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	)	Judge Thomas F. Hogan
ROOM NUMBER 2113	)	REDACTED VERSION
WASHINGTON, D.C. 20515	)	
	)	

FILED
JUL 17 2006
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

REPLY TO DOJ'S OPPOSITION TO MOTION FOR STAY

In the 218 years since ratification of the Constitution, the executive has never before sought to search a Congressional office. The legality of the unprecedented search of Congressman Jefferson's office was challenged not only by the Congressman, but also by the bipartisan leadership of the House of Representatives. And the legality of the search and seizure has been questioned by legal scholars across the political spectrum. Exhibit A, attached. As this court has itself recognized, "[t]he unprecedented search of Congressman Jefferson's office has raised questions of serious constitutional magnitude that directly implicate the fundamental workings of the federal government." July 10, 2006 Order at 8.

In this Circuit, 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." *Washington Metropolitan Area Transit*

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Commission, 559 F.2d 841, 844 (D.C. Cir. 1977). A stay in this case is appropriate to maintain the *status quo* so that the Constitutional question can be considered by the Court of Appeals without further breach of the absolute privilege that the Speech or Debate Clause confers upon Congressman Jefferson and his legislative records.

I. APPEALABILITY OF THE JULY 10, 2006 ORDER.

A. The July 10, 2006 Order Is Appealable Because There is No Other Means to Protect the Congressman's Rights Under the Speech or Debate Clause.

If the Congressman's analysis of the Speech or Debate Clause is correct, as he respectfully submits it is, then allowing the DOJ to proceed to review the seized documents and computer files -- which contain Speech or Debate material -- would violate the constitutional privilege. Once this review takes place, the constitutional injury has occurred and cannot be undone, even if a theoretical appeal after a criminal trial would vindicate the Congressman's view of the Speech or Debate Clause. Under these circumstances and the governing case law addressing the appealability of orders dealing with Speech or Debate issues, the July 10, 2006 Order is immediately appealable.

In *Helstoski v. Meanor,* 442 U.S. 500 (1979), the Supreme Court held that an order denying a motion to dismiss an

indictment under the Speech or Debate Clause was a final appealable order. Citing *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967), the court noted that "the Speech or Debate Clause was designed to protect Congressman 'not only from the consequences of litigation's results but also from the burden of defending themselves.'" 442 U.S. at 508. In light of that purpose,

> if a Member 'is to avoid *exposure* to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his … challenge to the indictment must be reviewable before … exposure [to trial] occurs.'

Id. (emphasis original)(citation omitted).

The D.C. Circuit reached a similar result by analyzing the appealability of orders dealing with Speech or Debate issues under the collateral order doctrine established by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). As described by the D.C. Circuit,

> Under that doctrine, an interlocutory order of the district court may be appealed immediately if it: (1) "conclusively determine[s] the disputed question"; (2) "resolve[s] an important issue completely separate from the merits of the action"; and (3) would be "effectively unreviewable on appeal from a final judgment."

U.S. v. Rostenkowski, 59 F.3d 1291, 1296 (D.C. Cir. 1995)(citations omitted).

The *Rostenkowski* court held that under the collateral order doctrine, it had jurisdiction to review the district court's order denying Rostenkowski's motion to dismiss the indictment on

Speech or Debate grounds. The court noted that the order in question "self-evidently" satisfied the first two requirements of the collateral order doctrine. 59 F.3d at 1297. It satisfied the third requirement because the Speech or Debate Clause protects a Member of Congress from the burden of defending himself against charges based on protected activities and, therefore, "post-trial review of an order denying a claim of immunity under that Clause is insufficient to vindicate the rights that the Clause is meant to protect." *Id.* For similar reasons, the D.C. Circuit also found that it had appellate jurisdiction over an order denying Rostenkowski's motion for review of grand jury materials to determine if the indictment had been obtained by improper reliance on Speech or Debate materials. 59 F.3d at 1300.

It is true the court found that a trial order denying Rostenkowski's request for pre-trial review of the government's evidence was not appealable, but that finding was not, as the DOJ suggests, based simply on the fact that a "discovery motion" was involved. Rostenkowski sought an extraordinary pre-trial hearing to preview all of the evidence the government intended to introduce against him on the grounds that he needed an opportunity to interpose objections to the introduction of any Speech or Debate material. The court held that the relief Rostenkowski could obtain in such a review would be a

prohibition on the use of any privileged evidence at trial, and that Rostenkowski could obtain the same relief by objecting to the introduction of such evidence at trial. Therefore, the order was not "effectively unreviewable on appeal from a final judgment" as required by the third prong of the collateral order doctrine. 59 F.3d at 1300.[1]

Here, the July 10, 2006 Order satisfies all three prongs of the collateral order doctrine. It plainly constitutes a conclusive determination of the disputed question, and it resolves an important constitutional issue separate from the merits of any prosecution. And, as discussed above, the Congressman will suffer an unreviewable constitutional injury if the examination of his documents proceeds but the legality of that examination cannot be challenged until after a conviction - which may never occur. Although the DOJ repeatedly denigrates the merits of the Congressman's position, it should be subject

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[1] DOJ also attempts to rely on *Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001), which on its facts has little relevance here. *Powell* involved state legislators who sought to intervene and participate in litigation, and to take discovery, but claimed legislative immunity against responding to any discovery. The court rejected the notion that legislative immunity, which is intended to provide absolute protection for legislative activities, could allow legislators to voluntarily participate in litigation but refuse to provide discovery in that litigation. 247 F.3d at 525. In this case, by contrast, the Congressman is seeking to exercise his absolute immunity against executive branch examination of his legislative activities.

to full consideration on appeal before a possible further invasion of the Congressman's rights takes place. For these reasons, and under the holdings in *Helstoski* and *Rostenskowski*, the July 10, 2006 Order is an appealable order.

B. The July 10, 2006 Order is Final and Appealable.

As discussed above, *Helstoski* and *Rostenkowski* establish the immediate appealability of the July 10, 2006 Order. The appealability analysis developed in Rule 41 case law cannot override the necessity of an appeal here to provide full protection of the Congressman's rights under the Speech or Debate Clause. Even if the issue were analyzed under Rule 41, however, the July 10, 2006 Order should also be found to be appealable.

While orders denying motions for return of property are generally treated as interlocutory, the Supreme Court has recognized that such orders *are* final and appealable when "the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." *DiBella v. U.S.*, 369 U.S. 121, 131-32 (1962). Contrary to the DOJ's arguments, this appeal falls within the terms of the *DiBella* rule.

The DOJ first asserts without analysis that the Congressman's motion is "arguably" tied to a criminal prosecution *in esse*. The circuits are split with regard to the

question of whether a criminal prosecution is in existence prior to an indictment, arrest, or similar accusatory event. The D.C. Circuit does not appear to have addressed this issue since *DiBella*. The Congressman submits that this court should follow those circuits that have held that a criminal prosecution is not in being until there has been an indictment or arrest. *See Sovereign News Co. v. U.S.*, 690 F.2d 569 (6th Cir. 1982); *Mr. Lucky Messenger Service, Inc. v. U.S.*, 587 F.2d 15 (7th Cir. 1978) *In re Grand Jury Proceedings*, 716 F.2d 493 (8th Cir. 1983); *Blinder, Robinson & Co., Inc. v. U.S.*, 897 F.2d 1549 (10th Cir. 1990).[2] This rule properly recognizes the difference between the rights and remedies available to a party during an investigation - which may or may not result in a prosecution - and after charges have been brought. Because the Congressman has not been indicted, his motion is not tied to a criminal prosecution *in esse*.

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[2] For cases holding that the existence of a grand jury investigation, even pre-indictment, constitutes a criminal prosecution in esse, *see Angel-Torres v. U.S.*, 712 F.2d 717 (1st Cir. 1983); *Standard Drywall, Inc. v. U.S.*, 668 F.2d 156 (2d Cir. 1982); *U.S. v. Furina*, 707 F.2d 82 (3d Cir. 1983); *U.S. v. Regional Consulting Services*, 766 F.2d 870 (4th Cir. 1985); *In re Grand Jury Proceedings*, 724 F.2d 1157 (5th Cir. 1984); *Andersen v. U.S.*, 298 F.3d 804 (9th Cir. 2002); *see also In the Matter of Grand Jury Proceedings*, 730 F.2d 716 (11th Cir. 1984)(pending criminal investigation may indicate that a Rule 41 motion is tied to an existing criminal prosecution).

DOJ next argues that the Congressman's motion does not meet *DiBella's* requirement that the motion be solely for return of property, because the Congressman also sought to preclude the DOJ from reviewing his documents and computer files. *See* Opposition at 6. But those requests were part and parcel of the Congressman's single central claim: that the search and ongoing review of his materials violated the Constitution. Also, it is clear from *DiBella* and the other cases relied on by the DOJ that the court's concern was with motions that sought suppression of evidence as well as the return of property. *DiBella* noted that a motion seeking suppression of evidence at a forthcoming trial was not severable from the trial itself, 369 U.S. at 127, and outlined the dangers of permitting immediate appeals of denials of motions to suppress. 369 U.S. at 129.

The Congressman's motion, however, was not directed to the suppression of evidence at trial. Instead, its purpose was to protect his rights under the Speech or Debate Clause. Those rights, as argued by the Congressman and *amicus*, were violated by the search of his office and would be further violated by any review of his documents that this court's order now permits. Therefore, the Congressman's request for return of all of his documents, coupled with a request for a prohibition on review until the return was accomplished, was necessitated solely by Speech or Debate considerations.

The text of Rule 41 itself also supports the conclusion that the Congressman's motion was not a suppression motion. Prior to 1989, Rule 41(e) provided that any property returned pursuant to a Rule 41 motion "would not be admissible in evidence at any hearing or trial" (quoted in *Blinder, Robinson*, 897 F.2d at 1554), creating at least a presumption that any Rule 41 motion was intended to suppress evidence. In 1989, the rule was changed to remove this language. *See* Fed.R.Crim.Pro. 41(g). Rule 41(h) now provides that "[a] defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides." This court is not the site of the pending grand jury investigation of Congressman Jefferson. Under the terms of the rule, therefore, the Congressman's motion was not a suppression motion.

More importantly, however, the Congressman's motion sought the return of property on the grounds that its seizure violated the Speech or Debate Clause, and its continued possession and review by the DOJ would engender further violations of the clause. The Congressman's motion was solely addressed to return of property and was not tied to a criminal prosecution *in esse*. Accordingly, even if the Rule 41 analysis were reached here, the July 10, 2006 Order is appealable under the standard in *DiBella*.

II. LIKELIHOOD OF SUCCESS ON THE MERITS.

The parties naturally disagree about the likelihood of success on the merits. DOJ repeatedly cites to this court's opinion as support for its assertion that the Congressman is not likely to succeed on appeal. Of course, that is the opinion that the Congressman respectfully intends to appeal. Indeed, in every case in which a court has granted a stay pending appeal, the movant was unsuccessful on the merits in the lower court. As one lower court has observed:

> The Court, perhaps not surprisingly, believes the … Order to be a proper declaration of the parties' constitutional rights. A district court, however, may properly stay its order pending appeal where such order involves the determination of "substantial and novel legal questions."

In re Worker's Compensation Refund, 851 F. Supp. 1399, 1401 (D. Minn. 1994). In short, especially as here, where the opinion dealt with a matter of first impression on a significant Constitutional question, the fact that the district court obviously believes its ruling to be correct should not drive the decision whether to maintain the *status quo* while the matter is on appeal.

III. HARM TO CONGRESSMAN JEFFERSON.

DOJ downplays the harm to the Congressman that would flow from the denial of a stay. It is true that what's done is done. It is also true that in the absence of a stay, DOJ proposes to

do it again. That is, the executive (i.e., DOJ's filter team) will undertake an unfettered review of the materials seized from the Congressman's office without his consent.[3] The important constitutional principle which the Congressman seeks to vindicate on appeal will again be breached in the absence of a stay. And because the privilege is absolute, there is no place for balancing how much Congressman Jefferson will be harmed. See *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 510 (1975)("The speech or debate protection provides an absolute immunity from judicial interference.").

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[3] DOJ says that it will be employing electronic search tools to aid in the search of the seized computer hard drives. Opp. at 11, n.6 ("With regard to the computer files on the Congressman's hard drives, no human eyes will ever see the vast majority of them; the narrow search terms … will automatically and electronically cull out the files unrelated to the investigation, thereby minimizing even the *filter team's* possible exposure to privileged items.") DOJ's search protocol ignores the fundamental reality that the search will be conducted by an FBI agent. The human agent will be searching not only the complete, unredacted computer hard drive taken from the Congressman, but those seized from every single member of his legislative staff. Moreover, the search terms do not guarantee that the agents will not be exposed to privileged material. The list found on Schedule C of the warrant includes such names as Abubakar, Obasanjo, and Sassuo-Ngesso, African officials whose names could well be found in a host of legislative materials. All three are listed even though Obasanjo nor Sassuo-Ngesso do not seem to be implicated in the investigation at all. The list also includes the names "Jackson" and "Simmons," names sufficiently common that the search is likely to generate a large number of documents with no connection to the investigation.

In asserting that the Congressman will not suffer enough harm to warrant a stay, DOJ continues to insist that the use of a filter team cures the constitutional objection. DOJ once again misperceives the purpose and the effect of the Speech or Debate clause. The Speech or Debate Clause was designed "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States v. Johnson,* 383 U.S. 169, 181 (1966); *see also Gravel v. United States,* 408 U.S. 606, 616 (1972). ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.")

In the end, DOJ's argument is that the use of a filter team eliminates the injury inherent in the invasion of the Congressman's privilege.[4] This argument is based on DOJ's mistaken view that the Speech or Debate clause protects against the <u>use</u> of privilege materials as evidence against Members of

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[4] While DOJ favors the use of a filter team when questions of privilege are raised in the context of a subpoena or a search, the courts have not necessarily agreed that law enforcement personnel should be making privilege determinations in the first instance or that measures intended to separate the prosecution team from the review team are sufficient. *See, e.g., United States v. Stewart,* 2002 WL 1300059, *8 (S.D.N.Y. June 11, 2002)("[R]eliance on the implementation of a Chinese Wall, especially in the context of a criminal prosecution, is highly questionable and should be discouraged.")(citation omitted).

Congress. But as the Court of Appeals has made clear, the Speech or Debate Clause does not simply protect a Member against the use of his documents against him; it is a privilege shielding the Member's legislative materials from discovery.

> B & W urges us to join the Third Circuit in holding that even though the Speech or Debate Clause bars the use of documents as *evidence* against Members, it does not privilege them against "discovery" -- and thus does not justify congressional refusals to disclose. We do not accept the proposition.

Brown & Williamson, 62 F.3d at 420-21.

IV. HARM TO DOJ; IMPACT ON THE PUBLIC INTEREST.

DOJ asserts a need for expedition and a public interest "in a prompt and final determination of whether a sitting United States Congressman accepted and paid out bribes." Opp. at 12. DOJ's argument that time is of the essence is undermined by several factors. First, DOJ has recently embarked on additional, extremely time consuming evidence collection efforts that will prolong the investigation at least as long as it would take for the court to review this matter, if not longer.[5]

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[5] *See* 152 Cong. Rec. H4895 (daily ed. June 29, 2006)(Communication from the Chief Administrative Officer of the House notifying the Speaker pursuant to Rule VIII of the Rules of the House of Representatives of the receipt of a grand jury subpoena). [redacted]

(Continued on next page)

Second, it is not unusual that a grand jury investigation into alleged complex white collar offenses would be still ongoing after a year. It is a matter of public knowledge that DOJ has multiple pending criminal investigations, involving multiple sitting United States Congressmen, that have been pending for considerably longer than this investigation. DOJ protests too much when it claims it cannot tolerate the stay sought in this instance.

Third, there is a dispute about whether DOJ "has been unable to obtain the evidence sought through any reasonable means short of a search warrant." Opp. at 12. Whether or not DOJ was required to exhaust them, alternative means have been available that would have provided DOJ with access to all of the non-privileged documents.

Finally, DOJ surely knew that the unprecedented search of a Congressional office would provoke an immediate legal challenge from the Congressman, and potentially from Congress, so DOJ must

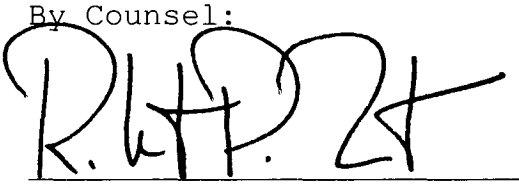
[redacted]

have anticipated that there might very well be some delay between the time it executed the warrant and when the matter was resolved by the courts. As the *Helstoski* and *Rostenkowski* cases cited above establish, the courts have been willing to tolerate some delay -- even in the prosecution of Congressmen -- when Speech and Debate issues are at stake.

Even if the court grants the stay, the investigation itself can continue to proceed. The public faces no threat to its health or safety. And, the fact that the leaders of both political parties in the House of Representatives saw fit to come together in a rare bipartisan effort to brief this issue for the court suggests that the public interest in the legal resolution of the constitutional question is quite strong. Thus, DOJ can point to no actual harm that it or the public would suffer as a result of the issuance of a stay pending appeal. Under those circumstances, in light of the incurable nature of an invasion of an absolute privilege and the significance of the issue to be appealed, the balance of the equities supports the granting of the Congressman's motion for stay pending appeal. *See Washington Metropolitan Area Transit Comm.,* 559 F.2d at 844.

Respectfully submitted,

WILLIAM J. JEFFERSON
By Counsel:



Robert P. Trout
D.C. Bar No. 215400
Amy Berman Jackson
D.C. Bar No. 288654
Gloria B. Solomon
D.C. Bar No. 358880
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 17th day of July, 2006 a copy of the foregoing was served on counsel listed below as follows:

BY MAIL AND ELECTRONICALLY

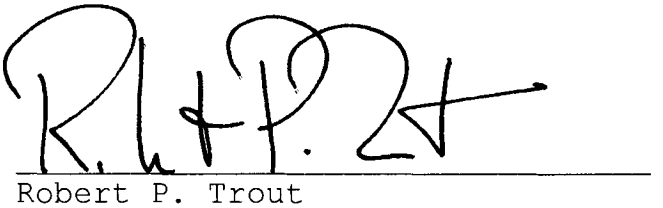
Mark D. Lytle
Assistant United States Attorney
Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, Virginia 22314

Michael K. Atkinson
Assistant United States Attorney
for the District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20350

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

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

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

Exh. A

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ONE HUNDRED NINTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

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U.S. House of Representatives
Committee on the Judiciary

Oversight Hearing on "RECKLESS JUSTICE: Did the Saturday Night Raid of Congress Trample the Constitution?"

Tuesday, May 30, 2006
9:30 a.m.; 2141 Rayburn H.O.B.

Witness List

Professor Charles Tiefer, Professor of Law, University of Baltimore School of Law

The Honorable Robert S. Walker, Chairman, Wexler & Walker, and Former Member of Congress from the State of Pennsylvania

Professor Jonathan Turley, J.B. & Maurice C. Shapiro Professor of Public Interest Law, The George Washington University Law School

Bruce Fein, Principal, The Lichfield Group, Inc.

UNIVERSITY OF BALTIMORE SCHOOL OF LAW

Charles Tiefer
Professor of Law
CTIEFER@ubalt.edu

3904 Woodbine Street
Chevy Chase, MD 20815
Tel: (301) 951-4239

TESTIMONY BEFORE THE 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

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[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.

(END)

TESTIMONY . ALKING POINTS OF ROBE. . . S. WALKER

Prepared for Hearing on *"Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?"*

Before the House Judiciary Committee
Tuesday, May 30, 2006

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.

(over)

- 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. 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, and such procedures and protocols can and should be worked out consistent with the Speech or Debate Clause.

    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.

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?

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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

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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).

functions. This was done in recognition that some of our most important constitutional values and traditions are not spelled 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.

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

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 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

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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

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:

- **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.

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.

A. The Origins of the Speech or Debate Clause

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

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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).

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 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

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

> 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. The Judicial Interpretation of the Clause

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 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

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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)).

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.

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 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

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[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, 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:

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.

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

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> 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).

[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)).

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.

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

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

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 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.

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

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.

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

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

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

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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.

of 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]

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

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.

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

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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

an office of a house of Congress. It, not Rep. Jefferson, deserved more circumspection and restraint.

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

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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 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)).

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 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.

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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)).

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

Jonathan Turley
Shapiro Professor of Public Interest Law
George Washington University Law School
2000 H St., N.W.
Washington, D.C. 20052
(202) 994-7001
jturley@law.gwu.edu

Statement of Bruce Fein

before the House of Representatives Committee

On The Judiciary

Re: "Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?"

May 30, 2006

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.

EXHIBITS REDACTED