

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Search of:)
)
RAYBURN HOUSE OFFICE BUILDING)
ROOM NUMBER 2113)
WASHINGTON, D.C. 20515)

Case No. 06-231-M-01 (TEH)

RECEIVED

MAY 30 2006

NANCY MAYER WHITTINGTON, CLERK

GOVERNMENT'S RESPONSE TO REPRESENTATIVE WILLIAM JEFFERSON'S
MOTION FOR RETURN OF PROPERTY

Representative Jefferson's motion for the return of property asserts that the search executed in his office on May 20, 2006—although it was authorized by a neutral judge based on a showing of probable cause painstakingly presented in an 83-page affidavit—violates the Constitution's Speech or Debate Clause, U.S. Const., art. I, § 6. In making that claim, Rep. Jefferson does not contend that the allegedly criminal activities detailed in the search warrant affidavit are protected by any privilege; he does not suggest that the Speech or Debate Clause broadly protects documents relevant to those alleged crimes; and he does not dispute this Court's determination that there was probable cause to believe that documents relevant to the alleged crimes would be found in his office. Instead, he argues that the Speech or Debate Clause categorically bars the Government from ever executing a search warrant on a congressional office seeking responsive material not covered by the Clause whenever Speech or Debate material might be present.

That position is fundamentally inconsistent with the bedrock principle that "the laws of this country allow no place or employment as a sanctuary for crime." *United States v. Brewster*, 408 U.S. 501, 521 (1972) (quoting *Williamson v. United States*, 207 U.S. 425, 439 (1908)). If accepted, Rep. Jefferson's interpretation would remove courts from their traditional role of

adjudicating privilege claims, would fundamentally subvert the well-established proposition that the Clause does not confer a general immunity on Members of Congress from the usual criminal procedures, and would effectively extend Speech or Debate immunity to clearly unprivileged materials by making it impossible to execute a search warrant in any place containing even one privileged document. The Court should reject that remarkable and unprecedented position, one fundamentally at odds with the Supreme Court's admonition that "legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons." *Gravel v. United States*, 408 U.S. 606, 615 (1972).

One point bears particular emphasis: the Government does not seek to obtain—and indeed has gone to great lengths to *avoid* obtaining—any information from Rep. Jefferson that is actually covered by the Speech or Debate Clause. Indeed, in recognition of the sensitive issues at stake, the Government proposes to follow elaborate and carefully crafted procedures to ensure that no legislative acts (or otherwise nonresponsive) material gathered from the search inadvertently comes into the hands of the Prosecution Team investigating Rep. Jefferson's alleged criminal activity. Those procedures include the use of a screened-off "Filter Team," which, as an additional accommodation, will afford Rep. Jefferson a full opportunity to examine all the seized materials and seek a ruling from this Court on any claim of privilege *before* any documents come into the possession of the Prosecution Team. (In addition, the Government will provide an extra copy of the materials to Rep. Jefferson to share with the General Counsel for the House of Representatives ("House Counsel") if he chooses, so that House Counsel may assist him in asserting privilege claims.) Therefore, despite Rep. Jefferson's heated and sweeping rhetoric, the basic question raised by his motion is simply whether the procedures suggested by the Government and approved by the Court violate the Constitution. Clearly they do not. For

that reason, and because Rep. Jefferson's claims under the Fourth Amendment and Fed. R. Crim. P. 41 are equally without merit, the motion for return of property should be denied.¹

STATEMENT

1. Since approximately March 2005, the Federal Bureau of Investigation ("FBI") has conducted an investigation into whether Congressman William Jefferson and other individuals bribed or conspired to bribe a public official, in violation of 18 U.S.C. §§ 201 and 371; committed or conspired to commit wire fraud, in violation of 18 U.S.C. §§ 371, 1343, 1346, and 1349; or bribed or conspired to bribe a foreign official, in violation of 15 U.S.C. § 78dd-1 *et seq.* and 18 U.S.C. § 371. The investigation involves, among other things, allegations that Rep. Jefferson used his position as a Congressman to promote the sale of telecommunications equipment and services offered by iGate—a Louisville-based communications firm that sought to provide data transfer, media, Internet, and related services—to Nigeria, Ghana, and possibly other African nations, in return for payments of stock and cash. The Government is also investigating whether Rep. Jefferson planned to bribe high-ranking government officials in Nigeria and to use his influence with high-ranking government officials in other African countries in order to obtain the necessary approval for iGate's ventures. Substantial information from cooperating witnesses, recorded conversations, and other sources indicates the following:

a. Rep. Jefferson, through a nominee company in the names of his spouse and children, received, *inter alia*, an equity stake in a Nigerian company controlled by an iGate

¹ Rep. Jefferson's motion also sought emergency interim relief, in particular an order that agents of the FBI and Department of Justice be enjoined from reviewing or inspecting the seized items and that those items be sequestered and "locked in a secure place." Mot. at 2. In light of subsequent events—in particular the Memorandum issued by the President on May 25 directing the Solicitor General (who is not involved in the investigation) to take sole custody of the materials seized from Rep. Jefferson's office and to seal and sequester them from anyone outside of the Solicitor General's office for 45 days—the request for emergency relief is now moot.

investor who is a cooperating witness in the investigation (hereinafter "CW"). *See, e.g.*, Redacted Search Warrant Affidavit ("Aff.") ¶ 9.² Rep. Jefferson, through the nominee company, also received more than \$400,000 in payments from iGate itself. Rep. Jefferson likewise negotiated for an equity stake in a Ghanaian company that was controlled by CW and was created for the sole purpose of marketing and distributing iGate's equipment and services in Ghana. *See ibid.*

b. In exchange for these and other payments, Rep. Jefferson, in his capacity as a Congressman, undertook various promotional efforts on CW's and iGate's behalf. *See, e.g.*, Aff. ¶ 10. Among other things, Rep. Jefferson communicated with the President and Vice President of Nigeria in an effort to secure an iGate business venture in Nigeria over the opposition of the government-owned Nigerian telephone company; he introduced CW to officials at the Export-Import Bank of the United States in order to assist CW in obtaining loan guarantees for iGate's African ventures; he wrote an official letter to the Vice President of Ghana in order to obtain approval for iGate's venture in that country; he followed up on that letter by traveling to Ghana (on CW's funding) and by then meeting with high-level Ghanaian officials in an effort to obtain approval for iGate; and he used his congressional staff to plan the trip to Ghana and to obtain the necessary travel documents for those who made the trip with him. *See ibid.*

c. In various meetings, Rep. Jefferson discussed with CW and others the payment of bribes to high-ranking foreign government officials to promote iGate's business in Nigeria. *See, e.g.*, Aff. ¶ 12. During these meetings, Rep. Jefferson indicated that a high-level Nigerian

² The redacted version of the search warrant affidavit has been made public, but the original version has not. Because the present response to Rep. Jefferson's motion is not being filed under seal, the following factual recitation refers only to the redacted affidavit and to other information that is already part of the public record.

official agreed to help secure government approvals necessary for iGate to operate in Nigeria in exchange for a substantial portion of iGate's Nigerian profits. *See ibid.* Jefferson likewise discussed with CW the possibility of CW's bribing the Nigerian official with a substantial up-front payment, before iGate commenced business operations in Nigeria. *See ibid.* To that end, at a July 2005 meeting at the Ritz-Carlton in Arlington, Virginia, CW gave Rep. Jefferson a leather briefcase containing \$100,000 cash, with the understanding that the payment would be forwarded to the Nigerian official in exchange for securing government approvals necessary for iGate to operate in Nigeria. *See ibid.* During an August 2005 search of Jefferson's Washington, D.C., residence, \$90,000 of the cash from the briefcase was found in Jefferson's freezer concealed inside frozen food containers. *See ibid.*

d. During and after the August 2005 search, federal agents gathered further evidence linking Rep. Jefferson to at least seven other schemes in which he sought things of value in return for his performance of official acts. *See Aff. ¶ 82, 86-122.* For example, a cooperating witness with firsthand knowledge of one such scheme reported that, in exchange for payments to an entity associated with Rep. Jefferson, the Congressman introduced officials from NetLink Digital Television (NDTV), a Nigerian telecommunications company, to officials from iGate. *See id. ¶¶ 83-85.* Rep. Jefferson's assistance enabled NDTV and iGate to negotiate a deal under which NDTV would pay iGate nearly \$45 million for the rights to distribute iGate's technology in Nigeria. *See id. ¶ 83.* Rep. Jefferson separately negotiated with NDTV officials to receive \$5 per subscriber in return for putting NDTV in contact with iGate. *See id. ¶ 83-85.*

e. Brett Pfeffer, who had once served on Rep. Jefferson's congressional staff, was President of the investment firm owned by CW at all times relevant to the instant investigation. *See Aff. ¶ 6(c).* As a result of the above-described scheme, in January 2006, Pfeffer pleaded

guilty to bribing and conspiring to bribe Rep. Jefferson, *see id.* ¶ 6(c) & n.3, and recently was sentenced to eight years of imprisonment. *See United States v. Brett M. Pfeffer*, Crim. No. 06-10-A (E.D. Va.). Similarly, in May 2006, Vernon Jackson, who was President and CEO of iGate at all times relevant to the investigation, pleaded guilty to bribing and conspiring to bribe Rep. Jefferson as described above. *See Aff.* ¶ 6(b) & n.2.

2. Based on the foregoing and other information, subpoenas were issued during late summer 2005 to Rep. Jefferson and his chief of staff. *See Communication from the Hon. William J. Jefferson, Member of Congress*, 151 Cong. Rec. H8061 (daily ed. Sept. 15, 2005) (informing Speaker of subpoena); *Communication from the Chief of Staff of Hon. William J. Jefferson, Member of Congress*, 151 Cong. Rec. H11026 (daily ed. Nov. 18, 2005) (same). The subpoenas sought certain records from Rep. Jefferson's congressional office that were deemed important to the investigation. During the intervening months, the Government worked to obtain those records and exhausted all other reasonable methods of obtaining the records in a timely manner. *See Aff.* ¶ 132. At that point, the Government decided that it was essential to move forward with the investigation.

3. On Thursday, May 18, 2006, again based on the foregoing and other information, the Government filed in this Court an application and affidavit for a warrant to search Rep. Jefferson's congressional office for paper documents and computer files related to the above described bribery scheme and other transactions. *See generally Aff.* ¶¶ 1-157. The discrete paper documents to be seized were described in detail in Schedule B of the (unredacted) application. The precise search terms to be used in examining Jefferson's computer files were similarly detailed in (the unredacted version of) Schedule C.

In an effort to “minimize the likelihood that any potentially politically sensitive, non-responsive items” would be disclosed, the application and affidavit set forth a rigorous set of “special search procedures” to prevent investigators and the Prosecution Team from obtaining paper documents and computer files “that may fall within the purview of the Speech or Debate Clause * * * or any other pertinent privilege.” Aff. ¶ 136. Specifically:

As to paper documents, the application provided for a designated Filter Team composed of two Department of Justice (“DOJ”) attorneys who were not on the Prosecution Team and an FBI agent who had no role in the investigation or prosecution of the case. Aff. ¶ 139. “Before giving any paper records seized from [Rep. Jefferson’s office] to the prosecution team,” the Filter Team would review the records to determine if they were responsive to the list of items on Schedule B. *Id.* ¶¶ 139-140. If the records were unresponsive, the Filter Team would arrange for their prompt return to Rep. Jefferson’s office. *Id.* ¶ 140. If the records were responsive, the Filter Team would then determine if they nevertheless “[f]ell within the purview of the Speech or Debate Clause” or some other privilege. *Id.* ¶ 141. If the Filter Team determined that records were privileged, they would be “returned to counsel for Congressman Jefferson.” *Id.* at 77 n.38. If the records were determined to be potentially privileged, a log and copies thereof would be provided to Rep. Jefferson’s counsel within 20 days of the search, *id.* ¶ 142, and the Filter Team would ask this Court to review the records for a final determination about privilege, *id.* ¶ 143. If, instead, the Filter Team determined that the records were unprivileged, it would provide copies to the Prosecution Team and to Rep. Jefferson’s counsel within 10 days of the search. *Id.* ¶ 141.

As to computer files, the designated Filter Team would include certified FBI computer examiners who, like the other members of the Filter Team, would have no role in the investigation or prosecution of the case. Aff. ¶ 144. The Filter Team would search the computer

files for the narrow search terms enumerated in Schedule C—thus undertaking an initial culling of the files unrelated to the investigation—and would then proceed in a manner similar to the one prescribed for the paper records. *Id.* ¶ 148.³ That is, before giving any of these already screened computer files to the Prosecution Team, the Filter Team would conduct a second screening to determine if the files were responsive to the list of items on Schedule B. *Id.* ¶¶ 149-150. If the files were unresponsive, they would “not be included for any further review or examination by the government absent court process or [Rep. Jefferson’s] consent.” *Id.* ¶ 150. If the files were responsive, the Filter Team would then determine if they nevertheless “[e]ll within the purview of the Speech or Debate Clause” or some other privilege. *Id.* ¶ 151. If the Filter Team determined the files were privileged, they would not be provided to the Prosecution Team. *Id.* at 81 n.40. If the files were determined to be potentially privileged, a log and copies thereof would be provided to Rep. Jefferson’s counsel, *id.* ¶ 152, and the Filter Team would ask this Court to review the records for a final determination about privilege, *id.* ¶ 154. If, instead, the Filter Team determined that the files were unprivileged, it would provide copies to the Prosecution Team and to Rep. Jefferson’s counsel. *Id.* ¶ 151.

4. Late in the afternoon on Thursday, May 18, this Court granted the Government’s application, issued the warrant, and ordered that the search be conducted on or before Sunday, May 21. *See Aff.* at 1-3. On Saturday, May 20, federal agents executed the warrant and searched Rep. Jefferson’s office for the narrowly defined paper records and computer files

³ The process for searching the computer files provided even greater protections. As the application and affidavit underscore, the computer images would only be searched (automatically and not with human eyes) with the search terms approved by the Court. Only those records deemed—by the computer—to be responsive to the search terms actually would be reviewed by the Filter Team, in the same manner as previously described for the paper records. Thus, the vast majority of computer records imaged in Rep. Jefferson’s office will never be seen by anyone on either the Prosecution Team or the Filter Team.

enumerated in the Schedules. The agents—who were dressed in formal business attire in lieu of the uniforms usually worn when executing warrants—carried out the search on Saturday in an effort to avoid disrupting congressional business. Similarly, in an effort to minimize disturbance of Rep. Jefferson’s office, the agents conducted extensive and time-consuming imaging and verification of computer files on site instead of removing the computers themselves. During the search, the agents excluded Rep. Jefferson’s counsel and counsel for the House of Representatives. The agents ultimately seized copies of Rep. Jefferson’s computer hard drive and two boxes of paper records. *See generally* Inventory of Seized Items; *see also* CR-15 Vision Quest Search Event Log. The limited number of paper records seized is a testament to the narrow scope of the list of items described in the warrant. The narrowly drafted computer search terms are similarly expected to generate a small number of documents.

5. a. On Wednesday, May 24, Rep. Jefferson filed in this Court his motion for return of the seized materials under Rule 41 of the Federal Rules of Criminal Procedure. In addition to the return of property, the motion seeks “emergency * * * interim relief” in the form of an order directing: “that the FBI and the Department of Justice, and their agents and employees[,] be immediately enjoined from any further review or inspection of the seized items”; “that the seized items be sequestered and locked in a secure place”; and “that the supervisor(s) of the search team and the ‘Filter Team’ file a report with the court detailing which documents or electronic records have been reviewed and what steps have been taken to sequester the documents from further review pending further order of the court.” Mot. for Return of Property and Emergency Mot. for Interim Relief (“Mot.”) 1-2; *see* Mem. in Support of Mot. for Return of Property (“Mem.”) 2-3.

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

c. On the afternoon of May 26, pursuant to the President's Memorandum, the Office of the Solicitor General took sole custody of the materials seized from Rep. Jefferson's office. The Solicitor General has sequestered those materials from anyone outside of his office, including, of course, all FBI agents and DOJ attorneys investigating or potentially prosecuting

this case. Significantly, because of the filtering procedures described in the warrant application and affidavit, and because the Office of the Deputy Attorney General had directed a freeze of any review of the seized items earlier in the week, *at no time* between the search and the Solicitor General's assumption of custody *has any agent or attorney on the Filter Team or investigating or potentially prosecuting the case viewed any of the paper records or computer files seized from Rep. Jefferson's office or received any information about the content of those records.*

d. In response to the concerns raised by Rep. Jefferson and the leadership of the House of Representatives, the Government now intends to make an additional procedural accommodation. Under this additional procedure, copies of all materials seized from Rep. Jefferson's office will be provided to Rep. Jefferson (and, if Rep. Jefferson chooses, he may provide copies to House Counsel).⁴ The Filter Team will prepare a log of the records they deem to be privileged. The log will identify any such records by date, recipient, sender, subject matter, and the nature of any potential privilege. The Filter Team will provide its log to Rep. Jefferson (and, if Rep. Jefferson chooses, to House Counsel) to allow him the opportunity to disagree with the Filter Team's privilege determinations. Documents that the Filter Team determines are privileged will be returned to counsel for Rep. Jefferson. Any disputes that may arise about whether particular remaining records are privileged will then be resolved by the Court. *No member of the Prosecution Team will have access to any seized document that Rep. Jefferson claims to be privileged until the Court has made a determination that the record is not privileged.* This accommodation obviates the concerns expressed in Rep. Jefferson's brief (Mem. 15) that the Filter Team, applying the original procedures set forth in the affidavit, might

⁴ In his motion, Rep. Jefferson states that the privilege belongs to him. Mem. 13.

make a unilateral determination that a document was not privileged and turn it over to the Prosecution Team without affording Rep. Jefferson the opportunity to assert privilege.

ARGUMENT

I. THE SEARCH OF REP. JEFFERSON'S OFFICE DID NOT VIOLATE THE SPEECH OR DEBATE CLAUSE

The Speech or Debate Clause provides that “[f]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.” U.S. Const. art. I, § 6. “Our speech or debate privilege was designed to preserve legislative independence, not supremacy.” *Brewster*, 408 U.S. at 508. The Supreme Court has thus made clear that the Speech or Debate Clause “does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases.” *Gravel*, 408 U.S. at 626. To be sure, “*when it applies*, the Clause provides protection against civil as well as criminal action, and against actions brought by private individuals as well as those initiated by the Executive Branch.” *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-03 (1975) (emphasis added). The purpose of the Speech or Debate Clause is to ensure that Members of Congress can perform their legislative function without fear that they will be sued or prosecuted for legislative acts. See *United States v. Johnson*, 383 U.S. 169, 180-81 (1966) (Clause was designed “to prevent intimidation by the executive and accountability before a possibly hostile judiciary”); *Tenny v. Brandhove*, 341 U.S. 267, 373 (1951); *United States v. Rostenkowski*, 59 F.3d 1291, 1302 (D.C. Cir. 1995) (Clause “protects the legislator from executive and judicial recrimination for his ‘legislative acts’”). But the Supreme Court “has been careful not to extend the scope of [the Clause] further than its purpose requires.” *Forrester v. White*, 484 U.S. 219, 224 (1988). Its

protections thus do not “extend beyond what is necessary to preserve the integrity of the legislative process.” *Brewster*, 408 U.S. at 517.

In particular, it is settled that the Clause extends only to those activities that are “an integral part of the deliberative and communicative processes by which Members participate” in their constitutionally mandated duties. *Gravel*, 408 U.S. at 625. Activities that are incidental to a Legislator’s constitutional functions fall outside the protections of the Clause. As the Court has explained, the Clause does not “prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself.” *Brewster*, 408 U.S. at 528. Indeed, “[t]he Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions.” *Id.*; see also *United States v. Helstoski*, 442 U.S. 477, 490 (1979); *United States v. Myers*, 635 F.2d 932, 941-42 (2d Cir. 1980).

Where the protections of the Clause do not apply, a Member of Congress has no claim to greater protection from traditional criminal process than any other citizen. *Cf. Gravel*, 408 U.S. at 615 (“[L]egislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons.”). As the D.C. Circuit has observed: “Beyond the necessary privileges granted by the Constitution to legislators, the people ought not to be immunized against themselves.” *Chastain v. Sundquist*, 833 F.2d 311, 328 (D.C. Cir. 1987). Thus, in *Gravel*, the Supreme Court held that a legislative aide, whose immunity under the Clause was identical to that of the Senator for whom he worked, could nevertheless be compelled to answer questions before a grand jury “relating to his or the Senator’s arrangements, if any, with respect to republication or with respect to third-party conduct under valid investigation by the grand jury, as long as the questions do not implicate legislative action of the Senator.” *Gravel*, 408

U.S. at 628. Where no “legislative act is implicated by the questions,” the aide had no more protection from the grand jury’s inquiry “than any other witness.” *Id.* The Clause simply does not “make Members of Congress super-citizens, immune from criminal responsibility.” *Brewster*, 408 U.S. at 516.

These cases make clear that a Member of Congress has no immunity from criminal process (including the execution of a search warrant) where neither the activity being investigated nor the information sought from the Member is covered by the privilege. As set forth in the 83-page affidavit accompanying the Government’s application for a search warrant, the alleged criminal conduct at issue here plainly falls outside of the scope of the Speech or Debate Clause. *See Brewster*, 408 U.S. at 512 (holding that Speech or Debate Clause does not cover “a wide range of legitimate ‘errands’ performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so called ‘news letters’ to constituents, news releases, and speeches delivered outside of Congress”). This Court issued the search warrant only after determining that there was probable cause to believe that evidence related to an international bribery conspiracy—one unconnected to any legislative act—was likely to be found in the office of Rep. Jefferson.

In executing that warrant, the Government has gone to great lengths to ensure that no privileged material inadvertently recovered during the search is obtained by the Prosecution Team. Indeed, in an effort to condemn the search, Rep. Jefferson’s motion entirely ignores the fact that, from the outset of this case, the Government has been interested only in obtaining non-legislative act evidence of criminal activity, and has committed to implementing elaborate procedures to *avoid* obtaining any information that would be covered by the Speech or Debate Clause (or that otherwise would be non-responsive). As a matter of comity, and out of an

abundance of caution, the Government proposed, and this Court approved, special procedures designed to accommodate the privilege and other political sensitivities by ensuring that *no document* covered by the Speech or Debate Clause would come into the possession of the Prosecution Team. These procedures are rigorous:

- The search itself was conducted by agents and certified forensic examiners from the FBI who have had no role in the investigation. *See* Aff. ¶¶ 137, 144. The non-case agents, furthermore, are forbidden from revealing any non-responsive or politically sensitive information they may have come across inadvertently during the search, and are required to “attest in writing to their compliance with this procedure.” *Id.* ¶ 138.
- The responsive documents were transferred from the non-case agents to a “Filter Team” consisting of an attorney from the Office of the United States Attorney for the Eastern District of Virginia, an attorney from the Fraud Section of the Criminal Division in the Department of Justice, and another non-case FBI agent. *See* Aff. ¶ 140. Members of the Filter Team “have had no role or connection to the investigation in this matter.” *Id.* The Filter Team is to review each seized document to ensure that it is responsive, and, if it is, to ensure that *no document* falling within the purview of the Speech or Debate Clause is transferred to the Prosecution Team. *See id.* ¶¶ 141, 151.
- Finally, in response to the concerns raised by Rep. Jefferson, the Government will not object to treating *all* documents and computer records seized during the search as “potentially privileged paper records” or “potentially privileged computer records.” *See* Aff. ¶¶ 142, 152. The Government will provide Rep. Jefferson (and, if Rep. Jefferson chooses, House Counsel) with copies of all of the seized documents so that he can raise any claims of privilege for resolution by this Court *before* any documents are transferred to the Prosecution Team.

Accordingly, both the warrant itself and the Government’s procedures for executing it will guarantee that only responsive documents that fall outside the scope of the Speech or Debate Clause will be made available to the Prosecution Team for use in the investigation of Rep. Jefferson. It is thus undisputed that this case is not one in which the Executive Branch seeks to review legislative act evidence gathered from a search; instead, the dispute here concerns merely whether the procedures in place to separate privileged and non-responsive information (which

the Government has no interest in) from unprivileged information (which Rep. Jefferson has no constitutional or other legal basis for withholding from a lawful search warrant) are constitutionally adequate.

Although the precise level of protection offered by the Speech or Debate Clause is the subject of some disagreement, Rep. Jefferson's motion can be denied without resolving that issue. The Third Circuit has held that "the privilege when applied to records or third-party testimony is one of nonevidentiary use, not of non-disclosure." *In re Grand Jury Investigation*, 587 F.2d 589, 597 (3d Cir. 1978). In the civil discovery context, the D.C. Circuit has suggested that the privilege provides Members of Congress with "testimonial immunity" from the production of documents held in connection with the legislative process. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995).⁵ The execution of a search warrant, of course, does not involve a testimonial act of production by the person whose premises are searched, and there is no need to provide a person whose premises are searched

⁵ *Brown & Williamson* was a civil case in which a private litigant was attempting to subpoena concededly privileged documents in the possession of two Members of Congress. (Indeed, every one of the cases that Rep. Jefferson cites in support of his claims about the scope of the privilege is a civil case, *see* Mem. 10 n.9.) The D.C. Circuit expressly recognized that "the existence of criminal proceedings" could alter the analysis because "the testimonial privilege might be less stringently applied when inconsistent with a sovereign interest." 62 F.3d at 419-20. Applying the privilege less stringently in that context may be necessary to accommodate the sovereign's compelling interest in the enforcement of the criminal law. *Cf. United States v. Nixon*, 418 U.S. 683, 713 (1974) (holding that the President's constitutional privilege in the confidentiality of his communications with his advisors would at times have to give way to the "fundamental demands of due process of law in the fair administration of criminal justice"). Thus, it is an open question in this Circuit whether a Member of Congress may assert an absolute immunity under the Speech or Debate Clause from being compelled to disclose privileged material in response to a grand jury subpoena or other form of compulsory process in a criminal case. The present motion can, however, be resolved on narrower grounds, as both the Government's law enforcement interests and Rep. Jefferson's legislative interests will be accommodated by the use of the special procedures designed to ensure that no document about which Rep. Jefferson wishes to assert a privilege claim will be seen or used by the Prosecution Team until this Court has decided whether the privilege applies.

with any form of immunity in order to obtain the documents. *See supra* note 11. Accordingly, whether the Clause provides Members with testimonial immunity in the discovery context does not answer the question of whether the Clause protects them from the execution of a search warrant authorized by a court.

Whatever the exact nature of the privilege, however, the procedures proposed to be used by the Government here are plainly sufficient to protect against any impermissible intrusion. Neither the text of the Clause, which protects Members of Congress from being “questioned” about their legislative acts, U.S. Const., art. I, § 6, nor its purpose, which is to preserve legislative “independence, not supremacy,” *Brewster*, 408 U.S. at 508, are implicated by the possibility that Executive Branch officials—who have been carefully screened off from the Prosecution Team and who have no law enforcement interest in this case—may incidentally see materials covered by the privilege in the process of screening such materials out of the set of documents seized during the execution of the warrant. Because such officials are under affirmative obligations not to disclose the contents of any documents they see (and to attest that they have not done so), there is no prejudice to Rep. Jefferson as a result of the way in which the search was carried out. *Cf. Weatherford v. Bursey*, 429 U.S. 545, 556-58 (1977) (no constitutional violation where undercover agent heard conversations between defendant and his attorney, but did not disclose that information to the Prosecution Team, because there was not “at least a realistic possibility of injury to [defendant] or benefit to the State”). Thus, even if the Speech or Debate Clause were understood to create a criminal discovery privilege, rather than a privilege protecting legislators against being questioned about privileged information or having such information used against them (a point that the Government does not concede), it simply does not constitute “discovery” for a law enforcement agent unconnected with the investigation

to make a cursory review of privileged information solely for the purpose of determining whether it is privileged.

Indeed, virtually identical procedures to the ones used here have been approved to screen documents that are protected by other important privileges, such as the attorney-client privilege, which, where it applies, “affords all communications between attorney and client *absolute and complete* protection from disclosure.” *Hanson v. USAID*, 372 F.3d 286, 291 (4th Cir. 2004) (internal citation omitted) (emphases added). Thus, for example, in the case of a criminal search warrant involving a computer believed to contain privileged attorney-client communications, the court described the use of a filter team to review the documents for potentially privileged information, along with ultimate review by the magistrate judge before any document was turned over to the prosecution team, as a “proper, fair and acceptable method of protecting privileged communications.” *United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 43 (D. Conn. 2002). Another district court reached the same conclusion in *United States v. Grant*, 2004 WL 1171258, *1-3 (S.D.N.Y. May 25, 2004), which involved the execution of a criminal search warrant that was expected to result in the seizure of some materials potentially protected by the attorney-client privilege. In approving the use of a filter team, with review by the district court before disclosure to the prosecution team, the district court explained that the documents at issue had been seized pursuant to a lawful warrant, and that use of a filter team would permit the Government to make fully informed arguments as to privilege, therefore serving “the public’s strong interest in the investigation and prosecution of criminal conduct.” *Id.* at *2-3.⁶

⁶ Some district courts have expressed reservations about the use of filter teams to review materials recovered during the execution of a search warrant where it is likely that some recovered materials would be protected by the attorney-client privilege, and have instead favored use of special masters, magistrate judges, or the district court itself to conduct such review. *See, e.g., United States v. Neill*, 952 F. Supp. 834, 839-42 (D.D.C. 1997). We are not aware,

Similarly, the implementation of the procedures described above will preclude any argument that Rep. Jefferson is deprived of the opportunity to assert his privilege. To the contrary, those procedures will allow him to assert that privilege—and have his claim adjudicated by this Court—before the Prosecution Team can see, much less use, any document uncovered during the execution of the search warrant. He thus will have a full and timely opportunity to “identify and segregate” the materials that may relate to his legislative activities, Mem. 13, and to ask this Court to ensure that no such materials are used against him or even come into the possession of those investigating his conduct. Rep. Jefferson suffers no cognizable injury under the Speech or Debate Clause because he must assert privilege after a judicially authorized search, rather than during it, especially when he suffers no prejudice as a result.

In arguing that these extensive procedural protections are constitutionally inadequate, Rep. Jefferson construes the Clause as an absolute barrier to the execution of any search warrant on a legislative office. Mem. 13. On Rep. Jefferson’s view, the Department of Justice is forbidden from executing a search warrant—even one that seeks only material not covered by the Speech or Debate Clause, and that contains express and detailed procedures to ensure that no privileged material will be obtained (or even seen) by the Prosecution Team—merely because the premises to be searched happen to contain privileged material. If accepted, that argument would fundamentally subvert the well established proposition that the Speech or Debate privilege neither confers a general immunity on Members of Congress nor makes congressional offices

however, of any decision holding the use of filter teams to be legally inadequate. Essentially for the reasons outlined by the district court in *Grant*, filter teams are an entirely appropriate and eminently practical way to protect potentially privileged material recovered during the execution of a search warrant.

sanctuaries from criminal process.⁷ Such a reading of the Clause is also in tension with the other legislative privileges embodied in Article I, section 6. Given that the Arrest Clause clearly “does not exempt Members of Congress from the operation of the ordinary criminal laws,” *Gravel*, 408 U.S. at 615,⁸ it “can hardly be thought that the Speech or Debate Clause totally protects what the sentence preceding it has plainly left open to prosecution, *i.e.*, all criminal acts,” *Brewster*, 408 U.S. at 521.

Indeed, far from forbidding the kind of procedures used by the Government here, the Speech or Debate Clause does not even *require* that such procedures be extended. The Clause affords Members of Congress two basic protections: first, a *privilege* against “be[ing] questioned” about their legislative acts, U.S. Const., art. I, § 6; and second, an *immunity* protecting them from “a civil or criminal judgment * * * because [of] conduct * * * within the ‘sphere of legitimate legislative activity.’” *Gravel*, 408 U.S. at 624. The protection it affords differs in important respects from traditional confidentiality privileges. Unlike traditional confidentiality privileges, the Clause protects public acts, such as floor debates, committee hearings, votes, and drafting bills and committee reports. *See Gravel*, 408 U.S. at 624; *Doe v. McMillan*, 412 U.S. 306, 311-13 (1973). To be sure, the Clause may apply to materials that have

⁷ Rep. Jefferson’s argument also would apply to the homes and cars of Members of Congress and their staffs, because it is possible that privileged documents would be located in those places as well. If his argument is accepted by this Court, Members of Congress and their staffs would be able to create search-free zones wherever they go by bringing along some legislative materials. This purported immunity from searches is plainly more extensive than what is necessary to protect privileged documents and the integrity of the legislative process. The Government notes that law enforcement officers searched Rep. Jefferson’s car (in the basement of the Rayburn House Office Building) and two of his residences in connection with this investigation, and we are not aware that he interposed any objection to those searches.

⁸ The Arrest Clause provides: “[Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same.” U.S. Const. art. 1, § 6.

not been made public, such as internal memoranda or conversations among Members discussing the need for legislation or the merits of a proposed bill. *Cf. Brown & Williamson*, 62 F.3d at 417-23 (Clause protects from production in civil discovery stolen law-firm documents received by Member of Congress for use in hearings on the effects of tobacco). But legislative materials and conversations covered by the Clause may be privileged whether or not confidentiality is maintained. *See id.* at 412 (Clause applied even though Member announced on a radio broadcast that he had received the stolen documents, and communicated to the subcommittee the substance of the documents).⁹ It is not the private or confidential status of the communication that is at the core of the privilege; rather, it is the need to allow Members of Congress to carry out their legislative responsibilities without fear of retribution.

Because the Clause serves a different purpose than do traditional confidentiality privileges, 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. It has never been suggested that the Constitution is offended merely because members of the prosecution team review legislative materials in the course of making privilege determinations. Whatever the scope of the Speech or Debate privilege, it does not sweep so broadly as that. And

⁹ Of course, statements a Member or staffer repeated outside the legislative process would not be immune from liability. *See Gravel*, 408 U.S. at 622-27.

this result does not change merely because the Government obtains evidence through a search warrant.¹⁰

The conclusion that the Constitution does not prohibit members of even a prosecution team from reviewing material covered by the Speech or Debate Clause is reinforced by the way in which courts have addressed remedial issues following the improper use of such material in a criminal prosecution. Courts have not ordered the return of Speech or Debate material because it has come into the hands of the prosecution team. Instead, courts typically only require remedies to ensure that privileged material is not used against a Member of Congress. Thus, courts generally do not require dismissal of an indictment even when Speech or Debate material was presented to the grand jury unless the protected material was pervasive or formed the basis for the criminal charge. *See Johnson*, 383 U.S. at 185 (“With all references to [Speech or Debate material] eliminated [from the indictment], we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause.”); *Rostenkowski*, 59 F.3d at 1300 (“the Government does not have to establish an independent source for the information upon which it would prosecute a Member of Congress. Rather * * * the Member must show that the Government has relied upon privileged material.”); *id.* at 1301 (where the indictment is “valid on its face,” Speech or Debate Clause “does not require pre-trial review of the evidence to be presented at trial”); *United States v. McDade*, 28 F.3d 283, 300 (3d Cir. 1994) (even if two overt acts were alleged in violation of the Clause, there were “numerous other overt acts” to support the indictment); *Myers*, 635 F.2d at 941 (dismissal

¹⁰ Unlike evidence obtained by subpoena, which has a “testimonial” component, *see United States v. Hubbell*, 530 U.S. 27 (2000); *Brown & Williamson*, 62 F.3d at 421, there is no testimonial component where the government seizes, pursuant to a search warrant, pre-existing documents. *Cf. Andresen v. Maryland*, 427 U.S. 463, 470-71 (1976) (seizure of private papers did not violate the Fourth or Fifth Amendment); *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004) (describing “testimonial” evidence).

not required although grand jury heard “some evidence of legislative acts that is privileged by the Speech or Debate Clause”); *compare United States v. Helstoski*, 635 F.2d 200, 205-06 (3d Cir. 1980) (indictment must be dismissed where the “improper production of privileged matter permeated the whole proceeding”). In none of those cases did the court suggest that the prosecution team’s mere exposure to Speech or Debate material violated the Clause or required a remedy. Instead, courts took steps to ensure that the material did not form the basis of a Member’s indictment or conviction.

Thus, just as the Speech or Debate Clause makes room for the prosecution of a Member of Congress for the kinds of non-legislative activity at issue in this case, it also makes room for the execution of a search warrant seeking such non-legislative information in the possession of a Member of Congress. To hold otherwise would effectively extend Speech or Debate privilege to documents and materials that are not legislative in nature by making it impossible to execute a search warrant in any place containing even one privileged document. This hardship would be particularly acute where, as here, there are no other avenues by which the Government can reasonably expect to obtain the non-privileged evidence. Indeed, Rep. Jefferson’s view of the privilege, taken to its logical conclusion, would allow a Member of Congress to prevent law enforcement officers from ever obtaining evidence of a crime simply by putting the evidence in a filing cabinet in his office that might contain privileged documents. Such a holding would give Members of Congress a ready means of frustrating criminal investigations that are entirely permissible under the Speech or Debate Clause, thereby undermining the bedrock principle that “the laws of this country allow no place or employment as a sanctuary for crime.” *Brewster*, 408 U.S. at 521 (quoting *Williamson v. United States*, 207 U.S. 425, 439 (1908)).

Ultimately, then, Rep. Jefferson’s argument that the execution of the warrant contravened the Speech or Debate privilege rests on the claim that he alone has the unreviewable power to determine what materials are privileged. *See* Mem. 13. He cites no authority for this expansive view of the privilege—and indeed no such authority exists. Moreover, the logic of this argument does not distinguish between a determination made by a member of the Filter Team and a determination made by this Court. On his view, each would be equally an impermissible and fundamental intrusion on the separation of powers. That proposition is, of course, directly refuted by the great body of case law in which disputes about the scope of the Speech or Debate Clause have been resolved by the courts, not unilaterally by a legislator asserting the privilege. *See, e.g., Gravel*, 408 U.S. at 622-27 (rejecting Senator’s argument that the privilege applied to his decision to privately publish materials that he had previously used in his legislative capacity); *In re Grand Jury Subpoena*, 587 F.2d at 597 (“Since the Congressman is asserting a use privilege personal to him, and since the information as to which calls were legislative acts is in his possession alone, the burden of going forward and of persuasion by a preponderance of the evidence falls on him.”).

The Speech or Debate Clause recognizes that those who write the laws are not exempt from them; the Clause does not exempt from that salutary principle the laws and rules providing for the execution of court-authorized search warrants. Rep. Jefferson’s attempt to expand the protections afforded by the Clause to insulate himself and his workplace from a valid search warrant thus finds no support in the text or purposes of the Constitution and is refuted by both precedent and common sense.

II. THE EXCLUSION OF REP. JEFFERSON'S COUNSEL DID NOT RENDER THE SEARCH UNLAWFUL UNDER EITHER RULE 41 OR THE FOURTH AMENDMENT

Rep. Jefferson contends (Mem. 18-21) that he is entitled to return of the property seized in the search of his congressional office because the Government, by not permitting his counsel to be present during the execution of the search warrant, violated Rule 41(f)(2) of the Federal Rules of Criminal Procedure and the Fourth Amendment. That contention lacks merit. Neither Rule 41(f)(2) nor the Fourth Amendment requires the Government to permit a property owner or his agent to be present to supervise the execution of a search warrant.

Rule 41(f)(2) sets forth procedures that law enforcement officers are to use when conducting an inventory of the property seized pursuant to a warrant. The Rule provides:

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

Rep. Jefferson asserts (Mem. 18) that the Rule requires that the owner be present to witness the preparation of the inventory. But the plain language of the Rule, which Rep. Jefferson only selectively quotes, clearly contemplates that the owner need not be present, explicitly providing that when the owner is not present, any "credible person" may witness the inventory.¹¹ As the text clearly demonstrates, the purpose of the Rule is not to provide the owner a right to be present, but simply to ensure that officers executing a warrant conduct a proper and credible inventory of any property seized. Accordingly, the absence of the owner, whether voluntary or

¹¹ Rep. Jefferson errs in suggesting (Mem. 8) that the return was defective because it "does not identify anyone in whose presence it was prepared or verified." While Rule 41 requires an officer executing the warrant to "prepare and verify an inventory of any property seized" in the presence of another officer and the owner or "at least one other credible person," Fed. R. Crim. P. 41(f)(2), it does not require the witness to sign the inventory or the warrant return.

involuntary, does not violate Rule 41(f)(2), and provides no basis for a motion to return the seized property. See *United States v. Daniel*, 667 F.2d 783, 785 (9th Cir. 1982) (rejecting claim that evidence should be suppressed because the officers prepared the inventory outside defendant's presence because "neither Fed. R. Cr. P. 41 nor the Fourth Amendment requires that the owner of the premises searched be present at the time of the inventory").¹²

Nor can a right to supervise the execution of a warrant be inferred from the Fourth Amendment. To the contrary, the Supreme Court has expressly held that the Fourth Amendment allows the police to detain the residents of premises at which a valid search warrant is being executed, and thereby forcibly prevent them from overseeing the search. See *Muehler v. Mena*, 544 U.S. 93 (2005); *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981). Indeed, an "officer's authority to detain incident to a search is categorical." *Mena*, 544 U.S. at 98. If law enforcement officers may detain an owner to ensure that a search is carried out in an orderly manner with minimum risk to both the officers and the occupants of the property, see *Summers*, 452 U.S. at 702-03, they surely may take the lesser step of excluding the owner from the premises during the search. Cf. *United States v. Stefonek*, 179 F.3d 1030, 1034 (7th Cir. 1999) ("nothing in the Fourth Amendment or in the case law elaborating it or in the practice of searches pursuant to warrants requires that searches be confined to times at which the owner or occupant of the premises to be searched is present so that he can monitor the search"); *United States v. Chubbuck*, 32 F.3d 1458, 1460-61 (10th Cir. 1994) ("[T]he only precedent[s] in the federal

¹² Rep. Jefferson notes (Mem. 17) that the inventory indicates that items were seized during the search that were "not listed on the schedule of items to be seized" pursuant to the search warrant. But it is well established that if agents have a valid warrant "to search a given area for specified objects, and in the course of the search come across some other article of an incriminating character," they may seize it under the "plain view" doctrine. *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971); *United States v. Pindell*, 336 F.3d 1049, 1054-56 (D.C. Cir. 2003).

courts of appeals * * * have held that police may search a dwelling even when the occupant is not present.”); *United States v. Gervato*, 474 F.2d 40, 43-45 (3d Cir. 1973) (“[N]either the Supreme Court nor any court of appeals has ever hinted or suggested, despite many opportunities to do so, that a search warrant should be executed only in the presence of the possessor or occupant of the property searched.”).

Alternatively, and even more broadly, Rep. Jefferson suggests that Rule 41(f)(2) establishes an obligation on the part of the Government to facilitate the owner’s presence once the owner becomes aware that a search is being conducted. There is no such requirement on the face of the Rule, and we are aware of no authority for that counterintuitive reading. Nor is there any basis for inferring such a requirement, particularly given the overriding policy reasons for not requiring law enforcement to permit owners to remain on site during the execution of a warrant. *Cf. United States v. Grubbs*, 126 S. Ct. 1494, 1501 (2006).¹³

Similarly, there is no authority for Rep. Jefferson’s assertion (Mem. 19-20) that the execution of the warrant was constitutionally unreasonable because the Government declined to permit his counsel to be present during the search. To support that argument, Rep. Jefferson contends that the Government had no good reason to exclude counsel. That assertion turns the proper analysis on its head. The question is why counsel’s presence was constitutionally

¹³ The Rule speaks only to the *owner*, and there is no textual basis for extending the right Rep. Jefferson seeks to create to the owner’s agents as well. Moreover, even under Rep. Jefferson’s own reading of Rule 41(f)(2) (Mem. at 20-21), the Rule would require return of the documents only if the violation was “deliberate and intentional.” It is clear that any alleged violation of Rule 41(f)(2) here was not deliberate and intentional. Since we are aware of no case establishing a right for counsel to be present for the execution of a warrant, let alone a right created by Rule 41(f)(2)—and Rep. Jefferson has certainly not cited any such case—it follows that any asserted violation of such right would not have been deliberate and intentional. *See, e.g., United States v. Williamson*, 439 F.3d 1125, 1134 n.7 (9th Cir. 2006) (“[L]inguistically, one cannot ‘deliberately disregard’ a Rule of which one is unaware.”). In any event, under no circumstances would a mere rule violation justify return of the property.

required in this case or, at a minimum, what counsel would have done if she had been present that would have rendered the search more reasonable. Rep. Jefferson merely states “that the prosecution knew * * * it was treading in uncharted constitutional waters, and it knew that its agents would be viewing Speech or Debate material” (Mem. 20), perhaps suggesting that counsel would have engaged in a dialogue with the agents regarding what to search and seize. As the Supreme Court recently noted, however, the Constitution protects property owners not by giving them license to engage law enforcement officers in debate over the scope or basis for the warrant, but by requiring that warrants be issued by neutral magistrates and by permitting parties to seek suppression after the fact. *Grubbs*, 126 S. Ct. at 1501. Indeed, given that the Fourth Amendment provides no right for the possessor or owner of property to be present during the execution of a search warrant, it would be absurd for the agent of that owner or occupant to have a greater right to be present. In any event, law enforcement has a reasonable interest in avoiding the possibility of delay, interference, and potential conflict if counsel decided to challenge the agents’ conduct of the search authorized by the warrant. The Government did not act unreasonably in premitting those potential problems by excluding Rep. Jefferson’s counsel from the office during the search.

III. NEITHER THE FOURTH AMENDMENT NOR RULE 41 REQUIRES THE GOVERNMENT TO ESTABLISH THAT A SEARCH IS THE LEAST INTRUSIVE MEANS OF OBTAINING EVIDENCE

Rep. Jefferson’s contention (Mem. 21) that the search was unlawful because “there were * * * less intrusive approaches to obtaining relevant documents” also lacks merit. Rep. Jefferson cites no authority for the proposition that the Government can obtain a warrant only if it first establishes that there are less intrusive means of obtaining the relevant documents. The

Government made such a showing here not because the law requires it, but to demonstrate that the Executive Branch did not lightly or precipitously seek a search warrant in this investigation.

Although there is no decision directly on point, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), refutes the premise of Rep. Jefferson's argument that the Constitution requires that law enforcement officers obtain evidence of a crime from a Member of Congress by the least intrusive means. In *Zurcher*, the Supreme Court rejected the argument that First Amendment concerns required law enforcement officers to show, as a prerequisite to obtaining a search warrant, that they could not obtain the documents by subpoena or some less intrusive means. *Id.* at 564-68. Likewise, there is nothing in the Fourth Amendment or the Speech or Debate Clause that requires the exhaustion of all other avenues before using search warrants to obtain evidence of a crime stored in a congressional office.

Rep. Jefferson asserts (Mem. 21-22) that in connection with the Government's efforts to obtain the documents at issue without executing a search warrant, his counsel "did not communicate a refusal to comply" with the subpoenas "but rather * * * proposed reasonable means to afford the Government access to his documents." The two exhibits on which Rep. Jefferson relies facially indicate, however, that his counsel's allegedly "reasonable" proposal would have jeopardized the Government's substantial case against him. *See* Mem. Exs. 1 & 2. In addition, during the August 2005 search of his New Orleans residence, information suggests that Rep. Jefferson attempted surreptitiously to remove documents responsive to the list of items to be seized. *See* Affidavit of FBI Special Agent Stacey E. Kent (May 29, 2006) (attached). Rep. Jefferson's evident attempt to frustrate the collection of documents pursuant to a lawful warrant raised questions about whether any production in response to the subpoena would be

complete. Thus, given all the circumstances, the Government was left with no other means of obtaining office records within Rep. Jefferson's exclusive control.

Finally, Rep. Jefferson surmises (Mem. 22) that the Government already had "many" of the documents covered by the search warrant, and he thus argues that the prosecution "can hardly assert that it had no other means of access to the records sought." That supposition is beside the point. The issue is not whether the Government already has "many" documents, but rather whether there was probable cause to believe that relevant and unprivileged documents would be found in a search of Rep. Jefferson's office. The search warrant affidavit identifies numerous categories of documents, and some of those categories of documents would be expected to be found in Rep. Jefferson's office rather than elsewhere. Rep. Jefferson does not and could not claim that all or even most of whatever responsive and unprivileged documents may have been recovered from his office were already in the possession of the Government. Moreover, evidence that Rep. Jefferson was himself in possession of particular documents could be highly relevant. Most fundamentally, however, if the prosecution has a warrant and conducts an otherwise reasonable search, it is entitled to obtain "*every available clue * * * and all witnesses [in order] to find if a crime has been committed.*" *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972) (emphases added).

IV. THE COURT SHOULD NOT EXERCISE ITS EQUITABLE JURISDICTION TO DECIDE REP. JEFFERSON'S RULE 41 MOTION AT THIS TIME

Although Rule 41(g) is ordinarily used to seek return of property after an indictment is issued, district courts are also authorized to entertain motions for return of property prior to indictment. Such motions, however, are treated as civil equitable proceedings and, as such, district courts "must exercise 'caution and restraint' before assuming jurisdiction." *See, e.g.*,

United States v. Kama, 394 F.3d 1236, 1238 (9th Cir. 2005); *In re Singh*, 892 F. Supp. 1, 3 (D.D.C. 1995).

“To prevent the district courts from exercising their equitable jurisdiction too liberally, the circuit courts have enumerated certain factors that must be considered before a district court can reach the merits of a preindictment Rule 41(e) motion.” *Ramsden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993). Those factors are “1) whether the Government displayed a callous disregard for the constitutional rights of the movant; 2) whether the movant has an individual interest in and need for the property he wants returned; 3) whether the movant would be irreparably injured by denying return of the property; and 4) whether the movant has an adequate remedy at law for the redress of his grievance.” *Id.* at 325 (citing *Richey v. Smith*, 515 F.2d 1239, 1243-44 (5th Cir. 1975)); *see also In re Search of 4801 Fyler Avenue*, 879 F.2d 385, 387 (8th Cir. 1989). Only where the balance of those considerations weighs in favor of the movant’s claim should a district court exercise its discretion to consider the merits of such a motion. *See, e.g., Kama*, 394 F.3d at 1238. If the district court reaches the merits, then (as relevant here) the court would be asked to address the lawfulness of the search and seizure and whether the property should be returned. Where the Government has an ongoing investigative or prosecutorial use of the property, its retention of the property is generally held to be reasonable, even if the seizure itself was unlawful. *See, e.g., Rule 41 (Advisory Committee Notes, 1989 amendment); Ramsden*, 2 F.3d at 326-27.

Rep. Jefferson cannot establish that the factors governing this Court’s exercise of equitable jurisdiction weigh in favor of considering his motion. First, the Government’s conduct in this case has not evinced a callous disregard for Rep. Jefferson’s constitutional rights. As shown above, the Government’s search and seizure of materials from Rep. Jefferson’s office was

consistent with the Speech or Debate Clause, the Fourth Amendment, and Rule 41(f)(2). Far from showing callous disregard of Rep. Jefferson's constitutional rights, the Government first exhausted efforts to obtain the documents by subpoena, then voluntarily adopted detailed "Special Search Procedures" in executing the warrant to minimize the risk that non-responsive materials or materials protected by the Speech or Debate Clause would be provided to the Prosecution Team. Given the highly novel nature of Rep. Jefferson's asserted Fourth Amendment and Rule 41(f)(2) claims, any asserted failure to act in conformity with the alleged obligations did not constitute callous disregard. *See* 6 Wayne R. LaFare, *Search and Seizure* §11.2, at 115 (4th ed. 2004) (in determining whether there was "a 'callous disregard for * * * constitutional rights,' one examines whether 'there is a clear and definite showing that constitutional rights have been violated.'" (footnotes omitted) (alteration in original).

Second, although Rep. Jefferson has an individual interest in the property, he cannot establish the requisite need for the property. Rep. Jefferson's "need" for the documents and other materials seized in the search is based solely on a claim that some of those materials may be privileged under the Speech or Debate Clause, and Rep. Jefferson will have an opportunity to seek this Court's review of any privilege claims before any such documents can be provided to the Prosecution Team. For the same reasons, Rep. Jefferson also cannot establish the third and fourth factors—that he will suffer irreparable harm unless the seized materials are returned or that he lacks an adequate remedy at law. In conjunction with these proceedings, a mechanism will be established to ensure that Rep. Jefferson has a chance to challenge and to seek return of specific materials he believes are protected by the Speech or Debate Clause.

CONCLUSION

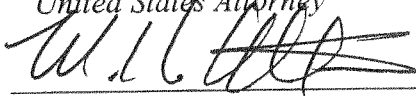
For the foregoing reasons, the Motion for Return of Property should be denied and the Emergency Motion for Interim Relief should be denied as moot.

Respectfully submitted.

Paul E. Pelletier
Acting Chief, Fraud Section
Stephan E. Oestreicher, Jr.
Jeffery P. Singdahlsen (Bar No. 440471)
Attorneys, Appellate Section
Criminal Division

John P. Elwood (Bar No. 452726)
Deputy Assistant Attorney General
Luke A. Sobota (Bar No. 477395)
Brian M. Willen (Bar No. 490471)
Attorney Advisers
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Kenneth E. Melson
*Acting United States Attorney**
Mark D. Lytle
Rebecca H. Bellows
Assistant U.S. Attorneys
U.S. Attorney's Office
Eastern District of Virginia
2100 Jamieson Ave.
Alexandria, VA 22314

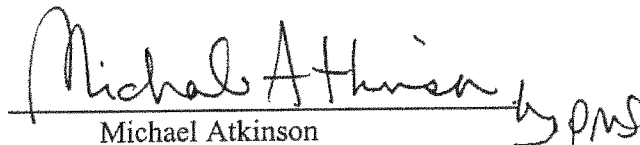
Kenneth L. Wainstein (Bar No. 451058)
United States Attorney

Michael K. Atkinson (Bar No. 430517)
Roy W. McLeese III (Bar No. 416667)
Assistant U.S. Attorneys
U.S. Attorney's Office
District of Columbia
555 4th St., N.W.
Washington, D.C. 20530

* The U.S. Attorney is recused from this matter.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing response has this day been served on counsel for Representative William J. Jefferson by electronic mail at the following address: ajackson@troutcacheris.com. I have also served a copy of the response by electronic mail on Counsel for the Bipartisan Legal Advisory Group of the U.S. House of Representatives at the following address: kerry.kircher@mail.house.gov.

May 30, 2006


Michael Atkinson

AFFIDAVIT

AFFIDAVIT OF FBI SPECIAL AGENT STACEY E. KENT

1. My name is Stacey E. Kent and I have been employed as a Special Agent with the United States Department of Justice, Federal Bureau of Investigation (FBI) since June 30, 2002. Presently, I am assigned to the FBI's field office in New Orleans, Louisiana as a member of the Public Corruption squad.

2. As part of my duties and responsibilities as a Special Agent with the FBI, I was asked to assist in the August 3, 2005 court-authorized search of the New Orleans, Louisiana residence of U.S. Congressman William J. Jefferson. During the search I was assigned to monitor Congressman Jefferson and certain family members during the execution of the search warrant.

3. During the beginning stages of the search, Congressman Jefferson and certain family members remained seated at a table located in the kitchen area of the residence. While he was there, I observed that Congressman Jefferson was looking at several pieces of paper which were laid on the table. At one point, Congressman Jefferson wanted to review a copy of the subpoena, with its 18 page attachment, which had been served upon him earlier that same day. After a copy had been brought to him and he reviewed it, I observed Congressman Jefferson then take the subpoena and the documents he had been reading earlier and place them together under his elbow on the kitchen table.

4. After law enforcement agents concluded their search of the living room, Congressman Jefferson requested that he and family members be allowed to move from the kitchen to the living room. During this time, I continued to monitor the documents in Congressman Jefferson's possession.

5. When Congressman Jefferson was allowed to move to the living room, he took the documents he had read earlier, along with the subpoena, and sat in a recliner in that room. Once he sat down, I observed Congressman Jefferson place the documents in a blue bag located on the floor next to the recliner. This bag had been previously searched by other Special Agents when searching the living room area. At that time, Congressman Jefferson had been able to observe the search in the living room as well as the search of the blue bag from the kitchen table.

6. After several minutes, I approached Congressman Jefferson and told him that I needed to look at the documents that he had placed into the bag. Congressman Jefferson told me the documents were subpoenas. I then reiterated my request to review the documents. In response, Congressman Jefferson removed the documents from the bag and placed the subpoena on top of the other documents before allowing me to review them. Located beneath the subpoena were the documents I previously observed Congressman Jefferson with at the kitchen table. I reviewed the documents and observed that they had been faxed to Congressman Jefferson from an individual named B.K. Son on August 3, 2005 (the same day the search was executed). Noting that the warrant called for, among other things, all communications between Congressman Jefferson and Mr. Son, I collected the documents and turned them into the search team leader as evidence.

7. It is my belief that when Congressman Jefferson placed documents into the blue bag, he was attempting to conceal documents that were relevant to the investigation and expressly sought by the warrant to search his New Orleans, Louisiana residence.

8. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on Monday, May 29, 2006.



Stacey E. Kent
Special Agent
Federal Bureau of Investigation