

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 (TFH)

FILED

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GOVERNMENT'S RESPONSE TO MEMORANDUM OF AMICUS
THE BIPARTISAN LEGAL ADVISORY GROUP
OF THE U.S. HOUSE OF REPRESENTATIVES

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

The General Counsel for the House of Representatives ("House Counsel") begins her brief by asserting that she makes no claim that "any * * * Member of Congress is above the law." Memorandum of Points and Authorities of the Bipartisan Legal Advisory Group of the U.S. House of Representatives as Amicus Curiae ("HC Mem.") 1. But that claim is belied by House Counsel's exorbitant vision of the Speech or Debate Clause, which would grant Members of Congress a privilege that vastly exceeds anything necessary to maintain the separation of powers. House Counsel advocates several rights under the Clause for which there is no precedent and that would raise undue barriers to criminal investigations of Members of Congress, who, like all citizens, are subject to the law:

- A right to advance notice of a search (HC Mem. 35), not available to any other person under the Fourth Amendment, *see Zurcher v. Stanford Daily*, 436 U.S. 547, 567 (1978);
- A right to be present at searches (HC Mem. 35), not available to any other person under the Fourth Amendment, *see United States v. Stefonek*, 179 F.3d 1030, 1034 (7th Cir. 1999);
- A right to remove documents claimed to be privileged before the search occurs (HC Mem. 28), not available under the attorney-client privilege (which is "absolute" where it applies, *Hanson v. USAID*, 372 F.3d 286, 291 (4th Cir. 2004)), *see United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 43 (D. Conn. 2002), and which is contrary to the very purpose of a search warrant;
- A right for the Member to be the final judge of whether particular documents are privileged (HC Mem. 29 & n.20), not available to any other person, including members of the co-equal branches of government—federal judges, *see In re Certain*

Complaints Under Investigation, 783 F.2d 1488, 1518-20 (11th Cir. 1986), and the President of the United States, *see United States v. Nixon*, 418 U.S. 683, 703-05 (1974); and

- A right to require the Government to exhaust alternatives such as subpoenas before seeking a search warrant (HC Mem. 41), not available to others, including the media, *see Zurcher*, 436 U.S. at 565, church congregations, *see United States v. Aguilar*, 871 F.2d 1436, 1473 (9th Cir. 1989), or law offices, *see National City Trading Corp. v. United States*, 635 F.2d 1020, 1025-26 (2d Cir. 1980).

House Counsel cites no authority to support these novel extensions of the Speech or Debate Clause, and we are aware of none. House Counsel never explains why the broad Speech or Debate protection *already recognized* by the courts—which includes absolute immunity from prosecution or suit for legislative acts, *Gravel v. United States*, 408 U.S. 606, 624 (1972), freedom from being “questioned” about those acts, *id.* at 615, and protection from the testimonial act of producing legislative records in response to a civil subpoena, *see Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995)—is not enough to satisfy the fundamental purpose of the Clause to “protect[] the legislator from executive and judicial recrimination for his ‘legislative acts.’” *United States v. Rostenkowski*, 59 F.3d 1291, 1302 (D.C. Cir. 1995).

These existing protections have provided abundant assurance of legislative independence for over two centuries. The prospect that a Member’s papers might be subject to search pursuant to a court approved warrant provides no basis for dramatically expanding the Speech or Debate Clause in a manner divorced from its text and purpose. Under the Clause, Members “shall not be questioned” “for any Speech or Debate.” U.S. Const. art. I, sec. 6. This prohibition has nothing to say about a search warrant that, as in this case, was not directed at—and thus did not question Rep. Jefferson about—legislative activity. Although House Counsel claims that requiring the Government “*only* to persuade a federal judge” to authorize a warrant affords insufficient

protection from Executive intimidation (HC Mem. 33 (emphasis added)), the existing protections of the Speech or Debate Clause, together with those of the Fourth Amendment, provide ample protection. Indeed, in another context implicating fundamental constitutional rights, the Supreme Court has held that “[p]roperly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection” to prevent harassment and retaliation. *Zurcher*, 436 U.S. at 565. There is no cause to adopt a different rule here.

In light of the unique circumstances of this case, the Government has proposed detailed procedures that are sensitive to congressional interests. As described in the Government’s response, the search was conducted by a team of agents completely insulated from the ongoing investigation, and the Government proposes that a similarly insulated Filter Team review the seized documents to screen out and return to Rep. Jefferson any privileged documents seized during the search. The Government therefore will not retain any documents that this Court concludes are protected by the Speech or Debate Clause. Under these proposed procedures—which courts have upheld as a precaution to limit dissemination of information that might be subject to other important privileges—no member of the Prosecution Team will see any documents until Rep. Jefferson has had an opportunity to review them and this Court has resolved any claims of privilege he may assert.

The Government has adopted these procedures as a matter of comity between the legislative and executive branches, not because it believes that the Constitution requires them. Indeed, the Supreme Court has made clear that Members of Congress are not “exempt[] * * * from liability or process in criminal cases.” *Gravel*, 408 U.S. at 626. The only question here is

whether the Speech or Debate privilege grants legislators a special immunity from a search warrant that has been recognized in no other context. That suggestion finds no support in logic or law, and should be rejected.

I. THE EXECUTION OF THE SEARCH WARRANT WAS CONSISTENT WITH THE SPEECH OR DEBATE CLAUSE

The crux of House Counsel's argument is that, absent extraordinary measures, the execution of a search warrant on a congressional office violates the Speech or Debate Clause because it "threatens to impair the legislative branch's conduct of its constitutionally-mandated functions." HC Mem. 16. But these claims of "intimidation," "abuse," and "overreaching" (HC Mem. 15, 27) ring hollow when it becomes clear precisely what House Counsel claims is a grave "threat": the cursory and incidental review of legislative documents by Government officers in the course of executing a lawful search warrant for concededly *unprivileged* evidence of criminal wrongdoing. House Counsel's protests are particularly unconvincing given the special procedures the Government voluntarily has proposed to ensure that Rep. Jefferson will have the opportunity to raise, and have this Court resolve, any claim of privilege *before* any disputed document is turned over to the Prosecution Team.

House Counsel can assert that this limited review of potentially privileged material violates the Speech or Debate Clause only by taking the unsupported and unsustainable position that the Clause may be enforced and adjudicated only by the Member himself. *See* HC Mem. 26. According to House Counsel, the Government may not execute a judicially authorized search warrant until it has given notice to the Member, allowed the Member to remove all documents that he determines to be privileged, permitted the Member to witness the search, and followed other as-yet unspecified procedures. *See id.* 32-33, 35. Under her view, even *judicial* review of

documents unilaterally claimed by a Member of Congress to be privileged is prohibited by the Clause. *See id.* 29 n.20. And although House Counsel attempts to resist the obvious implications of her argument (*see id.* 34), her proposed reading of the Speech or Debate Clause would bar the Government from using a search warrant to obtain unprotected material wherever privileged material might also be present, no matter whether the evidence is in the legislator's office, home, or automobile. This unprecedented and expansive view of the Speech or Debate privilege does not withstand scrutiny. With respect to legislator and citizen alike, the Supreme Court has repeatedly affirmed that "the laws of this country allow no place or employment as a sanctuary for crime." *Brewster*, 408 U.S. at 521 (quotation omitted).

A. The Speech or Debate Clause Does Not Give a Member of Congress the Opportunity, in His Unreviewable Discretion, to Withhold Privileged Material Before a Search Warrant is Executed

The breathtaking scope of House Counsel's proposed interpretation of the Speech or Debate Clause becomes clear when one considers the scope of the search warrant at issue here. House Counsel does not dispute that the conduct for which Rep. Jefferson is under investigation falls outside the Speech or Debate Clause. *See* Government's Response to Rep. Jefferson's Motion for Return of Property ("Gov't Resp.") 14. Nor does House Counsel challenge this Court's determination, based upon specific and credible evidence, that there was probable cause to believe that evidence of *unprivileged* criminal activity would be found in Rep. Jefferson's office. *See id.* What is at issue, then, is whether the incidental and circumscribed review of legislative materials by non-case agents executing a judicially authorized warrant comports with the Speech or Debate Clause. Plainly it does.

Despite the compelling law enforcement interests supporting the search warrant, House Counsel maintains that the search of Rep. Jefferson's office "violated the Constitution because it took place without Congressman Jefferson having had a prior opportunity to screen out and remove records and files (or determine not to assert the privilege)." HC Mem. 26. In House Counsel's view, the mere fact that protected documents *may have been seen* by law enforcement agents during the search violated the Constitution. *See id.* That this Court ultimately will resolve any privilege claims before documents are turned over to the prosecution is no palliative, according to House Counsel, because "the Constitution simply does not contemplate" judicial review of "documents that *might* be privileged under the Speech or Debate Clause." *Id.* 29 (emphasis added). Even if courts can opine "on the large question of what constitutes a 'legislative activity,'" House Counsel asserts, "a document-by-document review by the judiciary * * * is both unconstitutional and practically impossible." *Id.* 29 n.20.

House Counsel's claim for unreviewable discretion goes well beyond anything the law can support. Indeed, the Founders expressly rejected a constitutional proposal that would have permitted Members collectively to be the exclusive judges of their own privileges. *2 Records of the Federal Convention of 1787* 503 (Max Farrand ed., 1966). In successfully opposing that proposal, James Madison explained that it would be preferable "to make provision for ascertaining by *law*" the extent of privileges "previously & duly established" rather than to "give a discretion to each House as to the extent of its own privileges." *Id.* It is, of course, the Judicial Branch that ascertains the requirements of the law in accordance with Article III of the Constitution, and in other contexts the Supreme Court has rejected any suggestion that legislative privileges are to be determined solely by legislators themselves. *See Kilbourn v. Thompson*, 103

U.S. 168, 199 (1880) (“The house of representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court.”) (quotation omitted); *cf. Tenney v. Brandhove*, 341 U.S. 367, 376-77 (1951) (observing that in England, the “House of Commons’ claim of power to establish the limits of its privilege” is “little more than a pretense”).

In arguing for legislators’ right to unreviewable discretion, House Counsel claims a prerogative that the Supreme Court has held unavailable to the head of a coordinate Branch. When President Nixon asserted that “the separation of powers doctrine precludes judicial review of a President’s claim of privilege,” the Supreme Court, invoking *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), held that it is “the province and duty of this Court ‘to say what the law is’ with respect to the claim of privilege presented in this case.” *Nixon*, 418 U.S. at 703-05. Of particular relevance here, the *Nixon* Court supported this conclusion by relying upon “a series of cases * * * interpret[ing] the explicit immunity conferred * * * by the Speech and Debate Clause.” *Id.* at 704 (citing *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel*, 408 U.S. 606; *Brewster*, 408 U.S. 501; *United States v. Johnson*, 383 U.S. 169 (1966)).

Defining the scope and application of the Constitution is a quintessential judicial function, and the Supreme Court has repeatedly made such privilege determinations in the Speech or Debate context. *See, e.g., Brewster*, 408 U.S. at 526; *Gravel*, 408 U.S. at 622. As the D.C. Circuit has made clear, “the judiciary cannot avoid determining what are the outer limits of legitimate legislative process.” *Brown & Williamson*, 62 F.3d at 415; *see also Gov’t of the Virgin Islands v. Lee*, 775 F.2d 514, 522 (3d Cir. 1985). That much even House Counsel concedes. *See* HC Mem. 29 n.20. But House Counsel’s extravagant claim that “the Constitution

does not contemplate * * * a document-by-document review by the judiciary” (*id.*) is undermined by the practices of this Court and others. See *In re Possible Violations of 18 U.S.C. §§ 201, 371, 491* F. Supp. 211 (D.D.C. 1980) (rejecting Congressman’s motion to quash subpoena absent detailed index of material claimed to be privileged under Speech or Debate Clause); *Benford v. American Broad. Cos.*, 98 F.R.D. 42, 45 & n.2 (D. Md. 1983) (requiring detailed index of potentially privileged documents under Speech or Debate Clause to be submitted for judicial review and suggesting the need for in camera review of certain relevant documents “to determine whether the congressional defendants have accurately characterized their content”). Indeed, when House Counsel previously made this argument, the district court in *Benford* rejected it out of hand, saying it would not “blindly accept the[] conclusory and seemingly self-serving suggestion that [the House Select Committee on Aging] will screen what is and what is not protected.” 98 F.R.D. at 45. In the face of these decisions, House Counsel cannot credibly insist that the Speech or Debate Clause prohibits this Court from performing its traditional role of ensuring that documents claimed to be privileged are, in fact, privileged.

These Speech or Debate Clause precedents also undercut House Counsel’s assertions that only a Member or his staff can accurately determine whether a document is legislative in nature and that judicial review is “practically impossible” because “neither the Filter Team nor the Court are equipped to determine whether particular documents are Speech or Debate protected or not.” HC Mem. 29-30. Many of those determinations could presumably be made by referring to publicly available bills or hearing records and asking whether the document at issue is plausibly relevant to them. Courts, furthermore, routinely make privilege determinations in many technical, sensitive, and difficult areas of privilege, *see, e.g., Sterling v. Tenet*, 416 F.3d 338,

344-45 (4th Cir. 2005) (state secrets privilege); *Tax Analysts v. I.R.S.*, 294 F.3d 71, 80-82 (D.C. Cir. 2002) (deliberative process privilege), including, as noted above, in the very context of the Speech or Debate Clause, *see Benford*, 98 F.R.D. 42; *In re Possible Violations of 18 U.S.C. §§ 201, 371*, 491 F. Supp. at 211. Indeed, the *McDade* Order on which House Counsel relies (*see* HC Mem. 39 & Ex. 8) *explicitly* contemplates *in camera* review of legislative documents. *See United States v. McDade*, No. 96-1508, Order at 2 n.* (3d. Cir. July 12, 1996). That there might be—as with all privilege issues—some difficult questions does not alter the fact that such determinations fall squarely within a court’s competence to make after input from counsel. And, in this case, a “document-by-document” (HC Mem. 29 n.29) inquiry should be relatively straightforward because the search warrant was narrowly drawn to track the unprivileged conduct for which Rep. Jefferson is under investigation. Few responsive documents therefore are likely to be connected to any “legislative” acts.

Even if the Government seized some privileged materials, however, Rep. Jefferson will have ample opportunity to assert the privilege before those documents are turned over to the Prosecution Team. But, as illustrated by the numerous judicial decisions interpreting the Speech or Debate Clause, Rep. Jefferson is not the “ultimate interpreter of the Constitution” and cannot arrogate to himself “the ‘judicial Power of the United States’ vested in the federal courts by Art. III, § 1, of the Constitution.” *Nixon*, 418 U.S. at 704.¹

¹ House Counsel (HC Mem. 27-28) cites the Fourth Circuit’s decision in *United States v. Dowdy*, but that case stands only for the unremarkable proposition that the Speech or Debate Clause precludes the admission at trial of “legislative acts of a Congressman” even if those acts may have served “improper non-legislative purposes.” 479 F.2d 213, 225, 226 (4th Cir. 1979); *see also, e.g., United States v. Helstoski*, 442 U.S. 477, 490 (1979) (“Revealing information as to a legislative act—speaking or debating—to a jury would subject a Member to being ‘questioned’ in a place other than the House or Senate[.]”) (emphasis added). The language in *Dowdy* quoted by House Counsel addresses, at most, the question of what constitutes a “legislative” act; it does not indicate that that determination belongs solely to Members of Congress. Indeed, *Dowdy*

B. House Counsel Offers No Legitimate Justification for Further Extending the Already Broad Protections of the Speech or Debate Clause

To justify her sweeping claim of privilege, House Counsel repeatedly notes that courts have broadly interpreted the Speech or Debate Clause. *See* HC Mem. 19-25. That is not in dispute. By its terms, the Clause protects nothing more than a Member's right to engage in public debate in Congress, yet the Clause has been interpreted to "protect[] against inquiry into [any] acts that occur in the regular course of the legislative process and the motivation for those acts." *Brewster*, 408 U.S. at 525; *see also Gravel*, 408 U.S. at 625 ("[t]he heart of the Clause is speech or debate in each House"). But given her failure to identify any positive theory for why additional protections are necessary, the mere fact that the Clause has been applied beyond its literal terms cannot justify the further expansion House Counsel advocates. The Supreme Court has recognized that "the privilege is broad enough to insure the historic independence of the Legislative branch, essential to our separation of powers, *but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members.*" *Brewster*, 408 U.S. at 525 (emphasis added); *see also id.* at 517 ("[T]he [Speech or Debate] shield does not extend beyond what is necessary to preserve the integrity of the legislative process."); *McMillan*, 412 U.S. at 317 ("the Speech or Debate Clause has finite limits"). The question here is not whether the Speech or Debate Clause is to be read broadly; it is whether it must be read so broadly as to require extraordinary limitations on the Government's use of a fundamental tool of

actually undercuts House Counsel's argument because the court itself made the determination of which evidence introduced at trial fell within the scope of the Speech or Debate Clause. *See* 479 F.2d at 224. In any event, as the Third Circuit has explained, that language from *Dowdy* must be construed narrowly if it is to be reconciled with Supreme Court precedents. *See Lee*, 775 F.2d at 524.

law enforcement—the search warrant—in the course of a legitimate investigation into bribery of (and by) a Member of Congress.

The breadth of the existing Speech or Debate protection in fact undermines House Counsel's claim that legislative independence demands the unprecedented protections she advocates against the ordinary use of search warrants. There is no question that the Clause shields Members from civil or criminal liability for their legislative acts, *see McMillan*, 412 U.S. at 311-12; protects Members from inquiry into legislative acts or the motivation for their performance, *see Brewster*, 408 U.S. at 512; and prohibits using evidence of legislative conduct in any civil or criminal proceeding against the Member, *see Johnson*, 383 U.S. at 183. The D.C. Circuit likewise has held that the privilege protects against a *civil* subpoena for legislative documents used by a subcommittee in the performance of its official investigatory role. *See Brown & Williamson*, 62 F.3d at 417. Those existing privileges and immunities provide legislators ample "protect[ion] * * * from executive and judicial recrimination for [their] 'legislative acts.'" *Rostenkowski*, 59 F.3d at 1302. Indeed, as House Counsel concedes, the broad protection already afforded legislative acts creates "a potential for abuse." HC Mem. 24 (quotation omitted). House Counsel provides no justification for increasing "the potential for abuse" by providing still greater protection.

In support of her unprecedented effort to expand the scope of the Speech or Debate Clause, House Counsel relies on cases holding that legislators may invoke the Clause to avoid complying with subpoenas. HC Mem. 22-23 & nn.12, 15, 17. House Counsel summarily dismisses the distinction between subpoenas and search warrants, HC Mem. 23 n.15, but that distinction has constitutional significance. The Speech or Debate Clause provides that "for any

Speech or Debate in either House,” Members “shall not be *questioned* in any other Place.” U.S. Const. art. I § 6 (emphasis added). Complying with a subpoena has a “testimonial” component, *see, e.g., United States v. Hubbell*, 530 U.S. 27 (2000), and may involve questioning a Member about legislative acts; in contrast, executing a search warrant involves no questioning and calls for no compelled testimony. *See Gov’t Resp.* 22 n.10. The “testimonial privilege” recognized in *Brown & Williamson* in the context of a civil subpoena, 62 F.3d at 418, is therefore quite different from the expansive and uncompromising “non-disclosure” privilege that House Counsel urges this Court to adopt (HC Mem. 21-22). Reading the Clause to bar the Government from executing a search warrant seeking unprivileged material in any place where legislative information might also be stored would expand the Clause beyond the focus on questioning that *Brown & Williamson* emphasized. *See* 62 F.3d at 418.²

Moreover, the use of subpoenas in civil litigation differs in other important respects from the execution of a search warrant in a criminal investigation. Parties to civil litigation may have many reasons to seek information from Members of Congress and may issue subpoenas based on the broadest standard of relevance. By contrast, search warrants further the Government’s compelling interest in the investigation of criminal conduct, *see infra* Part I.C, and require a finding by a neutral judicial officer of probable cause. Civil subpoenas thus pose a far greater

² Although the Government did not rely on the Third Circuit’s view of the privilege, House Counsel devotes four pages (HC Mem. 37-40) to attacking a straw man by claiming that *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978), has been “gutted” (*id.* at 39) by an unpublished, four-sentence summary order. That argument cannot be taken seriously. The summary order in *United States v. McDade*, No. 96-1508, lacks any precedential value and could hardly overrule a prior precedential decision. *See* 3d Cir. I.O.P. 6.2.1, 9.1 (2002). Indeed, the Third Circuit reaffirmed *In re Grand Jury Investigation* in *In re Grand Jury*, 821 F.2d 946, 953 (3d Cir. 1987), a case also cited by House Counsel (HC Mem. 39), and one that reiterates that the Speech or Debate Clause was “at its core * * * not a privilege of nondisclosure.” *Id.* at 958; *see also Vieth v. Pennsylvania*, 67 Fed. Appx. 95, 99 (3d Cir. May 9, 2003) (unpublished).

risk of “impermissible interference in congressional business,” *Brown & Williamson*, 62 F.3d at 418 (quotation omitted), than do search warrants.³

In sum, there is no reason to believe that permitting a judge (or the Filter Team) to perform a cursory review of privileged documents would so threaten the integrity of the legislative process that it would violate the Speech or Debate Clause. Given that “a great deal” of legislative material is “publicly available” (HC Mem. 36), the Executive Branch’s cursory review of such material hardly offends the core purpose of the Speech or Debate Clause. As James Madison recognized, “all laws should be made to operate as much on the law makers as upon the people”: “Whenever it is necessary to exempt any part of the government from sharing in these common burthens, that necessity ought not only to be palpable, but should on no account be exceeded.” 2 *Founders’ Constitution* 331 (Philip B. Kurland & Ralph Lerner eds., 1987) (James Madison, Militia Bill, House of Representatives, Dec. 16, 1790). House Counsel provides absolutely no showing of such “necessity” in this case.

C. House Counsel’s Interpretation of The Speech or Debate Clause Would Permit Members to Thwart Criminal Investigations Into Unprivileged Conduct

House Counsel’s attempt to immunize congressional claims that particular documents are privileged from judicial review also runs headlong into the established precedent that the Speech or Debate Clause does not “make Members of Congress super-citizens, immune from criminal responsibility.” *Brewster*, 408 U.S. at 516. Members of Congress are not “exempt[] * * * from liability or process in criminal cases.” *Gravel*, 408 U.S. at 626; *see also* Gov’t Resp. 12-14. Yet blanket immunity is effectively what House Counsel would permit. Although House Counsel

³ The civil subpoena cases also contradict House Counsel’s claim that Members have an unreviewable and unilateral Speech or Debate privilege. On House Counsel’s view, a court could not review the legislator’s refusal to produce documents as privileged in response to a civil subpoena. The law, however, is to the contrary. *See supra* Part I.A.

claims that she is not arguing that the Government lacks power to execute a search warrant on a congressional office (HC Mem. 34), these are empty words, because if a Member may unilaterally determine what documents are privileged (HC Mem. 35), and if judicial review of that determination is unconstitutional (HC Mem. 29 n.20), then, at bottom, a search warrant will yield only those documents that the Member chooses to give. Such a system of optional and unreviewable compliance is particularly dangerous where that Member is a person for whom a court has found probable cause of involvement in criminal activity.

For these reasons, House Counsel's interpretation of the Speech or Debate Clause cannot be squared with this country's "historic commitment to the rule of law." *Nixon*, 418 U.S. at 708.

As the Supreme Court has explained:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

Id. at 709. The Government accordingly has a compelling interest in executing search warrants to obtain relevant criminal evidence that falls outside the Speech or Debate Clause. This is not to say, as House Counsel inaccurately suggests (HC Mem. 22), that the Clause does not apply in the criminal context, but rather that the Clause does not foreclose executing a search warrant for non-legislative information solely because the information sought may be commingled with privileged information. *See* Gov't Resp. 23; *Nixon*, 418 U.S. at 712 n.19; *Brown & Williamson*, 62 F.3d at 420 n.10 (noting that the privilege may be "less stringently applied" when inconsistent with the "countermanding sovereign interest in criminal law enforcement").⁴

⁴ House Counsel also misinterprets *Brown & Williamson's* reference to "third-party crimes," 62 F.3d at 419 (HC Mem. 23), in arguing that the Speech or Debate Clause would preclude the execution of the search warrant. *See* HC Mem. 23. In *Brown & Williamson*, the

Moreover, if House Counsel's view of the Speech or Debate Clause were to prevail, a Member of Congress could easily thwart a criminal investigation by unilaterally declaring certain documents to be privileged. Such power would be fundamentally at odds with the Supreme Court's rejection of "absolute congressional immunity from criminal prosecution." *Brewster*, 408 U.S. at 522 n.16. Just as the "[t]he Speech or Debate Clause does not prohibit the inquiry into illegal conduct simply because it has some nexus to legislative functions," *id.* at 528, neither does it foreclose the investigation of such conduct simply because the relevant evidence happens to be stored in the same room as information relating to a Member's legislative acts.

D. House Counsel's Claims About the Threat to Legislative Independence Are Baseless

House Counsel's foray into sixteenth-century English history (HC Mem. 17-18) serves only to highlight how far removed this case is from the Speech or Debate Clause's august beginnings. Rep. Jefferson is suspected of playing a central role in an international bribery conspiracy unrelated to privileged legislative functions, and House Counsel does not dispute that the Government had probable cause to believe that unprotected criminal evidence would be found in his office. *See* HC Mem. 19-21. The execution of the judicially approved search warrant here cannot seriously be compared with Tudor and Stuart monarchs' "utiliz[ing] the criminal and civil law to suppress and intimidate critical legislators" or Charles I's

D.C. Circuit relied upon *Gravel*'s observation that the Clause does not "immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act." 608 U.S. at 622. The *Gravel* Court emphasized "third-party crimes" because the Member's Fifth Amendment privilege would preclude compelled testimony where he himself was the target of the investigation. Nothing in *Gravel* or *Brown & Williamson* suggests that the Member should enjoy a greater Speech or Debate Clause privilege with respect to non-legislative activities when the Member is a target, rather than a witness. Indeed, the "sovereign interest" in criminal law enforcement discussed in *Brown & Williamson*, 62 F.3d at 420, would be just as powerful in each case.

“prosecut[ing] Sir John Elliot and others for ‘seditious’ speeches in Parliament.” HC Mem. 17-18 (quoting *Johnson*, 383 U.S. at 178, and *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)).

Neither the Government when it requested the search warrant, nor this Court when it approved it, sought to intimidate or harass Rep. Jefferson in the independent exercise of his legislative authority. It trivializes the Speech or Debate Clause to compare the British monarchy’s prosecution of political opponents to the possibility that Government agents might incidentally see privileged documents while collecting unprivileged evidence of serious criminal offenses pursuant to a judicially authorized search warrant.

Nor is House Counsel aided by invoking the generic separation of powers. See HC Mem. 14-16. The Founders indeed accepted “on a very profound level” the importance of “checking power with power” (HC Mem. 14), but that truism in no way requires holding that Members of Congress may shield unprotected documents from ordinary criminal process merely because they are commingled with protected documents. Given that a Member undoubtedly may be investigated and prosecuted for the conduct described in the warrant, it strains credulity to claim that separation-of-powers principles are threatened where an ongoing investigation has pointed to evidence of criminal activity in a Member’s possession; a neutral judicial officer has found probable cause and issued a search warrant to search that Member’s office; and law enforcement officers have conducted a narrow search specially designed to protect any privileged material and to prevent it from coming into the possession of the Prosecution Team.

The Supreme Court has dismissed Speech or Debate Clause arguments of the kind raised by House Counsel that trade on implausible and hypothetical concerns about over-reaching and abuse. See HC Mem. 32-34. In concluding that the Clause does not bar Members of Congress

from being prosecuted for bribery, the Court observed that speculative fears of a “parade of horrors” should not govern decisions about the scope of the Speech or Debate privilege:

The check-and-balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose. This may be explained in part because the third branch has intervened with neutral authority. * * * Probably of more importance is the public reaction engendered by any attempt of one branch to dominate or harass another.

Brewster, 408 U.S. at 523.

Indeed, in this case, this Court did “intervene[]” with the “neutral authority” of the “third branch.” Despite House Counsel’s dire warnings about “unchecked executive branch overreach and abuse” (HC Mem. 32), the fact remains that this Court stood between the Executive Branch and Rep. Jefferson and authorized a particularized search warrant, precisely as the Constitution requires. The Founders understood that search warrants “issued by neutral magistrates” and otherwise satisfying the requirements of the Warrant Clause “should afford sufficient protection” against abuse by the Executive Branch. *See Zurcher*, 436 U.S. at 565; *see also National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667 (1989) (by “interpos[ing] a neutral magistrate between the citizen and the law enforcement officer,” the Fourth Amendment ensures that the “intrusion is authorized by law and limited in its permissible scope”).

A federal judge is not a mere rubber stamp, as House Counsel suggests (HC Mem. 33), but rather an independent actor required to uphold and defend the Constitution, *see* U.S. Const. art. VI, who must independently determine that there is probable cause to believe that specific evidence of criminal wrongdoing will be found in the place to be searched. *See, e.g., Dalia v. United States*, 441 U.S. 238, 255 (1979). That is precisely what this Court did here. If there is any threat to the constitutional balance, it is not from two separate and independent Branches

approving a search warrant that meets the Fourth Amendment's requirements, but rather from House Counsel's proposal that a Member of Congress should enjoy the unilateral and unreviewable power to invoke an absolute privilege where that Member is the target of a criminal investigation.

E. The Proposed Filtering Procedures Are Consistent with the Speech or Debate Clause

Because 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, Rep. Jefferson's papers enjoy no special immunity from the search warrant issued by this Court in support of the Government's investigation. Nonetheless, the Government from the beginning has proposed rigorous procedures designed to ensure that no documents involving legislative acts would be used, or even seen, by the Prosecution Team. Since the search, the Government has proposed additional accommodations that would ensure that the Prosecution Team will not gain access to any seized document that Rep. Jefferson claims to be privileged until the Court has made a determination that the document is not privileged. *See Gov't Resp.* 11, 15. The Government proposed these measures, not because filtering would be constitutionally required, but to minimize any unnecessary intrusion and, with respect to the additional procedures, to fulfill the President's directive to resolve this dispute "in good faith and with mutual institutional respect." Presidential Mem. 1-2.

These measures represent a reasonable accommodation of the compelling law enforcement interest in investigating public corruption, and are plainly sufficient to protect the constitutional guarantee that Members of Congress "not be questioned" "for any Speech or Debate." U.S. Const. art. I, sec. 6. Courts have approved virtually identical procedures to screen

documents when the Government has executed search warrants in places such as law offices, where it is likely that the search will uncover materials subject to an absolute privilege from disclosure. House Counsel contends that while the use of filter teams may “adequately protect the attorney-client privilege,” their use is unacceptable in this context because “[t]he Speech or Debate privilege is not analogous to ordinary common law privileges” like the attorney-client privilege because it is not a “judicially-created qualified privilege,” but a “constitutional mandate.” HC Mem. 35. These supposed distinctions are illusory.

It is established that, far from being a “qualified privilege,” the attorney-client privilege is “as absolute as any known to law” where it applies. *Coleman v. American Broad. Cos.*, 106 F.R.D. 201, 203 (D.D.C. 1985) (quotation omitted). Outside its well established exceptions, the attorney-client privilege “affords all communications between attorney and client *absolute and complete* protection from disclosure.” *Hanson*, 372 F.3d at 291 (emphasis added); *see also Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (holding that the attorney-client privilege remains absolute after the client’s death). Thus, there is simply no basis for House Counsel’s contention that procedures reasonable to accommodate another absolute privilege are inadequate here.

House Counsel’s argument that the Speech or Debate privilege is entitled to differential treatment because it is a “constitutional” privilege fares no better. Although the Speech or Debate Clause immunity is rooted in the Constitution, it has been afforded a scope that exceeds the literal text of Article I, section 6 (*supra* Part I.B). Moreover, the Supreme Court in *Nixon* specifically rejected the idea of treating privileges differently based on their provenance. The Court there addressed the scope of all privileges together—whether “constitutional, common-

law, or statutory”—and stated 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.” 418 U.S. at 709, 710 (quotation omitted; emphases added). *Nixon* thus refutes the argument that the Speech or Debate privilege requires special procedures because it is expressly embodied in the Constitution. In any event, while the attorney-client privilege originated at common law, the attorney-client *relationship* assumes a constitutional dimension in the criminal context because of the Sixth Amendment right to the assistance of counsel. Even in this context, the Supreme Court has squarely held that the Government’s surreptitious monitoring of protected communication does not violate the Constitution. See *Weatherford v. Bursey*, 429 U.S. 545, 556-58 (1977) (no Sixth Amendment violation where undercover agent heard conversations between defendant and his attorney, but did not disclose that information to the prosecution, because there was not “at least a realistic possibility of injury to [defendant] or benefit to the State”).

Although the attorney-client privilege is, at its core, a confidentiality privilege, the Speech or Debate privilege is not. To the contrary, as the text of the Clause suggests by protecting two *public* acts—“Speech or Debate”—the confidential status of communications does not rest at the core of the privilege. See *Powell v. Ridge*, 247 F.3d 520, 524 (3d Cir. 2001) (noting that legislative immunity is not “bottomed on confidentiality”). Rather, it is the need to “protect[] the legislator from executive and judicial recrimination for his ‘legislative acts.’” *Rostenkowski*, 59 F.3d at 1302. Indeed, unlike the attorney-client privilege (which affords protection only to confidential communications), the Speech or Debate privilege’s protection against harassment and retaliation stands in large part *independent* of its ability to preserve

confidentiality, because legislators remain immune from prosecution or suit for public acts, *see Gravel*, 408 U.S. at 624, and may not even be required to testify about public acts or to engage in the testimonial act of producing documents about them, *see Brown & Williamson*, 62 F.3d at 412. The precautions taken here were more than adequate to serve these purposes.

Although the execution of search warrants at law offices poses a risk that absolutely privileged materials might be viewed and seized, courts have repeatedly upheld such searches, emphasizing that “a criminal enterprise does not exempt itself from a search warrant by conducting its business and keeping its records in its lawyer’s office.” *National City Trading*, 635 F.2d at 1026 (quotation omitted). “Although a law office search should be executed with special care to avoid unnecessary intrusion on attorney-client communications, it is nevertheless proper if there is reasonable cause to believe that the specific items sought are located on the property to be searched” and an impartial judge has determined that there is probable cause to believe that the items sought are evidence of a crime. *Id.* at 1025-26. As the Government has noted (*see Gov’t Resp.* 18 & n.6), the use of filter teams in conjunction with judicial review to ensure that privileged documents are not turned over to a prosecution team—the very sort of procedures the Government has proposed here—have been found to be a “proper, fair and acceptable method of protecting privileged communications.” *Triumph Capital Group*, 211 F.R.D. at 43; *accord United States v. Derman*, 211 F.3d 175, 181 (1st Cir. 2000); *United States v. Grant*, No. 04 CR 207, 2004 WL 1171258, at *1-3 (S.D.N.Y. May 25, 2004); *see also* U.S. Att’ys Man. § 9-13.420 (noting the procedure).⁵

⁵ In lieu of filter teams, courts have also reviewed seized materials themselves or delegated the task to special masters. *See, e.g., In re Impounded Case (Law Firm)*, 840 F.2d 196, 202 (3d Cir. 1988); *Does I Through IV*, 926 F.2d 847, 858-59 (9th Cir. 1991); *United States v. Stewart*, No. 02 CR 396 (S.D.N.Y. June 11, 2002). Especially in light of the Supreme Court’s hesitation about the use of *in camera* review, *see United States v. Zolin*, 491 U.S. 554, 571

In this case, the Government has proposed procedures designed to ensure that the Prosecution Team will not be given access to any protected legislative material seized during the search of Rep. Jefferson's office. See Gov't Resp. 11, 15. House Counsel errs in contending that such procedures would "lodg[e] the responsibility for making privilege determinations" with the Executive Branch. HC Mem. 29. That determination would rest, as it does with other privilege determinations, firmly with the judiciary. Rep. Jefferson could dispute any privilege classification proposed by the Filter Team, and no member of the Prosecution Team would have access to any disputed document until this Court had determined that the record is not privileged. Members of the Search Team and Filter Team would be required to certify compliance with these procedures. See Search Warrant Affidavit ¶¶ 138, 155. In the face of these procedures, House Counsel cannot credibly maintain that the execution of a judicially authorized search warrant on the office of a Member of Congress threatens to "reduce Congress to a subordinate branch of government by opening the door to unchecked executive branch overreach and abuse." HC Mem. 32.

The Supreme Court has emphasized that the Speech or Debate "privilege was designed to preserve legislative independence, not supremacy." *Brewster*, 408 U.S. at 508. House Counsel's conception of the Speech or Debate Clause would hardly protect legislative independence, but rather would allow Members to frustrate an investigation into non-legislative criminal activities for which the Speech or Debate Clause provides no protection from prosecution. Such a

(1989), the Government believes that the use of the filter team procedures in conjunction with adversary judicial review would be more appropriate and "will narrow the disputes to be adjudicated and eliminate the time required to review the rulings of the special master or magistrate judge." *Grant*, 2004 WL 1171258, at *3.

procedure is not required by the constitutional text or judicial precedent and should not be adopted here.

II. THE GOVERNMENT NEED NOT SHOW THAT A SEARCH IS THE LEAST INTRUSIVE MEANS OF OBTAINING EVIDENCE

The Government previously demonstrated (*see* Gov't Resp. 28-30) that neither the Fourth Amendment nor Federal Rule of Criminal Procedure 41 requires a showing that the Government has exhausted less intrusive approaches to obtaining relevant documents. Although the Government in fact "exhausted all other reasonable methods to obtain these records in a timely manner," Search Warrant Affidavit ¶ 132, it did so not because of any legal obligation, but because "the Executive Branch did not lightly or precipitously seek a search warrant in this investigation" (Gov't Resp. 29). House Counsel now tries to recast a voluntary act of restraint animated by comity as "an exhaustion standard" (HC Mem. 41), and argues, citing *no authority whatever*, that the purported failure to "exhaust all other reasonable methods to obtain the documents * * * renders the search inherently unreasonable." *Id.* That argument lacks merit.

The Supreme Court has rejected the argument that law enforcement officers must show, as a prerequisite to obtaining a search warrant, that they could not obtain the documents by subpoena or some "less intrusive" means, and the Court did so in a context implicating explicit constitutional protections. *See Zurcher*, 436 U.S. at 559 (search of newspaper offices). *Zurcher* specifically rejected the argument that, to prevent official intimidation of those searched, law enforcement officers must first make a "special showing[] that subpoenas would be impractical" before a court may issue a search warrant. *Id.* at 565. Such a step was unnecessary because the Framers had required search warrants to be "issued by neutral magistrates," and because, "[p]roperly administered, the preconditions for a warrant—probable cause, specificity with

respect to the place to be searched and the things to be seized, and overall reasonableness— should afford sufficient protection” against such harm. *Id.* That observation disposes of House Counsel’s claim that an exhaustion requirement is necessary to avoid Executive intimidation of legislators. Despite the Government’s earlier reliance on *Zurcher*, House Counsel does not even cite the decision in its response, much less explain why its reasoning is not dispositive here.⁶

In any event, the Government has explained (*see* Gov’t Resp. 29-30; Government’s Sealed Response to Rep. Jefferson’s Sealed Supplemental Memorandum 17-25) that it *did* exhaust all reasonable alternative means of obtaining the evidence sought through the warrant in a timely manner. It is irrelevant that the search warrant may have sought additional documents not sought in the subpoena issued to Rep. Jefferson nine months earlier. *See* HC Mem. 7 n.4, 41. During the intervening months, the Government obtained evidence linking Rep. Jefferson to at least seven other schemes. *See* Gov’t Resp. 5. There is every reason to believe that the circumstances that prevented the Government from obtaining the original documents by subpoena would apply equally to other documents held in the same location, and House Counsel gives no reason to believe otherwise. House Counsel cites no authority for the novel proposition that as an investigation continues and new potentially criminal acts come to light, the Government must separately exhaust every alternative avenue for obtaining relevant documents

⁶ The Court likewise emphasized that “[f]orbid[ding] [a] warrant and insist[ing] on [a] subpoena” would “seriously undermin[e] law enforcement efforts” because, among other things, the effectiveness of a subpoena depends largely on the recipient’s good-faith compliance. *Zurcher*, 436 U.S. at 560-61 & n.8. House Counsel misses this point entirely in arguing that Rep. Jefferson’s efforts to conceal documents during the August 2005 search of his New Orleans residence did not “justif[y] a search of his office in May 2006, *nine months later.*” HC Mem. 12. The Government has never contended that Rep. Jefferson’s furtiveness itself provided cause to search his congressional office. Rather, it has simply noted (*see, e.g.*, Gov’t Resp. 29-30; Government’s Sealed Response to Rep. Jefferson’s Sealed Supplemental Memorandum 3, 14, 23) that this conduct created significant doubt whether Rep. Jefferson would produce all relevant documents in response to a subpoena.

before including those documents in a search warrant application; nor does she explain how a separate exhaustion requirement would prevent intimidation or serve *any* purpose other than to delay a lawful investigation. *See Brewster*, 408 U.S. at 525 (“Depriving the Executive of the power to investigate and prosecute * * * is unlikely to enhance legislative independence.”).

Finally, there is no basis for House Counsel’s remarkable suggestion (HC Mem. 41 n.26) that the Government’s interest in investigating a legislator *diminishes once the Government can prove he has committed a crime*. There is an undeniable societal interest in uncovering the full extent of criminal conduct, and no reason to exempt Members from the general rule that investigations should continue “until every available clue has been run down and all witnesses examined in every proper way.” *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972).⁷

CONCLUSION

For these reasons, and for those stated previously, the Motion for Return of Property should be denied and the Emergency Motion for Interim Relief should be denied as moot.

⁷ As explained in the Government’s Response (*see* Gov’t Resp at 27 n.13), even if the execution of the search warrant was defective in some respect—and it was not—the appropriate remedy would not be to return to Rep. Jefferson unprivileged evidence of his involvement in a wide-ranging conspiracy to give and receive bribes. *Cf. United States v. Leon*, 468 U.S. 897 (1984) (no suppression of evidence where warrant, though defective, was executed in good faith). House Counsel implicitly acknowledges as much, arguing that this Court should declare the search unconstitutional but defer the remedy question until the political branches have reached an agreement about the “protocols and procedures under which search warrants can be executed constitutionally on House offices.” HC Mem. 3, 35. House Counsel cites no authority to support her remarkable suggestion that the remedy here should turn on negotiations between the political branches over procedures to be followed in future.

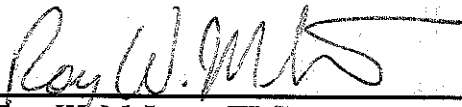
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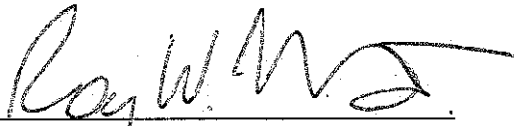
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CERTIFICATE OF SERVICE

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:
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June 13, 2006



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