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RECKLESS JUSTICE: DID THE SATURDAY NIGHT RAID OF CONGRESS TRAMPLE THE CONSTITUTION?

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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RECKLESS JUSTICE: DID THE SATURDAY NIGHT RAID OF CONGRESS TRAMPLE THE CONSTITUTION?

TUESDAY, MAY 30, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 9:30 a.m., in Room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order. A quorum for the purpose of taking testimony is present.

On May 20 and 21, for the first time in 219 years, the Department of Justice entered a Capitol Hill office and removed documents and materials without the involvement of a single legal representative of Congress. Exactly what was taken is known only to the Department of Justice.

Certainly, any Member of Congress who has committed a crime insured be prosecuted for his criminal acts, but the issues involved in this unprecedented action by the executive branch transcend any particular Member. A constitutional question is raised when communications between Members of Congress and their constituents, documents having nothing whatsoever to do with any crime, are seized by the executive branch without constitutional authority.

This seizure occurred without so much as lawyers or representatives of Congress being allowed to simply observe the search and how it was conducted. Neither was anyone representing the institutional interests of Congress allowed to make a case before a judge, raising these important separation of powers issues.

Our Founding Fathers, Thomas Jefferson and James Madison, made clear that a general legislative constitutional safeguard designed to prevent encroachments by the executive branch upon the legislative branch is embodied in article I, section 6, clause 1 of the Constitution, which provides that Senators and Representatives shall not be questioned for any speech or debate in either House.

The purpose of the speech or debate clause was aptly summarized by the Supreme Court in *Eastland v. U.S. Servicemen's Fund,* in which it stated "the central role of the clause is to prevent intimidation of legislators by the executive, and accountability before a possibly hostile judiciary."

The Supreme Court has also stated in *United States v. Johnson* that in the American governmental structure, the speech or debate

clause serves the function of reinforcing the separation of powers so deliberately established by the Founders.

In *Helstoski v. Meanor,* the Court said the clause is vitally important to our system of government.

In the case of *United States v. Brewster,* the Court emphasized that the speech or debate clause does not confer immunity from prosecution for criminal activities upon Members of Congress, because such activities are not legitimate legislative acts.

However, while bribery and other crimes clearly fall outside the scope of the constitutional legislative safeguard, the prior question is what procedures should be adopted to determine which Member communications are protected by the speech or debate clause and which are not. The Supreme Court has made it clear in the *Brewster* case that it is beyond doubt that the speech or debate clause protects against inquiry into acts that occur in the regular course of the legislative process.

In the case of Representative William J. Jefferson, the search warrant that the Justice Department obtained from a Federal judge allowed for his congressional office to largely be combed over with materials, including computer hard drives, placed in the sole possession is of the Department of Justice.

The materials taken very likely include communications created in the course of legitimate legislative process that have nothing to do whatsoever with the criminal inquiry into Representative Jefferson's activities. The Justice Department had the ability to seek enforcement of their Federal grand jury subpoena in Federal court to obtain the same documents seized from Congressman Jefferson's Capitol Hill office, but chose not to do so. The Justice Department has historically used grand jury subpoenas to obtain documents relative to a criminal investigation of a Congressman or Senator.

On May 25, the President ordered the seized documents sealed for a period of 45 days so that Congress and the Department of Justice could work out a constitutionally sound solution that will allow all materials relevant to any crime to be obtained while protecting innocent legislative materials legitimately protected by the speech or debate clause. In doing so, the President has allowed for precisely the sort of reasoned deliberation on important issues of separation of powers that I expect this hearing to accord with today.

I look forward to hearing from all our witnesses, who will address the propriety of the Justice Department's conduct in light of the Constitution, the separation of powers and the co-equal branch of Congress.

I now recognize the gentleman from Michigan, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman, and Members of the Committee. This is a historic moment in the House of Representatives. I have been on the Judiciary Committee for 4 decades now, and never has anything of this nature come to our attention and require that we try to bring the three branches of Government into more harmony.

Now, there is no doubt that Members of Congress are not above the law. The Department of Integrity Unit at the Department of Justice is a progressive professional unit. They have convicted one

Member of Congress this year already, and have several pending investigations. They have the full power of not only the Federal Bureau of Investigation, but the grand jury behind them, and they can be quite persuasive and resourceful when they are interested in obtaining evidence or witnesses in corruption investigations.

But the procedures employed on the Saturday night in question were sloppy at best, but reckless at worst. What we have brought down on our heads is 219 years on which, in which, in this history of the United States, have been able to avoid the spectacle of the Federal Bureau of Investigation swooping down into the Capitol in direct confrontation with another duly-empowered police force.

Ten days after the fact, we have yet to be told why the pending subpoena against a sitting Member could not have been enforced consistent with the law. We have never been told why this search had to be done in the middle of the night at a time when the constitutional Representatives of this body were unreachable. We have never learned why the Member in Committee was not permitted to have his attorneys present while his offices were searched for some 18 hours.

The so-called safeguards utilized by the Department, creating their own team to review claims of relevance and the speech request debate clause protections, provide us little constitutional comfort.

Like the rest of the search procedures, they were developed unilaterally by the Department of Justice with little thought given to the constitutional prerogatives at stake. I think this is an important and timely hearing, and the witnesses called here are very important. I am looking forward to hearing from them.

But I think we should keep in mind the threats of the Attorney General of the United States as has been reported, to resign over this matter. Well, I think that should not go unrecognized, because of the torture memorandum put out and developed while Mr. Gonzales was the counsel to the President, and later ratified as he was the Attorney General, there was a memorandum that stated that the President could order officials to commit crimes and that the executive branch could violate Federal laws when the President viewed it to be in the national interest.

We have the question of warrantless, domestic wiretaps, which did not excite him one bit, and which the President admitted that he ordered surveillance under the national—the NSA domestic surveillance program, despite the views of many experts that the operations violate Federal law and constitutes a Federal crime when they are not done under the FISA restrictions.

The Data Mining Corporation recently revealed 10 millions of names and phone numbers in a massive data bank that did not incline him to threaten to resign.

I think, Mr. Attorney General, you are barking up the wrong tree, and this is an issue that hopefully Members of the Republican and Democratic parties in the Congress can bring to an end. I commend the Chairman of this Committee for calling these hearings today.

Chairman SENSENBRENNER. Thank you, Mr. Conyers.

The gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. Thank you, witnesses, for being here today. It is an important issue that has never been dealt with before because of the observation of this delicate balance of power.

I have to confess to you, in my year and a half of becoming a seasoned veteran in Congress, I have been so much more concerned about the judiciary overreaching in power, and I really had not looked at that time executive function. But since we dealt with the PATRIOT Act and the request to make the PATRIOT Act permanent and the struggle over that and then the revelations about the NSA and over phone logs and things, and then this following on those heels, I have become more concerned. There has been a lot of talk about the speech and debate clause in section 6 of the Constitution.

One of the things that has also intrigued me is section 5 of the Constitution that says each House may determine the rules for its proceedings, punish the Members for disorderly behavior, and it was my understanding that there may have been some talk early on in this Nation's history that perhaps, unlike what we believe, should be appropriate, there were those who thought that Congress should punish even criminal offenses because it says Members of each House may punish their own Members, and that over time it has become the practice that, certainly, they are not above the law here in Congress, and that they can and will be prosecuted, the history being that the House Ethics counsel, when they discover any evidence of wrongdoing, would turn those documents over to the Department of Justice for prosecution. Because if somebody is corrupt, we want them out of Congress.

I am curious if you might have something to add to that. I know you each have prepared statements, and those will be part of the record. But I am curious, given your collective wisdom and knowledge about this body and about the executive and the cooperation of powers.

But we appreciate your being here today. I look forward to your comments. You know, some people have said you guys are just defending Jefferson, and I agree, if they are talking about Thomas Jefferson. But that is the way I see it. I am not defending any other Jefferson other than Thomas Jefferson, and the current concerns he had about the Congress and its powers being usurped and intimidation from the other branches coming to bear.

Thank you very much, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Chairman, you have to begin this discussion with the premise that no one is above the law. In that light, no one has said, to my knowledge, anything about the fact that Jefferson, Representative Jefferson's home was searched. No one said anything about that.

There is a suggestion that there is some kind of immunity for Congressmen from arrest. You know, there is a temporary immunity from arrest, if you are on your way to voting, the local sheriff can't hold you until the vote is over, but you are ultimately responsible to answer for whatever criminal charges there are.

So no one is above the law, but there is a concern with this because this kind of search hasn't happened in the history of the United States. In over 200 years, it hasn't happened. It didn't happen in Representative Cunningham's case. It didn't happen in the Abramoff investigations. It didn't happen when Representative Traficant was accused of taking kickbacks right from his office. It wasn't used in the bank scandal, or even ABSCAM.

What is so special about this case that this procedure had to be used? I am also concerned about the breadth of the subpoena. I think the analysis would be different if the subpoena had been based on the fact that a reliable informant had said there is evidence that can be found in the lower left hand drawer, say, the money was there. They went in and executed the search warrant, came out with the money and left. I think the analysis would be a little different than the FBI staying there for 18 hours, rummaging through everything, including documents, which you have to read all documents to know what you have, which means all of the information, all of the sources. If you are going to have an impeachment inquiry, all that information has to be made sensitive information from constituents, all is to be read before you can get to anything that you know might be used.

We have a precedence, a couple of decades ago, that dealt with FBI searching newsrooms. I think we are going to hear something from the witnesses about what we did in that case because of the potential of abuse. Now, at least in this case, at least we had judicial oversight, unlike the NSA wiretaps, up like picking up the telephone numbers, unlike designating somebody an enemy combatant—at least you had judicial oversight. We will hear testimony from the witnesses as to whether or not that makes much difference.

But I appreciate, Mr. Chairman, you calling the hearing. This is a very important issue. I look forward to our witnesses' testimony today.

Chairman SENSENBRENNER. The gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman, I want to thank all of the witnesses for being here during a recess. Professor Turley, I am confident that we are not going to get locked in today. We have assurances there will be no air hammers used any time anywhere. This is, in all seriousness, an extremely important hearing, not because of what we are going to learn, although I know we are going to learn that is going to be significant.

It is extremely important because the American people do not begin to understand why there is a concern. Their assumption, quite rightfully, is no one is above the law. Hopefully today, undoubtedly today, having looked through your testimony, people will begin to understand that it has always been a big deal when one branch of Government seeks to use a subpoena or any other form of legal document or, for that matter, brute force, to enter and to cast some question of the sovereignty of the other branch.

This was true, as I know we are going to hear in Abraham Lincoln's time, it certainly was true when this Committee and the Senate Committee sought to receive records from President Richard Nixon, went to the Supreme Court. It did not result in the Capitol

Police showing up in the Oval Office and wanting to pull tapes out of drawers.

I hope today that the American people will be the greatest beneficiary of your statements. I very much appreciate your being here for just that purpose. I yield back.

Chairman SENSENBRENNER. The gentleman from Maryland, Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman, thank you for holding this hearing. I thank all the witnesses for being here. I will be very brief. I think this is an important hearing. I think, as others have said, that there are many other areas where this executive branch has exerted their authority, and I think overstepped their grounds, and I think it would have warranted a hearing as well, in fact, probably warranted one as more or at least as much as this hearing.

We have heard the cases, of course, of the domestic wiretapping exercises by the Administration, and what is going on there. We have got the continuing practice of signing into law statutes with caveats, with signing statements, that essentially reinterpret those statutes to the benefit of the executive branch, just imposing their view on and their stamp on a law that was passed by Congress. I think all those areas warrant hearings. It's good to see, Mr. Turley, Professor Turley and Mr. Fein here.

In fact earlier, Mr. Conyers had a hearing that we had in the basement of this building, on the wiretapping issue, because we didn't have a full Committee hearing in the Judiciary Committee dedicated specifically to the issue of domestic wiretap, and we haven't had one devoted to that issue since it was broken by The New York Times last December.

I think, Mr. Chairman, that that also was an example of executive branch action and overstepping. I not sure to the extent there was overstepping in this particular issue. I am very interested in hearing the testimony.

As Mr. Scott said, a warrant was issued flew the judicial branch, so I am sort of open-minded with respect to this particular constitutional question. I think there have been other incidents, as I alluded to, where the overstep being of the executive branch was even more clear. I hope, as we go down the road, we will look into those issues as well.

Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Thank you, Mr. Van Hollen.

Without objection, all Members will have 5 legislative days in which to submit additional materials for the hearing record.

I would now like to introduce our witnesses for today's hearing. The first witness is Professor Charles Tiefer of the University of Baltimore Law School. Before joining the faculty there, Professor Tiefer was Assistant Legal Counsel to the United States Senate from 1979 to 1984. He then served as the Solicitor and Deputy General Counsel for the U.S. House of Representatives from 1984 to 1995.

Professor Tiefer has written extensively on separation of powers issues, and he is the author of the only treatise on congressional practice and procedure. He is a graduate of Columbia College and the Harvard Law School.

Our second witness is the Honorable Robert S. Walker, who represented the Sixteenth District of Pennsylvania for 20 years. During his tenure in the House, former Congressman Walker served as Chairman of the Science Committee as well as chief deputy, Republican whip. He currently serves as Chairman of Wexler & Walker Public Policy Associates, a Washington-based government affairs firm.

The third witness is Professor Jonathan Turley of the George Washington University Law School. Professor Turley is a nationally recognized legal commentator and constitutional scholar. He is a graduate of the University of Chicago and Northwestern University School of law.

Our fourth and final witness is Mr. Bruce Fein, who is a principal at the Lichfield Group. Mr. Fein served as Assistant Director at the Office of Legal Policy at the Department of Justice, and he is the author of several volumes on the U.S. Supreme Court and the U.S. Constitution. He is a graduate of Harvard Law School.

Chairman SENSENBRENNER. I welcome all of the witnesses and look forward to hearing your testimony. It is the practice of this Committee to swear in the witnesses. So would you all please rise and raise your right hand.

[Witnesses sworn.]

Chairman SENSENBRENNER. Let the record show that each of the witnesses answered in the affirmative. Usually we have a 5-minute rule here. What I will do is be very liberal in exercising the 5-minute rule, but the lights will be on. When 5 minutes is up, there will be a red light in front of you. So if you would kind of wrap it up at your own pace, and then we can get to questions.

Professor Tiefer.

STATEMENT OF CHARLES TIEFER, PROFESSOR, UNIVERSITY OF BALTIMORE LAW SCHOOL

Mr. TIEFER. Thank you, Mr. Chairman, Mr. Ranking Member and Committee Members. I was Solicitor and Deputy General Counsel of the House from 1984 to 1995. That is the office that represents the bipartisan leadership group of the House of Representatives in court.

The Framers' purpose in the speech or debate clause of the Constitution was "to prevent intimidation by the executive" of the Congress. That's the Supreme Court's term, "intimidation." The clause applies to all the records in the Congress of legislative activities, not just floor speeches and bills, but most of the work in Committees and legislative caucuses.

Its privilege is not that it puts Members above the law, Members are frequently investigated, frequently charged, frequently tried, frequently convicted. But it is an absolute privilege against law enforcers getting or seeing or using the legislative records that I just talked about.

During my 11 years in service for the House, and 4 years in a similar Senate office before then, many investigations occurred successfully of Members of Congress. I have cited some of them in my testimony. They started with ABSCAM, which occurred soon after I started work. We had Congressman Flake, Congressman Biaggi, Congressman Rostenkowski, Congressman Swindall, Congressman

McDade. Several of these were acquitted, several of these were convicted. The process succeeded. It worked. Not during that time, not before then, not since then, in 2 centuries has the Justice Department ever resorted to a raid on Congress to get its evidence.

Now, this raid had all the elements of unconstitutional executive intimidation. It breached what I have just described, a previously sacrosanct constitutional tradition without, not just without a showing of a unique necessity, but not even a claim of unique necessity. If you read carefully, the materials that had been reached by the executive branch, it does not claim that there was some exigent circumstance necessitating a new method. There is not a claim that even one piece of paper would have been lost by the traditional methods.

It was planned wrongly. There were no executive guidelines worked out with the House's protocols, no prior adversary judicial proceedings, no prior notice to the House leadership, nor any kind of consent or consultation, which meant that there was no dealing with the very serious objections that would have been made, that I would have made during my time, my predecessors, my successors, that anyone, knowing the constitutional, institutional interest of the House, would have made. Now we look at those methods.

What were those methods? I think that the opening statements of the Chair and the Ranking Member and the other Members have ably brought out what was involved in those methods, sweeping, indiscriminate, wholesale search by the FBI of the entire office of this Member for 18 hours during the night, and the downloading of the whole hard drive of his computer, besides carting away reams of documents.

When they take the whole computer of a Member of Congress, that means you are catching countless innocent constituents in there in your dragnet. Since every congressional office contains extensive privileged legislative materials, because that is what the Members are here to do, legislative work. That means that they are inevitably Wall Street, a wholesale constitutional violation, a wholesale intrusion by executive agents, in an intimidating way of legislative materials.

Furthermore, there was the exclusion of the House counsel, even as a mere observer, and neither the Representative nor any counsel were enabled to make privileged objections.

Instead, the Justice Department appointed itself to look into everything, and to decide for itself what was privileged. I have to tell you that with 15 years experience doing this work, I couldn't figure out what is legislative or not without the Member or staff putting it in context for me. I don't see how they could during that night, and I don't think they did. I think that each FBI agent could have trampled 1,000 privileged pages and most likely did.

Thank you, Mr. Chairman, and Members.

[The prepared statement of Mr. Tiefer follows:]

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TESTIMONY BEFORE THE
HOUSE COMMITTEE ON THE JUDICIARY

Hearing on
"*Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?*"
May 30, 2006

by Professor Charles Tiefer

THE TRADITIONAL METHOD FOR THE HOUSE TO PROVIDE EVIDENCE MADE THE SEARCH WARRANT RAID AN UNNECESSARY AND RADICAL STEP

Executive Summary

I was Solicitor and Deputy General Counsel of the House in 1984-95.

As expounded in the leading opinions, the Framers' purpose in the Speech or Debate Clause was "to prevent intimidation by the Executive . . . ."[1] The FBI raid into the Rayburn Building itself had all the elements of Executive intimidation: (1) breach of a previously sacrosanct constitutional tradition, without any unique necessity; (2) intrusion by the Executive's own agents, rather than the House personnel always previously relied upon, and without any Executive guidelines worked out with the House as protocols; (3) no prior adversary judicial proceedings to hear the very serious objections to the methods; (4) sweeping and wholesale methods, including downloading a Representative's whole hard drive, catching countless innocent constituents in the dragnet; and (5) exclusion of the House Counsel even as a mere observer, completing the one-sided Executive domination and unaccountability.

During my years in Congressional service, as in the times before and since, there have been many Department of Justice (DOJ)/FBI investigations of Congressman not legally different from the one of Rep. William Jefferson at issue in this matter.

DOJ has never, never before resorted to search warrant raids for this, which represents a radical step. Consistently, throughout the history of the many instances of DOJ successfully seeking and obtaining criminal investigation evidence from Congressional offices, the constitutional tradition was for that to occur **ONLY** through the use of subpoenas (or some similar arrangement) handled under lawful protocols.

Those who think only about what *categories* of Legislative materials receive constitutional protection, are unfamiliar with the importance of the *processes* of the examination – here, the difference between the traditional subpoena and the radical raid. DOJ's Public Integrity Section came to appreciate the sound constitutional tradition, which is mindful of the House's Rules as to its control over its own records, and reflects that tradition in section 2406 of the U.S. Attorney's Manual.

Not only were DOJ/FBI unwilling to await the appeal in this matter, but, more to the point, they were unwilling to accept the outcome of motions or negotiations pending appeal. It acted without prior adversary judicial consideration of the very serious objections. DOJ may have felt a tactical desire to move faster, and some at the FBI may have been emboldened by a couple of words in an opinion footnote. To breach the independence of the Legislative Branch without a true prior adversary judicial presentation is perhaps the most serious legal outrage.

If DOJ/FBI are in a rush, they should either ask for, and await, expedited judicial procedures, or negotiate a solution with the House leadership. And, any inquiry into a Representative's records should be according to pre-established protocols. Such a solution protects the House's institutional interest in the traditional system, as well as DOJ's law enforcement interest, without the radical and unnecessary step of a search warrant raid.

[1] *United State v. Johnson*, 383 U.S. 169, 181 (1966).

THE TRADITIONAL METHOD FOR THE HOUSE TO PROVIDE EVIDENCE MADE THE SEARCH WARRANT RAID AN UNNECESSARY AND RADICAL STEP

I was Solicitor and Deputy General Counsel of the House in 1984-95. Mine was the office that has represented the institutional interest of the House of Representatives – as a coordinate branch of the government under Article I of the Constitution - since the 1970s, in matters such as criminal investigations of Congressmen. I was also in a similar Senate post, Assistant Senate Legal Counsel, the four years before that, 1979-1984. I have been a professor at the University of Baltimore Law School since then.[2] I am also the author of a treatise entitled *Congressional Practice and Procedure*, and writing its 1000 pages and 2000 footnotes immersed me considerably in Congressional history.

The Constitutional Tradition Violated in Numerous Respects by the Raid

As expounded in the leading Supreme Court opinions, the Framers' purpose in the Speech or Debate Clause was "to prevent intimidation by the Executive . . . ."[3] The FBI raid into the Rayburn Building itself had all the elements of Executive intimidation: (1) breach of a previously sacrosanct constitutional tradition, without any unique necessity; (2) intrusion by the Executive's own agents, rather than the House personnel always previously relied upon, and without any Executive guidelines worked out with the House as protocols; (3) no prior adversary judicial proceedings to hear the very serious objections to the methods; (4) sweeping and wholesale methods, including downloading a Representative's whole hard drive, catching countless innocent constituents in the dragnet; and (5) exclusion of the House Counsel even as a mere observer, completing the one-sided Executive domination and unaccountability. My testimony will touch on each of these, although, frankly, in all the DOJ comments of self-justification, I have not seen much of this seriously disputed.

Let us recall that DOJ/FBI investigations of Congressmen have gone through the courts many times. During my fifteen years in Congressional service, as in the times before and since, there have been many, many Department of Justice (DOJ)/FBI investigations of Congressman like the one of Rep. William Jefferson at issue in this matter. So, I am intimately familiar with the lawful procedures and constitutional traditions associated with the process of DOJ/FBI investigations of Congressmen. This is a process obscure in many respects to outsider nonparticipants, not just to law professors out of the loop in New Haven, but even to most DOJ/FBI officials who may know the procedures for criminal investigations away from Congress, but have never been in the room for the tough yet constitutionally informed negotiations on the processes for a Congressional inquiry.

For example, let me note that the mixture of legislative and constituent and nonlegislative material on a Congressman's computer hard drive poses a solvable but

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[2] By activities and publications I have stayed close to the work of the Congressional counsel offices. For example, I have authored the leading legal publication surveying the history, and discussing the work, of the House Counsel's office, which documents the background to this testimony. Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 Law & Contemporary Problems 47-63 (1988).

[3] *United State v. Johnson*, 383 U.S. 169, 181 (1966).

delicate problem in investigative searching. After all, most if not all of the Members I will cite had computers, and DOJ obtained evidence without a raid. The problem is, of course, that the Speech or Debate Clause renders much of the material on that hard drive absolutely privileged from Executive scrutiny, or quite inappropriate to be dragged in, like the communications of thousands of constituents. Every Representative in this room understands first-hand what I mean about the problems for constituents posed by unconsidered dragnet methods. We all know how important for the independence of the Legislative Branch, and for the rights of the constituents whose sensitive affairs are often on that hard drive, it is – not to deny DOJ evidence, but, to work out such inquiries under lawful protocols. You know this. I do from my legal work on this for those 15 years. So do the very small handful of DOJ officials who have worked on Congressional cases in the past. But, most DOJ/FBI officials simply do not have that first-hand experience.

DOJ has never before resorted to search warrant raids for this, which represents a radical step. Consistently, throughout the history of the many, many instances of DOJ successfully seeking and obtaining criminal investigation evidence from Congressional offices, the constitutional tradition was that this occur **ONLY** through the use of subpoenas (or some similar arrangement) handled under lawful protocols.

For those looking for a more familiar situation, imagine if DOJ/FBI needed some particular documents from a law firm. The traditional method involves a subpoena, allowing prior adversary judicial consideration and tailored methods. In contrast, a dragnet raid would infringe the rights of all the uninvolved, innocent clients of the firm. The courts have condemned the raid method.[4]

Congressional objections to this radical step have nothing to do with getting in the way of investigations, nor of Members being "above the law." Consider the criminal investigations and prosecutions I personally was involved in, e.g., those of Abscam, Rep. Floyd Flake, Rep. Mario Biaggi, Rep. Dan Rostenkowski,[5] Rep. Patrick Swindall,[6] or Rep. Joe McDade.[7] Consider also the prior or subsequent ones I studied closely for briefing or commentary, e.g., from Koreagate to Rep. George Hansen[8] to Rep. Jim Traficant. In all these instances, the subpoena method and proper protocols allowed thorough DOJ/FBI investigation to obtain any proper material needed from the Members' offices, use it appropriately prepared indictments, conduct full trials with all the right

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[4] *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955 (3d Cir. 1984). Apparently DOJ/FBI are informally defending their acts by citing their past use of the raid method for an investigation of a federal judge. The Constitution does not provide anything like Speech or Debate protection for judges, for the obvious reason that, historically, there have been many times before the Framers' time, and since, when it was absolutely vital for the nation that Congress be free to take positions on matters like war and peace without Executive intimidation. The Framers did not consider the judiciary likely to be making politically controversial "Speech or Debate." Rather, judicial independence has a different set of protections, like lifetime tenure, which Congress, of course, does not enjoy.

[5] 59 F.3d 1291 (D.C. Cir. 1995).

[6] *United States v.Swindall*, 971 F.2d 1531, 1543 (11th Cir. 1992)

[7] *U.S. v. McDade*, 28 F.3d 283 (3d Cir. 1994).

[8] *U.S. v. Hansen*, 772 F.2d 940 (D.C. Cir. 1985). By citing the instances that involved me, I do not mean to lose sight of the enormous contribution to the defense of House prerogatives, in general, and to the advancement of this constitutional tradition of the proper methods for DOJ investigation, in particular, by Stanley M. Brand and Steven R. Ross, the first and second House Counsels. Their accomplishments on behalf of the House were great.

evidence from those Congressional offices, and obtain from juries the verdicts of either convictions or acquittals.

By the way, some observers have been confused by seeing a lack of concern in the Senate. Well, the Senate tends to become concerned when a Senate office is involved. When there was a DOJ encroachment, by grand jury subpoena, on the office of Senator Gravel, the Senate loudly expressed concern. When there was the FBI Abscam encroachment, by hidden FBI cameras in a sting operation, on Senator Harrison Williams, the Senate loudly expressed concern. In contrast, when there have been constitutional issues involving Representatives, even ones where the Supreme Court upheld the House, as with Rep. Henry Helstoski, who was asked a series of unconstitutional questions in grand jury on a bogus waiver theory, the Senate had a lack of concern. When it is not the Senate's ox being gored, one learns little from the reaction, or lack of reaction, from the Senate.

The Constitutional Tradition Succeeded and Should Not Be Sacrificed

The tradition does not put Members "above the law." In a Member's personal life, he has no shred of special treatment, as shown by how Rep. Jefferson reportedly had search warrant raids for his residences that found cash, without a word of objection from Congress – because that is his non-official life, that does not involve the rest of the House and the rights of our nation of House constituents. In his home, the Member is just like everyone else, with this institution taking no institutional interest. The subpoena method, rather than the search warrant raid method, is used in the Rayburn Building, not because any one Member is "above the law," but because it allows the orderly resolution of legal issues about materials for use in the judicial process, and the orderly sifting for responsive production, in a way that maintains the independence of the Legislative Branch for the protection of a nation of constituents.

Since traditional tools have worked perfectly well all these decades and, indeed, for centuries, the foreswearing of search warrant raids is like the foreswearing of other techniques never used to investigate the offices on Capitol Hill. Would the FBI like to start all of these going in the Halls of Congress: bugs and taps on the House phone system, undercover agents planted on the House staffs, polygraphing of Representatives and staffs who work on security issues, and mail covers on House offices and intrusion into the House Information Systems?

Of course not (or anyway, I would hope the answer is "of course not"). These weren't needed for those many, many investigations and prosecutions I just cited which proceeded successfully as to Representatives in past decades that simply used subpoenas to obtain evidence from their offices. Resort to radical approaches would have a chilling and intimidating effect inconsistent with the independence of the Legislative Branch.

As citizens, like millions of citizens represented by the audience - "you" (the audience) and "me" as citizens may write your and my Congressmen to express views on controversial issues, or to ask casework help on problems the family might have with the I.R.S. So, materials as to this – the materials about views or about family problems – will be in the Congressmen's computer and paper files. It must be accepted that law enforcement agents may gain access to the Congressional office's computer and paper files, but only in the extremely unlikely situation that the records materially relate to that investigation should they see the records of you and me – and the family and relatives

and neighbors and community. Otherwise, it chills and disturbs that the Congressman's whole computer, with those things in it, could get downloaded to the FBI without proper protocols, when the traditional methods, which have worked perfectly well for the many investigations of the past, would leave those things alone.

To be more precise, in terms of the constitutional principles found in the case law, those who think only about what *categories* of Legislative materials receive constitutional protection, are unfamiliar with the importance of the *processes* of the examination – here, the difference between the traditional subpoena or the radical raid with search warrant. (I will address below that the adversary proceedings that did occur as to this Representative, did not make up the lack of adversary judicial proceedings as to the *processes* used.) The subpoena tradition – and the foreswearing of raids -- follows logically from the central purpose of the Speech or Debate Clause, of preventing intimidation of the Legislative Branch by Executive agents, as part of the general principle of Separation of Powers which is to prevent interference by one Branch with another. Some DOJ and academic commentators have been misled by the seeming limitation of what categories the search warrant ultimately sought, to types of materials unprivileged under the Supreme Court case law. They do not have the practical experience – which I do – with the actual execution of subpoena inquiries for materials sought by DOJ/FBI; the House's internal actions in relation to Rule VIII; and the often unpublished legal outcomes recorded in unpublished motion decisions, Executive-Legislative correspondence, and protocols worked out between DOJ and House counsel.

The U.S. Attorney's Manual Recognizes This Constitutional Tradition

I particularly wish to note the allusion to this tradition in the *U.S. Attorney's Manual*, Title 9 (Criminal), Section 2046 (italics added):

> In addition, both the House and the Senate consider that the Speech and Debate Clause gives them an institutional right to refuse requests for information that originate in the Executive or the Judicial Branches that concern the legislative process. Thus, most requests for information and testimony dealing with the legislative process must be presented to the Chamber affected, *and that Chamber permitted to vote on whether or not to produce the information sought*. This applies to grand jury subpoenas, and to requests that seek testimony as well as documents. The customary practice when seeking information from the Legislative Branch which is not voluntarily forthcoming from a Senator or Member is to route the request *through the Clerk of the House* or the Secretary of the Senate. This process can be time-consuming. *However, bona fide requests for information bearing on ongoing criminal inquiries have been rarely refused.*
>
> PRACTICE TIP: The Public Integrity Section of Criminal Division has significant expertise in addressing and overcoming Speech and Debate issues. Prosecutors are encouraged to contact Public Integrity when the official acts of an elected Member of the Legislative Branch become the focus of a criminal inquiry.[9]

[9] The U.S. Attorney's Manual is available online. http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02046.htm

Let me elucidate. The House Counsel's office (and, to a lesser extent, the Senate Legal Counsel's office)[10] had a number of cases with the Public Integrity Section of the DOJ Criminal Division, particularly in the 1980s. Public Integrity had a special opportunity to come to understand these issues because its career attorneys were involved in a series of Congressional cases, whereas some prosecutorial offices, such as the U.S. Attorney's Office in Philadelphia or New York or Virginia, have only sporadic experience. So, Public Integrity came to understand the system of House and Senate resolutions to provide evidence (further discussed below). And, it cooperated with the House General Counsel (that is partly indicated by the reference in the *U.S. Attorney's Manual* to the Clerk of the House).[11]

So, DOJ's Public Integrity section came to appreciate, and to the extent possible within the context of government counsel offices serving independent branches, to cooperate, on what I call the "traditional" system, reflected in the U.S. Attorney's Manual. It would not surprise me if the wiser heads at DOJ who tried to hold off the radical step of the search warrant raid were in Public Integrity. I assume those who pushed for that radical step lacked experience with the tradition reflected in the U.S. Attorney's Manual. To some extent, when the House asks DOJ to establish protocols for obtaining Congressional evidence, it is simply asking for DOJ to get back to its own Manual when it gives the official DOJ direction on this very subject.

FBI Impatience Did Not Justify A Raid in this Delicate Legal Situation of Pending Appeals

The apparent legal rationale that DOJ/FBI decided to go ahead does not consist of some unique necessity that rendered obsolete the established tradition just discussed. After all, while we do not have the full story because much is cloaked at this point by the grand jury secrecy rule (Fed. R. Crim. P. 6(e)), we know DOJ/FBI sought by subpoena the computer and paper records they considered themselves entitled to; that there was adversary briefing by Rep. Jefferson's counsel and the House Counsel; that there was a judicial ruling ("E.D. Va. subpoena categories ruling") in which DOJ/FBI won part and lost part about the categories in its subpoena that arguably had Speech or Debate privilege; that appeals from the initial decision on their subpoenas was pending, in which proper legal arguments were to be presented to, and resolved by, the U.S. Court of Appeals for the Fourth Circuit; and that this search warrant raid took place while appeals were pending.

I am indebted to Marcia Coyle of the National Law Journal for an appreciation of the Manual's application to this matter.

[10] The Senate does have such cases. *See, e.g., Gravel v. U.S.; U.S. v. Brewster; U.S. v. Durenberger*. It so happens, historically, that this U.S. Attorney's Manual section arose in a period when there was more attention to House cases.

[11] During the 1980s, the House Counsel had the title of "General Counsel to the Clerk." The Senate Legal Counsel is housed for administrative purposes in the domain of the Secretary of the Senate. Both are responsible to the chamber and its leadership.

It is a reasonable surmise that there were points in dispute on appeal about the Speech or Debate privilege, and that records (paper or computer) in dispute were not being produced pending that appeal. Some have imagined that the raid did not involve a denial of prior judicial consideration, because of the prior judicial consideration in the E.D. Va. subpoena categories ruling. They are missing the whole point. Speech or Debate issues often involve, not just the categories of testimony or records, but the methods used.[12] The Supreme Court has recognized that the central purpose of the Speech or Debate Clause, to prevent Executive intimidation, necessitates special rules about methods, every bit as much as rules about categories. There was no such adversary judicial consideration before the raid in the E.D. Va. subpoena categories ruling, because DOJ was proceeding (properly) at that point by subpoena, not by raid. And, of course, there was no such prior adversary judicial consideration in the issuance of the warrant, because that was done *ex parte*, and the issuing judge confined his consideration to the uncontested question of probable cause, never hearing the House about the issues involving the raid method itself.

Not only was DOJ/FBI unwilling to await that appeal, but, more to the point, they were unwilling to accept the outcome of motions or negotiations pending appeal. Let me elucidate the delicate procedural situation.

First, the Supreme Court held, as to a Congressman accused of bribery, that he had a vital procedural right to take an appeal from adverse trial court decisions prior to the trial.[13] It is the Supreme Court that decided Congressmen had that vital procedural right – it is not something usurped by the House. As part of the tradition, I myself took part in exercises of that right, and, to my knowledge, DOJ fully accepted it. For example, in the case of Rep. Joe McDade, I myself argued for the House, before then-Judge (now Justice) Samuel Alito, in the pre-trial appeal of a number of key issues in the DOJ/FBI case against him.[14] DOJ presented its side of those issues, but did not seek to jump the gun and prematurely implement the appealed-from trial judge decision prior to the appeal. Without that appeal right, some very important legal issues would never have gotten full judicial consideration, but, for practical purposes, would have been sacrificed.

Second, as is often the case, in this matter of Rep. Jefferson, the DOJ/FBI have the course of working out, through the House Counsel, an approach involving the House's control of its own records – including those that were in dispute on the appeal. As part of the longstanding control of a legislative chamber over its records, both the House and the Senate have rules, and related procedures, for floor action on resolutions

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[12] *Helstoski v. Meanor*, 442 U.S. 500 (1979); *U.S. v. Helstoski*, 442 U.S. 477 (1979), *on remand*, 635 F.2d 200 (3d Cir. 1980). The *Helstoski* cases make two powerful points, both having to do with Speech or Debate protection from Executive intimidation as to the processes used, rather than the categories of subjects: that the Executive cannot induce waiver of Speech or Debate protection the way it can induce waiver of other rights; and, that interlocutory appeals by Representatives of disputed Speech or Debate issues can occur, whereas such appeals cannot occur of disputes over other rights.

[13] *Helstoski v. Meanor*, 442 U.S. 500 (1979). In a preindictment situation of a subpoena to a Congressman's office, this decision allows an appeal to contest the subpoena, whereas in other situations a respondent may only be able to obtain an appeal to contest an order sustaining, in whole or in part, a grand jury subpoena by going into contempt.

[14] *U.S. v. McDade*, 28 F.3d 283 (3d Cir. 1994). With me on the brief were several distinguished researchers and writers, including Richard Stanton, an assistant counsel in our office, and, on detail from the Congressional Research Service, Mort Rosenberg, a highly respected expert on Congressional privileges.

about subpoenaed records.[15] This is the system discussed in the *U.S. Attorney's Manual*, section 2046, quoted above. I may be the only counsel with experience as to both House and Senate resolutions about subpoenaed records (because of my four years serving the Senate). They are an enormously important way to resolve the tensions between the needs of law enforcement, and the independence of the Legislative Branch. Those in DOJ/FBI who think that they had no better alternative but the radical step of the search warrant raid frankly are ignorant of what can be done using these resolutions.

While I am not privy to the direct negotiations of DOJ with House Counsel in the Jefferson matter, that does free me from the grand jury secrecy rule that binds those who were privy to those direct talks, and I took part in enough similar ones under the traditional subpoena method to sketch the better alternative methods shunned by DOJ. First, it could have sought expedited relief pending appeal. It appears that the appeal took place in the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit is renowned for its "rocket docket." DOJ could surely have received some kind of a timely ruling, limiting its request to enforcement of specific key parts of its subpoena for which it had received a favorable ruling in district court. The appellate court understands that some – not all, but some – pretrial (and in this case, pre-indictment) clashes over evidence require expedited consideration. If this matter was considered urgent enough to take all the way to the Attorney General, why not put an affidavit by him into the request for expedited consideration? It was DOJ's decision – no one else's – not to seek that expedition all the way back last year.

It may be that DOJ has a tactical reason it felt in a hurry. I have seen press reports that it initially considered and rejected what it eventually did, and only later, in a new set of circumstances, made that decision to go ahead with the search warrant. It may have came into the possession of new evidence that not so much a matter of probable cause, which was never contested, but rather made categories of records helpful in the shaping of a not-far-off potential indictment. Because the public reporting on this matter depends significantly on the limited diet of leaked information, it is a challenge to understand this in non-sensational terms. But, it is important to do so, because otherwise, the public will succumb to the something fostered by FBI leak and innuendo that even responsible DOJ officials know quite well was not involved, namely, the notion that there is the kind of risk here involved in flight or obstruction situations.

When law enforcement personnel who have used tactics about which there is legitimate constitutional dispute resort to such innuendo, to be blunt, it disgusts me.[16] I note that the kinds of potential offenses laid out in the long affidavit underlying the warrant application have absolutely nothing to do with loss of evidence or anything remotely like it. Representative Jefferson himself is a lawyer with impressive

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[15] David Kaye, Congressional Papers, Judicial Subpoenas and the Constitution, 24 UCLA L. Rev. 523 (1977); David Kaye, Congressional Papers and Judicial Subpoenas, 23 U.C.L.A. L. Rev . 57 (1975).

[16] .

credentials,[17] he is represented by able personal counsel, and the House Counsel's office has had a role in the matter with specific respect to the records issue. That is a triple layer of lawyers. Whatever transpired "way back when" before that triple layer of lawyers may (or may not) become the basis of charges against the Congressman - - but with DOJ/FBI closely watching and with that triple layer of lawyers, the only sensational happenings in the Rayburn Building will be limited to the doings of crazed gunmen, not the handling by teams of lawyers of documents under subpoena. Moreover, the alert reader of the FBI affidavit will understand that while the FBI certainly a negative view of the Congressman, there is not one word of suggestion in the affidavit to suggest that he is an evidentiary risk. Hiding cash in a freezer is colorful, but it does not suggest the kind of evidentiary concerns that would arise if he smuggled it away himself or passed it to confederates to get it off-premises.

Rather, the DOJ tactical hurry would concern the legally complex problems of making the kind of charges recounted in its affidavit in support of the raid's search warrant, for which Rep. Jefferson's post-raid motion also illuminates the tactical landscape. The Representative has some Congressional caucus roles as to Nigeria and Africa. He seems to have written official correspondence to Nigeria about some commercial matters. Also, DOJ wants to list some other official acts of his. Those matters all seem central to DOJ's potential case against him. DOJ's fresh evidence may push those aspects to the center of a relatively near-term decision on some ways of framing the charges against him. The scenario has enough familiarity that I can recognize at least the generic nature of issues of privilege that might be pending on appeal.

There are resemblances here to cases I argued personally in the courts of appeals.[18] In this type of situation, on the one hand, potentially accused Members who write official correspondence in Congressional capacities akin to caucus roles will argue that as much as possible of the closely associated materials are privileged. That might be true of some aspects of the caucus letters about the main item, and even more so as diverse "other official acts" are thrown in. On the other hand, DOJ, pursuing potential charges that a Congressman received things of value as to those official acts, will argue that as much as possible of the closely associated materials are unprivileged. Moreover, the evidentiary issues foreshadow questions going, not just to evidence, but to the viability of the charges themselves. That is, DOJ's contention that certain kinds of closely associated materials are unprivileged, goes to what kinds of provable charges it has that are consistent with the Speech or Debate Clause. The Member's contention that some kinds of closely associate materials are privileged, goes to what kinds of charges cannot be made. These things occur much of the time in Congressional cases. They mean the opposite of any notion that the guilty are fleeing or the evidence is vanishing. They have to do with DOJ and the Representative making the kinds of moves that are the lifeblood of our adversary system of justice as each prepares for the looming legal

[17] He has both a J.D. from Harvard and an L.L.M. I am not arguing one way or the other about the types of offenses of which he may be accused. But loss of evidence is a matter which someone with those credentials, in this situation, will not slide into.

[18] Particularly the *McDade* case. I do not mean to compare one Member to another, or one alleged offense to another, just one type of legal issue to another.

contest, particularly as DOJ frames its charges. They have legal significance even though it may well be that every single piece of paper that DOJ would ultimately be putting into evidence from following the traditional subpoena route, it would ultimately be putting into evidence from the raid.

In the situation it found itself, DOJ may feel a tactical desire to move faster. It won a victory, on at least some pertinent points, from the district court, about evidence to come from the Congressman. It is not receiving the evidence, pending appeal. The appeal does not seem to be moving toward a rapid resolution. While it could ask for expedition, it has waited, and now the early points when it could have asked for the most expedition have passed. It is ready, more or less, to made the indictment decision, and wants to have the evidence in hand that would be used in framing any indictment – say, the associated material that will let it characterize the way it prefers to, the official correspondence and official roles involved in the charges. It regrets having not asked for maximum expedition as soon as the Congressman took his constitutionally-authorized appeal.

A Footnote is Not Enough to Justify This Radical Step

And, there was reportedly "a footnote to [U.S. District Judge T.S. Ellis III's] sealed ruling that the government was free to pursue a criminal search warrant to obtain the records, according to numerous law enforcement sources."[19] Such a footnote seems to have fueled a sense of righteousness at the FBI. The FBI thinks its own tactical desire to be active and dominant, via a raid method, rather than leaving matters more to the lawyers, as in the traditional constitutional method, gets a big boost from that footnote.

Now we all like to watch the FBI play cops and robbers like in the movies, but some legal reality can be let into this picture. There is absolutely no reason to think that Judge Ellis received full briefing last year about issues of search warrants. Indeed, since a disputed subpoena was in front of him and no search warrant was even in contemplation, I do not see why he would have received serious briefing about search warrants at all. It may have been what we call a "throwaway" remark, meant just to put in context the issues discussed in the opinion's text, about which the judge has received briefing and reached a decision. Moreover, the judge may have been thinking about some issues where (ironically) the raid method makes less of an issue, rather than focusing fully on the key issues discussed in this testimony.[20]

The (apparently FBI) sources who admit that whatever was said about this, was in "a footnote," fail to recognize how inappropriate it is to make major changes in vital and longstanding constitutional traditions on the basis of some words in one footnote in one trial judge's opinion on a point that was not seriously briefed and that may have had their

[19] Shailagh Murray & Allan Lengel, *Return of Jefferson Files is Sought*, Wash. Post, May 25, 2006 at A1, A11. I am quoted in this article.

[20] When a respondent has a Fifth Amendment issue about the "act of production" of subpoenaed documents, or the issue of Congressional waiver of Speech or Debate by allowing the Executive undue access to material comes up, a judge be thinking about how a search warrant does not involve these constitutional rights.

origin in the judge's thinking about other issues. Now, maybe it is a good footnote. Maybe it one of the best footnotes around. Maybe it belongs in the Footnote Hall of Fame.

On the other hand, maybe Judge Ellis, like just about every judge I ever dealt with, would appreciate some adversary briefing on particular legal issues and pertinent facts, before the FBI take his few words in a footnote, penned on the basis of last year's briefing about last year's very different situation, and shout them around as though they authorized this momentous radical step. I have seen a lot of trial judges' opinions on Congressional matters, with a lot of footnotes on issues that were not briefed, and I would say, that the independence of the Legislative Branch deserves more than one of those prior to taking steps that will lead to it being sacrificed. Moreover, DOJ did not rush immediately out and get a search warrant after that ruling, and perhaps even, at an interim point, considered and rejected such a step. This suggests that the wiser heads at DOJ recognized this one footnote as not conclusive in this situation, the way its less cerebral colleagues at the FBI do not.

As for the submission of the FBI affidavit to the district court here in Washington prior to issuance of a warrant, that very plainly has nothing to do with the legal questions involved in foregoing the prior adversary legal consideration of the traditional constitutional method, in favor of a raid. The district court here never got any adversary legal presentation at all. There is no reason for it to have been thinking about any question except the usual search warrant question of probable cause, which is not the issue. Quite the contrary, the affidavit plainly includes nothing to attempt to justify this as a unique necessity – nothing to show risk of flight or of evidence loss, nothing to show that House Counsel must be excluded from the legal proceedings or the search, indeed, nothing about the House Counsel at all. There is nothing in this affidavit to distinguish it from past instances of Representatives under investigation that were dealt with by the traditional constitutional method. To the alert reader, the affidavit fairly shouts that the specific factors making this intimidation, are acknowledged, and that from now on, the shadow of the Executive will fall, without any need to show unique necessity, across the whole of the Capitol.

Were There Better Alternatives?

I believe there are two aspects of a better alternative, that would be within the tradition, and different from the search warrant raid. A point that I especially want to make: it may well be that under the better alternative, DOJ would get every single record it is entitled to have and to use that it took away from the search warrant raid. And, it may well be that under the better alternative, the exact same legal consequences would ensue, in terms of whether the Representative is charged, and if so, whether he is convicted. It is not about protecting the individual Representative, not about Members being "above the law." It is about the independence of the Legislative Branch, for the benefit of our nation of constituents.

First, if DOJ/FBI are in a rush, they should either ask for, and await, expedited judicial procedures, or negotiate a solution with the House leadership. Either way, there will be input from the House to produce tailoring of what is taken, and how, from the

computerized records. There will be recognition of how privileged messages, non-relevant constituent messages, and relevant messages are mingled on a hard drive and only House input can produce a reasonable search.

Why not let judicial procedures – with adversary presentations – decide the issues? Presumably the courts will pay heed to a DOJ request for expedited consideration in a pretrial or pre-indictment situation. If not, DOJ's dispute is not with the House, it is with the judicial application of the Speech or Debate Clause to the right of a Member's appeal, in the *Helstoski* decision.

When a request for expedited judicial procedures is unavailing, DOJ's recourse is to negotiate a solution with the House leadership. The House, which can control all its documents, would consider a Rule VIII resolution put forth by the bipartisan leadership, resolving what to do with the subpoenaed documents, with conditions specified in the resolution to protect all legal rights and interests. In fact, any subpoena for a Senator's records calls forth such a Senate resolution, and when I first began serving the Congress, the House rule in effect at that time meant that any subpoena for a Representative's records called forth such a House resolution.

It is only since 1980 that the House has shifted to a system in which such matters are laid before the House without the need for passing a House resolution unless the particular situation suggests it. DOJ could simply say that the particular situation necessitates it, and, I cannot imagine it would not receive every consideration from the House leadership.[21]

Second, any inquiry into a Representative's records should be according to pre-established protocols. I personally would hope that this would be done only by subpoena, as traditional, and not by raid. But, however it is done, it should be done in a way that lets the House Counsel observe the process. And, it should be done in a way that does not involve the FBI engaging in a wholesale, insufficiently accountable downloading of a Representative's computer.

It would be best of all if the culling of the paper records was by Legislative Branch personnel – e.g., archiving personnel from the Clerk's office – who are conscientious, neutral, but non-intimidating - rather than Executive Branch agents who are, by profession, insensitive to Legislative Branch concerns, such as protecting the privacy of communications between Members with constituents, other Members of a legislative caucus, etc. On the other hand, the FBI may have some desire, which is suggested in its affidavit, to handle the retrieval of computer information so as to maximize the yield (e.g., to retrieve the kinds of prior–version superseded drafts that computers carry in ways that only a technician, not a clerical, person can access). So, if the FBI can show justified needs, let such retrieval occur under Executive-Legislative protocols. None of that calls for a raid.

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[21] For example, during the House Bank matter of the early 1990s, the House decided to pass a resolution turning all the House Bank's records over to the Department of Justice. Could DOJ have obtained these by search warrant or subpoena in the face of vigorous House objection? It is extremely doubtful, given that the records were those of hundreds of Members, of whom the overwhelming majority were above the least concern. Rather, the House acted pre-emptively, throwing the doors open to prove that it did not want to stand in the way of any law enforcement.

I suspect that kind of proposal will not fully satisfy either Rep. Jefferson, or, the hotter heads at the FBI. One or even both sides might quarrel with such a solution. But, it would comport with the constitutional tradition followed by DOJ in cooperation with the House Counsel. It would protect DOJ's law enforcement interest, as well as the House's institutional interest, in the traditional constitutional system, infinitely better than the radical and unnecessary step of a search warrant raid.

Chairman SENSENBRENNER. Mr. Walker.

STATEMENT OF THE HONORABLE ROBERT S. WALKER, CHAIRMAN, WEXLER & WALKER, AND FORMER MEMBER OF CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. WALKER. Mr. Chairman, Mr. Ranking Member and distinguished Members of the Committee, when the Republicans assumed the majority in 1995, one of our key missions was to have Members treated under law like other citizens. Some would have you believe that this particular case is all about such distinctions, but what we are discussing today is not about special rights for individual Congressmen, but the inherent rights the Constitution provides for Congress under the separation of powers doctrine.

No citizen, including a Member of Congress, is above the law, but no agency is above the Constitution. America's great experiment as a constitutional republic rests upon those understandings. Somewhere in the Rayburn raid, the value of these fundamental understandings got lost.

The Justice Department and the Federal Bureau of investigation have a duty under law to prosecute those citizens, including Members of Congress, who break the law. What they cannot do is use extra constitutional means to carry out their duty. Abandonment of fundamental law in the pursuit of upholding the law is a recipe for constitutional crisis.

There are ways of obtaining needed information for criminal prosecutions that have served us for 219 years, including the use of subpoenas. The idea that the Justice Department was without recourse in the Jefferson matter is completely without merit.

The American people should be deeply concerned that a decision to abandon tradition and conduct a raid on Congress was made consciously and evidently at the high levels inside of the Justice Department and the FBI. Press reports indicate that this was no casual decision but a conscious decision to act in an unprecedented way. The fact that this decision making process went on with no attempt to gauge the reaction of congressional leaders is wrong.

Now, there are lots of places to look to affix blame for this breakdown of precedent and tradition. The issue before you goes well beyond the facts of a particular alleged criminal case, but the Member involved certainly helped precipitate the situation with his noncooperation with authorities. The immediate issue may have been the Member's noncooperation, but the raid was on a co-equal branch of Government and threatened its unique status in our constitutional system.

It might also be noted that Congress' inability to maintain a working ethics process also contributed to an atmosphere conducive to the Justice Department's action. In addition, the warrant demanding Capitol Police cooperation with a raid on the institution that they are duty bound to protect denotes a casualness on the part of the judge about the unprecedented step and questionable procedures he was approving.

Congressional leadership must seek an explanation for the seemingly oblivious nature of the warrant process. While recognizing that the roles regarding criminal activities are different between the Congress and the executive branch, imagine a situation where

the situation was reversed. One can only imagine that the concern would be if the Capitol Police were sent on a raid of an executive agency in pursuit of Congress' oversight function.

My recommendations to Congress for appropriate reaction to the Justice Department action are as follows. One, avoid tying the Jefferson criminal investigation to the institutional prerogatives of the Congress. The legal focus of Congress should be on definition of the separation of powers issue to assure protection of its constitutional role. In no case should Congress appear to be interfering with criminal prosecutions of its Members conducted inside the bounds of constitutional authority.

Two, it is possible to create a set of procedures and protocols to cover search warrants the Department of Justice might want to execute on a congressional office, but such procedures and protocols can and should be worked out consistent with the speech or debate clause.

Three, demand a full accounting for the decision making process that led to the Rayburn raid. The Judiciary Committee should be prepared to subpoena documents tied to this incident.

Four, institute processes for appointed congressional officials and employees to follow in the event of incidence of a similar nature. If the Rayburn raid was a precedent for coming attractions and intimidating tactics, the way Congress responds initially must be improved.

Five, seek an explanation for what seems to be a lack of judicial respect for the traditions and precedence that have insulated legislative deliberations from the threat of overzealous exercise of executive power. As the Justice Department rationale has played itself out over a period of several days, it is clear that they believe that the ends justified the means in pursuing their case against Congressman Jefferson.

But the means deployed violated precedent, tradition and possibly constitutional parameters. Nothing in the Forefathers' view of representation Government was more important than protecting Representatives from the unfettered use of executive authority. So they used the means of Governments to restrict that authority.

By substituting ends to means, the Justice Department has sought to redefine a relationship 219 years in the making. They did so purposefully and with malice aforethought, and they have sought to use the sordid details of the Jefferson case as an excuse for the unprecedented incursion into the fundamental legislative rights.

It is a constitutional tragedy that this incident happened, a tragedy that will only be compounded if allowing ends to justify the means is permitted to stand unchallenged by a Congress unwilling to stand firmly for its most basic obligations to governance and posterity.

Chairman SENSENBRENNER. Thank you, Mr. Walker.

[The prepared statement of Mr. Walker follows:]

PREPARED STATEMENT OF THE HONORABLE ROBERT S. WALKER

Mr. Chairman,

No citizen, including a Member of Congress, is above the law. But no agency is above the Constitution. America's great experiment as a constitutional republic

rests upon those understandings. Somewhere in the Rayburn raid, the value of these fundamental understandings got lost.

The Justice Department and the Federal Bureau of Investigation have a duty under the law to prosecute those citizens, including Members of Congress, who break the law. What they cannot do is use extra-constitutional means to carry out their duty. Abandonment of fundamental law in pursuit of upholding the law is a recipe for constitutional crisis.

The American People should be deeply concerned that a decision to conduct a raid on Congress was made consciously and evidently at high levels inside the Justice Department and the FBI. Press reports indicate that this was no casual decision, but a conscious decision to act in an unprecedented way. The fact that this decision-making process went on with no attempt to gauge the reaction of key congressional leaders is wrong.

The issue before you goes well beyond the facts of a particular alleged criminal case. The Member involved certainly helped precipitate the situation with his non-cooperation with authorities, but that does not obviate the circumstances that led to an attack on the institutional prerogatives of the Congress. The immediate issue may have been a Member's non-cooperation, but the raid was on a co-equal branch of government and threatened its unique status in our constitutional system.

The warrant demanding Capitol Police cooperation with a raid on the institution that they are duty bound to protect denotes a casualness on the part of the judge about the unprecedented step and questionable procedures he was approving. Congressional leadership must seek an explanation for the seeming oblivious nature of the warrant process.

While recognizing the difference in roles regarding criminal activities, imagine a case where the situation was reversed.

My recommendations to Congress for appropriate reaction to the Justice Department's action:

1. Avoid tying the Jefferson criminal investigation to the institutional prerogative of Congress. The legal focus of Congress should be on definition of the separation of powers issue to assure protection of its constitutional role. In no case should Congress appear to be interfering with criminal prosecutions of its Members conducted inside the bounds of constitutional authority.
2. Demand the return of any files taken during the Rayburn raid (as the leadership has already done) and be prepared to pursue this demand all the way through the Supreme Court. Materials seized in the Rayburn raid clearly included constitutionally protected legislative documents and files.
3. Demand a full accounting for the decision-making process that led to the Rayburn raid. The Judiciary Committee should be prepared to subpoena documents tied to this incident.
4. Institute processes for appointed congressional officials and employees to follow in the event of future incidents of a similar nature. If the Rayburn raid was a precedent for coming attractions and intimidating tactics, the way Congress responds initially must be improved.
5. Seek an explanation for what seems to be a lack of judicial respect for the traditions and precedents that have insulated legislative deliberations from the threat of overzealous exercise of executive power.

Chairman SENSENBRENNER. Professor Turley.

STATEMENT OF JONATHAN TURLEY, J.B. & MAURICE C. SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. TURLEY. Thank you, Mr. Chairman, Representative Conyers, Members of the Committee. It is a great honor to appear today. I have been assured by the House Judiciary Committee that unlike the House Intelligence Committee, I will be allowed to leave at the end of my testimony. But just in case, I brought snacks if things go badly.

On a more serious note, we are here for a serious purpose. There have been very few times that this House has faced a moment of self-definition, where your identity and your dependence are at issue. The raid on this office of Representative Jefferson represents

a profound and almost gratuitous insult to a co-equal branch of Government.

In the history of this country, no President has ever ordered or allowed a search of the office of a sitting Member of this House. Now, there is a reason for that, that over 200 years this hasn't occurred. It is not because there has been a lack of interest of criminal investigators. There have been many investigations and many prosecutions. But there has been a tradition of mutual respect and mutual restraint between the branches.

What occurred on that Saturday shattered that tradition. Now, many of our most important constitutional values and traditions are not spelled out jot-for-jot in the text of the Constitution. They are part of a long-standing term of engagement between the branches. As I have laid out in my written testimony, there is a long history, and there is a long constitutional record to support the privileges of this House.

This is a question of means. It is a question of scope. This search was an abuse because it was unnecessary, and it was excessive, and it did great violence to the values of our constitutional system.

Now, I was asked once, what was the most important authority I could cite to this Committee by a reporter last week, and my response was that I would have every Member read Robert Frost, Mending Wall, because like that poem, the Constitution believes that good fences make good neighbors. That's the whole principle of the separation of powers. Good fences make good neighbors.

We have a tripartite system that creates walls, and there is no tension in that system because no branch has the authority to govern alone. So each branch minds the wall, minds its authority, minds its domain. To put it bluntly, the President did not prove to be a good constitutional neighbor.

Now, as this Committee knows, there have been a series of separation of powers and controversies that have occurred over the last 3 years. I mention some of them in my statement. I will not go into those. It was purely for the cathartic value of knowing that we are in a crisis and one that this Committee, I commend, for holding a hearing to look at this incident in that context, because it is a disturbing mosaic.

The walls of the Constitution are found in the first articles, the first three articles, of that document, as well as other parts. But the first three articles contain those structural limitations, including section 6 of article I. It was put there to protect the independence of this body from intrusions by both the executive and the judicial branches.

The mere fact that this search occurred with the authority of a Federal judge does not mitigate the problem. The Framers anticipated that it would occur that two branches would turn on a third branch. In all of the references to the clause in the Supreme Court, it is often the executive and judicial branch that are discussed together in terms of the dangers that this clause is meant to avoid.

In our system of Government, it matters how you do something, not simply whether you do it. No one is suggesting that Congressman Jefferson is above the law or that any Member of this House is above the law. That would be facially absurd.

No one is suggesting that a Member of Congress cannot be investigated. No one is suggesting that a Member of Congress may squirrel away incriminating evidence in their office. This is a question about means, and the means used here gave great constitutional offense.

In my testimony, I go through the various reasons why the search was so offensive. One of them is the availability of other means. What is most baffling about this search is that the affidavit that accompanied the search, that secured the warrant, stated, under oath, that the Government has exhausted all other reasonable methods to obtain these records.

In my view, that's facially untrue, because there are methods that could have obtained these—this material, without doing such a great constitutional insult to this body. It has been done for over 200 years. They could have sought a court order to compel Congressman Jefferson to comply. If that order was ignored, they could have sought an order for his incarceration.

Second, they could have sought in the court procedures to allow for the turning over of this material, that is part of the traditional method of the subpoena approach.

Third, they could have sought to seal the material or the office by simply going to the House with a legitimate law enforcement interest so that no material would have been in danger of being lost or destroyed. Finally, they could have sought direct action against a Member here if he refused to comply, which I quite seriously doubt.

The scope of the search is equally troubling. There is no question that this search did acquire a large amount of legislative material covered by the clause. The Supreme Court has said that what constitutes legislative material is broadly defined to achieve the purse of the clause. The hard drive of the computer is of particular concern.

By taking the hard drive of a Member, it's akin in the Framers' day of taking every single piece of paper out and a Member's office. If they had went in and removed every single piece of paper, people would not be debating how serious that is, but today that is exactly what happens when you take a hard drive.

There was a lack of exigency. This target of the search knew 8 months ago that they wanted to get this material. During that period no reasonable effort was made to use alternative methods.

I have suggested in my testimony that this court, this Committee, consider enacting a law that is analogous to the Privacy Protection Act that protects the media from the use of search warrants against their office. That was a wonderful decision, a wonderful law created by this Congress to protect the first amendment rights of journalists. You should have less protection under statutory law.

Let me first conclude that when Frost wrote the Mending Wall, he noted "Something there is that doesn't love a wall." We know in separation of powers, that is very true because all branches have chafed at the walls that confined them.

But good fences make good neighbors, and you have mended that wall, and you have maintained it. We have to remember that it is your duty. This is the people's House, not yours, not Representative

Jefferson's. We expect you to return this institution in the same condition you found it, as an independent and vigorous representative body. Anything else would be a betrayal, not just of yourselves, but of your institution.

Thank you.

Chairman SENSENBRENNER. Thank you, Professor Turley.

[The prepared statement of Mr. Turley follows:]

PREPARED STATEMENT OF JONATHAN TURLEY

STATEMENT FOR THE RECORD
JONATHAN TURLEY
SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

"RECKLESS JUSTICE: DID THE SATURDAY NIGHT RAID OF CONGRESS TRAMPLE THE CONSTITUTION?

MAY 30, 2006

COMMITTEE ON THE JUDICIARY
THE UNITED STATES HOUSE OF REPRESENTATIVES

I.
INTRODUCTION

Chairman Sensenbrenner, Representative Conyers, members of the Committee, it is an honor to appear before you today to discuss the disturbing recent events surrounding the search of a congressional office by the Executive Branch.[1]

There are relatively few times in history that a branch faces a critical test of institutional independence and identity. This is one of those times of self-definition. At the core of our unique system of governance is the concept of shared and separated powers. The search of Rep. Jefferson's office challenges not just the values and traditions of this house, but the doctrine of separation of powers itself. The raid on this office constitutes a profound and almost gratuitous insult to a co-equal branch of government. For that reason, this may not have been a challenge that you invited but it is one that you must not fail to meet.

I come to this subject as both a legal academic and as a litigator. I hold the Shapiro Chair for Public Interest law where I teach subjects ranging from constitutional law to criminal procedure. As a lawyer, I have litigated both constitutional and criminal cases with relevance to this controversy. These include cases raising core issues under the first three articles of the Constitution that concern legislative, executive, and judicial powers. While I have generally taken a robust view of the role of the Legislative Branch in our tripartite system of governance, I have also challenged Congress when it has exceeded its authority, including the successful constitutional challenge to the Elizabeth Morgan Act – legislation found to be a Bill of Attainder and struck down in *Foretich v. United States*.[2]

In the history of this nation, no President has ordered or allowed a search to be conducted on the legislative office of a sitting member of Congress. There is a reason for this previously flawless record. Both Legislative and the Executive Branches have long maintained a level of mutual respect and restraint in the conduct of their respective investigatory functions. This was done in recognition that some of our most important constitutional values and traditions are not spelled

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[1] After the lockdown that occurred during my testimony before the House Intelligence Committee last Friday, my expectations from congressional testimony have changed dramatically. I no longer hope for agreement, but only that when I finish my testimony today that I will be allowed to leave.

[2] 351 F.3d 1198 (D.C. Cir. 2003).

out jot for jot in the Constitution but exist in the long-standing terms of engagement between the branches.

As will be shown below, this search was abusive from a host of different perspectives from the failure to use alternative means to the scope of the search to the manner of its execution. In addition to being unnecessary, it was conducted in a manner that maximized the legal and policy concerns.

In evaluating the search, we must return to first principles. The question, in my view, is not whether the government had probable cause. Based on the lengthy affidavit, it is clear that probable cause exists that Rep. Jefferson has been engaged in possible criminal activity. This does not mean that he is guilty, of course, but rather that the standard under the Fourth Amendment of the Constitution is satisfied for a warrant. The question is not whether the government had a legitimate interest in this material. Even if the material is redundant as suggested by defense counsel, there are legitimate reasons to secure such material in a possible bribery case from the office of the individual. Rather, it is a question of means and a question of scope. This search was unreasonable because it was unnecessary and excessive in both scope and execution. While the entry to the office will likely be upheld, the specific material seized is likely to face a credible challenge that could have been entirely avoided with better judgment at the Justice Department. The various prophylactic measures imposed internally do not ameliorate or negate these concerns.

The fact that this search was done with the consent of the Judicial Branch does not change the constitutional equation. Obviously, given the recent controversy over the President's use of warrantless domestic surveillance, the use of a warrant is a welcomed addition. However, the separation of powers doctrine was created with the understanding that a branch may at times be threatened by the combined authority of the other two branches. Indeed, the Speech or Debate Clause is cited by the Supreme Court as a central bulwark against "intrusion by the Executive and Judiciary into the legislative sphere."[3] Likewise, the fact that there is a self-imposed "Filter Team" does not change the fact that it is a team created by the Executive Branch and composed of Executive Branch officers. The Administration prevented a legislative officer – the House General Counsel – from even witnessing the search, let alone reviewing the material.

The search on May 20, 2006, shattered over 200 years of tradition. What is most disturbing is not just the affront to a co-equal branch but the fact that the search was unnecessary to achieve purposes of securing these documents and material. If it were an act of impulse by some rogue FBI agent, it could be excused. However, this was an act of premeditation; ordered with the direct knowledge and

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[3] *Helstoski*, 442 U.S. at 492.

approval of Attorney General Alberto Gonzales. For that reason, it can be neither ignored nor tolerated if the balance of the tripartite system is to be maintained.

II.
THE SPEECH OR DEBATE CLAUSE: GOOD CONSTITUTIONAL FENCES MAKE GOOD CONSTITUTIONAL NEIGHBORS.

While I will be discussing a variety of cases related to the speech or debate clause, perhaps the most elegant explanation of the separation of powers can be found not in the Constitution but in the poem of Robert Frost, *The Mending Wall.* It is, of course, not a constitutional text but it captures the same basic principle of the separations of powers that "good fences make good neighbors." The Madisonian democracy creates a tripartite system in which no branch has the authority to govern alone. This creates a natural tension and, with that tension, a tendency for each branch to mind its walls of authority from any encroachment. Like Frost's neighbors, these walls tend to crumble through time or incursion, but it is in the interest of each branch to preserve the integrity of the walls first laid by the Founders.

To put it bluntly, since taking office President Bush has not proven a good constitutional neighbor. The last few years have been replete with direct assaults on the doctrine of the separation of powers and other core protections. I have testified on many of these controversies before various committees but the list is growing and represents a constitutional crisis for a system based on shared and separated powers.[4] A review of some of the most serious controversies illustrates why this President is viewed as the most hostile chief executive to the doctrine of separation of powers in modern American history:

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[4] *See, e.g.*, United States House of Representatives, Permanent Select Committee on Intelligence, "*The Constitutional and Criminal Status of the Media in Reporting on Classified Subjects*," May 26, 2006; United States House of Representatives, Subcommittee on Homeland Security, "Protection of Privacy in the DHS Intelligence Enterprise," April 6, 2006 (testimony of Professor Jonathan Turley); United States House of Representatives, House Judiciary Committee (Democratic members), "The Constitutionality of NSA Domestic Surveillance Operation," January 20, 2006 (testimony of Professor Jonathan Turley). It is not my intention to revisit that subject or my prior criticism of congressional oversight on such operations. *See* Jonathan Turley, *Down to the Fourth Estate*, USA Today, May 17, 2006, at 11A.

- **The Torture Memorandum**: Attorney General Alberto Gonzales, while White House Counsel, signed a memorandum that stated that the president could order officials to commit crimes and that the Executive Branch could violate federal laws when the President viewed it to be in the nation's interest.
- **Detainees:** The Administration has previously argued that the President could create his own court system and even execute detainees without any access to the federal courts.
- **Enemy Combatants:** The Administration has argued that the President may unilaterally declare citizens to be enemy combatants, strip them of all of their constitutional rights, and deny them access to the courts and counsel.
- **Signing Statements**: The President has repeatedly reserved the right to violate federal laws when he considers it in the nation's interests, including areas outside of national security subjects.
- **Domestic Surveillance**: The President has admitted that he ordered surveillance under the NSA domestic surveillance program over 30 times despite the view among many experts that the operation violates federal law and constitutes a federal crime.
- **Data Mining Operation**: Recently, it was disclosed that the Administration has created a massive data bank of telephone numbers and calls of millions of Americans – without congressional authority.

I realize that we do not all agree on these violations or their implications for our constitutional system. However, it is important to recognize that the latest controversy is part of a disturbing mosaic of extreme claims of executive authority by this Administration. In my view, the total disregard of congressional privileges and concerns in this search reflects this broader pattern. With that somewhat cathartic observation behind us, I will turn to the specific issue at hand.

A. <u>The Origins of the Speech or Debate Clause</u>

In our system of government, the "walls" of the Madisonian democracy are found in a series of checks and balances between the branches. These express powers and limitations, however, are merely the structural elements of a broader principle of separation of powers. While not expressly mentioned in the Constitution, the separation of powers doctrine is the unifying and stabilizing element of the tripartite system. It is a doctrine that is largely protected through long-standing traditions of mutual respect and mutual restraint between the branches.

One of the structural protections in the Constitution is found in Section 6, Article 1 of the Constitution:

> 1. 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.

The current controversy extends beyond this one clause but it is clearly the most directly affected by the exercise of a search by the Executive Branch on an office of Congress. The Speech or Debate Clause was intended "to preserve the Constitutional structure of separate, co-equal, and independent branches of government."[5] In more negative terms, "the central role of the Clause is to prevent intimidation of legislators by the Executive and accountability before a possible hostile judiciary."[6]

The speech or debate clause in Article 1 is obviously quite vague and neither the executive nor the Legislative Branches have been eager to litigate the meaning of this clause. The origins of the clause are well known. The clause is the direct descendent of the English Bill of Rights. As early as 1541, the Parliament was formally invoking this privilege. The notion of legislative immunity was forged during a period when the Tudor and Stewart monarchs used their executive power to harass legislators with the threat of criminal prosecution and penalties when they failed to yield to their views. Queen Elizabeth, King James I, and Charles I were particularly aggressive in the use of their authority to punish outspoken legislators. Legislators like Peter Wentworth became personifications for the right of the legislature to be free of such coercion or arrest after they went to jail rather than yield to the Crown.

Given the grievances against the King in the colonies and the desire to form a representative democracy, legislative immunity was an obvious element to the new system. Indeed, the Speech or Debate Clause generated very little discussion in the constitutional convention. At one time, the Committee on Detail considered a provision that limited the privilege to a protection from arrest. Beyond the prohibition on arrest, it was proposed that "they shall have no other privilege whatsoever." This proposal was defeated.

Only William Pinckney and James Madison opined in any substantive way on the privileges for the houses of Congress. Pinckney advocated a provision that

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5 *United States v. Helstoski*, 442 U.S. 477, 491 (1979).

6 *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 502 (1975).

would have allowed each house to define its own privileges while Madison viewed such authority as a dangerous concentration of power in a system based on the concept of shared powers. Yet, both Pinckney's support for an open-ended congressional authority and Madison's desire to concretely define the privileges failed. The final language of the clause was adopted on August 10, 1787. Pinckney would later observe that "[t]he Convention . . . well knew that it was an important point, and no subject had been more abused than privilege [and were] . . . determined to set the example, in merely limiting principle to what was necessary, and no more."[7] The framers clearly preferred to leave the clause somewhat vague. It was an telling choice given the fact that leaders for over two hundred years have largely avoided efforts to clearly define and confine such privileges.

Putting aside the Constitutional Convention, there is evidence that the legislative privilege was given broader meaning in the early Republic. For example, when President John Adams ordered the grand jury investigation for sedition of Rep. Samuel J. Cabell of Virginia in 1797, both James Madison and Thomas Jefferson cried foul. The offense concerned a constituent letter criticizing the policies of Adams vis-à-vis France. Jefferson and Madison jointly wrote that

> [i]n order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of the land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any . . .[8]

It is clear that the Framers viewed the clause, and the general operation of the separation of powers, as a vital component of the guaranteeing the legislative function. They notably did not create similar privileges for the other branches in recognition of the core relationship between legislative functions and legislative privileges.

B. <u>The Judicial Interpretation of the Clause</u>

The Supreme Judicial Court of Massachusetts handed down an important ruling in 1808 in *Coffin v. Coffin,* where Chief Justice Theophilus Parsons held that "the article ought not to be construed strictly, but liberally . . . to [include] the

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[7] 3 Max Farrand, The Records of the Federal Convention of 1787, at 385.

[8] 2 The Founders' Constitution 336 (Philip B. Kurland & Ralph Lerner eds., 1987) (Thomas Jefferson and James Madison, Protest to the Virginia House of Delegates (1797)).

giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office."[9] Yet, it was not until 1881 that the Speech or Debate Clause was addressed by the Supreme Court. In *Kilbourn v. Thompson*,[10] the Court ruled that the House of Representatives lacked the power to arrest and hold a citizen. However, it also found that members are immune from liability under the clause for such acts.

In the Twentieth Century, the Supreme Court would redefine the clause and, in some respects, narrow its application. In *United States v. Johnson*,[11] the Court emphasized the role of the clause in protecting the Legislative Branch from intrusions from both the executive and judicial branches: "The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature."[12] Nevertheless, the Court stressed the importance of whether the legislator was being prosecuted for a legislative act. This distinction was made even more plain in *United States v. Brewster*, where the held that "a prosecution under a general criminal statute . . . necessarily contravenes the Speech or Debate Clause."[13] Out of these cases, and cases like *Dombrowski v. Eastland*,[14] and others,[15] the Court embraced a legislative/political distinction in the application of the clause – excluding non-legislative acts from the legislative privilege.

These and other cases establish that there is no absolute immunity from investigation or prosecution for members of Congress simply due to their status. Rather, the immunity is only found in the prosecution of members for performing their legislative functions.[16] For the record, I have always reviewed the interpretation of the covered legislative functions under the clause to be too narrow, particularly in such functions as constituent newsletters.[17] Indeed, it is an

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[9] 4 Mass. 1, 27 (1808).

[10] 103 U.S. 168 (1881).

[11] 383 U.S. 169 (1969).

[12] *Johnson*, 383 U.S. at 179.

[13] 408 U.S. 501, 510 (1972).

[14] 387 U.S. 82 (1967).

[15] *See, e.g., Doe v. McMillan*, 412 U.S. 306 (1973); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

[16] *Gravel v. United States*, 408 U.S. 606, 616 (1972) (stressing that the clause "protects Members against prosecutions that directly impinge upon or threaten the legislative process.").

[17] *See, e.g., Williams v. Brooks*, 945 F.2d 1322, 1331 (5th Cir. 1991) (denying immunity for press conference statements); *Chastain v. Sunquist*, 833 F.2d 311,

interpretation that comes close to the view of King James II when he narrowly construed speech immunity in Parliament.[18] Yet, the general thrust of these cases is manifestly correct: the Framers did not intend for this clause to serve as a personal form of immunity for members from any criminal act that they may commit while in office.[19] As Jefferson noted in his work, *A Manual of Parliamentary Practice*, "[t]he privilege . . . is restrained to things done in the House in a Parliamentary course . . . For [the member] is not to have privilege *contra morem parliamentarium*, to exceed the bounds and limits of his place and duty."[20] For this reason, despite the comments of some in the media, no one is suggesting that Rep. Jefferson is immune from prosecution or is in any way "above the law." This is about the means, not the end, of a criminal prosecution. In our system, it matters how things are done, not simply whether they are done.

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328 (D.C. Cir. 1987) (denying immunity for letter to Attorney General); *but see Sundquist*, 833 F.2d at 329 (Mikva, J., dissenting) (arguing for a broader, functional interpretation of the clause); Joint Committee on Congressional Operations on the Legislative Role of Congress in Gathering and Disclosing Information, The Constitutional Immunity of Members of Congress, S. Rep. No. 896, 93d Cong., 2d Sess. 47, 53 (1974); Constitutional Immunity of Members of Congress: Hearings Before the Joint Comm. on Congressional Operations, 93d Cong., 1st Sess., pt. 1 (1973); Robert J. Reinstein & Harvey A. Silvergate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113 (1973).

[18] Reinstein & Silvergate, *supra*, at 1130. King James II recognized only statements and functions occurring inside the House of Commons in his prosecution of Sir William Williams when the latter published deliberations from the House. *Id.*

[19] This was made plain by James Madison:

> All laws should be made to operate as much on the law makers as upon the people; the greatest security for the preservation of liberty, is for the government to have a sympathy with those on whom the laws act, and a real participation and communication of all their burthens and grievances. Whenever it is necessary to exempt any part of the government from sharing in these common burthens, that necessity ought not only to be palpable, but should of no account be exceeded.

2 Founders' Constitution 331 (Philip B. Kurland & Ralph Lerner eds., 1987) (James Madison, The Militia Bill, House of Representatives (Dec. 16, 1790)).

[20] Thomas Jefferson, A Manual of Parliamentary Practice 20 (1854), in The Complete Jefferson 704 (S. Padorer ed., 1943); *see also Hutchinson v. Proxmire*, 443 U.S. 111, 125-26 (1979).

The Speech or Debate Clause is part of a doctrine of separation of powers that is more than the aggregation of insular rules of constitutional privilege or authority. Like privilege, there is a certain penumbra that surrounds these provisions; a living space between the branches. This is why there has not been a search of a congressional office in over two hundred years. The reckless decision to shatter this centuries old tradition is baffling not only because of the lack of respect given to a co-equal branch, but the utter lack of necessity. Tasked with performing oversight of the Executive Branch, it is essential that Congress not face unnecessary or unbridled intrusions in its public offices. The Framers wanted legislators to "be free, full, and unawed"[21] and not concerned about the integrity and sanctity of their institutional functions. The Speech or Debate Clause must be interpreted in light of that original intent to "protect the integrity of the legislative process by insuring the independence of individual legislators."[22]

At a minimum, the Jefferson search appears to have violated the spirit of the separation of powers and certainly destroyed over 200 years of flawless tradition. As for the constitutionality of the search itself, the most significant questions concern the scope of the search. Focusing on the material seized, as opposed to the entry into the office, the search appears to have acquired a vast array of legislative material that should concern every legislator and constitutional scholar. Time will tell if the material is suppressed. However, what should be clear is that this search was manifestly unwarranted and unwise.

III.
THE JEFFERSON SEARCH AND THE ABSENCE OF NECESSITY OR EXIGENCY

The search of Rep. Jefferson's office on a Saturday night on May 20, 2006, opened a new chapter in interbranch relations in the tripartite system of governance. There is a reason why no such search has occurred in over 200 years. It is not because of an absence of prior interest of investigators in the contents of congressional offices. There have been many prior investigations with more compelling reasons for a search than this search. Rather, it has been the presence of Justice Department officials who understood the traditions of our constitutional system and the implications of such an intrusion into the Legislative Branch.

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[21] 2 The Founders' Constitution 336 (Philip B. Kurland & Ralph Lerner eds., 1987) (Thomas Jefferson and James Madison, Protest to the Virginia House of Delegates (1797)).

[22] *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 502 (1975).

While the facts of the search are relevant to our discussion, it is important to emphasize that nothing in this analysis depends on the merits of the allegations against Rep. Jefferson. This is about an injury to an institution, not an individual. Rep. Jefferson will have to face these accusations in due course, but it will certainly not be today or before this Committee.

A. Availability of Other Reasonable Methods.

The affidavit accompanying the warrant in this case contains a standard statement that carries special significance in this context. Special Agent Timothy R. Thibault affirmed that the government "has exhausted all other reasonable methods to obtain these records." It is a common phrase to find in such documents, but in this context it is manifestly untrue and highlights the abuse of power in this search. There were various other avenues that the Administration could have taken short of a Saturday night raid on a congressional office. It is hardly credible, as claimed in the affidavit, that the Administration was "[l]eft with no other method" to obtain such material.

First, the Administration could have sought a court order to Rep. Jefferson to comply with the subpoena or, if such an order is ignored, an order holding him in contempt. Rep. Jefferson would have faced jail for a failure to comply with such an order. It is not clear whether the Administration sought such a contempt order or appealed any denial of such an order.

Second, the Administration could have sought to establish procedures for securing such material in federal court with counsel for the institution and the individual present. This is what has occurred in the past to allow all interested parties to argue and, if necessary, to appeal over involuntary disclosures.[23] The lack of an adversarial component in this case probably contributed to the lack of understanding or moderation in the scope or execution of the search. By foregoing the subpoena route and appeal, the government prevented experienced counsel for counsel to inform the court of the implications of and alternatives to this raid.

Third, the Administration could have sought to seal the material or even the office by dealing directly with the House of Representatives. The House has the authority to take steps to secure material and Rep. Jefferson would have likely cooperated with such efforts to avoid congressional action on these allegations. Indeed, the House has previously voted to turn over material in a criminal investigation. Indeed, when combined with true argument before a federal court, a compromise was possible in the use of neutral legislative officers to identify and remove the needed material. Instead, only after the intrusion into the Legislative Branch, President Bush ordered a period of consultation and negotiation. Had this

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[23] *See, e.g., United States v. McDade*, 28 F.3d 283 (3d Cir. 1994).

consultation occurred *before* the intrusion, there would likely be no constitutional confrontation and the evidence would have been secured without rancor.

Finally, the Administration could have even asked for direct action against Rep. Jefferson by the House for his failure to comply with a valid subpoena. Most of us doubt that Rep. Jefferson would have long refused to turn over this material if the matter were raised with the entire house and he faced a parallel legislative investigation.

This is not the first time that such material has been sought from congressional offices and, as over 200 years of precedent indicates, there has never been a need to resort to such a search. Even in highly contested cases like those involving Abscam, Rep. Dan Rostenkowski, and Rep. Jim Traficant, prosecutors followed reasonable procedures to secure evidence in cooperation with both congressional and individual counsel. Other avenues have been used and, in deference to the Legislative Branch, prior Administrations have worked out accommodations with defendants and congressional leaders. This long-standing working relationship is embodied in the United States Attorney's Manual. After discussing the dangers of using material from legislative offices, section 2046 states:

> In addition, both the House and the Senate consider that the Speech and Debate Clause gives them an institutional right to refuse requests for information that originate in the Executive or the Judicial Branches that concern the legislative process. Thus, most requests for information and testimony dealing with the legislative process must be presented to the Chamber affected, and that Chamber permitted to vote on whether or not to produce the information sought. This applies to grand jury subpoenas, and to requests that seek testimony as well as documents. The customary practice when seeking information from the Legislative Branch which is not voluntarily forthcoming from a Senator or Member is to route the request through the Clerk of the House or the Secretary of the Senate. This process can be time-consuming. However, *bona fide* requests for information bearing on ongoing criminal inquiries have been rarely refused.[24]

As shown below, the courts have held (and the Justice Department has recognized) that information related to the legislative process is broadly defined. This material shows that the Justice Department itself recognized that requests should be made through Congress and that Congress was unlikely to refuse. Moreover, it acknowledges that "the customary process" was not followed in this case.

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[24] Federal Rules of Criminal Procedure Rule 41(f)(2).

The availability of alternative methods is also indicated by the assertions of Rep. Jefferson that much of this material had already been acquired by other means and that they had never foreclosed a voluntary waiver for the search. While it certainly appears that Rep. Jefferson did not comply with the subpoena, eight months went by without any apparent effort to force compliance short of an actual search.

B. The Scope of the Search

The need to seek alternative avenues is manifested by the scope of material seized in this search. There is no question that material constituting legislative material was taken by the government. In addition to material related to Rep. Jefferson's appointments and contacts, the government took his entire hard drive from his computer. In today's world, a hard drive is what paper records and files were in the time of the Framers. Moreover, the most sensitive legislative material will be found on a member's personal computer. It is equivalent to going into Samuel Cabell's office and taking every scrap of paper. When one considers that the Court has stressed that the "the Speech and Debate Clause [must be read] broadly to effectuate its purposes," the scope of the seized material is daunting. The Court has defined the range of protected legislative activities to include all functions or activities that are

> An integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.[25]

Even the U.S. Attorney's Manual recognizes the broad interpretation given to such material, warning Justice Department attorneys that

> While the Speech and Debate Clause has been expressly held not to shield Senators or Representatives against bribery charges, *Johnson v. United States*, 383 U.S. 169 (1964), it does impose significant limits on the type of evidence that can be used to prove such an offense. . . . the parameters of what constitutes a "legislative act" are quite broad, and can severely impair the ability of prosecutors to prove bribery and gratuity cases where the recipient is an elected Member of the Legislative Branch.[26]

There is little question that the Justice Department seized legislative material that relates to both Rep. Jefferson's legislative actions as well as the process of

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[25] *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 504 (1975).

[26] United State's Attorney's Manual Section 2046.

legislation. Given the scope of the intended search, the Administration should have sought an interim method of securing the material while the Legislative Branch dealt with the failure to comply. There was no need for this to be an exclusive Executive Branch search. By allowing Congress to intervene, the transfer of this material could have been handled by legislative officials and avoided a conflict between the branches. Instead, the Administration carried out an extreme search with the most extreme means.

C. The Method of the Search

Magnifying the constitutional concerns further was how this search was conducted. It appears that Ms. Geraldine Gennet, the General Counsel of the House of Representatives, went to Rep. Jefferson's office on the night of the search. She correctly asked to be present as a representative of the Legislative Branch. It was a request that was not only manifestly reasonable but mutually beneficial. If the Administration had simply allowed Ms. Gennet to be present, it would have helped to mitigate the intrusion into the office. While constitutional concerns would remain, it would have shown a modicum of circumspection on the part of the Justice Department. Instead, Ms. Gennet was barred from entry. It was an outrageous and unjustifiable decision by the Justice Department.

After barring Ms. Gennet, the Justice Department barred Rep. Jefferson's legal counsel, Ms Amy Jackson. Ms. Jackson demanded to be present for the search – a common practice. She was also barred by Special Agent Thibault. Accordingly to Ms. Jackson, she was also told by Assistant United States Attorney Mark Lytle that she would be barred because it is against Justice Department policy. If true, that would be news to me. It is common for defendants and counsel to be present. Indeed, defendants or counsel often sign inventories after such searches. In federal court, Rep. Jefferson has objected to the exclusion for good reason. Rule 41 of the Rules of Federal Criminal Procedure anticipates the participation of a representative or party in its inventory provision:

> An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.[27]

The exclusion of both the House General Counsel and the personal counsel to Rep. Jefferson shows the complete disinterest of the Administration in accommodating even the most modest legal or constitutional concerns.

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[27] Federal Rules of Criminal Procedure Rule 41(f)(2).

D. The Lack of Exigency

After one considers the constitutional and policy concerns raised by this search, it is baffling why the Administration would take such a controversial step at this point in the case. There were no exigent circumstances in the case. Rep. Jefferson was aware *for eight months* that the government wanted to search his office. If there were terribly incriminating things in the office, the government had given him ample time to remove them – even if he had not done so before the warning. Moreover, these documents could have been easily secured through cooperation with the House of Representatives to avoid any concern months before the search was executed.

Looking back at history, there were a variety of criminal cases that had a more compelling claim for the search of an office. Yet, there was sufficient restraint and judgment at the Justice Department to use the least intrusive means to secure the material. What is striking in this case is the relatively low importance of the search in the context of the investigation. There is nothing in this record to indicate a compelling reason for a Saturday night raid on a congressional office. Indeed, the government reportedly leaked the news of the raid to the media before most congressional members were informed.

Rep. Jefferson was already reportedly facing the curious appearance of $90,000 in his freezer and some rather suspicious taped conversations. This is not a criminal case with an apparent dearth of incriminating evidence. Moreover, Rep. Jefferson's attorneys have insisted that some of the material sought in his office had already been acquired by the government by other means. As a practicing criminal defense attorney, this seems to be a routine search in a criminal case. Once the money was found, the government clearly had probable cause to search Rep. Jefferson's dwellings and office. However, this was not some mob safe house.[28] It was an office of a house of Congress. It, not Rep. Jefferson, deserved more circumspection and restraint.

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[28] Much has been made of the fact that the offices of lawyers and other confidential locations can be searched, including the seizure of computer hard drives. However, these locations are not the subject of Article I of the Constitution. The protection of the legislative process is expressly protected in the Speech or Debate Clause. In the same way, the fact that judicial offices have been searched is hardly determinative on this question. Lois Romano, *Senate Leaders Profess Less Outrage on FBI Raid*, Wash. Post, May 29, 2006, at A4 (quoting Sen. Dick Durbin as observing that the office of a federal judge has been searched in the past). Unlike the Legislative Branch, neither the Judicial nor the Executive Branches were expressly given a similar privilege under Article II or III. Rather, the courts

IV.
MENDING THE WALL:
THE CONGRESSIONAL RESPONSE TO THIS EXECUTIVE INTRUSION

The admissibility of this material will be left to the courts, assuming that the documents are not returned and secured with proper procedures. What should be the immediate concern of this Committee is how to mend this long-recognized wall. The Framers gave this body a host of tools to protect the interests of the public and this institution. They include the power of the purse as well as specific functions such as oversight investigations. It is not enough for the Administration to order a pro hoc recognition of congressional privileges. This act should not be repeated. However, this Administration has shown that it will take more than 200 years of tradition to deter such intrusions in the future.

The most obvious response would be to pass a congressional version of the Privacy Protection Act.[29] This law protects media offices from search warrants and instead mandates the use of subpoenas in deference to the first amendment role of played by journalists in our system. The law allows for narrow exceptions but, for the most part, allows such controversies to be litigated in federal court through the subpoena process. Congress should have no less protection or opportunity to be heard before material is secured by the government.

In deference to the Executive Branch, Congress can also codify the process by which material can be secured by legislative officials and reviewed by such officials for transfer to investigators. By allowing legislative officials to perform such a task, the branches can reach an easy accommodation. Thus, with the enactment of a type of Privilege Protection Act, this internal process should avoid future intrusions while protecting evidence for legitimate criminal investigations.

V.
CONCLUSION

As Frost wrote in *The Mending Wall*, "something there is that doesn't love a wall." In the history of this country, all three branches have chafed at the walls

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established privileges as a matter of judicial interpretation. The legislative privilege has a unique and separate history. Moreover, the focus of such analysis ignores the insular questions discussed above, including the availability of alternative avenues, the scope of the search, the manner of execution, and other issues.

[29] Pub. L. No. 96-440, 94 Stat. 1879 (1980) (codified at 42 U.S.C. 2000aa-2000aa-12 (2000)).

that separate them from coveted powers. Yet, good fences make good neighbors. While rocks fall, the branches tend to repair them and maintain the security of their own authority by recognizing the border of their co-equal neighbor. It is precisely the type of mutual interest described by Frost:

> And on a day we meet to walk the line
> And set the wall between us once again.
> We keep the wall between us as we go.

It is time to repair the wall between the legislative and Executive Branch. Thus far, President Bush has been a rather poor neighbor in respecting the wall between legislative and executive domains. You inherited this great legislative body from generations of congressional leaders who have maintained the separation of powers. It is, therefore, your obligation to act now. This will not be easy. Administration figures and supporters have tried to use the conduct or misconduct of Rep. Jefferson to personify this debate. I encourage you not to yield to such pressure on this issue – or the other recent challenges to the separation of powers. This is the People's House, not yours and not Rep. Jefferson's. We expect you to return this institution in the same condition as you found it – as an independent and vigorous representative body. It is time to show that members remain "free, full, and unawed" in their legislative authority.[30] Anything less is a betrayal not only of yourselves but your institution.

Thank you again for the honor of speaking with you today and I would be happy to answer any questions that you might have.

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[30] 2 The Founders' Constitution 336 (Philip B. Kurland & Ralph Lerner eds., 1987) (Thomas Jefferson and James Madison, Protest to the Virginia House of Delegates (1797)).

Chairman SENSENBRENNER. Mr. Fine.

STATEMENT OF BRUCE FEIN, PRINCIPAL, THE LICHFIELD GROUP, INC.

Mr. FEIN. Mr. Chairman and Members of the Committee, checks and balances are every bit as indispensable to our civil liberties as the Bill of Rights. Yet the Bush administration has been bent on a scheme for years of reducing Congress to akin to an extra in a Cecil B. DeMille political extravaganza, signing statements that are the equivalent of line item vetoes, the assertion of executive privilege to deny Congress any authority to oversee executive branch operations, a claim of inherent presidential authority to flout any statute that he thinks impedes his ability to gather foreign intelligence, whether opening mail, conducting electronic surveillance, breaking and entering, or committing torture.

This latest use of a search warrant by the executive branch to rummage through the files of a Member's office is simply an additional instrument of the Bush administration to cow Congress. It is exceptionally important that the Congress respond clearly and authoritatively with a statute that rejects the authority of the executive branch, whether or not a search warrant is authorized by a judge, to look through the files of a Member's office and glance at legislative protected materials under the speech or debate clause. That kind of authority can be abused to intimidate, to cow Congress into submission to executive desires.

Principles unchecked lie around like loaded weapons, and they will be used whenever an urgent need the claimed by the incumbent. That is why it is so important to reject the principle involved in the search warrant, not focus on the details of the Jefferson warrant and search.

The speech or debate clause is violated whenever the executive branch would obtain a search warrant that would require reading the files of a Member's office in order to determine whether any of the documents fit the demand of the search warrant. That is the only way in which a search warrant for documents can be implemented. You have to read every file to know whether or not it identifies something in the search warrant. That inescapably means when you are searching a legislative office, you must come across speech or debate protected materials.

As soon as the FBI looks at those documents and reads it, comes across, perhaps, sensitive political strategy, information in the hands of a Member, questions that might be asked during oversight hearings, the violation occurs. The memory of the official cannot be erased. It is then part of the executive branch apparatus pool of knowledge that can be utilized to implement the power, to cripple the congressional oversight and legislative function.

In my judgment, it makes no sense to be satisfied with protocols with the Department of Justice asking us that warrants be administered in particular ways. Because the breach occurs whenever there's an obligation to open your files to the executive branch, under any circumstances.

That is exactly why this Congress in 1980, after the Supreme Court's decision in *Zurcher v. The Stanford Daily,* held that the FBI, under the fourth amendment, could raid press offices and en-

acted the statute when it comes to the work product of the press, it doesn't matter how important to proving a crime, it's off limits. A subpoena can be utilized. If it is frustrated, it is more important that criminal justice be frustrated than that we have a timid and effete free press.

That is the same judgment the Founding Fathers made with regard to the speech or debate clause. It is different than any other clause protecting executive branch or judicial deliberations. It is expressed in the text. The Founding Fathers worried that Congress would be too weak, not too muscular. It worried about an executive branch and judicial branch that would deter Congress from asserting the prerogative that comes from the people directly.

That is why, I think, it would be misplaced to try to focus on any analogies with regard to searching executive branch or judicial branch offices, because they lack that explicit constitutional Constitution enshrined in article I, section 6.

Of course, the Founding Fathers were not so foolish to think that all Members would be saints. There would be some who would go astray. There are ample methods under the law in the Constitution that can prove criminal activity of a Member without requiring rummaging through their files. I underscore "files," because that is what is protected by the speech or debate clause, not cash, not evidence, an instrumentality of crime, drugs, a handgun, a corpse.

Many of the of attempts to satirize the claim of privilege have attempted, I think, to distort what is at issue here by suggesting how foolish it would be that you couldn't walk into an office and see demonstrative evidence of crime and seize it. Of course you can. You are not trenching on the speech or debate clause.

But when it comes to documents, the only way you can search is to read everything. When you read everything you encroach on the speech or debate clause. I would urge Congress to act swiftly in protecting the Members, not because we prefer that crime go unpunished, but the institution prerogative is so important to our institutional liberties, it is also, I think, wrong to suggest that simply because a Member provokes an investigation by the executive branch that, therefore, there must be guilt.

Oftentimes, investigations are unable to prove any wrongdoing. This Administration seems to operate on the assumption that the only people who would object to any of their investigative methods, electronic surveillances without warrants or otherwise, being identified as an illegal combatant and held forever without judicial review, are those who must be held guilty in wrongdoing.

But the law and the investigators get it wrong oftentimes. That is why we have procedural protections. The executive branch can make errors. It's not infallible. We locked up 120,000 Japanese-Americans in World War II based on the fallacious belief they were all plotting treason or some sort.

I would urge the Congress to work with the Senators and the President himself in crafting this legislation. It should not come apart because of a sense that this branch is in a position of self-protection and indulging its own Members. You are operating here in defense of separation of powers. That's the highest calling of any member of the executive branch.

I would look to close also with the comment on the so-called threat of the Attorney General, the deputy attorney general, to resign if the speech or debate clause is enforced. Well, let them resign.

I am astonished that the President wouldn't have fired them for undertaking this action without consulting him in advance. This is not esoteric constitutional law. Article I, section 6 is very explicit. If the Justice Department feels the need to resign, so much the better. We need people there who respect the law and the Constitution rather than those who believe their mission is to aggrandize the executive branch.

Thank you.

Chairman SENSENBRENNER. Thank you, Mr. Fein.

[The prepared statement of Mr. Fein follows:]

PREPARED STATEMENT OF BRUCE FEIN

Dear Mr. Chairman and Members of the Committee,

I am grateful for the opportunity to share my views on the Executive Branch's employment of search warrants in criminal cases to seek documentary material in various formats located in the office of a Member. The issue has come to prominence because of the unprecedented search of Congressman Jefferson's office for documentary evidence of suspected bribery or fraud. I respectfully submit that such warrants conflict with the purpose if not the letter of the Speech or Debate Clause because they inescapably expose legislative acts to the prying eyes of the Executive. I would urge Congress to enact a statute that would prohibit search warrants for documents in legislative offices comparable to the protection afforded the news media under the Privacy Protection Act of 1980. That would not leave criminal investigators helpless. They could still employ subpoenas to obtain relevant documents, and obtain contempt sanctions for unjustified refusals to comply. In some cases, the Fifth Amendment privilege against compulsory self-incrimination might frustrate the subpoena and the criminal investigation. In other cases, a Member might prefer contempt sanctions to compliance. But the Speech or Debate Clause premise is that insuring a fearless and uncowed legislative branch in some cases should trump criminal law enforcement.

The Founding Fathers were alert to the danger of entrusting to the executive branch or the judiciary powers to investigate, prosecute, or punish alleged criminal activity of Members through proof of legislative acts, including intramural correspondence and political strategy. Such a Sword of Damocles would deter Members from opposing legislation championed by the President or conducting forceful oversight. The Executive's discretion to investigate is virtually limitless. As then Attorney General Robert Jackson lectured in 1940, the countless technical statutes in the federal code invite prosecutors to select political opponents as potential criminals and then scour the books to pin an offense on them, in lieu of discovering a crime and then searching for the culprit. The Speech or Debate Clause answers this potential prosecutorial abuse as regards Members by categorically prohibiting the use of legislative acts to prove a crime, i.e., those things generally said or done in the House or Senate in the performance of legitimate official duties, such as fashioning political strategy for passing or defeating a bill or investigating the Executive Branch. The Founding Fathers thought it more important that crime escape punishment than that the Congress lose its force as a check against executive usurpations or folly.

Search warrants for documentary evidence in legislative offices are irreconcilable with the Speech or Debate Clause. A search warrant allows the F.B.I. to ransack the files of a Member, reading each and every document in hopes of discovering those described in the warrant. But legislative office files invariably include volumes of documents within the protection of the Clause, for example, correspondence with colleagues concerning pending or potential legislation, strategy for "killer" amendments, or questions for Executive Branch officials in oversight hearings. The Clause is offended the moment the F.B.I. peruses a constitutionally protected legislative document. Even if the document is not seized, memory of its political contents remains in the Executive Branch for use in thwarting congressional opposition or leaking embarrassing political information. Documentary searches are further intimidating to Congress because the "plain view" doctrine of the Fourth Amendment would entitle the F.B.I. to seize any material in the course of reading office files

concerning crimes unconnected to the search warrant. The knowledge by a Member that the F.B.I. can make an unannounced raid on his legislative office to read and rummage through every document or email is bound to discourage Congress from the muscular check against the Executive that the Speech or Debate Clause was calculated to foster.

A subpoena in lieu of a search warrant would permit Members to produce only the specific documents requested and avert executive prying into confidential legislative acts. A subpoena admittedly might not prove as effective. The Member might invoke the Fifth Amendment to decline production. And even if a court ordered compliance, a Member might prefer contempt sanctions to F.B.I. agents ransacking his office files. In other words, while requiring subpoenas and banning search warrants to obtain documentary evidence in a Member's office could conceivably derail a criminal investigation, that price was anticipated by the Speech or Debate Clause to vindicate the Constitution's separation of powers.

I would thus urge Congress to enact a statute as a necessary and proper adjunct to the Speech or Debate Clause as follows: "No search warrant in a criminal investigation shall be issued to obtain documents located in the office of a Member of Congress. A violation of this prohibition shall result in the suppression of any evidence that would not have been discovered but for the illegal search and the expunging of such evidence from the records of the Executive Branch. This law shall apply retroactively."

It might be said that the statute is a "special interest" law to protect Members of Congress and clashes with the constitutional prohibition on titles of nobility. But the Speech or Debate Clause is expressly and inherently a special protection for Members in recognition that there are occasions when criminal justice should be subordinated to the more compelling political interest and in a fearless Congress. The Clause might be likened to the President's pardon power, which permits the frustration of criminal justice to advance competing interests. Moreover, the proposed statute frowning on search warrants for documentary evidence in Members offices would work no novelty. The Privacy Protection Act of 1980 shields the work product of the media from search warrants. Pursuant to the Act, limitations are erected by Department of Justice regulations, 28 C.F.R section 59, for search warrants seeking documentary materials in the possession of persons not suspected of crime, with special deference to confidential relationships as may exist between lawyer and client, doctor and patient, or clergyman and parishioner.

Today, the Speech or Debate Clause is more important than at the Constitution's inception. Then, federal crimes were few and criminal investigations of Members a rara avis. It was not until the 20th century that Members began to be targets of Executive Branch criminal investigations. And as the federal criminal code has dramatically thickened, the opportunity for the Executive Branch to contrive an excuse for raiding the files of a Member has correspondingly expanded. That strengthens the reason for this Congress to erect an impenetrable barrier between federal criminal investigations and the official files of Members. Separation of powers is too important to be left to the discretion of the President.

Chairman SENSENBRENNER. First of all, let my say that I think your suggestion and the suggestion of Professor Turley that the Congress be given the same protection of its work product that the news media has following its work product, following the *Stanford Daily* case, is a good one.

This congressional Committee will be working promptly in drafting legislation to implement this, and we will be working with the Senate and consulting with the White House on this.

The issue really is one of procedure, rather than one of the allegations of criminality by Mr. Jefferson. I think that we want to make sure that when the next Congressman is investigated for illegal activity, that the procedure done by the Justice Department is right. So I think this law will help the Justice Department get it right next time because they didn't get it right this time.

The second point I would like to make is that I would like to have at least two more hearings on this subject, another hearing where people such as yourselves can talk about the historic and

constitutional arguments as a result of the speech and debate clause evolving over the last 219 years.

Then I want Attorney General Gonzales and FBI Director Mueller up here to tell us how they reached the conclusion that they did. Because I think all of you have said that reaching that conclusion is profoundly disturbing, not in the context of the Jefferson investigation, but in the context of separation of powers and preventing the Congress from being intimidated by the executive branch, and thus not being able to do the job that we were elected to do.

Having said that, Mr. Fein, schedule B of the search warrants lists "items to be seized from Representative Jefferson's congressional office." That has all been redacted by the Justice Department.

Whatever is on that list, and I think only the Justice Department knows, shouldn't someone representing the institutional interests of a co-equal legislative branch of Government have been given the opportunity to argue to a court whether or not the procedures and the list comported with constitutional norms were not?

Mr. FEIN. Well, that certainly would have been the appropriate thing to do. After all, the FBI is not schooled in speech or debate clause. They wouldn't necessarily know whether they were coming upon a protected document or not. At least someone in the legislative branch could alert the judge and have perhaps special descriptions of documents that could not be examined in the execution of this warrant.

But I come back, Mr. Chairman, to the idea that inherent in executing any search for documents is going to necessitate someone rummaging through that official file. It's going to require reading legislative protected materials. You can't expunge memory. Once you have read it, the violation has occurred. That's the same reason why this Congress enacted the Privacy Protection Act for the news media.

Once the constitutional resource is discovered in rummaging through the press files, the name doesn't just fall away by amnesia. That is why I think this broad-based statutory protection is indispensable, even though procedural mechanisms could alleviate the danger.

Chairman SENSENBRENNER. Also, isn't the issue very similar to testimonial privileges that are given to clients of lawyers and patients of doctors and penitents who confess their sins to priests, in that the determination of what is privileged or not belongs to the person who has the privilege, rather than someone who wants to look at privileged material and then determine whether or not it is privileged after seeing it all?

Mr. FEIN. That's correct, Mr. Chairman, and in connection with the Privacy Protection Act that created this blanket protection for the news media, was also a section title 2, that required the Department of Justice to issue regulations that specifically would protect the lawyer-client, doctor-patient, clergy-parishioner privilege from unmitigated search warrants and requiring some sort of in-camera judicial review of a warrant to determine whether or not they were protecting materials.

So those relationships have been protected especially by regulation demanded by this Congress. But the Congress here has a superior claim of privilege. It is written right into the Constitution of the United States and is so critical to vindicating separation of powers that transcends these other confidential relationships that are important but don't have that constitutional stature.

Chairman SENSENBRENNER. Thank you very much.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I want to thank the witnesses in particular. This is a very appropriate group of four, well-trained experienced people, coming before us to advise the Committee, and, by extension, the American people of the gravity of the problems that we face.

Now, was it proper for the Justice Department to prevent the House counsel, as well as the Congressman's attorney, from being permitted to be present while his offices were searched for some 18 hours? What were they trying to do, Professor Turley, in that particular sorry exercise of authority?

Mr. TURLEY. Well, that's one of the most baffling aspects of the search. The ironic thing is that when the House general counsel said, can I be present to witness the search, she was actually suggesting something that would have been of great benefit to the executive branch.

If they had simply allowed her in the room, they could have claimed some element of mitigation, some aspect of moderation. Excluding her was an extraordinary act. All she wanted to be able to have a legislative official present. It really does cross over into raw arrogance to tell such a legislative official, we won't even let you stand in the office.

As for the attorney, rule 41 of Federal Rules of Criminal Procedure, anticipate that an attorney or the subject of a search will be present. Most search warrants, as those of us who practice criminal defense law will tell you, most search warrants will have an inventory provision where you actually sign off as to what was taken.

For the FBI to say it's no longer our policy to allow someone present during such a search once again brings up this question of whether we now have such unbridled authority and arrogance that the executive branch will not even allow witnesses to the execution of its authority.

Mr. CONYERS. Professor Tiefer, what do you think was behind the fact that we haven't ever had this happen before in 219 years? Was there some motivation that still wasn't clear on the part of the Department of Justice to act in the face of all the restrictions that have been recited here this morning?

[10:30 a.m.]

Mr. TIEFER. Mr. Conyers, I tried to understand both from what records we have and from information that the FBI has leaked to the newspapers what the surrounding circumstances were here. There is no sign whatsoever of a claim by the Department of Justice, as I said in my opening statement, no claim, nor could there be, but the point is they are not even claiming they were facing an emergency, facing exigent circumstances, facing a situation where they couldn't get at the evidence the same way. They were simply in a hurry.

They seemed to have been in a hurry because they got themselves into a problem with an appeal from a proceeding in another district, and they didn't move that appeal along fast enough and they weren't willing to do, as Professor Turley suggested, to apply to a District Court for a court order, something which they could always do which could allow adversary proceedings and could involve supervision of the methods and could involve consultation with the congressional leadership and could involve some protocols, and would have brought us closer to the tradition of the last two centuries.

There has not been any suggestion whatsoever as to why there was a need to break with that tradition. They are investigating a Congressman. Is it different from all the other prior investigations of Congressmen? No.

Mr. CONYERS. Congressman Walker, the part that disturbs me as much as any other is that they told the Capitol Police that they were going to break down the doors of this congressional office if they didn't stand aside and let them in without any further to do, and it seems to me that that was really an act of threatened violence that goes way, way across the line.

Mr. WALKER. Well, I certainly agree with that, and what, as I say, what does concern me as well is that the whole warrant process to basically place a threat upon the Capitol Police, if they didn't cooperate that all sorts of things were going to happen, strikes me as being a complete overreach.

And so, as has been mentioned in the testimony here, what you have that is particularly disturbing is the executive and the judicial branches teaming to make a raid on the Congress with, as I said in my testimony, malice aforethought.

Mr. CONYERS. Thank you, sir.

The CHAIRMAN. The gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. Here is a quote. "I said to the President, if the equilibrium of the three great bodies, legislative, executive, and judiciary, could be preserved, if the legislature could be kept independent, I should never fear the result of such a Government, but that I could not but be uneasy when I saw the executive had swallowed up the legislative branch."

The President to whom that was spoken was named Washington and Thomas Jefferson is the one that said it. Apparently, this has been an ongoing struggle to keep this delicate balance of power going.

Now, in looking at precedent, as I have heard some people on television react, who perhaps were in the boat that I was originally, as a judge, a State judge, trial judge and former chief justice of an intermediate State court of appeals, I have signed hundreds, I don't know, thousands of warrants, reviewed lots of affidavits, gee, I'd never had an article I, section 6 question come up before. So I was unfamiliar with this, but began to do some digging.

You may have heard other people say in the media that, gee, there is a precedent for this because the Department of Justice has gone in and searched a judge's offices before. For whoever may wish to address that, could I get some comment on that being cited as a precedent? Mr. Fein?

Mr. FEIN. Mr. Member, if you look at article III of the Constitution, which addresses judicial power, there isn't anything comparable to the Speech or Debate Clause. We're addressing an explicit recognition by the Founding Fathers that the legislative branch needed special protection. They had experience with the efforts of the British King and executive to attempt to intimidate Parliament through criminal prosecutions and investigations. So they made a special effort to strengthen Congress' institutional capacity to check the executive or the judicial branches. They didn't fear that the judges would be intimidated. There is no express guarantee of a speech or debate kind of privilege on that score.

And it also seems to me that today, as opposed to at the founding, the danger of encroachment on speech or debate is far greater. At the outset, there were relatively few Federal crimes. We didn't have an FBI, there wasn't even a Department of Justice created to investigate until 1870. Today, there are so many crimes on the books, it's as then Attorney General Robert Jackson said in 1940, the danger is the prosecutor at the executive branch looks at a legislator and then scours the books to pin an offense or investigation on him rather than finding a crime and then searching for the culprit. You know, you can get a prosecutor to indict a ham sandwich.

Mr. GOHMERT. Have you been to Texas?

Mr. FEIN. I think that's a more universal attribute on the prosecutor.

Mr. GOHMERT. Okay. I know it's true in Texas.

Mr. FEIN. But if you have an executive branch eager to use search warrants in any criminal investigation, it can be any Member of Congress.

Mr. GOHMERT. So there is no real parallel between searching a judge's office under the Constitution and searching a Member of Congress or the Senate's office?

Mr. FEIN. I don't want to say there is no parallel, no indication that there isn't some enclave of privilege there, but it's not risen to the same constitutional dignity or importance as the Speech and Debate Clause.

Mr. GOHMERT. Well, all of you mention the Speech and Debate Clause as being what is at issue here, and I have also heard people on television, so-called media experts, say, and they will put the language of the section 6 on the TV screen and say, see there, it's talking about speech and debate, it's not talking about documents; where do you get that?

So if someone could address how in the world we get from speech and debate to documents, or hard drives. 'cause I've looked, hard drives is not mentioned in here.

Mr. TURLEY. Well, you know, that's an excellent question. First of all, there's a lot of misinformation about reading that clause. If you look at the Federal Convention, there was very little discussion about the clause, in part because Members, I think, believed it was obvious that there had to be privileges for the legislature.

Since 1541, the English Parliament had cited this privilege in their continual problems with the Stuart and Tudor monarchs. And so by the time the Constitutional Convention came around, it was already established that a legislature has a unique need for this type of privilege.

And, by the way, there is this great irony in this Administration that there seems to be no limits as to claims of what executive privilege means; that executive privilege covers the Vice President, covers everything that comes within a mile of the White House.

Executive privilege isn't mentioned in the Constitution. It was created by the courts, and yet you have this robust interpretation. But the privilege that is mentioned apparently is too small to even slow an FBI raid on an office.

Now, the one thing I want to emphasize is when the language therefore refers to speech or debate, the Supreme Court has been very, very clear that that goes beyond the literal meaning of those terms, and it is very broad if you take a look at some of the cases I cited in our papers. That at least is not, I assume, under debate.

Chairman SENSENBRENNER. Before I forget it, without objection, the witnesses' statements will appear in full in the record prior to their verbal testimony.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Well, Mr. Turley, let's kind of follow up on a that a little bit. The section 6, clause I says that "they shall in all cases, except for 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 and debate in any House they shall not be questioned in any other place."

Does that immunize Members of Congress from answering for the commission of a crime?

Mr. TURLEY. No. And this is one of the great misrepresentations we have seen in commentary. Nobody I know is arguing that this clause immunizes Members because of their status as Members of this institution.

Mr. SCOTT. Let me follow through on another question. In the execution of a search warrant, normally when you go to somebody's house to execute a search warrant, they are there.

Mr. TURLEY. Right.

Mr. SCOTT. They can contest it. They can tell you that you're at the wrong house. You have an opportunity to respond.

Was any opportunity like that given in this case, to your knowledge?

Mr. TURLEY. No. In fact, they were barred. You have both the Representative of the institution and the legal representation of the individual both being barred from being present for this very, very long search.

Mr. SCOTT. Now, we've heard about the exemption for searching press offices, and we've heard references to searching judicial offices. Those are inferior courts. Would it be different if we were talking about searching, rummaging through files at the Supreme Court?

Mr. TURLEY. Since they ultimately interpret the Constitution, I expect they would find a robust privilege somewhere. But we have seen the courts create significant protections for their own branch and for the executive branch.

In my view, the Supreme Court has too narrowly interpreted the Speech or Debate Clause. I think if you look back at the statements of Jefferson and Madison, after the sedition prosecutions by John

Adams, you will see very clear statements that they viewed speech or debate goes to an even broader range than the current doctrine would allow.

But all of that is for an academic debate. The material in this case is, without question, legislative material covered by the clause. I can't imagine anybody would suggest a Member's hard drive would not fit in there. And it's true it's not mentioned, but the best thing to remember is that everything that used to be in paper form, when Jefferson and Madison were criticizing Adams, all of that paper today would be found on a hard drive. So it is the equivalent of doing a sweep through a Member's office back then and taking every single piece of paper in the office.

Mr. SCOTT. Well, in terms of setting up a procedure, similar to the exemptions in the press situation, we've heard a suggestion that the Speaker of the House be notified.

You'll have to excuse me that this Democrat isn't particularly impressed with the Republican President notifying the Republican Speaker of the House that he's about to raid a Democratic office as a protection.

Do we have any idea of who decides what gets looked at and does the fact that a Member cooperates or is not cooperating? Is that relevant to the discussion?

Mr. TIEFER. If I may, Mr. Scott, I have some familiarity with the procedures. I actually want to mention something that both I——

Mr. SCOTT. Let me ask another question, then everybody can kind of comment on it.

And would it make a difference if you had a reliable informant tell you where the drugs were or where the money is, you went in, got that, and got out? Would that make a difference in all this?

Mr. TIEFER. That is too colorful for me. Let me go back to the drier procedural question you asked earlier, and I'll leave——

Both I and Professor Turley cited the fact that the U.S. Attorney's manual itself, the internal Justice Department manual, it's posted on the web, but the manual by which they tell themselves what procedures they're supposed to follow in the Justice Department and the FBI has an entire section, section 2046, about when they come to Congress for evidence. And it specifically says: "the customary practice when seeking information from the legislative branch, which is not voluntary forthcoming from a Senator or Member, is to route the request to the Clerk of the House or the Secretary of the Senate."

That's the way. Now, when they say the Clerk of the House, the Clerk of the House is a surrogate. The Clerk of the House and the General Counsel of the House report to the Speaker and bipartisan leadership group. That's the roles that the minority and majority have worked out within that framework. It may be satisfactory sometimes, it may not be other times, but it starts as a potentially bipartisan framework and it is not something political.

This is in the U.S. Attorney's manual. This isn't a political guide to how political things are done. This is a legal guide to how prosecutorial and investigative things are to be done, because of the way papers within the Congress are deemed to be available.

So was there a proper way to seek these papers? There was. Does asking the Speaker in advance have a role? It does. Following the

U.S. Attorney's manual, one consults with the Chamber so that the processes will be proper. Does that stop the evidence from being sought? Absolutely not. It just makes it be done right.

Chairman SENSENBRENNER. The gentleman from California——

Mr. SCOTT. Mr. Chairman, may Mr. Fein answer the follow-up question?

Chairman SENSENBRENNER. Mr. Fein.

Mr. FEIN. Yes. With regard to searching for cash or instrumentalities of crime, there isn't a Speech or Debate Clause problem. There are elements of comity, but you're not getting into elements of deliberations if you are searching for cash. You don't have to read the documents. It's the requirement that you read every document and file in the office to know whether or not you're identifying something that responds to the warrant that is the intrusion on the Speech or Debate Clause.

I want to give a clear example. Suppose we go back to the impeachment proceedings with regard to President Clinton, and in the files of Members on the Judiciary Committee could be evidence or questions they are going to ask witnesses. You would not want to have the FBI of the Clinton administration coming into that Member's office and saying, gee, we think there may be an election law violation, we've got to read through every single document in your file, including the questions you may be asking during the impeachment inquiry, in order to determine whether we need to continue this particular proceeding.

That is clearly an invasion of Speech or Debate Clause evidence, which would then be in the executive branch's ability to know how to evade or rebut the impeachment prosecution. That is what I think Professor Turley meant in explaining that the Speech or Debate Clause includes more than just what you say on the floor of Congress. It relates to those communications that are indispensable to discharging your functions as a legislator.

Chairman SENSENBRENNER. The gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. Fein, you have prepared everything for my few questions. You know, it's interesting to me that it's alleged that J. Edgar Hoover wiretapped or bugged Goldwater's aircraft on the request of Lyndon Johnson because there was no law preventing it at the time. And so he did what the President ordered him to do.

Constitutional challenge? Not in the strict sense. Chilling effect on the ability for an incumbent to ever not win reelection? Yeah, I'd say it was. And this body passed laws that make that a crime today, a crime affecting the President.

It's an interesting question, though, about laws, and I'm going to ask it as someone who came to this legislative body not to pass laws unless absolutely necessary. Do you really pass laws to protect the strict letter of the Constitution?

We have, and I hope this is appropriately controversial, we have the power to impeach the Attorney General. We have the power to impeach that particular judge who decided that our body, particularly even our own very small police force, had no powers to stop the other two branches.

Now, I'm not sure that Articles of Impeachment are going to come out today. I think we're a couple shakes short of a quorum for that purpose, although I suspect Members would quickly be here if it was brought by the Chair.

Chairman SENSENBRENNER. If the gentleman will yield. Not yet.

Mr. ISSA. Thank you, Mr. Chairman, happy to have yielded.

Reclaiming my time, my question to all of you, because we are here talking about something that we're not doing on behalf, as Mr. Scott might have said, we're not doing this as a Republican Congress on behalf of a Democrat, we're doing this out of the deep concern that this time it was about criminal behavior, this time this Member of Congress, Congressman Jefferson, was not investigating the President, seeking impeachment, so it seems like there was no attempt overtly to reduce the speech and debate or to in some way attack this body, although they accomplished it.

But my question, unless we get a second round perhaps my only question to you is, do we really need a law or should we in fact use the powers we have as a separate co-equal body to provide the appropriate checks and balances of those who have abused clear constitutional guidelines?

And I will start with Congressman Walker because I admired his work while he was here.

Mr. WALKER. Thank you, Mr. Issa.

You will notice that in my testimony I did not specifically call for a law, and I did that consciously. Because as I considered this, I thought to myself, I'm not certain but what a law does not diminish the constitutional authority; that as soon as you place a law of procedures, that that may have a diminishing effect on the very nature of the Constitution.

I'm not an attorney, but I reacted to it as a politician, just saying, I'm not certain that that's the route to go in this particular case. And what I'm concerned about is that we would tend to have a law that reacts to this particular situation, and yet the precedent being set here may have vastly more extensive implications to it.

For example, at the Justice Department right now it appears as though they are headed toward trying to create a new circumstance where campaign contributions can be regarded as bribes of Members of Congress. Will we then have a wave of raids on Capitol Hill to look at Members' records to find out whether or not they have taken campaign contributions that relate to their legislative duties? If this precedent is allowed to stand, it seems to me that that's a danger going forward.

Again, I say that not as a lawyer, which I'm not, but as a politician who just kind of reads the tea leaves and says these are concerns that I think Congress ought to be very aware of.

Mr. ISSA. I want to give everyone else a chance to answer, but I will interject that perhaps they've listened to special orders late in the night in this body talking about the President's taking of money from various oil companies and the assertion that somehow because they had a campaign contribution it was the equivalent of a bribe. Perhaps we gave the Attorney General's office exactly that wrong-minded idea.

Professor Turley.

Mr. TURLEY. First of all, I want to say that what Congressman Walker just said is absolutely true; that we have to be careful that we don't affirm a view that there's not a preexisting duty. But, in fact, there are other statutes that amplify and create procedures for existing constitutional rights.

What I would encourage you to do is not just pass this law but to make it clear that you are not conceding this point; that in fact you believe you have the inherent authority; but this, like those other laws, is designed to create procedures and to amplify the existing constitutional right. And I think in that sense you are right.

But I also want to encourage you that the Framers gave you the ability of self-defense. You have appropriations authority, oversight authority, and you have ultimately the impeachment authority. And I don't consider that to be such a trivial question. I think that when you have an offense that strikes at the separation of powers, you are talking about something that threatens the very stability of the system. You have those powers, and I hope that you will use them. Because the Framers expected that you would jealously protect your own authority. Because I promise you, the other branches are not likely to do so with as equal vigor.

Mr. FEIN. With regard to a statutory approach, I think the necessary and proper clause, article I, section 8, clause 18, was calculated to accomplish precisely what a statute would do. That empowers Congress to enact any law that's appropriate for the execution of any power belonging to any branch of Government, executive, legislative, or otherwise.

An example in my judgment of the use of the necessary and proper clause was the passage of the Foreign Intelligence Surveillance Act, which has been so much discussed. That is, whether or not the President might have inherent authority to gather foreign intelligence wherever he wanted if Congress said nothing; that Congress, after holding exhaustive hearings, said we want to regulate the gathering so it doesn't encroach on fourth amendment rights. The same thing would be true by this statute.

And I think that's superior than a case-by-case approach under the Constitution that will take years and years of litigation, up to the Supreme Court and back again, before there is anything that even closely resembles the clarity of a statute. It's best to decide now.

With regard to the alternate mechanisms that Congress holds to hold the executive branch accountable, they are there, as Professor Turley announced. But the greater the flexibility, the more likely sensible uses will be made. An impeachment proceeding really is totally disproportionate to an issue of this sort unless it remains systematic. A statute seems to me the first place that something ought to be tried before you resort to more drastic remedies.

Chairman SENSENBRENNER. The gentleman from Maryland, Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman, and thank all of you for your testimony. And, Mr. Chairman, I was pleased to hear you say you are also intending to call the Attorney General as well as Mr. Mueller because I'm interested in what they have to say. And I also think at these hearings it's important to have both sides represented as much as possible. I hope even the next panel you

mentioned we will have both views. Far be it from me to defend the executive branch, but I just think in terms of getting all the facts out and a full range of views, that would be helpful to everybody.

Professor Turley, you mentioned it is a catharsis, but I do think it's important to very briefly list on page five of your testimony the number of examples of overreaching by the executive branch where there's been a total lack of oversight by this Congress: The torture memorandum, detainees, enemy combatants, signing statements, domestic surveillance, data mining operations.

All important issues. And Members of this Committee may come down on different sides of those issues, but we should still have the oversight and the hearings so we can get the facts out and let people make a reasoned judgment about what the Administration is doing.

So, again, I'm pleased that we're having oversight on this issue, but I think there are so many other issues important to the American people that demand greater oversight.

Now, if I could ask you, Mr. Fein, with respect to the idea of having a statute to address this issue. A statute passed by the Congress, of course, is subject to a veto by the President. And it does raise the question that Mr. Walker raised, and I was thinking myself, doesn't this in some way, couldn't this be interpreted in some way as an admission that the Congress does not have the constitutional authorities that you talked about?

And what would happen if the President vetoed it and Congress then failed to override the veto for some reason? Would that not be interpreted as a sort of surrender of some of our claimed constitutional authorities?

Mr. FEIN. I don't think so. I think Congress can make clear that they are enacting the statute out of an excess of caution to avoid the delays involved in litigating with regard to the constitutional standard, and making clear that you're not yielding any argument that the Speech or Debate Clause on its own wouldn't have invalidated the warrant that was signed by Judge Hogan.

With regard to an executive branch veto, I suppose that's possible, but that's part of the legislative process. At least the President, then, would be open and clear to the American people as to what kind of authority he wanted to grant his executive branch and could be held accountable accordingly.

It seems to me, however, that the bipartisan support for this hearing suggests that a veto would be very unlikely, especially since the Vice President, Mr. Cheney, has voiced some objection or qualms about what was done here, and he seems to have substantial influence in the White House.

Mr. VAN HOLLEN. All right. Now, as I understand the testimony of Professor Turley, and I don't know if you share the view, but the actual search warrant itself was deemed to be—you judged that to be constitutional. The question has been the means and the scope of the documents looked at.

I'm interested whether you all share that view, but with respect to the proposals, I understand you would prohibit search warrants for documents in legislative offices, period?

Mr. FEIN. Yes. And that's why I think a search warrant for documents, on its face, is unconstitutional. Because you have to read all the files to know whether you have hit upon the document responsive to the warrant.

Mr. VAN HOLLEN. Well, let me ask you this hypothetical, though, because there are many forms of documents. What if you had a search warrant that specified specific documents that the FBI, or whoever it was, had good reason to believe were in a congressional office. And let's further presume that maybe it's one or two documents and they also believe there was a fear that if they announced in advance that that document would be missing.

Let me give you a hypothetical. In the Congressman Duke Cunningham case, there was apparently a napkin or a piece of paper that specified specific earmarks, and next to each earmark specified the amount of bribe that would be given in exchange. Let's say they believed that that document was in Congressman Cunningham's office and that they believed there was a real danger that if they provided advance notice that it would disappear, and you went to a Federal judge.

Under your statute, that would be prohibited even if you were looking for one document. Is that your intent? Under that circumstance, should we allow, under that kind of circumstance, should we allow for a search warrant of a congressional office?

Mr. FEIN. If you're talking about something that can be described in a way that enables it to be searched without reading all the files, then there is not a problem. But ordinarily a Member isn't going to put a special file and say this particular paper relates to the bribe or the money I've received. And the only way that you can determine whether or not a document is responsive to the warrant is reading a lot of files that aren't responsive because you don't know which one you've come upon or whether you've exhausted the total number.

That's the difficulty. If you are talking about some mosaic or cuneiform which isn't in the file, then you don't have that problem because you don't need to read all those documents to know whether you're looking at cuneiform. That's why I think the hypothetical you've raised really is not going to raise a problem if it's written on a napkin that isn't mixed in files which couldn't be readily separated.

Mr. VAN HOLLEN. Well, it could be on a separate piece of paper that looked like everything else.

Chairman SENSENBRENNER. Professor Turley.

Mr. TURLEY. Yes, I never disagree with Bruce, because I usually find out later I'm wrong, but I'll disagree just slightly here, and I'm not sure it is a disagreement.

But I believe that a search would still be inappropriate the way it was conducted here, even if you know that there is physical evidence in an office. And I think that Professor Tiefer actually has addressed this as well.

There is a way you can do it, and how we do things in our system means a lot. So even if you have the napkin with the bribe list on it, what they should do then is to go to the House of Representatives and secure the material so there is no danger it will be lost and then work through the legislative branch to get it. That's how

it's been done throughout our history. There's never been a problem that preexisted. So how we do it.

And when you mentioned my position as to the warrant, my point is that there was clearly probable cause here. That is not an issue. Finding 90 grand in a freezer gives you a pretty good basis for probable cause. And once you do that, most offices and dwellings and places that you frequent fall within that gambit. So probable cause is not a question. Their interest in the material is not a question. Even if it's redundant, according to his defense attorneys, they believed that in fact the Government already had much of this material. But even if it's redundant, they still have an interest in getting it. It's a question of means.

Chairman SENSENBRENNER. The gentleman's time has expired.

For what purpose does the gentleman from Texas seek recognition?

Mr. GOHMERT. Mr. Chairman, I ask unanimous consent to just make a comment about the warrant that I think has been wholly missed here.

Chairman SENSENBRENNER. Without objection.

Mr. GOHMERT. You guys are great, and I appreciate your intellect, as well as all the experts out there in the media, but it seems that everyone has presumed that this warrant had some protections built into it. But I would humbly submit to you this warrant has absolutely no protections built into it. It is a form warrant, and the only addition is the judge wrote in: "the U.S. Capitol Police are directed" I guess that's the proper verb, but "Police are directed to provide access to the property."

But it's a form warrant. Over here in the affidavit it says "I have been informed by the prosecutor overseeing the investigation in this matter"—obviously hearsay—"that they have decided to adopt special procedures." but when I have had a warrant as a judge that required special procedures, normally I set them out. This judge just simply says "you are commanded to search for the person or property specified."

There are no safeguards in this warrant. He says go have at it, without any assurance that any privilege will be afforded anything.

Thank you.

Chairman SENSENBRENNER. Thank you very much. I'd like to thank all of the witnesses for their very relevant testimony. This is a constitutional issue that is a matter of great concern, and the separation of powers and the checks and balances were put into our Constitution by the framers to make sure that no person or no branch of Government got too powerful. And it was a direct reaction against the notion of parliamentary supremacy where all three functions of Government were combined in the British Parliament, which exists to this day.

When I have talked to students about the Constitution, I have said that the Constitution was a reaction against the excesses of the British Parliament. They did not want to have the executive, legislative, and judicial functions being put in the same institution as they are in the United Kingdom. That is why we have three branches. It is also why there were the checks and balances put in, to make sure that the excesses of one branch could be checked by

the other two, or the excesses of two branches could be checked by the third.

It's worked for 219 years. There's no reason to ignore the 219 years of success of separation of powers and checks and balances, and that's why we're here today. And I thank all four of you for shedding light on why we have the separation of powers and the dangers that were employed a couple of weeks ago.

I'd also like to thank the Members who have participated in this hearing for taking some of their recess time to basically come out here to defend the Constitution.

So having said that, without objection, the hearing is adjourned.

[Whereupon, at 11:02 a.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

RESPONSE TO POST-HEARING QUESTIONS FROM THE HONORABLE ROBERT S. WALKER, CHAIRMAN, WEXLER & WALKER, AND FORMER MEMBER OF CONGRESS FROM THE STATE OF PENNSYLVANIA

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DEBBIE WASSERMAN SCHULTZ, Florida

June 14, 2006

The Honorable Robert S. Walker
Chairman
Wexler & Walker
1317 F Street, N.W.
Suite 600
Washington, D.C. 2004

Dear Congressman Walker:

Thank you for your recent appearance before the House Judiciary Committee. Your testimony on the FBI raid on Congressman Jefferson's office was insightful and will assist the Committee on the Judiciary in its consideration of this issue.

We are submitting, as promised, additional questions for your written response to supplement the information already provided. Please deliver your responses to the attention of Paul Taylor of the Constitution Subcommittee in H2-362 Ford House Office Building, Washington, DC 20515 no later than July 6, 2006.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman
Committee on the Judiciary

Congressman Walker
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June 14, 2006

1) Would the precedent of the Jefferson warrant, if it stands, open the door to Congressional offices and all of their correspondence, calls, notes, memoranda, and computer hard drives being subject to any local law enforcement if local law enforcement or prosecutors found a sufficiently ambitious local judge?

2) If this precedent stands and the local law enforcement attempted a congressional office raid with significant numbers of officers and used the FBI approach of bringing their own locksmith during non-business hours when virtually no one was present who had the time or ability to legally challenge a state, district, county, or even city warrant, how could the Capital Police respond if threatened with jail themselves by the local authorities?

3) Since the warrant in the case at hand was a common form in which the judge made no orders or requirements that privileged documents or material be kept confidential or safeguarded, does that make the warrant facially unconstitutional since the affidavit made clear that Constitutionally protected material would likely be encountered?

4) If you were a new FBI Director who was frustrated by Congressional questions, oversight, and threatened oversight of your new internal policies and new surveillance efforts and decisions, what would be the most intimidating things you could do to Congress and its members to make them back off of their oversight?

5) If congressional lawyers are to perform the sifting of documents instead of Executive Branch lawyers, then is law enforcement simply at the mercy of trusting congressional lawyers to hand over ALL documents called for in a subpoena?
   - Does your opinion change if congressional lawyers have incentive to protect the Member?
   - Is this fear allayed by having a bipartisan group of congressional lawyers sort through the documents, to make sure law enforcement is given the documents it is entitled to, but not the documents it is constitutionally forbidden from seizing?
   - Are their any concerns with having lawyers perform the sorting that have incentive to ruin a Member? If so, what would be the safeguards against such incentives?

6) **U.S. v Brewster**: Held that the Speech and Debate Clause protects Members of Congress from inquiry into legislative acts or the motivation for performance of such acts, but does not protect all conduct relating to the legislative process. The Court held that the Clause does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself.
   - Do your views on the Speech and Debate Clause comport with US v. Brewster?
   - Does Brewster support what the Department of Justice did on May 20, 2006 when it raided a congressional office?

- Do you believe that a judicial remedy and procedure should be pursued or a compromise procedure established between the Congress and the executive branch?

7) Isn't it true that it is not the Congress member's office and its contents that the founders sought to protect, but rather they were seeking to protect the people's material, their needed oversight and legislation that the Congress member was pursuing, and the founding effort was to keep the people's business from being derailed by executive intimidation?

8) Does it hinder law enforcement's ability to effectively investigate potential crimes committed by Members of Congress if officers have to go through the Speaker, the House Counsel, or the House Ethics Committee before searching for and seizing documents from a Congressional office? Have there been any criminal cases in the last 219 years that have been harmed or impeded by the observance of Constitutionally privileged material being within a Congressional office?

9) Would the protections afforded under the Speech and Debate clause also apply to Congressional offices within a Member's state district?

10) If the Speaker himself were under investigation, what procedure would still give law enforcement a means to pursue alleged corruption without the case being thwarted? Haven't Speakers themselves been investigated in the past without violating the Speech and Debate protections?

11) Has the Constitution given either the Executive branch or the Judiciary the heightened protections that the Speech and Debate clause afford to the Congress?

12) Under Article 1, Section 5 of the Constitution, doesn't the House have authority to discipline its own members and formulate rules to do so, including locking them out of their offices, taking materials from their offices, otherwise disciplining members, and even expelling them from Congress? Couldn't the House make a rule to punish or discipline a member if the member failed to respond to a lawful subpoena?

ROBERT S. WALKER
MEMBER OF CONGRESS
1977-1997

July 5, 2006

Mr. Paul Taylor
Constitution Subcommittee
H2-362 Ford House Office Building
Washington, DC 20515

Answers to questions submitted by the Judiciary Committee:

1.) Since the functional warrant used for the Rayburn raid was a bench warrant, one could imagine a politically motivated investigation of a Member of Congress where a local prosecutor and a local judge would issue a bench warrant for collection of files in a manner similar to the action taken against Congressman Jefferson.

2.) In my testimony I referenced the need for better processes within the Congress for handling these kinds of situations. The Capitol Police should not be the final arbiters for the legislative branch on whether a warrant is appropriate and proper.

3.) As a non-lawyer I am reluctant to attempt to engage in what is essentially a legal question.

4.) Not having been privy to the internal workings of the FBI, I can only speculate that the information regularly collected by the agency contains much unsubstantiated material which could be used for intimidation. In addition, the investigatory powers of the FBI could be used in a manner to create questions of a Member's honesty simply by leaking the potential of an investigation. It was exactly this kind of executive activity that the forefathers sought to curtail as it related to legislative functions.

5.) More than 200 years of precedent should be guideposts for procedures involving protection of legislative records under "Speech or Debate" obligations and the legitimate need to prosecute Members of Congress engaged in criminal conduct. Past actions have included negotiations that sought to protect legislative rights and prerogatives while allowing prosecutors to pursue a full criminal investigation. It is the abandonment of those precedents and traditions which is at the heart of my concerns about the Rayburn raid.

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6.) U.S. vs. Brewster did establish appropriate firewalls to protect the Speech or Debate Clause, and the raid on a congressional office on May 20, 2006 could have been conducted in a manner compliant with Brewster, but in my opinion was not. In my view the Congress has been put in a position of having to pursue a judicial remedy, but I am hopeful that negotiations between Congress and the executive can produce appropriate procedures for future criminal investigations.

7.) The protections afforded by the Constitution are, in my opinion, designed to allow the legislative branch independence of actions related to its Article I powers. The recognition of the forefathers that police powers invested in the Executive Branch could be used to thwart and intimidate the Legislature was the reason for the Speech or Debate protection afforded the Congress. Individual Members of Congress cannot engage in criminal behavior and attribute that behavior to a special status as a legislator, but so long as their work involves acting inside their constitutional responsibilities, no matter how controversial, their actions cannot circumscribed by use of executive police power.

8.) The precedents over 200 years have been cooperation by the Congress in criminal investigations of its Members, and I am not aware of resistance where observance of constitutional prerogatives has resulted in harm to any investigation.

9.) Yes

10.) While I am not versed on the specific procedures used in past investigations that have included Speakers, they have, in fact, happened without "Speech or Debate" violations.

11.) The "Speech or Debate" protections afforded the Congress were meant to give it a special policy status allowing it to conduct its business without fear of executive police power or judicial sanctions or a combination of both. The privacy afforded the Congress was conscious and different from the Executive and the Judiciary.

12.) The House certainly has the power to discipline its Members and, in my opinion, could take action against a Member for refusal to respond to a lawful subpoena. One of the problems I cited in my testimony was that the disciplinary process in the House through the Ethics Committee had been broken for some time and that the apparent inability of the Congress to adequately police its own ranks my have helped encourage the Justice Department to take the action they did in the Rayburn raid.

RESPONSE TO POST-HEARING QUESTIONS FROM JONATHAN TURLEY, J.B. & MAURICE C. SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

WRITTEN ANSWERS TO COMMITTEE QUESTIONS
FOR
JONATHAN TURLEY
SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

"RECKLESS JUSTICE: DID THE SATURDAY NIGHT RAID OF CONGRESS TRAMPLE THE CONSTITUTION?

COMMITTEE ON THE JUDICIARY
THE UNITED STATES HOUSE OF REPRESENTATIVES

1) **Would the precedent of the Jefferson warrant, if it stands, open the door to Congressional offices and all of their correspondence, calls, notes, memoranda, and computer hard drives being subject to any local law enforcement if local law enforcement or prosecutors found a sufficiently ambitious local judge?**

In my view, this incident creates extremely dangerous precedent and implications for the future. One of the most striking aspects of this search was the complete lack of necessity or exigency. Congress had worked with the investigators, and this information could have been easily secured without confrontation. It is clear that the Justice Department wanted to "cowboy" the search – alerting media and threatening to break into the office. Congress has always been a tempting target for ambitious prosecutors, judges, and politicians. Beating up on politicians is always going to be popular with the public. Likewise, the "no one is above the law' spin will always resonate with citizens. This search will only encourage such opportunistic action in the future. The important thing to remember is that Jefferson has not been charged with a crime – this is only the investigative stage. There are thousands of crimes that could be alleged against members of Congress. Likewise, a simple allegation of the release of classified information or similar crime could expose dozens, if not hundreds, of legislators to searches under this theory.

The fact that this search was conduct by federal officials does not limit the precedent. As the court noted, a member of Congress who is accused of a crime is subject to the same forms of searches and seizures as other citizens. This would presumably include searches and seizures by both local and federal investigators. Given the history of tension between the Congress and some states, the precedent radically increases the threat of such incursions into legislative areas.

2) **If this precedent stands and the local law enforcement attempted a congressional office raid with significant numbers of officers and used the FBI approach of bringing their own locksmith during non-business hours when virtually no one was present who had the time or ability to legally challenge a state, district, county, or**

even city warrant, how could the Capital Police respond if threatened with jail themselves by the local authorities?

The first response of Capitol Police should be to refuse to assist in an abusive or unconstitutional action. They are allowed to seek advice and instruction from the general counsel. Absent a direct court order, they should refuse to facilitate an unconstitutional search. Ideally, the Congress should draw up guidelines for the next such event to properly instruct officers and put investigators on notice. These guidelines should include instructions that the officers can seal the office pending judicial review on the expedited matter.

3) **Since the warrant in the case at hand was a common form in which the judge made no orders or requirements that privileged documents or material be kept confidential or safeguarded, does that make the warrant facially unconstitutional since the affidavit made clear that Constitutionally protected material would likely be encountered?**

It is likely that a court would not find the warrant to be facially unconstitutional. However, the clear defects in the warrant magnifies the importance of sealing the office and declining to assist in the search pending judicial review. The court gave little consideration to the privileges and protections of the House. I am frankly shocked by the failure of the court to craft a balanced order that protected the evidence while protecting congressional privileges.

4) **If you were a new FBI Director who was frustrated by Congressional questions, oversight, and threatened oversight of your new internal policies and new surveillance efforts and decisions, what would be the most intimidating things you could do to Congress and its members to make them back off of their oversight?**

Obviously, searches of this kind create a chilling effect on all members. Since this was just the investigative stage, such searches could become routine for thousands of different crimes. This creates something of a Damocles sword for members, leaving them in the unenviable position of conducting oversight on an agency that can order searches and seizures of the material in your office. It also creates a chilling effect for whistleblowers who cannot be confident that their identities or information will not be seized by the very Administration that they are criticizing.

This is precisely the danger that led to the creation of this protection in English Bill of Rights of 1689. Due to continual harassment under the Tudor and Stuart monarchs, legislators fashioned this protection to prevent the threat of criminal investigation and prosecution from the Crown. Hundreds of years later, we have now rediscovered the abuses that threaten the independence of a legislative branch.

5) **If congressional lawyers are to perform the sifting of documents instead of Executive Branch lawyers, then is law enforcement simply at the mercy of trusting congressional lawyers to hand over ALL documents called for in a subpoena?**

This is hardly a compelling basis for objection by the Justice Department, since it routinely conducts such review in criminal and civil cases for 'material" or "relevant" evidence. It is common for courts to accept the declaration of the Justice Department that all material evidence has been disclosed. Moreover, these searches are being conducted under the supervision of officers sworn to uphold the law and congressional attorneys who can be disbarred due to unethical or unlawful conduct. While there may be disagreement on certain documents, it is likely that these documents would be identified and, if there is a compelling reason to challenge the failure to disclose, subject to court review. The first step would be to produce a type of Vaughn index to give the investigators an itemization of documents. Any disputes would likely be resolved in informal discussions or, in rare cases, an ex parte review of the court.

- **Does your opinion change if congressional lawyers have incentive to protect the Member?**

Beyond some personal bias, it is hard to see the incentive that would affect an entire team. This is further avoided by the guarantee of multiple reviewers, including both majority and minority staff. If there is a real basis for claiming bias, the matter can be raised by the Justice Department and members added to the review team.

- **Is this fear allayed by having a bipartisan group of congressional lawyers sort through the documents, to make sure law enforcement is given the documents it is entitled to, but not the documents it is constitutionally forbidden from seizing?**

Yes, as noted above, these review teams can be assembled to guarantee independence. Moreover, this is far more consideration and balance than is present in a conventional investigatory team. Finally, it is always possible that Congress can yield to concerns by appointing an outside lawyer (as a congressional contractor) to allow for additional independence.

- **Are their any concerns with having lawyers perform the sorting that have incentive to ruin a Member? If so, what would be the safeguards against such incentives?**

As noted above, this is the type of concern that should be easily addressed by negotiations over the identity of the team. Guidelines could be written to allow for such input and consensus.

6) **<u>U.S. v Brewster</u>: Held that the Speech and Debate Clause protects Members of Congress from inquiry into legislative acts or the motivation for performance of such acts, but does not protect all conduct relating to the legislative process. The Court held that the Clause does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself.**

- **Do your views on the Speech and Debate Clause comport with US v. Brewster?**

I believe that the Court got this one wrong in its narrow treatment of the clause. It is rather ironic given the broad interpretation often given executive privilege, which is not mentioned in the Constitution and directly interferes with other constitutional duties like congressional oversight and judicial review. Such a narrow view was previously rejected in cases like *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881) when the Court criticized the attempt to "limit it to words spoken in debate" and defined it to encompass all the "things generally done in a session of the House by one of its members in relation to the business before it."

For example, I strongly disagree that constituent communications and dealings are not part of a reasonably defined category of legislation action. I do not consider this type of work to be so easily dismissed as merely "legislative 'errands' . . . for constituents." *Brewster*, 408 U.S. at 511. Likewise, I do not agree that by simply accusing someone of bribery or other federal offense, any relevant document is immediately moved from the realm of protected legislative action. The Court correctly held in *Eastland*, that courts should interpret the Clause "without exception . . . broadly to effectuate its purposes." *Eastland v. United States*, 421 U.S. 491, 501 (1975). The courts have shown an artificially abridged (and frankly uninformed) view of the legislative enterprise. This protection is designed to preserve the necessary environment in which legislators can perform their various responsibilities. *See Minpeco, S.A. v. Conticommodity Services*, 844 F.2d 856, 859 (D.C. Cir. 1988) (noting that the Clause is designed and intended to protect the "integrity of the legislative process itself.").

- **Does Brewster support what the Department of Justice did on May 20, 2006 when it raided a congressional office?**

I cannot imagine how this material can be read as falling outside of the category of protected legislative material – even under the most restrictive definition of the Court. Taking whole computer hard drives eradicates any sense of tailoring or selectivity to avoid compromising the Clause. The district court fell into the common mistake of focusing on the purpose of the search rather than the character of the documents and their relation to the legislative function. After all, this is a non-disclosure privilege that the Court has recognized as inimical to criminal investigations. *United States v. Helstoski*, 442 U.S. 477, 477 (1979) ("[T]he exclusion of evidence of past legislative acts will undoubtedly make prosecutions more difficult."). Any use of the Clause will frustrate a criminal investigation, but it is the status and character of the documents that should drive the constitutional analysis.

- **Do you believe that a judicial remedy and procedure should be pursued or a compromise procedure established between the Congress and the executive branch?**

I believe that Congress should litigate the case to the appellate level and then determine if this is an optimal time to take the issue to the Supreme Court. The addition of Associate Justice Sam Alito is not a good development for such constitutional claims given his extreme deference to executive power. I believe that a workable guideline can be developed that

would preserve the congressional privilege while eliminating any claim of exigent circumstances for unilateral searches by the executive branch.

7) Isn't it true that it is not the Congress member's office and its contents that the founders sought to protect, but rather they were seeking to protect the people's material, their needed oversight and legislation that the Congress member was pursuing, and the founding effort was to keep the people's business from being derailed by executive intimidation?

The Framers created this Clause to reinforce the legislative role in the tripartite system. *United States v. Johnson*, 383 U.S. 69, 181 (1966) ("In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders."). This Clause is unique; yet, the Framers believed that it was necessary to safeguard legislators from judicial or executive branch harassment. It is meant to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel*, 408 U.S. at 617. Oversight is an example of a congressional function that cannot be fully exercised when legislators feel they are vulnerable to searches and seizures in their offices. Thus, as the Court stressed in *Brewster*, the clause was not merely meant "for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *Brewster*, 408 U.S. at 507.

8) Does it hinder law enforcement's ability to effectively investigate potential crimes committed by Members of Congress if officers have to go through the Speaker, the House Counsel, or the House Ethics Committee before searching for and seizing documents from a Congressional office? Have there been any criminal cases in the last 219 years that have been harmed or impeded by the observance of constitutionally privileged material being within a Congressional office?

There is no plausible, let alone compelling, argument that investigators would be stymied by such a system. Indeed, history has shown that Congress has always cooperated in investigations – a fact expressly recognized in the U.S. Attorneys Manual. Ironically, this case evidenced such cooperation after Congress repeatedly assisted the government in securing material.

It is important to remember that members are not protected in a host of criminal investigations unconnected to their legislative work. However, when it comes to their legislative communications or the motivations behind their work, the Clause is designed to impose protections against some forms of investigation. As the Court noted in *Johnson*:

> A prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch on prosecution which, though as here founded on a criminal statute of general

> application, does not draw in question the legislative acts or the defendant member of Congress or his motives in performing them.

Johnson, 383 U.S. at 184-85 *Johnson* involved an alleged bribe of a member to give a speech on the House floor.

9) Would the protections afforded under the Speech and Debate clause also apply to Congressional offices within a Member's state district?

I believe that they do apply, but under the narrow definition given in cases like Brewster, a greater amount of material in local offices is likely to fall outside of the category of protected legislative material.

10) If the Speaker himself were under investigation, what procedure would still give law enforcement a means to pursue alleged corruption without the case being thwarted? Haven't Speakers themselves been investigated in the past without violating the Speech and Debate protections?

Congressional rules require a Speaker to recuse himself in cases of conflict. This general ethical rule can be expressly included in any guideline to name an alternative decision maker. A guideline could also allow the matter to be submitted to full house in some circumstances.

11) Has the Constitution given either the Executive branch or the Judiciary the heightened protections that the Speech and Debate clause affords to the Congress?

Notably, this is unique. The privileges afforded to the other branches are creatures of judicial construction. Thus, while courts have adopted broad readings of executive privilege (and the Justice Department has recently articulated virtually absolute interpretations), this textual privilege is now being given the narrowest possible meaning.

12) Under Article 1, Section 5 of the Constitution, doesn't the House have authority to discipline its own members and formulate rules to do so, including locking them out of their offices, taking materials from their offices, otherwise disciplining members, and even expelling them from Congress? Couldn't the House make a rule to punish or discipline a member if the member failed to respond to a lawful subpoena?

Yes, there are various ways that a member can be compelled to cooperate with a legitimate investigation. The House can discipline members who use their offices for personal or criminal advantage.

I would be happy to answer any further questions that members may have on my earlier testimony or the Jefferson controversy.

RESPONSE TO POST-HEARING QUESTIONS FROM BRUCE FEIN, PRINCIPAL, THE LICHFIELD GROUP, INC.

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July 7, 2006

Chairman F. James Sensenbrenner, Jr.
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

RE: May 30, 2006 Oversight Hearing on "Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?"

Dear Chairman Sensenbrenner:

Please find my answers to the questions posed by the Committee regarding my testimony at the May 30, 2006 hearing on "Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?" below.

1. *Would the precedent of the Jefferson warrant, if it stands, open the door to Congressional offices and all of their correspondence, noted, memoranda, and computer hard drives being subject to any local law enforcement if local law enforcement or prosecutors found a sufficiently ambitious local judge?*

   Probably yes. Decisions of the Supreme Court indicate that federal officials performing official functions are shielded from application of state criminal laws under the doctrine of federal governmental immunity. See Johnson v. Maryland, 254 U.S. 51 (1920); In re Neagle, 135 U.S. 1 (1890). But those cases would not prevent a local government prosecutor from investigating conduct by a Member of Congress allegedly violating a local law that does not implicate congressional duties, for example, a building code violation or fund raising violation, and obtaining a search warrant for the Member's offices seeking documents.

2. *If this precedent stands and the local law enforcement attempted a congressional office raid with significant numbers of officers and used the FBI approach of bringing their own locksmith during non-business hours when virtually no one was present who had the time or ability to legally challenge a state, district, county, or even city warrant, how could the Capital Police respond if threatened with jail themselves by the local authorities?*

   I think the Capitol Police in performing their official duties would be immune from any local power, which means they could use force to frustrate search warrants issued by state or local judges. In re Neagle authorized a federal agent to kill an attacker of a Supreme Court Justice in alleged violation of state homicide laws with impunity.

3. *Since the warrant in the case at hand was a common form in which the judge made no orders or requirements that privileged documents or material be kept confidential or safeguarded, does that make the warrant facially unconstitutional since the affidavit made clear that Constitutionally protected material would likely be encountered?*

   Yes. It was virtually inevitable that executing the search warrant would expose to the Executive Branch protected Speech or Debate Clause material in searching for documents described in the warrant.

4. *If you were a new FBI Director who was frustrated by Congressional questions, oversight, and threatened oversight of your new internal policies and new surveillance efforts and decisions, what would be the most intimidating things you could do to Congress and its members to make them back off their oversight?*

As FBI Director, I would contrive suspicion about Members concerning federal campaign finance law or anti-bribery laws, commence an investigation, and then obtain search warrants to search offices for documents that allegedly might show financial irregularities. As then Attorney General Robert Jackson observed as long ago as 1940, so many technical laws riddle the U.S. Code that a prosecutor is tempted to pick a foe and scour the books to pin an offense on him than to discover a crime and then look for the culprit.

5. *Your analysis of the Speech and Debate Clause and the need for it is quite helpful, but the public clamors that if a congressional office is completely immune from search by law, then Members can be criminals as long as everything incriminating is kept in the congressional office.*

   -Are you familiar with the process in place prior to the Jefferson search that allowed gathering of evidence from Members of Congress while still protecting Constitutionally privileged material? If so, how effective do you believe it has been?

   -If you believe the system being used prior to the Jefferson warrant needs improvement, can you conceive of a more effective system that protects Constitutionally privileged materials and yet allows for retrieval of evidence of a crime?

   -On what grounds do you state that the founding fathers anticipated that the Speech and Debate Clause might derail criminal investigations in come instances, and that this might be necessary to protect Separation of Powers?

No one is asserting that the Speech or Debate Clause categorically forbids searching a Member's office for evidence of crime. For instance, the Clause is not

disturbed by searches for cash or contraband or drug use. But search warrants for documents are different. All files in a Members office must be read to know whether it responds to the description in the warrant. That means that documents concerning legislative, oversight, or other strategy or privileged material will be read by the Executive Branch and be capable of use to embarrass or intimidate a Member.

The Clause, however, would not be offended if a legislative branch officer or employee executed the warrant to insure privileged materials remained concealed from Executive Branch eyes. The Clause only protests a Member from questioning or intrusions by the judicial or executive branches.

The Speech or Debate Clause also permits the Executive Branch to subpoena documents from a Member, who may be held in contempt of court for non-compliance, including a fine or jail sentence.

The Founding Fathers clearly intended that the Clause might frustrate an investigation or prosecution. That is the inescapable effect of preventing Speech or Debate material from exposure to either the judicial or executive branches. As the Supreme Court explained in United States v. Helstoski, 442 U.S. 477 (1979), the Clause "was designed to preclude prosecution of Members for legislative acts." And the High Court amplified in United States .v Johnson, 383 U.S. 169 (1966): "[I]t is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits...but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary."

****

"There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause."

6. *If congressional lawyers are to perform the sifting of documents instead of Executive Branch lawyers, then is law enforcement simply at the mercy of trusting congressional lawyers to hand over ALL documents called for in a subpoena?*
   -Does your opinion change if congressional lawyers have incentive to protect the Member?
   -Is this fear allayed by having a bipartisan group of congressional lawyers sort through documents, to make sure law enforcement is given documents it is entitled to, but not the documents it is constitutionally forbidden from seizing?
   -Are their any concerns with having lawyers perform the sorting that have incentive to ruin a Member? If so, what would be the safeguards against such incentives?

   No. Congressional lawyers might be required to submit an affidavit avowing a good faith search for the documents described in the warrant. It would be best to have two lawyers representing the two parties conduct the search as an additional safeguard against sabotaging the search warrant. It might also be made a federal crime for a congressional lawyer knowingly to disclose privilege materials to any person not authorized to receive the materials.

7. *U.S. v. Brewster: Held that the Speech and Debate Clause protects Members of Congress from inquiry into legislative acts or the motivation for performance of such*

acts, but does not protect all conduct relating to the legislative process. The Court held that the Clause does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself.

-Do your views on the Speech and Debate Clause comport with U.S. v. Brewster?

-Does Brewster support what the Department of Justice did on May 20, 2006 when it raided a congressional office?

-Do you believe that a judicial remedy and procedure should be pursued or a compromise procedure established between the Congress and the executive branch?

I believe Brewster's interpretation of the Clause was too cramped, and ignores the realities of Member activities that are pivotal to securing or defeating legislation and thus vulnerable to executive intimidation. But even taking Brewster as good law, the search of Jefferson's office for documents was nevertheless constitutionally deficient because it justified the Executive Branch in reading all of his office files, which inevitably include documents within Brewster's definition of a protected legislative act. I would recommend a statute that prohibits any search warrant for documents in a Member's legislative office unless its execution is entrusted to the legislative branch.

8. *Isn't it true that it is not the Congress member's office and its contents that the founders sought to protect, but rather they were seeking to protect the people's material, their needed oversight and legislation that the Congress member's office and its contents that the founders sought to protect the people's material, their needed oversight and legislation that the Congress member was pursuing , and the founding*

effort was to keep the people's business from being derailed by executive intimidation?

Yes, as amplified in Johnson.

9. *Does it hinder law enforcement's ability to effectively investigate potential crimes committed by Members of Congress if officers have to go through the Speaker, the House Counsel, of the House Ethics Committee before searching for and seizing documents from a Congressional office? Have there been any criminal cases in the last 219 years that have been harmed or impeded by the observance of Constitutionally privileged material being within a Congressional office?*

   The Department of Justice has been unable to identify any allegedly illegal conduct by a Member that has escaped punishment in 219 years because the execution of search warrants has been vetted by the Speaker, House Counsel, or the House Ethics Committee.

10. *Would the protections afforded under the Speech and Debate Clause also apply to Congressional offices within a Member's state district?*

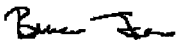
    Yes, because district files are overwhelmingly likely to contain documents concerning legislative strategy or oversight.

11. *If the Speaker himself were under investigation, what procedure would still give law enforcement a means to pursue alleged corruption without cause being thwarted? Haven't Speakers themselves been investigated in the past without violating the Speech and Debate protections?*

    A warrant to search the Speaker's office for documents could be executed by legislative officials.

12. *Has the Constitution given either the Executive branch or the Judiciary the heightened protections that the Speech and Debate clause afford to the Congress?*
    Yes. Confidential presidential communications may be concealed from Congress under United States v. Nixon, 418 U.S. 683 (1974), and confidential Supreme Court deliberations are off constitutional bounds to any other branch.
13. *Under Article 1, Section 5 of the Constitution, doesn't the House have authority to discipline its own members and formulate rules to do so, including locking them out of their offices, taking materials from their offices, otherwise disciplining members, and even expelling them from Congress? Couldn't the House make a rule to punish or discipline a member if the member failed to respond to a lawful subpoena?*
    Yes. The House could even expel a Member for flouting a lawful subpoena.

Sincerely,



Bruce Fein

"MEMORANDUM IN SUPPORT OF MOTION FOR RETURN OF PROPERTY"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Search of:	)	
	)	**Case No. 06-231-M-01**
RAYBURN HOUSE OFFICE BUILDING	)	
ROOM NUMBER 2113	)	**Judge Thomas F. Hogan**
WASHINGTON, D.C. 20515	)	
	)	

MEMEMORANDUM IN SUPPORT
OF MOTION FOR RETURN OF PROPERTY

On Saturday night, May 20, 2006, the FBI raided the Congressional offices of Representative William Jefferson. After approximately 15 agents spent about 18 hours painstakingly reviewing documents in the Congressman's office, the FBI carted away two boxes of paper records as well as every record from the Congressman's personal computer. In executing the search, the FBI and the Department of Justice refused to allow either Congressman Jefferson's personal attorney or House General Counsel to be present.

The search of a Congressional office and the seizure of records and files from that office are apparently without historical precedent. *See* Dan Eggen and Shailagh Murray, "FBI Raid on Lawmaker's Office is Questioned," Wash. Post, May 23, 2006. The actions of the Executive Branch are an affront to the Constitutional separation of powers and a violation of the absolute privilege and immunity that Members of Congress enjoy under the Speech or Debate clause of Article I, section 6 of the

U.S. Constitution. In addition, the exclusion of Congressman Jefferson's counsel from the premises during the execution of the search -- a circumstance that exacerbated the Constitutional problems inherent in the search -- violated Fed. R. Crim. P. 41 and rendered the search "unreasonable" in violation of the 4th Amendment. Finally, the search warrant was based on a false premise, to wit, that the government "has exhausted all other reasonable methods to obtain these records." *Aff.* ¶ 132.[1]

For the reasons set forth in this memorandum, Congressman Jefferson, "a person aggrieved by the unlawful search and seizure," requests that the court order the return of all items seized from the Congressional offices. Fed. R. Crim. P. 41(g). In order to minimize the harm that this violation of Constitutional privilege may cause while this motion is pending, Congressman Jefferson further requests the following immediate relief in order to allow for full briefing and careful consideration by the court of the serious Constitutional issues and the unprecedented circumstances that give rise to this motion:

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[1] The factual basis for this premise, *Aff.* ¶¶ 129-32, is redacted from the copy that has been released to Congressman Jefferson and to the public. As part of his motion, Congressman Jefferson requests that he be provided with the unredacted paragraphs 129-32 so that he may examine the representations made to the court to obtain the warrant, and have an opportunity to challenge them.

- that the FBI and the Department of Justice, and their agents and employees be immediately enjoined from any further review or inspection of the seized items;
- that the seized items be sequestered and locked in a secure place; and
- that the supervisor(s) of the search team and the "Filter Team" file a report with the court detailing which documents have been reviewed and what steps have been taken to sequester the documents from further review pending further order of the court.

Factual Background[2]

On May 18, 2006, this court issued a warrant authorizing the Federal Bureau of Investigation to search the premises known as Rayburn House Office Building, Room Number 2113, identified on Schedule A as "the office of Congressman William Jefferson." According to the affidavit in support of the search warrant application ("*Aff.*"), Congressman Jefferson is currently serving his eighth term as the elected Representative of people of the 2nd District of Louisiana, located in New Orleans.

[2] Congressman Jefferson reserves the right to supplement this factual recitation with information responding to Section VI of the affidavit, entitled "Government efforts to exhaust all lesser intrusive approaches to obtaining relevant documents and records located in the Washington, D.C. Congressional Office of William J. Jefferson." *Aff.* at 70. It is the Congressman's position that there were in fact less intrusive approaches that were rejected by the Department of Justice.

The warrant called for the search of the offices "and any and all storage areas and locked containers, associated therewith…." It authorized the seizure of records and documents, electronic or otherwise related to a list of 30 individuals and entities. The warrant authorized the seizure of records and documents related to appointments, visits, and telephone messages to or from the Congressman related to those 30 individuals and entities, including visitor sign in books, ledgers, paper telephone messages, and appointment calendars. Finally, the agents were permitted to copy or remove the Congressman's entire computer hard drive. In other words, every single file and every single email that was stored on the Member's computer was transferred to the custody of the executive branch on Saturday night.

The affidavit purported to set out "special procedures in order to identify information that may fall within the purview of the Speech or Debate Clause Privilege," *Aff.* ¶¶ 136-55, and it noted that the procedures would apply to both paper records and electronic media. The application set forth the following procedures to be employed in searching the Member's office:

- The physical search would be conducted by "non-case agents" who have no other role in the investigation.
- The non-case agents would review the paper records in the Congressman's office to determine if they were

responsive to the warrant, and they would remove any responsive records they found. No Speech or Debate privilege review would precede the removal.[3]

- Removed material would later be provided to a "Filter Team" consisting of Department of Justice lawyers and a Special Agent who are not otherwise involved in the investigation.
- The Filter Team would "validate" the decision made on responsiveness and then review the materials to determine if the Speech or Debate Privilege applied to them. The application sets forth no criteria by which such a determination would be made, and the procedure does not provide the Congressman with any opportunity to identify privileged material.
- If the Filter Team concludes that documents are not subject to the privilege, the materials are to be immediately provided to the prosecution team. <u>There is no provision under which the Congressman will be notified of those documents deemed to be not privileged and no provision under which he can</u>

[3] Congressman Jefferson submits, as will be set out in more detail below, that any privilege review by the Executive Branch -- even if before removal -- would run afoul of separation of powers principles and the privilege immunity that he enjoys under the Speech or Debate Clause.

interpose an objection and assert his privilege. In other words, the right to exercise the Congressman's Constitutional Speech or Debate privilege has been completely stripped from the Member and assigned to two Department of Justice lawyers and an FBI agent.

- The Filter Team will provide the Congressman with a log of the materials it does consider to be "potentially privileged." The Congressman can consent to their production, but he is not the decision maker in the event he considers the materials to be covered by Speech or Debate. Under the terms of the warrant, the court will rule on the production of any "potentially privileged" documents.
- With respect to the Congressman's computer, the government was permitted to copy or remove the entire hard drive without regard to the subject matter of the files preserved on it.
- While there is to be an initial search of the computer files conducted utilizing search terms drawn from the warrant, once files are located, the Filter Team will again conduct a review for responsiveness before considering the question of privilege, and the Filter Team, and not the Congressman, will make the Speech or Debate determination. And again, if the Filter Team

makes the unilateral determination that files fall outside the Speech or Debate privilege, those files will be immediately provided to the prosecution team.

The search was executed on the evening of Saturday, May 20, and the search continued into Sunday, May 21. At approximately 8:15 p.m. on May 20, the General Counsel of the House of Representatives, Geraldine Gennet, went to Congressman Jefferson's office, but the FBI agents prohibited her from entering during the execution of the search. Counsel for Congressman Jefferson, Amy Jackson, then spoke to the affiant, Special Agent Timothy R. Thibault, by telephone at around 8:45 p.m., and he advised her that he would not permit her to enter and observe the search either. When she noted that property owners or their lawyers are regularly permitted to remain when their premises are searched, the agent noted that it was "our decision" that "no one can enter, not even counsel."

Counsel then telephoned Assistant United States Attorney Mark Lytle, the lead prosecutor on the case, and he refused to instruct the agents to grant her access to her client's office. When she inquired as to the legal grounds for her exclusion, he stated, "that's our policy." He did send her a faxed copy of the warrant, with its attached form entitled "Return." The Return included blanks to be completed for such details as the date the warrant was received and the date and time it was executed, as

well as "inventory made in the presence of _____." On May 21, the government provided counsel for the Congressman with a copy of its Inventory of Seized Items, but it bears only one signature, and it does not identify anyone in whose presence it was prepared or verified.

I. THE SEARCH OF CONGRESSMAN JEFFERSON'S OFFICE INVADED THE CONGRESSMAN'S ABSOLUTE CONSTITUTIONAL PRIVILEGE UNDER THE SPEECH OR DEBATE CLAUSE.

A. *The issuance and execution of the search warrant for the office of a Member of Congress violates the Constitution.*

The government's unprecedented and extraordinary action on the evening of May 20 constituted not only a direct assault on the privacy and dignity of William Jefferson, but a violation of the Constitution itself. While the situation may be a novel one, the principles that govern the relationship between the three branches of government are over two hundred years old.

Article I, §6 of the United States Constitution provides: "the Senators and Representatives shall … be privileged from Arrest during their Attendance at the Session of their respective Houses … and for any Speech or Debate in either House, they shall not be questioned in any other Place." The purpose of the Speech or Debate Clause is to "protect the integrity of the legislative process by insuring the

independence of individual legislators." *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 502 (1975). In addition, the Clause serves "to preserve the Constitutional structure of separate, co-equal, and independent branches of government." *United States v. Helstoski*, 442 U.S. 477, 491, (1979). Unlike other privileges commonly analyzed by the courts, the Speech or Debate privilege is **absolute**, and there is no balancing test to be employed. *Eastland*, 421 U.S. at 509 - 510.

The Speech or Debate Clause has two components. First, the Clause provides immunity from lawsuits for all actions "within the legislative sphere … even though the conduct, if performed in another context, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973)(quotations omitted). This Constitutional immunity extends both to civil suits and criminal prosecutions. Second, and more importantly here, the Clause provides a testimonial privilege. *Gravel v. United States*, 408 U.S. 606, 615-16 (1972). This aspect of the privilege operates to protect those to whom it applies from being compelled to give testimony as to privileged matters, and from being compelled to

produce privileged documents.[9] The Supreme Court draws no distinctions between the immunity-from-suit and the testimonial aspects of the privilege.

The Supreme Court has underscored the critical importance of the Clause in "preventing intrusion by the Executive and Judiciary into the legislative sphere." *Helstoski,* 442 U.S. at 492.

> [T]he central role of the Clause is to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.

Eastland, 421 U.S. at 502 (quotations omitted). "In the American governmental structure, the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States v. Johnson,* 383 U.S. 169, 178 (1966). Because the guarantees of the Speech or Debate Clause are "vitally important to our system of government," they "are entitled to be treated by the courts with

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[9] **Testimony**: *See, e.g., Dennis v. Sparks,* 449 U.S. 24, 30 (1980) (dicta); *Gravel,* 408 U.S. at 615-16; *Miller v. Transamerican Press, Inc.,* 709 F.2d 524, 528-29 (9th Cir. 1983). **Documents**: *See, e.g., Brown & Williamson,* 62 F.3d 408; *MINPECO, S.A. v. Conticommodity Services, Inc.,* 844 F.2d 856, 859-61 (D.C. Cir. 1988); *McSurely,* 553 F.2d at 1296-97; *Dombrowski v. Burbank,* 358 F.2d 821, 823-24 (D.C. Cir. 1966) (dicta), *aff'd in part and rev'd in part sub nom. Dombrowski v. Eastland,* 387 U.S. 82 (1967); *Hearst v. Black,* 87 F.2d 68, 71-72 (D.C. Cir. 1936); *Pentagen Technologies Int'l, Ltd. v. Committee on Appropriations,* 20 F. Supp. 2d 41, 43-44 (D.D.C. 1998), *aff'd,* 194 F.3d 174 (D.C. Cir. 1999) (per curiam); *U.S. v. Peoples Temple of the Disciples of Christ,* 515 F. Supp. 246, 248-49 (D.D.C. 1981).

the sensitivity that such important values require." *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979). Accordingly, the Supreme Court has "[w]ithout exception… read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501. *See also McMillan*, 412 U.S. at 311; *Gravel*, 408 U.S. at 618; *Johnson*, 383 U.S. at 179; *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).

The protections afforded to Members of Congress by the Speech or Debate Clause apply to all activities "within the 'legislative sphere.'" *McMillan*, 412 U.S. at 312-13 (1973), quoting *Gravel*, 408 U.S. at 624-25 (1972). The "sphere of legitimate legislative activity" includes all activities that are

> an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Eastland, 421 U.S. at 504.

The courts have broadly construed the concept of "legislative activity" to include much more than words spoken in debate, and they have rejected a literal interpretation of the privilege. "Committee reports, resolutions, and the act of voting are equally covered." *Gravel*, 408 U.S. at 617. Similarly, committee investigations and hearings have been held

to be activities within the legislative sphere. *See, e.g., Eastland,* 421 U.S. 491. Information gathering in furtherance of legislative responsibilities is also covered by Speech or Debate 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.'" *Id.* at 504, quoting *McGrain v. Daugherty,* 273 U.S. 135, 175 (1927). Even informal information gathering by Members or their staff in furtherance of their legislative responsibilities and objectives has repeatedly been held to be protected. *See, e.g., Brown & Williamson Tobacco Corp. v. Williams,* 62 F.3d 408 (D.C. Cir. 1995) (documents voluntarily delivered to committee by private citizen protected); *McSurely v. McClellan,* 553 F.2d 1277, 1287 (D.C. Cir. 1976) (en banc), *cert. granted,* 434 U.S. 888 (1977), *cert. dismissed sub nom. McAdams v. McSurely,* 438 U.S. 189 (1978) ("[A]cquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the [Speech or Debate] privilege…."); *Tavoulareas v. Piro,* 527 F. Supp. 676, 680 (D.D.C. 1981) ("[A]cquisition of information by congressional staff, whether formally or informally, is an activity within the protective ambit of the speech or debate clause."). It is not necessarily obvious from the face of a document whether or not it falls within the protected realm;

only the Congressman knows whether information he has collected in his files relates to his committee work or legislation he has in mind.

The delicate balance of our democratic system was disrupted when the court authorized the executive branch to search the Member's office and peruse and remove Speech or Debate material. The execution of the search warrant called for federal agents to painstakingly review every piece of paper and every file in the Congressman's office in order to locate the responsive documents. **In this case, that process took 18 hours.** The Inventory of Seized items indicates that the agents went through desk drawers, cabinets, boxes under the desks in staff members' work stations, file cabinets, bookshelves, and even the floor behind a television stand.

Executing the search warrant on Congressman Jefferson's office through a process of reviewing documents one at a time necessarily required the agents to read Speech or Debate material. The wholesale copying or removal of the Congressman's computer hard drive guaranteed that the executive would be in possession of material that relates to the Member's legislative duties. Moreover, the Congressman was completely divested of his authority -- **his privilege --** to identify and segregate those materials in his office and on his computer that relate to his legislative activities. Thus, the execution of the search

warrant for Congressman Jefferson's office contravened the Constitution.

The government suggested in its warrant application that it might not be able to obtain the evidence it was seeking if it did not receive authority to search the Congressman's office. The fact that honoring the privilege might complicate an investigation or even the ultimate prosecution of the government's case does not justify a departure from the Constitution: the privilege is an absolute one. Indeed, in some cases, respecting the privilege could require dismissing a criminal indictment altogether. *See United States v. Johnson,* 383 U.S. at 169 (conspiracy conviction set aside).[4] The fact that some material may be outside the prosecution's reach is irrelevant;[5] the Constitution and the Bill of Rights expressly establish **limits** to executive authority, and there are spheres the executive cannot enter and information he cannot compel. *See* U.S. Const. amend. IV and U.S. Const. amend. V, as well as Art. I §6. Therefore, in order to vindicate the Constitution and

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[4] Moreover, as the affidavit in support of the search warrant reveals, the government is already in possession of copies of many of the records it sought with the warrant, and it has already charged two individuals with the very offenses under investigation based on the materials in its possession.

[5] *See Helstoski,* 442 U.S. at 491 ("[T]he Speech or Debate Clause was [not] designed to assure fair trials … Rather, its purpose was to preserve the constitutional structure of separate, co-equal, and independent branches of government").

maintain the separation of powers, the materials seized from Congressman Jefferson's office on May 20 and 21 should be immediately returned.

B. The proposed method of conducting the search of Congressman Jefferson's office and the procedures established for the ongoing review of his computer files did not comport with the Constitution.

Even if this court can conceive of a circumstance in which a carefully tailored warrant for a Member's office could lawfully issue, the search and seizure in this instance were plainly unlawful. The procedures set forth in the warrant application are fatally flawed in numerous ways. First and most important, it is the Member who must assert the privilege, and any procedure that transfers that authority to anyone else -- particularly to someone in the executive branch -- invades the privilege and contravenes the Constitution. Second, under the one-sided procedures devised and implemented by the prosecution, once the Filter Team concludes that something is not privileged, the materials are simply handed over to the prosecution team. The procedures include no mechanism for the Congressman to assert his privilege or challenge the government's privilege determination.

To place the Speech or Debate decision in the hands of the prosecution team essentially nullifies the privilege. Given the

breadth of the privilege, the Filter Team cannot possibly know what is or is not Speech or Debate material. The Filter team has no idea what legislative initiatives or committee hearings the Congressman is currently pursuing or contemplating. The affidavit notes that the Congressman is a member of the House Ways and Means Committee, and the subcommittee on Trade. He is a member of the Congressional Africa Trade and Investment Caucus, the Congressional Black Caucus, and the Congressional Caucus for Nigeria. They could not possibly know which telephone messages or visits recorded on the seized logs relate to his legislative activity or which communications with businessmen or with individuals in Africa were in furtherance of these legislative functions.

The procedures authorized the FBI to review every scrap of paper in the office and to seize the entire computer, thus ensuring that the agents would be reading reams of protected material before making their initial decision of what to remove. The entire process took approximately 18 hours. The fact that such an all out invasion into the legislative arena would be conducted by "non-case agents" does not begin to cure the problem the Speech or Debate Clause was designed to address: the incursion of executive authority into the legislative realm. While the affidavit proclaims the agent's desire to exercise "sensitivity" about these grave issues, the government's

unjustified refusal to permit either the General Counsel of the House of Representatives or Congressman Jefferson's private legal counsel to enter the premises while the search was ongoing reflects the government's real attitude: arrogance and hostility about questions of privilege. In accordance with the procedures routinely employed on Capitol Hill when subpoenas or other forms of legal process are involved, the lawyers could and should have been permitted to review each document for privilege in consultation with the Congressman before the records were read or removed by the agents.

Finally, a review of the inventory demonstrates that the search team had little regard for the limits prescribed by the warrant when they made determinations as to responsiveness, so the court should have little confidence in their ability to make determinations as to privilege. For instance, Box 1, item 40 on the Inventory notes the seizure of "letters requesting contributions to Jefferson Legal Defense Fund," correspondence not listed on the schedule of items to be seized.

In light of all of these circumstances, the search warrant issued in this case cannot pass muster under the Speech or Debate Clause of the Constitution as it has been consistently interpreted by the Supreme Court.

II. THE BARRING OF THE COUNSEL FROM THE CONGRESSMAN'S OFFICE DURING THE SEARCH VIOLATED RULE 41 AND RENDERED THE SEARCH "UNREASONABLE" IN VIOLATION OF THE 4TH AMENDMENT.

Rule 40(f)(2) provides: "[a]n officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken … (emphasis added). Thus, the Federal Criminal Rules expressly contemplate that the owner of the seized property will witness the preparation of the inventory of what is removed. In this case, though, the United States Attorney's Office and the FBI refused to permit the owner's designated representative or the General Counsel of the House of Representatives to monitor the execution of the warrant. No reason was given for the implementation of this "policy," and there were absolutely no grounds to believe that the attorneys would have impeded the search or destroyed any evidence.

The 4th amendment right to be free from unreasonable searches and seizures includes the right to be free from the unreasonable execution of search warrants. *Foreman v. Beckwith*, 260 F. Supp. 2d 500, 503 (D. Conn. 2003). In assessing the reasonableness of an officer's execution of a search warrant,

the court must examine the totality of the circumstances and consider the privacy due the public, the reasonable expectations of an informed public, the needs of law enforcement officials, and any other appropriate considerations. *United States v. Hester,* 361 F. Supp 2d 1145, 1151 (C.D. Cal. 2005).

Here, particularly in light of the Constitutional dimensions of the situation, the public had every reason to be concerned that the Congressman's rights were fully protected. And law enforcement certainly did not need to exclude the Congressman's representative. The items to be seized did not include weapons, explosives, controlled substances, or contraband. This warrant was not premised upon the existence of any exigent circumstance, and lawyers posed no danger to the 15 or so FBI agents searching a building guarded by the United States Capitol Police.

The search was justified on the grounds that relevant records could be found in the office, and that the government had no other reasonable means of obtaining them. *Aff.* ¶¶ 129-32. Basically, it was a document production exercise. The Congressman and his lawyers have been aware of the investigation since the beginning of August, and they have been in close communication with the government. The government knows that all of documents and computer files have been appropriately preserved, and that House Counsel and private counsel have been

scrupulous about these matters. Therefore, considering the totality of the circumstances, which includes the fact that the prosecution knew when it sought this warrant that it was treading in uncharted constitutional waters, and it knew that its agents would be viewing Speech or Debate material -- the government's insistence upon executing the search warrant in the absence of the property owner and his counsel was unreasonable.

Even if a violation of Rule 41 does not rise to constitutional dimensions, it may render the search unlawful. In *United States v. Slaey,* 2006 WL 1117881, *3 (E.D. Pa. 2006), the court explained that when a non-constitutional violation is merely ministerial, such as a delay in filing the return with the magistrate, the party whose premises were searched may have no recourse. But "there is cogent authority that a non-constitutional violation of Rule 41 is cause to suppress evidence when the defendant has been prejudiced or the violation is intentional and deliberate." *Id.* at *3, citing *United States v. Simons,* 206 F. 2d 392, 403 (4th Cir. 2000) and *United States v. Burke,* 517 F. 2d 377, 386 - 87 (2d. Cir. 1975). In this case, the violation was deliberate and intentional and as in *Slaey,* the violation was "particularly egregious" because the agents were acting at the direction of the Department of Justice. The defendant in *Sleay* presented the issue as a

suppression motion, but Rule 41 also mandates the return of property when a search is unlawful.

III. THE SEARCH WAS UNLAWFUL SINCE IT WAS BASED ON A FALSE PREMISE THAT THERE WERE NO LESS INTRUSIVE APPROACHES TO OBTAINING RELEVANT DOCUMENTS.

Section VII of the affidavit in support of the search warrant purports to set forth "government efforts to exhaust all lesser intrusive approaches to obtaining relevant documents and records located in the Washington, D.C. Congressional Office of William J. Jefferson." The information contained in section VII is redacted from the copy of the affidavit shared with the public and Congressman Jefferson, so the Congressman cannot yet comment upon the affiant's rendition of the facts. But in the published portion of the affidavit, the affiant concludes by asserting, "as a result of the information discussed in the paragraphs immediately above, the government has exhausted all other reasonable methods to obtain these records in a timely manner short of requesting this search warrant … Left with no other method, the government is proceeding in this fashion." *Aff.* ¶ 132.

Congressman Jefferson emphatically disputes this conclusion and submits that there were several less intrusive options available to the government. During their very first meeting with the prosecution team, the Congressman's lawyers did not

communicate a refusal to comply, but rather, they proposed reasonable means to afford the government access to his documents. Those efforts were rebuffed. Congressman Jefferson directs the court's attention to the letter his counsel sent Assistant United States Attorney Lytle more than eight months ago, on September 2, 2005, attached hereto as Exhibit 1, filed under seal, and Mr. Lytle's response, Exhibit 2. In addition, Congressman Jefferson reserves the right to supplement this memorandum at such time as he receives access to the redacted paragraphs of the affidavit from this court and the necessary authority from the Eastern District of Virginia to fully brief this court on the status of the matter. He notes as an aside that the government can hardly assert that it had no other means of access to the records sought when a reading of the search warrant affidavit makes it apparent that the prosecution already has many of them.

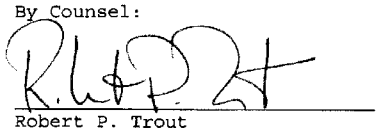
The government's debatable assertion undermines the integrity of the entire warrant. Coupled with the prosecution's failure to adequately consider the significant separation of powers issues implicated by the warrant, the nullification of Congressman's absolute privilege, the barring of the Congressman's lawyers from his office, and the refusal to pursue reasonable alternatives to gain access to the documents, this flawed premise adds to the unreasonableness of the search and

the unlawful nature of the seizure. The court should therefore order the return of the property seized.

WHEREFORE, Congressman William J. Jefferson respectfully submits that his motion for return of property should be GRANTED, and all material seized pursuant to the execution of the search warrant on Rayburn House Office Building Room Number 2113 should be returned to him forthwith.

Respectfully submitted,

WILLIAM J. JEFFERSON
By Counsel:



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Search of:	)	
	)	**Case No. 06-231-M-01**
RAYBURN HOUSE OFFICE BUILDING	)	
ROOM NUMBER 2113	)	**Judge Thomas F. Hogan**
WASHINGTON, D.C. 20515	)	
	)	

MOTION FOR RETURN OF PROPERTY
AND EMERGENCY MOTION FOR INTERIM RELIEF

Pursuant to Fed. R. Crim. Proc. 41(g), Congressman William J. Jefferson, by counsel, hereby respectfully moves for the return of all property seized pursuant to the execution of the search warrant on Rayburn House Office Building Room Number 2113 on May 20 and 21, 2006. The unprecedented search of the Representative's office offends the separation of powers embodied in the United States Constitution and violates the absolute privilege and immunity that Members of Congress enjoy under the Speech or Debate clause of Article I, section 6. As the target of the criminal investigation involved, the owner of the materials seized, and a Member of the United States House of Representatives, Congressman Jefferson is "a person aggrieved" by the unlawful search and seizure undertaken on that date. In support of his motion, Congressman Jefferson submits the accompanying memorandum of points and authorities.

For the reasons set forth in the memorandum, the Congressman requests that the court order the return of all

items seized from his office. In order to minimize the harm that this violation of Constitutional privilege may cause while this motion is pending, Congressman Jefferson further requests the following immediate relief in order to allow for full briefing and careful consideration by the court:

- that the FBI and the Department of Justice, and their agents and employees be immediately enjoined from any further review or inspection of the seized items;
- that the seized items be sequestered and locked in a secure place; and
- that the supervisor(s) of the search team and the "Filter Team" file a report with the court detailing which documents or electronic records have been reviewed and what steps have been taken to sequester the documents from further review pending further order of the court.

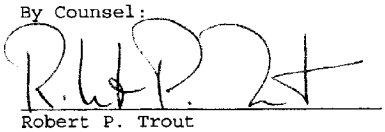
Finally, in order to brief the matter fully, Congressman Jefferson also requests that he and his counsel be permitted to review unredacted paragraphs 129 - 131 of the search warrant affidavit. The context of the redactions suggests that the paragraphs relate to matters to which he is a party.

WHEREFORE, Congressman William J. Jefferson respectfully submits that his motion for return of property should be GRANTED, and all material seized pursuant to the execution of

the search warrant on Rayburn House Office Building Room Number 2113 should be returned to him forthwith.

Respectfully submitted,

WILLIAM J. JEFFERSON
By Counsel:



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Certificate of Service

I hereby certify that on this 24th day of May, 2006 a copy of the foregoing motion together with the accompanying memorandum and proposed order was served on counsel listed below as follows:

BY HAND

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Michael K. Atkinson
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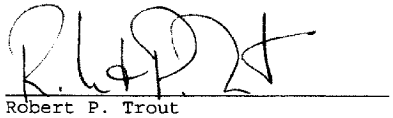

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