UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH OF	)	
RAYBURN HOUSE OFFICE BLDG.	)	Case No. 06-231 M-01
ROOM NUMBER 2113	)	Chief Judge Thomas F. Hogan
WASHINGTON, D.C. 20515	)	

MEMORANDUM OF POINTS AND AUTHORITIES OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES AS AMICUS CURIAE

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June 7, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

EXHIBIT LIST

MEMORANDUM OF POINTS AND AUTHORITIES OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES AS AMICUS CURIAE

The Bipartisan Legal Advisory Group of the U.S. House of Representatives, pursuant to this Court's Order of May 31, 2006, respectfully submits this Memorandum of Points and Authorities as amicus curiae in connection with the Motion for Return of Property, filed May 24, 2006, by the Honorable William J. Jefferson, U.S. Representative for the 2nd congressional district of Louisiana.[1]

The Bipartisan Legal Advisory Group does not file this Memorandum to protect Congressman Jefferson from criminal investigation; to suggest that he or any other Member of Congress is above the law or immune from prosecution; or to suggest that no search warrant can ever be executed on a congressional office. Rather, the Bipartisan Legal Advisory Group files this Memorandum because the particular search the Justice Department carried out on Congressman Jefferson's office was both unconstitutional and unnecessary. In carrying out its responsibilities, the Justice Department too must conform its conduct to the law and to the Constitution. It failed to do that in this case.

INTRODUCTION

On Saturday evening, May 20, 2006, and proceeding into Sunday morning, May 21, 2006, with no advance notice to the House leadership, 15 or so FBI agents executed a search warrant issued by this Court on Congressman Jefferson's Capitol Hill congressional office. The execution of the warrant – insofar as we have been able to determine, the first to be

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[1] The members of the Bipartisan Legal Advisory Group are the Honorable J. Dennis Hastert, Speaker of the House; the Honorable John A. Boehner, Majority Leader; the Honorable Roy Blunt, Majority Whip; the Honorable Nancy Pelosi, Democratic Leader; and the Honorable Steny H. Hoyer, Democratic Whip.

executed on a congressional office since the Constitution's adoption more than 200 years ago – has created a serious constitutional conflict between the executive and legislative branches of the federal government, a conflict that could have profound and far-reaching consequences.

The execution of the warrant poses a grave threat to the Separation of Powers principle that is the very foundation of our governmental structure. That principle is implemented by, among other constitutional provisions, the Speech or Debate Clause: "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." U.S. Const., art. I, § 6, cl. 1. The Speech or Debate Clause was included in the Constitution to "insure that the legislative function the Constitution allocates to Congress may be performed independently," *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 502 (1975), and it "serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *U.S. v. Johnson*, 383 U.S. 169, 178 (1966).

The Speech or Debate Clause – which applies to all activities within the "legislative sphere" and provides Members with, among other things, an absolute privilege against being questioned about legislative activities and against being forced to disclose legislative documents in criminal and civil cases – is critically important to Congress' relationship with the other two branches of the federal government and is a fundamental pillar of Congress' independence. (Of course, not everything that a member does is "legislative.")

The dangers created by the Justice Department's actions in this case far transcend in significance the possibility that it may not get documents it deems important to its investigation of one particular Member of Congress. That is so because our system of checks and balances requires that all three branches remain vigorously independent. Weaken the Speech or Debate

Clause in the manner the Justice Department seeks in this case, and the legislative branch of the government is necessarily weakened. Weaken the legislative branch, and the likelihood of abuses of authority by the other branches necessarily increases.

In this case, prior to the May 20 raid, the Justice Department was aggressively – and appropriately – investigating Congressman Jefferson for alleged criminal activity. However, in prosecuting alleged criminal activity, as well as in carrying out its other responsibilities, the Department is duty bound to support, defend, and conform its actions to our Constitution – and not just selected provisions of the Constitution, but *all* of the Constitution. On May 20 and 21, the Justice Department disregarded that duty.

In executing the search warrant on Congressman Jefferson's office, the Justice Department ignored more than 200 years of comity and respect for a coordinate branch of government; allowed its single-minded pursuit of a single criminal investigation to obscure its constitutional judgment; and unnecessarily damaged the fabric of our constitutional structure.

This Court must now repair that damage. We suggest that it do so by (i) first declaring unconstitutional both the warrant and its execution, for all the reasons articulated below, and (ii) then taking into account, in determining an appropriate remedy, the outcome of current negotiations between the House and the Justice Department aimed at devising an agreed-upon set of protocols and procedures under which search warrants can be executed constitutionally on House offices.

FACTUAL BACKGROUND

1. August 3, 2005 - Search Warrant for Congressman Jefferson's Vehicle.

Congressman Jefferson and the public first became aware on August 3, 2005, that he

was under criminal investigation by the Office of the U.S. Attorney for the Eastern District of Virginia.[2] On that day, FBI agents arrived on Capitol Hill with a search warrant, signed by Magistrate Judge Alan Kay of the U.S. District Court for the District of Columbia, for Congressman Jefferson's automobile. When the agents realized the vehicle was located in the garage of the Rayburn House Office Building – a part of the Capitol Hill complex – they, in cooperation with the U.S. Capitol Police ("Capitol Police"), secured the vehicle. The Capitol Police contacted the House Sergeant at Arms, who contacted the House Office of General Counsel ("House Counsel") and, while the FBI agents waited, House Counsel notified Congressman Jefferson, who then agreed to cooperate with the search. The Congressman had the keys to his vehicle provided to the FBI, and stated that to whatever extent his vehicle might contain legislatively-privileged materials, he would not assert the privilege with respect to those materials for purposes of the search.

At that point, the Capitol Police assisted the FBI in towing the Congressman's vehicle to an FBI facility, in accordance with the FBI's standard procedure, where the agents searched the vehicle and seized certain materials. An Assistant Counsel from the Office of House Counsel was present during the search.

The prosecutors subsequently advised House Counsel that, in applying for the warrant, they had advised Magistrate Judge Kay that they believed the vehicle was parked on the street in front of Congressman Jefferson's home on F Street, N.E. in Washington, D.C. In other

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[2] According to the Government's Response to Representative William Jefferson's Motion for Return of Property at 3 (May 30, 2006) ("Response"), the Congressman is under investigation for bribing or conspiring to bribe a public official, committing or conspiring to commit wire fraud, and bribing or conspiring to bribe a foreign official.

words, the prosecutors maintained that it was not their original intention to execute the warrant within the Capitol Hill complex.

2. August 3, 2005 - Grand Jury Document Subpoenas.

On August 3, 2005, the Justice Department also served grand jury document subpoenas on Congressman Jefferson, as the custodian of records for his congressional office, as well as on three members of the Congressman's staff. All four subpoenas called for production of exactly the same documents. The service of grand jury subpoenas in cases of this nature is well within the bounds of normal practice.[3]

Through his personal counsel, Congressman Jefferson instructed his staff to search his office for all documents potentially responsive to the subpoena served on him. The Congressman did not empower his staff to make final determinations about responsiveness, privilege or ultimate disposition. Rather, he reserved those determinations for himself, taking the position that the subpoenaed documents belonged exclusively to him and were in his exclusive possession, custody and control.

From the beginning, Congressman Jefferson's office took steps to preserve potentially responsive documents, as well as to preserve all other documents and materials in the office. When the prosecutors raised concerns in mid-September 2005 about the security and integrity of the documents identified as potentially responsive to the Jefferson subpoena, House Counsel – with the knowledge and assent of Congressman Jefferson and his counsel – arranged for the Congressman's Chief of Staff and Deputy Chief of Staff to secure the potentially responsive

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[3] A copy of the Jefferson subpoena duces tecum has already been submitted to the Court by Congressman Jefferson under seal.

documents in a locked drawer, to which only those two individuals had access. The prosecutors deemed those arrangements satisfactory. *See* Letter from Mark D. Lytle, AUSA to David Plotinsky (Sept. 16, 2005), attached as Exhibit 1.

Additional information that pertains to the subpoenas and the preserved documents is contained in the Supplemental Memorandum we are filing under seal.

3. May 20, 2006 - Search Warrant for Congressman Jefferson's Office.

On Saturday May 20, 2006, FBI agents again arrived at the Rayburn Building, this time with a search warrant issued by this Court two days earlier for Congressman Jefferson's congressional office in the Rayburn Building. This time, the FBI agents adopted an approach that was radically different from their measured efforts last August to obtain information.

Neither the FBI nor the Justice Department provided any advance notice to the House leadership, House Counsel or the U.S. Capitol Police. Instead, the FBI called Acting Capitol Police Chief Christopher McGaffin at home at 5:15 pm and, without telling him why, insisted that he meet the FBI at the Rayburn Building forthwith. When McGaffin arrived at the Rayburn Building, where the media was already waiting, the FBI showed him the warrant and demanded access to Congressman Jefferson's office. Although McGaffin called the House General Counsel for advice and asked the FBI not to proceed until she arrived, the FBI threatened to pick the office door lock if not given immediate entry.

At approximately 7:00 pm, the agents entered Congressman Jefferson's office where they remained until approximately 1:00 pm Sunday afternoon, May 21. Because the FBI agents were in the office for approximately 18 hours, and because the warrant enumerated several broad categories of documents to be seized, the agents had to have reviewed every, or virtually

every, document in the Congressman's office.[4]

The FBI refused to permit House Counsel and the Capitol Police to enter the office while the search was proceeding. Congressman Jefferson also was not present during the search, and his personal counsel, who requested that she be given access to the office while the search was proceeding, also was refused entry. "Policy" was the only reason given by the FBI for refusing entry to House Counsel and Congressman Jefferson's counsel.

Subsequently, the FBI prepared an inventory of the documents seized from Congressman Jefferson's office, again outside the presence of House Counsel and Congressman Jefferson's counsel. The inventory indicates that the FBI seized, among other things, one or two boxes of paper records, an unspecified number of floppy disks, and copies of 14 computer hard drives.[5]

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[4] Schedule B to the warrant identifies four categories of documents to be seized: (a) all documents from January 2001 to present related to 30 individuals and entities; (b) all documents from January 2001 to present reflecting any communications between the Congressman and any African government officials that relate to any of the 30 individuals and entities; (c) all documents from January 2001 to present related to appointments, visits and telephone messages for the Congressman related to any of the 30 individuals and entities; and (d) images of all electronic equipment and devices capable of storing or transmitting electronic computer impulses or data that relate to any of the information set forth in (a)-(c).

Schedule B to the warrant is *not* identical to the document schedule attached to the earlier grand jury subpoenas. That is, the warrant directs seizure of many documents that the prosecutors had not attempted to obtain earlier by subpoena.

[5] The FBI's handling of the Jefferson search warrant stands in marked contrast to its handling of a 1990 warrant authorizing an office search of a member of the federal judiciary – to whom, of course, the Speech or Debate Clause does not apply. In 1990, the FBI suspected that federal judge Robert F. Collins had accepted bribes. *U.S. v. Collins*, 972 F.2d 1385 (5th Cir. 1992). Early in the investigation and before seeking any warrants, the FBI notified the Chief Judge of the Fifth Circuit of its suspicions and he assigned another Circuit Judge to oversee the

(continued...)

4. May 18, 2006 - Affidavit Filed in Support of Search Warrant.

On May 18, 2006, the day the search warrant for Congressman Jefferson's office was issued, the FBI filed an 83-page affidavit in support of its application for the warrant. *See* Affidavit of Special Agent Timothy R. Thibault in Support of Application of [sic] Search Warrant (May 18, 2006) ("Thibault Affidavit"). Among other things, the Thibault Affidavit spelled out "special procedures" to be followed, once the warrant had been executed and documents seized, to "identify information that may fall within the purview of the Speech or Debate Clause privilege, U.S. Const., art. I, § 6, cl. 1." Thibault Affidavit at ¶ 136. The Justice Department obviously was aware that, in seeking the warrant, it was treading on constitutionally suspect ground, as it should have been. *See* US Attorney's Manual, Criminal Resource Manual at 2046, *available on-line at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02046.htm.

The "special procedures" include the following:

- seized material to be given to "Filter Team," consisting of one attorney from U.S. Attorney's Office for the Eastern District of Virginia (which is conducting

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[5](...continued)
investigation. *Id.* at 1390. Subsequently, the FBI obtained a warrant from the Chief Judge and the supervising circuit judge to search Collins' private office in his chambers. *Id.* at 1393. In executing the warrant, the FBI first brought Collins to his chambers (at his request) to search his person. Then, the FBI allowed Collins to remain in the office while the office was searched. *Id.* at 1394. In addition, in searching the office of a Collins associate, the FBI ensured that that individual, or someone on his behalf, was present during the search. *Id.*

When the FBI searched Congressman Jefferson's home in New Orleans on August 3, 2005, he was permitted to be present. *See* Affidavit of FBI Special Agent Stacey E. Kent at ¶¶ 2-3 (May 29, 2006) ("Kent Affidavit"), attached to Response.

the investigation), one Justice Department attorney, and one FBI agent, none of whom were previously involved in investigation, Thibault Affidavit at ¶ 139;

- Filter Team to "validate" responsiveness to warrant of records seized, and to return to Jefferson any non-responsive records, *id.* at ¶ 140;
- Filter Team to review remaining materials "to determine if they may fall within the purview of the Speech or Debate privilege . . . or any other pertinent privilege," *id.* at ¶ 141;[6]
- Filter Team to *immediately* provide to prosecution team any documents the former concluded were not covered by Speech or Debate or other privilege, *id.*;
- Filter Team to provide Jefferson with log of materials it concluded were "potentially within the purview of the Speech or Debate Clause privilege . . . or any other pertinent privilege," within 20 business days of the search, *id.* at ¶ 142, and to return to Jefferson any documents it deemed to be actually privileged, *id.* at ¶ 142 n.38;
- Filter Team to present potentially privileged documents to Court for, presumably, ex parte privilege determination, unless Jefferson consented after review of log to their release to prosecution team, *id.* at ¶ 143;
- with respect to computer files, non-case agents to copy entire hard drives of office computers without regard to content, *id.* at ¶ 145, and file original copies

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[6] There is no suggestion in the "special procedures" of any standard by which the Filter Team would make such a determination or how the Filter Team could possibly know which documents are legislative and which are not.

with Court, *id.* at ¶ 147;

- FBI forensic team to search replicated copies of hard drives using search terms specified on warrant Schedule C, *id.* at ¶ 148;
- Filter Team to "validate" responsiveness to warrant of computer files identified by forensic team as potentially responsive; any files not deemed responsive "will not be included for any further review or examination by the government absent court process or consent" by Jefferson, *id.* at ¶ 150;
- Filter Team to review remaining computer files "to determine if they may fall within the purview of the Speech or Debate privilege . . . or any other pertinent privilege," *id.* at ¶ 151;[7]
- Filter Team to immediately provide to prosecution team any computer files former concluded were not covered by Speech or Debate or other privilege, and to provide to Jefferson within 60 days from commencement of privilege review copies of any such non-privileged computer files, *id.*;
- Filter Team to provide Jefferson with log of files it concluded were "potentially within the purview of the Speech or Debate Clause privilege . . . or any other pertinent privilege" (and copies of files themselves), within 60 days from commencement of privilege review, *id.* at ¶ 152;
- computer files deemed to be actually privileged to be maintained by Filter Team

[7] Again, there is no suggestion of any standard by which the Filter Team would make such a determination or how the Filter Team could possibly know which computer files are legislative and which are not.

but not provided to prosecution team, *id.* at ¶ 152 n.40;

- Filter Team to present potentially privileged computer files to Court for, presumably, ex parte privilege determination, unless Jefferson consented after review of log and copies to their release to prosecution team, *id.* at ¶ 153.

Needless to say, there is no role anywhere in these "special procedures" for Congressman Jefferson or his counsel.

The Justice Department – apparently having belatedly realized that its constitutional position is even more precarious than it first believed – has since proposed an additional "special procedure" as an "accommodation":

- while Filter Team is reviewing documents and making privilege determinations, Congressman Jefferson to be afforded opportunity to do the same, Response at 2, 11, 14-15.

There is no suggestion in the Thibault Affidavit – at least not in the portion released publicly – that the FBI had any concerns that potential evidence in Congressman Jefferson's office was in any danger of being tampered with or destroyed. In our extensive discussions with high-level Justice Department officials during the week following the raid, they repeatedly assured us that their decision to authorize the raid was not based on any exigent circumstances such as fear that potential evidence in Congressman Jefferson's office would be tampered with or destroyed.

However, with its Response, the Justice Department filed the Kent Affidavit which alleges that Congressman Jefferson may have attempted to conceal documents during a search of his New Orleans home on August 3, 2005. The Response then argues that therefore (i) the

Justice Department had a fear that "any production in response to the subpoenas would [not] be complete, and (ii) "the Government was left with no other means of obtaining office records." Response at 29-30. This argument is inconsistent with the facts.

First, Congressman Jefferson has been represented by able and reputable counsel since this matter broke last August. The notion that they would subvert, or permit their client to subvert, the subpoena process is difficult to take seriously. Second, when the prosecutors raised concerns in September about the security and integrity of the documents identified – by staffers, not by the Congressman himself – as potentially responsive to the Jefferson subpoena, the Congressman and House Counsel addressed those concerns in a manner the prosecutors deemed satisfactory. *See supra* at 5-6. Third, the Justice Department can hardly claim that something the Congressman allegedly tried to do in August 2005 justifies a search of his office in May 2006, *nine months later*. Additional information that pertains to the Justice Department's new argument is described in the Supplemental Memorandum we are filing under seal.

The Thibault Affidavit asserts that "the government has exhausted all other reasonable methods to obtain these records in a timely manner short of requesting this search warrant." Thibault Affidavit at ¶ 132. However, the three preceding paragraphs which supposedly provide the factual support for this assertion have been redacted from the publicly released version of the affidavit. Additional information that pertains to the assertion in ¶ 132 of the Thibault Affidavit is described in the Supplemental Memorandum we are filing under seal.

The Justice Department and FBI did not contact the leadership of the House, House Counsel or anyone else in the House insofar as we are aware, before applying to this Court on

May 18 for issuance of the warrant.

5. Subsequent House and Executive Branch Actions.

The House's reaction to the execution of the search warrant was strong and swift.[8] The House Committee on the Judiciary conducted an oversight hearing on the constitutional implications of the raid on Tuesday, May 30, 2006, *available on-line at* http://judiciary.house.gov/oversight.aspx?ID=242. The four witnesses at the hearing all characterized the raid as both unconstitutional and unnecessary.[9]

On Thursday, May 25, after several days of tense negotiations between the House and high-level Justice Department and White House officials, the President ordered the Attorney General, acting through the Solicitor General, to seal for 45 days the materials seized from Congressman Jefferson's congressional office. The President also directed his Attorney General, and encouraged the House, to

> endeavor [] to resolve any issues relating to the materials through discussions between them in good faith and with mutual institutional respect and, if it should prove necessary after exhaustion of such discussions, through appropriate proceedings in the courts of the United States.

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[8] *See, e.g.*, Speaker Statement Regarding the [FBI] Search of Congressional Office (May 22, 2006), attached as Exhibit 2; Joint Statement from Speaker Hastert and Leader Pelosi (May 24, 2006), attached as Exhibit 3.

[9] The four witnesses were Jonathan Turley, Professor of Law at George Washington University Law School; Charles Tiefer, Professor of Law at the University of Baltimore School of Law, and former solicitor and Deputy General Counsel to the U.S. House of Representatives (1984-95); the Honorable Robert S. Walker, former Member of the U.S. House of Representatives from Pennsylvania (1977-97); and Bruce Fein, Adjunct Professor of Law at George Washington University Law School, and former Associate Deputy Attorney General (1981-82), former FCC General Counsel (1983-84), and former Research Director for the Joint Congressional Committee on Covert Arms Sales to Iran (1986-87).

Memorandum for the Attorney General and the Solicitor General of the United States (May 25, 2006), attached as Exhibit 4. The 45-day period will expire July 9, 2006.

The same day, the Speaker and Democratic Leader of the House directed House Counsel to "begin negotiations with the Department of Justice regarding the protocols and procedures to be followed in connection with evidence of criminal conduct that might exist in the offices of Members." Joint Statement of Speaker Hastert and Leader Pelosi (May 25, 2006), attached as Exhibit 5.

ARGUMENT

I. The Separation of Powers Principle Is a Fundamental Component of Our Constitutional Structure and Serves the Essential Function of Protecting Americans – All Americans – from Abuses of Power.

"[C]onstant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. . . . To prevent this abuse, it is necessary from the very nature of things that power should be a check to power." Montesquieu, *Spirit of the Laws*, XI, Ch. 4 (Thomas Nugent trans., D. Appleton and Co. 1900) (1748).

In The Federalist Papers, No. 47, James Madison described "the celebrated Montesquieu" as the "oracle who is always consulted and cited on th[e] subject [of separation of powers]." Madison and the other Founders accepted, on a very profound level, Montesquieu's ideas about the importance of checking power with power. As every school child knows, the Founders provided in the Constitution for three separate branches of government – legislative, executive and judicial – each with different powers and responsibilities, and each intended to check and balance the other two branches. In this manner,

the Founders intended to prevent overreaching and abuses of power by any one branch and thereby to safeguard American liberty.

The fundamental importance of the Separation of Powers principle cannot be overstated. It is the principle "on which the whole American fabric has been erected." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). "It is . . . evident that none of them [the three branches of the federal government] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." The Federalist No. 48 (James Madison).

The Separation of Powers principle may be violated in two ways.

> One branch may interfere impermissibly with the other's performance of its constitutionally assigned functions. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another.

INS v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring). *See also Loving v. U.S.*, 517 U.S. 748, 757 (1996) ("it remains a basic principle . . . that one branch of the Government may not intrude upon the central prerogatives of another"); *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) (one branch of government may violate the separation of powers by "prevent[ing another] Branch from accomplishing its constitutionally assigned functions" and "disrupt[ing] the proper balance between the coordinate branches"); *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (one branch may violate the separation of powers by "'impermissibly undermin[ing]' the powers of [another] Branch") (quoting *Commodity Futures*

Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986)); *McBryde v. Comm. to Review Circuit Council Conduct*, 264 F.3d 52, 79 (D.C. Cir. 2001) (J. Tatel, concurring) (separation of powers principle "prevents not only the aggrandizement of one branch of government at the expense of another, but also the disruption by one branch of another's essential functions"). The Justice Department's search of Congressman Jefferson's office violates the Separation of Powers principle because, as discussed more fully below, it threatens to impair the legislative branch's conduct of its constitutionally-mandated functions.

The Founders were acutely aware that simply dividing the government into three separate branches would not be sufficient to guarantee American liberty. Accordingly, they also included in the Constitution concrete mechanisms to make the Separation of Powers principle work, that is, mechanisms that would "provide some practical security for each [branch], against invasion of the others." The Federalist No. 48 (James Madison). *See also* The Federalist No. 51 (Alexander Hamilton or James Madison) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.").

One such concrete, practical mechanism is the Speech or Debate Clause of the Constitution, to which we now turn.

II. The Search Warrant Executed by the Justice Department on Congressman Jefferson's Office Violates the Speech or Debate Clause of the Constitution, and Undermines the Separation of Powers Principle.

The search warrant executed on Congressman Jefferson's office on May 20 is clearly

inconsistent with the Speech or Debate Clause of the Constitution and the Separation of Powers principle. The Justice Department's Response to Congressman Jefferson's motion clearly manifests a serious misunderstanding of the nature and reach of the Clause's protections, its importance to our governmental structure, and its proper application in this case.

Accordingly, to assist the Court in addressing the important issues now before it, we proceed as follows. We first provide a brief overview of the history, scope, purpose and functioning of the Speech or Debate Clause (Part A). We then explain how and why the execution of the Jefferson warrant violated the Speech or Debate Clause (Part B), and the potential dangers this precedent, if allowed to stand, poses (Part C). Next, we address certain Justice Department arguments that are particularly flawed (Part D). Finally, we explain why the Justice Department did not exhaust all lesser intrusive means of obtaining the information it sought, as the Thibault Affidavit claims (Section III).

A. Brief Overview of the Speech or Debate Clause of the Constitution.

1. The History and Purpose of the Clause.

The Speech or Debate privilege is rooted in the epic struggle for parliamentary independence in 16th- and 17th-century England:

> Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators.

Johnson, 383 U.S. at 178.

> As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could make only a tentative claim. . . . In 1668, after a long and bitter struggle, Parliament finally laid the ghost of

> Charles I, who had prosecuted Sir John Elliot and others for "seditious" speeches in Parliament. . . . In 1689, the Bill of Rights declared in unequivocal language: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."

Tenney v. Brandhove, 341 U.S. 367, 372 (1951).[10]

As a result of the English experience, "[f]reedom of speech and action in the legislature was taken as a matter of course" by the Founders, and reflected in the Speech or Debate Clause of our Constitution. *Id.*

The purpose of the Speech or Debate Clause

> is to insure that the legislative function the Constitution allocates to Congress may be performed independently.
>
> . . . .
>
> [T]he "central role" of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary. . . ."

Eastland, 421 U.S. at 502 (quoting *Gravel v. U.S.*, 408 U.S. 606, 617 (1972)). "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *Johnson*, 383 U.S. at 178. *See also Youngblood v. DeWeese*, 352 F.3d 836, 839 (3d Cir. 2003) ("Ensuring a strong and independent legislative branch was essential to the framers' notion of separation of powers . . . . The Speech or Debate Clause is one manifestation of the practical security for protecting the independence of the legislative branch."); *U.S. v. Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980)

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[10] *See also* Don Wolfensberger, *FBI Raid Breaches Constitutional Wall Built by the Founders*, Roll Call, June 5, 2006, at 8 (describing effort by King Charles I to intimidate English parliament that precipitated English Civil War), attached as Exhibit 6.

("Like the Speech or Debate Clause, the doctrine of separation of powers serves as a vital check upon the Executive and Judicial Branches to respect the independence of the Legislative Branch, not merely for the benefit of the Members of Congress, but, more importantly, for the right of the people to be fully and fearlessly represented by their elected Senators and Congressmen.").

Because "the guarantees of th[e Speech or Debate] Clause are vitally important to our system of government," they "are entitled to be treated by the courts with the sensitivity that such important values require." *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979). Accordingly, the Supreme Court has "[w]ithout exception . . . read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501. *See also Doe v. McMillan*, 412 U.S. 306, 311 (1973); *Gravel*, 408 U.S. at 624; *Johnson*, 383 U.S. at 179; *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).

2. The Scope of the Clause.

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

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

Eastland, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625).

The courts have broadly construed the concept of "legislative activity" to include much more than words spoken in debate. The cases "have plainly not taken a literalistic approach in applying the privilege. . . . Committee reports, resolutions, and the act of voting are equally covered." *Gravel*, 408 U.S. at 617. Similarly, committee investigations and hearings have been held to be activities within the legislative sphere, *Eastland*, 421 U.S. at 491, as has information gathering in furtherance of legislative responsibilities because "'[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'" *Id.* at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)). This includes informal information gathering, as well as the gathering of information through formal means such as committee subpoenas. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) (documents voluntarily delivered to committee by private citizen protected); *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976) (en banc), *cert. granted*, 434 U.S. 888 (1977), *cert. dismissed sub nom. McAdams v. McSurely*, 438 U.S. 189 (1978) ("[A]cquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the [Speech or Debate] privilege . . . ."); *Tavoulareas v. Piro*, 527 F. Supp. 676, 680 (D.D.C. 1981) ("[A]cquisition of information by congressional staff, whether formally or informally, is an activity within the protective ambit of the speech or debate clause.").[11]

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[11] *See also United Transportation Union v. Springfield Terminal Ry. Co.*, 113 Lab. Cas. ¶ 11,643 (D. Maine 1989); *Webster v. Sun Company, Inc.*, 561 F. Supp. 1184, 1189-90 (D.D.C. 1983), *vacated and remanded on other grounds*, 731 F.2d 1 (D.C. Cir. 1984); *Wilkinson v. O'Neil*, 1983 WL 30230 (D. Guam App. Div. 1983).

Of course, not everything a Member of Congress does is "legislative." Members engage in many official activities that are non-legislative such as issuing newsletters and press releases, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), and performing "legitimate 'errands' . . . for constituents." *U.S. v. Brewster*, 408 U.S. 501, 511 (1972). Given that even some official documents are not legislative and, therefore, not constitutionally protected, it is extremely unlikely that guns, drugs or other physical instrumentalities of crime could ever be deemed protected, as some have suggested.

3. The Functioning of the Clause.

In practice, the Speech or Debate privilege has two broad components. First, the Clause provides immunity for all actions "within the 'legislative sphere,' . . . even though the[] conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *McMillan*, 412 U.S. at 312-13 (quoting *Gravel*, 408 U.S. at 624-25). A necessary and concomitant part of this immunity is that a party to a lawsuit – and the prosecutors in a criminal case – against a Member of Congress may not advance their case by "[r]evealing information as to a legislative act." *U.S. v. Helstoski*, 442 U.S. 477, 490 (1979). This constitutional immunity (including its non-use at trial sub-component) extends both to civil suits and criminal prosecutions. However, the immunity aspect of the Clause is not particularly relevant to the matter now before the Court inasmuch as Congressman Jefferson has yet to be charged with any crime.

Second, and of considerable relevance here, the Clause provides a non-disclosure privilege. *Gravel*, 408 U.S. at 606. This aspect of the privilege – sometimes referred to as a "testimonial" privilege – operates to protect Members of Congress from being forced to provide

testimony as to privileged matters or to produce privileged documents.[12] The Supreme Court draws no distinctions between the immunity-from-suit component (including its non-use at trial sub-component) and the non-disclosure privilege component of the Clause.[13] Rather, it has stated unequivocally that when the Speech or Debate applies, it is "absolute."

> The question to be resolved is whether the actions of the petitioners fall within the "sphere of legitimate legislative activity." If they do, the petitioners "shall not be questioned in any other Place" about those activities since *the prohibitions of the Speech or Debate Clause are absolute.*

Eastland, 421 U.S. at 501 (emphasis added).[14]

The Justice Department's argument that the non-disclosure aspect of the Speech or Debate Clause does not apply in the criminal context, Response at 16 n.5, is flatly contradicted by the Supreme Court's case law which holds otherwise. *See, e.g.*, *Gravel,* 408 U.S. 606. The

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

[13] The D.C. Circuit, however, has suggested that the nondisclosure privilege aspect of the Clause is even stronger than the immunity-from-suit aspect. *See Brown & Williamson*, 62 F.3d at 418 ("Based on the text of the Constitution, it would seem that the immunity from suit derives from the testimonial privilege, not the other way around.").

[14] *Eastland* reaffirmed the absoluteness of the privilege on no less than *six* separate occasions. *See also* 421 U.S. at 503, 507, 509-10, 510 n.16. *See also Gravel*, 408 U.S. at 623 n.14; *Barr v. Matteo*, 360 U.S. 564, 569 (1959) ("[T]he Constitution itself gives an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session.").

argument is also based on a misreading of *Brown & Williamson* which said, in dicta, only that *Gravel* might be construed as suggesting that, with respect to "'trials or grand jury proceedings involving *third-party* crimes,'" the "testimonial privilege might be less stringently applied . . . but is 'absolute' in all other contexts." 62 F.3d at 419-20 (quoting *Gravel*, 408 U.S. at 622) (emphasis added). Obviously, the Justice Department is seeking in this case information directly from a Member of Congress that it claims is relevant to its investigation of that Member, not some "third-party." Furthermore, and in any event, the *Brown & Williamson* Court hastened to add that such a reading of *Gravel* "does not really square with the Court's statements in *Eastland* that the Clause's prohibitions, when applicable, is 'absolute.'" 62 F.3d at 419.[15]

* * *

In sum, the Speech or Debate Clause protects – absolutely – Members of Congress from being sued or prosecuted for legislative activities; bars prosecutors – absolutely – from using a Member's legislative acts to indict or convict even if the prosecution is not explicitly centered on legislative activity; and protects Members – absolutely – from being forced to disclose their legislative activities, either by way of testimony or through producing documents.

Are there potential costs associated with such a broad constitutional protection? Of course. "It has enabled reckless men to slander and even destroy others with impunity."

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[15] Similarly, the Justice Department's suggestion that seizures under a search warrant do not involve a "testimonial act" in the way that producing documents pursuant to subpoena does for Fifth Amendment purposes, Response at 22 n.10, is beside the point. The Speech or Debate Clause is not the Fifth Amendment. The former protects against compelled disclosure of legislative activities and information, not against inferences that may be drawn from the act of producing documents. *See Brown & Williamson*, 62 F.3d at 420.

Brewster, 408 U.S. at 516. "[T]he exclusion of evidence of past legislative acts will undoubtedly make prosecutions more difficult." *Helstoski*, 442 U.S. at 477. "The broad protection granted by the Clause creates a potential for abuse." *Eastland*, 421 U.S. at 510. And yet the Supreme Court and the lower courts have repeatedly held that the Speech or Debate Clause must be broadly construed and applied, notwithstanding these potential costs, because that was "'the conscious choice of the Framers,' buttressed and justified by history." *Id.* (quoting *Brewster*, 408 U.S. at 516).[16]

The Justice Department's claim that respect for the Speech or Debate Clause "would give Members of Congress a ready means of frustrating criminal investigations," Response at 23, is, of course, overstated. The Justice Department can pursue corruption and other criminal cases using all of its normal investigative tools, as it has always done – and done well.[17] Furthermore, Members of Congress are subject to numerous countervailing pressures and

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[16] Speech or Debate, of course, is hardly the only constitutional principle that we value and protect, notwithstanding associated costs. We, for example, "have always held that in criminal cases we would err on the side of letting the guilty go free rather than sending the innocent to jail. We have required proof beyond a reasonable doubt as 'concrete substance for the presumption of innocence.'" *Johnson v. Louisiana*, 406 U.S. 380, 393 (1972) (quoting *In re Winship*, 397 U.S. 358, 363 (1970)). And we tolerate offensive speech because we value free speech more. "The suppression of uncongenial ideas is the worst offense against the First Amendment." *Hill v. Colorado*, 530 U.S. 703, 746 (2000).

[17] For more than 200 years, the Department has successfully investigated, charged and convicted Members of Congress without overstepping its constitutional bounds as it did in this case. For example, in the last 20 years, the Justice Department has succeeded in convicting Rep. Randy Cunningham (Calif.) (2006), Rep. James Traficant (Ohio) (2002), Rep. Jay Kim (Calif.) (1997), Rep. Mel Reynolds (Ill.) (1997), Rep. Walter Tucker III (Calif.) (1996), Rep. Dan Rostenkowski (Ill.) (1996), Rep. Donald Lukens (Ohio) (1996), Rep. Joe Kolter (Pa.) (1996), Rep. Mel Reynolds (Ill.) (1995), Rep. Carl Perkins (Ky.) (1995), Rep. George Hansen (Idaho) (1995), Rep. Carroll Hubbard (Ky.) (1994), Rep. Albert Bustamante (Texas) (1993), Rep. Nick Mavroules (Mass.), (1993), Rep. Larry Smith (Fla.) (1993), and Rep. Mario Biaggi (NY) (1988).

disincentives including very significant public disclosure requirements (*e.g.*, campaign donations, personal finances, travel, office expenditures); constant media scrutiny; an electoral system that requires House Members to face the voters every two years; and the disciplinary jurisdiction of the House Committee on Standards of Official Conduct.[18] All of these factors, collectively, offset any potential costs associated with the Speech or Debate Clause.

B. The Execution of the Warrant Violated the Speech or Debate Clause.

1. The FBI's Search of Congressman Jefferson's Office Violated the Speech or Debate Clause Because FBI Agents Necessarily Reviewed and Seized Legislative Materials That Were Absolutely Protected.

The warrant this Court signed on May 18 authorized the FBI to seize a broad range of records and documents from Congressman Jefferson's office. *See supra* note 4. In order to properly execute the warrant, the FBI necessarily had to have reviewed *every* piece of paper in the office. It will come as no surprise to the Court that Congressman Jefferson's office contains many paper documents that reflect legislative activity. *See* Declaration of Aranthan Jones at ¶ 9 (June 4, 2006) ("Jones Declaration"), attached to Reply Memorandum of Congressman Jefferson in Support of Motion for Return of Property (June 5, 2006). Necessarily, therefore, the executive branch reviewed documents that were absolutely privileged from such review under the Speech or Debate Clause.

In addition, the warrant authorized the FBI to copy or image entire computer hard drives and other electronic media. Congressman Jefferson's office contains 12 personal computers

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[18] Congressman Jefferson himself is currently under investigation by the House Standards Committee. *See* Statement of Chairman Doc Hastings and Ranking Minority Member Howard Berman L. Berman (May 17, 2006), *available on-line at* http://www.house.gov/ethics/Press_Statement_Jefferson.html.

and one server (collectively, "Office Computers") which are used by the Congressman and his staff. It also will come as no surprise to the Court that the hard drives on those Office Computers all contain electronic files that reflect legislative activity. *Id.* at ¶ 7. The inventory the FBI filed indicates that it imaged or copied all of the Office Computer hard drives, as well as two USB memory sticks that contained almost nothing but legislative materials. *See* Inventory of Seized Items at 7-9 (May 21, 2006); Jones Declaration at ¶ 11. Necessarily, therefore, the executive branch seized electronic files that were absolutely privileged from disclosure under the Speech or Debate Clause.[19]

This search and seizure violated the Constitution because it took place without Congressman Jefferson having had a prior opportunity to screen out and remove legislative records and files (or determine not to assert the privilege). This is so for the following reasons.

First, the privilege against compelled production of legislative materials belongs to Congressman Jefferson and is absolute, as the Supreme Court has repeatedly held.

Second, the forcible compulsion inherent in the Court's warrant is legally indistinguishable from the compulsion inherent in a judicial subpoena duces tecum. The latter is a judicial order to produce documents; the former is a judicial order to stand aside and permit one's documents to be reviewed and seized. If the latter is constitutionally impermissible with respect to protected legislative materials – as the Supreme Court and the lower courts have

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[19] The Justice Department appears to suggest that the FBI only copied the hard drive of the computer in Congressman Jefferson's personal office. *See* Response at 9 (The agents ultimately seized copies of Rep. Jefferson's computer hard drive . . . ."). That representation cannot be accurate because it is inconsistent with the warrant itself, with the Inventory, and with the amount of time the agents spent in Congressman Jefferson's office. *See also* Jones Declaration at ¶¶ 12-13.

repeatedly held it is, *see supra* note 12 – then the former must also be constitutionally impermissible with respect to protected legislative materials.

Third, the Supreme Court has repeatedly held that the Clause must "*[w]ithout exception* . . . [be] read . . . broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501 (emphasis added). It is the opposite of a "broad" reading to permit law enforcement authorities search a congressional office before the Member has had an opportunity to screen out and remove legislative records and files.

Fourth, in terms of what the Speech or Debate Clause prohibits, there is no difference between the FBI's reviewing and seizing legislative materials from Congressman Jefferson pursuant to a judicially-authorized warrant and judicially-compelled production of legislative documents under a subpoena. Documents that are absolutely privileged from review or disclosure are taken by force of law. If the Speech or Debate Clause prohibits the latter, as it most assuredly does, then it also prohibits the former. *See Brown & Williamson*, 62 F.3d at 419 ("[A]ny probing of legislative *acts* is sufficient to trigger the immunity.").

Fifth, in terms of the underlying purpose of the Speech or Debate Clause – to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *Gravel*, 408 U.S. at 617 – intimidation is inherent in a search warrant that is executed on a Member's office without the Member having had a prior opportunity to screen out and remove legislative records and files. In terms of underlying purpose, the Speech or Debate Clause violation that occurred on May 20 and 21 could not be more stark.

Finally, the case law "forbids inquiry into acts which are purportedly or apparently legislative, even to determine if they are legislative in fact. Once it was determined . . . that the

legislative function . . . was *apparently* being performed, the propriety and the motivation for the action taken, as well as the detail of the acts performed, are immune from judicial review." *U.S. v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973).

These cases make absolutely no sense unless the Member has an initial opportunity to determine what materials he believes are legislative and, therefore, privileged – an opportunity Congressman Jefferson was denied here.

In short, a constitutional violation – a blatant constitutional violation – occurred when the FBI agents executed the warrant on Congressman Jefferson's office. The President's decision to seal the seized documents – although welcome – does not eliminate the violation because documents were unconstitutionally seized in the first instance and constitutionally privileged materials remain in the hands of the executive branch which had absolutely no right to take them in the first place and absolutely no right to keep them.

2. The "Special Procedures" in the Thibault Affidavit Do Not – and Could Not – Cure the Constitutional Violation.

The "special procedures" set forth in the Thibault Affidavit do not cure the constitutional violation that occurred when the FBI agents executed the warrant on Congressman Jefferson's office and, in fact, actually compound the violation because they require the executive branch (in the form of a so-called "Filter Team") to

- further review legislative materials it is constitutionally prohibited from reviewing;
- make unilateral determinations about what constitutes legislative materials and what does not;

- immediately turn over to other executive branch officials (the investigative team) all documents the Filter Team unilaterally determines – rightly or wrongly – are not privileged; and
- provide documents that might be privileged under the Speech or Debate Clause to the Court for review, a review the Constitution simply does not contemplate.[20]

These procedures do so much violence to the purposes of the Speech or Debate Clause that it is almost impossible to overstate. They take the principal guarantee of legislative branch independence – the Speech or Debate Clause – and turn it inside out by lodging the responsibility for making privilege determinations with the very branch the Clause was designed primarily to protect against in the first place. They reduce a constitutional provision "the guarantees of [which] are vitally important to our system of government," and "are entitled to be treated by the courts with the sensitivity that such important values require," *Helstoski*, 442 U.S. at 506, to something considerably less than an ordinary common law privilege.

On top of everything else, there is an enormous practical problem inherent in the "special procedures": neither the Filter Team nor the Court are equipped to determine whether particular documents are Speech or Debate protected or not. This is because the Speech or Debate privilege is not communications based (like most common law privileges such as the

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[20] Judicial review, of course, is appropriate on the large question of what constitutes a "legislative activity," as the extensive case law in this area makes clear. Thus, when a Member claims that certain documents are privileged from production because he gathered them for the purpose of formulating legislation, the Court can determine whether such information gathering constitutes "legislative activity." *See* Section II.A.2 supra (citing cases). What the Constitution does not contemplate – and what the Justice Department obviously does – is a document-by-document review by the judiciary. That is both unconstitutional and practically impossible as discussed in the text above.

attorney-client privilege). It is, as we discussed above, activity based. This means that it frequently is impossible to tell from the face of a document whether or not it is legislative in nature. In order to accurately determine whether a document is legislative in nature, one must know for what purpose the document was created or obtained, how it has been or will be used, what personal legislative initiatives a Member is currently pursuing, what future legislative initiatives a Member is contemplating pursuing, what oversight matters or investigations a Member is involved in pursuant to his or her committee assignments, and so forth. This information can only be obtained from a Member and his or her staff. (And obviously, neither the executive nor the judicial branch could compel a Member or staffer to disclose this information because such information would itself be Speech or Debate protected. *Eastland*, 421 U.S. at 508-509; *Miller*, 709 F.2d at 530; *Dowdy*, 479 F.2d at 226.)

Even House Counsel which, along with Senate Legal Counsel, deals with Speech or Debate matters on an almost daily basis and has litigated numerous Speech or Debate cases, frequently cannot tell, merely by looking at a document, whether it is privileged. We have to ask questions, sometimes lots of them.[21]

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[21] Recently, for example, House Counsel represented a Member who, because of a personal family tragedy, had developed a legislative interest in a particular drug. Over the course of several years, he accumulated a large volume of information about the drug including newspaper reports, magazine and medical journal articles, regulatory materials, memoranda, email traffic, judicial decisions and the like. When the drug's manufacturer subpoenaed all of the Congressman's records that related to the drug, we spent a significant amount of time questioning the Member and his staff in order to get a handle on what was "legislative," and therefore privileged, and what was not. We literally had to proceed document by document, in consultation with the Member and his staff. Ultimately, we determined that a handful of materials were not privileged – *e.g.*, press releases and communications with federal regulatory agencies unrelated to the legislative process – and those were produced. The vast majority – (continued...)

Thus, the Justice Department's statement that it "does not seek to obtain . . . any information from Rep. Jefferson that is actually covered by the Speech or Debate Clause," Response at 2, is meaningless because the Justice Department cannot possibly know whether the records it seeks are legislative are not. A document that is legislative – and thus Speech or Debate protected – remains protected even if the Justice Department believes the document may be evidence of a crime or relevant to a criminal investigation. That the Justice Department believes its Filter Team can make Speech or Debate determinations merely by examining the face of a document demonstrates just how little it really understands the Speech or Debate Clause and its operation.

The so-called "additional accommodation" now offered by the Justice Department, Response at 2, 11-12, 14-15, is every bit as unconstitutional as the original "special procedures." The new procedure would still require the Filter Team to "prepare a log of the records they [sic] deem to be privileged," *id.* at 11, which means the Filter Team will still be reviewing legislative materials in violation of the Speech or Debate Clause. Furthermore, the new procedure does not obviate the fact that the FBI violated both the letter and spirit of the Constitution when, on May 20-21, it reviewed all of Congressman Jefferson's records (including legislative materials), and seized massive numbers of those records (including

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[21](...continued)
including virtually all newspaper reports, magazine and medical journal articles, regulatory materials, memoranda and e-mail traffic – were withheld as legislative because they related to the Congressman's efforts to inform himself about the drug for the ultimate purpose of preparing legislation. A magistrate judge quashed the drug manufacturer's subpoena as to all such records on Speech or Debate grounds. Quite clearly, we think, were the FBI to seize such records, no Justice Department Filter Team could possibly make accurate Speech or Debate determinations about them.

legislative materials). Giving Congressman Jefferson an opportunity to make Speech or Debate determinations *after* the executive branch has already reviewed and seized legislative materials does not undo the constitutional violation.

The "additional accommodation" is nothing more than an effort by the Justice Department to improve its litigation posture. It is unsuccessful in doing that, and really only serves to highlight the Department's awareness of the constitutional infirmity of its actions.

Even if the Court thought the "additional accommodation" might be a satisfactory "practical" compromise in this case – which it is not – the Court should still declare the warrant and its execution unconstitutional. A contrary ruling will create a lasting precedent, a precedent that says it is acceptable for the FBI to search congressional offices, and acceptable to review and seize legislative documents, because Speech or Debate problems can be solved after the fact. Such a precedent is completely contrary to the underlying purpose of the Clause; it is also a formula for abuse and for constant strife between the branches, as we now discuss.

C. If the Warrant and Its Execution Are Not Declared Unconstitutional, the Resulting Precedent Will Greatly Increase the Potential for Executive Branch Overreach and Abuse at the Expense of Legislative Branch Independence.

If the Court declines to hold unconstitutional the warrant and its execution, it will reduce Congress to a subordinate branch of government by opening the door to unchecked executive branch overreach and abuse that could, among other things, obstruct and chill Congress' oversight function, and impair the normal and healthy process of information exchange between the branches through accommodation and negotiation.

One example will suffice. Following the September 11 attacks, the House Permanent

Select Committee on Intelligence and the Senate Select Committee on Intelligence convened a Joint Inquiry to investigate, among other things, possible mistakes made by the U.S. intelligence agencies, including the FBI, CIA and NSA.

In the course of the investigation, then-NSA Director Michael Hayden revealed, in closed session, the existence and content of two classified intercepts. Shortly thereafter, the media reported their existence and content. Concerned that this information may have been leaked from within the Joint Inquiry, the Chairmen and Ranking Members of the two intelligence committees requested that the FBI investigate. Because the Separation of Powers implications of such an investigation were so momentous, House Counsel and Senate Legal Counsel carefully worked out procedures with the Justice Department to govern the FBI investigation. Those procedures required, among other things, that if the FBI felt it needed to review Joint Inquiry documents, the request would be transmitted through congressional lawyers so that Speech or Debate concerns could be addressed. This is an example of inter-branch comity and appropriate accommodation.

If the Court now gives the Justice Department carte blanche to execute search warrants, like the one executed on Congressman Jefferson's office, the Justice Department will have little incentive to work with the Congress in matters related to criminal investigations. The Department will know that it has only to persuade a federal judge, in an ex parte proceeding from which the legislative branch is excluded, to authorize a warrant in order to get what it wants. The fact that documents may later have to be returned will be of very little concern. The result would inevitably be heightened tension and strain between the branches.

Furthermore, had the FBI agents assigned to the leaks investigation been able to search

the Joint Inquiry offices, they likely would have come across investigative files relating to the congressional investigation into the FBI itself. Such an outcome would not only violate the Speech or Debate Clause, it could obstruct and chill Congress' oversight of the executive branch, to the very great detriment of the American people.[22]

D. The Justice Department's Other Arguments Are Not Well-Founded.

1. The House Does Not Contend That a Search Warrant Could Never Be Executed on a Congressional Office.

The Justice Department asserts that Congressman Jefferson's position is "that the Speech or Debate Clause categorically bars the [Department] from ever executing a search warrant on a congressional office seeking responsive materials not covered by the Clause whenever Speech or Debate material might be present." Response at 1. *See also id.* at 19-24. We do not believe that is what Congressman Jefferson's motion says, and that is certainly not the House's position.

We think it is possible for the Justice Department to execute a search warrant on a congressional office to secure evidence that is relevant to a legitimate criminal investigation, provided that the warrant is executed pursuant to protocols and procedures that are pre-established – either by agreement between the House and the Justice Department or by legislation – and consistent with the requirements of the Constitution. Indeed, negotiations are

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[22] *See Investigating the Investigators*, N.Y. Times, Aug. 10, 2002, at A14 ("One way to chill a Congressional investigation is to send a flock of F.B.I. agents to Capitol Hill to ask legislators to take polygraph tests and answer questions about their dealings with reporters. . . . Bringing in the F.B.I., an executive branch agency, compromises the independence legislators need to do their jobs properly. It also places the F.B.I. in a conflict of interest, since the bureau is one of the agencies the committees should be investigating."), attached as Exhibit 7.

underway between the House and the Justice Department with exactly this aim in mind.

Clearly, however, such protocols and procedures would need to differ significantly from the procedures followed in this case. For example, they would need to provide, among other things, for a Member to be present at the search and to be permitted to remove Speech or Debate privileged materials prior to the search (subject, of course, to later judicial review as now occurs in the subpoena context).

This Court need not and should not reach the question of what such protocols and procedures might look like. That question is best left to the House and the Justice Department in the first instance. Rather, the Court should, as we suggested above, declare unconstitutional both the warrant and its execution, and then take into account, in determining an appropriate remedy, the outcome of those negotiations between the House and the Justice Department.

2. The Speech or Debate Privilege Is Not Analogous to Ordinary Common Law Principles – It Is a Constitutional Mandate.

The Speech or Debate privilege is not analogous to ordinary common law privileges, as the Justice Department suggests. The Department says, for example, that the Filter Team mechanism is sufficient to protect the Speech or Debate privilege because that mechanism has been used before to protect the attorney-client privilege. Response at 18. It may be true that such mechanisms adequately protect the attorney-client privilege, but that is utterly beside the point. Unlike the attorney-client privilege which is a judicially-created qualified privilege designed to protect a particular relationship that society deems important, the Speech or Debate Clause is a constitutional mandate intended to preserve the very structure and vitality of our tripartite system of government.

While the harm attendant on the FBI's seizure of attorney-client privileged materials thus may well be mitigated by the Filter Team procedure, the harm the Speech or Debate Clause aims to prevent is "intimidation of legislators by the Executive." *Gravel*, 408 U.S. at 617. It is hard to conceive of anything that could more intimidate legislators and curb their independence than the prospect of the Justice Department searches of legislative records. The prospect that those records might eventually be returned does not eliminate the intimidation.

3. The House Does Not Contend that the Constitution Bars the Justice Department from Ever Seeing Legislative Materials.

The Justice Department says that

> federal prosecutors generally have not in the past used filter teams to review investigative files for potential Speech or Debate material, and no court has held that they are required to do so. In past prosecutions of Members of Congress, the prosecution team itself has examined evidence returned in response to subpoenas to determine what evidence could be used and what was privileged. Where it was less than clear whether material was privileged, the Government submitted the material to the court for resolution on whether it could be used.

Response at 21 (citing no case law of other authority). The Justice Department is confused.

Nothing in the Constitution prohibits the executive branch from seeing legislative material that is publicly available (as a great deal is) or that it obtains from (i) a non-legislative source, or (ii) a Member of Congress who chooses to surrender such materials either voluntarily or in response to a subpoena (*i.e.*, to not assert the Speech or Debate privilege). And once such material is *properly* in the Department's hands, it can ask the Court whether that material can be used in a prosecution (in, of course, a proceeding in which the Member is also heard). If the material is legislative then, of course, the answer will be no. *See supra* at 21.

However, this has absolutely nothing to do with the issue in this case, *i.e.*, whether the executive branch can forcibly seize and review a Member's legislative records *against the Member's wishes*. For the multitude of reasons discussed elsewhere in this Memorandum, it cannot.

Similarly, the prosecution says that certain cases have permitted convictions to stand so long as legislative materials were not used in the prosecution. Response at 22-23 (citing *Johnson*, 383 U.S. at 185; *U.S. v. Rostenkowski*, 59 F.3d 1291, 1300 (D.C. Cir. 1995); *U.S. v. McDade*, 28 F.3d 283, 300 (3d Cir. 1994); *Myers*, 635 F.2d at 941). This is also beside the point. The *Johnson*, *Rostenkowski*, *McDade* and *Myers* decisions all involved the immunity aspect of the Speech or Debate Clause (and its non-use sub-component). None concerned the non-disclosure component of the Speech or Debate Clause, and none held that a Member of Congress could be forced to disclose legislative materials against his wishes. Therefore, those cases are simply irrelevant to the issue now before the Court.

4. Speech or Debate Is Not a Mere "Non Evidentiary Use" Privilege.

Finally, the Justice Department, quite predictably, relies on an isolated and discredited case to argue that the Speech or Debate privilege is one of "'nonevidentiary use, not non-disclosure.'" Response at 16 (quoting *In re Grand Jury Investigation*, 587 F.2d 589, 597 (3d Cir. 1978) ("*Eilberg*")). *Eilberg* rests on a earlier Third Circuit decision that was badly flawed; is distinguishable on its facts (if it has any validity at all); has since been discredited by the Third Circuit; and is, in any event, inconsistent with Supreme Court and D.C. Circuit case law.

a. The *Eilberg* Holding

Eilberg was an appeal from a denial of a motion to quash a grand jury subpoena, issued

to the Clerk of the House, which sought telephone records of then-Congressman Joshua Eilberg. While acknowledging that the Speech or Debate Clause has a testimonial aspect "designed to prevent hostile questioning by the executive branch before a possibly hostile judiciary," 587 F.2d at 596 (citing *Gravel*, 408 U.S. at 617), the Court asserted that "the Speech or Debate privilege is at its core a use privilege." *Id.*[23] The Third Circuit found the testimonial aspect of the privilege not implicated because neither the Congressman nor his aides had been subpoenaed, and because the telephone company possessed duplicates of the phone records sought. *Id.* at 597. Obviously, those facts are very different from the facts of this case, in particular, the fact that here the documents have been taken directly from the Member.[24]

---

[23] *Eilberg's* antecedents are very dubious. The notion that Speech or Debate is only a nonevidentiary use privilege and requires disclosure of privileged documents originated with *In re Grand Jury Proceedings*, 563 F.2d 577 (3d Cir. 1977) ("*Cianfrani*"). At issue in *Cianfrani* was whether a federal grand jury could obtain documents from *state* legislators and committees. The Third Circuit correctly held the legislators unprotected by the Speech or Debate Clause, but it recognized a limited "federal common law legislative privilege." *Id.* at 583. In defining the parameters of that "common law *evidentiary* privilege," the Court stated that "the privilege is not one of nondisclosure but of nonevidentiary use." *Id.* at 584. (*Cianfrani's* reasoning was badly flawed. In holding that state legislative immunity permitted disclosure of privileged documents, the Court relied on language in *Gravel*, *Brewster*, and *McMillan* which suggested that Speech or Debate is not all encompassing. *Id.* However, those cases held only that when a legislator is acting *outside* the legislative sphere, Speech or Debate does not apply. That is, *Gravel*, *Brewster* and *McMillan* were defining the circumstances under which the Speech or Debate Clause would apply at all, not the scope of the Clause when it does apply. Those cases did not hold, or even suggest, that Speech or Debate is anything less than absolute *when it does apply*.) While *Cianfrani* was not a Speech or Debate case, *Eilberg* erroneously picked up on its "disclosure/nonevidentiary use" language one year later.

[24] *See In re Grand Jury Subpoena*, 626 F. Supp. 1319, 1328 n.8 (M.D. Pa. 1986), *rev'd on other grounds*, 821 F.2d 946 (3d Cir. 1987), holding that "*Eilberg* is inapplicable [where] the subpoena is directed to the legislator himself, rather than to a third party. [In that case], (continued...)

b. The Third Circuit Has Since Gutted *Eilberg*.

In 1996, the Justice Department relied on *Eilberg* to argue that it was entitled to documents it had subpoenaed from the House Standards Committee for use in connection with a criminal prosecution of a Member of Congress. Justice claimed then, as it claims now, that the documents were critical to its case. The trial court held that the documents were Speech or Debate privileged but, on the strength of *Eilberg*, ordered them produced. The Standards Committee appealed in mid-trial and the Third Circuit reversed:

> (1) The district court has ruled that the documents at issue are [Speech or Debate] protected . . . ;
>
> (2) With this determination made, our decision in In re: Grand Jury Proceedings, 587 F.2d 589 (3d. Cir. 1977) ("Eilberg") neither required nor authorized disclosure to the government;
>
> (3) It was error for the district court to require production of the documents at issue to the government . . . .

Order at 1, in *U.S. v. McDade*, No. 96-1508 (3d Cir. 1996), attached as Exhibit 8.[25]

In addition, since *Eilberg* was decided in 1978, the Third Circuit has expressly acknowledged that the non-disclosure component, as well as the immunity component, of the Speech or Debate privilege is "absolute." *See, e.g., In re Grand Jury*, 821 F.2d 946, 953 (3d Cir. 1987). In effect, these later Third Circuit decisions have gutted *Eilberg*.

---

[24](...continued)
testimonial rather the use immunity applies."

[25] If this Court wishes to read the *McDade* briefs, we will be happy to submit them.

c. *Eilberg* Is Inconsistent with Supreme Court Case Law and the Law of This Circuit.

Even if *Eilberg* has any continuing validity in the Third Circuit – which we believe it does not – it is wholly inconsistent with Supreme Court and D.C. Circuit case law.

We have already discussed the Supreme Court case law in some detail. We will not reiterate that discussion here except to point out that the *Eilberg* "nonevidentiary use" language is wholly inconsistent with *every* aspect of that case law. *See supra*, 9-23.

The nonevidentiary use notion is also at odds with the law of this Circuit which does block *disclosure* of documents subpoenaed directly from legislators. *See, e.g.*, *Brown & Williamson*, 62 F.3d at 419; *Minpeco*, 844 F.2d at 859. Indeed, *Brown & Williamson* said expressly that

> [t]o the extent that the Third Circuit has adopted a special rule for the testimonial use of documents [in *Eilberg*], we therefore disagree. None of the Supreme Court's opinions acknowledges such a distinction

62 F.3d at 419.

Accordingly, *Eilberg* does not justify the search warrant executed on Congressman Jefferson's office.

III. The Justice Department Violated Its Own Standard in Not Exhausting All Lesser Intrusive Approaches To Obtaining the Information It Seized from Congressman Jefferson's Office.

The Justice Department told this Court, when it applied for a warrant, that "the government has exhausted all other reasonable methods to obtain these records in a timely manner short of requesting th[e] warrant." Thibault Affidavit at ¶ 132. That is not factually accurate. Information that specifically pertains to the inaccuracy of the assertion in ¶ 132 of the

Thibault Affidavit is described in the Supplemental Memorandum we are filing under seal. In addition, we remind the Court that the search warrant and the August 3 subpoena are not co-extensive. The warrant authorized the FBI to seek numerous documents that the Justice Department had made *no* prior effort to obtain by subpoena. *See supra* note 4.

Accordingly, the Justice Department failed to satisfy an exhaustion standard – a standard the Department now says was unnecessary, Response at 28-30 – which it established for itself in order to obtain a search warrant from this Court. The Court should hold the Justice Department to that standard. Furthermore, in light of the very significant Separation of Powers principles and Speech or Debate considerations that necessarily came into play when the Department searched Congressman Jefferson's office, this Court should hold that the Justice Department's failure to exhaust all other reasonable methods to obtain the documents renders the search inherently unreasonable.

We note finally that the Justice Department appears already to have obtained a plethora of hard evidence – including documentary evidence, videotaped evidence, audio-taped evidence and cooperating witnesses, among other things – in this case. The Thibault Affidavit, which runs to 83 pages, enumerates this evidence in great detail.[26] In light of all this, it appears that the raid on Congressman Jefferson's office was less about building a case and more about

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[26] Several Justice Department sources have said publicly that they already have enough evidence to charge Congressman Jefferson. *See, e.g.*, Brian Ross, The Blotter: Officials: Jefferson Charges by July, May 23, 2006 ("Federal officials tell ABC News they already "have enough evidence to arrest" Congressman William Jefferson."), attached as Exhibit 9; CBS Newswire, May 25, 2006 ("A senior law enforcement official said the cooling off period would not affect the investigation . . . . There's a videotape of the congressman putting cash in the trunk of his car, the official tells CBS News. There's two plea agreements, and more than enough evidence to finish the case."), attached as Exhibit 10.

Department frustration with pursuing other legal procedures and its desire to accumulate additional charges. That is scant justification for reversing a 200-year-old tradition of respect for a coordinate branch of government.

CONCLUSION

It is easy to treat this case, as many in the media and public have, as a simple matter of subjecting Members of Congress to the same laws as everyone else, or bringing an allegedly corrupt Congressman to justice. It is much more difficult to recognize the grave threat the Justice Department's unprecedented actions pose to our tripartite system of government and heretofore remarkably successful system of checks and balances. However, it is essential that this Court do so.

It is also easy to assume that this Justice Department is well-intentioned and that it (and its successors) can be trusted to not to abuse the precedent this case would establish. That is a dangerous assumption, and one which this Court should not entertain as the Founders did not more than 200 years ago. We urge the Court to consider Justice Frankfurter's words in the Steel Seizure Case:

> A constitutional democracy like ours is perhaps the most difficult of man's social arrangement to manage successfully. . . . The Founders of this Nation . . . acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed. *To that end they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. . . . These long-haired statesmen had not illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power.*

> . . . *The accretion of dangerous power does not come in a day. It does come, however, slowly from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.*

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) (emphasis added).

Accordingly, for all the foregoing reasons, the Bipartisan Legal Advisory Group of the U.S. House of Representatives respectfully urges this Court to declare unconstitutional both the warrant and its execution, and then take into account, in determining an appropriate remedy, the outcome of current negotiations between the House and the Justice Department aimed at devising an agreed-upon set of protocols and procedures under which search warrants can be executed constitutionally on House offices.

Respectfully submitted,

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KERRY W. KIRCHER
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Counsel for Amicus Curiae
Bipartisan Legal Advisory Group
of the U.S. House of Representatives

June 7, 2006

CERTIFICATE OF SERVICE

I certify that on June 7, 2006, I served one copy of the foregoing Memorandum of Points and Authorities of the Bipartisan Legal Advisory Group of the U.S. House of Representatives as Amicus Curiae by e-mail and first-class mail on the following:

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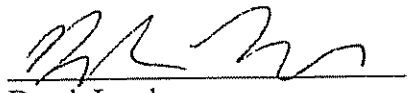

Derek Lawlor

EXHIBIT 1

U.S. Department of Justice

United States Attorney
Eastern District of Virginia

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

703/299-3768
FAX 703/299-3981

September 16, 2005

VIA FACSIMILE (202/226-1360)
AND FIRST CLASS U.S. MAIL

David Plotinsky, Esq.
Assistant Counsel
U. S. House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515

Re: Grand Jury Investigation 05GJ1318

Dear Mr. Plotinsky,

This will confirm our conversation today wherein you represented that the original documents responsive to the grand jury subpoena issued to Congressman Jefferson as custodian of records for his congressional office are being preserved in a locked drawer in the office of Chief of Staff, Nicole Venable. In addition, you have confirmed that back-up tapes that contain email traffic to and from Congressman Jefferson's office are being preserved by the Office of Chief Administrative Officer pending further discussions about the ability of that office to search the back up tapes for records related to what was called for in the grand jury subpoena.

Thank you for your assistance in these matters. Should you have any questions, I can be reached directly at 703-299-3768.

Very truly yours,

Paul J. McNulty
United States Attorney

By: _____
Mark D. Lytle
Assistant United States Attorney

EXHIBIT 2

J. Dennis Hastert
Fourteenth District
Illinois

http://www.speaker.gov

Speaker's Press Office

United States House of Representatives
Washington, DC 20515

FOR IMMEDIATE RELEASE:
May 22, 2006

CONTACT: 202-225-2800
Ron Bonjean or Lisa C. Miller

Speaker Statement Regarding the Federal Bureau of Investigation Search of Congressional Office

(Washington, D.C.) Speaker of the House J. Dennis Hastert (R-IL) issued the following statement today regarding the recent Federal Bureau of Investigation (FBI) search:

"It is the duty of the Justice Department to root out and prosecute corruption wherever it is found, including in the U.S. House of Representatives. I believe that all Members of the House should cooperate fully with any criminal investigation.

"That being said, I am very concerned about the necessity of a Saturday night raid on Congressman Jefferson's Capitol Hill Office in pursuit of information that was already under subpoena and at a time when those subpoenas are still pending and all the documents that have been subpoenaed were being preserved.

"The Founding Fathers were very careful to establish in the Constitution a Separation of Powers to protect Americans against the tyranny of any one branch of government. They were particularly concerned about limiting the power of the Executive Branch. Every Congressional Office contains certain Legislative Branch documents that are protected by the Constitution. This protection—as the Supreme Court has repeatedly held—is essential to guarantee the independence of the Legislative Branch. No matter how routine and non-controversial any individual Legislative Branch document might be, the principles of Separation of Powers, the independence of the Legislative Branch, and the protections afforded by the Speech or Debate clause of the Constitution must be respected in order to prevent overreaching and abuse of power by the Executive Branch.

"While all the facts surrounding Saturday night's raid have not yet been shared with me, it would appear that the Attorney General himself was aware that Separation of Powers concerns existed and that the Justice Department was treading on Constitutionally suspect grounds because in seeking the warrant the FBI suggested to the judge special procedures it would follow to deal with Constitutionally protected materials. However, it is not at all clear to me that it would even be possible to create special procedures that would overcome the Constitutional problems that the execution of this warrant has created.

(MORE, MORE, MORE)

"The actions of the Justice Department in seeking and executing this warrant raise important Constitutional issues that go well beyond the specifics of this case. Insofar as I am aware, since the founding of our Republic 219 years ago, the Justice Department has never found it necessary to do what it did Saturday night, crossing this Separation of Powers line, in order to successfully prosecute corruption by Members of Congress. Nothing I have learned in the last 48 hours leads me to believe that there was any necessity to change the precedent established over those 219 years.

"Once I have more information about this raid made available to me, I have had an opportunity to carefully consider the long-term ramifications for the Legislative Branch of this action, and I have consulted with the appropriate bipartisan leaders of the House, I expect to seek a means to restore the delicate balance of power among the branches of government that the Founders intended."

###

EXHIBIT 3

J. Dennis Hastert
Fourteenth District
Illinois

http://www.speaker.gov

Speaker's Press Office

United States House of Representatives
Washington, DC 20515

FOR IMMEDIATE RELEASE:
May 24, 2006

CONTACT: 202-225-2800
Ron Bonjean (Hastert)
CONTACT: 202-226-7616
Brendan Daly (Pelosi)

Joint Statement from Speaker Hastert and Minority Leader Pelosi

(Washington, D.C.) Speaker of the House J. Dennis Hastert (R-IL) and Democratic Leader Nancy Pelosi (D-CA) issued the following statement regarding the Federal Bureau of Investigation's search of a Congressional office:

"No person is above the law, neither the one being investigated nor those conducting the investigation.

"The Justice Department was wrong to seize records from Congressman Jefferson's office in violation of the Constitutional principle of Separation of Powers, the Speech or Debate Clause of the Constitution, and the practice of the last 219 years. These constitutional principles were not designed by the Founding Fathers to place anyone above the law. Rather, they were designed to protect the Congress and the American people from abuses of power, and those principles deserve to be vigorously defended.

"Accordingly, the Justice Department must immediately return the papers it unconstitutionally seized. Once that is done, Congressman Jefferson can and should fully cooperate with the Justice Department's efforts, consistent with his constitutional rights.

"In addition, the Justice Department must immediately cease any further review of the documents it unconstitutionally seized, ensure that those who have reviewed the documents do not divulge their contents to the investigators, and move in Court to vitiate the search warrant."

###

EXHIBIT 4

THE WHITE HOUSE

WASHINGTON

May 25, 2006

MEMORANDUM FOR THE ATTORNEY GENERAL
THE SOLICITOR GENERAL OF THE UNITED STATES

SUBJECT: Handling of Materials Held by the Department of Justice Following Execution of a Search Warrant

After taking appropriate account of the respective constitutional functions of the House of Representatives and of the executive branch, including important law enforcement interests, the protections afforded those functions under the Constitution, and the need for comity between the executive and legislative branches in the service of the American people, I direct that, with respect to the materials taken pursuant to the warrant dated May 18, 2006, and captioned "In the Matter of the Search of Rayburn House Office Building Room Number 2113," including any copies thereof or items derived in whole or in part therefrom:

(1) The Attorney General, acting through the Solicitor General of the United States who shall for this purpose be subject to no supervision by any officer of the Department of Justice other than the Attorney General, shall (a) preserve and seal the materials, (b) ensure that no use is made of the materials, and (c) ensure that no person has access to the materials, except that Office of the Solicitor General personnel under the direct supervision of the Solicitor General may have the minimum physical access to the materials essential to the preservation of the materials.

(2) The Attorney General shall endeavor, and the House of Representatives is respectfully encouraged to endeavor, to resolve any issues relating to the materials through discussions between them in good faith and with mutual institutional respect and, if it should prove necessary after exhaustion of such discussions, through appropriate proceedings in the courts of the United States.

The Attorney General shall keep me informed of discussions to which this memorandum refers and proceedings relating to the materials. This memorandum shall expire on July 9, 2006.

cc: The Speaker of the House of Representatives

EXHIBIT 5

J. Dennis Hastert
Fourteenth District
Illinois

http://www.speaker.gov

Speaker's Press Office

United States House of Representatives
Washington, DC 20515

FOR IMMEDIATE RELEASE:
May 25, 2006

CONTACT: 202-225-2800
Ron Bonjean or Heidi Armstrong

Joint Statement from Speaker Hastert and Leader Pelosi

(Washington, D.C.) Speaker of the House J. Dennis Hastert (R-IL) and Democratic Leader Nancy Pelosi (D-CA) today issued the following statement:

"Today, we are directing the House Counsel to begin negotiations with the Department of Justice regarding the protocols and procedures to be followed in connection with evidence of criminal conduct that might exist in the offices of Members."

###

EXHIBIT 6

6/5/06 Roll Call (Pg. Unavail. Online)
2006 WLNR 9611111

Roll Call (USA)

June 5, 2006

FBI Raid Breaches Constitutional Wall Built by the Founders

By Don Wolfensberger

I was contemplating a July 3 column on the role of procedural politics in the Continental Congresses leading up to our Declaration of Independence when news broke on the unprecedented FBI raid on a House Member's Capitol Hill office. The shock of that news instantly jolted me back to an earlier era of parliamentary history.

On Jan. 4, 1642, King Charles I, with a group of armed men, burst into the British House of Commons to arrest five of his most vocal critics for treason. The king climbed into the Speaker's chair, surveyed the chamber and declared, "I see the birds have flown." He then commanded Speaker William Lenthall to disclose their location. The Speaker reportedly fell to his knees and responded, "May it please your Majesty, I have neither eyes to see nor tongue to speak in this place but as the House is pleased to direct me, whose servant I am here."

Fearing for his life, the king fled London, followed by some loyalist members, established an alternative parliament in Oxford and began raising an army. A civil war ensued between the Royalists and Parliamentarians. The Parliamentarians eventually won in 1646 and, two years later, Charles was executed as a traitor.

I was reminded of this incident because it represents an early example of how the rights and privileges of Parliament were violated by the king when he broke into its lower chamber. The privileges and immunities of a legislative body, the principal of which are the freedom from arrest (now largely obsolete) and freedom of speech, date back to that 17th century "Mother of Parliaments." They were established to protect the Parliament against intrusions by the king or others on the body's ability to carry out its business.

Likewise, they were enshrined in the U.S. Constitution to guard against interference by the executive or private citizens with Congress' core lawmaking activities. Under the Speech or Debate Clause of the Constitution, Members are not to be questioned in any other place "for any speech or debate in either house." This protection extends to the legislative acts and papers of Congress and its Members. These privileges are the bulwark of the separation of powers doctrine, though, as James Madison acknowledged in Federalist 48, the wall that separates the branches is a mere "parchment barrier," susceptible to "the encroaching spirit

of power."

It is important to recognize that these privileges and immunities vest in a Member only as part of the legislature and not personally. Put another way, they protect Members only in carrying out their official duties and not in conducting personal business. It was not the intention of Parliament or our Founding Fathers to put Members above the law, but rather to protect them, and thus the institution's ability to function, from plundering raids by the crown or executive branch.

As the Supreme Court made clear in the 1979 case U.S. v. Helstoski, the purpose of the Speech or Debate Clause is "to preserve the constitutional structure of separate, coequal, and independent branches of government." The court elaborated: "The English and American history of the privilege suggests that any lesser standard would risk intrusion by the Executive and the Judiciary into the sphere of protected legislative activities."

It is that sphere the FBI invaded when it forced Capitol Police to admit its agents to a Member's office at 7:15 p.m. on Saturday, May 20. And it is the breach of that sphere that the U.S. District judge enabled by approving the search warrant. It makes little difference that some "neutral" Justice Department-appointed referees are sifting through the confiscated boxes of documents and hard drives to separate the legislative papers from relevant personal materials.

Any evidence is probably already tainted given the source and manner in which it was obtained - especially when you consider that no legislative branch officials were even permitted to observe what was being taken. One has to wonder what the Justice Department and the court were thinking in breaching that wall of separation in a way never before done in the 217-year history of our tripartite form of government. Could it be that some officials were convinced that Congress is so weakened by the current spate of scandals that it would not dare object to the incursion for fear it would be perceived as protecting wrongdoers? Or is it part of the larger, post-Sept. 11, 2001 mentality permeating the executive branch that anything goes, and the Constitution be damned?

While we cannot read the minds of those responsible for approving this raid on the "people's house," Congress already has begun to call them on the carpet to explain their reasoning (or lack thereof). Speaker Dennis Hastert (R-Ill.) and House Minority Leader Nancy Pelosi (D-Calif.) deserve praise and support for their forceful, nonpartisan defense of the institution against such an outrageous executive branch incursion. Their willingness to challenge this action - in the courts if necessary - is an encouraging sign that institutionalism is not dead and that Congress still has the spine to stand up to the extra-constitutional meanderings of the administration.

There are clear signs President Bush has gotten the message from the united Congressional outcry at this overreach of power and is interested in repairing the breach. The president does not need a Congress united against him in his final two years of office. Yet the actions of May 20 did more to strain mutual trust and respect between the branches. Let us hope the damage is not irreparable and that the two houses on the Hill and the White House may come again to enjoy each others' hospitality - when invited.

Now, maybe, I can get back to thinking about that Independence Day column and what it was that caused the Declaration's signers to break with the crown.

Don Wolfensberger is director of the Congress Project at the Woodrow Wilson International Center for Scholars and former staff director of the House Rules Committee.

---- INDEX REFERENCES ----

NEWS SUBJECT: (Judicial (1JU36); Legal (1LE33); Government (1GO80))

INDUSTRY: (Science & Engineering (1SC33); Social Science (1SO92); Science (1SC89); Political Science (1PO69))

REGION: (United Kingdom (1UN38); Europe (1EU83); England (1EN10); Western Europe (1WE41))

Language: EN

OTHER INDEXING: (BRITISH HOUSE; CONGRESS; CONGRESS PROJECT; CONGRESS UNITED; CONSTITUTION; CONTINENTAL CONGRESSES; DEBATE CLAUSE; FBI; FBI RAID BREACHES CONSTITUTIONAL; FOUNDING FATHERS; HOUSE; HOUSE MINORITY LEADER NANCY PELOSI; HOUSE RULES COMMITTEE; JUSTICE DEPARTMENT; MEMBERS; PARLIAMENT; ROYALISTS; SPEAKER; SPEAKER DENNIS HASTERT; SPEECH; SUPREME COURT; UNITED CONGRESSIONAL; WHITE HOUSE; WOLFENSBERGER; WOODROW WILSON INTERNATIONAL CENTER) (Bush; Charles; Helstoski; James Madison; Likewise; Parliamentarians; William Lenthall)

Word Count: 1205
6/5/06 ROLLCALL (No Page)

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EXHIBIT 7

8/10/02 N.Y. Times A14
2002 WLNR 4056687

New York Times (NY)

August 10, 2002

Section: A

Investigating the Investigators

Editorial opposes Federal Bureau of Investigation probe of leaks about intelligence lapses by Senate and House Intelligence committees reviewing government's response to terrorist threats in years leading up to Sept 11; holds bringing in FBI compromises independence legislators need to do their job properly and places FBI in conflict of interest, since committees should be investigating bureau; notes leaks, while embarrassing to Pres Bush, intelligence agency bureaucrats and committee chairmen, have helped alert public to possible defects in National Security Agency monitoring operations and helped increased public pressure for independent probe of possible intelligence failures

One way to chill a Congressional investigation is to send a flock of F.B.I. agents to Capitol Hill to ask legislators to take polygraph tests and answer questions about their dealings with reporters. Unfortunately, that is precisely what is happening these days at the Senate and House Intelligence Committees as they review the government's response to terrorist threats in the years leading up to last Sept. 11.

The F.B.I. investigation may be the coup de grace for a Congressional exercise that has been hobbled by timidity and mismanagement. The two committees should never have been given the job of examining intelligence failures because their own lax oversight of the C.I.A. and other spy agencies contributed to the nation's vulnerability last September. Assigning the committees to conduct a joint investigation suited the White House, which doesn't want an exacting inquiry and has resisted creation of an independent review commission.

Seizing on the leakage of information about intelligence lapses to the press, the White House moved this summer to deliver a debilitating blow by pressing Senator Bob Graham and Representative Porter Goss to order an aggressive investigation into the unauthorized disclosures. The lawmakers quickly caved and invited in the F.B.I.

The intelligence committees are part of a carefully constructed system designed to

monitor executive branch intelligence activities and hold them accountable to the legislature and the law. To carry out these responsibilities, committee members are given access to classified information. Public disclosure of secret information is governed by strict rules drawn up by Congress, rules that Congress itself is empowered to enforce among its members. Bringing in the F.B.I., an executive branch agency, compromises the independence legislators need to do their jobs properly. It also places the F.B.I. in a conflict of interest, since the bureau is one of the agencies the committees should be investigating.

The disclosures that upset the White House involved two messages in Arabic intercepted by the National Security Agency last Sept. 10 but not translated until Sept. 12. According to a CNN report in June, one message said, "Tomorrow is zero hour"; the other said, "The match begins tomorrow." CNN attributed this information to "Congressional and other sources." In addition to nearly all the 37 members of the two committees, the F.B.I. has questioned some 60 Congressional staff members and officials at the N.S.A., the Pentagon and the C.I.A.

While leaks of this kind are embarrassing to the White House, intelligence agency bureaucrats and the two committee chairmen, they have helped alert the public to possible defects in N.S.A. monitoring operations and have increased public pressure for an independent investigation of possible intelligence failures. Senator Graham and Representative Goss would better serve the nation if they turned their attention to uncovering these failures instead of inviting the F.B.I. to investigate their fellow committee members.

---- INDEX REFERENCES ----

NEWS SUBJECT: (International Terrorism (1IN37); Legislation (1LE97); Government (1GO80); Sept 11th Aftermath (1SE05))

INDUSTRY: (Aerospace & Defense (1AE96); Defense (1DE43); Security (1SE29); Defense Intelligence (1DE90))

REGION: (District Of Columbia (1DI60); USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

OTHER INDEXING: (Bush, George W (Pres)) (CNN; CONGRESS; FBI; FEDERAL BUREAU OF INVESTIGATION; HOUSE INTELLIGENCE; NATIONAL SECURITY AGENCY; PENTAGON; SENATE; WHITE HOUSE) (Bob Graham; Editorial; Graham; Pres Bush; Representative Goss; Representative Porter Goss; Seizing) (Terrorism; Editorials; Airlines and Airplanes; Hijacking; World Trade Center (NYC); Ethics; Terrorism; Intelligence Services) (Editorial) (New York City; Washington (DC))

COMPANY TERMS: FEDERAL BUREAU OF INVESTIGATION; NATIONAL SECURITY AGENCY

EDITION: Late Edition - Final

Word Count: 747
8/10/02 NYT A14

END OF DOCUMENT

EXHIBIT 8

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-1508

UNITED STATES OF AMERICA,

Appellee
v.

JOSEPH M. McDADE,

Defendant

CUSTODIAN OF RECORDS,
COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT,
UNITED STATES HOUSE OF REPRESENTATIVES,
Appellant

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DIRECTING THE PRODUCTION OF RECORDS PURSUANT TO FED.R.CRIM.P. 17(c), AT CRIMINAL NO. 92-249

ARGUED: July 12, 1996
BEFORE: Becker, Stapleton and Greenberg, Circuit Judges.

ORDER

It appearing to the Court that:

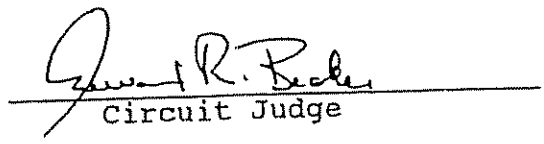
(1). The district court has ruled that the documents at issue are protected by the privilege conferred by the Speech or Debate Clause, and that ruling has not been challenged before us;

(2). With this determination made, our decision in In re: Grand Jury Proceedings, 587 F.2d 589 (3d. Cir. 1977) ("Eilberg") neither required nor authorized disclosure to the government;

(3). It was error for the district court to require production of the documents at issue to the government at the time of the district court's order;

It is hereby ORDERED that the portions of the district court's order of June 5, 1996 appealed from are VACATED.*

BY THE COURT:



Circuit Judge

DATED: JUL 12 1996

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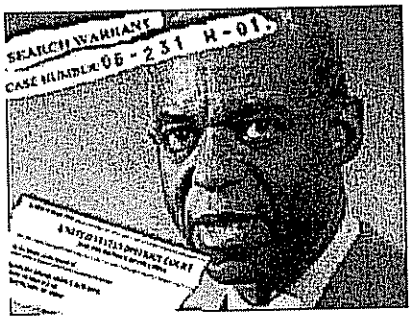
*. If in the course of future proceedings, the district court determines that a legitimate issue exists as to whether there has been a valid waiver of the Committee's privilege, nothing here said is intended to preclude the district court from ordering the documents at issue produced for its inspection in camera in connection with the resolution of that issue.

EXHIBIT 9

Officials: Jefferson Charges by July

May 23, 2006 9:07 AM

Brian Ross Reports:



Federal officials tell ABC News they already "have enough evidence to arrest" Congressman William Jefferson (D-LA) but will wait until a grand jury in Virginia returns a formal indictment. Charges are expected within four to six weeks on allegations Jefferson took bribes in exchange for his official help with a telecommunications contract in Africa.

Department of Justice officials are considering making public redacted portions of the search warrant application to deflect criticism of the FBI's unprecedented raid on Capitol Hill.

Republicans and Democrats Monday suggested the FBI raid violated the Separation of Powers doctrine of the U.S. Constitution.

Some of the redacted pages reportedly lay out the month-long sequence by which the FBI had sought to obtain documents and computer discs from Jefferson's office through the use of a grand jury subpoena.

Officials say the House of Representatives General Counsel made copies of the requested documents and discs several weeks ago but then refused to turn them over.

Officials said Judge Thomas Hogan himself suggested the FBI request a search warrant for the Capitol Hill office of the Congressman, which Hogan authorized last Thursday.

The FBI used a special "filter team" of agents not connected with the case to guarantee that "politically sensitive" documents were not taken as evidence.

Congressman Jefferson has called the raid "outrageous" but declined to answer the question of whether he took bribes.

May 23, 2006 | Permalink | User Comments (61)

EXHIBIT 10

5/25/06 CBS - CBS Evening News (Pg. Unavail. Online)
2006 WLNR 9107401

CBS - CBS Evening News

May 25, 2006

CBS Evening News 2006-05-25 17:30:00

National

CBS

4 CBSE

CBS Evening News

2006-05-25

17:30:00

Schieffer: I'M BOB SCHIEFFER. GUILTY, THE JURY SAYS KEN LAY AND JEFFREY SKILLING WERE RESPONSIBLE FOR THE COLLAPSE OF THE ENERGY GIANT ENRON. A COLLAPSE THAT COST 20,000 PEOPLE THEIR JOBS AND PENSIONS. WE'LL START THERE TONIGHT, AND WE'LL COVER THESE STORIES:.

Reporter: I'M DAVID MARTIN. INVESTIGATIONS INTO THE DEATHS OF IRAQI CIVILIANS COULD RESULT IN MURDER CHARGES AGAINST MARINES.

Reporter: THERE ARE SUDDENLY A LOT MORE SOCIAL SECURITY NUMBERS FOR SALE ON THE WEB. IS THERE A LINK BETWEEN THE STOLEN VETERANS DATA?

Reporter: I'M SLES. THERE ARE PEOPLE GETTING ABOUT 10 MILES TO THE GALEN AND LOVING IT. Captioning sponsored by CBS THIS IS THE 'CBS EVENING NEWS' WITH BOB SCHIEFFER.

Schieffer: GOOD EVENING. IF EVER THERE WAS A STORY THAT STARTS WITH OH, HOW THE MIGHTY HAS FALLEN, THIS HAS TO BE IT. WHEN ENRON WAS RUNNING HIGH, THE MEN WHO RAN IT, KEN LAY AND JEFFREY SKILLING, WERE POSTS OF THE CORPORATE WORLD. WHEN ENRON COLLAPSED IT COST STOCKHOLDERS $60 BILLION, IT'S $2.1 BILLION PENSION FUND COLLAPSED, AND 20,000 PEOPLE LOST THEIR JOBS. TODAY, A HOUSTON JURY CONCLUDED SKILLING AND LAY WERE RESPONSIBLE AND FOUND THEM GUILTY OF FRAUD AND CONSPIRACY. WE'RE GOING TO BEGIN TONIGHT WITH LEE COWAN IN HOUSTON. LEE.

I WOULD RANK THIS AS QUITE SERIOUS, BOTH INCIDENTS.

Reporter: PENTAGON SOURCES SAY IN BOTH CASE, THE INSTIGATOR OF THE KILLINGS APPEARS TO HAVE BEEN THE SERGEANT IN CHARGE, AND THAT HAS RAISED CONCERN ABOUT I BREAKDOWN OF LEADERSHIP IN IRAQ. BOB.

Schieffer: ALL RIGHT, WELL, THANK YOU, DAVID. WHEN F.B.I. AGENTS SEARCHED THE OFFICE OF DEMOCRATIC CONGRESSMAN WILLIAM **JEFFERSON**, IT MARKED A DUBIOUS FIRST. NEVER BEFORE HAD INVESTIGATORS FROM THE EXECUTIVE BRANCH SEARCHED CONGRESSIONAL OFFICES AT CAPITOL HILL.

CONGRESSIONAL LEADERS HAVE NO SYMPATHY FOR **JEFFERSON** WHO IS ACCUSED IN A BRIBERY SCANDAL, BUT THEY SAY THE SEARCH VIOLATED THE CONSTITUTION, AND THEY ARE FURIOUS. TODAY, THE PRESIDENT GOT INTO THE ACT, AND JIM AXELROD HAS THE STORY ON THAT. JIM.

Schieffer: WELL, BOB, PRESIDENT BUSH SAYS ALL THOSE RECORDS SEIZED DURING THAT WEEKEND RAID OF DEMOCRATIC CONGRESSMAN WILLIAM **JEFFERSON'S** OFFICE SHOULD NOW BE SEALED. NO ONE INVOLVE IN THE INVESTIGATION SHOULD HAVE ACCESS TO THE DOCUMENTS FOR 45 DAYS, WHILE BOTH BRANCHES OF GOVERNMENT INVOLVED WORK OUT THEIR DISPUTE. MR. BUSH SAYS THE RAID, PART OF A BRIBERY INVESTIGATION, HAS CREATED A KIND OF DILEMMA UNSEEN IN MORE THAN TWO CENTURIES. ON ONE HAPPENED, THE PRESIDENT SAID IN HIS STATEMENT, THE DEPARTMENT OF JUSTICE'S SEARCH 'WAS PART OF AN IMPORTANT INVESTIGATION INTO ALLEGED PUBLIC CORRUPTION.' ON THE OTHER 'THE BIPARTISAN LEADERSHIP OF THE HOUSE BELIEVES THIS SEARCH VIOLATE THE THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS.' MR. BUSH'S ORDER WAS WELCOMED BY THE HOUSE SPEAKER, WHO SAYS IMPORTANT PRINCIPLES ARE AT STAKE.

IN OUR OFFICE, THERE ARE MEMBERS -- LETTERS AND STUFF TO CONSTITUENTS, MIGHT BE INCOME TAXES, MIGHT BE VETERANS ISSUES. THOSE ARE PRIVATE THINGS. AND THEY'RE CONFIDENTIAL AND YOU NEED TO PROTECT THOSE.

Reporter: A SENIOR LAW ENFORCEMENT OFFICIAL SAID THE COOLING OFF PERIOD WOULD NOT AFFECT THE INVESTIGATION OF CONGRESSMAN **JEFFERSON**. THERE'S VIDEOTAPE OF THE CONGRESSMAN PUTTING CASH IN THE TRUNK OF HIS CAR, THE OFFICIAL TELLS CBS NEWS. THERE'S TWO PLEA AGREEMENTS, AND MORE THAN ENOUGH EVIDENCE TO FINISH THE CASE. SO WHAT BEGAN AS AN INVESTIGATION OF A LITTLE-KNOWN CONGRESSMAN FROM LOUISIANA ENDS UP WITH THE PRESIDENT OF THE UNITED STATES MAKING A HISTORIC ORDER TO POSSIBLY AVERT A CONSTITUTIONAL SHOWDOWN. QUITE A STORY LINE, BOB.

Schieffer: OKAY, WELL, THANK YOU VERY MUCH, JIM. COMING UP NEXT, HE WAS ONCE DRAFTED INTO THE HITLER YOUTH. NOW HE'S PLANNING TO HONOR HOLOCAUST VICTIMS BY VISITING AUSCHWITZ. HE'S ALSO THE POPE. (announcer)

THIS IS A GOOD SOURCE OF FIBER. THIS IS A GOOD SOURCE OF CALCIUM. AND THIS IS A GOOD SOURCE OF BOTH. INTRODUCING BENEFIBER CHEWABLES PLUS CALCIUM. GREAT WILD BERRY TASTE, AS MUCH CALCIUM AS EIGHT OUNCES OF MILK. BENEFIBER MAKES TAKING FIBER EASIER.

Schieffer: POPE BENEDICT TODAY BEGAN A VISIT TO POLAND, THE HOMELAND OF THE IMMENSELY POPULAR MAN HE SUCCEED AS HEAD OF THE ROMAN CATHOLIC CHURCH. THE NEW