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TESTIMONY BEFORE THE
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"*Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?*"
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by Professor Charles Tiefer

THE TRADITIONAL METHOD FOR THE HOUSE TO PROVIDE EVIDENCE MADE THE SEARCH WARRANT RAID AN UNNECESSARY AND RADICAL STEP

Executive Summary

I was Solicitor and Deputy General Counsel of the House in 1984-95.

As expounded in the leading opinions, the Framers' purpose in the Speech or Debate Clause was "to prevent intimidation by the Executive . . . ."[1] The FBI raid into the Rayburn Building itself had all the elements of Executive intimidation: (1) breach of a previously sacrosanct constitutional tradition, without any unique necessity; (2) intrusion by the Executive's own agents, rather than the House personnel always previously relied upon, and without any Executive guidelines worked out with the House as protocols; (3) no prior adversary judicial proceedings to hear the very serious objections to the methods; (4) sweeping and wholesale methods, including downloading a Representative's whole hard drive, catching countless innocent constituents in the dragnet; and (5) exclusion of the House Counsel even as a mere observer, completing the one-sided Executive domination and unaccountability.

During my years in Congressional service, as in the times before and since, there have been many Department of Justice (DOJ)/FBI investigations of Congressman not legally different from the one of Rep. William Jefferson at issue in this matter.

DOJ has never, never before resorted to search warrant raids for this, which represents a radical step. Consistently, throughout the history of the many instances of DOJ successfully seeking and obtaining criminal investigation evidence from Congressional offices, the constitutional tradition was for that to occur **ONLY** through the use of subpoenas (or some similar arrangement) handled under lawful protocols.

Those who think only about what *categories* of Legislative materials receive constitutional protection, are unfamiliar with the importance of the *processes* of the examination – here, the difference between the traditional subpoena and the radical raid. DOJ's Public Integrity Section came to appreciate the sound constitutional tradition, which is mindful of the House's Rules as to its control over its own records, and reflects that tradition in section 2406 of the U.S. Attorney's Manual.

Not only were DOJ/FBI unwilling to await the appeal in this matter, but, more to the point, they were unwilling to accept the outcome of motions or negotiations pending appeal. It acted without prior adversary judicial consideration of the very serious objections. DOJ may have felt a tactical desire to move faster, and some at the FBI may have been emboldened by a couple of words in an opinion footnote. To breach the independence of the Legislative Branch without a true prior adversary judicial presentation is perhaps the most serious legal outrage.

If DOJ/FBI are in a rush, they should either ask for, and await, expedited judicial procedures, or negotiate a solution with the House leadership. And, any inquiry into a Representative's records should be according to pre-established protocols. Such a solution protects the House's institutional interest in the traditional system, as well as DOJ's law enforcement interest, without the radical and unnecessary step of a search warrant raid.

[1] *United State v. Johnson*, 383 U.S. 169, 181 (1966).

THE TRADITIONAL METHOD FOR THE HOUSE TO PROVIDE EVIDENCE MADE THE SEARCH WARRANT RAID AN UNNECESSARY AND RADICAL STEP

I was Solicitor and Deputy General Counsel of the House in 1984-95. Mine was the office that has represented the institutional interest of the House of Representatives – as a coordinate branch of the government under Article I of the Constitution - since the 1970s, in matters such as criminal investigations of Congressmen. I was also in a similar Senate post, Assistant Senate Legal Counsel, the four years before that, 1979-1984. I have been a professor at the University of Baltimore Law School since then.[2] I am also the author of a treatise entitled *Congressional Practice and Procedure*, and writing its 1000 pages and 2000 footnotes immersed me considerably in Congressional history.

The Constitutional Tradition Violated in Numerous Respects by the Raid

As expounded in the leading Supreme Court opinions, the Framers' purpose in the Speech or Debate Clause was "to prevent intimidation by the Executive . . . ."[3] The FBI raid into the Rayburn Building itself had all the elements of Executive intimidation: (1) breach of a previously sacrosanct constitutional tradition, without any unique necessity; (2) intrusion by the Executive's own agents, rather than the House personnel always previously relied upon, and without any Executive guidelines worked out with the House as protocols; (3) no prior adversary judicial proceedings to hear the very serious objections to the methods; (4) sweeping and wholesale methods, including downloading a Representative's whole hard drive, catching countless innocent constituents in the dragnet; and (5) exclusion of the House Counsel even as a mere observer, completing the one-sided Executive domination and unaccountability. My testimony will touch on each of these, although, frankly, in all the DOJ comments of self-justification, I have not seen much of this seriously disputed.

Let us recall that DOJ/FBI investigations of Congressmen have gone through the courts many times. During my fifteen years in Congressional service, as in the times before and since, there have been many, many Department of Justice (DOJ)/FBI investigations of Congressman like the one of Rep. William Jefferson at issue in this matter. So, I am intimately familiar with the lawful procedures and constitutional traditions associated with the process of DOJ/FBI investigations of Congressmen. This is a process obscure in many respects to outsider nonparticipants, not just to law professors out of the loop in New Haven, but even to most DOJ/FBI officials who may know the procedures for criminal investigations away from Congress, but have never been in the room for the tough yet constitutionally informed negotiations on the processes for a Congressional inquiry.

For example, let me note that the mixture of legislative and constituent and nonlegislative material on a Congressman's computer hard drive poses a solvable but

[2] By activities and publications I have stayed close to the work of the Congressional counsel offices. For example, I have authored the leading legal publication surveying the history, and discussing the work, of the House Counsel's office, which documents the background to this testimony. Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 Law & Contemporary Problems 47-63 (1988).

[3] *United State v. Johnson*, 383 U.S. 169, 181 (1966).

delicate problem in investigative searching. After all, most if not all of the Members I will cite had computers, and DOJ obtained evidence without a raid. The problem is, of course, that the Speech or Debate Clause renders much of the material on that hard drive absolutely privileged from Executive scrutiny, or quite inappropriate to be dragged in, like the communications of thousands of constituents. Every Representative in this room understands first-hand what I mean about the problems for constituents posed by unconsidered dragnet methods. We all know how important for the independence of the Legislative Branch, and for the rights of the constituents whose sensitive affairs are often on that hard drive, it is – not to deny DOJ evidence, but, to work out such inquiries under lawful protocols. You know this. I do from my legal work on this for those 15 years. So do the very small handful of DOJ officials who have worked on Congressional cases in the past. But, most DOJ/FBI officials simply do not have that first-hand experience.

DOJ has never before resorted to search warrant raids for this, which represents a radical step. Consistently, throughout the history of the many, many instances of DOJ successfully seeking and obtaining criminal investigation evidence from Congressional offices, the constitutional tradition was that this occur **ONLY** through the use of subpoenas (or some similar arrangement) handled under lawful protocols.

For those looking for a more familiar situation, imagine if DOJ/FBI needed some particular documents from a law firm. The traditional method involves a subpoena, allowing prior adversary judicial consideration and tailored methods. In contrast, a dragnet raid would infringe the rights of all the uninvolved, innocent clients of the firm. The courts have condemned the raid method.[4]

Congressional objections to this radical step have nothing to do with getting in the way of investigations, nor of Members being "above the law." Consider the criminal investigations and prosecutions I personally was involved in, e.g., those of Abscam, Rep. Floyd Flake, Rep. Mario Biaggi, Rep. Dan Rostenkowski,[5] Rep. Patrick Swindall,[6] or Rep. Joe McDade.[7] Consider also the prior or subsequent ones I studied closely for briefing or commentary, e.g., from Koreagate to Rep. George Hansen[8] to Rep. Jim Traficant. In all these instances, the subpoena method and proper protocols allowed thorough DOJ/FBI investigation to obtain any proper material needed from the Members' offices, use it appropriately prepared indictments, conduct full trials with all the right

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[4] *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955 (3d Cir. 1984). Apparently DOJ/FBI are informally defending their acts by citing their past use of the raid method for an investigation of a federal judge. The Constitution does not provide anything like Speech or Debate protection for judges, for the obvious reason that, historically, there have been many times before the Framers' time, and since, when it was absolutely vital for the nation that Congress be free to take positions on matters like war and peace without Executive intimidation. The Framers did not consider the judiciary likely to be making politically controversial "Speech or Debate." Rather, judicial independence has a different set of protections, like lifetime tenure, which Congress, of course, does not enjoy.

[5] 59 F.3d 1291 (D.C. Cir. 1995).

[6] *United States v.Swindall*, 971 F.2d 1531, 1543 (11th Cir. 1992)

[7] *U.S. v. McDade*, 28 F.3d 283 (3d Cir. 1994).

[8] *U.S. v. Hansen,* 772 F.2d 940 (D.C. Cir. 1985). By citing the instances that involved me, I do not mean to lose sight of the enormous contribution to the defense of House prerogatives, in general, and to the advancement of this constitutional tradition of the proper methods for DOJ investigation, in particular, by Stanley M. Brand and Steven R. Ross, the first and second House Counsels. Their accomplishments on behalf of the House were great.

evidence from those Congressional offices, and obtain from juries the verdicts of either convictions or acquittals.

By the way, some observers have been confused by seeing a lack of concern in the Senate. Well, the Senate tends to become concerned when a Senate office is involved. When there was a DOJ encroachment, by grand jury subpoena, on the office of Senator Gravel, the Senate loudly expressed concern. When there was the FBI Abscam encroachment, by hidden FBI cameras in a sting operation, on Senator Harrison Williams, the Senate loudly expressed concern. In contrast, when there have been constitutional issues involving Representatives, even ones where the Supreme Court upheld the House, as with Rep. Henry Helstoski, who was asked a series of unconstitutional questions in grand jury on a bogus waiver theory, the Senate had a lack of concern. When it is not the Senate's ox being gored, one learns little from the reaction, or lack of reaction, from the Senate.

The Constitutional Tradition Succeeded and Should Not Be Sacrificed

The tradition does not put Members "above the law." In a Member's personal life, he has no shred of special treatment, as shown by how Rep. Jefferson reportedly had search warrant raids for his residences that found cash, without a word of objection from Congress – because that is his non-official life, that does not involve the rest of the House and the rights of our nation of House constituents. In his home, the Member is just like everyone else, with this institution taking no institutional interest. The subpoena method, rather than the search warrant raid method, is used in the Rayburn Building, not because any one Member is "above the law," but because it allows the orderly resolution of legal issues about materials for use in the judicial process, and the orderly sifting for responsive production, in a way that maintains the independence of the Legislative Branch for the protection of a nation of constituents.

Since traditional tools have worked perfectly well all these decades and, indeed, for centuries, the foreswearing of search warrant raids is like the foreswearing of other techniques never used to investigate the offices on Capitol Hill. Would the FBI like to start all of these going in the Halls of Congress: bugs and taps on the House phone system, undercover agents planted on the House staffs, polygraphing of Representatives and staffs who work on security issues, and mail covers on House offices and intrusion into the House Information Systems?

Of course not (or anyway, I would hope the answer is "of course not"). These weren't needed for those many, many investigations and prosecutions I just cited which proceeded successfully as to Representatives in past decades that simply used subpoenas to obtain evidence from their offices. Resort to radical approaches would have a chilling and intimidating effect inconsistent with the independence of the Legislative Branch.

As citizens, like millions of citizens represented by the audience - "you" (the audience) and "me" as citizens may write your and my Congressmen to express views on controversial issues, or to ask casework help on problems the family might have with the I.R.S. So, materials as to this – the materials about views or about family problems – will be in the Congressmen's computer and paper files. It must be accepted that law enforcement agents may gain access to the Congressional office's computer and paper files, but only in the extremely unlikely situation that the records materially relate to that investigation should they see the records of you and me – and the family and relatives

and neighbors and community. Otherwise, it chills and disturbs that the Congressman's whole computer, with those things in it, could get downloaded to the FBI without proper protocols, when the traditional methods, which have worked perfectly well for the many investigations of the past, would leave those things alone.

To be more precise, in terms of the constitutional principles found in the case law, those who think only about what *categories* of Legislative materials receive constitutional protection, are unfamiliar with the importance of the *processes* of the examination – here, the difference between the traditional subpoena or the radical raid with search warrant. (I will address below that the adversary proceedings that did occur as to this Representative, did not make up the lack of adversary judicial proceedings as to the *processes* used.) The subpoena tradition – and the foreswearing of raids -- follows logically from the central purpose of the Speech or Debate Clause, of preventing intimidation of the Legislative Branch by Executive agents, as part of the general principle of Separation of Powers which is to prevent interference by one Branch with another. Some DOJ and academic commentators have been misled by the seeming limitation of what categories the search warrant ultimately sought, to types of materials unprivileged under the Supreme Court case law. They do not have the practical experience – which I do – with the actual execution of subpoena inquiries for materials sought by DOJ/FBI; the House's internal actions in relation to Rule VIII; and the often unpublished legal outcomes recorded in unpublished motion decisions, Executive-Legislative correspondence, and protocols worked out between DOJ and House counsel.

The U.S. Attorney's Manual Recognizes This Constitutional Tradition

I particularly wish to note the allusion to this tradition in the *U.S. Attorney's Manual*, Title 9 (Criminal), Section 2046 (italics added):

> In addition, both the House and the Senate consider that the Speech and Debate Clause gives them an institutional right to refuse requests for information that originate in the Executive or the Judicial Branches that concern the legislative process. Thus, most requests for information and testimony dealing with the legislative process must be presented to the Chamber affected, *and that Chamber permitted to vote on whether or not to produce the information sought*. This applies to grand jury subpoenas, and to requests that seek testimony as well as documents. The customary practice when seeking information from the Legislative Branch which is not voluntarily forthcoming from a Senator or Member is to route the request *through the Clerk of the House* or the Secretary of the Senate. This process can be time-consuming. *However, bona fide requests for information bearing on ongoing criminal inquiries have been rarely refused.*
>
> PRACTICE TIP: The Public Integrity Section of Criminal Division has significant expertise in addressing and overcoming Speech and Debate issues. Prosecutors are encouraged to contact Public Integrity when the official acts of an elected Member of the Legislative Branch become the focus of a criminal inquiry.[9]

[9] The U.S. Attorney's Manual is available online.
http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02046.htm

Let me elucidate. The House Counsel's office (and, to a lesser extent, the Senate Legal Counsel's office)[10] had a number of cases with the Public Integrity Section of the DOJ Criminal Division, particularly in the 1980s. Public Integrity had a special opportunity to come to understand these issues because its career attorneys were involved in a series of Congressional cases, whereas some prosecutorial offices, such as the U.S. Attorney's Office in Philadelphia or New York or Virginia, have only sporadic experience. So, Public Integrity came to understand the system of House and Senate resolutions to provide evidence (further discussed below). And, it cooperated with the House General Counsel (that is partly indicated by the reference in the *U.S. Attorney's Manual* to the Clerk of the House).[11]

So, DOJ's Public Integrity section came to appreciate, and to the extent possible within the context of government counsel offices serving independent branches, to cooperate, on what I call the "traditional" system, reflected in the U.S. Attorney's Manual. It would not surprise me if the wiser heads at DOJ who tried to hold off the radical step of the search warrant raid were in Public Integrity. I assume those who pushed for that radical step lacked experience with the tradition reflected in the U.S. Attorney's Manual. To some extent, when the House asks DOJ to establish protocols for obtaining Congressional evidence, it is simply asking for DOJ to get back to its own Manual when it gives the official DOJ direction on this very subject.

FBI Impatience Did Not Justify A Raid in this Delicate Legal Situation of Pending Appeals

The apparent legal rationale that DOJ/FBI decided to go ahead does not consist of some unique necessity that rendered obsolete the established tradition just discussed. After all, while we do not have the full story because much is cloaked at this point by the grand jury secrecy rule (Fed. R. Crim. P. 6(e)), we know DOJ/FBI sought by subpoena the computer and paper records they considered themselves entitled to; that there was adversary briefing by Rep. Jefferson's counsel and the House Counsel; that there was a judicial ruling ("E.D. Va. subpoena categories ruling") in which DOJ/FBI won part and lost part about the categories in its subpoena that arguably had Speech or Debate privilege; that appeals from the initial decision on their subpoenas was pending, in which proper legal arguments were to be presented to, and resolved by, the U.S. Court of Appeals for the Fourth Circuit; and that this search warrant raid took place while appeals were pending.

I am indebted to Marcia Coyle of the National Law Journal for an appreciation of the Manual's application to this matter.

[10] The Senate does have such cases. *See, e.g.*, *Gravel v. U.S.; U.S. v. Brewster*; *U.S. v. Durenberger*. It so happens, historically, that this U.S. Attorney's Manual section arose in a period when there was more attention to House cases.

[11] During the 1980s, the House Counsel had the title of "General Counsel to the Clerk." The Senate Legal Counsel is housed for administrative purposes in the domain of the Secretary of the Senate. Both are responsible to the chamber and its leadership.

It is a reasonable surmise that there were points in dispute on appeal about the Speech or Debate privilege, and that records (paper or computer) in dispute were not being produced pending that appeal. Some have imagined that the raid did not involve a denial of prior judicial consideration, because of the prior judicial consideration in the E.D. Va. subpoena categories ruling. They are missing the whole point. Speech or Debate issues often involve, not just the categories of testimony or records, but the methods used.[12] The Supreme Court has recognized that the central purpose of the Speech or Debate Clause, to prevent Executive intimidation, necessitates special rules about methods, every bit as much as rules about categories. There was no such adversary judicial consideration before the raid in the E.D. Va. subpoena categories ruling, because DOJ was proceeding (properly) at that point by subpoena, not by raid. And, of course, there was no such prior adversary judicial consideration in the issuance of the warrant, because that was done *ex parte*, and the issuing judge confined his consideration to the uncontested question of probable cause, never hearing the House about the issues involving the raid method itself.

Not only was DOJ/FBI unwilling to await that appeal, but, more to the point, they were unwilling to accept the outcome of motions or negotiations pending appeal. Let me elucidate the delicate procedural situation.

First, the Supreme Court held, as to a Congressman accused of bribery, that he had a vital procedural right to take an appeal from adverse trial court decisions prior to the trial.[13] It is the Supreme Court that decided Congressmen had that vital procedural right – it is not something usurped by the House. As part of the tradition, I myself took part in exercises of that right, and, to my knowledge, DOJ fully accepted it. For example, in the case of Rep. Joe McDade, I myself argued for the House, before then-Judge (now Justice) Samuel Alito, in the pre-trial appeal of a number of key issues in the DOJ/FBI case against him.[14] DOJ presented its side of those issues, but did not seek to jump the gun and prematurely implement the appealed-from trial judge decision prior to the appeal. Without that appeal right, some very important legal issues would never have gotten full judicial consideration, but, for practical purposes, would have been sacrificed.

Second, as is often the case, in this matter of Rep. Jefferson, the DOJ/FBI have the course of working out, through the House Counsel, an approach involving the House's control of its own records – including those that were in dispute on the appeal. As part of the longstanding control of a legislative chamber over its records, both the House and the Senate have rules, and related procedures, for floor action on resolutions

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[12] *Helstoski v. Meanor*, 442 U.S. 500 (1979); *U.S. v. Helstoski*, 442 U.S. 477 (1979), *on remand*, 635 F.2d 200 (3d Cir. 1980). The *Helstoski* cases make two powerful points, both having to do with Speech or Debate protection from Executive intimidation as to the processes used, rather than the categories of subjects: that the Executive cannot induce waiver of Speech or Debate protection the way it can induce waiver of other rights; and, that interlocutory appeals by Representatives of disputed Speech or Debate issues can occur, whereas such appeals cannot occur of disputes over other rights.

[13] *Helstoski v. Meanor*, 442 U.S. 500 (1979). In a preindictment situation of a subpoena to a Congressman's office, this decision allows an appeal to contest the subpoena, whereas in other situations a respondent may only be able to obtain an appeal to contest an order sustaining, in whole or in part, a grand jury subpoena by going into contempt.

[14] *U.S. v. McDade*, 28 F.3d 283 (3d Cir. 1994). With me on the brief were several distinguished researchers and writers, including Richard Stanton, an assistant counsel in our office, and, on detail from the Congressional Research Service, Mort Rosenberg, a highly respected expert on Congressional privileges.

about subpoenaed records.[15] This is the system discussed in the *U.S. Attorney's Manual*, section 2046, quoted above. I may be the only counsel with experience as to both House and Senate resolutions about subpoenaed records (because of my four years serving the Senate). They are an enormously important way to resolve the tensions between the needs of law enforcement, and the independence of the Legislative Branch. Those in DOJ/FBI who think that they had no better alternative but the radical step of the search warrant raid frankly are ignorant of what can be done using these resolutions.

While I am not privy to the direct negotiations of DOJ with House Counsel in the Jefferson matter, that does free me from the grand jury secrecy rule that binds those who were privy to those direct talks, and I took part in enough similar ones under the traditional subpoena method to sketch the better alternative methods shunned by DOJ. First, it could have sought expedited relief pending appeal. It appears that the appeal took place in the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit is renowned for its "rocket docket." DOJ could surely have received some kind of a timely ruling, limiting its request to enforcement of specific key parts of its subpoena for which it had received a favorable ruling in district court. The appellate court understands that some – not all, but some – pretrial (and in this case, pre-indictment) clashes over evidence require expedited consideration. If this matter was considered urgent enough to take all the way to the Attorney General, why not put an affidavit by him into the request for expedited consideration? It was DOJ's decision – no one else's – not to seek that expedition all the way back last year.

It may be that DOJ has a tactical reason it felt in a hurry. I have seen press reports that it initially considered and rejected what it eventually did, and only later, in a new set of circumstances, made that decision to go ahead with the search warrant. It may have came into the possession of new evidence that not so much a matter of probable cause, which was never contested, but rather made categories of records helpful in the shaping of a not-far-off potential indictment. Because the public reporting on this matter depends significantly on the limited diet of leaked information, it is a challenge to understand this in non-sensational terms. But, it is important to do so, because otherwise, the public will succumb to the something fostered by FBI leak and innuendo that even responsible DOJ officials know quite well was not involved, namely, the notion that there is the kind of risk here involved in flight or obstruction situations.

When law enforcement personnel who have used tactics about which there is legitimate constitutional dispute resort to such innuendo, to be blunt, it disgusts me.[16] I note that the kinds of potential offenses laid out in the long affidavit underlying the warrant application have absolutely nothing to do with loss of evidence or anything remotely like it. Representative Jefferson himself is a lawyer with impressive

[15] David Kaye, Congressional Papers, Judicial Subpoenas and the Constitution, 24 UCLA L. Rev. 523 (1977); David Kaye, Congressional Papers and Judicial Subpoenas, 23 U.C.L.A. L. Rev . 57 (1975).

[16] .

credentials,[17] he is represented by able personal counsel, and the House Counsel's office has had a role in the matter with specific respect to the records issue. That is a triple layer of lawyers. Whatever transpired "way back when" before that triple layer of lawyers may (or may not) become the basis of charges against the Congressman - - but with DOJ/FBI closely watching and with that triple layer of lawyers, the only sensational happenings in the Rayburn Building will be limited to the doings of crazed gunmen, not the handling by teams of lawyers of documents under subpoena. Moreover, the alert reader of the FBI affidavit will understand that while the FBI certainly a negative view of the Congressman, there is not one word of suggestion in the affidavit to suggest that he is an evidentiary risk. Hiding cash in a freezer is colorful, but it does not suggest the kind of evidentiary concerns that would arise if he smuggled it away himself or passed it to confederates to get it off-premises.

Rather, the DOJ tactical hurry would concern the legally complex problems of making the kind of charges recounted in its affidavit in support of the raid's search warrant, for which Rep. Jefferson's post-raid motion also illuminates the tactical landscape. The Representative has some Congressional caucus roles as to Nigeria and Africa. He seems to have written official correspondence to Nigeria about some commercial matters. Also, DOJ wants to list some other official acts of his. Those matters all seem central to DOJ's potential case against him. DOJ's fresh evidence may push those aspects to the center of a relatively near-term decision on some ways of framing the charges against him. The scenario has enough familiarity that I can recognize at least the generic nature of issues of privilege that might be pending on appeal.

There are resemblances here to cases I argued personally in the courts of appeals.[18] In this type of situation, on the one hand, potentially accused Members who write official correspondence in Congressional capacities akin to caucus roles will argue that as much as possible of the closely associated materials are privileged. That might be true of some aspects of the caucus letters about the main item, and even more so as diverse "other official acts" are thrown in. On the other hand, DOJ, pursuing potential charges that a Congressman received things of value as to those official acts, will argue that as much as possible of the closely associated materials are unprivileged. Moreover, the evidentiary issues foreshadow questions going, not just to evidence, but to the viability of the charges themselves. That is, DOJ's contention that certain kinds of closely associated materials are unprivileged, goes to what kinds of provable charges it has that are consistent with the Speech or Debate Clause. The Member's contention that some kinds of closely associate materials are privileged, goes to what kinds of charges cannot be made. These things occur much of the time in Congressional cases. They mean the opposite of any notion that the guilty are fleeing or the evidence is vanishing. They have to do with DOJ and the Representative making the kinds of moves that are the lifeblood of our adversary system of justice as each prepares for the looming legal

[17] He has both a J.D. from Harvard and an L.L.M. I am not arguing one way or the other about the types of offenses of which he may be accused. But loss of evidence is a matter which someone with those credentials, in this situation, will not slide into.

[18] Particularly the *McDade* case. I do not mean to compare one Member to another, or one alleged offense to another, just one type of legal issue to another.

contest, particularly as DOJ frames its charges. They have legal significance even though it may well be that every single piece of paper that DOJ would ultimately be putting into evidence from following the traditional subpoena route, it would ultimately be putting into evidence from the raid.

In the situation it found itself, DOJ may feel a tactical desire to move faster. It won a victory, on at least some pertinent points, from the district court, about evidence to come from the Congressman. It is not receiving the evidence, pending appeal. The appeal does not seem to be moving toward a rapid resolution. While it could ask for expedition, it has waited, and now the early points when it could have asked for the most expedition have passed. It is ready, more or less, to made the indictment decision, and wants to have the evidence in hand that would be used in framing any indictment – say, the associated material that will let it characterize the way it prefers to, the official correspondence and official roles involved in the charges. It regrets having not asked for maximum expedition as soon as the Congressman took his constitutionally-authorized appeal.

A Footnote is Not Enough to Justify This Radical Step

And, there was reportedly "a footnote to [U.S. District Judge T.S. Ellis III's] sealed ruling that the government was free to pursue a criminal search warrant to obtain the records, according to numerous law enforcement sources."[19] Such a footnote seems to have fueled a sense of righteousness at the FBI. The FBI thinks its own tactical desire to be active and dominant, via a raid method, rather than leaving matters more to the lawyers, as in the traditional constitutional method, gets a big boost from that footnote.

Now we all like to watch the FBI play cops and robbers like in the movies, but some legal reality can be let into this picture. There is absolutely no reason to think that Judge Ellis received full briefing last year about issues of search warrants. Indeed, since a disputed subpoena was in front of him and no search warrant was even in contemplation, I do not see why he would have received serious briefing about search warrants at all. It may have been what we call a "throwaway" remark, meant just to put in context the issues discussed in the opinion's text, about which the judge has received briefing and reached a decision. Moreover, the judge may have been thinking about some issues where (ironically) the raid method makes less of an issue, rather than focusing fully on the key issues discussed in this testimony.[20]

The (apparently FBI) sources who admit that whatever was said about this, was in "a footnote," fail to recognize how inappropriate it is to make major changes in vital and longstanding constitutional traditions on the basis of some words in one footnote in one trial judge's opinion on a point that was not seriously briefed and that may have had their

[19] Shailagh Murray & Allan Lengel, *Return of Jefferson Files is Sought*, Wash. Post, May 25, 2006 at A1, A11. I am quoted in this article.

[20] When a respondent has a Fifth Amendment issue about the "act of production" of subpoenaed documents, or the issue of Congressional waiver of Speech or Debate by allowing the Executive undue access to material comes up, a judge be thinking about how a search warrant does not involve these constitutional rights.

origin in the judge's thinking about other issues. Now, maybe it is a good footnote. Maybe it one of the best footnotes around. Maybe it belongs in the Footnote Hall of Fame.

On the other hand, maybe Judge Ellis, like just about every judge I ever dealt with, would appreciate some adversary briefing on particular legal issues and pertinent facts, before the FBI take his few words in a footnote, penned on the basis of last year's briefing about last year's very different situation, and shout them around as though they authorized this momentous radical step. I have seen a lot of trial judges' opinions on Congressional matters, with a lot of footnotes on issues that were not briefed, and I would say, that the independence of the Legislative Branch deserves more than one of those prior to taking steps that will lead to it being sacrificed. Moreover, DOJ did not rush immediately out and get a search warrant after that ruling, and perhaps even, at an interim point, considered and rejected such a step. This suggests that the wiser heads at DOJ recognized this one footnote as not conclusive in this situation, the way its less cerebral colleagues at the FBI do not.

As for the submission of the FBI affidavit to the district court here in Washington prior to issuance of a warrant, that very plainly has nothing to do with the legal questions involved in foregoing the prior adversary legal consideration of the traditional constitutional method, in favor of a raid. The district court here never got any adversary legal presentation at all. There is no reason for it to have been thinking about any question except the usual search warrant question of probable cause, which is not the issue. Quite the contrary, the affidavit plainly includes nothing to attempt to justify this as a unique necessity – nothing to show risk of flight or of evidence loss, nothing to show that House Counsel must be excluded from the legal proceedings or the search, indeed, nothing about the House Counsel at all. There is nothing in this affidavit to distinguish it from past instances of Representatives under investigation that were dealt with by the traditional constitutional method. To the alert reader, the affidavit fairly shouts that the specific factors making this intimidation, are acknowledged, and that from now on, the shadow of the Executive will fall, without any need to show unique necessity, across the whole of the Capitol.

Were There Better Alternatives?

I believe there are two aspects of a better alternative, that would be within the tradition, and different from the search warrant raid. A point that I especially want to make: it may well be that under the better alternative, DOJ would get every single record it is entitled to have and to use that it took away from the search warrant raid. And, it may well be that under the better alternative, the exact same legal consequences would ensue, in terms of whether the Representative is charged, and if so, whether he is convicted. It is not about protecting the individual Representative, not about Members being "above the law." It is about the independence of the Legislative Branch, for the benefit of our nation of constituents.

First, if DOJ/FBI are in a rush, they should either ask for, and await, expedited judicial procedures, or negotiate a solution with the House leadership. Either way, there will be input from the House to produce tailoring of what is taken, and how, from the

computerized records. There will be recognition of how privileged messages, non-relevant constituent messages, and relevant messages are mingled on a hard drive and only House input can produce a reasonable search.

Why not let judicial procedures – with adversary presentations – decide the issues? Presumably the courts will pay heed to a DOJ request for expedited consideration in a pretrial or pre-indictment situation. If not, DOJ's dispute is not with the House, it is with the judicial application of the Speech or Debate Clause to the right of a Member's appeal, in the *Helstoski* decision.

When a request for expedited judicial procedures is unavailing, DOJ's recourse is to negotiate a solution with the House leadership. The House, which can control all its documents, would consider a Rule VIII resolution put forth by the bipartisan leadership, resolving what to do with the subpoenaed documents, with conditions specified in the resolution to protect all legal rights and interests. In fact, any subpoena for a Senator's records calls forth such a Senate resolution, and when I first began serving the Congress, the House rule in effect at that time meant that any subpoena for a Representative's records called forth such a House resolution.

It is only since 1980 that the House has shifted to a system in which such matters are laid before the House without the need for passing a House resolution unless the particular situation suggests it. DOJ could simply say that the particular situation necessitates it, and, I cannot imagine it would not receive every consideration from the House leadership.[21]

Second, any inquiry into a Representative's records should be according to pre-established protocols. I personally would hope that this would be done only by subpoena, as traditional, and not by raid. But, however it is done, it should be done in a way that lets the House Counsel observe the process. And, it should be done in a way that does not involve the FBI engaging in a wholesale, insufficiently accountable downloading of a Representative's computer.

It would be best of all if the culling of the paper records was by Legislative Branch personnel – e.g., archiving personnel from the Clerk's office – who are conscientious, neutral, but non-intimidating - rather than Executive Branch agents who are, by profession, insensitive to Legislative Branch concerns, such as protecting the privacy of communications between Members with constituents, other Members of a legislative caucus, etc. On the other hand, the FBI may have some desire, which is suggested in its affidavit, to handle the retrieval of computer information so as to maximize the yield (e.g., to retrieve the kinds of prior–version superseded drafts that computers carry in ways that only a technician, not a clerical, person can access). So, if the FBI can show justified needs, let such retrieval occur under Executive-Legislative protocols. None of that calls for a raid.

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[21] For example, during the House Bank matter of the early 1990s, the House decided to pass a resolution turning all the House Bank's records over to the Department of Justice. Could DOJ have obtained these by search warrant or subpoena in the face of vigorous House objection? It is extremely doubtful, given that the records were those of hundreds of Members, of whom the overwhelming majority were above the least concern. Rather, the House acted pre-emptively, throwing the doors open to prove that it did not want to stand in the way of any law enforcement.

I suspect that kind of proposal will not fully satisfy either Rep. Jefferson, or, the hotter heads at the FBI. One or even both sides might quarrel with such a solution. But, it would comport with the constitutional tradition followed by DOJ in cooperation with the House Counsel. It would protect DOJ's law enforcement interest, as well as the House's institutional interest, in the traditional constitutional system, infinitely better than the radical and unnecessary step of a search warrant raid.