NOTES

THE SPEECH OR DEBATE CLAUSE SHOULD NOT CONFER EVIDENTIARY OR NON-DISCLOSURE PRIVILEGES

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INTRODUCTION

A proper analysis of the original meaning of the Speech or Debate Clause[1] identifies two, and only two, protections it affords a federal legislator: an immunity from punishment for legislative acts and a privilege from testifying about those acts. Yet the Supreme Court has interpreted the Clause as prohibiting even the mention of legislative acts during a bribery trial. This judicially manufactured evidentiary privilege lacks basis in text or prior precedent. Appreciating the distinction between legislative immunity and evidentiary privilege makes clear that the evidentiary privilege is the outgrowth of a deeply flawed understanding of the Clause's role in our constitutional structure. The U.S. Court of Appeals for the D.C. Circuit recently deployed this flawed structural reasoning and thereby created yet another privilege out of whole cloth: the court held that the Clause also confers a non-disclosure privilege prohibiting the executive branch from searching a federal legislator's office, even pursuant to an otherwise valid warrant. These decisions needlessly frustrate the enforcement of anti-bribery laws which is necessary to punish and deter abuse of the public trust.[2] Seeking to unsettle the foundations of nearly fifty

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[1] U.S. Const. art. I, § 6, cl. 1.

[2] See Jonathan L. Entin, Responding to Political Corruption: Some Institutional Considerations, 42 Loy. U. Chi. L.J. 255, 274 (2011).

years of precedent, this Note argues that the Supreme Court should hold that the Clause does not confer on members of Congress an evidentiary privilege or a non-disclosure privilege. The Ninth Circuit's recent disagreement with the D.C. Circuit's interpretation of the Clause has presented the Supreme Court with a prime opportunity to resolve this circuit split and adopt a proper understanding of the Speech or Debate Clause.

Errant interpretation of the Speech or Debate Clause began with the Supreme Court's 1966 decision in *United States v. Johnson*, in which the Court held that a federal legislator's speech on the floor of Congress could not be admitted as evidence in a conspiracy trial against that member.[3] The Supreme Court in *Johnson* made two critical errors that led to the evidentiary privilege's creation. First, the Court failed to appreciate the difference between legislative immunity, which prohibits *punishment* for legislative acts, and an evidentiary privilege, which prohibits *mention* of those acts at trial. This failure stemmed from reading prior precedents that recognized only legislative immunity as supporting an evidentiary privilege as well. Second, the Court gave no weight to the interest in anti-corruption as a matter of constitutional structure and instead overweighed the danger of legislative chilling effects—federal legislators becoming beholden to the other branches of government or otherwise refraining from undertaking certain legislative acts for fear of reprisal. Notwithstanding these errors, *Johnson* continues to stand for the proposition that the Clause confers an evidentiary privilege inasmuch as it prohibits "judicial inquiry" into any legislative act of a member of Congress.[4]

Several years later, in *United States v. Brewster*, the Court held that although the Clause does allow references to a *future* legislative act not yet undertaken, the Clause still prohibits the government from introducing evidence of any *past* legislative act in a criminal prosecution against a federal legislator.[5] The *Brewster* Court also clarified what "legislative act" means.[6] Legislative acts

[3] 383 U.S. 169, 175–77 (1966). See generally Note, Evidentiary Implications of the Speech or Debate Clause, 88 Yale L.J. 1280, 1288 (1979) [hereinafter Evidentiary Implications].

[4] 383 U.S. at 177.

[5] 408 U.S. 501, 518–19 (1972).

[6] Id. at 512.

are those that are "integral to a Member's legislative function, *i.e.* . . . integral to the Member's participation in the drafting, consideration, debate, and passage or defeat of legislation."[7] The evidentiary privilege protects "legislative" acts such as a federal legislator's votes on legislation and floor speeches but does not protect "political" acts such as errands, appointments, press conferences, and news releases made for constituents' benefit.[8] Finally, *United States v. Helstoski* established that where a member of Congress faces indictment under the federal anti-bribery statute,[9] the Clause prohibits the government from mentioning past legislative acts at trial, even if offered only to prove the existence of an illegal quid pro quo.[10] In sum, *Johnson* established the evidentiary privilege in a general conspiracy case against a federal legislator; *Brewster* limited the privilege's protection to past legislative acts; and *Helstoski* applied the privilege under the modern federal anti-bribery statute.

In the wake of the Supreme Court creating the evidentiary privilege in *Johnson* and its progeny, the D.C. Circuit created yet another privilege. Relying chiefly upon the reasoning of the *Johnson* cases, the D.C. Circuit held in the 2007 case of *United States v.*

[7] United States v. Jefferson, 534 F. Supp. 2d 645, 651 & nn.18–19 (E.D. Va. 2008) (noting that the Clause protects "acts generally done in the course of the process of enacting legislation" (quoting *Brewster*, 408 U.S. at 513–14)).

[8] Id.; see Hutchinson v. Proxmire, 443 U.S. 111, 133 (1979) (referring to press releases about statement made on chamber floor and holding that as "[v]aluable and desirable as it may be in broad terms, the transmittal of such information by the individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process"); see also Gravel v. United States, 408 U.S. 606, 622 (1972) (declining to extend Speech or Debate Clause protection to republication of speech made on floor of Senate); Michael R. Seghetti, Note, Speech or Debate Immunity: Preserving Legislative Independence While Cutting Costs of Congressional Immunity, 60 Notre Dame L. Rev. 589, 594–97 (1985). Communicating with constituents may well be integral to a federal legislator's *representation*, but only acts integral to *legislation* fall within the ambit of the Clause.

[9] 18 U.S.C. § 201 (2006). The statute prescribes criminal penalties for any "public official" who "corruptly demands, seeks, receives, accepts or agrees to receive or accept anything of value . . . in return for: . . . being influenced in the performance of any official act." Id. § 201(b)(2)(A). The term "public official" statutorily includes members of Congress. Id. § 201(a)(1). For a discussion of the elements of 18 U.S.C. § 201, see *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404–05 (1999).

[10] 442 U.S. 477, 487–88 (1979). These references can take the form of questions before a grand jury, allegations in a criminal indictment, and evidence offered during trial.

Rayburn House Office Building, Room 2112 that a Justice Department search of a congressional office violated the Speech or Debate Clause.[11] The panel majority concluded that the need to avoid disrupting legislative activity justified holding that the Speech or Debate Clause prohibited government searches of official legislative offices and thereby conferred on all federal legislators a non-disclosure privilege. Just as the Supreme Court had created the evidentiary privilege to minimize legislative chilling effects, the D.C. Circuit created the non-disclosure privilege for the same reason.

The D.C. Circuit's decision has invigorated scholarly discussion about the Speech or Debate Clause, which had lain dormant for some time.[12] Ex-Representative William Jefferson's recent bribery prosecution has also rekindled academic interest in the Clause. This interest, however, has not produced calls for re-examining the Clause's meaning. One article proposes narrowing the Clause's testimonial privilege "in light of a heightened state interest in combating government corruption" but addresses neither the evidentiary privilege nor the structural interest in anti-corruption.[13] The scholarly works that have commented on the D.C. Circuit's decision in *Rayburn* assume the testimonial privilege's existence but leave issues of original meaning and structural reasoning unmentioned.[14] The only work to have critiqued the evidentiary privilege was directed at the lower court opinion that *Johnson* later affirmed.[15] Scholars have not since expanded on the brief attempt,[16] and no academic work has cleanly separated the Clause's distinct protections or criticized the D.C. Circuit's expansion of the testimonial privilege specifically.

[11] 497 F.3d 654, 656 (D.C. Cir. 2007).

[12] See, e.g., John C. Raffetto, Note, Balancing the Legislative Shield: The Scope of the Speech or Debate Clause, 59 Cath. U. L. Rev. 883 (2010).

[13] Jay Rothrock, Striking a Balance: The Speech or Debate Clause's Testimonial Privilege and Policing Government Corruption, 24 Touro L. Rev. 739, 740 (2008).

[14] See, e.g., Sarah Letzkus, Comment, Damned if You Do, Damned if You Don't: The Speech or Debate Clause and Investigating Corruption in Congress, 40 Ariz. St. L.J. 1377 (2008).

[15] Note, The Bribed Congressman's Immunity from Prosecution, 75 Yale L.J. 335, 335–36 (1965).

[16] The closest such attempt discussed but did not critique the evidentiary privilege. See generally Evidentiary Implications, supra note 3.

Although scholars have not criticized the D.C. Circuit's expansive reading of the Clause, the Ninth Circuit did so very recently in *United States v. Renzi*. Noting that the D.C. Circuit's decision remains "the only case that has ever held that the Clause goes so far as to preclude the Executive from obtaining and reviewing 'legislative act' evidence," the Ninth Circuit in *Renzi* criticized the D.C. Circuit for resting its decision in *Rayburn* "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."[17] The Ninth Circuit therefore "decline[d] to adopt the D.C. Circuit's *Rayburn* formulation" and instead held that the Clause "does not blindly preclude disclosure and review by the Executive of documentary 'legislative act' evidence."[18]

Notwithstanding the Ninth Circuit's recent rebuke, the errant meaning assigned to the Speech or Debate Clause continues to frustrate federal anti-corruption efforts. "Bringing cases now because of the state of affairs of speech or debate," commented Lanny A. Breuer, the Assistant Attorney General in charge of the Justice Department's Public Integrity Section, "makes these cases much more difficult."[19] Federal prosecutors simply do not bring charges against a suspect, particularly one as politically visible as a member of Congress, unless conviction is near certain. The evidentiary privilege has also made securing such convictions far more difficult. As one lawyer familiar with corruption cases remarked, "[i]f you can't introduce legislation, a bill, a speech on the floor, how do you make the case?"[20] Worse still, the D.C. Circuit's decision in *Rayburn* has hamstrung the Justice Department's ability to discover vital evidence. Discussing the Clause, the Washington Post recently noted that "[a] constitutional clash over whether House members are immune from many forms of Justice Department scrutiny has helped derail or slow several recent corruption investigations of lawmakers."[21] Nearly every criminal investigation

[17] United States v. Renzi, 651 F.3d 1012, 1033–34 (9th Cir. 2011).
[18] Id. at 1037.
[19] Jerry Markon & R. Jeffrey Smith, Hill Probes Deflected by Clause in Constitution, Wash. Post, Jan. 17, 2011, at A1.
[20] Id.
[21] Id.

of federal legislators implicates the Clause because federal legislators' official offices are located within Washington and therefore the D.C. Circuit. The non-disclosure privilege has even blocked the ability of federal investigators to conduct wiretaps and other surveillance.[22]

The frustration of these efforts is especially tragic in light of the many cases over the last decade that have exposed federal legislators' susceptibility to bribery.[23] Recent attention to legislative corruption extends beyond cases involving indictment and conviction. Fact-gatherers and news outlets have documented many well-evidenced instances of uncharged, unpunished quid pro quo among members of Congress.[24] Federal prosecutors, who already face significant political hurdles in strategic decisions about charging, face even more daunting odds in light of the evidentiary privilege, which makes demonstration of corrupt agreement—a necessary statutory element that must be proven beyond a reasonable doubt—especially difficult.[25] The broad shield that the Clause currently confers puts the anti-corruption onus on Congress,[26] whose

[22] Id.

[23] See, e.g., Paul Kiel, 21 Legislators from 109th Congress Investigated for Corruption, ProPublica (June 12, 2008, 5:10 PM), http://www.propublica.org/article/pol-investigation-wrap-up; see also United States v. Jefferson, 634 F. Supp. 2d 595, 605 (E.D. Va. 2009) (reviewing sufficiency of factual allegations against member of Congress and declining to dismiss bribery indictment); Information at 4–5, United States v. Abramoff, No. 1:06-CR-00001 (D.D.C. Jan. 3, 2006), 2006 WL 6035909 (describing alleged quid pro quo arrangements among private interests, lobbyists, and members of Congress).

[24] See, e.g., Citizens for Responsibility and Ethics in Washington, The 15 Most Corrupt Members of Congress (Sept. 15, 2009), http://www.citizensforethics.org/mostcorrupt/entry/past-reports (detailing evidence of quid pro quo arrangements involving campaign contributions and personal gifts among fifteen federal legislators).

[25] The Court admitted as much in *Helstoski*, 442 U.S. 447, 488 (1979) ("[W]ithout doubt the exclusion of such evidence will make prosecutions more difficult."); see also Brief for the United States at 71–72, United States v. Helstoski, 442 U.S. 447 (1979) (Nos. 78-349, 78-546), 1979 WL 199698 at *71–72. Some scholars have argued that Congress, and not the federal judiciary, should be charged with the task of policing corruption among federal legislators. See, e.g., Josh Chafetz, Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions 92–93 (2007). But see Paul M. Thompson, First, Do No Harm: Why a Commissioner for Standards is Unhealthy for the American Body Politic, 117 Yale L.J. Pocket Part 230, 231–34 (2008).

[26] Whitener v. McWatters, 112 F.3d 740, 744 (4th Cir. 1997).

efforts succumb readily to political concerns.[27] Indeed, Congress has shown itself to be most ineffective at investigating and punishing corruption of its members.[28]

This Note seeks to unsettle the foundations of nearly fifty years of Supreme Court precedent that have long strayed from the Speech or Debate Clause's original meaning.[29] The Note proceeds in two parts. Part I defines the boundaries of legislative immunity and demonstrates that the evidentiary privilege was born not of text or precedent, but rather of a misapplication of structural reasoning. Even though the recognition of an evidentiary privilege would not be textually foreclosed, the best reading of the text understands the Clause as conferring only legislative immunity rather than an evidentiary privilege.[30] Early English and American cases establish legislative immunity from punishment for legislative acts but do not recognize an evidentiary privilege. Particularly given the great weight that anti-corruption must be accorded as a matter of constitutional structure, the principal rationale underlying the evidentiary privilege—preserving legislative independence—collapses

[27] 1 Thomas Cooley, Constitutional Limitations 536–38 (Walter Carrington ed., 8th ed. 1927).

[28] *Brewster*, 408 U.S. at 518; see also James Walton McPhillips, Note, "Saturday Night's Alright for Fighting": Congressman William Jefferson, the Saturday Night Raid, and the Speech or Debate Clause, 42 Ga. L. Rev. 1085, 1116 (2008); cf. Edward E. Oppenheim, Congressional Free Speech, 8 Loy. L. Rev. 1, 27–28 (1955–56) (noting Congress' ineffectiveness at policing slander). That such embattled federal legislators as Charlie Rangel and Maxine Waters have faced no prosecution, and that Rangel remains in Congress despite the body having expended substantial resources to censure him, underscores the brokenness of our system of policing congressional corruption. See Paul Kane, Republicans Accuse Democrats of Delaying Two Ethics Trials, Wash. Post, Sept. 29, 2010, at A6.

[29] *Brewster* and *Helstoski* each involved Justices dissenting from the judgment, but every concurring and dissenting opinion among *Johnson*, *Brewster*, and *Helstoski* expressed agreement with the proposition that the Clause prohibits the government from referencing past legislative acts against federal legislators facing indictment.

[30] Many English and American cases refer to a provision protecting legislative speech as a legislative "privilege." See, e.g., *Johnson*, 383 U.S. at 183. Early English law recognized protecting legislative speech as one of the "Privileges" or benefits to being a Member of Parliament. See 1 Hatsell, Precedents of Proceedings in the House of Commons 86–87 (1786) (quoting Strode's Act as protecting "the antient [sic] and necessary Rights and Privileges of Parliament"). In the American context, the Speech or Debate Clause can be understood as a *general* privilege—a benefit unique to members of Congress—conferring a *specific* privilege—a protection against having legislative speech "questioned" by the executive or judiciary. To avoid confusion, this Note avoids referring to provisions protecting legislative speech as "privileges."

on closer inspection. Part II defines the narrow scope of the testimonial privilege and illustrates how the same flawed structural reasoning that produced the evidentiary privilege also produced the D.C. Circuit's invention of a non-disclosure privilege. The Ninth Circuit rightly criticized the D.C. Circuit for construing the Clause as providing far greater protection than necessary to preserve legislative independence. Although the Supreme Court has declined to review the Ninth Circuit's decision,[31] the circuit split on the Clause's meaning endures. When presented with a better vehicle for review,[32] the Court should seize the opportunity to make clean distinctions among the Clause's protections and jettison the evidentiary and non-disclosure privileges from it.

I. WHERE THE SUPREME COURT WENT WRONG—DURING PROSECUTION, THE SPEECH OR DEBATE CLAUSE CONFERS LEGISLATIVE IMMUNITY, NOT AN EVIDENTIARY PRIVILEGE

The Speech or Debate Clause confers legislative immunity but not an evidentiary privilege. Appreciating this critical difference illuminates how the Supreme Court has confused the two and thereby concluded that the Clause contains both. In essence, immunity acts as a complete bar to civil and criminal process, whereas an evidentiary privilege only prevents admitting certain information as part of those processes. In the context of the Speech or Debate Clause, both legislative immunity and an evidentiary privilege protect the same conduct—legislative speech—but the difference between legislative immunity and an evidentiary privilege during prosecution manifests in two respects.

First, the substance of the right differs in that the circumstances triggering protection are not the same. Legislative immunity protects against legal punishment for legislative acts.[33] The government

[31] See Renzi v. United States, 132 S. Ct. 1097, 1097 (2012).

[32] In its opposition to the petition for certiorari in *Renzi*, the government took the position that the D.C. Circuit's decision in *Rayburn* was "fundamentally incorrect" but nonetheless argued that *Renzi* presented a poor vehicle for review. See Brief for the United States in Opposition at 13–15, Renzi v. United States, 132 S. Ct. 1097 (2012) (No. 11-557), 2011 WL 6370518 at *13–15.

[33] See, e.g., E.E.O.C. v. Wash. Suburban Sanitary Comm'n, 631 F.3d 174, 184 (4th Cir. 2011); Leon R. Yankwich, The Immunity of Congressional Speech—Its Origin, Meaning and Scope, 99 U. Pa. L. Rev. 960, 969–70 (1951) (quoting restatements of immunity doctrine). The Court in *Eastland v. United States Servicemen's Fund* recog-

in *Johnson* argued that the Clause protects against proceedings "based upon the *content* of a legislator's speech or action" as distinguished from "the *antecedent conduct* of accepting or agreeing to accept the bribe."[34] The government in *Helstoski* took the position that the Clause prevents "criminal or civil liability [from] be[ing] imposed on the basis of" legislative conduct.[35] Writing for the majority in *Flanagan v. United States*, Justice O'Connor aptly characterized this immunity as "the right not to 'be questioned' about [legislative activities]—that is, not to be *tried for them*."[36] By contrast, an evidentiary privilege bars any mention of a legislative act during judicial proceedings. In short, although both legislative immunity and an evidentiary privilege protect a federal legislator's official acts, legislative immunity prohibits punishing those acts while an evidentiary privilege prohibits mentioning them.

Second, the remedy differs for a violation of legislative immunity versus a violation of an evidentiary privilege. Like qualified and absolute immunity, legislative immunity protects against the judicial process itself to avoid burdening legislators with the specter and cost of litigation.[37] Legislative immunity under the Speech or Debate Clause may be asserted early in a proceeding, and the proceeding terminates upon finding that the legal action (whether civil or criminal) seeks to impose liability for a legislative act. Violating an evidentiary privilege, however, would not necessarily prevent legal process from going forward. Were legislative-act evidence erroneously introduced, the remedy could simply involve amending the indictment or complaint or retrying the case against the legislator.

Again, the differences between legislative immunity and an evidentiary privilege are critical to understanding how the Supreme

nized correctly that the Clause protects from "civil as well as criminal *actions*." 421 U.S. 491, 502 (1975) (emphasis added).

[34] Brief for the United States at 10, United States v. Johnson, 383 U.S. 169 (1966) (No. 25), 1965 WL 115697 at *10. Massachusetts's provision protecting legislative speech prevents that speech from being "the foundation of any accusation or prosecution, action or complaint." Mass. Const. pt. 1, art. XXI.

[35] Brief for the United States at 16, United States v. Helstoski, 442 U.S. 447 (1979) (Nos. 78-349, 78-546), 1979 WL 199698 at *16.

[36] 465 U.S. 259, 265 (1984) (emphasis added).

[37] See infra note 56. This immunity does not allow a "[member] or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts." Gravel v. United States, 408 U.S. 606, 626 (1972).

Court has misconstrued the Clause. These differences matter because legislative immunity would not bar admission of legislative-act evidence against a federal legislator during a bribery trial. As will be further explained, a legislator on trial for bribery is being subject to legal process for taking a bribe, not engaging in a particular legislative act. The legislative act is not the gravamen of the prosecution; instead, the legislative act is merely evidence of an illegal quid pro quo.

A. The Clause's Text is Ambiguous as to Whether it Confers an Evidentiary Privilege

As with interpreting any other constitutional provision, an analysis of the Speech or Debate Clause rightly starts with its text.[38] For easy reference by the reader, reproduced here is the full text of the first two sentences of Article I, Section 6:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They 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.[39]

It is remarkable that the Supreme Court has not discussed this text with great rigor. *Johnson* (which first recognized the evidentiary privilege) gestures toward the text but, rather than closely scrutinizing it, relies almost exclusively on history and structure to interpret the Clause.[40] *Helstoski* (which applied the privilege in a

[38] See District of Columbia v. Heller, 554 U.S. 570, 571–72 (2008).

[39] U.S. Const. art. I, § 6, cl. 1.

[40] See generally 383 U.S. 169 (1966). The Court concluded that the government's questioning of Congressman Johnson before a grand jury "violate[d] the express language of the Constitution" and quoted several analogous legislative speech protection provisions. Id. at 177. Its textual analysis went no further, however, and the remainder of the opinion relies principally on English and American precedents. Id. at 178–84.

bribery prosecution) similarly relies on precedent rather than textual meaning.[41]

To be sure, the Supreme Court has rightly settled on what constitutes "Speech or Debate in either House." These terms have been construed broadly, but not maximally so. In the first Supreme Court case to have considered the Speech or Debate Clause's meaning, *Kilbourn v. Thompson*, the Court held that a House resolution falls within the ambit of "any Speech or Debate."[42] Even though the phrase could certainly have been construed to include only "words spoken in debate," the Court adopted a broader reading that included anything "generally done in a session of the House by one of its members in relation to the business before it."[43] What's more, the Clause protects "Speech or Debate" in which a federal legislator engages even if that conduct "take[s] place outside the physical confines of the legislative chamber."[44] Since *Kilbourn*, federal courts have broadened the scope of protected conduct even further by adopting a narrow reading of the limiting phrase "in either House." Any act "which was clearly a part of the legislative process—the *due* functioning of the process" receives protection.[45] The Court has concluded, however, that the Clause does not protect conduct that is "political" rather than "legislative," even to the extent that constituents expect such political conduct.[46]

When the Court first created the evidentiary privilege, the conduct deserving protection was well established but the circumstances under which that protection applied were not. This is because the words do not definitively establish what it means to be "questioned" "for" a legislative act. The Clause makes use of the

[41] See generally 442 U.S. 477 (1979). In response to Justice Stevens's partial concurrence, Chief Justice Burger, writing for the majority, advances the position that "[t]he Clause does not simply state, 'No proof of a legislative act shall be *offered*'; the prohibition of the Clause is far broader." Id. at 489. The Chief Justice then briefly reiterates the understanding of "questioned" that originated with *Johnson*. Id. at 490. These passages constitute the whole of the *Helstoski* majority's textual interpretation.

[42] 103 U.S. 168, 204 (1880).

[43] Id. The *Kilbourn* interpretation of the Speech or Debate Clause continues to guide the modern functional test as to which activities qualify as legislative and therefore eligible for protection. See Gravel v. United States, 408 U.S. 606, 625 (1972).

[44] *Brewster*, 408 U.S. at 515.

[45] Id. at 515–16; see also id. at 512.

[46] Id. at 512; *Gravel*, 408 U.S. at 625.

transitive form of "questioned." Even though the Clause takes the passive voice, the phrase "shall not be questioned" nonetheless has an implied subject: whoever does the questioning. It also has a direct object: "they," the "Senators and Representatives" who are questioned. For purposes here, let us rearrange the independent and dependent clauses to consider the phrase "shall not be questioned for any Speech or Debate." The provision's literal meaning—no one may "question" a member of Congress about any legislative speech or debate—cannot be the correct one as common sense dictates that other members of Congress, and members of the public, should be allowed to ask such questions. The provision does not say "Speech or Debate cannot be mentioned in any judicial proceeding," or that "the motives of members may not be inquired into." And even legislative immunity, which the Speech or Debate Clause almost undoubtedly provides, does not find a comfortable home in the Clause as it does not say that members "shall enjoy immunity for any Speech or Debate." Put another way, "questioned for" could mean many things.

The phrase "shall not be questioned" appears to have been a legal term of art, the presence of which demanded treating a particular issue as settled. The Speech or Debate Clause is not the only Founding-era or constitutional provision that employs the phrase "shall not be questioned." The Constitution of Kentucky, for example, guaranteed in 1792 that "the right of the citizens to bear arms in defense of themselves and the State *shall not be questioned*."[47] Another provision of the U.S. Constitution also makes use of the construction. The first sentence of Section 4 of the Fourteenth Amendment, ratified in 1868, reads as follows: "The validity of the public debt of the United States, authorized by law, . . . shall not be questioned."[48] Several Supreme Court cases decided shortly after the ratification of the Constitution also use the construction when referring to legal instruments.[49] Many English cases similarly

[47] Ky. Const. art. XII, § 23 (1792) (emphasis added). Pennsylvania's constitutional protection of the right to bear arms reads similarly, Penn. Const. art. 1X, § 21 (1790), as does that of the Missouri Constitution, Mo. Const. art. XIII, § 3 (1820).

[48] U.S. Const. amend. XIV, § 4, cl. 1.

[49] See, e.g., Brown v. Gilman, 17 U.S. 255, 286 (1819) ("The company has pledged its faith, that the title under this certificate shall not be questioned."); The Betsey, 3 U.S. (3 Dall.) 6, 11 (1794) ("The terms of the treaty are clear and explicit, that the validity of prizes shall not be questioned . . . .").

understand "shall not be questioned" constructions as springing from doctrines of res judicata, compelling courts to give claim-preclusive effect to a particular subject.[50] When used, the phrase would thus admonish courts, state actors, or private actors that something must be taken as given.

These usages fail to illuminate the Speech or Debate Clause's original meaning. In each of these other instances, the object of "shall not be questioned" is a legal concept, not a natural person. They prohibit a court from "question[ing]," for example, whether a state's citizens have a right to bear arms, whether a particular instrument should be given legal effect, or whether an obligation should be recognized as valid. The implied object of the Speech or Debate Clause, by contrast, is "they," being "[t]he Senators and Representatives."[51] Importing the meaning of "shall not be questioned" from these other usages into the Speech or Debate Clause would compel reading the Clause as requiring that legislative acts be recognized as valid. Such a reading would render the Clause almost useless. Acts of Congress have legal effect without another provision in the Constitution saying so. And no one doubts that particular members of Congress or their floor debates exist.

Comparing the Speech or Debate Clause to its English predecessor and state analogues does support understanding it as affording immunity from punishment for legislative acts, though doing so requires glossing over some obvious textual differences. Parliament enjoyed its own version of the protection under the English Bill of Rights, which read: "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."[52] Because scant debate informed the drafting of the Speech or Debate Clause, we cannot know why the Framers chose to make members themselves, rather than freedom of legislative speech, the object that "shall not be questioned." The Bill of Rights of the Constitution of Massachusetts also recognizes a legislative speech protection, which reads: "The freedom of deliberation, speech, and debate in either

[50] See, e.g., Anisminic v. Foreign Compensation Comm'n, [1969] 2 A.C. 147, 157 (H.L.) (interpreting Parliamentary provision that decisions shall not be "questioned, reviewed or reconsidered in any court").

[51] U.S. Const. art. I, § 6.

[52] 1 W. & M., Sess. 2, c. 2 (1688).

house of the legislature is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."[53] Both the English and Massachusetts analogues, which predate the Speech or Debate Clause, appear to confer immunity from punishment for legislative acts (the Massachusetts provision clearly does).[54] Assuming that the drafters did not intend to substantially affect the Clause's meaning or deviate from these analogues by making natural persons the object of "shall not be questioned," construing the Clause consistently with these analogues means concluding that it guarantees legislative immunity.

It is no wonder that the Court avoided this lengthy discussion and proceeded directly to precedent when recognizing the evidentiary privilege. When determining whether the Clause confers such a privilege, the text is simply unavailing. Even legislative immunity, the inclusion of which in the Speech or Debate Clause draws near-universal agreement, does not occupy the Clause comfortably.

B. Precedent Supports Only Legislative Immunity

Because the Clause lacks any drafting history and was adopted without debate, the next most authoritative source of the Clause's meaning then becomes the common law and the early cases interpreting it. This authority confirms the presence of legislative immunity but does not support finding an evidentiary privilege. Apposite precedent instructs only that a legislative immunity, protecting against legal action tantamount to punishment for a legislative act, must be recognized.[55] This Section closely examines the cases that the Supreme Court relied upon when it created the evidentiary privilege. While the text of the Clause might have left room for this privilege, the precedent informing the Clause's inter-

[53] Mass. Const. pt. 1, art. XXI.

[54] The Constitution retains only two of the legislative protections—arrest and speech—that Parliament had long enjoyed. For evidence that the Convention deliberately chose to reject certain legislative protections out of fear of those protections being abused, see Robert J. Reinstein & Harvey A. Silverglate, Legislative Privilege and Separation of Powers, 86 Harv. L. Rev. 1113, 1335–40 (1973).

[55] *Helstoski* did not revisit the English precedents but instead gave precedential effect to *Johnson*, which marked the first instance in which the U.S. Supreme Court examined the English case law interpreting the British analogue to the American Speech or Debate Clause.

pretation makes no mention of such an evidentiary privilege and supplies scant basis for recognizing one. Early English and American cases do demonstrate concern for executive and judicial interference in legislative affairs and demand recognition of legislative immunity.[56] But these cases do not address whether a legislative act can be introduced when the member of Congress is on trial for something other than the act itself (for example, bribery, where the quid pro quo agreement and not the legislative act is the asserted basis for criminal punishment).[57] Not a single pre-Founding- or Founding-era court case construes either the American Clause or its English analogue as conferring an evidentiary privilege. A review of these cases also raises doubt about whether an evidentiary privilege would be necessary to effectuate that immunity.

Because many (if not most) provisions of our Constitution are born of English common law and tradition, the pre-Founding English cases are an ideal starting point. Prior to the Speech or Debate Clause's inception, no English case had recognized an evidentiary privilege of which members of Parliament could avail themselves. The early English cases instead established only that legislators were immune from arrest and prosecution stemming from their legislative acts. The earliest known case to have considered the English legislative speech protection, *Strode's Case*, established only that sanction or liability could not be imposed against a Member of Parliament for a legislative act (in that case, advocating a tin regulation bill on the floor).[58] The Supreme Court mentioned *Strode's Case* as "persuasive evidence that the parliamentary privilege meant more than merely preventing libel and treason prosecutions."[59] This states the obvious but misses the mark. *Strode's Case* established an immunity from suit and prosecution arising from a member's legislative acts, not a privilege protecting legislative-act

[56] Immunity of this sort is "[c]hief among" the protections that the Clause affords. Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 415 (D.C. Cir. 1995); see also Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975); Powell v. McCormack, 395 U.S. 486, 502–03 (1969).

[57] See Note, "They Shall Not Be Questioned . . .": Congressional Privilege to Inflict Verbal Injury, 3 Stan. L. Rev. 486, 487 (1951) ("Much of the authority is by way of dictum, but the dicta have been restated at each opportunity without dissent.").

[58] 4 Hen. 8, c. 8, *reproduced in* Tanner, Tudor Constitutional Documents 558, 559 (2d ed. 1930), *quoted in* United States v. Johnson, 383 U.S. 169, 183 n.13 (1966).

[59] *Johnson*, 383 U.S. at 183 n.13.

evidence. The case plainly did not involve a bribery prosecution against Mr. Strode. It did not hold that legal action could proceed against him if his tin regulation bill were not mentioned. Nor did it prohibit judicial inquiry into Mr. Strode's motivations for introducing his bill.

The Supreme Court also relied upon the Crown's prosecution of Sirs Eliot, Hollis, and Valentine, but these prosecutions have more historical than precedential significance.[60] Parliament made Strode's Act (which had declared the action against Strode illegal) general law,[61] and the Supreme Court correctly observed that Parliament generalized the legislative speech protection to all members based on concerns arising from "fear of the executive [and] of the judiciary"[62] In relying upon this history to recognize an evidentiary privilege, the Court failed to account for three distinguishing facts. First, in making Strode's Act general law through resolutions and through the English Bill of Rights, Parliament only codified legislative immunity, not an evidentiary privilege. The resolutions did not expressly protect members of Parliament from having their legislative acts received as evidence against them where the gravamen of the legal proceeding primarily concerned otherwise illegal and unprotected conduct. Second, the fears prompting Parliament to protect the speech and debate of its members is more precisely characterized as concern about reprisal for legislative acts rather than about mere mention of those acts during a proceeding outside Parliament. Finally, even though Parliament may well have been concerned about judges being "lackeys of the Stuart monarchs,"[63] a specific concern over intrusiveness of judicial inquiry or the possible chilling effects of accounting for legislative acts in court appears nowhere in Parliament's response. In sum, the pre-Founding English cases support recognizing legislative immunity but not an evidentiary privilege.[64]

[60] 3 How. St. Tr. 294, 310 (1629).

[61] I Hatsell, Precedents of Proceedings in the House of Commons 86–87 (1786), *quoted in Johnson*, 383 U.S. at 183 n.13.

[62] *Johnson*, 383 U.S. at 181.

[63] Id. at 181–82 (citing 4 Holdsworth, A History of English Law 214–15 (1927)).

[64] The case seemingly most supportive of finding an evidentiary privilege in our Speech or Debate Clause is the English case of *Ex parte Wason*, [1869] 4 Q.B. 573. The Supreme Court would later rely heavily on a concurring opinion in *Wason*, which concluded that courts "ought not to allow it to be doubted for a moment that the mo-

With respect to the American cases, no case decided prior to 1966 held that the Speech or Debate Clause conferred any sort of evidentiary privilege. The earliest occasion the Supreme Court had to interpret the Clause concerned just the sort of case—a defamation action against a legislator for legislative speech—for which English precedents had already supplied ample direction.[65] Members of Congress, just like members of Parliament, could not be subjected to judicial process where the substantive law governing the suit required proof of a legislative act as an element of the claim or charge. In other words, neither the executive nor the judiciary could legally sanction a legislator for a legislative act. Legislative immunity had already been firmly established in American common law, but as the Court observed when it created the evidentiary privilege, "[c]learly no precedent controls the decision in the case before us."[66] By the time the Court had seized the opportunity to determine the Clause's effect on a prosecution for corruption, the meaning of the Clause had been determined by cases involving substantially different legal issues and procedural postures. Early cases construed the Clause broadly in certain contexts without having foreshadowed the unique interpretive considerations that bribery prosecutions would eventually raise. In any event, all of the American cases that the Supreme Court considered when

tives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House." Id. at 577. Within two decades, the decision was followed by *Bradlaugh v. Gosset*, [1884] 12 Q.B. 271 at 275, which pronounced that, "What is said or done within the walls of Parliament cannot be inquired into in a court of law." These appear to be the first instances in which a court construes legislative speech protection as prohibiting all judicial inquiry into legislative activity. But *Wason* was decided in 1869, nearly eighty years after our Constitution had been ratified. The concurring opinion of a lone justice in an English case interpreting another legislative speech protection eighty years after our Constitution was ratified has little historical or precedential significance. Moreover, simply importing this understanding into interpretation of the Speech or Debate Clause fails to account for critical structural differences between the English parliamentary system and the American checks-and-balances system and between the nations' respective histories. See infra Subsection I.C.2.

[65] Cf. Brief for the United States at 24–25, United States v. Johnson, 383 U.S. 169 (1966) (No. 25), 1965 WL 115697 at *24–25 (describing the eighteenth-century English privilege for legislative actions as "in no way related to conduct beyond the official duties of legislators").

[66] *Johnson*, 383 U.S. at 179.

creating the evidentiary privilege support finding legislative immunity, while none support this privilege.

The first American case to interpret the speech protection of an American legislator, *Coffin v. Coffin*, made an analogous state legislative speech protection available only if a legislative act forms the "foundation" of the action against him.[67] Recall that Massachusetts's own legislative speech protection provided that "deliberation, speech, and debate in either house of the [state] legislature . . . cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."[68] In *Coffin*, the Supreme Judicial Court of Massachusetts held that assertion of the legislative speech protection required that "some language or conduct of his, in the character of a representative," must appear as the "foundation of the prosecution."[69] The court affirmed the lower court's slander verdict against the legislator, finding that the allegedly slanderous statements were not made in such a representative capacity. Even though this finding precluded the court from considering whether an evidentiary privilege should be recognized, the holding supports understanding the nontestimonial protection of legislative speech as consisting only of immunity from legal action predicated on legislative activity.

The first Supreme Court opinion to interpret the Speech or Debate Clause reached a similar conclusion, namely, that the applicable provision protecting legislative speech should be read as providing immunity against judicial process, not as an evidentiary privilege. *Kilbourn v. Thompson*, mentioned previously, involved a false imprisonment action against several members of the House for ordering the plaintiff's arrest.[70] Even though the arrest was found to have been unlawful, the Supreme Court held that the Speech or Debate Clause immunized the federal legislators against punishment for making or enforcing the arrest order and therefore prevented the plaintiff's suit from proceeding against those legislators. The Court in *Kilbourn* could have construed the Speech or Debate Clause as conferring an evidentiary privilege that barred

[67] 4 Mass. (4 Tyng) 1, 31 (1808).
[68] Mass. Const. pt. 1, art. XXI.
[69] 4 Mass. (4 Tyng) at 31 (noting further that "in no other character can he claim the privilege").
[70] 103 U.S. 168, 169 (1880).

mention of the illegal order in court. The result—a win for the defendant legislators—would have been the same because the plaintiff, without being able to offer proof of the legislative activity, could not have established a prima facie case of false imprisonment. Instead, the *Kilbourn* Court properly understood the Clause as conferring immunity from judicial process where the substantive law makes a federal legislator's protected conduct a necessary element of the claim. This disposition also mooted the issue of judicial inquiry into a legislator's motivation. No action could lie against the legislator defendants for issuing the order, and evidence of improper motivation would not have deprived them of Speech or Debate Clause protection. Even though the Court later read *Kilbourn* as supporting the proposition that the Clause should be read broadly to effectuate its purpose, its reliance on *Kilbourn*, understandably, extended no further.

The only other Supreme Court precedent that had discussed the issue of legislative speech protection prior to *Johnson* was the Supreme Court's 1951 decision in *Tenney v. Brandhove*,[71] which the Court in *Johnson* expanded well beyond its holding. "Claim of unworthy purpose" against a *state* legislator, who enjoyed common-law legislative immunity protection in California, did not deprive the legislator of immunity such that a federal civil rights action could be brought against him.[72] In language that the Court would later use to support the evidentiary privilege's existence, Justice Frankfurter's majority opinion cited *Fletcher v. Peck* for the proposition that "it [is] not consonant with our scheme of government for a court to inquire into the motives of legislators."[73] But Justice Frankfurter acknowledged that the Court in *Tenney* "only considered the scope of the privilege as applied to the facts of the present case"[74] and thereby announced only two narrow holdings: the defendant legislator's alleged conduct fell within the legislative sphere, and the federal civil rights statute did not give rise to civil liability for that conduct.[75] Moreover, *Fletcher* did not support the

[71] 341 U.S. 367 (1950).
[72] Id. at 377.
[73] Id. (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810)).
[74] *Tenney*, 341 U.S. at 378.
[75] Id. at 379.

proposition for which *Tenney* cited it.[76] *Fletcher* considered whether allegation of improper motive underlying enactment could invalidate an otherwise duly enacted law. After posing several rhetorical questions, Chief Justice Marshall avoided making a broad pronouncement and instead concluded only that the facts before the Court did not support striking down the law facilitating the land sale that the plaintiff had challenged.[77] In creating the evidentiary privilege, the Supreme Court acknowledged none of these cautionary notes in applying *Tenney* or, for that matter, any other instructive precedent.

C. The Strong Structural Interest in Combating Bribery Weighs Heavily Against Recognizing an Evidentiary Privilege

Against the backdrop of an ambiguous text and unsupportive precedent, the Supreme Court's recognition of an evidentiary privilege rested chiefly upon reasoning from structure—that is, consideration of how interpreting the Speech or Debate Clause would affect the behavior of actors across the branches of the federal government in constitutionally significant ways. Structural reasoning is an oft-used tool in the Court's interpretational kit. In fact, one can hardly make sense of the evidentiary privilege without appreciating the extent to which structural reasoning—and separation-of-powers analysis specifically—guides the decisions that created it.[78] The text of the Speech or Debate Clause does not, of course, make specific reference to legislative independence or checking the executive, but these concerns appear plainly on considering the role that the Clause might have in balancing the powers of the federal branches.

The Court's gravest error in its structural reasoning was failing to weigh the (admittedly important) interest in preserving separation of powers against the federal government's significant interest in combating bribery among federal legislators. Precedent interpreting the Speech or Debate Clause has overweighed the separa-

[76] See Craig M. Bradley, The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption?, 57 N.C. L. Rev. 197, 219 (1979).

[77] *Fletcher*, 10 U.S. (6 Cranch) at 130.

[78] See James E. Ryan, Laying Claim to the Constitution: The Promise of New Textualism, 97 Va. L. Rev. 1523, 1552–53 (2011).

tion-of-powers interest and given almost no effect to the countervailing interest in preventing and punishing bribery. That the decisions recognizing the evidentiary privilege gave no attention to the important federal interest in combating bribery is as astonishing as it is erroneous. An interpretation that employs structural reasoning to determine the original meaning of a constitutional provision should not cherry-pick the structural interests to which it gives effect.[79] This is to say, where multiple structural interests demand consideration, one cannot ignore an interest simply because recognizing it would make rendering judgment more difficult. The structural principle of anti-corruption demands consideration here and compels the conclusion that the evidentiary privilege is wholly at odds with the structural interest in combating corruption.[80]

"The Constitution," argues Professor Teachout, "carries within it an anti-corruption principle, much like the separation-of-powers principle . . . ."[81] Evidence of this principle can be found in the text of the Constitution itself. Article II, Section 4 requires the removal of the President, Vice President, and any "civil Officers of the United States" upon impeachment and conviction of "Treason, Bribery, or other high Crimes and Misdemeanors."[82] As concerns Congress specifically, the Constitution contains twenty-three separate provisions that "limit legislators' opportunities to serve them-

[79] See Ernest A. Young, *Alden v. Maine* and the Jurisprudence of Structure, 41 Wm. & Mary L. Rev. 1601, 1604–05 (2000).

[80] This Note does not argue, as some commentators have, that the compelling interest in preventing and punishing bribery justifies exempting certain legislative activities from Speech or Debate Clause protection. The argument concerns instead the meaning of the Clause itself, and therefore what protection the Clause should be read to afford.

[81] Zephyr Teachout, The Anti-Corruption Principle, 94 Cornell L. Rev. 341, 342 (2009); see also Peter J. Henning, Federalism and the Federal Prosecution of State and Local Corruption, 92 Ky. L.J. 75, 87–89 (2003). Professor Lawson, in a particularly animated fashion, puts the point thusly: "the Constitution is very worried that Congress will be full of power-mad, petty, vindictive, venal, greedy, corrupt gasbags who, unless constitutionally constrained, will abuse their power, punish anyone who tries to stop them, force themselves into positions in the other departments, create lucrative offices to which they will get themselves appointed, and vote themselves largesse from the public till." Gary Lawson, The Constitution's Congress, 89 B.U. L. Rev. 399, 403 (2009).

[82] U.S. Const. art. II, § 4. Whether members of Congress would be considered "civil Officers of the United States" remains unclear, but the Rulemaking Clause is understood to contain the doctrinal home of Congress's authority to punish its members for misconduct, including bribery. See U.S. Const. art. I, § 5, cl. 2.

selves."[83] The No Conflicts Clause, for example, prevents a member of the federal legislature from simultaneously serving in the capacity of another federal officer.[84] The Ineligibility Clause prevents members of Congress from being appointed to a position that the previous session created.[85] The Emoluments Clause prevents a former federal legislator from assuming a federal civil office whose compensation the previous session of Congress increased.[86] Members of Congress cannot receive titles of nobility or gifts from foreign governments.[87] Each house may, under the Rulemaking Clause, "punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[88] Even the large, diverse number of members serving in Congress functionally lessens the risk of corrupting the body.[89]

Founding-era debates further support existence of a structural anti-corruption principle, not merely as a general matter but also specifically with respect to congressional power. Prior to the drafting of the Constitution, would-be founders showed keen awareness of the corruption in the English Parliament and understood the necessity of modeling the new national government to minimize such susceptibility.[90] Concerns over corruption in legislative councils motivated calling the Constitutional Convention, at which delegates expressed concern over corruption in the Continental Congress.[91] Delegates also debated how best to institutionally minimize corruption in the new Congress. One such mechanism was giving the Executive means to check the federal legislature consisting of "the Great & the wealthy who in course of things will necessarily compose . . . the Legislative body."[92] Several delegates, including James Madison, showed particular concern for the corruptibility of the

[83] Teachout, supra note 81, at 354–55.
[84] U.S. Const. art. I, § 6, cl. 2.
[85] Id. George Mason referred to this clause as "the corner-stone" of the republic. Teachout, supra note 81, at 359.
[86] U.S. Const. art. I, § 6, cl. 2.
[87] Id. art. I, § 9, cl. 8.
[88] Id. art. I, § 5, cl. 2.
[89] Teachout, supra note 81, at 356.
[90] See Bradley, supra note 76, at 211–12.
[91] Teachout, supra note 81, at 348.
[92] Id. at 364 (alteration in original).

Senate.[93] Similarly, judicial independence was argued to have been necessary to avoid "the gust of faction" and corruption.[94]

Congress has itself recognized that delegation of significant anti-corruption authority to the executive is consistent with other structural constitutional principles. Nothing in the Constitution required Congress to enact a generally applicable statute prescribing criminal sanction for accepting a bribe as a member of Congress. On its own accord, Congress first chose to criminalize a member accepting a bribe in 1853.[95] Where it could have retained exclusive authority under the Rulemaking Clause to police bribery among its member ranks, it decided instead to enact a federal criminal statute that would give the federal executive power to bring bribery charges and give the federal judiciary jurisdiction to consider those charges.[96]

Congress therefore chose to delegate this anti-corruption authority, at least in part, to the judicial and executive branches.[97] Moreover, without a basis in an enumerated power under Article I, Congress would not have had this authority unless it recognized that its Rulemaking Clause power constitutionally enabled it to police corruption through the criminal law.[98] This is not tantamount to the proposition that Congress "waived" the protection that the Speech or Debate Clause would afford a member in a bribery prosecution. The Court considered and rightly rejected this argument because a clear statement of intent to waive protection could not be found in the text of the federal statute criminalizing bribery,

[93] Id. at 355–56.

[94] Id at 368–69; see also Amanda Frost & Stefanie A. Lindquist, Countering the Majoritarian Difficulty, 96 Va. L. Rev. 719, 739 n.63 (2010).

[95] Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 170, 171; see also Cong. Globe, 32d Cong., 2d Sess. 291 (1853) (statement of Rep. Stephens).

[96] See Laura Krugman Ray, Discipline Through Delegation: Solving the Problem of Congressional House-Cleaning, 55 U. Pitt. L. Rev. 389, 437–39 (1994). In 1789 and 1790, Congress enacted laws criminalizing bribe-taking by other federal officers and making reference specifically to the indictment method. Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46–47; Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117.

[97] Ray, supra note 96, at 439 ("[D]iscipline by one branch of another branch is a fundamental part of the constitutional design.").

[98] See generally Adam H. Kurland, First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction, 45 Emory L.J. 1, 91–93 (1996).

18 U.S.C. Section 201.[99] What cannot be contested is that Congress criminalized accepting a bribe using a constitutional power that it construed to allow both anti-corruption legislation and partial delegation of anti-corruption enforcement authority.

A broad evidentiary privilege cannot be reconciled with this structural principle of anti-corruption. If the evidentiary privilege is not *necessary* to preserve the integrity of the legislative process, the defensibility of the privilege requires that legislative independence be placed above, and not merely balanced against, other considerations. Put more concretely, the evidentiary privilege requires assuming that legislative independence must be maximized. The presence of another structural interest precludes adopting such an assumption given that at least some weight must be given to anti-corruption. As the Court has held in the context of effectuating congressional objectives, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."[100] At the least, a methodologically sound understanding of the Speech or Debate Clause must recognize the structural principle of curbing corruption, rather than ignore that principle entirely.

The fruit of this inattention to the structural interest in anti-corruption is the enormous difficulty of bringing successful bribery investigations and prosecutions against federal legislators.[101] Not only has this resulted in under-enforcement of an important federal criminal law, it has also failed to create sufficient negative incentives against consummating a bribe-induced agreement and thereby gutted a critical deterrent to abuse of the public trust for private gain.[102]

D. The Structural Interest in Separation of Powers Does Not Support an Evidentiary Privilege

Another critical error that the Court committed was vastly overstating the harm to separation of powers in allowing legislative-act

[99] *Helstoski*, 442 U.S. at 492; see also Reinstein & Silverglate, supra note 54, at 1169–70.

[100] Rodriguez v. United States, 480 U.S. 522, 526 (1987) (per curiam).

[101] See Bradley, supra note 76, at 221–23.

[102] Markon & Smith, supra note 19.

evidence in bribery prosecutions. Undoubtedly, the primary force that has guided interpretation of the Clause for over a hundred years is separation of powers. The Court almost unfailingly has shown hostility toward any interpretation of the Clause that would allow the executive to use the legislative acts of a member of Congress against him. The Court has thereby made an unnecessary sacrifice on the separation-of-powers altar. Referring to the protection that the Speech or Debate Clause affords, the Supreme Court has concluded that "the shield does not extend beyond what is *necessary* to preserve the integrity of the legislative process."[103] It simply cannot be the case that the evidentiary privilege is *necessary* to preserve legislative independence. When the Court speaks of "legislative independence," it intertwines two concepts—*actual* coercion of the legislature by the executive and judicial branches, and legislative timidity caused by the mere *specter* of such coercion.[104] The Court has presented the picture of legislative independence teetering on the brink, only saved from tumbling because of the evidentiary privilege in bribery actions. This account offers a woefully distorted image of political reality. For many reasons, narrowing the Speech or Debate Clause would not threaten legislative independence.

1. Innocuousness of Judicial Inquiry in Bribery Cases

Allowing the fact-finder in a bribery case to make inferences as to the motivation behind a legislative activity is of a different, less dangerous sort than allowing the motivation to constitute the central focus of a criminal proceeding. The fact-finder in a bribery case would merely be permitted, but not required, to make such an in-

[103] United States v. Brewster, 408 U.S. 501, 517 (1972) (emphasis added). As the Court stated in *Powell v. McCormack*, "[l]egislative immunity does not, of course, bar all judicial review of legislative acts" because it only applies as necessary to preserve legislative independence. 395 U.S. 486, 503 (1969); see also Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977); 4 James Madison, Letters and Other Writings 221 (1865).

[104] In *United States v. Gillock*, the Court phrased these interests somewhat differently—"the need to avoid intrusion" and "the desire to protect legislative independence." 445 U.S. 360, 369 (1980). The interests as defined here nonetheless track the Court's two-fold characterization.

ference of legislative intent.[105] The trier of fact need not even give any weight to such evidence. The gravamen of any bribery action would remain whether an illegal agreement existed between a federal legislator and another party, and the legislative-act evidence would only make it more likely that an agreement existed and that the legislator acted with corrupt intent.[106] In addition, because the legislator could claim Fifth Amendment protection against self-incrimination before a grand jury or at trial, another federal official (such as a Government Printing Office clerk or a White House aide) would necessarily have to testify to introduce the legislative-act evidence, lessening its direct association with "questioning" of the legislator.[107] To be sure, evidence of legislative conduct consistent with an alleged illegal agreement is highly probative of the issue of whether an agreement existed and what its terms were. Proving the existence of a quid pro quo becomes difficult when evidence of only the quid, but not the quo, is admitted. The Court conceded as much when it stated that bribery prosecutions would be "more difficult" if legislative-act evidence were inadmissible.[108] This sort of inquiry seems far more benign, though, than that which Founding-era statements about the Clause contemplated.

2. The English Versus American Experience

The great significance that the Court has assigned to English history of legislative coercion should be doubted. Protection of legislative speech undoubtedly traces its roots to bloody struggles between the English monarchy and the Parliament, but the Court rightly commands that the Speech or Debate Clause "must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the

[105] The government in *Johnson* admitted that a quid pro quo could not be inferred merely from the fact that a legislator engaged in a legislative activity favorable to another's interest. Brief for the United States at 17, United States v. Johnson, 383 U.S. 169 (1966) (No. 25), 1965 WL 115697 at *17.

[106] See 18 U.S.C. § 201(b) (2006). Evidence of this sort becomes extremely important for the government's case given that a quid pro quo must be demonstrated, as most bribes "are carried out without express . . . agreements." Daniel Hays Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 UCLA L. Rev. 784, 825 (1985) (citing William J. Chambliss, On the Take 103 (1978)).

[107] See Bradley, supra note 76, at 226 n.168.

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

English parliamentary system."[109] At the time of our founding, the historical relationship between the Crown and Parliament, on one hand, and the anticipated relationship between the President and Congress on the other, differed significantly.[110] The English Bill of Rights sought to establish the *superiority* of Parliament vis-à-vis the monarchy.[111] The American Constitution, however, sought division of power among *co-equal* branches.[112] And it did so without "a well-developed separation of powers theory."[113] More robust legislative speech protection would be expected where the objective was to prevent *any* exercise of executive power that might interfere or even influence the operations of the legislature as the superior authority. By contrast, our Constitution anticipates give-and-take among the branches of government, with each acting within its own sphere of influence. Independence of all branches, and not primacy of one over others, is the hallmark of our system.

These differences have several implications that weigh against reading an evidentiary privilege into the Speech or Debate Clause. In England, Parliament enjoys political superiority not only over the Crown, but even over the English courts. The U.S. Supreme Court stands as our supreme judicial authority and a co-equal branch of our federal government. The Houses of Parliament, however, are the highest courts in Great Britain.[114] Additionally, Parliament alone retains the power to try and punish its own members for corruption.[115] Our Congress does possess authority to pursue ethics charges against its members and even remove them from office. Unlike Parliament, however, Congress chose to delegate to the executive and judicial branches partial authority to prosecute

[109] *Brewster*, 408 U.S. at 508.

[110] Alexander J. Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk U. L. Rev. 1, 15 (1968).

[111] See *Brewster*, 408 U.S. at 508. For more on the historical and philosophical background of the political superiority of Parliament over the Crown, see Jeffrey Goldsworthy, The Sovereignty of Parliament 142–220 (1999).

[112] *Brewster*, 408 U.S. at 508 & n.5.

[113] Samuel W. Cooper, Note, Considering "Power" in Separation of Powers, 46 Stan. L. Rev. 361, 362 (1994).

[114] 3 How. St. Tr. 294, 296 (1629).

[115] Cella, supra note 110, at 15–16.

federal legislators for bribery.[116] This delegation does not effect a waiver of legislative speech protection or preemption of its authority to expel members for corruption. Still, that Congress chose to delegate in such a fashion, or even simply has the power to make that choice, further reinforces the point that fundamental structural differences between the English and American systems counsel hesitation before making the English understanding of its legislative speech protection our own.[117]

3. No Actual Coercion

Independence, rightly understood in light of the American experience, easily withstands reading the evidentiary privilege out of the Speech or Debate Clause. A realistic notion of legislative independence sees "independence" not as each individual legislator being influenced only by evaluations of legislative merit, but rather as collective freedom from being beholden to another political branch. Under the Madisonian concept of separation of powers, a healthy system of checks-and-balances ensures that no one branch be made subordinate to one of the others.[118] The interplay among the branches ensures that no one branch achieves superiority over any other and thereby facilitates a functional political process.[119] This is what the Speech or Debate Clause helps structurally ensure—that neither the executive nor the judiciary can so readily influence the legislative process as to render Congress a subordinate entity. Unlike the British monarchs who constantly (and sometimes literally) picked battles with Parliament, American federal prose-

[116] Note, The Bribed Congressman's Immunity from Prosecution, supra note 15, at 337–38.

[117] Also worth noting is the fact that American governors and state legislatures did not experience the contentious, violent struggles that characterized relations between the Crown and Parliament. *Brewster*, 408 U.S. at 508–09.

[118] See Harold J. Krent, Separating the Strands in Separation of Powers Controversies, 74 Va. L. Rev. 1253, 1259–61 (1988); Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory, 41 Duke L.J. 449, 451 (1991).

[119] See Josh Chafetz, Multiplicity in Federalism and the Separation of Powers, 120 Yale L.J. 1084, 1112–13 (2011) (reviewing Alison L. Lacroix, The Ideological Origins of American Federalism (2010)); Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 325–26 (1994) (arguing that under existing structural checks and balances no two branches can maintain a stable, permanent coalition and thereby subordinate a third).

cutors have not shown tendencies toward overzealousness or intimidation. Several commentators have observed that threatening criminal prosecution is already a "clumsy" means through which the executive can attempt to influence Congress.[120] A long history of abuse might suggest otherwise, but given the lack of such history in our country, excluding evidence of legislative acts in bribery prosecutions is simply unnecessary to prevent coercion of the legislature.[121]

For these reasons, removing the constitutional shield impeding bribery prosecutions by adopting a proper understanding of the Speech or Debate Clause would not result in coercion of Congress. Were it to be otherwise, the political process could be trusted to rebalance the power relationship among the co-equal branches.[122] Eliminating the evidentiary privilege might result in either or both of the other federal branches exerting pressure on members of Congress to a greater extent than each presently does. Were that to prompt a separation-of-powers crisis, however, the political process provides any number of remedies that allow the federal system to self-correct. The Court has rightly stated that "[t]he Legislative Branch is not without weapons of its own and would no doubt use them if it thought the Executive were unjustly harassing one of its members."[123] It seems absurd to think that the executive branch could make the entire Congress obedient simply by threatening all of its members with criminal investigation and prosecution.

4. Minimal Risk of Legislative Timidity

The Court has stated that the mere possibility or threat of coercion from one of the co-equal branches might threaten legislative

[120] See, e.g., Note, The Bribed Congressman's Immunity from Prosecution, supra note 15, at 348.

[121] Letzkus, supra note 14, at 1393–95; see Terence M. Fitzpatrick, Comment, The Speech or Debate Clause: Has the Eighth Circuit Gone Too Far?, 68 UMKC L. Rev. 771, 788–89 (2000).

[122] Such give-and-take is a key feature of our federal structure, which persists in part through flexibility. See Ronald J. Krotoszynski, Jr., The Shot (Not) Heard 'Round the World: Reconsidering the Perplexing U.S. Preoccupation with the Separation of Legislative and Executive Powers, 51 B.C. L. Rev. 1, 12, 14 (2010).

[123] *Brewster*, 408 U.S. at 522–23 n.16.

independence by chilling legitimate legislative activity.[124] Judge Hand famously wrote in *Gregoire v. Biddle* that the Speech or Debate Clause allows even the most corrupt of federal legislators to "vent his spleen upon others" without judicial sanction because "to submit all officials . . . to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[125] One can immediately see, however, that the evidentiary privilege fails to serve the purpose of avoiding chills on legislative speech particularly well. After all, an overzealous executive could just as easily target members of Congress for prosecution notwithstanding the evidentiary privilege.[126] By the time a legislator faces a bribery prosecution, the executive and judiciary already will have begun an "inquiry" into his political activities as a legislator. Were the Supreme Court truly so concerned about the danger of criminal trials against federal legislators, its own stated premises supporting the evidentiary privilege would require reading the Clause so broadly as to encompass political as well as legislative activity, a result foreclosed by the Court's own precedents. This flaw in the Court's reasoning already casts doubt that legislative timidity truly is a matter of such grave importance.

The notion of the evidentiary privilege's necessity also relies on an outmoded notion of legislative behavior that fails to account for decades of advances in the fields of political science, economics, and history which have enhanced our understanding of legislative behavior.[127] To the extent any chilling can reasonably be antici-

[124] See Recent Case, Constitutional Law—Congress—Freedom of Debate Privilege Prevents Indictment of Representative for Taking Bribe to Make a Speech Before Congress, 78 Harv. L. Rev. 1473, 1475–76 (1965).

[125] 177 F.2d 579, 581 (2d Cir. 1949); see Charles W. Johnson IV, Comment, The Doctrine of Official Immunity: An Unnecessary Intrusion into Speech or Debate Clause Jurisprudence, 43 Cath. U. L. Rev. 535, 575 (1994).

[126] See Bradley, supra note 76, at 226.

[127] See John H. Aldrich & Kenneth A. Shepsle, Explaining Institutional Change: Soaking, Poking and Modeling in the U.S. Congress, *in* Congress on Display, Congress at Work 31 (William T. Bianco ed., 2000) (noting that legislators are guided chiefly by three purposes, namely, reelection, good policy, and in-chamber power); Pierre Lemieux, The Public Choice Revolution, 27 Regulation 22, 22 (2004) ("Individuals, when acting as voters, politicians, or bureaucrats, continue to be self-interested and try to maximize their utility."); cf. Alan L. Feld, Separation of Political Powers: Boundaries or Balance?, 21 Ga. L. Rev. 171, 187 (1986) ("The notion that

pated from jettisoning the evidentiary privilege from the Speech or Debate Clause, a reasonable member of Congress would respond by altering *political*, not legislative, behavior. Remember that political activities such as constituent relations and fundraising, while within the ambit of a federal legislator's expected responsibilities, are not integral to the legislative process and therefore fall outside the Speech or Debate Clause's protection.[128] The corrupt legislator, facing a higher likelihood of prosecution, would face greater consequences for accepting a bribe and would therefore be less likely to do so. The virtuous federal legislator would respond to a judicial decision allowing legislative-act evidence in bribery prosecutions—if he responds at all[129]—not by reducing involvement in the legislative process, but rather by better keeping his political activities clean. In particular, he would presumably make clear to donors that, while he appreciates their support and will continue to advocate for their respective interests, he will make no promises to engage in particular legislative acts. That way, if a federal prosecutor begins grand jury proceedings, the contributor can testify not only that an agreement for particular official action never existed, but also that the legislator foreswore any such promise. Such changes in political behavior would actually be considerable benefits to jettisoning the privilege.

Even if making the thumb on Congress's side of the scale slightly less heavy affects legislative outcomes, not all influence over legislative conduct threatens legislative independence. A federal legislator already knows that the legislative decisions he makes are regularly "questioned" in the press, by constituents, and among other members of Congress. Public officials cannot escape the public eye, particularly when making decisions in an official capacity. The complex processes of bargaining among political parties, donors, supporters, lobbyists, and even other members of Congress exert significant influence over the decisions of a particular legisla-

Congress and the President adhere to a strict separation of functions becomes implausible on examination of specific decisionmaking [sic] areas.").

[128] See supra Section I.A.

[129] Cf. Note, The Bribed Congressman's Immunity from Prosecution, supra note 15, at 345 (positing that legislators acting in good faith are unlikely to fear politically motivated executive harassment and therefore would not suffer chilling effects).

tor.[130] Given the massive, numerous pressures that influence the incentives upon which a given legislator acts,[131] legislative "independence" is a mere fiction. The legislator is not merely an esteemed servant whose own vision of the public good exclusively guides his judgment.[132] Much like sausage-making, legislating often involves complex, unsavory processes that are nonetheless accepted as part of doing business. In short, as extensive academic research has shown and as any freshman Congressman would admit if made to speak truthfully, there is no such thing as true independence in the halls of Congress. Numerous external forces already deprive the federal legislator of the ideal of independence, and many of those factors encourage problematic legislative behavior (such as bribe-taking). Given this, the Court would do well to adopt an understanding of the Speech or Debate Clause that, at the least, does not worsen the incentive problems that plague the legislative process.

II. WHERE THE D.C. CIRCUIT WENT WRONG—DURING INVESTIGATION, THE SPEECH OR DEBATE CLAUSE CONFERS A TESTIMONIAL PRIVILEGE, NOT A NON-DISCLOSURE PRIVILEGE

The Supreme Court's understanding of the Speech or Debate Clause has done more than impede conviction after indictment. The D.C. Circuit has followed the Court's flawed separation-of-powers analysis to prohibit executive searches of congressional property. Federal prosecutors since the D.C. Circuit's 2007 *Rayburn* decision not only have great difficulty proving an illegal quid pro quo at trial, but they also cannot fully investigate bribery charges, whether pre- or post-indictment. The Washington Post observed that "[a]t least four recent investigations of current or former members of Congress have been affected by issues stemming from" the Clause:[133] "[S]peech-or-debate challenges have killed an investigation of former representative Tom Feeney (R-Fla.), hampered probes of Rep. Peter J. Visclosky (D-Ind.) and former representative John T. Doolittle (R-Calif.), and slowed a pending corruption case against former representative Rick Renzi

[130] Feld, supra note 127, at 178–79.
[131] See, e.g., Richard F. Fenno, Congressmen in Committees 1 (1973).
[132] Feld, supra note 127, at 178–79.
[133] "Speech or Debate" Issues, Wash. Post, Jan. 17, 2011, at A12.

(R-Ariz.)."[134] While the text of the Clause evidences a testimonial privilege—not to be confused with the evidentiary privilege—its lack of precedential support and the need to revisit the Court's separation-of-powers analysis demand jettisoning the non-disclosure privilege and instead recognizing a limited testimonial privilege that prohibits actual questioning of federal legislators and congressional aides, rather than all searches of congressional property.

A. Text Supports the Testimonial Privilege's Existence

Modern doctrine correctly recognizes that the Speech or Debate Clause, in addition to guaranteeing legislative immunity, also contains a testimonial privilege. This testimonial privilege provides that neither the executive nor judicial branches of the federal government can interrogate a federal legislator regarding his legislative acts. In other words, no "question[s]" can be put to members of Congress. Nothing would prohibit either the legislator from voluntarily testifying about legislative activities or the fact-finder from making inferences regarding the legislator's motivations for engaging in those activities.[135] What the Clause does prohibit is hauling a federal legislator or a legislative aide into court and forcing her to testify regarding her legislative acts.[136] Members of Congress could still perform activities "integral to the functioning of the legislative process" secure in the knowledge that no tribunal or official could force them, or their staff, to testify or otherwise disclose information about those protected activities, or about their thought processes in undertaking those activities.[137]

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[134] Markon & Smith, supra note 19.

[135] Lower federal courts recognize that even the current understanding of the Speech or Debate Clause allows this. E.g. United States v. McDade, 28 F.3d 283, 294–95 (3d Cir. 1994) (Alito, J.) ("[A] member is not 'questioned' when he or she chooses to offer rebuttal evidence of legislative acts."); see also id. (citing United States v. Myers, 635 F.2d 932, 942 (2d Cir. 1980)).

[136] See Gravel v. United States, 408 U.S. 606, 616 (1972).

[137] For further discussion of the scope and applicability of the testimonial privilege, see John D. Friel, Note, "Members Only!" *United States v. Rayburn House Office Building, Room 2113*: The Speech or Debate Clause, the Separation of Powers and the Testimonial Privilege of Preemptive Nondisclosure, 53 Vill. L. Rev. 561, 574–80 (2008).

Understanding the testimonial privilege this way finds support in the original meaning of the Speech or Debate Clause's plain text. The Clause is ambiguous as to whether it guarantees legislative immunity or confers an evidentiary privilege.[138] The text speaks much more clearly with regard to the testimonial privilege. Determining the original meaning of a word in a provision involves referencing its definition in a dictionary from the approximate era in which the provision was enacted. The first entry of the first edition of Webster's Dictionary, upon which the Supreme Court regularly relies to interpret the original meaning of constitutional provisions,[139] defines the transitive form of the verb "question" as, "[t]o inquire of by asking questions; to examine by interrogatories; as, to *question* a witness."[140] The first entry of the transitive verb "question" appearing in the second edition of the Oxford English Dictionary defines the term similarly: "[t]o ask a question or questions of (a person or *fig.* a thing); to interrogate."[141] This definition, which supports the interrogation understanding, finds further support in plain usage of the verb "questioned" when its direct object is a natural person. One might "question" the legal merit of a concept, but to "question" a person most naturally means "putting questions to" that person.

Two caveats must be noted. First, one major obstacle to recognizing that the Speech or Debate Clause contains a testimonial privilege is the privilege's lack of basis in history or precedent. It suffers the opposite problem of legislative immunity, which lacks substantial textual support but clearly enjoys a long lineage at common law. The testimonial privilege appears on a plain reading of the Clause's text but receives no mention in the English cases interpreting its legislative speech analogue, or in the early American cases interpreting the Speech or Debate Clause. At the least, this lack of precedential support cautions loudly against a broad read-

[138] See supra Section I.A.

[139] See, e.g., Citizens United v. FEC, 130 S. Ct. 876, 928 n.6 (2010) (Scalia, J., concurring) (First Amendment); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3162–63 (2010) (Appointments Clause); District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (Second Amendment).

[140] I Noah Webster, American Dictionary of the English Language (1st ed. 1828).

[141] Oxford English Dictionary (Simpson & Weiner eds., 2d. ed. 1989). This dictionary does list the Speech or Debate Clause as an example of an "inquired into" definition but also notes that this usage is now "*rare*." Id.

ing of the testimonial privilege. Second, by operation of the text, the privilege should vest in the person, not the information. In the same way that the Fifth Amendment protects against producing documents that reveal a defendant's thought process,[142] the testimonial privilege does the same with respect to legislative activities and the thought processes integral to them. Though these activities are "protected," this protection only engages when a federal legislator or aide is asked about it. The text limits the ability of others to compel testimony about "any Speech or Debate" but does not protect that speech or debate as such. The executive can still obtain this protected information through other means, and federal legislators and aides can still be compelled to testify about activities outside the legislative process.

B. Following the Supreme Court's Structural Reasoning, the D.C. Circuit Created a Non-Disclosure Privilege

The D.C. Circuit's decision in *Rayburn* should have been an easy case. There, the court considered Congressman William Jefferson's appeal from the district court's denial of his motion to return property that the FBI had seized from his congressional office.[143] As the Solicitor General later argued, "a criminal search warrant . . . involves no 'question[ing]' of a Member of Congress."[144] The Supreme Court held decades ago in *Andresen v. Maryland* that an executive search for evidence in an office pursuant to a legally valid search warrant does not violate the Fifth Amendment privilege against self-incrimination.[145] To be sure, had Jefferson been subpoenaed to produce documents from his office, this form of investigation may well have violated both the testimonial privilege of the Speech or Debate Clause and the Fifth Amendment.[146] Unlike a subpoena, however, a search warrant does not compel testimony—the search is executed against a place, not a person.[147] Absent the

[142] See, e.g., Curcio v. United States, 354 U.S. 118, 128 (1957).

[143] *Rayburn*, 497 F.3d at 657.

[144] Petition for Writ of Certiorari at 3, United States v. Rayburn House Office Bldg., Room 2113, 552 U.S. 1295 (2008) (No. 07–816), 2007 WL 4458912 at *3.

[145] 427 U.S. 463, 477 (1976).

[146] See United States v. Hubbell, 167 F.3d 552, 585 (D.C. Cir. 1999).

[147] Brief for Citizens for Responsibility and Ethics in Washington as Amicus Curiae Supporting Appellee at 15, United States v. Rayburn House Office Bldg., Room 2113,

evidentiary privilege, the D.C. Circuit surely would have extended *Andresen* and held that because the Speech or Debate Clause confers only a testimonial privilege at the investigative stage, a search of congressional property that involves no direct questioning of a federal legislator does not violate the Clause.[148]

The separation-of-powers reasoning underpinning the evidentiary privilege, however, led the D.C. Circuit in *Rayburn* to conclude that the search of Jefferson's office violated the Clause even though the search involved no questioning. Supreme Court precedent forced the government to concede that even "in connection with the execution of a search warrant, . . . there is a role for a Member of Congress to play in exercising the Member's rights under the Speech or Debate Clause."[149] The panel majority opinion stated that "a key purpose of the privilege is to prevent intrusions in the legislative process," which "is disrupted by disclosure of legislative material."[150] In the majority's view, the district court "fail[ed] to adhere to this court's interpretation of the scope of the testimonial privilege . . . much less to the Supreme Court's interpretation of what constitutes core legislative activities and the history of the Clause."[151] The mere possibility that the executive might discover written statements about legislators or their aides may "chill the exchange of views with respect to legislative activity."[152] This chill, the majority concluded, "runs counter to the Clause's purpose of protecting against disruption of the legislative process."[153]

Thus the D.C. Circuit created a non-disclosure privilege that protected congressional offices from executive searches that might turn up legislative-act evidence. Using purpose-driven reasoning to craft an unprecedented privilege is exactly what the Supreme

497 F.3d 654 (D.C. Cir. 2007) (No. 06–3105), 2007 WL 1072218 (citing *Andresen*, 427 U.S. at 475).

[148] The court would have easily distinguished its former decision in *Brown & Williamson Tobacco Corp. v. Williams*, whose holding that "a party is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen" would not control absent compelled testimony or production. 62 F.3d 408, 421 (D.C. Cir. 1995).

[149] 497 F.3d at 659.

[150] Id. at 660.

[151] Id. at 661 (internal citation omitted).

[152] Id.

[153] Id.

Court had done. Its decisions relied upon the assumption that any "intrusion" into the legislative process is necessarily inconsistent with separation-of-powers principles and therefore would violate the Speech or Debate Clause. The Supreme Court created the evidentiary privilege principally to avoid legislative chilling effects; decades later, the D.C. Circuit created the non-disclosure privilege for the same reason.

C. A Proper Understanding of the Clause Demands Jettisoning the Non-Disclosure Privilege

The textual analysis recognizing the testimonial privilege, paired with the separation-of-powers analysis in Section I.C, reveals the error of the D.C. Circuit's decision in *Rayburn*. The Ninth Circuit observed that *Rayburn* remains "the only case that has ever held that the Clause goes so far as to preclude the Executive from obtaining and reviewing 'legislative act' evidence" and, after lengthy analysis of the testimonial privilege, "decline[d] to adopt the D.C. Circuit's *Rayburn* formulation."[154] The Ninth Circuit held instead that "the Clause does not blindly preclude disclosure and review by the Executive of documentary 'legislative act' evidence."[155] There are many reasons why, in denying the existence of a non-disclosure privilege, the Ninth Circuit has the proper understanding of the Clause.

First, the D.C. Circuit largely sidestepped the plain text of the Clause, under which an executive search of congressional property does not constitute "questioning" given that no questions are put to anyone. Judge Henderson, concurring in the judgment in *Rayburn*, would have held that "the Executive Branch's execution of a search warrant on a congressional office—with its unavoidable but minimal exposure to records of legislative acts—does not constitute 'question[ing]' within the meaning of the" Clause.[156]

Second, the Clause is concerned not with "intrusions in the legislative process" generally,[157] but rather with specific sorts of intrusions which are not implicated absent questions about legislative

[154] United States v. Renzi, 651 F.3d 1012, 1033, 1039 (9th Cir. 2011).
[155] Id. at 1037.
[156] See *Rayburn*, 497 F.3d at 672 (Henderson, J., concurring in the judgment).
[157] Id. at 660 (majority opinion).

activity or sanction for such activity. The Ninth Circuit criticized the D.C. Circuit for resting its decision in *Rayburn* "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."[158] Reasoning which results in forbidding any executive or judicial interference with the legislative process supports exactly the sort of legislative imperialism that our Constitution and separation-of-powers system rejected.

Third, corrupt or not, the federal legislator enjoys a panoply of protections that would remain even if the Speech or Debate Clause's protection consisted solely of legislative immunity and a testimonial privilege. Given that legislative speech receives First Amendment protection,[159] executive or judicial action to restrict or punish legislative speech in a public forum (which a chamber of Congress would undoubtedly be) on the basis of the speaker's viewpoint would trigger strict scrutiny.[160] Against allegations of criminal misconduct, the Fifth Amendment gives the accused legislator a broad shield that can defend against certain encroachments by the co-equal federal branches. Because the legislator cannot "be compelled . . . to be a witness against himself," neither the executive nor judiciary can force him to testify before a grand jury or a petit jury in a criminal proceeding against him.[161] Even under a narrower understanding of testimonial privilege, neither a legislator nor his staff could be interrogated regarding the legislative activities of themselves or others in Congress,[162] and those activities still

[158] *Renzi*, 651 F.3d at 1034.

[159] Modern-day lawyers accept as uncontroversial that the First Amendment's limitation on free speech abridgement applies to all state action. See Gitlow v. New York, 268 U.S. 652, 671 (1925); see also Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

[160] Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 828–29 (1995). As illustrated supra Section I.A, many expressive activities of legislators—such as voting on the floor of either Chamber—can be considered "speech."

[161] U.S. Const. amend. V. This shield has limits, however. It would not prevent a staffer or other member of Congress from being compelled by subpoena to testify against him, nor would it prevent statements regarding legislative acts from being introduced in a later criminal proceeding if the legislator had waived her *Miranda* rights before making those statements.

[162] That the Speech or Debate Clause extends the testimonial privilege to policy aides and civil matters helps alleviate a surplusage problem vis-à-vis the Fifth

cannot constitute the foundation of a criminal or civil proceeding against a member.

Finally, allowing the executive to conduct *Rayburn*-style searches would not destabilize the balance of power among the co-equal branches, even if Congress took no protective legislative remedies. Members of Congress and their staff do not operate under the illusion that their legislative activities are private and protected from public scrutiny. To the contrary, given the modern press, the Freedom of Information Act, and other transparency measures, nearly everything that members and staff do on a daily basis could see the light of day and become public knowledge. As noted previously, there is no reason why legislation or other means of exercising congressional power could not cure a power imbalance. Congress would have the same tools at its disposal to shield its internal information *outside* trial as it does to shield this information *during* trial. The only reason it has not done so is the D.C. Circuit's decision to constitutionalize a non-disclosure privilege, thereby removing the need to codify protections through the political process.

CONCLUSION

The Supreme Court and the D.C. Circuit have constitutionalized doctrines that instead should be subjects of the political process. Their Speech or Debate Clause precedents facilitate corruption in ways that rarely appear in *The Washington Post* but are all too real nonetheless. The time has come for these courts to remove corruption's constitutional shield in the Speech or Debate Clause by returning it to its proper meaning and scope. This requires jettisoning the evidentiary privilege while continuing to recognize legislative immunity and a testimonial privilege. Such a move would achieve a better balance of power among the federal branches and provide a more effective antidote to the poison of corruption in Congress. The circuit split created by *United States v. Renzi* gives the Supreme Court a prime opportunity to restore the Speech or Debate Clause's true meaning.

Amendment. See Gravel v. United States, 408 U.S. 606, 616 (1972) (holding that "for the purpose of construing the [Clause] a Member and his aide are to be treated as one") (internal quotation omitted).

The federal judiciary has shown understandable reluctance to referee disputes between the executive and legislative branches. But in cases involving bribery of federal legislators, the structure of our Constitution and the dictates of Congress command that the judicial branch do just that. Though federal courts must remain cognizant of the separation-of-powers concerns that these cases necessarily present, their resolution calls for analytic nuance and methodological soundness. Sweeping generalities should not decide cases, nor should judicial intuitions about the propriety of judicial inquiry into the conduct of members of other federal branches. As distrust in our government continues to rise, the federal judiciary has an opportunity not only to correct an error in precedent, but also to remove an impediment that contributes to this distrust. Should it more readily assume the responsibility of correcting deficiencies in the political process,[163] both the public and the federal branches of government may enjoy the benefits of greater accountability and higher confidence in our public institutions.

[163] See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 181 (1980).