Congressional Research Service

Memorandum

June 13, 2006

SUBJECT: **Legal and Constitutional Issues Raised by Executive Branch Searches of Legislative Offices**

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This memorandum is in response to requests for an analysis of the legal and constitutional issues raised by the execution of a search warrant on May 20, 2006, by the Federal Bureau of Investigation on the Rayburn House Office Building offices of Congressman William J. Jefferson. This memorandum is based entirely upon information that was available in the public domain at the time of its writing, thus any additional information that is subject to "sealed" court orders or other private non-disclosure agreements is not addressed. Moreover, because this event involved a Member of the House of Representatives, we have focused our research on the history and precedent of that chamber. While case law and other evidence may reference events in the United States Senate, the history, procedure, precedent, and rules of the Senate are not specifically addressed. Therefore, any potential impact that this analysis may have on the Senate is beyond the scope of this memorandum and would require an equally detailed inquiry into Senate history, practice, and procedure.

This memorandum first details the factual background, as publicly known at the time of this writing, and attempts to define the scope of the legal and constitutional issues that are involved. Second, the memorandum reviews the Supreme Court case law and precedent with respect to the Constitution's Speech or Debate Clause, which provides a textual privilege to Members and their staffs. Third, the memorandum outlines and discusses the history, practice, and various procedures that the House of Representatives has utilized dating back to the first official request, by subpoena, for documents and testimony in 1876. Fourth, the memorandum returns to the specifics of this incident and addresses the numerous arguments made by both the Department of Justice and Congressman Jefferson, attempting to apply the diverse strands of case law, history, and institutional precedent to the use of a search warrant on a congressional office. Finally, the memorandum focuses on the separation of powers arguments that may be available to the institution concerning its institutional privileges and prerogatives. This memorandum concludes that should a reviewing court find that the

procedures currently utilized by the House that vest the initial determination of coverage under the Speech or Debate Clause, in subpoena situations, with the House are not constitutionally impelled and, therefore, not required in the case of execution of a search warrant for documents on a congressional office, then the Congress might opt to consider a legislative solution that defines the specific procedures and methods for such searches.

Background Facts and Issue Definition

On Saturday evening, May 20, 2006, agents of the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) began the execution of a search warrant at the congressional offices in the Rayburn Building of Congressmen William J. Jefferson.[1] The search had been authorized by a warrant issued by Chief Judge Thomas Hogan of the United States District Court for the District of Columbia on May 18, 2006. The search lasted approximately 18 hours and resulted in the seizure of two boxes of paper records and the entire contents of the hard drive of the Congressman's personal computer, which was copied. The General Counsel of the House of Representatives and Congressman Jefferson's private counsel sought entry to the offices to oversee the search but were prohibited from doing so by the agents.[2]

The grounds for probable cause, a description of the records sought, and the proposed protocol for the search are contained in an 83-page affidavit accompanying the request for the warrant. The affidavit details the FBI's investigation of Representative Jefferson, which began in March of 2005, to determine whether he and other persons bribed or conspired to bribe a public official, committed or conspired to commit wire fraud, or bribed or conspired to bribe a foreign official, in violation of sections 201, 371, 343, 1346, and 1349 of Title 18, and section 78dd-1 of Title 15 United States Code. The investigation involves allegations, *inter alia*, that the Congressman used his position to promote the sale of telecommunications equipment and services by a domestic firm to several African nations in return for payment of stocks and cash and whether he planned to bribe high-ranking officials in Nigeria and to use his influence with high-ranking government officials in other African countries to obtain the necessary approval for the firm's ventures. The affidavit detailed supporting evidence obtained from cooperating witnesses, recorded conversations, and other sources.[3] Previous warrants had been issued to search the Congressman's residences in both Florida and Washington D.C., as well as his automobiles. A videotape of his receipt of $100,000 in marked bills from a cooperating witness led to the search of his D.C. residence where $90,000 of the currency was found in the freezer of his refrigerator.[4]

The portions of the affidavit detailing the grounds for probable cause to believe that evidence relating to the alleged offenses would be found at the Congressman's offices, the

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[1] Unless otherwise noted, the sources for the factual background herein related are as follows: The Affidavit in Support of Application of Search Warrant, dated May 18, 2006 (Affidavit); the Memorandum in Support of Motion for Return of Property, dated May 24, 2006 on behalf of Congressman William J. Jefferson (Jefferson Memo); and the Government's Response to Representative William Jefferson's Motion for Return of Property, dated May 30, 2006 (DOJ Response).

[2] Jefferson Memo, *supra* note 1 at 3-8; *see also* DOJ Response, *supra* note 1 at ¶ 4.

[3] *See* Affidavit, *supra* note 1 at 6-65.

[4] *See id.* at 33-34; *see also* DOJ Response, *supra* note 1 at 3-5.

particular items of evidence that were sought, and the description of the government's previous efforts to exhaust all less intrusive approaches to obtaining the relevant documents are heavily or completely redacted from the publicly available version. DOJ's response to Congressman Jefferson's motion to return the papers, however, indicates that after the seizure of the $90,000 from the Congressman's residence, subpoenas were issued to him and his chief of staff seeking certain records from the Congressman's Rayburn office that were deemed important to the investigation.[5] The Government's efforts to obtain the documents "in a timely manner" were apparently unavailing. It appears that the record of the subpoena enforcement proceedings in the District Court for the Eastern District of Virginia is sealed and, therefore, not publically available. According to the DOJ's Response, "[a]t that point, the Government decided it was entitled to move forward with the investigation."[6]

In apparent recognition of the unique and constitutionally sensitive action that the DOJ was preparing to take – it appears that no warrant to search a congressional office has ever been sought or obtained before – the supporting affidavit contained special procedures to guide and confine the search process. As explained by the DOJ in its response opposing the return of the documents:

> [T]he Government has been interested only in obtaining non-legislative act evidence of criminal activity and has committed to implementing elaborate procedures to avoid any information that could be covered by the Speech or Debate Clause (or that would be non-responsive). As a matter of comity, and out of an abundance of caution, the Government proposed, and this Court approved, special procedures designed to accommodate the privilege and other political sensitivities by ensuring that *no document* covered by the Speech or Debate Clause would come into the possession of the prosecution team.[7]

These procedures, as originally described,[8] provided that with regard to paper records in the offices, a search team of Special Agents from the FBI who have no role in the investigation (non-case agents) would examine every document in the office and determine which documents were responsive to the list of documents being sought. The non-case agents are forbidden from revealing any non-responsive or politically sensitive information they may come across during the search. Responsive documents were to be transferred to a "Filter Team" consisting of two DOJ attorneys, who are not part of the prosecution team, and a non-case FBI agent, who are to review each seized document to address its responsiveness. Those documents deemed responsive would then be reviewed by the "Filter Team" to determine if any document falls within the protection of the Speech or Debate Clause.[9] Non-privileged records, determined to fall outside of the Speech or Debate Clause protection, were to be transferred to the prosecution team, which was to provide counsel to Congressman Jefferson with copies within ten days. Papers potentially covered by the Speech or Debate

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[5] These subpoenas were properly reported to the Speaker of the House in accordance with House of Representatives Rule VIII and were thereafter published in the Congressional Record. *See Communication from the Hon. William J. Jefferson, Member of Congress*, 151 CONG. REC. H8061 (daily ed. Sept. 15, 2005); *see also Communication from the Chief of Staff for the Hon. William J. Jefferson, Member of Congress*, 151 CONG. REC. H11026 (daily ed. Nov. 18, 2005). As will be discussed *infra*, such notification normally triggers the involvement of the House General Counsel.

[6] DOJ Response, *supra* note 1 at 6.

[7] *Id.* at 14-15 (emphasis in original).

[8] *See* Affidavit, *supra* note 1 at ¶¶ 136-156.

[9] *See* discussion *infra* at 5-12.

Clause were to be catalogued in a log and the log provided to counsel for Congressman Jefferson along with copies of the papers within twenty business days. According to the warrant, the potentially privileged papers will not be supplied to the prosecution team until a court so orders.

With respect to the computer files, a special FBI forensics team would download materials from the office computers where they were to be transferred to an FBI facility where a search of the data would be conducted using court approved search terms contained in Schedule C of the affidavit. After the responsive data is retrieved it is to be turned over to the "Filter Team" for a review for responsive documents. Responsive, potentially privileged computer documents were to be logged and provided to counsel along with copies of those documents within 60 days from the start of the review. The "Filter Team" would then request the court to review the potentially privileged records.

On May 25, 2006 the President of the United States issued a Memorandum to the Attorney General and the Solicitor General of the United States, directing the Solicitor General to take sole custody of all of the materials seized from Congressman Jefferson's office and to seal and sequester them from anyone outside of the Solicitor General's office for a period of 45 days. According to the President's Memorandum, this action was intended to allow for the Attorney General and the House of Representatives "to resolve any issues relating to the materials through discussions between them in good faith and with mutual institutional respect and, if it should prove necessary after exhaustion of such discussion, through appropriate proceedings in the courts of the United States."[10] At the time of the sequestration it appears that all the paper records in the Congressman's office had been viewed by the search team, but not by the "Filter Team," while none of the computer records had been reviewed.

In response to the "concerns" raised by the Congressman and the House leadership, DOJ in its response brief announced "additional procedural accommodation[s]." The additional procedures are discussed as follows:

> Under this additional procedure, copies of all materials seized from Rep. Jefferson's office will be provided to Rep. Jefferson (and, if Rep. Jefferson chooses, he may provide copies to House Counsel). The Filter Team will prepare a log of the records they deem to be privileged. The log will identify any such records by date, recipient, sender, subject matter, and the nature of any potential privilege. The Filter Team will provide its log to Rep. Jefferson (and, if Rep. Jefferson chooses, to House Counsel) to allow him the opportunity to disagree with the Filter Team's privilege determinations. Documents that the Filter Team determines are privileged will be returned to counsel for Rep. Jefferson. *Any disputes that may arise about whether particular remaining records are privileged will then be resolved by the Court.* ***No member of the Prosecution Team will have access to any seized documents that Rep. Jefferson claims to be privileged until the Court has made a determination that the record is not privileged.*** *This accommodation obviates the concern expressed in Rep. Jefferson's brief that the Filter Team, applying the original procedures set forth in the affidavit, might make a unilateral determination that a documents was not privileged and turn it over to the Prosecution Team without affording Rep. Jefferson the opportunity to assert privilege.*[11]

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[10] DOJ Response, *supra* note 1 at 10.

[11] *Id.* at 11-12 (internal footnotes and citations omitted) (italics denote emphasis added) (bold and (continued...)

In his motion to have the seized documents returned, counsel for Congressman Jefferson argues, *inter alia*, that execution of the search warrant on the premises via a document-by-document search of every paper record in the office and the "wholesale" copying and removal of the Congressman's computer hard drive "guaranteed that the executive would be in possession of material that relates to the Member's legislative duties."[12] The motion asserted that those actions coupled with the exclusion of Rep. Jefferson's counsel and the General Counsel for the House of Representatives from even viewing the search process, impermissibly interfered with and violated the absolute privilege afforded by the Speech or Debate Clause.[13] DOJ responds that the Congressman's position "would effectively extend Speech or Debate immunity to clearly unprivileged materials by making it impossible to execute a search warrant in any place containing even one privileged document."[14] DOJ contends that a search warrant is a valid and legally appropriate investigative vehicle in these circumstances and that special search procedures approved by the court insulate the search from collateral attack.[15] The DOJ suggests that the past practice of utilizing subpoenas and allowing initial review by the House General Counsel's Office pursuant to House Rule VIII to determine whether the protection of the Clause has been simply a matter of "comity."[16]

In this memorandum we review the origins, nature, and scope of the immunity provided by the Speech or Debate Clause, as informed by the understandings of the Framers, pertinent Supreme Court and appellate court rulings, and the practice of the House and the executive branch for over 130 years. The issue in this dispute is not whether a Member violated criminal statutes or whether a warrant for the search of a Member's office is a constitutionally appropriate investigative vehicle. Rather, the primary constitutional issue raised here is whether a search of a Member's documents, in a Member's office – conducted exclusively by executive branch agents, which excludes the presence of legislative branch representation, and which has the *potential* of exposing protected legislative documents – inherently subjects the legislature to the type of executive and judicial intimidation and harassment that the Speech or Debate Clause was intended to guard against.

The Speech or Debate Clause

The Constitution provides that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place."[17] Commonly referred to as the Speech or Debate Clause, this language affords Members of Congress immunity from certain civil and criminal suits relating to their legislative acts.[18] In addition, the clause also provides

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[11] (...continued)
italics denote emphasis in original).

[12] Jefferson Memo, *supra* note 1 at 13.

[13] *Id.*

[14] DOJ Response, *supra* note 1 at 23.

[15] *Id.* at 23-24.

[16] *Id.* at 14.

[17] U.S. CONST. Art. I, § 6, cl. 1.

[18] *See e.g., United States v. Helstoski*, 442 U.S. 477 (1979) (excluding evidence of legislative action (continued...)

a testimonial privilege[19] that extends not only to oral testimony about privileged matters,[20] but also the production of privileged documents.[21]

Adopted at the Constitutional Convention without debate or opposition,[22] the historic rationale and purpose of the Speech or Debate Clause has been clearly understood to protect the "independence and integrity" of members of the legislature from "intimidation" by both the executive branch and the judiciary – that is, to help assure that the legislature would be a co-equal, independent branch of government by "prevent[ing] intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary."[23] In explaining the purposes of the Speech or Debate Clause, the Supreme Court has traced the ancestry of the Clause to the English Bill of Rights of 1689, which was "the culmination of a long struggle for parliamentary supremacy:"

> Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature.[24]

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[18] (...continued)
in a criminal prosecution of a Member of the House of Representatives); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (dismissing civil suit to enjoin a Senate Committee investigation); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (dismissing a civil conspiracy claim against members of a Senate committee); *United States v. Johnson*, 383 U.S. 169 (1966) (reversing criminal conspiracy conviction based on Speech or Debate Clause immunity).

[19] *See generally, Gravel v. United States*, 408 U.S. 606 (1972).

[20] *Id.* at 615-616; *see also Dennis v. Sparks*, 449 U.S. 24, 30 (1980) (stating "we have held that Members of Congress need not respond to questions about their legislative acts"); *Miller v. Transamerica Press, Inc.*, 709 F.2d 524, 528-29 (9th Cir. 1983) (denying a motion to compel testimony from a former congressmen).

[21] *See e.g., Maddox v. Williams*, 855 F.Supp. 406, 413 (D.D.C. 1994) (stating that "the Speech or Debate Clause stands as an insuperable obstacle to [a party's] attempt to acquire by compulsion documents or copies of documents in the possession of the Congress") *aff'd sub nom. Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995); *see also Minpeco, S.A. v. Conticommodity Services*, 844 F.2d 856, 859-61 (D.C. Cir. 1988) (applying a broad reading of the Clause to protect the "integrity of the legislative process itself"); *Hearst v. Black*, 87 F.2d 68, 71-2 (D.C. Cir. 1936) (stating that "[i]f a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded").

[22] *See Powell v. McCormack*, 395 U.S. 486, 502 (1969) (citing 5 DEBATES ON THE FEDERAL CONSTITUTION 406 (J. Elliot, ed. 1876); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 246 (M. Farrand, rev. ed. 1966)).

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

[24] *Id.* at 178 (internal citations omitted); *see also Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (stating that:

> The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could

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In addition, the Supreme Court has recognized that the clause was not intended simply "for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators."[25] The Court has also expressly noted the function of the Speech or Debate Clause as serving the interests of separation of powers: "In the American governmental structure the [C]lause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders."[26] Moreover, the Court has "without exception ... read the Speech or Debate Clause broadly to effectuate its purposes."[27]

As mentioned above, the Speech or Debate Clause provides both immunity from litigation, as well as a testimonial privilege. Based on a review of the relevant case law, it appears that the Court has never drawn a distinction between these two aspects of the privilege. Rather, according to the Court,

> [t]he question to be resolved is whether the actions of the petitioners fall within the 'sphere of legitimate legislative activity.' If they do, the petitioners 'shall not be questioned in any other Place' about those activities since the prohibitions of the Speech or Debate Clause are absolute.[28]

In fact, the Court has made clear that the Framers understood the ramifications of such an absolute privilege. Specifically, the Court has stated that at "its narrowest scope, the [Speech or Debate] Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers."[29]

The Supreme Court, however, has construed the Speech or Debate Clause in only a few cases. In the earliest decision interpreting the Clause, *Kilbourn v. Thompson*,[30] the Court was presented with an imprisonment for contempt levied by the House of Representatives against Mr. Kilbourn for perjury before a House committee.[31] In addressing charges of false imprisonment that were brought against those members of the House who voted for contempt, the Court read the language of the Speech and Debate Clause expansively, finding

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[24] (...continued)
> make only a tentative claim. ... In 1668, after a long and bitter struggle, Parliament finally laid the ghost of Charles I, who had prosecuted Sir John Elliot and others for "seditious" speeches in Parliament) (internal citations omitted).

[25] *United States v. Brewster*, 408 U.S. 501, 507 (1972); *see also Kilbourn v. Thompson*, 103 U.S. 168, 203 (1881).

[26] *Johnson*, 383 U.S. at 181.

[27] *Eastland*, 421 U.S. at 502.

[28] *Id.* at 501 (*citing Doe v. McMillan*, 412 U.S. 306, 312, 313 (1973); *Brewster*, 408 U.S. at 516; *Gravel*, 408 U.S. at 623 n. 14; *Powell v. McCormack*, 395 U.S. 486, 502, 503 (1969); *Dombrowski*, 387 U.S. at 84-85; *Johnson*, 383 U.S. at 184-85; *Barr v. Matteo*, 360 U.S. 564, 569 (1959)).

[29] *Brewster*, 408 U.S. at 516 (*citing Coffin v. Coffin*, 4 Mass. 1, 28 (1808)).

[30] 103 U.S. 168 (1881).

[31] *Id.* at 177-78.

that the Member's privilege extended "to things generally done in a session of the House by one of its Members in relation to the business before it."[32]

In *United States v. Johnson*,[33] Representative Johnson was charged with conspiracy to defraud based in part on evidence of a bribe he had received in return for giving a speech on the floor of the House of Representatives.[34] According to the Court, at trial, in support of the conspiracy to defraud count, the government extensively questioned Representative Johnson about the floor speech and his motives for its authorship and deliverance.[35] The Court held that:

> a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.[36]

In its 1972 decision in *United States v. Brewster*,[37] the Court in more detail addressed the question of what constituted a "legislative act." In *Brewster*, which involved charges of bribery against a former member of the Senate for actions taken while a member of the Senate, the Court held that the privilege afforded by the clause protects only inquiry into "legislative acts."[38] The Court reasoned that "a legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the [S]peech or [D]ebate [C]lause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts."[39] Distinguishing "legislative acts" from what the Court termed "legitimate 'errands'" such as securing government contracts or giving speeches outside the Congress, the Court determined that "[a]lthough these [errands] are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases."[40]

Gravel v. United States,[41] decided on the same day as *Brewster*, involved the issue of whether a senator's aide could be compelled to testify before a grand jury about the publication of the Pentagon Papers by a private publisher. According to the facts of the case,

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[32] *Id.* at 204

[33] 383 U.S. 169 (1966).

[34] *Id.* at 171-72.

[35] *Id.* at 173.

[36] *Id.* at 184-85. The court drew a distinction between a prosecution that raised an inquiry into legislative acts which is proscribed – and prosecution for taking a bribe – which is not. *See id.* at 186.

[37] 408 U.S. 501 (1972).

[38] *Id.* at 509.

[39] *Id.* at 512.

[40] *Id.*

[41] 408 U.S. 606 (1972)

the government sought testimony from the aide about events surrounding the senator's receipt of the papers, a subcommittee meeting chaired by the senator for the purpose of putting the papers in the public domain as part of the subcommittee's record, as well as for information regarding the arrangements with the private publisher to republish the papers.[42] The Court, in holding that the Speech or Debate Clause clearly protected events that occurred at the subcommittee meeting, explained that, in addition to actual speech or debate in either chamber, the privilege applies to those acts which 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."[43] In addition, the Court held that the Clause also prohibited questioning about "communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator."[44] The Court, however, refused to find that the discussions with the private publisher were "essential to the deliberations of the Senate" and, therefore, were not part of the legislative process protected by the scope of the Clause.[45] Finally, the Court addressed the protective order issued by the Circuit Court of Appeals that was to govern the interrogation of the aide.[46] While the Court left the ultimate drafting of the protective order to the lower courts, the opinion offered guidance and drafting suggestions clearly indicating that the Court believed it was necessary and possible to draft a judicial order that adequately protected the privileges afforded by the Clause.[47]

Six years later, in *United States v. Helstoski*,[48] the Court again had occasion to rule on the scope of the privilege afforded Members of Congress by the Speech or Debate Clause. During an investigation into allegations of corruption relating to the introduction of private bills that suspended the application of the immigration laws, former Representative Helstoski voluntary appeared before 10 grand juries and provided testimony and documents regarding his involvement in the introduction of such private bills.[49] When Congressman Helstoski was later indicted utilizing evidence of his legislative acts, he moved to quash the indictment as a violation of the Speech or Debate Clause.[50] In presenting its case before the Court, the Government asserted three arguments. First, the Government argued that the Clause only prohibited the introduction of the legislation itself and, therefore, did not prohibit the introduction of evidence relating to discussions, correspondence, and/or motivations for

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[42] *Id.* at 609-610.

[43] *Id.* at 625.

[44] *Id.* at 629.

[45] *Id.* at 625-26.

[46] *Id.* at 627-29.

[47] *Id.* at 628 (stating that "it appears to us that paragraph one of the [protective] order, alone, would afford ample protection for the privilege if it forbade questioning any witness, including [the senator's aide]").

[48] 442 U.S. 479 (1978).

[49] *Id.* at 480-483.

[50] *Id.* at 484.

introducing the bills.[51] Second, and in the alternative, the Government argued that by voluntarily providing the information to the grand jury, Representative Helstoski waived his privilege.[52] Finally, the Government asserted by enacting the statute under which Representative Helstoski was charged, which expressly authorized the indictment and trial of Members of Congress, the Congress implicitly waived the Speech or Debate privilege.[53] Relying on the Court's previous decisions in *Johnson* and *Brewster*, the Court rejected the government's arguments, holding that "past legislative acts cannot be admitted without undermining the values protected by the Clause."[54] According to the Court, "revealing information as to a legislative act ... to a jury would subject a Member to being 'questioned' in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause."[55] With respect to the arguments regarding Representative Helstoski's waiver of the Clause's protections, the Court specifically noted that "waiver can be found only after explicit and unequivocal renunciation of the protection."[56] According to the Court, even given Representative Helstoski's numerous voluntary appearances before the grand jury, no such unequivocal expression of a Speech or Debate waiver could be shown.[57] The Court, however, specifically declined to address whether an individual Member may waive the Clause's protections, thus, leaving that question open for future decisions.[58] Finally, the Court rejected the government's suggestion that Congress had effected a waiver of the privilege by the enactment of a criminal statute.[59]

Taken together, the Court's interpretations and holdings in *Johnson*, *Brewster*, *Gravel*, *Helstoski*, as well as other decisions, indicate that the Speech or Debate Clause absolutely protects a Member when speaking on the House or Senate floor,[60] introducing and voting on

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[51] *Id.* at 486-86.

[52] *Id.* at 486.

[53] *Id.* at 486-87.

[54] *Id.* at 489.

[55] *Id.* at 489-90.

[56] *Id.* at 491.

[57] *Id.* at 492 (stating that "[o]n the record before us, Helstoski's words and conduct cannot be seen as an explicit and unequivocal waiver of his immunity from prosecution for legislative acts ... the Speech or Debate Clause provides a separate, and distinct, protection which calls for at least as clear and unambiguous an expression of waiver.").

[58] *Id.* at 490-91.

[59] *Id.* at 492.

[60] *Johnson*, 383 U.S. at 184-85; *Gravel*, 408 U.S. at 616; *see also Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir 1929), *cert. denied*, 282 U.S. 874 (1930).

bills and resolutions,[61] preparing and submitting committee reports,[62] acting at committee meetings and hearings,[63] and conducting investigations and issuing subpoenas.[64] Conversely, the Clause clearly does not protect criminal conduct, such as taking a bribe, which is not a part of the legislative process.[65] Additionally, it appears that the clause provides no protection for what the Court has deemed "political" or "representational" activities such as direct communications with the public,[66] speeches outside of Congress,[67] newsletters,[68] press releases,[69] private book publishing,[70] or even the distribution of official committee reports outside the legislative sphere.[71] According to the Court, these types of activities are not

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[61] *Powell v. McCormack*, 395 U.S. 486, 505 (1969) (stating that "[t]he purpose of the protection afforded legislators is ... to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions); *Kilbourn*, 103 U.S. at 204 (stating that "[t]he reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, ... and to the act of voting, ... "); *see also Fletcher v. Peck* 10 U.S. (6 Cranch) 87, 130 (1810) (declining to examine the motives of state legislators who were allegedly bribed for their votes).

[62] *Doe v. McMillan*, 412 U.S. 306 (1973); *Kilbourn*, 103 U.S. at 204.

[63] *See id.*; *see also Gravel*, 408 U.S. 628-29. In addition, some lower federal courts have also held that the Clause bars the use of evidence of a Member's committee membership. *Compare United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1991), *rehearing denied*, 980 F.2d 1449 (11th Cir. 1992) *with United States v. McDade*, 28 F.3d 283 (3d Cir. 1994), *cert. denied*, 514 U.S. 1003 (1995).

[64] *See Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *see also Tenney v. Brandhove*, 341 U.S. 367 (1951) (refusing to examine motives of state legislator in summoning witness to hearing).

[65] *See Brewster*, 408 U.S. at 526; *see also United States v. Helstoski*, 442 U.S. 477, 489 (1979) (holding that evidence can be introduced regarding corrupt agreements on the basis that "promises by a Member to perform an act in the future are not legislative acts"); *but see Doe v. McMillan*, 412 U.S. 306, 312-13 (1973) (stating that "Congressmen and their aides are immune from liability for their actions within the 'legislative sphere' even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes.").

[66] *See Brewster*, 408 U.S. at 512 (stating that "[a]lthough these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.").

[67] *Id.*

[68] *Id.*

[69] *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

[70] *Gravel*, 408 U.S. at 625.

[71] *Doe v. McMillan*, 412 U.S. 306 (1973). In *Doe*, the Court held that the actions of the Members, their staffs and a consultant in preparing a committee report were protected. On remand, the district court granted them immunity on the basis that there had been quite limited public distribution of the report. *See Doe v. McMillan*, 374 F. Supp. 1313 (D.D.C. 1974). The D.C. Circuit subsequently upheld the claim of immunity as to the Public Printer and Superintendent of Documents. *See Doe v. McMillan*, 566 F.2d 713 (D.C.Cir. 1977), *cert. denied*, 435 U.S. 969 (1978). The D.C. Circuit, however, expressly reserved the question of the availability of immunity "in a case where distribution was more extensive, was specially promoted, was made in response to specific requests rather than standing orders, or continued for a period after notice of objections was received." *Id.*

(continued...)

covered because they are not "an integral part of the deliberative and communicative processes" by which Members participate in legislative activities.[72] Finally, it appears that the Clause protects certain contacts by Members with the executive branch, such as investigations and hearings related to legislative oversight of the executive, but others, like assisting constituents in "securing government contracts" and making "appointments with government agencies" are not protected.[73] The Clause's application to other types of contact by Members with the executive, especially informal communications from Members to officials of the executive branch, even if arguably in the course of the oversight process, remains uncertain.[74]

There also remains an open question as to whether the Speech or Debate Clause immunizes a Member for actions related to office personnel. Decisions of the D.C. Circuit have held that the Clause immunizes Members for personnel actions regarding at least some congressional employees.[75] The subsequent ruling of the Supreme Court in *Forrester v. White*,[76] however, involving judicial immunity for personnel actions, raises doubts as to whether the Court would find Speech or Debate Clause immunity applicable to employment actions. In *Forrester*, the Court held that a state court judge did not have judicial immunity for firing a probation officer, and advocated a "functional" approach to the immunity issue, evaluating the effect of possible liability on the performance of a particular function. In addition, in 1995, with little debate focused on the immunity issue, the House and Senate passed the Congressional Accountability Act,[77] which provides for judicial review under various statutes of congressional personnel actions. Section 413 of the Act, however, declares that the authorization to bring judicial proceedings under various provisions of the law does not constitute a waiver of the Speech or Debate privilege of any Member. There are currently cases pending on this issue before both the D.C. Circuit Court of Appeals and the District Court for the District of Colorado.[78]

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[71] (...continued)
at 718.

[72] *Gravel*, 408 U.S. at 625.

[73] *United States v. McDade*, 28 F.3d 283, 299-300 (3d Cir. 1994) (*citing Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504-06 (1975)), *cert. denied*, 514 U.S. 1003 (1995); *see also Brewster*, 408 U.S. at 512.

[74] *McDade*, 28 F.3d at 300.

[75] *See, e.g., Browning v. Clerk*, 789 F.2d 923, 929 (D.C. Cir.1986), *cert. denied*, 479 U.S. 996 (1986) (holding that personnel actions protected by the clause if the "employee's duties were directly related to the due functioning of the legislative process").

[76] 484 U.S. 219 (1988).

[77] Congressional Accountability Act, Pub. L. No. 104-1, 109 Stat. 3 (1995).

[78] *Bastien v. Office of Senator Ben Nighthorse Campbell*, 209 F.Supp.2d 1095 (D.Colo. 2002) (holding that Speech or Debate immunity did apply to employment actions), *rev'd*, *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004); *see also Fields v. Office of Representative Eddie Bernice Johnson*, No. 04-5315 (D.C. Cir. 2004).

History of the House of Representative's Responses to Executive Investigations and Demands for Evidence in the Possession of the Legislature

A reviewing court examining whether a search of all documents in a Member's office solely by executive branch agents, constitutes the type of intrusion and intimidation by the executive and judiciary intended to be prevented by the Speech or Debate Clause, will not be making its judgments in isolation. In addition to the Speech or Debate Clause case law just reviewed, a reviewing court might find it useful to consider previous actions that the House of Representatives has taken, pursuant to its authority under Article 1, section 5, clause 2,[79] since the first subpoena for congressional records was issued in 1876. These actions have evolved from a flat requirement that any response to a subpoena for documents or testimony be approved by passage of a House resolution, to the current system of notice to the Speaker and review by the House General Counsel. At the heart of this process has been the understanding, acquiesced in by the executive, that the initial determination of Speech or Debate privilege is to be made by the institution itself, subject to court review. Moreover, a court may also be informed by the Supreme Court's emergent separation of powers jurisprudence, which may shed light on whether the Clause is a "structural" safeguard that protects against even potential intrusions into the doctrine's fundamental purposes. While the House itself cannot expand the constitutional scope of the protection of the Clause by internal rules, the *procedures* adopted to deal with subpoenas may be judged to be a constitutionally appropriate alternative to the executive's utilization of a search warrant that precluded the House's ability to conduct a protective review and make privilege determinations.

For 130 years, since the first service of a subpoena for documents by the executive branch on a House committee,[80] the House of Representatives has consistently and unequivocally resisted direct and unilateral transgressions on the perceived privileges and prerogatives of the Congress under the Speech or Debate Clause. Utilizing its constitutional authority to establish rules for the conduct of its business, until 1980 such subpoenas for documents (or testimony) could be complied with only with permission of the House by passage of a resolution to that effect.[81] In the last three decades, however, as challenges by the executive to the autonomy of the legislature have increased – demonstrated by the increased instances of issuance of compulsory process, the increased executive unwillingness to defend the constitutionality of congressional enactments and certain privileges and prerogatives of the legislature in litigation under its control, and the increased resistance to the investigative demands of congressional committees on executive entities and officials – the House has adapted its rules to respond to these executive actions by establishing the Office of House General Counsel and by vesting determinations of compliance or responsive litigation in the House leadership.

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[79] U.S. CONST. Art. 1, § 5, cl. 2 (stating that "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member").

[80] *See infra* notes 84-88 and accompanying text.

[81] *See supra* note 79.

Specifically with respect to responding to subpoenas, whether for documents,[82] testimony[83] or both, the House of Representatives has a history of precedent that dates back to 1876. In March of that year, Members of the House committee that had recommended the impeachment of Secretary of War William Belknap, informed the House that a subpoena had been issued ordering the committee to produce papers relating to the Secretary's alleged acceptance of bribes.[84] At the same time, the committee also informed the House that it had complied with the subpoena as ordered.[85] The committee's compliance appears to have spurred a lengthy debate over the privileges of Members of the House.[86] Members who were opposed to compliance argued that had this been the British House of Commons, they would undoubtedly have been punished for breach of privilege for complying without permission of their House.[87] Accordingly, the House adopted the following resolution:

> Whereas the mandate of said Court is in breach of the privilege of this House: Resolved, That the said committee and members thereof are hereby directed to disregard said mandate until the further order of this House.[88]

Three years later in 1879, the Adjutant-General of the Army attempted to serve a subpoena on a file clerk of the House, requesting that the clerk not only appear to testify, but also that the clerk produce a manuscript of specific testimony that had been given before the Military Affairs Committee in 1872.[89] This subpoena was referred to the Committee on the Judiciary, which concluded that "the file clerk could not be compelled by a *subpoena duces tecum* to remove any paper or document whatever from the files of the House."[90] The report also provides some insight as to how the House of Representatives viewed its own prerogatives, stating that "[the documents] belong to the House, and are under its absolute and unqualified control. It can at any time take them from the custody of the Clerk, refuse to allow them to be inspected by anyone, order them to be destroyed, or dismiss the Clerk for permitting any of them to be removed from the files without its expressed consent."[91] Moreover, the Committee, drawing parallels to claims of executive privilege, asserted that the House of Representatives "having the exclusive custody and control of its own archives, should judge for itself whether the production or inspection of these papers would be injurious to the public interests or not, and refuse to permit such production or inspection

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[82] Subpoenas for the production of documents are commonly referred to as *subpoenas duces tecum*

[83] Subpoenas for testimony are commonly referred to as *subpoenas ad testificatum.*

[84] 3 A. Hinds, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, § 2661 (1907) (the subpoena stated that the Members were instructed to bring "all papers, documents, records, checks, and contracts in your possession, or in possession of the committee of the House of Representatives on Expenditures in the War Department in relation to the charge against said defendant of accepting a bribe or bribes while Secretary of War of the United States, and to attend the said court immediately to testify on behalf of the United States ... .") [hereinafter Hinds].

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at § 2663.

[90] *Id.*

[91] *Id.* (*citing* H.R. REP. NO. 1, 46th Cong. 1st Sess. (1879)).

accordingly as its own judgment might dictate."[92] As a result of the committee's findings, the House adopted a resolution on April 22, 1879, which prohibited its officers or employees from making any document public without first obtaining the consent of the House.[93]

In 1886, the House adopted a resolution that according to several accounts became the paradigm for more contemporary responses to subpoenas for congressional papers.[94] The Resolution states in full that:

> 1. *Resolved*, That by the privilege of this House no evidence of a documentary character under the control and in possession of the House of Representatives can by the mandate or process of the ordinary courts of justice be taken from such control or possession but by its permission.
> 2. That when it appears by the order of a court or of the judge thereof, or any legal officer charged with the administration of the orders of such court or judge, that documentary evidence in the possession and under the control of the House is needful for use in any court of justice or before any judge or such legal officer for the promotion of justice, this House will take such orders thereon as will promote the ends of justice consistently with the privileges and rights of this House.
> 3. That Hon. John B. Clark, Clerk of the House, be authorized to appear at the place and before the officer named in the subpoena duces tecum before mentioned, but shall not take with him the book named therein nor any document or paper on file in his office or under his control or in his possession as Clerk of the House.
> 4. That the said court, through any of its officers or agents, have full permission to attend with all witnesses and proper parties to the proceeding, and then always at any place under the orders and control of this House, and take copies of any documents or papers in possession or control of said Clerk, and any evidence or witnesses in respect thereto which the court or other proper officer thereof shall desire, so as, however, the possession of said documents and papers by the said Clerk shall not be disturbed, or the same shall not be removed from their place of file or custody under said Clerk.[95]

In the resolution's first paragraph, and consistent with the precedents before it, the House appeared to be asserting the power to decide for itself whether and when to comply with subpoenas for its papers. According to at least one scholar, when read and considered in its entirety, however, the resolution appears limited to "the preservation and protection of [Congress's] original papers."[96]

Based upon these early precedents, it appears reasonable to assert that the House, clearly protective of its Constitutional prerogatives and privileges, had established a procedure under its constitutional authority to establish rules for the conduct of its business,[97] by which a subpoena for either documents or testimony could be complied with only upon passage of

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[92] *Id.*

[93] *Id.* (*citing* 9 CONG. REC. 680 (1879)).

[94] *See* David Kaye, *Congressional Papers and Judicial Subpoenas*, 23 U.C.L.A. L. REV. 57, 63 (1975) [hereinafter Kaye]; *see also* H.R. REP. NO. 96-1116, 96th Cong., 2d Sess. at 3 (1980).

[95] 17 CONG. REC. 1295 (1886).

[96] *See* Kaye, *supra* note 94 at 64.

[97] U.S. CONST. Art. 1, § 5, cl. 2 (stating that "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member").

a resolution of the House granting permission for such compliance. The only discernable standard that guided the House's decisions appears to have been the language "as will promote the ends of justice consistently with the privileges and rights of this House." While the previous examples would seem to indicate that the House was loathe to permit disclosure, there are several notable examples where properly subpoenaed information was supplied upon the passage of a resolution.

An early example of compliance occurred in 1921 with respect to a civil action involving former Congressman Cordell Hull.[98] Both parties to the dispute sought papers and testimony relating to executive sessions of the Committee on Ways and Means.[99] In response to the subpoena, the House adopted a resolution that granted certain employees permission to testify and supply certified copies of the documents.[100] The resolution, however, specifically forbade both the Clerk of the House and the Clerk of the Committee on Ways and Means from taking "any book, document, or paper on file in his office or under his control or in his possession ... ."[101] A similar result was reached in 1927, with the House adopting a resolution permitting certified copies of documents to be produced, but prohibiting the disclosure of any original material.[102] In addition, in 1968 the House adopted a resolution releasing documents related to a grand jury investigation into the activities of former Congressman Adam Clayton Powell.[103] Even in cases involving disclosure, however, the House appears to have been protective of its ultimate authority over the documents, asserting that "said papers shall remain the property of the House of Representatives and shall be returned to the Chief Clerk, Committee on House Administration of the House of Representatives immediately upon the conclusion of the deliberations of the said grand jury."[104]

This case-by-case approach appears to have remained in place until the 95th Congress in 1977, when the House adopted House Resolution 10, which provided a more general authority for the House to respond to *subpoenas duces tecum* properly served without having to adopt separate resolutions.[105] Unlike previous resolutions, House Resolution 10 appears to have adopted a "materiality and relevancy" standard that required a court finding of materiality and relevancy before documents may be provided in compliance with the subpoena.[106] House Resolution 10 clearly exempted minutes and transcripts of executive

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[98] 6 C. Cannon, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, § 824 (1936) [hereinafter Cannon].

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *See id.* at § 587.

[103] *See* H.R. Res. 1022, 90th Cong., 2d Sess. (1968); *see also* H.R. Res. 1023, 90th Cong., 2d Sess. (1968).

[104] *Id.*

[105] *See* 121 CONG. REC. 73 (1977).

[106] *Id.* (stating that "after the Speaker has been notified by the Member, officer, or employee that a proper court has determined upon the materiality and relevancy of specific papers of documents called for in the subpoena or other order, that said court, through any of its officers or agents shall have full permission to attend with all proper parties to the proceedings before said court and at a

(continued...)

sessions as well as the testimony of any witnesses thereto.[107] In addition, House Resolution 10 prohibited the removal of original documents.[108] Finally, House Resolution 10 reserved the privilege of the House to revoke or modify any authority granted based on the facts of specific instances.

House Resolution 10 appears to have been the precursor to what would eventually become Rule L of the House Rules, which is now currently Rule VIII of the House Rules.[109] In 1980, the House adopted a resolution instructing the Committee on Rules to inquire into the circumstances surrounding a *subpoena duces tecum* that was issued to the Clerk of the House of Representatives. The Committee on Rules, after hearings and the creation of an ad hoc task force, recommended that the House adopt House Resolution 722, which made revisions to the procedures contained in House Resolution 10. According to the legislative history that accompanied House Resolution 722,[110] it appears that the resolution is structured around two distinct and constitutionally based principles.[111] First, the resolution makes clear that compliance with properly issued subpoenas should be the ultimate goal.[112] This principle recognizes that while the Speech or Debate Clause provides absolute protection where applicable, it does not immunize Members or their staffs from all inquiries or allegations. Second, and arguably most important, the resolution, consistent with the precedent, prerogatives, and privileges of the House, makes clear that it is the institution of the House of Representatives, through the Speaker of the House, that it is to remain in control of all determinations with respect to the application of the privilege and the protections that it affords.[113]

To accomplish these goals, House Resolution 722 established the process by which the House, consistent with its constitutional prerogatives and privileges, addresses subpoenas or other orders, whether by courts, the executive branch, including administrative agencies, independent regulatory agencies, private parties, or other non-legislative entities. According

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[106] (...continued)
place under the orders and control of the House of Representatives and take copies of the said documents or papers ... .").

[107] *Id.* (stating that "under no circumstances shall any minutes or transcripts of executive sessions, or any evidence of witnesses in respect thereto be disclosed or copied, ...").

[108] *Id.* (providing that "nor shall the possession of said documents and papers by any Member, officer, or employee of the House be disturbed or removed from their place of file or custody under said Member, officer, or employee; ...").

[109] This resolution was initially added to the House Rules as Rule L by the 97th Congress. *See* H.R. RES. 5, 97th Cong. (1981). The 106th Congress re-codified the rules and this provision became House Rule VIII, which is where it remains today as amended. *See* H.R. RES. 5, 106th Cong. (1999).

[110] The legislative history of House Resolution 722 consists of a committee report by the Committee on Rules, H.R. REP. NO. 96-1116, 96th Cong., 2d Sess. (1980), as well as an extensive floor debate 126 CONG. REC. 25787-790 (1980).

[111] H.R. REP. NO. 96-1116, 96th Cong., 2d Sess. (1980).

[112] *Id.* at 3 (stating that "the House shall comply, consistently with the privileges and rights of the House, unless the House adopts a resolution to the contrary").

[113] *Id.* at 8 (stating that "House Resolution 722 enables the House to exercise its prerogative of determining whether papers should be released pursuant to the doctrine of privilege of the House by requiring that the Speaker and the House be notified when a subpoena is received...").

to the resolution, when a subpoena (either for documents or testimony) is properly served on a Member, officer, or employee of the House, said person "shall promptly notify the Speaker of its receipt in writing" and the Speaker shall lay the notification before the House.[114] After notification to the entire House, the resolution provides that:

> the Member, officer, or employee of the House shall determine whether the issuance of the subpoena or other judicial order is a proper exercise of the court's jurisdiction, is material and relevant, and is consistent with the privileges and rights of the House. The Member, officer, or employee shall notify the Speaker before seeking judicial determination of these matters.[115]

According to the Committee on Rules "[t]he resolution does not mandate a court determination of these matters." Rather, the committee "intended that the Member, officer, or employee may seek the advice of counsel within the House and/or outside of Congress in determining whether the subpoena raises substantive or procedural questions."[116] Even upon a determination by a court, the resolution requires the Speaker of the House to be notified in writing and the notification laid before the House. This second notification arguably provides the institution the opportunity to adopt a resolution prohibiting the release of the documents or testimony to be taken.[117] The language used by the committee and the procedure established by the resolution make the House's position clear, although certain disputes with respect to subpoenas may be handled by the judiciary, the ultimate compliance determination remains with the institution of the House consistent with its constitutional privilege.

House Resolution 722 and its current iteration, House Rule VIII,[118] appears to represent a much more liberal disclosure and compliance mechanism than the previous case-by-case approach appeared to have permitted. By requiring written notice to the Speaker and subsequent notification to the House, the institution has delegated much of the decision-making with respect to subpoenas to the House General Counsel's office in conjunction with the Speaker as well as any privately hired lawyers that might be involved. This delegation, however, should not be mistaken for a waiver or diminishment of the House's position that it must be the ultimate arbiter of the privilege. In fact, during the floor debate on House Resolution 722, the House specifically rejected an amendment that would have returned to the days of the case-by-case, subpoena-by-subpoena determination as to whether the House would comply.[119] From the rejection of such an amendment, it appears that the House was of the opinion, and continues to believe, that the requirement that the Speaker be notified, combined with the intent that the subpoenaed party work with the Counsel's office are adequate to effectuate the dual purposes of the resolution. These procedures are intended to ensure that compliance with properly filed subpoenas is afforded, but not to waive, impede, limit, or in any way prevent the institution from asserting its position and protecting its interest with respect to intrusions by the other branches of government. Whether the

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[114] *Id.* at 13.

[115] *Id.*

[116] *Id.* at 8.

[117] *Id.* at 9.

[118] *See supra* note 109.

[119] 126 CONG. REC. 25789-790 (1980) (recorded vote on an amendment offered by Rep. Bauman, which failed 55-353).

institution asserts its interests through *amici curiae* filings in the courts, or by adopting a resolution prohibiting compliance, under Rule VIII, the House maintains that it, and not the courts or the executive branch, remain the initial protector of the privilege.

Since the adoption of House Resolution 722 and its subsequent inclusion into the Rules of the House, there have been numerous examples of investigations and prosecutions that successfully have utilized these procedures. For example, Representatives Swindell,[120] McDade[121] and Rostenkowski,[122] were all indicted and tried in criminal court using material obtained from their congressional offices via the subpoena procedures first adopted by House Resolution 722.[123] It is also worth noting that the Department of Justice appears to have recognized the validity and propriety of the subpoena process as well. Specifically, in the U.S. Attorney's Manual, Criminal Resource Manual it states that:

> both the House and the Senate consider that the Speech [or] 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. [124]

While it is true that this language does not in any way preclude or discourage the use of alternative means for obtaining materials from Members of Congress, the inclusion of such language in a document that advises U.S. Attorneys how to proceed is arguably an indication of not only an recognition of the privileges and prerogatives asserted by the Congress, but also a tacit acceptance of the rules and procedures established by the House and Senate to effectuate the disclosure of non-protected material in a manner consistent with the protections of the privilege.

A proper appreciation of the constitutional ramifications of the House's 1980 decision to vest in the House leadership, through House Resolution 722, the determination whether or not to comply with executive subpoena demands for documents and testimony requires an understanding of the historical context within which this decision was made. It is perhaps not widely known today that for many years prior to 1980 Congress relied primarily on the

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

[121] *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994).

[122] *United States v. Rostenkowski*, 59 F.3d 1219 (D.C. Cir. 1995).

[123] *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution*: Hearing Before the House Comm. on the Judiciary, 109th Cong., 2d Sess. (May 30, 2006) (Written Testimony of Prof. Charles Tiefer, at 4), *available at*, http://judiciary.house.gov/media/pdfs/tiefer053006.pdf.

[124] *See* United States Department of Justice, United States Attorney's Manual, Criminal Resource Manual § 2046, *available at*, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02046.htm (emphasis added).

Department of Justice for its representation in litigation arising out of the exercise of its constitutional powers.[125]

In 1818, when Congress found itself in need of legal representation to enforce a congressional contempt order, the House authorized the Speaker to hire private counsel to defend the actions of the Sergeant at Arms. The Speaker hired the Attorney General who took the case (and prevailed) as a private citizen for the fee of $500.[126] Since that time, the Attorney General, and after the creation of the Department of Justice in 1870, the Department itself, has represented congressional interests in various litigation. Legislation passed in 1875 required the Department of Justice to "defend an 'office' of either House of Congress for acts performed in the 'discharge of his official duty.'"[127] The legislation was in response to a suit against Speaker James Blaine for having enforced an order of the House.[128] It was also the case, developed by tradition rather than statutory authorization, that individual Members and committees of Congress were represented by the Department when such representation was requested. There were some instances when the Department, perceiving a conflict of interest, refused to defend the constitutionality of a congressional enactment which required Congress to provide its own counsel.[129]

In the late 1960's the legal environment involving Congress and the Executive began to change dramatically, becoming increasingly more confrontational. Litigation directly and indirectly involving constitutional prerogatives increased exponentially, particularly with the unfolding of the Watergate scandal and the conduct of investigations by the Senate Watergate Committee and the Office of the Special Prosecutor. A Senate Committee estimated that between 1970 and 1977 Congress became involved in over 200 legal proceedings, many eventually requiring defense of the institution's constitutional powers. During that period the Justice Department defended Members, offices, and committees of Congress in at least 70 cases; and 60 additional legal matters arose in which the Senate Watergate Committee

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[125] The history of the evolution from Congress's principal reliance on the Justice Department and private counsel for representation of institutional and Member interests raised in judicial and administrative proceedings to virtually exclusive reliance on the Offices of the House General Counsel and Senate Legal Counsel may be found in the Senate's Report on the Public Officials Integrity Act of 1977. *See generally*, S. Rep. No. 95-170 95th Cong. 1st Sess., 8-21 (1977) [hereinafter Senate Report]; *see also* Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing In Court The Institutional Client*, 61 LAW & CONTEMP. PROB. 47 (1988) [hereinafter Tiefer]; Rebecca M. Solokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 CONG. & THE PRESIDENCY 131 (1993) [hereinafter Solokar]; Eva R. Rubin, *Congress v. the President: Congressional Legal Offices, the Defense of the Constitutionality of Statute and the Separation of Powers*, (paper prepared for delivery at the Southwestern Social Science Association Meeting, Dallas, TX, March 18-21, 1989) (copies on file with CRS); Congressional Oversight Manual, CRS Report RL30240, Oct. 21, 2004 at 121-26.

[126] *See Anderson v. Dunn*, 19 U.S. 204 (1821); *see also* Senate Report, *supra* note 125 at 9; Solokar, *supra* note 125 at 134.

[127] 2 U.S.C. § 118 (2000).

[128] *See* Senate Report, *supra* note 125 at 9.

[129] *See Myers v. United States*, 272 U.S. 52 (1926); *see also United States v. Smith*, 286 U.S. 6 (1932); *United States v. Lovett*, 328 U.S. 303 (1946); *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963); Solokar, *supra* note 125 at 134.

became involved.[130] It became clear that the Department of Justice's representation of congressional interests, and even representation by private counsel, was increasingly problematic and contrary to effectively advocating the Congress's institutional interests.

About this same time, the Department of Justice made it clear that in cases where the substantive position of the Congress would, in the Department's view, result in an infringement of presidential powers, or that a congressional action, in its view, was clearly unsupportable constitutionally, it could not, and would not, defend it. Often the Department's determinations of such "conflicts of interest" did not occur until well after it had entered an appearance and had taken control of the litigation. This occurred in the midst of litigation involving three important separation of powers cases, including two involving the Speech or Debate Clause.[131] Prior to those incidents, the Department in three Speech or Debate Clause cases before the Supreme Court – *United States v. Johnson* in 1966, *Gravel v. United States* in 1972, and *United States v. Brewster*, also in 1972 – argued strenuously for a limitation on the scope of the immunity. In each case, the Congress had a muted voice before the Court. In *Johnson*, the Congress had its voice heard through an *amicus curiae* brief submitted by attorneys hired by Congress specifically for the case, but the institution had to rely on the oral arguments of the Department of Justice. In *Gravel*, Senators Sam Ervin, Jr. and William Saxbe presented a brief and argued as *amicus* on behalf of the Senate. In *Brewster*, Congress did not employ private counsel and relied on the arguments presented by the Justice Department, with the result reflected in what it viewed as a constitutionally unsatisfactory Court opinion.[132]

The dissatisfaction with the traditional modes of constitutional representation, which were recognized in the late 1960's, when calls for the creation of an independent office of congressional counsel began, took on a sense of urgency after Watergate. While Watergate-related reforms were being debated in the Senate, Speaker of the House Thomas P. "Tip" O'Neil selected a new House Counsel in 1977, Stanley Brand, and gave him a mandate to provide aggressive constitutional representation and the authority to accomplish this task.[133] The new Speaker presided over the adoption of new House rules requiring Members who were served with legal process to notify the Speaker and directed Mr. Brand to review all subpoenas issued by committees to the executive and private parties.[134] The Counsel's Office also began to represent the House more actively in litigation, with Mr. Brand appearing personally in cases that formerly would have been contracted out while also getting involved in cases that in the past the House would likely have stayed away from entirely.[135]

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[130] *See* Senate Report, *supra* note 125 at 9-10.

[131] *See* Senate Report, *supra* note 125 at 12-13 (discussing *Doe v. McMillen*, 412 U.S. 306 (1973); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); and *Buckley v. Valeo*, 424 U.S. 1 (1976)).

[132] *See* Solokar, *supra* note 125 at 137.

[133] *See id.*

[134] *See supra* notes 110-119.

[135] *See* David Lauter, *As Chief Lawyer for the House, Stanley Brand is Making His Mark*, Nat'l Law Journal, May 15, 1983 at 1.

Throughout this early period the House Counsel's Office legal status before the courts was uncertain, largely because the office had no official authorization either in law or rule to appear before a court. The breakthrough event for the office occurred in March of 1979 when Mr. Brand presented an *amicus curiae* brief on behalf of Speaker O'Neil and was allowed to argue on behalf of the House's institutional interests in *United States v. Helstoski*. The Justice Department had strongly opposed the House's petition for amicus status and oral argument time. It was a turning point for both the Counsel's Office and the House, because it was the first Speech or Debate case in which the House represented itself, and it resulted in a favorable ruling for the institution's interests.[136]

On October 26, 1978, the Ethics in Government Act was enacted into law and provided for the establishment of an Office of Senate Legal Counsel.[137] The House was reluctant to be a part of what was originally proposed to be a joint congressional counsel's office. One commentator has suggested that the House's reluctance was not out of any fear of domination by the Senate, but out of an understanding of the markedly different "cultures," which required separate offices to accommodate the often divergent institutional viewpoints:

> My sixteen-year service in the two offices and my countless discussions with other counsel in both offices have led me to develop only a theory, not a confident understanding, of the difference. I think of it in terms of a difference between the cultures of the two chambers. The House culture defers less to prosecutors, seeing their power frequently and potently employed, knowing there is no necessary correlation between the House's own internal judgments upon members and the diverse calculations of the ninety-plus politically appointed U.S. Attorneys around the country, and hence sometimes distrusting prosecutors' motivations and judgments. Therefore, the House culture has approved, at least at times, General Counsels who scrap with prosecutors on members' behalf. Senators have a reduced sense of vulnerability to, and distrust of, prosecutors. Hence, the Senate culture approves a Senate Legal Counsel who remains aloof from the controversies surrounding the occasional prosecutorial activity. Both cultures, on the other hand, are equally sensitized to, and fed up with, the massive current tides of civil litigation and discovery, and so both cultures expect, and receive, counsel offices that aggressively respond to civil suits and subpoenas.[138]

In sum, the House's action in 1980 clearly reflects the chamber's unequivocal assertion of its autonomy and independence with respect to perceived executive intrusions on its constitutional prerogatives. The events that precipitated the creation of the Office of House General Counsel and its role in monitoring subpoena demands by the executive may be seen as inextricably intertwined with the defense of the House's constitutional privileges.

Legal and Constitutional Issues Specific to the Search of Congressman Jefferson's Office

It is in light of the institution's historical precedent and practice as well as Supreme Court case law that we now turn to the specifics of the search of Congressman Jefferson's congressional office. At the outset it is imperative to define precisely where and under what

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[136] *See supra* notes 47-57 and accompanying text.

[137] Ethics in Government Act, Pub. L. No. 95-521 § 701, 92 Stat. 1875 (1978) (*codified* at 2 U.S.C. § 288-288n (2000)).

[138] *See* Tiefer, *supra* note 125 at 60-61.

circumstances the legal and constitutional issues arise and where they do not. To start, there appears to be no legal support for an argument that the FBI's seeking, obtaining, and executing a search warrant on Congressman Jefferson's office was a violation of any principle of law, constitutional or otherwise. As discussed above, Members of Congress under the Clause are not immune from all criminal prosecution, nor from the criminal investigative process.[139] Although we have been unable to locate any case law directly on point, there appears to be nothing inherently sacrosanct about the "space" of a congressional office that makes such office inviolable to any outside, law-enforcement personnel.[140] Therefore, there does not appear to be an inherent "jurisdictional" issue, nor is there necessarily a "separation of powers" violation for any and every executive law enforcement action involving or relating to the official workspace of a Member of Congress, such that a congressional office could *never* be subject to a properly defined search warrant based upon sufficient "probable cause."[141]

That said, however, the legal and constitutional objections appear to arise as a result of the failure in the search warrant to follow certain procedures promulgated by the House to protect the constitutionally afforded privileges of the House of Representatives under the Speech or Debate Clause. While the principal purpose of the Clause is not to protect or shield individual Members of Congress from prosecution for their "personal or private benefit ..., but to protect the integrity of the legislative process by insuring the independence of individual legislators,"[142] there nevertheless appears to be a legitimate argument with respect to the process and procedures employed during the search and seizure in the Member's office. It could be argued that the use of a search warrant to enter into a congressional office and seize not only specified paper record items directly relevant to a criminal investigation, but also the contents of the entire "hard drive" of a computer of a Member of Congress — which will undoubtedly contain numerous items, entries, and images which are an "integral part of the deliberative and communicative processes by which

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[139] Unlike members of many European parliaments, Members of Congress do not have a *general* immunity from all legal processes or criminal prosecutions during their tenure. In *Gravel*, the Supreme Court stated specifically that: "[the clause] does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true. While the Speech or Debate Clause recognized speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts." *Gravel v. United States*, 408 U.S. 606, 626-27 (1972). The constitutional bar to the "Arrest" of Members during their attendance of, or "going to and returning from" a session of Congress for other than a felony or "Breach of the Peace" (Article I, Section 6, cl. 1), is a substantially "obsolete" provision which applies only to arrests in civil suits, common in the 18th century, but does not apply to criminal arrests. *See Williamson v. United States,* 207 U.S. 425, 446 (1908); *see also Long v. Ansell*, 293 U.S. 76 (1934); *Gravel*, 408 U.S. at 614; Lewis Deschler, 3 DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, Ch. 12, § 3.1 (1977).

[140] It may be noted that law enforcement personnel from the District of Columbia police force may make arrests on the Capitol Grounds, but may enter into congressional buildings to make arrests or to serve warrants only "with the consent or upon the request of the Capitol Police Board." 40 U.S.C. § 212a.

[141] U.S. CONST. Amend IV (prohibiting "unreasonable" searches and seizures and providing that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[142] *United States v. Brewster*, 408 U.S. 501, 507 (1972).

Members participate in committee and House proceedings"[143] — could be sufficiently intimidating to legislative office holders as to implicate the precise reasons for the protections afforded by the Speech or Debate Clause.

Initially, it appears that a potential Speech or Debate argument exists because, although material falling within the protective framework of the Speech or Debate Clause could *eventually* be ruled inadmissable in a court proceeding or any other legal proceeding (outside of the institutions of the House or Senate themselves) based on the Speech or Debate privilege, the act of such a wide-ranging examination of materials pursuant to a search warrant — most likely materials specifically and clearly covered by the privilege — is arguably in itself an action that raises concerns of intimidation and diminution of the independence and autonomy of the legislative branch and its integral legislative functions at which the Speech or Debate Clause is directed. That is, it could be argued that the search itself in allowing the seizure of the contents of the entire "hard drive" of a Member's computer and the indiscriminate perusal by executive branch officials of every paper document in a congressional office outside the presence of any congressional representative, is not sufficiently protective of the autonomy and independence of the legislative branch, its Members and processes, that the Clause sought to protect.

Moreover, as explained in relevant court documents, the FBI itself and its own agents will be responsible for "sifting" through all the electronic and paper material seized in the Member's office, so that the FBI, and not a court (nor officials of the legislative branch), will make the initial determinations not only of what material is "responsive" to the warrant, but also which material might be "privileged" under the Speech or Debate Clause. Therefore, it also could be argued that the independence and autonomy of the legislative branch under this process are left initially to the legal and constitutional interpretations of the agents of the FBI. As a former Deputy Attorney General in the Reagan Administration recently testified:

> Search warrants for documentary evidence in legislative offices are irreconcilable with the Speech or Debate Clause. ... The Clause is offended the moment the F.B.I. peruses a constitutionally protected legislative document. Even if the document is not seized, memory of its political contents remains in the Executive Branch for use in thwarting congressional opposition or leaking embarrassing political information. Documentary searches are further intimidating to Congress because the "plain view" doctrine of the Fourth Amendment would entitle the F.B.I. to seize any material in the course of reading office files concerning crimes unconnected to the search warrant. The knowledge by a Member that the F.B.I. can make an unannounced raid on his legislative office to read and rummage through every document or email is bound to discourage Congress from the muscular check against the Executive that the Speech or Debate Clause was calculated to foster.[144]

Conversely, the issuance of a subpoena for relevant materials and then the initiation of judicial proceedings by law enforcement authorities to enforce the subpoena if not complied with – consistent with not only past practices, but also the current Rules of the House – would assure that any claims of Speech or Debate Clause privilege or immunity from process

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[143] *Gravel*, 408 U.S. at 625.

[144] *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution*: Hearing Before the House Comm. on the Judiciary, 109th Cong. , 2d Sess. (May 30, 2006) (written testimony of Mr. Bruce Fein at 3-4) *available at*, http://judiciary.house.gov/OversightTestimony.aspx?ID=637.

would be heard and resolved by a judge, rather than placed in the initial discretion of the representatives from the executive branch.

The DOJ, in its filing before the U.S. District Court for the District of Columbia responding to Representative Jefferson's motion for return of property, argues that because it is only interested in obtaining non-legislative materials, the use of a "filter team," developed as a matter of comity to the House and consisting of one attorney from the Department of Justice, one attorney from the U.S. Attorney's Office for the Eastern District of Virginia and one non-case FBI agent, provides sufficient protection of the privilege under the Speech or Debate Clause.[145] Based on the DOJ's filing, it appears that it has adopted the position that the Clause's language "shall not be questioned at any other place" merely protects Members from having information relating to legislative acts used against them in a criminal proceeding.[146] The DOJ's argument appears to rest on the contention that because the actual prosecution team will never have access to any information that would be subject to the privilege, the Clause has not been violated.[147] In other words, the DOJ appears to be arguing that the Speech or Debate Clause is nothing more than an evidentiary privilege that can be asserted prior to trial, similar to any other available motion to exclude improperly seized evidence. Thus, the Department asserts that the procedures employed do not in any way prohibit Congressman Jefferson from asserting his privilege and having his claims adjudicated by a court.[148] In support of its claim that the Speech or Debate Clause is not violated merely because the DOJ makes determinations regarding privileged material, the DOJ references other prosecutions of Members of Congress.[149] In these instances, the DOJ contends that it reviewed materials obtained in response to subpoenas and determined what could be used and what was privileged and, therefore, inadmissible and in close or debatable

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[145] DOJ Response, *supra* note 1 at 14-17 (stating that "the procedures proposed to be used by the Government are plainly sufficient to protect against any permissible intrusion").

[146] *Id.* at 17-18 (stating that "even if the Speech or Debate Clause were understood to create a criminal discovery privilege, rather than a privilege protecting legislators against being questioned about privileged information or having such information used against them (a point the Government does not concede), it simply does not constitute 'discovery' for a law enforcement agent unconnected with the investigation to make a cursory review of privileged information solely for the purpose of determining whether it is privileged."). It should be noted the phrase "questioned in any other place" has not been the subject of much discussion. We have been able to locate no court cases or historical evidence that may guide modern interpreters as to the phrase's meaning. While neither the DOJ nor Congressman Jefferson has directly raised the issue, it would appear possible to argue that because the DOJ specifically excluded any legislative branch representatives from the office search, they constructively converted Congressman Jefferson's office into "any other place" for Speech or Debate purposes. In addition, since documents were removed from the office so they could be"filtered" by DOJ that may also constitute questioning "in any other place." Moreover, the search of the computer files, which according to the DOJ's own procedures was to be done at an FBI laboratory, appears to most certainly qualify as "any other place."

[147] *Id.* at 17 (arguing that "[b]ecause such officials are under affirmative obligations not to disclose the contents of any documents they see (and to attest that they have not done so), there is no prejudice to Rep. Jefferson as a result of the way in which the search was carried out." *citing Weatherford v. Bursey*, 429 U.S. 545, 556-58 (1977)).

[148] *Id.* at 19 (stating that "Rep. Jefferson suffers no cognizable injury under the Speech or Debate Clause because he must assert privilege after a judicially authorized search, rather than during it, especially when he suffers no prejudice as a result.").

[149] *Id.* at 21.

situations, consistent with the Constitution, the information was submitted to a court for a resolution as to whether the material could be used.[150]

The practices and procedures embodied in the Rules of the House of Representatives are not simply a matter of interbranch comity, but rather are grounded in constitutional structures and principles.[151] Those rules, promulgated under the House's authority under Article 1, section 5, clause 2 of the Constitution,[152] reflect over 130 years of consideration, experience, and practice with respect to Executive subpoenas that have served to further the independence of the institution and the protections afforded by the Speech or Debate Clause. The immunity afforded by the Clause is among the structural safeguards of our constitutional scheme. The Court's separation of powers jurisprudence underscores the importance of protecting these safeguards. Therefore, it can be argued that the execution of the search warrant in this case – by excluding any legislative branch representatives from being present and participating during the search and subsequent filtering process – ran afoul of these safeguards.

The Supreme Court has developed two lines of separation of powers jurisprudence. The first reflects the Court's concerns over "encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'"[153] In such structural cases, the Court has articulated interpretations of constitutional directions that are rigid and, therefore, may not be altered and are not subject to judicial "balancing." Justice Blackmun, speaking for the Court in *Mistretta v. United States*, delineated the cases that had, up to that time, been subject to a formalist analysis:

> ... Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch. For example, just as the Framers recognized the particular danger of the Legislative Branch's accreting to itself judicial or executive power, so too have we invalidated attempts by Congress to exercise the responsibilities of other Branches or to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch. *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress may not exercise removal power over officer performing executive functions); *INS v. Chadha*, [462 U.S. 919 (1983)] (Congress may not control execution of laws except through Art. I procedures); *Northern Pipeline*

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[150] *Id.* at 21 (arguing that "[i]t has never been suggested that the Constitution is offended merely because members of the prosecution team review legislative materials in the course of making privilege determinations").

[151] *See United States v. Ballin*, 144 U.S. 1, 5 (1982); *see also United States v. Nixon*, 506 U.S. 224 (1993) (holding that a challenge to a Senate impeachment rule that permitted the appointment of a committee to take evidence and testimony before reporting to the full body was non-justiciable as there was a demonstrable textual commitment of the issue to the Senate and no judicially discoverable and manageable standards for resolution of the issue).

[152] U.S. CONST. Art. 1, § 5, cl. 2 (providing that "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member").

[153] *Mistretta v. United States*, 488 U.S. 361, 382 (1989).

> *Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (Congress may not confer Art. III power on Art. I judge).[154]

Juxtaposed to the formalist cases is a second line of cases, often referred to as the functionalist cases. In these cases aggrandizement or encroachment are not apparent and what is involved is often the establishment by Congress of the arrangements within and between the administrative agencies, the President, Congress, and the Judiciary, under its broad Article I authority to create agencies and vest them with the necessary tools to carry out their assigned tasks. The key question in disputes over agency arrangements is whether so much has been taken from the functioning of one constitutional actor as to impair that actor's core constitutional functions. The Court sees its task in these cases as assuring that the essential lines of authority from the constitutional actors remain intact by utilizing a balancing test, a functionalist approach. As Justice Blackman explained in *Mistretta*:

> By the same token, we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment. *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding judicial appointment of independent counsel); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (upholding agency's assumption of jurisdiction over state-law counterclaims).
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> In *Nixon v. Administrator of General Services*, ... upholding, against a separation-of-powers challenge, legislation providing for the General Services Administration to control Presidential papers after resignation, we described our separation-of-powers inquiry as focusing "on the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned function." 433 U.S., at 443 (*citing United States v. Nixon*, 418 U.S. at 711-712). In cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed "tasks that are more properly accomplished by [other] branches," *Morrison v. Olson*, 487 U.S., at 680-681, and, second, that no provision of law "impermissibly threatens the institutional integrity of the Judicial Branch." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S., at 851.[155]

In 1991, the Court again adopted a formalist view of separation of powers, when in *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.* (*Washington Airports*),[156] it struck down as unconstitutional a legislative attempt by Congress to vest managing authority over both Washington National and Dulles International Airports in a regional authority while at the same time seeking to maintain control over key policy and management decisions of the Airports Authority's Board of Directors.[157] The Court found

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[154] *Id.* at 382.

[155] *Mistretta*, 488 U.S. at 382-83.

[156] 501 U.S. 252 (1991) (holding that Congress may not maintain control of the decision making of an executive entity by means of a review entity whose members it has appointed).

[157] This was accomplished by requiring the Directors to establish a Board of Review (Board) consisting of nine Members of Congress to which the Directors had to submit for the Board's consideration and possible veto operative decisions such as the adoption of the annual budget, the authorization for the issuance of bonds, and the adoption, amendment or repeal of regulations. Congress also retained substantial authority over the appointment and removal of the members of the Board. *See* Agriculture, Rural Development, and Related Agencies Appropriations Act of 1987,

(continued...)

that, as a result of those provisions, the Board was an agent of Congress and that the scheme of congressional control violated separation of powers principles.[158] The Court rejected the functional argument that the Board was a "kind of practical accommodation between the Legislative and the Executive ... that might prove innocuous," stating that "the statutory scheme challenged today provides the blueprint for extensive expansion of the legislative power beyond its constitutionally confined role" and, therefore, was a violation of the principles of separation of powers and could not be countenanced.[159]

Likewise, in *Clinton v. City of New York,*[160] the Supreme Court adopted a formalist approach by striking down two presidential cancellations pursuant to the Line-Item Veto Act.[161] The Court held that allowing the President to cancel provisions of enacted law violated the Constitution's Presentment Clause.[162] The Court found that nothing in the Constitution authorized the President to amend or repeal a statute, or parts of a statute, unilaterally, and because historical writings and practice provided "powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition."[163] The Court's opinion in *Clinton* pointedly rejected the notion that Congress and the President could agree by law to authorize "the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, sec.7. The fact that Congress intended such a result is of no moment. ... Congress cannot alter the procedures set out in Article I, sec. 7, without amending the Constitution."[164] Justice Kennedy's concurring opinion also viewed the Court's decision as falling within the formalist line of cases, or as he characterized them, the "vertical" separation of powers line of authority.

> Separation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority. In this respect the device operates on a horizontal axis to secure a proper balance of legislative, executive and judicial authority. Separation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised. The citizen has vital interest in the regularity of the exercise of governmental power. If this point was not clear before *INS v. Chadha*, it should have been

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[157] (...continued)
Pub. L. No. 99-591 §§ 6001-6012, 100 Stat. 3341 (1986).

[158] *Metropolitan Washington Airports Authority*, 501 U.S. at 276-77 (stating that "If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, sec. 7. In short, when Congress [takes] action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons... outside the Legislative Branch, it must take that action by the procedures authorized in the Constitution." (internal citations omitted)).

[159] *Id.*

[160] 524 U.S. 417 (1998).

[161] Pub. L. No. 104-130, 110 Stat. 1200 (*codified at* 2 U.S.C. §§ 691-692 (1994)).

[162] U.S. CONST. Art. I, § 7, cl. 2 (stating that "Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; ...").

[163] *Id.* at 440.

[164] *Id.*

> so afterwards. Though *Chadha* involved the deportation of a person, while the case before us involves the expenditure of money or the grant of a tax exemption, this circumstance does not mean that the vertical operation of the separation of powers is irrelevant here. By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.[165]

Justice Kennedy succinctly encapsulated the notion of formalism in his conclusion: "That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow ... . Abdication of responsibility is not part of the constitutional design."[166]

The salient characteristic of these formalist rulings is that each appears to admit no exceptions and allow no balancing of interests such as need, necessity, or convenience because the actions at issue effect encroachments or aggrandizements that may "undermine the authority and independence of one or another coordinate Branch" contrary to the Constitution's structural safeguards. In addition, these cases appear to expressly reject the validity of an agreement on such reassignments by the political branches that is embodied in a law. In at least one instance a federal appeals court has enforced such a structural ruling, finding that Congress had attempted to evade a High Court's ruling by indirection.[167] These cases are illuminating on the subject at issue as it appears possible to argue that if one accepts that the Speech or Debate Clause is a structural safeguard and, therefore, central to the Constitution's scheme of separation of powers, it must be interpreted consistent with the formalist line of cases. Such a conclusion, if adopted by the Court, would likely lead to a determination that the way the search warrant was executed in this case[168] violated the protection of the Speech or Debate Clause.

In addition to the constitutional arguments, there appears to be an argument for nullifying the search based on arguments analogous to those afforded by the protections of common law privileges. In *Klitzman, Klitzman, & Gallagher v. Krut*[169] the Third Circuit Court of Appeals voided a government search of an attorney's office on the grounds that the search was overboard and evidenced no attempt to minimize the impact on the attorney-client privilege.[170] Attorney Klitzman was under investigation for allegations of mail fraud related to false insurance documents for his personal injury clients. There was no dispute with respect to probable cause, rather the case is limited to Klitzman's challenge of the scope of the warrant. According to the court, the warrant "authorized the postal inspectors to search all client files, open or closed, ... all of the firm's financial records, file lists, and appointment books, ... In effect, the warrants authorized virtually a wholesale search and seizure of the

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[165] *Id.* at 452.

[166] *Id.*

[167] *See Hechinger v. Metropolitan Washington Airports Authority*, 36 F. 3d 97, 105 (D.C.Cir.1994), *cert. denied*, 513 U.S. 1126 (1995).

[168] *See supra* notes 140-144 and accompanying text.

[169] 744 F.2d 955 (3d Cir. 1984).

[170] *Id.* at 960.

business records of the firm."[171] As a result of the warrant's overbreadth, combined with the government's failure to take any steps to minimize the intrusion into the attorney-client privilege, the court granted Attorney Klitzman's motion for a preliminary injunction and ordered the return of the documents.[172]

Similarly, it appears possible to argue that the warrant executed in Congressman Jefferson's office is analogous to the circumstances in *Klitzman*. Both warrants were broad, required the review of potentially privileged documents to determine which were in compliance with the warrant. Moreover, it appears reasonable to assert that since Congressman Jefferson's privilege stems from the Constitution as opposed to the common law, his rights should have been afforded even a greater degree of protection. The DOJ will likely assert that its use of a "filter team" was designed to provide the required protection of Congressman's Jefferson's privilege. The "filter team," however, was comprised entirely of executive branch officials and, therefore, it appears legitimate to question whether they were the people in the best position to evaluate what documents enjoy the protection of a legislative privilege and what documents were relevant to the warrant.

Potential Congressional Actions

Based on a review of the precedent, rules and case law, it would appear that there are at least three alternatives that Congress might consider to address some of the issues raised by the executive seeking to execute a search warrant on a congressional office. Generally speaking, it would appear that Congress has the constitutional authority to adopt a statute that would prohibit such a practice from occurring. As one constitutional scholar has suggested, Congress could adopt the following language:

> "No search warrant in a criminal investigation shall be issued to obtain documents located in the office of a Member of Congress. A violation of this prohibition shall result in the suppression of any evidence that would not have been discovered but for the illegal search and the expunging of such evidence from the records of the Executive Branch. This law shall apply retroactively.[173]

Such a statute would effectively prohibit such warrants from being obtained in future situations, but it would also have the effect of making the warrant executed in Congressman Jefferson's office unlawful and likely would necessitate a return of all of the materials seized during the search.

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[171] *Id.*

[172] *Id.* (stating that "this government rampage potentially or actually invaded the privacy of every client of the Klitzman firm. The government well knew, prior to the search, that the client files contained privileged communications, yet the government took not one step to minimize the extent of the search or to prevent the invasion of the clients' privacy guaranteed by the attorney-client privilege.").

[173] *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution*: Hearing Before the House Comm. on the Judiciary, 109th Cong. 2d Sess. (May 30, 2006) (written testimony of Mr. Bruce Fein at 4).

A second approach, also suggested by several constitutional scholars, might be to extend the protections of the Privacy Protection Act,[174] which protects media offices from search warrants and mandates that subpoenas be used to fully effectuate the First Amendment protections afforded journalists under the Constitution.[175] By extending these protections to Congress, it would appear that Congress would simply be codifying the existing preference, at least in the House of Representatives, for the subpoena process into federal law. These protections could also be applied retroactively, which could potentially result in a return of the documents and a continuation of the litigation relating to the subpoena process. Finally, if Congress did not want to address the Jefferson case by legislation, it could arguably simply pass prospective legislation, thereby permitting this particular event to run its course through either interbranch negotiations and/or potentially through the courts.

In addition to actions by the full Congress, it would appear that the House of Representatives, acting pursuant to its own privileges and prerogatives, may have several options available to it. First, it would appear that the House could authorize, by resolution, the participation of the House General Counsel in any litigation or negotiations that concern this particular matter. The House Counsel would arguably not be representing Mr. Jefferson in his personal capacity, but rather would be representing the institution of the House and assisting Mr. Jefferson's personal attorneys. Second, the House could also adopt a resolution that attempts to assert dominion and control over the papers and computer files in question as the property of the House. As such, it would seem possible for the House to decree, again via resolution, that the papers should be turned over to either the Clerk of the House or the Sergeant at Arms for safekeeping. Further, the resolution could require that the House General Counsel, with the assistance of Congressman Jefferson and his personal attorneys, review the documents, divulge any non-privileged responsive documents, and fully inform the DOJ of any claims of privilege. Any objections that arise could either be brought to the full House for a final determination, or could be subject to adjudication before a court. While we can find no precedent for such a detailed resolution, it would arguably appear consistent with previous examples discussed above where the House asserted a property right and exercised considerable control over its papers via resolutions authorizing only certain material to be disclosed.[176] How this type of a solution would work given the President's sequestration order and the district court's asserted jurisdiction over this matter is impossible to determine at this time.

Conclusion

As has been detailed, when taken together, the historical origins of the Speech or Debate Clause, the recognition by the Supreme Court of the Clause's critical importance as a structural safeguard of separated but balanced powers, and the consistent and unbroken 130-year practice and understanding of the House, form a substantial body of precedent that could lead a reviewing court to conclude that any response to legal process on Members,

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

[175] *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution*: Hearing Before the House Comm. on the Judiciary, 109th Cong. 2d Sess. (May 30, 2006) (written testimony of Mr. Bruce Fein at 5 and Professor Jonathan Turley at 17).

[176] *See supra* notes 82-102 and accompanying text.

officers, or employees for either documents and/or testimony, whether by subpoena or search warrant, is, initially, to be a determination made by the House or its leadership.

While it is true that the precise scope and extent of the privilege is still a matter of considerable debate, it would seem that the very novelty of the events that have occurred is likely to draw the attention of a reviewing court, which will likely be asked to rule on the constitutionality of the procedures that must be utilized to make an initial determination of coverage under the Clause. As the history and precedent of the House suggests, the subpoena process protects the institutional interests of the chamber by ensuring that House institutional representatives do the initial "filtering" to determine which documents are privileged and which may be turned over. Conversely, pursuant to the DOJ's proposed search warrant process, executive branch official(s), with ostensibly no connection or interest in the investigation or prosecution of the Member, will read the paper documents seized or the documents downloaded from the Member's computer that have been "filtered" by search terms. If such a scheme passes constitutional muster because a "neutral" executive branch system (e.g. "filter" teams) has been employed, then Congress might respond by passing legislation (or the House may be able to use its rulemaking authority) providing for procedures for such filtering to restore the current level of institutional protection. On the other hand, if the executive screening role is deemed to be a violation of the Clause's protections because of potential Member intimidation and diminution of constitutional independence and autonomy, then the current subpoena process under Rule VIII could remain in place, perhaps with legislative modifications designed to address additional investigative procedures such as a search warrant. As part of determining which discovery method is most consistent with the Constitution, a reviewing court may question whether anyone outside the legislative branch has a sufficient understanding of, or interest in, congressional institutional needs or can be entrusted to make initial judgments with respect to safeguarding the core legislative interests.