



# The Speech or Debate Clause: Recent Developments

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## Summary

Members of Congress have immunity for their legislative acts under Article I, § 6, cl. 1, of the Constitution, which provides in part that “for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place.” Even if their actions are within the scope of the Speech or Debate Clause or some other legal immunity, Members of Congress remain accountable to the House of Congress in which they serve and to the electorate. In cases in which the clause applies, the immunity is absolute and cannot be defeated by an allegation of an improper purpose or motivation. When applicable, the clause affords not only substantive immunity but also a complementary evidentiary privilege. In other words, the clause provides both immunity from liability (in civil and criminal proceedings) and a testimonial privilege.

Recently, two separate and previously unresolved issues have arisen with respect to the scope and application of the Speech or Debate Clause. The first involves the execution of a search warrant on the Rayburn House Office of Representative William J. Jefferson. The search was conducted as part of the FBI’s investigation of Representative Jefferson to determine whether he and other persons were involved in criminal activity, including bribery and other felonies. Such an action by the executive branch appears to be unprecedented in U.S. history and raises serious and significant constitutional questions with respect to potential intimidation and diminution of the independence and autonomy of the legislative branch and its integral legislative functions at which the Speech or Debate Clause is directed. Although Representative Jefferson lost his initial legal challenge to have the seized documents and materials returned, the Court of Appeals for the District of Columbia (D.C. Circuit) has since held the search to have been a violation of the Speech or Debate Clause. The court left in place an order instructing the lower court to provide Representative Jefferson with copies of the materials and a chance to make his claims of privilege *ex parte* and *in camera*. Moreover, the Court of Appeals ordered that the Department of Justice (DOJ) continue to refrain from reviewing any of the seized materials until the questions of privilege have been settled by the lower court.

The second Speech or Debate Clause question on which the courts have recently issued opinions concerns claims of employment discrimination brought against Members’ offices pursuant to the Congressional Accountability Act of 1995. Both the Tenth Circuit Court of Appeals and the D.C. Circuit have recently ruled that the Speech or Debate Clause does not automatically prevent such suits from proceeding. In addition, an appeal to the Supreme Court has been rejected on the grounds that the Court lacked a jurisdictional basis to decide the case. These decisions, however, appear to have left unanswered significant questions relating to the use and introduction of evidence that may be related to “legislative acts” and, therefore, protected by the Speech or Debate Clause. Such questions could ultimately frustrate the ability of potential plaintiffs to pursue their claims.

This report examines these recent developments in Speech or Debate Clause jurisprudence and will be updated as events warrant.

## **Contents**

Constitutional Background.....	1
Searches and Seizures of Congressional Offices .....	3
Factual Background .....	3
General Legal Arguments .....	5
District Court Proceedings.....	6
Court of Appeals Proceedings.....	9
Employment and Personnel Actions .....	12

## **Contacts**

Author Contact Information .....	17
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## Constitutional Background

The Constitution provides that “for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place.”<sup>1</sup> Commonly referred to as the Speech or Debate Clause, this language affords Members of Congress immunity from certain civil and criminal suits relating to their legislative acts.<sup>2</sup> In addition, the clause also provides a testimonial privilege<sup>3</sup> that extends not only to oral testimony about privileged matters<sup>4</sup> but to the production of privileged documents.<sup>5</sup>

Adopted at the Constitutional Convention without debate or opposition,<sup>6</sup> the historic rationale and purpose of the Speech or Debate Clause has been clearly understood to protect the “independence and integrity” of members of the legislature from “intimidation” by both the executive branch and the judiciary—that is, to help ensure that the legislature would be a co-equal, independent branch of government by “prevent[ing] intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary.”<sup>7</sup> In explaining the purposes of the Speech or Debate Clause, the Supreme Court has traced the ancestry of the clause to the English Bill of Rights of 1689, which was “the culmination of a long struggle for parliamentary supremacy”:

Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature.<sup>8</sup>

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<sup>1</sup> U.S. CONST. Art. I, § 6, cl. 1.

<sup>2</sup> See e.g., *United States v. Helstoski*, 442 U.S. 477 (1979) (excluding evidence of legislative action in a criminal prosecution of a Member of the House of Representatives); *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491 (1975) (dismissing civil suit to enjoin a Senate Committee investigation); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (dismissing a civil conspiracy claim against members of a Senate committee); *United States v. Johnson*, 383 U.S. 169 (1966) (reversing criminal conspiracy conviction based on Speech or Debate Clause immunity).

<sup>3</sup> See generally, *Gravel v. United States*, 408 U.S. 606 (1972).

<sup>4</sup> *Id.* at 615-616; see also *Dennis v. Sparks*, 449 U.S. 24, 30 (1980) (stating “we have held that Members of Congress need not respond to questions about their legislative acts”); *Miller v. Transamerica Press, Inc.*, 709 F.2d 524, 528-29 (9<sup>th</sup> Cir. 1983) (denying a motion to compel testimony from a former Member of Congress).

<sup>5</sup> See e.g., *Maddox v. Williams*, 855 F.Supp. 406, 413 (D.D.C. 1994) (stating that “the Speech or Debate Clause stands as an insuperable obstacle to [a party’s] attempt to acquire by compulsion documents or copies of documents in the possession of the Congress”) *aff’d sub nom. Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995); see also *Minpeco, S.A. v. Conticommodity Services*, 844 F.2d 856, 859-61 (D.C. Cir. 1988) (applying a broad reading of the Clause to protect the “integrity of the legislative process itself”); *Hearst v. Black*, 87 F.2d 68, 71-2 (D.C. Cir. 1936) (stating that “[i]f a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded”).

<sup>6</sup> See *Powell v. McCormack*, 395 U.S. 486, 502 (1969) (citing 5 DEBATES ON THE FEDERAL CONSTITUTION 406 (J. Elliot, ed. 1876); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 246 (M. Farrand, rev. ed. 1966)).

<sup>7</sup> *United States v. Johnson*, 383 U.S. 169, 181 (1966).

<sup>8</sup> *Id.* at 178 (internal citations omitted); see also *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (stating that:

The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could make only a tentative claim. ... In 1668, after a long and bitter struggle, Parliament finally laid the ghost of Charles I, who had prosecuted Sir John Elliot and others for “seditious” speeches in Parliament) (internal citations omitted).

In addition, the Supreme Court has recognized that the clause was not intended simply “for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.”<sup>9</sup> The Court has also expressly noted the function of the Speech or Debate Clause as serving the interests of separation of powers: “In the American governmental structure the [C]ause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.”<sup>10</sup> Moreover, the Court has “without exception ... read the Speech or Debate Clause broadly to effectuate its purposes.”<sup>11</sup>

The Supreme Court’s interpretations and holdings in cases involving the Speech or Debate Clause indicate absolute protection for Members when speaking on the House or Senate floor,<sup>12</sup> introducing and voting on bills and resolutions,<sup>13</sup> preparing and submitting committee reports,<sup>14</sup> acting at committee meetings and hearings,<sup>15</sup> and conducting investigations and issuing subpoenas.<sup>16</sup> Conversely, the Court has made clear that the Speech or Debate Clause does not protect criminal conduct, such as taking a bribe, which is not a part of the legislative process.<sup>17</sup> In addition, it appears that the clause provides no protection for what the Court has deemed “political” or “representational” activities, such as direct communications with the public,<sup>18</sup> speeches outside of Congress,<sup>19</sup> newsletters,<sup>20</sup> press releases,<sup>21</sup> private book publishing,<sup>22</sup> or even

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<sup>9</sup> *United States v. Brewster*, 408 U.S. 501, 507 (1972); see also *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1881).

<sup>10</sup> *Johnson*, 383 U.S. at 181.

<sup>11</sup> *Eastland*, 421 U.S. at 502.

<sup>12</sup> *Johnson*, 383 U.S. at 184-85; *Gravel*, 408 U.S. at 616; see also *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir. 1929), cert. denied, 282 U.S. 874 (1930).

<sup>13</sup> *Powell v. McCormack*, 395 U.S. 486, 505 (1969) (stating that “[t]he purpose of the protection afforded legislators is ... to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions); *Kilbourn*, 103 U.S. at 204 (stating that “[t]he reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, ... and to the act of voting, ...”); see also *Fletcher v. Peck* 10 U.S. (6 Cranch) 87, 130 (1810) (declining to examine the motives of state legislators who were allegedly bribed for their votes).

<sup>14</sup> *Doe v. McMillan*, 412 U.S. 306 (1973); *Kilbourn*, 103 U.S. at 204.

<sup>15</sup> See *id.*; see also *Gravel*, 408 U.S. 628-29. In addition, some lower federal courts have also held that the Clause bars the use of evidence of a Member’s committee membership. Compare *United States v. Swindall*, 971 F.2d 1531 (11<sup>th</sup> Cir. 1991), rehearing denied, 980 F.2d 1449 (11<sup>th</sup> Cir. 1992) with *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994), cert. denied, 514 U.S. 1003 (1995).

<sup>16</sup> See *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491 (1975); see also *Tenney v. Brandhove*, 341 U.S. 367 (1951) (refusing to examine motives of state legislator in summoning witness to hearing).

<sup>17</sup> See *Brewster*, 408 U.S. at 526; see also *United States v. Helstoski*, 442 U.S. 477, 489 (1979) (holding that evidence can be introduced regarding corrupt agreements on the basis that “promises by a Member to perform an act in the future are not legislative acts”); but see *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973) (stating that “Congressmen and their aides are immune from liability for their actions within the ‘legislative sphere’ even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes”).

<sup>18</sup> See *Brewster*, 408 U.S. at 512 (stating that “[a]lthough these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.”).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

<sup>22</sup> *Gravel*, 408 U.S. at 625.

the distribution of official committee reports outside the legislative sphere.<sup>23</sup> According to the Court, these types of activities are not covered because they are not “an integral part of the deliberative and communicative processes” by which Members participate in legislative activities.<sup>24</sup> Finally, it appears that the clause protects certain contacts by Members with the executive branch, such as investigations and hearings related to legislative oversight of the executive, but does not protect others, such as assisting constituents in “securing government contracts” and making “appointments with government agencies.”<sup>25</sup> The clause’s application to other types of contact by Members with the executive, especially informal communications from Members to officials of the executive branch, even if arguably in the course of the oversight process, remains uncertain.<sup>26</sup>

## Searches and Seizures of Congressional Offices

The application for, receipt of, and ultimate execution by the Department of Justice (DOJ) of a search warrant for the Rayburn House Office of Representative William J. Jefferson has raised significant constitutional questions about the application and scope of the immunity provided by the Speech or Debate Clause.

### Factual Background

On May 20, 2006, DOJ agents and the Federal Bureau of Investigation (FBI) executed a search warrant at the congressional offices in the Rayburn Building of Representative William J. Jefferson.<sup>27</sup> The search had been authorized by a warrant issued by Chief Judge Thomas Hogan of the United States District Court for the District of Columbia on May 18, 2006. The search lasted approximately 18 hours and, according to subsequently filed court documents, resulted in the seizure of two boxes of paper records and electronic copies of the contents of every computer hard drive in the Representative’s office. The General Counsel of the House of Representatives and Representative Jefferson’s private counsel sought entry to the offices to oversee the search but were prohibited from doing so by the agents.<sup>28</sup>

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<sup>23</sup> *Doe v. McMillan*, 412 U.S. 306 (1973). In *Doe*, the Court held that the actions of the Members, their staffs and a consultant in preparing a committee report were protected. On remand, the district court granted them immunity on the basis that there had been quite limited public distribution of the report. *See Doe v. McMillan*, 374 F. Supp. 1313 (D.D.C. 1974). The D.C. Circuit subsequently upheld the claim of immunity as to the Public Printer and Superintendent of Documents. *See Doe v. McMillan*, 566 F.2d 713 (D.C.Cir. 1977), *cert. denied*, 435 U.S. 969 (1978). The D.C. Circuit, however, expressly reserved the question of the availability of immunity “in a case where distribution was more extensive, was specially promoted, was made in response to specific requests rather than standing orders, or continued for a period after notice of objections was received.” *Id.* at 718.

<sup>24</sup> *Gravel*, 408 U.S. at 625.

<sup>25</sup> *United States v. McDade*, 28 F.3d 283, 299-300 (3d Cir. 1994) (citing *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 504-06 (1975)), *cert. denied*, 514 U.S. 1003 (1995); *see also Brewster*, 408 U.S. at 512.

<sup>26</sup> *McDade*, 28 F.3d at 300. For additional reading on the constitutional immunity afforded by the Speech or Debate Clause, *see* CRS Report RL30843, *Speech or Debate Clause Constitutional Immunity: An Overview*, by Todd B. Tatelman.

<sup>27</sup> Unless otherwise noted, the sources for the factual background herein related are as follows: The Affidavit in Support of Application of Search Warrant, dated May 18, 2006 (Affidavit); the Memorandum in Support of Motion for Return of Property, dated May 24, 2006 on behalf of Representative William J. Jefferson (Jefferson Memo); and the Government’s Response to Representative William Jefferson’s Motion for Return of Property, dated May 30, 2006 (DOJ Response).

<sup>28</sup> Jefferson Memo, *supra* footnote 27 at 3-8; *see also* DOJ Response, *supra* footnote 27 at ¶ 4.

The search was conducted as part of the FBI's investigation of Representative Jefferson, which began in March 2005, to determine whether he and other persons bribed or conspired to bribe a public official, committed or conspired to commit wire fraud, or bribed or conspired to bribe a foreign official, in violation of Sections 201, 371, 343, 1346, and 1349 of Title 18, and Section 78dd-1 of Title 15 United States Code. The investigation involves allegations, inter alia, that the Representative used his position to promote the sale of telecommunications equipment and services by a domestic firm to several African nations in return for payment of stocks and cash and whether he planned to bribe high-ranking officials in Nigeria and to use his influence with high-ranking government officials in other African countries to obtain the necessary approval for the firm's ventures.

In apparent recognition of the unique and constitutionally sensitive action that the DOJ was preparing to take—it appears that no warrant to search a congressional office had ever been sought or obtained before—the supporting affidavit contained special procedures to guide and confine the search process. As explained by the DOJ in its response to the district court opposing the return of the documents to Representative Jefferson:

[T]he Government has been interested only in obtaining non-legislative act evidence of criminal activity and has committed to implementing elaborate procedures to avoid any information that could be covered by the Speech or Debate Clause (or that would be non-responsive). As a matter of comity, and out of an abundance of caution, the Government proposed, and this Court approved, special procedures designed to accommodate the privilege and other political sensitivities by ensuring that *no document* covered by the Speech or Debate Clause would come into the possession of the prosecution team.<sup>29</sup>

These procedures, as originally described,<sup>30</sup> provided that with regard to paper records in the offices, a search team of Special Agents from the FBI who had no role in the investigation (non-case agents) would examine every document in the office and determine which documents were responsive to the list of documents being sought. The non-case agents were forbidden from revealing any non-responsive or politically sensitive information they came across during the search. Responsive documents were to be transferred to a “filter team” consisting of two DOJ attorneys, who were not part of the prosecution team, and a non-case FBI agent, who were to review each seized document to address its responsiveness. Those documents deemed responsive would then be reviewed by the filter team to determine if any responsive document fell within the protection of the Speech or Debate Clause. Non-privileged records, determined to fall outside of the Speech or Debate Clause protection, were to be transferred to the prosecution team, which was to have provided counsel to Representative Jefferson copies within 10 days. Papers potentially covered by the Speech or Debate Clause were to be catalogued in a log and the log provided to counsel for Representative Jefferson along with copies of the papers within 20 business days. According to the warrant, the potentially privileged papers were not to be supplied to the prosecution team until a court so ordered.

With respect to the computer files, a special FBI forensics team would download materials from the office computers and transfer the downloaded files to an FBI facility, where a search of the data would be conducted using court-approved search terms contained in Schedule C of the affidavit. Responsive data were to be turned over to the filter team for a review. Responsive, potentially privileged computer documents were to be logged and provided to counsel along with

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<sup>29</sup> See DOJ Response, *supra* footnote 27 at 14-15 (emphasis in original).

<sup>30</sup> See Affidavit, *supra* footnote 27 at ¶¶ 136-156.

copies of those documents within 60 days from the start of the review. The filter team would then request the court to review the potentially privileged records.

In response to concerns raised by Representative Jefferson and members of the House leadership, DOJ in its court filing developed and proposed “additional procedural accommodation[s].” The additional procedures are discussed as follows:

Under this additional procedure, copies of all materials seized from Rep. Jefferson’s office will be provided to Rep. Jefferson (and, if Rep. Jefferson chooses, he may provide copies to House Counsel). The Filter Team will prepare a log of the records they deem to be privileged. The log will identify any such records by date, recipient, sender, subject matter, and the nature of any potential privilege. The Filter Team will provide its log to Rep. Jefferson (and, if Rep. Jefferson chooses, to House Counsel) to allow him the opportunity to disagree with the Filter Team’s privilege determinations. Documents that the Filter Team determines are privileged will be returned to counsel for Rep. Jefferson. Any disputes that may arise about whether particular remaining records are privileged will then be resolved by the Court. No member of the Prosecution Team will have access to any seized documents that Rep. Jefferson claims to be privileged until the Court has made a determination that the record is not privileged. This accommodation obviates the concern expressed in Rep. Jefferson’s brief that the Filter Team, applying the original procedures set forth in the affidavit, might make a unilateral determination that a document was not privileged and turn it over to the Prosecution Team without affording Rep. Jefferson the opportunity to assert privilege.<sup>31</sup>

## **General Legal Arguments**

Initially, it appears that a potential Speech or Debate argument exists because, although material falling within the protective framework of the Speech or Debate Clause could *eventually* be ruled inadmissible in a court proceeding or any other legal proceeding (outside of the institutions of the House or Senate themselves) based on the Speech or Debate privilege, the act of such a wide-ranging examination of materials pursuant to a search warrant—most likely materials specifically and clearly covered by the privilege—is arguably in itself an action that raises concerns of intimidation and diminution of the independence and autonomy of the legislative branch and its integral legislative functions at which the Speech or Debate Clause is directed.

Moreover, as explained in relevant court documents, the FBI itself and its own agents were to be responsible for “sifting” through all the electronic and paper material seized in the Member’s office, so that the FBI, and not a court (nor officials of the legislative branch), was to make the initial determinations not only of what material is “responsive” to the warrant, but also which material might be “privileged” under the Speech or Debate Clause. Therefore, it also could be argued that the independence and autonomy of the legislative branch under this process was left initially to the legal and constitutional interpretations of the agents of the FBI. As a former Deputy Attorney General in the Reagan Administration testified before the House Judiciary Committee:

Search warrants for documentary evidence in legislative offices are irreconcilable with the Speech or Debate Clause.... The Clause is offended the moment the F.B.I. peruses a constitutionally protected legislative document. Even if the document is not seized, memory

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<sup>31</sup> See DOJ Response, *supra* footnote 27 at 11-12 (internal footnotes and citations omitted).



of its political contents remains in the Executive Branch for use in thwarting congressional opposition or leaking embarrassing political information. Documentary searches are further intimidating to Congress because the “plain view” doctrine of the Fourth Amendment would entitle the F.B.I. to seize any material in the course of reading office files concerning crimes unconnected to the search warrant. The knowledge by a Member that the F.B.I. can make an unannounced raid on his legislative office to read and rummage through every document or email is bound to discourage Congress from the muscular check against the Executive that the Speech or Debate Clause was calculated to foster.<sup>32</sup>

It should be noted that the phrase “questioned in any other place” has not been the subject of much discussion. There do not appear to be any court decisions or other historical evidence that may guide modern interpreters as to the phrase’s meaning. While to date neither the DOJ nor Representative Jefferson has directly raised the issue in this case, it would appear possible to argue that because the DOJ specifically excluded any legislative branch representatives from the office search, they constructively converted Representative Jefferson’s office into “any other place” for Speech or Debate purposes. In addition, the removal of documents for off-site “filtering” by the DOJ may also constitute questioning “in any other place.” Moreover, the search of the computer files, which according to the DOJ’s own procedures was to be done at an FBI laboratory, appears to most certainly qualify as “any other place.”

## District Court Proceedings

In response to the search and seizure of materials from his House office, Representative Jefferson, joined by the House General Counsel filing as *amicus curiae* on behalf of the House Bi-Partisan Leadership Council, sought to have the search declared unconstitutional and the seized materials returned to his possession. In addition to raising many of the arguments discussed above, Representative Jefferson argued, inter alia, that execution of the search warrant on the premises via a document-by-document search of every paper record in the office and the “wholesale” copying and removal of the Representative’s computer hard drive “guaranteed that the executive would be in possession of material that relates to the Member’s legislative duties.”<sup>33</sup> The motion asserted that those actions, coupled with the exclusion of Representative Jefferson’s counsel and the General Counsel for the House of Representatives from even viewing the search process, impermissibly interfered with and violated the absolute privilege afforded by the Speech or Debate Clause.<sup>34</sup>

The DOJ, in its brief responding to Representative Jefferson’s motion for return of property, argued that because it was only interested in obtaining non-legislative materials, the use of a “filter team” provided sufficient protection of the privilege under the Speech or Debate Clause.<sup>35</sup> Based on the DOJ’s filing, it appears that the DOJ adopted the position that the Clause’s language “shall not be questioned at any other place” merely protects Members from having information relating to legislative acts used against them in a criminal proceeding.<sup>36</sup> The DOJ’s filing

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<sup>32</sup> *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution*, Hearing Before the House Comm. on the Judiciary, 109<sup>th</sup> Cong., 2d Sess. (May 30, 2006) (written testimony of Mr. Bruce Fein at 3-4) *available at*, <http://judiciary.house.gov/OversightTestimony.aspx?ID=637>.

<sup>33</sup> Jefferson Memo, *supra* footnote 27 at 13.

<sup>34</sup> *Id.*

<sup>35</sup> DOJ Response, *supra* footnote 27 at 14-17 (stating that “the procedures proposed to be used by the Government are plainly sufficient to protect against any permissible intrusion”).

<sup>36</sup> *Id.* at 17-18 (stating that “even if the Speech or Debate Clause were understood to create a criminal discovery (continued...)”).

suggested that the past practice of using subpoenas and allowing initial review by the House General Counsel's Office pursuant to House Rule VIII to determine whether the protection of the clause has been simply a matter of "comity."<sup>37</sup> The DOJ also argued that Representative Jefferson's position "would effectively extend Speech or Debate immunity to clearly unprivileged materials by making it impossible to execute a search warrant in any place containing even one privileged document."<sup>38</sup>

DOJ's argument seemed to rest on the contention that because the actual prosecution team was never to have had access to any information that would have been subject to the privilege, the Speech or Debate Clause had not been violated.<sup>39</sup> Thus, the DOJ appeared to be arguing that the Speech or Debate Clause is nothing more than an evidentiary privilege that can be asserted prior to trial, similar to any other available motion to exclude improperly seized evidence. As a result, DOJ asserted that the procedures employed did not in any way prohibit Representative Jefferson from asserting his privilege and having his claims adjudicated by a court.<sup>40</sup> In support of its claim that the Speech or Debate Clause was not violated merely because the DOJ was to make determinations regarding privileged material, the DOJ referenced other prosecutions of Members of Congress.<sup>41</sup> In these instances, the DOJ contended that it reviewed materials obtained in response to subpoenas and determined what could be used and what was privileged and, therefore, inadmissible and in close or debatable situations, consistent with the Constitution, the information was submitted to a court for a resolution as to whether the material could be used.<sup>42</sup>

On July 10, 2006, United States District Judge Thomas Hogan issued a written opinion rejecting the arguments of Representative Jefferson and upholding the search and seizure of materials from his Rayburn House Office as constitutional.<sup>43</sup> In reaching this conclusion, Judge Hogan first rejected the arguments made by Representative Jefferson, as well as the House General Counsel's Office, with respect to the scope of the immunity afforded by the Speech or Debate Clause.

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(...continued)

privilege, rather than a privilege protecting legislators against being questioned about privileged information or having such information used against them (a point the Government does not concede), it simply does not constitute 'discovery' for a law enforcement agent unconnected with the investigation to make a cursory review of privileged information solely for the purpose of determining whether it is privileged").

<sup>37</sup> *Id.* at 14. DOJ's assertion with respect to the development and use of House Rule VIII appears to discount the significant historical precedent and evidence that suggests the House of Representatives have nearly always taken a strong position with respect to the release of information in response to requests and subpoenas by the executive branch. Namely, it appears that the House has consistently defended its right to make the first determination with respect to the application of the Speech or Debate privilege. See CRS General Distribution Memorandum, *Legal and Constitutional Issues Raised by Executive Branch Searches of Legislative Offices*, 13-22, by Morton Rosenberg, Jack H. Maskell, and Todd B. Tatelman (June 13, 2006) (copies available from author on request).

<sup>38</sup> *Id.* at 23.

<sup>39</sup> *Id.* at 17 (arguing that "[b]ecause such officials are under affirmative obligations not to disclose the contents of any documents they see (and to attest that they have not done so), there is no prejudice to Rep. Jefferson as a result of the way in which the search was carried out." citing *Weatherford v. Bursey*, 429 U.S. 545, 556-58 (1977)).

<sup>40</sup> *Id.* at 19 (stating that "Rep. Jefferson suffers no cognizable injury under the Speech or Debate Clause because he must assert privilege after a judicially authorized search, rather than during it, especially when he suffers no prejudice as a result").

<sup>41</sup> *Id.* at 21.

<sup>42</sup> *Id.* at 21 (arguing that "[i]t has never been suggested that the Constitution is offended merely because members of the prosecution team review legislative materials in the course of making privilege determinations").

<sup>43</sup> *In Re: Search of the Rayburn House Office Building Room 2113, Washington, D.C. 20515*, No. 06-213, slip op. 1 (D.D.C. July 10, 2006).

Specifically, Judge Hogan noted that should the execution of a search warrant be limited to a period after the elected official has first been permitted to review and remove privileged information, it would impermissibly expand the Speech or Debate Clause's protection to require advance notice of a search of any property frequented by the Member, not just his congressional office.<sup>44</sup>

Next, Judge Hogan focused on the testimonial privilege aspect of the clause. Like the DOJ, Judge Hogan appears to have adopted an arguably narrow construction of the Speech or Debate Clause's protection, noting that unlike providing responses to a subpoena, having property searched pursuant to a search warrant is not a testimonial act; therefore, the clause's protection does not apply.<sup>45</sup> Relying exclusively on Fifth Amendment case law for this analysis, Judge Hogan concludes that "[j]ust as a search warrant does not trigger the Fifth Amendment's testimonial privilege, neither does a search trigger the Speech or Debate Clause's testimonial privilege."<sup>46</sup>

Turning to the Speech or Debate Clause's purpose in protecting the independence and integrity of the legislative branch,<sup>47</sup> Judge Hogan again appears to have adopted an arguably narrow construction of the immunity afforded by the Speech or Debate Clause. Here again, he interprets the Speech or Debate Clause as protecting a right analogous to the right against self-incrimination afforded by the Fifth Amendment. For Judge Hogan, the Speech or Debate Clause merely protects Members from having to "answer questions as to [their] legislative activities"; it "does not prohibit the disclosure of legislative material."<sup>48</sup> Because in this case Representative Jefferson was not questioned about things within the sphere of his legislative activities, Judge Hogan held that the Clause's immunity did not apply.<sup>49</sup>

Finally, Judge Hogan addressed the "filtering" procedures approved by the warrant. He rejected the argument that members of the legislature be permitted to determine what is privileged and what is not prior to a search warrant being executed. Arguing by analogy to both the privilege provided by the First Amendment's protections, as well as other privileges at common law, Judge Hogan indicated that he was able to find "no support for the proposition that a Member of Congress must be given advance notice of a search, with an opportunity to screen out and remove materials the Member believes to be privileged. Indeed, the Court is aware of no case in which such a procedure is mandated by any other recognized privilege."<sup>50</sup>

With respect to this point, it appears that Judge Hogan is attempting to preserve the role of the judiciary in determining the proper scope and application of privileges. Specifically, Judge Hogan observed that the power to determine the scope of a privilege is conferred to neither federal judges<sup>51</sup> nor the President of the United States<sup>52</sup> and concluded, therefore, that such power cannot

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<sup>44</sup> *Id.* at 12 (stating that "this argument would require a Member of Congress to be given advance notice of any search of his property, including property outside his congressional office, such as his home or car, and further that he be allowed to remove any material that he deemed to be covered by the legislative privilege prior to the search").

<sup>45</sup> *Id.* at 14.

<sup>46</sup> *Id.* at 15.

<sup>47</sup> *Id.* at 16 (stating that "[t]he purpose of the Speech or Debate Clause is rather to protect the independence and integrity of the legislature by not questioning Members of Congress for their legitimate legislative acts") (citing *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995)).

<sup>48</sup> *Id.* at 16.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 17.

<sup>51</sup> *Id.* at 19 (citing *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1518-20 (11<sup>th</sup> Cir. 1986)).

be available to Members of Congress. Based on these findings, Judge Hogan held that “[r]eview of allegedly privileged material by the Court is allowed and appropriate under the Constitution.”<sup>53</sup> Further, Judge Hogan concluded that because Representative Jefferson remained free to assert claims of privilege at a later point in potential criminal proceedings against him, the search of his House office did not violate the Speech or Debate Clause. Judge Hogan also issued an order permitting the DOJ to begin reviewing the documents and other materials seized from Representative Jefferson’s office.

## **Court of Appeals Proceedings**

Almost immediately after Judge Hogan issued his ruling, Representative Jefferson filed a motion for a stay pending appeal to the Court of Appeals. Judge Hogan, on July 19, 2006, denied this motion, relying primarily on his opinion that Representative Jefferson was not substantially likely to prevail on the merits of his appeal, that Representative Jefferson had suffered no irreparable injury, and that the damage to the government in delaying its investigation outweighed any potential harm to Representative Jefferson.<sup>54</sup> Representative Jefferson promptly filed notice of appeal to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), seeking a stay of both Judge Hogan’s order and any DOJ review of the documents pending the outcome of his appeal. The resolution of Representative Jefferson’s appeal appears to have been expedited due to an announcement by the Attorney General that set a July 26, 2006, deadline for investigators to begin reviewing the documents and materials seized from the Representative’s House office.<sup>55</sup>

On July 28, 2006, a three-judge panel of the D.C. Circuit issued a two-page order remanding the case back to the district court for further fact finding with respect to claims of legislative privilege and detailing the procedures under which the court is to perform its duties.<sup>56</sup> Specifically, the Court of Appeals ordered that the District Court, either via a magistrate judge or other judicial officer, copy all of the paper documents seized by the FBI, as well as provide a list of responsive computer documents to Representative Jefferson for his review.<sup>57</sup> Moreover, the Court of Appeals ordered that Representative Jefferson, within two days of receipt of said documents and records, submit ex parte any claims of privilege under the Speech or Debate Clause.<sup>58</sup> According to the order, the District Court would then conduct an in camera review of the claims and make any and all necessary findings regarding whether the specific documents are legislative in nature and,

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(...continued)

<sup>52</sup> *Id.* at 20 (citing *United States v. Nixon*, 418 U.S. 683, 703-05 (1974)).

<sup>53</sup> *Id.* at 21.

<sup>54</sup> *In Re: Search of the Rayburn House Office Building Room 2113, Washington, D.C. 20515*, No. 06-213, slip op. 2 (D.D.C. July 19, 2006).

<sup>55</sup> See Kenneth P. Doyle, *DOJ Complying with Appeals Court Order; Review of Jefferson Search Materials Put Off*, BNA MONEY & POLITICS REPORT, 2 (Aug. 1, 2006), available at, <http://pubs.bna.com/ip/bna/mpr.nsf/eh/A0B3B3Y4F0>.

<sup>56</sup> See *United States v. Rayburn House Office Building Room 2113, Washington, D.C. 20515*, No. 06-3105 slip op. 1 (D.C. Cir. July 28, 2006).

<sup>57</sup> *Id.* (citing *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995)).

<sup>58</sup> *Id.*

therefore, privileged.<sup>59</sup> Finally, the Court of Appeals enjoined the DOJ from reviewing any of the documents or materials seized pending further order of the court.<sup>60</sup>

Because the Court of Appeals order contains no analysis and only two case citations, it is difficult to draw any definitive conclusions about the legal rationale for the order. From the text of the order, it appears reasonable to conclude that the Court of Appeals felt that there was too little lower court review of claims of privilege pursuant to the Speech or Debate Clause. Moreover, it appears that the Court of Appeals felt strongly that those claims, whatever they may be, should be dealt with prior to any review of the materials by the executive branch and, significantly, without any opportunity for input or argument from the DOJ. Beyond that, however, it appears that few, if any, principles regarding the Speech or Debate immunity can be derived from the Court of Appeals' order. Consequently, it appears that the question of the legality of such a search and seizure remains very much an unresolved question.

The D.C. Circuit heard oral argument on Representative Jefferson's appeal on May 15, 2007, and issued its decision on August 3, 2007.<sup>61</sup> The court concluded that the "compelled disclosure of privileged material to the Executive during execution of the search warrant ... violated the Speech or Debate Clause and that the Congressman is entitled to the return of documents that the court determines to be privileged under the Clause."<sup>62</sup> In reaching its conclusion the court relied upon many of the core concepts of Speech or Debate Clause jurisprudence, including the Speech or Debate Clause's broad scope and its purpose of protecting the legislative branch from intimidation from the Executive.<sup>63</sup> Specifically, the D.C. Circuit affirmed its holding in *Brown & Williamson Tobacco Corporation v. Williams*,<sup>64</sup> which made clear that a critical component of the Speech or Debate Clause is the prevention of intrusions into the legislative process, and that the compelled disclosure of legislative materials is such a disruption, regardless of the proposed use of the material.<sup>65</sup>

Applying these principles to the search of Representative Jefferson's office, the court stated that the

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<sup>59</sup> *Id.* (citing *Klitzman, Klitzman, and Gallagher v. Krut*, 744 F.2d 955, 962 (3d Cir. 1984)).

<sup>60</sup> *Id.*

<sup>61</sup> See *United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515*, No. 06-3105, slip op. (D.C. Cir. 2007). Merits briefs were filed by both Representative Jefferson and the DOJ. In addition, *amicus curiae* (friend of the court) briefs, supporting Representative Jefferson's legal position on the Speech or Debate Clause, were filed by the following individuals: Stanley M. Brand, Christopher Bryant, Steven F. Huefner, Thomas E. Mann, Norman J. Ornstein, Steven R. Ross, Thomas J. Suplak, Charles Tiefer, the Honorable Thomas S. Foley, the Honorable Newt Gingrich, the Honorable Robert H. Michel, the Honorable Abner J. Mikva, Scott Palmer, Elliot Berke, and Reid Stuntz. In support of the DOJ, the Washington Legal Foundation, Judicial Watch, and the Citizens for Responsibility and Ethics in Washington each filed *amicus curiae* briefs. The House General Counsel, who filed as *amicus curiae* on behalf of the House Bi-Partisan Leadership Council before the District Court, did not file a brief before the D.C. Circuit.

<sup>62</sup> *Id.* at 3.

<sup>63</sup> See *id.* at 11 (noting that the Supreme Court has held that one of the purposes of the Speech or Debate Clause is to "assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel v. United States*, 408 U.S. 606, 616 (1972)).

<sup>64</sup> 62 F.3d 408 (D.C. Cir. 1995).

<sup>65</sup> See *United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515*, No. 06-3105, slip op. at 12 (D.C. Cir. 2007) (citing *Brown & Williamson*, 62 F.3d at 419).

compelled disclosure clearly tends to disrupt the legislative process: 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 legislative activity. This chill runs counter to the Clause's purpose of protecting against disruption of the legislative process.<sup>66</sup>

In so holding the court sought to carefully distinguish between the lawfulness of searching a congressional office pursuant to a search warrant—which the court holds is clearly permissible—and the lawfulness of the manner in which the search was executed in light of the protections afforded to the Member pursuant to the Speech or Debate Clause.<sup>67</sup> Thus, the court concluded that because the Executive's procedures for executing the warrant “denied the Congressman any opportunity to identify and assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents,” they violated the Speech or Debate Clause.<sup>68</sup> The court declined, however, to expressly delineate acceptable procedures for avoiding a violation of the Speech or Debate Clause in future searches of congressional offices, noting only that there appears to be “no reason why the Congressman's privilege under the Speech or Debate Clause cannot be asserted at the outset of a search in a manner that also protects the interests of the Executive in law enforcement.”<sup>69</sup> Moreover, the court observed that the precise contours of those accommodations are a matter best left to negotiations between the political branches.<sup>70</sup>

Finally, with respect to what remedy Representative Jefferson is entitled to, the court declined to grant what was requested; namely, a return of all of the documents seized from the office during the unconstitutional search. Rather, the court determined that, with respect to the computer files, the court's previous Remand Order “affords the Congressman an opportunity to assert the privilege prior to disclosure of privileged materials to the Executive.”<sup>71</sup> With respect to the paper documents, however, the court concluded that, while the Speech or Debate Clause prevents the compelled disclosure of privileged documents, it does not prohibit “inquiry into illegal conduct simply because it has some nexus to legislative functions.”<sup>72</sup> Therefore, according to the court, a return of all of the documents would be an inappropriate remedy for a violation of the Speech or Debate Clause. As a result, the court concluded that Representative Jefferson is entitled to a return of all legislative documents subject to the Speech or Debate Clause, whose protection is absolute, while non-privileged materials—which may yet be subject to future challenges as the criminal trial proceeds—are not required to be returned at this time.<sup>73</sup> Furthermore, the court ordered that “the FBI agents who executed the search warrant shall continue to be barred from disclosing the contents of any privileged or politically sensitive and non-responsive items, and

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<sup>66</sup> *Id.* at 13.

<sup>67</sup> *Id.* at 14.

<sup>68</sup> *Id.* at 15.

<sup>69</sup> *Id.* at 16.

<sup>70</sup> *Id.* at 17 (stating that “[h]ow that accommodation is to be achieved is best determined by the legislative and executive branches in the first instance”).

<sup>71</sup> *Id.* at 17. The court notes, however, that this conclusion is at least in part based on the assertion of the Executive that no agent of the Executive has seen any of the electronic documents or will see them until claims of privilege have been adjudicated. *See id.* at 17-18.

<sup>72</sup> *Id.* at 20 (citing *Brewster*, 408 U.S. at 528).

<sup>73</sup> *Id.* at 21-22.

they shall not be involved in the pending prosecution or other charges arising from the investigation described in the warrant affidavit other than as regards responsiveness.”<sup>74</sup>

Representative Jefferson’s specific claims of privilege, based on his review of the documents pursuant to the D.C. Circuit’s July 28 Order, are still pending before the courts. These claims are apparently still awaiting disposition before Judge Hogan. However, the documents for which Representative Jefferson has not asserted privilege appear to have been turned over to the DOJ and are currently being reviewed.

## Employment and Personnel Actions

For some time now, there has been an open question as to whether the Speech or Debate Clause immunizes a Member from civil actions related to office personnel. In 1995, with little debate focused on the immunity issue, the House and Senate passed the Congressional Accountability Act (CAA),<sup>75</sup> which provides for judicial review under various statutes of congressional personnel actions. Section 413 of the CAA, however, declares that the authorization to bring judicial proceedings under various provisions of the law does not constitute a waiver of the Speech or Debate privilege of any Member. In light of the statute, as well as prior decisions of the appellate courts, both the Tenth Circuit Court of Appeals<sup>76</sup> and the United States Court of Appeals for the District of Columbia (D.C. Circuit)<sup>77</sup> have recently issued decisions that have refused to automatically dismiss employment-related civil cases on the grounds that they are a violation of the Speech or Debate immunity.

Prior to the passage of the CAA, the D.C. Circuit had held that the Speech or Debate Clause immunized Members for personnel actions regarding at least some congressional employees. In *Browning v. Clerk, U.S. House of Representatives*,<sup>78</sup> it was alleged that the termination of the first African American Official Reporter employed by the House was the result of racial animus.<sup>79</sup> The court, in dismissing the claims, held that personnel actions by Members were protected by the Speech or Debate Clause if the “employee’s duties were directly related to the due functioning of the legislative process.”<sup>80</sup> Two years later, however, the Supreme Court in *Forrester v. White*<sup>81</sup> raised doubts as to whether Speech or Debate Clause immunity extended to employment actions. In *Forrester*, a case raising the issue of judicial immunity for personnel actions, the Supreme Court held that a state court judge did not have judicial immunity for the firing of a probation officer, concluding that the immunity did not extend to “administrative, legislative, or executive functions,” regardless of how important the functions may be to the “very functioning of the

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<sup>74</sup> *Id.* at 23 (internal quotations and citations omitted). In light of the fact that Representative Jefferson’s indictment was filed in the Eastern District of Virginia, which is a court in the Fourth Circuit, it is unclear exactly what binding effect the D.C. Circuit’s holdings and remedies will have on that criminal prosecution. Generally speaking, the decisions of one circuit are not binding on the others.

<sup>75</sup> Congressional Accountability Act, P.L. 104-1, 109 Stat. 3 (1995).

<sup>76</sup> *Bastien v. Office of Senator Ben Nighthorse Campbell*, 209 F.Supp.2d 1095 (D.Colo. 2002) (holding that Speech or Debate immunity did apply to employment actions), *rev’d*, *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10<sup>th</sup> Cir. 2004).

<sup>77</sup> *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1 (D.C. Cir. 2006).

<sup>78</sup> 789 F.2d 923 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 996 (1986).

<sup>79</sup> *Id.* at 924.

<sup>80</sup> *Id.* at 929.

<sup>81</sup> 484 U.S. 219 (1988).

court.”<sup>82</sup> In other words, according to the Court, the employment decision in *Forrester* was administrative, not judicial; therefore, there was no entitlement to judicial immunity.<sup>83</sup> Subsequently, in *Gross v. Winter*,<sup>84</sup> the D.C. Circuit, applying *Forrester*, held that common-law legislative immunity did not immunize a D.C. Council Member from suit for employment-related decisions.<sup>85</sup> The court in *Gross*, however, declined to overturn the reasoning in *Browning*, preferring instead to distinguish the case on the grounds that it dealt with a common law privilege and not the Speech or Debate Clause.

In 2002, the United States District Court for the District of Colorado heard the first case involving the Speech or Debate Clause as it related to an employment discrimination allegation brought pursuant to the CAA.<sup>86</sup> The plaintiff, a former district office staffer for Senator Ben Nighthorse Campbell, alleged age discrimination and retaliation for discrimination complaints under the CAA. The Senator’s office moved to dismiss the claims, arguing that the Speech or Debate Clause immunized the office from the claims because the “[p]laintiff’s duties of meeting with constituents, gathering information for the Senator, discussing constituent suggestions and then conveying them to the Senator, constitute actions that directly relate to the due functioning of the legislative process.”<sup>87</sup> The district court found that the plaintiff’s duties were “not only to provide Senator Campbell with information, but to take action on behalf of the Senator and provide him with recommendations on various legislative issues and agendas.”<sup>88</sup> In addition, the court described the plaintiff’s job responsibilities as including “gathering and conveying to Senator Campbell himself, and to the Defendant, information critical to the Senator’s legislative agenda.”<sup>89</sup> As a result, the court dismissed the suit, holding that because the plaintiff’s duties were directly related to the due functioning of the legislative process, the immunity afforded Members of Congress by the Speech or Debate Clause applied.<sup>90</sup>

The Court of Appeals for the Tenth Circuit, however, reversed the lower court’s decision, distinguishing between “legislative” acts that are entitled to Speech or Debate immunity and non-legislative acts, which are not.<sup>91</sup> The court noted that even if a legislative act had been involved, only the Senator’s actual vote would be entitled to immunity.<sup>92</sup> The Senator’s office, on the other hand, could still be liable for personnel decisions, as its actions fall outside the scope of the immunity.<sup>93</sup> In addition, the court found, relying on Supreme Court precedent, that the “[p]laintiff’s discrimination claim does not require proof of any legislative act by Senator

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<sup>82</sup> *Id.* at 227-28.

<sup>83</sup> *Id.* at 229-30.

<sup>84</sup> 876 F.2d 165 (D.C. Cir. 1989).

<sup>85</sup> *Id.* at 172 (stating that “the functions judges and legislators exercise in making personnel decisions affecting ... are administrative, not judicial or legislative”).

<sup>86</sup> *Bastien v. Campbell*, 209 F.Supp.2d 1095 (D. Colo. 2002).

<sup>87</sup> *Id.* at 1101.

<sup>88</sup> *Id.* at 1103.

<sup>89</sup> *Id.* at 1104.

<sup>90</sup> *Id.* at 1103 (stating that “the Speech or Debate Clause provides immunity to Members of Congress and their aides for personnel actions taken with respect to employees whose duties are directly related to the due functioning of the legislative process”); *see also id.* at 1104 (stating that “the personnel actions taken by [the Office] against the Plaintiff are afforded Speech or Debate Clause immunity”).

<sup>91</sup> *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301, 1315 (10<sup>th</sup> Cir. 2004).

<sup>92</sup> *Id.* at 1315.

<sup>93</sup> *Id.* at 1315-16.



Campbell or his staff.”<sup>94</sup> Senator Campbell had argued that the plaintiff’s job function constituted a legislative act because the information received from constituents or other members of the public could affect his drafting and supporting of legislation and ultimately his committee and floor votes. The court disagreed, classifying such functions as “informal information gathering,” which is distinct from the type of information gathering performed by legislative committees. The gathering of information by committees, according to the court, is clearly protected by Supreme Court precedent;<sup>95</sup> however, extending the protection to other forms of information gathering by individual Members would exceed the Court’s pronouncements of the Clause’s scope.<sup>96</sup> Moreover, the court specifically refused to adopt the D.C. Circuit’s reasoning in *Browning v. Clerk*, noting that, in its opinion, *Browning* extended farther than the Supreme Court’s cases involving the Speech or Debate Clause. The court, however, did note that even had it chosen to adopt and follow the *Browning* standard, this employee’s case would be entitled to proceed because the duties performed were not central to the legislative process and, therefore, not entitled to the Speech or Debate Clause’s protection.<sup>97</sup>

The Tenth Circuit’s decision in *Bastien* created a conflict between the circuits that led the D.C. Circuit to consolidate two pending cases and hear them en banc.<sup>98</sup> The two cases involve a House office, that of the Honorable Eddie Bernice Johnson, as well as a Senate office, that of Senator Mark Dayton.<sup>99</sup> Neither case has been decided on the merits by any court. The D.C. Circuit sought to determine whether employment suits brought under the CAA were required to be dismissed by the Speech or Debate Clause, and whether *Browning v. Clerk of U.S House of Representatives* should remain the law of the circuit.<sup>100</sup> With 8 of the 10 members of the D.C. Circuit participating, the court decided unanimously that the Speech or Debate Clause does not require the dismissal of suits brought under the CAA.<sup>101</sup> With respect to the continued validity of *Browning*, the court also held unanimously that the *Browning* framework is no longer consistent with Supreme Court precedent and should be abandoned.<sup>102</sup> Despite this agreement, however, the court splintered regarding the question of how much of a role the Speech or Debate Clause should play in such cases.

The unresolved issue involves the proper role that the Speech or Debate Clause may play during the course of employment litigation. The fact that plaintiffs may be able to bring prima facie cases against Members of Congress under the CAA does not mean that the Speech or Debate Clause is no longer a relevant consideration. On the one hand, as Judge Randolph, writing for a plurality of the court, notes, the judicially created, burden-shifting framework under which employment

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<sup>94</sup> *Id.* at 1316 (citing *Gravel v. United States*, 408 U.S. 606 (1972)).

<sup>95</sup> *Id.* at 1316 (citing *Gravel*, 408 U.S. at 619-21).

<sup>96</sup> *Id.* (stating that “[t]o extend protection to informal information gathering ... would be the equivalent of extending Speech or Debate Clause immunity to debates before local radio stations or Rotary Clubs”).

<sup>97</sup> *Id.* at 1319 (stating that “[i]n any event, even under the *Browning* formulation, Plaintiff here prevails, because her job duties do not satisfy the *Gravel* standard for legislative act”).

<sup>98</sup> An *en banc* proceeding is one “with all judges present and participating; in full court.” BLACK’S LAW DICTIONARY, 546 (7<sup>th</sup> ed. 1999).

<sup>99</sup> Senator Dayton has since retired from the Senate, which has raised the question of whether the case involving his office is moot.

<sup>100</sup> *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 3 (D.C. Cir. 2006).

<sup>101</sup> *Id.* at 17; *see also id.* at 17 (Rodgers, J., concurring); *id.* at 25-26 (Brown, J., concurring); *id.* at 18 (Tatel, J., concurring).

<sup>102</sup> *Id.* at 17; *see also id.* at 17 (Rodgers, J., concurring); *id.* at 25-26 (Brown, J., concurring); *id.* at 18 (Tatel, J., concurring).

discrimination cases are litigated—where a plaintiff proves a *prima facie* case of discrimination, which the employer rebuts by producing evidence that its conduct was nondiscriminatory, and which the plaintiff then seeks to demonstrate is pretextual<sup>103</sup>—may present special problems when combined with the Speech or Debate Clause.<sup>104</sup> These problems may arise specifically when the nondiscriminatory reason for the adverse employment action was motivated by the employee’s participation in the legislative process or in activities protected by the Speech or Debate Clause.

Members remain protected from “inquiry into legislative acts or the motivation for actual performance of legislative acts.”<sup>105</sup> Moreover, the Speech or Debate Clause’s testimonial privilege prevents a Member from “being ‘questioned’ in a place other than the House or Senate” about legislative acts.<sup>106</sup> These protections afforded by the Speech or Debate Clause may, according to Judge Randolph, depending on the facts of the case, frustrate or even prevent the pursuit of employment discrimination claims, as they would likely prevent a plaintiff from presenting evidence to challenge the Member’s assertion that there was a legitimate nondiscriminatory basis for the employment decision.<sup>107</sup> Although Judge Randolph attempts to provide some guidelines for invoking the Speech or Debate Clause’s protection,<sup>108</sup> he refrains from ultimately answering the question, noting that decisions about whether the asserted activity is protected by the Speech or Debate Clause will be rendered by district court judges on a case-by-case basis.<sup>109</sup>

On the other hand, Judge Janice Rodgers Brown, writing for three members of the court, takes a slightly different approach. First, Judge Brown notes that the CAA creates a “legal fiction” by making the Member’s “employing office” liable for any employment discrimination and not the Member or his aides personally.<sup>110</sup> As such, Judge Brown concludes that the “employing office,” as an “organizational division within Congress,” is not in any way entitled to protection under the Speech or Debate Clause.<sup>111</sup> Furthermore, according to Judge Brown, to the extent that the Member personally is implicated, there remains the Speech or Debate Clause’s evidentiary privilege, which provides ample protection to the Member from disclosure or discussion of decisions that involve “legislative acts.”<sup>112</sup>

With respect to the potential evidentiary and procedural problems raised by Judge Randolph’s opinion, Judge Brown appears to suggest a narrower reading of the Speech or Debate Clause.

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<sup>103</sup> See *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-56 (1981); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>104</sup> *Fields*, 459 F.3d at 14-16.

<sup>105</sup> *Id.* at 14 (citing *United States v. Brewster*, 408 U.S. 501, 508 (1972); *Brown & Williamson*, 62 F.3d 408, 415 n. 5 (D.C. Cir. 1995) (stating that “[e]ven when properly subject to suit, members of Congress are privileged against the evidentiary use against them of any legislative act, even if the act is not claimed to be itself illegal, but is offered only to show motive....”)); see also *United States v. Helstoski*, 442 U.S. 477, 487-89 (1979); *United States v. Johnson*, 383 U.S. 169, 169 (1966).

<sup>106</sup> *Id.* (citing *Helstoski*, 442 U.S. at 490).

<sup>107</sup> *Id.* at 15-16.

<sup>108</sup> Judge Randolph’s opinion indicates that an affidavit should be submitted from a person eligible to invoke the Clause and that it should indicate the “legislative activity” or integral part of the legislative process the plaintiffs suit will require inquiry into. See *id.* at 15-17.

<sup>109</sup> *Id.* at 17-18.

<sup>110</sup> *Id.* at 26 (Brown, J., concurring).

<sup>111</sup> *Id.* at 27 (Brown, J., concurring).

<sup>112</sup> *Id.* (Brown, J., concurring).

According to Judge Brown's opinion, as long as the Member or other potentially immune aides are not themselves providing evidence or giving testimony, the Speech or Debate Clause is not implicated and, therefore, plaintiffs can potentially pursue more claims under this interpretation.<sup>113</sup> However, if the suit requires such evidence or testimony, then, even under Judge Brown's interpretation, the district courts will have to address individual assertions of Speech or Debate immunity on a case-by-case basis.<sup>114</sup>

A writ of *certiorari* to the U.S. Supreme Court was sought by Senator Dayton's office. In addition, Senator Dayton's office filed a statement of jurisdiction asserting that the CAA affords his office an appeal by right to the U.S. Supreme Court.<sup>115</sup> On January 19, 2007, the Court postponed consideration of the question of jurisdiction and set oral argument for April 24, 2007.<sup>116</sup> The Court heard argument specifically on the following questions: (1) Was the Office of Senator Mark Dayton entitled to appeal the judgment of the Court of Appeals for the District of Columbia Circuit directly to this Court? and (2) Was this case rendered moot by the expiration of the term of office of Senator Dayton?<sup>117</sup>

The Court issued its decision on May 21, 2007, unanimously holding that it lacked jurisdiction to reach the merits of the case.<sup>118</sup> Senator Dayton had sought review on the basis of Section 412 of the Congressional Accountability Act, which states that "[a]n appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this chapter."<sup>119</sup> According to the Court, this section cannot serve as the basis for jurisdiction because the D.C. Circuit's "determination that jurisdiction attaches despite a claim of Speech or Debate Clause immunity is best read as a ruling on the scope of the Act, not its constitutionality."<sup>120</sup> Moreover, the Court concluded that this reading of Section 413 as limiting appellate review is "faithful to our established practice of interpreting statutes to avoid constitutional difficulties"<sup>121</sup> and is consistent with the Court's jurisprudence holding that "statutes authorizing appeals are to be strictly construed."<sup>122</sup> Finally, the Court concluded that there was no basis for exercising its discretionary certiorari jurisdiction

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<sup>113</sup> *Id.* at 32 (Brown, J., concurring) (stating that "[b]ecause the members are not defendants, the suits do not burden them with defense costs nor place them at any risk of personal liability, and as long as members and their aides are not themselves 'questioned,' an inquiry into legislative acts does not implicate the Speech or Debate Clause. Cf. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977)").

<sup>114</sup> *Id.* (Brown, J., concurring) (stating that "[w]e need not explore the precise contours of this privilege today; the district court may address these problems as they arise").

<sup>115</sup> See Congressional Accountability Act, P.L. 104-1 § 412, 109 Stat. 3 (1995) (codified at 2 U.S.C. § 1412 (2000)) (stating that "[a]n appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this chapter.>").

<sup>116</sup> See *Office of Senator Dayton v. Hanson*, No. 06-618, available at <http://www.supremecourtus.gov/docket/06-618.htm>.

<sup>117</sup> *Id.*

<sup>118</sup> *Dayton v. Hanson*, 550 U.S. \_\_\_, 127 S. Ct. 2018 (2007). Technically, the Court's decision was by a vote of 8-0 with Chief Justice Roberts not participating, as he had been a member of the D.C. Circuit when it rendered its decision in this case.

<sup>119</sup> Congressional Accountability Act, P.L. 104-1 § 412, 109 Stat. 3 (1995) (codified at 2 U.S.C. § 1412 (2000)) (emphasis added).

<sup>120</sup> *Dayton*, 550 U.S. at \_\_\_, 125 S. Ct. at 2020.

<sup>121</sup> *Id.* at 2021 (citing *Clark v. Martinez*, 543 U.S. 371, 381-382 (2005)).

<sup>122</sup> *Id.* (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 43 (1983); see also *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42, n. 1 (1970) (per curiam)).

as the D.C. Circuit's decision does not conflict with any other Circuit with respect to the application of the Speech or Debate Clause in suits brought challenging personal actions by Members of Congress.<sup>123</sup>

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<sup>123</sup> *Id.* (comparing *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1 (D.C. Cir. 2006) (case below), with *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10<sup>th</sup> Cir. 2004).