. at 172.

114. See *Rayburn*, 432 F. Supp. 2d at 106.

115. See *Johnson*, 383 U.S. at 176-77, 180.

116. See *id.* at 185.

117. See *id.* at 173-76 & n.5 (detailing the exchanges between the prosecutor and Congressman Johnson concerning the motivations, manner of preparation, and ingredients of a speech that Johnson gave on the House floor).

118. See *Rayburn*, 432 F. Supp. 2d at 106, 110 (detailing that, in the instant case, filter team agents kept logs of potentially privileged documents for final review by a court, but allowed no mechanism for Congressman Jefferson to challenge the determination of the agents and court as to what constituted legislative material).

119. See *Johnson*, 383 U.S. at 179-80 (interpreting Supreme Court precedent to mean that the Speech or Debate Clause provides protection for only those acts generally done in a session of the House, and concluding that a conspiracy to defraud the United States did not fit into this category). But see *Rayburn*, 432 F. Supp. 2d at 110 (disagreeing with Congressman Jefferson's argument that because members of the executive branch necessarily reviewed and seized legislative material during the execution of the search warrant, the search itself was unconstitutional, because, carried to its logical conclusion, this argument would require advance warning to Members of Congress who are the targets of the search warrants to allow them to remove what they deem to be protected legislative material, thereby precluding removal of potentially significant material to a legitimate investigation).

120. See 408 U.S. 501, 526 (1972) (distinguishing the acceptance of bribes by Senator Brewster from the influence it had on his position, and asserting that the bribe was a crime for which the Senator could be tried, while the motivation behind his change in official position was irrelevant to proving the crime).

prosecutable.<sup>121</sup> But, when the executive begins questioning the motives behind the legislative actions of a Member of Congress—even if those motives were illegally induced—the Speech or Debate Clause protects the Member of Congress.<sup>122</sup> Once the offending legislative material in *Johnson* had been excised, the remaining evidence did not involve legislative material at all.<sup>123</sup> On the other hand, where, as here, the evidence against Congressman Jefferson is the legislative material itself—in the form of paper documents and computer files—the Speech or Debate Clause is supposed to provide protections that Chief Judge Hogan overlooks.<sup>124</sup>

*D. Separation of Powers Principles: Best Served When the Executive Does Not Have Unbridled Access to Legislative Material*

Congressman Jefferson frames his Speech or Debate argument within a more general argument concerning separation of powers.<sup>125</sup> Congressman Jefferson's main point is that the executive disrupts the careful system of checks and balances when it gains judicial authorization to search an office of a member of the legislative branch.<sup>126</sup> Indeed, the Supreme Court came to a similar conclusion in *Brewster* when it discussed the potential for harassment of the legislature by an unscrupulous executive.<sup>127</sup> Rather than addressing this concern, however, Chief Judge Hogan relies on the argument that, by placing the judiciary as a neutral arbiter between the executive and legislature, the likelihood of abuse is lessened.<sup>128</sup> How

121. *See id.* (stressing that, so long as the motivations behind the speech or vote are not questioned, which would be protected by the testimonial privilege of the Speech or Debate Clause, Senator Brewster could be tried on the bribery charge).

122. *See Johnson*, 383 U.S. at 180 (asserting that where a Member of Congress' actions are reprehensible, the essence of legislative privilege forecloses inquiry by the executive and judicial branches, because the separation of powers argument outweighs the executive's interest in prosecution).

123. *See id.* at 185 (allowing the case against Congressman Johnson, for conspiring to defraud the United States, to go forward on evidence not connected to the motivations the Congressman had for giving a speech).

124. *See id.* at 180-81.

125. *See Rayburn*, 432 F. Supp. 2d 100, 116-17 (D.D.C. 2006); *see also* Seghetti, *supra* note 88, at 590 (stating that the underlying purpose of legislative immunity is to assure separation of powers among the three branches of government).

126. *Rayburn*, 432 F. Supp. 2d at 116.

127. *See* 408 U.S. 501, 523 (1972) (asserting that attempts by one branch of government to establish dominance over another branch have met with little success, due in part to public sentiment to the contrary).

128. *See Rayburn*, 432 F. Supp. 2d at 117 (arguing that the threat to separation of powers principles comes not from one co-equal branch executing a search warrant over another, after the independent authorization by the third co-equal branch, but by the position argued by Congressman Jefferson that the Members of Congress within the legislative branch enjoy unilateral and unreviewable power to invoke an absolute privilege).

neutral an arbiter the judiciary is when granting search warrants, however, shows that this analysis is flawed because oftentimes the judiciary is a rubber stamp on the desires of the executive.<sup>129</sup>

In some respects, the *Rayburn* decision comports with a new interpretation of separation principles.<sup>130</sup> By giving cursory analysis to the issue, and concluding that the search of Congressman Jefferson's office did not violate the separation of powers principle, *Rayburn* stays out of the way of an inter-branch dispute.<sup>131</sup>

*E. Analogizing Law Office Searches and the Fourth Amendment: Concerns About Searching Privileged Areas*

Chief Judge Hogan's analysis correctly dismissed Congressman Jefferson's argument that the search of his office without the presence of counsel was unreasonable under the Fourth Amendment.<sup>132</sup> However, Chief Judge Hogan's cursory analysis of another Fourth Amendment concern raises further questions.<sup>133</sup> While Chief Judge Hogan cites *United States v. Triumph Capital Group, Inc.*<sup>134</sup> to support his argument that searches of areas in which privileged material is expected to be found are

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129. See Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 34 & n.63 (1988) (likening magistrate approval of search warrants to rubber stamping of executive desires, given the oftentimes lax protocol employed by magistrates, including judge shopping and perfunctory review). But see *Rayburn*, 432 F. Supp. 2d at 116 ("A federal judge is not a mere rubber stamp in the warrant process, but rather an independent and neutral official. . .").

130. See Bruce G. Peabody & John D. Nugent, *Toward A Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 36-42 (2003) (articulating in favor of a new interpretation of separation of powers principles, whereby the judiciary takes an active role only infrequently, and that court rulings ought to be delayed and restrained when considering inter-branch disputes).

131. See *Rayburn*, 432 F. Supp. 2d at 116-17 (dismissing as a "gross trivialization" Congressman Jefferson's separation of powers argument that intervention by the judiciary merely provides a rubber stamp on the executive's unfettered desire to obtain search warrants of congressional offices).

132. See *id.* at 117 (holding that Congressman Jefferson's argument that the barring of his counsel from his office during the search violated FED. R. CRIM. P. 41(f)(2) and rendered the search unreasonable under the Fourth Amendment fails because the plain language of the rule "clearly contemplates that the owner [of the property that is subject to a search warrant does] need not be present" at the time of the execution of the warrant and that the rule says nothing about the property owner's counsel).

133. See *id.* at 118 n.12 (discussing examples of valid searches of areas where privileged material is expected to be found, including attorneys' offices, and determining that the cases have not held this to be unreasonable under the Fourth Amendment so long as certain procedures were followed to ensure protection of the attorney-client privilege).

134. 211 F.R.D. 31, 43 (D. Conn. 2002) (holding that a search of an attorney's computer, believed to contain privileged attorney-client materials, was reasonable where a filter team was in place to screen for privileged material and where a neutral magistrate had ultimate authority to approve documents turned over to the prosecution).

not unreasonable in violation of the Fourth Amendment, there is an important exception.

Law office searches offer a parallel interpretation to the search of a congressional office; the searches are analogous because both entail explorations where information that is specially privileged beyond the ambit of the Fourth Amendment may be improperly divulged.<sup>135</sup> As such, jurisprudence regarding searches of law firm documents provides a relevant starting point to determine how congressional documents may be properly searched pursuant to a criminal investigation.<sup>136</sup> In the case of law offices, the general rule is that if the lawyer is accused of wrongdoing, and his office is searched, the fact that some of his files contain privileged attorney-client material does not act as a bar to conducting the search.<sup>137</sup> Likewise, Chief Judge Hogan correctly argues that a search of a congressional office when a Member of Congress is accused of wrongdoing—which almost assuredly contains legitimate legislative material protected by the Speech or Debate Clause—is not barred merely because the privileged material may be seen.<sup>138</sup> *United States v. Neill* offers another parallel in the use of a filter team and ultimate review by a magistrate judge before any document is turned over to the prosecution to ensure that protected materials were not included.<sup>139</sup>

Upholding the spirit of these analogous precedents, Chief Judge Hogan's conclusion—that the execution of the search warrant on a congressional office was constitutional, despite the proximity of privileged material—is

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135. See Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955, 961 (3d Cir. 1984) (holding that the warrant to search the law firm's files, and the subsequent seizure of files, was overly broad because the government made no attempt to exclude files containing attorney-client information that were unrelated to the plaintiff's claims). But see *Rayburn*, 432 F. Supp. 2d at 106 (allowing the search and seizure of legislative documents because the procedure and limits of the warrant sought to prevent disclosure of privileged materials and was sufficiently narrow).

136. See, e.g., John E. Davis, Note, *Law Office Searches: The Assault on Confidentiality and the Adversary System*, 33 AM. CRIM. L. REV. 1251, 1273 (1996) (comparing searches of law offices to searches of congressional offices and proposing the imposition of a neutral arbiter to determine whether private records of an attorney are privileged within the scope of the attorney-client relationship).

137. See *Rayburn*, 432 F. Supp. 2d at 118 (holding that when there is a compelling need to conduct a search in relation to an investigation involving serious crimes, an invasion of privilege greater than usual may be allowed if evidence cannot be obtained through any other reasonable means).

138. See *id.* at 114-18 (holding the search reasonable under the Fourth Amendment, assuming that privileged material is not necessarily guaranteed to be kept confidential, if the Member of Congress is immune from civil or criminal liability).

139. See 952 F. Supp. 834, 840-41 (D.D.C. 1997) (expressing reservations, for "obvious reasons," about the use of filter teams in seizing privileged material from a lawyer's office, and instead favoring review by a neutral and detached magistrate, or by a court-appointed special master).

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appropriate.<sup>140</sup> The FBI had probable cause to request a warrant,<sup>141</sup> and the presence of a filter team designed to prevent privileged legislative material from falling into the hands of the executive partially allays the interest of third-parties.<sup>142</sup> Thus, unlike law office searches, the primary concern of the breach of a third-party privilege is not present.<sup>143</sup>

#### IV. A COMPROMISE? USING *IN CAMERA* REVIEW TO PROTECT PRIVILEGED MATERIAL WHILE STILL ALLOWING FOR AUTHORIZED SEARCHES

The arguments and reasoning adopted by Chief Judge Hogan in *Rayburn* did not consider the possibility of *in camera* review of supposed legislative material.<sup>144</sup> However, on appeal the D.C. Circuit Court of Appeals determined that Chief Judge Hogan must conduct an *in camera* review, in the presence of Congressman Jefferson, of documents the FBI seized.<sup>145</sup> *In camera* review of potentially privileged legislative material has been used in the past as a necessary protection to materials privileged by the Speech or Debate Clause.<sup>146</sup> In the instant case, Congressman Jefferson will highlight sections and documents that he feels are privileged as legitimate legislative acts, and Chief Judge Hogan will then determine whether the documents are, in fact, privileged.<sup>147</sup> If the documents are indeed privileged, they are to be excluded from the evidence against Congressman

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140. See *Rayburn*, 432 F. Supp. 2d at 118.

141. See Shenon, *supra* note 7, at A18 (discussing allegations pointing to corruption of Congressman Jefferson, including his plan to bribe Nigerian officials with \$500,000 in cash, in exchange for their help in winning business in West Africa).

142. *Rayburn*, 432 F. Supp. 2d at 106 (indicating that the purpose of the filter team was to log which documents were potentially privileged, and provide the log to the Court for a final determination of privilege, before turning non-privileged documents over to the prosecutor).

143. See Davis, *supra* note 138, at 1254 (indicating that the effect of a broken privilege is a shift in power to the executive, because the executive branch enforces the law and therefore decides whom to prosecute).

144. See *Rayburn*, 432 F. Supp. 2d at 115-16 (discussing the possibility of *in camera* review by the judicial branch in theory, but ultimately deeming such review unnecessary in the instant case because the prior judicial determination to grant the search warrant, as well as the formation of the filter team, provided protection to Congressman Jefferson's interests).

145. Philip Shenon, *Lawmaker Wins Delay on Review of Evidence*, N.Y. TIMES, July 29, 2006, at A10.

146. See, e.g., *In re Possible Violations of 18 U.S.C. §§ 201, 371*, 491 F. Supp. 211, 213-14 (D.D.C. 1980) (agreeing with the Third Circuit's holding in *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978), requiring *in camera* review of documents an accused congressman indicated were privileged legislative material as a necessary protection that the Speech or Debate Clause grants to Members of Congress).

147. See, e.g., *Benford v. Am. Broad. Cos.*, 98 F.R.D. 42, 45 n.2 (D. Md. 1983) (detailing the *in camera* procedure, which requires an index of potentially privileged documents, as well as the documents themselves, to be submitted for judicial review, to ensure that the defendants characterized their content accurately).

Jefferson; if the documents are not privileged, the FBI and prosecutor will gain access to them.<sup>148</sup> Because the Speech or Debate Clause does not provide for the confidentiality of legitimate legislative materials, this poses no problem, at least facially.<sup>149</sup>

The *in camera* review requirement imposed by the Court of Appeals is similar to the original requirement of having a filter team present during the search. Under either regime the purpose is to prevent privileged material from falling into the hands of the executive.<sup>150</sup> However, there are important differences. First, the Speech or Debate Clause is supposed to protect against an overzealous executive handling and viewing such material.<sup>151</sup> Nonetheless in this case, two Department of Justice attorneys and an FBI agent, albeit with no role in the investigation or prosecution of Congressman Jefferson, were chosen for the filter team.<sup>152</sup> While these individuals had no connection to the instant case, they were all members of the executive branch.<sup>153</sup> Likewise, the computer file filter team was composed of FBI computer examiners, also executive branch members, who had no role in the investigation or prosecution of the case.<sup>154</sup> One of the primary motivations behind the Speech or Debate Clause is to shield the legislature from an executive that may wish to interfere in the legislative process.<sup>155</sup>

Concerns that the executive will improperly view or use privileged material can be assuaged by inserting a neutral member of the judiciary into the role of arbiter to determine what constitutes privileged material.<sup>156</sup>

148. Shenon, *supra* note 147, at A10.

149. See *Rayburn*, 432 F. Supp. 2d at 110, 114 (arguing that, because the Speech or Debate Clause does not provide confidentiality to privileged material, an intrusion is lawful when such material is incidentally captured during the execution of a valid search warrant).

150. See *id.* at 105-06, 108-15 (asserting that the special search procedures used during the execution of the search warrant minimized the likelihood of legitimate legislative materials falling into the hands of the executive, and concluding that these procedures satisfied the requirements of the Speech or Debate Clause).

151. See *United States v. Johnson*, 383 U.S. 169, 179 (1966); see also Reinstein & Silverglate, *supra* note 15, at 1161 (suggesting that an unfriendly executive could selectively apply bribery statutes against Members of Congress whose rapport with the White House may be less than ideal).

152. See *Rayburn*, 432 F. Supp. 2d at 106 (suggesting that because the agents were not directly involved in the investigation or prosecution of Congressman Jefferson, the likelihood of inter-branch conflict was lessened).

153. See Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1304 (2004) (arguing in favor of legislative oversight of the FBI, because it is a very powerful arm of the executive branch with a history of abuse).

154. See *Rayburn*, 432 F. Supp. 2d at 106.

155. Seghetti, *supra* note 88, at 589-91.

156. *Rayburn*, 432 F. Supp. 2d at 115-16. But see *Gravel v. United States*, 408 U.S. 606, 618 (1972) (noting that the Court, when interpreting the Speech or Debate Clause,



As Chief Judge Hogan notes, having an experienced, knowledgeable judiciary decide where and when to authorize search warrants preserves the legislative privilege shield.<sup>157</sup> Oftentimes, however, the judiciary does act as a rubber stamp on the executive's desire to obtain a search warrant.<sup>158</sup> One way to alleviate the concern of having executive branch members giving the final determination of what is and is not privileged legislative material is to reinsert the judiciary as the final arbiter. Much like in *United States v. Triumph Capital Group, Inc.*, where the judiciary's role was to screen for material that fell into the classification of attorney-client privilege, the judiciary should play a similar role in searches of congressional offices.<sup>159</sup>

The compromise offered by the D.C. Circuit Court of Appeals is the most reasonable because it best assures that the judiciary serves as the arbiter of what materials the executive may view without violating the privilege of the Speech or Debate Clause. While implicitly affirming Chief Judge Hogan's conclusion that search warrants could be executed on congressional offices, the D.C. Circuit re-imposed a neutral judiciary into the role of final arbiter on whether any of the documents seized from Congressman Jefferson's office fell into the legitimate legislative material privilege provided by the Speech or Debate Clause.<sup>160</sup>

#### CONCLUSION

Despite the fact that no search warrant had been executed on a congressional office in over two hundred years, Chief Judge Hogan

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has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that threatens to influence a Member of Congress' actions).

157. See *Rayburn*, 432 F. Supp. 2d at 116 (expressing distaste at Congressman Jefferson's argument that the judiciary acts as a rubber stamp to executive controls, and noting that federal judges are sworn to uphold the Constitution—presumably meaning that separation of powers concerns are already provided for through the authorization of the search warrant in the first place).

158. See Wasserstrom & Seidman, *supra* note 131, at 34 (arguing that the "rubber stamping" of warrants by magistrates is an "open scandal" because of the perfunctory review conducted by magistrates); Stephen Labaton, *Before the Explosion, Officials Saw Little Risk for Building in Oklahoma City*, N.Y. TIMES, May 2, 1995, at A19 (concluding that judges are largely rubber stamps for the executive, after conducting a review of authorization of wiretaps by federal and state judges, and finding that only seven applications out of 8,950 since 1983 have been turned down).

159. See 211 F.R.D. 31, 43 (D. Conn. 2002) (discussing role of the judiciary in approving and authorizing procedures to create a taint team to set up a wall between the evidence and the prosecution).

160. See Shenon, *supra* note 147, at A10 (discussing the procedure set up by the D.C. Circuit Court of Appeals requiring Chief Judge Hogan to conduct *in camera* review of any documents that Congressman Jefferson indicates are privileged legislative material).

correctly authorized a search of Congressman Jefferson's office. While the *Rayburn* court correctly interpreted and applied aspects of the testimonial privilege provided for in the Speech or Debate Clause, it failed to properly consider the ramifications of allowing the executive unbridled access to legitimate legislative material—exactly the type of protection that the Supreme Court has held the Speech or Debate Clause provides.<sup>161</sup>

Legislative government only works if Congress is held accountable, and, while it is arguably a political question that should be addressed through the election cycle,<sup>162</sup> “legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons.”<sup>163</sup> With probable cause, the offices of Congress should be subject to searches, so long as certain protections are taken to ensure compliance with the Speech or Debate Clause of the Constitution. These protections should be a combination of a filter team, designed to screen out legitimate legislative material, and a reinsertion of the judiciary as the final arbiter of what constitutes legitimate legislative material.<sup>164</sup> However, unlike the filter team in the instant case, future teams should be composed of non-executive branch members. Only if the executive is not involved in the actual screening process of legitimate legislative material can legislative privilege fully be protected.

At a time when Americans view Congress with increasing credulity,<sup>165</sup> and with major scandals already destroying political careers<sup>166</sup> or hanging over the heads of politicians,<sup>167</sup> one way of helping restore trust in

161. See *Doe v. McMillan*, 412 U.S. 306, 324 (1973).

162. See Brodie, *supra* note 94, at 1120 (arguing Speech or Debate Clause privileges exclude “political acts” outside the scope of legitimate legislative activity).

163. *Gravel v. United States*, 408 U.S. 606, 615 (1972).

164. See *Rayburn*, 432 F. Supp. 2d 100, 106-07, 115-17 (D.D.C. 2006) (suggesting that the judicially-created “filter team” regime, followed by judicial review of documents that the filter team thinks fall within the purview of legislative privilege, rebuts Congressman Jefferson’s argument that the search violated his constitutional rights).

165. See Adam Nagourney & Janet Elder, *Poll Finds Most Americans Displeased With Congress*, N.Y. TIMES, Sept. 20, 2006, available at <http://www.nytimes.com/2006/09/20/us/politics/21pollnd.html> (reporting that congressional approval ratings are at their lowest point since 1994, with only twenty-five percent of Americans polled approving of the job Congress was doing).

166. See, e.g., David Stout, *DeLay Rules Out Campaign For His Former House Seat*, N.Y. TIMES, Aug. 9, 2006, at A12 (discussing why former House Majority Leader Tom DeLay would not seek reelection in 2006, citing his indictment on campaign finance violations and his involvement in the Jack Abramoff scandal as contributing factors to his decision).

167. See, e.g., Kate Zernike & Abby Goodnough, *Lawmaker Quits Over E-Mail Sent to Teenage Pages*, N.Y. TIMES, Sept. 29, 2006, at A1 (discussing the scandal surrounding former Congressman Mark Foley after sexually charged emails between him and underage congressional pages came to light).

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government is to allow search warrants to be executed on congressional offices. By holding Members of Congress accountable for their actions, while giving special search protection for legitimate legislative actions, trust in elected government can be restored.