No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM J. JEFFERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT P. TROUT
COUNSEL OF RECORD
AMY BERMAN JACKSON
GLORIA B. SOLOMON
TROUT CACHERIS, PLLC
1350 CONNECTICUT AVENUE, N.W.
SUITE 300
WASHINGTON, D.C. 20036
PHONE: (202) 464-3300
FAX: (202) 464-3319

COUNSEL FOR PETITIONER

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTION PRESENTED

Whether the indictment of a Member of Congress, although facially valid, should be dismissed when evidence privileged under the Speech or Debate Clause was used in the grand jury to obtain the indictment.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

William J. Jefferson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-32a[1]), is reported at 546 F.3d 300. The opinion of the district court (App. 36a-56a), is reported at 534 F. Supp.2d 645. The order of the district court (App. 34a-35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2008. A timely petition for rehearing en banc was denied on December 12, 2008 (App. 33a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (Westlaw through Jan. 2009).

CONSTITUTIONAL PROVISION INVOLVED

The Speech or Debate Clause provides that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1.

---

[1] "App." refers to the appendix to this petition. "C.A. App." references are to the joint appendix in the court of appeals.

STATEMENT OF THE CASE

The Speech or Debate Clause is a unique constitutional provision that creates an absolute privilege for legislative activities within its scope. It protects legislators not only from conviction based on legislative acts, but also from having to defend themselves as a result of those acts.

This case presents an important Speech or Debate question that this Court has never expressly addressed, and on which there is a clear circuit conflict. It arises from Mr. Jefferson's motion to dismiss the bribery-related counts in the indictment against him on the grounds that the grand jury heard evidence describing privileged legislative activities that was directly relevant to those counts and supported the government's case. The trial court, which has jurisdiction over this criminal matter under 18 U.S.C. § 3231 (Westlaw through Jan. 2009), reviewed the evidence presented to the grand jury, but denied the motion to dismiss. Mr. Jefferson appealed that denial to the Fourth Circuit, which, pursuant to the collateral order doctrine and *Helstoski v. Meanor*, 442 U.S. 500 (1979), had jurisdiction under 28 U.S.C. § 1291 (Westlaw through Jan. 2009).

On appeal, the Fourth Circuit refused even to consider whether legislative evidence protected by the Speech or Debate Clause had been presented to the grand jury. Applying the general rule regarding facially valid indictments developed in cases involving the Fourth and Fifth Amendments, the court below held that it was "barred … from looking behind an indictment to assess whether the grand

jury had considered privileged legislative materials." *United States v. Jefferson*, 546 F.3d 300, 313 (4th Cir. 2008); App. 28a. Because there was no facial challenge to the indictment here, the Fourth Circuit affirmed the denial of the motion to dismiss.

This holding is in direct conflict with the decisions of the D.C. Circuit, the Third Circuit and the Eleventh Circuit on this issue. Those circuits concluded that a court has the power to examine the evidence presented to a grand jury to determine whether the Speech or Debate Clause has been violated, and to dismiss the indictment where a violation is found. Unlike the Fourth Circuit, they recognized that general principles from other constitutional contexts cannot be applied in contravention of the Speech or Debate Clause, and that the purposes of the Clause cannot be vindicated unless a court can review and remedy a Speech or Debate violation occurring in the grand jury.

Whether the Clause requires dismissal of an indictment because of the use of privileged legislative evidence in the grand jury is a question that will recur in investigations of other Members of Congress. The facts of this case highlight the need to resolve the circuit conflict on this question: there is no remedy available to Mr. Jefferson for a Speech or Debate violation in the grand jury simply because the government chose to indict him in Virginia rather than in the District of Columbia, where Mr. Jefferson's home, his office, and Congress itself are all located.

It is likely that in opposing this petition, the government will refer, as it did in its brief below, to the $90,000 that was found in Mr. Jefferson's

freezer. But that widely-reported fact has no bearing here.[2] Mr. Jefferson maintains his innocence and will defend against all of the charges in the indictment at trial. More importantly for purposes of this petition, he – like all current and former Members of Congress – has an absolute constitutional right not to stand trial at all on charges obtained in violation of the Speech or Debate Clause. Given the circuit conflict and the importance of the constitutional issue involved, review by this Court is warranted.

A. The Charges at Issue.

Mr. Jefferson was a Member of the United States House of Representatives, representing the 2nd District of Louisiana, from 1991 until January 2009. As set forth in the indictment, during his tenure in Congress, Mr. Jefferson served on several legislative committees, subcommittees and caucuses that focused on issues relating to trade in general, and trade with Africa in particular. C.A. App. 20.

---

[2] The money in the freezer is not alleged to be a bribe received by Mr. Jefferson. Rather, it was transmitted to Mr. Jefferson by the government's cooperating witness during the course of the FBI's sting operation so that he would pass it to a foreign government official. C.A. App. 50. But Mr. Jefferson did not do that. Instead, the marked funds were recovered in his home. C.A. App. 51-52. The count in the indictment relating to those funds, which alleges a violation of the Foreign Corrupt Practices Act, was not one of the counts that were the subject of the underlying motion to dismiss, and it will not be affected by any ruling on this petition.

The sixteen count indictment includes fourteen counts that are based upon allegations of bribery. In addition to the two counts expressly charging bribery (Counts 3 and 4), the counts charging conspiracy, honest services wire fraud, money laundering and RICO violations (Counts 1-2, 5-10, 12-14 and 16) also depend on allegations that Mr. Jefferson solicited or agreed to accept things of value from companies seeking to do business in West Africa in return for the performance of "official acts" to assist those companies.[3] In other words, the crux of the alleged bribery schemes is the assertion that Mr. Jefferson "sold" his influence with African leaders to aid companies seeking opportunities in Africa.

The indictment expressly alleges that Mr. Jefferson solicited things of value in exchange for use of his influence with foreign officials. C.A. App. 33, 55 (the official acts allegedly performed by Mr. Jefferson included "conducting official travel to foreign countries and meeting with foreign government officials for the purpose of influencing those officials"). The government has consistently maintained that this alleged sale of influence is what the case is all about. For instance, Mr. Jefferson moved to dismiss the bribery counts for failure to allege any official act as that term is defined in the bribery statute. In response, the government specifically pointed to the allegations charging the use of Mr. Jefferson's influence to support its claim

[3] The portion of Count I that alleges a conspiracy to violate the Foreign Corrupt Practices Act is not covered by the motion to dismiss.

that the indictment made out a bribery case. C.A. App. 133. And, during the hearing on the instant motion in the trial court, the government argued that dismissing the indictment on Speech or Debate grounds would provide a barrier to prosecution "whenever a congressman is charged with using influence in return for things of value." C.A. App. 265.

As explained below, the Speech or Debate challenge at issue here focuses on the 14 bribery-based counts in the indictment relating to this alleged sale of influence.

B. Proceedings on Mr. Jefferson's Motion for Review of Grand Jury Materials and to Dismiss.

The indictment's references to Mr. Jefferson's committee, subcommittee and caucus memberships, the contents of recorded conversations provided in discovery by the government, and the fact that current and former staffers with knowledge of Mr. Jefferson's legislative activities involving African trade had testified in the grand jury, strongly suggested that privileged Speech or Debate evidence had been presented to the grand jury. Accordingly, Mr. Jefferson filed a motion in the trial court seeking review of the transcripts of all grand jury proceedings in this case, under the standard set forth in *United States v. Rostenkowski*, 59 F.3d 1291, 1313 (D.C. Cir. 1995), coupled with a request that all counts in the indictment obtained through the use of privileged legislative materials be dismissed. C.A. App. 113-28.

In response to the motion, the government asserted that the grand jury had heard no privileged evidence, but offered to make transcripts of the staffers' grand jury testimony (but no others) available to the defense for review. The defense's examination of these transcripts revealed that, contrary to the government's claims, information relating to Mr. Jefferson's legislative activities *had* been provided to the grand jury. The transcripts included testimony by legislative aides describing Mr. Jefferson's legislative activities in Congress and, particularly, his leading role in the passage of a trade bill known as the African Growth and Opportunity Act ("AGOA"). C.A. App. 178-79, 181-83. The transcripts also included questioning by the prosecutors that directly linked this testimony to Mr. Jefferson's influence with African leaders.

The most significant evidence of legislative activities came from Lionel Collins, who served as Congressman Jefferson's chief of staff for a number of years. After meeting with Collins in advance of his grand jury testimony, the prosecutors asked a broad question on the record inviting him to describe the Congressman's relationships with government officials in Nigeria. Collins described how Mr. Jefferson had been on the forefront of bringing democracy to the country. He then explained:

> And then a second thing, as I mentioned, a trip in 1997, the purpose of the trip was they were considering legislation dealing with the African growth and opportunity, a trade bill dealing with Africa. Congressman

> Jefferson was very instrumental in moving the legislation through the Congress, and it was voted on by the House and Senate side. It was passed.
>
> Congressman Jefferson had a lot of the African ambassadors involved in the legislation and so forth, and the legislation was very instrumental to the continent of Africa …. So as a result, Congressman Jefferson knew the leaders, the African leaders. When they would come to the United States, they would visit with the President and always come to Capitol Hill, visit with members of Congress, and Jefferson personally knew probably about 30 leaders, heads of state, and all of them were thankful because of his involvement with this legislation that passed, that opened up all kind[s] of trading opportunities with the continent of Africa.
>
> So as a result of that, Congressman Jefferson became known as a member who, basically, his specialty was international trade and, in particular, Africa. . . .

C.A. App. 182.

The prosecution immediately followed up on this testimony with argumentative questions linking

Mr. Jefferson's legislative activities to his unique influence with African leaders:

> Q. So it's an understatement to say he was very influential with high-ranking government officials in Nigeria?
>
> A. Nigeria, but Africa – I can list about 20 countries that he knew the leaders and influential – and when the leaders would come to the United States, they would visit him.
>
> Q. And would you say Congressman Jefferson was one of the most influential members of Congress with respect to African nations?
>
> A. Probably so, yes, on the trade side, international trade.

C.A. App. 183.

The grand jury also heard exchanges with staff members Melvin Spence and Stephanie Butler that reinforced Mr. Collins' testimony connecting Mr. Jefferson's influence in Africa to his legislative acts. C.A. App. 178-79.

Because the government had introduced evidence of Mr. Jefferson's legislative activities and drawn an express connection between these activities and the influence that is the crux of the bribery schemes, the defense sought dismissal of the 14 bribery-related counts in the indictment. In the

alternative, Mr. Jefferson maintained that the defense or the trial court should review the rest of the grand jury transcripts to determine whether additional evidence of legislative activities had been put before the grand jury.

By order dated November 30, 2007, the trial court denied Mr. Jefferson's request to review the grand jury materials, but stated that it would review them itself in camera. C.A. App. 221. The court ordered the government "to provide the Court for in camera review those portions of the grand jury record that have not been provided to the defendant." *Id.* In response to this order, the government submitted transcripts of the testimony of the remaining (non-staff member) witnesses to the trial court.[4]

Ruling from the bench at a hearing on February 6, 2008, the district court denied the motion to dismiss, C.A. App. 272-86, and issued a written order to that effect on the same date, App. 34a-35a, followed by a memorandum opinion on February 13, 2008. *United States v. Jefferson,* 534 F. Supp.2d 645 (E.D. Va. 2008); App. 36a-56a. The court stated that although it had reviewed the grand jury transcripts submitted by the government, such a review was not compelled on the record before it. Nevertheless, the trial court's decision was predicated on its consideration of the evidence

---

[4] However, the government did not provide transcripts of the prosecutors' instructions to, or colloquies with, the grand jurors – for no reason other than that these matters, although recorded, had not been transcribed. C.A. App. 311 n.7. The defense objected to this failure both in the trial court, C.A. App. 342, and on appeal. *See* 546 F.3d at 309-10, App. 20a.

submitted to the grand jury. The court found that the transcripts it read contained no Speech or Debate material, and that the staff member excerpts identified by the defense, including the testimony of Lionel Collins, did not violate the Speech or Debate Clause.

Mr. Jefferson appealed the trial court's denial of his motion to dismiss to the Fourth Circuit.

C. The Fourth Circuit's Decision.

Unlike the trial court, the Fourth Circuit refused even to consider whether the evidence presented to the grand jury in this case violated the Speech or Debate Clause. Although it described the trial court's review of the grand jury record and outlined the trial court's holdings in its opinion, the Fourth Circuit did not analyze the Collins testimony or any other grand jury evidence, and it did not review or adopt the trial court's findings.

Instead, the Fourth Circuit based its decision on more general principles of grand jury independence and criminal procedure. The court stated:

> Under controlling precedent, a facially valid indictment is not subject to dismissal simply because the grand jury may have considered improper evidence, or because it was presented with information or evidence that may contravene a constitutional privilege.

546 F.3d at 312; App. 26a. The court relied for this proposition primarily on *Costello v. United States,*

350 U.S. 359 (1956), a Fifth Amendment case holding that an indictment could not be challenged on the ground that the only evidence before the grand jury was hearsay. It also cited *United States v. Calandra*, 414 U.S. 338 (1974), which held that the exclusionary rule does not apply in the grand jury, so evidence derived from violations of the Fourth Amendment can be put before that body.

The Fourth Circuit emphasized that it had "consistently adhered to *Costello*'s guiding and settled principles." 546 F.3d at 313; App. 28a. It pointed to its prior decision in *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), in which,

> in a context not unlike that presented here, we concluded that the *Costello* mandate barred us from looking behind an indictment to assess whether the grand jury had considered privileged legislative materials.

546 F.3d at 313; App. 28a. The court concluded here that "[b]ounded by such precedent, we are likewise not entitled to review the grand jury record in Jefferson's case – the Indictment simply does not question any legislative acts." *Id.*[5]

Mr. Jefferson's petition for rehearing en banc was denied by the Fourth Circuit.

---

[5] The Fourth Circuit also noted that although the trial court's review of the grand jury record was not required by controlling authorities, the trial court's decision to conduct such a review was within its discretion. 546 F.3d at 314; App. 31-32a.

D. Further Proceedings.

Following the denial of his petition for rehearing en banc, Mr. Jefferson filed a motion asking the Fourth Circuit to stay issuance of its mandate pending certiorari, so that he would not have to stand trial until his Speech or Debate claims were finally resolved. This motion was denied by order dated December 29, 2008.

Mr. Jefferson then filed a motion in the trial court asking it to set a trial date after the expected completion of the certiorari process in this Court. By order dated January 15, 2009, the trial court denied the motion. Due to considerations of its docket, however, the court set the trial to begin on May 26, 2009, which it acknowledged would have the practical effect of allowing this petition to be considered. Given this trial date, no stay is currently necessary. Mr. Jefferson will seek further relief regarding the trial date if this petition is granted or has not been resolved by the time of trial.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case to resolve a clear split in the circuits on a significant constitutional question: whether the Speech or Debate Clause protects a Member of Congress from having to defend against an indictment obtained through use of privileged Speech or Debate material in the grand jury. The Fourth Circuit's erroneous conclusion that a Member cannot challenge an indictment on these grounds – which is contrary to the view of the three other circuit courts that have considered this issue – is based on a misapplication

of *Costello* and ignores this Court's teachings concerning the purposes and scope of the Clause and the absolute nature of the privilege it creates. As a result, the Fourth Circuit never reached the critical question of whether the bribery-related counts in the indictment should have been dismissed. If the opinion stands, a Member of Congress indicted in the Fourth Circuit would have no recourse and would be forced to stand trial even if the prosecution introduced evidence of his privileged legislative acts in the grand jury.

A. The Fourth Circuit's Decision Is in Direct Conflict with the Decisions of Other Circuits that Have Addressed this Issue.

There is a real and significant conflict between the decision of the Fourth Circuit in this case and the decisions of the D.C. Circuit in *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), the Eleventh Circuit in *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1992), and the Third Circuit in *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980).[6] Although its opinion does not acknowledge the existence of a conflict, the Fourth Circuit's holding that *Costello* and *Calandra* preclude a court from examining whether Speech or

[6] In *United States v. Durenberger*, Crim. No. 3-93-65, 1993 WL 738477 (D. Minn. Dec. 3, 1993), the district court in Minnesota also held that a court could review the evidence presented to the grand jury and dismiss the indictment where it was "plausible" that the grand jurors had relied on privileged legislative material. 1993 WL 738477 at *2-4.

Debate evidence was presented to the grand jury is fundamentally at odds with the position taken by the other circuits.

1. The conflict with *Rostenkowski.*

The Fourth Circuit addressed *Rostenkowski,* as well as *Helstoski,* only in one footnote in its opinion. It noted that those decisions had "observed, in *dicta*, that a *pervasive* violation of the Speech or Debate Clause might be used to invalidate an indictment." 546 F.3d at 314 n.8; App. 31a n.8 (emphasis original). The Fourth Circuit stated that it had no reason to reach this issue because Mr. Jefferson had not alleged a pervasive violation. *Id.* But the court ignored the findings and reasoning of those cases, which plainly contradict the conclusion that the government's use of Speech or Debate material in the grand jury was immune from challenge.

In *Rostenkowski,* the D.C. Circuit considered a motion by the defendant for in camera review of grand jury materials. In determining whether it could hear an interlocutory appeal from the trial court's denial of that motion, the D.C. Circuit stated that the jurisdictional question "depends upon whether an indictment would be deemed invalid solely because it was procured by the use of material protected by the Speech or Debate Clause." *Rostenkowski,* 59 F.3d at 1297. "If so, then to delay review until after trial would be to deny the Congressman the protection from 'the cost and inconvenience of litigation' to which he is entitled under that Clause." *Id.* The court therefore was

required to resolve "whether the protection of the Speech or Debate Clause extends beyond the face of the indictment to limit the materials that may lawfully be presented to a grand jury." *Id.* (citations omitted). Basing its analysis on the purposes of the Clause – to protect legislators from intimidation and to prevent them from being distracted or hindered in carrying out their legislative tasks – the court found that it did:

> In order to fully secure these purposes, it seems that a court may find it necessary, at least under some circumstances, to look beyond the face of an indictment and to examine the evidence presented to the grand jury. … Otherwise, a prosecutor could with impunity procure an indictment by inflaming a grand jury against a Member upon the basis of his Speech or Debate, subject only to the necessity of avoiding any reference to the privileged material on the face of the indictment.

Id. at 1298 (citations omitted).

In reaching this conclusion, the *Rostenkowski* court carefully examined both *Costello* and *Calandra*. It found that the general rule set down by these cases – that a facially valid indictment is not subject to dismissal on the ground that improper evidence was introduced in the grand jury – did *not* foreclose the examination of grand jury evidence in a Speech or Debate challenge. "While we accept the validity of those propositions in general, of course,

we do not think that they are applicable where they would undermine the important purposes served by the Speech or Debate Clause." *Rostenkowski*, 59 F.3d at 1298. The D.C. Circuit further explained that *Calandra* involved the use of evidence seized in violation of the Fourth Amendment, not Speech or Debate material. "Unlike a violation of the Fourth Amendment, which the *Calandra* court held to be a past abuse and thus the lawful basis for subsequent grand jury questioning, it is the very act of questioning that triggers the protections of the Speech or Debate Clause." 59 F.3d at 1298, *quoting In re Grand Jury Investigation*, 587 F.2d 589, 598 (3d Cir. 1978).[7]

Although the D.C. Circuit ultimately determined that Rostenkowski had not made a sufficient showing that Speech or Debate material had been used in the grand jury in his case and, therefore, that no review of grand jury materials was warranted, its conclusions that such a review must be undertaken in appropriate cases in order to fully vindicate the purposes of the Clause, and that an indictment can be deemed invalid solely because it was procured by use of privileged legislative

---

[7] The reference to "pervasive" Speech or Debate violations, cited by the Fourth Circuit in its footnote, was made by the D.C. Circuit when it noted that even the government conceded that pervasive violations could invalidate an indictment. *See* 59 F.3d at 1229. The plain import of this statement, and of *Rostenkowski's* approach to this issue, is that other types of violations may also be grounds for dismissing an indictment.

material, stand in direct contrast to the Fourth Circuit's decision here.

2. The conflict with *Helstoski*.

In *Helstoski*, the Third Circuit held that an indictment based on "wholesale violation of the speech or debate clause before a grand jury" could not survive. 635 F.2d at 205. Its decision was predicated on the determination that a court can examine the evidence presented in the grand jury and dismiss an indictment because of Speech or Debate violations occurring there.

The *Helstoski* court explicitly rejected the application of *Costello* and *Calandra* in the Speech or Debate context. It noted that *Calandra* itself distinguishes the use of inadequate or incompetent evidence "from instances where what was transpiring before the grand jury would itself violate a constitutional privilege," 635 F.2d at 203, and further recognized that "[t]he purposes served by invoking the speech or debate clause vary greatly from those that the Supreme Court has considered and rejected in other cases seeking to quash indictments." *Id.* at 204. Finally, the court emphasized the importance of protecting Speech or Debate rights at the grand jury stage:

> A hostile executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring or threatening to ignore the privilege in a presentation to a grand jury. Invocation of the constitutional

> protection at a later stage cannot undo the damage. If it is to serve its purpose, the shield must be raised at the beginning.

Id. at 205.

3. The conflict with *Swindall.*

The decision of the Eleventh Circuit in *Swindall* also stands for the proposition that the introduction of Speech or Debate evidence in the grand jury may be grounds for invalidating an indictment. The Fourth Circuit discounted Mr. Jefferson's reliance on *Swindall*, describing that case as focusing on the use of evidence of legislative activities at trial. 546 F.3d at 311-12; App. 25a. But *Swindall* was also specifically concerned with the use of legislative material in the grand jury: "When a violation of the privilege occurs in the grand jury phase, a member's rights under the privilege must be vindicated in the grand jury phase." 971 F.2d at 1546-47. And there is no doubt that the *Swindall* court found that the use of legislative material *in the grand jury* was grounds for dismissing an indictment. *See* 971 F.2d at 1547 ("During the grand jury phase, Swindall's Speech or Debate privilege was violated in two separate ways. First, his privilege against criminal liability was violated when reference to Speech or Debate material was used as critical evidence leading to his indictment. Second, his privilege against being questioned in any place other than Congress was violated when he was questioned before the grand jury about Speech or

Debate matters. Each violation, standing alone, requires dismissal of the affected counts.").

Swindall is based on the fundamental proposition that the "Speech or Debate privilege is violated if the Speech or Debate material exposes the member to liability," 971 F.2d at 1548, which occurs when legislative material that is relevant to the decision to indict is used in the grand jury. *See id.* The Fourth Circuit's conclusion here that it could not even consider the use of legislative material in the grand jury is plainly inconsistent with the holding in *Swindall*.

4. The impact of the Fourth Circuit's decision in *Johnson*.

The Fourth Circuit's decision cited *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), as controlling precedent. That case concerned a Member of Congress who was initially convicted on an indictment that included a conspiracy count based in part on a speech in Congress. After Johnson's conviction was reversed, the conspiracy count was dismissed, and Johnson was retried and found guilty on the remaining counts. Johnson then challenged his conviction on those counts on the ground that the grand jury that had returned all of the counts had heard the evidence of his Congressional speech. Relying on *Costello*, the court rejected his challenge, holding that a facially valid indictment returned by a legally constituted and unbiased grand jury was all that was required by the Fifth Amendment. 419 F.2d at 58. It also rejected

Johnson's claim that the grand jury was biased because it had heard evidence of his speech. *Id.*

But *Johnson* was not controlling here. Unlike Johnson, Mr. Jefferson did not assert bias as grounds for dismissing any of the charges against him. More importantly, the counts at issue on the motion to dismiss in *Johnson* "had nothing to do with his speech." 419 F.2d at 58. In other words, once the conspiracy charge was dismissed, the privileged material presented to the grand jury was not relevant to any remaining charges. In this case, by contrast, Mr. Jefferson is seeking to dismiss only those counts to which the Speech or Debate evidence *was* relevant: the 14 bribery-related counts, which focus on the sale of the influence that his staffer testified he derived from his legislative acts.[8] Even if *Johnson* were deemed to be controlling, however, it would only further demonstrate the conflict between the Fourth Circuit's approach to a claim that Speech or Debate evidence was improperly used in the grand jury and the approach of the other circuits that have considered this issue.

Thus, there is no doubt that there is a split in the circuits concerning the scope of a court's authority to review the use of Speech or Debate

---

[8] Consistent with *Johnson*, Mr. Jefferson sought the dismissal only of those counts affected by the improper evidence about his legislative activities. Mr. Jefferson's influence with African leaders had nothing to do with two of the indictment's 16 counts, to wit, those alleging a violation of the Foreign Corrupt Practices Act (Count 11) and obstruction of justice (Count 15). Accordingly, Mr. Jefferson has never argued that those two counts should be dismissed.

evidence in the grand jury. This conflict has serious practical consequences. The work of Members of Congress is centered in the District of Columbia, but they come from every district in the country, may maintain a residence in Maryland or Virginia, and travel frequently, usually through airports in Virginia. As a result, prosecutors investigating a Member of Congress may have a choice of venues in which to pursue any given case. Under the law as it currently stands, a Member's absolute Speech or Debate privilege will be accorded a different level of protection depending upon the government's choice of forum. Indeed, in this case, the defendant – who owns a home in the District of Columbia and who is charged with operating his Congressional office in the District of Columbia in an illegal fashion – could not obtain review of his Speech or Debate claim simply because the government chose to bring its case against him in Virginia. This is an untenable state of affairs. Granting of a writ of certiorari is warranted so that this Court can resolve this important constitutional conflict.

B. The Fourth Circuit's Erroneous Decision Undermines the Protections Afforded by the Speech or Debate Clause as Defined by This Court.

The Fourth Circuit's decision places no check on a prosecutor's ability to introduce privileged legislative materials in the grand jury. As a result, it significantly undermines the protections the Speech or Debate Clause was intended to offer, as defined in this Court's own decisions. In resolving the conflict

between the circuits on this issue, the Court should reverse the erroneous decision of the Fourth Circuit.

1. The Speech or Debate Clause protects legislators against the use of Speech or Debate evidence in the grand jury.

The Speech or Debate Clause provides that Members of Congress "shall not be questioned in any other Place" for their legislative activities. It is a unique provision, which "was designed neither to assure fair trials nor to avoid coercion." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). Instead, its purpose is "to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972). Indeed, this Court has stated that "the 'central role' of the Clause is to 'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.'" *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975) (citations omitted). It also "serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States v. Johnson*, 383 U.S. 169, 178 (1966).

In order to accomplish these purposes, the Speech or Debate Clause prohibits "inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *Brewster*, 408 U.S. at 525. The clause applies to all acts within the "legislative sphere," *Gravel v. United States*, 408 U.S. 606, 624 (1972); and as to such

activities, "the prohibitions of the Speech or Debate Clause are *absolute*." *Eastland*, 421 U.S. at 501 (emphasis added). In addition to actual speech or debate, activities within the legislative sphere include those

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

Gravel, 408 U.S. at 625.

The Speech or Debate Clause protects Members both from criminal prosecutions and civil suits based on legislative activity. *See Eastland*, 421 U.S. at 502-503. It bars the introduction of evidence referring to legislative acts in any prosecution against a Member:

> Revealing information as to a legislative act – speaking or debating – to a jury would subject a Member to being "questioned" in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause.

United States v. Helstoski, 442 U.S. at 490. And the Clause protects legislators "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). Thus, even requiring a Member to stand trial as the result of legislative activities is a violation of the Clause.

The circuit courts in *Rostenkowski*, *Helstoski,* and *Swindall* correctly applied these Speech or Debate principles in concluding that the purposes of the Clause could not be vindicated unless a court could examine the evidence presented to the grand jury in an investigation of a Member of Congress. Otherwise, as the D.C. Circuit recognized, as long as no legislative activity appeared in the indictment itself, a prosecutor could, "with impunity," use Speech or Debate evidence in the grand jury to obtain an indictment and bring a legislator to trial. *Rostenkowski*, 59 F.3d at 1298.

Allowing the use of evidence of legislative activities in the grand jury would clearly chill a legislator's freedom of action. As the Third Circuit explained,

> We must recognize that the mere issuance of an indictment has a profound impact on the accused, whether he be in public life or not. Particularly for a Member of Congress, however, publicity will be widespread and devastating. Should an election intervene before a trial at which he is found innocent, the damage will have been done, and in all likelihood the seat

> lost. Even if the matter is resolved before an election, the stigma lingers and may well spell the end to a political career. …

Helstoski, 635 F.2d at 205 (citations omitted).

Further,

> It cannot be doubted, therefore, that the mere threat of an indictment is enough to intimidate the average congressman and jeopardize his independence. Yet, it was to prevent just such overreaching that the speech or debate clause came into being. A hostile executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring or threatening to ignore the privilege in a presentation to a grand jury.

Id.

2. The Fourth Circuit misapplied *Costello* and *Calandra*.

The Fourth Circuit failed to give appropriate consideration to this Court's strong pronouncements about the purposes and scope of the Clause, and also failed to consider the impact that use of Speech or Debate evidence in the grand jury would have on legislative independence. Instead, it reached the conclusion that it was barred from looking behind

the indictment to examine whether the Speech or Debate Clause was violated in the grand jury by mechanically, and erroneously, applying the rule of *Costello* and *Calandra* to this case.

Neither *Costello* nor *Calandra* involve the Speech or Debate Clause. *Costello* concerned a tax evasion prosecution in which cross-examination at trial revealed that the only evidence presented to the grand jury was hearsay testimony from government investigators. The defendant moved to dismiss the indictment, arguing that the grand jury's reliance on mere hearsay from the investigators violated the Fifth Amendment's requirement that federal prosecutions be instituted by indictment. The Court rejected this claim, holding that where a facially valid indictment was returned by "a legally constituted and unbiased grand jury," the indictment cannot be challenged as based on inadequate or incompetent evidence. *Costello*, 350 U.S. at 363. The fundamental question addressed in *Costello* was whether the Constitution set minimum evidentiary requirements for return of an indictment. The Court's conclusion that there is no constitutional minimum simply does not speak to the consequences of a Speech or Debate violation occurring in the grand jury.

Calandra involved a witness who refused to answer questions in the grand jury that were based on illegally-seized documents. The Court declined to apply the exclusionary rule to grand jury proceedings, finding that doing so would not advance the rule's purpose of deterring future Fourth Amendment violations. *Calandra*, 414 U.S. at 351. In reaching this holding, the Court reiterated

Costello's rule regarding facially valid indictments. But, importantly, it also made it clear that while a grand jury has broad powers to investigate, it "may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." *Id.* at 346. The Court rejected the argument that grand jury questioning based on evidence seized in violation of the Fourth Amendment was itself an independent constitutional violation. *Id.* at 354.

By contrast, this Court has expressly recognized that the introduction of evidence of legislative activities *is* questioning that constitutes an independent constitutional violation of the Speech or Debate Clause. *See United States v. Helstoski,* 442 U.S. at 490. Such violations can only be policed and remedied if courts have the power in appropriate cases to review the evidence presented to the grand jury and dismiss indictments obtained through use of Speech or Debate materials.

Although this Court has not ruled on this question directly, its decision in *Helstoski v. Meanor* is instructive. The defendant in that case sought a writ of mandamus from the appellate court directing the trial court to dismiss the indictment against him. One of his arguments was that "the indictment was invalid because the grand jury had heard evidence of legislative acts." 442 U.S. at 504-505. In rejecting the mandamus request, the court of appeals "declined to go behind the indictment, holding that it was valid on its face." *Id.* at 505. This Court held that mandamus was unavailable because the defendant could have taken a direct appeal from the district court order denying his motion to dismiss. *Id.* at 506.

The Court found that such an appeal was necessary to fully vindicate a legislator's right to be protected from having to defend against charges obtained in violation of the Clause. While *Helstoski v. Meanor* did not reach the question of the validity of the indictment, its holding assumes that courts do have the power to consider a claim that the Speech or Debate Clause has been violated in the grand jury. It further suggests that such a claim must be analyzed in light of the unique purposes of the Clause, and supports the conclusion that an inquiry into the improper use of Speech or Debate evidence in the grand jury is not precluded by *Costello* or *Calandra.*

Because the Fourth Circuit erroneously held that *Costello* and *Calandra* precluded it from looking behind the indictment in this case, this Court should grant the writ of certiorari and reverse the decision of the Fourth Circuit.

C. The Fourth Circuit's Decision Allowed a Violation of the Speech or Debate Clause to Go Unreviewed and Unremedied.

There is no doubt that evidence of legislative activity within the meaning of the Speech or Debate Clause was introduced in the grand jury in this case. The testimony of Lionel Collins describes Mr. Jefferson's leadership role in the passage of AGOA, a major African trade bill, and some of the methods he used in that effort. The Speech or Debate Clause covers all acts within the "legislative sphere." *Gravel*, 408 U.S. at 624-25. This includes activities that are "an integral part of the deliberative and

communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation." *Id.* at 625. Collins' testimony falls squarely within this definition. Indeed, in discussing this testimony, the trial court acknowledged that "a Member's role in passing legislation is the sort of legislative activity protected by the Clause." C.A. App. 319.

Because of its reliance on *Costello*, however, the Fourth Circuit failed to consider whether the use of Collins' testimony in the grand jury violated the Speech or Debate Clause. The court below never reached Mr. Jefferson's argument that this evidence was directly relevant to the government's theory of the bribery counts, and that it was used by the government to advance its case in support of those counts.[9] As a result, a serious breach of the legislative privilege went unreviewed and unremedied.

The testimony about Mr. Jefferson's activities in support of the AGOA legislation was expressly connected to his influence with African officials and, therefore, directly relevant to the criminal conduct alleged in the indictment. The bribery charges against Mr. Jefferson are predicated on his alleged use of his influence to get other people – mostly African government officials, and a few U.S. government agencies – to assist various businesses, in return for things of value. As set forth above, the

---

[9] The trial court's erroneous conclusion that no Speech or Debate violation occurred here was accordingly not reviewed by the Fourth Circuit.

government has repeatedly described this case as one involving the sale of influence. Indeed, the district court's description of the various schemes alleged in the indictment, which was adopted by the Fourth Circuit, confirms that the use of Mr. Jefferson's influence to promote business ventures is at the heart of the bribery charges. *See* 546 F.3d at 303-304; App. 4a-6aa (the indictment alleges that in return for things of value, the defendant "met with foreign government officials to promote the use of iGate's technology;" "met with Ghanaian governmental officials to promote Mody's, IBBS's, and W2-IBBS's interests in Ghana and elsewhere in Africa;" met with "Nigerian government officials to promote the interests of Arkel Oil and Gas;" and met with "Nigerian government officials to promote TDC's interests in Nigeria").

Collins' testimony, underscored by the prosecutor's follow-up questions, established that Mr. Jefferson possessed uniquely valuable influence that he allegedly sold in these schemes, and that his influence was principally derived from his work on the passage of African trade legislation. The introduction of this evidence of Mr. Jefferson's legislative activities was "questioning" of the type prohibited by the Clause. *See United States v. Helstoski*, 442 U.S. at 490.

As the Eleventh Circuit appropriately recognized in *Swindall*, the Speech or Debate privilege is violated in the grand jury "if the Speech or Debate material exposes the member to liability," that is, if it is relevant to the decision to indict. *See* 971 F.2d at 1548. This was the case here. Proof that Mr. Jefferson actually had influence in Africa –

which was based on his privileged activities in connection with African trade legislation – supported the government's theory that he was selling influence to businesses seeking projects in Africa. It also supported the government's contention that the transactions described in the indictment involving members of Mr. Jefferson's family were not legitimate business activities, but were merely "shams" designed to disguise schemes for the sale of Mr. Jefferson's influence. There is no way to separate the privileged evidence from the other evidence heard by the grand jury, and no way to conclude that the grand jury did not rely on the evidence showing that Mr. Jefferson had influence in Africa, derived from his legislative activities, in deciding that the government had provided sufficient proof of the alleged bribe schemes.[10] Therefore, the "infection cannot be excised," *Helstoski*, 635 F.2d at 205, and the affected counts should not be permitted to stand.

Vindicating the Speech or Debate Clause in this manner would not immunize Members of Congress for anything they do while in office or place them above the law; nor would it impose unwarranted burdens on law enforcement.

> All that is required is that in presenting material to the grand jury the prosecutor uphold the Constitution

---

[10] It certainly cannot be concluded that the grand jury did not rely on this evidence or treat it as important when the prosecutors' colloquies with and instructions to the grand jury were not provided to the court for review. C.A. App. 311 n.7.

> and refrain from introducing evidence of past legislative acts or the motivation for performing them.

Helstoski, 635 F.2d at 206. To ensure that courts will protect the Speech or Debate privilege where a showing has been made that the government used evidence of a Member's privileged legislative acts in the grand jury in support of an indictment, this Court should grant a writ of certiorari and reverse the judgment of the Fourth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert P. Trout
Counsel of Record
Amy Berman Jackson
Gloria B. Solomon
TROUT CACHERIS, PLLC
1350 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20036
Phone: (202) 464-3300
Fax: (202) 464-3319

Counsel for Petitioner