STATEMENT FOR THE RECORD
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"RECKLESS JUSTICE: DID THE SATURDAY NIGHT RAID OF CONGRESS TRAMPLE THE CONSTITUTION?

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COMMITTEE ON THE JUDICIARY
THE UNITED STATES HOUSE OF REPRESENTATIVES

I.
INTRODUCTION

Chairman Sensenbrenner, Representative Conyers, members of the Committee, it is an honor to appear before you today to discuss the disturbing recent events surrounding the search of a congressional office by the Executive Branch.[1]

There are relatively few times in history that a branch faces a critical test of institutional independence and identity. This is one of those times of self-definition. At the core of our unique system of governance is the concept of shared and separated powers. The search of Rep. Jefferson's office challenges not just the values and traditions of this house, but the doctrine of separation of powers itself. The raid on this office constitutes a profound and almost gratuitous insult to a co-equal branch of government. For that reason, this may not have been a challenge that you invited but it is one that you must not fail to meet.

I come to this subject as both a legal academic and as a litigator. I hold the Shapiro Chair for Public Interest law where I teach subjects ranging from constitutional law to criminal procedure. As a lawyer, I have litigated both constitutional and criminal cases with relevance to this controversy. These include cases raising core issues under the first three articles of the Constitution that concern legislative, executive, and judicial powers. While I have generally taken a robust view of the role of the Legislative Branch in our tripartite system of governance, I have also challenged Congress when it has exceeded its authority, including the successful constitutional challenge to the Elizabeth Morgan Act – legislation found to be a Bill of Attainder and struck down in *Foretich v. United States*.[2]

In the history of this nation, no President has ordered or allowed a search to be conducted on the legislative office of a sitting member of Congress. There is a reason for this previously flawless record. Both Legislative and the Executive Branches have long maintained a level of mutual respect and restraint in the conduct of their respective investigatory

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[1] After the lockdown that occurred during my testimony before the House Intelligence Committee last Friday, my expectations from congressional testimony have changed dramatically. I no longer hope for agreement, but only that when I finish my testimony today that I will be allowed to leave.

[2] 351 F.3d 1198 (D.C. Cir. 2003).

functions. This was done in recognition that some of our most important constitutional values and traditions are not spelled out jot for jot in the Constitution but exist in the long-standing terms of engagement between the branches.

As will be shown below, this search was abusive from a host of different perspectives from the failure to use alternative means to the scope of the search to the manner of its execution. In addition to being unnecessary, it was conducted in a manner that maximized the legal and policy concerns.

In evaluating the search, we must return to first principles. The question, in my view, is not whether the government had probable cause. Based on the lengthy affidavit, it is clear that probable cause exists that Rep. Jefferson has been engaged in possible criminal activity. This does not mean that he is guilty, of course, but rather that the standard under the Fourth Amendment of the Constitution is satisfied for a warrant. The question is not whether the government had a legitimate interest in this material. Even if the material is redundant as suggested by defense counsel, there are legitimate reasons to secure such material in a possible bribery case from the office of the individual. Rather, it is a question of means and a question of scope. This search was unreasonable because it was unnecessary and excessive in both scope and execution. While the entry to the office will likely be upheld, the specific material seized is likely to face a credible challenge that could have been entirely avoided with better judgment at the Justice Department. The various prophylactic measures imposed internally do not ameliorate or negate these concerns.

The fact that this search was done with the consent of the Judicial Branch does not change the constitutional equation. Obviously, given the recent controversy over the President's use of warrantless domestic surveillance, the use of a warrant is a welcomed addition. However, the separation of powers doctrine was created with the understanding that a branch may at times be threatened by the combined authority of the other two branches. Indeed, the Speech or Debate Clause is cited by the Supreme Court as a central bulwark against "intrusion by the Executive and Judiciary into the legislative sphere."[3] Likewise, the fact that there is a self-imposed "Filter Team" does not change the fact that it is a team created by the Executive Branch and composed of Executive Branch officers. The Administration prevented a legislative officer – the House General Counsel – from even witnessing the search, let alone reviewing the material.

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[3] *Helstoski*, 442 U.S. at 492.

The search on May 20, 2006, shattered over 200 years of tradition. What is most disturbing is not just the affront to a co-equal branch but the fact that the search was unnecessary to achieve purposes of securing these documents and material. If it were an act of impulse by some rogue FBI agent, it could be excused. However, this was an act of premeditation; ordered with the direct knowledge and approval of Attorney General Alberto Gonzales. For that reason, it can be neither ignored nor tolerated if the balance of the tripartite system is to be maintained.

II.
THE SPEECH OR DEBATE CLAUSE: GOOD CONSTITUTIONAL FENCES MAKE GOOD CONSTITUTIONAL NEIGHBORS.

While I will be discussing a variety of cases related to the speech or debate clause, perhaps the most elegant explanation of the separation of powers can be found not in the Constitution but in the poem of Robert Frost, *The Mending Wall.* It is, of course, not a constitutional text but it captures the same basic principle of the separations of powers that "good fences make good neighbors." The Madisonian democracy creates a tripartite system in which no branch has the authority to govern alone. This creates a natural tension and, with that tension, a tendency for each branch to mind its walls of authority from any encroachment. Like Frost's neighbors, these walls tend to crumble through time or incursion, but it is in the interest of each branch to preserve the integrity of the walls first laid by the Founders.

To put it bluntly, since taking office President Bush has not proven a good constitutional neighbor. The last few years have been replete with direct assaults on the doctrine of the separation of powers and other core protections. I have testified on many of these controversies before various committees but the list is growing and represents a constitutional crisis for a system based on shared and separated powers.[4] A review of some of the

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[4] *See, e.g.*, United States House of Representatives, Permanent Select Committee on Intelligence, "*The Constitutional and Criminal Status of the Media in Reporting on Classified Subjects*," May 26, 2006; United States House of Representatives, Subcommittee on Homeland Security, "Protection of Privacy in the DHS Intelligence Enterprise," April 6, 2006 (testimony of Professor Jonathan Turley); United States House of Representatives, House Judiciary Committee (Democratic members), "The Constitutionality of NSA Domestic Surveillance Operation," January 20, 2006 (testimony of Professor

most serious controversies illustrates why this President is viewed as the most hostile chief executive to the doctrine of separation of powers in modern American history:

- **The Torture Memorandum**: Attorney General Alberto Gonzales, while White House Counsel, signed a memorandum that stated that the president could order officials to commit crimes and that the Executive Branch could violate federal laws when the President viewed it to be in the nation's interest.
- **Detainees:** The Administration has previously argued that the President could create his own court system and even execute detainees without any access to the federal courts.
- **Enemy Combatants:** The Administration has argued that the President may unilaterally declare citizens to be enemy combatants, strip them of all of their constitutional rights, and deny them access to the courts and counsel.
- **Signing Statements**: The President has repeatedly reserved the right to violate federal laws when he considers it in the nation's interests, including areas outside of national security subjects.
- **Domestic Surveillance**: The President has admitted that he ordered surveillance under the NSA domestic surveillance program over 30 times despite the view among many experts that the operation violates federal law and constitutes a federal crime.
- **Data Mining Operation**: Recently, it was disclosed that the Administration has created a massive data bank of telephone numbers and calls of millions of Americans – without congressional authority.

I realize that we do not all agree on these violations or their implications for our constitutional system. However, it is important to recognize that the latest controversy is part of a disturbing mosaic of extreme claims of executive authority by this Administration. In my view, the total disregard of congressional privileges and concerns in this search reflects this broader pattern. With that somewhat cathartic observation behind us, I will turn to the specific issue at hand.

Jonathan Turley). It is not my intention to revisit that subject or my prior criticism of congressional oversight on such operations. *See* Jonathan Turley, *Down to the Fourth Estate*, USA Today, May 17, 2006, at 11A.

A. The Origins of the Speech or Debate Clause

In our system of government, the "walls" of the Madisonian democracy are found in a series of checks and balances between the branches. These express powers and limitations, however, are merely the structural elements of a broader principle of separation of powers. While not expressly mentioned in the Constitution, the separation of powers doctrine is the unifying and stabilizing element of the tripartite system. It is a doctrine that is largely protected through long-standing traditions of mutual respect and mutual restraint between the branches.

One of the structural protections in the Constitution is found in Section 6, Article 1 of the Constitution:

> 1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

The current controversy extends beyond this one clause but it is clearly the most directly affected by the exercise of a search by the Executive Branch on an office of Congress. The Speech or Debate Clause was intended "to preserve the Constitutional structure of separate, co-equal, and independent branches of government."[5] In more negative terms, "the central role of the Clause is to prevent intimidation of legislators by the Executive and accountability before a possible hostile judiciary."[6]

The speech or debate clause in Article 1 is obviously quite vague and neither the executive nor the Legislative Branches have been eager to litigate the meaning of this clause. The origins of the clause are well known. The clause is the direct descendent of the English Bill of Rights. As early as 1541, the Parliament was formally invoking this privilege. The notion of legislative immunity was forged during a period when the Tudor and Stewart monarchs used their executive power to harass legislators with the threat of criminal prosecution and penalties when they failed to yield to their views. Queen Elizabeth, King James I, and Charles I were particularly aggressive in the use of their authority to punish outspoken legislators. Legislators like

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5 *United States v. Helstoski*, 442 U.S. 477, 491 (1979).

6 *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 502 (1975).

Peter Wentworth became personifications for the right of the legislature to be free of such coercion or arrest after they went to jail rather than yield to the Crown.

Given the grievances against the King in the colonies and the desire to form a representative democracy, legislative immunity was an obvious element to the new system. Indeed, the Speech or Debate Clause generated very little discussion in the constitutional convention. At one time, the Committee on Detail considered a provision that limited the privilege to a protection from arrest. Beyond the prohibition on arrest, it was proposed that "they shall have no other privilege whatsoever." This proposal was defeated.

Only William Pinckney and James Madison opined in any substantive way on the privileges for the houses of Congress. Pinckney advocated a provision that would have allowed each house to define its own privileges while Madison viewed such authority as a dangerous concentration of power in a system based on the concept of shared powers. Yet, both Pinckney's support for an open-ended congressional authority and Madison's desire to concretely define the privileges failed. The final language of the clause was adopted on August 10, 1787. Pinckney would later observe that "[t]he Convention . . . well knew that it was an important point, and no subject had been more abused than privilege [and were] . . . determined to set the example, in merely limiting principle to what was necessary, and no more."[7] The framers clearly preferred to leave the clause somewhat vague. It was an telling choice given the fact that leaders for over two hundred years have largely avoided efforts to clearly define and confine such privileges.

Putting aside the Constitutional Convention, there is evidence that the legislative privilege was given broader meaning in the early Republic. For example, when President John Adams ordered the grand jury investigation for sedition of Rep. Samuel J. Cabell of Virginia in 1797, both James Madison and Thomas Jefferson cried foul. The offense concerned a constituent letter criticizing the policies of Adams vis-à-vis France. Jefferson and Madison jointly wrote that

> [i]n order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of the land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the

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[7] 3 Max Farrand, The Records of the Federal Convention of 1787, at 385.

> co-ordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any . . .[8]

It is clear that the Framers viewed the clause, and the general operation of the separation of powers, as a vital component of the guaranteeing the legislative function. They notably did not create similar privileges for the other branches in recognition of the core relationship between legislative functions and legislative privileges.

B. The Judicial Interpretation of the Clause

The Supreme Judicial Court of Massachusetts handed down an important ruling in 1808 in *Coffin v. Coffin*, where Chief Justice Theophilus Parsons held that "the article ought not to be construed strictly, but liberally . . . to [include] the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office."[9] Yet, it was not until 1881 that the Speech or Debate Clause was addressed by the Supreme Court. In *Kilbourn v. Thompson*,[10] the Court ruled that the House of Representatives lacked the power to arrest and hold a citizen. However, it also found that members are immune from liability under the clause for such acts.

In the Twentieth Century, the Supreme Court would redefine the clause and, in some respects, narrow its application. In *United States v. Johnson*,[11] the Court emphasized the role of the clause in protecting the Legislative Branch from intrusions from both the executive and judicial branches: "The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature."[12] Nevertheless, the Court stressed the importance of whether the legislator was being prosecuted for a legislative act. This distinction was made even more plain in *United States v. Brewster*, where the held that "a prosecution under a general criminal statute . . . necessarily contravenes the

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8 2 The Founders' Constitution 336 (Philip B. Kurland & Ralph Lerner eds., 1987) (Thomas Jefferson and James Madison, Protest to the Virginia House of Delegates (1797)).

9 4 Mass. 1, 27 (1808).

10 103 U.S. 168 (1881).

11 383 U.S. 169 (1969).

12 *Johnson*, 383 U.S. at 179.

Speech or Debate Clause."[13] Out of these cases, and cases like *Dombrowski v. Eastland,*[14] and others,[15] the Court embraced a legislative/political distinction in the application of the clause – excluding non-legislative acts from the legislative privilege.

These and other cases establish that there is no absolute immunity from investigation or prosecution for members of Congress simply due to their status. Rather, the immunity is only found in the prosecution of members for performing their legislative functions.[16] For the record, I have always reviewed the interpretation of the covered legislative functions under the clause to be too narrow, particularly in such functions as constituent newsletters.[17] Indeed, it is an interpretation that comes close to the view of King James II when he narrowly construed speech immunity in Parliament.[18] Yet, the general thrust of these cases is manifestly correct: the Framers did not intend for this clause to serve as a personal form of immunity for members from any criminal act that they may commit while in office.[19] As

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13 408 U.S. 501, 510 (1972).

14 387 U.S. 82 (1967).

15 *See, e.g., Doe v. McMillan*, 412 U.S. 306 (1973); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

16 *Gravel v. United States*, 408 U.S. 606, 616 (1972) (stressing that the clause "protects Members against prosecutions that directly impinge upon or threaten the legislative process.").

17 *See, e.g., Williams v. Brooks*, 945 F.2d 1322, 1331 (5th Cir. 1991) (denying immunity for press conference statements); *Chastain v. Sunquist*, 833 F.2d 311, 328 (D.C. Cir. 1987) (denying immunity for letter to Attorney General); *but see Sundquist*, 833 F.2d at 329 (Mikva, J., dissenting) (arguing for a broader, functional interpretation of the clause); Joint Committee on Congressional Operations on the Legislative Role of Congress in Gathering and Disclosing Information, The Constitutional Immunity of Members of Congress, S. Rep. No. 896, 93d Cong., 2d Sess. 47, 53 (1974); Constitutional Immunity of Members of Congress: Hearings Before the Joint Comm. on Congressional Operations, 93d Cong., 1st Sess., pt. 1 (1973); Robert J. Reinstein & Harvey A. Silvergate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113 (1973).

18 Reinstein & Silvergate, *supra*, at 1130. King James II recognized only statements and functions occurring inside the House of Commons in his prosecution of Sir William Williams when the latter published deliberations from the House. *Id.*

19 This was made plain by James Madison:

Jefferson noted in his work, *A Manual of Parliamentary Practice*, "[t]he privilege . . . is restrained to things done in the House in a Parliamentary course . . . For [the member] is not to have privilege *contra morem parliamentarium*, to exceed the bounds and limits of his place and duty."[20] For this reason, despite the comments of some in the media, no one is suggesting that Rep. Jefferson is immune from prosecution or is in any way "above the law." This is about the means, not the end, of a criminal prosecution. In our system, it matters how things are done, not simply whether they are done.

The Speech or Debate Clause is part of a doctrine of separation of powers that is more than the aggregation of insular rules of constitutional privilege or authority. Like privilege, there is a certain penumbra that surrounds these provisions; a living space between the branches. This is why there has not been a search of a congressional office in over two hundred years. The reckless decision to shatter this centuries old tradition is baffling not only because of the lack of respect given to a co-equal branch, but the utter lack of necessity. Tasked with performing oversight of the Executive Branch, it is essential that Congress not face unnecessary or unbridled intrusions in its public offices. The Framers wanted legislators to "be free, full, and unawed"[21] and not concerned about the integrity and sanctity of their institutional functions. The Speech or Debate Clause must

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> All laws should be made to operate as much on the law makers as upon the people; the greatest security for the preservation of liberty, is for the government to have a sympathy with those on whom the laws act, and a real participation and communication of all their burthens and grievances. 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 of no account be exceeded.

2 Founders' Constitution 331 (Philip B. Kurland & Ralph Lerner eds., 1987) (James Madison, The Militia Bill, House of Representatives (Dec. 16, 1790)).

[20] Thomas Jefferson, A Manual of Parliamentary Practice 20 (1854), in The Complete Jefferson 704 (S. Padorer ed., 1943); *see also Hutchinson v. Proxmire*, 443 U.S. 111, 125-26 (1979).

[21] 2 The Founders' Constitution 336 (Philip B. Kurland & Ralph Lerner eds., 1987) (Thomas Jefferson and James Madison, Protest to the Virginia House of Delegates (1797)).

be interpreted in light of that original intent to "protect the integrity of the legislative process by insuring the independence of individual legislators."[22]

At a minimum, the Jefferson search appears to have violated the spirit of the separation of powers and certainly destroyed over 200 years of flawless tradition. As for the constitutionality of the search itself, the most significant questions concern the scope of the search. Focusing on the material seized, as opposed to the entry into the office, the search appears to have acquired a vast array of legislative material that should concern every legislator and constitutional scholar. Time will tell if the material is suppressed. However, what should be clear is that this search was manifestly unwarranted and unwise.

III.
THE JEFFERSON SEARCH AND THE ABSENCE OF NECESSITY OR EXIGENCY

The search of Rep. Jefferson's office on a Saturday night on May 20, 2006, opened a new chapter in interbranch relations in the tripartite system of governance. There is a reason why no such search has occurred in over 200 years. It is not because of an absence of prior interest of investigators in the contents of congressional offices. There have been many prior investigations with more compelling reasons for a search than this search. Rather, it has been the presence of Justice Department officials who understood the traditions of our constitutional system and the implications of such an intrusion into the Legislative Branch.

While the facts of the search are relevant to our discussion, it is important to emphasize that nothing in this analysis depends on the merits of the allegations against Rep. Jefferson. This is about an injury to an institution, not an individual. Rep. Jefferson will have to face these accusations in due course, but it will certainly not be today or before this Committee.

A. Availability of Other Reasonable Methods.

The affidavit accompanying the warrant in this case contains a standard statement that carries special significance in this context. Special Agent Timothy R. Thibault affirmed that the government "has exhausted all other reasonable methods to obtain these records." It is a common phrase to

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[22] *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 502 (1975).

find in such documents, but in this context it is manifestly untrue and highlights the abuse of power in this search. There were various other avenues that the Administration could have taken short of a Saturday night raid on a congressional office. It is hardly credible, as claimed in the affidavit, that the Administration was "[l]eft with no other method" to obtain such material.

First, the Administration could have sought a court order to Rep. Jefferson to comply with the subpoena or, if such an order is ignored, an order holding him in contempt. Rep. Jefferson would have faced jail for a failure to comply with such an order. It is not clear whether the Administration sought such a contempt order or appealed any denial of such an order.

Second, the Administration could have sought to establish procedures for securing such material in federal court with counsel for the institution and the individual present. This is what has occurred in the past to allow all interested parties to argue and, if necessary, to appeal over involuntary disclosures.[23] The lack of an adversarial component in this case probably contributed to the lack of understanding or moderation in the scope or execution of the search. By foregoing the subpoena route and appeal, the government prevented experienced counsel for counsel to inform the court of the implications of and alternatives to this raid.

Third, the Administration could have sought to seal the material or even the office by dealing directly with the House of Representatives. The House has the authority to take steps to secure material and Rep. Jefferson would have likely cooperated with such efforts to avoid congressional action on these allegations. Indeed, the House has previously voted to turn over material in a criminal investigation. Indeed, when combined with true argument before a federal court, a compromise was possible in the use of neutral legislative officers to identify and remove the needed material. Instead, only after the intrusion into the Legislative Branch, President Bush ordered a period of consultation and negotiation. Had this consultation occurred *before* the intrusion, there would likely be no constitutional confrontation and the evidence would have been secured without rancor.

Finally, the Administration could have even asked for direct action against Rep. Jefferson by the House for his failure to comply with a valid subpoena. Most of us doubt that Rep. Jefferson would have long refused to turn over this material if the matter were raised with the entire house and he faced a parallel legislative investigation.

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[23] *See, e.g., United States v. McDade*, 28 F.3d 283 (3d Cir. 1994).

This is not the first time that such material has been sought from congressional offices and, as over 200 years of precedent indicates, there has never been a need to resort to such a search. Even in highly contested cases like those involving Abscam, Rep. Dan Rostenkowski, and Rep. Jim Traficant, prosecutors followed reasonable procedures to secure evidence in cooperation with both congressional and individual counsel. Other avenues have been used and, in deference to the Legislative Branch, prior Administrations have worked out accommodations with defendants and congressional leaders. This long-standing working relationship is embodied in the United States Attorney's Manual. After discussing the dangers of using material from legislative offices, section 2046 states:

> 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.[24]

As shown below, the courts have held (and the Justice Department has recognized) that information related to the legislative process is broadly defined. This material shows that the Justice Department itself recognized that requests should be made through Congress and that Congress was unlikely to refuse. Moreover, it acknowledges that "the customary process" was not followed in this case.

The availability of alternative methods is also indicated by the assertions of Rep. Jefferson that much of this material had already been acquired by other means and that they had never foreclosed a voluntary waiver for the search. While it certainly appears that Rep. Jefferson did not

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[24] Federal Rules of Criminal Procedure Rule 41(f)(2).

comply with the subpoena, eight months went by without any apparent effort to force compliance short of an actual search.

B. The Scope of the Search

The need to seek alternative avenues is manifested by the scope of material seized in this search. There is no question that material constituting legislative material was taken by the government. In addition to material related to Rep. Jefferson's appointments and contacts, the government took his entire hard drive from his computer. In today's world, a hard drive is what paper records and files were in the time of the Framers. Moreover, the most sensitive legislative material will be found on a member's personal computer. It is equivalent to going into Samuel Cabell's office and taking every scrap of paper. When one considers that the Court has stressed that the "the Speech and Debate Clause [must be read] broadly to effectuate its purposes," the scope of the seized material is daunting. The Court has defined the range of protected legislative activities to include all functions or activities that are

> An integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.[25]

Even the U.S. Attorney's Manual recognizes the broad interpretation given to such material, warning Justice Department attorneys that

> While the Speech and Debate Clause has been expressly held not to shield Senators or Representatives against bribery charges, *Johnson v. United States*, 383 U.S. 169 (1964), it does impose significant limits on the type of evidence that can be used to prove such an offense. . . . the parameters of what constitutes a "legislative act" are quite broad, and can severely impair the ability of prosecutors to prove bribery and gratuity cases where the recipient is an elected Member of the Legislative Branch.[26]

There is little question that the Justice Department seized legislative material that relates to both Rep. Jefferson's legislative actions as well as the process

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[25] *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 504 (1975).

[26] United State's Attorney's Manual Section 2046.

of legislation. Given the scope of the intended search, the Administration should have sought an interim method of securing the material while the Legislative Branch dealt with the failure to comply. There was no need for this to be an exclusive Executive Branch search. By allowing Congress to intervene, the transfer of this material could have been handled by legislative officials and avoided a conflict between the branches. Instead, the Administration carried out an extreme search with the most extreme means.

C. The Method of the Search

Magnifying the constitutional concerns further was how this search was conducted. It appears that Ms. Geraldine Gennet, the General Counsel of the House of Representatives, went to Rep. Jefferson's office on the night of the search. She correctly asked to be present as a representative of the Legislative Branch. It was a request that was not only manifestly reasonable but mutually beneficial. If the Administration had simply allowed Ms. Gennet to be present, it would have helped to mitigate the intrusion into the office. While constitutional concerns would remain, it would have shown a modicum of circumspection on the part of the Justice Department. Instead, Ms. Gennet was barred from entry. It was an outrageous and unjustifiable decision by the Justice Department.

After barring Ms. Gennet, the Justice Department barred Rep. Jefferson's legal counsel, Ms Amy Jackson. Ms. Jackson demanded to be present for the search – a common practice. She was also barred by Special Agent Thibault. Accordingly to Ms. Jackson, she was also told by Assistant United States Attorney Mark Lytle that she would be barred because it is against Justice Department policy. If true, that would be news to me. It is common for defendants and counsel to be present. Indeed, defendants or counsel often sign inventories after such searches. In federal court, Rep. Jefferson has objected to the exclusion for good reason. Rule 41 of the Rules of Federal Criminal Procedure anticipates the participation of a representative or party in its inventory provision:

> An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.[27]

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[27] Federal Rules of Criminal Procedure Rule 41(f)(2).

The exclusion of both the House General Counsel and the personal counsel to Rep. Jefferson shows the complete disinterest of the Administration in accommodating even the most modest legal or constitutional concerns.

D. The Lack of Exigency

After one considers the constitutional and policy concerns raised by this search, it is baffling why the Administration would take such a controversial step at this point in the case. There were no exigent circumstances in the case. Rep. Jefferson was aware *for eight months* that the government wanted to search his office. If there were terribly incriminating things in the office, the government had given him ample time to remove them – even if he had not done so before the warning. Moreover, these documents could have been easily secured through cooperation with the House of Representatives to avoid any concern months before the search was executed.

Looking back at history, there were a variety of criminal cases that had a more compelling claim for the search of an office. Yet, there was sufficient restraint and judgment at the Justice Department to use the least intrusive means to secure the material. What is striking in this case is the relatively low importance of the search in the context of the investigation. There is nothing in this record to indicate a compelling reason for a Saturday night raid on a congressional office. Indeed, the government reportedly leaked the news of the raid to the media before most congressional members were informed.

Rep. Jefferson was already reportedly facing the curious appearance of $90,000 in his freezer and some rather suspicious taped conversations. This is not a criminal case with an apparent dearth of incriminating evidence. Moreover, Rep. Jefferson's attorneys have insisted that some of the material sought in his office had already been acquired by the government by other means. As a practicing criminal defense attorney, this seems to be a routine search in a criminal case. Once the money was found, the government clearly had probable cause to search Rep. Jefferson's dwellings and office. However, this was not some mob safe house.[28] It was

[28] Much has been made of the fact that the offices of lawyers and other confidential locations can be searched, including the seizure of computer hard drives. However, these locations are not the subject of Article I of the Constitution. The protection of the legislative process is expressly protected in the Speech or Debate Clause. In the same way, the fact that judicial offices have been searched is hardly determinative on this question. Lois

an office of a house of Congress. It, not Rep. Jefferson, deserved more circumspection and restraint.

IV.
MENDING THE WALL:
THE CONGRESSIONAL RESPONSE TO THIS EXECUTIVE INTRUSION

The admissibility of this material will be left to the courts, assuming that the documents are not returned and secured with proper procedures. What should be the immediate concern of this Committee is how to mend this long-recognized wall. The Framers gave this body a host of tools to protect the interests of the public and this institution. They include the power of the purse as well as specific functions such as oversight investigations. It is not enough for the Administration to order a pro hoc recognition of congressional privileges. This act should not be repeated. However, this Administration has shown that it will take more than 200 years of tradition to deter such intrusions in the future.

The most obvious response would be to pass a congressional version of the Privacy Protection Act.[29] This law protects media offices from search warrants and instead mandates the use of subpoenas in deference to the first amendment role of played by journalists in our system. The law allows for narrow exceptions but, for the most part, allows such controversies to be litigated in federal court through the subpoena process. Congress should have no less protection or opportunity to be heard before material is secured by the government.

In deference to the Executive Branch, Congress can also codify the process by which material can be secured by legislative officials and

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Romano, *Senate Leaders Profess Less Outrage on FBI Raid*, Wash. Post, May 29, 2006, at A4 (quoting Sen. Dick Durbin as observing that the office of a federal judge has been searched in the past). Unlike the Legislative Branch, neither the Judicial nor the Executive Branches were expressly given a similar privilege under Article II or III. Rather, the courts established privileges as a matter of judicial interpretation. The legislative privilege has a unique and separate history. Moreover, the focus of such analysis ignores the insular questions discussed above, including the availability of alternative avenues, the scope of the search, the manner of execution, and other issues.

[29] Pub. L. No. 96-440, 94 Stat. 1879 (1980) (codified at 42 U.S.C. 2000aa-2000aa-12 (2000)).

reviewed by such officials for transfer to investigators. By allowing legislative officials to perform such a task, the branches can reach an easy accommodation. Thus, with the enactment of a type of Privilege Protection Act, this internal process should avoid future intrusions while protecting evidence for legitimate criminal investigations.

V.
CONCLUSION

As Frost wrote in *The Mending Wall*, "something there is that doesn't love a wall." In the history of this country, all three branches have chafed at the walls that separate them from coveted powers. Yet, good fences make good neighbors. While rocks fall, the branches tend to repair them and maintain the security of their own authority by recognizing the border of their co-equal neighbor. It is precisely the type of mutual interest described by Frost:

> And on a day we meet to walk the line
> And set the wall between us once again.
> We keep the wall between us as we go.

It is time to repair the wall between the legislative and Executive Branch. Thus far, President Bush has been a rather poor neighbor in respecting the wall between legislative and executive domains. You inherited this great legislative body from generations of congressional leaders who have maintained the separation of powers. It is, therefore, your obligation to act now. This will not be easy. Administration figures and supporters have tried to use the conduct or misconduct of Rep. Jefferson to personify this debate. I encourage you not to yield to such pressure on this issue – or the other recent challenges to the separation of powers. This is the People's House, not yours and not Rep. Jefferson's. We expect you to return this institution in the same condition as you found it – as an independent and vigorous representative body. It is time to show that members remain "free, full, and unawed" in their legislative authority.[30] Anything less is a betrayal not only of yourselves but your institution.

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[30] 2 The Founders' Constitution 336 (Philip B. Kurland & Ralph Lerner eds., 1987) (Thomas Jefferson and James Madison, Protest to the Virginia House of Delegates (1797)).

Thank you again for the honor of speaking with you today and I would be happy to answer any questions that you might have.

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