No. 08-4215

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM J. JEFFERSON,

Appellant.

Appeal From The United States District Court
For The Eastern District Of Virginia
Alexandria Division

BRIEF OF APPELLANT WILLIAM J. JEFFERSON

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STATEMENT OF JURISDICTION

This appeal arises from a pending criminal case, over which the district court has jurisdiction pursuant to 18 U.S.C. § 3231. The defendant, Congressman William J. Jefferson, filed a pre-trial Motion for Review of Grand Jury Materials and to Dismiss, asserting that fourteen of the sixteen counts in the indictment should be dismissed because legislative material privileged under the Speech or Debate Clause of the Constitution had been presented to the grand jury. By order dated February 6, 2008, the district court denied the motion. JA 303. Under *Helstoski v. Meanor*, 442 U.S. 500 (1979), denial of a motion to dismiss an indictment on Speech or Debate grounds is a collateral order from which an immediate interlocutory appeal may be taken. Congressman Jefferson timely filed a notice of appeal on February 20, 2008. JA 321-23. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 .

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in denying defendant's motion to dismiss when legislative material privileged under the Speech or Debate Clause was presented to the grand jury and used by the government to obtain the bribery-related counts in the indictment.

2. Whether the district court erred in finding that the government did not use privileged legislative material in the grand jury when it failed to examine transcripts of the government's arguments and instructions to the grand jury.

STATEMENT OF THE CASE

William J. Jefferson has been a United States Congressman since 1991. His legislative activities have focused largely on international trade, particularly with Africa, and he has served as a member of Congressional committees and caucuses dealing with African trade. On June 4, 2007, a grand jury in the Eastern District of Virginia returned a 16-count indictment against Congressman Jefferson, charging him with conspiracy, bribery, wire fraud, violation of the Foreign Corrupt Practices Act, money laundering, obstruction of justice and racketeering. Fourteen of the sixteen counts in the indictment are based on allegations that he solicited or agreed to receive bribes in return for the use of his influence as a Congressman to assist businesses seeking opportunities in Africa.

Following his indictment, Congressman Jefferson filed a number of pre-trial motions, including the Motion for Review of Grand Jury

Materials and to Dismiss at issue here.[1] This motion asserted that the Speech or Debate Clause was violated when the grand jury heard testimony detailing Congressman Jefferson's legislative activities relating to African trade, and the government tied those activities to the influence the Congressman allegedly "sold" as part of the bribery schemes in the indictment. During the proceedings, the defense was provided with access to the grand jury testimony of the Congressman's current and former staffers, and those transcripts contained explicit references to legislative acts. The Congressman argued that the Constitution therefore required (1) the examination of the entire remaining grand jury record to determine whether additional Speech or Debate material had been presented to the grand jury, and (2) the dismissal of all of the counts in the indictment obtained through the use of privileged legislative material.

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[1] Congressman Jefferson also filed motions seeking to dismiss counts in the indictment on other grounds. The trial court has ruled on some of the pre-trial motions, while others are still pending as of the date of this brief. None of the counts of the indictment has been dismissed to date.

After reviewing *in camera* the rest of the witness transcripts, but not the prosecutors' arguments and instructions to the jury, the trial court denied Congressman Jefferson's motion to dismiss by Order dated February 6, 2008. JA 303. It issued a Memorandum Opinion explaining the reasons for the denial on February 13, 2008. JA 305-320 (now reported as *United States v. Jefferson*, 534 F. Supp. 2d 645 (E.D. Va. 2008)). This appeal followed.

STATEMENT OF FACTS

A. The Indictment.

1. Mr. Jefferson has been a Member of the United States House of Representatives, representing the 2nd District of Louisiana, since 1991. During his tenure in Congress, he has served on several legislative committees and caucuses that focused on issues relating to trade generally, and trade with Africa in particular. As set forth in the indictment,

> At various times relevant to this Indictment, Defendant JEFFERSON was a Member of the Committee on Ways and Means, Subcomittee on Trade; Member of the Committee on the Budget; Co-Chair of the Africa Trade and Investment Caucus; and Co-Chair of the Congressional Caucus on Nigeria.

JA 20, ¶ 3.

2. Congressman Jefferson was indicted by a grand jury in the Eastern District of Virginia on June 4, 2007. JA 19-112. The indictment alleges two counts of conspiracy to, *inter alia*, solicit bribes (Counts 1 and 2); two counts of solicitation of bribes by a public official (Counts 3 and 4); six counts of honest services wire fraud involving bribery (Counts 5 through 10); one Foreign Corrupt Practices Act count (Count 11); three counts of money laundering involving the proceeds of the alleged bribery (Counts 12 through 14); one count of obstruction of justice (Count 15); and one Racketeer Influenced and Corrupt Organizations (RICO) count (Count 16) alleging a pattern of racketeering acts involving bribery.

3. The conspiracy, bribery, honest services, money laundering and RICO counts in the indictment are based on allegations that Congressman Jefferson solicited or agreed to accept things of value in return for the performance of official acts to assist companies and

individuals seeking to do business in West Africa. *See* JA 32-34, 54-56, 67-72, 75, 77-103, ¶¶ 45-46, 49, 145-146, 149, 207, 209, 211, 216, 222, 225-227, 229-231, 233-235, 237-239, 241-243, 245-247, 249-251, 253-255, 257-259, 261-263, 265-267, 269-270. In other words, fourteen of the sixteen counts in the indictment depend on the assertion that Congressman Jefferson participated in bribery schemes in which he "sold" his influence to aid businesses seeking opportunities in Africa.

4. Many of these allegations relate to influence allegedly asserted by Congressman Jefferson on behalf of a company called iGate, Inc., seeking to sell high speed internet technology in Nigeria and Ghana. The indictment also asserts that Congressman Jefferson solicited bribes to use his influence to assist other companies seeking to develop such businesses as a sugar plant, a fertilizer plant, and oil and gas wells in Nigeria.

5. The indictment enumerates the following activities as the "official acts" that Congressman Jefferson allegedly performed:

> a. conducting official travel to foreign countries and meeting with foreign government officials for the purpose of influencing those officials;

> b. using his congressional staff members to create trip itineraries, accompany Defendant JEFFERSON on travel, and otherwise provide official assistance;
>
> c. contacting both United States and foreign embassies to schedule meetings with foreign government officials, obtaining entry and exit visas for travelers, and otherwise assisting with the official travel;
>
> d. sending official correspondence on congressional letterhead to foreign government officials; and
>
> e. scheduling and participating in meetings with officials of United States agencies to secure potential financing for the business ventures sought by the companies and businesspersons.

JA 15-16, ¶ 49; *see also* JA 55-56,¶ 149.

6. The indictment ties Congressman Jefferson's membership on legislative committees and caucuses dealing with African trade to his alleged assistance to companies seeking to do business in Africa:

> As a Member of the United States House of Representatives and certain of its committees and caucuses, Defendant JEFFERSON discussed providing official assistance to constituent companies, including iGate and CW's companies, and businesspersons, including Vernon Jackson and CW, seeking to obtain and conduct business in west African nations, including Nigeria, Ghana, and Cameroon.

JA 32, ¶45; *see also* JA 54,¶145.

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

7. On September 7, 2007, defendant filed his Motion for Review of Grand Jury Materials and to Dismiss. JA 113-28. The motion requested that the defense be permitted to review the transcripts of the grand jury proceedings in this matter or, in the alternative, that the transcripts be reviewed by the trial court *in camera*, to determine whether information about Congressman Jefferson's legislative activities had been presented to the grand jury and relied upon by the government in obtaining the indictment. The motion also sought dismissal of all counts in the indictment obtained through the use of privileged legislative materials.

8. The motion contended that there was good reason to believe that the government had introduced evidence of Congressman Jefferson's privileged legislative activities to support its theory that he had developed specialized knowledge about African trade and influence with African leaders through those activities.

9. In addition to the language in the indictment, the motion pointed to the fact that current and former members of Congressman

Jefferson's legislative staff, including individuals who were knowledgeable about his legislative accomplishments involving trade, had been called to testify before the grand jury. Therefore, there was a danger that privileged Speech or Debate material had been presented in obtaining the indictment.

10. Furthermore, the discovery produced as of the motions date revealed that a key government witness – Brett Pfeffer, a former aide who entered a guilty plea with an agreement to cooperate – spoke extensively in conversations recorded by the government about Congressman Jefferson's legislative activities and the connection between those activities and the potential assistance Congressman Jefferson could offer to private businesses. JA 123-24. The defense argued that there was reason to believe that Pfeffer had presented similar testimony to the grand jury. It was also likely that some or all of his recorded conversations had been played to the grand jury.

11. After the motion to dismiss was filed, the government advised the defense that Brett Pfeffer did not testify before the grand jury and that none of his taped conversations had been played in the

grand jury.[2] JA 151. The government also offered to make transcripts of the staffers' grand jury testimony (but no others) available to the defense for review.

12. In the government's opposition to the motion, the prosecutors stated that they were "unaware of any privileged material being presented to the grand jury." JA 153. The government asserted that the staff members who testified were questioned only about "introductory and preliminary matters such as job title, job description, areas of specialty, which may have included areas of legislation they were assigned to cover." JA 150. It claimed that these "generic topics" had "nothing to do with Speech or Debate protected materials." *Id.*

13. But the review of the staffers' transcripts revealed that information relating to Congressman Jefferson's legislative activities *had* been provided to the grand jury. The evidence disclosed to the defense included testimony by legislative aides describing Mr.

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[2] The fact that Pfeffer did not appear before the grand jury did not alleviate the concern about his evidence. Because he was a cooperating witness, it was likely that Pfeffer's statements were presented to the grand jury through an FBI summary witness or the cooperating witness who was the other party to his conversations.

Jefferson's activities in Congress and, particularly, his work on a trade bill known as the African Growth and Opportunity Act ("AGOA"). JA 178-79, 181-83. The transcripts also included questioning by the prosecutors that directly linked this testimony to Congressman Jefferson's influence with African leaders – the influence that lies at the heart of the bribery schemes alleged in the indictment.

14. Lionel Collins, who served as Congressman Jefferson's chief of staff for a number of years, testified on May 8, 2006. The prosecutors asked a broad question inviting him to describe the Congressman's relationships with government officials in Nigeria. Collins described how the Congressman 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. . . .

JA 182.[3]

15. The prosecution immediately followed up on this testimony with questions about Congressman Jefferson's influence:

> 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.

JA 183.

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[3] Because the defense was not permitted to copy the staff member transcripts it reviewed, these quotations are taken from passages of testimony reproduced in the government's sur-reply.

16. Melvin Spence, a former senior policy analyst, was asked to address the same point:

> Q: Was Congressman Jefferson seen as a leader in a particular area of trade by constituents, as far as you know?
>
> A: Africa would be the closest thing. Like AGOA, the Africa Growth and Opportunity Act, which is a preferential trade bill.

JA 179.

17. In addition, the prosecution prefaced a question to Stephanie Butler, the head of Mr. Jefferson's New Orleans district office, as follows: "The Congressman, *through his activities in Congress*, has a special knowledge of West Africa, you know, countries in Subsaharan Africa, Gulf of Guinea area...." JA 178 (emphasis added).

18. Based on the introduction of this evidence of Congressman Jefferson's legislative activities and the express connection drawn between these activities and the influence that is the crux of the bribery schemes, the defense sought dismissal of all of the bribery-related counts in the indictment. In the alternative, Congressman 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.[4] The defense argued that this review should include not only transcripts of testimony, but also the prosecutors' colloquies with and instructions to the grand jury, to discover the extent to which the government had referred to the evidence of Congressman Jefferson's legislative activities when explaining the bribery counts or advocating for the return of the indictment.

19. By Order dated November 30, 2007, the trial court denied Congressman Jefferson's request to review the grand jury materials, but determined to review them itself *in camera*. JA 221.[5] 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.*

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[4] Such evidence could have been presented through sources other than the staff members themselves, including but not limited to the FBI agents or other summary witnesses.

[5] Despite some references in the record to a hearing on November 30, 2007, the court did not hear argument on the instant motion at that time.

20. The government subsequently made four *in camera*, under seal submissions to the trial court of grand jury transcripts and exhibits, but failed to include the prosecutors' arguments or instructions to the grand jury. *See* JA 340-42. With two minor exceptions, the defense has not been provided with access to any of the submitted materials.[6]

21. The district court heard argument on Congressman Jefferson's motion to dismiss on February 6, 2008. JA 228-286. During the argument, the government confirmed that it had provided the court with all of the witness transcripts (except for those initially provided to the defense for review) and also with the exhibits that had been presented to the grand jury, in the form of binders organized by

[6] During the process of gathering the transcripts for the court, the government discovered an additional staff member transcript, which it both submitted to the court and permitted the defense to review. In addition, on Sunday, January 20, 2008, after a four day hearing on motions to suppress evidence and statements had concluded, the government produced Jencks material consisting of the grand jury transcript of the lead case agent, who had been the chief witness during the hearing.

paragraph of the indictment. JA 230-31, 267-72. The trial court stated that it would make all of the papers part of the record. JA 272.

22. The defense reiterated its request that the court review not only witness testimony but also the government's arguments and instructions to the grand jury. The court asked the prosecutors, "Any reason why you couldn't deliver to my chambers in the next 30 minutes the instructions, the portion of the grand jury record that contains the instructions." JA 265-66. The prosecutors replied that they could not, because they had never ordered those portions of the record to be transcribed. JA 266. The court proceeded to rule on the motion nonetheless.

23. Ruling from the bench at the February 6, 2008 hearing, the district court denied Congressman Jefferson's motion to dismiss. JA 272-86. The court issued a written Order to that effect on the same date (JA 303), and followed with a Memorandum Opinion setting forth the reasons for the denial of the motion on February 13, 2008. JA 305-320.

24. Congressman Jefferson timely noticed an appeal from the district court's order denying his motion to dismiss. JA 321-23.[7]

SUMMARY OF THE ARGUMENT

The Speech or Debate Clause protects a Member of Congress from having to defend against an indictment that was procured through the use of privileged legislative materials. The question in this case is whether the bribery-related counts in the indictment should be dismissed because evidence of Congressman Jefferson's legislative activities was improperly presented to the grand jury. The district court's decision that the Clause was not infringed, and that dismissal of

[7] Congressman Jefferson subsequently moved to supplement the record on appeal with the staff member transcripts that had been provided to him for review but had not been included in the *in camera* submissions to the district court. JA 325-32. The government moved, under seal, to supplement the record with an additional grand jury transcript that, it asserted, had not previously been submitted to the district court due to an oversight. In his response to that motion, Congressman Jefferson requested that the prosecutors' arguments and instructions to the grand jury also be included in the record. By Order dated March 19, 2008, the trial court denied Congressman Jefferson's requests and granted the government's motion to supplement the record. JA 340-43.

the bribery-related counts was not required, was erroneous for the following reasons:

- The grand jury heard testimony about privileged legislative acts.
- The testimony was relevant to the bribery allegations, and the prosecutors made the connection explicit in the grand jury room.
- The problem was compounded by the additional evidence of the Congressman's membership on particular legislative committees and caucuses and the influence he gained thereby.
- The trial court's articulation of the legal standard to be applied in this case was wrong as a matter of law.
- The trial court erred in failing to examine the entire record of the grand jury proceedings.

Even from the limited portion of the grand jury record that the defense was allowed to see, it is clear that evidence of Congressman Jefferson's legislative activities was presented to the grand jury. It cannot be disputed – and the trial court found – that the grand jury heard express testimony about Congressman Jefferson's actions in support of the African Growth and Opportunity Act ("AGOA"), a major African trade bill. It also heard testimony connecting these activities to Congressman Jefferson's influence with African leaders.

Despite acknowledging that "a Member's role in passing legislation is the sort of legislative activity protected" by the Speech or Debate Clause, the trial court found that the Clause was not infringed here because the evidence was "neither material nor relevant to the criminal conduct alleged in the indictment." JA 319. But this conclusion ignores the fact that the testimony about Congressman Jefferson's legislative activities and the influence he derived from them is central to the bribery allegations in the indictment.

Congressman Jefferson is charged with participating in multiple bribe schemes in which he allegedly sold his influence with African officials to companies seeking to do business in Africa. The indictment does not allege that he solicited payment in exchange for a decision on any pending bill, for an earmark or appropriation, or for action in a congressional investigation. Instead, the government's entire case is premised upon an alleged use of influence in exchange for the promise

of something of value.[8] The government's own pleadings stress the centrality of this influence to the criminal charges. And, the government plainly told the grand jury that the particular influence in question was derived from specific, privileged legislative acts related to trade legislation involving Africa.

The grand jury was thus permitted to rely on these legislative activities in determining that the evidence supported the bribery charges pursued by the government. Requiring Congressman Jefferson to defend himself against criminal charges obtained through use of evidence of legislative activities violates the Speech or Debate Clause.

The government also used repeated references to Congressman Jefferson's service on the House Ways and Means subcommittee on trade, and his leadership of the Africa Trade and Investment Caucus and the Congressional Caucus on Nigeria, to demonstrate his influence in the area of African trade, which he allegedly sold as part of the

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[8] In other motions still pending before the trial court, Congressman Jefferson has moved to dismiss all of the bribery related counts for this failure to allege the "official act" that is an essential element of the offense. *See* 18 U.S.C. § 201(a).

bribery scheme. These committee and caucus memberships are specifically referenced in the indictment, and according to the trial court, the grand jury transcripts contain additional references to Congressman Jefferson's committee memberships. In the context of this case, these references go well beyond mere mentions of title or status. They compound the problem created by the testimony about AGOA by reinforcing the importance of Congressman Jefferson's influence and its connection to his legislative activities.

Even if this Court were to conclude that the excerpts of the grand jury record known to the defense do not require dismissal of the indictment at this time, that does not end the inquiry. Congressman Jefferson's right to be protected from criminal charges procured through use of Speech or Debate materials cannot be fully vindicated unless the grand jury record is analyzed properly and reviewed completely. This did not happen below because the trial court did not apply the proper standard, and because it did not review the entire record.

In its memorandum opinion denying the defendant's motion to dismiss, the district court described what it called the "lens" it used in its *in camera* review to determine whether privileged Speech or Debate

material was presented to the grand jury. But the district court's "lens" was too narrow, distorting the proper application of the Speech or Debate Clause to this case. The court looked only for whether legislative acts were themselves the subject of the charges in the indictment. *See* JA 319. But the proper inquiry was whether the evidence of legislative acts was relevant to the charges in the indictment. A review of the entire grand jury record using the correct legal standard is therefore required.

The district court also erred in failing to insist that the government produce the entire record before the grand jury, including the prosecutors' instructions and arguments to, and colloquy with, the grand jury. Accordingly, if the Court does not find that Congressman Jefferson's motion to dismiss should be granted at this time, it should remand this matter to the district court so that the complete grand jury record can be reviewed.

ARGUMENT

Standard of Review

Appellant's challenges to the trial court's interpretation and application of the Speech or Debate Clause are reviewed *de novo. See United States v. Swindall*, 971 F.2d 1531, 1543 (11th Cir. 1992) ("Review of Swindall's Speech or Debate claims is *de novo.*"); *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988)(scope of Speech or Debate immunity is a pure question of law reviewed *de novo*).

I. The Speech or Debate Clause Provides Absolute Protection To a Member of Congress against the Use in the Grand Jury of Evidence of Legislative Activities.

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. The purpose of the Clause is "to preserve the independence and thereby the integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 524 (1972). *Accord*, *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). The Clause "serves the additional function of reinforcing the separation of powers so deliberately established by the

Founders," *Eastland,* 421 U.S. at 502, since it was designed "to preserve the Constitutional structure of separate, co-equal, and independent branches of government." *United States v. Helstoski ("Helstoski I"),* 442 U.S. 477, 491 (1979). Where the Speech or Debate privilege applies, it is "absolute." *Eastland*, 421 U.S. at 509; *see also Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 and 418 (D.C. Cir. 1995).

The constitutional privilege gives legislators "wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel v. United States,* 408 U.S. 606, 616 (1972). The Clause was rooted in the struggle for parliamentary independence that marked the 16th and 17th centuries, during which "successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators." *United States v. Johnson,* 383 U.S. 169, 178 (1966). The Speech or Debate privilege "is one manifestation of the 'practical security' for ensuring the independence of the legislature," and was designed to protect legislators "against possible prosecution by an unfriendly executive and conviction by a hostile judiciary." *Johnson,* 383 U.S. at 179. *See also United States v. Rayburn House Office*

Building, 497 F.3d 654, 659 (D.C. Cir. 2007), *cert. den.*, 2008 WL 833305 (Mar. 31, 2008).

In order to accomplish these purposes, "the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525 (1972). The clause applies to all acts within the "legislative sphere." *Gravel*, 408 U.S. at 624-25. In addition to actual speech or debate in the House, it covers other matters "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." *Id.* at 625.

The Speech or Debate Clause protects Members from both criminal prosecutions and civil suits based on legislative activity. *See Eastland*, 421 U.S. at 502. It also protects a Member against introduction of evidence referring to legislative acts in any prosecution or action against him. The Supreme Court has it made clear:

> The Court's holdings in *United States v. Johnson* . . . and *United States v. Brewster* . . . leave no doubt that evidence of

> a legislative act of a Member may not be introduced by the Government in a prosecution under § 201.

United States v. Helstoski, 442 U.S. at 487. Convictions that are obtained with such evidence must be overturned. *See United States v. Dowdy*, 479 F.2d 213 (4th Cir. 1973).

But enforcing the Speech or Debate Clause involves more than overturning convictions tainted by the use of privileged evidence. The Clause protects a Member "not only from the consequences of litigation's results but also from the burden of defending [himself]." *United States v. Rostenkowski*, 59 F.3d 1291, 1297 (D.C. Cir. 1995), quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). *See also United States v. Helstoski*, 442 U.S. at 488. Accordingly, a Member cannot be tried on an indictment that relies on its face on Speech or Debate materials. And most importantly for the purposes of this case, a Member cannot be required to defend against an indictment that was procured through the presentation of privileged materials to the grand jury. *See United States v. Swindall*, 971 F.2d at 1547 (violation of Speech or Debate privilege before grand jury requires dismissal of indictment); *United States v. Helstoski ("Helstoski II")*, 635 F.2d 200 (3d Cir. 1980) (affirming dismissal of indictment where Speech or Debate

materials were presented to the grand jury). "Disclosing information on legislative acts subjects a Member of Congress 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. Durenberger*, 1993 WL 738477, *1 (D. Minn. Dec. 3, 1993), citing *Helstoski*, 442 U.S. at 489.

In order to vindicate a Congressman's right not to be forced to defend against an indictment procured through the use of Speech or Debate materials, the court may need to go beyond the face of the indictment and review the evidence that was presented to the grand jury:

> In order to fully secure th[e] purposes [of the Speech or Debate Clause], 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 the 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.

Rostenkowski, 59 F.3d at 1298. *See also Swindall*, 971 F.2d at 1547 ("A court will consider the evidence received by the grand jury . . . when what transpired before the grand jury itself violates a constitutional

privilege."); *Durenberger*, 1993 WL 738477, *1, 4-5 (*in camera* review of grand jury testimony and exhibits revealed that legislative committee reports had been presented).

The court in *Rostenkowski* stated that for a request for *in camera* review of grand jury materials to be granted, the defendant "must be able to provide, either from the allegations of the indictment or from some other source, *at least some reason* to believe that protected information was used to procure his indictment." 59 F.3d at 1313 (emphasis added). *Rostenkowski* sets a relatively low threshhold, and appropriately so given the importance of the constitutional right at issue, the difficulty of vindicating that right without review of the proceedings before the grand jury, and the defendant's lack of access to the grand jury record.[9]

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[9] In this case, based upon the matters set forth in the defendant's motion, the trial court ordered that the complete grand jury record be submitted to the court for *in camera* review. Yet after that review was completed, the trial court then stated in its order – without further explanation – that Congressman Jefferson had failed to make a showing warranting *in camera* review under the *Rostenkowski* standard. JA 310-11. This conclusion is not supported by the record. Congressman Jefferson provided more than sufficient grounds in his initial motion to give rise to "at least some reason" to believe that legislative material

Continued

In reviewing the proceedings before a grand jury to determine whether an indictment has been obtained by use of Speech or Debate material, the fundamental issue is whether the use of privileged material exposed the legislator to liability. *See United States v. Swindall*, 971 F.2d at 1548. The court in *Swindall* described the test as whether the legislative acts were *relevant* to the decision to indict: "If reference to a legislative act is irrelevant to the decision to indict, the improper reference has not subjected the member to criminal liability." *Id.* In *Swindall*, relevance was established by the government's admission that privileged evidence was an essential element of its proof on the challenged count. *Id.* at 1549.

But since relevance is the standard, it is not necessary for the legislative information to rise to the level of an "essential element" of

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had been presented to the grand jury. And his fears were borne out when the staffers' transcripts were revealed – the defense discovered grand jury testimony explicitly discussing legislative activities, and it presented that material to the court. Despite its erroneous comment that review of the grand jury transcripts was not warranted here, the trial court nevertheless went on to examine all of the grand jury materials submitted by the government, and it issued the opinion challenged in this appeal based on that examination.

the government's proof for use of legislative material to violate the Clause. Nor is the government's acknowledgment required. If privileged material was put before the grand jury, and it is "plausible" that the jurors relied upon the privileged material, then the Member has been exposed to liability on the basis of his legislative acts in violation of the Clause. *Durenberger*, 1993 WL 738477 at *2.

In *Durenberger,* the court found it necessary to dismiss the indictment for a Speech or Debate Clause violation because excerpts from legislative reports had been submitted as exhibits to the grand jury. It was conceivable that the grand jury never even saw the selected pages, but equally plausible that they had attached some significance to them. Stating that "no one . . . knows what weight, if any, the grand jury attached to the selected pages from the Reports," the court dismissed the indictment.[10]

Applying these standards, the bribery-related counts in the indictment in this case should have been dismissed.

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[10] See also *Rostenkowski,* 59 F.3d at 1298 (Speech or Debate Clause would be violated if the prosecutor inflamed the grand jury against a Member on the basis of his legislative acts).

II. The Limited Record Made Available to the Defense Demonstrates that the Grand Jury Heard Privileged Legislative Material in Support of the Bribery-Related Counts in the Indictment, So Those Counts Must Be Dismissed.

The defense was given access to a portion of the record before the grand jury: transcripts of the testimony of the current or former staff members of Congressman Jefferson. From that limited record it is evident that Congressman Jefferson has been exposed to liability based upon his legislative acts in violation of the Speech or Debate Clause. Neither the prosecution nor the court can quantify the harm that flowed from the introduction of privileged Speech or Debate material – live testimony about the Congressman's efforts to pass particular legislation – to the grand jury in this case. Given the clear relevance of the evidence to the charges, and the manner in which the prosecution has repeatedly tied the Congressman's legislative activities to the charges, it is likely – and certainly it is plausible – that the grand jurors took it into consideration. Therefore the bribery-related counts in the indictment should have been dismissed.

The trial court's ruling denying the motion to dismiss was based largely on two premises: (1) that the testimony provided by Lionel

Collins about privileged legislative acts was "neither material nor relevant" to the criminal charges against Congressman Jefferson (JA 319); and (2) that the remaining evidence pointed to by the defense related only to Congressman Jefferson's influence, knowledge and status, which are matters only "casually or incidentally related to legislative affairs" and therefore not protected by the Speech or Debate Clause. JA 315. These rulings misapply governing Speech or Debate precedent and ignore the critical role that the proof of Congressman Jefferson's legislative acts – and the influence he supposedly derived from those acts – plays in the government's case.

A. Lionel Collins's testimony directly tied Congressman Jefferson's legislative activities to the influence with African leaders that is at the heart of the bribery case.

Lionel Collins testified about Congressman Jefferson's involvement in the passage of the African Growth and Opportunity Act, a major trade bill. His testimony addressed Congressman Jefferson's support for the bill, his key role in obtaining its passage, and some of the methods he used in that legislative effort:

> 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 . . . . So as a result, Congressman Jefferson knew the leaders, the African leaders. . . .

JA 182.[11] A congressman's actions with respect to legislation fall squarely within the protection of the Speech or Debate Clause. *See Doe v. McMillan*, 412 U.S. 306, 312-13 (1973); *Gravel*, 408 U.S. at 625.

The government's very next question to Mr. Collins built upon this prohibited testimony to establish a connection between Congressman Jefferson's legislative activities and his influence with African officials:

> 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.

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[11] In its opposition to the Motion for Review of Grand Jury Materials and to Dismiss, the government represented that the former staff members did not testify about legislative matters, but only such preliminary matters as job title or job description. JA 153. The actual transcripts, however, flatly contradict the government's assurances.

> 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.

JA 183.

When presented with this clear record of the introduction of privileged material in the grand jury, the trial court acknowledged that "a Member's role in passing legislation is the sort of legislative activity protected by the Clause." JA 319. Nevertheless, the court found that the grand jury's receipt of this testimony was "no infringement of the Clause." The court stated:

> Collins's reference to defendant's role in securing passage of the [African Growth and Opportunities Act] is neither material nor relevant to the criminal conduct alleged in the indictment. Put differently, defendant is not being questioned in this proceeding about his vote or role in the AGOA legislation.

JA 319.

But this is not the correct standard. Although indicting the Congressman for his conduct in supporting AGOA would obviously be barred by the Clause, the Constitution's protections do not apply only when the charge against the Member is predicated narrowly on

legislative acts, such as when he is challenged for a particular vote. The question, rather, is whether the use of Speech or Debate material exposed the member to criminal liability – that is, whether the reference to the legislative act was relevant to the decision to indict. *See Swindall*, 971 F.2d at 1548. Thus, contrary to the trial court's view, the introduction of legislative material to the grand jury to support a charge violates the Constitution because it subjects the Member to the questioning barred by the Clause. *Durenberger*, 1993 WL 738477 at 1, citing *Helstoski*, 442 U.S. at 489.

The court was correct in its understanding that Speech or Debate evidence must be relevant to the grand jury's inquiry before it will necessitate a dismissal. But it was plainly wrong when it brushed away Mr. Collins's testimony about legislative acts by declaring it to be "neither material nor relevant to the criminal conduct alleged in the indictment."[12] Mr. Collins's testimony about privileged acts was directly

[12] Relevant evidence has been defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

relevant to facts of consequence to the grand jury because it connected the Congressman's legislative activities to his alleged influence with African officials – a central aspect of the case.

The importance of Congressman Jefferson's legislatively-derived influence to the theory of the prosecution is evident from both the indictment and the government's other pleadings. The indictment asserts that Mr. Jefferson, acting as a Member of Congress and a participant on committees and caucuses dealing with African trade, discussed providing assistance to companies seeking to do business in Africa. JA 32, 54, ¶¶ 45, 145. And it then asserts that the "official acts" Congressman Jefferson allegedly performed for the benefit of these companies included "conducting official travel to foreign countries and meeting with foreign government officials for the purpose of influencing those officials." JA 33, ¶ 49(a); *see also* JA 55, ¶ 149(a). This alleged use of influence is critical to the government's case – the bribery counts in the indictment allege no other sort of official act or decision at all.

The government demonstrated that Congressman Jefferson's influence in the area of African trade is central to its case in its motion papers as well. For example, in its opposition to Congressman

Jefferson's motion to dismiss the bribery counts for failure to allege the official acts necessary to the charge, the government stated:

> . . . Defendant Jefferson directly maintained influence by virtue of his status as a Member of Congress and various committee and caucus memberships. Ind. ¶¶ 1 and 3. These committee and caucus memberships, particularly his membership on the House Ways and Means Committee, Subcommittee on Trade, allowed him to exert tremendous influence over the ExIm Bank and USTDA, both of which are U.S. government credit agencies, as well as various foreign government officials in West Africa.

JA 138.

The government again emphasized the importance of Congressman Jefferson's alleged influence to its case when it explained in a pleading why it wanted to take the unusual step of calling Abner Mikva, a former Congressman and appellate judge, to the stand as an expert:

> [Mr.] Mikva is also expected to opine that membership in certain congressional committees and caucuses, such as the House Ways and Means Committee, its sub-committees, and various other committees and caucuses provides the Member with influence and access to various foreign government agencies and U.S. government agencies, including, but not limited to, the U.S. Department of State, U.S. Embassies and Consulates, the U.S. Army, the Export-Import Bank of the United States, and the United States Trade and Development Agency.

JA 212.[13] So, Lionel Collins's testimony about Congressman Jefferson's influence in Africa and how it grew out of his Speech or Debate activities was relevant to the core allegation in the case, and the trial court's attempt to minimize the significance of the testimony must be rejected.

The trial court offered several other reasons why the introduction of clear Speech or Debate material did not mandate dismissal of the indictment. First, citing *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994), the court stated that "a reference to a privileged activity does not render an indictment – or grand jury proceeding – constitutionally infirm, provided there are independent, non-privileged grounds sustaining the charges in the indictment." JA 319.

But this also misapplies the law, since the situation before the court was clearly distinguishable from that presented in *McDade.* The *McDade* court was considering whether two conspiracy counts in the indictment should be dismissed in their entirety because one of the

[13] Congressman Jefferson filed a motion to exclude the proffered opinion testimony of this witness on a number of grounds, including Speech or Debate. The motion is still pending in the trial court.

overt acts in each count arguably involved activity protected by the Speech or Debate Clause. The *McDade* court found that even if those individual overt acts were invalid, neither conspiracy count needed to be dismissed because both counts "allege numerous other overt acts, and an indictment under 18 U.S.C. § 371 need only allege one overt act." 28 F.3d at 300.

But this motion does not address a count that includes a list of factual allegations where only one is needed, so the Court cannot simply excise the problematic material and save the indictment. The Speech or Debate material was key evidence underlying the majority of the counts in the indictment. The indictment contains substantive bribery and honest services counts, the conspiracy counts allege an agreement to commit bribery, and the RICO count depends upon proof of bribery. The privileged legislative material goes to the heart of these bribery-related counts and was relevant to the grand jury's decision to return those counts. There is no way to separate the privileged evidence from other evidence heard by the grand jury, and the Court cannot go back in time and unring the bell. More important, the Court cannot construct a scenario under which it did not matter. The Speech or Debate material

was the evidence supporting the allegation of influence, and there would be no indictment without the influence.[14]

Second, the district court stated that Collins's testimony "did not result in any further inquiry into legislative activities by the Assistant United States Attorney or the grand jury." JA 319-20 (footnote omitted). This conclusion is legally and factually incorrect. The prosecutor immediately followed up on the testimony about Mr. Jefferson's legislative activities with questions about his influence with African officials – thereby tying those activities to the alleged bribery schemes.[15] Once the prosecutors had fully established the point with Lionel Collins, it was not necessary to repeat it. But in any event, they also

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[14] The Fourth Circuit's decision in *United States v. Johnson,* 419 F.2d 56 (4th Cir. 1969), is similarly distinguishable. The issue in *Johnson* was whether the retrial of counts that had nothing to do with legislative acts was barred due to alleged "bias" resulting from the grand jury's hearing testimony about legislative material. Here, the counts at issue all relate to the Speech or Debate material that was introduced in the grand jury. Consistent with *Johnson*, Congressman Jefferson has not moved to dismiss those counts unaffected by the Speech or Debate material.

[15] And neither the trial court nor the defense knows whether there were references to Mr. Collins's testimony in the prosecutors' colloquies with and instructions to the grand jury.

addressed the same issue when questioning Melvin Spence and Stephanie Butler.

As a legal matter, though, whether there was other testimony on this issue is not the dispositive question. An "inquiry" into a Member's legislative activities occurs when those activities are revealed to the grand jury and used to obtain the indictment. *See Swindall; see also Helstoski*, 442 U.S. at 490 ("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."). Once the prosecutors used legislative acts to advance their case, the Constitution was violated, and the counts obtained in that manner should have been dismissed.

The government stressed below that the grand jury only heard a small amount of Speech or Debate evidence. *See, e.g.*, JA 175, 177. But this assertion minimizes the importance of the evidence. This case does not present the situation where a brief foray into legislative matters was completely tangential to the issues before the grand jury. An aide did not happen to mention as an aside the Congressman's position on

an unrelated bill. Here, Collins's testimony connected Congressman Jefferson's legislative acts to the influence that is central to the government's entire bribery case. So it is of no moment that the grand jurors only heard the evidence once or twice or that the testimony did not take long to complete. There is no quantitative analysis under the Constitution; where the Speech or Debate Clause applies, its protections are absolute. *Eastland*, 421 U.S. at 509.

Finally, the government argued below that dismissal of the bribery-related counts was not warranted because the Speech or Debate evidence was volunteered by Collins and not elicited by the prosecution. The court adopted that characterization as additional grounds for denying the motion. JA 180-83; JA 319. But the prosecutors' conduct in the face of the testimony belies that contention. They did not interrupt Collins's lengthy narrative at any point or admonish him to avoid mention of legislative acts, nor did they issue a cautionary instruction to the grand jurors when the witness finished his answer. Instead they used the testimony as the predicate for their argumentative, follow-up questions. JA 183. Furthermore, the prosecutors had interviewed

Collins in advance of his testimony and had the opportunity to discover what responses he would provide to certain questions. *See* JA 201.

What's more, the prosecutors addressed the same point when questioning other staffers. For example, during the questioning of Stephanie Butler, it was the prosecutor, and not the witness, who stated "[t]he Congressman, *through his activities in Congress,* has a special knowledge of West Africa." JA 178 (emphasis added). But in the end, the issue of whether the prohibited evidence was elicited by the prosecutors or offered by the witness is of little legal moment. The question before the court was whether the grand jury heard testimony about legislative activities, and whether that testimony was relevant to the charges and the theory of prosecution.

The testimony the grand jury heard connected Congressman Jefferson's alleged influence not only to his elected position and the fact of his committee assignments, but also to specific legislative acts that clearly fall within the protection of the Clause. In *Durenberger,* dismissal of the indictment was predicated on the introduction of just an exhibit, even though it was unclear if any of the jurors had even read it. But all of the grand jurors present on May 8, 2006 heard Lionel

Collins. And the subject matter of his testimony was directly relevant to the prosecution. Thus, one cannot conclude that the grand jury did not rely on the evidence of legislative acts when it considered the bribery charges against Congressman Jefferson. The district court's ruling that the evidence of legislative activity was "neither material nor relevant" to the charges in the indictment cannot be reconciled with the theory of the prosecution as described in the indictment, in government's pre-trial briefs, and in the government's proffer of the expert testimony it wants to use to advance the bribery counts. Under these circumstances, the Constitution mandates that the bribery-related counts of the indictment be dismissed.

B. The repeated references to Mr. Jefferson's committee membership and the testimony of other staffers compounded the violation of the Clause.

For the reasons set forth above, the Collins testimony is a sufficient violation of the Speech or Debate Clause to require dismissal of the bribery-related counts in the indictment. Further, the government compounded this violation with other evidence presented to the grand jury.

First, as the trial court found, "the grand jury materials submitted for review do contain references to defendant's status as a congressman and as a member of various congressional committees."[16] JA 316. Citing *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994), the trial court dismissed this evidence as mere references to status that posed no Speech or Debate problems. But in reaching this conclusion, the court misread *McDade* as providing blanket approval for any mention of a Congressman's committee or caucus memberships, and failed to properly analyze the government's use of the Congressman's status here. In fact, *McDade's* discussion of the opinion in *United States v. Swindall* indicates that evidence of a Congressman's status may violate the Clause if it used for an improper purpose.

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[16] Because the defense was not permitted to review the grand jury transcripts, and because the trial court also did not grant the defense's request that it be permitted to see excerpts of testimony that contained any potential Speech or Debate material, Congressman Jefferson has no knowledge of the number, nature, level of detail and specificity, or context of the references mentioned by the district court, and he cannot direct this Court's attention to any particular portion of the record. Therefore, he submits that this Court must review the transcripts so that it has this information available as it considers this appeal.

Swindall concerned the prosecution of a former congressman for committing perjury in grand jury testimony relating to his knowledge of the illegality of money laundering transactions. 971 F.2d at 1539. In the grand jury, the government questioned Swindall about his membership on the House Banking and Judiciary Committees and his knowledge of money-laundering statutes. The trial court permitted the government to introduce evidence of Swindall's committee memberships at trial, and to argue the inference that as a result of those memberships, Swindall had knowledge of the contents of the money laundering bills and should have known that the transactions he was involved in were illegal. 971 F.2d at 1540.

On appeal, the Eleventh Circuit held that the references to Swindall's committee memberships in the grand jury and at trial were constitutionally impermissible. First, the court stated that the Speech or Debate privilege "protects legislative status as well as legislative acts." 971 F.2d at 1543. Second, the court found on the facts before it that "the government's inquiry into Swindall's committee memberships actually amounted to an inquiry into legislative acts." *Id*. As the court explained,

> The government was allowed to argue a permissive inference that Swindall knew the details of the money-laundering statutes because of his status as a member of the Banking and Judiciary Committees. If the inference is drawn that Swindall acquired knowledge of the statutes *through* his committee memberships, one sees that Swindall could have acquired such knowledge *only* by performing a legislative act such as reading a committee report or talking to a member of his staff.

Id. (emphasis in original). The court further found that allowing inquiry into a Congressman's committee memberships for the purpose of demonstrating personal knowledge of bills would impede the legislative process and violate the Speech or Debate Clause. 971 F.2d at 1545.

In *McDade*, the defendant relied on *Swindall* in moving to dismiss his indictment, complaining that it referred to his committee memberships. The Third Circuit concluded that *Swindall* did not prohibit all references to legislative status in the grand jury, and noted that it would not agree with such a holding. 28 F.3d at 292-94. But *McDade* did not reject the second prong of *Swindall*: that some references to committee memberships may be prohibited by the Speech or Debate Clause depending on their purpose. *Id.* at 292-93. The court in *McDade* analyzed the indictment's reliance on the defendant's committee memberships, and concluded that the Clause had not been

violated because the references there had not been used to give evidentiary significance to his legislative acts. 28 F.3d at 293.

Here, the government has asserted that Congressman Jefferson's participation on certain committees was the source of his influence: "[T]he government's theory is that Defendant Jefferson had influence with both U.S. and foreign government officials because of his status as a Member of Congress and its various committees and caucuses." JA 184. In the grand jury, the government established that the Congressman's influence derived from specific legislative activities relating to African trade, which is the area of focus of the very committees and caucuses identified by the government. So here, every reference to the influence Congressman Jefferson derived from membership on the Ways and Means trade subcommittee, the Africa Trade and Investment Caucus, or the Congressional Caucus on Nigeria reinforced the Speech or Debate evidence connecting his influence to his legislative acts, and re-emphasized the relevance of his influence to the bribery charges.

The government may assert that its references to Congressman Jefferson's committee and caucus memberships have no relation to the

substantive work of those bodies, but this claim rings hollow in the context of this case. When the government asserts in its opposition to the motion to dismiss the bribery counts that the Congressman's membership on a specific committee "particularly" allowed him to exert "tremendous" influence, JA 138, it is no longer simply making note of the Member's mere status as a committee member. What was it about serving on the Ways and Means committee or the trade caucus that "particularly" increased Congressman Jefferson's influence? It was not the committee's title – it was the substance of its legislative activities.

This is also evident from the government's description of the expert testimony it hopes to offer from a former Member of Congress:

> [Mr.] Mikva is also expected to opine that *membership in certain congressional committees and caucuses*, such as the House Ways and Means Committee ... *provides the Member with influence* and access to various foreign government agencies and U.S. government agencies ....

JA 212 (emphasis added). The government's thesis that membership in "certain" committees gives rise to particular influence can only be based upon the activities undertaken by those committees – that is, the legislation it was their responsibility to consider. When the government emphasizes Congressman Jefferson's particular committee activities to

advance the prosecution in this way, it reveals a purpose different from that deemed acceptable in *McDade*. Coupled with the explicit evidence of legislative acts, the repeated mention of "certain" committees enables the grand jury to draw an impermissible evidentiary inference from those acts.

In this case the Court is not being asked to find that the references to Congressman Jefferson's committee and caucus memberships alone constituted the violation of the Speech or Debate Clause, and for that reason the result in *McDade* is not controlling. There is an additional, critical difference between the instant case and *McDade*: the testimony of Lionel Collins. In this case, the grand jury heard live testimony about specific legislative activities undertaken by Congressman Jefferson relating to African trade, and – as the result of specific questions posed by the prosecution – it heard testimony connecting those activities to Mr. Jefferson's influence with African leaders. The government's repeated references to his status compounded the problem caused by this testimony by re-emphasizing the importance of his influence and its relevance to the bribery allegations.

Furthermore, there are other instances of Speech or Debate evidence in the record. The prosecutor tried to encourage staff member Stephanie Butler to expound on the same topic explored with Lionel Collins by prefacing a question to her as follows: "The congressman, *through his activities in Congress, has a special knowledge of West Africa*, you know, countries in Subsaharan Africa, Gulf of Guinea area." JA 178 (emphasis added).

The trial court said that this did not violate the Speech or Debate Clause because it related only to defendant's "influence and status," and also because "[n]othing in the question or the witness's answer required the grand jury to inquire into defendant's involvement in the consideration and passage or rejection of any legislation." JA 317. This analysis fails because it turns upon the trial court's narrow and mistaken application of the Speech or Debate Clause. In addition, it ignores the plain language of the prosecutor's question, which points the witness to Congressman Jefferson's "activities" in Congress – that is, his legislative acts – and not his job title when reminding the grand jurors of his "special knowledge" of Africa. Furthermore, it was

necessary for the court to consider the excerpt in connection with the other evidence and not simply in isolation.

The prosecutors also took Melvin Spence, Congressman Jefferson's former Senior Policy advisor, down the same road.

> Q: Was Congressman Jefferson seen as a leader in a particular area of trade by constituents, as far as you know?
>
> A: Africa would be the closest thing. Like AGOA, the African Growth and Opportunity Act, which is a preferential trade bill.

JA 179.

In discussing this testimony, the trial court expressed the exaggerated concern that enforcing the Speech or Debate Clause as the defense requested would allow crime to flourish on Capitol Hill. The court asserted that since "[a]ll of a Member's expertise, influence and even status derive, ultimately, from his or her legislative acts," finding that references to status, influence or expertise were references to legislative acts would effectively immunize congressman from scrutiny for any activity during their term in office. JA 318-19.

But of course this is not so. As discussed above, this case does not involve merely generalized references to status and influence. Moreover, nothing that the defense has argued would prevent the

government from bringing otherwise permissible prosecutions against Members of Congress for bribery, political corruption or any other crimes. The only issue is what proof the government may introduce in support of its case. As the Third Circuit remarked in *United States v. Helstoski*:

> Observance of this rule will not foreclose indictments for illegal conduct beyond the scope of the [S]peech or [D]ebate [C]lause. All that is required is that in presenting material to the grand jury the prosecutor uphold the Constitution and refrain from introducing evidence of past legislative acts or the motivation for performing them.

635 F.2d at 206.

In this case, the government did not heed this proscription. The grand jury heard evidence of Congressman Jefferson's past legislative acts, and evidence linking those acts to his influence – influence which is indisputably relevant to the bribery charges in the indictment. And the problem was compounded by the references to his membership on particular committees and caucuses dealing with African trade and the influence he derived thereby, as well as by the testimony of other staffers who appeared before the grand jury.

As the court found in *Swindall*, it would interfere with the legislative process if Members had to be concerned that their actions

with respect to specific bills could be used to obtain indictments against them. Because the grand jury here was permitted to rely on evidence linking Congressman Jefferson's legislative actions and the influence he allegedly sold in the bribery schemes, he is now in the position of having to defend against charges that were obtained in reliance on his conduct as a legislator. This is precisely the situation that the Speech or Debate Clause forbids. Accordingly, this Court should reverse the decision below and order the dismissal of the bribery-related counts in the indictment.

III. The District Court Applied An Erroneous Legal Standard When Reviewing *In Camera* Other Portions Of The Grand Jury Record.

The record in this case includes transcripts of all the witnesses who appeared before the grand jury and whose testimony was not made available to the defense.[17] The district court reviewed *in camera* those witness transcripts, as well as grand jury exhibits; the defense has not seen that part of the record.

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[17] The defense's motion to supplement the record with the staff member transcripts was denied. JA 341-42.

The district court stated that its *in camera* review "disclose[d] no infringement of the Speech or Debate Clause in the issuance of the indictment." JA 315. In its Memorandum Opinion the district court described its view of the Speech or Debate Clause in order to define the "lens" through which it conducted the *in camera* inspection. JA 311. But because it was using an incorrect lens, one that was too narrowly focused, the district court's review of the grand jury record was distorted so that it may not have seen infringing material.

The district court expressed the view that if the defendant is not being questioned in this proceeding about his role or vote in particular legislation, then the evidence of legislative acts is "neither material nor relevant" and so there is no infringement. JA 319. This reflects a misreading of Speech or Debate principles, as well as a misunderstanding of the relevance of the legislative activity that was indisputably put before the grand jury. As described above, the indictment itself, the government's own pretrial briefs, and its proffered expert testimony leave no doubt about the relevance of that evidence to the theory of prosecution.

Similarly, in defining its "lens" the district court drew a sharp distinction between legislative acts within the privilege and acts "casually or incidentally related to legislative affairs but not part of the legislative process itself." JA 315 (quoting *Brewster*, 408 U.S. at 528). The court therefore reviewed the grand jury materials "with an eye toward detecting whether activities integral to defendant's participation in the consideration and passage of legislation played a role in obtaining the indictment." JA 315.

But the court ignored the clear statement in *Brewster* that the Clause prohibits inquiry into "the motivation for legislative acts" as well as legislative acts themselves. 408 U.S. at 512. Moreover, the court's reference to activities integral to legislation appears to be a paraphrase of language from *Gravel v. United States*, 408 U.S. 606, which actually has a more expansive scope:

> Insofar as the Clause is construed to reach other matters [beyond speech or debate], they must be 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.

408 U.S. at 625. In applying this standard, courts have recognized that the Clause covers investigations and information gathering, both formal and informal, as well as the more obvious legislative acts of drafting legislation and voting. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d at 420; *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976).

There is reason to believe that the trial court's adoption of this narrow view of the Speech or Debate Clause led it to miss legislative material in the record. Although defendant cannot point to examples from the transcripts he has not seen, the trial court's discussion of the testimony from the former Senior Policy Advisor, Melvin Spence (JA 179), is instructive. While Spence explicitly referred to legislative acts in his testimony, the court concluded that "Spence's reference to the AGOA was not a reference to defendant's involvement in the consideration and passage of the Act" – in other words, it was not Speech or Debate material as defined by the court. JA 318. Using its "lens," the trial court incorrectly concluded that this testimony relating to the Congressman's leadership on specific African trade legislation did not even raise Speech or Debate concerns. There is no way to know

what other evidence of legislation or legislative activities was similarly incorrectly ignored by the trial court. And although the court found that the grand jury materials did "contain references to defendant's status as a congressman and as a member of various congressional committees," it did not (other than mentioning a biography of Congressman Jefferson reprinted from website) describe the number, nature or context of these references, making their true import virtually impossible to determine. *See* JA 316.

Because the defense has not seen the transcripts, it cannot point this Court to any other errors or omissions in the trial court's findings. Accordingly, Congressman Jefferson respectfully submits that this Court should review all of the grand jury materials filed by the government with the district court and then assess the district court's conclusions regarding that material. If the Court does not go through this process, the trial court's conclusions regarding the critical constitutional issues at the heart of this appeal will be subject to no review at all. Should this Court determine that the transcripts contain potential Speech or Debate material that was not identified by the trial court in its Memorandum Opinion, the defense respectfully requests the

opportunity to review the relevant excerpts and submit supplemental briefing on their impact.

IV. The Trial Court Erred By Denying Mr. Jefferson's Motion To Dismiss Without Reviewing The Prosecution's Instructions And Argument To The Grand Jury.

In response to Congressman Jefferson's motion to dismiss, the trial 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." JA 221. The government made four piecemeal *in camera* submissions and a supplemental submission after the court had already ruled. But the government's production, and hence the record before this Court, fell short of what the district court had ordered to be produced. Rather than submit the entire record before the grand jury, the government simply provided exhibits and transcripts of witness testimony. The government did not provide the court with the prosecutors' colloquies with and instructions to the grand jury, despite the fact that the motion had urged that such material should be part of the record reviewed.

At the hearing on defendant's motion to dismiss, the defense reiterated its position that review of the grand jury record would not be

complete unless the prosecutors' arguments and instructions to the grand jury were included.[18] The court then asked the government if the missing transcripts could be provided to the court within 30 minutes. The government replied that it could not do so because it had never ordered that those portions of the record be transcribed. JA 265-66.

In its ruling from the bench, the trial court stated:

> I am sensitive to the fact that you have asked for the charge – the instructions, and that they don't have those, and that they haven't submitted those.
>
> I will note that, and you can make whatever you think you need make of that.

JA 288. In its opinion, the trial court noted again that the government had not submitted "the Assistant United States Attorney's instructions and arguments to the grand jury." JA 311 n.7. Nevertheless, the court went on to consider whether Speech or Debate activities "played a role in obtaining the indictment." JA 315.

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[18] *See* Fed. R. Crim. P. 6(e)(1) ("Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. … [A]n attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.")

Under *Rostenkowski*, Congressman Jefferson was entitled to have the entire grand jury record examined, at least by the court *in camera,* to determine if it contained privileged legislative material. The district court was therefore correct to order, as it did on November 30, the production of everything that had not yet been disclosed to the defense. Although the district court determined – after it conducted its review – that Mr. Jefferson had not met the *Rostenkowski* standard, that conclusion is erroneous for the reasons set forth above. And without the government's arguments and instructions, the review mandated by *Rostenkowski* and ostensibly undertaken by the trial court was inadequate and incomplete.[19]

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[19] Congressman Jefferson submits that, as with the other issues in this appeal, a *de novo* standard of review applies to the Constitutional question of whether the Clause required the trial court to review the prosecutors' arguments and instructions to the grand jury before ruling on the motion to dismiss. Even if an abuse of discretion standard were to apply, *cf. United States v. Zolin*, 491 U.S. 554, 572 (1989), this Court should find that the trial court abused its discretion in declining to review these materials simply because they could not be provided to the court on the afternoon of the motions hearing. JA 265-66. *See generally United States v. Mason*, 52 F.3d 1286, 1289-90 (4th Cir. 1995) (question is whether the trial court's action, considering the law and the facts, was arbitrary and capricious; among other things, applying erroneous legal principles is an abuse of discretion).

The limited record that was made available to the defense revealed that privileged Speech or Debate material was improperly put before the grand jury, so the court's conclusion to the contrary can be reversed on the existing record. But the record was necessarily inadequate for the district court to declare the negative, i.e., that nothing occurred before the grand jury that infringed the Speech or Debate Clause. The determination whether legislative acts "played a role," *see* JA 315, could only be made based on the entire grand jury record. The court's categorical statement that Collins's testimony "did not result in any further inquiry into legislative activities by the Assistant United States Attorney or the grand jury," JA 319-20, lacks a proper foundation absent a review of the entire record.

Thus the court erred in accepting less than what it ordered and then making its decision based on an incomplete record. The prosecutors' colloquies with the grand jurors – the arguments, instructions, and questions and answers – could very well have included additional Speech or Debate material. The testimony of Lionel Collins, the importance of that testimony, and the statements made by Brett Pfeffer while he was being secretly recorded during the undercover

portion of the investigation all combine to make that likely. The trial court could not fairly conclude that the Clause was not infringed without knowing the full scope of the violation.

In addition, a critical question before the district court was whether the known Speech or Debate evidence was relevant to the grand jury's decision to return the bribery-related counts of the indictment. It is undisputed that evidence of specific legislative acts relating to the passage of the African Growth and Opportunity Act was presented to the grand jury. While the court deemed it immaterial and irrelevant, the prosecutors emphasized this work along with Congressman Jefferson's membership on particular committees in discussing the influence he developed thereby. Whether and how the prosecutors referred to these matters in their discussions with the grand jurors may have brought the relevance of this legislative activity to the counts in the indictment into sharper focus for the district court .

The only reason for the trial court's failure to review the prosecutors' arguments and instructions to the grand jury is that they were not transcribed and therefore not available when the district court was ready to rule on the motion. JA 311 n.7. But the government never

asserted that these portions of the proceedings could not be obtained. The trial court's failure to insist upon a complete review of the grand jury proceedings, including the prosecutors' arguments and instructions to the grand jury, improperly denied Congressman Jefferson the protections to which he is entitled under the Speech or Debate Clause of the Constitution. Accordingly, if this Court does not agree that the bribery-related counts should be dismissed on the existing record, it should remand this case to the trial court so that the remaining portions of the grand jury record can be considered.

CONCLUSION

For the reasons set forth above, Congressman William J. Jefferson respectfully submits that the district court's Order of February 6, 2008 should be reversed, and that Counts 1-10, 12-14 and 16 of the indictment should be dismissed. If the Court determines that these counts cannot be dismissed on the basis of the existing record, then it should reverse the trial court's order and remand this matter so that the remainder of the grand jury record – the prosecutors' colloquies with and instructions to the grand jury – can be reviewed for Speech or Debate material.

REQUEST FOR ORAL ARGUMENT

William J. Jefferson respectfully requests that this Court hear oral argument in this case. This appeal raises serious Constitutional issues regarding the application of the Speech or Debate Clause to the indictment of a Member of Congress.

Respectfully submitted,

/s/ Robert P. Trout

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CERTIFICATE OF COMPLIANCE

In accordance with Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure, the undersigned counsel for appellant certifies that the accompanying brief is printed in 14 point typeface, with serifs, and, including footnotes, contains no more than 14,000 words. According to the word-processing system used to prepare the brief, Microsoft Word, it contains 12,636 words.

/s/ Robert P. Trout

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Robert P. Trout

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2008, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF System which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on May 9, 2008, eight paper copies of the brief were manually filed with the Clerk of the Court by United Parcel Service overnight delivery.

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