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## NOTE

# Do Congressmen Still Pay Parking Tickets? The D.C. Circuit's Overextension of Legislative Privilege in *United States v. Rayburn House Office Building*\*

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### TABLE OF CONTENTS

INTRODUCTION .....	1623
I. BACKGROUND .....	1624
A. <i>Historical Origin of the Legislative Privilege</i> .....	1624
B. <i>The Supreme Court's Interpretation of the Clause</i> .....	1625
1. Function of the Clause Is to Protect the Entire Legislative Process .....	1625
2. Scope of the Clause Is Limited to Legitimate Legislative Activities .....	1629
C. <i>The D.C. Circuit's Interpretation of the Clause</i> .....	1633
II. <i>UNITED STATES V. RAYBURN HOUSE OFFICE BUILDING</i> .....	1635
A. <i>Factual and Procedural Background</i> .....	1635
B. <i>Holding and Reasoning</i> .....	1637
III. ANALYSIS .....	1639

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\* This Note neither directly nor indirectly addresses actual parking tickets. I leave that for the D.C. Department of Motor Vehicles. The title is pure hyperbole intended to point out sensible limits of legislative privilege.

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1622	<i>University of California, Davis</i>	[Vol. 42:1621
	A. <i>The D.C. Circuit’s Holding Runs Counter to the Direction of Recent Supreme Court Rulings</i> .....	1639
	B. <i>Rayburn Violates the Framers’ Intent by Creating Improper Blanket Immunity for Members of Congress</i> .....	1642
	C. <i>Expansion of the Documentary Nondisclosure Privilege in the Criminal Context Disrupts the Balance of Coequal Government Branches</i> .....	1645
	CONCLUSION.....	1647

## INTRODUCTION

On May 20, 2006, for the first time in American history, Department of Justice (“DOJ”) and Federal Bureau of Investigation (“FBI”) agents raided the congressional offices of a sitting Congressman, Representative William J. Jefferson.<sup>1</sup> A district court judge issued the search warrant, authorizing the agents to search for materials related to a pending investigation into bribery for congressional votes.<sup>2</sup> In all, the search lasted approximately eighteen hours and yielded information leading to the Congressman’s indictment on bribery charges.<sup>3</sup>

This novel situation presented the issue of whether the search violated the Speech or Debate Clause (“the Clause”) of the United States Constitution.<sup>4</sup> In *United States v. Rayburn House Office Building* (“*Rayburn*”), the United States Court of Appeals for the District of Columbia Circuit held that the raid violated the Clause and therefore the government could not use the evidence against the Congressman.<sup>5</sup> This Note, however, argues that the raid on Representative Jefferson’s congressional office did not violate the Clause.

The D.C. Circuit’s holding in *Rayburn* improperly expanded the Clause’s legislative privilege in spite of the Supreme Court of the United States’ recent trend of decisions that have narrowed the privilege.<sup>6</sup> Additionally, the D.C. Circuit’s expansion violates the Framers’ intent for the Clause by creating improper blanket immunity for members of Congress.<sup>7</sup> Furthermore, this expansion of the legislative privilege disrupts the balance of coequal government branches.<sup>8</sup> Part I of this Note explores the historical background of the Clause and its interpretation by the U.S. Supreme Court, Part II

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<sup>1</sup> *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 657, 659 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008) (describing events leading up to raid and procedure of raid as carried out); *In re Search of the Rayburn House Office Bldg. Room No. 2113 Washington, D.C. 20515*, 432 F. Supp. 2d 100, 106 (D.D.C. 2006) (describing factual and procedural history leading up to raid).

<sup>2</sup> *Rayburn House Office Bldg.*, 497 F.3d at 657; *In re Search of the Rayburn House*, 432 F. Supp. 2d at 106.

<sup>3</sup> *Rayburn House Office Bldg.*, 497 F.3d at 657-58.

<sup>4</sup> *See id.* at 655 (stating question on appeal of whether search procedures comported with Clause).

<sup>5</sup> *Id.* at 656 (holding that compelled disclosure of privileged material to Executive during execution of search warrant violated Clause).

<sup>6</sup> *See discussion infra* Part III.A.

<sup>7</sup> *See discussion infra* Part III.B.

<sup>8</sup> *See discussion infra* Part III.C.

discusses the facts and reasoning of the D.C. Circuit in *Rayburn*, and Part III analyzes the reasons the D.C. Circuit erred in its ruling.

## I. BACKGROUND

The Clause's language and the legislative privilege it embodies originated in the early English Parliament.<sup>9</sup> But the Clause has taken on a unique character in the American form of government since its adoption by the Framers of the U.S. Constitution.<sup>10</sup> Both the Supreme Court and the D.C. Circuit have interpreted and shaped the Clause to create the current legislative privilege, which provides a broad protection for the legislative process. This protection safeguards not only actual speech and debate on the floors of Congress, but also prevents inquiry into the motivations and reasons for a legislator's actions, as well as the questioning of any activities legitimately related to legislative actions.<sup>11</sup>

### A. Historical Origin of the Legislative Privilege

The Clause states that "for any Speech or Debate in either House, [members of Congress] shall not be questioned in any other place."<sup>12</sup> The Constitutional Convention approved and passed the Clause without discussion or opposition.<sup>13</sup> The Framers took the Clause's language nearly verbatim from Article V of the Articles of Confederation, the Constitution's predecessor.<sup>14</sup> Article V, in turn, derived its language from the parliamentary privilege, which originated in the English Bill of Rights of 1689.<sup>15</sup>

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<sup>9</sup> See *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (stating legislative privilege has roots in parliamentary struggles of 16th and 17th centuries); discussion *infra* Part I.A.

<sup>10</sup> See, e.g., *United States v. Brewster*, 408 U.S. 501, 508 (1972) (stating that one must interpret Clause in light of American experience and in context of American constitutional scheme of government rather than English parliamentary system).

<sup>11</sup> See discussion *infra* Part I.B-C.

<sup>12</sup> U.S. CONST. art. 1, § 6, cl. 1.

<sup>13</sup> *Powell v. McCormack*, 395 U.S. 486, 502 (1969) (citing 5 DEBATES ON THE FEDERAL CONSTITUTION 406 (J. Elliot ed., 1876)); *United States v. Johnson*, 383 U.S. 169, 177 (1966); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 246 (M. Farrand ed., rev. ed. 1966); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 337 (1965).

<sup>14</sup> See *Johnson*, 383 U.S. at 177; see also ARTICLES OF CONFEDERATION art. V ("Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress . . .").

<sup>15</sup> See *Johnson*, 383 U.S. at 177 (noting similarity of language in Clause and English Bill of Rights); Note, *supra* note 13, at 337 (noting several state constitutions and Articles of Confederation incorporated parliamentary privilege);

The English Bill of Rights' legislative privilege developed from the long struggle for parliamentary supremacy in England.<sup>16</sup> Successive Tudor and Stuart Monarchs had abused the criminal and civil law to suppress and intimidate key legislators.<sup>17</sup> In response to these abuses, the privilege's purpose was to protect the independence and integrity of the legislature.<sup>18</sup> In the United States, the Clause also serves two additional purposes: it reinforces the separation of powers between branches of government and protects the legislature from potentially hostile executive or judiciary branches.<sup>19</sup>

### B. *The Supreme Court's Interpretation of the Clause*

#### 1. Function of the Clause Is to Protect the Entire Legislative Process

The language of the Clause addresses only speech inside the two houses of Congress.<sup>20</sup> The Supreme Court, however, has long

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*see also* Bill of Rights, 1689, 1 W. & M., sess. 2, c. 2 (Eng.) (“[T]he freedom of speech and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.”); MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 12 (Da Capo Press 1971) (1943) (noting that Colonial assemblies patterned themselves after English Parliament and claimed privilege of free speech and debate).

<sup>16</sup> *Johnson*, 383 U.S. at 178; *see Note, supra* note 13, at 336 (stating evolution of English privilege mirrored continuing constitutional struggle between British Crown and Parliament).

<sup>17</sup> *Johnson*, 383 U.S. at 178. *See generally* CARL WITTKÉ, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* (Da Capo Press 1970) (1921) (analyzing conflicts between Parliament and various factions of power in England leading to current parliamentary privilege); John Neale, *The Commons' Privilege of Free Speech in Parliament*, in *TUDOR STUDIES* 257 (Seton-Watson ed., 1924) (discussing history of freedom of speech in Parliament under Tudors).

<sup>18</sup> *See Johnson*, 383 U.S. at 178 (describing historical English conflict between commons and monarchs leading to creation of legislative privilege); JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 863 (Fred B. Rothman & Co. 1991) (1833); II *THE WORKS OF JAMES WILSON* 37-38 (James DeWitt Andrews ed., 1896); *Note, supra* note 13, at 336 (noting ancestry of Clause in parliamentary privilege to be free from outside influences that might affect course of debate or legislation).

<sup>19</sup> *See Johnson*, 383 U.S. at 178-79 (stating that legislative privilege protects against possible prosecution by unfriendly executive and conviction by hostile judiciary, and that privilege ensures independence of legislature); *THE FEDERALIST* NO. 48, at 332 (James Madison) (J. Crooke ed., 1961); *see also* *United States v. Brewster*, 408 U.S. 501, 508 (1972) (recognizing that despite Clause's English roots, Court must interpret it in light of American experience and in context of American constitutional government).

<sup>20</sup> *See* U.S. CONST. art. 1, § 6, cl. 1 (“[F]or any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other place.”).

recognized the Clause as a protection of the entire legislative process.<sup>21</sup> The Supreme Court first addressed the Clause in *Kilbourn v. Thompson*, in which Congressman Kilbourn brought a claim of false imprisonment against fellow legislators.<sup>22</sup>

Kilbourn appeared by subpoena before a special congressional committee investigating the bankruptcy of Jay Cooke and Company, a debtor of the United States.<sup>23</sup> Although he appeared, Kilbourn did not answer any questions and did not tender subpoenaed documents.<sup>24</sup> The Speaker and several other members of the House of Representatives ordered Thompson, the House Sergeant at Arms, to arrest Congressman Kilbourn for contempt of Congress.<sup>25</sup> Kilbourn then sued Thompson and the House members who voted for the resolution ordering Kilbourn's arrest for false imprisonment.<sup>26</sup> Following judgment for the defendants, Kilbourn appealed to the Supreme Court.<sup>27</sup> The Court considered two questions: (1) whether Congress may arrest one of its own and (2) if not, whether Congress members can be held personally liable in tort for issuing a resolution to do so.<sup>28</sup> On the first issue, the Court held that Congress did not have power to order the arrest.<sup>29</sup> The Court then considered whether the Clause's legislative privilege protected the actions of the congressional defendants.<sup>30</sup>

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<sup>21</sup> See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501-02 (1975) (noting that earlier Supreme Court cases have read Clause broadly "to effectuate its purposes" (citing *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881))); *Gravel v. United States*, 408 U.S. 606, 617-18 (1972); *Brewster*, 408 U.S. at 508-09; *Powell v. McCormack*, 395 U.S. 486, 502-03 (1969); *Johnson*, 383 U.S. at 179.

<sup>22</sup> See 103 U.S. 168, 170 (1881) (addressing Clause privilege in false imprisonment suit brought against sitting members of Congress).

<sup>23</sup> *Id.* at 172.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 173.

<sup>26</sup> *Id.* at 170. Kilbourn's declaration charged that the defendants took him from his home by force, against his will, and without reasonable or probable cause. *Id.* The defendants then confined Kilbourn in the common jail of the District of Columbia for 45 days. *Id.*

<sup>27</sup> *Id.* (omitting mention of any intermediate procedure).

<sup>28</sup> See *id.* at 182, 200.

<sup>29</sup> *Id.* at 182, 199-200 (finding that despite congressional power to punish its own members, Congress has no express power to punish congressional contempt by nonmembers).

<sup>30</sup> See *id.* at 200. The Court clarified that the Congressmen did not personally assist in arresting or confining Kilbourn. *Id.* Therefore, the Court addressed only whether they were liable for directing the acts. *Id.* The Court then moved to consider whether the Clause covered the action of ordering Kilbourn's arrest. *Id.* at 201 (questioning whether resolution offered by member is speech or debate within

The *Kilbourn* Court recognized the Clause's origin in the English Bill of Rights.<sup>31</sup> It concluded that the Framers of the Constitution intended the Clause to embody the same legislative privilege in the United States.<sup>32</sup> The Court thus held that the privilege is broad and includes more than literal debate.<sup>33</sup> The privilege extends to all activities related to a session of Congress, including a legislative vote, writing a report, and all acts resulting from the execution of a congressional office.<sup>34</sup> Applied to Kilbourn's claim, the Clause protected the defendant Congressmen's action of passing the resolution for Kilbourn's arrest.<sup>35</sup> *Kilbourn* thus concretely established that the Clause represents a legislative privilege that extends beyond the mere words of legislative debate.<sup>36</sup>

In *Tenney v. Brandhove*, the Supreme Court confirmed that the Clause's privilege prevents inquiry into the motivation for legislative acts.<sup>37</sup> The issue in *Tenney* was whether the legislative privilege protected members of a committee of the California Legislature from a claim for civil rights violations.<sup>38</sup> William Brandhove alleged that members of the Senate Fact-Finding Committee on Un-American Activities, colloquially known as the Tenney Committee, violated his rights by calling him before a hearing that the Committee held for a

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meaning of Clause).

<sup>31</sup> *Id.* at 201 (tracing history of legislative privilege in English Parliament and noting that constitutional Framers based legislative privilege on English Bill of Rights).

<sup>32</sup> *See id.* at 202 (reasoning that Framers of Constitution meant same thing as parliamentary law of England by use of language borrowed from that source). The Court also noted that the principle intent of the legislative privilege is not to benefit Congress members. *Id.* at 203. Rather, the intent is to ensure the rights of the people. *Id.* (citing *Coffin v. Coffin*, 4 Mass. 1 (1808)). The privilege enables the people's representatives to carry out the duties of office without fear of prosecutions. *Id.*

<sup>33</sup> *See id.* at 204 (stating that it would be narrow view of Clause to limit it to words spoken in debate).

<sup>34</sup> *See id.* at 203-04 (stating that purpose of legislative privilege is to allow Congress members to carry out their work without fear of prosecution). The Court also noted that in some situations the legislative privilege would cover activities beyond the representative's chamber. *See id.* The Court, however, did not elaborate or give examples of such cases. *See id.*

<sup>35</sup> *See id.* at 204-05 (holding that plea set up by members of House claiming privilege under Clause is valid defense).

<sup>36</sup> *See id.* at 204 (stating that legislative privilege extends "to things generally done in a session of the House by one of its members in relation to the business before it").

<sup>37</sup> *See* 341 U.S. 367, 377-78 (1951) (holding that legislators need not defend motives when acting within sphere of legitimate legislative activity).

<sup>38</sup> *See id.* at 371. The Court analyzed the state legislative privilege as coequal with the federal legislative privilege. *See id.* at 372-76 (analyzing state legislative privilege in same context as federal privilege deriving from English parliamentary privilege).

nonlegislative purpose.<sup>39</sup> According to Brandhove, the Committee held the hearing to intimidate and silence him after he circulated a Senate petition to persuade the Legislature to stop funding the Committee.<sup>40</sup> Brandhove further alleged, among other things, that the Committee intended to deter and prevent him from exercising his right of free speech and from petitioning the Legislature for grievances.<sup>41</sup> The district court dismissed Brandhove's suit for failing to state a claim.<sup>42</sup> The United States Court of Appeals for the Ninth Circuit reversed, finding the complaint stated a cause of action against members of the Senate committee, and the Supreme Court granted certiorari.<sup>43</sup>

The *Tenney* Court recognized wide latitude in the sphere of legitimate legislative activity that the privilege protects.<sup>44</sup> Accordingly, the mere claim of an unworthy purpose does not destroy the privilege.<sup>45</sup> Otherwise, the conclusions of a pleader or a jury's speculation may inhibit legislators from performing their legislative duty for the public good.<sup>46</sup> Thus, in dismissing Brandhove's claim, the Court affirmed that, in addition to actual legislative activities, legislative privilege protects against inquiry into a legislator's motivations for legislative acts.<sup>47</sup>

*Kilbourn* and *Tenney* represent the Supreme Court's early, broad interpretation of the Clause.<sup>48</sup> The Clause embodies a legislative privilege that protects the legislative process as a whole.<sup>49</sup> This

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<sup>39</sup> *Id.* at 369-71.

<sup>40</sup> *Id.* at 370-71.

<sup>41</sup> *Id.* at 371.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See *id.* at 376-77. But cf. *id.* at 376 (stating limit to activities privilege protects, that "[l]egislatures may not of course acquire power by an unwarranted extension of privilege").

<sup>45</sup> *Id.* at 377.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 377-79.

<sup>48</sup> See generally *id.* (holding that legitimate legislative activities of Congress members are privileged from suit); *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (holding that Clause privileged otherwise actionable activities of Congress members in suit for false imprisonment).

<sup>49</sup> See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501-02 (1975) (noting that earlier Supreme Court cases have read Clause broadly "to effectuate its purposes"); *Gravel v. United States*, 408 U.S. 606, 617-18 (1972); *United States v. Brewster*, 408 U.S. 501, 508-09 (1972); *Powell v. McCormack*, 395 U.S. 486, 502-03 (1969); *United States v. Johnson*, 383 U.S. 169, 179 (1966).



protection ensures that members of Congress can carry out their duties for the benefit of their constituents.<sup>50</sup>

## 2. Scope of the Clause Is Limited to Legitimate Legislative Activities

Throughout the 1970s, the Supreme Court decided a series of cases that limited the scope of the Clause.<sup>51</sup> These cases did not weaken the privilege, but they more narrowly defined the legitimate legislative activities and situations to which the privilege applies.<sup>52</sup>

*United States v. Brewster* defined the Speech or Debate privilege as it applies to legislative motivation.<sup>53</sup> The federal government indicted former Senator Daniel Brewster for accepting bribes that influenced the performance of his legislative duties.<sup>54</sup> Brewster moved to dismiss the indictment on immunity grounds under the Clause.<sup>55</sup> The district court agreed that the Senator was immune from the charges and dismissed the indictment on Brewster's pretrial motion.<sup>56</sup> The United

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<sup>50</sup> See *Tenney*, 341 U.S. at 376-77 (emphasizing that legislative privilege is intended to benefit constituents, not Congress members); *Kilbourn*, 103 U.S. at 203 (stating that legislative privilege is secured to support rights of people, by enabling representatives to execute functions of their office); see also *Eastland*, 421 U.S. at 502 (stating that purpose of Clause is to ensure that Congress may independently perform legislative function that Constitution allocates to it); *Powell*, 395 U.S. at 505 (stating that purpose of legislative protection is to ensure legislators are not hindered in performance of legislative tasks by possibility of defending actions in court).

<sup>51</sup> See, e.g., *Doe v. McMillan*, 412 U.S. 306, 314-15 (1973) (holding that legislative privilege does not apply to actions in preparation for or in implementation of legislative act); *Gravel*, 408 U.S. at 626 (holding that legislative privilege does not apply to related activities before or after legislative act); *Brewster*, 408 U.S. at 526 (holding that legislative privilege does not preclude investigation into bribery motivating legislative act); discussion *infra* Part I.B.2 (discussing Supreme Court cases limiting the scope of Clause privilege).

<sup>52</sup> See generally *McMillan*, 412 U.S. 306 (limiting application where Congressman breaks otherwise valid law in preparation for or in implementation of legislative act); *Gravel*, 408 U.S. 606 (declining to apply legislative privilege to related activities before or after legislative act); *Brewster*, 408 U.S. 501 (denying application of privilege against investigation into bribery motivating legislative act).

<sup>53</sup> See 408 U.S. at 526 (holding that legislative privilege does not preclude investigation into bribery motivating legislative activity).

<sup>54</sup> The United States indicted Brewster on five counts of bribery occurring on four separate occasions while Brewster was a United States Senator. *Id.* at 502-03. The bribes were to influence Brewster's official acts with respect to his action, vote, and decision on postage-rate legislation. *Id.* at 502.

<sup>55</sup> *Id.* at 503.

<sup>56</sup> *Id.* at 504 (relying on Supreme Court's interpretation of Clause in *United States v. Johnson*).

States appealed directly to the Supreme Court, which upheld the indictment.<sup>57</sup> The Court reasoned that accepting a bribe is not a legislative activity and is therefore outside the scope of the Clause.<sup>58</sup>

The *Brewster* Court distinguished between an inquiry into the motivation for a legislative act and an inquiry into a bribe that motivated a legislative act.<sup>59</sup> The Court clarified that the Clause only protects activities legitimately related to legislative action; mere nexus to legislative function is insufficient.<sup>60</sup> Contrasting two seemingly similar scenarios clarifies this distinction. The first is a prosecution that inquires into legislative acts or the legislator's motivation for legislative acts.<sup>61</sup> Such prosecution would necessarily probe how the legislator spoke, debated, voted, or acted in committee or legislative chamber.<sup>62</sup> The second is a prosecution for bribery, where the illegal act is complete upon acceptance of the bribe.<sup>63</sup> Such prosecution therefore does not require investigation into whether the legislator fulfilled the legislative act for which she was bribed.<sup>64</sup> The Clause protects the legislative activities in the former situation, but it does not protect the activities in the latter scenario.<sup>65</sup> Thus, the Clause prohibits an inquiry into a legislative act, but it does not prohibit the investigation of a bribe to perform a legislative act.<sup>66</sup>

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<sup>57</sup> The government appealed pursuant to 18 U.S.C. § 3731 (1970). *Brewster*, 408 U.S. at 501. Section 3731 allowed the United States to appeal directly from the district courts to the Supreme Court in particular criminal cases. *Id.* One such situation was a decision setting aside an indictment. *Id.* Congress subsequently amended the statute, but this appeal went forward under the old statute. *Id.*

<sup>58</sup> *Brewster*, 408 U.S. at 526 (reasoning that accepting bribe is not act performed as part of or incidental to role of legislator, therefore accepting bribe is not legislative act).

<sup>59</sup> *See id.* (stating that inquiry into purpose of bribe “does not draw in question the legislative acts . . . or . . . motives for performing them” (quoting *United States v. Johnson*, 383 U.S. 169, 185 (1996))).

<sup>60</sup> *See id.* at 528 (noting that Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions).

<sup>61</sup> *See id.* at 526.

<sup>62</sup> *Id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.* at 526-27.

<sup>65</sup> *See id.* at 526.

<sup>66</sup> The Court is sensitive to the balance of protecting the legislative process and policing the privilege so as not to allow abuse. *See id.* at 525. The privilege is broad enough to ensure the independence of the Legislature, which is essential to the separation of powers. *Id.* The privilege, however, is narrow enough to guard against the excesses of those who would corrupt the process by corrupting its members. *Id.* In addition to bribery, the Supreme Court has also addressed cases that deal with corruption of members of Congress. *See United States v. Helstoski*, 442 U.S. 477, 489 (1979) (holding that government may introduce evidence regarding corrupt

In *Gravel v. United States*, the Supreme Court distinguished between legitimate legislative activity and acts preceding or following such activities.<sup>67</sup> A U.S. Senator revealed that he possessed secret Defense Department papers that he intended to release to the public.<sup>68</sup> A grand jury investigating violations of federal law in the public printing of the classified papers subpoenaed an aide to the Senator.<sup>69</sup> The Senator moved to quash the subpoena under the Clause privilege.<sup>70</sup>

The district court denied the motion, holding that the Clause's legislative privilege did not extend to protect the private publication of secret government documents.<sup>71</sup> The United States Court of Appeals for the First Circuit affirmed the lower court's decision, finding that the Clause barred direct inquiry of the legislator, but not of third parties, as to the sources of the Senator's information used in performing legislative duties.<sup>72</sup> The Supreme Court agreed that the legislative privilege did not preclude an investigation tracing the source of the classified materials, but with different reasoning.<sup>73</sup>

The *Gravel* Court clarified that the legislative privilege does not provide blanket criminal immunity for legislators.<sup>74</sup> It privileges only legislative acts and closely related matters that are an integral part of the process leading to the passage of legislation.<sup>75</sup> The privilege does not protect a Congressman when he breaks an otherwise valid criminal law while preparing for or while implementing a legislative

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agreements because promises by member to perform act in future are not legislative acts). *But see Doe v. McMillan*, 412 U.S. 306, 312-313 (1973) (stating that Congressmen are immune from liability for actions within legislative sphere even if their conduct would be illegal if performed outside legislative context).

<sup>67</sup> See 408 U.S. 606, 626 (1972) (stating Clause does not privilege legislator who violates criminal law in preparation for or implementation of legislative acts).

<sup>68</sup> *Id.* at 608. The document, popularly known as the Pentagon Papers, carried a "Top Secret-Sensitive" defense security classification. *Id.*

<sup>69</sup> *Id.* The grand jury was investigating multiple alleged crimes. *Id.* These crimes included retention of public property with intent to convert, gathering and transmitting of national defense information, and concealment or removal of public records. *Id.*

<sup>70</sup> *Id.* at 608-09.

<sup>71</sup> *Id.* at 611.

<sup>72</sup> See *id.* at 611-13.

<sup>73</sup> See *id.* at 628 (finding no constitutional or other privilege shielding jury questions relevant to tracing source of classified documents, so long as no questions implicate legislative acts).

<sup>74</sup> See *id.* at 626 (noting that Clause does not purport to confer general exemption upon members of Congress from liability or process in criminal cases).

<sup>75</sup> See *id.*

act.<sup>76</sup> Senator Gravel's public reprinting of classified papers was not a legislative activity.<sup>77</sup> The Clause privilege, therefore, did not protect the Senator's act, and the Senator could not evade the subpoena through a claim of legislative privilege.<sup>78</sup>

In *Doe v. McMillan*, the Supreme Court further narrowed the scope of legitimate legislative activity that the Clause protects.<sup>79</sup> A published congressional report on the District of Columbia school system included personal information about a D.C. schoolchild.<sup>80</sup> The student's parents sued for invasion of privacy and libel against defendants including members of the House Committee on the District of Columbia.<sup>81</sup> The D.C. Circuit affirmed the district court's dismissal, in part because the defendants were immune under the legislative privilege.<sup>82</sup> The Supreme Court, however, reversed the D.C. Circuit's holding on Clause immunity.<sup>83</sup>

The Court distinguished between legislative and nonlegislative uses of the allegedly libelous material.<sup>84</sup> Legislative privilege protected the introduction and use of the materials at committee hearings and nonpublic distribution to other members of Congress.<sup>85</sup> Public distribution of the material, however, was not a legislative act.<sup>86</sup> The legislative privilege therefore did not protect the defendant legislators against the claim arising out of that publication.<sup>87</sup> Thus, legislative privilege does not extend beyond the use of legislative materials for strictly legislative purposes.<sup>88</sup>

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<sup>76</sup> *See id.*

<sup>77</sup> *See id.* Because neither Congress nor the full committee authorized the publication, the Court concluded that the Senator's publication was not part of the legislative process. *See id.*

<sup>78</sup> *See id.* at 625, 628.

<sup>79</sup> *See* 412 U.S. 306, 314-15 (1973) (holding that legislative privilege does not apply when Congress member publicly releases allegedly libelous materials he previously used under privilege in congressional committee).

<sup>80</sup> *Id.* at 307-08.

<sup>81</sup> *Id.* at 309. The other named defendants included committee staff members, members of the D.C. Board of Education, and the principal and teachers at the high school. *Id.*

<sup>82</sup> *Id.* at 312.

<sup>83</sup> *Id.* at 325.

<sup>84</sup> *See id.* at 314-15.

<sup>85</sup> *See id.* at 312 (citing *Gravel v. United States*, 408 U.S. 606, 618 (1972)) (stating that with respect to uses among members of Congress, actions are legislative acts and therefore immune from suit).

<sup>86</sup> *See id.* at 316-17.

<sup>87</sup> *See id.*

<sup>88</sup> *See id.* at 315-16 (stating that Clause does not immunize those who publish and

McMillan, Brewster, and Gravel narrowly defined the scope of legitimate legislative activities to which the Clause's privilege applies.<sup>89</sup> These cases clarify that actions merely related to or associated with legislative acts are not privileged. Beyond actual speech and debate, the Clause protects only closely related matters and activities that are an integral part of the process leading to the passage of legislation.<sup>90</sup>

### C. The D.C. Circuit's Interpretation of the Clause

In *Brown & Williamson Tobacco Corp. v. Williams*, the D.C. Circuit addressed a unique aspect of the Clause — whether it includes a nondisclosure privilege for documents that are part of the legislative process.<sup>91</sup> The court determined that it does.<sup>92</sup> *Brown & Williamson* grew out of a lawsuit that a law firm brought in state court against a former paralegal, Merrell Williams.<sup>93</sup> When Williams left the firm, he made copies of confidential product liability litigation documents concerning the firm's representation of Brown & Williamson Tobacco Corporation ("B&W").<sup>94</sup> The firm filed suit against Williams for breach of contract and various torts based on his theft of the confidential documents.<sup>95</sup> The trial court ordered Williams to return the materials and issued a temporary injunction restraining him from disclosing or using the information.<sup>96</sup>

Meanwhile, the House of Representatives Subcommittee on Health and the Environment held hearings on the effects of tobacco products.<sup>97</sup> The Chairman of the Subcommittee publicly stated that a

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distribute otherwise actionable materials beyond reasonable requirements of legislative function).

<sup>89</sup> See generally *id.* at 306 (limiting application where Congressman breaks otherwise valid law in preparation for or in implementation of legislative act); Gravel v. United States, 408 U.S. 606 (1972) (limiting application of privilege from related activities before or after legislative act); United States v. Brewster, 408 U.S. 501 (1972) (denying application of privilege against investigation into bribery motivating legislative act).

<sup>90</sup> See discussion *supra* Part I.B.2.

<sup>91</sup> See 62 F.3d 408, 420-21 (D.C. Cir. 1995) (addressing whether Clause legislative privilege includes nondisclosure of written legislative materials).

<sup>92</sup> See *id.* at 421 (holding that direct suit or subpoena may not reach materials in Congressman's possession so long as Congressman acquired materials through circumstances within legitimate legislative sphere).

<sup>93</sup> *Id.* at 411.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

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

<sup>97</sup> *Id.* at 412.

former employee of a law firm representing B&W provided documents inculpatory of the large tobacco companies.<sup>98</sup> The trial court issued a subpoena duces tecum to the Chairman for the production of all B&W documents.<sup>99</sup> The Chairman filed a successful petition for removal to federal court, where the district court granted the Chairman's motion to quash the subpoena based on the Clause privilege.<sup>100</sup> The D.C. Circuit affirmed.<sup>101</sup>

The D.C. Circuit held that the Clause includes a nondisclosure privilege for documents that are part of legitimate legislative actions.<sup>102</sup> The court reasoned that revealing documentary evidence could be just as disruptive as forcing oral testimony.<sup>103</sup> Because the Clause protects against any disruption of the legislative process, the legislative privilege also protects against forced disclosure of written legislative materials.<sup>104</sup> The D.C. Circuit thereby established the documentary nondisclosure privilege upon which it later expanded in *Rayburn*.<sup>105</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* A subpoena duces tecum requires the served party to produce specified materials. See, e.g., *United States v. Nixon*, 418 U.S. 683, 688 (1974) (requiring production of tapes and other materials).

<sup>100</sup> *Brown & Williamson*, 62 F.3d at 412. In holding that the Clause barred enforcement of the subpoenas against Congressmen, the district court broke from prior district court rulings. See *id.* at 412 n.2. The D.C. district court previously held that passive receipt of documents from an outside party is not a legislative act privileged under the Clause. See *id.*; *Tavoulareas v. Piro*, 527 F. Supp. 676, 680 (D.D.C. 1981). B&W sought reconsideration by the district court, but the court denied the motion. *Brown & Williamson*, 62 F.3d at 412. B&W then appealed to the D.C. Circuit. *Id.*

<sup>101</sup> *Brown & Williamson*, 62 F.3d at 423. The Kentucky court order directed the representatives to attend a deposition. *Id.* at 412. On appeal, however, appellant B&W stated that it did not wish to depose the Congressmen. *Id.* The subpoenas at issue before the D.C. Circuit were therefore only for the production and inspection of the B&W documents. See *id.*

<sup>102</sup> See *id.* at 420-21 (stating that direct suit or subpoena may reach materials in Congress member's possession only if member acquired them by circumstances outside legitimate legislative activity); see also *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660 (D.C. Cir. 2007) (restating holding in *Brown & Williamson* that legislative privilege extends to nondisclosure of documentary material). But see *In re Grand Jury Investigations*, 587 F.2d 589, 595 (3rd Cir. 1978) (holding that when Clause is invoked as bar to discovery of documentary materials, availability of privilege depends on purposes for which information is sought).

<sup>103</sup> See *Brown & Williamson*, 62 F.3d at 420-21.

<sup>104</sup> See *id.* (stating that subpoena or suit may not reach documents that are part of legitimate legislative sphere); see also *Rayburn House Office Bldg.*, 497 F.3d at 655 (stating that precedent in *Brown & Williamson* established that "the testimonial privilege under Clause extends to nondisclosure of written legislative materials").

<sup>105</sup> See *Rayburn House Office Bldg.*, 497 F.3d at 660 (turning to *Brown & Williamson*

## II. UNITED STATES V. RAYBURN HOUSE OFFICE BUILDING

## A. Factual and Procedural Background

On May 18, 2006, the DOJ filed a search warrant application for Room 2113 of the Rayburn House Office Building, which was the office of Congressman William J. Jefferson.<sup>106</sup> An investigation had yielded probable cause that the Congressman had sought and partially accepted payments in exchange for official acts as a Congressman promoting the business of the payers.<sup>107</sup> The warrant affidavit outlined special procedures that the DOJ was required to follow in carrying out the search warrant.<sup>108</sup> The intent of the special procedures was twofold: to prevent the seizure of politically sensitive, nonresponsive items and to allow for identification of information that may fall under the Clause privilege or any other privilege.<sup>109</sup> The FBI agents conducting the search would not have a substantive role in the criminal investigation, nor would they disclose any politically sensitive or nonresponsive items.<sup>110</sup> Their sole job in the case was to review and seize responsive paper documents and copy all electronic files.<sup>111</sup> These agents would then turn this material over for review by a filter team, whose purpose was to keep privileged documents from coming into the hands of the Executive.<sup>112</sup> The filter team, consisting of two DOJ attorneys and an FBI agent, would determine which documents were nonresponsive and which documents were privileged.<sup>113</sup> The FBI would then return any such documents to the Congressman.<sup>114</sup> The government contended that it was only interested in obtaining nonprivileged evidence.<sup>115</sup>

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precedent because Supreme Court had not spoken on whether privilege conferred by Clause includes nondisclosure privilege).

<sup>106</sup> *Id.* at 656.

<sup>107</sup> *Id.* The investigation also uncovered evidence of wire fraud, bribery of a foreign official, and conspiracy to commit these crimes. *Id.* The warrant application alleged that in exchange for official legislative acts, Congressman Jefferson sought and accepted financial backing and concealed payments of cash or equity interests in business ventures located in the United States, Nigeria, and Ghana. *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (describing special search procedures outlined in search warrant affidavit designed to avoid violation of Clause privilege).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 656-67.

<sup>113</sup> *Id.* at 656.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

The district court found probable cause to issue the search warrant and signed it on May 18, 2006, with the above conditions in place.<sup>116</sup> The raid took place over the weekend of May 20 and 21, when more than a dozen FBI agents spent eighteen hours in the Congressman's office.<sup>117</sup> They reviewed every paper record and copied all electronic files in Room 2113.<sup>118</sup> In all, FBI agents seized two boxes of documents and made copies of all computer and electronic data.<sup>119</sup>

On May 24, Congressman Jefferson filed a motion in the District Court for the District of Columbia challenging the constitutionality of the search and requesting the return of all seized materials pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure.<sup>120</sup> The next day, the President of the United States directed the Attorney General to seal the records and ensure no one had access to them.<sup>121</sup> Before the seal expired, the district court denied Jefferson's motion. It ruled that the seizure of documents did not violate the Clause privilege because the raid did not require Congressman Jefferson to answer for activities he undertook in the furtherance of the legislative process.<sup>122</sup> The district court determined the *Brown & Williamson* documentary nondisclosure privilege did not apply because this was a criminal, rather than a civil, case.<sup>123</sup> Noting that *Brown & Williamson* was a civil case and was silent on the application of the privilege in a criminal investigation, the district court emphasized the critical differences between a criminal warrant and a civil subpoena.<sup>124</sup> A criminal search warrant is issued after judicial approval, is subject to strict Fourth Amendment

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<sup>116</sup> *Id.* at 657.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*; see *In re Search of the Rayburn House Office Bldg. Room No. 2113* Washington, D.C. 20515, 432 F. Supp. 2d 100, 104 (D.D.C. 2006). Congressman Jefferson's motion also sought an order enjoining FBI and Justice Department review and inspection of the seized materials. *Rayburn House Office Bldg.*, 497 F.3d at 657; *In re Search of the Rayburn House*, 432 F. Supp. 2d at 104 n.1. The district court, however, viewed the Motion for Emergency Interim Relief as moot. *In re Search of the Rayburn House*, 432 F. Supp. 2d at 104 n.1 (noting that President of United States ordered Solicitor General's office to seal and sequester seized materials for 45 days).

<sup>121</sup> *Rayburn House Office Bldg.*, 497 F.3d at 657. The directive to seal the records was temporary, set to expire on July 9, 2006. *Id.*

<sup>122</sup> *In re Search of the Rayburn House*, 432 F. Supp. 2d at 115-16 (holding legislative privilege does not extend further than necessary to preserve integrity of legislative process).

<sup>123</sup> See *id.* at 111 (distinguishing between civil subpoena in *Brown & Williamson* and criminal search warrant in *Rayburn*).

<sup>124</sup> See *id.*



requirements, and authorizes government officers to seize evidence without enforcement through the courts.<sup>125</sup> With a subpoena, however, the person served determines whether to surrender the identified objects or challenge the subpoena's validity before complying.<sup>126</sup> Congressman Jefferson appealed to the D.C. Circuit.<sup>127</sup> The question on appeal was whether the Executive's search procedures protected the Congressman's legislative privilege under the Clause.<sup>128</sup>

### B. Holding and Reasoning

Congressman Jefferson argued that he may claim legislative privilege before the disclosure of the contents of his office to the Executive.<sup>129</sup> The Congressman further argued that any violation of the privilege required return of all of the seized material.<sup>130</sup> The DOJ contended that its procedures were sufficient to protect the Congressman's legislative privilege.<sup>131</sup> Furthermore, violation of the privilege did not require the return of all nonprivileged materials within the scope of the search warrant.<sup>132</sup>

The court noted that the constitutionality of such a raid was an issue of first impression, to which the Supreme Court has not precisely spoken.<sup>133</sup> While the Supreme Court has found that the Clause ensures an independent legislature, it has not ruled whether the privilege includes a nondisclosure element.<sup>134</sup> The circuit court therefore turned to its own precedent for guidance.<sup>135</sup>

*Brown & Williamson* established a nondisclosure privilege, reasoning that the purpose of the Clause is to prevent intrusions into the

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<sup>125</sup> See *id.* (citing *United States v. Miller*, 425 U.S. 435, 446 n.8 (1976)).

<sup>126</sup> See *id.* (citing *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 854 (9th Cir. 1991)).

<sup>127</sup> *Rayburn House Office Bldg.*, 497 F.3d at 655.

<sup>128</sup> *Id.* The appellate court did not face the Fourth Amendment issue of suppression of evidence. *Id.* (stating that question of whether Fourth Amendment requires suppression of seized evidence is not before court).

<sup>129</sup> *Id.* at 659.

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

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (stating that Supreme Court has not spoken to precise issue at hand because this was first time Executive ever searched sitting member's congressional office).

<sup>134</sup> *Id.* at 659-60 (citing *Gravel v. United States*, 408 U.S. 606, 616 (1972)) (stating that *Gravel* Court held Clause includes testimonial privilege, but Court has not yet addressed whether legislative privilege includes nondisclosure privilege).

<sup>135</sup> See *id.*

legislative process.<sup>136</sup> Compelled document disclosure disrupts the legislative process and may chill the exchange of ideas between members of Congress or between congressional members and their staffs.<sup>137</sup> The *Rayburn* court moved outside the civil context and found no reason to allow compelled disclosure in a criminal investigation.<sup>138</sup> The D.C. Circuit therefore held that any search that allows executive agents to review privileged material without the legislator's consent violates the Clause.<sup>139</sup>

Applying its interpretation to the raid of Congressman Jefferson's office, the court reasoned that only part of the search violated the legislative protection.<sup>140</sup> The search of the Congressman's paper files violated the Clause, but the copying of the computer hard drives and other electronic media did not.<sup>141</sup> This distinction focused on the form of the information and the way the DOJ seized it from the Congressman's office.<sup>142</sup>

The seizure of the electronic files did not violate the Clause because agents did not review the information.<sup>143</sup> The FBI agents carrying out the raid copied the entire contents of the computer hard drives without looking at the material on the drives.<sup>144</sup> The court held that this seizure did not violate the legislative privilege because no executive agent reviewed the privileged documents.<sup>145</sup> The court issued a remand order, under which the Congressman could assert legislative privilege before executive agents actually reviewed the

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<sup>136</sup> See *id.* (citing *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995)).

<sup>137</sup> See *id.* at 661 (noting that exchanges between Congress member and staff on legislative matters may legitimately involve frank or potentially embarrassing statements).

<sup>138</sup> See *id.* The D.C. Circuit had previously addressed nondisclosure of legislative materials under the legislative privilege only in the context of civil litigation. See generally *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) (addressing civil case in matter of first impression on this issue).

<sup>139</sup> See *Rayburn House Office Bldg.*, 497 F.3d at 663 (finding Clause violation where searching agents review legislative materials without Congress member's consent).

<sup>140</sup> See *id.* (discussing seizure of paper files and electronic files separately).

<sup>141</sup> See *id.*

<sup>142</sup> See *id.* The Court addressed only the review of potentially privileged documents that took place during the raid itself. See *id.* Immediately following the raid, the Office of the Deputy Attorney General directed an immediate freeze on any review of the seized material. *Id.* at 657-58.

<sup>143</sup> See *id.*

<sup>144</sup> *Id.* at 656 (describing how agents conducting search copied all electronic materials without looking at files).

<sup>145</sup> See *id.* at 663.

electronic files.<sup>146</sup> The district court would then evaluate the Congressman's claim and determine whether the claimed material was, in fact, privileged.<sup>147</sup>

In contrast, the DOJ's special search procedures for the Congressman's paper files indicated that agents reviewed all paper files in the office.<sup>148</sup> The filter team turned over to the prosecution team only the materials that it determined were unprivileged.<sup>149</sup> The Congressman had no opportunity to claim legislative privilege before the executive agents viewed the documents.<sup>150</sup> Therefore, the *Rayburn* court held that search and seizure of the paper documents from the Congressman's office violated the legislative privilege of the Clause.<sup>151</sup>

### III. ANALYSIS

The novel issue in *Rayburn* deals with the interplay of nonprivileged material intermixed with privileged legislative material.<sup>152</sup> The D.C. Circuit erred in holding that the *Rayburn* search targeting nonprivileged materials violated the Clause. First, the court's holding runs counter to recent Supreme Court jurisprudence.<sup>153</sup> Second, the holding violates the Framers' intent for the Clause by creating improper blanket immunity for Congress members.<sup>154</sup> And third, the D.C. Circuit's ruling disrupts the coequal balance between branches of government.<sup>155</sup>

#### A. *The D.C. Circuit's Holding Runs Counter to the Direction of Recent Supreme Court Rulings*

Since the 1970s, the Supreme Court has established a clear trend of narrowing the legislative privilege.<sup>156</sup> The Court has consistently

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<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

<sup>148</sup> *Id.* at 657 (describing that FBI agents reviewed every paper record in Room 2113).

<sup>149</sup> *Id.* at 656.

<sup>150</sup> See *id.* at 656-57 (describing search procedure, in which documents were given over to executive agents without review by Congressman).

<sup>151</sup> See *id.* at 663.

<sup>152</sup> See *id.* at 655 (stating question on appeal of whether search procedures for acquiring nonprotected materials adequately avoided violation of Clause's protection of legislative materials).

<sup>153</sup> See discussion *infra* Part III.A.

<sup>154</sup> See discussion *infra* Part III.B.

<sup>155</sup> See discussion *infra* Part III.C.

<sup>156</sup> See *Doe v. McMillan*, 412 U.S. 306, 314-15 (1973) (limiting application where Congressman breaks otherwise valid law in preparation for or in implementation of

defined and limited the privilege every time it has addressed the Clause.<sup>157</sup> By expanding the legislative privilege, the D.C. Circuit's holding in *Rayburn* departs from the Supreme Court's clear constitutional jurisprudence.<sup>158</sup>

In *Gravel*, the Court held that the legislative privilege does not apply to activities occurring before or after a legislative act, which are merely related to the act itself.<sup>159</sup> *McMillan* denied legislative privilege where a Congressman broke an otherwise valid law in implementing a legislative act.<sup>160</sup> *Brewster* allowed an investigation into bribery of a Congressman, holding that bribery, even if motivating a legislative act, is not itself a legislative activity.<sup>161</sup> In opposition to this, recent D.C. Circuit rulings have treated the Clause expansively.<sup>162</sup>

The D.C. Circuit first expanded the privilege by finding a documentary nondisclosure privilege in the civil context in *Brown & Williamson*.<sup>163</sup> The court further expanded this nondisclosure

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legislative act); *Gravel v. United States*, 408 U.S. 606, 626 (1972) (limiting application of privilege from related activities before or after legislative act); *United States v. Brewster*, 408 U.S. 501, 526 (1972) (denying application of privilege against investigation into bribery motivating legislative act); discussion *supra* Part I.B.2 (outlining more recent Supreme Court cases narrowing scope of Clause).

<sup>157</sup> See *supra* note 156.

<sup>158</sup> See *infra* notes 159-66 and accompanying text. Compare discussion *supra* Part I.B.2 (discussing Supreme Court cases limiting scope of Clause legislative privilege), and *supra* note 156 and accompanying text (stating that Supreme Court has consistently narrowed Clause since 1970s), with *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007) (applying documentary nondisclosure privilege to criminal context in bribery investigation), and *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995) (finding legislative privilege includes nondisclosure privilege for legislative documents in civil context).

<sup>159</sup> See *Gravel*, 408 U.S. at 626.

<sup>160</sup> See *McMillan*, 412 U.S. at 314-15.

<sup>161</sup> See *Brewster*, 408 U.S. at 526.

<sup>162</sup> Compare *McMillan*, 412 U.S. at 313-14 (finding legislative privilege does not protect private reproduction of documents introduced and made public at committee hearing, even though hearing was part of legislative process), *Gravel*, 408 U.S. at 626 (holding that Clause does not apply to activities merely related to legislative acts), and *Brewster*, 408 U.S. at 526 (holding that bribery is not part of legislative process or function, therefore legislative privilege does not preclude investigation into bribery of Congress member), with *Rayburn House Office Bldg.*, 497 F.3d at 663 (finding violation of Clause by search that was part of investigation into legislative bribery), and *Brown & Williamson Tobacco Corp.*, 62 F.3d at 420 (finding that Clause privilege includes nondisclosure of written materials).

<sup>163</sup> See *Rayburn House Office Bldg.*, 497 F.3d at 660 (explaining that *Brown & Williamson* court found nondisclosure privilege); *Brown & Williamson Tobacco Corp.*, 62 F.3d at 420; discussion *supra* Part II.B.

privilege to the criminal context in *Rayburn*.<sup>164</sup> Ironically, *Rayburn* bolstered the legislative privilege while addressing the same issue where the *Brewster* Court previously limited the Clause: an investigation into bribery.<sup>165</sup> Thus, in addition to violating the Supreme Court's general narrowing trend, *Rayburn* guts the very accountability for nonprivileged criminal acts that the Supreme Court explicitly recognized in *Brewster*.<sup>166</sup>

*Rayburn* proponents may argue that the Supreme Court cases are distinguishable because they do not involve a mix of privileged and nonprivileged material.<sup>167</sup> Facing the issue as a matter of first impression in *Rayburn*,<sup>168</sup> the D.C. Circuit properly held that a search targeting nonprivileged materials violates the Clause if agents review privileged materials without the Congress member's consent.<sup>169</sup> Thus, the inspection of all paper files in the congressional office violated the Clause, but the seizure of electronic files without initial review did not.<sup>170</sup> *Rayburn*'s careful reasoning in this novel situation reflects a proper balance between the Supreme Court's narrow rulings and the need to protect the legislative process.<sup>171</sup>

Despite the novel factual element of intermixed materials, however, *Rayburn* still contravenes Supreme Court precedent narrowing the legislative privilege.<sup>172</sup> *Brewster* explicitly held that the Clause does not preclude an investigation into bribery.<sup>173</sup> The *Brewster* Court reasoned that bribery of an elected official would "gravely undermine" legislative integrity and defeat the right of the public to honest representation.<sup>174</sup> These same concerns apply to Congressman

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<sup>164</sup> See *Rayburn House Office Bldg.*, 497 F.3d at 663 (finding search that was part of investigation into legislative bribery violated Clause).

<sup>165</sup> Compare *Brewster*, 408 U.S. at 525 (stating that legislative privilege is narrow enough to guard against those who would corrupt legislative process by corrupting members of Congress), with *supra* note 164 and accompanying text (stating that D.C. Circuit in *Rayburn* extended nondisclosure privilege to criminal context of investigation into bribery).

<sup>166</sup> See *Brewster*, 408 U.S. at 526 (holding that accepting bribe is not legislative activity protected by Clause); discussion *supra* Part I.B.2.

<sup>167</sup> See *infra* text accompanying notes 168-71.

<sup>168</sup> See *Rayburn House Office Bldg.*, 497 F.3d at 659 (noting that Supreme Court has not spoken to precise issue at hand).

<sup>169</sup> *Id.* at 663 (finding Clause violation where searching agents review legislative material without Congress member's consent).

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

<sup>171</sup> See *supra* notes 168-70 and accompanying text.

<sup>172</sup> See *infra* notes 173-79 and accompanying text.

<sup>173</sup> See *United States v. Brewster*, 408 U.S. 501, 526 (1972).

<sup>174</sup> *Id.* at 524-25.

Jefferson's alleged bribery.<sup>175</sup> The D.C. Circuit, however, undercut *Brewster's* limitation of the Clause.<sup>176</sup> The court's application of the nondisclosure privilege in *Rayburn* resulted in finding a constitutional obstacle to a legislative bribery investigation.<sup>177</sup> This procedural impediment erodes *Brewster's* limitation on the legislative privilege, effectively expanding the Clause.<sup>178</sup> Thus, *Rayburn* represents an expansion of the legislative privilege in conflict with the Supreme Court's clear trend of a narrower scope of the legislative privilege.<sup>179</sup>

*B. Rayburn Violates the Framers' Intent by Creating Improper Blanket Immunity for Members of Congress*

The D.C. Circuit's application of the legislative privilege in *Rayburn* also defies the intent of the drafters of the Clause.<sup>180</sup> The drafters borrowed the privilege from Parliament and intended it to be a protection for the legislative system rather than a personal privilege for legislators.<sup>181</sup> *Rayburn*, however, violates this intent by creating a shield of privilege behind which Congress members may hide incriminating evidence.<sup>182</sup>

The Supreme Court has consistently interpreted that the Framers intended the Clause to protect legislative independence.<sup>183</sup> The Court

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<sup>175</sup> Compare *id.* (expressing grave concern about bribery undermining integrity of legislative process), with *Rayburn House Office Bldg.*, 497 F.3d at 656-57 (describing investigation into alleged bribery of Congress member).

<sup>176</sup> See *Rayburn House Office Bldg.*, 497 F.3d at 663 (holding that search allowing executive agents to review privileged material without Congress member's consent violates Clause).

<sup>177</sup> *Id.* (finding that search reviewing files in congressional office subject to bribery investigation violated Clause).

<sup>178</sup> See *Brewster*, 408 U.S. at 526 (holding that legislative privilege does not preclude investigation into bribery motivating legislative action).

<sup>179</sup> See *supra* notes 156-58 and accompanying text.

<sup>180</sup> See *infra* notes 181-203 and accompanying text.

<sup>181</sup> See STORY, *supra* note 18, § 863 (describing that member of Congress would be criminally liable for actions not part of legislative duties); discussion *supra* Part I.A; see also *Gravel v. United States*, 408 U.S. 606, 626 (1972) (stating that Clause does not privilege member of Congress who acts outside legislative activity); *Brewster*, 408 U.S. at 508, 526 (stating that privilege preserves legislative independence and does not immunize members of Congress from criminal responsibility); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (stating that legislative privilege is for public good, not private indulgence).

<sup>182</sup> See *infra* notes 187-203 and accompanying text.

<sup>183</sup> See *Gravel*, 408 U.S. at 626 (stating Clause does not privilege member of Congress who acts outside legislative activity); *Brewster*, 408 U.S. at 508, 526 (stating privilege was designed to preserve legislative privilege and Clause does not immunize

has also repeatedly stated that the Clause does not grant immunity to members of Congress by virtue of their office.<sup>184</sup> Thus, in keeping with the Framers' intent, the legislative privilege applies only when the underlying activity falls within the sphere of legitimate legislative activity.<sup>185</sup> The Clause does not privilege a legislator's private actions, such as receipt of a bribe, which are outside the legitimate legislative sphere.<sup>186</sup>

*Rayburn*, however, allows Congress members to shield nonprivileged materials from a criminal search warrant by intermixing them with privileged materials.<sup>187</sup> Because a search violates the Clause if agents see privileged material, the Executive cannot search for the intermixed nonprivileged materials without violating the Constitution.<sup>188</sup> The scope of the privilege thus implicitly includes nonprivileged material, so long as the materials are intermixed.<sup>189</sup> The intelligent Senator can presumably keep legitimate legislative materials

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members of Congress from criminal responsibility); *United States v. Johnson*, 383 U.S. 169, 181 (1966) (explaining that purpose of Clause is to prevent intimidation by Executive and accountability before possibly hostile judiciary); *Tenney*, 341 U.S. at 372 (describing English predecessor privilege as intended to keep legislators free from arrest or civil protests for their legislative actions).

<sup>184</sup> See *Gravel*, 408 U.S. at 626 (clarifying that immunity applies only to legitimate legislative activities); *Brewster*, 408 U.S. at 516 (stating Clause was not intended to make Congress members immune from criminal liability); see also *United States v. Helstoski*, 442 U.S. 477, 489 (1979) (holding that evidence can be introduced regarding corrupt agreements on basis that promises by Congress member to perform future activities are not legislative acts); *Doe v. McMillan*, 412 U.S. 306, 324 (1973) (holding privilege does not apply when private information used for legislative process is distributed beyond legitimate legislative activities).

<sup>185</sup> See, e.g., *McMillan*, 412 U.S. at 313 (holding that public publishing of material used in legislative committee is nonprivileged, nonlegislative act); *Gravel*, 408 U.S. at 626 (holding that acquisition and subsequent publication of materials used in congressional committee meeting are nonprivileged, nonlegislative acts); *Brewster* 408 U.S. at 526-28 (stating Clause does not prohibit inquiry into illegal conduct with mere nexus to legislative function); discussion *supra* Part I.B.2 (discussing Supreme Court's limitations on legislative privilege).

<sup>186</sup> See *Brewster*, 408 U.S. at 526 (holding Clause does not prohibit investigation into bribery in exchange for legislative act); discussion *supra* Part I.B.2.

<sup>187</sup> See *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 663 (D.C. Cir. 2007). The D.C. Circuit concluded that, even with the FBI's special precautions to avoid disclosure of privileged documents, such disclosure was inevitable. See *id.* at 661. The court went on to conclude that regardless of the material actually sought, the search violates the Clause if agents see protected legislative materials. See *id.* at 663.

<sup>188</sup> See *id.* at 663 (holding search that allows agents of Executive to review privileged materials without Congress member's consent violates Clause); *supra* note 187.

<sup>189</sup> See *Rayburn House Office Bldg.*, 497 F.3d at 663; *supra* notes 187-88 and accompanying text.

in his office, home, or even his car. These materials may then act as a shield, precluding search and therefore discovery of incriminating nonlegislative materials.<sup>190</sup> Contrary to the drafters' intent, *Rayburn* thereby creates de facto blanket immunity under which Congress members can hide evidence in a criminal investigation.<sup>191</sup>

One may argue that *Rayburn* did not create a new immunity or expand the scope of materials that the legislative privilege protects.<sup>192</sup> The D.C. Circuit recognized that the legislative privilege applies only to actual legislative material.<sup>193</sup> The court did not extend the privilege to nonlegislative or criminally inculpatory material.<sup>194</sup> The agents searching Congressman Jefferson's office did not violate the Clause by executing the search warrant for nonlegislative material; the agents violated the Clause only when they viewed legitimately privileged legislative materials.<sup>195</sup> *Rayburn* did not expand the privilege, but rather applied the existing legislative privilege to protect legislative material regardless of the circumstances surrounding its discovery.<sup>196</sup>

While the *Rayburn* holding, on its face, does not expand the privilege, its natural consequences inevitably violate the drafters' intent.<sup>197</sup> A proper constitutional interpretation must consider whether its practical effects comport with the intent of the Framers.<sup>198</sup>

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<sup>190</sup> See *supra* note 189 and accompanying text. Although overturned, the district court presented this argument in its findings that the search did not violate the Clause. See *In re Search of the Rayburn House Office Bldg. Room No. 2113* Washington, D.C. 20515, 432 F. Supp. 2d 100, 110 (D.D.C. 2006) (stating that such application of Clause would require giving legislator advance notice of search, including property outside congressional office, such as home or car).

<sup>191</sup> Compare *supra* notes 181-86 and accompanying text (describing Framers' intent for Clause), with *supra* notes 187-90 and accompanying text (describing how *Rayburn* creates improper blanket immunity for members of Congress).

<sup>192</sup> See *infra* text accompanying notes 193-96.

<sup>193</sup> See *Rayburn House Office Bldg.*, 497 F.3d at 663 (discussing whether search led to discovery of privileged legislative material, which court distinguished from nonprivileged, nonlegislative material).

<sup>194</sup> See *supra* note 193 and accompanying text.

<sup>195</sup> See *Rayburn House Office Bldg.*, 497 F.3d at 663 (holding that search violated Clause because agents viewed protected legislative material).

<sup>196</sup> See *supra* notes 193-96 and accompanying text.

<sup>197</sup> See *infra* notes 198-202 and accompanying text.

<sup>198</sup> See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting) (citing *Lake County v. Rollins*, 130 U.S. 662, 670 (1889)) (stating aim of constitutional construction is to ascertain and give effect to intent of Framers and people who adopted it); STORY, *supra* note 18, § 181 (stating effect and consequences of particular construction must be examined in light of reason and spirit of law); Richard Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1373 (1990) (noting that satisfactory constitutional interpretation may not ignore consequences).



If a certain interpretation creates results contrary to the Framers' intent, the interpretation itself violates the intent.<sup>199</sup> The *Rayburn* court stated that the privilege protects only legitimate legislative materials.<sup>200</sup> While that may be true, practical application of the *Rayburn* ruling creates a shield for nonlegislative material.<sup>201</sup> This result defies the Framers' intent that the Clause protect legislative independence but not create immunity for Congress members by virtue of their office.<sup>202</sup> *Rayburn* is therefore improper because it defies the intent of the Clause's drafters.<sup>203</sup>

C. *Expansion of the Documentary Nondisclosure Privilege in the Criminal Context Disrupts the Balance of Coequal Government Branches*

The D.C. Circuit's *Rayburn* holding improperly fortifies the legislative privilege so that, as applied, it is more expansive than the executive privilege.<sup>204</sup> The Supreme Court has explicitly stated that the application of the Clause should preserve the balance of coequal government branches.<sup>205</sup> This stance is consistent with the Clause's

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*But cf.* Gerald MacCallum, *Legislative Intent*, 75 YALE L.J. 754, 754-56 (1966) (outlining general debate over whether one can ever actually know intended meaning). *See generally* Knowlton v. Moore, 178 U.S. 41, 95 (1900) (stating that to correctly interpret meaning of provision one should consider necessities of time, conflicts of opinion, and controversies preceding creation of Constitution).

<sup>199</sup> *See supra* note 198 and accompanying text.

<sup>200</sup> *See Rayburn House Office Bldg.*, 497 F.3d at 663.

<sup>201</sup> *See id.* (holding search that allows agent of Executive to review privileged materials without Congress member's consent violates Clause); *supra* notes 187-91 and accompanying text (describing how *Rayburn* holding creates default immunity for members of Congress by virtue of Clause).

<sup>202</sup> *See Gravel v. United States*, 408 U.S. 606, 626 (1972) (stating that Clause does not privilege member of Congress who acts outside legislative activity); *United States v. Brewster*, 408 U.S. 501, 508, 526 (1972) (stating that privilege was designed to preserve legislative privilege and that Clause does not make members of Congress immune from criminal responsibility); STORY, *supra* note 18, § 863 (describing that member of Congress would be criminally liable for actions not part of legislative duties); discussion *supra* Part I.A.

<sup>203</sup> *See supra* notes 181-202 and accompanying text.

<sup>204</sup> *Cf. Brewster*, 408 U.S. at 508 (recognizing Court's task to apply Clause to ensure independence of Legislature without altering historic balance of three coequal branches of government). *Compare Rayburn House Office Bldg.*, 497 F.3d at 663 (holding that search with valid search warrant in bribery investigation violated legislative privilege), with *United States v. Nixon*, 418 U.S. 683, 684-85 (1974) (holding that absent extreme circumstances, executive privilege yields to specific need for evidence in criminal investigation).

<sup>205</sup> *See Gravel*, 408 U.S. at 616 (stating that legislative privilege of Clause was designed to ensure coequal branch of government-wide freedom of speech, debate,

intent to preserve legislative independence without creating legislative supremacy.<sup>206</sup> The *Brewster* Court thus stated that courts must apply the Clause to preserve legislative independence without altering the coequal balance between governmental branches.<sup>207</sup> The D.C. Circuit abandoned this guidance, however, in holding that the legislative privilege includes a nondisclosure privilege in both civil and criminal contexts.<sup>208</sup>

The Supreme Court has also previously held that the executive documentary disclosure privilege is not absolute.<sup>209</sup> The executive privilege must yield to a demonstrated, specific need for evidence in a pending criminal trial, absent a specific national security interest.<sup>210</sup> The Supreme Court has also indicated in dicta that, like the executive privilege, the legislative privilege would also yield in criminal proceedings.<sup>211</sup> The D.C. Circuit itself recognized in *Brown & Williamson* that the documentary nondisclosure privilege may yield when it is inconsistent with a sovereign interest.<sup>212</sup> In particular, the court indicated that the privilege should yield in the criminal context.<sup>213</sup>

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and deliberation without intimidation or threats); *Brewster*, 408 U.S. at 508 (stating that Court's task is to apply Clause to ensure independence of legislature without altering historic balance of three coequal branches of Government).

<sup>206</sup> See *Brewster*, 408 U.S. at 508 (stating that Clause privilege is designed to preserve legislative independence, not supremacy); Alexander J. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U. L. REV. 1, 15 (1968); Note, *supra* note 13, at 337-38.

<sup>207</sup> See *Brewster*, 408 U.S. at 508 (stating that task is to apply Clause to ensure independence of legislature without altering historic balance of three coequal branches of government).

<sup>208</sup> See *Rayburn House Office Bldg.*, 497 F.3d at 663 (applying legislative privilege to nondisclosure of written materials in context of criminal investigation).

<sup>209</sup> See *Nixon*, 418 U.S. at 713 (finding that generalized assertion of executive privilege must yield to demonstrated, specific need for evidence in pending criminal trial).

<sup>210</sup> See *id.*

<sup>211</sup> See *Gravel v. United States*, 408 U.S. 606, 622 (1972) (stating that Clause offers no protection for criminal conduct threatening security of person or property of others regardless of whether performed as part of legislative act). By accepting a bribe to perform certain legislative activities, a Congress member deprives her constituents of effective representation in government. The member is no longer acting in the best interests, or as the representative "property," of her constituents. See *id.*

<sup>212</sup> See *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 419-20 (D.C. Cir. 1995). But see *id.* (noting that privilege is absolute in all other contexts).

<sup>213</sup> See *id.* (noting that Supreme Court in *Gravel* at least suggests testimonial privilege might be less stringently applied when inconsistent with sovereign interest). Although it was technically ruling as a matter of first impression, the D.C. Circuit is particularly deferential to *Gravel* because it is expanding the application of *Gravel*. See

The D.C. Circuit's holding in *Rayburn*, however, bolsters the legislative privilege to prevent disclosure of possibly incriminating materials, even with a valid search warrant.<sup>214</sup> This expansion makes the legislative privilege stronger than the executive privilege, which yields where there is specific need for evidence in a criminal context.<sup>215</sup> Thus, *Rayburn*'s documentary nondisclosure privilege disrupts the balance between coequal government branches in violation of the Supreme Court's stance that the Clause should preserve this balance.<sup>216</sup>

#### CONCLUSION

Despite the D.C. Circuit's improper expansion of the Clause legislative privilege in *Rayburn*, the Supreme Court denied certiorari.<sup>217</sup> Other circuits, however, should be wary of following the D.C. Circuit's precedent in their treatment of legislative privilege. While the legislative privilege protects a central element of American government, as the Supreme Court has said, it should not provide blanket immunity or create an imbalance between the executive and legislative branches. In order that legislators remain accountable for the same laws that they create, courts should not expand legislative privilege further than is necessary to serve its legitimate purpose of protecting the legislative process.

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*id.* The circuit court based *Brown & Williamson*'s documentary nondisclosure privilege on the testimonial privilege clarified in *Gravel*. *See id.* Therefore, where the *Gravel* testimonial privilege yields, so must the *Brown & Williamson* documentary nondisclosure privilege. *See id.*

<sup>214</sup> *See* *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 657 (D.C. Cir. 2007) (describing acquisition of search warrant from federal district court before search of Representative Jefferson's congressional office).

<sup>215</sup> *Compare Rayburn House Office Bldg.*, 497 F.3d at 663 (holding that search with valid search warrant in bribery investigation violated legislative privilege), *with Nixon*, 418 U.S. at 684-85 (holding that executive privilege yields to specific need for evidence in criminal investigation).

<sup>216</sup> *See supra* notes 205-07, 214-15 and accompanying text.

<sup>217</sup> 128 S. Ct. 1738 (2008) (denying certiorari).