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BALANCING THE LEGISLATIVE SHIELD: THE SCOPE OF THE SPEECH OR DEBATE CLAUSE

John C. Raffetto

In the interest of legislative autonomy, the Speech or Debate Clause "has enabled reckless men to slander and even destroy others with impunity." Article I, Section 6 of the United States Constitution provides that "for any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place." This privilege, which sits atop a dual balance, is an integral aspect of the separation of powers envisioned by the Framers. It has the power to protect the independence of Congress, and the power to protect corrupt behavior.

The difficulty in determining the scope of the Speech or Debate Clause stems from its multi-dimensional nature. Members of Congress have always done more than just speak and debate on the floor of the House of Representatives and Senate, and the modern legislative process only increases the tasks required in lawmaking. That process is further complicated by the nature of representative government because the members of Congress are

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5. See Letzkus, supra note 3, at 1391–93. On one side of the debate are "strange bedfellows," such as Nancy Pelosi and Newt Gingrich, who argue that any search of a congressional office violates separation of powers principles. Id. at 1391. On the other side are those, such as Justice Department officials and former Attorney General Alberto Gonzales, who argue that creating an absolute protection transforms congressional offices into "sanctuaries" of corruption. Id. at 1391–92 (quoting Richard B. Schmitt, Congressman Could Challenge Federal Possession of Papers: The Justice Department Offers a Concession to Jefferson and Colleagues Upset over a Raid, L.A. TIMES, May 31, 2006, at A4).
neither exclusively representatives nor solely private citizens.\textsuperscript{7} As a result of this dual nature, punishing the individual entails punishing the citizens she represents.\textsuperscript{8} In order to protect the interests of his constituents, the Constitution grants that representative a certain level of protection.\textsuperscript{9}

Despite the complexity of the issue, defining the scope of the Speech or Debate Clause is integral to both the investigative and judicial processes.\textsuperscript{10} Interpreting the Clause too broadly exposes the legislature to corruption; interpreting the Clause too narrowly exposes it to intrusion.\textsuperscript{11} One way to

\textsuperscript{7} Alexander J. Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecution in the Courts, 2 SUFFOLK U. L. REV. 1, 35 (1968). While Alexander Celia is correct in asserting that “[a] legislator, after all, is merely another citizen when he is not engaged in any way in his legislative activities,” his assertion misses the mark. \textit{Id.} A representative, while in office, is always both “merely another citizen” and a representative. HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 281 (2006). Inhibiting her freedom as an individual entails restricting her freedom to act as a representative and, in turn, inhibits Congress’s ability to act as a body. See \textit{id.} (asserting that “the privilege protects both the autonomy of Congress [as a body] and the interests of its Members”).

\textsuperscript{8} See THOMAS JEFFERSON, A Manual of Parliamentary Practice, in THE COMPLETE JEFFERSON: CONTAINING HIS MAJOR WRITINGS, PUBLISHED AND UNPUBLISHED, EXCEPT HIS LETTERS 698, 702–03 (Saul K. Padover ed., 1943) (“When a representative is withdrawn from his seat by summons, the 47,700 people whom he represents lose their voice in debate and vote . . . . when a Senator is withdrawn by summons, his State loses half its voice in debate and vote . . . . The enormous disparity of evil admits no comparison.”).

\textsuperscript{9} \textit{Id.} at 701–02.

\textsuperscript{10} FEDERALIST 48, supra note 3, at 256 (describing the balance of power between the branches of government as “the great problem to be solved”); see also Del Quentin Wilber, Ruling Favors Ex-Congressman and Could Limit Other Investigations, WASH. POST, Feb. 5, 2009, at A3 (suggesting that there has been an increase in claims of Speech or Debate privilege by members of Congress under investigation). In 2007, Acting-Solicitor General Gregory G. Garre stated that the Supreme Court should address the scope of the Clause’s protection, otherwise “investigations of corruption in the nation’s capital and elsewhere will be seriously and perhaps fatally stymied.” Susan Schmidt, U.S. Asks High Court to Nix ‘Speech-or-Debate’ Ruling, WASH. POST, Dec. 21, 2007, at A3. A recent case has raised the issue of where to draw the line between legislative and non-legislative behavior. United States v. Renzi, No. CR08-00212-TUC-DCB (BPV), 2009 WL 995475, at *2–3 (D. Ariz. Apr. 9, 2009); see also Tomorrow’s Just Your Future Yesterday, http://pointoforder.com/ (Oct. 5, 2009, 18:12 EST) (analyzing the magistrate’s decision not to grant Speech or Debate privilege to “discussions of future legislative acts”). In contrast to the D.C. Circuit’s recent decision in \textit{Rayburn}, the Renzi court determined that the Speech or Debate Clause provides for a “non-evidentiary use” privilege. The Renzi Wiretap and FBI Interviews, http://pointoforder.com/ (Oct. 2, 2009, 12:09 EST).

\textsuperscript{11} See TRIBE, supra note 4, § 5-20 (discussing the importance of confining the scope of the Clause). Professor Tribe noted:

If the Clause were construed to reach the very periphery of activity incidentally, but only remotely, relevant to the Representative’s or Senator’s official role as a member of Congress . . . then members and perhaps their staffs as well would be permitted to roam the land armed with what, for all practical purposes, would be a shield of absolute immunity greater than that enjoyed even by the President.

\textit{Id.} Tribe concluded that “the bar represented by the Clause must not be set so high as to completely preclude judicial review.” \textit{Id.}
frame the issue is to ask: at what point can the executive and judicial branches question a member of Congress about his actions? Although the Supreme Court has considered the scope of the Speech or Debate Clause, it has yet to define an outer limit.\textsuperscript{12} As such, legislative history and underlying purposes play a more significant role than they otherwise might.\textsuperscript{13}

Recently, the United States Court of Appeals for the District of Columbia Circuit considered the scope of the legislative privilege in the context of congressional ethics committee hearings.\textsuperscript{14} In 2007, the Federal Bureau of Investigation (FBI) contacted then-Representative Tom Feeney as part of its investigation of lobbyist Jack Abramoff.\textsuperscript{15} The FBI was specifically interested in an Abramoff-funded golf trip to Scotland.\textsuperscript{16} The FBI’s probe came after the Committee on Standards of Official Conduct (Ethics Committee) investigated whether Representative Feeney’s participation in the trip violated House rules regarding the acceptance of private funds for personal purposes.\textsuperscript{17} As part of the criminal investigation, the government sought to interview Representative Feeney; when he refused, the grand jury subpoenaed his lawyers for documents and testimony related to the Ethics Committee hearing.\textsuperscript{18} Representative Feeney’s attorneys initially moved to quash the subpoena on the grounds of the attorney-client privilege and the work-product doctrine; however, Feeney intervened and moved to quash on the additional ground of privilege under the Speech or Debate Clause.\textsuperscript{19} Although the United States District Court for the District of Columbia denied the motion, the court of

\begin{enumerate}
\item[12.] See United States v. Brewster, 408 U.S. 501, 516 (1972) (considering the scope of the Speech or Debate Clause); see also infra Part I.B–C.
\item[13.] See United States v. Johnson, 383 U.S. 169, 180–81 (1966); see also infra Part I.B–C.
\item[14.] In re Grand Jury Subpoenas, 571 F.3d 1200, 1200 (D.C. Cir. 2009).
\item[15.] See Anita Kumar, FBI Asks Feeney about Lobbyist, ST. PETERSBURG TIMES, Apr. 4, 2007, at 1B. Although the court did not specifically name the Florida representative, the Washington Post revealed the defendant’s identity in a February 5, 2009, article. See Wilber, supra note 10.
\item[16.] See Anita Kumar, Rep. Feeney Sought Rule Change Tied to Abramoff: He Joined in a GOP Letter Criticizing an Energy Policy Revision, ST. PETERSBURG TIMES, Apr. 29, 2007, at 1A (describing the trip as “a luxury golf trip to Scotland that began with a trans-Atlantic flight on a private jet and featured twice-daily golf at world-famous locales”). On his blog, Point of Order, Michael Stern suggested that “although it is not clear from the opinion, it appears that the investigation may have focused on whether these statements were truthful.” D.C. Circuit Issues Speech or Debate Ruling in the Feeney Case, http://pointoforder.com/ (Oct. 7, 2009, 21:04 EST).
\item[18.] In re Grand Jury Subpoenas, 571 F.3d at 1201.
\item[19.] Id.
\end{enumerate}
appeals reversed, holding in *In re Grand Jury Subpoenas* that the Speech or Debate Clause protected Feeney’s committee testimony.  

In ruling that the Speech or Debate Clause shielded Representative Feeney’s testimony from the government, the court relied on a test derived from two prior decisions: *Ray v. Proxmire* and *United States v. Rose*.  

Under the *Ray/Rose* test, testimony before the Ethics Committee is protected when it relates to official or legislative matters, but it is not protected when the testimony relates to personal matters.  

Despite concurring in the decision, Judge Brett M. Kavanaugh urged the court to reconsider its use of the *Ray/Rose* test.

*In re Grand Jury Subpoenas* demonstrates both the interpretive and political complexities of defining the scope of the Speech or Debate Clause. Judge Kavanaugh’s concurrence urged the court to reconsider the way it approaches the legislative privilege, and this Note will address Judge Kavanaugh’s demand. Beginning with an examination of Supreme Court precedent, this Note discusses the genesis, codification, and underlying purposes of the Speech or Debate Clause. After considering the Clause’s legislative and judicial history, this Note sets forth the D.C. Circuit’s current test and examines its strengths and weaknesses. Next, this Note addresses the majority and concurring opinions of *In re Grand Jury Subpoenas*. This Note then analyzes the benefits of a test that protects the purposes of the Speech or Debate Clause while preventing abuse of the immense power that it creates. Supreme Court precedent and the history and underlying purposes of the privilege require a test that protects the actions of members of Congress only when those acts fall within the scope of the members’ legislative capacity. This Note concludes that because both the *Ray/Rose* test and Judge Kavanaugh’s suggested rule fail to achieve this goal, the D.C. Circuit should adopt a new test.

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20. *Id.* This ruling did not prohibit the government from investigating actions outside Representative Feeney’s testimony before the committee and thus raises the question of what components of the testimony are actually protected.

21. *Id.* at 1203.

22. *Id.* In both *Ray v. Proxmire* and *United States v. Rose*, the difference between legislative and non-legislative action was the determining consideration. *See United States v. Rose*, 28 F.3d 181, 188 (D.C. Cir. 1994); *Ray v. Proxmire*, 581 F.2d 998, 1000 (D.C. Cir. 1978) (per curiam). For a more detailed discussion of these two cases, see *infra* Part I.D.


24. *See Wilber*, *supra* note 10 (noting that because of the case’s temporal proximity to the opinion in *United States v. Rayburn House Office Bldg.*, *Room 2113*, *Wash.*, *D.C.* 20515, 497 F.3d 654 (D.C. Cir. 2007), commentators view the ruling as the D.C. Circuit siding “with Congress in its fight with the Justice Department”).

I. THE BLURRED SCOPE: THE SPEECH OR DEBATE CLAUSE IN SUPREME COURT JURISPRUDENCE

Although the Supreme Court has not directly addressed the use of testimony given in congressional committee hearings, it has begun to trace the extent of the Speech or Debate Clause.26 Three issues permeate the discussion of the legislative privilege: separation of powers,27 the dual identity of representatives,28 and the freedom to act.29 These three issues are inseparable from questions about the extent of the legislative privilege because they are the principles that underlie the privilege's existence.30 Therefore, the Supreme Court has considered these issues, along with the history of the privilege, when making its decisions.31 As a result of these considerations, the Court has, with some variation, interpreted the Clause broadly, limiting it only to curtail abuse of power and imposition on individual rights.32

A. Legislative History: A Passage without Debate

In contrast to the slow and politically complicated creation of the English privilege,33 the Speech or Debate Clause became part of the United States

26. See infra Parts I.B–C.
27. See, e.g., Gravel v. United States, 408 U.S. 606, 616 (1972) (“The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.”).
28. See supra notes 7–8 and accompanying text; see also Coffin v. Coffin, 4 Mass. (1 Will.) 1, 27 (Mass. 1808) (“These privileges are thus secured, not with the intention of protecting the members against prosecution for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.”).
29. See Rayburn, 497 F.3d at 660; see also United States v. Johnson, 383 U.S. 169, 180–81 (1966). In particular, the Court concluded that while the need to bar private suits in order to avoid drains on representatives' time is an aspect of the privilege, it is not the only aspect. Johnson, 383 U.S. at 180–81. The Court opined that the history of the privilege reveals that the primary motivation behind the development of the privilege was “to prevent intimidation by the executive and accountability before a possibly hostile judiciary.” Id. at 181.
30. See Cella, supra note 7, at 3–10 (discussing these issues in the context of the English Parliament’s analogous privilege).
31. See, e.g., United States v. Brewster, 408 U.S. 501, 516–18 (1972) (considering the three issues in conjunction with the privilege’s history); Johnson, 383 U.S. at 177–79 (discussing the history and development of the privilege).
32. See Brewster, 408 U.S. at 516 (“Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility.”).
33. See Johnson, 383 U.S. at 177–78 (noting that the Speech or Debate Clause as it appears in the Constitution has its roots in the English Bill of Rights and the struggle between the English Parliament and Monarchy); Cella, supra note 7, at 4 (discussing the conflict that led to Parliament’s legislative privilege). The English Bill of Rights of 1689 demonstrates the severity of the conflict leading up to the adoption of the English privilege. Amid references to the Glorious Revolution, the abdication of King James II, and Parliament’s coronation of William
Constitution without recorded debate.\textsuperscript{34} The distinction between the English and American rights leads to differing judicial interpretations of the legislative privilege.\textsuperscript{35} As a result, the Court has determined that its task is "to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government."\textsuperscript{36} Describing the constraints of interpretation in this way, the Court has demonstrated that, while the English and American privileges may share an underlying purpose, their application is not uniform.\textsuperscript{37} This distinction is quite important because the English privilege is extremely broad.\textsuperscript{38}

B. The Machinations of the Privilege

Although the text of the Clause only refers to "Speech or Debate," the Court has interpreted these words as inclusive of legislative activity, whether spoken or not.\textsuperscript{39} Likewise, the Court has refused to limit the protection afforded by the privilege to merely being "questioned in any other Place."\textsuperscript{40} Instead, the Court has interpreted the Clause "broadly to effectuate its purposes."\textsuperscript{41}

\begin{footnotesize}
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\item \textsuperscript{34} See Johnson, \textit{383 U.S. at 177} ("The Speech or Debate Clause of the Constitution was approved at the Constitutional Convention without discussion and without opposition.").
\item \textsuperscript{35} See Brewster, \textit{408 U.S. at 508} (noting that the Clause "must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary scheme"); see also Kilbourn v. Thompson, \textit{103 U.S. 168, 201} (1880) (explaining that "while the framers of the Constitution did not adopt the \textit{lex et consuetude} of the English Parliament as a whole, they did incorporate such parts of it, and with it such privileges of Parliament, as they thought proper to be applied to the two Houses of Congress"); Léon R. Yankwich, \textit{The Immunity of Congressional Speech—Its Origin, Meaning and Scope}, \textit{99 U. Pa. L. Rev. 960, 962} (1951) (noting that the Speech or Debate Clause was a product of the judicial role of the House of Lords and the lack of that power in the House of Commons). The Court, in \textit{Brewster}, noted that "Parliament is the supreme authority, not a coordinated branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy." \textit{Brewster}, \textit{408 U.S. at 508}.
\item \textsuperscript{36} \textit{Id. at 518–19} (noting, for example, that Parliament, as a body with the power to adjudicate, is able to punish members otherwise protected by the privilege in a way that Congress is not).
\item \textsuperscript{37} See \textit{Jefferson, supra note 8, at 701–02} (describing the broad parliamentary privileges and explaining the Framers' decision to narrow the scope of the Speech or Debate Clause).
\item \textsuperscript{38} Kilbourn, \textit{103 U.S. at 204}; see also \textit{Johnson, 383 U.S. at 180} ("[T]he legislative privilege will be read broadly to effectuate its purpose.").
\item \textsuperscript{39} U.S. \textit{CONST. art. I, § 6, cl. 1; see also infra Part I.B.2.}
\item \textsuperscript{40} \textit{Johnson, 383 U.S. at 180.}
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\end{footnotesize}
1. Defining the Phrase “Speech or Debate”

In United States v. Johnson, the Court considered a representative’s attempt to exclude evidence in his conspiracy trial. As part of its case, the government attempted to show that Representative Thomas F. Johnson received payment in exchange for reading a speech, which was beneficial to independent savings and loan associations, on the House floor. Although the government used evidence of his financial transactions at trial, Representative Johnson challenged only the use of evidence related to his motive for delivering the speech. The Court held that the government, by using evidence relating to the House speech, violated the Speech or Debate Clause. The Court also held that “[t]he claim of an unworthy purpose does not destroy the privilege.”

Discussing English precedent, the Court found that the protection of the Speech or Debate Clause must extend beyond the mere content of a speech to its motives and preparation because allowing inquiry into those aspects would “necessarily contravene[] the Speech or Debate Clause.” More importantly, the Court made it clear that the government’s introduction of evidence regarding the speech and its motivations was not “the [lone] constitutional infirmity infecting [the] prosecution”; the act of inquiring into the text and motivation of the speech also violated the protection of the Speech or Debate Clause. Centered on the principle of separation of powers, the analysis in

42. Id. at 172; see also Cell, supra note 7, at 31–33. The Department of Justice brought charges against Representative Johnson under the federal conflict of interest statute, 18 U.S.C. § 281, and a federal conspiracy statute, 18 U.S.C. § 371. Johnson, 383 U.S. at 170–71. Johnson and two other representatives were found guilty of receiving money from a Maryland savings and loan institution for the purpose of “exerting influence on the Department of Justice to obtain the dismissal of pending indictments of the loan company and its officers on mail fraud charges.” Id. at 171.


44. Id. at 172. The limited appeal suggests that the Court was correct in determining that the Speech or Debate Clause would not protect these financial records. Id.

45. Id. at 184–85. The Court noted that the prosecution “question[ed] the manner of preparation and the precise ingredients of the speech,” as well as “the motives for giving it.” Id. at 175–76.

46. Id. at 180 (quoting Tenney v. Brandhove, 341 U.S. 367, 377 (1951)). The Clause would provide little protection if it could be circumvented merely by claiming that a member of Congress engaged in criminal conduct. Furthermore, the determination of guilt before trial is an impossible antecedent inquiry. It might be tempting to argue that because no illegal act can fall into the category of legislative conduct, any claim of criminal activity would strip away the privilege—but such an argument presumes guilt. If the defendant congressman is innocent—as presumed under the law before conviction—then one cannot presume that any charged criminal activity is automatically outside the scope of legislative conduct.

47. Id. at 184–85. In Ex Parte Wilson, the court denied a motion to prosecute members of the House of Lords, holding that “the motives 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 183 (quoting Ex Parte Wilson, (1869) L.R. 4 Q.B. 573, 577).

48. Id. at 176–77.
Johnson demonstrates the Court’s willingness to reach beyond the text of the Clause in order to effectuate its purposes.\[49\]

In order to prevent any access to protected material, the Court also extended the protection of the privilege to congressional aides.\[50\] This expansion was based on an increasingly important factor in legislative-privilege jurisprudence: the nature of the “modern legislative process.”\[51\] Because the modern legislative process requires constant attention, “it is literally impossible . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants.”\[52\] Although some may argue—as the government did in Gravel v. United States—that only serving as a Senator or Representative confers the legislative privilege,\[53\] such an argument presents too narrow a view of the purposes underlying the privilege.\[54\] Just as constituents lose their voice when their representative must answer allegations,\[55\] so too would their voice be weakened if the representative could not confide in his staff.

2. Interpreting the Phrase “Questioned in Any Other Place”

In a case involving the first ever search of a sitting Congressman’s office, the D.C. Circuit addressed the issue of whether procedures used by the executive branch “were sufficiently protective of the legislative privilege created by the Speech or Debate Clause.”\[56\] The Department of Justice

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49. See generally Kilbourn v. Thompson, 103 U.S. 168, 204 (1880) (discussing the extension of the privilege to acts outside of speech or debate because of the centrality of those acts to the work of Congress); see also James Walton McPhillips, “Saturday Night’s Alright for Fighting”: Congressman William Jefferson, the Saturday Night Raid, and the Speech or Debate Clause, 42 GA. L. REV. 1085, 1092–93 (2008) (defining the historical purposes of the Clause as promoting unfettered speech for members of Congress and delineating the separation of powers).

50. See Gravel v. United States, 408 U.S. 606, 616 (1972) (rejecting the government’s argument that “because the Speech or Debate Clause confers a privilege only upon ‘Senators and representatives,’ aides [have] no valid claim to constitutional immunity from grand jury inquiry”). In Gravel, the Court found that “for the purpose of construing the privilege a Member and his aide are to be ‘treated as one.’” Id. (quoting United States v. Doe, 455 F.2d 753, 761 (1st Cir. 1972), vacated, 408 U.S. 606 (1972)).

51. Id.

52. Id. at 616–17.

53. Id. at 616.

54. See The Scope of Immunity for Legislators and Their Employees, 77 YALE L.J. 366, 384 (1967) [hereinafter The Scope of Immunity] (positing that hinging the legislative privilege “not on the dignity of the high political office, but the nature of the functions exercised” makes judicial intervention inevitable).

55. See Jefferson, supra note 8, at 702–03.

obtained a warrant to search then-Representative William Jefferson’s office for
evidence of fraud and bribery. The eighteen-hour search was executed on the
evening of May 20, 2006. During the search, the FBI barred Representative
Jefferson, his attorney, and counsel for the House of Representatives from the
office.

The court found the Justice Department’s argument—that procedures were
in place to protect legislative material—unconvincing, and held that “seriatim
initial reviews by agents of the Executive of a sitting Member’s congressional
office are inconsistent with the privilege under the Clause.” The court based
its opinion on two justifications for the legislative privilege: freedom to
perform legislative acts without fear of suit and freedom from investigative
intrusion. Just as the Supreme Court held in Johnson, the D.C. Circuit
concluded that pre-trial requirements such as discovery were also an
unconstitutional intrusion because “the legislative process is disrupted by the
disclosure of legislative material, regardless of the use to which the disclosed
materials are put.” Concluding that the intrusive nature of required
disclosure alone, regardless of the eventual use of the documents, violated the
Speech or Debate Clause, the court held that “a search that allows agents of the
Executive to review privileged materials without the Member’s consent
violates the Clause.” Thus, the court found that the Speech or Debate Clause
Ellis III sentenced Representative Jefferson to thirteen years in prison. Jerry Markon, Jefferson

57. Rayburn, 497 F.3d at 656.
58. Id. at 657; Shenon, supra note 56; see also Brian Reimels, Note, United States v.
Rayburn House Office Building, Room 2113: A Midnight Raid on the Constitution or Business as
briefcase, cold hard cash (literally), and a telecommunications initiative in Africa”).
59. Rayburn, 497 F.3d at 662.
60. Id. at 663, 666–67.
61. Id. at 660. Specifically, the court noted that, in order to operate independently, the
legislature must be free from “the distractions of private civil litigation or the periods of criminal
prosecution.” Id. (quoting Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 400, 420
(D.C. Cir. 1995)).
62. Id. But see United States v. Renzi, No. CR08-00212-TUC-DCB (BPV), 2009 WL
995474, at *3 (D. Ariz. Jan. 13, 2009) (discussing Rayburn and finding that the Speech or Debate
Clause provides a protection against evidentiary use, not a protection against disclosure).
63. Rayburn, 497 F.3d at 661, 663. The court ordered the Justice Department to return “all
legislative materials . . . protected by the Speech or Debate Clause.” Id. at 666. On his blog,
Michael Stern reported that Representative Jefferson “is seeking a writ of certiorari on the
question of ‘whether the indictment of a Member of Congress, although facially valid, should be
dismissed when evidence privileged under the Speech or Debate Clause was used in the grand
jury to obtain the indictment.’” Jefferson’s Cert Petition on Speech or Debate, http://pointof
order.com/ (Feb. 20, 2009, 22:02 EST). The United States Court of Appeals for the Fourth
Circuit rejected Representative Jefferson’s argument that the mere mention of evidence covered
by the Speech or Debate Clause taints an indictment, finding that “a grand jury will not be
deemed biased solely because it heard some evidence relating to congressional speech.” United
is not solely a shield against the use of certain evidence at trial, but also a shield against forced disclosure. 64

C. Probing the Extent of the Clause

Although the Court has embraced a broad view of the Clause in many cases, it has also set limits on the privilege's reach. 65 These limits are a product of both the preservation of the system of coordinate branches and a desire to prevent damage to individual rights. 66

In an early case, the Court considered the assertion of the Speech or Debate Clause defense by House members who ordered the arrest of a private citizen for contempt. 67 After Hallett Kilbourn refused to appear before a House committee, the House of Representatives passed a resolution ordering its Sergeant at Arms to effect his arrest. 68 The Sergeant at Arms, John Thompson, arrested Kilbourn and placed him in the Washington, D.C., jail. 69 Although the Court focused much of its opinion on Congress's right to issue arrest warrants, it also considered whether the legislators who passed the resolution were liable in tort for Kilbourn's arrest. 70 After setting out the general principle that "the person who procures the arrest of another by judicial process, by instituting and conducting the proceedings, is liable in an action for false imprisonment," the Court explained that if the resolution had been passed "in any ordinary tribunal, without probable cause, they would have been liable for the action which they had thus promoted." 71 Despite this general principle, the Court found that those members of the House who passed the resolution were not liable because they were protected by the Speech or Debate Clause. 72 In distinguishing between the act of passing a resolution and the act of effecting

64. Rayburn, 497 F.3d at 656. But see Reimels, supra note 58, at 336–38 (arguing that the court's reasoning was "unconvincing" and that its decision left several unanswered questions).

65. See United States v. Brewster, 408 U.S. 501, 516 (1972) (noting the importance of limiting the protection that the Speech or Debate Clause affords).

66. See supra note 32 and accompanying text.

67. Kilbourn v. Thompson, 103 U.S. 168, 201 (1880). The Court relied on the Massachusetts case Coffin v. Coffin, 4 Mass. (3 Tyng) (1803), because it was "unable to find any decision of a Federal court on this clause of section 6 or article 1." Id. at 203–04.

68. Id. at 172–73.

69. Id. at 176–77.

70. Id. at 199–200.

71. Id. at 200–01.

72. Id. at 205 ("[T]he plea [of legislative privilege] set up by those of the defendants who were members of the House is a good defence, and the judgment of the court overruling the demurrer to it and giving judgment for those defendants will be affirmed."). While briefly noting that there might be some circumstances "of an extraordinary character, for which the members who take part in the act may be held legally responsible," the Court did not rule on that issue because any holding defining those circumstances would have been speculative. Id. at 204–05. In contrast, the Court found that the Sergeant at Arms was not protected by the Clause. Id. at 205.
an arrest, *Kilbourn* represents the beginning of a division between legislative and non-legislative action.\textsuperscript{73}

The Court further delineated the distinction between legislative and non-legislative action in *Gravel v. United States*, in which it considered a Speech or Debate Clause challenge to a federal investigation into the dissemination of the *Pentagon Papers*.\textsuperscript{74} Although Senator Mike Gravel argued that his transmission of the *Pentagon Papers* to a third-party publisher should be protected by the Speech or Debate Clause, the Court held that such an act was not privileged.\textsuperscript{75} In holding that Senator Gravel’s behavior was not protected, the Court considered the extent to which the Senator’s act was “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.”\textsuperscript{76} It found that the private publication of information is not protected by the Speech or Debate Clause because it is “in no way essential to the deliberations of the Senate.”\textsuperscript{77}

Arguing that the act of disseminating information from congressional hearings was a historic duty of members of Congress, the dissenting justices in

\textsuperscript{73} See Doe v. McMillan, 412 U.S. 306, 315 (1973) (noting that while the Speech or Debate Clause protects members of Congress when they vote, it “no more insulates legislative functionaries carrying out such nonlegislative directives than it protected the Sergeant at Arms in *Kilbourn v. Thompson* when, at the direction of the House, he made an arrest that the courts subsequently found to be ‘without authority’” (quoting *Kilbourn*, 103 U.S. at 200)). The distinction is often described as being between legislative and private action, but as *Kilbourn* demonstrates, some acts are neither legislative nor private. This creates a separate category of activities that can be called “official.” In *Doe v. McMillan*, the Court discussed the difference between legislative conduct, which is protected by the Speech or Debate Clause, and official conduct, which is sometimes protected by the doctrine of official immunity. *Id.* at 318–25; see also Hutchinson v. Proxmire, 443 U.S. 111, 130 (1979) (finding that while the Speech or Debate Clause protects legislative conduct, it does not extend to those actions which fall into the scope of official conduct). For cases concerning the doctrine of official immunity, see *Howard v. Lyons*, 360 U.S. 593, 597 (1959), and *Barr v. Matteo*, 360 U.S. 564, 573–74 (1959).

\textsuperscript{74} *Gravel v. United States*, 408 U.S. 606, 608–09 (1972). The *Pentagon Papers*—formally titled *History of the United States Decision-Making Process in Viet Nam Policy*—was a classified study conducted by the Department of Defense. *Id.* at 608. Those subpoenaed, including a member of Senator Gravel’s staff, were called to testify about the Senator’s involvement in a planned publication of the study. *Id.* at 608–10.

\textsuperscript{75} *Id.* at 622. Senator Gravel relied on an English case, *Wason v. Walter*, (1868) 4 L.R.Q.B. 73, to support the proposition that his republication should be protected. *Id.* at 623 n.14. The court in *Wason* held that a publisher was not liable “for an accurate republication of a debate in the House of Lords.” *Id.* (citing *Wason*, 4 L.R.Q.B. 73). The Court disagreed with Senator Gravel, finding that the decision in *Wason* was not based on the legislative privilege. *Id.*

\textsuperscript{76} *Id.* at 625.

Gravel further entrenched the distinction between legislative and non-legislative acts. Favoring a broad interpretation of the Clause, Justice William Douglas asserted that informing the public is, in fact, a legislative role.

Likewise, Justice William Brennan found the majority's interpretation too narrow—in particular, he considered the majority's distinction between "words spoken in debate or written in congressional reports" and the dissemination of information from hearings contrived. Justice Brennan argued that "it is plain that Senator Gravel's dissemination of material, placed by him in the record of a congressional hearing, is itself legislative activity protected by the privilege of speech or debate." Although both Justice Douglas and Justice Brennan sought to expand the definition of legislative action beyond that embraced by the majority, they agreed with the majority's position that protection must be hinged on the legislative role. The interplay between Kilbourn and the majority and dissenting opinions in Gravel suggests that the scope of the legislative privilege reaches only as far as the extent of the legislative role.

D. Ray/Rose: The Current D.C. Circuit Test

In the context of testimony before a congressional ethics committee, the D.C. Circuit uses a test based on two cases: Ray v. Proxmire and United States v. Rose. In line with the Supreme Court's legislative-function limitation, this

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79. Id. at 639 (Douglas, J., dissenting) ("It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees." (quoting WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 303 (1885))). Justice Douglas illustrated this point through reference to instances of governmental suppression of the media. Id. at 641–42 ("[A]s has been revealed by such exposés as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin 'incident,' and the Bay of Pigs invasion, the Government usually suppresses damaging news but highlights favorable news.").

80. Id. at 648–49 (Brennan, J., dissenting) (noting that Senator Gravel's reading of the Pentagon Papers in the Senate would have been protected, "[y]et because he sought a wider audience, to publicize information deemed relevant to matters pending before his own committee, the Senator suddenly loses his immunity and is exposed to grand jury investigation and possible prosecution for the republication").

81. Id. at 659–60. Justice Brennan bolstered his argument with the words of James Wilson, one of the drafters of the Speech or Debate Clause, who noted "[t]hat the conduct and proceedings of representatives should be as open as possible to the inspection of those whom they represent, seems to be, in republican government, a maxim, of whose truth or importance the smallest doubt cannot be entertained." Id. at 656 (quoting 1 WORKS OF JAMES WILSON 422 (Robert Green McCloskey ed., 1967)).

82. See supra notes 74–77 and accompanying text.

83. See Charles W. Johnson, Comment, The Doctrine of Official Immunity: An Unnecessary Intrusion into Speech or Debate Clause Jurisprudence, 43 CATH. U. L. REV. 535, 573 (1994) (concluding that, to the extent that a legislative privilege exists independent of Article I, Section 6, any legislative privilege "must not extend beyond the Speech or Debate Clause").

The Scope of the Speech or Debate Clause

1. Legislative Capacity: Ray v. Proxmire

In Ray, the D.C. Circuit considered a Speech or Debate Clause defense to a libel action against Senator William Proxmire. Senator Proxmire’s wife ran a D.C. tour company named “Whirl-Around Inc.” Appellant Ray, who operated a competing tour company, alleged that Senator and Mrs. Proxmire had tortiously interfered with her business. Specifically, she contended that Senator Proxmire had “libeled [her] and disparaged her business in a letter to Senator [Howard] Cannon, Chairman of the Senate Select Committee on Standards and Conduct.” Finding that the letter was a “response to a Senate inquiry into an exercise of [Proxmire’s] official powers,” the court dismissed the libel claim. Furthermore, the court noted that, in responding to Senator Cannon, Senator Proxmire “was engaged in a matter central to the jurisdiction of the Senate.” Because Senator Proxmire did not disseminate the letter to anyone other than Senator Cannon, and because the letter did not pass beyond the scope of Senator Cannon’s inquiry, the court found that the letter should be protected. Thus, Ray, as half of the D.C. Circuit’s test, stands for the proposition that when a legislator responds to an ethics complaint related to legislative activities, his actions are protected.

2. Private Action: United States v. Rose

In United States v. Rose, Representative Charles G. Rose argued that his testimony before the House Ethics Committee was protected by the Speech or Debate Clause. In 1986, the committee investigated a claim that Representative Rose violated the Ethics in Government Act by impermissibly

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85. Id. at 1202 (discussing the parameters established by Johnson and Gravel).
86. Ray v. Proxmire, 581 F.2d 998, 1000 (D.C. Cir. 1978) (per curiam). The scope of the charges in Ray extended beyond the charge of libel: the main thrust of the suit involved a tortious interference claim against the Senator’s wife. Id.
87. Id. at 999–1000.
88. Id.
89. Id. at 1000. The letter was a response to Ray’s accusation that the Senator “had arranged for Whirl-Around to make use of Senate rooms on its tours.” Id.
90. Id.
91. Id. The court also reiterated the reasoning from Tenney and Johnson that “‘[t]he claim of unworthy purpose does not destroy the privilege.’” Id. (quoting Tenney v. Brandhove, 341 U.S. 367, 377 (1951)).
92. Id. The court’s conclusion that Proxmire had not “disseminated his letter to anyone whose knowledge of its contents was not justified by legitimate legislative needs,” highlights its lack of concern about the member’s motives. Id. The court’s concern was not the content of the letter, but rather its purpose. Id. Because the letter was a response to a legitimate exercise of a legislative function, the contents of the letter were immaterial.
taking campaign funds for personal use.94 After its investigation, the
committee issued a report concluding that Representative Rose had violated
both the House rules and the Ethics Act.95 Consequently, the committee issued
a letter of reproval.96 In addition to this proceeding, the Department of Justice
initiated its own investigation of Representative Rose’s actions, despite the
committee’s request that no civil action be brought.97 The district court denied
Representative Rose’s motion to exclude the testimony he gave before the
committee because the subject of that testimony—his personal financial
activities—did not fall within the scope of his legislative capacity.98

On appeal, the D.C. Circuit considered the constitutionality of the Justice
Department’s use of Representative Rose’s committee testimony.99 The court
first considered the history of the Speech or Debate Clause and noted that the
Clause was a “necessary guarantor of legislative independence.”100 Citing
Thomas Jefferson, the court noted that the power of the privilege was hedged

94. Id. at 183 (quoting 2 U.S.C. §§ 701(a), 702(a)) (internal citations omitted) (discussing
the Ethics in Government Act of 1978, which required “Members of Congress [to] file a ‘full and
complete’ financial disclosure report . . . . [The] report must include, inter alia, the ‘source, type,
and amount or value’ of non-U.S. government income aggregating $100 or more; gifts from a
non-relative aggregating $100 or more; and liabilities to creditors over $10,000, except certain
secured loans” (citations omitted)).
95. Id. The court noted:
Specifically, it found that he had (a) “borrowed from his campaign on eight separate
occasions from 1978 to 1985, in violation of House Rule XLIII, clause 6”; (b) “pledged
a $75,000 certificate of deposit belonging to his campaign on a personal loan . . . . in
violation of House Rule XLIII, clause 6”; (c) “failed to list as liabilities to his campaign
the borrowings referred to [in (a)] on his Financial Disclosure Statements” for the years
1982 through 1986, in violation of the Ethics Act and House Rule XLIV, clause 2; and
(d) “failed to list liabilities to certain financial institutions on his Financial Disclosure
Statements, in violation of the [Act].”
Id. at 184 (alterations in original) (quoting H.R. REP. NO. 100-526, at 25 (1988)).
96. Id.
97. Id. The dual investigation raises an issue tangential to the legislative privilege:
Congress’s power to “determine the Rules of its Proceedings [and] punish its members for
disorderly Behaviour.” U.S. CONST. art I, § 5, cl. 2. One motivation behind this recommendation
was the committee’s finding that while Representative Rose had violated House rules and the
Ethics Act, he had not done so “knowingly and willfully.” Rose, 28 F.3d at 184. Furthermore,
the committee argued that intervention by the Justice Department would undermine the power of
Congress to sanction its members under Article I, Section 5. Id. at 184–85. The Justice
Department disregarded the committee’s request and brought suit against Representative Rose on
May 19, 1989. Id. at 185. As part of that investigation, Acting-Assistant Attorney General Brent
Hatch sent the committee a letter seeking its views regarding a potential civil suit. Id. at 184. In
this letter, he explained that the Attorney General was not limited by Congress’s proceeding. Id.
1992)). The district court’s analysis raises an unsettled aspect of the D.C. Circuit test: is the
subject of the ethics committee testimony or the forum in which it takes place dispositive? The
court stated, “we focus on what Congressman Rose said, not where he said it.” Id. at 188. This
focal point seems inconsistent with Ray. See infra notes 150–54 and accompanying text.
99. Rose, 28 F.3d at 186.
100. Id. at 186–87.
by “the legislative sphere.” Relying on Johnson and Gravel, the court reasoned that the privilege must be limited to a member’s legislative capacity in order to promote the purposes of the privilege “without unduly trampling ‘the rights of private individuals.’” With this limitation on the legislative privilege delineated, the court found that the Speech or Debate Clause did not protect Representative Rose’s testimony because “[t]he testimony was not addressed to a pending bill or to any other legislative matter; it was, instead, the Congressman’s defense of his handling of various personal financial transactions.” Rose thus stands as Ray’s opposite because the subject of the disclosed information was private, and therefore non-legislative. The D.C. Circuit’s combined Ray/Rose test incorporates both extremes by considering the nature of the member’s testimony—specifically, asking whether the member’s conduct was legislative.

II. THE TEST IN ACTION: IN RE GRAND JURY SUBPOENAS

As part of a larger 2007 investigation into the actions of Jack Abramoff, the Department of Justice began to investigate Representative Tom Feeney’s overseas golf trip. The appeal in Representative Feeney’s case presented a second opportunity in as many years for the D.C. Circuit to consider the scope of the Speech or Debate Clause. In re Grand Jury Subpoenas presented an issue more narrow than that previously presented: whether testimony given during a congressional committee hearing is privileged under the Speech or Debate Clause.

A. The Majority Application of the Ray/Rose Test

To determine whether the district court properly denied the motion to quash the grand jury subpoenas for testimony given by Representative Feeney before the House Ethics Committee, the D.C. Circuit turned to the Ray/Rose test. Investigating a claim that Representative Feeney violated House Rule 25, clause 5(b), by accepting private funding for a vacation, the committee “invited the congressman to respond to the allegations and recommended his response include details about the trip and about his understanding as to the sources of

101. Id. at 187.
102. Id. (quoting Gravel v. United States, 408 U.S. 606, 624 n.15 (1972)).
103. Id. at 188. The court went on to say that “Congressman Rose was acting as a witness to facts relevant to a congressional investigation of his private conduct; he was not acting in a legislative capacity.” Id.
104. See In re Grand Jury Subpoenas, 571 F.3d 1200, 1202 (D.C. Cir. 2009).
105. Kumar, supra note 15.
106. Wilber, supra note 10. The probe into Representative Feeney’s trip was under way when the D.C. Circuit reached its decision in United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515. See Schmidt, supra note 10.
107. In re Grand Jury Subpoenas, 571 F.3d at 1200-01.
108. Id. at 1202-03.
payment therefor." Representative Feeney's lawyers presented details about the trip and asserted the representative's belief that it was "a privately sponsored fact-finding trip." The committee found that "the trip did not comply with House rules and [the representative] ha[d] agreed to resolve the matter by paying the cost of the trip to the United States Treasury."

When a federal grand jury began a subsequent investigation, a government attorney told Representative Feeney's lawyers that he wanted to interview the representative about certain statements. When Representative Feeney did not comply with the request, his attorneys were subpoenaed "for testimony and documents related to their representation of the congressman before the Ethics Committee and their preparation of the submissions made on his behalf." Although his attorneys sought to avoid the subpoenas through the attorney-client privilege as well as the work-product doctrine, Representative Feeney "intervened, adopted his lawyers' arguments, and moved to quash on the additional ground that the documents and testimony were protected from discovery by the Speech or Debate Clause." Following the district court's denial of this motion, Representative Feeney filed for an immediate appeal on the issue of legislative privilege.

The court began its analysis by noting that the role of the privilege is to maintain the balance of power between the coordinate branches, that the privilege must be construed in such a way as to avoid damaging the rights of individuals, and that its scope is co-terminus with legislative acts. The

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109. Id. at 1201.
110. Id. The lawyers' submission also detailed the representative's "understanding of who was sponsoring the trip and his recollection that he paid personally for his recreational activities." Id.
111. Id. (internal quotations omitted).
112. Id.
113. Id.
114. Id. Ruling on Representative Feeney's motion, the district court found that "the congressman was not acting in his legislative capacity but in his personal capacity as a witness to facts relevant to the Committee's investigation." Id.
115. Id. at 1201-02. The appellate court noted that the defendant had the right to an immediate appeal "under the collateral order doctrine." Id. (citing United States v. Rostenkowski, 59 F.3d 1291, 1297 (D.C. Cir. 1995)). If immediate appeals were not available in legislative privileges cases, the Speech or Debate Clause would lose much of its power. Requiring a trial and allowing evidence of potentially protected testimony would force upon the member of Congress an intrusion by at least one other branch of government and distract him from the task of representing his constituents. See Wilber, supra note 10 (concluding that "the court may have wanted to halt 'imminent' grand jury proceedings involving Feeney").
116. In re Grand Jury Subpoenas, 571 F.3d at 1202. The district court, interpreting the same precedent, found that "a congressman may assert the Speech or Debate Clause to bar compelled disclosure of testimony or documents from his attorney about the congressman's legislative acts." Id. (internal quotations omitted).
court, applying the *Ray/Rose* test, sought to determine whether Representative Feeney’s act fell within the ambit of his legislative capacity.\(^{117}\)

In response to the government’s argument that because the accusation involved a “recreational vacation,” Representative Feeney was acting outside of his legislative capacity when he responded to the House Ethics Committee inquiry, the court noted that the representative’s guilt had not been established.\(^{118}\) Turning its attention to the House Ethics Committee’s communication with Representative Feeney, the court asserted that the letter—describing the purpose of the investigation—“might well have signaled an inquiry into a wholly personal transaction.”\(^{119}\) Despite the initial possibility of “a wholly personal transaction,” the court determined that Representative Feeney’s classification of the trip as a fact-finding excursion returned the committee’s inquiry to the sphere of legislative capacity.\(^{120}\) Although the court left open the possibility that the trip was “a privately sponsored vacation,” it found the case more factually similar to *Ray* than to *Rose*, and reversed the denial of the congressman’s motion to quash.\(^{121}\)

**B. Challenging the Ray/Rose Test: Judge Kavanaugh’s Concurrence**

Judge Kavanaugh, concurring in the judgment, urged the court to reconsider the *Ray/Rose* test.\(^{122}\) Analyzing the Speech or Debate Clause from a textualist perspective, Judge Kavanaugh asserted that the court, in *Ray* and *Rose*, surpassed the permissible scope of its inquiry.\(^{123}\) Judge Kavanaugh argued that *Ray* “watered down the constitutional text and decided that a Member’s speech in a congressional disciplinary proceeding warrants protection only if the legislative committee is inquiring into a Member’s ‘exercise of his official powers.’”\(^{124}\) He suggested that, in addition to these failings, the *Ray/Rose* test was inefficient.\(^{125}\)

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117. *Id.* at 1203.

118. *Id.* The government argued that the trip was purely recreational, thus the privilege did not apply because a recreational trip was not within the scope of the legislative capacity. *Id.* Because this argument assumes guilt, it, without further proof, cannot stand to strip away the privilege.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (Kavanaugh, J., concurring).

123. *Id.* at 1205 (arguing that, because the speech in *Ray* and *Rose* occurred before a House committee, the court’s inquiry “need have gone no further”).

124. *Id.* at 1203–04 (quoting *Ray v. Proxmire*, 581 F.2d 990, 1000 (D.C. Cir. 1978) (per curiam)).

125. *Id.* at 1204 (“The *Ray/Rose* test not only distorts the constitutional text, but also creates a host of practical and jurisprudential difficulties—perhaps best exemplified by the fact that *Ray* and *Rose* reached different results on very similar facts.”).
In reaching his conclusion, Judge Kavanaugh relied on the same precedent and historic purpose as the majority. While referencing the English Bill of Rights, Kilbourn, and Gravel, Judge Kavanaugh argued that a broad interpretation of the Speech or Debate Clause is in line with the Framers' intent to protect legislative independence. This textual command, he asserted, was designed to preserve the independence of the coordinate branches of government. Judge Kavanaugh further argued that the "Supreme Court has arguably extended the protections of the Speech or Debate Clause beyond what its plain text otherwise might suggest . . . but . . . has not interpreted the Clause to provide less protection than the text establishes." Based on this reasoning, he concluded that the court could not now restrict the privilege by allowing the judiciary to probe the underlying causes of a congressional investigation.

Judge Kavanaugh did not base his call to reconsider the Ray/Rose test on history alone; he emphasized that Congress's power to investigate its members is enshrined in Article I, Section 5, which grants the House and Senate power to "determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." Judge Kavanaugh reasoned that any procedure under this authority should be protected by the Speech or Debate Clause.

Judge Kavanaugh's main critique of the Ray/Rose test was its focus. According to Judge Kavanaugh, "[t]he Ray Court went off the rails . . . by focusing on the subject matter of the underlying disciplinary proceeding—and by applying a test that grants protection only when the investigation concerns a Member's official conduct, as opposed to his or her personal conduct." To him, the error in the court's test was made apparent in the comparison of the factual situations in Ray and Rose. Judge Kavanaugh noted that "it can be

126. Id.
127. Id.
128. Id.
129. Id. at 1206 n.2.
130. Id.
131. U.S. CONST. art. I, § 5, cl. 2; see In re Grand Jury Subpoenas, 571 F.3d at 1204 (Kavanaugh, J., concurring).
132. In re Grand Jury Subpoenas, 571 F.3d at 1204–05 (Kavanaugh, J., concurring) ("In my view, the answer is straightforward. Regardless whether the Member's underlying 'disorderly Behaviour' is considered official or personal, the House or Senate's disciplinary proceedings are official 'Proceedings' of the House or Senate. And a Member's speech in such an official congressional proceeding constitutes 'Speech . . . in either House.'" (quoting U.S. CONST. art. I, § 5, cl. 2 and § 6, cl. 1).
133. Id. at 1206; see also D.C. Circuit Issues Speech or Debate Ruling in the Feeney Case, supra note 16 (discussing "the incoherence of the Ray/Rose distinction").
134. In re Grand Jury Subpoenas, 571 F.3d at 1206 (Kavanaugh, J., concurring) (alteration in original).
135. Id.
quite difficult to determine whether an allegation of wrongdoing involves official or personal acts because the categories often overlap. This lack of clarity proves to be a detriment to members of Congress because, in order to be effective, "the scope of a privilege must be clear and predictable." Thus, Judge Kavanaugh suggested that the Ray/Rose test is ripe for reconsideration because it is inefficient, unclear, and unconstitutional.

III. MERGING THE MAJORITY AND CONCURRENCE

Although Judge Kavanaugh's objections to the Ray/Rose test highlight several of its significant failings, his proposed holistic approach to the legislative privilege is also flawed. The benefit of the Ray/Rose test is that it strives to protect the balance of coordinate powers without tipping it in any one direction. Because the test is unclear, however, it fails to achieve this goal and has the potential to suffocate legislative independence. Conversely, the benefit of Judge Kavanaugh's proposed rule is that it seeks to more faithfully preserve the purposes of the Speech or Debate Clause. The proposed rule, however, is also flawed because it expands the legislative privilege beyond the scope set out in Supreme Court precedent. The Supreme Court has demonstrated that the legislative privilege is not absolute; the determination of legislative capacity or private action is the touchstone for providing or withholding the benefits of the privilege. Because the Ray/Rose test does not sufficiently defend legislative independence, and because Judge Kavanaugh's proposal provides too much protection, the D.C. Circuit should seek to create a test that spans the two.

A. Flaws in the Ray/Rose Test

Judge Kavanaugh's first objection to the Ray/Rose test is that it provides insufficient protection of legislative independence. Two problems with the

136. Id. To illuminate his point, Judge Kavanaugh gave the example of a member of Congress who "is alleged to have abused his or her official position for personal gain." Id.
137. Id.
138. See More on Feeney and the Speech or Debate Clause, http://pointoforder.com/ (July 29, 2009, 8:58 EST) (agreeing with Judge Kavanaugh's concerns while doubting the appropriateness of his approach).
139. See supra note 116 and accompanying text.
140. See supra Part II.B.
141. See More on Feeney and the Speech or Debate Clause, supra note 138 (suggesting that testimony before an ethics committee might not be "in the Member's capacity as a Member (and thus not 'an integral part' of the process by which Members 'participate in committee . . . proceedings')" (alterations in original)).
142. See supra Part I.C.
test subvert the sufficiency of its protection: (1) uncertainty and (2) exposure of the legislative branch.

1. Uncertainty

The Ray/Rose test creates uncertainty by resting its analysis on opposing decisions that have fairly similar fact patterns. In determining whether Representative Feeney was acting within the scope of his legislative capacity, the court attempted to distinguish Ray from Rose. However, the court's determination that "the congressman's statements in this case were protected because they were directly spurred by the inquiry into whether he had abused his office to obtain a vacation" evinces a failure to distinguish Ray from Rose. On one hand, Representative Feeney's vacation was no less personal than Representative Rose's financial actions, and on the other, the sought-after material was no less responsive to the Ethics Committee than Senator Proxmire's letter. Thus, even though the court chose to rely on Ray, it is unclear which of those two cases should control.

The analytical framework created by comparing these two cases is further muddled by the lack of a clear vantage point. In Ray, the court based its legislative-capacity determination on the nature of the contact between the

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144. Id. ("[T]he Ray/Rose approach created great uncertainty. After all, it can be quite difficult to determine whether an allegation of wrongdoing involves official or personal acts because the categories often over-lap—for example, when a Member is alleged to have abused his or her official position for personal gain.").

145. Id. ("Like any privilege, the one that the Speech or Debate Clause grants to members of Congress would be virtually worthless if courts judging its applicability had to scrutinize very closely the acts ostensibly shielded, especially if those courts then had to balance the considerations for and against extending privileged status." (quoting TRIBE, supra note 4, at § 5-20)).

146. See D.C. Circuit Issues Speech or Debate Ruling in Feeney Case, supra note 16 ("In [Ray], the Member allegedly misused an official power for personal gain, while in [Rose] the Member allegedly failed to perform an official duty for personal benefit. Why this makes a difference for purposes of Speech or Debate protection is not explained by the Rose case."); see also Recent Case, D.C. Circuit Quashes Subpoenas for Congressman's Testimony to the House Ethics Committee—In Re Grand Jury Subpoenas, 571 F.3d 1200 (D.C. Cir. 2009), 123 HARV. L. REV. 564, 567 (2009) [hereinafter D.C. Circuit Quashes Subpoenas] (discussing the "purely rhetorical" nature of the D.C. Circuit's Ray/Rose distinction); Note, Title VII and Congressional Employees: The "Chilling Effect" and the Speech or Debate Clause, 90 YALE L.J. 1458, 1467–69 (1981) (discussing the "legislative inhibition" caused by the unclear scope of the Speech or Debate Clause, and blaming that lack of clarity on the "breadth of the modern legislator's role").

147. In re Grand Jury Subpoenas, 571 F.3d at 1203. The court contrasted the responsive nature of Senator Proxmire's ""allegedly defamatory statement"" with Representative Rose's statements "concern[ing] his 'personal loans' and 'personal financial transactions.'" Id. (internal citations omitted).

148. Id.; see also D.C. Circuit Issues Speech or Debate Ruling in Feeney Case, supra note 16 (criticizing the distinction because "it is not at all obvious how one concludes that misuse of Senate rooms is more 'official' than improper filing of financial disclosures").

149. In re Grand Jury Subpoenas, 571 F.3d at 1203.
Senator and the congressional committee. By contrast, the court in Rose based its determination on the nature of the alleged offense that led to the committee hearing. In effect, the court took a snapshot of one runner during warm-ups and a snapshot of another runner mid-race and compared their running styles. Had the court decided to examine the action that led to the investigation in In re Grand Jury Subpoenas, it might have found that it was personal in nature and therefore not protected; however, the court based its decision on Representative Feeney’s response to the Ethics Committee. The mutable nature of the court’s inquiry leads to unpredictable results; the focal point must be static in order to provide any level of certainty.

2. Exposure of the Legislative Branch

Beyond his concerns with the technical machinations, Judge Kavanaugh also questioned the textual validity of the Ray/Rose test. In doing so, he highlighted a common theme found in both In re Grand Jury Subpoenas and Rayburn—exposure of the legislative branch to judicial review lessening the protection afforded by the Speech or Debate Clause.

In Rayburn, the court found that the executive branch had violated the Speech or Debate Clause even before the Justice Department used the evidence it gathered from Representative Jefferson’s office. The protection in Rayburn is a logical extension of the groundwork laid in Gravel and Johnson, in which the Supreme Court demonstrated that the Clause’s scope extends beyond mere protection of the words and processes of debate in either House.

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150. See Ray v. Proxmire, 581 F.2d 998, 1000 (D.C. Cir. 1978) (per curiam) (“In responding to a Senate inquiry into an exercise of his official powers, Senator Proxmire was engaged in a matter central to the jurisdiction of the Senate . . . .”).

151. See United States v. Rose, 28 F.3d 181, 188 (D.C. Cir. 1994) (“The testimony was not addressed to a pending bill or to any other legislative matter; it was, instead, the Congressman’s defense of his handling of various personal financial transactions.”).

152. In re Grand Jury Subpoenas, 571 F.3d at 1203 (“[T]he congressman’s statements in this case are protected because they were directly spurred by the inquiry into whether he had abused his office to obtain a vacation.”).

153. Id. at 1206 (Kavanaugh, J., concurring).

154. See Upjohn Co. v. United States, 449 U.S. 383, 393 (1998) (“An uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all.”). But see D.C. Circuit Quashes Subpoenas, supra note 146, at 568 (noting that the courts should examine two static points—the underlying act and the act of testifying before the Ethics Committee—to determine the applicability of the Speech or Debate Clause). The article concludes that “[b]ecause a member is not carrying out his legislative responsibilities when testifying before an ethics committee, but rather is acting as a witness with respect to his conduct, a court must analyze the subject matter of the testimony before granting it the Speech or Debate Clause’s protections.” Id. at 569.

155. See In re Grand Jury Subpoenas, 571 F.3d at 1206 (Kavanaugh, J., concurring).

156. Id.; see also supra notes 60–64 and accompanying text.

to the very workings of the "modern legislative process." Following this reasoning, an intrusion on the internal workings and products of this process subverts the purpose of the legislative privilege.

When, as in *In re Grand Jury Subpoenas*, a court issues a subpoena to a sitting member of Congress, that court infringes on the member’s independence. Likewise, when a court requires that a member involve himself in a judicial determination of the privileged nature of the information sought, it infringes on that member’s independence. Because the *Ray/Rose* test allows this intrusion to occur before determining whether the Clause protects the information in question, it does not adequately serve the goals of the Speech or Debate Clause.

### B. Flaws in Judge Kavanaugh’s Proposed Rule

Addressing the issues of clarity and effectuation, Judge Kavanaugh suggested a simple rule: any communication between a sitting member of Congress and the Member’s staff or among Members of Congress on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to this legislative activity.” *Rayburn*, 497 F.3d at 661. But see Recent Cases, *D.C. Circuit Holds that FBI Search of Congressional Office Violated Speech or Debate Clause—United States v. Rayburn House Office Building*, 497 F.3d 654 (D.C. Cir. 2007), Reh’g En Banc Denied, No. 06-3015, 2007 U.S. App. Lexis 26295 (D.C. Cir. Nov. 9, 2007), 121 HARV. L. REV. 914, 919 (2008) [hereinafter *FBI Search of Congressional Office*] (“The Rayburn court . . . ignored [separation of powers] concerns in narrowly focusing on legislative independence as an end in itself, rather than as a means toward the end of preserving the separation of powers structure established in the Constitution.” (citation omitted)).

158. *Gravel v. United States*, 408 U.S. 606, 616 (1972); *United States v. Johnson*, 383 U.S. 169, 180 (1966). In *Gravel*, the Court extended the privilege to congressional aides. *Gravel*, 408 U.S. at 628–29. In *Johnson*, the Court found that the legislative privilege prohibited investigation into the underlying motivations behind a speech. *Johnson*, 383 U.S. at 180. These cases recognize that the job of a legislator is not confined to the legislative floor; rather, what happens there is the product of investigation, communication, and preparation. See Cella, supra note 7, at 34 (discussing the need for the legislative privilege to evolve in light of the need of “[m]odern legislatures . . . to adopt their techniques of operation to the increasingly complex society within which they must function”). *But see Letzkus*, supra note 3, at 1395–96 (arguing that the D.C. Circuit extended the scope of the legislative privilege far beyond the scope of the Speech or Debate Clause). Letzkus argued that the D.C. Circuit “should have relied on general separation of powers principles rather than focusing on the Speech or Debate Clause to justify its decision in the Jefferson case.” Id. at 1396. In making such an argument, Letzkus glosses the difference between a legislative privilege created by the separation of powers and that enumerated by the Speech or Debate Clause. See *Johnson*, supra note 83, at 573. For a discussion of the Court’s decision to expand the scope of the Speech or Debate Clause instead of supplementing a limited view with a common law immunity, see *The Scope of Immunity*, supra note 54, at 384 (concluding that the Court’s decision limited its flexibility).

159. Cella, supra note 7, at 34. As the *Rayburn* court noted: “exchanges between a Member of Congress and the Member’s staff or among Members of Congress on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to this legislative activity.” *Rayburn*, 497 F.3d at 661. But see Recent Cases, *D.C. Circuit Holds that FBI Search of Congressional Office Violated Speech or Debate Clause—United States v. Rayburn House Office Building*, 497 F.3d 654 (D.C. Cir. 2007), Reh’g En Banc Denied, No. 06-3015, 2007 U.S. App. Lexis 26295 (D.C. Cir. Nov. 9, 2007), 121 HARV. L. REV. 914, 919 (2008) [hereinafter *FBI Search of Congressional Office*] (“The Rayburn court . . . ignored [separation of powers] concerns in narrowly focusing on legislative independence as an end in itself, rather than as a means toward the end of preserving the separation of powers structure established in the Constitution.” (citation omitted)).

160. See *TRIBE*, supra note 4, § 5-20 (“Put simply, we’d better make sure we don’t so thoroughly question and probe each ‘speech or debate’ in asserting its privileged status that by the time the member’s ordeal is over, being told that the privilege applies after all would be anticlimactic.”).
The Scope of the Speech or Debate Clause

Congress and a congressional committee is protected by the Speech or Debate Clause. Like the Ray/Rose test, Judge Kavanaugh's rule is flawed; however, unlike the Ray/Rose test, it is the rule's simplicity which dooms it. In attempting to establish an absolute privilege in the context of congressional ethics committee hearings, Judge Kavanaugh's proposal fails to take into account the complexities of the situation. For example, the Supreme Court has recognized the potential for corruption and injury that stems from placing members of Congress above the law. Thus, there are two major flaws in Judge Kavanaugh's rule: (1) it fails to adequately take into account Supreme Court precedent and (2) it fails to consider the relationship between the testifying member of Congress and the committee.

1. Precedent

Although the Supreme Court has read the Speech or Debate Clause broadly, it has not granted members of Congress total immunity. In Gravel, the Court set legislative capacity as a hard line for invoking the privilege and, by doing so, the Court demonstrated its unwillingness to allow the legislative privilege to shield legislators completely. Providing a total shield would likely give legislators complete independence from both the executive and the judiciary branches. In such a system, political consequences and legislative

161. See In re Grand Jury Subpoenas, 571 F.3d 1200, 1205 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (concluding that, under Gravel, testimony before a congressional committee should be protected because when a member participates in such an inquiry he “not only engages in Speech or Debate in either House but also, by definition, takes part in communicative processes with respect to matters which the Constitution places within the jurisdiction of the House” (internal quotations omitted)). Judge Kavanaugh relies on Congress's power to sanction its members under Article I, Section 5, to protect any speech before a congressional ethics committee. Id.

162. See More on Feeney and the Speech or Debate Clause, supra note 138 (suggesting that the issue is more complex than Judge Kavanaugh portrays); see also John D. Pingel, Note, Do Congressmen Still Pay Parking Tickets? The D.C. Circuit's Overextension of Legislative Privilege in United States v. Rayburn House Office Building, 42 U.C. DAVIS L. REV. 1621, 1643-44 (2009) (arguing that the court's extension allows legislators to use the privilege to protect personal material simply by co-mingling it with legislative material); FBI Search of Congressional Office, supra note 159, at 918–19 (disagreeing with the court's decision to extend an absolute privilege in the context of criminal cases and arguing that “separation of powers principles do not demand the absolute privilege the court conferred”).

163. See Doe v. McMillan, 412 U.S. 306, 316–17 (1973) (explaining that granting an unlimited privilege “would be to invite gratuitous injury to citizens for little if any public purpose”); United States v. Brewster, 408 U.S. 501, 516 (1972) (arguing that the privilege cannot be applied in such a manner as “to make Members of Congress super-citizens, immune from criminal responsibility”); see also The Scope of Immunity, supra note 54, at 385–86 (recognizing “the courts' own interest in reconciling control of aberrant conduct by individual legislators or staff members with a healthy respect for a coordinate branch of government”).

164. See More on Feeney and the Speech or Debate Clause, supra note 138.

165. See supra Part I.C.

Censure would replace judicial punishment.\textsuperscript{167} In recognizing the dual nature of legislators as both politicians and citizens, the Supreme Court has rejected an interpretation that provides a total shield for legislators.\textsuperscript{168}

2. Relationship Between a Testifying Member and the Committee

Judge Kavanaugh urged the D.C. Circuit to end its inquiry as soon as it determined that the subpoenaed testimony was given in an official proceeding.\textsuperscript{169} He reasoned that because congressional ethics committee hearings take place pursuant to the power granted to Congress by Article I, Section 5, "a Member's speech in such an official congressional proceeding constitutes Speech . . . in either House."\textsuperscript{170} This interpretation fails to recognize the position of the legislator in the hearing—whether he is giving or receiving the testimony in question. The distinction is important because only matters that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings" are placed by the Constitution "within the jurisdiction of either House."\textsuperscript{171} Thus, the difference between members of the committee and individuals who are the subject of the inquiry should require a differing application of the Speech or Debate Clause.\textsuperscript{172}

The members of the committee, when they are inquiring into alleged violations and determining punishment, are full participants in a process "place[d] within the jurisdiction of either House."\textsuperscript{173} As the subject of the process, the member being investigated is distinct from the members of that committee. If the committee investigates a member for actions taken outside the scope of his legislative capacity, its investigation is of the private

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\bibitem{67} See Brewster, 408 U.S. at 518 (noting that in the absence of judicial inquiry, Congress would retain a constitutional power to sanction its members); see also Comment, Brewster, Gravel, and Legislative Immunity, 73 Colum. L. Rev. 125, 152 n.181 (1973) (commenting that members of Congress may be sanctioned by the legislative branch if the Speech or Debate Clause barred judicial inquiry).
\bibitem{68} See supra note 7 and accompanying text; see also Gravel, 408 U.S. at 624–25 (noting the privilege's outer limit).
\bibitem{69} In re Grand Jury Subpoenas, 571 F.3d 1200, 1205 (D.C. Cir. 2009) (Kavanaugh, J., concurring). Judge Kavanaugh could find some support from Justice Douglas's dissent in Gravel, which concluded that the judiciary could only exercise a supervisory function over the introduction of a document before a committee where "a witness before a committee is prosecuted for contempt and he makes the defense that the question he refused to answer was not germane to the legislative inquiry or within its permissible range." Gravel, 408 U.S. at 635 (Douglas, J., dissenting).
\bibitem{70} In re Grand Jury Subpoenas, 571 F.3d at 1205 (Kavanaugh, J., concurring) (internal quotations omitted). Judge Kavanaugh added that not only would the oral testimony itself be protected, but the written communications would be as well. Id. at 1205 n.1.
\bibitem{71} Gravel, 408 U.S. at 625.
\bibitem{72} See infra notes 173–76 and accompanying text.
\bibitem{73} Gravel, 408 U.S. at 625.
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individual and not the representative. The Ethics Committee itself must be protected to ensure that it carries out its task free of the encumbrance of the executive or judicial branch. The member appearing before the committee, however, needs no such independence—if the member would not otherwise be able to claim the privilege, it is illogical to grant him that privilege simply because he is called before a congressional committee.

C. The Power to Determine

Judge Kavanaugh does not suggest that members of Congress can never be hailed before a court. The dangers of such an interpretation are not difficult to imagine; however, such an extensive privilege has never existed, even under the broad English privilege. Judge Kavanaugh’s rule appears to grant the legislature a judicial function. Although it is true that the houses of Congress already exercise a judicial function under Article I, Section 5, this function is limited in its scope in four ways: (1) Congress is not designed to serve a judicial function; (2) forcing Congress to establish the required standards would severely damage the balance of powers; (3) Congress’s power to punish is limited; and (4) such a function would impose a great responsibility on a

174. See, e.g., United States v. Johnson, 383 U.S. 169, 172 (1966) (refusing to extend the Speech or Debate Clause to private acts). But see The Scope of Immunity, supra note 54, at 372 (describing the Johnson Court as having a "seemingly cavalier attitude toward any possible claim of immunity under the Speech or Debate Clause").

175. Eastland v. U.S. Servicemen’s Fund, 421 U.S. 491, 503 (1975). In Eastland, the Court recognized that “[t]he power to investigate and to do so through compulsory process plainly falls within” the scope of the Speech or Debate Clause. Id. at 504. However, the D.C. Circuit found that Eastland’s protection of investigating committee members was limited, holding that the Speech or Debate Clause protects an investigating committee member when: (1) the committee has jurisdiction to perform the inquiry; and (2) the committee performs the inquiry by lawful means. McSurely v. McClellan, 553 F.2d 1277, 1287 (D.C. Cir. 1976).

176. See More on Feeeney and the Speech or Debate Clause, supra note 138 (“Consider, for example, an election contest held before the Committee on House Administration. Like disciplinary proceedings, election contests are a judicial function exercised by each House of Congress pursuant to explicit constitutional authority. Following [Judge] Kavanaugh’s reasoning, the testimony of an incumbent Member in an election contest would be protected by Speech or Debate, while the testimony of the adverse party (i.e., the as yet unsuccessful challenger seeking the Member’s seat) presumably would not be. It would seem more logical, however, to treat the two in the same fashion, reflecting the fact that both are in the same relationship, that of party/witness, to the tribunal.”).

177. In re Grand Jury Subpoenas, 571 F.3d 1200, 1205–07 (Kavanaugh, J., concurring). Although Judge Kavanaugh never explicitly makes this assertion, his call is for the D.C. Circuit to “resolve [the issues created by the Ray/Rose test] by looking to the text of the Speech or Debate Clause,” which seems to extend beyond the context of Ethics Committee hearings. Id. at 1205. Because Ray, Rose, and In re Grand Jury Subpoenas each involved the attempted use of Ethics or Standards Committee testimony, it seems logical that Judge Kavanaugh’s concern is limited to that context. On the other hand, it seems likely that Judge Kavanaugh would apply this prospective reconsideration to any case where a house of Congress was exercising its jurisdiction. Id. at 1207.

178. See Kilbourn v. Thompson, 103 U.S. 168, 202–03 (1880).
body that is already too overburdened to complete all of the business before it.  

In *Brewster*, the Court agreed that the houses of Congress have some power to inquire into the action of their members, but noted Congress's judicial incapacity. Reciting the powers enumerated by Article I, Section 5, the Court commented that "Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process." The Court found that "[t]he process of disciplining a Member in the Congress is not without countervailing risks of abuse since it is not surrounded with the panoply of protective shields that are present in a criminal case." One such risk is that placing the power to determine the applicability of the Speech or Debate Clause in the hands of Congress "would enable a legislative majority to suppress dissent simply by criminalizing conduct otherwise thought of as legislative." Even if such inquiries were performed fairly, the members of Congress would not be exclusively focused on the cases before them, and the body has no appellate procedure.

Although it places the power to determine whether a member of Congress is protected by the Speech or Debate Clause in the hands of the judiciary, a test that allows courts to determine whether the conduct prompting a congressional committee's inquiry is potentially illicit behavior is a necessity.

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179. See United States v. Brewster, 408 U.S. 501, 518–19, 524 (1972); see also D.C. Circuit Quashes Subpoenas, supra note 146, at 570–71 (noting the "institutional limitations" on Congress's power to "police itself effectively").


182. *Brewster*, 408 U.S. at 519. The Constitution grants Congress the power to determine "the Rules of its own Proceedings." U.S. CONST. art I, § 5, cl. 2. Although this might entail the ability to adjudge whether a member acted in his legislative capacity, the uncertainty regarding a member's continuation in office, as well as the political nature of the legislature and of appointments to committees, serves to undermine Congress's power to adequately determine whether speech or debate is privileged.

183. James Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. ON LEGIS. 1, 29 (1999). Professor Brudney further argues that "[w]hile Article I authorizes Congress to inflict its own forms of discipline upon members it deems recalcitrant, that is a far cry from exposing members to prosecution and punishment from the two other branches." *Id.* at 29–30.

184. See *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or Executive."). This power would be limited by the "case or controversy" requirement of Article III, Section 2, clause 1. But see Josh Chafetz, Comment, *Cleaning House: Congressional Commissioners for Standards*, 117 YALE L.J. 165, 167 (2007) (arguing that Congress, alone, should regulate the conduct of its members).
In order to combat the flaws in the Ray/Rose test, as well as those in Judge Kavanaugh’s proposed rule, the D.C. Circuit should adopt a test that minimizes investigative infringement of legislative independence. A two-part test that front-loads the determination of legislative capacity would provide such a solution. This test would require the proponent of a warrant or subpoena to demonstrate by clear and convincing evidence that: (1) the action on which the suit is based was performed outside the member’s legislative capacity and (2) the information sought is integral to the suit for which it is to be used. To clarify further, the D.C. Circuit could define legislative capacity as the Supreme Court did in Gravel.

This test would preserve the purposes of the Speech or Debate Clause, remain true to Supreme Court precedent, and clarify the subject of the inquiry. This test would effectuate the purposes of the legislative privilege by limiting intrusion in three ways. First, by requiring an investigator to show that the information he seeks falls outside the member’s legislative capacity, it keeps the investigator and legislator separate to the greatest extent possible without totally insulating the legislator. Second, it limits potential intimidation by placing an obstacle in the way of unfettered access. Third, it minimizes any potential unnecessary, though arguably proper, intrusion by requiring some level of necessity. Despite these protections, the test allows investigators to

Chafetz suggests that the houses of Congress should form their ethics committees “to improve upon the British model,” to increase effectiveness, and to shield itself from any intrusion by the executive or judicial branches. Id. at 171–73. Chafetz’s proposition, however, is flawed on many levels. The Framers structured Congress to be different from Parliament; unlike Parliament, Congress is not a court. See Brewster, 408 U.S. at 518–19. Furthermore, “[t]he Constitution’s bill of attainder prohibition is an explicit and dramatic departure from the British tradition of legislative punishment and impeachment.” Victor Williams, Unconstitutional Bills of Attainder or Valid Impeachment Convictions? The Walter Nixon and Alcee Hastings Impeachment Cases, 22 Sw. U. L. REV. 1077, 1098 (1993); see also Paul Thompson, First, Do No Harm: Why a Commissioner on Standards is Unhealthy for the American Body Politic, 117 YALE L.J. 230, 232–34 (2008) (criticizing Chafetz’s arguments).

185. Commentators have suggested the use of pre-trial showings to protect legislative independence in the context of employment discrimination. See The Scope of Immunity, supra note 54, at 387–88 (proposing a test to allow aggrieved constituents to sue members of Congress, and suggesting that “[t]he new rule should contain the further limitation that the plaintiff must have evidence of the defendant’s malice before the trial begins”). The Supreme Court has used this pre-trial determination in cases involving executive privilege. See United States v. Nixon, 418 U.S. 683, 703–07 (1974).

186. Gravel v. United States, 408 U.S. 606, 625 (1972) (defining legislative capacity as that which is “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House”); see also D.C. Circuit Quashes Subpoenas, supra note 146, at 567–68 (urging the D.C. Circuit to rely on the Gravel definition of legislative acts).

187. The D.C. Circuit demonstrated in Rayburn the need to keep these entities separate until a decision is made. See supra notes 60–64 and accompanying text.
reach information that is not protected by the Clause.\textsuperscript{188} Perhaps most importantly, the test provides a measure of certainty to litigants by clarifying the focal point of the analysis.

Judge Kavanaugh would likely oppose such a test for a number of reasons. First, although the test addresses a number of Judge Kavanaugh’s concerns, it does not address his underlying belief that a member testifying before a congressional committee is participating in legislative activity.\textsuperscript{189} Beyond this concern, this test is also far less efficient than either the Ray/Rose test or Judge Kavanaugh’s proposed rule; because the test must be applied before disclosure, it requires the parties to litigate an issue before discovery is completed.\textsuperscript{190} Further, the early determination would likely lead to multiple rounds of litigation regarding just the disputed material.\textsuperscript{191} However, this preliminary intrusion is minimal when compared to an FBI raid or a court-ordered subpoena.\textsuperscript{192} In other words, the intrusion caused by litigating the issue at such an early stage is a necessary cost of maintaining the purposes of the privilege while restricting the totality of its protection.

IV. CONCLUSION

In order to maintain the balance of powers, the D.C. Circuit should create a new test that strikes a balance between the goals of the Ray/Rose test and Judge Kavanaugh’s concerns. While the court should clarify the focus of its analytical inquiry, its primary goal in creating a new test should be protecting legislative independence while limiting a congressman’s ability to use the privilege as a shield for corruption.\textsuperscript{193}

\begin{itemize}
  \item To complete the analysis, the D.C. Circuit would have to set out a test for what constitutes legislative conduct. The court needs to look no further than Supreme Court precedent to achieve this goal. Although the test does not expressly confront the concern of co-mingled legislative and non-legislative documents, a provision such as that in \textit{Rayburn} might solve that issue. \textit{See} United States v. Rayburn House Office Bldg., Room 2113, Wash., DC 20515, 497 F.3d 654, 663–64 (D.C. Cir. 2007).
  \item In \textit{In re Grand Jury Subpoenas}, 571 F.3d 1200, 1204–05 (D.C. Cir. 2009) (Kavanaugh, J., concurring). If that argument was dispositive, however, no test would be necessary because anything presented before a congressional committee would be privileged.
  \item In cases like \textit{Rayburn}, the Department of Justice may be unwilling to do this because it would tip its hand to the legislator.
  \item This initial determination would not preclude re-litigation of a claim of privilege at a later stage.
  \item \textit{See supra} notes 58–60, 108–15 and accompanying text.
  \item \textit{See supra} Part III.D.
\end{itemize}