

IN DEFENSE OF *RAYBURN HOUSE*: WHY THE
SUPREME COURT SHOULD RECOGNIZE AN
EVIDENTIARY PRIVILEGE OF NON-
DISCLOSURE IN ITS SPEECH OR
DEBATE CLAUSE JURISPRUDENCE

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Article I of the United States Constitution includes the legislative privilege commonly known as the Speech or Debate Clause. The Clause reads that members of Congress:

[S]hall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.¹

Despite the Clause's long history,² there have been comparatively few Supreme Court cases dealing with the grant of legislative immunity for words spoken in legislative acts.³ Reasons for this could be numerous, including the fact that legislators rarely commit acts worthy of prosecution in connection with their service in Congress. How-

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1 U.S. CONST. art. I, § 6, cl. 1.

2 See *infra* Part I (discussing the history of the Clause).

3 At the time of writing, a Westlaw terms-and-connectors search for the term "Speech or Debate Clause" revealed just forty-two Supreme Court cases which include even a cursory glance at the Clause.

ever, recent cases in both the Ninth⁴ and District of Columbia⁵ Circuits have created one of the first modern controversies over the scope of the Clause. Specifically, the Circuits disagree over whether the Clause provides an evidentiary privilege of non-disclosure during an investigation into the activity of a member of Congress.⁶ If the Supreme Court chooses to take this case, as some commentators believe it will,⁷ it will have to address this disputed question and decide once and for all how far the Speech or Debate Clause will extend in protecting documents possibly used in a congressional investigation.

This Note will argue that in order to preserve the structural values inherent in the Constitution, especially the separation of powers and the independence of the legislative branch,⁸ the Supreme Court should resolve this split in favor of the D.C. Circuit's decision in *United States v. Rayburn House Office Building*.⁹ This Note will demonstrate that without the strong legislative privilege enunciated in that case, the framers' notion of legislative independence will be in danger. The executive branch could take advantage of a weaker Speech or Debate protection to give its agencies power to investigate documents that come very close to the border of "legislative acts." This flies in the face of the structural ideal of separation of powers, but may prove to be politically popular for a sitting president. To avoid such inevitable conflicts of interest, the independent judiciary must strike the balance between the other two branches. The Ninth Circuit's recent decision in *Renzi* fails to protect legislative independence, and despite extremely valid concerns about the inability to control legislative corruption, it should be rebuked if and when the Supreme Court grants certiorari on this issue.

Part I will begin by describing the origins and history of the Speech or Debate Clause. Part II will provide an overview of the Supreme Court's modern Speech or Debate jurisprudence in order to set the stage for the current split. Part III will follow with a detailed

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

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

6 *See Renzi*, 651 F.3d at 1032 ("Rather, to do as [Rep. Renzi] suggests would require us to agree that there exists some grandiose, yet apparently shy, privilege of non-disclosure that the Supreme Court has not thought fit to recognize.")

7 *See, e.g.*, Jonathon H. Adler, *Circuit Split Over Speech and Debate Clause*, THE VOLOKH CONSPIRACY (June 24, 2011, 4:00 PM), <http://volokh.com/2011/06/24/circuit-split-over-speech-and-debate-clause>.

8 *See, e.g.*, *Youngblood v. DeWeese*, 352 F.3d 836, 839 (3d Cir. 2003) ("Ensuring a strong and independent legislative branch was essential to the framers' notion of separation of powers . . .").

9 497 F.3d 654.

analysis of the decisions leading up to *Renzi* in the Ninth Circuit and *Rayburn House* in the D.C. Circuit. Part IV will analyze the holdings in those cases and discuss the ensuing circuit split created after the Ninth Circuit's June 2011 decision in *Renzi*. Part V will conclude with a recommendation that if the Supreme Court grants certiorari on the issue, it should follow *Rayburn House's* broader reading of the legislative immunity provision embodied in the Speech or Debate Clause in order to protect the important constitutional values of legislative independence and separation of powers.

I. HISTORY AND BACKGROUND OF THE CLAUSE

Unlike other, more controversial grants of legislative power, the Speech or Debate Clause was approved at the Federal Convention in 1787 without any debate or opposition.¹⁰ As the Supreme Court stated in *United States v. Johnson*, the Clause adopted “almost verbatim the language of Article V of the Articles of Confederation,” which “in turn [is] almost identical to the English Bill of Rights of 1689.”¹¹ The English Bill of Rights provision states that “the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.”¹² As the Supreme Court and some commentators have written, the original Clause was a reaction to years of legislative suppression committed by both the Tudor and Stuart monarchs in the sixteenth and seventeenth centuries.¹³ It was apparently intended to guarantee and preserve “the independence and integrity of the legislature.”¹⁴ When the Clause was adopted into the new United States Constitution, its purpose remained the same. Instead of regulating the dichotomy between the monarch and the two houses of Parliament, its key goal was to preserve the separation and autonomy of the new United States Congress from encroachment by a hostile executive branch, made worse by a possibly equally hostile judiciary.¹⁵ In contrast to previous

10 See *United States v. Johnson*, 383 U.S. 169, 177 (1966).

11 *Id.* at 177.

12 *Modern History Sourcebook: The Bill of Rights, 1689*, FORDHAM UNIV., <http://www.fordham.edu/halsall/mod/1689billofrights.asp> (last visited Nov. 8, 2012).

13 See *Johnson*, 383 U.S. at 178; John D. Pingel, Note, *Do Congressmen Still Pay Parking Tickets? The D.C. Circuit's Overextension of Legislative Privilege in United States v. Rayburn House Office Building*, 42 U.C. DAVIS L. REV. 1621, 1625 (2009).

14 Pingel, *supra* note 13, at 1625.

15 See John D. Friel, Note, “*Members Only!*” *United States v. Rayburn House Office Building, Room 2113: The Speech or Debate Clause, the Separation of Powers and the Testimonial Privilege of Preemptive Nondisclosure*, 53 VILL. L. REV. 561, 563 (2008) (“Thus, what was substantively conceived as a protection from the judicial retribution of a

Notes and Articles discussing the *Rayburn House* case,¹⁶ this Note argues that the Clause must be interpreted broadly in order to serve this original intent.

II. SUPREME COURT'S SPEECH OR DEBATE JURISPRUDENCE

A. *Early Decisions: Speech or Debate in the Civil Context*

The Supreme Court existed for nearly one hundred years before it first had occasion to examine the meaning of the Speech or Debate Clause. That first instance occurred in 1880 in *Kilbourn v. Thompson*.¹⁷ That case required the Court to determine whether the legislative privilege embodied in the Clause protected sitting Congressmen in a committee from an investigation into discussions on the floor of the House of Representatives to determine whether they were guilty of false imprisonment.¹⁸ In determining whether the committee's written resolutions would be protected, the Court offered the first definitive statement on the extent of the legislative privilege:

It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.¹⁹

In short, faced with a choice between narrowing the Clause to enable a judicial investigation into the conduct of this legislative com-

hostile Executive is today recognized as an absolute procedural roadblock to otherwise legitimate judicial inquiry of any kind."); Pingel, *supra* note 13, at 1625. ("[The Clause] protects the legislature from potentially hostile executive or judiciary branches.");

16 See, e.g., Pingel, *supra* note 13, at 1623, 1642–47 (arguing that the D.C. Circuit erred in its ruling in *Rayburn House* by creating "improper blanket immunity for members of Congress"); see also Craig M. Bradley, *The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption?*, 57 N.C. L. REV. 197, 198 (1979) (arguing that long before the idea that the Speech or Debate Clause contained an evidentiary privilege had surfaced, the Supreme Court's broad interpretation of the clause "created a serious impediment to the successful investigation and prosecution of congressional corruption").

17 103 U.S. 168 (1880).

18 The plaintiff claimed that he was placed in a District of Columbia jail for forty-five days after the defendants forcibly removed him from his house. *Id.* at 170; see also *id.* at 170–78 (describing the plea that the actions were protected by the Clause as well as the proceedings in the House that led to the suit).

19 *Id.* at 204.

mittee (which could have seemed like the more palatable alternative, especially given the accusation), and holding to the principles and protecting legislative independence with a strong privilege, the Court opted for the latter. By holding that the written acts of this particular legislative committee were protected by the Clause from investigation (and, in effect, the defendants were immune from being held liable for the intentional tort of false imprisonment),²⁰ the Supreme Court established precedent for a strong legislative privilege.²¹ *Kilbourn's* facts could have been reason enough for the Court to shy away from the privilege and weaken it, but instead *Kilbourn* gave us a strong interpretation of the privilege and an important jumping off point for more modern Speech or Debate jurisprudence.

The Clause was addressed on only a few occasions in the Supreme Court between *Kilbourn* and the beginning of the modern era. The next significant case expanding on the Court's jurisprudence came in 1951, at a time when McCarthyism was exerting significant pressure on the freedom of speech and expression in the United States.²² *Tenney v. Brandhove*²³ involved plaintiff William Brandhove challenging the Senate Fact-Finding Committee on Un-American Activities and

20 However, the Court noted that the House, of course, retains the jurisdiction to punish its own members for transgressions where the judiciary cannot. *Id.* at 189. *Kilbourn* even countenanced a possible penalty of imprisonment for certain wrongdoings. *Id.* at 189–90.

21 Some commentators, including Professor Bradley, have argued that the Court created this broad privilege almost out of thin air, purportedly relying on the seminal Massachusetts case of *Coffin v. Coffin*, 4 Mass. (3 Tyng) 1 (1808), but actually ignoring an important aspect of that case, namely that the privileged acts or materials must have occurred or been produced within the legitimate duties of the legislator. See, e.g., Bradley, *supra* note 16, at 216 (“The *Kilbourn* Court failed to note, however, that, having thus paid lip service to a broad legislative privilege, the *Coffin* court went on to conclude that Micajah Coffin was not ‘executing the duties of his office.’” (quoting *Coffin*, 4 Mass. (3 Tyng) at 30)). This principle would surface in the Supreme Court's later jurisprudence as the requirement that privileged material be created in the course of a legislative act. See *infra* Part II.C. It was not ignored in *Kilbourn* because, as Professor Bradley seems to acknowledge, the acts there (committee memos and resolutions) were clearly within the duties of the office. See Bradley, *supra* note 16, at 217.

22 See, e.g., Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 49 (2006) (describing some actions of the House Un-American Activities Committee and quoting then-Chief Justice Earl Warren in blaming the government for its large role in abridging the freedom of speech and expression); Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1342 (2007) (describing “the period of McCarthyism during the 1940s and 1950s” as “an era characterized by what are now viewed as excessive assaults on the freedom of speech”).

23 341 U.S. 367 (1951).

California state Senator Jack B. Tenney. Brandhove claimed that Tenney and his Committee violated his civil rights guaranteed by the Federal Constitution and by statute.²⁴ After the Ninth Circuit sided with Brandhove and held that he could state a valid claim for relief,²⁵ the Supreme Court found that the legislative privilege applied and accordingly reversed. The Court gave a powerful endorsement to a strong legislative privilege in *Tenney*. After discussing the historical background of the Clause and its formulations in several of the Revolution-era state constitutions,²⁶ Justice Frankfurter added a new justification for the breadth of the Clause, even surpassing the language used in *Kilbourn*. That powerful addition was the broad support of the privilege even in the face of heavy skepticism of legislatures on the part of both James Madison and Thomas Jefferson.²⁷ In Frankfurter's view, because influential framers who were not enamored by the possibility of legislative overreach still saw fit to give that branch of government such complete protection from liability, the privilege could not be overcome by a simple act of that same legislature. Part of Brandhove's complaint was based on a statute passed by Congress in 1871 under the enforcement power of Section five of the Fourteenth Amendment.²⁸ Justice Frankfurter rightfully expressed his surprise and doubt that the Congress itself meant, in the course of passing the statute, to abrogate the legislative privilege. As he wrote, "[w]e cannot believe that Congress—itsself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before

24 See *id.* at 369.

25 See *Brandhove v. Tenney*, 183 F.2d 121 (9th Cir. 1950). The Ninth Circuit's short opinion failed to even mention the legislative privilege in determining that Brandhove's suit could proceed.

26 See *Tenney*, 341 U.S. at 373–74.

27 *Id.* at 375. Justice Frankfurter noted that legislatures were the supreme power in every state during and immediately after the Revolution, and quoted Madison's declaration that "[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." *Id.* (quoting THE FEDERALIST No. 48 (James Madison)).

28 *Id.* at 369. The statute provided:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

8 U.S.C. § 43 (1946).

us.”²⁹ The Court then inquired into whether the activities of the Committee were “within the sphere of legitimate legislative activity,” and determined that “[i]nvestigations . . . are an established part of representative government,” and therefore the Committee was performing a legitimate function and could not be questioned or held liable for acts occurring as a result of it.³⁰

Justice Black, concurring in *Tenney*, generally endorsed Justice Frankfurter’s expansive reading of the Clause and agreed that the Committee could not be held liable for its actions in requiring Brandhove to testify, but he cautioned that “there is a point at which a legislator’s conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act.”³¹ However, neither Justice Black nor Justice Frankfurter gave any indication of what such a point might be, or how close Tenney’s Committee had come to liability despite the enunciation of a strong privilege. Justice Black did strongly criticize Tenney’s actions,³² but, known as a staunch textualist and originalist, he agreed with Frankfurter’s analysis of the broad privilege in order to protect the independence of the legislature.³³

Justice Douglas, dissenting in *Tenney*, presented an argument for a far weaker legislative privilege. He was extremely worried that the Speech or Debate shield could become essentially an unlimited grant of immunity and eventually apply to far more conduct than he believed was socially optimal.³⁴ He did not trust the internal governance of legislatures nor the political process to correct issues such as the stifling of free speech that took place as a result of the Committee

29 *Tenney*, 341 U.S. at 376.

30 *Id.* at 376–78.

31 *Id.* at 379 (Black, J., concurring).

32 Among other things, Justice Black clarified his view of the matter: “[t]hat is to say, the holding that the chairman and the other members of his Committee cannot be sued in this case is not a holding that their alleged persecution of Brandhove is legal conduct.” *Id.* He also worried about the effect that such a strong privilege could have on freedom of speech and the press generally if committees are simply allowed to call anyone to be investigated and have their actions protected by the Constitution. *Id.* at 380–81. This, of course, is a valid concern. However, in our system of government, the political process is designed to solve problems like this, and the privilege should not be circumvented even if the ends seem noble enough. Like the Court in *Kilbourn* imagined, the legislature retains the power to punish its own members. See *supra* note 20.

33 *Tenney*, 341 U.S. at 379 (Black, J., concurring).

34 See *id.* at 381–83 (Douglas, J., dissenting).

in *Tenney* and others like it throughout the nation at the time.³⁵ Justice Douglas's description, through a series of rhetorical questions, of the results that could stem from the Court's holding, was striking:

But we are apparently holding today that the actions of those committees have no limits in the eyes of the law. May they depart with impunity from their legislative functions, sit as kangaroo courts, and try men for their loyalty and their political beliefs? May they substitute trial before committees for trial before juries? May they sit as a board of censors over industry, prepare their blacklists of citizens, and issue pronouncements as devastating as any bill of attainder?³⁶

Justice Douglas essentially argued that the Court's "extension" of the Clause came at the expense of the First Amendment rights of the public. His opinion was clearly in the minority at this point, as seven members of the Court joined in Frankfurter's strong endorsement of the legislative privilege. The end result was that, in 1951 (though with an admittedly small sample size), the Court uniformly praised the Speech or Debate Clause and the idea of legislative privilege in general. There were no limits enumerated other than the legitimate legislative acts requirement, and the Court had given no indication of how far afield such "Un-American Activity Committees" would have to extend in order for the legislators at fault to lose their immunity. It was against this backdrop that the Court heard its first criminal case presenting a legislative privilege question.

B. *The Court Interprets the Clause in the Criminal Context*

After deciding only two Speech or Debate cases in the first one and a half centuries of the Court's existence, the first criminal matter involving the privilege finally arrived in 1966 in the case of *United States v. Johnson*.³⁷ There, a former United States Congressman was indicted on accusations that he both violated the federal conflict of interest statute³⁸ and participated in a conspiracy to defraud the United States.³⁹ The Fourth Circuit overturned his conspiracy conviction.

35 For example, McCarthyism was rampant in the United States at the time of the *Tenney* decision. Wide support existed for limiting the free speech rights of those suspected to be communist sympathizers. See generally Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (providing restrictions on the activities of several groups, including communists, and passed by a two-thirds majority in both houses over President Truman's veto).

36 *Tenney*, 341 U.S. at 382 (Douglas, J., dissenting).

37 383 U.S. 169 (1966); see Bradley, *supra* note 16, at 218 (confirming that this was in fact the first criminal case involving the legislative privilege).

38 18 U.S.C. § 281 (1964); *Johnson*, 383 U.S. at 170.

39 18 U.S.C. § 371 (1964); *Johnson*, 383 U.S. at 170–71.

tion⁴⁰ on the ground that he could not be questioned about conspiring to make a speech on the floor of the House of Representatives without violating the Speech or Debate Clause.⁴¹ It also vacated his other convictions not directly related to the alleged speech because “the invalidity of [the conspiracy charge] as applied to Johnson was obviously prejudicial to his right to the unbiased consideration of the jury on the remaining counts. Many of the events testified to at the trial related only to the speech.”⁴²

A divided Supreme Court affirmed the Fourth Circuit in both respects.⁴³ All seven Justices who considered the case agreed that the conspiracy charge had to be thrown out because the act of questioning former Representative Johnson about the speech would be a violation of the Speech or Debate Clause.⁴⁴ The majority, led by Justice Harlan, clearly applied the strong privilege from *Kilbourn* and *Tenney* in the criminal context. In fact, Justice Harlan indicated that he intended to follow the broad reading encouraged by those cases.⁴⁵ He acknowledged that neither of those cases dealt with a criminal investigation against a then-sitting Representative, but connected this case to that line by asserting that “it is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the Executive and accountability before a possibly hostile judiciary.”⁴⁶ Having confirmed that the “prophylactic purposes” of the Clause⁴⁷ applied just as strongly to criminal as civil cases, the majority moved on to address whether the Clause protects legislators’ purposes and motivations as much as actual legislative acts themselves. The question of how far the privilege extends in protecting things that may not themselves be direct legislative acts, but would require the executive to conduct a search of a Representative’s personal files, containing privileged information, to prove a violation of

40 See *United States v. Johnson*, 337 F.2d 180, 192 (4th Cir. 1964)

41 See *Johnson*, 383 U.S. at 171.

42 *Johnson*, 337 F.2d at 204.

43 Neither Justice Black nor Justice White took part in the decision. The vote was therefore 4–3, with Chief Justice Warren and Justices Douglas and Brennan concurring in the portion of the opinion that overturned the conspiracy charges but asserting that the Court should have decided the federal conflict counts rather than leave them to remand. See *Johnson*, 338 U.S. at 186–87 (Warren, C.J., concurring in part and dissenting in part).

44 *Id.*

45 *Id.* at 180 (majority opinion) (“*Kilbourn* and *Tenney* indicate that the legislative privilege will be read broadly to effectuate its purposes . . .”).

46 *Id.* at 180–81.

47 *Id.* at 182.

law, is a difficult one to answer. This Note argues that these “peripheral” documents should be privileged, despite the possible societal costs, to preserve the independence of the legislature and the original meaning of the Speech or Debate Clause.

On the question of purpose, Justice Harlan turned to both *Tenney* and the landmark case of *Fletcher v. Peck*⁴⁸ for the proposition that the federal courts are not the proper vehicle to investigate the purpose of individual legislators, and that it is actually a violation of the ideas of separation of powers and an independent legislature for courts to investigate such.⁴⁹ The opinion quoted *Tenney* with approval for the proposition that “[t]he claim of an unworthy purpose does not destroy the privilege.”⁵⁰ This, along with the Court’s discussion of the English case *Ex parte Wason*,⁵¹ which involved a conspiracy between several members of Parliament to make untrue statements in the House of Lords,⁵² formed the basis for the Court’s assertion that the privilege applied. Professor Bradley has argued that it was inaccurate to reference *Wason* because in Britain it would not have been a crime to utter such statements, or to conspire to do so; instead, it would have simply been a breach of the privilege and Parliament would have had the exclusive power to discipline its own members.⁵³ However, true as this may be, it does not change the fact that such actions would be privileged in the United States as well, so that even if they would normally be considered a crime if committed outside the House walls, representatives are protected from such prosecution if it is based on legitimate legislative acts. In addition, the Court’s main reason for citing and discussing *Wason* in the first place appears to be to strengthen its holding that the judiciary may not inquire into the individual purpose of legislators.⁵⁴ Professor Bradley’s distinction therefore seems inapposite. Though he concedes that “*Johnson* may have reached the correct result because the Court was dealing with a broad statute that was not by its terms applicable to congressmen,” he maintains that *Johnson*’s language stretched the scope of the Clause to capture actions that are not legitimately within the sphere of the legislature.⁵⁵ This Note argues that the prophylactic function of the

48 10 U.S. (6 Cranch) 87 (1810).

49 See *Johnson*, 383 U.S. at 180 (citing *Fletcher*, 10 U.S. (6 Cranch) at 130).

50 *Id.* (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)).

51 See *id.* at 183.

52 See Bradley, *supra* note 16, at 219 (describing, in his opinion, the *Johnson* Court’s misplaced reliance on *Wason*).

53 See *id.*

54 See *Johnson*, 383 U.S. at 183.

55 Bradley, *supra* note 16, at 220.

Clause requires it to occasionally bring into its purview some materials outside of the legislative sphere in order to adequately protect individual legislators' freedom to engage in legislative acts without fear of prosecution.

C. *The Legislative Act Restriction "Narrows" The Privilege*

It is commonly thought that, while *Johnson* represented a broad, generous reading of the Speech or Debate clause (unwarranted, according to some),⁵⁶ the next leading legislative privilege case, *United States v. Brewster*,⁵⁷ was responsible for weakening the protection the Clause gave to congressmen.⁵⁸ This conclusion is not quite correct. *Brewster* involved the prosecution of a former United States Senator for allegedly accepting a bribe to cast a vote in a certain way.⁵⁹ Of course, following the Supreme Court's decision in *Johnson*, Brewster moved to dismiss the indictments on the ground that the Speech or Debate Clause prohibited a court from inquiring into his motives.⁶⁰ The District Court, in a short opinion quoted by Chief Justice Burger, attempted to follow *Johnson* and ruled that prosecution of Senator Brewster was in fact barred by the Clause.⁶¹ This illustrated the confusion that the "purpose" language from *Johnson* caused in the interpretation of the privilege, as the Supreme Court disagreed, reversing the District Court's dismissal of the indictment and remanding for a new trial.⁶²

Chief Justice Burger's opinion, as Professor Bradley points out, created a contradiction in the Court's Speech or Debate jurisprudence.⁶³ *Johnson* had held that the legislative privilege prevented judicial inquiry into an individual legislator's motive or purpose for acting a certain way in performing his legislative duties, but *Brewster* allowed

56 See *supra* notes 52–53 and 55.

57 408 U.S. 501 (1972).

58 See, e.g., Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389, 405 (1994) ("If *Johnson* offered a generous reading of the Clause, *Brewster* tightened considerably the range of constitutional protection against prosecution for criminal offenses.").

59 See *Brewster*, 408 U.S. at 502–03 (describing the indictment against Senator Brewster).

60 *Id.* at 503.

61 The District Court's opinion, as quoted by the Supreme Court, stated: "It is the opinion of this Court that the immunity under the Speech and [sic] Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act." *Id.* at 504.

62 *Id.* at 528–29.

63 See Bradley, *supra* note 16, at 221 ("A contradiction is immediately apparent.").

an inquiry into a bribe to sustain the Government's prima facie case. As Justice Brennan pointed out in his dissent, even the Government's attorneys did not claim that Brewster's acts were not within the legislative sphere.⁶⁴ He then succinctly stated the flaw of the majority's argument, namely that, under *Johnson*, these were not legislative acts:

These charges, it seemed to me, fell within the clear prohibition of the Speech or Debate Clause as interpreted by decisions of this Court, particularly *United States v. Johnson*. For if the indictment did not call into question the "speeches or debates" of the Senator, it certainly laid open to scrutiny the motives for his legislative acts; and those motives, I had supposed, *were no more subject to executive and judicial inquiry than the acts themselves*, unless, of course, the Congress could delegate such inquiry to the other branches.⁶⁵

Justice Brennan felt that the only issue was whether Congress, through a statute, could effectively delegate the power to discipline an individual member of the legislature for receiving a bribe.⁶⁶ He concluded that even such a "narrowly drawn statute"⁶⁷ would not apply because Congress itself could not abrogate a portion of the Constitution, even if it was for the purpose of allowing a member of another branch to discipline a legislator for reprehensible conduct.⁶⁸

64 See *Brewster*, 408 U.S. at 530 (Brennan, J., dissenting). Brennan quoted heavily from the trial court proceedings:

At the hearing before the District Court, the prosecutor was asked point blank whether "the indictment in any wise [sic] allege[d] that Brewster did anything not related to his purely legislative functions." The prosecutor responded: "We are not contending that what is being charged here, that is, the activity by Brewster, was anything other than a legislative act. We are not ducking the question; it is squarely presented. They are legislative acts."

Id.

65 *Id.* at 529–30 (emphasis added) (citation omitted).

66 *Id.* at 531.

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

68 See *Brewster*, 408 U.S. at 540–41 (Brennan, J., dissenting) ("The Government offers several reasons why such a 'waiver' of legislative immunity should be allowed. None of these, it seems to me, is sufficient to override the public's interest in legislative independence, secured to it by the principles of the Speech or Debate Clause."); see also Robert J. Reinstein & Harvey A. Silvergate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1169–70 (1973) ("For similar reasons, Congress should not be able to divest any of its members of the privilege by a statute authorizing prosecution in the courts. As we have indicated, the privilege is guaranteed to each member personally, and its constitutional protection is not subject to collective discretion."). But see Bradley, *supra* note 16, at 223–24. Bradley argues that the framers did not intend to prevent Congress from passing such a statute on the grounds that this was not how the British Parliament would have interpreted their provision. He argues that instead the privilege was the property of the legislature as a whole, and such "narrowly tailored" statutes should be permitted to abrogate the privilege.

The majority did not address that contention. It also did not overrule *Johnson*, preferring to make the distinction between apparently “legitimate” legislative acts “necessary to preserve the integrity of the legislative process,”⁶⁹ and those which fell completely outside the sphere of legislation. This distinction fails to provide adequate protection to the independence of the legislature, as Justice Brennan pointed out.⁷⁰ The *Brewster* situation is remarkably similar to the dilemma faced by the two Courts of Appeal in the cases this Note will discuss below, *Rayburn House* and *Renzi*.⁷¹ While *Brewster* purports to follow *Johnson*, the reality is that *Brewster* has allowed lower courts to exempt far more conduct from the protection of the privilege⁷² and has played a hand in creating the circuit split that this Note will address.

D. Gravel Further Erodes Johnson

In the same year as the Court decided *Brewster*, it also handed down a decision in another Speech or Debate Clause case, *Gravel v. United States*.⁷³ In *Gravel*, a United States Senator’s staff members were subpoenaed to testify as part of a federal grand jury investigation into the publication of the classified “Pentagon Papers.”⁷⁴ The Senator moved to quash the subpoenas on the ground that “requiring these witnesses to appear and testify would violate his privilege under the Speech or Debate Clause”⁷⁵ The District Court denied the motion,⁷⁶ and the First Circuit affirmed.⁷⁷ The Supreme Court followed suit, though not before emphasizing that it was not attempting to weaken the privilege itself, rather only to limit the scope of legislative activities. First, Justice White confirmed that anything Senator Gravel said at the subcommittee hearing from which the publication of the Pentagon Papers resulted was automatically privileged under

69 *Brewster*, 408 U.S. at 517 (majority opinion).

70 *See supra* note 68.

71 *See infra* Parts III–IV.

72 *See, e.g.*, *United States v. McDade*, 827 F. Supp. 1153, 1161–62, 1163–64 (E.D. Pa. 1993). The Court stated, “The taking of a bribe by a member of Congress is . . . not protected,” and held that the Clause was not violated in a proceeding charging Congressman McDade with “accepting illegal gratuities, conspiracy, and racketeering.” *Id.* at 1163 (citing *Brewster*, 408 U.S. at 501).

73 408 U.S. 606 (1972).

74 *See id.* at 608.

75 *Id.* at 609.

76 *See United States v. Doe*, 332 F. Supp. 930, 938 (D. Mass. 1971).

77 *See United States v. Doe*, 455 F.2d 753, 763 (1st Cir. 1972).

the Clause.⁷⁸ The Court also emphatically rejected the Government's argument that Senator Gravel's aides and staff were not entitled to the privilege because the Clause only referred to "Senators and Representatives."⁷⁹

However, the Court agreed with the lower courts that the republication of the Pentagon Papers was not protected by the Clause.⁸⁰ Again reading *Johnson* narrowly, the Court stated that "[l]egislative acts are not all-encompassing,"⁸¹ and agreed with the proposition that not everything done by a congressman or senator having any relation to his or her duties is covered by the privilege.⁸² This is where the majority and dissents differed sharply. Justice Douglas (who had interestingly been a dissenter in *Tenney*, where he had presented an argument for a weaker privilege in the civil context)⁸³ argued that *Johnson* counseled a generous reading of the privilege, and that "[i]f republication of a Senator's speech in a newspaper carries the privilege, as it doubtless does, then republication of the exhibits introduced at a hearing before Congress must also do so."⁸⁴ He did not believe that it was the province of the federal courts to inquire into the reason for the publication, but thought that the republication was "clearly" covered by the Speech or Debate Clause.⁸⁵

Justice Brennan, also dissenting, emphatically recast his views from *Brewster* and accused the majority of misreading the history of the legislative privilege in the United States to arrive at its result.⁸⁶

78 See *Gravel*, 408 U.S. at 615–16.

79 See *id.* at 616–19 ("We have little doubt that we are neither exceeding our judicial powers nor mistakenly construing the Constitution by holding that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.").

80 See *id.* at 622–23 (citing *Stockdale v. Hansard*, 112 Eng. Rep. 1112, 1156 (Q.B. 1839)).

81 *Id.* at 625.

82 See *id.*

83 See *supra* text accompanying notes 34–36.

84 *Gravel*, 408 U.S. at 636–37 (Douglas, J., dissenting).

85 *Id.* at 634–35, 639–40 ("Classification of documents is a concern of the Congress. It is, however, no concern of the courts, as I see it, how a document is stamped in an Executive Department or whether a committee of Congress can obtain the use of it.").

86 See *id.* at 652–59 (Brennan, J., dissenting) (discussing the views of key founders and framers, including Jefferson and James Wilson, that the freedom of speech from a legislator to his constituents should be unencumbered by the other branches because it is one of the most important ways to protect the freedom of the people, and arguing that the English precedents were wrongly interpreted by the Court and actually support Senator Gravel's position).

Expanding on his views of the possible negative effects from *Brewster*, he wrote:

The threat of “prosecution by an unfriendly executive and conviction by a hostile judiciary,” that the Clause was designed to avoid, can only lead to timidity in the performance of this vital function. The Nation as a whole benefits from the congressional investigation and exposure of official corruption and deceit. It likewise suffers when that exposure is replaced by muted criticism, carefully hushed behind congressional walls.⁸⁷

Justice Brennan’s broad reading once again best represents both the original intent of the Clause and privilege as well as the Court’s precedent in *Kilbourn*, *Tenney*, and *Johnson*. The Court should, and may, head back in this direction if it gets the opportunity to review the Ninth Circuit’s decision in *Renzi* in an upcoming term. Both *Brewster* and *Gravel* had strong and multiple dissents, which may be an indication that a small change in the composition of the Court could create a monumental change in doctrine. This Note argues that Justice Brennan’s approach, if applied to the set of facts from *Renzi*, would yield a stronger and more effective privilege able to protect the values of an independent legislature and separate, co-equal branches of government. From here, our discussion moves on to the circuit split in question.

III. A CIRCUIT SPLIT EMERGES OVER THE EXISTENCE OF AN EVIDENTIARY PRIVILEGE OF NON-DISCLOSURE

A. *The Road to Rayburn House in the D.C. Circuit:* Brown & Williamson

Twelve years prior to the much-maligned *Rayburn House* decision, the D.C. Circuit faced a Speech or Debate question in a civil case. In *Brown & Williamson Tobacco Corp. v. Williams*,⁸⁸ the Court of Appeals was asked to decide whether two Congressmen, Representatives Waxman (the chairman of the House Subcommittee on Health and the Environment of the Committee on Energy and Commerce) and Wyman, could be forced to comply with a subpoena *duces tecum*.⁸⁹ The tort action arose when Williams, an employee of the law firm representing the tobacco company Brown & Williamson, stole documents belonging to the company.⁹⁰ Some documents apparently made their

87 *Id.* at 662 (quoting *United States v. Johnson*, 383 U.S. 169, 179 (1968)).

88 62 F.3d 408 (D.C. Cir. 1995).

89 *Id.* at 412.

90 *See id.* at 411.

way into the hands of the Subcommittee chaired by Representative Waxman. As a result, both Representatives were asked to turn over the documents after the Subcommittee began an investigation on the effects of tobacco products.⁹¹

After the District Court ruled that the legislative privilege barred the enforcement of subpoenas against Waxman and Wyman, Brown & Williamson appealed.⁹² The D.C. Circuit broke from several established precedents in other circuits in order to establish its core holding that the Speech or Debate Clause includes a privilege of non-disclosure.⁹³ This was a very broad reading of the Clause, but one which adequately safeguarded the independence of the legislature by implying the existence of a method of enforcement. Disagreeing with the Third Circuit, the D.C. Circuit explained that:

We do not share the Third Circuit's conviction that democracy's "limited toleration for secrecy" is inconsistent with an interpretation of the Speech or Debate Clause that would permit Congress to insist on the confidentiality of investigative files. To the extent that the Third Circuit has adopted a special rule for the testimonial use of documents, we therefore disagree.⁹⁴

The effect of the D.C. Circuit's failure to draw a distinction between use and disclosure for the purpose of the legislative privilege was to effectively create a privilege of non-disclosure for documents pertaining to legislative acts. As one commentator summed up, "[b]ecause the Clause protects against any disruption of the legislative process, the legislative privilege also protects against forced disclosure of written legislative materials."⁹⁵ Thus, the D.C. Circuit was in possession of clear precedent on which to base its decision in *Rayburn House*.

91 *See id.* at 412.

92 *Id.*

93 The Court of Appeals mentioned in detail the Third Circuit case *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978), which held that because the Speech or Debate Clause was not designed to encourage secrecy, it could not include a privilege of non-disclosure along with the non-evidentiary use privilege. *Brown & Williamson*, 62 F.3d at 420 (discussing *In re Grand Jury Investigation* 587 F.2d at 595, 597).

94 *Brown & Williamson*, 62 F.3d at 420. The court also noted that the Supreme Court had never addressed any difference between the production of documents and forced testimony under the legislative privilege, so they were unwilling to read one into the existing jurisprudence. *Id.*

95 Pingel, *supra* note 13, at 1634.

B. United States v. Rayburn House Office Building

We now come to this much-maligned 2007 decision of the D.C. Circuit.⁹⁶ The case presented a novel issue not directly confronted in the *Brown & Williamson* decision: whether, when a search of a congressman's office inevitably turns up both privileged and non-privileged documents, the congressman is entitled to the return of all materials under the *Brown & Williamson* evidentiary non-disclosure privilege, or, in the alternative, only those materials that are determined to be privileged.⁹⁷

1. Facts

In *Rayburn House*, investigators from the Federal Bureau of Investigation (FBI) searched Congressman William J. Jefferson's office pursuant to a warrant obtained by the Department of Justice (DOJ).⁹⁸ An informant had come forward and accused the Congressman of accepting a bribe, bribing a foreign official, and wire fraud, as well as conspiracy to commit those offenses.⁹⁹ The DOJ, an arm of the executive branch, determined that the only reasonable way to obtain possible records of the illegal transactions was to execute a search of Representative Jefferson's office.¹⁰⁰ The DOJ and FBI were sensitive to the Speech or Debate Clause during the search.¹⁰¹ They devised a system designed to separate privileged from nonprivileged materials

96 Given that Professor Bradley and others had been writing even after decisions like *Brewster* and *Gravel*, (see Bradley, *supra* note 16) that the privilege had gone too far, it is not surprising that a few Notes popped up criticizing *Rayburn House* in recent years. See, e.g., Friel, *supra* note 15 (arguing that, although *Rayburn House* was correctly decided, it lacked enforceable limits and had other problems which would cause difficulty in lower court application); Pingel, *supra* note 13 (arguing that *Rayburn House* took even the *Brown & Williamson* rule too far by applying it to some unprivileged material that was intermingled with privileged documents, and that the framers did not intend for the immunity to stretch this far).

97 See *Rayburn House v. Rayburn House Office Bldg.*, Room 2113, 497 F.3d 654, 655 (D.C. Cir. 2007). Judge Henderson, concurring in the judgment, stated the issue as “can Executive Branch personnel—here, special agents of the Federal Bureau of Investigation—execute a search warrant directed to the congressional office of a Member of the Congress (Member) without doing violence to the Speech or Debate Clause . . . ?” *Id.* at 666 (Henderson, J., concurring in judgment); see also Pingel, *supra* note 13, at 1639 (“The novel issue in *Rayburn* deals with the interplay of nonprivileged material intermixed with privileged legislative material.”).

98 *Rayburn House*, 497 F.3d at 656.

99 *Id.*

100 *Id.*

101 *Id.*

and protect politically charged documents as much as possible.¹⁰² Despite its efforts, the contents of the search arguably went beyond what the DOJ expected to collect. Nevertheless, the DOJ placed an immediate freeze on the collected materials before the members of the executive could sort through them.¹⁰³

Immediately after the search was executed, Congressman Jefferson challenged its constitutionality under the Speech or Debate Clause. He claimed that he held a right to determine for himself which documents fell under the legislative privilege's protection and which were nonprivileged.¹⁰⁴ After the District Court found that the Congressman had no right to remove materials that he determined were privileged,¹⁰⁵ he was granted a stay of the search pending appeal to the D.C. Circuit.¹⁰⁶ The D.C. Circuit, as described below, correctly dealt a strong blow for a broad legislative privilege despite the serious allegations levied against Congressman Jefferson.

2. Analysis and Opinion

The D.C. Circuit's main argument was that the precedent it set in *Brown & Williamson* properly decided that the Clause, in order to

102 The Court of Appeals described the DOJ's procedures for filtering the materials as follows:

The filter team would determine: (1) whether any of the seized documents were not responsive to the search warrant, and return any such documents to the Congressman; and (2) whether any of the seized documents were subject to the Speech or Debate Clause privilege or other privilege. Materials determined to be privileged or not responsive would be returned without dissemination to the prosecution team. Materials determined by the filter team not to be privileged would be turned over to the prosecution team, with copies to the Congressman's attorney within ten business days of the search. Materials determined by the filter team to be potentially privileged would, absent the Congressman's consent to Executive use of a potentially privileged document, be submitted to the district court for review, with a log and copy of such documents provided to the Congressman's attorney within 20 business days of the search. The filter team would make similar determinations with respect to the data on the copied computer hard drives, following an initial electronic screening by the FBI's Computer Analysis and Response Team.

Id. at 656–57.

103 *Id.* at 657.

104 *See id.*

105 *See In re Search of the Rayburn House Office Bldg., Room No. 2113*, 432 F. Supp. 2d 100 (D.D.C. 2006).

106 *See Rayburn House*, 497 F.3d at 658. The District Court had found that “[t]he fact that some privileged material was incidentally captured by the search does not constitute an unlawful intrusion.” *Rayburn House*, 432 F. Supp. 2d at 114.

serve its proper function, must contain a privilege of evidentiary non-disclosure.¹⁰⁷ *Rayburn House* extended *Brown & Williamson* to criminal proceedings, which is fairly uncontroversial and was not disputed by the Ninth Circuit in *Renzi*.¹⁰⁸ This Note argues that the ultimate holding of *Rayburn House*, which granted to Congressman Jefferson the return of all privileged documents but not those which were not privileged,¹⁰⁹ was correct and that the evidentiary privilege of non-disclosure should have been applied in *Renzi*. To do this, this Note will respond to the three contentions in John D. Pingel's recent Note in the *University of California Davis Law Review*, which generally argues that the D.C. Circuit erred in *Rayburn House* by including a privilege of evidentiary non-disclosure in the Speech or Debate Clause.¹¹⁰

First, Pingel argued that *Rayburn House* runs counter to the Supreme Court cases that limited the scope of the privilege by condensing the definition of a legislative act, most notably *Brewster* and *Gravel*.¹¹¹ Whether this assertion is true (and it probably is, because *Rayburn House* does have the net effect of strengthening the privilege while *Brewster* and *Gravel* clearly weakened it) is irrelevant to the question of whether *Rayburn House* was correctly decided.¹¹² *Rayburn*

107 See *Rayburn House*, 497 F.3d at 660 (arguing that *Brown & Williamson*'s non-disclosure privilege was required in order to protect the freedom and independence of the legislature from bothersome civil suits as well as criminal prosecution, and rehashing that case's assertions that the seizure of documents is just as intrusive to a legislator as if he were forced to testify in front of a grand jury).

108 See *id.* ("Although *Brown & Williamson* involved civil litigation and the documents being sought were legislative in nature, the court's discussion of the Speech or Debate Clause was more profound and repeatedly referred to the functioning of the Clause in criminal proceedings."). But see *id.* at 666–67 (Henderson, J., concurring in judgment) ("But *Brown & Williamson*'s brief comments regarding the Clause in the criminal context—which comments importantly acknowledge the Clause's less categorical scope in that context—remain dicta no matter how 'profound.'") (quoting *id.* at 661 (majority opinion) (footnote omitted)).

109 See *id.* at 665–66 (majority opinion).

110 See generally Pingel, *supra* note 13. The title of his Note, a rhetorical question "Do Congressmen Pay Parking Tickets?," adequately sums up Pingel's view of the privilege of non-disclosure.

111 See *id.* at 1639–42 (arguing that the Supreme Court had retreated from a broader reading of the legislative privilege with its holdings in *Gravel* and *Brewster* and that the D.C. Circuit erred in *Rayburn House* by contravening the Court's clear direction with respect to the Speech or Debate Clause).

112 In any event, as noted throughout the discussion of the applicable Supreme Court precedent, Justice Brennan's interpretation of the Clause in both *Brewster* and *Gravel* is more faithful to both original intent of the framers and Justice Harlan's opinion in *Johnson*. See *supra* Part II. If *Brewster* and *Gravel* had been decided according to Justice Brennan's rationale, the decision in *Rayburn House* would not be controversial.

House, as Pingel concedes, involved a search that inevitably uncovered some materials that were protected by the privilege and others that were not.¹¹³ The ultimate holding imposes only the sensible requirement from *Brown & Williamson* that documents, the discovery of which can be just as intrusive as forced testimony, receive the same protection from the Clause as such testimony would.¹¹⁴ It does not disturb the trend established in *Brewster* and *Gravel* of narrowing the scope of legitimate legislative acts. Only privileged materials, that is, those that fall within the definition of “legislative acts,” were required to be returned to Congressman Jefferson. The assertion by the D.C. Circuit that “a search that allows agents of the Executive to review privileged materials without the Member’s consent violates the Clause”¹¹⁵ is necessary lest the executive be able to circumvent the privilege by simply claiming that the material is unprivileged. Given that the Clause has been interpreted to have “prophylactic purposes,”¹¹⁶ these would be best served by capturing some unprivileged material along with the privileged documents rather than sacrificing some materials protected by the privilege in order to allow the executive to continue more favorably with the investigation. While the investigation may serve an important public good, this should not win out over first principles such as the independence of the legislature and the protection of three co-equal branches of government. This is especially true because legislative mechanisms exist to punish corruption¹¹⁷ that are not offensive to the Constitution and still protect the right of the people to fair, uncorrupted representation in both houses of Congress. In addition, the privilege should not be defeated simply because it suppresses relevant evidence; this is the traditional function of privileges.¹¹⁸

Why place structural and procedural values above a legitimate concern about corruption in the legislative branch? The framers pro-

113 See Pingel, *supra* note 13, at 1641.

114 See *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420–21 (D.C. Cir. 1995).

115 *Rayburn House v. Rayburn House Office Bldg., Room 2113*, 497 F.3d 654, 663 (D.C. Cir. 2007).

116 See *supra* text accompanying note 47.

117 See *supra* note 21.

118 See, e.g., Mikah K. Story Thompson, *To Speak or Not to Speak? Navigating the Treacherous Waters of Parallel Investigations Following the Amendment of Federal Rule of Evidence 408*, 76 U. CIN. L. REV. 939, 981 (2008) (“Traditionally, the evidentiary privileges . . . have been the vehicle by which courts exclude relevant, reliable evidence for extrinsic policy reasons.”). Here, the policy reasons are those discussed throughout this Note, namely protecting the ancient values of separation of powers and an independent, unimpeded legislature.

vided us with little reason to trust one branch with a high degree of power to regulate the internal affairs of one of the other branches. Rather, the Constitution is filled with provisions that caution against accumulating too much power in one branch.¹¹⁹ Legislative independence is not only supported by the precedents cited in this Note, but also by the Vesting Clause of Article I, granting the legislative power to Congress.¹²⁰ Though it may be argued that these principles actually authorize executive interference into the affairs of Congress, this is not the case. Concentrated power in the hands of the executive is more dangerous than concentration of power in the other branches, because the fact that the power is concentrated at the top of the branch makes it easier to exercise executive power than legislative power. Because of this, executive interference in legislative affairs, even at the margins of where the Speech or Debate Clause applies, has the potential to allow the executive to gain undue control over legislative actions. Corruption is not exclusive to members of Congress; officials in the executive branch have the potential to abuse their power just as much, if not more so, than legislators. Legislative independence is not simply an arcane notion that serves no purpose in today's monolithic federal government. It provides security against the branches overstepping their bounds and allows the legislators themselves to resolve disputes within the branch.

Next, Pingel argued that *Rayburn House* runs counter to the intent of the framers by creating "blanket immunity" for congressmen who commit crimes.¹²¹ This argument does not hold up because, as this Note has demonstrated, there is no blanket immunity. Congressmen may in fact be prosecuted as long as independent evidence exists. For example, the case against Representative Jefferson continued after the D.C. Circuit decided that materials privileged under the Speech or Debate Clause must be returned to the Congressman.¹²² The District Court in *United States v. Jefferson* denied Representative Jefferson's request to suppress all of the evidence from the search,

119 For example, the presidential veto prevents the two houses of Congress from accumulating power through legislation, U.S. CONST. art. II, § 7, and the Appointments Clause provides restrictions on the president's power to populate the executive branch with those unduly loyal to him. U.S. CONST. art. II, § 2. The structural qualities of the Constitution make it clear that the framers were highly skeptical of any concentration of power. See THE FEDERALIST NO. 51 (James Madison).

120 U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

121 See Pingel, *supra* note 13, at 1642–45.

122 See *United States v. Jefferson*, 615 F. Supp. 2d 448, 451 (E.D. Va. 2009).

and therefore allowed the case to go forward on the basis of the non-privileged evidence.¹²³ Though it cannot be disputed that extra evidence, especially pertaining to legislative acts that would normally be privileged, could be helpful in obtaining prosecutions, even under Justice Brennan's formulation of the legislative privilege, it cannot be termed as "blanket immunity."¹²⁴ Rather, the immunity only goes far enough to prevent the legislative process from being compromised by executive or judicial investigations.¹²⁵ Thus, an expanded enforcement of the Speech or Debate Clause does not provide blanket immunity to legislators for their improprieties in the chambers of Congress.¹²⁶

Finally, Pingel contends that the balance of coequal branches of government is disrupted by *Rayburn House's* aggrandizement of the legislature above the executive.¹²⁷ However, a non-disclosure privilege is merely a remedy for a right that exists in the Speech or Debate Clause already; namely, the right not to be questioned for legislative acts. It does not provide Congress with any additional powers. To the contrary, it respects the notion of coequal government branches by making it more difficult for executive officials to delve deeply into legislative records searching for evidence that a specific legislator may have committed a crime. Such an investigation may be used as a pretense for the executive to peruse a congressman's files containing information about an upcoming vote, that legislator's plans regarding Congressional horse-trading, or other things outside the purview of executive knowledge. Like other privileges, the legislative privilege may suppress certain relevant evidence (especially when strengthened by the non-disclosure privilege),¹²⁸ but it comes with the benefit of preserving our interest in an independent legislature and allowing

123 See *id.* at 452 ("Given [the good faith exception to the exclusionary rule of the Fourth Amendment,] there is no good reason to believe that the blanket suppression in this case of evidence not covered by the Speech or Debate Clause would have any deterrent effect and hence suppression of the unprivileged documents is unwarranted." (citing *United States v. Leon*, 468 U.S. 897 (1984))).

124 See *supra* Part II B–C.

125 The final argument that Pingel made, that the legislative privilege is now more powerful than the executive privilege, may be correct but it is beyond the scope of this Note to discuss the executive privilege in depth. For the argument, see Pingel, *supra* note 13, at 1645–47.

126 One wonders, perhaps, if proponents of this view would see qualified immunity under 42 U.S.C. § 1983 (2006) or sovereign immunity under the Eleventh Amendment, subject to state waiver, as "blanket immunity" because of their wide coverage.

127 Pingel, *supra* note 13, at 1645.

128 See *supra* note 21.

Congress itself to ferret out instances of corruption within its ranks.¹²⁹ Contrary to this assertion, the legislative privilege of non-disclosure actually strengthens the functioning of the three coequal branches of government.

IV. THE NINTH CIRCUIT'S RECENT ERROR IN *UNITED STATES V. RENZI*¹³⁰

A. *Facts*

As in Representative Jefferson's case, former Representative Richard Renzi of Arizona was accused of "using his public office to benefit himself rather than his constituents" by attempting to orchestrate a land deal using his influence as a member of Congress.¹³¹ In 2005, three years after he was elected to his post, Western Land Group (Western) approached Representative Renzi, representing Resolution Copper Mining LLC (RCC), about RCC possibly entering into a transaction with the federal government whereby RCC would obtain surface rights to extract copper from land that it owned near Phoenix.¹³² Renzi allegedly told Western and RCC to purchase another property owned by James Sandlin (the Sandlin Property) in exchange for his support. However, no deal could be reached between RCC/Western and Sandlin.¹³³ The Congressman's alleged response to the breakdown of negotiations was to tell RCC/Western "[N]o Sandlin property, no bill."¹³⁴

With that having failed, Renzi allegedly made contact with Philip Aries and began a similar type of negotiation. He told Aries that if the property was purchased, he would make sure that the legislation received a "free pass" through the House Natural Resources Committee.¹³⁵ In neither set of negotiations did Renzi reveal that he was a creditor of Sandlin.¹³⁶ Aries's group completed the sale with Sandlin, who subsequently paid Renzi's company \$200,000. Renzi, however, never introduced the promised bill.¹³⁷ He was indicted on "[forty-eight] criminal counts related to his land exchange 'negotiations,'

129 This is not an unrealistic expectation given that the two political parties have a great incentive to discredit each other in the media and other areas.

130 651 F.3d 1012 (9th Cir. 2011).

131 *Id.* at 1016.

132 *See id.* at 1017.

133 *Id.*

134 *Id.* at 1030.

135 *Id.* at 1017.

136 *Id.*

137 *See id.* at 1017–18.

including public corruption charges of extortion, mail fraud, wire fraud, money laundering, and conspiracy.”¹³⁸ The appeal that the Ninth Circuit decided was interlocutory in nature as Congressman Renzi asserted that the Speech or Debate Clause barred the entire prosecution as an investigation into his privileged legislative activities.¹³⁹

B. *The Ninth Circuit’s Erroneous Holding*

The Ninth Circuit framed Renzi’s arguments on appeal as follows: (1) “that the district court erred by not dismissing the Government’s public corruption charges against him because, as he contends, those charges are based on his ‘legislative acts’ or his motivation for his ‘legislative acts’ and would require the introduction of ‘legislative act’ evidence[;]” (2) “that the district court erred by not dismissing the [indictment] in its entirety because, as he contends, ‘legislative act’ evidence permeated the Government’s presentation to the grand jury[;]” and (3) “that the district court erred by refusing to hold a *Kastigar*-like hearing to determine whether the Government used evidence protected by the Speech or Debate Clause to obtain non-privileged evidence and whether the government can prove its case without allegedly tainted evidence.”¹⁴⁰ Because the first two of these issues were most likely resolved correctly given the Supreme Court’s 1970s Speech or Debate cases, especially *Brewster* and *Gravel*,¹⁴¹ this Note will not cover these and rather addresses the Ninth Circuit’s erroneous holding that the legislative privilege does not include a like privilege of evidentiary non-disclosure.¹⁴²

The Ninth Circuit’s ruling erred in several ways. By stating that the Supreme Court had never addressed the existence of such an evidentiary privilege, the Ninth Circuit proved little.¹⁴³ The Supreme Court has not had an extensive Speech or Debate Clause docket; in fact, if it grants certiorari on this case or a similar one in the future, it would be the first major Speech or Debate Clause case the highest

138 *Id.* at 1018.

139 *Id.* at 1016.

140 *Id.* at 1019 (citing *Kastigar v. United States*, 406 U.S. 441 (1972)).

141 *See supra* Part II. *But see* text accompanying notes 66–70, 86–87 (discussing Justice Brennan’s broader view of legislative acts and the prohibition established in *Johnson* on investigation of the motive of individual legislators in making a specific legislative act). However, these opinions are not the law.

142 The Ninth Circuit makes its split very visible: “Simply stated, we cannot agree with our esteemed colleagues on the D.C. Circuit. We disagree with both *Rayburn*’s premise and its effect and thus decline to adopt its rationale.” *Renzi*, 651 F.3d at 1034.

143 *See id.* at 1032–33.

Court will hear in nearly thirty years. It has simply never had occasion to determine whether the legislative privilege extends to written documents, or to privileged documents in the midst of some other, unprivileged ones. However, combining the reasoning of *Gravel*¹⁴⁴ and the D.C. Circuit cases *Brown & Williamson* and *Rayburn House*, it is clear that such a privilege should exist and Representative Renzi should have been granted a hearing to determine whether some of the evidence obtained by the government was obtained using privileged materials.

This is a logical extension of the Clause. The testimonial or evidentiary privilege would mean little if the government could use the privileged materials as a means to obtain non-privileged materials and admit those non-privileged materials against the representative. Contrary to the Ninth Circuit's exclamation, such a reading would not "make Members of Congress supercitizens,"¹⁴⁵ but simply confer on them the privilege which they are guaranteed by the Constitution. The Ninth Circuit also asserted that both *Brown & Williamson* and *Rayburn House* erred by interpreting the Clause as a protection against distraction of legislators and the legislative process.¹⁴⁶ Whether Congressman Renzi or his office was distracted by the investigation or not, the privilege protects against the use of a representative's legislative acts through testimony, so it should also prohibit the use of those acts through written documents. Whatever the scope of legislative acts (narrower today, of course, than in the days of *Johnson*), where the privilege exists it is absolute.¹⁴⁷ As a result, the Ninth Circuit erred by refusing Congressman Renzi the opportunity to prove that some of the admittedly non-privileged material the government obtained was tainted because it would not have been discovered but for the use of privileged materials.

144 See *supra* text accompanying notes 73–79 (showing that the Supreme Court in *Gravel* assumed that, if the privilege applied, it would prevent the enforcement of subpoenas against Senator Gravel and his aides—a clear testimonial privilege).

145 *Renzi*, 651 F.3d at 1016 (quoting *United States v. Brewster*, 408 U.S. 501, 516 (1972)).

146 See *id.* at 1034.

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

CONCLUSION

Though the Speech or Debate Clause and the attached legislative privilege are, compared to some other Constitutional law issues, less popular both in terms of case law and legal scholarship, some very important structural issues are at play in this circuit split. Should the Supreme Court refuse to grant certiorari in this case, lower courts will continue to struggle with the application of the doctrine. This is especially true given the wealth of different opinions on less controversial issues such as the scope of the “legislative acts” requirement. As this Note described, it was not until the early 1970s that the Supreme Court began narrowing the privilege at all. Before then, given the litigation record, it could have been said to be a near absolute bar against civil and criminal actions in the sphere of somewhat legitimate legislative activity. While it might never have been, and certainly can no longer be described that way, it is still vitally important that the framers’ notions of separation of powers, co-equal branches of government, and above all, the independence of the legislative process, be recognized in our modern Constitutional interpretation.

Without the evidentiary privilege of non-disclosure expanded on in *Rayburn House*, too often the Clause and the privilege will become nugatory. While it may seem like bad policy to leave out reliable evidence of corruption in a house of Congress, the Constitution requires that the executive and judiciary show restraint. The non-disclosure privilege should have been applied in *Renzi* so as to prevent the government from obtaining non-privileged information through the use of privileged documents. Because the law of the D.C. Circuit is so vitally important on this issue (given the location of the federal government, it seems likely that many of these suits will be heard in courts in the District), the Supreme Court should re-examine *Rayburn House* and *Renzi* and conclude that in order to protect the framers’ notion of first principles and their belief that the legislature should handle these issues without interference from the other branches, the Supreme Court should recognize a broad evidentiary privilege of non-disclosure in its Speech or Debate Clause jurisprudence.