**THE PENTAGON PAPERS REVISITED:**

**CONGRESSIONAL CENSORSHIP AND WHISTLEBLOWING IN THE POST-9/11 ERA**

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**Abstract:** Post-9/11 era government secrecy and transparency practices are examined in

the context of the Article I, Section 6, Clause 1 (Speech or Debate Clause) protections provided to Members of Congress by the Constitution, and the Constitution’s Article I, Section 5, Clause 3 (Journal and Secrecy Clause) requirements. The question as to whether a Member of Congress who discloses all or portions of a Congressional report containing information classified by

a federal agency may be investigated or punished by a federal agency, the courts, or Congress is analyzed. It is concluded that Members of Congress are protected from punishment or even questioning by the Executive Branch and by the Judiciary for all such conduct legitimately related to Congressional proceedings, even if they disclose information classified by the Executive Branch. It is also concluded that Article I Section 5 Clause 3 of the Constitution requires all Congressional proceedings to be published except for any portion thereof that Congress itself, in its own judgment -- not that of the Executive Branch -- determines requires secrecy. It is further concluded that although Congress may regulate its own affairs and discipline its members for misconduct, in light of the Article I Section 5 Clause 3 requirement that all Congressional proceedings be published, any Member who reveals or publishes all

or a portion of Congressional proceedings or reports, such as a portion of a Congressional investigative committee report previously allowed to be kept secret by Congress, may not

be punished for such disclosure even by Congress itself unless Congress had legitimately and explicitly decided, in its own judgment prior to the disclosure by the member that the matter

in question required secrecy. This analysis is explicitly applied to the real-world example of

the “28 Pages” – the final chapter -- of the December 2002 “Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001” *Congressional* report that have to date been kept secret from the public by Congress. It is concluded that because Congress has not decided in its own judgment that the substance of

the 28 Pages requires secrecy, but rather requested Executive Branch agencies to declassify

the information contained therein, that Congress itself had, and has, an obligation to publish these 28 Pages or their substance pursuant to Article I Section 5 Clause 3 of the Constitution,

and any Member of Congress who chooses to place into the Congressional Record the substance of the 28 Pages, either by reading the text of the Pages or from memory, would be protected from any punishment or even inquiry by the Executive Branch or the Judiciary under the Speech or Debate Clause of the Constitution and also would not be subject to discipline by Congress itself because such act would not legitimately be misconduct as it would be in furtherance of the Constitution’s Article I Section 5 Clause 3 requirement that Congressional proceedings be published/made public. The almost decade-and-a-half conduct of Congress in keeping the substance of the 28 Pages secret under these circumstances itself constitutes

a violation of the Constitution’s Article I, Section 5, Clause 3.

**I. INTRODUCTION**

This article discusses two provisions of the Constitution that govern the extent secrecy is allowed and the extent transparency is required in regard to the proceedings of Congress. The **Article I Section 6 Clause 1 (Speech or Debate Clause)** protections provided to Members of Congress who disclose classified information during the course of congressional proceedings are examined, as is the Supreme Court’s 1972 decision in the “Pentagon Papers” case *Gravel v. U.S.*,[[2]](#footnote-2) an important precedent that explains in some detail these Speech or Debate Clause protections. In addition, the nature and extent of the obligation imposed on Congress by Article I Section 5 Clause 3 of the Constitution to publish the proceedings of Congress is examined. How these constitutional provisions apply and interrelate in regard to secrecy and transparency in congressional proceedings in the post-9/11 era is examined in the context of the real life example of the decision (thus far) by Congress to not publish a portion (28 pages) of a congressional report resulting from congressional inquiries into the events surrounding of the terrorist attacks of September 11, 2001.

Unfortunately, the threat of terror attacks in this country (whether of external or internal origin) is real, and such attacks in the future may, regrettably, cost more lives. Such tragedies may be unavoidable regardless of the extent to which constitutional rights and freedoms are compromised in the name of greater security. Prior generations have stood and fought, and many have died, both in wars and in protests in this country, to preserve the rights and freedoms guaranteed by the Constitution. It would be a dramatic about face for the citizens of this nation to abandon long held values and choose to give up rights and freedoms protected by the Constitution out of fear of loss of life from terrorist attacks. Although the threat of loss of life is real, there is no real potential for an actual international terrorist group to take control of this country by force and do away with the current constitutional democracy. Only the citizens of the United States, and their elected representatives, have the power to cause the demise of this democracy.

Although the Post-9/11 era may be characterized by a real threat of terror attacks, this era has also been characterized by abuses of government authority and power, including initiation of war based on manipulated, mischaracterized, exaggerated and/or just plain false intelligence reports, warrantless surveillance of citizens on a mass scale, detention without trial or access to counsel, and even the torture and killing of “detainees”. Are such abuses to be tolerated as an evil necessary to national defense or are they to be prohibited and punished as violations of the Constitution and the criminal statutes? Do citizens and their elected officials stand by the Constitution and the nation’s laws or abandon them out of fear of terrorist attacks? These questions have been under debate since the post-9/11 exposure of the above referenced government excesses.

The role of Congress in this debate, and its ultimate resolution, is critical. This is certainly not the time to be placing a muzzle on Congress. Each Member of Congress still serves a critical role in maintaining the eternal vigilance that Thomas Jefferson recognized was essential to the preservation of the then young constitutional democracy. In order for citizens to obtain adequate information to participate meaningfully in the on-going public debate regarding government abuses of authority and compromises of citizens’ rights and freedoms in the name of national security, it is essential to protect the rights and duties of Members of Congress to reveal to their constituencies information that may have been unilaterally and/or erroneously classified by the very Executive Branch agencies and officials engaging in the constitutionally questionable actions. Consequently, the protections afforded to a Member of Congress under the Speech or Debate Clause are of the utmost importance, as are the Constitution’s requirement that the workings of Congress be transparent to and published for the benefit of the public that the Congress serves.

Although this debate continues regarding the extent to which citizens’ rights and freedoms should be restricted in order to address the risk of terrorism, there has not, however, been any corresponding public debate regarding whether the unique constitutional protections provided to Members of Congress under the Speech or Debate Clause must now give way to national defense concerns in this post-9/11 era. The reason for the absence of this debate may simply be that the Constitution leaves little room for argument on the matter as the Speech and Debate Clause protections for Members of Congress have been consistently upheld by the courts. However, as reflected by the example of the secret 28 Pages of the otherwise published (with some occasional redactions) congressional report “Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001” (hereafter “Joint Inquiry”) discussed *infra*, in the aftermath of 9/11 the Congress may be making compromises in regard to both the Speech or Debate Clause protections for Members of Congress and the right of the public to have access to congressional proceedings pursuant to the Journal Clause. Such compromises may be the result of pressure from the Executive Branch.

It is the intent of this article to contribute to informing public debate on these important questions. First, a review of the history of the federal courts’ interpretation and application of the protections provided to Members of Congress under the Speech or Debate Clause is presented. Then, the Constitution’s Journal or Secrecy Clause requirement that Congress publish its proceedings, unless Congress in its own judgment determines there is a need for secrecy, is discussed. Then both the protections provided by the Speech or Debate Clause and obligations created by the Journal or Secrecy Clause are analyzed in the context of the non-hypothetical post-9/11 era scenario regarding the 28 Pages of the Joint Inquiry report that have been kept secret by Congress for 13 years. The on-going controversy regarding release of the 28 Pages is remarkably reminiscent of the situation that unfolded some forty years ago when Daniel Ellsberg felt ethically compelled to blow the whistle on the Pentagon Papers, and United States Senator Mike Gravel of Alaska read and placed substantial portions of those classified documents regarding the Vietnam War into the (public) Congressional Record.

**II. SPEECH OR DEBATE CLAUSE PROTECTIONS FOR MEMBERS OF CONGRESS WHO DISCLOSE CLASSIFIED INFORMATION DURING CONGRESSIONAL PROCEEDINGS**

***A.* The Pentagon Papers Case: *Gravel v. United States***

In 1972, in the case of *Gravel v. U.S.*,[[3]](#footnote-3) the Supreme Court of the United States was called upon to decide the scope of the Speech or Debate Clause protections for Members of Congress and their aides in the context of a public disclosure of information related to national security that was classified by the Executive Branch as secret. *Gravel* concerned a Department of Justice (DOJ) investigation and a federal grand jury proceeding regarding the release and publication of this classified information. The classified information in question was from a voluminous Department of Defense (DOD) study entitled the “History of the United States Decision-Making Process on Viet Nam Policy” which became known as the “Pentagon Papers”.

The Pentagon Papers had originally been copied and disclosed to Congress and the press by now famous whistleblower Daniel Ellsberg. On the night of June 29, 1971, United States Senator Mike Gravel of Alaska, as Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, convened a meeting of the subcommittee. During this meeting, the Senator read extensively from a copy of the Pentagon Papers and then placed the entire forty-seven volumes of the study in the public congressional Record. Dr. Leonard S. Rodberg had been added to the Senator's staff earlier in the day and assisted Senator Gravel in preparing for and conducting this subcommittee hearing.[[4]](#footnote-4) The Federal Department of Justice (DOJ) sought to subpoena Senator Gravel and his aide to testify before a grand jury as part of the DOJ’s preparation for a criminal prosecution of Senator Gravel. The Senator brought suit to enforce his rights under the Speech or Debate Clause and the controversy reached the Supreme Court.

The *Gravel* case required the Supreme Court to interpret and apply the long recognized but seldom litigated protections provided to a Member of Congress by the Constitution’s Speech or Debate Clause. The Framers of the Constitution were concise in the language chosen to provide these protections to Congress:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They 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**.[[5]](#footnote-5)

In *Gravel*, the Supreme Court held, unambiguously, that in light of the clear protection provided to a Member of Congress by the Speech or Debate Clause, no Member of the House or Senate could be interrogated about or prosecuted for disclosing classified information, or for other actions that DOJ considered to constitute the commission of a crime, if those actions were taken in the course of performing official duties related to legislation.[[6]](#footnote-6) The Court in *Gravel* also held that an aide to a Member of Congress is also similarly protected from prosecution insofar as the aide's conduct would be a protected legislative act if performed by the Member of Congress himself.[[7]](#footnote-7)

This broad protection provided to a Member of Congress by the Speech or Debate Clause was held by the Court to not be dependent on the motive of the Member of Congress or their aide in taking the actions in question.[[8]](#footnote-8) Inquiries into the motives of a Member of Congress or their aides in conducting official legislative acts are not allowed.[[9]](#footnote-9)

In *Gravel*, the Supreme Court defined the conduct of Members of Congress, and their aides, that is protected by the Speech or Debate Clause from criminal or civil prosecution, process, or inquiry, including inquiry by a grand jury or federal agency. The Court concluded that it was “incontrovertible” that the Speech or Debate Clause at the least protected Senator Gravel from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were placed in in the record.[[10]](#footnote-10) The Court explained that the Speech or Debate Clause was designed to assure that Congress, as a co-equal branch of government, had wide freedom of speech, debate, and deliberation without fear of intimidation or threats from the Executive Branch.[[11]](#footnote-11) Members of Congress are protected from prosecutions that impinge upon or threaten the legislative process.[[12]](#footnote-12) Based on these principles, the Court concluded that Senator Gravel could neither be questioned nor forced to defend himself from prosecution regarding the events that occurred at the subcommittee meeting, which included the Senator’s reading of portions of the classified Pentagon Papers and his placing the entire set of papers in the public record.

The Court in *Gravel* concluded that for the purpose of construing the Speech or Debate Clause privilege a Member and his aide are to be “treated as one.”[[13]](#footnote-13) The Speech or Debate Clause was held to prohibit inquiry into the actions of Dr. Rodberg as the Senator's assistant which would have been privileged legislative acts if performed by the Senator personally.[[14]](#footnote-14)

Reflecting on the Court’s Speech or Debate Clause precedent since 1881, the Court observed that the consistent approach of the Judiciary has been to read the Clause broadly and to not confine the protection of the Speech or Debate Clause to words spoken in debate.[[15]](#footnote-15) Committee reports, resolutions, and the act of voting are equally covered, as are all things generally done in a session of the House by one of its members in relation to the business before it.[[16]](#footnote-16) The Court has sought to implement the fundamental purpose of the Speech or Debate Clause of freeing the legislator from executive and judicial oversight that threatens to control his conduct as a legislator.[[17]](#footnote-17) The Court held, consistent with this logic and precedent, that a Member's conduct at a legislative committee hearing “may not be made the basis for a civil or criminal judgment against a Member” because such conduct is “within the ‘sphere of legitimate legislative activity.’”[[18]](#footnote-18)

In *Gravel*, the Court held that Executive Branch agencies could be, and should be, enjoined from questioning any witness, including an aide to a Member of Congress, concerning the Member's conduct, or the conduct of an aides, at a subcommittee meeting.[[19]](#footnote-19) The Court also held that such an injunction should prohibit any inquiry into the motives and purposes behind the conduct of a Member of Congress or his aides at such a meeting or hearing.[[20]](#footnote-20) Likewise, Executive Branch agencies, including via grand jury proceedings, may be enjoined from inquiring into communications between a Member of Congress and his aides during the term of their employment related to such subcommittee meetings or hearings or in regard to any other legislative act of the Member.[[21]](#footnote-21)

In *Gravel*, the Supreme Court also defined the conduct of Members of Congress that is not protected by the Speech or Debate Clause. The Speech or Debate Clause privilege does not protect non-legislative actions performed by aides for Members of Congress, even though within the scope of their employment.[[22]](#footnote-22) It likewise provides no protection for “criminal conduct threatening the security of the person or property of others,” whether done at the direction of a Member of Congress or not.[[23]](#footnote-23) This privilege does not immunize a Member 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.”[[24]](#footnote-24)

Legislative activity is not considered to be an all-encompassing concept, and the Clause has not been extended beyond the legislative sphere.[[25]](#footnote-25) Communications from Congress to the Executive Branch and administrative agencies, including advocacy regarding how a statute should be administered, although common, is not protected legislative activity.[[26]](#footnote-26)

The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. 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 indirect impairment of such deliberations.’[[27]](#footnote-27)

Applying these principles, the Court in *Gravel* concluded that the Senator’s conduct and statements in the subcommittee hearing were legislative in nature and clearly protected, but the private publication by the Senator through Beacon Press was not essential to the deliberation of the Senate and therefore not legislative in nature.[[28]](#footnote-28) Consequently, the Court held that this particular conduct relating to external publication of the Pentagon Papers via the Beacon Press was not protected under the Clause.[[29]](#footnote-29) The Court in *Gravel* also qualified the scope of injunctions that could be issued to protect a Member of Congress noting that actions of a Member of Congress or an aide in preparation for a subcommittee hearing could be inquired into if relevant to an investigation of a possible “third-party crime,” if the act of the Member inquired into would not in itself be criminal. [[30]](#footnote-30)

The *Gravel* decision in 1972 was one of the few occasions the Supreme Court has had to analyze and explicate the protections provided to Members of Congress by the Speech or Debate Clause, but it was not the first. The Supreme Court’s first occasion to deal with the Speech or Debate Clause came in 1880 in *Kilbourn v. Thompson*.[[31]](#footnote-31) *Kilbourn* involved a suit for false imprisonment wherein the petitioner alleged that the Speaker and several Members of the House of Representatives ordered the petitioner to be arrested for contempt of Congress. In *Kilbourn* , the Court, after holding that Congress did not have power to order the arrest, further held that were it not for the privilege created by the Speech or Debate Clause, the defendants would have been liable for false imprisonment. The Court in *Kilbourn* held that the privilege should be read broadly to include not only words spoken in debate but also anything generally done by Members of Congress in relation to the business before Congress.[[32]](#footnote-32)

In 1951, the Supreme Court decided *Tenney v. Brandhove*.[[33]](#footnote-33) The question to be decided in *Tenney* was whether a state legislative privilege was analogous to that created by the Speech or Debate Clause in the Constitution of the United States and whether this privilege protected a state legislator from a Civil Rights lawsuit. The Civil Rights suit alleged that the legislator had used his official forum to obstruct plaintiff from exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances. The Court, in deciding that the Civil Rights suit should be dismissed, concluded that the state legislative privilege was comparable to the similar federal privilege created under the Speech or Debate Clause, and held that “The claim of an unworthy purpose does not destroy the privilege.”[[34]](#footnote-34) The Court further noted that the Court’s earlier holding in *Fletcher v. Peck[[35]](#footnote-35)* that it would be contrary to the separation of powers scheme of government for a court to inquire into the motives of legislators “has remained unquestioned.”[[36]](#footnote-36)

The Supreme Court recounted in detail the history of the Clause in 1966 in *United States v. Johnson*.[[37]](#footnote-37) The Court in *Johnson* noted that because the tradition of legislative privilege is so well established, there have been few judicial decisions regarding this issue.[[38]](#footnote-38) In *Johnson*, the Court in recounting the history of the Speech or Debate Clause discussed the Court’s prior decisions in *Kilbourn* and *Tenney*.[[39]](#footnote-39) The Court concluded that the purpose of the Speech or Debate Clause was to prevent intimidation of legislators by the Executive Branch and accountability before a possibly hostile judiciary.[[40]](#footnote-40)

**B. Speech or Debate Clause Decisions after *Gravel***

In *Doe v. McMillan*, decided two months after *Gravel*, the Court of Appeals for the District of Columbia Circuit also had occasion to consider the nature and purpose of the protections provided to members of Congress in the Speech or Debate Clause. The Court of Appeals held, consistent with *Gravel*, that committee reports, resolutions, and the act of voting are as protected as actual words spoken in debate, as is any act done in a session of Congress by a Member in relation to the business of Congress.[[41]](#footnote-41)

“In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.” To accomplish this important objective, the Supreme Court has recognized the necessity for construing the Speech or Debate Clause protection in a broad fashion.[[42]](#footnote-42)

The Court of Appeals in *McMillan* noted, significantly, that the Speech or Debate Clause not only provides a defense on the merits, but it also protects a legislator from the annoyance of having to defend himself in court.[[43]](#footnote-43) For this protection against having to defend against a lawsuit to apply, the only question a trial court need consider is whether the pleadings reflect that the Member’s actions at issue were within the sphere of legitimate legislative activity.[[44]](#footnote-44) The Court of Appeals also noted, again consistent with *Gravel*, that when “congressional employees or officers are acting pursuant to valid legislative authorization, in furtherance of a proper legislative purpose, they also come within the scope of the Speech or Debate Clause protection.”[[45]](#footnote-45)

The United States Supreme Court accepted certiorari and reviewed the Court of Appeals decision in *McMillan*.[[46]](#footnote-46) The Court affirmed the Court of Appeals in regard to the holdings noted *supra*. As in *Gravel*, the Court in *McMillan* addressed both the conduct that is protected and the conduct that is not protected by the Speech or Debate Clause.

In terms of conduct that is protected, the Court held that held that congressional committee members, including their staff, consultant, and investigator, were absolutely immune under the speech or debate clause insofar as they engaged in legislative acts such as compiling a committee report, referring a report to the House, and voting for publication of a report. The Court held that Congressmen and their aides are immune from liability for their actions within the legislative sphere, even though their conduct if performed in another context would be unconstitutional or contrary to criminal or civil statutes.[[47]](#footnote-47)

The Court also held that the public printer and the superintendent of documents were protected by the doctrine of official immunity for publishing and distributing the congressional committee report but only to the extent that this conduct served legitimate legislative functions.[[48]](#footnote-48) The Court reaffirmed that the Speech or Debate Clause protects anything generally done in a legislative session by a Member of Congress in relation to the business before Congress.[[49]](#footnote-49)

The *McMillan* Court further held that a published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries (but not to the general public).[[50]](#footnote-50) Inclusion in a congressional committee hearing and report of matters unnecessary and irrelevant to any legislative purpose does not result in loss of the congressional committee members’ (and their aides’) immunity under the Speech or Debate Clause.[[51]](#footnote-51)

In terms of conduct that is not protected, the Court noted that although Members of Congress may frequently engage in communications with the Executive Branch, such conduct is not protected legislative activity that falls within the protection of the Speech or Debate Clause.[[52]](#footnote-52) And, as in *Gravel*, the Court in *McMillan* held that the Speech or debate clause does not protect criminal conduct that threatens the security of the person or property of others.[[53]](#footnote-53)

Further, the *McMillan* Court held that the Speech or Debate clause does not protect a private republication of documents introduced and made public at congressional committee hearings, even though the hearing was unquestionably a part of the legislative process.[[54]](#footnote-54) Thus, a Member of Congress will not be protected under the Clause, for example, if the Member publishes a libelous statement in a speech or press release in the Member’s home district even though the statement is read or quoted from an official committee report because such a republishing of the libelous statement would not be an essential part of the legislative process or the deliberative process by which Members participate in committee and congressional proceedings.[[55]](#footnote-55) Even if Congress authorized distribution of some actionable (subject to a tort action under local law such as for invasion of privacy or defamation) material to the public at large, the *McMillan* Court held that the administrative personnel who implement such authorization and act to distribute such information to the public (such as the Government Printing Office) have no automatic immunity under the Speech or Debate Clause, and therefore would be required to respond to private suits to the extent that others must respond under the applicable law and rules.[[56]](#footnote-56) Activities such as public speaking are considered political rather than legislative for purposes of the Speech or Debate Clause.[[57]](#footnote-57) Republication of intra-congressional material outside Congress, including to the news media or the public is not a protected legislative activity under the Speech and Debate Clause.[[58]](#footnote-58) [[59]](#footnote-59) [[60]](#footnote-60)

However, it should be noted that just because particular conduct is not protected by the Speech or Debate Clause does not necessarily mean that the conduct is not otherwise protected by law. The *McMillan* Court, and the courts that have addressed Speech or Debate Clause issues thereafter, have not been presented with and have not decided the question of whether the rights and obligations under the Journal or Secrecy Clause, the First Amendment Right of Free Speech, The First Amendment Right of Freedom of the Press, and the doctrine of official immunity provide a defense or immunity to those who publish and distribute congressional proceedings required to be published by the Journal Clause.[[61]](#footnote-61) This issue is discussed further *infra*.

Three years after *Gravel*, in *Eastland v. United States Servicemen’s Fund*,[[62]](#footnote-62) the Supreme Court emphasized that actions of Members of Congress to conduct inquiries and investigations clearly fall within the protections of the Speech or Debate Clause.

[The Court has] often noted that the power to investigate is inherent in the power to make laws because ‘[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.’ ... To conclude that the power of inquiry is other than an integral part of the legislative process would be a miserly reading of the Speech or Debate Clause in degradation of the ‘integrity of the legislative process.’[[63]](#footnote-63)

In 1983 in *Miller v. Transamerican Press, Inc.*, [[64]](#footnote-64) the Ninth Circuit discussed the test for determining the applicability of the broad protection provided to Members of Congress in the Speech or Debate Clause, as interpreted by the Supreme Court’s prior decisions such as *Gravel* and *Eastland*.

However, “[l]egislative acts are not all-encompassing”; the privilege extends beyond pure speech and debate only when necessary to prevent indirect impairment of congressional deliberations. *Gravel*, 408 U.S. at 625, 92 S.Ct. at 2627. Activity other than speech or debate must meet what may be characterized as a two-part test to qualify for the privilege. First, it must be “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings.” *Id*. The privilege applies “to things generally done in a session of the House by one of its members in relation to the business before it.” *Kilbourn v. Thompson*, 103 U.S. 168, 204, 26 L.Ed. 377 (1881). Second, the activity must address proposed legislation or some other subject within Congress' constitutional jurisdiction. *Gravel*, 408 U.S. at 625, 92 S.Ct. at 2627. The scope of congressional inquiry is broad, see, e.g., *id*. at 610 n. 6, 92 S.Ct. at 2619 n. 6, though not unlimited. *Watkins v. United States*, 354 U.S. 178, 187, 77 S.Ct. 1173, 1179, 1 L.Ed.2d 1273 (1957). The Supreme Court has so far disapproved only abusive, persecutory inquisitions into purely private affairs. See *id*. Once the legislative-act test is met, the privilege is absolute. *Eastland*, 421 U.S. at 503, 95 S.Ct. at 1821. “It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers.” *Brewster*, 408 U.S. at 516, 92 S.Ct. at 2539.[[65]](#footnote-65)

In *Miller*, the Ninth Circuit noted that while not all conduct preceding a legislative act falls within the privilege,[[66]](#footnote-66) inquiry and investigation by a Member of Congress related to legislation or other legitimate congressional business is protected.[[67]](#footnote-67)

The Ninth Circuit Court of Appeals held, relying on Supreme Court precedent, that placing information or articles into the congressional Record is protected as well under the Speech or Debate Clause.

In any event, it meets part one of the legislative-act test because of the Record's role in the intra-congressional communicative process. Part two of the test is also satisfied here. Steiger was on the House Select Subcommittee on Crime, and the article hinted at misappropriation of pension funds. Courts should not go beyond a narrow determination that the subject of a congressional inquiry “may be fairly deemed” within the committee's province. *Tenney v. Brandhove,* 341 U.S. 367, 378, 71 S.Ct. 783, 789, 95 L.Ed. 1019 (1951).

Because Steiger's insertion of the article into the Record was privileged, questions about it are prohibited. This proscription includes questions about his motive or legislative purpose. *See Brewster,* 408 U.S. 501, 525, 92 S.Ct. 2531, 2544, 33 L.Ed.2d 507 (1972); *Johnson,* 383 U.S. at 184–85, 86 S.Ct. at 757–58.[[68]](#footnote-68)

The Ninth Circuit in *Miller* also made clear that the Speech or Debate Clause protections extended to protecting the identity of confidential sources of Members of Congress involved in official inquiries or investigations.

Obtaining information pertinent to potential legislation or investigation is one of the “things generally done in a session of the House,” *Kilbourn v. Thompson,* 103 U.S. at 204, concerning matters within the “legitimate legislative sphere,” *Eastland,* 421 U.S. at 503, 95 S.Ct. at 1821. Constituents may provide data to document their views when urging the Congressman to initiate or support some legislative action. Informants may, in confidence, give information that is useful in exposing corruption within the government or elsewhere.

If a source's identity is disclosed, he could suffer serious adverse consequences. In the case of organized crime, for example, disclosure could even be life-threatening. The possibility of public exposure could constrain these sources. It could deter constituents from candid communication with their legislative representatives and otherwise cause the loss of valuable information.

Even more to the point, it would chill speech and debate on the floor. The Congressman might censor his remarks or forgo them entirely to protect the privacy of his sources, if he contemplated that he could be forced to reveal their identity in a lawsuit. We conclude that the privilege extends to questions about a Congressman's sources of information.[[69]](#footnote-69)

The 9th Circuit in *Miller* also explained that the Speech or Debate Clause protections apply just as broadly to former Members of Congress as well as to active Members.[[70]](#footnote-70)

Lower courts have disregarded the absence of liability or of current legislative tasks when applying the privilege. *Tavoulareas v. Piro,* 93 F.R.D. 11, 18–19 (D.D.C.1981) (congressional staff as nonparty deponents in libel suit); *Dickey v. CBS, Inc.,* 387 F.Supp. 1332, 1336 (E.D.Pa.1975) (ex-Congressman nonparty to libel suit); *Smith v. Crown Publishers, Inc.,* 14 F.R.D. 514 (D.C.N.Y.1953) (Congresswoman plaintiff in libel action). None has compelled testimony about legislative acts.

We conclude that the clause means what it says. Steiger “shall not be questioned” on matters to which the privilege applies. His present status with regard to public office or to the lawsuit is irrelevant.[[71]](#footnote-71)

In 1994 in *Maddox v. Williams*, [[72]](#footnote-72) the United States District Court for the District of Columbia held, citing several decisions of the Supreme Court, that the Speech or Debate Clause protections extend even to use by a Member of Congress of information and documents illegally obtained as long as the use is related to an official inquiry and the Member was not involved in the illegal action.

The Supreme Court has squarely held that the use by a congressional committee of information that is gathered illegally [footnote omitted] is nevertheless protected by the Speech or Debate Clause, provided the use occurs in the course of a legitimate legislative investigation, and the Congressmen were not personally involved in the criminal activity. [footnote omitted] Thus, in *Dombrowski v. Eastland*, 387 U.S. 82, 85, 87 S.Ct. 1425, 1427, 18 L.Ed.2d 577 (1967), the Court stated that an action against the Chairman of the Internal Security Subcommittee of the United States Senate's Judiciary Committee was properly dismissed under the Speech or Debate Clause, and retention and use of certain records by that Subcommittee were protected by that Clause, even against a claim that the records had been secured by means of a conspiracy and other illegal acts. *See* *Eastland v. United States Servicemen's Fund*, *supra*, 421 U.S. at 501, 95 S.Ct. at 1820; *Doe v. McMillan*, 412 U.S. 306, 312–13, 93 S.Ct. 2018, 2024–25, 36 L.Ed.2d 912 (1973); *United States v. Brewster*, *supra*, 408 U.S. at 516, 92 S.Ct. at 2539; *Powell v. McCormack*, 395 U.S. 486, 502–03, 89 S.Ct. 1944, 1953–55, 23 L.Ed.2d 491 (1969); *United States v. Johnson*, 383 U.S. 169, 184–85, 86 S.Ct. 749, 757– 58, 15 L.Ed.2d 681 (1966); *Dombrowski v. Burbank*, 358 F.2d 821 (D.C.Cir.1966).[[73]](#footnote-73)

As recently as 2010 in *Porteous v. Baron*, [[74]](#footnote-74) the United States District Court for the District of Columbia applied the above cited Supreme Court precedents governing application of the Speech or Debate Clause protections for members of Congress, including *Gravel*. The District Court in *Porteous* cited the Supreme Court’s decision in *Dombrowski v. Eastland*, 387 U.S. 82, 84–85 (1967) for the proposition that the Speech or Debate Clause gives “Members of Congress immunity from suit for things that they say or do while ‘engaged in the sphere of legitimate legislative activity’” which includes protection from the burden of having to defend against a lawsuit, not just protection from the consequences of a negative outcome of litigation.[[75]](#footnote-75)

The District Court in *Porteous* cited the Supreme Court’s decision in *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502–03 (1975) for the proposition that the Clause provides protection against both civil and criminal actions, whether such actions are brought by private individuals or by the Executive Branch.[[76]](#footnote-76)

The District Court in *Porteous* noted that the Speech or Debate Clause has been recognized as an important protection of the independence and integrity of the legislature that prevents both the intimidation of legislators by the executive and accountability before a possibly hostile judiciary.[[77]](#footnote-77) The *Porteous* court observed that the Speech or Debate Clause also serves the important function of reinforcing the separation of powers and that the “purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently.”[[78]](#footnote-78)

The District Court in *Porteous* observed thatthe Supreme Court has “[w]ithout exception ... read the Speech or Debate Clause broadly to effectuate [those] purposes.”[[79]](#footnote-79) The District Court in *Porteous* acknowledged the Supreme Court precedent discussed *supra* to the effect that the privilege extends not only to words spoken in debate, but to anything generally done in a session of the House by one of its members in relation to the business before it, and thus whether a Member of Congress is entitled to immunity under the Speech or Debate Clause hinges therefore on whether the Member is “acting in the sphere of legitimate legislative activity.” [[80]](#footnote-80)

The District Court in *Porteous,* quoting *Gravel,* recognized the Supreme Court precedentto the effect that where actual speech or debate is not involved, the activity “must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.”[[81]](#footnote-81)

The District Court in *Porteous* noted the Supreme Court precedent which establishes that “conducting of an investigation where information is gathered, holding hearings where the information is presented, preparing a report where the information is reproduced, and authorizing the publication and distribution of that report are all acts that fall within the legislative sphere.”[[82]](#footnote-82) If a court determines that a Member of Congress is acting within that sphere, “the Speech or Debate Clause is an absolute bar to interference.”[[83]](#footnote-83)

The District Court in *Porteous,* again quoting *Gravel*, noted that the Supreme Court has extended the protections of the Speech or Debate Clause beyond Members of Congress to their aides as well.[[84]](#footnote-84)

The District Court in *Porteous* concluded, in light of the Supreme Court precedents discussed, that the proper focus of the courts’ inquiry under the Speech or Debate Clause is “on the nature of the defendants' conduct more generally. So long as the type of conduct [the plaintiff] seeks to enjoin falls legitimately within the scope of legislative activity, it matters not whether the specific conduct is unlawful.”[[85]](#footnote-85)

As the Supreme Court teaches, “[c]ongressmen and their aides are immune from liability for their actions within the ‘legislative sphere,’ even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes.” *Doe*, 412 U.S. at 312–13, 93 S.Ct. 2018 (internal citation omitted) (emphasis added). Therefore, because the use of testimony to prepare for and conduct congressional impeachment and removal proceedings is conduct of the type that clearly falls within the legislative sphere, the Speech or Debate Clause prevents this Court from questioning, let alone enjoining, the defendants about their use of Judge Porteous' immunized testimony, whether or not such use actually runs afoul of the Fifth Amendment.[[86]](#footnote-86)

These cases cited *supra* reflect a willingness and commitment by the courts at all levels over time to enforce the protections provided to Members of Congress by the Speech or Debate Clause. The Supreme Court and lower courts in addressing the scope and application of the Speech or Debate Clause have consistently held to date that: 1) No Member of the House of Representatives or the Senate can be interrogated about or prosecuted for making otherwise defamatory statements, disclosing classified information, or for other actions that DOJ or a private litigant might consider to constitute the commission of a crime or tort, if those actions are taken in the course of performing duties related to legislation or some other legitimate business before Congress; 2) Aides to a Member of Congress are similarly protected from prosecution and civil litigation; 3) This protection provided to a Member of Congress by the Speech or Debate Clause is not dependent on the motive of the Member of Congress or their aide in taking the actions in question; 4) Inquiry and investigation related to legislation or other business of Congress falls within the protections of the Clause; and 5) The confidentiality of a source of information for a Member of Congress is protected. The history of the federal courts’ interpretation and application of Speech or Debate Clause makes clear that if a Member of Congress chooses to disclose information in the congressional Record, in a congressional debate, or in a congressional hearing, or to conduct an official inquiry or a congressional investigation, or otherwise participate in a congressional committee or House or Senate proceeding, that the DOJ or any other element of the Executive Branch or Judicial Branch may not prosecute or persecute in any manner the Member of Congress for such official actions.

A Member of Congress (and/or their aides) might choose to take such actions because of their commitment to preserve and protect the Constitution via their oath of office, in light of some violations of the Constitution by the Executive Branch (or Congress) that have come to light. A Member of Congress (and/or their aides) might choose to take such actions because they feel it is necessary to promote an investigation on a matter of public importance such as some alleged corruption within the government itself. Or, a Member of Congress (and/or their aides) might choose to take such actions because they feel it necessary to protect the public welfare via enactment of some legislation or passage of a resolution. Regardless of the motives of the members of Congress in taking such official actions, which have consistently been held by the courts to be irrelevant to the question of protection under the Speech or Debate Clause, there is no reason to think that the federal courts would, or should, now abandon their long history of protecting such actions under the Speech or Debate Clause. Even if the Supreme Court had the power to reinterpret the plain language of the Constitution in the Speech or Debate Clause, there is no legitimate rationale in the post-9/11 era for changing the long established precedent that continues to protect each Member of Congress in performing official duties even in times of controversy and even in the face of criticism or opposition from other branches of government.

**III. THE OBLIGATION OF CONGRESS TO MAKE CONGRESSIONAL PROCEEDINGS PUBLIC PURSUANT TO THE JOURNAL CLAUSE OF THE CONSTITUTION ABSENT AN EXPLICIT DETERMINATION BY CONGRESS ITSELF OF A NEED FOR SECRECY**

The Constitution requires that “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy.” CONST. Art. I § 5, cl. 3 (the “Journal Clause” or “Secrecy Clause”). The Journal Clause has not been the subject of extensive judicial examination. A number of courts have had occasion to note this constitutional requirement, without having the need to expound much on its nature or scope. The Supreme Court, for example, in 1892, noted the purpose of the Journal Clause was to inform the electorate regarding congressional proceedings and promote government transparency.

**The clause of the constitution upon which the appellants rest their contention that the act in question was never passed by congress is the one declaring that ‘each house shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy;** and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.’ **Article 1, § 5.** It was assumed in argument that the object of this clause was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by the two houses of congress. But the words used do not require such interpretation. **On the contrary, as Mr. Justice Story has well said, ‘the object of the whole clause is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents. And it is founded in sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main resources, by plotting and devising measures in secrecy. The public mind is enlightened by an attentive examination of the public measures; patriotism and integrity and wisdom obtain their due reward**; and votes are ascertained, not by vague conjecture, but by positive facts. \* \* \* So long as known and open responsibility is valuable as a check or an incentive among the representatives of a free people, so long a journal of their proceedings and their votes, published in the face of the world, will continue to enjoy public favor and be demanded by public opinion.’ 2 Story, Const. §§ 840, 841.[[87]](#footnote-87)

The Supreme Court in 1892 noted the wording of the Journal Clause and went on to explain, on a point relevant to the discussion *infra*, that although the House and Senate have discretion to establish their own rules, neither the House or Senate may by way of their rules ignore or violate requirements of the Constitution.

The constitution empowers each house to determine its rules of proceedings. **It may not by its rules ignore constitutional restraints or violate fundamental rights**, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.

Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact; and as there is no constitutional method prescribed, and no constitutional inhibition of any of those, and no violation of fundamental rights in any, it follows that the house may adopt either or all, or it may provide for a combination of any two of the methods.[[88]](#footnote-88)

The Supreme Court in 1938 again noted the substance of the Journal Clause and con-cluded, again relevant to the discussion below, that in implementing the Journal Clause a vote of all members of a House of Congress is not required to invoke the secrecy provision, but rather there must be concurrence by a controlling part of “whose opinion, under applicable rules of congressional procedure, is decisive of the question.”[[89]](#footnote-89)

The Fifth Circuit in a 1975 decision related to the Vietnam War had occasion to note the Journal Clause secrecy provision but was not called upon to decide in that case its scope or limitations.

Note 6: **We have no reason to answer at this time any question as to remedy, in the event constitutional secrecy is claimed and sustained. In such event, the district court would be required to balance the rights of Lt. Calley to evidence with the constitutional right afforded Congress to secrecy.** *Roviaro v. United States*, 1957, 353 U.S. 53, 62, 77 S.Ct. 623, 1 L.Ed.2d 639, 646. *See also* Note, *A Defendant’s Right to Inspect Pre-trial congressional Testimony of Government Witnesses*, 1971, 80 Yale L.J. 1388, *supra*.

One underlying principle of American jurisprudence is that no man or institution is above the law. Congress is not exempt from this principle. … .[[90]](#footnote-90)

The District of Columbia Circuit in 1976 noted the Secrecy (Journal) Clause but again failed to reach questions regarding its scope or limitations.

**We need not, however, indulge in any discussion as to whether Congressman Nedzi’s response constituted a claim of privilege under the Secrecy Clause, U.S.Const. Art. 1, Sec. 5, Cl. 3 and under the Speech or Debate Clause, U.S. Const. Art. I, Sec. 6**, or under the House Rules which prohibit production of executive session testimony except upon affirmative vote of the Committee or the House. See House Resolution 12, 93rd Cong., 1st Sess., 119 Cong.Rec. H. 30-31. The spector of an academic discussion giving rise to a possible future conflict between co-equal branches of the government is both unappealing and inappropriate under the existing circumstances … .[[91]](#footnote-91)

In a 1978 case, the Third Circuit noted the substance of both the Journal Clause and the Speech or Debate Clause but found it unnecessary to engage in a detailed analysis of either, noting also that the key question regarding whether Congress had the power to limit the protections for Members under the Speech or Debate Clause had not yet been reached by the Supreme Court.

**It seems clear from H.R. 10 that the House believes it has the power to resist a valid subpoena from a court in some instances. Possibly it would rest its power to do so on Article I, s 5, cl. 3,****FN4 since the resolution refers to “the privileges and rights of this House.”** **Textually, at least, the resolution does not seem aimed at vindication of the Speech or Debate Clause privilege of House members. That privilege, although of great institutional interest to the House as a whole, is also personal to each member. Whether it could be narrowed by congressional action to the member’s detriment is a question carefully reserved in United States v. Brewster, 408 U.S. 501, 529 n.18, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972) and United States v. Johnson, 383 U.S. 169, 185, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966). Whether it could be enlarged by legislation, or more particularly by the nonstatutory action of a single house, so as to place beyond the subpoena power of the judicial branch matters not actually within the Speech or Debate Clause privilege is an open question of considerable delicacy. See United States v. Liddy, 177 U.S.App.D.C. 1, 7-8, 542 F.2d 76, 82-83 (1976); Calley v. Calloway, 519 F.2d 184, 219-22 (5th Cir. 1975), Cert. denied, 425 U.S. 911, 96 S.Ct. 1505, 47 L.Ed.2d 760 (1976). But this is not a proper case to decide whether the House has the power to restrict or expand the reach of the Speech or Debate Clause beyond that which a court might otherwise determine**. On the present record the House has not taken a position in opposition to the subpoena. We agree with the district court that in challenging a subpoena to the Clerk for House Records, an individual congressman lacks standing as an intervenor to assert in his individual interest whatever institutional interest the House as a whole may have in a more particularized compliance with its resolution.

Note 4: **“Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their judgment require Secrecy; … .”[[92]](#footnote-92)**

The Third Circuit, *en banc,* in 1986 noted that the Journal Clause was one of several constitutional provisions adopted with the purpose of keeping the electorate informed, and also noted that the First Amendment prohibits governmental interference with the flow of information by closure of government proceedings that have been historically open to the public.

The First Amendment provides that “Congress ... shall make no law ... abridging the freedom of speech, or of the press.” The Fourteenth Amendment extends this preclusion to actions by the states. This means that, with a few, carefully crafted exceptions, the government can neither interfere with anyone who is attempting to speak or publish nor punish him or her thereafter for having done so. [footnote omitted] It further means that government cannot interfere with one reading or hearing that which someone else wishes to communicate. [footnote omitted] The free speech clause also precludes government interference with the flow of information at a pre-publication stage. Thus, the government may not interfere with those seeking information to communicate to others. “There is an undoubted right to gather news ‘from any source by means within the law.’ ” *Houchins v. KQED, Inc.*, 438 U.S. 1, 11, 98 S.Ct. 2588, 2594, 57 L.Ed.2d 553 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681–82, 92 S.Ct. 2646, 2656–57, 33 L.Ed.2d 626 (1972)). **Moreover, we now know that the free speech clause bars government interference with the flow of information through the closure of governmental proceedings that historically have been open to the public, except in certain limited circumstances. [footnote omitted] Government interference in each of these guises can fairly be characterized, in the words of the First Amendment, as “abridging the freedom of speech.”**

\* \* \*

**The concern for an informed public led to the adoption of a number of constitutional provisions.** In Article I, Section 9, it is provided that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” Article II, Section 3 further provides that the President “shall from time to time give to the Congress Information of the State of the Union ...” **Article I, Section 5 specifically directs that each House of Congress shall “from time to time publish ... [a Journal of its Proceedings], excepting such Parts as may in their Judgment require Secrecy.”** [footnote omitted] Finally, in addition to these specific requirements of governmental disclosure, the First Congress proposed, and the States ratified, the First Amendment’s preclusion of governmental interference with speech and the press. Beyond these provisions, history indicates that the founders of the Republic left decisions concerning the release of government-held information to the democratic process.[[93]](#footnote-93)

In that same Third Circuit *en banc* decision, several Circuit Judges dissenting noted that the Journal Clause establishes a “general disclosure rule” regarding congressional proceedings, with secrecy being the exception.

The reference to the early practice of the Senate and House of Representatives adds little. **The journal clause in Article I, Section 5, which antedates the first amendment, lays down a general disclosure rule, “excepting such parts as may ... require secrecy.” U.S. Const. art. I, § 5.** The first amendment is not absolute. It accommodates the need for governmental secrecy, both legislative and executive, in certain instances. I would not suppose, however, that if presented with the question the Supreme Court would defer totally to Congress with respect to the secrecy of legislative proceedings. Rather it would, as it has frequently done, accommodate the competing governmental interest in secrecy and the values of the first amendment. See New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).[[94]](#footnote-94)

Although the courts have not had occasion to expound upon the requirements of Art. I, Sec. 5, Clause 3 in detail, the language of this provision is sufficiently plain to make the meaning of this provision clear, and the cases noted *supra* show that the courts treat this provision as meaning what it says. The language stating that each House must “keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . .” is not ambiguous and thus there is no need to resort to court decisions to understand and apply this simple but important provision. This provision simply requires Congress to publish (i.e. disclose to the public) all of its proceedings (including the full text of all reports of all committees) except where some portion of those proceedings has been determined by Congress itself to require secrecy.

The Congress itself has recognized the plain import of this language in Article I Section 5 Clause 3 of the Constitution. In a statute enacted by Congress for the purpose of defining the responsibilities of the Senate’s legal counsel, the Congress recognized, in addition to the Speech or Debate Clause protections, Congress’ right to except portions of its proceedings from publication but only if in its own judgment secrecy is required.

Defense of certain constitutional powers.

In performing any function under this chapter, the **Counsel shall defend vigorously when placed in issue**--

**(1)** **the constitutional privilege from** **arrest or from** **being questioned in any other place for any speech or debate under section 6 of article I of the Constitution of the United States**;

**(2)** the constitutional power of the Senate to be judge of the elections, returns, and qualifications of its own Members and to punish or expel a Member under section 5 of article I of the Constitution of the United States;

**(3)** **the constitutional power of the Senate to except from publication such parts of its journal as in its judgment may require secrecy**;

**(4)** the constitutional power of the Senate to determine the rules of its proceedings;

**(5)** the constitutional power of Congress to make all laws as shall be necessary and proper for carrying into execution the constitutional powers of Congress and all other powers vested by the Constitution in the Government of the United States, or in any department or office thereof;

**(6)** all other constitutional powers and responsibilities of the Senate or of Congress; and

**(7)** the constitutionality of Acts and joint resolutions of the Congress.[[95]](#footnote-95)

Thus, in order for Congress to withhold some portion of congressional proceedings from publication without violating the Journal Clause, Congress itself in the exercise of its own judgment must conclude that the portion of the proceedings to be withheld requires secrecy.

**IV. IMPLICATIONS OF THE SPEECH OR DEBATE CLAUSE AND THE JOURNAL OR SECRECY CLAUSE IN REGARD TO CONGRESS’ CURRENT PRACTICES: THE CASE OF THE “28 PAGES”**

One not hypothetical current scenario where the Speech or Debate Clause protections may come to be exercised, and where the Article I Section 5 Clause 3 requirement for publication of congressional proceedings may be invoked, involves the current national debate as to whether Congress should publish the “28 Pages” from the “Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001”, which pages contain information classified by Executive Branch agencies as secret. This joint report from the House and Senate intelligence committees was published, with the 28 Pages redacted, in December of 2002. The text of the 28 Pages was not published by Congress at that time and this text has not been published by Congress at any time during the 13 years that have followed. Members of Congress are currently allowed to read these 28 Pages in a secure room and are not allowed to remove the relevant pages of the document from the room. Members of Congress who review the 28 Pages must sign an oath promising to keep the information they have read secret.

If a Member of Congress determined that the content of these 28 pages needed to be placed into the Congressional Record or discussed during debate in Congress in order to inform legislative decisions on proposed legislation, or for some investigative purpose, or to inform a vote on a proposed resolution to declassify these 28 pages, would the Member be protected in doing so from actions of the Executive Branch and the Judicial Branch? A plain reading of the Speech or Debate Clause and the applicable federal court decisions over the last 50 years clearly provides the answer. Because the Supreme Court’s precedent is clear that a disclosure by a Member of Congress as part of an official legislative act or proceeding, even of classified information, as in the *Gravel* Pentagon Papers case, falls within the Speech or Debate Clause, the answer is simply yes, the Member would be protected – protected from punishment, prosecution, or inquiry by the Executive Branch or the Judiciary.

The Speech or Debate Clause clearly protects Members of Congress who make disclosures during the course of congressional proceedings, including disclosures of information classified as secret by the Executive Branch, from punishment or inquiry by the Executive Branch or Judicial Branch. However, although the Speech or Debate Clause clearly protects Members of Congress from actions of the other branches government, such as grand jury investigations or threatened or initiated prosecutions, it is not as clear that the Speech or Debate Clause precludes Congress from censoring itself and from punishing its members for disclosures made during congressional proceedings. Congress does have, to an extent consistent with other requirements of the Constitution, the power to regulate itself and to punish its own members for misconduct.[[96]](#footnote-96)  And, the Speech or Debate Clause language regarding Members not being questioned "in any other place" has, as discussed *supra*, thus far been read by the courts to mean questioned outside the House or Senate. So, the question arises, would a Member of Congress who placed the substance of the 28 Pages into the Congressional Record be protected from disciplinary action initiated by Congress itself?

Members of Congress may be questioned in their own legislative body, i.e. the House or the Senate, regarding their conduct in performing their duties. The Constitution, Art. 1 Sec. 5, Clause 2, provides that the Congress may establish its own rules and punish its Members for misconduct including by censure, removal from a committee, and removal from the House or Senate itself (expulsion).[[97]](#footnote-97) The Congress may also refer to the DOJ a Member of Congress for investigation and possible prosecution for an alleged crime committed via actions other than participation in congressional proceedings. However, as noted, the DOJ must act within the limits of the Speech or Debate Clause, and could not initiate a prosecution or grand jury regarding a Member of Congress’ conduct related to congressional proceedings. Although the Supreme Court has left undecided the question of whether Congress can itself narrow the Speech or Debate Clause protections enjoyed by its Members by way of passing a narrowly drawn statute specifically providing for prosecution of Members of Congress for certain specified conduct,[[98]](#footnote-98) violation of the Rules of either the House or the Senate alone (absent additional facts reflecting generally criminal conduct such as embezzlement, fraud, or a violent crime) would not be sufficient to overcome the Speech or Debate Clause immunity (or possibly the political question doctrine) and allow a Member of Congress to be prosecuted.[[99]](#footnote-99)

A Member violating a valid rule of the House or Senate could be disciplined by Congress itself of course under its own rules. However, notwithstanding its power to regulate itself and establish its own rules, the Congress must also act within the limits established by the Constitution, and in regard to matters of secrecy and transparency this includes the limits established by Art. I, Sec. 5, Clause 3, which, as noted, requires that each House “keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . .”

If the Congress has made an explicit finding that in its own judgment the 28 Pages are required to be kept secret, then it may be within the powers of Congress to restrict disclosure of that information and punish members up to expulsion for a violation of such a restriction. However, in regard to the 28 Pages, the Congress has not made such a prerequisite determination, but to the contrary has expressed its intention to send a letter to Executive Branch agencies requesting that the agencies involved declassify the 28 Pages (apparently with the option of some redaction of sensitive information such as intelligence sources and methods) and that a nonclassified version of the 28 pages be published with the remainder of the report in “the entire nonclassified report”.[[100]](#footnote-100)

The Rules of the House and the Senate regarding misconduct would arguably be inapplicable to a Member who published or disclosed the substantive fact findings and conclusions portions of the 28 Pages (excluding names of intelligence sources and other intelligence gathering method information). This is so because these portions of the Joint Inquiry report in question, which the intelligence committees themselves concluded should be declassified, fall under the general disclosure rule of the Journal Clause and are required by the Constitution to be disclosed by Congress. Therefore, such a disclosure would not constitute misconduct. If the Rules of Congress were read to authorize punishment of such a disclosure under these circumstances, then those Rules would be in conflict with Article I Section 5 Clause 3, and therefore such Rules would be void and unenforceable.

The Senate’s rules delegate to the Senate Select Committee on Intelligence the authority to make determinations regarding any portion of its congressional proceedings requiring secrecy and to publish any classified material determined by the Committee to be in the public interest to disclose.[[101]](#footnote-101) Only if the President himself issues a written objection to such disclosure within five days of being notified of the Committee’s decision to disclose is the decision on disclosure elevated to the entire Senate. Under these Rules, the Senate may then still authorize such disclosure over the President’s objection.

Congress has enacted statutes which recognize that committees have authority to act and speak for Congress on matters delegated to them. For instance:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, **upon the request of a duly authorized representative** of the House of Congress **or the committee concerned**, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that--

(1) in the case of a proceeding before or ancillary to either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;

(2) **in the case of a proceeding before or ancillary to a committee or a subcommittee of either House of Congress or a joint committee of both Houses,** **the request for such an order has been approved by an affirmative vote of two-thirds** **of the members of the full committee** … .[[102]](#footnote-102)

In addition, the Senate’s Rules indicate that a decision relating to Congress’ obligations and rights under Article I Section 5 Clause 3 relating to publication or secrecy can be made in regard to a matter assigned to a committee by the committees involved, at least in the first instance subject to review by the entire Senate should the President timely object.[[103]](#footnote-103)

In regard to the 28 Pages, the House Permanent Select Intelligence Committee and the Senate Select Intelligence Committee have determined not only that the Joint Report containing the 28 Pages, with the exception of the 28 Pages, should be published (as it has been), but have also determined that all or a substantial portion of the information contained in the 28 Pages which was classified by the Executive Branch should be declassified and a non-classified text made available to the public in a final version of the report. These Committees stated, in their December 20, 2002 transmittal letters to the Senate President Pro Tem and the House Speaker, that they intended to submit a formal written request to the Executive Branch agencies involved requesting such declassification.[[104]](#footnote-104)  Thus, rather than the Congress determining in its own judgment that the 28 Pages should be kept secret, the Congress in its own judgment -- i.e. the judgment of the Committees to which Congress, via its own rules, has delegated the authority to make such decisions -- has determined that the substantive information in the 28 pages should be declassified by the Executive Branch.  Thus, the Congress has not in its own judgment determined that the 28 Pages and information therein must be kept secret.

Given that the Constitution requires public disclosure through periodic congressional record/journal publications of all of the proceedings in Congress, absent a specific determination by Congress that in its own judgment a certain specific subset of the proceedings must be kept secret, and given that the only congressional bodies to address the matter thus far, the two intelligence committees involved in the Joint Inquiry, have determined that the substantive information in the 28 Pages should be declassified, the Constitution, Article I Section 5 Clause 3 requires publication of these 28 Pages or at least the substantive fact findings and conclusions therein (excluding any non-outdated specific intelligence source or methods information).

Neither the Constitution nor the Congress' own rules require the Congress to keep secret information classified by the Executive Branch.  As noted, the Speech and Debate Clause actually protects members who publicly disclose such information during congressional proceedings.  Congress has recognized its right to disclose classified information via the establishment within its own Rules of a procedure for Congress to publicly report classified information even over the objection of the President when Congress believes it to be in the public interest to do so.[[105]](#footnote-105) The Congress generally, and the Members of the two intelligence committees involved in the Joint inquiry, for the past 13 years, have chosen to not make use of these Rules for the purpose of publishing the substance of the 28 Pages. Although there may have been a concern initially on the part of these Committees or the Committee Chairs that publishing the 28 Pages might interfere with a then-on-going investigation, it is not apparent why that rationale would withstand scrutiny over the succeeding 13 years.

Even if there were no Rules established by Congress for the purpose of publishing information classified by the Executive Branch (without permission from the Executive Branch), the Rules established by Congress, like the statutes enacted by Congress, must give way when in conflict with a provision of the Constitution. Thus, regardless of the existence or content of the Senate or House Rules, and whether Members of Congress have chosen to make use of these Rules, the failure of the Congress to publish these 28 Pages (or their substance), an official part of the proceedings of Congress, for thirteen years without having themselves found that continued secrecy was required, represents a violation of the Constitution's Journal Clause requirement for public reporting of congressional proceedings. Because there is a constitutional requirement to publicly disclose congressional proceedings absent Congress itself concluding secrecy is required, and because Congress has determined via the Joint Inquiry’s two intelligence committees that the information in the 28 Pages should be declassified, the Rules of the Senate or House that might otherwise authorize censure, removal from a committee, or expulsion of a Member for misconduct should not be applicable to a Member of Congress who chose to disclose the substance of the 28 Pages. The Congress does not have the power to define and punish as misconduct something that the Constitution requires.

Although the Executive Branch classified as secret certain information subsequently included by Congress in the withheld 28 Pages of the Report of the Joint Committee, the CIA, one of the key Executive Branch agencies involved, has acknowledged that the Joint Report itself is the property of Congress, and Congress, not the CIA, controls public access to this Report.[[106]](#footnote-106) This CIA position is consistent with the Constitution’s Separation of Powers provisions. It would be a violation of the Constitution's Separation of Powers provisions for an Executive Branch agency to presume to control public access to reports prepared by and for Congress.   Once Congress has acquired information, classified or not, when that information becomes part of a congressional proceeding (such as a report), that report must, pursuant to Article I Section 5 Clause 3 of the Constitution, be published unless Congress itself determines the information must be kept secret, which in the case of the 28 Pages Congress has not.

This brings us to the related question of whether, notwithstanding that a Member of Congress is protected by the Speech or Debate Clause and the Journal Clause in placing the 28 Pages (with perhaps appropriate redactions regarding any intelligence sources or methods information) into the public Congressional Record, would a Member of Congress, the Government Printing Office (GPO), the news media, or a private person or organization be protected from prosecution in engaging in the further act of physically publishing and distributing such information to the public.[[107]](#footnote-107) There is some case law such as the *Gravel* decision indicating that the Speech or Debate Clause standing alone would not protect this conduct. However, the information and documents being disclosed in *Gravel* did not originate with Congress but came from the Executive Branch (the Pentagon Papers). In the case of the 28 Pages, the information and document at issue constitute an original congressional proceeding, a report of a congressional investigation. There was no constitutional duty to publish the underlying documents at issue in *Gravel* but such a duty to publish under the Journal Clause is at issue in the case of the 28 Pages. The case law does not appear to specifically and definitively address the situation presented in the case of the 28 Pages. A detailed analysis of this question is beyond the scope of this article. However, in the opinion of the author the case law does suggest the answer.

Given that the Journal Clause of the Constitution establishes disclosure of congressional proceedings as a default obligation of Congress, and secrecy as the exception,[[108]](#footnote-108) given that there is a legitimate legislative function served by informing the public as to congressional proceedings,[[109]](#footnote-109) and given that Congress has not made a determination that in its own judgment the 28 Pages require secrecy, the courts should recognize that the publication of the 28 Pages by Congress, a Member of Congress, or the GPO acting on direction from Congress, would be protected by a privilege and immunity established by the Journal Clause (and/or the doctrine of official immunity[[110]](#footnote-110)). Further, distribution of the 28 pages by the Press or a private person or entity (or a Member of Congress) once the material has been placed into the Congressional Record should be held to be protected by the First Amendment Right of Free Speech and the First Amendment Right of Freedom of the Press.[[111]](#footnote-111) The Government’s interests in preventing publication would not outweigh the First Amendment interests because the Constitution, which is the highest authority in defining the Government’s interests, requires publication.

In addition, if Congress fails to make a determination that information in a congressional proceeding requires secrecy, such as here in regard to the 28 pages, and that material is published as part of the Congressional Record as is required by the Journal Clause, then the Executive Branch classification of the underlying information as secret would be irrelevant. The action of the Congress, an independent co-equal branch of government given authority under the Constitution to make its own judgments as to secrecy, in publishing such portions of congressional proceedings would preclude an Executive Branch prosecution. The underlying classified documents would not have been published, and it would not be a crime to publish or distribute the congressional report or the Congressional Record. The congressional report and Congressional Record were not classified secret by the Executive Branch nor could they be given the Constitution’s Separation of Powers. The Constitution’s Journal Clause requirement that congressional proceedings be published absent a finding by Congress that secrecy is warranted and the absence of such a congressional finding effectively declassifies or precludes classification of such congressional proceedings. A detailed analysis of these issues is also beyond the scope of this article.

**V. SUMMARY AND CONCLUSIONS**

Members of Congress are protected by the Article I Section 6 Clause 1 Speech or Debate Clause protections from punishment or questioning by the Executive Branch and by the Judiciary for their conduct legitimately related to congressional proceedings, even if they disclose information classified secret by the Executive Branch. Article I Section 5 Clause 3 requires all congressional proceedings to be published except for any portion thereof that Congress, in the judgment of Congress itself, determines must be kept secret. Congress may regulate its own affairs and discipline its Members for misconduct, but in light of the Article I Section 5 Clause 3 requirement that all congressional proceedings be published, a Member who places into the Congressional Record the actual text of a portion of congressional proceedings or the Member’s recollection of such text, such as a portion of an investigative committee report previously kept secret by Congress, may not be punished for such disclosure, even by Congress itself, unless the Congress had legitimately and explicitly decided, in its own judgment, prior to the disclosure by the Member, that the matter in question required secrecy. In such circumstances, it would be the Congress in failing to timely publish the relevant proceedings, not the Member who disclosed them, that engaged in misconduct (conduct contrary to the Constitution).

In regards to the non-hypothetical example of the “28 Pages” of the December 2002 “Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks

of September 11, 2001” congressional report that have been kept secret from the public by Congress for thirteen years, it is concluded -- because Congress did not decide in its own judgment that the substance of the 28 Pages required secrecy (and actually requested Executive Branch declassification), and given that the CIA, an Executive Branch agency, has taken the constitutionally correct position that the Congress, not the CIA owns the Joint Inquiry report -- that Congress itself had an obligation to publish these 28 Pages or their substance pursuant to Article I Section 5 Clause 3. Consequently, given this thirteen year delay in Congress complying with its duty under the Constitution to publish these 28 Pages, any Member of Congress who chose to place the text, or the Member’s recollection of the substance, of the 28 Pages into the Congressional Record as part of a congressional proceeding, such as during speech or debate

on a proposed resolution or as part of a request to a committee to forward a request for publica-tion to the entire House or Senate, would be protected from any punishment or inquiry by the

Executive Branch or Judiciary via the Speech or Debate Clause. Further, any Member of Congress who placed such information into the Congressional Record would not be subject to discipline by Congress itself because such an act under the circumstances would not be misconduct because it would be in furtherance of the Article I Section 5 Clause 3 requirement that congressional proceedings be published and consistent with the Member’s oath to defend the Constitution. However, an attempt by Congress or a committee or the Chair or a member thereof to prevent such publication in the Congressional Record would, under the circumstances, given the 13 year delay in publication and the lack of any finding by Congress itself that the 28 Pages required secrecy, be misconduct as a violation of the Constitution, Article I Section 5 Clause 3.

A detailed analysis of the related question of whether a Member, the GPO, the press, or a private person would have a right, privilege, immunity, or legal defense if they distributed to the public the 28 Pages once the 28 Pages had been placed into the Congressional Record is beyond the scope of this article but the case law suggests the answer. The distribution of such information to the public would serve the legitimate legislative function of informing citizens and therefore would arguably be protected under the Speech or Debate Clause and arguably required by the Journal Clause if the publication and distribution was performed by a Member of Congress. If the publication and distribution were conducted by the news media, then such disclosures would appear protected by the First Amendment Rights of Freedom of Speech and Freedom of the Press. If the publication and distribution were conducted by private persons or organizations, then such disclosures would also appear to be protected by the First Amendment Right of Freedom of Speech. This latter question does not appear to have been definitively addressed to date by the courts.

1. Mick Harrison, a graduate *summa cum laude* of the District of Columbia School of Law, is a public interest attorney with over 30 years experience who has a national practice focused on whistleblower protection and government accountability. [↑](#footnote-ref-1)
2. *Gravel v.* *U.S.*, 408 U.S. 606 (1972). [↑](#footnote-ref-2)
3. *Id*. [↑](#footnote-ref-3)
4. *Id*. at 609. [↑](#footnote-ref-4)
5. U.S. CONST. Art. I § 6, cl. 1 (emphasis added). [↑](#footnote-ref-5)
6. *Gravel v. U.S.*, 408 U.S. at 616. [↑](#footnote-ref-6)
7. *Id*. at 617-22. [↑](#footnote-ref-7)
8. *Id.* at 621, 628-29. [↑](#footnote-ref-8)
9. *Id*. [↑](#footnote-ref-9)
10. *Id.* at 615-16. [↑](#footnote-ref-10)
11. *Id.* at 616. [↑](#footnote-ref-11)
12. *Id*. [↑](#footnote-ref-12)
13. *Id.* at 616, quoting *United States v. Doe*, 455 F.2d, at 761. [↑](#footnote-ref-13)
14. *Id.* at 616. [↑](#footnote-ref-14)
15. *Id.* at 617-18, citing *United States v. Johnson*, 383 U.S., at 180. [↑](#footnote-ref-15)
16. *Id.* at 617-18, citing *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881); *United States v. Johnson*, 383 U.S., at 179. [↑](#footnote-ref-16)
17. *Id.* at 618. [↑](#footnote-ref-17)
18. *Id.* at 624, citing *Kilbourn v. Thompson*, 103 U.S., at 204; and quoting *Tenney v. Brandhove*, 341 U.S. 367, 377-378 (1951). [↑](#footnote-ref-18)
19. *Id.* at 628-29. [↑](#footnote-ref-19)
20. *Id.* at 621,628-29. [↑](#footnote-ref-20)
21. *Id.* at 628-29. [↑](#footnote-ref-21)
22. *Id.* at 627-28. [↑](#footnote-ref-22)
23. *Id.* at 622. [↑](#footnote-ref-23)
24. *Id.* at 622. [↑](#footnote-ref-24)
25. *Id.* at 624-25, note 15, citing *Tenney v. Brandhove*, 341 U.S. 367, 376—377 (1951). [↑](#footnote-ref-25)
26. *Id.* at 625, citing *United States v. Johnson,* 383 U.S., at 172. [↑](#footnote-ref-26)
27. *Id.* at 625, citing *United States v. Doe*, 455 F.2d, at 760. [↑](#footnote-ref-27)
28. *Id.* at 625-26. [↑](#footnote-ref-28)
29. *Id.* (Noting that neither Congress nor the full committee ordered or authorized this external publication). [↑](#footnote-ref-29)
30. *Id.* at 628-29. [↑](#footnote-ref-30)
31. *Kilbourn v. Thompson*, 103 U.S. 168 (1880). [↑](#footnote-ref-31)
32. *Id.* at 204. [↑](#footnote-ref-32)
33. *Tenney v. Brandhove*, 341 U.S. 367 (1951). [↑](#footnote-ref-33)
34. *Id.* at 377. [↑](#footnote-ref-34)
35. *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162 (1810). [↑](#footnote-ref-35)
36. *Tenney v. Brandhove*, 341 U.S. at 377. [↑](#footnote-ref-36)
37. *United States v. Johnson*, 383 U.S. 169, 177–79 (1966). [↑](#footnote-ref-37)
38. *Id.* at 179. [↑](#footnote-ref-38)
39. *Id*. at 181. [↑](#footnote-ref-39)
40. *Id.* at 180-81. [↑](#footnote-ref-40)
41. *Doe v. McMillan*, 459 F.2d 1304 (1972), citing *Kilbourn v. Thompson*, *supra*, at 204.” *Powell v. McCormack*, 395 U.S. 486, 502 (1969). [↑](#footnote-ref-41)
42. *Id.* at 1312, citing *Tenney v. Brandhove*, *supra*, 341 U.S. at 373 (quoting 2 Works of James Wilson (Andrews ed. 1896) 38); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881); *United States v. Johnson*, 383 U.S. 169, 179-180 (1966). [↑](#footnote-ref-42)
43. *Id.* at 1312, citing *Powell v. McCormack*, *supra*, 395 U.S. at 502-503; *Dombrowski v. Eastland*, 387 U.S. 82, 85, (1967). [↑](#footnote-ref-43)
44. *Id.* at 1312-13, citing *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *Barenblatt v. United States*, *supra*, 360 U.S. at 125. [↑](#footnote-ref-44)
45. *Id.* at 1314, citing *United States v. Doe*, 455 F.2d 753, 761 (1st Cir. 1972). [↑](#footnote-ref-45)
46. *Doe v. McMillan*, 412 U.S. 306 (1973). [↑](#footnote-ref-46)
47. *Id.* at 312-13. [↑](#footnote-ref-47)
48. *Id.* at 315-17. [↑](#footnote-ref-48)
49. *Id.* at 311. [↑](#footnote-ref-49)
50. *Id.* at 312. [↑](#footnote-ref-50)
51. *Id.* at 312-13. [↑](#footnote-ref-51)
52. *Id.* at 313. [↑](#footnote-ref-52)
53. *Id.* at 315. [↑](#footnote-ref-53)
54. *Id.* at 315-17, 323-24. [↑](#footnote-ref-54)
55. *Id.* [↑](#footnote-ref-55)
56. *Id.* [↑](#footnote-ref-56)
57. *United States v Brewster*, 408 U.S. 501, 512–14 (1972). [↑](#footnote-ref-57)
58. *See, e.g., Hutchinson v. Proxmire*, 443 U.S. 111, 127–28 (1979). [↑](#footnote-ref-58)
59. *Walker v. Jones*, 733 F.2d 923, 929 (1984). [↑](#footnote-ref-59)
60. *United States v Brewster*, 408 U.S. 501, 512–14 (1972). [↑](#footnote-ref-60)
61. As noted *infra*, it is the author’s conclusion that in regard to information classified secret by the Executive Branch (putting aside the question for the moment regarding publication of material that is defamatory or invades privacy) that becomes part of a congressional proceeding as part of legitimate legislative activities (such as relevant material included in a report of a congressional investigation), and that has not been the subject of a determination by Congress itself that this information warrants secrecy, that the publication and distribution of the congressional report or Congressional Record containing such information to the public would not only serve the legitimate legislative function of informing citizens, it would be an act consistent with and required by the Constitution’s Journal Clause discussed *infra*. [↑](#footnote-ref-61)
62. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504–05 (1975). [↑](#footnote-ref-62)
63. *Id.* [↑](#footnote-ref-63)
64. *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983). [↑](#footnote-ref-64)
65. *Id.* at 529. [↑](#footnote-ref-65)
66. *Id.* at 30, citing *United States v. Helstoski*, 442 U.S. 477, 489–90 (1979); *Brewster*, 408 U.S. at 528. [↑](#footnote-ref-66)
67. *Id.* [↑](#footnote-ref-67)
68. *Id.* at 529-30. [↑](#footnote-ref-68)
69. *Id.* at 530-31. [↑](#footnote-ref-69)
70. *Id.* at 528, citing *United States v. Brewster*, 408 U.S. 501 (1972). [↑](#footnote-ref-70)
71. *Id.* at 529. [↑](#footnote-ref-71)
72. *Maddox v. Williams*, 855 F.Supp. 406 (1994). [↑](#footnote-ref-72)
73. *Id.* at 411-12. [↑](#footnote-ref-73)
74. *Porteous v. Baron*, 729 F.Supp.2d 158 (2010). [↑](#footnote-ref-74)
75. *Id.* at 163. [↑](#footnote-ref-75)
76. *Id.* at 163-64. [↑](#footnote-ref-76)
77. *Id.* at 164. [↑](#footnote-ref-77)
78. *Id.* quoting *Eastland*, 421 U.S. at 502. [↑](#footnote-ref-78)
79. *Id.* citing *Eastland*, 421 U.S. at 501 (collecting cases). [↑](#footnote-ref-79)
80. *Id.* citing *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951). [↑](#footnote-ref-80)
81. *Id.* quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972). [↑](#footnote-ref-81)
82. *Id.* citing *Doe v. McMillan*, 412 U.S. 306, 313 (1973). [↑](#footnote-ref-82)
83. *Id.* quoting *Eastland*, 421 U.S. at 503. [↑](#footnote-ref-83)
84. *Id.* quoting *Gravel*, 408 U.S. at 616–18. [↑](#footnote-ref-84)
85. *Id.* at 166. [↑](#footnote-ref-85)
86. *Id*. [↑](#footnote-ref-86)
87. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 670-71 (1892) (emphasis added). [↑](#footnote-ref-87)
88. *United States v. Ballin*, 144 U.S. 1, 4-6 (1892) (emphasis added). [↑](#footnote-ref-88)
89. *Wright v. U.S.*, 302 U.S. 583, 608 (1938) (Justice Stone dissenting in part). [↑](#footnote-ref-89)
90. *Calley v. Callaway*, 519 F.2d 184, 228-29, 232 (5th Cir. 1975) (en banc) (Bell, Circuit Judge, with whom Gewin, Thornberry, Morgan and Clark, Circuit Judges, joined dissenting) (emphasis added). [↑](#footnote-ref-90)
91. *U.S. v. Liddy*, 542 F.2d 76, 82-83 (D.C. Circuit 1976) (emphasis added). [↑](#footnote-ref-91)
92. *In re Grand Jury Investigation*, 587 F.2d 589, 593 (3rd Cir. 1978) (emphasis added). [↑](#footnote-ref-92)
93. *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1167-68 (3rd Cir. 1986) (en banc) (emphasis added). [↑](#footnote-ref-93)
94. *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1185 (3rd Cir. 1986) (en banc) (Gibbons, Circuit Judge, Dissenting, with whom Higginbotham, Sloviter and Mansmann, Circuit Judges, joined) (emphasis added). [↑](#footnote-ref-94)
95. 2 U.S.C. § 288h (emphasis added). [↑](#footnote-ref-95)
96. CONST. Art. 1 Sec. 5, Clause 2. [↑](#footnote-ref-96)
97. *Id.* [↑](#footnote-ref-97)
98. *United States v. Brewster*, 408 U.S. 501, 529 n.18 (1972); *United States v. Johnson*, 383 U.S. 169, 185 (1966). [↑](#footnote-ref-98)
99. *cf* *Brown v. Hansen*, 973 F.2d 1118, 1122 (3d Cir.1992) (claim that Virgin Islands legislators violated internal rules of legislature, based solely upon those rules, held non-justiciable). [↑](#footnote-ref-99)
100. *See*, December 20, 2002 Transmittal Letters from the U.S. House Permanent Select Committee on Intelligence and the U.S. Senate Select Committee on Intelligence to the Senate President Pro Tem and the Speaker of the House stating that “the classified portions of the report will be submitted for declassification and a nonclassified text produced as a result of that process. The entire nonclassified report will be published as early as possible in the 108th Congress.” [↑](#footnote-ref-100)
101. Senate Select Committee on Intelligence Rules of Procedure, Congressional Record Volume 161, Number 32 (Wednesday, February 25, 2015), Pages S1109-S1115, and Appendix A: S. Res. 400, 94th Cong., 2d Sess. (1976), Section 8. [↑](#footnote-ref-101)
102. 18 U.S.C. § 6005 (emphasis added). [↑](#footnote-ref-102)
103. *cf* *Wright v. U.S.*, 302 U.S. 583, 608 (1938) (Justice Stone dissenting in part) (quoted *supra*). [↑](#footnote-ref-103)
104. *See*, Note 100 *supra*. [↑](#footnote-ref-104)
105. *See*, Note 101 *supra*. [↑](#footnote-ref-105)
106. *See*, CIA Letters to George Canning of October 21, 2011 and February 2, 2012. [↑](#footnote-ref-106)
107. It should be noted that the question being discussed is whether a prosecution would be legally viable regarding such publication, not the separate question of whether the Executive Branch would be entitled to prior restraint, i.e. would be able to obtain an injunction to prevent publication. Prior government restraint of free speech or of the press is generally very unlikely to be authorized because of the heavy legal burden placed by the First Amendment on the government. *See,e.g.,* *New York Times Co. v. U.S.*, 403 U.S. 713 (1971) (another Pentagon Papers case). Such prior restraint would be virtually impossible in the case where the material being published was an original congressional proceeding required by the Constitution (the Journal Clause) to be published, as with the 28 Pages. [↑](#footnote-ref-107)
108. *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1185 (3rd Cir. 1986) (*en banc*) (Gibbons, Circuit Judge, Dissenting, with whom Higginbotham, Sloviter and Mansmann, Circuit Judges, joined). [↑](#footnote-ref-108)
109. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 670-71 (1892); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1167-68 (3rd Cir. 1986) (*en banc*). [↑](#footnote-ref-109)
110. *See, e.g., Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593, 597—598 (1959); *Dombrowski*

     *v. Eastland*, 387 U.S. 82 (1967). [↑](#footnote-ref-110)
111. *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1167-68 (3rd Cir. 1986) (*en banc*). [↑](#footnote-ref-111)