

An Uncertain Privilege: Reexamining the Scope and Protections of the Speech or Debate Clause

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The Speech or Debate Clause of the United States Constitution was put in place to protect and preserve the independence of the legislative branch. The United States Supreme Court has consistently read the Clause broadly to effectuate this purpose, and it has applied the Clause's protections absolutely to ensure that legislators are not questioned by a hostile executive or judiciary in regard to their legislative activities. In recent years, a circuit split has developed regarding whether the Clause provides for a documentary non-disclosure privilege, which would shield legislators from subpoenas or search warrants issued by the executive branch and enforced by the judiciary. The Ninth and Third Circuits have rejected such a documentary non-disclosure privilege, while the D.C. Circuit has consistently reaffirmed its commitment to a broad documentary non-disclosure privilege. Adding further uncertainty to the Clause's protections, the Ninth Circuit has also denied the Clause's protections to legislators involved in negotiations about future legislation. In order to provide clarity to the Clause's privileges, the Supreme Court should adopt a limited documentary non-disclosure privilege and should apply the Clause's protections to non-criminal negotiations in anticipation of future legislation.

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I. INTRODUCTION

“An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”

— Chief Justice William Rehnquist, 1981¹

The Speech or Debate Clause (Clause) of the United States Constitution has become an uncertain privilege, one that neither serves its original purpose nor effectuates the intent of the Framers. The Clause states:

The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.²

The Clause articulates the longstanding notion of legislative privilege, which protects legislators from prosecution for their official legislative acts. In so doing, it is designed to preserve the independence and integrity of the legislature by shielding legislators from hostile questioning from the executive or judiciary.³ Moreover, the Framers intended to reinforce a delicately balanced tripartite structure and the separation of powers by ensuring that legislative acts are not the product of interference or intrusion on the part of the other branches.⁴

Part II of this Note will discuss the history of the Clause, as well as its most current interpretations by the Supreme Court. Then, it will discuss the current circuit split regarding whether or not the Clause provides for a documentary non-disclosure privilege. Part III will argue that the circuit split surrounding the scope of the Clause's protections should be resolved in two key ways. First, it will argue for the adoption of a documentary non-disclosure privilege to resolve the circuit split and extend the Clause's protection beyond legislators' words to their written materials. While this documentary non-disclosure privilege will

1. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

2. U.S. Const. art. I, § 6, cl. 1.

3. *See United States v. Johnson*, 383 U.S. 169, 178 (1966).

4. *See id.*

shield legislators from responding to subpoenas, it is limited in that legislators will not be protected from search warrants, which do not require an affirmative response. Second, it will argue for the extension of the Clause's protections to negotiations in anticipation of future legislation. Part IV will analyze those suggested measures applied in the context of a current litigation matter: the prosecution of Senator Robert Menendez. This matter provides an opportunity for the Court to both apply a limited non-disclosure privilege and to clarify the Clause's reach. Broadening the scope of the Clause's protections is more consistent with the Framers' goals and is essential to maintaining the separation of powers and ensuring meaningful protection for members of the legislature and the legislative process. A proper understanding of the Clause will not lead to protection for corrupt activities. Instead, clarifying these two crucial aspects of the Clause will bring certainty to an important, constitutionally mandated privilege.

II. HISTORY OF THE SPEECH OR DEBATE CLAUSE

The scope and nature of the Clause can be ascertained by examining both its historical roots and the subsequent interpretations by the Supreme Court. While the Court's most recent decisions have somewhat narrowed the Clause's protections to ensure that legislators do not become immune from criminal prosecution, they nonetheless reaffirm the Court's commitment to broadly reading the Clause and ensuring meaningful separation of powers. This Part will discuss both the Clause's origin in the Bill of Rights and English common law and the development of the Supreme Court's precedent regarding the Clause.

A. ORIGIN IN THE ENGLISH BILL OF RIGHTS

The present version of the Clause was quickly approved at the Constitutional Convention in 1787, slightly altering the construction found in the Articles of Confederation.⁵ The language in the

5. *See id.* at 177 ("The Speech or Debate Clause of the Constitution was approved at the Constitutional Convention without discussion and without opposition. The present version of the clause was formulated by the Convention's Committee on Style, but the original vote of approval was of a slightly different formulation which repeated almost verbatim the language of Article V of the Articles of Confederation: 'Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress . . .'" (citations omitted)).

Clause corresponds closely with that of the English Bill of Rights of 1689.⁶ However, it took much longer to create legislative privilege in England than in America.⁷ While the enactment process differed in England and America, the reasons and rationale for adoption were largely the same in both countries — to preserve the independence of the legislative arm of the government and avoid undue outside influence.⁸ Without the Clause's protections, the Executive could hale legislators into court if they expressed unfavorable, minority viewpoints or criticized the President, for example. One unique purpose the Clause serves for the American governmental system is “reinforcing the separation of powers so deliberately established by the Founders”⁹ — the separation is reinforced by ensuring that legislative actions are not the product of coercion or intimidation on the part of the executive or judiciary branches. Allowing the Executive such unchecked power to force legislative enactment would create an unbalanced system, contrary to the bedrock principles behind the American governmental system.

B. SUPREME COURT INTERPRETATION

The earliest Supreme Court case explicating the meaning of the Clause was *Kilbourn v. Thompson*.¹⁰ Kilbourn, a real estate investor, was imprisoned on order of the House of Representatives for refusing to answer questions and produce documents at a congressional hearing.¹¹ Kilbourn sued the House Sergeant-at-Arms, along with several Members of the House, arguing that

6. *See id.* at 177–78 (“The language of that Article, of which the present clause is only a slight modification, is in turn almost identical to the English Bill of Rights of 1689: ‘That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.’” (citation and internal quotation marks omitted)).

7. *See id.* at 178 (“This formulation of 1689 was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators.” (footnote omitted)).

8. *See id.* (“Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature.” (citations omitted)).

9. *See id.*

10. *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *see also* *United States v. Johnson*, 383 U.S. 169, 179 (1966) (“This Court first dealt with the clause in *Kilbourn v. Thompson* . . .”).

11. *Kilbourn*, 103 U.S. at 168.

they lacked the power to punish him for contempt.¹² The Court held that the House lacked authority to punish Kilbourn, but determined that the Clause's protections applied to the individual congressmen. In holding that the Clause's protections extended to the suit against the defendants-congressmen, the Court made it clear that legislative privilege extended beyond just the words uttered by legislators in congressional debates.¹³ Instead, the Court explained that the Clause should be read broadly¹⁴ and applied 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."¹⁵

After *Kilbourn*, the Supreme Court did not substantively address the Clause until almost a century later.¹⁶ The Supreme Court revisited the scope of the Clause in *United States v. Johnson*.¹⁷ In *Johnson*, the Court determined that the admission of evidence in federal court concerning a speech on the floor was prejudicial and violated the protections of the Clause.¹⁸ *Johnson* involved allegations that a United States congressman conspired to make a speech for compensation on the House floor, in violation of federal conflict-of-interest statutes and a federal fraud

12. *See id.*

13. *See id.* at 204 ("It seems to us that the views expressed in the authorities we have cited are sound and are applicable to this case. It would be a narrow view of the constitutional provision to limit it to words spoken in debate.")

14. *See United States v. Brewster*, 408 U.S. 501, 509 (1972) ("In [*Kilbourn*], the first case in which this Court interpreted the Speech or Debate Clause, the Court expressed a similar view of the ambit of the American privilege. There the Court said the Clause is to be read broadly to include anything 'generally done in a session of the House by one of its members in relation to the business before it.'" (citing *Kilbourn*, 103 U.S. at 204)); *see also Gravel v. United States*, 408 U.S. 606, 624 (1972) ("Prior cases have read the Speech or Debate Clause 'broadly to effectuate its purposes' . . ." (citing *Johnson*, 383 U.S. at 180)).

15. *Gravel*, 408 U.S. at 617 (explaining, in short, the Clause applies to "things generally done in a session of the House by one of its members in relation to the business before it").

16. *See Johnson*, 383 U.S. at 179 (explaining the lack of clarification on the subject is "[i]n part because the tradition of legislative privilege is so well established in our polity, there is very little judicial illumination of this clause").

17. Jay Rothrock, *Striking A Balance: The Speech or Debate Clause's Testimonial Privilege and Policing Government Corruption*, 24 *TOURO L. REV.* 739, 748 (2008) ("The clause's early days in the American legal landscape were similarly unremarkable. Before [*Johnson*] in 1966, the Supreme Court was rarely called upon to interpret the scope of the Speech or Debate Clause.")

18. *See Johnson*, 383 U.S. at 184–85 ("We hold that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause.")

statute.¹⁹ In attempting to prove the bribery scheme, the Government relied on evidence regarding the motives for the congressman's legislative action — giving the speech — and the Court determined that such evidence was privileged under the Clause.²⁰ The Court rejected the Government's contention that the "gravamen of the count was the alleged conspiracy, not the speech" because the indictment "focused with particularity upon motives underlying the making of the speech and upon its contents."²¹ The motives and contents of legislative action fell squarely within the Clause's protections. Despite finding that the testimony was privileged, the *Johnson* decision is notable in that it reined in the previously expansive reading of the Clause.²² The Court's narrow interpretation suggested the Clause may only apply in a criminal context, but the Court limited its holding to the specific factual situation present in *Johnson*.²³ Moreover, the Court in *Johnson* laid out a "dual system of protection under the Speech or Debate Clause"²⁴:

[W]here a charge is based wholly within the scope of a legislative act, the Speech or Debate Clause confers substantive immunity, but where the charge draws on additional acts beyond those protected by the clause, a testimonial privilege may be asserted to prevent the admission of legislative acts into evidence, but the legislator can still be prosecuted based upon the unprotected evidence.²⁵

19. *Id.* at 170–71.

20. *Id.* at 184–85.

21. *Id.* at 184.

22. See Rothrock, *supra* note 17, at 749 ("In contrast to the initial lack of judicial involvement regarding the clause, the 1960s and 70s brought the Speech or Debate Clause before the Supreme Court numerous times, bringing about a rapid evolution in the Clause's interpretation. The *Johnson* Court's holding, the first in this string of decisions, reigned [sic] in the Kilbourn Court's expansive reading of the clause." (footnote omitted)); see also James Walton McPhillips, "Saturday Night's Alright for Fighting": Congressman William Jefferson, the Saturday Night Raid, and the Speech or Debate Clause, 42 GA. L. REV. 1085, 1095 (2008) ("In 1966, the Court began to reign [sic] in its broad reading of the Clause.").

23. See *Johnson*, 383 U.S. at 185 ("We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us.").

24. Rothrock, *supra* note 17, at 751 (footnote omitted).

25. *Id.*; see also *Johnson*, 383 U.S. at 185 ("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. And, without intimating any view thereon, we expressly leave open for

Thus, *Johnson* stands for the proposition that legislators are immune from criminal charges stemming directly from their legislative acts, but they are not immune from criminal charges that do not implicate activities protected by the Clause.²⁶

The Court further narrowed the Clause in *United States v. Brewster*, in which the Government charged a senator for “accepting a bribe in exchange for a promise relating to an official act.”²⁷ The defendant argued that certain counts of his conviction were based on evidence privileged under the Speech or Debate Clause, as in *Johnson*, and the district court agreed.²⁸ The Supreme Court, however, took a different approach. First, the Court clarified the holding in *Johnson*, stating that its conclusion “was that the privilege protected Members from inquiry into legislative acts or the motivation for actual performance of legislative acts.”²⁹ Next, the Court reaffirmed the “very narrow scope of the Court’s holding in *Johnson*” and reiterated that it only applied to the particular facts of that case.³⁰ Finally, the Court made it clear that *Johnson* did not prevent prosecution of a legislator under a criminal statute unless the Government’s case relied on “legislative acts or the motivation for legislative acts.”³¹

Given the central role that legislative activities play in making this determination, the Court went on to define the actions that qualify as legislative and deserve protection under the Clause.³² In an oft-quoted passage, the *Brewster* Court held that “legislative act” has “consistently been defined as an act generally

consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.” (footnote omitted)).

26. See Rothrock, *supra* note 17 at 751.

27. *United States v. Brewster*, 408 U.S. 501, 502 (1972).

28. *Id.* at 503 (The district court had concluded that “the immunity under the Speech and [sic] Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, constitutionally shields him [sic] from any prosecution for alleged bribery to perform a legislative act.” (internal quotation marks omitted)).

29. *Id.* at 509.

30. *Id.* at 510.

31. *Id.* at 512.

32. See *id.* at 512–13; see also Rothrock, *supra* note 17, at 752 (“The *Johnson* Court’s contemplation of ‘legislative acts’ led the Supreme Court to further refine the term in three subsequent Speech or Debate Clause decisions, each time further restricting the scope of the definition. In determining that the Speech or Debate Clause did not immunize a legislator from a bribery prosecution, [*Brewster*] clarified that not all acts performed by legislators are ‘legislative acts.’” (footnotes omitted)).

done in Congress in relation to the business before it.”³³ The Court contrasted such legislative activities with merely political activities:

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate ‘errands’ performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called ‘news letters’ to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases.³⁴

Thus, under *Brewster*, while purely “legislative activities” warrant protection under the Clause, “political activities” do not.³⁵ Applying this distinction between legislative and political acts to the facts before it, the *Brewster* Court determined that the Senator’s efforts to influence Justice Department staff members to

33. *Brewster*, 408 U.S. at 512 (further explaining “the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts.”).

34. *Id.*; see also *Gravel v. United States*, 408 U.S. 606, 624–25 (1972) (“But the Clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies — they may cajole, and exhort with respect to the administration of a federal statute — but such conduct, though generally done, is not protected legislative activity. *United States v. Johnson* decided at least this much.”).

35. See *Brewster*, 408 U.S. at 512–13 (“[I]t has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things ‘generally done in a session of the House by one of its members in relation to the business before it,’ or things ‘said or done by him, as a representative, in the exercise of the functions of that office.’” (citations omitted)); see also *id.* at 515–16 (“In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process. In every case thus far [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.” (footnotes omitted)).

seek dismissal of pending prosecutions were not sufficiently related to the legislative process and, consequently, did not merit protection under the Clause.³⁶ According to the Court, extending the privilege to the types of political activities described above would sweep too broadly; it would “make Members of Congress super-citizens, immune from criminal responsibility.”³⁷

From *Brewster*, the Court continued to narrow the privilege in *Gravel v. United States*.³⁸ *Gravel* involved a Senator’s participation in the release and publication of classified documents.³⁹ While the *Gravel* Court clarified that congressional aides also qualified for privilege under the Clause, it then narrowed the Clause’s protections by further limiting the acts that qualify as “legislative.” The Court determined that legislative acts:

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.⁴⁰

In a third case, *United States v. Helstoski*,⁴¹ the Supreme Court took an additional step to limit the protections of the clause. In *Helstoski*, the Government charged a congressman with conspiracy to violate an official bribery statute for receiving money from undocumented immigrants in return for his introduction of private bills that would prevent the immigrants from being removed from the United States.⁴² The Court held that, under the Clause, evidence referring to past legislative acts cannot be admitted, but “[p]romises by a Member to perform an act in the future are not legislative acts.”⁴³ The Court’s opinion thus means that “promises or future acts are beyond the scope of the Speech or Debate Clause.”⁴⁴

36. *See id.* at 526.

37. *Id.* at 516.

38. *Gravel*, 408 U.S. 606.

39. *Id.* at 608.

40. *Id.* at 625.

41. *United States v. Helstoski*, 442 U.S. 477 (1979).

42. *Id.*

43. *Id.* at 489.

44. Rothrock, *supra* note 17, at 752–53 (footnote omitted).

In addition to further narrowing the Clause's protections, the *Helstoski* Court also clarified the Clause's purpose. The Court asserted that the Clause was "designed neither to assure fair trials nor to avoid coercion."⁴⁵ Instead, the Clause was meant to "preserve the constitutional structure of separate, coequal, and independent branches of government[]" and prevent "intrusion by the Executive and the Judiciary into the sphere."⁴⁶ The Court cited the history of the Clause to justify this reading of the purpose, stating that:

There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause.⁴⁷

The Clause, as articulated by the Court in *Helstoski*, is an important bulwark preserving the separate, co-equal branches of the American governmental system.

III. THE CIRCUIT SPLIT: DETERMINING WHETHER THERE IS A NON-DISCLOSURE PRIVILEGE UNDER THE SPEECH OR DEBATE CLAUSE

While the Supreme Court adheres to the distinction between legislative and political activities in determining whether to extend the Clause's protections to members of Congress, it has not addressed at least one key aspect of the law. The Court has not resolved whether the Clause's protections "include a privilege not to disclose documents that fall within the sphere of legislative activity, as opposed to a privilege that merely bars the evidentiary use of such documents."⁴⁸ The Supreme Court's silence on the issue of a non-disclosure privilege has led to a circuit split. The D.C. Circuit provides a broad documentary non-disclosure privilege that shields legislators' written materials from intrusion

45. *Helstoski*, 442 U.S. at 491.

46. *Id.*

47. *Id.* at 491–92 (internal quotation marks omitted) (quoting *United States v. Johnson*, 383 U.S. 169, 182 (1966)).

48. *S.E.C. v. The Comm. on Ways & Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 238 (S.D.N.Y. 2015) (citation and internal quotation marks omitted).

through a subpoena in the civil context and a search warrant in the criminal context. The Ninth and Third Circuits, citing concern over immunizing legislators from criminal prosecution, refuse to provide for a documentary non-disclosure privilege.

A. THE D.C. CIRCUIT'S NON-DISCLOSURE PRIVILEGE

The D.C. Circuit applies a broad non-disclosure privilege for documents that fall within the sphere of legitimate legislative activity. As a result of this documentary non-disclosure privilege, legislators possess both a testamentary privilege, protecting them from questioning, and an absolute immunity from turning over their documents related to legitimate legislative activity in response to a subpoena or search warrant.⁴⁹

The D.C. Circuit's non-disclosure privilege is exemplified in *MINPECO, S.A. v. Conticommodity Services, Inc.*⁵⁰ The case involved a subpoena *duces tecum* served on the Custodian of Records and the Staff Director of the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Committee on Government Operations; the subpoenas sought documents relating to six areas, including "correspondence and communications between the subcommittee and other congressional committees."⁵¹ The subcommittee moved to quash the subpoenas based on the protections provided in the Clause.⁵² The D.C. Circuit's analysis focused on whether the documents sought by the defendants fell within the sphere of legislative activity.⁵³ The court determined that the "process by which a committee takes statements and prepares them for publication clearly qualifies as an activity 'within the legislative sphere.'"⁵⁴ Once the court made

49. See *United States v. Rayburn House Office Bldg., Room 2113, Washington, D.C.* 20515, 497 F.3d 654 (D.C. Cir. 2007); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995).

50. *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856 (D.C. Cir. 1988).

51. *Id.* at 857–60.

52. *Id.* at 858.

53. See *id.* at 860 ("To use Judge Green's succinct formulation, the critical inquiry, in determining questions of constitutional immunity, 'is whether the action at issue, whether legal or not, was undertaken within the "legislative sphere.'" This phrasing conforms with Supreme Court teaching: '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.' The issue, therefore, is not whether the information sought might reveal illegal acts, but whether it falls within the legislative sphere." (citations omitted)).

54. *Id.* (citation omitted).

this determination, it quickly concluded that the documents were privileged: “[a]s the preparation of the statement for publication in the subcommittee report was part of the legislative process, *that is the end of the matter.*”⁵⁵ Consequently, *MINPECO* affirms the D.C. Circuit’s commitment to a broad non-disclosure standard, privileging documents relating to activities within the legislative sphere under the Speech or Debate Clause.⁵⁶

The D.C. Circuit has affirmed this commitment in several later decisions.⁵⁷ In *Brown & Williamson Tobacco Corp. v. Williams*, two members of Congress received subpoenas at the behest of a tobacco company.⁵⁸ The tobacco company sought to recover stolen documents that had been brought before a House subcommittee.⁵⁹ Despite the fact that this case involved the recovery of stolen documents, as opposed to an inquiry into legitimately-created congressional records as in *MINPECO*, the D.C. Circuit maintained its broad non-disclosure privilege for legislative materials. Despite assuming that the documents were stolen from the tobacco company,⁶⁰ the D.C. Circuit nonetheless held that the Speech or Debate Clause barred the subpoenas issued to the two Members of Congress:

We do not accept the proposition that the testimonial immunity of the Speech or Debate Clause only applies when Members or their aides are personally questioned. Documentary evidence can certainly be as revealing as oral communications — even if only indirectly when, as here, the documents in question . . . do not detail specific congressional actions. But indications as to what Congress is look-

55. *Id.* at 861 (emphasis added).

56. *See, e.g.*, *S.E.C. v. The Comm. on Ways & Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 239 (S.D.N.Y. 2015) (citing *MINPECO* as an example of a case recognizing a broad non-disclosure privilege).

57. *See id.* (“The broad Speech or Debate Clause non-disclosure privilege applied in *MINPECO* has been confirmed in subsequent D.C. Circuit cases.”).

58. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 411–12 (D.C. Cir. 1995).

59. *See id.* at 418 (“[The tobacco company] claims that *MINPECO* and *Miller* do not control; the subpoenas at issue here are different from the discovery efforts in those earlier cases, because there the information sought would have impugned congressional ‘integrity’ by showing that testimony had been altered before being published as reports or that materials had been inserted into the Congressional Record for improper purposes. Here, by contrast, the subpoenas are said to be entirely neutral as to congressional conduct; all that is sought is access to appellant’s own documents.” (citing *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528 (9th Cir. 1983); other citations omitted)).

60. *Id.* at 417.

ing at provide clues as to what Congress is doing, or might be about to do — and this is true whether or not the documents are sought for the purpose of inquiring into (or frustrating) legislative conduct or to advance some other goals⁶¹

Furthermore, the court also found that the non-disclosure privilege is equivalent in effect to a Congressperson's privilege against being sued for legislative acts under the Clause: “[a] party is no more entitled to compel congressional testimony — or production of documents — than it is to sue congressmen. We do not perceive a difference in the vigor with which the privilege protects against compelling a congressman's testimony as opposed to the protection it provides against suit.”⁶² Moreover, with respect to subpoenas, the court held that “documents or other material that comes into the hands of congressmen may be reached either in a direct suit or a subpoena only if the circumstances by which they come can be thought to fall outside ‘legislative acts’ or the legitimate legislative sphere.”⁶³ Consequently, the court quashed the subpoenas and reaffirmed the D.C. Circuit's broad enforcement of a non-disclosure privilege under the Clause.⁶⁴

In a third and final case, *United States v. Rayburn Office Building, Room 2113, Washington, D.C. 20515*, the D.C. Circuit addressed the execution of a search warrant at a congressman's office.⁶⁵ The court held that “compelled disclosure of privileged material to the Executive during execution of the search warrant for Rayburn House Office Building Room 2113 violated the Speech or Debate Clause and that the Congressman is entitled to the return of documents that the court determines to be privileged under the Clause.”⁶⁶ In reaching this conclusion, the court reiterated that “the testimonial privilege under the Clause extends to non-disclosure of written legislative materials.”⁶⁷ The court rejected the notion that a search warrant narrows the ex-

61. *Id.* at 420.

62. *Id.* at 421.

63. *Id.*

64. *Id.* at 411 (“[The tobacco company] appeals an order of the district court quashing subpoenas *duces tecum* issued to two Members of the House of Representatives. We affirm.”).

65. *United States v. Rayburn House Office Bldg., Room 2113, Washington, D.C. 20515*, 497 F.3d 654, 655 (D.C. Cir. 2007).

66. *Id.* at 656.

67. *Id.* at 655 (citation omitted).

tent of the Clause's protections, determining instead that any search that "allows agents of the Executive to review privileged materials without the Member's consent violates the Clause."⁶⁸ In sum, the D.C. Circuit, in *Rayburn*, expanded the scope of protection offered to congresspersons under the Clause by extending the non-disclosure privilege to include search warrants in a criminal context.⁶⁹

B. OTHER CIRCUITS' REJECTION OF A NON-DISCLOSURE PRIVILEGE

In contrast to the D.C. Circuit, the Ninth and Third Circuits have both rejected a non-disclosure privilege for documents relating to legislative acts.⁷⁰ In *United States v. Renzi*, the Ninth Circuit addressed a claim against former Congressman Renzi who was charged with using his office to benefit himself through a quid pro quo deal with two private parties.⁷¹ As a defense, Renzi sought to invoke the Speech or Debate Clause's protections, arguing that the Clause provides a non-disclosure privilege that "precludes the Government from reviewing documentary evidence referencing 'legislative acts' even as part of an investigation into unprotected activity."⁷² Renzi argued that "legislative act" evidence "permeated the Government's presentation to the grand jury," and he requested a "*Kastigar*-like hearing"⁷³ to determine

68. *Id.* at 663.

69. *See id.* at 660 ("The bar on compelled disclosure is absolute, and there is no reason to believe that the bar does not apply in the criminal as well as the civil context." (citation omitted)); *see also* A.J. Green, *United States v. Renzi: Reigning [sic] in the Speech or Debate Clause to Fight Corruption in Congress Post-Rayburn*, 2012 B.Y.U.L. REV. 493, 497 (2012) ("The D.C. Circuit then proceeded to expand the scope of the *Brown & Williamson* decision, which established a nondisclosure privilege that protected against compelled production of records in response to a civil subpoena. The court extended the same non-disclosure privilege to Congressman Jefferson even though disclosure of his records was effectuated by a criminal search warrant." (footnote omitted)).

70. *See* S.E.C. v. The Comm. on Ways & Means of the U.S. House of Representatives, 161 F. Supp. 3d 199, 240 (S.D.N.Y. 2015) ("The Ninth and Third Circuits have held that the Speech or Debate Clause does not provide a non-disclosure privilege for 'legislative act' documents." (citing *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011)); *In re Fattah*, 802 F.3d 516 (3d Cir. 2015).

71. *Renzi*, 651 F.3d at 1016.

72. *Id.* at 1032 (citation omitted).

73. *See Kastigar v. United States*, 406 U.S. 441 (1972) (holding the Government bears an affirmative burden of demonstrating that, when prosecuting an individual with a grant of immunity, it has not used the testimony or any evidence resulting from that testimony to further the prosecution).

whether the Government used evidence protected by the Speech or Debate Clause to obtain non-privileged evidence.”⁷⁴

Invoking the *Brewster* Court’s policy concern about turning legislators into “super-citizens”⁷⁵ by immunizing them from prosecution, the Ninth Circuit rejected Renzi’s argument and refused to adopt the D.C. Circuit’s non-disclosure privilege.⁷⁶ The *Renzi* court described the *Rayburn* decision as resting on “the notion that ‘distraction’ of Members and their staffs from 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.”⁷⁷ The *Renzi* court made it clear that “legislative distraction is not the primary ill the Clause seeks to cure.”⁷⁸ Instead, the court determined that “concern for distraction *alone* precludes inquiry *only* when the underlying action is itself precluded.”⁷⁹ The court justified its reasoning thus:

When the Clause bars the underlying action, any investigation and litigation serve only as wasted exercises that *unnecessarily* distract Members from their legislative tasks. They work only as tools by which the Executive and Judiciary might harass their Legislative brother.

When the underlying action is not precluded by the Clause, however, the calculus is much different. In that circumstance, the Court has demonstrated that other legitimate interests exist, most notably the ability of the Executive to adequately investigate and prosecute corrupt legislators for non-protected activity.⁸⁰

The Ninth Circuit’s analysis turns on the purpose of the Clause — the court rejected what it identified as the D.C. Circuit’s premise that the sole concern of the Clause is to prevent legislators from distraction; instead, it determined that the Clause is not only intended to prevent distraction, but also to prevent bribery

74. *Renzi*, 651 F.3d at 1019.

75. *Id.* at 1032 (citing *United States v. Brewster*, 408 U.S. 501, 516 (1972)).

76. *Id.* at 1032, 1034 (“Simply stated, we cannot agree with our esteemed colleagues on the D.C. Circuit. We disagree with both *Rayburn*’s premise and its effect and thus decline to adopt its rationale.”).

77. *Id.* at 1034 (citing *United States v. Rayburn House Office Bldg.*, Room 2113, Washington, D.C. 20515, 497 F.3d 654, 660 (D.C. Cir. 2007)).

78. *Id.* at 1035.

79. *Id.*

80. *Id.* at 1036 (citations omitted).

and to ensure honest representation.⁸¹ With this in mind, the court determined that providing a non-disclosure privilege in criminal investigations would be counterproductive to the true purpose of the Clause and undermine enforcement efforts on the part of the executive branch.

The Ninth Circuit drew further support for its conclusion from several Supreme Court cases addressing the protections provided by the Speech or Debate Clause. The *Renzi* court analyzed *Helstoski*, *Johnson*, and *Gravel*, and determined that each involved compelled disclosure of documentary “legislative act” evidence when the underlying action was not precluded by the Clause.⁸² In those cases, the Court “never said a word about the compelled disclosure or the Government’s review of that evidence” — the *Renzi* court nevertheless used its tacit review of legislative act evidence to support its rejection of a documentary non-disclosure privilege.⁸³

Similarly, in *In re Fattah*,⁸⁴ the Third Circuit rejected an argument for a non-disclosure privilege under the Clause. There, the government obtained a search warrant to search a congressman’s email account.⁸⁵ The congressman challenged the search

81. See generally *id.*; see also Green, *supra* note 69, at 500 (“The Ninth Circuit reasoned that while one purpose of the Clause is to prevent the distraction of legislators from their legislative responsibilities, such distraction alone could not serve as the touchstone for the absolute protection of the Clause. The Clause’s purpose goes further than merely preventing legislators from distraction; the Clause is also meant to protect against bribery and corruption. Thus, the Clause was not meant to provide members of Congress an escape from reasonable investigations. To so deprive the Executive of its ‘power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of congress’ would be inconsistent with the Clause’s purpose because ‘financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation.’” (footnotes and internal quotation marks omitted)).

82. See *United States v. Renzi*, 651 F.3d 1012, 1036–37 (9th Cir. 2011) (“Moreover, in resolving any lingering uncertainty as to whether distraction alone can preclude disclosure of documentary ‘legislative act’ evidence, we cannot ignore the example of the Court. The Court’s own jurisprudence demonstrates that Members have been distracted by investigations and litigation — and have even been compelled to disclose documentary ‘legislative act’ evidence — in cases in which the underlying action was *not* precluded by the Clause.” (citing *United States v. Helstoski*, 442 U.S. 477 (1979); *Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Johnson*, 383 U.S. 169 (1966))).

83. *Id.* at 1037, 1039 (“In sum, the very fact that the Court has reviewed ‘legislative act’ evidence on countless occasions — and considered cases in which such evidence had been disclosed to the Executive with nary an eyebrow raised as to the disclosure — demonstrates that the Clause does not incorporate a non-disclosure privilege as to any branch.” (citations omitted)).

84. *In re Fattah*, 802 F.3d 516 (3d Cir. 2015).

85. *Id.* at 520–521.

warrant on Speech or Debate Clause grounds.⁸⁶ As in *Renzi*, the Third Circuit in *Fattah* determined that allowing a non-disclosure privilege prohibiting disclosure of evidentiary records to the Government during the course of an investigation would provide too much protection to legislators and run afoul of the Supreme Court's policy against entirely insulating members of Congress from criminal prosecution.⁸⁷ The court reasoned:

[T]he Clause was meant to “free the legislator from the executive and judicial oversight that realistically threatens to control his conduct as a legislator.” The crux of the Clause is to “prevent intimidation by the executive and accountability [for legislative acts] before a possibly hostile judiciary.” It is clear that the purpose, however, has never been to shelter a Member from potential criminal responsibility.⁸⁸

Based on the foregoing analysis, the Third Circuit held that, “while the Speech or Debate Clause prohibits hostile questioning regarding legislative acts in the form of testimony to a jury, it does not prohibit disclosure of Speech or Debate Clause privileged documents to the Government. . . . [I]t merely prohibits the evidentiary submission and use of those documents.”⁸⁹

IV. RESOLVING THE CIRCUIT SPLIT AND REEXAMINING THE SCOPE OF THE CLAUSE

The Supreme Court should act to resolve the current circuit split. Part IV.A considers application of a limited non-disclosure privilege to resolve the current split. Such a privilege would insulate legislators from being required to actively respond to subpoenas, but it would not extend to all search warrants. Part IV.A concludes that a limited non-disclosure privilege is consistent with Supreme Court precedent, and it is the appropriate interpretation of the Clause's protections.

86. *Id.* at 522.

87. *See id.* at 528 (“If it were any other way, investigations into corrupt Members could be easily avoided by mere assertion of this privilege. Members could, in effect, shield themselves fully from criminal investigations by simply citing to the Speech or Debate Clause. We do not believe the Speech or Debate Clause was meant to effectuate such deception.”).

88. *Id.* at 528–29 (footnotes omitted).

89. *Id.* at 529.

Part IV.B will additionally consider reaffirming the Court's commitment to broadly reading the Clause to resolve the circuit split, thereby ensuring the separation of powers and protecting the legislative process. In order to provide realistic and effective protection, the scope of the Clause should extend to negotiations between legislators and their constituents in anticipation of pending litigation. While Supreme Court precedent arguably validates an interpretation allowing inquiry into any activity that does not result in actual legislation, Part IV.B argues that this approach should be rejected in favor of one that takes into account the realities of modern legislation and focuses on protecting the legislative process as well as underlying legislative activities.

A. LIMITED NON-DISCLOSURE PRIVILEGE

A limited non-disclosure privilege is the best means of resolving the current circuit split. As noted above, the Speech or Debate Clause is designed to protect the integrity and independence of the legislative branch and preserve the separation of powers; as a result, legislators should not be forced to respond to subpoenas, issued by the executive branch and enforced by the judiciary, that seek to compel disclosure of documentary evidence pertaining to legislative matters. However, the same justifications for shielding the legislature from responding to a subpoena are not present in the case of properly crafted search warrants, which can ensure that investigators are only empowered to seize documents unrelated to legislative acts. Additional protections, including giving legislators the opportunity to assert privilege over documents that fall within the Clause's ambit, will preserve the separation of powers without compromising investigations into illegal behavior. Thus, the non-disclosure privilege should be limited to civil and criminal subpoenas, which call for testimonial responses, and not to strictly limited and carefully administered search warrants.

Throughout its discussions of the Clause, the Supreme Court has consistently reiterated the importance of preserving the separation of powers by preventing hostile questioning of legislators.⁹⁰ The Clause itself makes unequivocally clear that Members

90. See, e.g., *S.E.C. v. The Comm. on Ways & Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 242 (S.D.N.Y. 2015) ("At its essence, the Speech or Debate Clause's purpose is to preserve the constitutional structure of separate, co-equal, and

“shall not be questioned” about their legislative acts.⁹¹ To the extent that a subpoena attempts to compel a legislator to provide information that would otherwise be protected by the Clause, the subpoena functions the same as direct questioning.⁹² As a result, the issuance of a subpoena is a form of prohibited questioning under the Clause, regardless of whether the subpoena seeks to compel testimony regarding a legislative act or documents that “fall within the sphere of legitimate legislative activity.”⁹³ The same policy concerns associated with allowing questioning of legislators are also implicated by forcing documentary disclosure — intimidation and violation of the separation of powers.⁹⁴

A broad search warrant, which does not distinguish between legislatively privileged documents and other unprotected materials, similarly violates the Clause’s protections. In *Rayburn*, the search warrant “permitted DOJ to examine legislative documents that had the potential to reveal as much information as testimony.”⁹⁵ Permitting investigators to examine such revealing documents and “forc[ing] disclosure of legislative documents and oral questioning are barred by the testimonial privilege inherent in the Clause’s prohibition on ‘questioning,’ because either inquiry intrudes into and interferes with a Congressman’s legislative freedom.”⁹⁶ Improperly applied, overly broad search warrants violate the Clause’s protections, disturb the balance of powers, and function much the same way as subpoenas.

independent branches of Government,’ and to protect Congress from interference, intimidation, and intrusion by the other branches of Government. The Framers were well aware of the English Crown’s efforts to intimidate those in Parliament through the use of criminal prosecutions and sanctions.” (quoting *United States v. Helstoski*, 442 U.S. 477, 491 (1979)) (alterations omitted)).

91. U.S. Const., art. I, § 6, cl. 1.

92. See *Comm. on Ways & Means*, 161 F. Supp. 3d at 242 (“A question is a request for information, and a subpoena constitutes an effort to compel the disclosure of information.”).

93. See *id.* (“Whether an Executive Branch subpoena seeks testimony from a Member concerning a ‘legislative act’ or documents that fall ‘within the sphere of legitimate legislative activity’ is, in this Court’s view, immaterial under the Speech or Debate Clause. The Executive Branch’s issuance of such a subpoena, and the Judiciary’s enforcement of it, constitutes interference with the legislative process forbidden by the Speech or Debate Clause.”).

94. See *id.* (“The issuance of such subpoenas, and a judicial practice of enforcing them, also presents a significant risk of intimidation, and upsets the checks and balances the Framers envisioned and put in place.”).

95. Reply Br. of Congressman William J. Jefferson, *United States v. Rayburn House Office Bldg.*, Room 2113, Washington, D.C. 20515, 497 F.3d 654 (D.C. Cir. 2007), 2007 WL 1140937.

96. *Id.*

Moreover, the plain language of the Clause and the relevant Supreme Court cases add support to the argument against broad search warrants. The Clause itself speaks in absolute terms, which supports a documentary non-disclosure privilege.⁹⁷ The language in numerous Supreme Court cases makes clear that, as long as members act legitimately within the legislative sphere, there is an absolute bar on interfering with their activities.⁹⁸ It makes little sense to read the series of Supreme Court decisions, which unequivocally and absolutely bar interference with legislative activities in the context of testamentary questioning, to permit forced disclosure of documentary evidence pertaining to the same matters — the forced disclosures constitute the same sort of interference, regardless of whether the answers are required verbally or in written form.

Furthermore, the justification for abrogating a documentary non-disclosure privilege in *Renzi*, which reasoned that the Supreme Court has tacitly condoned the compelled disclosure of documents with information in the sphere of legitimate legislative activities, is belied by the three cases cited in *Renzi*, none of which address, let alone approve of, forced disclosure.⁹⁹

Finally, the concern for avoiding giving legislators immunity from criminal prosecution, as discussed in both *Fattah* and *Renzi*, is not a valid justification for opting against a documentary non-disclosure privilege. It is possible to bring a successful criminal

97. See *Comm. on Ways & Means*, 161 F. Supp. 3d at 243 (“Enforcing a subpoena for ‘legislative act’ documents is also contrary to the language of the Clause, which — as the Supreme Court has repeatedly recognized — speaks in absolute terms.” (citations omitted)).

98. See *id.* (citing *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975); *Doe v. McMillan*, 412 U.S. 306, 324 (1973); *United States v. Brewster*, 408 U.S. 501, 516 (1972)).

99. See *id.* at 244 (“To the extent that *Renzi* asserts that *Helstoski*, *Johnson*, and *Gravel* demonstrate that no non-disclosure privilege exists under the Speech or Debate Clause, this Court disagrees. These cases do not address that issue. For example, although the *Renzi* court states that ‘*Helstoski* is particularly insightful’ concerning the non-disclosure privilege issue — because ‘Congressman *Helstoski* had been compelled to turn over “files on numerous private bills[.]” — the Supreme Court does not address in any fashion the propriety of this production. *Helstoski*, *Johnson*, and *Gravel* all acknowledge and apply the Speech or Debate Clause’s prohibition against the introduction of evidence of legislative acts against a Member, but these cases do not address whether the Clause grants Congress, Members, and their aides a privilege not to disclose legislative materials.” (citing *United States v. Renzi*, 651 F.3d 1012, 1037 (9th Cir. 2011); *United States v. Helstoski*, 442 U.S. 477, 487–99 (1979); *Gravel v. United States*, 408 U.S. 606, 615–16 (1972); *United States v. Johnson*, 383 U.S. 169, 184–85 (1966))).

prosecution without delving into legislative matters.¹⁰⁰ In *Brewster*, the Court distinguished the illegitimate actions of a former senator from legitimate legislative activities:

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 a part of or even incidental to the role of a legislator. It is not an “act resulting from the nature, and in the execution, of the office.” Nor is it a “thing said or done by him, as a representative, in the exercise of the functions of that office.” . . . When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman’s influence with the Executive Branch. And an inquiry into the purpose of a bribe “does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.”

Nor does it matter if the Member defaults on his illegal bargain. To make a *prima facie* case under this indictment, the Government need not show any act of appellee subsequent to the corrupt promise for payment, for it is taking the bribe, not performance of the illicit compact, that is a criminal act.¹⁰¹

Thus, a privilege barring compelled disclosure of documents within the sphere of legitimate legislative activity, but not those associated with criminal acts, does not completely insulate legislators from prosecution.¹⁰²

While the Clause justifies extending a non-disclosure privilege to documents within the sphere of legitimate legislative activity, that privilege should be clearly limited to subpoenas and not extended to all search warrants. Search warrants, if clearly limited

100. See *Comm. on Ways & Means*, 161 F. Supp. 3d at 244 (“Countless successful prosecutions have been brought against corrupt legislators without resort to ‘legislative act’ documents, however, in large part because the elements necessary to prove crimes of corruption do not involve ‘legislative acts.’”).

101. *United States v. Brewster*, 408 U.S. 501, 526 (1972) (citations omitted).

102. See *Comm. on Ways & Means*, 161 F. Supp. 3d at 245 (“In sum, history demonstrates that prosecutors have all the tools necessary to prove an illicit compact without impinging on the legislative function by issuing subpoenas for documents that fall within the sphere of legitimate legislative activity.” (citation, alterations, and internal quotation marks omitted)).

in scope to unprotected materials, fall outside the documentary non-disclosure privilege, so long as legislators are given the opportunity to either waive or assert the speech-or-debate privilege. These limited search warrants differ from subpoenas in several critical respects. For example, whereas a subpoena requires an affirmative act in the form of the recipient's testimony or challenge to the subpoena's validity, a limited search warrant does not require any affirmative response unless a legislator claims privilege.¹⁰³ Therefore, allowing the execution of a search warrant does not implicate the Clause's prohibition on questioning legislators, because legislators need not give an affirmative response nor must they divulge protected information.¹⁰⁴

Legislators may, however, claim a limited non-disclosure privilege. Such a privilege would allow the execution of carefully crafted search warrants but shield legislators from both subpoenas and broad, unfettered search warrants that fall within the Clause's protections. Moreover, this privilege is consistent with goals of political accountability¹⁰⁵ and with the purposes and precedent behind the Clause.¹⁰⁶ Furthermore, a limited non-disclosure privilege "preserves the unique character of a search warrant, which can be validly obtained only if other, less intrusive judicial processes have been exhausted or are impracticable."¹⁰⁷

Federal investigators in the District of Columbia have created special procedures that are a model for attaining search warrants that do not violate the Clause's protections, because they allow legislators to invoke a limited non-disclosure privilege. In 2013,

103. See *United States v. Rayburn House Office Bldg., Room 2113*, Washington, D.C. 20515, 497 F.3d 654, 669 (D.C. Cir. 2007) (Henderson, J., concurring).

104. See, e.g., Artur Davis & Gene Besen, *Circuit Split: Enforcing The Speech Or Debate Clause*, LAW360 (July 15, 2011, 1:48 PM), <http://www.law360.com/articles/256446/circuit-split-enforcing-the-speech-or-debate-clause> [<https://perma.cc/4Z2Z-XTP5>] ("Furthermore, as Judge Karen Henderson's concurring opinion observes in *Rayburn*, the execution of a search warrant — which requires no assertive response by its target — lacks the element of compelled testimonial assertion that is present in the response to a subpoena." (footnotes omitted)).

105. See *id.* ("The disclosure-based privilege in *Rayburn* seems to insulate congressmen from the ordinary operations of the criminal justice system, a result that is at odds with fundamental notions of political accountability.")

106. See *id.* ("A more restrained approach than *Rayburn*, anchored in the Supreme Court's recognition of a testimonial privilege in *United States v. Gravel*, might reserve limitations on compelled disclosure of legislative acts to civil or criminal subpoenas, rather than to the nontestimonial event of a warrant." (footnote omitted)).

107. *Id.*

investigators “seized Senate-owned devices belonging to former congressional aide Jesse Ryan Loskarn.”¹⁰⁸ Loskarn, who formerly served as chief-of-staff to Senator Lamar Alexander, was under investigation based on alleged possession of child pornography.¹⁰⁹ The investigator working on the case was aware that the “Loskarn’s residence is likely to contain computers, other electronic devices (including mobile telephones, Blackberries and the like), and electronic storage media issued to Loskarn” because of Loskarn’s position as a congressional aide.¹¹⁰ The investigators were also aware that such devices and storage media were “likely to contain materials protected by the Speech or Debate Clause of the United States Constitution.”¹¹¹ Given the likelihood of finding such protected material, the investigators followed a special procedure — the Justice Department “was to contact the Office of Senate Legal Counsel, which in turn contacted [Senator] Alexander and gave him an opportunity to either waive or assert the speech or debate privilege.”¹¹² The search warrant application itself specifically noted that “even incidental review of Speech or Debate privileged material by agents during the execution of a search of a Member’s office violate the Privilege unless the member is provided an opportunity to review and assert the privilege.”¹¹³ Senator Alexander did not assert privilege and cooperated fully with the search warrant, so the search at issue never came before any court.¹¹⁴ Nevertheless, the warrant is an example of the procedures that investigators can follow to ensure that a search warrant comports with the Clause’s requirements.

While the search warrant applied in *Loskarn* is an example of a permissible search pursuant to the Speech of Debate Clause, the search warrant in *Rayburn*, in contrast, provides an example of an impermissible search. In *Rayburn*, the “agents did not obtain a warrant calling for one type of material and simply ‘inadvertently’ scoop up another. The warrant called for the seizure of *all* responsive records and specifically authorized a search of all

108. Ryan J. Reilly, *Feds Took Special Precautions To Protect ‘Speech Or Debate’ In Child Porn Case*, HUFFINGTON POST, (Dec. 18, 2003, 2:14 PM), http://www.huffingtonpost.com/2013/12/18/senate-aide-child-porn_n_4462199.html [<https://perma.cc/K9PW-KCLP>].

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

of the files utilized by the Member and his aides.”¹¹⁵ Moreover, “[w]ith respect to computer records, the warrant provided for DOJ to review all of the files that contained any of the search terms in the warrant, regardless of the privilege, and for DOJ to make unilateral privilege determinations with regard to these files.”¹¹⁶ As a result of such broad terms, appellant asserted that the “invasion of the privilege was an expected, fundamental aspect of the search, not its chance or ‘incidental’ by-product.”¹¹⁷

These procedures directly conflict with the deferential approach taken by the investigators in *Loskarn*. As Congressman Jefferson argued in *Rayburn*, “it is not difficult to suggest appropriate procedures that would neither require advance notice of a search nor give a Member the opportunity to remove and conceal incriminating non-privileged evidence.”¹¹⁸ For example, “[a]ny Congressional office could be secured in advance, after which the Member would make a privilege review, with all materials deemed privileged kept available for judicial review if necessary.”¹¹⁹ The *Loskarn* investigation is an example of such an appropriate procedure, given the investigator’s careful approach to ensuring adherence to Constitutional requirements.

In sum, the Clause mandates a documentary non-disclosure privilege to prevent the issuance of all subpoenas, which are equivalent in effect to questioning legislatures because they require an affirmative response, but the Clause does not require the non-execution of search warrants that are properly administered and targeted at non-legislative activities. The limited non-disclosure privilege serves both goals: ensuring that legislators are not immunized from criminal prosecution and ensuring that legislators are not subject to questioning at the hands of a potentially hostile executive or judicial branch, which would impede upon the system of checks and balances. Providing a limited non-disclosure privilege is a necessary step toward restoring certainty to the Clause’s protections, especially in light of the current split.

115. Reply Br. of Congressman William J. Jefferson, *United States v. Rayburn House Office Bldg.*, Room 2113, Washington, D.C. 20515, 497 F.3d 654 (D.C. Cir. 2007), 2007 WL 1140937.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

B. CLARIFYING THE SCOPE OF LEGISLATIVE ACTIVITIES

As an additional measure to provide certainty to the Clause's protections, the Supreme Court should extend the evidentiary, documentary, and testimonial privileges the Clause to both completed legislative acts as well as the actions legislators take in furtherance of potential legislation, including fact-finding and negotiations with constituents, even if legislation is never introduced. The Ninth Circuit's decision in *Renzi*, which drew heavily on a distinction between completed acts and future acts from *Helstoski*, refused to apply the Clause's protections to testimony regarding the congressman's non-criminal motivations for introducing legislation and to negotiations between the congressman and his constituents, because the motivations and negotiations revolved around future legislation. Arguably, this reading is consistent with *Helstoski*, but it is inconsistent with the purpose of the Clause and creates ambiguity regarding the extent of the Clause's protections. Consequently, to restore the Clause's emphasis on meaningful separation of powers, the Supreme Court should reject the *Renzi* court's position so that the executive and judiciary branches are prohibited from questioning the motivation for legislation or interfering with the legislative process.

As noted above, the *Renzi* decision involved a quid pro quo arrangement between a congressman and two private parties.¹²⁰ In addition to rejecting a documentary non-disclosure privilege, the Ninth Circuit determined that the Clause's protections only apply to completed legislative acts: "[c]ompleted legislative acts are protected; promises of future acts are not."¹²¹ Based on this distinction, the court rejected *Renzi*'s contention that "the very act of negotiating with private entities over future legislation is analogous to discourse between legislators over the content of a bill and must be considered a protected legislative act."¹²² In rejecting this assertion, the Ninth Circuit based its reasoning largely on *Brewster*, where the Court determined that accepting a bribe was not a part of the legislative process.¹²³ The *Renzi* court analogized to the congressman's conduct in *Brewster* to hold that Ren-

120. See *supra* note 71 and accompanying text.

121. *United States v. Renzi*, 651 F.3d 1012, 1022 (9th Cir. 2011) (citing *United States v. Helstoski*, 442 U.S. 477, 489–90 (1979)) (internal quotation marks omitted).

122. *Id.* (internal quotation marks omitted).

123. *Id.* at 1023 (citing *United States v. Brewster*, 408 U.S. 501, 502, 516 (1972)).

zi's extortionate behavior was similarly not part of the legislative process.

As commentators have noted, finding that extortion, like bribery, is not part of the legislative process is "unlikely to be second-guessed," however, "the court's conclusion regarding an array of ancillary evidence is less well founded."¹²⁴ Specifically, the court's holding swept too broadly in determining that the Clause did not protect any of the discussions or interactions between Renzi and his constituents, because "[n]umerous elements of the congressman's discussions and interactions with constituents that are not extortionate in nature are nonetheless treated as nonlegislative on the ground that no actual legislation was ever introduced . . ."¹²⁵ Both Renzi's interactions with constituents and much of the ancillary evidence revolved around non-extortionate motivations for introducing the legislation in question. For example, prosecutors questioned one of Congressman Renzi's aides about the congressman's "motivation for including the particular property Renzi allegedly demanded be in the land exchange legislation."¹²⁶ The aide testified that Renzi's "motive for suggesting the selected property was that it 'had conservation value.'"¹²⁷ Moreover, a host of "House emails and other records from Congressman Renzi's office discussing or directly relating to proposed legislative land exchanges[]" was presented to the grand jury:

These official congressional records concerned or reflected: (1) the timing of votes, the schedule and agendas for House Committee meetings and legislative mark-up sessions, descriptions of meetings with constituents, lobbyists and others regarding legislation, and other legislative fact-finding trips and meetings, (2) draft statements written for Congressman Renzi regarding a piece of legislation, (3) revisions to land exchange legislation, (4) "a congressional file regarding one of the legislative land exchanges at issue" here, and (5) an email from Renzi's Legislative Director to

124. Davis & Besen, *supra* note 104.

125. *Id.*

126. Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives for Leave to File a Brief Amicus Curiae within the Word Limits Applicable to Parties' Principal Briefs [hereinafter BLAG Brief] at 49, *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011) (Nos. 10-10088, 10-10122), 2010 WL 6775539.

127. *Id.* at 49–50.

then-Congressman Kolbe's Chief of Staff concerning mark-ups to the draft legislation and a strategy discussion of how best to pass what Rep. Kolbe's Chief of Staff describes as a great bill.¹²⁸

This testimony and accompanying records were presented to the grand jury without any waiver of privilege by Renzi. Furthermore, the testimony and the records did not relate to the alleged extortionate behavior in any way. While the Ninth Circuit's distinction between completed legislative activities and promises of future acts "has a foundation in the Supreme Court's decision in *Helstoski*," the distinction nonetheless "seems in tension with the clause's focus on protecting the legislative process."¹²⁹ This tension derives from the Clause's absolute protection of legislative acts in the context of enactments with its weak protection of similarly legislative acts that do not result in enacted legislation. There are numerous, legitimate reasons why a Congressman may choose to abandon legislation before its completion, such as a change in the political climate or a backlash by constituents, and these reasons were seemingly overlooked because of the desire to prosecute corrupt behavior. While the concern that legislators will be immunized from prosecution is valid, it does not justify a complete abrogation of the Clause's robust and principled protections simply because legislators' actions do not result in legislation.

Given the tension between a broad reading of *Helstoski* and the clear purpose of the Clause to prevent interference with the legislative process and ensure separation of powers, the Supreme Court should adopt a narrow reading of *Helstoski* that allows the protections of the Clause to extend to legislators' actions in preparation for pending or future legislation. The *Helstoski* decision leaves room for a more narrow reading than that applied by the *Renzi* court.¹³⁰ While *Helstoski*, in relying on *Brewster*, determined that the Clause's protections only applied if the activities related to the due functioning of the legislative process,¹³¹ such activities need not be completed legislative activities. Rather, *Helstoski* can be read to exclude a narrower set of activities from

128. *Id.* at 51–52 (citations and internal quotation marks omitted).

129. Davis & Besen, *supra* note 104.

130. *Helstoski*, 442 U.S. at 489.

131. *Id.*

the Clause's protections; specifically, a compact to commit bribery or any other criminal activity is not a legislative act because it does not relate to the due functioning of the legislative process. This leaves room for the argument that legitimate actions committed in furtherance of pending legislation are shielded by the Clause, and inquiry into the motivation for such actions is prohibited. In fact, this comports with *Brewster*, where the Court determined that prosecution for bribery was permissible because "no inquiry into legislative acts or motivation for legislative acts [i]s necessary for the Government to make out a prima facie case[]" given that taking a bribe is "not . . . an act performed as a part of or even incidental to the role of a legislator."¹³²

Shielding legitimate activities related to pending or future legislation from hostile questioning would further the purposes of the Clause, because "crafting constituent coalitions and maneuvering to gain stakeholder support seems interwoven into the lawmaking process and often outweighs in value core legislative acts like speaking or advocating on the floor."¹³³ Consequently, allowing executive or judicial interference with these valuable activities is equally, if not more, damaging to the separation of powers than inquiry into the clearly protected core legislative activities. Moreover, a narrower reading of *Helstoski* is consistent with the Court's emphasis on protecting the independence of the legislative process from involvement by the other branches.¹³⁴ As these legitimate activities would otherwise count as legislative activities, but for the fact that no actual legislation was ever introduced, providing them protection from inquiry would relieve the "tension with the clause's focus on protecting the legislative process[]" created by the *Renzi* court's distinction between completed and future legislation.¹³⁵

It is undisputed that expanding the Clause's protections may make it more difficult for the government to prosecute legislators.

132. *Brewster*, 408 U.S. at 525–26.

133. *Davis & Besen*, *supra* note 104 (footnote omitted).

134. See BLAG Brief, *supra* note 126, at 18 ("In accordance with the Clause's purposes, the Supreme Court has recognized that its protections apply to all activities by Members of Congress within the legislative sphere. This sphere includes all activities that are 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." (citing *Gravel*, 408 U.S. at 625) (internal quotation marks omitted)).

135. *Davis & Besen*, *supra* note 104.

For example, precluding inquiry into the ancillary evidence discussed above would have impeded, to some extent, the justified investigation into Congressman Renzi's illegal behavior. This consequence, however, is not a justification for narrowing the Clause's protections:

[I]t has long been recognized that the functions performed by the Speech or Debate Clause in our constitutional framework — preserving legislative independence and the separation of powers — are so important that the privileges provided by the Clause must be protected even if they conflict with the interests of law enforcement. Thus, courts have held that the Speech or Debate privilege may require the dismissal of an indictment, *see United States v. Helstoski*, 635 F.2d 200, 205 (3d Cir. 1980), or the reversal of a conviction. *See United States v. Johnson*, 383 U.S. at 184–85. If these results must be accepted to carry out the purposes of the Clause, then procedures that make evidence-gathering slower or more cumbersome are certainly tolerable.¹³⁶

While slowing down or impeding government investigations may pose a burden on the executive branch, it is a necessary burden to preserve the legislative independence and separation of powers that for the preservation of legislative independence and the separation of powers. Moreover, prosecutors can still target bribery, the acceptance of gratuities, and other forms of corruption on the part of legislators, so long as prosecutors can substantiate their claims through unprivileged evidence.

V. LOOKING AHEAD: AN OPPORTUNITY FOR THE COURT TO ADDRESS THE CLAUSE

The Supreme Court may have the opportunity to address both the circuit split regarding documentary non-disclosure and the proper scope of the Clause's protections. First, in regard to the scope of the Clause, Senator Robert Menendez, who, at the time of this Note's publication, is currently facing bribery and public corruption charges, has argued that the Clause protects activities

136. Br. Opp. at 31, *United States v. Rayburn House Office Bldg.*, Room 2113, Washington, D.C. 20515, 497 F.3d 654 (D.C. Cir. 2007), 2008 WL 467883, at *32.

related to his policy advocacy and oversight of executive agencies. Second, in regard to documentary non-disclosure, the U.S. Securities and Exchange Commission relied on a decision in the ongoing Menendez litigation to enforce a subpoena directed at the U.S. House Ways and Means Committee, though the case was ultimately dismissed.¹³⁷ Both the trial court and the appellate court have rejected Menendez's claims, and Menendez has appealed to the Supreme Court.¹³⁸ Thus, *Menendez* presents an opportunity for the Court to adopt the foregoing arguments, which would preserve an important constitutional bulwark protecting legislative independence and the separation of powers.

The charges against Senator Menendez are based on an "alleged quid pro quo relationship where political favors were traded for undisclosed gifts and campaign donations from long-time donor and friend Dr. Salomon E. Melgen."¹³⁹ Dr. Melgen allegedly provided the "quid" when he "made gifts and directed contributions to Menendez worth nearly \$1 million."¹⁴⁰ The gifts included "19 free rides on a private jet, a vacation at Melgen's villa in the Dominican Republic, and stays at a five-star hotel in Paris."¹⁴¹ Moreover, Melgen "directed over \$700,000 in corporate contributions to Majority Pac which, in turn, used that money to support Menendez's 2012 re-election campaign."¹⁴²

Senator Menendez allegedly provided the "quo" by "repeatedly interced[ing] on behalf of Melgen's personal and business interests."¹⁴³ More specifically, he appealed to the Health and Human Services Administration in an ultimately unsuccessful attempt to settle an administrative enforcement action against Melgen's practice stemming from a \$8.9 million Medicare billing dispute.¹⁴⁴ Menendez also "tried to pressure the Obama admin-

137. Martin O'Sullivan, *House, SEC End Health Care Insider Trading Subpoena Row*, LAW 360 (Jan. 19, 2017), <https://www.law360.com/articles/882785/house-sec-end-health-care-insider-trading-subpoena-row> [<https://perma.cc/D8RB-SXWX>].

138. Josh Gerstein, *Menendez asks Supreme Court to hear case*, POLITICO (Dec. 13, 2016), <http://www.politico.com/story/2016/12/menendez-supreme-court-bribery-case-232597> [<https://perma.cc/T65T-Y9TD>].

139. *Senator Menendez and the Speech or Debate Clause: What Comes Next?*, CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY (August 26, 2016), http://web.law.columbia.edu/sites/default/files/microsites/public-integrity/files/senator_menendez_and_the_speech_and_debate_clause.pdf [<https://perma.cc/97HA-CCB7>].

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

istration to alter Medicare reimbursement policies in a way that would generate the surgeon more income.”¹⁴⁵ Finally, Menendez “attempted to involve the Executive Branch in a business dispute between the government of the Dominican Republic and a company owned by Melgen” and “secured travel visas for three of Melgen’s foreign girlfriends.”¹⁴⁶

Relying on the Clause, Senator Menendez argued that “he is entitled to immunity” because “the actions he took on behalf of Melgen were within the scope of his position as a Senator, and therefore ‘legislative acts’ protected under the Clause.”¹⁴⁷ More specifically, Senator Menendez argued that “a series of meetings, phone calls and other communications he and his staff had with executive branch officials were legislative in nature because they addressed policy issues and were not specifically focused on Melgen’s affairs.”¹⁴⁸ Menendez went on to assert that the “Speech or Debate privilege protects any effort by a Member to oversee the Executive Branch, including informal efforts to influence it.”¹⁴⁹

The Third Circuit rejected both of these positions.¹⁵⁰ It found that “Menendez’s actions were ‘essentially lobbying on behalf of a particular party, and thus, under the specific circumstances, are outside the constitutional safe harbor [of the Speech and Debate Clause].”¹⁵¹ Menendez’s subsequent request for en banc review was denied by the Third Circuit.¹⁵² The former Senator has submitted a petition for the Court to hear his case.¹⁵³

The Court may also have an opportunity to resolve the circuit split involving documentary non-disclosure based on an application of *Menendez*. The House Ways and Means Committee was “fighting an SEC subpoena that seeks information on whether former health subcommittee staff director Brian Sutter or others

145. *Id.*

146. *Id.*

147. *Id.*

148. Charles Toutant, *Third Circuit Rejects Bid to Throw Out Case Against Menendez*, LAW.COM (July 29, 2016), <http://www.law.com/sites/articles/2016/07/29/third-circuit-rejects-bid-to-throw-out-case-against-menendez/?slreturn=20160927195036> [<https://perma.cc/N6MS-KCEX>].

149. *United States v. Menendez*, 831 F.3d 155, 168 (3d Cir. 2016).

150. CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY, *supra* note 139.

151. *Id.*

152. John Bresnahan, *Sen. Menendez loses in appeals court*, POLITICO (Sept. 13, 2016, 7:35 PM) <http://www.politico.com/story/2016/09/menendez-loses-in-appeals-court-228127> [<https://perma.cc/NV6D-8995>].

153. *See* O’Sullivan, *supra* note 137.

tipped off Greenberg Traurig LLP lobbyist Mark Hayes that a coming decision by the Centers for Medicare & Medicaid Services was to save the health care industry billions of dollars.”¹⁵⁴ The subpoenas were filed in June 2014, and the SEC filed suit to enforce the requests shortly thereafter.¹⁵⁵ U.S. District Judge Paul Gardephe granted, in part, the agency’s request in November, “finding that neither sovereign immunity nor the speech or debate clause of the U.S. Constitution protect the communications.”¹⁵⁶ The committee appealed Judge Gardephe’s order.¹⁵⁷ In response, the SEC asked the Second Circuit to rely on the Third Circuit’s decision in the *Menendez* prosecution.¹⁵⁸ Based on that decision, the SEC argued that “the House can’t use the [Speech or Debate Clause] to escape an agency subpoena probing insider-trading allegations involving health care legislation.”¹⁵⁹ While the SEC and House committee ultimately stipulated to dismiss the case,¹⁶⁰ the Court should still consider the application of *Menendez*, taking this opportunity to adopt a limited documentary non-disclosure privilege.

First, the *Menendez* prosecution provides a vehicle for the Court to clarify that the Clause extends to the type of “ancillary evidence” that was deemed unprivileged in the *Renzi* decision. Even with this extension of the Clause’s protections, the Court should not accept *Menendez*’s argument that conduct related to policy matters and executive oversight actions are privileged. The charges against *Menendez* would go forward because his conduct does not involve typically legislative activity that is currently unprotected because it relates to pending, rather than completed, legislative activity. Decided as such, *Menendez* would be a particularly effective case for addressing the scope of the Clause because it would quell the concern that providing additional protections would insulate legislators from prosecution.

It could also be an opportunity to adopt a limited non-disclosure privilege, as the Court can indicate that subpoenas

154. Martin O’Sullivan, *SEC Points To Menendez Ruling In House Subpoena Row*, LAW360 (August 2, 2016, 7:49 PM), <http://www.law360.com/articles/824298/sec-points-to-menendez-ruling-in-house-subpoena-row> [<https://perma.cc/8CRJ-2ESM>].

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *See Gerstein, supra* note 138.

related to protected activity are unenforceable. If, however, they inquire into criminal activity, arguably the activity at issue in *Menendez*, for which he would not be protected, such subpoenas should be enforced. Although the Court may be unwilling to adopt such a non-disclosure privilege because it goes beyond the case and controversy before the Court, the fact that *Menendez* has already been applied in such a way with respect to the SEC subpoena may be grounds for the Court to resolve this uncertainty regardless. This decision thus provides the Court the opportunity to settle a split that has created uncertainty and ambiguity for seven years.

VI. CONCLUSION

A historical analysis of the Supreme Court's interpretation of the Speech or Debate Clause clarifies that the longstanding purpose of the Clause is to protect the independence of the legislature and the legislative process. Counterbalancing these concerns is the desire to ensure that legislators are not immune from criminal prosecution. Both the Clause's purpose and related concerns can be served by instituting a limited documentary non-disclosure privilege, combined with greater protection of the legislative process regardless of whether legislation is introduced.

A limited non-disclosure privilege, which adheres to the clear text of the Clause, will prevent legislators from being forced to respond to hostile questioning by affirmatively producing documentary information. While preventing the executive from reviewing these documents through a subpoena may make prosecution more difficult, it will by no means insulate legislators from prosecution. Legislators can still be prosecuted for taking a bribe or extorting a constituent, which are crimes that have historically been proven without reference to protected information. Moreover, limiting the privilege to subpoenas, rather than search warrants, will ensure that there is some prosecutorial recourse, albeit one that does not fall afoul of the clear textual prohibition of questioning legislators about their legislative acts.

Additionally, clarifying that the Clause protects the legislative process independent of whether any legislation is introduced is consistent with Court precedent. While this clarification may narrow the application of *Helstoski*, it is warranted based on the

modern realities of legislation and the historical purpose of the Clause.

Making these changes to how the Clause is applied will restore certainty to a currently uncertain privilege. Moreover, it will help prevent prosecution of corrupt politicians from becoming a matter of jurisdiction, where certain behavior is prosecuted on the basis of whether privilege applies. Legislative privilege is a foundational concept in the American governmental system, and it should be restored to its full effectiveness regardless of jurisdiction.