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Limiting the Legislative Privilege: Analyzing the Scope of the Speech or Debate Clause

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Limiting the Legislative Privilege: Analyzing the Scope of the Speech or Debate Clause

Kelly M. McGuire*

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I. Introduction

Article I, Section Six, Clause One of the American Constitution provides that Senators and Representatives:

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

This language, known as the Speech or Debate Clause (the Clause), sets forth the legislative privilege.² Like the President’s executive privilege, the legislative privilege permits legislators to refuse to disclose information protected by the Clause. Since the Clause’s inception, the Supreme Court has interpreted it broadly and has continually expanded the breadth of the privilege given to legislators.³ Such interpretations have enabled self-interested legislators to abuse the privilege by shielding their misconduct from the Judiciary, the Executive, and the public.⁴ Moreover, this improper broadening of the legislative privilege has precluded needed inquiry into legislators’ actions.⁵

The Supreme Court has not indicated whether the privilege granted by the Speech or Debate Clause permits legislators to refuse to disclose documents relating to legislative actions.⁶ The

1. U.S. CONST. art. I, § 6, cl. 1.

2. *Id.*

3. *See infra* Part II (discussing the scope of the Speech or Debate Clause as set forth by the Supreme Court).

4. *See infra* Part IV (discussing legislators’ ability to hide misconduct because of the broadening of the Speech or Debate Clause).

5. *See infra* Part IV.C (discussing the need for legislative accountability).

6. *See infra* Part III (indicating that the Supreme Court has not determined whether the Speech or Debate Clause includes a document

Ninth and D.C. Circuits, however, have considered this question.⁷ The D.C. Circuit broadly interpreted the Clause and determined that it privileges legislators' documents.⁸ In contrast, the Ninth Circuit decided that when the legislative action at issue is not protected by the privilege, the Clause does not prohibit the review of relevant documents referencing legislative acts.⁹

In Part II, this Note explains the current interpretation of the Speech or Debate Clause as set forth by Supreme Court decisions. Part III discusses the D.C. and Ninth Circuit cases creating the circuit split regarding the privilege's application to document disclosure. Part IV analyzes the Speech or Debate Clause using textual, historical, and ethical constitutional interpretive methods. Finally, Part V proposes a new test for applying the Speech or Debate Clause that will answer the question of document disclosure and narrow the scope of the privilege.

II. Supreme Court Decisions: Defining the Scope of the Speech or Debate Clause

To narrow the scope of the legislative privilege and thereby attempt to curb its abuse, it is important to understand the current interpretation of the Clause as set forth by the Supreme Court. In its numerous decisions addressing the scope of the Speech or Debate Clause,¹⁰ the Court has provided legislators with a very powerful protection.¹¹ For instance, it has indicated

nondisclosure privilege).

7. See *infra* Part III (discussing the circuit split between the D.C. and Ninth Circuits regarding the scope of the Speech or Debate Clause).

8. See *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 663 (D.C. Cir. 2007) ("Accordingly, we hold that a search that allows agents of the Executive to review privileged materials without the Member's consent violates the Clause.").

9. See *United States v. Renzi*, 651 F.3d 1012, 1039 (9th Cir. 2011) (stating that "the alleged choices and actions for which [Renzi was] prosecuted [lay] beyond [the] limits" of the Speech or Debate Clause and declining to find a document "non-disclosure privilege").

10. See *infra* Part II.A–B (discussing Supreme Court decisions defining the Speech or Debate Clause's scope).

11. See, e.g., *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501–03

that, when the privilege applies, it applies absolutely.¹² The Court has also stated that the Clause must be “read broadly to effectuate its purposes.”¹³

In addition to giving legislators a robust privilege, throughout its decisions, the Supreme Court has interpreted the two distinct portions of the Speech or Debate Clause: (1) “Speech or Debate in either House” and (2) “shall not be questioned in any other Place.”¹⁴

A. Defining “Speech or Debate”

In *Kilbourn v. Thompson*,¹⁵ the first Supreme Court case considering the Speech or Debate Clause, the Court rejected the narrowest interpretation of the phrase “speech or debate.”¹⁶ Rather than limiting the Clause to its literal meaning, the Court concluded that “speech or debate” also includes “things generally done in a session of the House by one of its members in relation to the business before it.”¹⁷ For example, the Court explained that written reports, resolutions, and voting all constitute privileged “speech or debate.”¹⁸

(1975) (discussing the powerful privilege granted by the Speech or Debate Clause); *United States v. Johnson*, 383 U.S. 169, 180 (1966) (same).

12. *See, e.g., Eastland*, 421 U.S. at 501 (indicating that “the prohibitions of the *Speech or Debate Clause* are absolute” (citations omitted)).

13. *Johnson*, 383 U.S. at 180.

14. U.S. CONST. art. I, § 6, cl. 1.

15. *See Kilbourn v. Thompson*, 103 U.S. 168, 204–05 (1880) (holding that a resolution by defendant members of the House of Representatives was privileged by the Speech or Debate Clause).

16. *See id.* at 204 (explaining that a narrow construction of the Clause, which would “limit [the privilege] to words spoken in debate,” would not be adopted).

17. *See id.*; *see also Gravel v. United States*, 408 U.S. 606, 617–18 (1972) (quoting with approval the expansive interpretation of the Speech or Debate Clause set forth in *Kilbourn*); *United States v. Johnson*, 383 U.S. 169, 179 (1966) (same).

18. *See Kilbourn*, 103 U.S. at 204 (“The reason of the [Clause] 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 *Tenney v. Brandhove*,¹⁹ the Court followed the expansive interpretation of the phrase “speech or debate” set forth in *Kilbourn*.²⁰ The *Tenney* Court determined that an investigation by a legislative committee was within “the sphere of legitimate legislative activity” covered by the privilege.²¹ The Court explained that a broad interpretation of the Clause is necessary to enable legislators to fulfill their roles as lawmakers.²² In reaching its conclusion the Court asserted that to “exceed[] the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the

19. See *Tenney v. Brandhove*, 341 U.S. 367, 378–79 (1951) (holding that a committee investigation was protected by the legislative privilege because it did not clearly impinge upon the powers of another branch of the federal government). The Court considered whether defendant legislators could be subject to civil liability for requiring plaintiff Brandhove to appear at a committee hearing. *Id.* at 370–72. A committee of California legislators, “the Senate Fact-Finding Committee on Unamerican Activities,” summoned Brandhove to appear before it at a committee hearing. *Id.* at 369–70. Brandhove appeared, but refused to testify. *Id.* at 370. Consequently, the state courts held him in contempt. *Id.* at 371. Brandhove then brought a claim seeking damages in which he asserted that the committee hearing “was not held for a legislative purpose.” *Id.* He argued that the hearing was instead held to prevent him from “effectively exercising his constitutional rights.” *Id.* The Court first explained that “acts done within the sphere of legislative activity” could not subject legislators to civil liability. *Id.* at 376. The Court then considered whether the committee action constituted a privileged legislative act. *Id.* The Court stated that in order for legislators to fulfill their role as lawmakers, “the cost and inconvenience and distractions of a trial” must be avoided. *Id.* at 377. The Court concluded that a broad privilege is necessary to accomplish this goal. *Id.* Additionally, the Court explained that the voting process rather than the courts should be used to correct legislative abuse. *Id.* at 378. Finally, the Court stated that for legislative action to be outside the privilege, it must clearly encroach upon the power of the Executive or the Judiciary. *Id.* The Court found that the committee hearing did not reach this high standard, and the action was protected from civil suit by the legislative privilege. *Id.* at 378–79.

20. See *id.* at 378 (stating that “[t]o find that a [legislative action] has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive”); see also *Kilbourn*, 103 U.S. at 204 (stating that the legislative privilege extends to “things generally done in a session of the House by one of its members in relation to the business before it”).

21. See *Tenney*, 341 U.S. at 376–79.

22. See *id.* at 377 (“Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.”).

Executive.”²³ Moreover, the case made clear that a mere allegation of a legislator’s improper motive does not terminate the privilege.²⁴

In spite of the expansive definition of “speech or debate,” the Court has indicated that there is a limit to which actions by legislators will qualify as privileged legislative acts.²⁵ For example, in *Gravel v. United States*,²⁶ although the Court agreed with prior cases stating that the privilege’s scope is not limited to literal speech and debate, it emphasized that “[l]egislative acts are not all-encompassing.”²⁷ *Gravel* provided

23. *Id.* at 378.

24. *See id.* at 377 (“The claim of an unworthy purpose does not destroy the privilege.”).

25. *See, e.g.*, *Gravel v. United States*, 408 U.S. 606, 625 (1972) (“Legislative acts are not all-encompassing.”); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (“This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role.” (citations omitted)).

26. *See Gravel v. United States*, 408 U.S. 606, 618, 624–25 (1972) (holding that although the legislative privilege “applies not only to a Member but also to his aides,” the privilege does not extend to actions that do not fall within the legitimate legislative sphere). The Court considered whether a subpoena requiring Senator Gravel’s aide, Rodberg, to testify in an investigation into possible criminal conduct relating to the disclosure and publication of top-secret national defense information, known as the Pentagon Papers, violated the legislative privilege. *Id.* at 608–09. Senator Gravel, as chairman, called an evening meeting of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee. *Id.* at 609. At the meeting, he read large portions of the Pentagon Papers to the subcommittee and had the entire forty-seven volumes of the papers placed into the public record. *Id.* Rodberg helped Senator Gravel prepare for and hold the subcommittee meeting. *Id.* A few weeks later, Senator Gravel had the papers published by Beacon Press. *Id.* at 609–10. First, the Court explained that for legislators to be adequately protected from the Executive and Judiciary, the legislative privilege must shield legislators’ aides from questioning. *Id.* at 616–18. The Court then determined the extent to which the Clause protected Senator Gravel from inquiry regarding the crime. *Id.* at 622. The Court discussed the history of the Clause and noted that “the English legislative privilege was not viewed as protecting republication of an otherwise immune libel on the floor of the House.” *Id.* Similarly, the Court concluded that although the Senator could not be questioned about the subcommittee meeting itself, his involvement in the publication of the papers was not a privileged legislative act. *Id.* at 616, 626. Thus, the Court held that the Speech or Debate Clause did not protect Rodberg from testifying in the criminal investigation about his own involvement and that of Senator Gravel in arranging the publication of the Pentagon Papers. *Id.* at 626–27.

27. *See id.* at 624–25.

a test for determining which actions beyond literal speech and debate can be classified as immune legislative acts.²⁸ To be privileged under the *Gravel* standard, a legislator's action must be "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."²⁹ This standard vastly decreases the number of activities that will be deemed immune legislative acts under the Clause.³⁰

Additionally, *Gravel* emphasized that a senator who violates criminal law, in his role as a legislator, cannot avoid liability by simply asserting the legislative privilege.³¹ In the case of Senator Gravel, this meant he could be asked about his involvement with the publication of confidential national defense papers because this was a nonprivileged violation of criminal law.³² He could not, however, be forced to answer questions regarding the subcommittee meeting at which he had portions of the confidential papers read into the public record.³³ The Court ultimately held that the Speech or Debate Clause could not legitimize Senator Gravel's aide's refusal to testify before a grand jury about his or the Senator's criminal action.³⁴

28. *See id.* at 625 (giving a standard for determining which acts are privileged by the Speech or Debate Clause).

29. *Id.*

30. *See* Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1118 (1973) (stating that in *Gravel*, "a split Court held that the scope of activities protected by the clause is very narrow and does not include publication of the record or receipt of the material for use in committee").

31. *See* *Gravel v. United States*, 408 U.S. 606, 626 (1972) (stating that the Speech or Debate Clause "does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts").

32. *See id.* at 626 ("If republication of these classified papers would be a crime under an Act of Congress, it would not be entitled to immunity under the *Speech or Debate Clause*.").

33. *See id.* at 616 ("We have no doubt that Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting.").

34. *See id.* at 626–27 ("The *Speech or Debate Clause* does not in our view

On the same day that *Gravel* was decided,³⁵ the Court, in *Brewster v. United States*,³⁶ applied a similar standard for interpreting legislative acts under the Clause.³⁷ The Court explicitly stated that the *Kilbourn* standard should not be expanded to include in the privilege “everything . . . ‘related’ to the office of a Member.”³⁸ If such a standard were implemented, legislators could characterize nearly every action as somehow related to the legislative process.³⁹ To avoid this impermissible broadening, the Court restricted the privilege to questioning about legislators’ actions and motivations that are “clearly a part of the legislative process.”⁴⁰ Like in *Gravel*, when applying this

extend immunity to Rodberg, as a Senator’s aide, from testifying before the grand jury about the arrangement between Senator Gravel and Beacon Press or about his own participation, if any, in the alleged transaction . . .”).

35. See generally *id.* (indicating that the case was decided on June 29, 1972); *Brewster v. United States*, 408 U.S. 501 (1972) (same).

36. See *Brewster v. United States*, 408 U.S. 501, 528–29 (1972) (holding that “under these statutes and this indictment, prosecution of appellee is not prohibited by the Speech or Debate Clause”). The Court considered which actions by legislators qualify as immune legislative acts under the Speech or Debate Clause. *Id.* at 503. Senator Brewster was charged with accepting a bribe in return for promises regarding postage rate legislation. *Id.* at 502. Senator Brewster argued that his actions were privileged under the Speech or Debate Clause and the indictment must be dismissed. *Id.* at 503. The Court disagreed with Senator Brewster. *Id.* at 528–29. It explained that although past cases have defined a legislative act “as an act generally done in Congress in relation to the business before it,” the privilege is not unlimited. *Id.* at 512. The Court noted that there are a number of activities that are in some sense related to legislative activity but are not protected under the Clause because they are not “clearly a part of the legislative process.” *Id.* at 512–13, 516. The Court emphasized that a strong link to the legislative process is necessary to prevent legislators from avoiding criminal prosecution. *Id.* at 520. The Court concluded that Senator Brewster’s actions were not privileged because accepting a bribe was in no way “part of the legislative process or function.” *Id.* at 525, 528–29.

37. See *id.* at 515–16 (“In every case thus for [sic] before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process.”).

38. *Id.* at 513–14.

39. See *id.* at 516 (stating that if the Speech or Debate Clause was construed to extend the legislative privilege “to include all things in any way related to the legislative process,” there would be “few activities in which a legislator engages that he would be unable somehow to ‘relate’ to the legislative process”).

40. *Id.*

standard to the facts, the Court determined that accepting a bribe does not meet the legislative act standard and was therefore not privileged.⁴¹

Although it appears that the Supreme Court has attempted to narrow the legislative act definition,⁴² a number of cases have permitted legislators' actions to be privileged in disconcerting circumstances.⁴³ In *Doe v. McMillan*,⁴⁴ school children's parents

41. See *id.* at 526 (stating that “[t]aking a bribe is, obviously, no part of the legislative process or function” and is therefore not a privileged legislative action).

42. See *id.* at 515–16 (“[T]he Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process.”); *United States v. Gravel*, 408 U.S. 606, 625 (1972) (stating that not every action taken by a legislator will be privileged, and to be privileged under the Clause, an action must be essential to carrying out the individual’s duties as a legislator); see also *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975) (applying the standard set forth in *Gravel* for determining whether activities qualify as immune legislative acts (citing *Gravel*, 408 U.S. at 625)).

43. See *Eastland*, 421 U.S. at 507 (“We conclude that the *Speech or Debate Clause* provides complete immunity for the Members for issuance of this subpoena.”); *Doe v. McMillan*, 412 U.S. 306, 312–13 (1973) (“Congressmen and their aides are immune from liability for their actions within the legislative sphere” (quoting *Gravel*, 408 U.S. at 624–25)).

44. See *Doe v. McMillan*, 412 U.S. 306, 324 (1973) (holding that “the Court of Appeals applied the immunities of the *Speech or Debate Clause* and of the doctrine of official immunity too broadly”). The Court considered the scope of the Speech or Debate Clause. *Id.* at 307. The House of Representatives directed the Committee on the District of Columbia to carry out an investigation. *Id.* As part of the investigation, the Committee collected academic information about specific students. *Id.* at 308. The report was presented at Committee hearings, given to the Speaker of the House, and voted on for publication. *Id.* at 312. Additionally, the report was printed and given to members of Congress for “legislative purposes.” *Id.* Parents of children who were identified in the report brought suit for a violation of their “and their children’s statutory, constitutional, and common-law rights to privacy.” *Id.* at 309. The Court considered whether the investigation and use of the children’s information should be protected by the legislative privilege. *Id.* at 309–11. The Court stated that to be immune under the privilege, the actions must fall “within the legislative sphere.” *Id.* at 312 (citation omitted). The Court noted that actions that qualify as legislative acts can be privileged even though in other situations they would violate the law. *Id.* at 312–13. Additionally, the Court stated that it is not the role of the Judiciary to question the necessity of congressional action taken within the legislative sphere. *Id.* at 313. The Court held that the authorization of the investigation, the actual investigation, the disclosure of the information at the hearings, and the preparation, publication, and distribution

sued legislators and their aides who collected information from schools about the children.⁴⁵ The parents claimed a violation of their “and their children’s statutory, constitutional, and common-law rights to privacy.”⁴⁶ The Court stated that the investigation, the presentation of the information at Committee hearings, and the referral of the report to the Speaker of the House were all privileged legislative acts.⁴⁷ The information remained privileged when it was “distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries.”⁴⁸ The Court indicated that acts within the “legislative sphere” are privileged even if in other situations they would be considered unconstitutional or a violation of local law.⁴⁹ The Court’s only constraint on this extremely broad interpretation of the privilege was its statement that it did not extend to those who, by congressional authorization, provided the materials to the public in violation of the Constitution and other laws.⁵⁰

of the report to Committee members were privileged legislative acts. *Id.* at 313. The Court also held that, despite congressional authorization, defendants who made the information available to the public at large were not acting within the legislative sphere. *Id.* at 316. Thus, their actions were not privileged. *Id.*

45. *See id.* at 309 (stating that petitioners brought suit on behalf of their children against various members of the House Committee on the District of Columbia).

46. *Id.*

47. *See id.* at 312 (stating the Clause protected Congressmen-Committee members, the Committee staff, the consultant, and the investigator who “introduce[ed] material at Committee hearings that identified particular individuals, . . . referr[ed] the report that included the material to the Speaker of the House, and [who] vot[ed] for publication of the report”).

48. *Id.*

49. *See id.* at 312–13 (“Congressmen and their aides are immune from liability for their actions within the ‘legislative sphere’ even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes.” (citation omitted)).

50. *See id.* at 316 (stating that defendants who provided the information to the public, pursuant to congressional authorization, were not protected by the privilege).

Similarly, in *Eastland v. United States Servicemen's Fund*,⁵¹ the Court determined that a senator's questionable actions fell within the scope of the privilege, despite the attempted narrowing of the legislative act definition.⁵² In this case, Senator Eastland signed a subpoena in his role as chairman of a Senate subcommittee.⁵³ The organization affected by the subpoena claimed it violated its constitutional rights and sought an injunction that would prevent its enforcement.⁵⁴

The Court applied the test created in *Gravel*.⁵⁵ It determined that investigation and inquiry qualify as legislative acts because they are "an integral part of the legislative process."⁵⁶ The Court emphasized that the investigation was protected by the privilege

51. See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 507 (1975) ("We conclude that the *Speech or Debate Clause* provides complete immunity for the Members for issuance of this subpoena."). The Court considered whether a subpoena issued by Senator Eastland, in his role as chairman of a Senate subcommittee, fell within the "sphere of legitimate legislative activity" protected by the *Speech or Debate Clause*. *Id.* at 494, 501. In 1970, the Senate authorized the Senate Subcommittee on Internal Security to conduct an investigation of the Internal Security Act of 1950. *Id.* at 493. Acting under this authority, the Subcommittee initiated an investigation of the United States Servicemen's Fund, Inc. (USSF). *Id.* While carrying out the examination, Senator Eastland signed a *subpoena duces tecum*, which was issued to USSF's bank. *Id.* at 494. Consequently, USSF brought an action seeking an injunction that would prevent the enforcement of the subpoena. *Id.* at 496. USSF claimed that the subpoena was aimed as silencing the organization in violation of the First Amendment. *Id.* at 495. In determining whether the act of issuing the subpoena should be privileged, the Court reaffirmed the test for legislative action set forth in prior cases. *Id.* at 501–04. The Court then determined that subpoenas have "long been held to be a legitimate use by Congress of its power to investigate." *Id.* at 504 (citation omitted). Thus, the Court concluded that the legislative privilege protected the legislators who authorized the subpoena. *Id.* at 507.

52. See *id.* at 507 ("We conclude that the *Speech or Debate Clause* provides complete immunity for the Members for issuance of this subpoena.").

53. See *id.* at 494 (stating that Senator Eastland approved a *subpoena duces tecum*).

54. See *id.* at 495–96 (stating that the United States Servicemen's Fund, Inc. sought an injunction claiming that the subpoena violated the First Amendment).

55. See *id.* at 504 (quoting the *Gravel* standard for determining whether actions qualify as immune legislative acts).

56. *Id.* at 504–05.

because it was connected to a permissible function of Congress.⁵⁷ In reaching this conclusion, the Court distinguished *Eastland*'s facts from prior cases in which illegal actions by legislators were not privileged.⁵⁸ For example, the Court explained that in *Kilbourn*, the individual who carried out an illegal arrest was not immune because his action was not "essential to legislating."⁵⁹ In contrast, according to the Court, the *Eastland* subpoena was privileged because it was made in an investigation relating to a topic that could be the subject of lawmaking.⁶⁰ This was found to be true despite the alleged violation of the Constitution.

Finally, it is important to note that the legislative privilege only applies to legislative actions that have been completed.⁶¹ As explained in *United States v. Helstoski*,⁶² "[p]romises by a

57. *See id.* at 505–06 ("The particular investigation at issue here is related to and in furtherance of a legitimate task of Congress." (citing *Watkins v. United States*, 354 U.S. 178, 187 (1957))).

58. *See id.* at 507–08 (explaining that respondents had pointed to language in *Gravel* to argue that the subpoena should not be privileged because it violated their right to privacy (citing *Gravel v. United States*, 408 U.S. 606, 621 (1972))). The Court, however, disagreed and distinguished the cases. *Id.* at 508.

59. *Id.* at 508 (citation omitted).

60. *See id.* (stating that the action in this case was privileged because it was "a routine subpoena intended to gather information about a subject on which legislation may be had" (citing *Quinn v. United States*, 349 U.S. 155, 161 (1955))).

61. *See* Jay Rothrock, *Striking a Balance: The Speech or Debate Clause's Testimonial Privilege and Policing Government Corruption*, 24 *TOURO L. REV.* 739, 752 (2008) ("[T]he Court in *United States v. Helstoski* held that the term 'legislative acts' extends only to those past acts which have already taken place." (citation omitted)).

62. *See United States v. Helstoski*, 442 U.S. 477, 489 (1979) (holding that the Speech or Debate Clause protects "references to past legislative acts of a Member" from required disclosure). The Court considered the effect of the Speech or Debate Clause on the admissibility of legislative act evidence in a former congressman's criminal trial. *Id.* at 479. Respondent Helstoski, a former member of the House, was on trial for allegedly receiving payment in return for promises of legislative action, which he eventually carried out. *Id.* Specifically, Helstoski accepted money and in return introduced immigration bills that were favorable to aliens. *Id.* Helstoski appeared before a grand jury on numerous occasions and eventually claimed his indictment must be dismissed under the Speech or Debate Clause. *Id.* at 484. The district court did not dismiss the indictment. *Id.* It did, however, state that the Speech or Debate Clause prohibited the Government from introducing evidence of completed legislative acts at trial. *Id.* The Government appealed, arguing that completed legislative

Member to perform an act in the future are not legislative acts.”⁶³ Thus, they are not immune under the Speech or Debate Clause.⁶⁴

B. Defining “shall not be questioned in any other Place”

In determining the scope of the legislative privilege, the Supreme Court has also interpreted the meaning of the phrase “shall not be questioned in any other Place.”⁶⁵ The Supreme Court has determined that this language of the Speech or Debate Clause provides legislators with testimonial⁶⁶ and liability privileges.⁶⁷

The suggestion of a testimonial privilege first arose in *United States v. Johnson*.⁶⁸ In *Johnson*, the lower court concluded that

acts should be admissible in order to show the respondent’s motive for accepting the bribe. *Id.* at 485. The Supreme Court disagreed, stating that the case law “leave[s] no doubt that evidence of a legislative act of a Member may not be introduced by the Government.” *Id.* at 487 (citations omitted). The Court indicated that the fact that this holding may make prosecutions more difficult is irrelevant. *Id.* at 488. Finally, the Court stated that promises of future legislative acts will not be privileged under the Clause. *Id.* at 489.

63. *Id.* at 489.

64. *See id.* (indicating that the Clause does not protect legislators from inquiry about legislative acts that may occur in the future).

65. U.S. CONST. art. I, § 6, cl. 1.

66. *See, e.g.*, *United States v. Gravel*, 408 U.S. 606, 616 (1972) (stating that a senator cannot “be made to answer . . . in terms of questions” about a legislative act); *United States v. Johnson*, 383 U.S. 169, 177 (1966) (“We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it.”).

67. *See, e.g.*, *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 502–03 (1975) (explaining that the Speech or Debate Clause provides legislators with “protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the *Executive Branch*”).

68. *See United States v. Johnson*, 383 U.S. 169, 184–85 (1966) (holding that a conviction based on a criminal statute that is obtained by questioning a legislator about legislative action is a violation of the Speech or Debate Clause). The Court considered whether a former congressman’s conspiracy conviction could be overturned because of a violation of the Speech or Debate Clause. *Id.* at 171. The lower court found former Congressman Johnson guilty of conspiracy. *Id.* Johnson had agreed to persuade the Department of Justice to dismiss charges against a loan company in exchange for funds from the company. *Id.* at

former Congressman Johnson had agreed to persuade the Department of Justice to dismiss charges against a loan company in exchange for funds from the company.⁶⁹ Additionally, the lower court found that Johnson had agreed to make a speech in the House that would support the loan company.⁷⁰ The Supreme Court, however, held that Johnson's legislative privilege had been violated because the conviction was obtained through inquiry into the circumstances and motives of a speech made in the House.⁷¹ Although the Court found in favor of Johnson, it made clear that its decision is limited to the facts of the case.⁷² The Clause cannot be used to prohibit a criminal conviction that is not based on inquiry into privileged legislative action.⁷³

The testimonial privilege initially suggested in *Johnson* was specifically recognized in *Gravel*.⁷⁴ *Gravel* indicated that the

171–72. Additionally, Johnson had agreed to make a speech in the House that would support the loan company. *Id.* The conspiracy conviction, however, was set aside by the court of appeals due to a claim that questioning Johnson about his agreement to make the speech in return for payment violated the Speech or Debate Clause. *Id.* at 171. The Court first explained that the Speech or Debate Clause clearly does not cover “conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process.” *Id.* at 172. The Court next considered the Government's inquiry about the speech. *Id.* at 173–76. The Government had questioned Johnson about who wrote the speech, the reasons for certain statements contained in the speech, and the motives for its delivery. *Id.* The Court subsequently held that this type of questioning violated the Speech or Debate Clause. *Id.* at 184–45; *see also* Rothrock, *supra* note 61, at 751 n.45 (stating that “Johnson implies the creation of the testimonial privilege”).

69. *See Johnson*, 383 U.S. at 171–72 (explaining the charges against former Congressman Johnson).

70. *See id.* (explaining the bribe accepted by Johnson).

71. *See id.* at 184–85 (holding that a criminal conviction based on questioning about legislative actions violated the Speech or Debate Clause).

72. *See id.* at 185 (“We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us.”).

73. *See id.* (“Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.”).

74. *See Rothrock, supra* note 61, at 751 n.45 (“[M]any courts cite [the testimonial privilege's] creation to *Gravel v. United States*, 408 U.S. 606, 615, 616 (1972), which first explicitly articulated and applied the privilege impliedly created in *Johnson*.”).

testimonial privilege permits legislators and their aides to refuse to testify about legislative acts.⁷⁵ Additionally, the testimonial privilege can be used to immunize qualifying legislative acts from being admitted into evidence at trial.⁷⁶ This will not, however, prevent a legislator from being convicted through questioning about actions not protected by the Clause.⁷⁷

In addition to the testimonial privilege, the Clause provides a powerful immunity against liability.⁷⁸ Thus, when a legislator is acting within the legislative sphere,⁷⁹ his actions are immune from suit.⁸⁰ The immunity against liability protects congressmen's legislative acts from being the subject of civil and criminal actions.⁸¹

In *Eastland*, the Court cited numerous cases confirming that the Clause provides a very broad immunity privilege.⁸² *Eastland* explained that this expansive interpretation is necessary to ensure that legislators can carry out their legislative tasks without the threat of suit.⁸³ The Court reasoned that both civil and criminal actions "create[] a distraction and force[] Members to divert their time, energy, and attention from their legislative

75. See *Gravel v. United States*, 408 U.S. 606, 616 (1972) (stating that the Senator and his aide could not be forced to testify about the Subcommittee meeting).

76. See *Rothrock*, *supra* note 61, at 751 ("[A] testimonial privilege may be asserted to prevent the admission of legislative acts into evidence . . .").

77. See *id.* ("[T]he legislator can still be prosecuted based upon the unprotected evidence.").

78. See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502–03 (1975) (discussing the Clause's protection against civil and criminal actions and those brought by the Executive).

79. See *supra* Part II.A (defining which actions by legislators qualify as privileged legislative acts).

80. See *Eastland*, 421 U.S. at 503 ("We reaffirm that once it is determined that Members are acting within the 'legitimate legislative sphere' the *Speech or Debate Clause* is an absolute bar to interference." (citing *Doe v. McMillan*, 412 U.S. 306, 314 (1973))).

81. See *id.* at 502 (stating that the Clause "protect[s] against civil as well as criminal actions").

82. See *id.* at 502–03 (citing *Kilbourn v. Thompson*, 103 U.S. 168 (1881), *Tenney v. Brandhove*, 341 U.S. 367 (1951), *Doe v. McMillan*, 412 U.S. 306 (1973), and *Dombrowski v. Eastland*, 387 U.S. 82 (1967)).

83. See *id.* at 503 (explaining the negative implications of lawsuits on legislators' ability to perform their legislative duties).

tasks to defend the litigation.”⁸⁴ This unnecessary “distraction” can impinge the legislative process.⁸⁵ Additionally, the Judiciary’s involvement threatens “legislative independence,” which the Clause was designed to protect.⁸⁶

III. The Circuit Split: The Speech or Debate Clause and Its Application to Document Review

An issue that has not been addressed by the Supreme Court is the Speech or Debate Clause’s application to governmental review of a legislator’s documents in an investigation into the legislator’s alleged misconduct.⁸⁷ The resolution of this issue depends on whether document review falls within the purview of the phrase “shall not be questioned in any other Place.”⁸⁸ Although the Supreme Court has not spoken on this issue,⁸⁹ the Ninth and D.C. Circuits have each drawn a different conclusion regarding the breadth of the privilege, creating a split among the circuits.⁹⁰

84. *Id.*

85. *Id.*

86. *Id.*

87. *See* United States v. Rayburn House Office Bldg., 497 F.3d 654, 659 (D.C. Cir. 2007) (indicating that the Supreme Court has not addressed the Speech or Debate Clause’s application to document disclosure).

88. *See id.* at 659–60 (considering whether the testimonial privilege “includes a non-disclosure privilege”).

89. *See id.* at 659 (“The Supreme Court has not spoken to the precise issue at hand.”).

90. *Compare* United States v. Renzi, 651 F.3d 1012, 1039 (9th Cir. 2011) (“[T]he Clause does not incorporate a non-disclosure privilege as to any branch.” (citations omitted)), *with* Rayburn, 497 F.3d at 663 (“[W]e hold that a search that allows agents of the Executive to review privileged materials without the Member’s consent violates the Clause.”).

A. *The D.C. Circuit: United States v. Rayburn House Office Building*

In *United States v. Rayburn House Office Building*,⁹¹ the United States Court of Appeals for the District of Columbia Circuit considered the propriety of a search of former Congressman Jefferson's office in light of the privilege conferred by the Speech or Debate Clause.⁹² This case is significant because the search was the first time that the Executive had ever ordered a search of a sitting congressman's office.⁹³ Not surprisingly, Jefferson challenged the search, asserting a violation of the Speech or Debate Clause.⁹⁴

91. See *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 663 (D.C. Cir. 2007) (holding that "a search that allows agents of the Executive to review privileged materials without the Member's consent violates the Clause"). The court considered the application of the Speech or Debate Clause to searches performed by the Executive Branch. *Id.* at 655. Additionally, the court determined the proper remedy for a violation of the Clause. *Id.* at 663–66. The Department of Justice issued a search warrant for former Representative William J. Jefferson's office. *Id.* at 656. The warrant was issued in an investigation surrounding Jefferson's alleged involvement in a bribery scheme. *Id.* It was believed that Jefferson had accepted payments from businesses and in return promised to use his position in Congress to promote legislation benefitting those paying him. *Id.* The warrant permitted FBI agents to collect information from Jefferson's office. *Id.* Then, a "filter team" reviewed the information and was instructed to remove documents that "were not responsive to the search warrant" or "were subject to the *Speech or Debate Clause* privilege." *Id.* at 656–57. The circuit court was given documents labeled "potentially privileged" to determine if they were in fact covered by the Clause. *Id.* at 657. Jefferson argued that the search violated his legislative privilege. *Id.* The court pointed to *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995), in which it held that "the Clause includes a non-disclosure privilege" in civil suits. *Id.* at 660. The court reasoned that a nondisclosure privilege applies in criminal actions as well. *Id.* The court determined that the privilege was violated because the Executive had access to privileged documents before Jefferson had the opportunity to claim that they were protected by the Clause. *Id.* at 662. Finally, the court ordered that the privileged documents be returned and prohibited those who saw them from revealing their contents. *Id.* at 666.

92. See *id.* at 655 (considering whether the search of former representative Jefferson's office violated the Speech or Debate Clause).

93. See *id.* at 659 ("May 20–21, 2006 was the first time a sitting Member's congressional office has been searched by the Executive.").

94. See *id.* at 657 (stating that Jefferson "argued . . . that the issuance and execution of the search warrant violated the *Speech or Debate Clause*").

In determining that the legislative privilege was violated, the court followed its holding in *Brown & Williamson Tobacco Corp. v. Williams*.⁹⁵ The D.C. District Court, in *Brown*, created an extremely broad testimonial privilege in civil suits.⁹⁶ Specifically, the *Brown* court protected not only direct questioning about legislative action but also documents referring to such acts.⁹⁷

In following *Brown*, the *Rayburn* court explained that the holding in *Brown* was rooted in a concern that document disclosure would “distract[]” legislators.⁹⁸ *Rayburn* warned that without a document privilege, “the possibility of compelled disclosure may . . . chill the exchange of views with respect to legislative activity.”⁹⁹ Based on this reasoning, the *Rayburn* court concluded that discovery of legislative act documents should similarly be prohibited in criminal suits.¹⁰⁰ Because Jefferson was

95. *See id.* at 660, 663 (discussing the District Court of Appeals for the D.C. Circuit’s precedent on this issue and finding the legislative privilege violated); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 423 (D.C. Cir. 1995) (“B & W’s claim at bottom, is to a right to engage in a broad scale discovery of documents in a congressional file that comes from third parties. The Speech or Debate Clause bars that Claim.”). The court considered whether the Speech or Debate Clause permits congressmen to refuse to respond to subpoenas requiring them to produce documents in a suit among third parties. *Id.* at 412. The underlying suit pertained to documents stolen from an attorney’s office by a former paralegal. *Id.* at 411. A House of Representatives subcommittee received the documents at issue. *Id.* at 412. Subpoenas ordering copies of the stolen documents were then issued to two congressmen on the committee that had allegedly received them. *Id.* The congressmen claimed the Speech or Debate Clause exempted them from compliance with the subpoenas. *Id.* The court determined that the Clause privileges congressmen from being forced to produce “documentary evidence” as well as being required to testify. *Id.* at 420. The court reasoned that such a privilege is vital to preventing congressional “distractions” that “divert [legislators’] time, energy, and attention from their legislative tasks.” *Id.* at 421 (citation omitted). The court determined that the subpoena violated the legislative privilege. *Id.* at 423.

96. *See Brown*, 62 F.3d at 420 (discussing the Speech or Debate Clause’s application to documents).

97. *See id.* (stating that the Speech or Debate Clause’s testimonial privilege applies to “[d]ocumentary evidence”).

98. *See United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660 (D.C. Cir. 2007) (stating that the *Brown* decision was based on the concern that document disclosure requirements would cause legislative “distraction[]”).

99. *Id.* at 661.

100. *See id.* at 660 (stating that a nondisclosure privilege must apply in both civil and criminal suits).

prevented from removing privileged documents before his office was searched, the D.C. Circuit held that his rights granted by the Speech or Debate Clause were violated.¹⁰¹ The court assured that this does not mean courts cannot review a legislator's claim of privilege.¹⁰² Pursuant to its holding, the court ordered that the privileged documents be returned to Jefferson.¹⁰³ The Government, however, was permitted to retain the nonprivileged documents.¹⁰⁴

B. The Ninth Circuit: United States v. Renzi

The question of the Speech or Debate Clause's application to document disclosure was also considered in *United States v. Renzi*.¹⁰⁵ In *Renzi*, former Arizona Congressman Richard Renzi

101. *See id.* at 662 (stating that the search violated the Clause because it “denied the Congressman any opportunity to identify and assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents”).

102. *See id.* (indicating that courts can review a congressman's assertion of privilege).

103. *See id.* at 666 (“[W]e hold that the Congressman is entitled to the return of all legislative materials . . . that are protected by the *Speech or Debate Clause* seized [during the search].”).

104. *See id.* at 665 (“[I]t is unnecessary to order the return of non-privileged materials as a further remedy for the violation of the Clause.”).

105. *See United States v. Renzi*, 651 F.3d 1012, 1039 (9th Cir. 2011) (holding that the “actions for which [Renzi was] prosecuted [lay] beyond [the] limits” of the Speech or Debate Clause). The court considered the role of the Speech or Debate Clause in the criminal investigation of former Arizona Congressman Richard G. Renzi. *Id.* at 1016. Renzi was indicted for “public corruption charges of extortion, mail fraud, wire fraud, money laundering, and conspiracy.” *Id.* at 1018. Specifically, Renzi was accused of promising legislative action that would benefit parties who agreed to purchase a particular piece of land. *Id.* at 1016. Purchase of the land would allow its owner to repay a debt owed to Renzi. *Id.* Renzi contended that the land negotiations were legislative acts. *Id.* He argued that his actions were immune from suit under the Speech or Debate Clause. *Id.* Additionally, he contested the Government's use of what he believed to be legislative act evidence to obtain a grand jury indictment. *Id.* Renzi requested a hearing at which the Government would have to show that it had not used evidence that he believed was protected by the privilege. *Id.* He argued that all the evidence relating to the land negotiations should have been suppressed. *Id.* First, the court determined that the land negotiations were not legislative acts. *Id.* at 1023. Next, the court concluded that the indictment was not “caused” by

was indicted for promising legislative action that would benefit parties who agreed to purchase a particular piece of land.¹⁰⁶ Purchase of the land would allow its owner to repay a debt owed to Renzi.¹⁰⁷ Throughout this discussion, this incident will be referred to as the land negotiations. Renzi first attempted to obtain the Clause's liability, testimonial, and evidentiary privileges.¹⁰⁸ In doing so, Renzi argued that his land negotiations were legislative acts.¹⁰⁹ The court disagreed for two reasons.¹¹⁰ First, the land negotiations did not qualify because they were not completed legislative actions.¹¹¹ The court refused to broaden the meaning of legislative acts to include discussions leading up to legislative action or promises of future legislative action.¹¹² Second, the land negotiations were not privileged because accepting a bribe does not have the requisite relationship to the legislative process.¹¹³

the use of privileged legislative act evidence. *Id.* at 1031. Although the prosecution conceded that privileged documents had been shown to the jury, they were not necessary to obtain the indictment. *Id.* at 1031–32. Therefore, the indictment was permitted to stand. *Id.* Finally, the court expressly disagreed with the D.C. Circuit by permitting review of documentary evidence referencing legislative acts when the underlying action is not privileged. *Id.* at 1036. The court upheld the district court judgment and dismissed each of Renzi's causes of action. *Id.*

106. *See id.* at 1016 (explaining the basis for Renzi's indictment).

107. *See id.* (explaining the basis for Renzi's indictment).

108. *See id.* at 1020 (explaining that if the charged actions qualified as legislative acts, the Government could not prosecute Renzi for them, the Government could not force him or his aides to testify about them, and "evidence of those acts could not be introduced to any jury, grand or petit" (citation omitted)).

109. *See id.* at 1016 ("[H]e claims that the public corruption charges against him amount to prosecution on account of his privileged 'legislative acts' . . .").

110. *See id.* at 1022–27 (giving two reasons why Renzi's action did not qualify as a legislative act).

111. *See id.* at 1022 ("Completed 'legislative acts' are protected; promises of future acts are not." (citation omitted)).

112. *See id.* at 1023 (stating that "negotiating with and ultimately promising private individuals [to] perform future legislative acts" is not a legislative act (citation omitted) (emphasis removed)).

113. *See id.* ("Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as part of or even incident to the role of legislator." (citation omitted)).

Renzi also argued that the indictment must be thrown out because the grand jury was presented with privileged evidence.¹¹⁴ This argument also failed.¹¹⁵ Despite the fact that the jury was exposed to legislative act evidence, the jury could have made the indictment without it.¹¹⁶ There was sufficient evidence regarding the land negotiations, which were uncompleted nonprivileged actions, for the indictment to stand.¹¹⁷

Finally, the court considered the issue of document disclosure.¹¹⁸ Renzi sought an extremely broad privilege, like that in *Rayburn*,¹¹⁹ which would prevent the Executive Branch from forcing the congressman to produce documents relating to legislative acts.¹²⁰ The court, however, refused to follow the D.C. Circuit.¹²¹ The court criticized *Rayburn*, stating that the D.C. Circuit erroneously permitted the threat of “distraction *alone*” to cause the privilege to attach.¹²² Although *Renzi* acknowledged that potential distraction has a role in the inquiry, it concluded that distraction can only trigger the privilege in cases in which

114. *See id.* at 1027 (considering “whether the district court erred by declining to dismiss the indictment in its entirety for, as Renzi alleges, the pervasive presentation of ‘legislative act’ evidence to the grand jury”).

115. *See id.* at 1031–32 (“We therefore have no cause to grant Renzi the relief he seeks.”).

116. *See id.* at 1031 (stating that although the privileged documents “should not have been presented, we cannot conclude that they were ‘essential elements of proof that *caused* the jury to indict” (citations omitted)).

117. *See id.* (explaining that to obtain the indictment, the Government only needed to “introduce evidence of Renzi’s promise to support legislation and the circumstances surrounding that promise”).

118. *See id.* at 1032–39 (considering whether the Speech or Debate Clause confers a document nondisclosure privilege).

119. *See United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660 (D.C. Cir. 2007) (finding that the Speech or Debate Clause provides a document nondisclosure privilege).

120. *See United States v. Renzi*, 651 F.3d 1012, 1033 (9th Cir. 2011) (explaining that Renzi sought to “preclude the Executive from obtaining and reviewing ‘legislative act’ evidence”).

121. *See id.* at 1034 (“[W]e cannot agree with our esteemed colleagues on the D.C. Circuit.”).

122. *See id.* (“*Rayburn* rests on the notion that ‘distraction’ of Members and their staffs from their legislative tasks is a principal concern of the Clause, and that distraction *alone* can therefore serve as a touchstone for application of the Clause’s testimonial privilege.” (citation omitted)).

the action at issue is privileged.¹²³ The court held that when evidence is sought to prosecute nonprivileged action, here Renzi's illegal land negotiations, legislators can be forced to disclose documents containing references to legislative acts.¹²⁴

IV. Resolving the Split: Narrowing the Scope of the Legislative Privilege

In order to resolve this issue, it is important to carefully consider the text and history of the Speech or Debate Clause.¹²⁵ Additionally, it is essential that one study the effect that this very powerful privilege has on the values, such as self-government, upon which the United States was founded.¹²⁶

A. A Look at the Text of the Speech or Debate Clause

In both the *Renzi* and *Rayburn* opinions, the courts reference the current scope of the Speech or Debate Clause as set forth in Supreme Court decisions.¹²⁷ A textual analysis of the Clause, however, does not support the extremely broad reach it is given by courts today.¹²⁸

123. See *id.* at 1035 (stating the “concern for distraction *alone* precludes inquiry *only* when the underling action is itself precluded”).

124. See *id.* at 1036 (indicating that “documentary ‘legislative act’ evidence” can be reviewed as “part of an investigation into unprotected activity”).

125. See PHILIP BOBBITT, CONSTITUTIONAL FATE 7 (1982) (stating that two methods of constitutional interpretation are the “*textual argument*” and the “[h]istorical argument”).

126. See *id.* at 94 (“It is the character, or *ethos*, of the American polity that is advanced in ethical argument as the source from which particular decisions derive.”).

127. See *United States v. Renzi*, 651 F.3d 1012, 1021–23 (9th Cir. 2011) (discussing Supreme Court decisions interpreting the Speech or Debate Clause); *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 659 (D.C. Cir. 2007) (same).

128. See BOBBITT, *supra* note 125, at 25–38 (discussing the “textual argument” as a method of constitutional interpretation). In this chapter, Bobbitt explains that the “textual argument” is based “on a sort of ongoing social contract, whose terms are given their contemporary meanings continually reaffirmed by the refusal of the People to amend the instrument.” *Id.* at 26.

Rayburn applied *Brewster*'s standard for interpreting the "speech or debate" portion of the Clause, stating that "the Supreme Court has limited the scope to *conduct* that is an integral part of 'the due functioning of the legislative process.'"¹²⁹ *Renzi* quoted similar language from *Brewster*.¹³⁰ Additionally, *Renzi* cited *Kilbourn* for the assertion that the Clause protects more than just "words spoken in debate."¹³¹ Such interpretations, however, impermissibly ignore the contemporary meaning of the Clause's actual language.¹³²

According to Webster's dictionary, "speech" is defined as "the communication or expression of thoughts in spoken *words*."¹³³ "Debate" is defined as "a contention by *words* or arguments."¹³⁴ Each of these definitions requires *words*. Including legislators' *actions* within the phrase "speech or debate" simply because they have a strong connection to legislating greatly deviates from the modern understanding of the Clause's language.¹³⁵

To resolve the issue of whether the Clause provides a nondisclosure privilege, the phrase "they shall not be questioned in any other Place" should also be assessed through a textual interpretation.¹³⁶ The operative word in this phrase is

Thus, a textual constitutional analysis applies the modern meanings of words in order to interpret portions of the Constitution. *Id.* at 33.

129. *Rayburn*, 497 F.3d at 659 (quoting *United States v. Brewster*, 408 U.S. 501, 513 (1972)) (emphasis added).

130. *Renzi*, 651 F.3d at 1021–22.

131. *Id.* at 1021 (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)).

132. See BOBBITT, *supra* note 125, at 30 (stating that the textual approach to constitutional analysis "give[s] absolute affect to the words of the Constitution").

133. *Speech Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/speech> (last visited Nov. 14, 2012) (emphasis added) (on file with the Washington and Lee Law Review).

134. *Debate Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/debate> (last visited Nov. 14, 2012) (emphasis added) (on file with the Washington and Lee Law Review).

135. See, e.g., *Brewster v. United States*, 408 U.S. 501, 515–16 (1972) (stating that the Clause applies to "an *act* which was clearly a part of the legislative process—the *due* functioning of the process" (emphasis added)); see also BOBBITT, *supra* note 125, at 26 (stating that the textual constitutional analysis uses the current meanings of the words in the text).

136. See BOBBITT, *supra* note 125, at 25–38 (discussing the "textual argument" as a method of constitutional interpretation).

“questioned,” which is defined as “to ask a question of or about.”¹³⁷ The word “question” is defined as “a form of words addressed to a person in order to elicit information or evoke a response; interrogative sentence.”¹³⁸ It has also been defined as “an interrogative expression often used to test knowledge.”¹³⁹ The plain meaning of the word “question” suggests that an individual be present in order to supply an answer to the questioner.¹⁴⁰ Additionally, the word “they” in the Clause refers to congressmen who are the subjects of the questioning.¹⁴¹ Thus, the explicit language of the Clause supports a testimonial privilege, which protects congressmen from “words addressed to [them] in order to elicit information” about qualifying “speech or debate.”¹⁴² In contrast, an inanimate object, such as a document, cannot be “questioned” in such a manner. A document nondisclosure privilege would improperly expand the legislative privilege beyond the text’s contemporary meaning.¹⁴³

B. The Legislative Privilege and the Framers’ Intent

In addition to studying the Clause’s text, its history should be considered to determine the Clause’s application to a document nondisclosure privilege.¹⁴⁴ As explained by John

137. *Questioned Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/questioned> (last visited Nov. 14, 2012) (on file with the Washington and Lee Law Review).

138. *Question Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/question> (last visited Nov. 14, 2012) (on file with the Washington and Lee Law Review).

139. *Question Definition*, FREE DICTIONARY, <http://www.thefreedictionary.com/question> (last visited Nov. 14, 2012) (on file with the Washington and Lee Law Review).

140. *See supra* notes 138–39 and accompanying text (providing definitions for the word “question”).

141. *See* U.S. CONST. art. I, § 6, cl. 1 (showing that the word “they” in the Speech or Debate Clause is referring to “Senators and Representatives”).

142. *See id.*; *see also supra* notes 138–39 and accompanying text (defining the word “question”).

143. *See* BOBBITT, *supra* note 125, at 33 (stating that the textual analysis interprets the Constitution by using modern definitions of its terms).

144. *See id.* at 9–24 (discussing the “historical argument” of constitutional

Adams, the Constitution must be interpreted according to its original meaning “to preserve the advantages of liberty and to maintain a free government.”¹⁴⁵ The Speech or Debate Clause should be applied today in accordance with the constitutional Framers’ intentions.¹⁴⁶

The “original understanding” of the Clause can be defined by considering the circumstances of its inclusion in the American Constitution.¹⁴⁷ The language of the Speech or Debate Clause is nearly identical to the parliamentary privilege granted by the 1689 English Bill of Rights.¹⁴⁸ The Framers included the Clause at the Constitutional Convention without extensive discussion.¹⁴⁹ Only minor changes were made to the Clause throughout the drafting period, and the final draft from the Committee of Detail had almost the same language as the Speech or Debate Clause in the Articles of Confederation.¹⁵⁰ The Committee members unanimously accepted this final draft.¹⁵¹ Similarly, the Clause was not contested at states’ ratification debates.¹⁵² This nearly uncontroverted adoption of the Clause can be explained by the

analysis).

145. *Id.* at 9 (quoting John Adams as support for the “historical argument” of constitutional interpretation).

146. *See id.* at 9–10 (stating that the historical argument considers the Framers’ intentions to determine the meaning of the Constitution).

147. *See id.* at 9–11 (“[T]he Supreme Court announced that construction of the Constitution must rely on ‘the meaning and intention of the convention which framed and proposed it for adoption and ratification.’” (citation omitted)).

148. *See United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 659 (D.C. Cir. 2007) (stating that the Speech or Debate Clause very closely matches the language of the 1689 English Bill of Rights).

149. *See* JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW* 87 (2007) (“The Speech or Debate Clause seems to have been little discussed at the Philadelphia Convention.”).

150. *See id.* at 87–88 (explaining the minimal changes to the Clause throughout its drafting).

151. *See id.* at 88 (stating that the final draft by the Committee of Detail was “approved by the entire Convention without dissent or even recorded debate”).

152. *See id.* (“[T]he Clause was completely uncontroversial at the states’ ratification debates and in the debates in the press.”).

historical acceptance of a legislative speech or debate privilege in American government.¹⁵³

Because of the lack of debate surrounding the adoption of the Speech or Debate Clause at the Constitutional Convention, records from the Convention itself provide little insight into the Framers' understanding of the legislative privilege.¹⁵⁴ After the Constitution's ratification, however, statements made by the Framers and other individuals who were influential in early America provide information regarding the Speech or Debate Clause's purpose.¹⁵⁵

James Wilson, a constitutional Framers, discussed the Speech or Debate Clause, stating:

In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indisputably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.¹⁵⁶

Additionally, Wilson commended the Clause for supporting legislative independence.¹⁵⁷ He said that it was “a very considerable improvement in the science and the practice of

153. See *id.* at 87 (stating that the Articles of Confederation and three state constitutions contained clauses providing a speech or debate privilege); see also Reinstein & Silverglate, *supra* note 30, at 1136 (“Presumably because the principle was so firmly rooted, there was little discussion of the clause during the debates of the Constitutional Convention and virtually none at all in the ratification debates.”).

154. See Reinstein & Silverglate, *supra* note 30, at 1136 (explaining that there was minimal discussion of the Clause at the Constitutional Convention); see also BOBBITT, *supra* note 125, at 9 (explaining that “[h]istorical arguments depend on a determination of the original understanding of the constitutional provision to be construed”).

155. See CHAFETZ, *supra* note 149, at 88–89 (discussing statements made after the Constitutional Convention by the Founders about the Speech or Debate Clause's meaning).

156. *Id.* at 88 (citation omitted).

157. See Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389, 403 (1994) (stating that Wilson commended the Speech or Debate Clause for “its role in securing legislative independence”).

government.”¹⁵⁸ From these statements, it is clear that the Framers included the Clause to facilitate legislators’ ability to carry out their role as lawmakers by shielding them from liability for their speech.¹⁵⁹

Thomas Jefferson wrote about the legislative privilege in a petition to the Virginia House of Delegates.¹⁶⁰ Although Jefferson did not attend the Constitutional Convention or sign the Constitution, as one of the drafters of the Declaration of Independence and a “founding father,” his understanding of the Speech or Debate Clause can provide useful insight into the Framers’ intent. Jefferson made the petition in support of Samuel Cabell, who was a member of the House of Representatives.¹⁶¹ Cabell had been charged with seditious libel based on a letter he had written that spoke unfavorably of the Adams administration.¹⁶² In the petition, Jefferson wrote:

[I]n order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any.¹⁶³

First, the circumstances of the petition provide information on the original understanding of the Clause.¹⁶⁴ Jefferson discussed

158. *See id.* (citation omitted).

159. *See supra* notes 156–58 and accompanying text (providing quotations from James Wilson, one of the Constitution’s Framers, about the Speech or Debate Clause’s meaning and purpose).

160. *See* CHAFETZ, *supra* note 149, at 88 (discussing Jefferson’s comments on the legislative privilege in a petition to the Virginia House of Delegates).

161. *See id.* (discussing Jefferson’s petition to the Virginia House of Delegates on behalf of Samuel A. Cabell, who was a member of the House of Representatives).

162. *See id.* (stating that Cabell “was charged with seditious libel for a letter he sent to constituents denouncing the Adams administration”).

163. *Id.* (citation omitted).

164. *See id.* (discussing Jefferson’s petition to the Virginia House of Delegates, which provides insight into his understanding of the Speech or Debate Clause).

the legislative privilege in a petition to aid a congressman who had been charged because of a letter voicing his opinion.¹⁶⁵ This fact supports the assertion that the Clause was aimed at preventing the other branches of government from punishing congressmen who express unpopular views.¹⁶⁶ Second, in this statement, Jefferson, like Wilson, indicates that the legislative privilege is aimed at enabling legislators to fulfill their roles as lawmakers.¹⁶⁷ According to Jefferson, in order for the people to actively participate in government through their legislators, they must be adequately informed.¹⁶⁸ Consequently, the legislative privilege was included to encourage legislators to provide voters with essential information by reducing their fear that other branches of government will punish them.¹⁶⁹

In addition to the quoted language above, other portions of the petition emphasized “the link between freedom of speech and debate on the floor of the legislature, freedom of communication with constituents, and popular sovereignty.”¹⁷⁰ Jefferson discussed the need for free communication between legislators and the people in representative government.¹⁷¹ He asserted that if legislators are put “into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary” for statements that “do not exactly square with [its] ideas of fact or right, or with [its] designs of wrong,” legislative independence

165. *See id.* (stating that Representative Cabell had been charged with seditious libel for a letter “denouncing the Adams administration”).

166. *See id.* (discussing Jefferson’s petition in support of Representative Cabell who was charged with seditious libel because of his controversial statements about the Adams administration).

167. *See supra* text accompanying note 163 (quoting Jefferson’s petition to the Virginia House of Delegates); *see also supra* notes 156–59 and accompanying text (discussing Wilson’s statements about the Speech or Debate Clause).

168. *See supra* text accompanying note 163 (quoting Jefferson’s petition to the Virginia House of Delegates).

169. *See supra* text accompanying note 163 (quoting Jefferson’s petition to the Virginia House of Delegates).

170. CHAFETZ, *supra* note 149, at 89.

171. *See id.* (“[F]or the Judiciary to . . . overawe the free correspondence which exists and ought to exist between [representatives and the people] . . . is to put the legislative department under the feet of the Judiciary . . .” (citation omitted)).

will be impinged and representative government destroyed.¹⁷² These statements provide further support for the argument that the Speech or Debate Clause was designed to promote communication between legislators and their constituents by protecting legislators from liability for such communication.¹⁷³

Lastly, James Madison stated that interpretation of the Clause must be guided by “the reason and necessity of the privilege.”¹⁷⁴ He warned that “[i]t is certain that the privilege has been abused in British precedents, and may have been in American also.”¹⁷⁵ These statements by James Madison indicate that the Clause should be interpreted only as broadly as required to accomplish its purposes.¹⁷⁶ Additionally, courts must be careful when applying the Clause in order to prevent legislators from taking advantage of the protection for personal gain.¹⁷⁷

In addition to considering statements made by the original interpreters of the Constitution to determine the intended meaning of the privilege, it is also significant that the Clause’s language was largely taken from the English Bill of Rights.¹⁷⁸ Thus, the Framers likely intended the American Speech or Debate Clause to have a meaning similar to the English article from which it originated.¹⁷⁹ Consequently, the English parliamentary privilege can be used to understand the interpretation the Framers envisioned when they used nearly identical language in the American Constitution.¹⁸⁰

172. *Id.* (citation omitted).

173. *See supra* notes 170–72 and accompanying text (discussing Thomas Jefferson’s statements about the Speech or Debate Clause’s purpose).

174. CHAFETZ, *supra* note 149, at 89 (citation omitted).

175. *Id.* (citation omitted).

176. *See supra* notes 174–75 and accompanying text (providing quotes from James Madison about the Speech or Debate Clause).

177. *See supra* notes 174–75 (providing guidance from James Madison for interpreting and applying the Speech or Debate Clause).

178. *See United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 659 (D.C. Cir. 2007) (stating that the Speech or Debate Clause very closely matches the language of the 1689 English Bill of Rights).

179. *See Kilbourn v. Thompson*, 103 U.S. 168, 202 (1880) (“[I]t may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source.”).

180. *See Rayburn*, 497 F.3d at 659 (stating that the American Speech or

The concept of privileging parliamentary speech and debate is deeply rooted in English history.¹⁸¹ The English privilege emerged in the early fourteenth and fifteenth centuries.¹⁸² In the beginning, its scope was limited to shielding parliamentary speech and debate from civil suits.¹⁸³ Over time, the privilege was expanded to include protection from Executive prosecution.¹⁸⁴ This expansion brought a period of lengthy controversy with the Crown regarding the privilege's reach.¹⁸⁵ During this era, monarchs, displeased with criticism of their policies by members of Parliament, asserted, "[T]he privilege ended where [monarchical] prerogatives began."¹⁸⁶ Conversely, members of Parliament argued that the privilege applied to any action related to their role in Parliament.¹⁸⁷

The contention regarding the reach of the parliamentary privilege was present in the case of Sir William Williams.¹⁸⁸ Sir William Williams, in his parliamentary role as Speaker of the House of Commons, permitted the publication of Dangerfield's *Narrative of the Late Popish Designs*.¹⁸⁹ He was subsequently

Debate Clause has nearly the same language as the 1689 English Bill of Rights granting the parliamentary privilege).

181. See CHAFETZ, *supra* note 149, at 69 ("The privilege of Members of Parliament to be free from questioning in any other place for their speeches in Parliament is undoubtedly an ancient one . . .").

182. See Reinstein & Silverglate, *supra* note 30, at 1122 ("Parliament's privileges originated in the fourteenth and fifteenth centuries . . .").

183. See *id.* (stating that the parliamentary privilege originally only protected members of Parliament from civil suit).

184. See *id.* at 1123 ("The free speech privilege evolved gradually and painfully into a practical instrument for security against the executive, an evolution triggered by basic changes in the functions of the legislature.")

185. See *id.* at 1126 (explaining that parliamentary "intrusions into the Crown's prerogatives led to a century-long battle over Parliament's freedom of speech or debate").

186. *Id.* at 1127.

187. See *id.* ("[T]he House declar[ed] that the privilege was absolute for any matter touching parliamentary business.")

188. See CHAFETZ, *supra* note 149, at 74 (explaining that Sir William Williams was "hauled before the King's Bench on a charge of seditious libel" for an action carried out in his role as the Speaker of the House of Commons).

189. See *id.* (stating that Sir William Williams, while acting as the Speaker of the House of Commons, "ordered the printing of a pamphlet (Dangerfield's *Narrative of the Late Popish Designs*) that was libelous of the Duke of York").

charged with seditious libel.¹⁹⁰ He raised the defense that his action was privileged because it was “done in [the] time of parliament, and ordered to be done by the House of Commons.”¹⁹¹ Despite his assertion of privilege, Sir William Williams was convicted.¹⁹²

Shortly after Sir William Williams’s conviction, Parliament passed the 1689 English Bill of Rights in response to incidents of monarchial aggression.¹⁹³ The Bill of Rights included Article 9, which stated, “[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.”¹⁹⁴ The legislative privilege guarantee was included for parliamentarians, like Sir William Williams, who were punished by the Crown for their parliamentary actions.¹⁹⁵ Consequently, shortly after the Bill of Rights was passed, the House of Commons passed a resolution that pronounced the judgment against Williams “an illegal Judgment, and against the Freedom of Parliament.”¹⁹⁶

Although Sir William Williams was convicted, the 1689 English Bill of Rights was created to protect individuals in similar situations.¹⁹⁷ This fact indicates that the English

190. *See id.* (stating that Sir William Williams was charged with seditious libel).

191. *Id.* (citation omitted).

192. *See id.* (stating that despite Sir William Williams’s assertion of parliamentary privilege, “[t]he judges disagreed”).

193. *See* Reinstein & Silverglate, *supra* note 30, at 1134 (“[S]hortly after the indictment of Sir William Williams, James II published a Declaration of Indulgence declaring it to be his ‘royal will and pleasure that . . . the execution of all and all manners of penal laws in matters ecclesiastical . . . be immediately suspended.” (citation omitted)). This Declaration gave the “executive power to nullify statutes passed by Parliament.” *Id.* In response, the 1689 English Bill of Rights “both abolished the suspending power and guaranteed the speech or debate privilege.” *Id.* at 1135.

194. CHAFETZ, *supra* note 149, at 74 (citation omitted).

195. *See id.* at 74–75 (explaining that one drafter of the English Bill of Rights said that the Article 9 legislative privilege “was put in for the sake of one . . . Sir William Williams, who was punished out of Parliament for what he had done in Parliament”(citation omitted)).

196. *Id.* at 75 (citation omitted).

197. *See id.* (stating that the 1689 English Bill of Rights was created for

parliamentary privilege was aimed at shielding parliamentarians from suits based on the content of their speech.¹⁹⁸ Consequently, it can be inferred that the Framers of the American Constitution had a similar protection in mind when they adopted nearly the exact same language in the American Speech or Debate Clause.¹⁹⁹

In summary, the statements by James Wilson, Thomas Jefferson, and James Madison reveal two related purposes of the Clause.²⁰⁰ First, the Framers sought to protect legislative independence by shielding legislators from speech-based litigation.²⁰¹ Second, the Framers aimed to help legislators carry out their duty of informing the public without the fear of punishment.²⁰² These purposes must be interpreted with the Clause's roots in the English parliamentary privilege in mind.²⁰³ Rather than allowing the Clause to protect congressional action simply because legislators happened to discuss it aloud or put it in writing, the Clause must be understood in a much more limited sense.²⁰⁴ Instead, the Clause should be interpreted in a fashion that only protects as legislative action statements that could become the basis of a libel suit or speech-based crime.²⁰⁵

people like “Sir *William Williams*, who was punished out of Parliament for what he had done in Parliament” (citation omitted).

198. *See id.* at 74–75 (explaining that the Speaker of the House of Commons, Sir William Williams, was convicted of seditious libel, and the parliamentary privilege in the 1689 English Bill of Rights was created to prevent such injustice in the future).

199. *See Kilbourn v. Thompson*, 103 U.S. 168, 202 (1880) (indicating that because the Speech or Debate Clause has nearly the same language as that of the English Bill of Rights, the Framers likely intended a similar meaning).

200. *See supra* notes 156–77 and accompanying text (discussing statements by James Wilson, Thomas Jefferson, and James Madison regarding the intended purposes of the Speech or Debate Clause).

201. *See supra* notes 159, 166 and accompanying text (indicating that the Framers sought to protect legislators from suit based on the content of their speech).

202. *See supra* notes 163–73 and accompanying text (providing statements from Jefferson about the role of the Speech or Debate Clause in encouraging communication between legislators and their constituents).

203. *See supra* notes 178–99 and accompanying text (discussing the parliamentary privilege).

204. *Supra* notes 178–99 and accompanying text.

205. *Supra* notes 178–99 and accompanying text.

The *Rayburn* and *Renzi* decisions show that the current interpretation of the legislative privilege has deviated from the Framers' "original understanding" of the Clause.²⁰⁶ In finding a document nondisclosure privilege, the *Rayburn* court stated that "the purpose of the *Speech or Debate Clause* is 'to insure that the legislative function the Constitution allocates to Congress may be performed independently,' without regard to the distractions of private civil litigation or the periods of criminal prosecution."²⁰⁷ This focus on avoiding distraction to promote legislative independence is misplaced.²⁰⁸ The legislative independence that the Framers sought to protect was grounded in the goal of encouraging legislators to fulfill their duty of open communication with their constituents.²⁰⁹ This type of legislative independence necessitates a privilege that protects congressmen from speech-based suits, such as libel.²¹⁰ The *Rayburn* privilege, in contrast, allows a legislator who has misused his position of power to potentially use the privilege to avoid liability.²¹¹ *Rayburn* gives legislators an opportunity to shield from review documents that may contain evidence of wrongdoing merely because the documents mention a "legislative act."²¹²

206. See BOBBITT, *supra* note 125, at 9 (stating that "[h]istorical arguments depend on a determination of the original understanding of the constitutional provision to be construed").

207. See *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660 (D.C. Cir. 2007) (citations omitted).

208. See *id.* (stating that the purpose of the privilege is to promote legislative independence by protecting legislators from the "the distractions of private civil litigation or the periods of criminal prosecution" (citations omitted)).

209. See *supra* notes 163–73 and accompanying text (providing statements from Jefferson about the role of the Speech or Debate Clause in encouraging communication between legislators and their constituents).

210. See *supra* notes 159, 166 and accompanying text (indicating that the Framers sought to protect legislators from suit based on the content of their speech).

211. See *Rayburn*, 497 F.3d at 662 (indicating that in an investigation into misconduct, legislators must be given a chance to review documents for privilege before their forced disclosure to the Executive).

212. See *id.* (stating that the Speech or Debate Clause requires a congressman to be given an "opportunity to identify and assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents").

Allowing legislators to refuse to disclose documents in an investigation of their misconduct is a far broader interpretation of the Clause than is necessary to fulfill the Framers' goals.²¹³ A privilege that could allow legislators to hide documents linked to crime goes beyond what is needed to protect congressmen from punishment for the content of speech that may be deemed unpopular or a misstatement of fact.²¹⁴ Moreover, this opportunity for legislators to conceal their wrongdoing is the antithesis of the Framers' aim of facilitating voters' access to information.²¹⁵

Unlike the *Rayburn* court, the *Renzi* court permitted discovery of documents containing information about legislative acts in an investigation of nonprivileged action.²¹⁶ The court, citing *Brewster*, stated that the purpose of the Clause is to “preserve the independence and thereby the integrity of the legislative process” and that “financial abuses by way of bribes . . . would gravely undermine legislative integrity and defeat the right of the public to honest representation.”²¹⁷ The court stated that preventing investigation by the Executive and punishment by the Judiciary in such cases is “unlikely to enhance legislative independence.”²¹⁸ As already mentioned in a quote by Madison, the Clause must be interpreted in light of its

213. See *supra* notes 200–05 and accompanying text (discussing the Framers' goals for the Speech or Debate Clause).

214. See *supra* note 174 and accompanying text (quoting James Madison for the proposition that the Speech or Debate Clause should be interpreted according to its “reason and necessity” (citation omitted)); *supra* note 172 and accompanying text (providing quotations by Jefferson about the intended purpose of the Speech or Debate Clause).

215. See *supra* notes 163–73 and accompanying text (discussing Jefferson's statements indicating that the Speech or Debate Clause was created to encourage legislators to fulfill their duty of communication with their constituents without the fear of punishment based on their statements).

216. See *United States v. Renzi*, 651 F.3d 1012, 1036 (9th Cir. 2011) (indicating that the Speech or Debate Clause does not prohibit review of “documentary ‘legislative act’ evidence” when it is done “as part of an investigation into unprotected activity” (citation omitted)).

217. *Id.* (quoting *Brewster v. United States*, 408 U.S. 501, 524–25 (1972)).

218. *Id.* (quoting *Brewster v. United States*, 408 U.S. 501, 524–25 (1972)) (emphasis removed).

“reason and necessity.”²¹⁹ The *Renzi* court correctly realized that applying the Clause in a manner that would enable congressmen to hide misconduct, such as bribery, is not necessary to fulfill the Clause’s purposes.²²⁰ A nondisclosure privilege for documents in an investigation into legislative transgression is not needed to protect legitimate legislative speech or to encourage properly motivated legislative communication with the people.²²¹ The *Renzi* court’s refusal to grant an unlimited nondisclosure privilege indicates that it also correctly considered James Madison’s warning about the possibility of congressional abuse of the privilege.²²²

Renzi, however, in dicta, cited *Eastland* for its statement that “[w]hen the Clause bars the underlying action, any investigation and litigation serve only as wasted exercises that *unnecessarily* distract Members from their legislative tasks.”²²³ This statement suggests that legislators can refuse to disclose documents by simply asserting that the underlying investigation relates to an action protected by the legislative privilege.²²⁴ Because of the expansive definition of legislative acts,²²⁵ it will not be difficult for legislators to obtain this classification for their actions and prevent disclosure of documents.²²⁶ Such an

219. CHAFETZ, *supra* note 149, at 88 (citation omitted).

220. *See Renzi*, 651 F.3d at 1036 (indicating that the legislative privilege does not include document nondisclosure when the underlying action is not privileged).

221. *See supra* notes 200–02 and accompanying text (giving the Framers’ intended purposes of the Speech or Debate Clause).

222. *See United States v. Renzi*, 651 F.3d 1012, 1036 (9th Cir. 2011) (indicating that documents containing references to legislative acts can be reviewed when the underlying action is not privileged); *see also* CHAFETZ, *supra* note 149, at 88 (giving James Madison’s warning that the legislative privilege was abused in English precedent and the American privilege could similarly be abused).

223. *Renzi*, 651 F.3d at 1036 (citations omitted).

224. *See id.* (stating that when the underlying action is privileged “any investigation and litigation” is prohibited as “[t]hey work only as tools by which the Executive and Judiciary might harass their Legislative brother”).

225. *See supra* Part II.A (discussing the broad interpretation of legislative acts).

226. *See Renzi*, 651 F.3d at 1036 (“When the Clause bars the underlying action, any investigation and litigation serve only as wasted exercises that

interpretation of the Clause extends beyond the Framers' intended protection against speech-based suits and is the opposite of the Framers' aim of supporting legislative communication with the public.²²⁷

*C. The Speech or Debate Clause and the Need for
Legislative Accountability*

Lastly, the scope of the Speech or Debate Clause and the permissibility of a document nondisclosure privilege should be considered pursuant to the "ethical argument" of constitutional analysis.²²⁸ This type of argument resolves constitutional issues by choosing solutions that "comport[] with the sort of people we are and the means we have chosen to solve political and customary constitutional problems."²²⁹ Stated differently, this argument "uses the character, or *ethos*, of the American polity. . . as the source from which particular decisions derive."²³⁰

It is beyond dispute that one such "ethos" or "ethical commitment[]" of the American polity is the notion of self-government.²³¹ This is made clear in the Declaration of Independence, which is a reliable source for determining the values on which America was founded.²³² The second paragraph of the Declaration states "[t]hat to secure these rights,

unnecessarily distract Members from their legislative tasks." (citations omitted)).

227. See *supra* notes 200–02 and accompanying text (giving the Framers' intended purposes of the Speech or Debate Clause).

228. See BOBBITT, *supra* note 125, at 93–99 (discussing the "ethical argument" of constitutional analysis).

229. *Id.* at 95.

230. *Id.* at 94.

231. See Phillip Bobbitt, *Constitutional Law and Interpretation*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 126, 135 (Dennis Patterson ed., 1996) ("A corollary to this idea is reflected in the ethos of self-government and representative institutions.").

232. See *id.* ("The proto-constitutional document, the Declaration of Independence, manifests these ethical commitments."); see also James R. Stoner, Jr., *Is There a Political Philosophy in the Declaration of Independence?*, *INTERCOLLEGIATE REV.* 3, 8 (2005) (stating that the Declaration of Independence "assert[s] a right to self-government").

Governments are instituted among Men, deriving their just powers from the *consent* of the governed.”²³³ In the very next sentence, the Declaration indicates that the people have the power to destroy the government if it fails to protect their rights.²³⁴ These statements clearly indicate a commitment to self-government.²³⁵

Additionally, the portion of the Declaration enumerating the wrongs of the English King shows the importance of self-government.²³⁶ For example, the Declaration admonished the King because he “refused to pass other Laws for the accommodation of large districts of people, unless those people would *relinquish the right of Representation in the Legislature*.”²³⁷ The Declaration then compares this refusal by the King to an act of a tyrant.²³⁸ The Declaration also indicates that the King “dissolved Representative Houses repeatedly” and he “called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.”²³⁹ By taking away the people’s representation, the King obliterated self-government.²⁴⁰ Because the Declaration of Independence gives the King’s infringement on the Colonies’ self-government as a basis for the American Revolution, it is clear that the concept of self-government is an extremely important “*ethos*” of the

233. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

234. *Id.* (giving the people the right to destroy a government that is not serving their interests).

235. See Stoner, *supra* note 232, at 8–9 (indicating that the Declaration of Independence stands for individuals’ right to self-government); *cf.* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (explaining the rights of Man and the role of government in enforcing those rights).

236. *Cf.* THE DECLARATION OF INDEPENDENCE paras. 3–28 (U.S. 1776) (enumerating the wrongs of the English King).

237. *Id.* para. 5 (emphasis added).

238. See *id.* (comparing the King’s action to that of a tyrant).

239. *Id.* paras. 6–7.

240. *Cf. id.* paras. 3–28 (discussing the King’s infringement on Colonial America’s self-government).

American polity.”²⁴¹ Thus, it must be considered when making constitutional determinations.²⁴²

Today, American self-government is achieved through a representative system in which the people elect legislators who will promote their interests. The integrity of the legislature is essential to sustaining legitimate self-government.²⁴³ It is, therefore, imperative that legislators be held accountable for misconduct.²⁴⁴ Because the Speech or Debate Clause provides legislators with a privilege that could potentially be used to hide legislative transgressions, it must be interpreted in a manner that eliminates, or at least reduces, the chances of such a result.²⁴⁵

By holding that, pursuant to the Speech or Debate Clause, legislators must be permitted to “assert the privilege prior to disclosure of privileged materials to the Executive,” *Rayburn’s* interpretation fails to adequately account for the need for legislative accountability in a system of self-government.²⁴⁶ This holding gives the legislator who is accused of wrongdoing vast amounts of control over which documents the government is able to obtain.²⁴⁷ Even though the court states that the legislators’ assertions of privilege can be reviewed by the courts,²⁴⁸ savvy legislators will be able to avoid disclosure of potentially

241. See BOBBITT, *supra* note 125, at 94.

242. See *id.* at 93–99 (discussing the “ethical argument” of constitutional analysis).

243. See Ray, *supra* note 157, at 428 (stating the very important interest of “constituents in a fair and honest legislature”).

244. See *id.* (explaining that because “voters alone cannot purge their Congress of its malefactors,” legislative accountability must be obtained through other avenues).

245. See *id.* at 389 (explaining that the Speech or Debate Clause “provide[s] sweeping protection for members of Congress from investigation by the other branches of government”).

246. *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 663 (D.C. Cir. 2007).

247. See Rothrock, *supra* note 61, at 759 (“By placing the initial, potentially unlimited control of Speech or Debate Clause privilege in the hands of the legislator being investigated, the Rayburn Court radically changed the distribution of the most essential investigatory element—information.”).

248. See *Rayburn*, 497 F.3d at 662 (stating that Jefferson did not argue “that his assertions of privilege could not be judicially reviewed”).

incriminating documents by simply inserting references to legislative material protected by the privilege.²⁴⁹ *Rayburn*'s extension of the phrase "shall not be questioned" will make investigations into the misconduct of legislators much more difficult.²⁵⁰ This will enhance corrupt legislators' ability to escape liability for their betrayal of the public trust. If legislators are permitted to use their position in government for personal gain without reproach, they are no longer working toward the interests of their constituents. Like when the King interfered with representative government in Colonial America, self-government will be impinged if legislators are no longer working toward the goals of the people they have been chosen to represent.²⁵¹

Unlike *Rayburn*, the *Renzi* decision does not provide a document nondisclosure privilege when the underlying action is not privileged.²⁵² The court, however, suggested that legislators cannot be forced to disclose documents when the underlying action is a privileged act.²⁵³ This interpretation is much narrower than the *Rayburn* holding.²⁵⁴ Yet it still provides an avenue for legislators to avoid accountability for impermissible actions. Because of the broad understanding of what qualifies as a protected legislative act, legislators can refuse to disclose documents revealing unacceptable practices if the underlying

249. *See id.* (stating that legislators must be given an "opportunity to identify and assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents").

250. *See Rothrock, supra* note 61, at 759 (indicating that a document nondisclosure privilege gives legislators control over which information the government can obtain in an investigation).

251. *See supra* notes 236–42 and accompanying text (discussing the King's wrongdoing as set forth in the Declaration of Independence).

252. *See United States v. Renzi*, 651 F.3d 1012, 1036 (9th Cir. 2011) (indicating that "documentary 'legislative act' evidence" can be reviewed as "part of an investigation into unprotected activity" (citation omitted)).

253. *See id.* (stating that "[w]hen the Clause bars the underlying action, any investigation and litigation serve only as wasted exercises that *unnecessarily* distract Members from their Legislative tasks" (citations omitted)).

254. *See United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 663 (D.C. Cir. 2007). (holding "that a search that allows agents of the Executive to review privileged materials without the Member's consent violates the Clause").

action is sufficiently linked to a permissible legislative function.²⁵⁵

There are a number of disturbing Supreme Court cases wherein questionable legislative conduct was privileged because it qualified as a legislative act.²⁵⁶ For example, in *Doe v. McMillan*, the Committee on the District of Columbia compiled a report containing “copies of absence sheets, lists of absentees, copies of test papers, and documents relating to disciplinary problems of certain specifically named students.”²⁵⁷ The children’s parents brought suit for a violation of their “children’s statutory, constitutional and common-law rights to privacy.”²⁵⁸ The court found liability immunity for the legislators because “their actions [were] within the ‘legislative sphere.’”²⁵⁹ This finding was based on the argument that such an investigation is an “integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation.”²⁶⁰ Thus, the Court prohibited investigation into a potential violation of the Constitution and criminal and civil statutes simply because the conduct could be classified as a legislative act.²⁶¹

Similarly, in *Eastland*, questionable congressional conduct could not be investigated because it was found to be within “the

255. See *Renzi*, 651 F.3d at 1036 (indicating that when the underlying action is privileged, legislative act documents cannot be reviewed by the Executive).

256. See e.g., *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 495, 507 (1975) (finding that a subpoena alleged to violate complainants’ First Amendment rights was privileged by the Speech or Debate Clause); *Doe v. McMillan*, 412 U.S. 306, 309, 312–13 (1973) (finding an investigation alleged to have violated the complainants’ “statutory, constitutional, and common-law rights to privacy” was privileged because it was “within the ‘legislative sphere’” (citation omitted)).

257. *Doe*, 412 U.S. at 308.

258. *Id.* at 309.

259. *Id.* at 312 (citation omitted).

260. *Id.* at 313 (citation omitted).

261. See *id.* at 312–13 (stating that “acts within the ‘legislative sphere’” are privileged “even though [the] conduct, if performed in other than legislative contexts would in itself be unconstitutional or otherwise contrary to criminal or civil statutes” (citation omitted)).

‘legitimate legislative sphere.’”²⁶² In *Eastland*, a subpoena was issued to a bank that demanded the bank produce “any and all records appertaining to or involving the account or accounts of [United States Servicemen’s Fund].”²⁶³ United States Servicemen’s Fund (USSF) brought suit, stating that the subpoena was issued for an improper purpose.²⁶⁴ USSF also claimed the subpoena violated its members’ First Amendment rights.²⁶⁵ The Court, however, found that the issuers of the subpoena were protected by the privilege because it was issued according to an “authorized investigation” and was “in furtherance of a legitimate task of Congress.”²⁶⁶ Consequently, like in *Doe*, an alleged violation of the Constitution by congressmen could not be examined because it was labeled a legislative act.²⁶⁷

Permitting legislative immunity and document nondisclosure in circumstances such as those in *Doe* and *Eastland* diminishes legislative accountability in two ways.²⁶⁸ First, the immunity privilege prevents civil and criminal suits for legislative wrongdoing. Second, document nondisclosure limits investigations into wrongful legislative conduct, which restricts voters’ access to such information. Each of these consequences impair the legitimacy of self-government by allowing legislators to commit actions that are contrary to the interests of the people they represent.

262. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503, 507 (1975) (citation omitted).

263. *Id.* at 494.

264. *See id.* at 495 (stating that the complainants argued that the subpoena was issued for an improper purpose).

265. *See id.* at 492–93 (“We granted certiorari to decide whether a federal court may enjoin the issuance by Congress of a subpoena *duces tecum* that directs a bank to produce the bank records of an organization which claims a First Amendment privilege status . . .”).

266. *Id.* at 505–06 (citation omitted).

267. *See id.* at 507 (“We conclude that the *Speech or Debate Clause* provides complete immunity for the Members for issuance of this subpoena.”).

268. *See generally* *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491 (1975) (privileging questionable congressional conduct under the *Speech or Debate Clause*); *Doe v. McMillan*, 412 U.S. 306 (1973) (same).

V. Proposed Solution: Limiting the Speech or Debate Clause and Increasing Legislative Accountability

To narrow the scope of the Speech or Debate Clause so that it more closely reflects its text, the intent of the Framers, and the *ethos* of self-government, this Note proposes a two-part solution. First, the issue of whether “shall not be questioned” includes a nondisclosure privilege must be resolved. Second, the legislative acts that are protected under the phrase “Speech or Debate” must be narrowed.

A. Document Nondisclosure and the Scope of the Phrase “shall not be questioned in any other Place”

This Note proposes that the *Renzi* holding regarding document disclosure be adopted.²⁶⁹ Specifically, when the basis of the suit is not protected by the privilege, then the Clause should not permit document nondisclosure.²⁷⁰

First, this will bring the Speech or Debate Clause more in line with the actual meaning of the words used in the text.²⁷¹ As discussed in Part IV.A, the contemporary meaning of the word “question” requires that it be directed at an individual.²⁷² This definition forecloses the application of the Clause to documents.²⁷³ This test will greatly reduce legislative document nondisclosure and the privilege will more closely conform to the Clause’s actual language.²⁷⁴

269. See *United States v. Renzi*, 651 F.3d 1012, 1036 (9th Cir. 2011) (providing the case’s holding).

270. See *id.* (stating that “documentary ‘legislative act’ evidence” can be reviewed “as part of an investigation into unprotected activity” (citation omitted)).

271. See *supra* Part IV.A (interpreting the Speech or Debate Clause using a textual approach to constitutional interpretation).

272. See *supra* notes 138–39 and accompanying text (providing definitions of the word “question”).

273. See *supra* notes 136–43 and accompanying text (discussing the meaning of the word “question”).

274. See *supra* Part IV.A (discussing the Speech or Debate Clause’s text).

Second, this standard adequately protects the *ethos* of self-government.²⁷⁵ By reducing legislators' ability to hide documents containing information about misconduct, legislative accountability will be bolstered. This standard should increase criminal and civil prosecution for wrongdoing and improve voters' access to information about corrupt legislators. As a result, the integrity of the legislature will be improved and self-government through representatives acting in good faith can be achieved.

B. Narrowing the Meaning of Legislative Acts

To obtain the protection of the privilege, a legislator's action must be within the meaning of the phrase "Speech or Debate."²⁷⁶ The Supreme Court has indicated that qualifying legislative acts will be privileged.²⁷⁷ This Note proposes a new test for the meaning of legislative acts that will greatly reduce the number of privileged activities. In order to be classified as "speech or debate," legislative action should be conduct that could be the cause of a speech-based suit, such as libel. For example, under this test protected action would include legislators' statements of opinion, policy, or belief that could later become the basis of a libel suit. If an action does not meet this test, it should not receive the benefit of the Speech or Debate privilege.

First, such a test adheres to the plain meaning of the words "speech" and "debate" in the Clause.²⁷⁸ Second, this complies with the intended meaning of the Clause as set forth by the Framers.²⁷⁹ The Framers included the Clause to promote legislators' communication with their constituents and to protect legislators from punishment for their statements, views, and

275. See *supra* Part IV.C (discussing the *ethos* of self-government).

276. See *supra* Part II.A (discussing actions that are protected by the phrase "Speech or Debate").

277. See *supra* Part II.A (discussing actions that are protected by the phrase "Speech or Debate").

278. See *supra* Part IV.A (interpreting the Speech or Debate Clause through a textual analysis of constitutional interpretation).

279. See *supra* Part IV.B (discussing the Framers' understanding of the Speech or Debate Clause).

opinions that could later be alleged untrue, libelous, or contrary to the law in some other way.²⁸⁰ This test accurately reflects these aims of the Framers.²⁸¹

Finally, the test will promote the interest in self-government, which requires that representatives be held accountable for wrongdoing.²⁸² By requiring conduct to be linked to a threat of speech-based punishment, the circumstances in which legislators will be able to avoid document nondisclosure, based on a privileged underlying action, will be greatly reduced. This will help prevent the troubling results in cases such as *Doe* and *Eastland*.²⁸³ For example, in *Doe* the investigation and report of children's school records, which potentially violated the complainants' right to privacy, would not have qualified as a legislative act.²⁸⁴ Such an *investigation* could not lead to a speech-based suit. Similarly, the *Eastland* subpoena would not have qualified as a privileged legislative act under the proposed standard.²⁸⁵ Reducing the types of legislative acts protected by the privilege will thereby increase legislative accountability and improve the legitimacy of self-government.

VI. Conclusion

In *Rayburn*, Congressman William J. Jefferson was charged with using his position as a legislator for personal gain through the acceptance of bribes.²⁸⁶ In spite of his alleged abuse of power, he was permitted to have documents returned to him because of a

280. See *supra* Part IV.B (discussing the reasons the Framers included the Speech or Debate Clause).

281. See *supra* Part IV.B (discussing the aims of the Framers when they included the Speech or Debate Clause).

282. See *supra* Part IV.C (discussing the *ethos* of self-government).

283. See *supra* notes 256–68 and accompanying text (discussing *Doe* and *Eastland*).

284. See *supra* notes 256–61 and accompanying text (discussing the disturbing result in *Doe*).

285. See *supra* notes 262–67 and accompanying text (discussing the disturbing result in *Eastland*).

286. See *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 656 (D.C. Cir. 2007) (discussing Jefferson's involvement in a bribery scheme).

legislative privilege violation.²⁸⁷ Thus, the D.C. Circuit created a privilege that facilitates legislators' ability to escape civil and criminal liability.²⁸⁸ *Renzi* attempted to eliminate this counterintuitive result by stating that when an investigation relates to nonprivileged action, forced document disclosure is permissible.²⁸⁹ Its decision, however, does not go far enough to prevent legislators' use of the privilege to hide questionable conduct.²⁹⁰ By leaving the possibility of document nondisclosure in cases where the underlying action is privileged, *Renzi* failed to remove a powerful tool that corrupt legislators can use to avoid liability.²⁹¹ Because of the overly expansive definition of legislative acts, dishonest legislators will have little trouble linking an action that could become the subject of investigation to a permissible legislative function.²⁹² This will prevent punishment of legislative wrongdoing and leave the voters uninformed.

The proposal set forth in this Note should be adopted to help combat legislative malfeasance.²⁹³ By limiting the privilege to action that could be the cause of a speech-based suit, the quantity of privileged legislative action will be reduced.²⁹⁴ Additionally, a privilege that does not include document disclosure in misconduct investigations will enhance legislative accountability.²⁹⁵ This will

287. *See id.* at 666 (holding "that the Congressman is entitled to the return of all legislative materials . . . that are protected by the *Speech or Debate Clause*").

288. *See id.* at 663 (holding that the legislative privilege includes document nondisclosure).

289. *See United States v. Renzi*, 651 F.3d 1012, 1036 (9th Cir. 2011) (permitting document nondisclosure when the underlying action is not privileged).

290. *See id.* (permitting document nondisclosure when the underlying action is not privileged).

291. *See id.* (indicating that when the underlying action is privileged, legislative act documents cannot be reviewed by the Executive).

292. *See supra* Part IV.C (discussing the disturbing results in *Doe* and *Eastland* because of the overly broad legislative act definition).

293. *See supra* Part V (proposing a new method of applying the Speech or Debate Clause).

294. *See supra* Part V (discussing a new method of interpreting the Speech or Debate Clause).

295. *See supra* Part IV.C (discussing the need for legislative accountability).

increase the integrity of representative government and fulfill the *ethos* of self-government upon which the United States was founded.²⁹⁶

296. See *supra* Part IV.C (discussing the *ethos* of self-government).