RECENT CASES

CONSTITUTIONAL LAW — SPEECH OR DEBATE CLAUSE — 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).

The Speech or Debate Clause[1] protects legislators from being questioned about their "legislative acts"[2] by the other branches of government. Although the clause's core purpose is to promote uninhibited debate on legislation, members of Congress have attempted to invoke its privileges when under investigation for corruption or other illegal conduct.[3] Recently, in *In re Grand Jury Subpoenas*,[4] the D.C. Circuit refused to allow a grand jury to subpoena testimony that a Congressman gave to the House Ethics Committee regarding what the Congressman claimed was a legislative factfinding trip,[5] but the media characterized as an illegal golf junket financed by a lobbyist.[6] The court reasoned that the Speech or Debate Clause covered the Congressman's testimony because the testimony was connected to an alleged exercise of his "official powers," as opposed to his personal conduct.[7] As Judge Kavanaugh noted in his concurrence, the circuit's vague distinction between official and personal acts has unnecessarily muddled Speech or Debate Clause doctrine.[8] However, given Supreme Court precedent and the purposes of the Speech or Debate Clause, the solution is not, as Judge Kavanaugh proposed, to broaden the protections for members of Congress under ethical investigation.[9] Rather, the clause's privileges should apply to members' testimony only when it is related to considering, passing, or rejecting potential legislation. Under this test, a member's testimony concerning legislative factfinding would be protected, but a court would allow a grand jury to subpoena ethics committee testimony that is not concerned with any underlying legislative act.

---

[1] U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place.").

[2] Gravel v. United States, 408 U.S. 606, 626 (1972).

[3] *See, e.g.*, United States v. Rayburn House Office Bldg., 497 F.3d 654 (D.C. Cir. 2007). *See generally* Jay Rothrock, *Striking a Balance: The Speech or Debate Clause's Testimonial Privilege and Policing Government Corruption*, 24 TOURO L. REV. 739 (2008).

[4] 571 F.3d 1200 (D.C. Cir. 2009).

[5] *Id.* at 1203.

[6] *See, e.g.*, Tamara Lytle, *2 of Feeney's Trips Violated Ethics Rules: Junkets to Scotland and Asia Were Paid For by a Lobbyist and a Foreign Group, Records Show*, ORLANDO SENTINEL, Mar. 10, 2005, at A1.

[7] *Grand Jury Subpoenas*, 571 F.3d at 1203.

[8] *Id.* at 1203–04 (Kavanaugh, J., concurring).

[9] *See id.* at 1205.

In August 2003, then-Representative Tom Feeney[10] flew to Scotland, where he played golf at St. Andrews.[11] Feeney was accompanied by lobbyist Jack Abramoff, who funded the trip, but Feeney's disclosure forms stated that a nonprofit think tank paid for it.[12] In 2005, when the media first reported Feeney's "junket,"[13] he wrote to the House Ethics Committee to account for the discrepancies.[14] The Committee opened an investigation and found that Feeney had violated House rules, but decided not to censure him when he agreed to donate the cost of the trip to the U.S. Treasury.[15] Subsequently, a grand jury began investigating Feeney's conduct and served subpoenas on his lawyers for his testimony before the Ethics Committee.[16] The Congressman intervened and moved to quash the subpoenas on the ground that the testimony was protected by the Speech or Debate Clause.[17]

In a sealed opinion, District Judge Hogan refused to quash the subpoenas.[18] He reasoned that the Speech or Debate Clause did not protect the testimony because Feeney had not been acting in his official capacity when testifying, but rather in his personal capacity as a witness who had knowledge of facts relevant to the investigation.[19]

The D.C. Circuit reversed.[20] Judge Ginsburg,[21] writing for a unanimous panel, grounded his reasoning in two D.C. Circuit prece-

---

[10] *Grand Jury Subpoenas* did not mention the Congressman's name, but the news media identified Feeney as the legislator in question. *See, e.g.*, Mark K. Matthews, *Feds End Inquiry of Feeney's '03 Junket*, ORLANDO SENTINEL, Aug. 1, 2009, at A1.

[11] Chuck Neubauer & Walter F. Roche Jr., *Golf, and Playing by the Rules: Lobbyist Who Arranged a Junket for DeLay Also Set Up St. Andrews Trips for Two of His Colleagues*, L.A. TIMES, Mar. 9, 2005, at A1.

[12] *See* Lytle, *supra* note 6.

[13] *See* Neubauer & Roche, *supra* note 11.

[14] *See* Lytle, *supra* note 6.

[15] *See* Press Statement, Doc Hastings, Chairman, & Howard L. Berman, Ranking Minority Member, House Ethics Comm., Statement Regarding Representative Tom Feeney (Jan. 3, 2007) [hereinafter Hastings & Berman Statement], *available at* http://ethics.house.gov/Media/PDF/Press%20Statement%20Feeney.pdf. Although the Committee did not specify which rules Feeney had violated, House rules prohibit a congressperson from accepting reimbursements from registered lobbyists for travel expenses "in connection with [the congressperson's] duties as an officeholder," RULES OF THE HOUSE OF REPRESENTATIVES, R. XXV(5)(b)(1)(A), H.R. DOC. NO. 107-284, at 908 (2003), and for "activities . . . which are substantially recreational in nature," *id.*, R. XXV(5)(b)(1)(B), H.R. DOC. NO. 107-284, at 909. *See Grand Jury Subpoenas*, 571 F.3d at 1201.

[16] *Grand Jury Subpoenas*, 571 F.3d at 1201.

[17] *Id.*

[18] *See id.*; Del Quentin Wilber, *Ruling Favors Ex-Congressman and Could Limit Other Investigations*, WASH. POST, Feb. 5, 2009, at A3. Although Judge Hogan's opinion has not been released, the circuit court's opinion and other secondary sources provide an indication of its content.

[19] *See Grand Jury Subpoenas*, 571 F.3d at 1201.

[20] *Id.* at 1203.

[21] Judge Ginsburg was joined by Judges Williams and Kavanaugh.

dents.[22] The first, *Ray v. Proxmire*,[23] involved a Senate Ethics Committee investigation of allegations that a Senator used Senate rooms to benefit his wife's tour business.[24] The *Ray* court held that the Senator's alleged act was "an exercise of his official powers," and therefore his letter to the Ethics Committee responding to the charge was protected by the clause.[25] Judge Ginsburg reasoned that Feeney's statements were similar to those in *Ray* because they too were "directly spurred by the [ethics committee's] inquiry into whether he had abused his office."[26] The second precedent, *United States v. Rose*,[27] involved a House Ethics Committee report on a Congressman who borrowed money from his campaign and failed to disclose the liabilities, in violation of House rules and the Ethics in Government Act.[28] The *Rose* court held that the report was not protected by the clause because "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."[29] Judge Ginsburg distinguished *Rose* by reasoning that it dealt only with "personal financial transactions"[30] that were neither "done [nor] claimed to have been done in [the Congressman's] legislative capacity," whereas Feeney's actions were either a use or abuse of his "official powers."[31] The court therefore concluded that the clause protected Feeney's testimony.[32]

Judge Kavanaugh, who joined the opinion of the court, also wrote a concurrence.[33] Arguing that the distinction between official acts in *Ray* and personal acts in *Rose* "distorts the constitutional text" and "creates a host of practical and jurisprudential difficulties," Judge Kavanaugh urged the court to convene en banc to overturn the test.[34] He reasoned that the Speech or Debate Clause's protections "must be clear and predictable for the privilege to serve its purpose,"[35] but that the existing doctrine was "confus[ing]" and "erratic."[36] Based on his reading of the Constitution and Supreme Court precedent, he argued that

---

[22] *Grand Jury Subpoenas*, 571 F.3d at 1202–03.

[23] 581 F.2d 998 (D.C. Cir. 1978) (per curiam).

[24] *Id.* at 999–1000.

[25] *Id.* at 1000.

[26] *Grand Jury Subpoenas*, 571 F.3d at 1203.

[27] 28 F.3d 181 (D.C. Cir. 1994).

[28] *Id.* at 184.

[29] *Id.* at 188.

[30] *Grand Jury Subpoenas*, 571 F.3d at 1203 (quoting *Rose*, 28 F.3d at 188) (internal quotation marks omitted).

[31] *Id.*

[32] *Id.*

[33] *Id.* (Kavanaugh, J., concurring).

[34] *Id.* at 1204.

[35] *Id.* at 1206.

[36] *Id.* at 1207.

testifying before an ethics committee is itself the relevant legislative act, rather than the action under investigation,[37] and therefore such testimony should always be protected.[38]

Judge Kavanaugh rightly criticized the court's test as opaque and unpredictable.[39] When analyzing *Ray*, the court summarized the Senator's alleged act as "abus[ing] his office to help his wife's travel business."[40] By contrast, the court distinguished *Rose* as an issue of "'personal loans' and 'personal financial transactions.'"[41] The court's official/personal distinction between *Ray* and *Rose* was purely rhetorical.[42] In both cases, as well as in *Grand Jury Subpoenas*, a member, in order to reap personal, nonlegislative rewards, allegedly violated a law that applied specifically to members of Congress. Indeed, even if it were possible to draw a clear line between personal and official conduct, the Supreme Court has explicitly repudiated as overinclusive a reading of the Speech or Debate Clause that protects all official conduct.[43] The D.C. Circuit's analysis thus failed to explain satisfactorily why the Senator in *Ray* and Congressman in *Grand Jury Subpoenas* were protected by the clause while the Congressman in *Rose* was not.

Instead of focusing on the false dichotomy between personal and official activity, the D.C. Circuit should have adhered to the Supreme Court's formulation in *Gravel v. United States*,[44] under which acts protected by the Speech or Debate Clause "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with re-

---

[37] *See id.* at 1206 ("The *Ray* Court went off the rails, in my judgment, by focusing on the *subject matter* of the underlying disciplinary proceeding . . . .").

[38] *Id.* at 1207.

[39] Indeed, attempting to reconcile the D.C. Circuit's precedents into a workable rule was so difficult that "all of the competing parties in [*Grand Jury Subpoenas*] — the Executive Branch, the House of Representatives, and an individual Member of Congress — . . . suggest[ed] that the en banc Court reconsider *Ray*, *Rose*, or both." *Id.* at 1203.

[40] *Id.* (majority opinion). The Senator in *Ray* was also accused of misusing his votes to benefit his wife's customers, but the letter to the Ethics Committee that was the subject of the court's Speech or Debate Clause analysis did not relate to this allegation. *See* Ray v. Proxmire, 581 F.2d 998, 1000 (D.C. Cir. 1978) (per curiam). If the letter had concerned the Senator's voting — a legislative act, not merely an official one — then *Ray* might have been distinguished from *Rose* more sensibly.

[41] *Grand Jury Subpoenas*, 571 F.3d at 1203 (quoting United States v. Rose, 28 F.3d 181, 188 (D.C. Cir. 1994)).

[42] Although the court also described its decision as premised on whether "any act [was] done or claimed to have been done in [the Congressman's] legislative capacity," *id.*, its analysis neither explained whether this legislative/nonlegislative distinction was different from the official/personal distinction nor analyzed the "legislative capacity" issue independently. *See id.*

[43] *See* Gravel v. United States, 408 U.S. 606, 624–25 (1972) ("[T]he Clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature.").

[44] 408 U.S. 606.

spect to other matters which the Constitution places within the jurisdiction of either House."[45] *Grand Jury Subpoenas* involved two distinct acts undertaken by Feeney: first, traveling to Scotland, and second, testifying before the Ethics Committee. If *either* act is protected, Feeney's testimony would qualify for protection.[46]

The first question, therefore, is whether Feeney's trip to Scotland should qualify as a protected legislative act. Under *Gravel*'s formulation, both the allegedly improper use of Senate rooms in *Ray* and the failure to disclose borrowing from campaign funds in *Rose* were clearly unprotected acts; neither was related to the process of legislating, much less an integral part of it. In contrast, legislative factfinding, which is essential to the lawmaking process, should be protected.[47] But a court would not be able to determine whether Feeney's trip qualified as legislative factfinding without engaging in the very questioning that the Speech or Debate Clause circumscribes. Judge Ginsburg's opinion glossed over this problem by privileging all of Feeney's testimony as having some "*connection* [to] . . . [an] act done or *claimed* to have been done in his legislative capacity."[48] The court rightly refused to inquire into whether the trip constituted genuine legislative factfinding, but the court's rule goes too far: claiming that a golf trip was legislative factfinding should not imbue all testimony "connect[ed]" to that trip with the Speech or Debate Clause's protection. Instead, the testimony of a member of Congress should be privileged only insofar as it addresses the legislative nature of his act — in this case, Feeney's motivations for taking the trip and the facts that he found. Questions concerning such essential legislative prerogatives must remain off-limits to courts and grand juries. However, the clause should not protect the portion of Feeney's testimony that addressed who financed his trip and why his disclosure forms falsely claimed that a nonprofit paid for his flight, because those actions were not legislative acts.[49] The clause's protections should not be extended to nonlegislative actions simply because they are "connect[ed]" to what might have been legislative factfinding.

---

[45] *Id.* at 625.

[46] If the act of testifying to an ethics committee does not itself qualify for the clause's protection but the testimony concerns an underlying legislative act that is protected, then the testimony should be protected because it could contain information about Congress's "deliberative and communicative processes," *id.* If the act of testifying to an ethics committee is itself a "legislative act," then any such testimony should be protected, regardless of its subject matter.

[47] The D.C. Circuit also held that legislative factfinding is protected. *See Grand Jury Subpoenas*, 571 F.3d at 1202 (citing McSurely v. McClellan, 553 F.2d 1277, 1286–87 (D.C. Cir. 1976)).

[48] *Id.* at 1203 (emphases added).

[49] When subpoenaed, the privileged portion of a congressman's testimony should be redacted, and certain categories of questions should be forbidden during in-court testimony. *Cf. Gravel*, 408 U.S. at 628–29 (holding that the privilege would be "ampl[y] protect[ed] . . . if it forbade questioning any witness," *id.* at 628, with regard to specific categories of questions).

This leaves the question of whether all ethics committee testimony — independent of its underlying subject matter — should qualify for the Speech or Debate Clause's protection. In his concurrence, Judge Kavanaugh argued that testifying before an ethics committee is inherently a protected legislative act.[50] He reasoned that Congress has the power to "punish its Members for disorderly Behaviour,"[51] and thus that ethics committee testimony constitutes "Speech . . . in either House,"[52] or at least falls within the "other matters which the Constitution places within the jurisdiction of either House" catchall from *Gravel*.[53] The problem with this reasoning is that *Gravel*'s analysis focused only on protecting the process of making laws. After determining that Senator Mike Gravel's actions were not "part and parcel of the legislative process,"[54] the Court did not explore "other matters" the Constitution assigns to the Senate to which the Senator's acts might have been connected.[55] Indeed, that the Court's analysis was limited to how integral Gravel's actions were to the legislative process is best understood as cabining the scope of the clause to what is "essential to legislating,"[56] or at the very least, leaving open the question of what "other matters" might be protected. Because 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,[57] a court must analyze the subject matter of the testimony before granting it the Speech or Debate Clause's protections.

Applying the clause's privileges only to testimony concerned with considering, passing, or rejecting potential legislation would be faithful

---

[50] *See Grand Jury Subpoenas*, 571 F.3d at 1204–05 (Kavanaugh, J., concurring). The majority did not discuss whether testifying might itself be a protected legislative act.

[51] *Id.* at 1204 (emphasis omitted) (quoting U.S. CONST. art. I, § 5, cl. 2).

[52] *Id.* at 1205 (omission in original) (quoting U.S. CONST. art. I, § 6, cl. 1) (internal quotation marks omitted).

[53] *Id.* (emphasis omitted) (quoting *Gravel*, 408 U.S. at 625) (internal quotation mark omitted).

[54] *See Gravel*, 408 U.S. at 626.

[55] In the only two cases in which the Court has found an act to fall outside the essential lawmaking process, it refused to grant the clause's protections. *See id.* (holding that the act of privately republishing legislative committee documents is not protected); United States v. Johnson, 383 U.S. 169 (1966) (holding that legislators' attempts to influence the Executive Branch's administration of a federal statute are not protected when they are "in no wise related to the due functioning of the legislative process," *id.* at 172). In neither case did the Court spend any time inquiring into whether the acts in question were connected to "other matters which the Constitution place[d] within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. It follows that the "other matters" catchall should be understood as dicta insofar as it might be read to extend the clause's protections beyond the lawmaking process.

[56] *Gravel*, 408 U.S. at 621. As the Court explained in a case decided on the same day as *Gravel*, the clause does not protect all conduct "*relating* to the legislative process," United States v. Brewster, 408 U.S. 501, 515 (1972), but rather only those acts that are "clearly a part of the legislative process — the *due* functioning of the process." *Id.* at 516.

[57] District Judge Hogan offered a similar argument. *See Grand Jury Subpoenas*, 571 F.3d at 1201.

to the clause's core purpose of ensuring that Congress remains a "forum[] for robust political discourse."[58] The clause was adopted to protect free speech in the House and Senate, especially from the potential of a President's abuse of authority to question members of Congress who oppose his preferences.[59] Because legislation is at the core of American democracy, the clause specifically gives the legislative process additional safeguards to prevent any chilling of congressional speech by the other branches. However, privileging a member's testimony to an ethics committee on a matter that is unrelated to legislative deliberation does not protect the integrity of the legislature's constitutional function. In such cases, including *Ray*, *Rose*, and *Grand Jury Subpoenas*, the need for the Speech or Debate Clause privilege is at its nadir. Judge Kavanaugh's analysis of the intent of the clause[60] neglected to recognize that its purposes could be effectuated while restricting its scope to members' acts that are integral to the legislative function.

Thorough ethics investigations are especially important because corruption poses a serious threat to the proper functioning of a democracy. The Supreme Court's jurisprudence accordingly "reflect[s] a decidedly jaundiced view towards extending the clause so as to privilege illegal or unconstitutional conduct."[61] Indeed, the clause was fashioned to be "somewhat narrower in scope"[62] than its English forebear, which similarly "preserved the freedom of legislative debate and the force of legislative enactment,"[63] because "the early American experience cautioned against a system of unchecked legislative power."[64] Independent inquiries into potential corruption serve a vital role in protecting the integrity of the legislative process. Although Judge Kavanaugh emphasized that Congress has the power to discipline its

---

58 AKHIL REED AMAR, AMERICA'S CONSTITUTION 102 (2005).

59 Protection from a hostile executive was the original purpose of the Speech or Debate Clause's English predecessor. *See* Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. REV. 879, 894–96 (1985).

60 *See Grand Jury Subpoenas*, 571 F.3d at 1204 (Kavanaugh, J., concurring).

61 *Gravel*, 408 U.S. at 620; *see also Brewster*, 408 U.S. at 526 ("Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act."); United States v. Johnson, 383 U.S. 169, 185 (1966) ("[W]e expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.").

62 Raveson, *supra* note 59, at 896.

63 *Id.* (quoting Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1135 (1973)) (internal quotation mark omitted).

64 *Id.*; *see also* United States v. Rose, 28 F.3d 181, 187 (D.C. Cir. 1994) ("[T]he American speech or debate privilege was to be a more modest shield than its English ancestor . . . ." (citing *Brewster*, 408 U.S. at 508)).

members,[65] Congress faces institutional limitations that inhibit its ability to police itself effectively. The House Ethics Committee need not disclose even the existence of an investigation,[66] allowing the members to protect their own or to trade favors when deciding whether to investigate or to sanction their colleagues. In fact, although the Committee was aware of potential misconduct by Feeney (a Republican) at least as early as March 2005,[67] he did not face any official consequences until January 3, 2007[68] — the day before the Democrats would control the House for the first time since Feeney flew to Scotland.[69] Although this eventual reprimand suggests that interparty competition can produce some checks on corruption, the censure consisted only of a five-sentence press statement that failed even to specify which rules Feeney violated.[70] The *Grand Jury Subpoenas* test gives members of Congress too much protection in criminal investigations by overreading an exception to the checks and balances that accompany separated powers.[71]

The D.C. Circuit's official/personal distinction fails to offer a predictable rule. Although Judge Kavanaugh's proposal would be clearer, it would privilege statements by members even when they are unrelated to legislating, thus sweeping far beyond Supreme Court precedent and the principles of the Speech or Debate Clause. James Madison wrote that "the reason and necessity of the privilege must be the guide" to interpreting the clause.[72] Members of Congress need the privilege of protected speech when they are participating in the legislative process, not when they are responding to an ethics committee investigation that does not concern a legislative act.

---

[65] *Grand Jury Subpoenas*, 571 F.3d at 1204 (Kavanaugh, J., concurring) (citing U.S. CONST. art. I, § 5, cl. 2).

[66] *See* U.S. HOUSE OF REPRESENTATIVES, 111TH CONG., RULES OF THE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT, R. 7, at 12–15 (2009), *available at* http://ethics.house.gov/Media/PDF/111th_Rules_Amended_June_2009.pdf.

[67] *See* Lytle, *supra* note 6.

[68] *See* Hastings & Berman Statement, *supra* note 15.

[69] *See* Jonathan Weisman & Jeffrey H. Birnbaum, *House Democrats Prepare To Tighten Lobbyist Rules*, WASH. POST, Jan. 4, 2007, at A3.

[70] *See* Hastings & Berman Statement, *supra* note 15.

[71] Narrowing the clause so that it does not protect nonlegislative statements might simply result in less forthright ethics committee testimony. But even if that were the case, cabining the clause's protections offers a substantial benefit: eliminating the appearance of impropriety that currently exists when legislators discuss their alleged ethics violations with other legislators behind closed doors, but refuse to repeat those statements to a grand jury.

[72] JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW 88 (2007) (quoting Letter from James Madison to Philip Doddridge (June 6, 1832), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 221 (R. Worthington ed., 1884)) (internal quotation marks omitted).