

The Fourth Amendment and the Speech or Debate Clause

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Various [searches](#) by federal agents of [sitting](#) Members of [Congress](#) can raise questions about the intersection of Fourth Amendment principles and the privilege held by Members under the Speech or Debate Clause of the Constitution. In one of these examples, reporting indicates that agents from Homeland Security Investigations [seized](#) documents and the Member’s cellphone and laptop as part of an immigration-related investigation. It has also been reported that the search in the previous example was executed pursuant to a warrant and that the issuing judge imposed [special procedural requirements](#) on law enforcement in light of the Member’s constitutional protections under the Speech or Debate Clause. The Member has [reportedly alleged](#) that some of those protocols were not followed, including a requirement that the Member and the House General Counsel be notified prior to execution of the warrant. Similar questions regarding the Fourth Amendment and the Speech or Debate Clause were raised in September 2026 in an [interim staff report](#) detailing the Department of Justice’s (DOJ’s) access to Member phone records during Special Counsel Jack Smtih’s investigation of the events of January 6, 2021.

This Legal Sidebar discusses the intersection of the Fourth Amendment’s prohibition on unreasonable searches and seizures, the search warrant requirement under that Amendment, and the sometimes-countervailing protections afforded by the Speech or Debate Clause.

Fourth Amendment Background

The [Fourth Amendment](#) prohibits unreasonable searches and seizures. As a result, law enforcement generally must obtain a search warrant from a “neutral and detached [magistrate](#)” before entering a private space to look for evidence. The Amendment states that “no [Warrants](#) shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The Supreme Court has characterized the probable-cause [standard](#) as “the kind of ‘fair probability’ on which ‘reasonable and prudent’” people act.

To obtain a search warrant, law enforcement must establish probable cause that the [materials sought](#) are contraband or evidence that will “aid in a [particular apprehension](#) or conviction,” or otherwise “seizable by virtue of being connected with [criminal activity](#).” Law enforcement must also demonstrate “a fair probability” that these materials “will be found in a [particular place](#).” (This requirement may include a

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place occupied by a person not “[implicated](#) in the crime.”) The Supreme Court has held that the privacy interest protected by the Fourth Amendment is strongest in [people’s homes](#).

Where a proposed search may [implicate](#) certain constitutional, statutory, or common-law privileges, such as the attorney-client privilege, courts sometimes impose search protocols that law enforcement must follow to preempt potential law enforcement access to privileged material. These processes can involve preliminary review by a “[filter team](#)”—meaning a group of law enforcement agents and prosecutors who are separate from the prosecution team and agree not to disclose any privileged information to the prosecution team. In other situations, where materials might be especially sensitive or otherwise subject to heightened concern, a [judge or a special master](#) can review the government’s privilege determinations or conduct a filter review in the first instance.

DOJ [policy](#) requires certain procedural steps to be taken before law enforcement may execute a search warrant in which a Member of Congress is involved. These steps include consultation with the Department’s Public Integrity Section and the filing of an “[Urgent Report](#)” to Department leadership.

Speech or Debate Background

The [Speech or Debate Clause](#) ensures that, “for any Speech or Debate in either House,” Members of Congress “shall not be questioned in any other Place.” The Clause is a [key pillar](#) in the separation of powers and serves chiefly to protect the independence, integrity, and effectiveness of the legislative branch by barring executive or judicial intrusions into the protected legislative sphere. Despite its text, courts have found the protections afforded by the Clause extend well beyond “speeches” or “debates,” instead providing Members with a series of privileges and immunities in both civil and criminal contexts that are meant to [shield Members](#) from a “hostile judiciary” or “intimidation by the executive.” The Clause does not, however, turn Members into “[super-citizens](#)” by providing them with a blanket exemption from legal liability for all illegal acts. Rather, the Clause shelters only a certain class of actions, known as “[legislative acts](#),” which the Court has defined as conduct that is an “integral part of the deliberative and communicative processes” through which Congress implements “matters which the Constitution places within the jurisdiction of either House.”

The Clause’s protections are implemented in a variety of ways. First and foremost, the Clause provides Members with [absolute immunity](#) from civil or criminal liability for all “legislative acts” taken in the course of their official responsibilities. Second, even where absolute immunity is not applicable, the Clause provides Members with complementary [evidentiary and testimonial privileges](#). The evidentiary component prohibits evidence of legislative acts from being introduced in court for use against a Member, while the testimonial component of the Clause generally may be invoked when a Member is questioned about his legislative acts, either in a trial, before a grand jury, or in a deposition. As a result of the breadth of these protections, criminal prosecution of a Member can be complicated, but this impact on executive enforcement of the law was [fully understood](#) at the time the Clause was adopted and was considered a necessary consequence of protecting legislators from undue influence or intimidation.

Most relevant for this Sidebar, courts have [divided](#) over whether to extend the Clause further to prohibit not only the *use* of legislative act material at trial, but also the mere disclosure of that material to the executive branch—for example, during an administrative or criminal investigation. The U.S. Court of Appeals for the District of Columbia (D.C. Circuit), the federal circuit court with jurisdiction over the District of Columbia, has [held](#) that the Clause includes a “non-disclosure privilege,” which can prohibit the disclosure of protected legislative act documents pursuant to a subpoena or during a search executed as part of a criminal investigation. The [U.S. Court of Appeals for the Ninth Circuit](#) and [U.S. Court of Appeals for the Third Circuit](#) have rejected this “non-disclosure privilege,” considering it an undue expansion of the Clause. Instead, these courts have held, at least in criminal cases, that the Clause

prohibits only the evidentiary use of privileged documents, not disclosure to the government for review as part of an investigation. The disagreement has not been addressed by the Supreme Court.

Intersection of the Fourth Amendment and the Speech or Debate Clause

Various courts have addressed how the Fourth Amendment and the Speech or Debate Clause interact. These cases suggest that whether a search violates the Speech or Debate clause may depend on (1) whether the circuit at issue recognizes a non-disclosure privilege; (2) a fact-specific inquiry as to whether the location of the search is realistically likely to contain legislative materials; and (3) whether a reviewing court views filter team procedures as adequately protective of the privilege.

In *United States v. Rayburn House Office Building*, the D.C. Circuit held that a Federal Bureau of Investigation (FBI) search of Rep. William Jefferson's office pursuant to a warrant obtained from a federal judge [violated](#) the Clause because the manner in which the search was carried out "[denied](#) the Congressman any opportunity to identify and assert the privilege with respect to legislative materials *before* their compelled disclosure to Executive agents" (emphasis added). The FBI had adopted [special procedures](#) for the search (approved by the judge who had issued the warrant), which required that the agents who searched the office have no other role in the investigation. All hard drives in the office were copied, and these copies along with any collected documents were then turned over to a separate filter team, which was required to assess the material [as follows](#):

Materials determined to be privileged or not responsive would be returned without dissemination to the prosecution team. Materials determined by the filter team not to be privileged would be turned over to the prosecution team, with copies to the Congressman's attorney within ten business days of the search. Materials determined by the filter team to be potentially privileged would, absent the Congressman's consent to Executive use of a potentially privileged document, be submitted to the district court for review, with a log and copy of such documents provided to the Congressman's attorney within 20 business days of the search.

These precautions, the court held, [were inadequate](#) under the Clause because they "called for review by FBI agents and the several members of the Justice Department filter team before the Congressman would be afforded an opportunity to identify potentially privileged materials." Any physical act of searching the office, the court reasoned, would inevitably expose the agents to protected legislative materials in violation of the non-disclosure privilege. For that same reason, however, the court held that the [copying of hard drives](#) did not violate the Clause, since no executive branch agents had yet viewed the electronic material. The opinion did not articulate a permissible procedure to be applied when the executive branch obtains a warrant to search a Member's office, but the court did [suggest](#) that an accommodation could be reached whereby the office is "seal[ed]" and the Member is "afforded an opportunity to identify potentially privileged legislative materials prior to any review by Executive agents." Regardless, the D.C. Circuit held that the Member must have the opportunity to assert the protections of the Speech or Debate Clause [prior to](#) executive agents conducting any search of the office.

The majority opinion in *Rayburn* did not directly address whether its holding would extend beyond Members' offices to cover searches of other areas or devices. There was, however, [language](#) in the opinion that could suggest that the principles established in *Rayburn* may appropriately be applied when searches "occur[] in a location where legislative materials [are] inevitably to be found." Moreover, a circuit judge who concurred in the judgment but not in majority's reasoning was critical of the breadth of the majority's non-disclosure privilege, [expressing concern](#) that criminal investigations would be hampered by the need to provide a Member with advance notice "of any search of his property, including

property outside of his congressional office, such as his home or car, and further that he be allowed to remove any material he deemed to be covered by the legislative privilege prior to a search.”

In 2023, the D.C. Circuit [considered](#) the application of the Speech or Debate Clause to an FBI search of Representative Scott Perry’s cell phone pursuant to a search warrant. In that case, the FBI obtained a [warrant to seize](#) and create a forensic digital image of the phone, and then [another warrant](#) to review the contents of that copy. Pursuant to *Rayburn*, the second warrant [provided that](#) Representative Perry “would have an opportunity to assert any claims of privilege under the Speech or Debate Clause before the government could review the phone’s content.” In considering Representative Perry’s claims of privilege, the court [rejected](#) the government’s threshold argument that *Rayburn* should be limited to Members’ physical offices and consequently that the cell phone was not privileged at all. The court wrote that “*Rayburn*, however, explained that the privilege applies whenever the Executive Branch searches ‘a location where legislative materials [a]re inevitably to be found,’” and that a Member’s cell phone “is realistically such a location.”

By contrast, in a [criminal case](#) against Representative Christopher Collins, a judge in the United States District Court for the Southern District of New York (which is located within the jurisdiction of the U.S. Court of Appeals for the Second Circuit) found that certain device and account data obtained by the government pursuant to search warrants was not subject to the Speech or Debate privilege because, as a threshold matter, the Clause did not include a non-disclosure privilege. Further, “[in stark contrast](#)” to the *Rayburn* case, the court found that “the searches did not involve congressional offices or official accounts but were of the personal electronic devices and accounts of certain current and/or former staff members of Defendant Collins.” Finally, the court wrote that “even if the protections provided by the Speech or Debate Clause includes a non-disclosure privilege, [the procedures](#) undertaken by the Government to identify and segregate any protected materials without involving the prosecution team were sufficient under the facts and circumstances presented here.” The government had used a [filter team](#) to ensure that “any materials that were arguably legislative materials potentially protected by the Speech or Debate Clause were not reviewed by or made available to the prosecution team.”

A recently reported [search](#) of a Member’s home occurred in the District of Columbia. As such, under the controlling precedent of *Rayburn*, a court might look to whether the search is of a place “where legislative materials [a]re [inevitably to be found](#).” If so, a court might find that the non-disclosure privilege applies and might require the Member to be given the opportunity to assert the protections of the Clause prior to the disclosure of any privileged materials to executive branch agents. Whether a Member’s home—or a personal office within a home—would be subject to the same protections as a Member’s office appears to be an open question. In [appealing](#) *Rayburn* to the Supreme Court (an appeal that was denied), the Solicitor General warned that the *Rayburn* rule “threaten[ed] to [impede searches](#) of Members’ homes, vehicles, or briefcases.” “Within the District of Columbia,” the Solicitor General [stated](#), “the United States will no longer search for documents in an office of a Member located in his home because of concerns that such a search could (under the court of appeals’ decision) taint an investigation.”

One reason why the *Rayburn* court seemed willing to create procedural guardrails for the executive branch was that the “[historical record](#)” was “utterly devoid” of searches of a Member’s office—the search at issue in *Rayburn* was the “[first time](#) a sitting Member’s congressional office [had] been searched by the Executive.” Executive searches of a Member’s home, though also [rare](#), have reportedly occurred on several [occasions](#). For example, the FBI had [searched](#) Representative Jefferson’s home and found \$90,000 in cash in his freezer before executing a search of his office. While Representative Jefferson filed a motion to [suppress evidence](#) from the search of his home, the motion does not appear to have raised the Speech or Debate privilege.

With respect to the seizure of electronic devices, under the D.C. Circuit’s [opinion](#) regarding Representative Perry’s cell phone, any search or seizure of a Representative’s electronic devices in the District of Columbia—at least if the device is used for official purposes—would likely require the

Representative to be given an opportunity to shield legislative materials from disclosure. The D.C. Circuit’s non-disclosure rule may be applicable not only to the search of a Member’s phone, but also to law enforcement acquisition of [remotely held](#) toll records indicating calls made and received by Member phones. At least one other court has [reasoned](#) that toll records can “fall within the protection of the Speech or Debate Clause,” and the House Judiciary Committee majority interim staff report on the Jack Smith investigation [concluded](#) that non-disclosure orders that barred notification to Members that their records were being disclosed “violated controlling D.C. Circuit precedent stating that a Member must be allowed the ‘opportunity to assert the [Speech or Debate] privilege before the Executive scour[s] his records.’”

Considerations for Congress

Congress has options for protecting potentially privileged material from executive branch search and seizure and has on multiple instances [legislated](#) with respect to executive search and seizure authority. Among Congress’s options, should it seek to enhance protections for potentially privileged materials, is to impose procedural requirements on the execution of search warrants. [Federal Rule of Criminal Procedure 41](#) governs processes for federal search warrants. Congress could choose to impose requirements in that rule to govern the execution of warrants in special circumstances, like requiring filter teams or other safeguards in cases where the search might expose privileged legislative materials. For example, Congress could codify the procedure endorsed in *Rayburn*, requiring that a Member of Congress have an opportunity to review materials being searched prior to law enforcement access to that material.

In another example, following [revelations](#) of law enforcement access to [Senate toll records](#) during the Jack Smith special counsel investigation, Congress [amended](#) 2 U.S.C. § 6628 in 2025 to require that the Senate Sergeant at Arms (SAA) or any third-party provider of an “electronic communication service” or “remote computing service” for a Senate office notify the “Senate office,” whenever the SSA or provider receives a subpoena or other “legal process” for covered Senate data, with certain [exceptions](#) when the Senator is a target of the criminal investigation. The law does not define “legal process,” but that phrase generally can refer to a [variety of processes](#), including [search warrants](#).

Alternatively, Congress may opt to leave the matter to the courts, including waiting to see whether the Supreme Court takes up the non-disclosure privilege in light of the current circuit split.

Author Information

Cassandra J. Barnum
Legislative Attorney

Todd Garvey
Legislative Attorney

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