

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 STAY PENDING APPEAL AND
STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Congressman William J. Jefferson, by counsel, hereby respectfully moves this court to stay execution of its order dated June 10, 2006, pending the Congressman's appeal of the denial of his motion for return of property. In support of his motion, Congressman Jefferson relies upon the following points and authorities.¹

On May 20, 2006, agents of the FBI executed a search warrant on the office of a Member of the House of Representatives for the first time in this nation's history. The search and the manner in which it was conducted raised significant constitutional questions. Congressman Jefferson was joined by a bipartisan group of House leaders in arguing that the search violated the absolute privilege embodied in the Speech or Debate Clause, and in considering the motion, the

¹ Pursuant to Fed. R. App. Proc. 8(a)(1)(A), a party must ordinarily move for a stay pending appeal in the District Court in the first instance.

court was faced with a constitutional issue of first impression and of historic magnitude.

On May 24, 2006, the Congressman filed a motion for return of property and an emergency motion for interim relief. Before the court had an opportunity to hear the emergency motion, the President of the United States issued his May 25, 2006 Memorandum sequestering the seized materials for 45 days. On May 26, the court recognized the transfer of custody of the seized materials and suspended the search procedures set forth in the warrant pending further order of the court.²

On July 10, 2006, the court entered its order denying the Motion for Return of Property and ordering that the Department

² In his Emergency Motion for Interim Relief, the Congressman had requested that the materials be sealed and secured pending this court's consideration of the Motion for Return of Property. In light of the President's directive and this court's May 25 order calling for the government to file a response to the Congressman's motion by close of business on May 26, Congressman Jefferson and the Department of Justice negotiated and filed a Consent Motion to Reset the Briefing and Hearing Schedule and to address the status of Emergency Motion in light of the President's order. The May 26, 2006 Consent Motion and proposed Order are attached hereto. The parties jointly proposed that as an agreed substitute for the procedures proposed by Congressman Jefferson in his Motion for Interim relief, DOJ would comply with the procedures set forth in the President's Memorandum, **and DOJ would maintain the materials under seal beyond the 45 days, if necessary, in accordance with its terms, pending further order of the court.** The intent of the motion was to ensure that the disposition of the materials would remain within the court's control. It does not appear from the record, though, that the court signed the proposed consent order or signed an order denying the consent motion.

of Justice could regain custody of the seized materials and resume its review of those materials. Congressman Jefferson is filing a timely notice of appeal of that order, and in connection with that appeal he has moved this court to stay its order pending the outcome of the appeal. Pursuant to the Local Rules, counsel for the Congressman has conferred with Assistant United States Attorney Mark D. Lytle, who has advised that DOJ is opposed to this motion.

Congressman Jefferson seeks to vindicate and preserve his absolute privilege under the Speech or Debate clause. The documents have been sequestered, and the Congressman seeks a stay pending appeal in order to maintain the status quo while the litigation proceeds. In the absence of a stay, the documents and computer records will be reviewed by the executive, and the Congressman's right to preserve his privilege will be irretrievably lost.

Statement of Points and Authorities

When considering a motion for stay pending appeal, the court must consider whether the movant has shown: 1) that he has a substantial likelihood of success on the merits; 2) that he will suffer irreparable injury if the stay is denied; 3) that issuance of the stay will not cause substantial harm to other parties; and 4) that issuing a stay will serve the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *United*

States v. Philip Morris, Inc. et.al., 314 F.3d 612, 617 (D.C. Cir. 2003); *In re Lorazepam & Clorazepate Antitrust Litigation*, 208 F.R.D. 1, 3-6 (D.D.C. 2002) (recommending a "flexible" balancing of the factors).

With respect to the first factor, Congressman Jefferson submits that both Supreme Court precedent and the law of this circuit make it clear that agents of the executive branch cannot engage in a wholesale review of all of the records and all of the computer hard drives in the Congressman's office without running afoul of the Constitution. He is, of course, mindful that this court has rejected his constitutional challenge to the search, but "the court is not required to find that ultimate success by the movant is a mathematical probability, and indeed ... may grant a stay even though its own approach may be contrary to the movant's view of the merits." *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977).

The second and third factors clearly support the issuance of a stay. If the executive branch goes ahead and reviews the materials in the absence of stay, the Congressman's absolute privilege will be lost. But DOJ will not be harmed by the issuance of a stay. The documents remain in the custody of the executive, they have been secured, and there is no danger that they will be lost or destroyed. And, the government's grand jury

investigation is continuing unimpeded. Finally, the fourth factor, the public interest, militates in favor of a stay. The public will not suffer any harm in the interim, and the public will benefit from full and fair consideration of this important issue.

Courts have recognized that where the denial of a stay "will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay." *Providence Journal Company v. Patriarca*, 595 F.2d 889, 890 (1st Cir. 1979). The D.C. Circuit has issued a similar instruction:

An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Washington Metropolitan Area Transit Comm., 559 F.2d at 844. In this case, a serious legal issue has been presented, the denial of a stay would cause the Congressman irreparable injury, and the issuance of a stay would not prejudice other parties or the public, so the court should grant the Congressman's motion.

WHEREFORE, Congressman William J. Jefferson respectfully submits that his motion for stay pending appeal should be

GRANTED, and all material seized pursuant to the execution of the search warrant on Rayburn House Office Building Room Number 2113 should remain in the custody of the Solicitor General of the United States until the matter has been resolved on appeal.

Respectfully submitted,

WILLIAM J. JEFFERSON

By Counsel:

A handwritten signature in black ink, appearing to read 'R. P. Trout', written over a horizontal line.

Robert P. Trout

D.C. Bar No. 215400

Amy Berman Jackson

D.C. Bar No. 288654

TROUT CACHERIS, PLLC

1350 Connecticut Avenue, N.W.

Suite 300

Washington, D.C. 20036

Phone: (202) 464-3300

Fax: (202) 464-3319

Certificate of Service

I hereby certify that on this 11th day of July, 2006 a copy of the foregoing motion together with the proposed order was served in the following manner on counsel listed below:

BY MAIL AND E-MAIL

Mark D. Lytle
Assistant United States Attorney
Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, Virginia 22314

Michael K. Atkinson
Trial Attorney
United States Department of Justice
c/o U.S. Attorneys Office
555 4th Street, N.W.
Washington, D.C. 20530

Stephan Oestreicher
Department of Justice
Criminal Division - Appellate Section
Bond Federal Building
Room 10300
1400 New York Avenue, N.W.
Washington, D.C. 20530

Kerry D. Kircher
Deputy House Counsel
U.S. House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515

Roy W. McLeese, III
Chief, Appellate Division
Assistant United States Attorney
for the District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20350



Robert P. Trout

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

RECEIVED

MAY 26 2006

In the Matter of the Search of:

**RAYBURN HOUSE OFFICE BUILDING
ROOM NUMBER 2113
WASHINGTON, D.C. 20515**

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Case No. 06-231-M-01

Chief Judge Thomas F. Hogan

UNDER SEAL

**NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT**

**CONSENT MOTION TO RESET THE BRIEFING AND HEARING SCHEDULE
RELATING TO CONGRESSMAN WILLIAM JEFFERSON'S
MOTION FOR RETURN OF PROPERTY**

For the reasons stated below, the United States of America, by and through its counsel, the United States Attorney for and in the District of Columbia, urges this Court to extend the time within which the government may file its response to the Motion for Return of Property to the close of business on Tuesday, May 30, 2006, and the time within which Congressman Jefferson may file a reply to the close of business on Monday, June 5, 2006. If the motion is granted, the Court would reset the hearing for a date and time convenient to the Court, but no earlier than the week of June 5, 2006. Counsel for Congressman Jefferson consents to the relief requested herein.

STATEMENT

1. On Thursday, May 18, 2006, based on information developed over a number of years from a wide-ranging investigation into bribery and related offenses, the government filed in this Court an application and affidavit for a warrant to search Mr. Jefferson's congressional office for paper documents and computer files related to the bribery scheme. *See generally*: Aff. ¶¶ 1-157.

The application and affidavit also reported that—in an effort to “minimize the likelihood that any potentially politically sensitive, non-responsive items” in the Congressman's office would be subject to discovery—the government would implement a of “special search procedures” to prevent

investigators and the prosecution team from obtaining paper documents and computer files “that may fall within the purview of the Speech or Debate Clause * * * or any other pertinent privilege.” Aff. ¶ 136. Specifically, the application provided for a designated “Filter Team” to review the seized items to see whether they fell within the purview of the Speech or Debate Clause, and to provide those items that were possibly privileged to the Mr. Jefferson’s counsel within 20 days of the search, *id.* ¶ 142, and the Filter Team would ask this Court to review the records for a final determination about privilege, *id.* ¶ 143. If instead the Filter Team determined that the records were unprivileged, it would provide copies to the prosecution team and to Jefferson’s counsel within 10 days of the search. *Id.* ¶ 141. The application provided for similar procedures relating to computer files. *Id.* ¶ 151.

2. Late in the afternoon on Thursday, May 18, this Court granted the government’s application, issued the warrant, and ordered that the search be conducted on or before Sunday, May 21. *See* Aff., pp. 1-3. On Saturday, May 20, federal agents executed the warrant and searched Mr. Jefferson’s office for the paper records and computer files enumerated in the Schedules. In an effort to minimize disturbance of Mr. Jefferson’s office, the agents conducted imaging and verification of computer files instead of removing the computers themselves. During the search, the agents excluded Mr. Jefferson, his counsel, and counsel for the House of Representatives. The agents ultimately seized copies of several computer files and two boxes of paper records. *See generally* Inventory of Seized Items; *see also* CR-15 Vision Quest Search Event Log.

3. a. On Wednesday, May 24, Mr. Jefferson filed in this Court his motion for return of the seized materials under Rule 41 of the Federal Rules of Criminal Procedure. In addition to the return of property, the motion sought “emergency * * * interim relief” in the form of an order

directing: "that the FBI and the Department 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." Mot. 1-2; see Mem. in Support 2-3.

b. On the afternoon of Thursday, May 25, the President personally issued a Memorandum to the Attorney General and the Solicitor General of the United States, directing the Solicitor General to take sole custody of the materials seized from Jefferson's office and to sequester them from anyone outside of the Solicitor General's office for 45 days. Specifically, the Memorandum ordered the Solicitor General to "(a) preserve and seal the [seized] materials"; "(b) ensure that no use is made of the materials"; and "(c) ensure that no person has access to the materials, except that Office of the Solicitor General personnel under the direct supervision of the Solicitor General may have the minimum physical access to the materials essential to the preservation of the materials." Mem. 1. With this sequestration in place to maintain the status quo, the Memorandum (which was also copied to the Speaker of the House of Representatives) further directed that "[t]he Attorney General shall endeavor, and the House of Representatives is respectfully encouraged to endeavor, to resolve any issues relating to the materials through discussions between them in good faith and with mutual institutional respect and, if it should prove necessary after exhaustion of such discussions, through appropriate proceedings in the courts of the United States." Mem. 1-2. In its concluding sentence, the Memorandum provided that it "shall expire on July 9, 2006." Mem. 2. In a public Statement issued in conjunction with the Memorandum, the President

reiterated that the Memorandum “direct[ed] the Department of Justice to seal all the materials recovered from Congressman Jefferson’s office for the next 45 days and not to allow access to anyone involved in the investigation.” Statement 1.

c. Also on the afternoon of May 25, pursuant to the President’s Memorandum and Statement, the Office of the Solicitor General took sole custody of the materials seized from Jefferson’s office. The Solicitor General will now sequester them from anyone outside of his office, including, of course, all FBI agents and DOJ attorneys investigating or potentially prosecuting this case. Significantly, and because of the filtering procedures described in the warrant application and affidavit, *at no time* between the search and the Solicitor General’s assumption of custody *has any agent or attorney investigating or potentially prosecuting the case viewed any of the paper records or computer files seized from Jefferson’s office.*

d. Finally, and also on May 25, this Court ordered, *inter alia*, that the government respond to Mr. Jefferson’s motion for return of property “by no later than close of business on Friday, May 26, 2006.”

4. The prosecution team has not received any of the documents seized from Mr. Jefferson’s office.

ARGUMENT

5. The President has directed the Solicitor General to seal the seized documents and computer files and to deny all agents and attorneys access to them for 45 days. Moreover, no copies of the seized documents were provided to the prosecution team prior to the President’s order. Accordingly, there will be no “review or inspection of the seized items” for 45 days; “the seized items [have been] sequestered and locked in a secure place”; and, by way of this motion, the

government has advised the Court that no "documents or electronic records have been reviewed."

Mot. 1-2.

6. It is appropriate to give the parties additional time to address the important constitutional questions he raises in his Motion for Return of Property. This motion is not made for reasons of delay. In that regard, if the government completes its response prior to Tuesday, May 30, it may file before that date. In light of all the foregoing facts, the Government requests, and counsel for Congressman Jefferson agrees, that the Court should Order the following:

- a. The Government's opposition to the Motion for Return of Property shall be due on or before Tuesday, May 30, 2006.
- b. Congressman Jefferson's reply shall be due on or before Monday, June 5, 2006.
- c. The hearing previously scheduled for May 30, 2006 shall be postponed to a date selected by the Court after June 5, 2006.
- d. As an agreed substitute for the procedures proposed by Congressman Jefferson in his Motion for Interim Relief, the Government shall comply with the procedures set forth in the President's order, and shall maintain the materials under seal beyond the 45 days, if necessary, in accordance with its terms pending further Order of this Court.

CONCLUSION

FOR THE FOREGOING REASONS, the time for filing the Government's response should be extended to close of business on May 30, 2006. The time for filing Congressman Jefferson's reply should be extended to close of business on June 5, 2006. And the Court should reschedule the hearing on this motion for some time thereafter, as is the convenient to the Court. Finally, the Court should order the government to maintain the seized materials under seal in accordance with the terms of the President's order pending further order of this Court.

Respectfully submitted,

KENNETH L. WAINSTEIN
UNITED STATES ATTORNEY IN
AND FOR THE DISTRICT OF COLUMBIA



Michael K. Atkinson
Assistant United States Attorney
Bar No. 430517
555 4th Street, N.W.
Washington, D.C. 20530
Phone: (202) 616-3702
Fax: (202) 307-2304

DATED: May 26, 2006

CERTIFICATE OF SERVICE

This is to certify that this 26th day of May, 2006, a copy of the Consent Motion to Reset the Briefing and Hearing Schedule Relating to Congressman William Jefferson's Motion for Return of Property was served by email and hand-delivery on the following:

Robert P. Trout
Amy Berman Jackson
Trout Cacheris PLLC
1350 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20036
rtrout@troutcacheris.com



Michael K. Atkinson

**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)	Chief Judge Thomas F. Hogan
WASHINGTON, D.C. 20515)	

ORDER

For the reasons stated in the Consent Motion to Reset the Briefing and Hearing Schedule in the above-captioned matter, it is hereby

ORDERED that the Government shall respond to the Motion for Return of Property no later than close of business on Tuesday, May 29, 2006; and that Movant may file a reply by close of business on Monday, June 5, 2006. The hearing previously scheduled for May 30, 2006 shall be postponed to a date selected by the Court after June 5, 2006. As an agreed substitute for the procedures proposed by Congressman Jefferson in his Motion for Interim Relief, the Government shall comply with the procedures set forth in the President's order, and shall maintain the materials under seal beyond the 45 days, if necessary, in accordance with its terms pending further Order of this Court.

SO ORDERED.

May __, 2006

Thomas F. Hogan
Chief Judge