Call the Question: Is Capitol Hill A Warrant-Free Zone Post-*Rayburn*?

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Introduction

The Speech or Debate Clause ensures that congressional officials can investigate and speak freely upon legislative matters without executive interference. The executive branch's unprecedented decision to search a congressman's office raises serious constitutional questions about legislative independence and presidential powers. The fallout may have serious implications for federal public corruption investigations and prosecutions.

In Part I, we will review the history of the Speech or Debate Clause, tracing its origin to the Middle Ages and its application and evolution in the United States. In Part II, we will discuss the D.C. Circuit's decision in *Rayburn House Office Building*. In Part III, we will consider the court's analysis and discuss the decision's ramifications for federal public corruption cases. Finally, in Part IV, we will offer a search procedure that helps to ensure that Congress will remain free from executive overreaching and intimidation, but that also protects law enforcement interests.

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I. The History of the Speech or Debate Clause

The Speech or Debate Clause has a venerable history that traces back to medieval England. As early as 1377, the Speaker of the House of Commons petitioned the crown for certain rights and privileges, including freedom from arrest, freedom from molestation for Members and their servants, and (most importantly) freedom of speech.[1] Parliament recognized that the law did not permit it to criticize the crown. But it also recognized that its chief function – petitioning the king for new laws and the reform of existing laws – required some critique of the Crown's actions.[2] The Speaker's Petition was a pragmatic solution. Essentially, the Speaker would ask the king or queen's forgiveness before conducting any business.[3] The crown, realizing that representative government would be impracticable without some semblance of free speech, gave its assent.[4]

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[1] CARL WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 21 (Da Capo Press 1970) (1921). There is some dispute over when the Speaker's Petition began to include the request for free speech. The first written record of this request is from Sir Thomas More's petition in 1542. J. E. Neale, *Free Speech in Parliament*, *in* TUDOR STUDIES at 259 (R. W. Seton-Watson ed., Russel & Russel 1970) (1924).

[2] Neale, *supra* note 1, at 267-68.

[3] Before Sir Thomas More's petition, the Speaker's petition took the form of a request not to be punished. More made a subtle, but important, change by asking for freedom of speech. In other words, his predecessors simply sought to avoid punishment while he sought secure a positive privilege. *Id.* The difference may appear to be inconsequential, but it showcases an evolutionary step from free speech as a privilege to free speech as a right.

[4] *See id*.

Although some historians dispute whether *Haxey's Case*[5] is the first recorded effort to enforce a member's freedom of speech in Parliament, it illustrates at the very least the opening salvo in Parliament's bid for the privilege. In January 1397, Sir Thomas Haxey petitioned the House of Commons to curb King Richard II's spending powers because he believed that the king was too extravagant in providing for the royal household.[6] At the king's behest, Parliament condemned Haxey as a traitor and sentenced him to death.

Although King Richard II eventually pardoned him, Haxey later petitioned Parliament to annul the condemnation on the ground that punishing a member for his speech was contrary to Parliament's practice.[7] Parliament agreed, and it petitioned the king for an annulment. The king granted the petition. Yet Parliament was not content. In 1399, the House of Commons re-petitioned for an annulment and asked the king to admit that the condemnation had been against Parliament's normal practice and procedure and in "destruction of the ancient customs of the Commons."[8] The king also granted this petition. This suggests that the crown afforded Members of Parliament (MPs) freedom of speech when speaking in Parliament before 1397.

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[5] Haxey's Case, 3 *Rotuli Parliamentorum* 434 (1937).

[6] WITTKE, *supra* note 1, at 23.

[7] There is some dispute over Haxey's status. Some historians do not believe he was a Member of Parliament at all, and they therefore argue that he was not invoking the privilege of free speech. Neale, *supra* note 1, at 267. Others suggest that he was a priest who represented the clergy before Parliament. WITTKE, *supra* note 1, at 24, n.13. Still others argue that he must have been a Member of Parliament because he invoked the privilege. *See* Neale, *supra* at 259.

[8] WITTKE, *supra* note 1, at 24.

Half a century later, King Henry VI imprisoned Thomas Young, a burgess from Bristol, because of offensive statements that he made while on the floor of Parliament.[9] In 1455, Young petitioned Parliament, demanding damages for personal injuries and injuries to his estate stemming from his imprisonment.[10] The House of Commons took up his cause as a means to protect the freedom of speech that it had enjoyed from time immemorial.[11] The king relented, and he ordered what would become the House of Lords to make reparations to Young.[12]

As the privilege of free speech became firmly rooted in parliamentary tradition, Parliament became bolder. It began to claim free speech as a right, not a privilege. In 1621, King James I struggled with Parliament over its intrigue with the marriage of the prince of Wales to Maria Anna of Spain. He ordered Parliament to stop its inquiry, and he reminded the MPs that he retained his prerogative to punish them.[13] The two sides sent dueling letters back and forth until the king gave his assurance that he would preserve Parliament's privileges, just as he would preserve his own.[14] But the king

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[9] *Id.* at 24-25.

[10] *Id.* at 25.

[11] *Id.* at 24-25 ("the old liberte and freedom of the Comyns of this Lande had, enjoyed and prescribed, fro the tyme that no mynde is, all such psones . . . ought to have their freedom to speke and sey in the House . . . withoute any manner chalange, charge, or punycion therefore to be leyde to theyme in eny wyse. . . . .").

[12] *Id.* at 25. "The king ordered that the Lordes of his Counsell do and provide in this partie for the seid Suppliant, as by theire discrecions shall be though convenient and reasonable." *Id.* at n. 15 (citing 5 *Rotuli Parliamentorum* 357).

[13] *Id.* at 28.

[14] WITTKE, *supra* note 1, at 28-29.

qualified Parliament's privilege as one stemming from royal grace.[15] Although Parliament thanked him for recognizing its privilege, it established a committee to research the king's claim.[16] The committee concluded that the privilege of free speech was not a product of royal grace, but rather that it was their "[ancient] and undoubted birthright."[17] After destroying the committee's report in a fit of rage, the king dissolved Parliament and imprisoned some of the most vocal advocates of the "right" to free speech.[18]

Only a generation later, Parliament suffered yet another outrage against free speech. In 1642, in what is perhaps the closest historical analogy to the search of Representative William Jefferson's office, King Charles I ordered the arrest of John Pym and four other MPs, as well as the seizure of their papers.[19] When Parliament refused to comply, the king personally appeared with a group of soldiers to enforce his warrant.[20] He demanded to know the Members' whereabouts, but Speaker William Lenthall refused to answer, stating that Parliament had chosen not to comply and he served Parliament, not the king.[21] Although the Members escaped, the trunks of

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[15] *Id.*

[16] *Id.* at 29.

[17] *Id.*

[18] *Id.*

[19] MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 1 (Yale University Press) (1943).

[20] *Id.*

[21] GEORGE PETYT, LEX PARLIAMENTARIA 169.

documents were seized.[22] The House of Commons condemned the king for his "high breach of the rights and privileges of [P]arliament."[23]

Shortly after the incident, Catholics in Ireland began to revolt. King Charles and Parliament raised separate armies to quell the uprisings. The relationship between the king and Parliament quickly deteriorated, and their armies battled each other in a fight for supremacy. Ultimately, Parliament won. King Charles was forced to accept the English Bill of Rights, which guaranteed, among other things, Parliament's right to free speech. "[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."[24] Parliament's freedom of speech was never seriously questioned again.[25]

The American colonists brought the English tradition of representative government to the New World. For the most part, freedom of speech was afforded to the American assemblies. Indeed, most governors confirmed that they enjoyed the same rights and privileges as the House of Commons.[26] By 1725, at least a dozen colonies either assumed that they possessed the customary privileges, including the freedom of speech, or their speakers petitioned the governor in the same ceremonial

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[22] CLARKE, *supra* note 19.

[23] *Id.* (citing 2 Journals of the House of Commons 373, 383).

[24] *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, 1 Will. & Mary sess 2, c. 2.

[25] WITTKE, *supra* note 1, at 30.

[26] CLARKE, *supra* note 19 at 64-66, 68 (citing the state of the privilege in Maryland, Virginia, New York, New Jersey, South Carolina, Georgia, and North Carolina).

manner in which the Speaker of the House of Commons presented his petition.[27] As with Parliament, the assemblies gradually began to assert their privileges as inherent rights.[28]

In 1787, with a revolution behind them, the Founding Fathers drafted a constitution to replace the Articles of Confederation and to strengthen the American Union. They met in Philadelphia, and after many months of passionate debate and difficult compromises, they completed their proposed constitution. But not every clause caused consternation.

The Speech or Debate Clause was adopted without much speech or debate. In fact, there was no opposition.[29] The Founding Fathers knew that representative democracy could not survive unless the people's representatives were free to engage in "robust political discourse."[30] They were well aware from English history that the executive could use the criminal laws as a pretext to silence critical or disfavored legislators.[31]

Since the Constitution went into effect in March 1789, the United States Supreme Court has interpreted the Speech or Debate Clause only a handful of times, with the

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[27] *Id.* at 70. Nonetheless, some attempts to reign in the colonial assemblies occurred. For example, in 1669, the Maryland governor told the assembly that its privileges were not the same as the House of Commons. *Id*. at 84.

[28] *Id.* at 84-92.

[29] Todd B. Tatelman, CRS Report for Congress, *The Speech or Debate Clause: Recent Developments* 1 (citing *Powell v. McCormack*, 395 U.S. 486, 502 (1969)).

[30] AHKIL REED AMAR, AMERICA'S CONSTITUTION 102 (Random House 2005).

[31] *United States v. Johnson*, 383 U.S. 169, 181-182 (1966).

more recent cases involving public corruption.[32] The Court has come to recognize an important difference between the purpose of the Clause in the United Kingdom and the purpose it serves in the United States. Parliament is supreme, but Congress is a co-equal branch of government. Unlike the English Bill of Rights, the American Speech or Debate Clause is designed to ensure Congress's freedom from presidential or judicial interference and intimidation, not its supremacy.[33]

It has been more than 30 years since Senator Mike Gravel (D-AK) read the Pentagon Papers into the Congressional Record and prompted the Court's last, major case involving the Speech or Debate Clause.[34] Now, another opportunity has arisen to interpret the contours of the Clause – the FBI's search of Representative Jefferson's office on Capitol Hill.[35] It is the first time in American history that the executive branch has ever executed a search warrant on a congressional office.[36]

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[32] *E.g.*, *United States v Helstoski*, 442 U.S. 477 (1979) (excluding evidence of legislative action in a congressman's trial); *United States v. Johnson*, 383 U.S. 169 (1966) (reversing a congressman's criminal conviction because the prosecution relied upon a speech he made on the floor of the House of Representatives).

[33] *United States v. Brewster*, 408 U.S. 501, 507-08 (1972).

[34] *Gravel v. United States*, 408 U.S. 606 (1972).

[35] The Government petitioned for a writ of certiorari on December 19, 2007. *United States v. Rayburn House Office Building, Room 2113, Washington D.C., 20515*, __ U.S. __ (No. 07-816).

[36] Tatelman, *supra* note 29, at Summary, ¶ 2.

II. *Rayburn Office Building*

On Saturday, May 20, 2006, FBI agents raided Representative Jefferson's office.[37] The Louisiana congressman, who has been under investigation for years and who was indicted in June 2007, was denied access to his office during the 18-hour search.[38] The agents removed two boxes full of paper records, and they made copies of the hard drives of every computer in the office.[39] The unprecedented search caused an uproar in Congress. The very partisan 109th Congress temporarily set aside its political differences to address the issue. Democrats and Republicans came together to denounce the search as a breach of the Speech or Debate Clause, much like Parliament denounced King Charles I when he raided Parliament to seize John Pym and his papers.[40]

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[37] Vincent J. Marella and Peter J. Shakow, *The Speech or Debate Clause: Congress' First Defense?*, *in* WHITE COLLAR CRIME 2007, at G-23.

[38] *Id.*

[39] *Id.*

[40] Speaker Dennis Hastert (R-IL) and Minority Leader Nancy Pelosi (D-CA) issued a press release that reminded the executive branch that everyone, including law enforcement officials, must act within the law:

> No person is above the law, neither the one being investigated nor those conducting the investigation.
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> The Justice Department was wrong to seize records from Congressman Jefferson's office in violation of the [c]onstitutional principle of Separation of Powers, the Speech or Debate Clause of the Constitution, and the practice of the last 219 years. These constitutional principles were not designed by the Founding Fathers to place anyone above the law. Rather, they were designed to protect Congress and the American people from abuses of power, and those principles deserve to be vigorously defended.

The Justice Department quickly dug in its heels. Attorney General Alberto Gonzales noted that Representative Jefferson ignored a subpoena for his records for several months.[41] It was only after the Justice Department tried to get unprivileged records without a warrant that it was forced to resort to this method.[42] The Attorney General claimed that that the Department acted properly, and he even threatened to resign if the President acceded to Congress's demands.[43] President George W. Bush struck a middle ground, ordering a 45-day "cooling off" period, during which time the files would be held by the Solicitor General's office.[44]

The Justice Department relied chiefly upon the fact that the United States District Court for the District of Columbia found probable cause to support the search and approved the special "filter team" procedures designed to preserve the privilege. The special procedures described in the warrant affidavit called for FBI agents who had no involvement with the investigation to conduct the search and to collect any responsive documents and electronic data they could find.[45] The agents would then turn the records over to a filter team that would consist of two Justice Department attorneys and

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Carl Hulse, *House Leaders Demand Return of Seized Files*, N.Y. TIMES, May 25, 2006. http://www.nytimes.com/2006/05/25/washington/25cong.html?_r=1&oref=slogin. Last accessed on Jan. 10, 2008.

[41] Marella and Shakow, *supra* note 37, at G-24.

[42] *Id.*

[43] *Id.* (citing David Johnston and Carl Hulse, *Gonzales Said He Would Quit in Raid Dispute*, N.Y. TIMES, May 27, 2006).

[44] *Id.*

[45] *United States v. Rayburn House Office Bldg., Room 2113, Washington D.C. 20515*, 497 F.3d 654, 656 (D.C. Cir. 2007).

an FBI agent, none of whom would be involved with the investigation.[46] They would look through the seized documents, return unresponsive documents, and make an initial privilege determination.[47] The filter team would forward all responsive, unprivileged documents to the prosecution team and provide copies of privileged documents to Representative Jefferson and his attorneys.[48] The filter team would forward the documents to the district court for a final determination, unless the Representative consented to disclosure of privileged documents.[49] This process was reportedly followed.[50]

Representative Jefferson moved the district court to order the return of the documents, asserting his Speech or Debate Clause privilege.[51] The court denied the motion after the 45-day "cooling off" period expired. It ruled that the warrant "did not impermissibly interfere with [his] legislative activities" because it only sought documents outside the "legitimate legislative sphere."[52] Jefferson immediately appealed, and the Justice Department put a hold on any review of the documents pending the outcome of

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[46] *Id.*

[47] *Id.*

[48] *Id.* at 656-57.

[49] *Id.* at 657.

[50] *Id.*

[51] *United States v. Rayburn House Office Bldg., Room 2113, Washington D.C. 20515*, 497 F.3d 654, 657 (D.C. Cir. 2007).

[52] *In re Search of the Rayburn House Office Bldg., Room 2113, Washington D.C. 20515*, 432 F. Supp. 2d 100, 113 (D.D.C. 2006).

the appeal.[53] The court of appeals concluded that the Speech or Debate Clause applied and that it affords every Member of Congress an absolute privilege against producing "legislative act" materials to executive branch officials.[54] The purpose of the Clause is to prevent the executive from interfering with the legislative process or from intimidating legislative officials.[55] Yet the court also held that the Clause does not make congressional offices warrant-free zones.[56] It does not trump the President's Article II and Fourth Amendment powers to conduct judicially sanctioned searches of legislative offices.[57]

Although the court approved the notion that a search warrant could be issued for an office on Capitol Hill, it held that the search procedures used in this case failed to protect the privilege because they authorized the compelled disclosure of privileged material to the executive branch. "The special procedures outlined in the warrant affidavit would not have avoided the violation of the Speech or Debate Clause because they denied the Congressman any opportunity to identify and assert the privilege . . . before their compelled disclosure to Executive agents."[58] Yet at the same time, the court of appeals did not decide the issue of how a search warrant could be constitutionally executed. "How [the privilege is to be accommodated] is best

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[53] *Rayburn House Office Bldg.*, 497 F.3d at 658.

[54] *Id.* at 665 ("Where the Clause applies its protection is absolute.").

[55] *Id.* at 659.

[56] *See id.* at 659.

[57] *Id.* at 665.

[58] *Id.* at 662.

determined by the legislative and executive branches in the first instance."[59] The court only imposed a remedy for the breach, ordering the return of all privileged material and imposing a gag order on the seizing agents and the filter team.[60]

III. Post-Rayburn Considerations

A. Should Congressional Offices Be Warrant-Free Zones?

Significantly, Representative Jefferson limited his appeal to the issue of executive branch officials viewing privileged materials. He did not claim that the Speech or Debate Clause precludes searches of congressional offices altogether.[61] This led to an interesting result. On the one hand, the court began with the assumption that the Fourth Amendment applies and that the executive branch can search congressional offices.[62] On the other hand, it held that it is unconstitutional for the executive officials to review privileged material without a Member's consent.[63]

As the Justice Department suggests in its petition for certiorari,[64] the court of appeals created a dichotomy that effectively prohibits traditional searches. Every document seizure requires some review of the document's contents to determine

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[59] *Rayburn House Office Bldg.*, 497 F.3d at 663.

[60] *Id.* at 665-66.

[61] *Id.* at 659.

[62] *Id.* at 659.

[63] *Id.* at 663.

[64] Brief for the United States, *United States v. Rayburn House Office Bldg., Room 2113, Washington D.C. 20515*, __ U.S. __ (No. 07-816) at (I).

whether it is responsive.[65] While a quick glance at a document may seem insignificant, it leaves open the possibility that sensitive information could be made known to the executive branch. In turn, the executive branch could improperly use that information to interfere with the legislative process or to intimidate a Member of Congress. The Clause was designed to guard against this very possibility.

Perhaps the D.C. Circuit's assumption was wrong. An argument can be made that the Speech or Debate Clause trumps the executive branch's ability to conduct searches of Members' offices. Such an argument would be consistent with the history and purpose of the Clause. The House of Commons and the colonial assemblies jealously guarded their privilege because it was their only defense against the king's vindictive use of the criminal law and against other royal attempts to limit their independence.[66] Indeed, royal interference with colonial legislatures was one of the chief grievances that sparked the American Revolution.[67]

In addition, relatively recent trends in public corruption prosecutions suggest that this may be the time to strengthen protections for legislators. While the Supreme Court correctly noted in *United States v. Brewster* that "our history does not reflect a catalogue of abuses at the hands of the Executive that gave rise to the privilege in England,"[68] it is

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[65] This logic led the court to conclude that the seizure of documents was unconstitutional, but that the seizure of the computer files was perfectly permissible because copying digital data does not involve a review of the data's contents. *Id.*

[66] *See e.g., An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, 1 Will. & Mary sess 2, c. 2.

[67] THE DECLARATION OF INDEPENDENCE para. 3-8, 22-24 (U.S. 1776).

[68] *United States v. Brewster*, 408 U.S. 501, 508-09 (1972).

also important to note that Members of Congress are more likely to be the targets of federal investigators today than at any time since the Founding:

> Today, the Speech or Debate Clause is more important than at the Constitution's inception. Then, federal crimes were few and criminal investigations of Members *a rara avis*. It was not until the 20th century that Members began to be targets of Executive Branch criminal investigations. And as the federal criminal code has dramatically thickened, the opportunity for the Executive Branch to contrive an excuse for raiding the files of a Member has correspondingly expanded. . . .[69]

As Bruce Fein, a former Deputy Attorney General under the Reagan Administration noted, the pendulum has swung back to the early days of the House of Commons, and the "[s]eparation of powers is too important to be left to the discretion of the President."[70]

Nor is it of any comfort that the judicial branch gave its blessing to the search. As the Supreme Court recognized in *United States v. Johnson*, the Speech or Debate Clause was designed to guard against not only a vindictive or meddlesome executive, but also against the possibility of Members being held to account before a hostile judiciary.[71] Part of the brilliance of the separation of powers is that it was designed to protect one branch from being threatened by the joint action of the other two. Indeed, in *United States v. Helstoski*, the Supreme Court cited the Speech or Debate Clause as "a

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[69] *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?*: Hearing Before the H. Comm. on the Judiciary, 109th Cong. (2006) (written testimony of Bruce Fein at 4).

[70] *Id.*

[71] *United States v. Johnson*, 383 U.S. 169, 181-182 (1966).

central bulwark against intrusion by the Executive and Judiciary into the legislative sphere."[72]

Additionally, there is the matter of what is at the bottom of the slippery slope. If the Speech or Debate Clause does not preclude searches that otherwise comply with the Warrant Clause, then it presumably does not preclude other types of Fourth Amendment activity, either. Nothing would seem to stand in the way of bugging a representative's phone or planting undercover agents on a senator's staff[73] or conducting any other "investigatory techniques deemed essential" by the executive branch, regardless of how intrusive they may be.[74] While these are commonly accepted and constitutionally permitted investigative methods, they would undoubtedly intimidate congressional officials, discourage them from "discharg[ing their] publick [sic] trust with firmness and success,"[75] and deter Congress from performing its traditional oversight role over the executive branch. It is this very chilling effect that the Speech or Debate

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[72] *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?*, Hearing Before the H. Comm. on the Judiciary, 109th Cong. (2006) (prepared statement of Prof. Jonathan Turley at 2 (citing *United States v. Helstoski*, 442 U.S. 477, 492 (1979)) (internal quotations omitted)).

[73] *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?*, Hearing Before the H. Comm. on the Judiciary, 109th Cong. (2006) (prepared statement of Prof. Charles Tiefer (former House Solicitor and General Counsel 1984-95) at 5).

[74] *See* Brief for the United States, *United States v. Rayburn House Office Bldg., Room 2113, Washington D.C. 20515*, __ U.S. __ (No. 07-816).

[75] James Wilson, *The Works of James Wilson* (Robert Green McCloskey, ed. 1967).

Clause was designed to safeguard against, much like the First Amendment was designed to prevent a chilling effect on the people's right to free speech.[76]

Importantly, interpreting the Speech or Debate Clause privilege to prohibit searches of legislative offices would not place Members of Congress above the law. Without a doubt, public corruption is a grave breach of the public's trust, and it must be punished appropriately. But not all punishment must come through criminal prosecution. The Constitution affords another avenue of relief. In the rare cases where conviction would be impossible because the only evidence of the crime is stored in the Member's office, "[e]ach House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[77] Nothing prevents the Justice Department from notifying the Member's Chamber of its investigation and recommending that the Chamber take disciplinary action.

Congress has previously used its expulsion power when confronted with public corruption.[78] For example, in 2002, the House voted 420-1 to expel Representative

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[76] For a brief discussion on the mutually reinforcing nature of the Speech or Debate Clause and the First Amendment, see AMAR, *supra* note 29, at 103.

[77] U.S. CONST. art. I, § 5.

[78] *But see United States v. Brewster*, 408 U.S. 501, 519-20 (1972), in which the Court laments that such trials could lapse into a political circus devoid of any due process. Although this is a possibility, the recent expulsion of a representative suggests that the Court's fear may be misplaced. The expulsion proceeding was fairly orderly, with the accused Member afforded 45 minutes to make his case. The vote was also non-partisan: 420-1. In addition, the Court seemed to forget that whatever disciplinary action a House of Congress takes against a Member is a political punishment, not a legal one. The Court also stated its concern that the independence of individual members might be impaired if Congress regularly sat in judgment of its Member. Even if that is true, that is a calculated risk that the Founding Fathers took, and their decision to vest Congress with a discipline power should be respected. *See also Id.* at n.12.

James Traficant because of bribery, racketeering, and income tax evasion.[79] In 1980, the House expelled Representative Michael Myers for accepting bribes.[80] The Senate has attempted to use this power no less than five times since 1797 to punish corrupt senators. [81] The senators resigned, however, before action could be taken against them.[82]

Although it may seem counterintuitive, it is important to remember that the Speech or Debate Clause privilege exists to protect the public, not the legislator. As the Court has noted, privileges are "not for the protection or benefit of a malicious or corrupt [public official], but for the benefit of the public, whose interest it is that [public officials] should be at liberty to exercise their functions with independence and without fear of consequences."[83] By strengthening the privilege, free speech is strengthened and the separation of powers principle is buttressed. In turn, the "constitutional structure of separate, co-equal, and independent branches of government" is preserved.[84]

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[79] Tom Squitieri, *Traficant Expelled After Final Jabs in House*, USA TODAY, *accessible at* http://www.usatoday.com/news/washington/legislative/house/2002-07-24-traficant_x.htm. Last accessed Jan. 11, 2008.

[80] *Id.*

[81] Expulsion and Censure in the Senate, *accessible at* http://www.senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm. Last accessed Jan. 11, 2008.

[82] *Id.*

[83] *Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982).

[84] *United States v. Helstoski*, 442 U.S. 477, 491 (1979).

1. Searches of Legislative Home Offices and Automobiles

The Justice Department has raised an interesting, related point in its petition for certiorari. Even if the Speech or Debate Clause does not prohibit the executive from searching Member's offices, the circuit court's ruling still seems to impose a de facto moratorium on searches of Members because executive branch officials cannot view privileged material. This would seem to preclude searches of Members' home offices, automobiles, and any other place where someone could reasonably expect privileged material to be located. As the Supreme Court noted in *Katz v. United States*, "[t]he Fourth Amendment protects people, not places."[85] In much the same way, the Speech or Debate Clause grants a privilege to individual legislators in an effort to preserve the separation of powers. Consequently, the Clause protects not only a Member's office, but also every document that falls within the Court's definition of a "legislative act," regardless of where it may be located.

No matter where the Justice Department searches, it is reasonably foreseeable that a search relating to a Member of Congress will yield "legislative act" materials. In an age of telecommuting and home offices, Members may very well work on drafts of committee reports or other "legislative acts" at home. Searches of Members' cars may also prove difficult. For example, if a Member is arrested while driving their car, a *Belton* search of the passenger compartment,[86] a *Robinson* search of the Member or

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[85] *Katz v. United States*, 389 U.S. 347 (1967).

[86] *New York v. Belton*, 453 U.S. 454 (1981) (police officers may search the passenger compartment of a vehicle when they arrest the vehicle's occupants or recent occupants).

his or her briefcase or purse,[87] or an inventory search of the vehicle after impounding it may yield privileged materials.[88]

Members are on the job every day, whether they are investigating, legislating, meeting with constituents, lobbyists, or executive branch officials, or making public speeches. It is foreseeable that privileged material will accompany them wherever they go and wherever they call home for the night. Consequently, regardless whether the Speech or Debate Clause makes Capitol Hill a warrant-free zone as to Members, the executive branch is effectively precluded under *Rayburn*'s broad holding from conducting searches in any place where a Member may keep his or her privileged material – at least until a suitable procedure is developed.

2. Implications for Pending Public Corruption Cases

Regardless whether the Speech or Debate Clause prevents the executive branch from searching congressional offices, *Rayburn*'s impact may not be as dire as the Justice Department fears. It should not stymie current investigations of non-Members, who would not have standing to challenge the use of privileged material on the ground that it was unconstitutionally seized. Under *Rakas v. Illinois*, defendants cannot challenge the validity of a seizure unless they had custody or control of the seized

[87] *United States v. Robinson*, 414 U.S. 218 (1973) (police officers may conduct a search of the arrestee incident to a lawful arrest and the area within the arrestee's control).

[88] Of course, in the automobile situation, it is much more likely that the legislator would put the arresting officers on notice by orally invoking the privilege.

item.[89] Therefore, federal prosecutors generally would not be barred from using at a non-Member's trial privileged material that had been unconstitutionally seized.

A possible wrinkle might surface if a Member petitioned for privileged material to be returned under Rule 41(g) of the Federal Rules of Criminal Procedure before the prosecutor secures a conviction.[90] But a court order to return the privileged material to the Member under Rule 41(g) would not preclude a later attempt to obtain the information by subpoena. If the subpoenaed Member refuses the request, the United States Attorneys' Manual lays out a well-developed, respectful procedure to petition the Clerk of the House or the Secretary of the Senate for a vote of the Chamber to decide whether to force the Member to disclose the material.[91]

As for investigations of Members, *Rayburn* does not preclude the investigation, the prosecution, or the punishment of public corruption. Nor does it make federal investigators' jobs substantially more difficult than they have been for the last 30 years.

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[89] *Rakas v. Illinois*, 439 U.S. 128 (1979).

[90] Rule 41(g) states: "A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings."

[91] United States Attorneys' Manual, § 2046 provides, in relevant part: "In addition, both the House and the Senate consider that the Speech and Debate Clause gives them an institutional right to refuse requests for information . . . . Thus, most requests for information and testimony dealing with the legislative process must be presented to the Chamber affected, and that Chamber permitted to vote on whether or not to produce the information sought. . . . The customary practice when seeking information from the Legislative Branch [when a Member does not voluntarily produce the requested information] is to route the request through the Clerk of the House or the Secretary of the Senate. . . . . However, *bona fide* requests for information bearing on ongoing criminal inquiries have been rarely refused."

The Supreme Court acknowledged in *Helstoski* that the Speech or Debate Clause was a major impediment to public corruption prosecutions. When the Government complained that it would have a difficult time proving the *quid pro quo* in public corruption prosecutions if privileged material must be suppressed, the Court responded with a pithy rebuke: "We do not accept the Government's arguments; without doubt the exclusion of such evidence will make prosecutions more difficult. Indeed, the Speech or Debate Clause was designed to preclude prosecution of Members for legislative acts."[92]

In addition, assistant U.S. Attorneys have secured the convictions of numerous Members without ever having raided a Capitol Hill office. The Government's hue and cry in this case is perplexing considering that it has all but acknowledged that it does not need any of the seized evidence to secure Representative Jefferson's conviction – it does not even plan on requesting a delay of the trial pending the privilege review.[93] Instead, the Justice Department plans to use the seized records as evidence against non-Members.[94]

There is little evidence that creating warrant-free zones for congressional offices will prevent the executive branch from ferreting out corrupt Members and prosecuting them. Given the fact that the Government has successfully prosecuted corrupt Members in the past, the Government appears to overstate its case when it claims that prohibiting searches on Capitol Hill "critically undermine[s] the Executive Branch's ability

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[92] *United States v. Helstoski*, 442 U.S. 477, 488 (1979).

[93] *See* Brief for the United States, *United States v. Rayburn House Office Bldg., Room 2113, Washington D.C. 20515*, __ U.S. __ (No. 07-816) at 10-11.

[94] *Id.*

to investigate and prosecute corrupt activity in and affecting the Legislative Branch."[95] The material seized in this case is not even critical enough to delay the trial against Representative Jefferson, much less to dismiss the indictment. And as the United States Attorneys' Manual notes, the legislative branch has rarely refused an official Justice Department request for Speech or Debate Clause materials.

Even if *Rayburn* stands, and a search procedure is developed that passes Speech or Debate Clause muster, the trade-off for burdening the Justice Department seems a fairly small price to pay in exchange for shoring up the separation of powers and protecting Congress's independence. The Founding Father's generation launched a revolution because the executive interfered with the legislative sphere and intimidated assemblymen. They believed in an independent legislature so strongly that Congress is the only branch of government with an express privilege to protect it from encroachment by the other two branches.

Privileges are about trade-offs. The Founding Fathers favored legislative independence over a meddlesome executive – even if it meant that it would be more difficult to punish those who are unworthy to continue holding public office. It is a trade-off that has served Americans well for almost 220 years.

B. Should Members of Congress Be Afforded a Speech or Debate Clause Right to Counsel if Searches are Permitted?

If the executive branch is permitted to conduct searches of congressional offices, some safeguard should be put in place to ensure that the Speech or Debate Clause privilege is afforded the maximum protection possible. Attorneys have played a role

[95] *Id.* at 2-3.

throughout history in helping others assert their rights and privileges. Members of Congress should be afforded a right to counsel to help them protect their privilege.

There are two ways a right to counsel could be granted. First, the Speech or Debate Clause could be interpreted to afford a right to counsel in much the same way that the Fifth Amendment grants a right to counsel for the limited purpose of protecting the privilege against self-incrimination. Second, Congress could enact legislation that requires that counsel be appointed to protect the Member's privilege.

Affording Members a right to counsel under the Clause is concededly different than the circumstances that gave rise to the right afforded by the Fifth Amendment. In *Miranda*,[96] *Yarborough*,[97] *Innis*,[98] and *Perkins*,[99] the Court made clear that the Fifth Amendment right to counsel is afforded only because of the uniquely coercive nature of in-custody interrogation, which works to undermine the privilege. Also, the Fifth Amendment does not apply to search warrants because there is no testimonial component to a search – the executing officers simply take items that respond to the warrant.[100] Moreover, the Fifth Amendment generally does not extend to documents, except for the act-of-production privilege, which attaches in the face of a subpoena.[101]

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[96] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[97] *Yarborough v. Alvarado*, 541 U.S. 652 (2004); *see also Oregon v. Mathiason*, 429 U.S. 492 (1977) *and California v. Beheler*, 463 U.S. 1121 (1983).

[98] *Rhode Island v. Innis*, 446 U.S. 291 (1980).

[99] *Illinois v. Perkins*, 496 U.S. 292 (1990).

[100] *Andreson v. Maryland*, 427 U.S. 463 (1976) (The Fifth Amendment's act-of-production privilege applies only to subpoenas, not to search warrants, because the police self-service the warrant, whereas the subpoenaed party personally provides incriminating information.).

Yet there are enough differences between the scope of the two clauses (and enough similarities between their goals) to warrant a Speech or Debate Clause right to counsel. To be sure, both clauses guard against executive branch intimidation. One guards against intimidation to confess guilt, while the other guards against intimidation that threatens the independence of a co-equal branch of government. The Fifth Amendment right to counsel is designed to counter the coercive effect of stationhouse questioning by affording detainees an advocate who can help them preserve their privilege against self-incrimination. A Speech or Debate Clause right to counsel would ensure that Members of Congress have an advocate who can help them preserve their privilege. It would also further the institution's interest in maintaining the appropriate balance of power between the branches.

At the same time, the scope of the Speech or Debate Clause also exceeds the scope of the Fifth Amendment. The Clause protects documents, unlike the Fifth Amendment. Indeed, as the *Rayburn* Court noted, the Clause even affords an absolute production privilege.[102] The Fifth Amendment's act-of-production privilege can be overcome if the existence, location, and authenticity of the sought-after document are foregone conclusions.[103] Under *Rayburn*, the Speech or Debate Clause production privilege applies regardless whether production would require a compelled testimonial

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[101] *Id. See also Fisher v. United States*, 425 U.S. 391 (1976).

[102] *Rayburn House Office Bldg.*, 497 F.3d at 665.

[103] *United States v. Doe*, 465 U.S. 605 (1984) (*Doe I*); *Fisher v. United States*, 425 U.S. 391 (1976).

disclosure.[104] While both the Fifth Amendment and the Clause grant a testimonial privilege, the Clause goes further – it protects the documents from ever being viewed by the executive branch. Thus, even if the President knew that a certain Member possessed certain documents, that he kept them in his office, and that they are authentic, the President would still be prohibited from obtaining them if they are "legislative act" materials, even though he could establish a "foregone conclusion" to overcome the Fifth Amendment's act-of-production privilege.

If, however, the courts decline to read a right to counsel into the Speech or Debate Clause, then Congress could enact legislation to that effect. Some have suggested that the Emolument Clause[105] would prevent such legislation because it could be construed as a title of nobility.[106] Most of the Founding Fathers eschewed noble titles because they were incompatible with America's egalitarian belief that society is comprised of equals and governed by equals. Benjamin Franklin once wrote that hereditary titles are "groundless and absurd, [and] often hurtful to . . . Posterity, since [they are] apt to make them proud, disdaining to be employ'd in useful Arts, and thence falling into Poverty, and all the Meannesses, Servility, and Wretchedness attending it. . . ."[107] Thomas Paine shared a similar sentiment. He believed that noble titles were unfit

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[104] *See Rayburn House Office Bldg.*, 497 F.3d at 661.

[105] U.S. CONST. art. I, § 9 provides, in relevant part: "No Title of Nobility shall be granted by the United States . . . ."

[106] *See Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?*, Hearing Before the H. Comm. on the Judiciary, 109th Cong. (2006) (prepared statement of Bruce Stein at 4).

[107] THE WRITINGS OF BENJAMIN FRANKLIN. (Albert Henry Smyth ed., Macmillian Co. 1905).

for the Great American Experiment because noblemen too often believed that their titles gave them license to act with impunity. This made their supplicants little more than slaves:

> Dignities and high sounding names have different effects on different beholders. The lustre of the Star and the title of My Lord, over-awe the superstitious vulgar, and forbid them to inquire into the character of the possessor: Nay more, they are, as it were, bewitched to admire in the great, the vices they would honestly condemn in themselves. This sacrifice of common sense is the certain badge which distinguishes slavery from freedom; for when men yield up the privilege of thinking, the last shadow of liberty quits the horizon.[108]

Granting Members a right to counsel in the rare case where the executive branch obtains a search warrant does not present the nobility problems the Framers sought to avoid, but it does afford maximum protection to the separation of powers at the very core of the republic.

IV. Search Procedure

If the Speech or Debate Clause does not make Capitol Hill a warrant-free zone, then a protocol must be developed to ensure Congress's independence while accommodating the President's law enforcement interest, regardless whether Members of Congress are afforded a right to counsel. While legislators may prefer advance notice so that they may separate privileged material on their own, this would obviously pose serious forensic risks from a law enforcement perspective. Yet an announced search, like the one in *Rayburn*, exposes privileged material to the executive branch and runs afoul of the Clause.

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[108] THE LIFE AND WORKS OF THOMAS PAINE. (William M. Van der Weyde ed. Patriots' Edition. 1925).

Rayburn demands the creation of a middle ground between announced and unannounced searches. After *Rayburn*, it seems that some sort of advanced notice is required. But the notice need not necessarily be given to the targeted Member. There are a number of alternatives. One possible method is for the federal agent who obtains a warrant to deliver it to the Chief of the Capitol Police. The Chief would then notify the Sergeant at Arms of the appropriate Chamber and dispatch a specially trained team to seal the Members' office. The team would remove all personnel from the office, and only the Member, the Member's attorney, the Sergeant at Arms, and the Chamber's General Counsel would be admitted entry under the team's supervision.

The Member would identify allegedly privileged documents, and the Sergeant at Arms would photograph them in their original state, record a brief description of each document in a privilege log, and place the documents in a catalogued box. Once the Member has completed his privilege review, the Sergeant at Arms would personally transport the boxed records to the United States District Court for the District of Columbia. The Court would review the privilege claims. Privileged documents would be returned to the Member, whereas unprivileged documents and the photographs of their original state would be forward to the federal agent who obtained the warrant.

This procedure would ensure that executive branch officials do not review privileged material before a proper determination has been made. At the same time, it would minimize the risk that the targeted Member would purposely destroy evidence or accidentally alter it.

Conclusion

The unprecedented FBI raid on a congressional office has upset the delicate balance of powers between the three branches of government. Interpreting the Speech or Debate Clause to create a warrant-free zone on Capitol Hill would restore the balance.

If the courts, however, decline to interpret the Clause in this manner, then a Speech or Debate Clause right to counsel would assist Members of Congress in exercising their privilege and protecting them from executive intimidation. It would also protect against executive interference in the legislative sphere. This right to counsel could be found in the Clause itself, much like the Fifth Amendment grants a right to counsel to preserve the privilege against self-incrimination, or it could be granted by an Act of Congress.

Yet whether Members are afforded a right to counsel, a proper protocol must be developed to govern how searches are executed if congressional offices are subject to the Fourth Amendment. Any procedure should prohibit executive branch agents from entering Members' offices, while also imposing a supervision requirement on Members while they review their documents to protect the forensic integrity of the records for law enforcement officials. In the end, the procedure must preserve the separation of powers by balancing Congress's independence and law enforcement interests.