

No. 06-3105

[SCHEDULED FOR ORAL ARGUMENT ON MAY 15, 2007]

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

UNITED STATES OF AMERICA,
APPELLEE,

v.

RAYBURN HOUSE OFFICE BUILDING, ROOM 2113,
WASHINGTON, DC 20515,
APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF FOR AMICUS CURIAE WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF APPELLEE AND URGING AFFIRMANCE**

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RULE 28(a)(1) CERTIFICATE

In accordance with D.C. Cir. R. 28(a)(1), counsel for amicus curiae Washington Legal Foundation hereby certify as follows:

A. Parties and Amici

All parties, intervenors and amici appearing before the district court and in this Court are listed in the Brief for Appellee.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellee.

C. Related Cases

Counsel for amicus curiae are unaware of any related cases pending in any court.

/s/ Paul D. Kamenar
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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rule 26.1, Amicus Curiae Washington Legal Foundation hereby states that it is a non-stock, non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code, and therefore, there are no parent corporations or publicly held corporations that own stock of amicus.

**CERTIFICATE OF COUNSEL PURSUANT
TO D.C. CIR. RULE 29(d)**

Undersigned counsel hereby certifies that a separate amicus brief is necessary to state the views of the Washington Legal Foundation, a non-profit public interest law and policy center, and that it was not practicable to join on the same brief with other amici due in part to the differing perspectives on the history, scope, and applicability of the Speech or Debate Clause.

/s/ Paul D. Kamenar

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TABLE OF CONTENTS

RULE 28(a)(1) CERTIFICATE	i
RULE 26.1 DISCLOSURE STATEMENT	ii
CERTIFICATE OF COUNSEL	iii
TABLE OF AUTHORITIES	v
INTERESTS OF AMICUS CURIAE.....	1
INTRODUCTORY STATEMENT.....	1
ARGUMENT.....	3
I. THIS COURT SHOULD NOT EXTEND THE PROTECTIONS OF THE SPEECH OR DEBATE CLAUSE BEYOND WHAT IS NECESSARY TO PRESERVE THE INTEGRITY OF THE LEGISLATIVE PROCESS.....	3
A. The Shield of the Speech or Debate Clause Does Not Extend Beyond What Is Necessary To Preserve the Integrity of the Legislative Process.....	4
B. Supreme Court Precedent Rejects Representative Jefferson’s Contention that He May Determine the Scope of His Own Privilege.....	11
C. The Arrest Privilege Under Article I, § 6, cl. 1 Supports the Limited Reading of the Words “They Shall Not Be Questioned In Any Other Place”	14
II. THE SPEECH OR DEBATE CLAUSE DOES NOT PROHIBIT THE EXECUTION OF A VALID SEARCH WARRANT.....	17
A. The Testimonial Privilege Does Not Include a Blanket Right of Non-Disclosure	17
B. The Speech or Debate Clause Should Be Considered In Light of Our Historic Commitment to the Rule of Law	27
CONCLUSION.....	30
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES

<i>Berger v. United States</i> , 295 U.S. 78 (1935)	19
<i>Brown & Williamson Tobacco Corp. v. Williams</i> , 62 F.3d 408 (D.C. Cir. 1995)	17, 18, 19, 20, 24, 25
<i>Burton v. United States</i> , 202 U.S. 344 (1906)	28
<i>Coffin v. Coffin</i> , 4 Mass. 1 (1808)	9
<i>Doe v. McMillan</i> , 412 U.S. 306 (1973)	5, 8
<i>Eastland v. United States Servicemen’s Fund</i> , 421 U.S. 491 (1975)	6, 19, 20
<i>Fields v. Johnson</i> , 459 F.3d 1 (D.C. Cir. 2006).....	4, 8, 10
<i>In re Grand Jury Investigation</i> , 587 F.2d 589 (3d Cir. 1978).....	25
* <i>Gravel v. United States</i> , 408 U.S. 606 (1972).....	5, 7, 8, 13, 16, 17, 29
<i>Hutchinson v. Proxmire</i> , 443 U.S. 111 (1979).....	10, 27
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803).....	4, 11
<i>Miller v. Transamerican Press, Inc.</i> , 709 F.2d 524 (9th Cir. 1983).....	20
<i>In re Search of the Rayburn House Office Building Room Number</i> 2113 Washington, D.C. 20515, 432 F. Supp. 2d 100 (D.D.C. 2006)	18, 19
* <i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951).....	3, 5, 11
* <i>United States v. Brewster</i> , 408 U.S. 501 (1972).....	3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 16, 21, 25, 28

* Authorities upon which we chiefly rely are marked with asterisks.

* <i>United States v. Helstoski</i> , 442 U.S. 477 (1979).....	5, 20, 21, 22
<i>United States v. Johnson</i> , 383 U.S. 169 (1966).....	5, 6, 22, 28
<i>United States v. Lee</i> , 106 U.S. 196 (1882)	28
* <i>United States v. Nixon</i> , 418 U.S. 683 (1974)	7, 8, 11, 12, 13, 19, 26, 27, 29
<i>United States v. Rostenkowski</i> , 59 F.3d 1291 (D.C. Cir. 1995)	23, 24
<i>Williamson v. United States</i> , 207 U.S. 425 (1908).....	15

U.S. CONSTITUTION & STATUTES

U.S. Const. Art. I, § 6, cl. 1	5, 15
28 U.S.C. § 516.....	7

MISCELLANEOUS

2 Records of the Federal Convention of 1787 (Farrand rev. ed. 1937)..	13, 14
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INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to participating in cases that raise important questions concerning the proper exercise of governmental powers. WLF has regularly appeared as amicus curiae before the Supreme Court and lower federal courts, including this Court, in cases raising important constitutional issues, including the separation of powers between the three branches of the federal government. WLF submits that the Speech or Debate Clause at issue in this case should not be interpreted so broadly as to unduly restrict or frustrate the Executive's duty to enforce the criminal laws against Members of Congress. Pursuant to Fed. R. App. P. 29(c)(3), WLF hereby states that the source of its authority to file this amicus brief is the order of this Court, dated October 6, 2006, granting WLF's unopposed motion to participate in this case as amicus curiae.

INTRODUCTORY STATEMENT

In the interests of judicial economy, amicus hereby adopts by reference the Statement of the Case and Facts as presented in the brief of the Appellee United States. DOJ Br. 3-14. In short, the Federal Bureau of Investigation (FBI) has been investigating Representative William J.

Jefferson over the last two years for possible violations of bribery and fraud statutes in relation to certain commercial interests seeking Rep. Jefferson's assistance in obtaining business in African countries. A lawful FBI search of Rep. Jefferson's home in August 2005 turned up \$90,000 in cash in his freezer that was part of the \$100,000 that was allegedly earmarked for bribing certain foreign officials. A lawful subpoena was issued in late summer 2005 to Rep. Jefferson requesting additional evidence related to the criminal investigation, but he refused to comply. Finally, on May 18, 2006, after being presented with a detailed 83-page sworn affidavit by an FBI case agent, a valid search warrant was issued by U.S. District Court Judge Thomas F. Hogan authorizing a search of Rep. Jefferson's offices for specific non-legislative documents and evidence. Sensitive to the concerns implicated by a search of congressional offices, the search was conducted on May 20, 2006 by "filter teams," *i.e.*, non-case FBI agents and attorneys from the Department of Justice who were not involved in the investigation of Rep. Jefferson.

Nevertheless, Rep. Jefferson filed a motion seeking a return of all property seized during the search, claiming that the search violated his rights under the Speech or Debate Clause of the Constitution. He asserts that the Clause forbids the Executive from executing a valid search warrant

expressly targeting non-privileged materials unless he first decides which documents are privileged from disclosure. He does not dispute the validity of the search warrant nor the fact that it sought only non-legislative documents.

The district court denied Rep. Jefferson's motion to return the documents, and this appeal ensued. In the meantime, this Court issued a remand order that allowed Rep. Jefferson to first examine copies of the documents in question, turn over those that he believes are not privileged to the Department of Justice, and to allow *in camera* judicial review for those documents for which he does claim privilege. It appears that the district court has yet to issue its findings with respect to the validity of Rep. Jefferson's assertions of privilege.

ARGUMENT

I. THIS COURT SHOULD NOT EXTEND THE PROTECTIONS OF THE SPEECH OR DEBATE CLAUSE BEYOND WHAT IS NECESSARY TO PRESERVE THE INTEGRITY OF THE LEGISLATIVE PROCESS

The Speech or Debate Clause, Article I, § 6, cl. 1, is designed “to protect the integrity of the legislative process by insuring the independence of individual legislators,” *United States v. Brewster*, 408 U.S. 501, 507 (1972), acting within the “sphere of legitimate legislative activity.” *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). It is not intended to “immunize

Congress from all liability; rather, its purpose is to ensure free and unrestrained discussion, debate, and decision relating to legislative matters.” *Fields v. Johnson*, 459 F.3d 1, 32 (D.C. Cir. 2006) (Brown, J., concurring). The Supreme Court has explicitly recognized that public corruption “gravely undermine[s] [the] legislative integrity” that the Clause protects, and “defeat[s] the right of the public to honest representation.” *Brewster*, 408 U.S. at 524-25. Rep. Jefferson’s arguments regarding pre-search privilege determination would allow Members of Congress to determine the scope of their own privilege under the Speech or Debate Clause despite Chief Justice Marshall’s admonition that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Moreover, if sustained, Rep. Jefferson’s position would operate to “[d]epriv[e] the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress.” *Brewster*, 408 U.S. at 525. Such a result “is unlikely to enhance legislative independence.” *Id.*

A. The Shield of the Speech or Debate Clause Does Not Extend Beyond What Is Necessary To Preserve the Integrity of the Legislative Process

The Speech or Debate Clause, Article I, § 6, cl. 1, affords neither the broad confidentiality privilege, nor the right to the unilateral privilege

determination, that Rep. Jefferson asserts. The Clause provides in relevant part:

[Members of Congress] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. Const. Art. I, § 6, cl. 1.

The Supreme Court has read the phrase “shall not be questioned in any other place” to include, when it applies, a testimonial privilege, *Gravel v. United States*, 408 U.S. 606 (1972), and a liability shield. *United States v. Brewster*, 408 U.S. 501 (1972); *Doe v. McMillan*, 412 U.S. 306 (1973); *United States v. Johnson*, 383 U.S. 169 (1966). However, the protections of the Clause are limited to conduct or documents within the “sphere of legitimate legislative activity.” *Tenney*, 341 U.S. at 376. Conduct legitimately within this sphere is generally immunized against criminal or civil liability predicated on the covered conduct, *see, e.g., Doe v. McMillan*, 412 U.S. 306 (1973); *United States v. Helstoski*, 442 U.S. 477 (1979); *United States v. Johnson*, 383 U.S. 169 (1966), subject to limitations not relevant to the matter at hand.

The purpose of the Clause, “to protect the integrity of the legislative process by insuring the independence of individual legislators,” *Brewster*,

408 U.S. at 507, stemmed from the “English experience.” *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 502 (1975). That experience resulted in a provision that bears close resemblance to the language found in the Bill of Rights of 1689: “[t]hat 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.” *Johnson*, 383 U.S. at 178 (as quoted). However, the “English history does not totally define the reach of the Clause. Rather, it ‘must be interpreted in light of the American experience and in the context of the American constitutional scheme of government.’” *Eastland*, 421 U.S. at 502 (citing *Brewster*, 408 U.S. at 508).

Undoubtedly the Supreme Court has “read the Speech or Debate Clause broadly to effectuate its purposes.” *Eastland*, 421 U.S. at 501. Thus, “when it applies, the Clause provides protection against civil as well as criminal actions.” *Id.* at 502. In other words, “where the privilege applies, it is ‘absolute.’” Jefferson Br. 15 (citing *Eastland*, 421 U.S. at 509). However, it is precisely because of the absolute nature of the privilege that the Supreme Court is very careful not to extend the privilege beyond its intended scope:

We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way

related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to ‘relate’ to the legislative process. Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility.

Brewster, 408 U.S. at 516.

The Speech or Debate Clause does not require this Court to invalidate the otherwise legal search of Rep. Jefferson’s office, nor does it require the return of non-privileged documents. The Department of Justice correctly notes that “nothing in the Supreme Court’s decisions indicates that the Clause forbids search warrants.” DOJ Br. 44. In fact, those cases “reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters.” *Gravel*, 408 U.S. at 620. The search at issue did not attempt to “control *** legislative speech or debate.” *Id.* Instead, it was limited by its terms to non-privileged documents subject to a validly issued warrant executed pursuant to the “authority of Art. II, § 2, [which] Congress has vested in the Attorney General *** to conduct the criminal litigation of the United States Government.” *United States v. Nixon*, 418 U.S. 683, 694 (1974) (citing 28

U.S.C. § 516). Indeed, when considering whether to extend the protections of the Speech or Debate Clause to preclude the execution of a search warrant on a Member's office, this Court should bear in mind the principle recognized by the Supreme Court in *Nixon* that “[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” *Id.* at 710.

“Legislative immunity under the Speech or Debate Clause is limited to matters that are part of, or integral to, the due functioning of the legislative process.” *Fields v. Johnson*, 459 F.3d 1, 12 (D.C. Cir. 2006). The Clause ““does not prohibit inquiry into illegal conduct simply because it has *some nexus* to legislative functions,’ or because it is merely ‘related to,’ as opposed to ‘part of,’ the ‘due functioning’ of the ‘legislative process.’” *Id.* at 10 (citing *Brewster*, 408 U.S. at 528, 514) (internal citations omitted) (emphasis in original). The Supreme Court has repeatedly emphasized this limitation on the Clause's protections,¹ and it is clear that taking a bribe is not part of the legitimate legislative process:

¹ See *Gravel*, 408 U.S. at 624-25 (“[T]he Clause has not been extended beyond the legislative sphere.”); *Brewster*, 408 U.S. at 515-16 (“In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process.”); *McMillan*, 412 U.S. at 313 (“Our cases make

Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not “an act resulting from the nature, and in the execution, of the office.” Nor is it a “thing said or done by him, as a representative, in the exercise of the functions of that office.”

Brewster, 408 U.S. at 526 (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)).

To be sure, this Court does not need to determine which, if any, of the documents seized are privileged at this stage of the proceedings. However, in order to sustain Rep. Jefferson’s broad claims of confidentiality and a right to unilateral determination of his own privilege, this Court would have to expand the existing scope of the Speech or Debate Clause. In light of the possible extension of the privilege, it bears repeating that “*the shield does not extend beyond what is necessary to preserve the integrity of the legislative process.*” *Brewster*, 408 U.S. at 517 (emphasis added). The integrity of the legislative process cannot condone granting Members of Congress the form of investigatory immunity that Rep. Jefferson demands. The interpretation of the Speech or Debate Clause that Rep. Jefferson urges upon this Court would operate to “[d]epriv[e] the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of

perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause.”).

Members of Congress.” *Id.* at 525. Such an expanded interpretation “is unlikely to enhance legislative independence,” and should be rejected. *Id.*

Sustaining Rep. Jefferson’s claim of a right to a unilateral pre-search privilege determination would, “extend a form of investigatory immunity to Members of Congress far beyond anything the Constitution contemplates.” DOJ Br. 51. The Speech or Debate Clause is not intended to “immunize Congress from all liability; rather, its purpose is to ensure free and unrestrained discussion, debate, and decision relating to legislative matters.” *Fields*, 459 F.3d at 32 (Brown, J., concurring). Striking down an otherwise valid search warrant, the express focus of which is non-privileged information, on Speech or Debate grounds, cannot be squared with its underlying purpose, nor is it required to effectuate that purpose.

The Department of Justice correctly notes that Rep. Jefferson’s broad claims of a confidentiality privilege and a right to a unilateral pre-search privilege determination, “finds no support in the text, history, or purpose of the Clause.” DOJ Br. 17. In fact, those claims undermine the purpose of the Clause by unnecessarily immunizing Members of Congress from criminal investigation, and constitute an unwarranted extension of the privilege. They should, therefore, be “closely scrutinized.” *Hutchinson v. Proxmire*, 443 U.S. 111, 127 (1979).

B. Supreme Court Precedent Rejects Representative Jefferson's Contention that He May Determine the Scope of His Own Privilege

The Supreme Court's Speech or Debate Clause cases essentially reject Rep. Jefferson's position that he may determine the scope of his own privilege, explaining that, "[l]egislatures may not of course acquire power by an unwarranted extension of privilege." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). As Chief Justice Marshall wrote in *Marbury* "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. at 177.

Rep. Jefferson was undoubtedly correct to note that "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." Jefferson Br. 21 n.7 (citing *Nixon*, 418 U.S. at 703). However, Justice Burger's opinion in that case does not support Rep. Jefferson's broad claims of confidentiality and a right to a unilateral pre-search determination of his own privilege. Those claims would expand the protections afforded by the Speech or Debate Clause and constitute the sort of "unwarranted extension of privilege" cautioned against by *Tenney*.

Rep. Jefferson asserts he is entitled to deference on his interpretation of the legislative privilege. Jefferson Br. 21 n.7. His claim involves not merely an interpretation by the Legislative Branch (or at least by one legislator) of the powers of that branch, but an interpretation of the scope of the powers of the Executive Branch in conducting criminal investigations and of the Judiciary Branch in issuing search warrants. Whatever deference, if any, is due a single legislator's interpretation of the scope of the Speech or Debate Clause, no deference is due to an interpretation that delineates the powers of the other branches. Instances requiring constitutional interpretation impacting all of the governmental branches are properly resolved by the judiciary. Undoubtedly, it is the role of the Judicial Branch to "exercise[] the power to construe and delineate claims arising under express powers," *Nixon*, 418 U.S. at 704, a power the Court has "consistently exercised." *Id.*

"In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." *Id.* at 707. Rep. Jefferson's position, taken to its logical conclusion, would fundamentally alter the balance of power between the three branches under

the guise of the Speech or Debate Clause. The unilateral determination of privilege would allow a Member of Congress to acquire, by defining the boundaries of the privilege he or she seeks to assert, power not otherwise delegated to the Member to the detriment of the other two branches. This power was not even available to Parliament, a body that is supreme within its governmental structure.² “The House of Commons’ claim of power to establish the limits of its privilege has been little more than a pretense since *Ashby v. White*.” *Gravel*, 408 U.S. at 624 n.15 (citations omitted). Nor is such power available to the Executive Branch. *See United States v. Nixon*, 418 U.S. 683 (1974). Thus, the recognition of legislative supremacy that the affirmation of Rep. Jefferson’s contentions requires is inappropriate. “Our speech or debate privilege was designed to preserve legislative independence, not supremacy.” *Brewster*, 408 U.S. at 508.

During the course of the Constitutional Convention, a motion was submitted “declaring ‘that each House should be judge of the privilege of its own members.’” 2 Records of the Federal Convention of 1787, 502 (Farrand rev. ed. 1937). After James Madison and Edmund Randolph voiced their concerns as to the “propriety” of granting such a power,

² *Brewster*, 408 U.S. at 508 (“We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch.”).

Mr. Madison distinguished between the power of Judging of privileges previously & duly established, and the effect of the motion which would give a discretion to each House as to the extent of its own privileges. He suggested that it would be better to make provision for ascertaining by *law*, the privileges of each House, than to allow each House to decide for itself.

2 Records of the Federal Convention of 1787, 503 (Farrand rev. ed. 1937)
(emphasis in original).

Clearly, as evidenced by the current language of Article I, § 6, cl. 1, the motion did not carry. Although the records of the Convention are sparse with respect to the Speech or Debate Clause, the fact that the Framers rejected what amounts to Rep. Jefferson’s position is instructive.

C. The Arrest Privilege Under Article I, § 6, cl. 1 Supports the Limited Reading of the Words “They Shall Not Be Questioned In Any Other Place”

The Supreme Court has recognized that the Speech or Debate Clause privilege should not be read to contravene the arrest privilege:

We recognize that the privilege against arrest is not identical with the Speech or Debate privilege, but it is closely related in purpose and origin. 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.

The privilege from arrest under Article I, § 6, cl. 1, does not prohibit the Executive Branch from arresting Members of Congress during “their attendance at the session of their respective Houses, and in going to and

returning from the same.” U.S. Const. Art. I, § 6, cl. 1. Justice White made this point very clearly in *Williamson v. United States*, 207 U.S. 425, 436 (1908), when he observed:

[T]he words ‘treason, felony and breach of the peace,’ as applied to parliamentary privilege, were *** well understood *** as confining the privilege alone to arrests in civil cases, the deduction being that when the framers of the Constitution adopted the phrase in question they necessarily must be held to have intended that it should receive its well understood and accepted meaning.

Rep. Jefferson’s reading of the Speech or Debate Clause would preclude the execution of a valid search warrant based on probable cause seeking non-legislative documents in a criminal investigation; yet the exemptions to the “privileged from arrest” provision, U.S. Const., Art. I, § 6, cl. 1, by their express terms, would permit a Member to be arrested on probable cause for, *inter alia*, fraud or racketeering, while he is “going to and returning from” Congress. For that matter, he could even be arrested “during [his] attendance at the session” of the House or Senate while engaged in a “speech or debate,” or indeed, while casting his vote on legislation.

Clearly, the Framers understood that the arrest clause exemption authorized a much greater disruption of a congressman’s exercise of his legislative duties than that resulting from the execution of a valid search

warrant seeking non-legislative documents. Put in its proper context, the arrest clause “privilege” further underscores the Framers’ awareness of, and appreciation for, the proper execution of our criminal laws by the Executive Branch and that no one be above the law. Accordingly, the Speech or Debate Clause, properly understood, was not meant to preclude the execution of a valid search warrant for non-legislative documents, but was intended only to prevent, as discussed earlier, the Member from “being questioned” about his legislative acts in a testimonial capacity.

It is difficult to dispute the Government’s contention that, “[a] regime in which the search target becomes the guardian of the evidence hardly seems like the sort of arrangement that the practically-minded drafters of the Constitution would have tolerated.” DOJ Br. 18. The Framers clearly intended to subject Members of Congress to the criminal laws of this country as the limitations on the arrest privilege illustrate, and the purpose of the Speech or Debate Clause, “to protect the integrity of the legislative process,” demands. *Brewster*, 408 U.S. at 507.

“Freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members.” *Gravel*, 408 U.S. at 615. “[I]mplicit in the narrow scope of the privilege of

freedom from arrest is, as [Thomas] Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons.” *Id.* It follows, and the Supreme Court has recognized, that the Speech or Debate Clause does not immunize a Member from *criminal process* *Id.* at 626. Criminal process clearly encompasses a search warrant issued pursuant to an investigation of a Member’s criminal conduct that is well beyond the realm of legitimate legislative activities, and further, is not predicated upon legitimate legislative acts.

II. THE SPEECH OR DEBATE CLAUSE DOES NOT PROHIBIT THE EXECUTION OF A VALID SEARCH WARRANT

A. The Testimonial Privilege Does Not Include a Blanket Right of Non-Disclosure

The Speech or Debate Clause, when applicable, provides a testimonial privilege and liability shield. *See* Section I-A, *supra*. Despite the assertions of Rep. Jefferson to the contrary, Jefferson Br. 11, 15, 18, 32, the testimonial privilege does not amount to a blanket right of non-disclosure. Although Rep. Jefferson does not articulate the actual basis for his claim of a non-disclosure privilege, it appears that he relies on *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995). That reliance is misplaced.

Rep. Jefferson’s interpretation misconstrues Court precedent on the scope and protections under the Clause. Certainly it is conceded that “[t]he Clause confers on Members of Congress immunity for all actions ‘within the ‘legislative sphere,’ even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes.’” *Brown & Williamson*, 62 F.3d at 415 (citations omitted). It is also clear “[t]he Clause is not, to be sure, a blanket prohibition on suits against congressman. It protects only those congressional acts properly thought to fall within the legislative function.” *Id.* Therefore, the protections of the Clause are not all-encompassing, and despite Rep. Jefferson’s claims to the contrary, the Clause does not provide an absolute privilege against disclosure in the criminal context.

The district court below was correct to note *Brown & Williamson*’s recognition that the “‘documents or other material that comes into the hands of congressmen may be reached either in a direct suit or a subpoena only if the circumstances by which they come can be thought to fall outside ‘legislative acts’ or the legitimate legislative sphere.’” *In re Search of the Rayburn House Office Building Room Number 2113 Washington, D.C. 20515*, 432 F. Supp. 2d 100, 111 (D.D.C. 2006) (quoting *Brown & Williamson*, 62 F.3d at 421). *Brown & Williamson*, however, does

not address the issue of whether non-privileged materials may be obtained by a valid search warrant. “Because the case addressed civil subpoenas, and says nothing about the availability of documents pursuant to a search warrant in a criminal investigation, *Brown & Williamson* does not control here.” *In re Search*, 432 F. Supp. 2d at 111. Judge Hogan noted that *Brown & Williamson* acknowledged this point: “the outcome in a case involving criminal rather than civil process may be different, *** the Supreme Court has ‘at least suggest[ed] that the testimonial privilege might be less stringently applied when inconsistent with a sovereign interest’ such as the sovereign interest in law enforcement.” *In re Search*, 432 F. Supp. 2d at 111 n.6 (citing *Brown & Williamson*, 62 F.3d at 419-20). Justice Burger’s opinion in *Nixon* supports the principle underlying this contention: “this presumptive [executive] privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that ‘the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.’” 418 U.S. at 708-09 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Similarly, *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491 (1975), does not suggest that the testimonial privilege amounts to a right of non-disclosure. *Brown & Williamson* did note that *Eastland* stands for the

basic proposition that “[o]nce the legislative-act test is met, *** the privilege is absolute.” 62 F.3d at 418 (quoting *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 529 (9th Cir. 1983) (citing *Eastland*, 421 U.S. at 503)). Rep. Jefferson seized upon the “absolute” nature of the protections to justify a novel and broad confidentiality privilege and a right to a unilateral pre-search privilege determination. Nothing in the Speech or Debate Clause, *Eastland* or this Court’s ruling in *Brown & Williamson* requires such a result.

Interestingly, the Supreme Court’s handling of criminal matters triggering Speech or Debate Clause analysis, though preventing the use at trial of materials privileged under the Clause, made clear the Court expected that the Executive Branch might come legitimately to possess legislative materials during a criminal prosecution. *See generally United States v. Helstoski*, 442 U.S. 477 (1979). Thus, the Court prohibited the use, at trial, of such materials and suggested that the documents containing both legislative and non-legislative materials may be redacted, if necessary, prior to introducing them as evidence. *Id.* at 488-89. Justice Stevens, in his dissent, expressed concerns about extending the protections of the Clause too far:

In light of the Court’s holding in *Brewster* that bribery prosecutions are permissible, it is illogical to adopt rules of

evidence that will allow a Member of Congress effectively to immunize himself from conviction simply by inserting references to past legislative acts in all communications, thus rendering all such evidence inadmissible.

Id. at 498 (Stevens, J., dissenting).

Justice Burger, responding to these concerns, emphatically stated that “[n]othing in our opinion, by any conceivable reading, prohibits excising references to legislative acts, so that the remainder of the evidence would be admissible.” *Id.* at 488 n.7 (emphasis added). The Court in *Helstoski* rejected Rep. Jefferson’s uncompromising claims of privilege and a corresponding right of non-disclosure by explicitly sanctioning the “excising [of] references to legislative acts” in documentary evidence for use at trial. *Id.* Thus, the Court’s precedents do not permit a “Member of Congress [to] effectively [] immunize himself from conviction simply by inserting references to past legislative acts in all communications.” *Id.* at 498 (Stevens, J., dissenting). Such “sweeping claims,” as contemplated by Rep. Jefferson,

would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their holding office. Such claims are inconsistent with the reading this Court has given, not only to the Speech or Debate Clause, but also to the other legislative privileges embodied in Art. I, § 6.

Brewster, 408 U.S. at 520.

Accepting Rep. Jefferson’s proposed interpretation of the Speech or Debate Clause would effectively negate the Supreme Court’s clear inference that legislative materials could come into the possession of the Executive during a criminal investigation as long as those legislative materials are removed from any documentary or other evidence admitted at any criminal trial of the legislator. Indeed, there would never be anything in need of redaction if the Speech or Debate Clause precluded the Executive Branch in the first instance—as Rep. Jefferson argues—from ever possessing legislative materials.

The Court reiterated the use versus possession distinction in *United States v. Johnson*, 383 U.S. 169 (1966), where it held:

[A] prosecution under a general criminal statute dependent on such inquiries [covered by the privilege] necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative act of the defendant member of Congress or his motives for performing them.

Id. at 184-85. This holding does not preclude the use of properly excised evidence, as *Helstoski* makes clear, 442 U.S. at 488-89, but it does prohibit prosecutions *predicated solely* on privileged conduct. The problem in

Johnson was not the prosecutor's possession of privileged material, but its use at trial.

This Court appropriately recognized that the use of privileged material under the Speech or Debate Clause "in order to procure a criminal indictment" would violate the protections afforded by the Clause, *United States v. Rostenkowski*, 59 F.3d 1291, 1298 (D.C. Cir. 1995). It also properly qualified the application of the privilege when it stated that "[t]he Government's use of Speech or Debate material in the course of a prosecution based upon a valid indictment implicates only the substantive protection of the Speech or Debate Clause against conviction, not its procedural protection against prosecution." *Id.* at 1301. In other words, the Speech or Debate Clause forbids the use of privileged material in the course of a prosecution. This Court did not intimate that the prosecution's *possession* of such material was improper:

Assuming that the indictment is untainted by the submission of Speech or Debate material to the grand jury, but that a preview of the evidence that the Government proposes to present at trial would reveal some Speech or Debate material, it would still not be appropriate for the district court to dismiss the indictment; rather, the court would merely prohibit the Government from presenting the evidence at trial.

Id. at 1300.

Moreover, as this Court noted, “the district court is fully capable of protecting the Congressman against the admission into evidence of Speech or Debate material.” *Id.* at 1301. That is all that is required here.

While *Brown & Williamson* rejected the assertion that “privilege depends on the purposes for which the information is sought,” 62 F.3d at 420, this Court has not addressed the issue of whether privilege depends on the *means* by which the information is sought, namely a validly issued, obtained, and executed search warrant. *Brown & Williamson* was concerned about Congress’s “capacity to function effectively if beset by third-party discovery requests.” *Id.* at 419. The issuance and execution of a search warrant, targeting non-privileged materials, upon a Member’s office does not implicate those concerns.

This Court’s statement in *Brown & Williamson* that “the nature of the use to which documents will be put—testimonial or evidentiary—is immaterial if the touchstone is interference with legislative activities,” *Id.* at 421, does not require the invalidation of the search at issue. Clearly, bribery does not fall within the sphere of legitimate legislative activity. Even more clearly, the search warrant did not seek material outside that sphere, and the incidental seizure, if any, of protected documents does not defeat the warrant. To be sure, privileged material may not be used in trial, but the

Executive Branch's possible possession of it does not render the search unconstitutional.

Although *Brown & Williamson* disagreed with the Third Circuit's contention that the "privilege 'when applied to records or third-party testimony is one of nonevidentiary use, not of non-disclosure,'" *Id.* at 420 (quoting *In re Grand Jury Investigation*, 587 F.2d 589, 597 (3d Cir. 1978)), the reasons for that disagreement were born out of a concern that civil litigation and its ensuing discovery requirements would overwhelm Members and prevent them from fulfilling their constitutional duties. Those concerns are inapplicable to the situation at hand. Granted, criminal investigations of non-privileged conduct of Members can distract them from their obligations, but that does not justify precluding such an investigation under the auspices of the Clause. Indeed, the Supreme Court has recognized the dangers associated with the extension of the legislative privilege on that type of basis. *See generally United States v. Brewster*, 408 U.S. 501 (1972). Nothing in the Speech or Debate Clause, or in *Brown & Williamson*, requires this Court to extend the scope of the Clause to prevent the execution of search warrants on a Member's congressional or district office. The purposes of the Clause are at odds with such an extension, and the search at

issue does not trigger this Court's concerns and ensuing rationale underlying *Brown & Williamson*.

The incidental review of privileged material by the filter teams does not contaminate the unprivileged material actually obtained, nor is the government's mere possession of any privileged material contrary to the Speech or Debate Clause. As the Supreme Court noted in *Nixon*, 418 U.S. at 714, "[s]tatements that meet the test of admissibility and relevance," *i.e.*, materials privileged under the Speech or Debate Clause, "must be isolated; all other material must be excised." *Id.* Neither the constitutionally based executive privilege, nor the Speech or Debate Clause privilege precludes the possession of protected materials, but both prevent their use in trial. Assuming *arguendo* that the search of Rep. Jefferson's was somehow constitutionally infirm under the Clause, which it is not, this Court's remand order of July 28, 2006, (JA 421), cured any defect. Indeed, the Speech or Debate Clause does not seem to require the government's extraordinary precautions in the execution of the search, particularly when the search targeted non-privileged materials. Of course, the government should take care to protect the confidentiality of the seized materials, *see Nixon*, 418 U.S. at 715-16, which it did, but that is not to say the government was not entitled to the materials in the first instance.

B. The Speech or Debate Clause Should Be Considered In Light of Our Historic Commitment to the Rule of Law

The Supreme Court recognized the dangers associated with the assertion of an unqualified privilege in *Nixon*, 418 U.S. at 707. “The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III.” *Id.* This Court, when considering whether to extend the scope of the legislative privilege, should consider the concerns motivating the Supreme Court’s recognition of limitations on the constitutionally derived executive privilege.

Although Rep. Jefferson argues that the Clause requires pre-search segregation of documents by the target of the search, such a requirement is inconsistent with both the purpose of the Clause and the Supreme Court’s interpretation of it. Neither the language of the Clause, nor this Court’s or the Supreme Court’s holdings mandate the affirmation of Rep. Jefferson’s broad assertions of confidentiality and the right of the target of the search to determine what documents are amenable to it. The Supreme Court requires close scrutiny of Rep. Jefferson’s arguments, *Hutchinson*, 443 U.S. at 127, because they constitute “[c]laims under the Clause going beyond what is needed to protect legislative independence.” *Id.* The “integrity of the

legislative process,” *Brewster*, 408 U.S. at 507, does not require the extension of the Clause’s protections in this instance. Whether the search constitutes an affront to separation of powers is an issue not before this Court, and although the Speech or Debate Clause implicates separation of powers concerns, *see Johnson*, 383 U.S. at 182, the immediate issue is whether the search of Rep. Jefferson’s office violates the Speech or Debate Clause, not separation of powers.

Since the Speech or Debate Clause does not require this Court to extend its protections to the matter at hand, this Court should weigh a possible extension of the privilege afforded by the Clause against competing concerns. The vindication of Rep. Jefferson’s broad claims of confidentiality and the right of the target of a search to determine which documents are amenable to it in the first instance would afford Members of Congress a form of investigatory immunity not contemplated by the Constitution.

“‘No man in this country,’ this court has said, ‘is so high that he is a[b]ove the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it.’” *Burton v. United States*, 202 U.S. 344, 368 (1906) (quoting *United States v. Lee*, 106 U.S. 196, 220

(1882)). The Supreme Court, interpreting the constitutionally-derived executive privilege, recognized that, “[t]he so-called executive privilege has never been applied to shield executive officers from prosecution for crime.” *Gravel*, 408 U.S. at 627. Although the Speech or Debate Clause has been interpreted by the Court to shield members from prosecutions *predicated upon* legitimate legislative conduct, those interpretations do not preclude the execution of an otherwise valid search warrant on a Member of Congress.

When the Supreme Court interpreted the constitutionally-derived executive privilege in light of the countervailing interests of the sovereign in the rule of law and criminal prosecution, it limited the scope of executive privilege accordingly. *United States v. Nixon*, 418 U.S. 683 (1974). This Court, when evaluating the proposed extension of the protections afforded by the Speech or Debate Clause, should take care not to extend the legislative privilege beyond what is necessary to further its purposes. The promotion of legislative integrity, however defined, is not advanced—indeed it is undermined—by unwarranted extensions of legislative privilege. Precisely because the protections of the Speech or Debate Clause are absolute when they apply, it is critical that this Court carefully balance the competing concerns recognized in *Nixon* when construing the outer limits of the Clause.

CONCLUSION

For the foregoing reasons, the district court's opinion and order denying Rep. Jefferson's motion for return of property should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7) and D.C. Cir. R. 29(c)(5), 29(d), and 32(a), the undersigned counsel of record certifies that the foregoing Amicus Brief for the Washington Legal Foundation was prepared in 14-point, proportionally spaced, serif font (Times New Roman), using Microsoft Office Word 2003; the brief contains 6,564 words; and, accordingly, the brief complies with the requirements of Fed. R. App. P. 32(a)(7).

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that the foregoing Amicus Brief for the Washington Legal Foundation was this day, April 6, 2007, delivered to the Court and served two copies by first-class mail, postage pre-paid to counsel for Rep. Jefferson, counsel for the United States, and amici at the following addresses:

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