

5-1-2012

United States v. Renzi: Reigning in the Speech or Debate Clause to Fight Corruption in Congress PostRayburn

A.J. Green

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Constitutional Law Commons](#), and the [Criminal Law Commons](#)

Recommended Citation

A.J. Green, *United States v. Renzi: Reigning in the Speech or Debate Clause to Fight Corruption in Congress PostRayburn*, 2012 BYU L. Rev. 493 (2012).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2012/iss2/8>

This Note is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

United States v. Renzi: Reigning in the Speech or
Debate Clause to Fight Corruption in Congress Post-
Rayburn

I. INTRODUCTION

In *United States v. Renzi*,¹ the United States Court of Appeals for the Ninth Circuit was asked to decide whether a nondisclosure privilege exists under the Speech or Debate Clause (“Clause”) for members of Congress.² The Ninth Circuit boldly refused to recognize such a privilege and found that evidence of a congressman’s “negotiations,” which gave rise to allegations of extortion, mail fraud, wire fraud, and conspiracy, was not protected from disclosure or prosecution.³ The D.C. Circuit had previously concluded that the Clause gave members of Congress a nondisclosure privilege.⁴ The Ninth Circuit nonetheless created a circuit split by holding that such a privilege cuts against Supreme Court precedent and “make[s] Members of Congress super-citizens, immune from criminal responsibility.”⁵ In so holding, the Ninth Circuit correctly reigned in the Clause and refused to recognize a nondisclosure privilege by properly relying upon the Clause’s plain language, the framers’ intent to balance power among the branches of government while preserving Congress’s integrity, and Supreme Court precedent.

This Note argues that the Ninth Circuit’s delineation of the Clause in *Renzi* is correct, and that such an interpretation strikes the proper balance in fighting corruption in Congress while maintaining Congress’s integrity and independence. Part II provides a brief review of the Clause’s legal background. Part III summarizes the relevant facts and procedural history of *Renzi*. Part IV presents a brief discussion of the D.C. Circuit decision from which the Ninth

1. 651 F.3d 1012 (9th Cir. 2011).

2. *Id.* at 1020.

3. *Id.*

4. *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 655–56 (D.C. Cir. 2007).

5. *Renzi*, 651 F.3d at 1023 (quoting *United States v. Brewster*, 408 U.S. 501, 516 (1972)).

Circuit split and provides an in-depth discussion of the Ninth Circuit's reasoning in *Renzi*. Finally, Part V analyzes the delineation of the Clause in *United States v. Rayburn* and *Renzi* and the likely impact of those cases. This Part also explains why *Renzi* more adequately comports with Supreme Court precedent and the plain language of the Clause.

II. SIGNIFICANT LEGAL BACKGROUND

After briefly explaining the Speech or Debate Clause, this Part surveys relevant Supreme Court precedent regarding challenges to the Clause's application. It then concludes by examining *Rayburn*, the D.C. Circuit decision from which *Renzi* split.

A. *The Speech or Debate Clause*

The Speech or Debate Clause provides as follows:

The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and *for any Speech or Debate in either House, they shall not be questioned in any other Place.*⁶

The Supreme Court has explained that the purpose of this Clause is to balance powers within the Federal Government and “assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch,” “thus protect[ing] Members [of Congress] against prosecutions that directly impinge upon or threaten the legislative process.”⁷

Accordingly, the Court has sought to apply the Clause in a way that balances the three branches of government equally while insuring the independence of the legislature.⁸ The Court has interpreted the words “Speech or Debate” to go beyond “words spoken in debate,” but to include “things generally done in a session of the House by one of its members in relation to the business

6. U.S. CONST. art. I, § 6, cl. 1 (emphasis added).

7. *Gravel v. United States*, 408 U.S. 606, 616 (1972).

8. *Brewster*, 408 U.S. at 508.

before it.”⁹ Such protected actions are generally known as “[l]egislative acts.”¹⁰ The Court further defined these protected acts:

[T]hey [are] an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. . . . [T]he courts have extended the privilege to matters beyond pure speech or debate in either House, but “only when necessary to prevent indirect impairment of such deliberations.”¹¹

Legislative acts protected by the Clause enjoy the “benefit of three distinct protections.”¹² The first protection includes immunity from prosecution for such acts,¹³ notwithstanding the motivation behind them.¹⁴ The second provides immunity for both members of Congress and their aides from the requirement to testify regarding those acts.¹⁵ The third protects against introduction of evidence regarding those acts to any jury.¹⁶ Consequently, due to the great protections afforded “legislative acts,” members of Congress under investigation aggressively seek safety under the Clause.

9. *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

10. *Gravel*, 408 U.S. at 625.

11. *Id.* (quoting *United States v. Doe*, 455 F.2d 753, 760 (1st Cir. 1972), *vacated*, *Gravel*, 408 U.S. at 606).

12. *United States v. Renzi*, 651 F.3d 1012, 1020 (9th Cir. 2011).

13. *See Gravel*, 408 U.S. at 616.

14. *United States v. Johnson*, 383 U.S. 169, 180 (1966) (“However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions. The essence of such a charge in this context is that the Congressman’s conduct was *improperly motivated*, and as will appear that is *precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.*” (emphasis added)).

15. *Gravel*, 408 U.S. at 622 (stating that the Speech or Debate Clause does not “immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act”).

16. *Renzi*, 651 F.3d at 1020 (citing *United States v. Helstoski*, 442 U.S. 477, 489 (1979)).

B. *United States v. Rayburn: An Inappropriate Application of the Speech or Debate Clause*

The D.C. Circuit established a nondisclosure privilege under the Clause in *United States v. Rayburn*, concluding that the FBI's search of a congressman's files in his congressional office was improper.¹⁷

In *Rayburn*, Congressman William J. Jefferson was accused of "bribery of a public official, wire fraud, bribery of a foreign official, and conspiracy to commit these crimes."¹⁸ After a finding of probable cause, the district court issued a search warrant for Jefferson's office, the Rayburn House, signed on May 18, 2006.¹⁹ For eighteen hours, from May 20th to the 21st, FBI agents reviewed all paper documents in Jefferson's office and copied all hard drives and electronic data.²⁰ The FBI agents seized numerous documents responsive to the warrant.²¹ The documents and electronic data were then handed over to another team of FBI agents who reviewed the documents again to ensure that only responsive, nonlegislative act materials were handed over to the prosecution.²²

When Congressman Jefferson challenged the constitutionality of the search on May 24, 2006, the district court held that the search did not violate the Speech or Debate Clause.²³ Jefferson subsequently appealed, claiming that prior to the search of his office, he was entitled to the exercise of his nondisclosure privilege under the Clause before the contents of his office were subject to review.²⁴

The circuit court began its analysis by outlining the limits of the Clause established in *United States v. Brewster*.²⁵ It then stated that the Supreme Court had not addressed whether the Clause includes a "nondisclosure" privilege, as Jefferson contended, but that the D.C.

17. *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 656 (D.C. Cir. 2007).

18. *Id.*

19. *Id.* at 657.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 659 (quoting *United States v. Brewster*, 408 U.S. 501, 513 (1972) (limiting the scope of the Speech or Debate Clause to "conduct that is an integral part of 'the due functioning of the legislative process.'")).

Circuit had established such a privilege in *Brown & Williamson Tobacco Corp. v. Williams*.²⁶ The D.C. Circuit then proceeded to expand the scope of the *Brown & Williamson* decision, which established a nondisclosure privilege that protected against compelled production of records in response to a *civil* subpoena. The court extended the same nondisclosure privilege to Congressman Jefferson even though disclosure of his records was effectuated by a criminal search warrant.²⁷

The court reasoned that such an expansion was appropriate by focusing on the Clause's purpose to prevent intrusions and disruptions in the legislative process and the possibility that allowing such searches would "chill the exchange of views [among congressmen] with respect to legislative activity."²⁸ Despite these potential dangers, however, the Ninth Circuit later held in *Renzi* that the potential for members of Congress to abuse such a privilege outweighed any countervailing interests.

III. FACTS AND PROCEDURAL HISTORY

Former Arizona Congressman Richard G. Renzi became a member of the United States House of Representatives in November 2002 and held a seat on the House Natural Resources Committee ("NRC"), which is responsible for approving land exchange legislation before it reaches the House floor.²⁹ Western Land Group, a consulting firm hired by Resolution Mining LLC ("RCC"), approached Renzi in 2005 with a request to draft and sponsor favorable land exchange legislation that would permit RCC to acquire the surface rights to a large copper deposit near Superior, Arizona.³⁰

Congressmen Renzi met with officers from RCC in his congressional office in February 2005 and told them that they would need to purchase property from James Sandlin before he would give them his support.³¹ Renzi did not disclose that Sandlin owed Renzi

26. *Id.* at 660 (citing *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995)).

27. *Id.* at 660–63.

28. *Id.* at 660–62.

29. *Id.* at 1016.

30. *Id.* at 1017.

31. *Id.*

over \$700,000 or that the two men were former business partners.³² When negotiations with Sandlin were unsuccessful, RCC contacted Renzi by phone.³³ During that call, Renzi assured RCC that Sandlin would cooperate in the future.³⁴ However, RCC and Sandlin never reached an agreement.³⁵ When RCC told Renzi about the failed negotiations, Renzi responded, “no Sandlin property, no bill.”³⁶

Less than a week later, Renzi began meeting with another group, “Aries,” a company that desired the same surface rights.³⁷ Renzi again insisted on the purchase of the Sandlin property before he would support any land exchange legislation favoring Aries and again failed to disclose his relationship with Sandlin.³⁸ Renzi then assured Aries that in the event it purchased the Sandlin property, he would make sure the desired “legislation received a ‘free pass’ through the NRC.”³⁹ Within a week, Aries and Sandlin struck a deal.⁴⁰ Sandlin subsequently wrote a \$200,000 check to Renzi Vino, Inc., a company owned by Renzi.⁴¹ Renzi later told Aries that he would introduce its land exchange proposal once the purchase of the Sandlin property was complete.⁴² However, even after the sale closed and Sandlin had paid \$533,000 to another company owned by Renzi, Renzi failed to introduce any land exchange bill.⁴³

Following an investigation, two grand juries returned indictments against Renzi.⁴⁴ The second indictment charged Renzi with “48 criminal counts related to his land exchange ‘negotiations,’ including public corruption charges of extortion, mail fraud, wire fraud, money laundering, and conspiracy.”⁴⁵

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* (emphasis added).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1017–18.

43. *Id.* at 1018.

44. *Id.*

45. *Id.*

In reviewing the indictments, the district court issued three orders.⁴⁶ The first denied Renzi's motion for a *Kastigar*-like hearing⁴⁷ and determined that the Clause protects *use* of legislative act evidence, not *disclosure* of such evidence.⁴⁸ The second order denied Renzi's motion to dismiss on the grounds that his communication with RCC was not protected under the Clause and that there was other evidence sufficient to support the government's claims.⁴⁹ In its third order, the district court refused to suppress evidence "related to Renzi's 'negotiations' with RCC and Aries."⁵⁰ Renzi consequently filed an interlocutory appeal, which was later taken up by the Ninth Circuit.

IV. THE NINTH CIRCUIT'S DECISION

The Ninth Circuit in *Renzi* refused to recognize a nondisclosure privilege under the Speech or Debate Clause.⁵¹ The court concluded that preventing distraction of legislators is only one purpose of the Clause and that claiming distraction alone is insufficient to receive complete protection under the Clause.⁵² It then analyzed other Supreme Court precedent and noted that the Court had reviewed legislative act evidence in numerous cases without ever mentioning whether the disclosure of that evidence had violated the Clause.⁵³

The Ninth Circuit rejected Renzi's claim that his "negotiations" were protected "legislative acts" and that disclosure of those negotiations to the FBI was a violation of the Clause.⁵⁴ Thus, the Ninth Circuit split with the D.C. Circuit's decision in *Rayburn* by

46. *Id.*

47. *Id.* A *Kastigar*-like hearing requires the prosecution to prove that its case is based solely on admitted evidence and does not rely on protected information, like legislative acts protected by the Speech or Debate Clause. *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

48. *United States v. Renzi*, 651 F.3d 1012, 1018 (9th Cir. 2011). "Use" is something beyond mere discovery by FBI agents conducting a valid search; it involves relying on discovered information to support the case against the accused. *See Kastigar*, 406 U.S. at 470–71 (Marshall, J., dissenting).

49. *Renzi*, 651 F.3d at 1018.

50. *Id.*

51. *Id.* at 1032.

52. *Id.* at 1034.

53. *Id.* at 1039 (citing *United States v. Helstoski*, 422 U.S. 477, 480–81 (1979); *United States v. Johnson*, 383 U.S. 169, 173, 177 (1966)).

54. *Id.* at 1032. *But see United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 655–56, 666 (D.C. Cir. 2007).

rejecting *Rayburn*'s holding that the Clause precluded both civil and criminal discovery of any legislative act material, even during a proper search for nonprivileged material.⁵⁵ The Ninth Circuit reasoned that while one purpose of the Clause is to prevent the distraction of legislators from their legislative responsibilities, such distraction alone could not serve as the “‘touchstone’ for the absolute protection of the Clause.”⁵⁶ The Clause’s purpose goes further than merely preventing legislators from distraction; the Clause is also meant to protect against bribery and corruption.⁵⁷ Thus, the Clause was not meant to provide members of Congress an escape from reasonable investigations. To so deprive the Executive of its “power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of congress” would be inconsistent with the Clause’s purpose because “financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation.”⁵⁸

The Ninth Circuit further supported its position by citing numerous Supreme Court cases that addressed the limits of the Clause’s protections.⁵⁹ The *Renzi* court reasoned that because the Clause only precludes the executive and judicial branches from using “legislative act” evidence,⁶⁰ and since the Supreme Court had reviewed legislative act evidence in numerous cases, “with nary an eyebrow raised as to the disclosure,” there was ample evidence that a nondisclosure privilege does not exist under the Clause.⁶¹

55. *Renzi*, 651 F.3d at 1033 (citing *Rayburn*, 497 F.3d at 660).

56. *Id.* at 1034.

57. *Id.*

58. *United States v. Brewster*, 408 U.S. 501, 524–25 (1972).

59. *Renzi*, 651 F.3d at 1038–39 (citing *United States v. Helstoski*, 422 U.S. 477, 487, 490 (1979); *Gravel v. United States*, 408 U.S. 606, 627, 629 (1972); *United States v. Johnson* 383 U.S. 169, 185–86 (1966)).

60. *Id.* at 1038 (quoting *Johnson*, 383 U.S. at 181–82 (“It was not only fear of the executive that caused concern in Parliament *but of the judiciary as well, for the judges were often lackeys of the Stuart monarchs, levying punishment more ‘to the wishes of the crown than to the gravity of the offence.’* There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause.”) (emphasis added)).

61. *Id.* at 1039 (citing *Helstoski*, 422 U.S. at 480–81; *Johnson*, 383 U.S. at 173, 177).

V. ANALYSIS

In holding that the Clause's privilege is one of "use, not non-disclosure,"⁶² the Ninth Circuit properly split with the D.C. Circuit's decision in *Rayburn*. A "use" privilege prevents the Executive from using evidence they have recovered in a proper search that is a protected "legislative act." Conversely, a "non-disclosure" privilege prevents the Executive from even searching material that may constitute "legislative act" evidence without consent of the member of Congress under investigation. The *Rayburn* decision that recognizes a "non-disclosure" privilege under the Clause for members of Congress inappropriately hinders the Executive's ability to investigate members of Congress and threatens the Legislature's integrity. The Ninth Circuit's decision appropriately reined in the protections afforded members of Congress under the Clause and properly delineated its limits in accordance with Supreme Court precedent and the plain language of the Clause.

A. The Problems with Rayburn and Its Impact

The Supreme Court has clearly established that the Clause's purpose is to balance the powers within the federal government.⁶³ However, *Rayburn* upended the balance of power in favor of Congress when it recognized a nondisclosure privilege under the Clause.⁶⁴ The *Rayburn* court's nondisclosure privilege precludes executive branch investigation of any material referencing "legislative acts" even as part of an investigation into unprotected activity" because such investigations distract members of Congress.⁶⁵ This effectively eviscerated the Executive's ability to investigate members of Congress because it prevented the "Executive [from reviewing] privileged materials without the Member's consent."⁶⁶

62. *Id.* at 1018 n.8(citing *Kastigar v. United States*, 406 U.S. 441, 460–61 (1972)) (stating that "[i]n *Kastigar*, the Court held that, when prosecuting an individual who has been granted immunity in exchange for his or her testimony, the Government bears an affirmative burden of demonstrating that it has not used that testimony, or any evidence derivative of that testimony, to further the prosecution").

63. *Gravel*, 408 U.S. at 616.

64. *Renzi*, 651 F.3d at 1032 (citing *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 654–56, 666 (D.C. Cir. 2007)).

65. *Id.*

66. *Id.* at 1033 (citing *Rayburn*, 497 F.3d at 661, 664, 671–72 (Henderson, J., concurring)).

Rayburn thus departed from Supreme Court precedent that clearly established that the Clause “does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases.”⁶⁷ Consequently, *Rayburn*’s expansion of the Clause jeopardizes the balance of power among the government’s branches and threatens the integrity of Congress.⁶⁸

Rayburn’s nondisclosure privilege renders judicial warrants powerless,⁶⁹ deprives the Executive of the power to investigate and prosecute,⁷⁰ and deprives the Judiciary of its constitutional duty to punish criminal misconduct of members of Congress.⁷¹

First, the Executive is deprived of its investigative and prosecutorial power under *Rayburn* because it makes judicial search warrants practically ineffective by requiring a congressman’s consent to execute the search. Any member trying to evade prosecution for criminal activity would logically never consent if such a search would reveal incriminating evidence. Thus, if disclosure to, or discovery by, the executive branch alone violates the Clause, members effectively enjoy a general exemption from “process in Criminal cases,” which is explicitly barred by *Gravel*.⁷² While protecting Congress from improper intimidation by the executive branch is fundamental to the balance of powers in our government, a nondisclosure privilege goes too far because it effectively exempts members of Congress from searches and seizures and strips the Executive of its power by effectively barring searches of a legislator’s property.

Second, the Judiciary is also deprived of its power under *Rayburn* because the practical inability of the Executive to enforce search warrants means that members accused of corruption may never stand before a judge. This inhibits the Judiciary from exercising its duty to define the scope of the Executive’s power to investigate.⁷³ It further deprives the Judiciary of its ability to fulfill its

67. *Gravel*, 408 U.S. at 626.

68. *Williamson v. United States*, 207 U.S. 425, 439 (1908).

69. *Rayburn*, 497 F.3d at 661, 664, 671–72 (Henderson, J., concurring).

70. *United States v. Brewster*, 408 U.S. 501, 525 (1972).

71. *Id.*; *United States v. Nixon*, 418 U.S. 683, 707 (1974).

72. *Gravel*, 408 U.S. at 626 (The Clause “does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true.”).

73. *Nixon*, 418 U.S. at 703–04 (1974) (using cases involving the Speech or Debate Clause to establish the judiciary’s power to delineate the scope of executive privilege).

“primary constitutional duty . . . to do justice in criminal prosecutions”⁷⁴ and to punish bribery of members of Congress.⁷⁵

Thus, the nondisclosure privilege recognized in *Rayburn* disrupts the balance of power among government branches and makes members of Congress akin to “super-citizens.”⁷⁶

B. Renzi’s Proper Delineation of the Clause and its Impact

The *Renzi* court refused to recognize a nondisclosure privilege under the Clause, appropriately concluding that to do so “would require [the court] to agree that there exists some grandiose, yet apparently shy, privilege of non-disclosure that the Supreme Court has not thought fit to recognize.”⁷⁷ *Renzi* followed Supreme Court precedent that had never interpreted the Clause’s plain language to contain a nondisclosure privilege⁷⁸ and properly limited the Clause’s protections. *Renzi* further stated that that the Clause’s privilege applies only to “use, not non-disclosure,” and anchored the distraction analysis,⁷⁹ i.e., an analysis of how much a search will distract a particular member of Congress under investigation, to precluded actions only.⁸⁰ In other words, under *Renzi*, the Executive is allowed to perform properly authorized searches that result in discovery of “legislative act” material protected by the Clause as long as the Executive does not *use* that material.⁸¹ For example, if the FBI conducts a proper search of a member of Congress’s property and that search results in the discovery of material that is a “legislative act,” the Executive cannot introduce that material as evidence in a lawsuit against the member of Congress under investigation.⁸² And a claim that a properly authorized search is improper under the Clause because it inappropriately distracts the member of Congress is proper

74. *Id.* at 707.

75. *Brewster*, 408 U.S. at 525.

76. *Id.* at 516.

77. *United States v. Renzi*, 651 F.3d 1012, 1032 (9th Cir. 2011).

78. *Id.*

79. *Id.* at 1034–35 (referencing *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975) (stating that the Clause serves to protect members from private civil actions that “create[] a distraction and force[] Members to divert their time, energy, and attention from their legislative tasks to defend . . . litigation”)).

80. *Id.* at 1018, 1035 (quoting *United States v. Renzi*, 686 F. Supp. 2d 991, 996 (D. Ariz. 2010), *aff’d*, 651 F.3d 1012 (9th Cir. 2011)).

81. *Id.*

82. *See id.*

only when the search is not already precluded.⁸³ In other words, if the search is only to recover documents that refer to what occurred in a subcommittee hearing, the member of Congress need not prove that the investigation is an improper distraction because the entire search will already be precluded, as it is purely a search of privileged “legislative acts.”⁸⁴

I. Renzi comports with the Clause’s plain language and Supreme Court precedent

As stated earlier, the Supreme Court has clearly established that the Clause’s purpose is to balance the powers within the federal government.⁸⁵ The Court has stated that the Clause was meant to assure legislative independence without making members immune from criminal process.⁸⁶ This precedent comports with the Clause’s plain language that prevents the “question[ing]” of members concerning their legislative acts.⁸⁷

The Clause’s plain language only prevents the executive branch from “question[ing]” legislators,⁸⁸ which logically does not include executing search warrants. This is because “question[ing]” usually implies that a dialogue occurs between the party asking the questions and the party being questioned. Such a dialogue requires the party being questioned to take affirmative action in the form of a response.⁸⁹ This is fundamentally different than the proper execution of a search warrant because no dialogue occurs and no affirmative action or response is required of the individual whose property is searched.⁹⁰ Consequently, a proper search of property under the

83. *Id.*

84. *See id.* at 1035–36 (citing *Gravel v. United States*, 408 U.S. 606, 629 n.18 (1972)).

85. *Gravel*, 408 U.S. at 616.

86. *Id.* at 626.

87. U.S. CONST. art. I, § 6, cl. 1.

88. *Id.*

89. *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 667–71 (2007) (Henderson, J., concurring).

90. *See id.*

authority of a search warrant,⁹¹ even if such a search reveals privileged materials, is not precluded by the Clause.⁹²

Thus, allowing proper searches of members' property seems to comport with the plain language of the Clause, even if it results in the disclosure of some privileged material. The Ninth Circuit's delineation of the Clause that allows for such searches, but prevents the use of privileged material recovered in those searches, strikes an appropriate balance by acknowledging the need for legislative independence without making members of Congress super-citizens, immune from criminal process.⁹³

2. *Renzi affirmed that the Clause's privilege applies to "use, not non-disclosure"*

Renzi limited the Clause's privilege only to *use*,⁹⁴ which preserves the ability of the Executive and Judiciary to act as a check on corrupt members through investigation, prosecution, and punishment. The Ninth Circuit recognized that the criminal investigation of members would most often require discovery of privileged materials (because privileged and nonprivileged materials are likely intermingled),⁹⁵ but realized that such discovery, although it could threaten legislative independence, is often necessary to discover important nonprivileged evidence and is thus permissible.

The Ninth Circuit further established that when improperly redacted, privileged materials are introduced as evidence in trial, a

91. *United States v. Nixon*, 418 U.S. 683, 713 (1974) ("Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases. . . . The generalized assertion of privilege *must yield to the demonstrated, specific need for evidence in a pending criminal trial.*" (emphasis added)).

92. *Rayburn*, 497 F.3d at 667-71 (Henderson, J., concurring).

93. *United States v. Brewster*, 408 U.S. 501, 516 (1972).

94. The court in *Renzi* did not define "use." However, the court's analysis makes it clear that "use" is something beyond disclosure. *United States v. Renzi*, 651 F.3d 1012, 1018 (9th Cir. 2011). Consequently, it is reasonable to apply a standard definition of "use." Thus, when the Executive searches a Congressman's property and finds privileged material, that material has been disclosed, but it is not "used" until the Executive takes some action with that material to accomplish a purpose. DICTIONARY.COM, <http://dictionary.reference.com/browse/use> (last visited Mar. 9, 2012).

95. John D. Pingel, Note, *Do Congressmen Still Pay Parking Tickets? The D.C. Circuit's Overextension of Legislative Privilege in United States v. Rayburn House Office Building*, 42 U.C. DAVIS L. REV. 1621, 1640-41 (2009).

trial court's decision should be struck down only if the other nonprivileged evidence admitted was not sufficient to support the court's holding.⁹⁶ This decision puts members subject to suit in the Ninth Circuit on notice that the Clause does not act as a shield for corruption.⁹⁷ However, *Renzi* did aim to protect members compelled to act as third-party witnesses from distraction and thus keep the Executive and Judiciary in check by "foreclos[ing] improvident harassment and fishing expeditions."⁹⁸

3. Renzi refused to recognize a nondisclosure privilege, but provided a distraction analysis as a means to protect members of Congress serving as third-party witnesses

Renzi properly denied the existence of any nondisclosure privilege under the Clause. However, it also provided that in proper searches that are likely to result in the discovery of both privileged and nonprivileged material under the Clause, the level of distraction imposed on members of Congress serving as third-party witnesses by an investigation should be analyzed to protect them when the distraction becomes unreasonable.⁹⁹

In third-party crimes a distraction analysis is needed because the Supreme Court made clear in *Gravel* that a third-party witness who is also a member of Congress may be subject to interrogation regarding other members' legislative acts in grand jury investigations and criminal trials.¹⁰⁰ In such cases, questioning a member-witness can sometimes threaten legislative independence.¹⁰¹ Accordingly,

96. *Renzi*, 651 F.3d at 1027–32.

97. *Id.* at 1029 (quoting *United States v. Swindall*, 971 F.2d 1531, 1548 (11th Cir. 1992)) ("We think *Swindall* represents an elegant solution to an awkward problem—how to provide a remedy sufficiently measured that it protects a Member's privilege without transforming the shield of the Clause into a sword that unscrupulous Members might wield to avoid prosecution for even unprotected acts. We therefore adopt that standard [that '[i]f reference to a legislative act is irrelevant to the decision to indict, the improper reference has not subjected the member to criminal liability [and] [t]he case can proceed to trial with the improper references expunged'] and look behind the face of the indictment to evaluate whether Clause materials *caused* the grand jury to indict.").

98. *Id.* at 1036 (quoting *Gravel v. United States*, 408 U.S. 606, 620 n.18 (1972)).

99. *Id.* at 1035 ("[C]oncern for distraction *alone* precludes inquiry *only* when the underlying action is itself precluded . . .").

100. *Gravel*, 408 U.S. at 629 n.18.

101. *Cf.* *United States v. Nixon*, 418 U.S. 683, 703–04 (1974) (citing cases involving the Speech or Debate Clause that establish the judiciary's power to delineate the scope of executive privilege).

Renzi found a case-by-case distraction analysis appropriate.¹⁰² However, *Renzi* limited the power of the distraction analysis by stating that distraction alone should never serve as the “touchstone for the absolute protection of the Clause.”¹⁰³ The court stated that the potential for distraction should be considered in cases where members or their aides are interrogated as third-party witnesses concerning the legislative acts of other members of Congress.¹⁰⁴ Protecting members from such interrogations undoubtedly gives peace of mind to members who are participating in legitimate deal-making and compromising that goes on in Congress. Without that peace of mind, it is inevitable that less legislation would get passed because members would fear that those outside the legislature would misinterpret such legitimate deals and members would lose the support of their constituents. Thus, *Renzi*’s delineation of the Clause promotes the legislature’s independence without preventing other branches from investigating and deterring corruption in Congress.

VI. CONCLUSION

The Ninth Circuit’s decision in *Renzi* appropriately reined in the potentially broad protections of the Speech or Debate Clause. Both the Clause and Supreme Court precedent are silent about prohibiting disclosures of legislative acts in a proper search and merely prohibit “questioning” members of Congress about those acts. Thus, *Renzi*’s decision to allow proper searches and subsequent disclosures of legislative-act material to the Executive, but prohibit the use of recovered privileged material, comports with the Clause’s plain language. The allowance for disclosure and prohibition on use of legislative-act material complies with the Clause’s purpose of protecting Congress’s independence without unduly inhibiting the Executive and Judiciary in investigating and prosecuting members of Congress. *Renzi*’s suggested use of a distraction analysis to protect members of Congress from serving as third-party witnesses also preserves Congress’s integrity; it assures that members will not be forced to act as third-party witnesses against other members if it would result in an unreasonable distraction from their legislative duties. Thus, the Ninth Circuit’s decision properly reined in the

102. See *Renzi*, 651 F.3d at 1036–37.

103. *Id.* at 1036.

104. *Id.*

Speech or Debate Clause to protect legislative independence without making Congress a shelter for corruption.

*A.J. Green**

* J.D. candidate, April 2013, J. Reuben Clark Law School, Brigham Young University.