CONSTITUTIONAL LAW — LEGISLATIVE PRIVILEGE — D.C. CIRCUIT HOLDS THAT FBI SEARCH OF CONGRESSIONAL OFFICE VIOLATED SPEECH OR DEBATE CLAUSE. — *United States v. Rayburn House Office Building*, 497 F.3d 654 (D.C. Cir. 2007), *reh'g en banc denied*, No. 06-3015, 2007 U.S. App. LEXIS 26295 (D.C. Cir. Nov. 9, 2007).

The exact contours of legislative privilege have never been clear in American constitutional law. The privilege's textual root, the Speech or Debate Clause,[1] follows the language of the English Bill of Rights,[2] which sought both to protect legislative independence and to ensure parliamentary supremacy.[3] Yet, in the United States, the Speech or Debate Clause — and with it legislative privilege — must be interpreted in light of the separation of powers structure of our Constitution.[4] Recently, in *United States v. Rayburn House Office Building*,[5] the D.C. Circuit considered the scope of legislative privilege and its effect on an FBI search of a congressional office.[6] In affirming the district court's denial of Representative William Jefferson's motion for the return of all documents obtained in the search of his office,[7] the

[1] U.S. CONST. art. I, § 6, cl. 1.

[2] *Compare id.* ("[F]or any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place."), *with* An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c. 2, § 97 (Eng.) ("That the Freedom of Speech, and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament.").

[3] *See* Alexander J. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present, and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U. L. REV. 1, 3–13 (1968); *see also* United States v. Brewster, 408 U.S. 501, 508 (1972) ("We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy.").

[4] *See Brewster*, 408 U.S. at 508 ("Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system."); Cella, *supra* note 3, at 15 (explaining how England and America's differences led to changes in the concept of legislative privilege in early America); Note, *Evidentiary Implications of the Speech or Debate Clause*, 88 YALE L.J. 1280, 1284–88 (1979) (discussing the background of the Speech or Debate Clause in America).

[5] 497 F.3d 654 (D.C. Cir. 2007), *reh'g en banc denied*, No. 06-3015, 2007 U.S. App. LEXIS 26295 (D.C. Cir. Nov. 9, 2007).

[6] *See id.* at 655.

[7] The court affirmed the denial of Representative Jefferson's motion for the return of *all* documents, but ordered the return of all *privileged* documents — as to be determined by the district court. *See id.* at 665; *see also id.* at 667 (Henderson, J., concurring in the judgment). Therefore, the court's decision had the practical effect of reversing the district court's holding that the search did not violate the Speech or Debate Clause. *Compare In re* Search of the Rayburn House Office Bldg., 432 F. Supp. 2d 100, 116 (D.D.C. 2006) ("[T]he search did not violate the Speech or Debate Clause."), *with Rayburn*, 497 F.3d at 663 ("[W]e hold that a search that allows agents of the Executive to review privileged materials without the Member's consent violates the Clause.").

court held that the search violated the Speech or Debate Clause.[8] Although the court correctly held that compelled disclosure of legislative material within the sphere of "legitimate legislative activity"[9] violated the Congressman's legislative privilege, it went too far in holding that the nondisclosure privilege is absolute in the criminal context. Just as the Supreme Court has qualified the executive privilege in order to preserve separation of powers values, the D.C. Circuit would have better protected those values by similarly limiting the legislative nondisclosure privilege.

During its investigation into allegations that Congressman William Jefferson was involved in a fraud and bribery scheme, the Department of Justice (DOJ) applied for a warrant to search Congressman Jefferson's office.[10] In its warrant request, the DOJ sought nonlegislative evidence and asserted that it "had exhausted all other reasonable methods to obtain these records in a timely fashion."[11] In addition, the DOJ described "special procedures" through which it would screen seized documents to avoid disclosing privileged documents to prosecutors or members of the executive branch other than the three members of the screening team.[12] After finding probable cause for the search, the district court issued the warrant.[13] Two days later, FBI agents entered Congressman Jefferson's office and spent approximately eighteen hours reviewing and seizing paper and electronic documents, some of which were legislative materials.[14] Following the search, the Office of the Deputy Attorney General froze review of the seized documents.[15]

Congressman Jefferson then filed a motion under Federal Rule of Criminal Procedure 41, requesting the return of all seized materials.[16] His motion alleged that the search violated the Speech or Debate Clause and sought to have the FBI and DOJ enjoined from reviewing the materials.[17] The district court denied the motion, holding that "execution of the warrant 'did not impermissibly interfere with Con-

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[8] *See Rayburn*, 497 F.3d at 656.

[9] *Id.* at 667 (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)) (internal quotation marks omitted).

[10] *Id.* at 656 (describing the origins of the DOJ's investigation of the Congressman and its suspicion that he had "accepted financial backing and or concealed payments of cash or equity interests in business ventures located in the United States, Nigeria, and Ghana in exchange for his undertaking official acts as a Congressman while promoting the business interests of himself and [those providing the backing and payments]").

[11] *Id.*

[12] *Id.* at 656–57.

[13] *Id.* at 657.

[14] *See id.*

[15] *Id.* (citing Brief of Appellee at 10, *Rayburn*, 497 F.3d 654 (No. 06-3105)).

[16] *Id.*

[17] *Id.*

gressman Jefferson's legislative activities'"[18] because the warrant's limited scope prevented "undue Executive intrusion."[19]

The D.C. Circuit affirmed the district court's denial of the motion but held that the search violated the Speech or Debate Clause.[20] Writing for the majority, Judge Rogers[21] rested her decision on an extension of the D.C. Circuit's legislative privilege doctrine as most recently articulated in *Brown & Williamson Tobacco Corp. v. Williams*,[22] which addressed nondisclosure of legislative materials in the context of a civil subpoena.[23] The court first explained the historical roots of legislative privilege.[24] It then recounted Supreme Court precedent on the clause, which "has made clear . . . that '[t]he Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.'"[25] Accordingly, the Supreme Court has limited the clause's protection to "conduct that is an integral part of 'the due functioning of the legislative process,'" but has not addressed whether the clause provides a nondisclosure privilege.[26] However, the court noted that its own precedent, established in *Brown & Williamson*, has interpreted the clause as providing a nondisclosure privilege in civil cases.[27]

Judge Rogers concluded that *Brown & Williamson*'s holding controlled the case. She construed that case as "mak[ing] clear that a key purpose of the privilege is to prevent intrusions in the legislative process and that the legislative process is disrupted by the disclosure of legislative material."[28] Next, she stated that *Brown & Williamson*'s "bar on compelled disclosure is absolute."[29] Thus, because Congressman Jefferson was not given a chance to assert his privilege over documents before the FBI reviewed and seized them, the court held that the search violated the Speech or Debate Clause.[30]

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[18] *Id.* (quoting *In re* Search of the Rayburn House Office Bldg., 432 F. Supp. 2d 100, 113 (D.D.C. 2006)).

[19] *Id.*

[20] *See id.* at 663, 665.

[21] Judge Rogers was joined by Chief Judge Ginsburg.

[22] 62 F.3d 408 (D.C. Cir. 1995).

[23] *See Rayburn*, 497 F.3d at 660.

[24] *Id.* at 659.

[25] *Id.* (alteration in original) (quoting Gravel v. United States, 408 U.S. 606, 616 (1972)).

[26] *Id.* (quoting United States v. Brewster, 408 U.S. 501, 513 (1972)).

[27] *Id.* at 660.

[28] *Id.*

[29] *Id.* (citation omitted) (arguing that "[a]lthough *Brown & Williamson* involved civil litigation and the documents being sought were legislative in nature, the court's discussion of the Speech or Debate Clause was more profound and repeatedly referred to the functioning of the Clause in criminal proceedings").

[30] *Id.* at 662–63.

Turning to the question of the proper remedy for the constitutional violation, the court set forth the following principle: "The Speech or Debate Clause protects against the compelled disclosure of privileged documents to agents of the Executive, but not the disclosure of non-privileged materials."[31] In accord with this principle, the court rejected the Congressman's request for the return of all seized documents and ordered the return of only the privileged documents.[32]

Judge Henderson concurred in the judgment. She accused the majority of over-reading *Brown & Williamson*, which she would have limited to situations involving civil subpoena requests for legislative documents.[33] Unlike subpoenas, she argued, search warrants do not require an affirmative act by the targeted party and therefore do not amount to "question[ing]" under the Speech or Debate Clause.[34] Judge Henderson thus argued that *Brown & Williamson*'s nondisclosure rule did not extend to criminal investigations because "it is well settled that a Member is subject to criminal prosecution and process"[35] and because a shield against all disclosure of materials to the executive branch would "jeopardize law enforcement tools 'that have never been considered problematic.'"[36] In short, Judge Henderson agreed with the majority's denial of Congressman Jefferson's motion for the return of all documents, but disagreed with the majority's more doctrinally significant holding[37] that the FBI's review and seizure of legislative documents violated the Speech or Debate Clause.

Over two hundred years after James Madison presciently called for a clearer articulation of the Speech or Debate Clause's scope,[38] courts

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[31] *Id.* at 664.

[32] *Id.* at 666. The court seemed to suggest, however, that the return of all seized documents might be an appropriate remedy when the lack of original documents poses a disruption to the legislative function of a Congressman's office. *See id.* at 665.

[33] *See id.* at 669 (Henderson, J., concurring in the judgment).

[34] *Id.* (quoting *id.* at 660 (majority opinion)).

[35] *Id.* at 670.

[36] *Id.* at 671 (quoting Brief of Appellee at 10, *Rayburn*, 497 F.3d 654 (No. 06-3105)).

[37] Judge Henderson characterized the majority's holdings beyond denial of the motion as dicta. *See id.* at 667. But it is unlikely that future courts will treat the majority's Speech or Debate Clause reasoning as dicta since that reasoning forms the basis for the majority's ultimate holding affirming the district court's denial of the motion.

[38] *See* Cella, *supra* note 3, at 15 (citing JANE BUTZNER, CONSTITUTIONAL CHAFF 47 (1941)). This desire to define clearly the scope of the privilege stands somewhat in contrast to Blackstone's description of the breadth of English parliamentary privileges: "The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite." 1 WILLIAM BLACKSTONE, COMMENTARIES *159. In fact, during a speech on the floor of the Sixth U.S. Senate, Charles Pinckney explained the Founders' intentional break from the undefined English privilege as follows:

> [The Founders] well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here. They knew that in free countries very few privileges were necessary to the undisturbed exercise of legislative duties . . . ; they never meant that the body who ought

still struggle to determine the exact contours of its protections.[39] In *Rayburn*, the D.C. Circuit engaged this struggle as it addressed the question of whether the Speech or Debate Clause prohibits compelled disclosure of legislative materials. The court correctly concluded that the clause confers a legislative privilege against the compelled disclosure of legislative materials to executive branch officials, but it incorrectly enshrined this privilege as absolute. Instead, the court should have better respected the separation of powers rationale underlying the Speech or Debate Clause by qualifying the nondisclosure privilege as the Supreme Court qualified the executive privilege in *United States v. Nixon*.[40]

Although the D.C. Circuit claimed to be following precedent and adhering to the separation of powers rationale undergirding the Speech or Debate Clause,[41] neither precedent nor the separation of powers calls for an absolute nondisclosure privilege. First, relevant precedent does not require the court's absolute privilege. In *Brown & Williamson*, the chief case on which the *Rayburn* court relied, the D.C. Circuit suggested that the absolute nondisclosure privilege it recognized in the civil context should yield to sovereign interests in some situations.[42] The *Rayburn* court acknowledged this suggestion[43] but summarily dismissed the possibility that legislative privilege should yield to sovereign interests in this case.[44] In bypassing this internal limitation on *Brown & Williamson*'s holding, the court expanded the scope of the legislative privilege beyond the dictates of precedent, and it did so without explicit reasoning.

Second, separation of powers principles do not demand the absolute privilege the court conferred. Those principles function to protect each branch from undue intrusions by the other branches, but do not preclude *all* intrusions.[45] In fact, some separation of powers balancing

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> to be the purest, and the least in want of shelter from the operation of laws equally affecting all their fellow citizens, should be able to avoid them . . . .

10 ANNALS OF CONG. 72 (1851).

[39] *See* Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389, 404 (1994) ("The problem that the Supreme Court has repeatedly failed to solve is the definition of those [Speech or Debate Clause] boundaries with precision and consistency.").

[40] 418 U.S. 683 (1974).

[41] *See Rayburn*, 497 F.3d at 660–61.

[42] Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 419–20 (D.C. Cir. 1995) ("*Gravel*'s sensitivities to the existence of criminal proceedings against persons other than Members of Congress at least suggest that the testimonial privilege might be less stringently applied when inconsistent with a sovereign interest . . . .").

[43] *See Rayburn*, 497 F.3d at 660 n.4.

[44] *See id.* at 660, 663.

[45] *See* Mistretta v. United States, 488 U.S. 361, 380 (1989) ("[W]hile our Constitution mandates that 'each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others,' the Framers did not re-

is always required in conflicts involving two branches of the federal government.[46] Importantly, the Supreme Court — and ironically the *Rayburn* court itself — has acknowledged that such balancing concerns should not be ignored when applying the Speech or Debate Clause, especially in criminal cases.[47]

The *Rayburn* court, however, ignored those very balancing concerns in narrowly focusing on legislative independence as an end in itself,[48] rather than as a means toward the end of preserving the separation of powers structure established in the Constitution. Although the court eventually considered separation of powers concerns when addressing remedies,[49] it had already disrupted the balance of power between the branches by ignoring those concerns when delineating the nondisclosure privilege.[50] By failing to balance each branch's respective constitutional interests, the *Rayburn* court effectively ignored the difference between the American and English legislative privileges.[51] In fact, in its attempt to preserve legislative independence, the court inadvertently damaged legislative integrity and the separation of powers — the only legitimate reasons for preserving that independence. As the Supreme Court recognized in *United States v. Brewster*, independence and integrity are inharmonious with corruption and immunity: "[B]ribes . . . gravely undermine legislative integrity and defeat

quire — and indeed rejected — the notion that the three Branches must be entirely separate and distinct." (quoting Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935))); THE FEDERALIST NO. 47, at 297–300 (James Madison) (Clinton Rossiter ed., 1961).

[46] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring). For this reason, courts should avoid overemphasizing one separation of powers protection while ignoring other protections provided to preserve the constitutional structure. By focusing solely on the independence rationale underlying the Speech or Debate privilege and ignoring the other branches' interests, the *Rayburn* majority strengthened legislative privilege beyond its structurally legitimate bounds. On the other hand, the concurrence's overly narrow conception of the Speech or Debate Clause and heavy emphasis on the Executive's law enforcement power similarly disrupted the inter-branch balance sought through the separation of powers.

[47] *See* United States v. Brewster, 408 U.S. 501, 508 (1972) ("Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government."); *Rayburn*, 497 F.3d at 664–65 (quoting *Brewster* for this proposition, but doing so only after determining the scope and strength of the nondisclosure privilege).

[48] *See Rayburn*, 497 F.3d at 660–61.

[49] *See id.* at 664–65.

[50] *See In re* Search of the Rayburn House Office Bldg., 432 F. Supp. 2d 100, 117 (D.D.C. 2006) ("[T]he principle of the separation of powers is threatened by the position that the legislative branch enjoys the unilateral and unreviewable power to invoke an absolute privilege, thus making it immune from the ordinary criminal process of a validly issued search warrant.").

[51] In recognition of the functional difference between the English and American legislative privileges, the Founders affirmatively limited the English concept by providing only for legislative privilege from arrest and the Speech or Debate privilege, while eighteenth-century Parliament enjoyed a wider range of privileges, including protection from service of process, entrance upon members' lands, arrest of members' menial servants, and seizure of members' property. *Compare* U.S. CONST. art. I, § 6, cl. 1, *with* 1 BLACKSTONE, *supra* note 38, at *159–60.

the right of the public to honest representation. Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence."[52]

To better respect the Speech or Debate Clause's underlying separation of powers rationale, the *Rayburn* court should have considered the interbranch conflict at play when delineating the legislative nondisclosure privilege, and accordingly should have set forth a nondisclosure privilege similar to the one established in *United States v. Nixon*. *Nixon* is an appropriate parallel to *Rayburn* because both involved an official's assertion of privilege over confidential materials in response to a criminal prosecution.[53] In *Nixon*, the Supreme Court addressed a conflict between the need for effective law enforcement and the need to preserve the President's ability to receive candid, confidential advice.[54] Similarly, the *Rayburn* court addressed a conflict between the executive branch's law enforcement duties and Representatives' need for advice.[55] Yet, the two courts addressed the conflict at different stages of their respective analyses: the *Nixon* Court addressed the conflict when crafting the executive privilege,[56] while the *Rayburn* court addressed the conflict when considering possible remedies *after* crafting the legislative privilege.[57]

Initially, the qualified executive privilege in *Nixon* might seem inapposite because executive privilege is inferred from structural and functional understandings of the Constitution while legislative privilege derives from an explicit constitutional provision. However, as the *Rayburn* court's analysis makes clear, a legislative nondisclosure privilege is based more on the clause's underlying rationale of protecting the separation of powers by protecting legislative independence, and less on the specific language of the Speech or Debate Clause.[58] Therefore, because the nondisclosure privilege essentially derives from inferred rationales underlying constitutional text, the *Nixon* privilege, which also derives from underlying constitutional rationales, is different only in that it lacks a discrete constitutional origin.

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[52] *Brewster*, 408 U.S. at 524–25.

[53] Although the issue in *Nixon* derived from a conflict between two executive branch officials, a Special Prosecutor and the President, the Court characterized the conflict as an inter-branch conflict between the judicial branch, which issued the subpoena for President Nixon's tapes, and the President, who sought to prevent their release. *See* United States v. Nixon, 418 U.S. 683, 707 (1974).

[54] *Id.* at 705–09.

[55] *See Rayburn*, 497 F.3d at 664–65.

[56] *See Nixon*, 418 U.S. at 707.

[57] *See Rayburn*, 497 F.3d at 663–65.

[58] *See id.* at 659–60.

In *Nixon*, the Supreme Court carefully balanced the President's interest in confidentiality and independence with the courts' interest in the administration of justice. The Court achieved this balance by requiring there to be a "demonstrated, specific need for evidence"[59] to overcome the executive privilege. This formulation effectively respected each branch's interest by recognizing a presumption of privilege[60] but ensuring that the privilege could not insulate political actors from criminal law enforcement.

The conflict in *Rayburn* presented many of the same structural interests at stake in *Nixon*. Like President Nixon, Representative Jefferson had interests in preserving his confidential deliberations and in being free from undue harassment by the other branches. Moreover, in both cases the executive branch had an interest in enforcing the nation's bribery laws and the judicial branch had an interest in ensuring the administration of criminal justice. Just as in *Nixon* — and just as the D.C. Circuit recognized in *Brown & Williamson* — these interests all deserved respect when the *Rayburn* court crafted the nondisclosure privilege within the criminal context. A properly qualified nondisclosure privilege would appropriately balance these interests: Congress would have a presumption of privilege, as required by the Speech or Debate Clause; the Executive would not be stifled in its criminal investigations, as required by the Take Care Clause; and the courts would be able to issue effective search warrants and to administer justice effectively, as required by Article III.

In *Rayburn*, the D.C. Circuit addressed an important question implicating the entire constitutional structure. The court failed to recognize, however, that its conception of the legislative nondisclosure privilege should value not only the legislature's interest in independence, but also the executive's interest in law enforcement and the judiciary's interest in the administration of justice. In other words, the court failed to recognize that constitutional privileges do not exist in a vacuum. By focusing narrowly on legislative independence, the *Rayburn* court not only ignored the other two branches of government, but it also ignored the Supreme Court's guidance in *Nixon* and consequently crafted a nondisclosure privilege more fit for a supreme rather than coequal legislature.

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[59] *Nixon*, 418 U.S. at 713. D.C. Circuit precedent recognizes a nearly identical standard for *Congress* to overcome an assertion of executive privilege: the privileged material must be "demonstrably critical to the responsible fulfillment of the Committee's functions." *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). Thus, the qualified privilege standard has proven apt within the contexts of both criminal prosecutions and conflicts between the two political branches.

[60] *Nixon*, 418 U.S. at 713 ("Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged . . . .").