

CONGRESSIONAL CRIMINALITY AND BALANCE OF POWERS: ARE INTERNAL FILTER TEAMS REALLY WHAT OUR FOREFATHERS ENVISIONED?

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Mark Twain once quipped: “It could probably be shown by facts and figures that there is no distinctly American criminal class except Congress.” Will Rogers said, “Congress is the best money can buy.”¹

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.²

PREFACE: A LATE NIGHT RAID ON CONGRESS

On the night of May 20, 2006, the Federal Bureau of Investigation (FBI) executed an unprecedented search warrant on Congressman William J. Jefferson’s office in the Rayburn House Office Building in Washington, D.C.³ The search, which lasted all night and well into the next day, was part of a Department of Justice (DOJ) investigation into allegations that Jefferson accepted bribes from a technology company and was involved in wire fraud, conspiracy, and the attempted bribery of African officials.⁴

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¹ L. Peter Schultz, *Introduction to SEPARATION OF POWERS AND GOOD GOVERNMENT* 185 (Bradford P. Wilson and Peter W. Schramm, eds., 1994) (citation omitted).

² THE FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1999) (1961).

³ Philip Shenon, *F.B.I. Contends Lawmaker Hid Bribe in Freezer*, N.Y. TIMES, May 22, 2006, at A1 (“F.B.I. officials said the raid, which began about 7:15 p.m. Saturday and ended early Sunday afternoon, was the first the agency had ever conducted at a lawmaker’s office on Capitol Hill.”).

⁴ *Id.* at A1, A17. “The search warrant . . . accused Mr. Jefferson . . . of accepting bribes to help a small technology company win contracts with federal agencies and with businesses and governments in West Africa. Mr. Jefferson . . . is one of several members of Congress who are under scrutiny by the Justice Department on corruption charges.” *Id.* at A1. “[T]he F.B.I. said its investigation of Mr. Jefferson began in March 2005 and had turned up

Because the search warrant was to be executed on a congressional office, the FBI and the DOJ “decided to adopt special procedures in order to minimize the likelihood that any potentially politically sensitive, non-responsive items in the Office [would] be seized and provided to the Prosecution Team.”⁵ These procedures included the use of a filter team composed of one attorney from the Office of the U.S. Attorney for the Eastern District of Virginia, one attorney from the DOJ, Criminal Division, Fraud Section, and a non-case FBI special agent.⁶

The filter team reviewed seized paper and computer records to determine whether each document was responsive to a list of items provided in the search warrant.⁷ Responsive items next underwent a second level of review, during which the filter team determined whether the records fell under the Speech or Debate Clause privilege⁸ of the U.S. Constitution.⁹ The filter team turned over documents they deemed to be non-privileged to the prosecution team immediately, with no judicial review or verification.¹⁰ Jefferson was not afforded an opportunity to assert his privilege or to challenge the government’s determinations of whether the privilege applied to seized material.¹¹ The filter team then created a log of potentially privileged records identified by date, recipient, sender, and subject matter, which was at some point provided to Jefferson’s counsel.¹² The filter team requested that the district court further review potentially privileged records to make a final determination of whether, in fact, the privilege applied.¹³

The FBI’s raid on Jefferson’s Capitol Hill office sparked a storm of political controversy in the media and among congressional leaders. The raid was called “surprising,”¹⁴ an exercise of “broad executive authority,”¹⁵ and “a dangerous

evidence of various crimes by the lawmaker, including bribery, wire fraud, conspiracy and attempted bribery of officials of foreign governments in Nigeria and Ghana.” *Id.* at A17.

⁵ Application and Affidavit for Search Warrant at ¶¶ 136–55, *In re Search of Rayburn House Office Bldg. Room No. 2113 Wash., D.C. 20515, No. 06-231-M-01 (D.D.C. 2006)*, available at <http://www.citizensforethics.org/filelibrary/ApplicationforSearchWarrant.pdf> [hereinafter Search Warrant].

⁶ *Id.* at ¶ 139.

⁷ *Id.* at ¶¶ 138, 151. The schedule of responsive items is entirely redacted from the publicly available version of the Search Warrant. *See id.* at Schedule B.

⁸ U.S. CONST. art. I, § 6, cl. 1.

⁹ Search Warrant, *supra* note 5, at ¶¶ 140–41, 150–51.

¹⁰ *Id.* at ¶¶ 141–42, 151, 152 n.40.

¹¹ Memorandum in Support of Motion for Return of Property at 15, *In re Search of Rayburn House Office Bldg. Room No. 2113 Wash., D.C. 20515, No. 06-231-M-01 (D.D.C. 2006)* [hereinafter Motion Memorandum for Return of Property].

¹² *Id.* at 6; Search Warrant, *supra* note 5, at ¶¶ 142, 152.

¹³ Search Warrant, *supra* note 5, at ¶¶ 143, 154.

¹⁴ Carl Hulse, *F.B.I. Raid Divides G.O.P. Lawmakers and White House*, N.Y. TIMES, May 24, 2006, at A1 [hereinafter Hulse, *F.B.I. Raid*].

¹⁵ *Id.*

precedent.”¹⁶ Then-Speaker of the House Dennis Hastert condemned the search in a rare joint statement with then-House Minority Leader Nancy Pelosi: “The Justice Department was wrong to seize records from Congressman Jefferson’s office in violation of the constitutional principle of separation of powers, the speech or debate clause of the Constitution, and the practice of the last 219 years.”¹⁷

Amidst these “cries of constitutional foul,”¹⁸ Jefferson and his attorney, Robert Trout, filed a Motion for Return of Property with the U.S. District Court for the District of Columbia.¹⁹ A memorandum filed in support of the motion stated that “[t]he delicate balance of our democratic system was disrupted when the court authorized the executive branch to search the Member’s office and peruse and remove Speech or Debate material.”²⁰ In a memorandum opinion, Chief Judge Thomas Hogan²¹ denied Jefferson’s motion and upheld the constitutionality of the search, ruling that the FBI’s raid did not violate the separation of powers principle or the Constitution’s Speech or Debate Clause.²² On February 28, 2007, Jefferson asked a federal appeals court to force the DOJ to return all seized documents.²³ On June 4, 2007, the grand jury returned a sixteen count, ninety-four page indictment²⁴ against Jefferson in the Eastern District of Virginia.²⁵ Jefferson’s appeal of Hogan’s ruling was decided by the D.C. Circuit on August 3, 2007.²⁶ The court ordered the return

¹⁶ *Id.* at A22 (“But lawmakers of both parties said they had no interest in protecting criminal activities or Mr. Jefferson. Their fear, they said, is that the search set a dangerous precedent that could be used by future administrations to intimidate or harass a supposedly coequal branch of the government.”).

¹⁷ Carl Hulse, *House Leaders Demand Return of Seized Files*, N.Y. TIMES, May 25, 2006, at A1.

¹⁸ Hulse, *F.B.I. Raid*, *supra* note 14, at A1.

¹⁹ Motion for Return of Property and Emergency Motion for Interim Relief at 1, 3, *In re Search of Rayburn House Office Bldg. Room No. 2113 Wash., D.C. 20515*, 434 F. Supp. 2d 3 (D.D.C. 2006) (No. 06-231-M-01).

²⁰ Motion Memorandum for Return of Property, *supra* note 11, at 13.

²¹ Interestingly, Hogan is the same judge who signed the search warrant. *See Search Warrant*, *supra* note 5. It is unlikely that Hogan would have reached any other result than the one he did in *In re Search* as he had previously approved the special search procedures when he issued the search warrant, and, had he granted Jefferson’s Motion for Return of Property, Hogan would have effectively overruled himself. *See In re Search of Rayburn House Office Bldg. Room No. 2113 Wash., D.C. 20515*, 432 F. Supp. 2d 100 (D.D.C. 2006).

²² *In re Search*, 432 F. Supp. 2d at 104–05.

²³ *Jefferson Attorneys Call for Return of Raided Documents*, CongressDaily, Mar. 1, 2007.

²⁴ *Louisiana Congressman Pleads Not Guilty in Bribery Case*, N.Y. TIMES, June 9, 2007, at A10 [hereinafter *Congressman Pleads*].

²⁵ Press Release, U.S. Dep’t of Justice, *Congressman William Jefferson Indicted on Bribery, Racketeering, Money Laundering, Obstruction of Justice, and Related Charges* (June 4, 2007), available at http://www.usdoj.gov/opa/pr/2007/June/07_crm_402.html.

²⁶ *United States v. Rayburn House Office Bldg. Room 2113 Wash., D.C. 20515*, No. 06-3105, 2007 WL 2275237 (D.C. Cir. Aug. 3, 2007).

of all privileged documents seized in the FBI raid.²⁷ As of this writing, Jefferson has pleaded not guilty to the charges against him.²⁸

INTRODUCTION

This Note will examine the use of internal filter teams²⁹ during criminal investigations of members of Congress.³⁰ It is the position of this Note that such teams, made up solely of executive branch officials, violate the Constitution's Speech or Debate Clause privilege and the principle of separation of powers, which is central to American government.³¹

This Note argues that the dual theories of separation of powers and checks and balances demand a greater role for judges during investigations of members of Congress, and that this role includes neutral intervention between the executive and the legislature through the creation of independent filter teams. The executive's zealous public integrity investigations "have created an unprecedented potential for abuses that not only endanger the constitutional rights of private citizens, but may threaten the balance of power between the executive and Congress."³² Some scholars warn that "members of Congress are uniquely vulnerable to abusive exercises of prosecutorial discretion."³³ In light of the apparent recent rise in congressional corruption scandals,³⁴ it is increasingly important to develop search procedures that

²⁷ *Id.* at *10.

²⁸ *Congressman Pleads*, *supra* note 24, at A10.

²⁹ Filter teams are also commonly known as "taint teams" or "privilege teams." See Heidi Boghosian, *Taint Teams and Firewalls: Thin Armor for Attorney-Client Privilege*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 15, 21 (2003).

³⁰ The author makes no claim as to whether any privileged materials have been wrongly used thus far in the Jefferson case, nor whether Jefferson is innocent or guilty of the charges against him. This Note will address only the constitutionality of the procedures used during the search of the Rayburn House Office Building on May 20–21, 2006.

³¹ Filter teams have been questioned—and in some instances, rejected—in other contexts, especially that of attorney-client privilege. See, e.g., *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) (holding the use of a government taint team "inappropriate" and "a serious risk to holders of privilege"); *United States v. Hunter*, 13 F. Supp. 2d 574, 583 n.2 (D. Vt. 1998) ("It may be preferable for the screening of potentially privileged records to be left not to a prosecutor behind a 'Chinese Wall,' but to [the judiciary]."); Boghosian, *supra* note 29, at 21 (discussing danger that "the Department of Justice . . . team member's motives and objectives will be in accordance with those of the prosecution").

³² Anita Bernstein, Note, *Executive Targeting of Congressmen as a Violation of the Arrest Clause*, 94 YALE L.J. 647, 647 (1985).

³³ Brian A. Cromer, Comment, *Prosecutorial Indiscretion and the United States Congress: Expanding the Jurisdiction of the Independent Counsel*, 77 KY. L.J. 923, 925 (1989).

³⁴ See, e.g., Editorial, *Locking up the Ghost of Congress Past*, N.Y. TIMES, Mar. 3, 2007, at A14 (discussing a proposed independent integrity office to investigate congressional ethics violations); Editorial, *The Odor from Capitol Hill*, N.Y. TIMES, Oct. 18, 2006, at A22 (reviewing several recent congressional scandals).

will allow criminal investigations to go forward while guarding the speech or debate privilege and the separation of powers. Therefore, in order to comply with the Supreme Court's direction that the speech or debate privilege be applied broadly,³⁵ this Note proposes judicial creation of independent filter teams for future interbranch investigations.

These filter teams would be wholly removed from the executive branch, temporary, and answerable to the judiciary. The proposed filter teams would exist only to review potentially privileged material and make determinations as to whether the privilege applies. The utilization of such teams more adequately protects the Speech or Debate Clause privilege and the separation of powers, and in doing so raises the legitimacy of future criminal investigations into Congress.

This Note will conclude that such interbranch appointments are constitutional. The members of the filter teams would likely be classified as agents or employees and could therefore be appointed at the discretion of a judge with no prior authorization from Congress. If, however, the members of the filter teams were determined to be officers of the United States, the appointments would still be constitutional under the Supreme Court's existing Appointments Clause analysis because the members would be classified as inferior officers. Furthermore, there would be no incongruity in judicially created filter teams because federal judges are, in fact, uniquely well-positioned for this task. Such appointments would therefore not offend the separation of powers principle or the Constitution.

In Part I, this Note will discuss the purpose and application of the Speech or Debate Clause privilege and its place in the American structure of separated powers. Then, in Part II, the analysis will shift to the judiciary's unique checking and balancing role, particularly in the context of applying the Speech or Debate Clause privilege through analogy to the executive privilege. Finally, in Part III, this Note will propose that the appointment of external filter teams is constitutional through analogy to independent counsel.

I. THE SPEECH OR DEBATE CLAUSE PRIVILEGE

Article I, Section 6, Clause 1 of the Constitution provides:

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.³⁶

³⁵ See *infra* notes 54–59 and accompanying text.

³⁶ U.S. CONST. art. I, § 6, cl. 1.

The Speech or Debate Clause was included in the Constitution to protect legislators from being targeted for criminal prosecution as political retaliation.³⁷ Although the privilege belongs to each individual member of Congress,³⁸ the Framers added this protection not to shield members from criminal liability,³⁹ but rather to protect the coequal status and independence of the legislature in the American system of separated powers.⁴⁰ In *United States v. Brewster*, the Court held that the Clause must be applied “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.”⁴¹ It is this careful balance and a desire to protect the independence of the legislature that motivated the Framers to include the Speech or Debate Clause in the Constitution,⁴² and the privilege remains a central part of the American ideal of separation of powers.⁴³

As the Court described in *Brewster*, “the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members.”⁴⁴ It is accepted universally that the Speech or Debate Clause does not immunize members of Congress from criminal liability for

³⁷ *United States v. Johnson*, 383 U.S. 169, 182 (1966) (“There is little doubt that the instigation of criminal charges against critical or disfavored legislators . . . is the predominate thrust of the Speech or Debate Clause.”).

³⁸ *United States v. Helstoski*, 442 U.S. 477, 493 (1979) (“[T]he privilege secured . . . is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, *even against the declared will of the house.*”) (quoting *Coffin v. Coffin*, 4 Mass. (1 Tyng) 1, 27 (1808)).

³⁹ *See Kilbourn v. Thompson*, 103 U.S. 168, 203 (1880) (“These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit”) (quoting *Coffin*, 4 Mass. (1 Tyng) at 27)).

⁴⁰ *See* Louis Fisher, *The Allocation of Powers: The Framers’ Intent*, in SEPARATION OF POWERS IN THE AMERICAN POLITICAL SYSTEM 19, 22 (Barbara B. Knight ed., 1989) (“The courts have consistently held that the immunities offered by this Clause exist not simply for the personal or private benefit of members ‘but to protect the integrity of the legislative process by insuring the independence of individual legislators.’”) (quoting *United States v. Brewster*, 408 U.S. 501, 507 (1972)).

⁴¹ 408 U.S. at 508.

⁴² *See Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 502 (1975) (“The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently.”).

⁴³ *Helstoski*, 442 U.S. at 491 (stating that the clause works “to preserve the constitutional structure of separate, coequal, and independent branches of government”); *United States v. Johnson*, 383 U.S. 169, 178 (1966) (“In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.”); Bernstein, *supra* note 32, at 662 (“By expressing the separateness of the legislature with respect to freedom from arrest and freedom of debate, the privileges clause comes closer than any other textual provision to a constitutional affirmation of institutional integrity as mandated by separation of powers.”).

⁴⁴ 408 U.S. at 525.

bribery and other acts of corruption, as the Court stressed in *Gravel v. United States* when it stated, “Article I, § 6, cl. 1, as we have emphasized, does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases.”⁴⁵

What is not so clear, however, are the precise protections the Clause affords to members of Congress who are under criminal investigation.⁴⁶ The Clause is commonly recognized as providing two separate privileges: one of “free[dom] from arrest while attending or traveling to or from a session” and one of protection “from questioning in any other place for any speech or debate in either House.”⁴⁷ The testimonial privilege “operates to protect those to whom it applies from being compelled to give testimony as to privileged matters, and from being compelled to produce privileged documents.”⁴⁸ To qualify for the privilege, documents and other materials must be part of a legitimate legislative act, defined as “an act generally done in Congress in relation to the business before it.”⁴⁹ However, not everything a senator or representative might do can logically be a privileged act.⁵⁰ The act or material in question must be “an integral part of the deliberative and communicative processes” of Congress

⁴⁵ 408 U.S. 606, 626 (1972); *see also In re Search of the Rayburn House Office Bldg. Room No. 2113 Wash., D.C. 20515*, 432 F. Supp. 2d 100, 112 (D.D.C. 2006) (“The purpose of the Speech or Debate Clause is not to promote or maintain secrecy in legislative activity.”); Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105, 110 (1995) (“[F]ederal criminal laws apply to congressmen. This fact exposes them to the full powers of investigation and prosecution of the Department of Justice. . . . Prosecutions for crimes such as bribery . . . have succeeded even though they present tricky problems of avoiding intrusion on the Speech or Debate privilege of the members.” (citations omitted)); Bernstein, *supra* note 32, at 662–63 (“Legislative privilege is a force for equality between branches, not superiority of congressmen over their fellow citizens.”).

⁴⁶ *See, e.g.,* Bruff, *supra* note 45, at 124 (discussing how “the Court accommodates criminal law to the privilege by defining the elements of a crime to steer clear of any need for proof of legislative acts”); Michael R. Seghetti, Note, *Speech or Debate Immunity: Preserving Legislative Independence While Cutting Costs of Congressional Immunity*, 60 NOTRE DAME L. REV. 589, 594 (1985) (“While the object of the bribe, the congressman’s action in a session of Congress, falls within the definition of speech or debate, the deal-making performed outside of Congress is not protected.”).

⁴⁷ *In re Search*, 432 F. Supp. 2d at 109–10.

⁴⁸ Motion Memorandum for Return of Property, *supra* note 11, at 9–10.

⁴⁹ *Brewster*, 408 U.S. at 512.

⁵⁰ *See Doe v. McMillan*, 412 U.S. 306, 313 (1973) (“Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause.”); *see also Gravel*, 408 U.S. at 625 (“Legislative acts are not all-encompassing. The heart of the Clause is speech or debate As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but ‘only when necessary to prevent in direct impairment of such deliberations.’” (quoting *United States v. Doe*, 455 F.2d 753, 760 (1st Cir. 1972))).

that falls within “the legislative sphere.”⁵¹ “Committee reports, resolutions, and the act of voting” are within the legislative sphere,⁵² as is information-gathering.⁵³

The privilege’s jurisprudential history, while relatively meager,⁵⁴ indicates that the Clause was traditionally interpreted broadly in order to afford congressmen the most protection possible.⁵⁵ The Court in *Kilbourn v. Thompson* held that the Clause “ought not be construed strictly, but liberally, that the full design of it may be answered.”⁵⁶ In *Gravel* the Court stated, “[P]rior cases have plainly not taken a literalistic approach in applying the privilege. The Clause . . . speaks only of ‘Speech or Debate,’ but the Court’s consistent approach has been that to confine the protection . . . to words spoken in debate would be an unacceptably narrow view.”⁵⁷ Furthermore, when applicable, the privilege is “absolute,”⁵⁸ and there is no balancing test used by courts.⁵⁹

Because neither the FBI nor any other executive branch agency saw fit to raid a congressional office prior to the Jefferson case,⁶⁰ proper search procedures to protect the legislative privilege and separation of powers have never been addressed. In his *In re Search* decision, Chief Judge Hogan held that “[t]he Speech or Debate Clause is not undermined by the mere incidental review of privileged legislative material”⁶¹ and that “[t]he Government’s incidental and cursory review of documents covered by the legislative privilege, in order to extract non-privileged evidence, does not constitute an intrusion on legitimate legislative activity.”⁶² Hogan is correct that the Clause appears to contain no express prohibition against executive branch officials merely *viewing* privileged material. Notwithstanding this, he failed to adequately recognize the danger of late-night, unsupervised executive branch seizures of privileged documents to be “filtered” later.⁶³

⁵¹ *Gravel*, 408 U.S. at 624–25.

⁵² *Id.* at 617.

⁵³ *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)).

⁵⁴ The Clause was not construed by the Supreme Court until 1881, and since then, it has been interpreted less than a dozen times. JOHN C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE 196 (1988).

⁵⁵ See *Eastland*, 421 U.S. at 501 (“Without exception, our cases have read the Speech or Debate Clause broadly to effectuate its purposes.” (emphasis added)).

⁵⁶ 103 U.S. 168, 203 (1880) (quoting *Coffin v. Coffin*, 4 Mass. (1 Tyng) 1, 27 (1808)).

⁵⁷ 408 U.S. at 617.

⁵⁸ *Eastland*, 421 U.S. at 509.

⁵⁹ *Id.* at 509–11 n.16.

⁶⁰ See Shenon, *supra* note 3, at A1.

⁶¹ *In re Search of the Rayburn House Office Bldg. Room No. 2113 Wash., D.C. 20515*, 432 F. Supp. 2d 100, 114 (D.D.C. 2006).

⁶² *Id.* at 116 n.9.

⁶³ For a description of the potential dangers of executive power in this context, see Cromer, *supra* note 33, at 924–25. “[Article II’s] broad grant of discretionary authority, the destructive nature of the power to prosecute, and the inherent constitutional conflict between the President and Congress.” *Id.*

The D.C. Court of Appeals, however, correctly held that “a search that allows agents of the Executive to review privileged materials without the Member’s consent violates the [Speech or Debate] Clause.”⁶⁴ The court based this ruling on the non-disclosure privilege in *Brown & Williamson Tobacco Corp. v. Williams*.⁶⁵ The court further held that there could be no doubt that the legislative privilege was violated during the FBI raid on Jefferson’s Capitol Hill office.⁶⁶ Unfortunately, the court did not provide any recommendations on how such searches should be conducted in the future.

A. Impermissible Interference

This Note asserts that the internal filter team used during the FBI’s search of Jefferson’s Capitol Hill office breached the Speech or Debate Clause privilege when members of the executive branch viewed and removed privileged material. The raid clearly violated the spirit of the Clause. The Court in *Powell v. McCormack* held that “[t]he purpose of the protection afforded legislators is . . . to insure that legislators are not distracted from or hindered in the performance of their legislative tasks.”⁶⁷ A more distracting and hindering event can hardly be imagined than having one’s office secretly raided in the middle of the night and assorted documents seized to be filtered at some other time and in some other location.

The Speech or Debate Clause privilege “serves to insulate members of Congress from distractions that ‘divert their time, energy, and attention from their legislative tasks.’”⁶⁸ The Court in *Brown & Williamson Tobacco Corp.* held that the Clause’s “touchstone is interference with legislative activities.”⁶⁹ The unprecedented FBI raid on Jefferson’s office undoubtedly caused him and other members of Congress immeasurable time, energy, attention, and resources. The D.C. Circuit in *Rayburn* described the likely effects: “This compelled disclosure clearly tends to disrupt the legislative process: exchanges [among members and their staffs] on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity.”⁷⁰

⁶⁴ *United States v. Rayburn House Office Bldg. Room 2113 Wash., D.C. 20515*, No. 06-3105, 2007 WL 2275237, at *8 (D.C. Cir. Aug. 3, 2007).

⁶⁵ *Id.* at *7 (citing 62 F.3d 408, 421 (D.C. Cir. 1995)).

⁶⁶ *Id.* at *8. “The search of Congressman Jefferson’s office must have resulted in the disclosure of legislative materials to agents of the Executive. Indeed, the application accompanying the warrant contemplated it.” *Id.* at *6.

⁶⁷ 395 U.S. 486, 505 (1969).

⁶⁸ *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.D.C. 1995) (quoting *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975)).

⁶⁹ *Id.*

⁷⁰ *Rayburn*, 2007 WL 2275237, at *6.

If searches like this one are upheld as legitimate exercises of executive power and continue to be utilized as investigative tools, it is entirely plausible to expect senators and representatives to be significantly distracted, and their time, energy, and attention diverted from the performance of their daily legislative duties by the looming specter of executive branch officials raiding their own offices at any moment. The Founders undoubtedly contemplated this kind of hindrance of the legislative process as they drafted the Speech or Debate Clause.

B. “Questioning in Any Other Place”

In addition to brazenly defying the spirit of the Clause, the raid also violated its letter, as the DOJ’s actions constituted impermissible “question[ing] in any other [p]lace.”⁷¹ This phrase should be broken down into two parts for analysis. First, the Jefferson raid constitutes questioning. The term “questioned” in the Clause is not read literally to mean only the act of testifying.⁷² Rather, the testimonial privilege also protects members of Congress from being compelled to produce privileged documents⁷³ and, it appears, even more. In *United States v. Helstoski*, the Court held that “[r]evealing information as to a legislative act . . . to a jury would subject a Member to being ‘questioned’ in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause.”⁷⁴ If merely telling a jury about legislative acts amounts to a violation, it can hardly be maintained that the Jefferson raid should be called anything else. Just as submitting privileged information to a neutral, objective jury violates the Clause, so too must a detailed review of privileged paper documents and electronic files by executive branch officials hidden away from the legislature.

The Framers intended senators and representatives to be accountable to the people but not to a potentially hostile executive.⁷⁵ In order to effectuate this accountability, some questioning must be permissible under the Clause. The pertinent inquiry, then, is not *whether* the legislators are being questioned but rather *by whom* they are being questioned. Everything the Framers sought to prevent when they drafted the Speech or Debate Clause, such as intimidation and retaliatory prosecutions, results only from *executive* questioning.⁷⁶ Surely the Framers envisioned some kind of questioning from the judicial branch or criminal prosecutions of members of Congress would be impossible, which quite clearly was *not* the object of including

⁷¹ U.S. CONST. art. I, § 6, cl. 1. (“[F]or any Speech or Debate in either House, [senators and representatives] *shall not be questioned in any other Place.*” (emphasis added)).

⁷² See *infra* note 74 and accompanying text.

⁷³ See *supra* note 48 and accompanying text.

⁷⁴ 442 U.S. 447, 490 (1979).

⁷⁵ See *supra* notes 37–43 and accompanying text.

⁷⁶ See, e.g., *supra* notes 32–33 and accompanying text.

the Clause.⁷⁷ It is therefore the position of this Note that the filtering process in criminal investigations of Congress would not violate the “question[ing] in any other Place” prohibition⁷⁸ when done by teams created by the judicial branch rather than by teams comprised solely of executive branch officials.

The raid also violated the locational term “in any other Place.” Jefferson and all House officials were excluded from being present during the search,⁷⁹ thereby constructively converting Jefferson’s office into “any other Place” for purposes of the Speech or Debate Clause privilege. Under the DOJ’s search procedures, documents were removed to be filtered in another location,⁸⁰ which also clearly constitutes questioning “in any other Place.” Furthermore, the computer files seized were copied and then searched at the FBI’s computer analysis and response team laboratory.⁸¹ An FBI lab is undoubtedly “any other Place.”

There are no judicial precedents construing the phrase, “in any other Place,” nor any historical records indicating what, precisely, the Framers intended for it to encompass.⁸² It is clear, however, that the Clause’s drafters sought to protect legislators not from being investigated at all, but rather from the possibility that such investigations would prevent legislators from carrying out their duties.⁸³ It is likely that a file or document Jefferson needed for a House debate or vote could be mislabeled as non-privileged and removed from his office.⁸⁴ It is also likely that Jefferson would not even realize this item was missing until he needed it because the raid was conducted outside of his presence and the presence of his counsel.⁸⁵ This is the kind of distraction and hindrance that the Framers intended to prevent.⁸⁶ It follows then, that if the review of the privileged materials was conducted inside the office and within the presence of Jefferson, his lawyers, and House officials, the search would presumably be contained within the legislative branch sufficient to steer clear of the definition of “any other Place” for Speech or Debate Clause purposes.

⁷⁷ See *supra* note 45 and accompanying text.

⁷⁸ U.S. CONST. art. I, § 6, cl. 1.

⁷⁹ Motion Memorandum for Return of Property, *supra* note 11, at 1, 7.

⁸⁰ Search Warrant, *supra* note 5, at ¶¶ 139–40.

⁸¹ *Id.* at ¶¶ 145–46.

⁸² The author’s research failed to reveal any such records, and a recent Congressional Research Service Memorandum indicates that their attorneys and specialists were also unable to locate “court cases or historical evidence that may guide modern interpreters as to the phrase’s meaning.” Memorandum from Morton Rosenberg et al., Congressional Research Serv. on Legal and Constitutional Issues Raised by Executive Branch Searches of Legislative Offices to Congressional Clients 25 n.146 (June 13, 2006), available at <http://www.scotusblog.com/movabletype/archives/JeffersonGDMemo.pdf>.

⁸³ *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975); see also Motion Memorandum for Return of Property, *supra* note 11, at 8–9.

⁸⁴ See Motion Memorandum for Return of Property, *supra* note 11, at 12–13, 15, 16.

⁸⁵ *Id.* at 1, 7.

⁸⁶ See *supra* notes 67–70 and accompanying text.

This Note proposes the creation of external, independent filter teams to conduct searches of congressional offices when necessary. Independent filter teams would enable the DOJ to constitutionally investigate members of Congress and preserve the admissibility of evidence discovered in such investigations. The review done by these filter teams would not constitute “question[ing] in any other Place,” because it would be performed by people outside of the class that the Framers intended to exclude from questioning and would be performed within the legislative branch itself.

II. SEPARATION OF POWERS AND THE JUDICIARY’S ROLE

The formation of filter teams wholly removed from both the legislative and executive branches is a task properly placed with the judiciary under the dual theories of separation of powers and checks and balances. The Framers of the Constitution envisioned such confrontations between the branches and carefully created a system of governance in which each branch acts as a counterweight to the others.⁸⁷ The Founders “viewed the principle of separation of powers as a vital check against tyranny,”⁸⁸ and they believed the idea that “power must check power by the arrangement of things.”⁸⁹ The Framers also believed in “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others,”⁹⁰ and so they created what has been called a “self-executing safeguard” against such encroachments.⁹¹

One crucial part of this safeguard is judicial intervention between the executive and legislature.⁹² It has been said that “[f]or anything of consequence to be accomplished,

⁸⁷ THE FEDERALIST NO. 51 (James Madison), *supra* note 2, at 289–90.

⁸⁸ *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam); *see also* CHARLES-LOUIS DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds., Cambridge Univ. Press 1989) (1748) (“All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making laws, that of executing public resolutions, and that of judging the crimes or disputes of individuals.”). For a discussion of Montesquieu’s influence on the Framers, *see* Matthew P. Bergman, *Montesquieu’s Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 20–36 (1990).

⁸⁹ MONTESQUIEU, *supra* note 88, at 155.

⁹⁰ THE FEDERALIST NO. 51 (James Madison), *supra* note 2, at 289–90.

⁹¹ *Buckley*, 424 U.S. at 122.

⁹² Though the judiciary is arguably required to step between the executive and the legislature, it is often reluctant to do so. *See* T.J. Halstead, *The Separation of Powers Doctrine: An Overview of its Rationale and Application*, in *THE SEPARATION OF POWERS DOCTRINE: RATIONALE, APPLICATIONS AND BIBLIOGRAPHY* 1, 36 (Michael C. Packard ed., 2002) (discussing “[j]udicial reticence in ruling on direct conflicts of constitutional authority between the legislative and executive branches”); J. Woodford Howard, Jr., *Supreme Court Enforcement of Separation of Powers: A Balance Sheet*, in *SEPARATION OF POWERS IN THE AMERICAN POLITICAL SYSTEM* 81, 84 (Barbara B. Knight ed., 1989) (“The bulk of Supreme Court business—and objections to its decisions—have always concerned federalism and

the executive and legislative branches must be brought from confrontation into a reasonable degree of harmony.”⁹³ In *United States v. Brewster*, the Court stated that “[t]he check-and-balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose. This may be explained in part because the third branch has intervened with neutral authority.”⁹⁴

Monitoring the executive for overstepping its bounds is clearly within the purview of the judiciary. In fact, the Framers did not heavily limit the executive’s power because they presumed that the judiciary would intervene and “fill[] in [restrictions] over time.”⁹⁵ It seems, then, that the neutral intervener role is precisely what the Framers envisioned for the judiciary.⁹⁶

A. Judges as Final Interpreters of Legislative Privilege

Criminal investigations into Congress present a situation that allows and, in fact, demands judicial intervention. The determination of the existence of the Speech or Debate Clause privilege is a task that can be placed neither with Congress, nor with the President. It must, then, fall to the judiciary to interpret the bounds of the privilege.

individual rights, not separation of powers.”).

⁹³ Ann Stuart Anderson, *A 1787 Perspective on Separation of Powers*, in SEPARATION OF POWERS—DOES IT STILL WORK? 138 (Robert A. Goldwin & Art Kaufman eds., 1986) (quoting James Sundquist, *More Confrontation, Stalemate, Deadlock*, WASH. POST, June 26, 1983, at D).

⁹⁴ 408 U.S. 501, 523 (1972).

⁹⁵ See Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 310 (1989).

The powers of the executive branch are not as carefully constrained for conflicts of interest in article II as Congress’ powers are in article I. To some degree this fact reflects the framers’ belief that the power of the President was not as great a concern. Thus the executive power is granted to a President in article II whereas the legislative power is both granted and limited by article I. The restraints upon the executive branch were presumably to be filled in over time by Congress through the enactment of legislation and by the Supreme Court through the exercise of the power of constitutional interpretation.

Id. (footnotes omitted).

⁹⁶ See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 994 (2006) (“[The Framers] feared the tyranny of majorities that would seek to oppress opponents through the use of criminal laws. They therefore established a constitutional structure that separates power among the branches and gives the judiciary (judges and juries) a particularly strong role in enforcing that separation.”); Cromer, *supra* note 33, at 949 (“[T]he weakest of the three departments of power’ clearly is less prone than the executive branch to be driven by the desire to disadvantage the legislature.” (citing THE FEDERALIST No. 78, *supra* note 2, at 433–34)).

The executive cannot properly decide when the privilege applies and when it does not, because the executive may be the target of the potentially privileged speech.⁹⁷ Congress, as the body which stands to gain from the Clause's application, cannot determine the reach of its own privilege.⁹⁸ The Framers of the Constitution specifically rejected a proposal to allow members of Congress, acting as one body, to be the exclusive judge of their own privileges.⁹⁹ The Founders preferred, rather, to have the privilege determined by *law*; that is to say, the courts.¹⁰⁰ Chief Judge Hogan, in his *In re Search* opinion, even went so far as to declare that “[t]he formulation of the Speech or Debate privilege implies that the judiciary *cannot avoid* determining what are the outer limits of legitimate legislative process.”¹⁰¹

1. Executive Privilege Analogy

An analogy to the executive privilege is helpful, as the privilege belonging to the President is the governmental privilege most closely comparable to that provided to Congress by the Speech or Debate Clause.¹⁰² In *United States v. Nixon*, the President claimed that the separation of powers precluded judicial review of his assertion of executive privilege.¹⁰³ The Court began its analysis with the principle of judicial review and quoted the rule from the seminal case, *Marbury v. Madison*: “[I]t is emphatically the province and duty of the judicial department to say what the law is.”¹⁰⁴ The Court next moved on to state, “Our system of government ‘requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.’”¹⁰⁵ Finally, the Court discussed that its role as “ultimate interpreter of the Constitution” included determining the relative powers and authority of the other two branches.¹⁰⁶ The Court held that the President could not unilaterally assert his privilege free from judicial review.¹⁰⁷

⁹⁷ See *supra* Part I.A (describing the Speech or Debate privilege as a protection against impermissible executive interference with Congress).

⁹⁸ See, e.g., *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1880) (“The house of representatives is not the final judge of its own power and privileges” (quoting *Burnham v. Morrissey*, 80 Mass. (14 Gray) 226, 238 (1859))).

⁹⁹ *In re Search of the Rayburn House Office Bldg. Room No. 2113 Wash., D.C. 20515*, 432 F. Supp. 2d 100, 114 (D.D.C. 2006).

¹⁰⁰ “In opposition to the proposal, Madison explained that it would be preferable to make provision for ascertaining by law the extent of privileges previously [and] duly established rather than to give a discretion to each House as to the extent of its own privileges.” *Id.*

¹⁰¹ *Id.* at 115 (citing *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995) (emphasis added)).

¹⁰² This analogy was also utilized by Judge Hogan in *In re Search*, 432 F. Supp. 2d at 115, 418 U.S. 683, 703 (1974).

¹⁰³ *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹⁰⁴ *Id.* at 704 (quoting *Powell v. McCormack*, 395 U.S. 486, 549 (1969)).

¹⁰⁵ *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

¹⁰⁶ *Id.* at 706.

These principles are easily applicable in the context of congressional office searches. A senator or representative cannot assert his Speech or Debate Clause privilege without the approval of a court.¹⁰⁸ Nor can the executive decide what is privileged and what is not.¹⁰⁹ Particularly relevant here, the D.C. Circuit stated in *Rayburn* that “it is, of course, the judiciary, not the executive or legislature, that delineates the scope of the privilege.”¹¹⁰ Thus, in the Jefferson case, only Chief Judge Hogan could determine when to apply the privilege, and he could have done so by forming a filter team to act as his agent in identifying, reviewing, and classifying Jefferson’s documents and files.

2. Political Question Analysis

In order for a judicial review and determination of privilege to be constitutional it must not present a political question.¹¹¹ Political questions arise in cases that require non-legal knowledge or techniques not suitable for a court, and they render some matters non-justiciable.¹¹² The Supreme Court already upheld a judicial determination of privilege against claims that it would constitute a political question.¹¹³

Several formulations present a political question inextricably linked to the case.¹¹⁴ The first condition that will create a political question is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”¹¹⁵ In the context of the Speech or Debate Clause privilege, there is no text in the Constitution that allocates the power to determine the Clause’s applicability to another branch of government.

Second, an issue will be deemed a political question when there is “a lack of judicially discoverable and manageable standards for resolving it.”¹¹⁶ This condition is also not present in the scenario at hand, as the Supreme Court has interpreted the Speech or Debate Clause several times and provided judicial precedents to follow when construing the privilege.¹¹⁷

Third, “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion” creates a political question.¹¹⁸ The creation of

¹⁰⁸ See *supra* notes 98–101 and accompanying text.

¹⁰⁹ See *supra* note 97 and accompanying text.

¹¹⁰ *United States v. Rayburn House Office Bldg. Room 2113 Wash., D.C. 20515, No. 06-3105, 2007 WL 2275237, at *12 (D.C. Cir. Aug. 3, 2007).*

¹¹¹ See *Baker*, 369 U.S. at 198.

¹¹² *Id.*

¹¹³ See *United States v. Nixon*, 418 U.S. 683, 692–97 (1974).

¹¹⁴ *Baker*, 369 U.S. at 217.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See *supra* Part I (discussing *Johnson*, *Helstoski*, *Kilbourn*, *Eastland*, etc.).

¹¹⁸ *Baker*, 369 U.S. at 217.

filter teams, and the subsequent review of items by that team would not require a judge to make any policy determinations of a “nonjudicial” nature—it would only require an application of the Constitution, which is clearly within the purview of the judiciary.¹¹⁹

Fourth is the “impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government.”¹²⁰ In the context of the legislative privilege, there would be no disrespect to the other branches because the courts alone make the final determinations of the privilege’s protections.¹²¹

The fifth factor is that of “an unusual need for unquestioning adherence to a political decision already made.”¹²² This condition would likely not be present in any judicial creation of filter teams or determination of privilege because the judiciary does not make political decisions and is not bound by those of the other branches.¹²³ There could be no controlling political decision in the context of the legislative privilege, as determinations made by any other branch would be unconstitutional.

Finally, a matter becomes a political question when there is “potentiality of embarrassment from multifarious pronouncements by various departments on one question.”¹²⁴ This issue was addressed definitively in the context of the Speech or Debate Clause by the Court in *Powell v. McCormack* when it stated, “[A] judicial resolution of petitioners’ claim [for a determination that the House did not have the power to exclude him from Congress] will not result in ‘multifarious pronouncements’ [I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution.”¹²⁵ It therefore seems quite clear that judicial creation of filter teams, and the subsequent filtering by those teams acting as agents of the judge who appointed them, would not create a political question.

The kind of judicial branch filtering process that would be utilized if courts followed this Note’s proposal was ruled constitutional.¹²⁶ Chief Judge Hogan even held constitutional “a document-by-document review by the judiciary” to determine whether the Speech or Debate Clause applies.¹²⁷

¹¹⁹ See U.S. CONST. art. III, § 2 (defining the jurisdiction of the judiciary).

¹²⁰ *Baker*, 369 U.S. at 217.

¹²¹ See *supra* notes 92–101 and accompanying text.

¹²² *Baker*, 369 U.S. at 217.

¹²³ See *supra* text accompanying notes 111–13.

¹²⁴ *Baker*, 369 U.S. at 217.

¹²⁵ 395 U.S. 486, 549 (1969) (citing *Baker*, 369 U.S. at 211).

¹²⁶ See *Benford v. Am. Broad. Co.*, 98 F.R.D. 42, 45 & n.2 (D. Md. 1983) (requiring that a detailed index of potentially privileged documents be prepared for judicial review and suggested that an in camera review of contested documents may be necessary); *In re Possible Violations of 18 U.S.C. §§ 201, 371, 491 F. Supp. 211, 214* (D.D.C. 1980) (ordering that potentially privileged subpoenaed documents be examined in camera).

¹²⁷ *In re Search of the Rayburn House Office Bldg. Room No. 2113 Wash., D.C. 20515*, 432 F. Supp. 2d 100, 115 (D.D.C. 2006).

B. The Jefferson Raid Violated Separation of Powers

As it is clear that the determination of legislative privilege is a task vested exclusively in the judiciary, it follows that the executive branch violated the separation of powers when it utilized an internal filter team during the Jefferson raid. There are two approaches for analyzing possible separation of powers violations, both of which lead to the same conclusion: the use of internal filter teams by the DOJ to determine legislative privilege during investigations into Congress violates the separation of powers.

First is the formalist approach, which the Court articulated in *Youngstown Sheet & Tube Co. v. Sawyer*.¹²⁸ The Court held that presidential authority to issue executive orders “must stem either from an act of Congress or from the Constitution itself.”¹²⁹ Formalism stands for the proposition that “the powers of each branch are exclusive to it unless the Constitution specifically says otherwise.”¹³⁰ Applied in the instant case, the formalist approach would find the Jefferson raid violative of the separation of powers. There is no congressional or constitutional authorization for the executive branch’s agents to decide when the Speech or Debate Clause applies and when it does not. Therefore, absent a textual or legislative delegation of the power to determine the application of the legislative privilege, such an attempt must be struck down.

The competing theory, functionalism, advocates that a pragmatic, flexible approach is best for the separation of powers.¹³¹ “[A]ll functionalists believe that the primary objective of judicial review . . . is to insure that each branch retains ‘enough’ governmental power to permit it to operate as an effective check on the other branches of government.”¹³² Under this theory, an act violates the separation of powers if it is a “core function” of another branch or if the appropriate branch does not maintain enough control over the function.¹³³ This entails a determination of whether the act in question would constitute a usurpation or aggrandizement of power by one branch at the expense of another.¹³⁴

The executive’s use of internal filter teams violates the separation of powers doctrine under the functionalist approach as it undoubtedly disrupts the pertinent control relationship. The power to determine privileges rests solely with the judiciary as a central element of the American system of checks and balances.¹³⁵ If the executive branch exercises this power instead and determines which documents are

¹²⁸ 343 U.S. 579 (1952).

¹²⁹ *Id.* at 585.

¹³⁰ Katy J. Harriger, *The Separation of Powers in the Modern Context*, in SEPARATION OF POWERS: DOCUMENTS AND COMMENTARY 15, 17 (Katy J. Harriger ed., 2003).

¹³¹ See Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 232 (1992).

¹³² *Id.* at 232 (citation omitted).

¹³³ *Id.* at 232–33.

¹³⁴ *Id.*

¹³⁵ See *supra* Part II.A.1.

privileged and which are not, the judicial branch will be unable to maintain control of its function as the “ultimate interpreter of the Constitution.”¹³⁶ Determinations of privilege amount to an “absolute” function—there can be only one final decision determining whether to invoke a privilege, and this decision can be made by only one actor.¹³⁷ It is not desirable, or even possible, for this function to be shared between multiple branches.

Any attempt by the executive to exercise this function amounts to usurpation of the judicial branch’s power and, if allowed, would result in an aggrandizement of the executive’s power. Having the power to declare materials privileged or unprivileged would significantly increase the executive’s power over Congress. If allowed to make determinations of privilege without judicial review, the executive could effectively nullify the Speech or Debate Clause and use any documents and files as evidence against a legislator, regardless of privilege. The Framers specifically tried to prevent this kind of executive abuse by including the Speech or Debate Clause in the Constitution.¹³⁸

III. “APPOINTING” INDEPENDENT FILTER TEAMS

The judiciary can fulfill its checking and balancing role and its duty as final determiner of the legislative privilege¹³⁹ by appointing non-executive branch lawyers and agents to form temporary, independent filter teams during investigations of members of Congress. This task is consistent with the judiciary’s traditional role in criminal investigations.¹⁴⁰ A judge is, as Chief Judge Hogan put it, “not a mere rubber stamp in the warrant process, but rather an independent and neutral official sworn to uphold and defend the Constitution.”¹⁴¹ Judges have long had authority to appoint special masters to oversee complex civil discovery or to administer trusts, such as the 9/11 Fund.¹⁴² A special master, however, would be insufficient to protect the Speech or Debate Clause privilege. The privilege is simply too fundamental in our system of laws to be guarded adequately by one person. If even just for appearance’s sake, the privilege must be protected by an entire team of judicially-appointed, independent filterers.

¹³⁶ *Baker v. Carr*, 369 U.S. 186, 211 (1962).

¹³⁷ *See generally* *United States v. Nixon*, 418 U.S. 683, 704–05 (1974) (discussing determinations of privilege and sharing of power between branches).

¹³⁸ *See supra* Part I (asserting that the Speech or Debate Clause was created to insulate the legislative branch from hostile executive oversight).

¹³⁹ *See supra* Part II.A.1.

¹⁴⁰ *See In re Search of the Rayburn House Office Bldg. Room No. 2113 Wash., D.C. 20515*, 432 F. Supp. 2d 100, 116 (D.D.C. 2006).

¹⁴¹ *Id.*

¹⁴² *Cf. FED. R. CIV. P. 53(a)(1)* (“Unless a statute provides otherwise, a court may appoint a master . . .”).

The Appointments Clause of the Constitution provides that the President shall appoint principal officers such as ambassadors, ministers, and consuls, “but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”¹⁴³

The Clause, however, does not specify the proper method of appointment for positions not falling into the “officer” class.¹⁴⁴ It appears, then, that a judge may create the proposed independent filter teams with no congressional authorization so long as the members are classified not as “officers,” but rather as “employees” or “agents.” The vast majority of people working for the government fall into this class,¹⁴⁵ and as will be shown, members of a filter team certainly would as well.

The Court has repeatedly used a stringent standard in classifying appointees as officers. The Court in *United States v. Hartwell* held that “[a]n office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.”¹⁴⁶ This standard was further articulated in *United States v. Germaine*, in which the Court held that a civil surgeon appointed by the Commissioner of Pensions to periodically examine pensioners was “but an agent of the commissioner,” rather than an officer of the United States, because “the [surgeon’s] duties are *not* continuing and permanent, and they *are* occasional and intermittent.”¹⁴⁷ The members of the independent filter teams would possess this temporary quality. They would be appointed only when there is a risk of executive officials encountering privileged material during an investigation and would be disbanded immediately after the filtering process is complete. This temporary, intermittent existence strongly supports the conclusion that filter teams are “agents” or “employees” of the government rather than “officers.”

Furthermore, in *Buckley v. Valeo*, the Court held that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by [the Appointments Clause].”¹⁴⁸ The proposed independent filter teams would not exercise any authority other than that needed to examine material and segregate anything protected by the Speech or Debate Clause privilege. Their work would be supervised and subject to review and final determination by a judge. They would therefore not possess the “significant authority” described in *Buckley*¹⁴⁹ and would clearly not be officers.

¹⁴³ U.S. CONST. art. II, § 2, cl. 2.

¹⁴⁴ *See id.*

¹⁴⁵ In *United States v. Germaine*, the Court stated that “nine-tenths of the persons rendering service to the government” are “undoubtedly” agents or employees rather than officers. 99 U.S. 508, 509 (1878).

¹⁴⁶ 73 U.S. (6 Wall.) 385, 393 (1867).

¹⁴⁷ 99 U.S. at 512.

¹⁴⁸ 424 U.S. 1, 126 (1976) (per curiam).

¹⁴⁹ *Id.*

Should the members of these ad hoc, independent filter teams be classified as officers, however, they can be constitutionally appointed by a court as long as they are considered inferior and not principal.¹⁵⁰ Acting pursuant to the Appointments Clause, Congress could pass a law conferring authority upon the federal courts to create the independent filter teams when needed.¹⁵¹ Motivated by a desire to protect its legislative privilege and independence from the executive branch, Congress would likely pass such a law with ease.

The Court has consistently classified positions with far more authority and responsibility than the members of a filter team as inferior. In *United States v. Eaton*, the Court upheld the appointment of vice-consuls during temporary absences of consuls, because such a vice-consul was “charged with the performance of the duty of the superior for a limited time and under special and temporary conditions” and was therefore a “subordinate officer.”¹⁵² In *Ex Parte Siebold* and *Ex Parte Hennen*, the Court found that federal election supervisors¹⁵³ and district court clerks,¹⁵⁴ respectively, were inferior officers for purposes of the Appointments Clause. *Rice v. Ames* held that extradition commissioners could be appointed by federal courts because such commissioners are not “judges in the constitutional sense.”¹⁵⁵ In *Go-Bart Importing Co. v. United States*, the Court further held that U.S. commissioners with the power to arrest, to issue warrants, and to institute prosecutions were inferior officers.¹⁵⁶ These decisions by the Court indicate its resistance to classifying temporary appointees as principal officers, thereby revealing a tendency to group nearly all such appointees with more responsibility than the filter teams as inferior.

A. *The Independent Counsel Analogy*

The independent counsel is the most well-known officer that the Court has declared inferior. The position, then called the “special prosecutor,” was created in 1978 by the Ethics in Government Act.¹⁵⁷ The Ethics in Government Act was amended in 1983,¹⁵⁸ and the independent counsel provision was reauthorized in

¹⁵⁰ *Morrison v. Olson*, 487 U.S. 654, 670–71 (1988) (quoting *Buckley*, 424 U.S. at 132).

¹⁵¹ See *Ex Parte Siebold*, 100 U.S. 371, 397–98 (1880) (“But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress.”).

¹⁵² 169 U.S. 331, 343 (1898).

¹⁵³ *Siebold*, 100 U.S. at 397.

¹⁵⁴ *Ex Parte Hennen*, 38 U.S. (13 Pet.) 225, 228–29 (1839).

¹⁵⁵ 180 U.S. 371, 378 (1901).

¹⁵⁶ 282 U.S. 344, 352–53 & n.2 (1931).

¹⁵⁷ 28 U.S.C. §§ 591–598 (1982); CHARLES A. JOHNSON & DANETTE BRICKMAN, *INDEPENDENT COUNSEL: THE LAW AND THE INVESTIGATIONS* 1 (2001).

¹⁵⁸ Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983). The term “special prosecutor” was replaced with “independent counsel” in this amendment. *Id.* § 2(b)(1).

1987¹⁵⁹ and 1994,¹⁶⁰ but the provision lapsed in 1999.¹⁶¹ The independent counsel was appointed by a new three-judge panel, the “Special Division,”¹⁶² which was created by the Ethics in Government Act “for the purpose of appointing independent counsels.”¹⁶³ During investigations of executive branch officials, the Attorney General would petition the Special Division to appoint the independent counsel, who would then investigate and prosecute the case, if necessary.¹⁶⁴ The independent counsel, after appointment, could only be removed for good cause by the Attorney General.¹⁶⁵

In *Morrison v. Olson*, the Court addressed the question of whether the independent counsel was an inferior officer and, in making this determination, considered four factors: removal, duties, jurisdiction, and tenure.¹⁶⁶ Although the Court stated, “[w]e need not attempt here to decide exactly where the line falls between the two types of officers, because in our view [the independent counsel] clearly falls on the ‘inferior officer’ side of that line,”¹⁶⁷ *Morrison*’s four-part test has been almost uniformly accepted as the definitive test since its articulation in 1988.¹⁶⁸ An analogy to the independent counsel is particularly applicable in an analysis of independent filter teams, as both perform limited functions associated with prosecutions.¹⁶⁹ To demonstrate the constitutionality of independent filter team appointments, this Note will now apply the *Morrison* independent counsel test.

1. Removal

The *Morrison* test first looks to the means by which the appointed officials may be removed from office. In *Morrison*, the Court stated that the independent counsel was “subject to removal by a higher Executive Branch official,” namely the Attorney General,¹⁷⁰ and found that this fact “indicates that she is to some degree ‘inferior’ in rank and authority.”¹⁷¹ The members of the proposed filter teams certainly share this same inferiority of rank and authority because they would be removable by the

¹⁵⁹ Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293.

¹⁶⁰ Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (codified as amended at 28 U.S.C. §§ 591–598 (1994), *replaced by* 28 C.F.R. §§ 600.1–600.10 (2006) (effective July 1, 1999)).

¹⁶¹ 28 U.S.C. § 599 (2000); JOHNSON & BRICKMAN, *supra* note 157, at 1.

¹⁶² *Morrison v. Olson*, 487 U.S. 654, 661 & n.3 (1988).

¹⁶³ 28 U.S.C. § 49 (2000).

¹⁶⁴ *Morrison*, 487 U.S. at 661–63.

¹⁶⁵ *Id.* at 664.

¹⁶⁶ *Id.* at 671–72.

¹⁶⁷ *Id.* at 671.

¹⁶⁸ *But cf. infra* notes 184–86 and accompanying text (discussing the court’s departure from the *Morrison* test in *Edmond v. United States*).

¹⁶⁹ *See infra* Part III.A.2.

¹⁷⁰ 487 U.S. at 671.

¹⁷¹ *Id.*

judge who appointed them. Independent filter teams would therefore meet *Morrison's* removal requirement.

2. Duties

The next factor to be considered in assessing the principal or inferior status of appointed officers is the extent, and perhaps even more importantly, the limitations, of the duties those officers are empowered to perform.¹⁷² The independent counsel possessed ten specific powers:

- (1) conducting proceedings before grand juries and other investigations;
- (2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel considers necessary;
- (3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;
- (4) reviewing all documentary evidence available from any source;
- (5) determining whether to contest the assertion of any testimonial privilege;
- (6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;
- (7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and . . . exercising the authority vested in a United States attorney or the Attorney General;
- (8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and . . . exercising the powers vested in a United States attorney or the Attorney General;
- (9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States; and
- (10) consulting with the United States attorney for the district in which any violation of law with respect to which the independent counsel is appointed was alleged to have occurred.¹⁷³

¹⁷² *Id.*

¹⁷³ 28 U.S.C. § 594 (1994), *replaced by* 28 C.F.R. §§ 600.6–600.10 (2006).

The Court in *Morrison*, however, found the independent counsel had “only certain, limited duties”¹⁷⁴ and referred to her role as “restricted” in that she was only authorized to investigate, and if necessary, to prosecute certain federal crimes in accordance with the executive branch’s policies.¹⁷⁵

The duties of the proposed independent filter teams would be considerably more restricted than those of the independent counsel and would easily meet this factor of the *Morrison* test for inferiority. The independent filter teams would be empowered only to collect and review documents and other materials to determine whether the Speech or Debate Clause privilege applies. If necessary, a judge would make the final determination of whether material was protected by the privilege. If the extensive prosecutorial and discretionary duties of the independent counsel are of an inferior nature, so too must be the meager duties of the proposed independent filter teams.

3. Jurisdiction

The third factor examined under the *Morrison* framework is the jurisdiction that appointed officers possess.¹⁷⁶ The Court found the independent counsel’s jurisdiction of a limited scope because she could only investigate certain federal officials suspected of specified crimes and because her jurisdiction was only granted pursuant to a request by the Attorney General.¹⁷⁷ In fact, the officials covered by the independent counsel law included some of the most powerful government positions, such as the President, Vice President, and Cabinet officials including the Attorney General, senior White House staff, the Solicitor General, as well as the Directors of the FBI and Central Intelligence.¹⁷⁸

Moreover, the independent counsel’s jurisdiction included the authority to investigate and prosecute the matter she was appointed to handle as well as most other federal crimes arising from that matter.¹⁷⁹ Yet, the Court in *Morrison* found the independent counsel’s jurisdiction sufficiently limited to render her post “inferior.”¹⁸⁰

The “jurisdiction” of the proposed independent filter teams would undoubtedly be deemed satisfactorily limited as well, considering that the teams would participate only in rare investigations and searches involving a recognized risk of violating the Speech or Debate Clause privilege. The Court in *United States v. Germaine* appeared

¹⁷⁴ 487 U.S. at 671.

¹⁷⁵ *Id.* at 671–72.

¹⁷⁶ *Id.* at 672.

¹⁷⁷ *Id.*

¹⁷⁸ 28 U.S.C. § 591 (2000).

¹⁷⁹ *Id.* § 593. The independent counsel was granted jurisdiction over ancillary federal crimes (other than Class B or C misdemeanors or infractions) “including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.” *Id.*

¹⁸⁰ 487 U.S. at 672.

to be influenced by the fact that the surgeon in that case was “only to act when called on by the Commissioner of Pensions in some special case.”¹⁸¹ The proposed judicially appointed independent filter teams would only have the ability to act when called upon by the executive branch and would therefore always have a jurisdiction limited to the matter they were called to handle.

4. Tenure

The final factor in the *Morrison* analysis is tenure.¹⁸² In *Morrison*, the Court found that “the office of independent counsel is ‘temporary’ in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated.”¹⁸³ The proposed internal filter teams would work in the same temporary way. They would be formed only in the case of a criminal investigation into congressional activities that poses a risk of investigators encountering privileged materials, and disbanded when the investigation concludes, thus satisfactorily limiting the teams’ tenure. The independent filter teams would therefore be limited sufficiently under all four *Morrison* factors and would certainly be classified as inferior officers.

The Court departed from the *Morrison* test in *Edmond v. United States*.¹⁸⁴ Justice Scalia, writing for the Court, held simply, “Whether one is an ‘inferior’ officer depends on whether he has a superior.”¹⁸⁵ Justice Scalia elaborated on the Court’s new standard by stating, “[W]e think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”¹⁸⁶ The proposed independent filter teams undoubtedly also meet this standard, as they would be directed and supervised by a district court judge who was nominated by the President and approved by the Senate.¹⁸⁷

B. Congruence of Duties

The next step in the Court’s Appointments Clause analysis is to determine whether there is “some ‘incongruity’ between the functions normally performed by the courts

¹⁸¹ 99 U.S. 508, 512 (1878).

¹⁸² 487 U.S. at 672.

¹⁸³ *Id.*

¹⁸⁴ *Edmond v. United States*, 520 U.S. 651 (1997). Justice Scalia stated, “*Morrison* did not purport to set forth a definitive test for whether an office is ‘inferior’ under the Appointments Clause.” *Id.* at 661.

¹⁸⁵ *Id.* at 662.

¹⁸⁶ *Id.* at 663.

¹⁸⁷ *See* U.S. CONST. art. II, § 2, cl. 2.

and the performance of their duty to appoint.”¹⁸⁸ In *Ex Parte Siebold*, the Court stated, “It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain.”¹⁸⁹ It is, as previously explicated, the task of the judiciary to protect the Speech or Debate Clause privilege of the legislature.¹⁹⁰ As the Court in *United States v. Nixon* held, “it is the province and duty of this Court ‘to say what the law is’ with respect to the claim of privilege.”¹⁹¹ The duties of an independent filter team, then, certainly appertain to the judicial branch. The filter team would be responsible only for reviewing material and determining whether the privilege applies, which is clearly a judicial task. The team would not perform any executive tasks.

In *Morrison*, the Court stated, “We thus disagree with the . . . conclusion that there is an inherent incongruity about a court having the power to appoint prosecutorial officers.”¹⁹² The Court went on to describe the judicial branch as “especially well qualified”¹⁹³ and as “the most logical place to put” such appointing authority.¹⁹⁴ Not only did the Court in *Morrison* think it appropriate to allow judges to appoint the independent counsel,¹⁹⁵ other courts also upheld the appointments of private attorneys to prosecute judicial contempt cases¹⁹⁶ and of interim U.S. Attorneys.¹⁹⁷

If the Court is willing for Congress to grant judges the power to appoint prosecutors and private lawyers to actually try entire cases, why not allow judges to appoint the substantially more inferior members of a filter team who would simply assist in the investigation process? Judges are well-positioned to select attorneys and agents to compose independent filter teams, and there is arguably no more appropriate place in which to vest this proposed appointment authority.¹⁹⁸ The Framers of the Constitution did not envision a “hermetic sealing off” of the branches from each other or a “total separation of each of [the] three essential branches of

¹⁸⁸ *Morrison*, 487 U.S. at 676 (1988) (“[T]he duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void.” (quoting *Ex Parte Siebold*, 100 U.S. 371, 398 (1879))); see also Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 424–36 (2001) (discussing the incongruity analysis).

¹⁸⁹ 100 U.S. at 397.

¹⁹⁰ See *supra* Part II.A.1.

¹⁹¹ 418 U.S. 683, 705 (1974).

¹⁹² 487 U.S. at 676.

¹⁹³ *Id.* at 676 n.13.

¹⁹⁴ *Id.* at 677.

¹⁹⁵ *Id.* at 676.

¹⁹⁶ See *Young v. United States*, 481 U.S. 787 (1987).

¹⁹⁷ See *United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963).

¹⁹⁸ See generally *Morrison*, 487 U.S. at 674–79 (discussing the constitutionality of interbranch appointments).

Government.”¹⁹⁹ They expected sharing of functions²⁰⁰ and even some confusion of functions.²⁰¹ There is therefore no inherent incongruity present in the judicial appointment of filter teams that should “excuse the courts” from performing this duty or “render [such appointments] void.”²⁰²

POSTSCRIPT: HOW THE JEFFERSON SEARCH WOULD OCCUR UNDER THIS
NOTE’S PROPOSAL

First, Congress would pass a “Filter Team Authorization Act” similar to the independent counsel statutes²⁰³ enumerating the duties and jurisdiction of the filter teams, as well as their appointment and removal procedures. When the investigation of Jefferson was initiated, or at such time as the Attorney General or lead prosecutor realized that a search was necessary and that this search would encompass materials privileged under the Speech or Debate Clause, the responsible official would apply for the appointment of an independent filter team. At this point, Chief Judge Hogan would appoint a three- to four-member filter team comprised of a combination of private lawyers, non-DOJ government lawyers, political scientists, and legal scholars.

Next, the FBI and the DOJ would apply for a search warrant. The search warrant would include a detailed list of specific items the government sought, as it did in the real Jefferson raid. The Capitol Police would seal the office, and the search warrant would then be executed (preferably not under the cover of night) in the presence of Jefferson, his counsel, and designated house officials. Jefferson would be given an opportunity to identify potentially privileged documents, at which time the independent team would filter the documents and files to determine which were responsive and which were privileged while they remained in Jefferson’s office. The filter team would do a document-by-document review to determine whether the legislative privilege applied. Documents and files would be logged and that log would then be provided to Hogan for review. Contested items would be made available to Hogan for in camera inspection and final determination.

¹⁹⁹ *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam).

²⁰⁰ See Marc R. Salans, *Independent Counsel: The Separation of Powers and the Separation of Politics from the Administration of Justice*, 56 GEO. WASH. L. REV. 900, 910 (1987) (“The Federalist Papers indicate that the powers of each of the three branches of government were not to be mutually exclusive. . . . They envisioned a system of shared powers that would be flexible enough to withstand the test of time and would allow the nation to govern itself effectively.” (citations omitted)).

²⁰¹ THE FEDERALIST NO. 37 (James Madison), *supra* note 2, at 196 (“Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different branches.”).

²⁰² *Morrison*, 487 U.S. at 676.

²⁰³ See *supra* notes 157–65 and accompanying text.

CONCLUSION

The Speech or Debate Clause was crafted by the Framers to protect the legislature from executive retaliation and to preserve Congress's position as a coequal, independent branch.²⁰⁴ The Clause does not shield members of Congress from criminal prosecutions for bribery, but it does provide some necessary protections.²⁰⁵ These protections act in conjunction with the separation of powers doctrine to protect Congress from executive encroachments such as the shocking and unprecedented FBI raid of Congressman William J. Jefferson's Capitol Hill office. The filter team used in the Jefferson raid inadequately protected Jefferson's privilege and violated the separation of powers and the Constitution.²⁰⁶

To more effectively protect Congress and its members from future encroachments, this Note proposed the utilization of judge-created filter teams that are entirely independent of the executive. Such filter teams would likely be classified as agents or employees and could be appointed by a judge with no prior approval from Congress. Alternatively, if the teams were classified as officers, they could still be appointed by a judge pursuant to an authorizing act of Congress because such teams would undoubtedly consist of inferior, rather than principal, officers.²⁰⁷ Because of the judiciary's unique role as a neutral intervener between Congress and the President, there would be no inherent incongruity in a judge appointing the independent filter team, and the appointment would be constitutional.²⁰⁸ These proposed independent filter teams would thus protect the Speech or Debate Clause privilege and the separation of powers from future executive encroachments.

The DOJ's argument that "[t]aking the Speech or Debate Clause to such an extreme would impede legitimate law enforcement activities and give shelter to criminal conduct"²⁰⁹ is not persuasive. Neither Jefferson, nor this Note, nor the D.C. Circuit has suggested that the Speech or Debate Clause operates as a shield for illegality. Rather, search procedures can be designed to better protect not only the legislative privilege, but also the executive's interest in preserving the admissibility of evidence. Should documents be seized during another FBI raid on Congress, the affected member would undoubtedly challenge the admissibility of such evidence at trial, given the controversy over the propriety of such procedures. In fact, Jefferson already obtained the return of materials seized from his office when the D.C. Circuit held the raid unconstitutional.²¹⁰

²⁰⁴ See *supra* notes 36–37 and accompanying text.

²⁰⁵ See *supra* notes 45–53 and accompanying text.

²⁰⁶ See *supra* Part II.B.

²⁰⁷ See *supra* Part III.A.

²⁰⁸ See *supra* notes 188–94 and accompanying text.

²⁰⁹ Corrected Brief for the United States, *United States v. Rayburn House Office Bldg.* No. 06-3105, 2007 WL 1022640, at *41 (D.C. Cir. 2007).

²¹⁰ *United States v. House Office Bldg. Room 2113 Wash., D.C. 20515*, No. 06-3105, 2007 WL 2275237, at *10 (D.C. Cir. Aug. 3, 2007).

The DOJ should welcome, rather than reject, new search procedures including the use of independent, judicially-created filter teams, because such precautions give criminal investigations into Congress increased legitimacy. Allowing members of Congress to be present and to assert their privilege during searches would effectively prevent the members from later challenging determinations made by the filter teams and would likely decrease the amount of objectionable evidence at trial.

The context of criminal investigations into Congress is a unique one full of special privileges and considerations; it is therefore imperative for both the charged member of Congress and for the investigating executive that the judicial branch step between them and guard the Constitution.