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

PETITION FOR REHEARING *EN BANC*

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STATEMENT REQUIRED BY RULE 35(b)

Rehearing *en banc* is warranted because this case involves a question of exceptional importance. The panel's holding that a Member of Congress cannot challenge the prosecution's use of evidence of privileged Speech or Debate activities in the grand jury dramatically curtails the absolute protection the Speech or Debate Clause was designed to provide, and is in direct conflict with decisions of other circuits that have addressed the issue.

The Speech or Debate Clause prohibits the use of evidence of legislative acts in a prosecution against a Member. *See United States v. Helstoski*, 442 U.S. 477, 487 (1979). The Clause is designed to protect 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); and indictments as well as convictions may be challenged based on Speech or Debate violations. *See Helstoski v. Meanor*, 442 U.S. 500, 508 (1979).

In this case, Congressman Jefferson moved to dismiss 14 of the 16 counts in the indictment against him because Speech or Debate material relevant to those counts was introduced in the grand jury. The panel relied on *United States v. Costello*, 350 U.S. 359 (1956), a case involving a Fifth Amendment challenge to the use of hearsay in the grand jury, in affirming the trial court's denial of the motion to dismiss. It concluded that as long as an indictment was facially valid, it

was not subject to dismissal simply because the grand jury had been presented with evidence that contravened the Speech or Debate privilege. *United States v. Jefferson*, 2008 WL 4868411, *10 (4th Cir. November 12, 2008).

The panel decision is in direct conflict with the decision of the D.C. Circuit in *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), as well as with the decisions of the Eleventh Circuit in *United States v. Swindall*, 971 F.2d 1531 (1992), and the Third Circuit in *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980). These cases hold that a court may go behind an indictment and examine the evidence presented to a grand jury to determine whether the Speech or Debate Clause has been violated. *See Rostenkowski*, 59 F.3d at 1298; *Swindall*, 971 F.2d at 1548-49; *Helstoski*, 635 F.2d at 205.

These decisions, and not the decision of the panel, appropriately apply the Speech or Debate Clause in the grand jury setting. *Costello* and similar cases that do not address the unique purposes of the Speech or Debate Clause cannot control a challenge to the use of Speech or Debate material in the grand jury. The panel's holding leaves the government free to use privileged evidence to obtain the indictment of a Member of Congress and to put the Member to the burden of defense – in direct violation of the Clause.

This Court should grant rehearing *en banc* to address the important constitutional issue of the scope of the protection afforded to a legislator by the

Speech or Debate Clause, and to fully consider Congressman Jefferson's challenge to the evidence heard by the grand jury in this case. Moreover, to the extent that *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), is deemed to have controlled the panel decision, *en banc* review is particularly appropriate for it will allow the full court to address the Speech or Debate issues in this case in light of the subsequent analysis by other circuits.

BACKGROUND

On June 4, 2007, a grand jury in the Eastern District of Virginia returned a 16-count indictment against Congressman Jefferson. Fourteen of the sixteen counts in the indictment – Counts 1-10, 12-14 and 16 – 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.

In response to Congressman Jefferson's motion for disclosure of grand jury materials and for dismissal of all counts in the indictment affected by the use of privileged materials, the government permitted defense counsel to review the grand jury testimony of Mr. Jefferson's current and former staffers. This review revealed that evidence of Mr. Jefferson's participation – indeed, leadership – in the consideration and passage of legislation was in fact presented to the grand jury. Moreover, because the privileged material was introduced for the purpose of

demonstrating Mr. Jefferson's influence with African leaders, it was quite clearly tied to the bribery-related counts.

Specifically, upon being asked about Mr. Jefferson's relationship with African leaders, Lionel Collins, a former member of Congressman Jefferson's staff, testified in the grand jury about the Congressman's involvement in the passage of the African Growth and Opportunity Act ("AGOA"), a major trade bill:

> 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.

The prosecution immediately followed up on this testimony with questions designed to emphasize the 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.
>
> 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.

Establishing that Congressman Jefferson actually had valuable influence in Africa directly supported the government's theory that the transactions at issue before the grand jury were corrupt bribe schemes involving the sale of influence, rather than legitimate business activities. The defense argued that the government's use of privileged legislative evidence to demonstrate this point was a clear violation of the Speech or Debate Clause warranting dismissal of the 14 bribery-related counts in the indictment.[1]

After reviewing the remaining transcripts of grand jury testimony – but not the prosecutors' arguments to and colloquies with the grand jury – the trial court denied the motion to dismiss, finding that nothing that had occurred in the grand jury "constituted an infringement of the Speech or Debate Clause that would require dismissal of the indictment." *United States v. Jefferson*, 534 F. Supp.2d 645, 654 (E.D. Va. 2008). On appeal, the panel affirmed the trial court's holding, but in doing so, it declined to address whether the introduction of the Collins testimony violated the Speech or Debate Clause. Instead, it held that it was barred

[1] The panel's assertion that there was "some ambiguity" as to which counts Mr. Jefferson sought to dismiss, 2008 WL 4868411, at *7 n.6, is mistaken. Mr. Jefferson specifically identified the counts at issue in his pleadings in the district court, as well as in his brief and reply brief in this court. *See* JA 162, 168, 208, 321; Brief at 64; Reply Brief at 20 n.10, 35.

from going behind the indictment to examine the evidence presented to the grand jury.

ARGUMENT

A. The Panel Decision Is In Direct Conflict with the Decisions of Other Circuits.

The panel's conclusion that a Member of Congress is not entitled to challenge the use of Speech or Debate evidence in the grand jury is in direct conflict with the decisions in *Rostenkowski*, *Helstoski*, and *Swindall*.[2]

United States v. Rostenkowski, 59 F.3d 1291 (D.C. Cir. 1995), involved, *inter alia*, 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." 59 F.3d at 1297. 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.* Basing its analysis on the purposes of the Clause – to protect legislators from intimidation

[2] The panel addressed *Rostenkowski* and *Helstoski* only in a footnote, stating that those decisions noted that "pervasive violations" of the Clause in the grand jury might invalidate an indictment, but that there was no allegation of a pervasive violation here. 2008 WL 4868411, at *11 n. 8.

and to prevent them from being distracted or hindered in carrying out their legislative tasks – the court held that it did. *Id.*

In reaching this conclusion, the *Rostenkowski* court carefully examined both *Costello* and *United States v. Calandra*, 414 U.S. 338, 344-45 (1974) (holding that the Fourth Amendment exclusionary rule does not apply in the grand jury), another decision relied on by the panel here. The D.C. Circuit held that the general rule regarding facially-valid indictments 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." 59 F.3d at 1298. The court 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).

Although *Rostenkowski* ultimately determined that review of the grand jury materials was not warranted by the proof in that case, 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 material, stand in direct contrast to the panel decision here.

The panel decision also conflicts with the Third Circuit's decision in *Helstoski*, which found that an indictment based on violations of the Speech or Debate Clause before the grand jury could not survive. 635 F.2d at 205. The *Helstoski* court 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." 635 F.2d at 204. Finally, the court emphasized the importance of protecting Speech or Debate rights at the grand jury stage. 635 F.2d at 205.

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 panel described *Swindall* as focusing on the use of evidence of legislative activities at trial. 2008 WL 4868411, at *9. But the Eleventh Circuit in *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 the *Swindall* court found that the use of privileged legislative evidence that is relevant to the decision to indict is a violation of the Clause and grounds for dismissing an indictment. *See* 971 F.2d at 1547-48.

The approach taken by the courts in *Rostenkowski*, *Helstoski* and *Swindall* flows directly from Supreme Court case law concerning the Speech or Debate Clause, and is bolstered by *Helstoski v. Meanor*, in which the Court held that a Congressman may take an immediate, direct appeal from the denial of a motion to dismiss an indictment on the ground that the grand jury had improperly heard evidence of legislative acts. 442 U.S. at 506-07. The Court concluded 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 the Court did not reach the question of the validity of the indictment in that case, its holding recognizes that a claim that the Speech or Debate Clause has been violated in the grand jury must be analyzed in light of the unique purposes of that 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 the rule of *Costello* and *Calandra.*

Thus, given the clear conflict between the panel decision and the decisions of the D.C. Circuit, the Third Circuit and the Eleventh Circuit, *en banc* review is

warranted so that this court can address the scope of the protection afforded to a Member of Congress by the Speech or Debate Clause at the grand jury stage, and fully consider, as the panel did not, whether the Clause was violated in this case.

Mr. Jefferson further notes that the panel decision cited *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), as controlling precedent. *Johnson* involved a multi-count indictment in which some counts were based on a speech made in Congress. After the speech-related counts were dismissed, Johnson challenged the remaining counts on the ground that the grand jury had heard 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 unspecific claim that the grand jury was biased because it had heard evidence of his speech. *Id.*

The defense does not agree that *Johnson* is controlling in this case. Congressman Jefferson has not asserted bias as grounds for dismissing any of the charges against him. And importantly, the counts that Johnson sought to dismiss "had nothing to do with his speech." 419 F.2d at 58. Here, by contrast, the evidence that Congressman Jefferson's legislative activities were the source of his influence in Africa was directly relevant to the 14 bribery-related counts in the indictment.

Consistent with *Johnson*, Mr. Jefferson has never sought dismissal of the two counts that have nothing to do with the improperly admitted legislative activities. If *Johnson* is deemed to have controlled the panel decision, it is appropriate for the court to rehear this case *en banc* to re-examine *Johnson*, which was decided before *Rostenkowski, Helstoski*, *Swindall*, and *Helstoski v. Meanor*.

B. The Panel Decision Failed to Address the Critical Constitutional Question Raised by the Motion to Dismiss.

As the Supreme Court has emphasized, where the Speech or Debate privilege applies, it is "absolute." *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 509 (1975). Use of privileged information against a Member is an infringement of the Clause. "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 491.

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 Congressman Jefferson's support for AGOA, his key role in obtaining its passage, and some of the methods he used in that effort, activities that fall directly within the "legislative sphere." *See Gravel v. United States*, 408 U.S. 606, 624-25 (1972). As a result of its reliance on *Costello*, however, the panel never reached Mr. Jefferson's argument that this evidence was

directly relevant to the government's theory of the bribery counts, and was used by the government to advance its case in obtaining the return of the bribery-related counts in the indictment in violation of the Clause.

The bribery charges against Congressman Jefferson are predicated on the alleged use of his influence to get other people – mostly African government officials – to assist various businesses, in return for things of value. That is unmistakable from the district court's description of the seven alleged bribery schemes, a description that was adopted by the panel. The common *quid pro quo* explicitly described in these alleged schemes was Mr. Jefferson's meeting with African government officials to promote certain private business interests. *See* 2008 WL 4868411, at *1-2. The government, moreover, has repeatedly described this case as one involving the sale of influence. For example, during the hearing on this motion in the trial court, the government argued that dismissing the instant 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." JA 265. In its opposition to Congressman Jefferson's motion to dismiss the bribery counts for failure to allege any official acts, the government insisted that its allegations made out a bribery case specifically because they charged a sale of influence. *See* JA 133. Collins' testimony concerning Congressman Jefferson's

influence was directly related to this effort to establish an essential element of the offense as the prosecution conceived it.

As the Eleventh Circuit appropriately recognized in *Swindall*, the "Speech or Debate privilege is violated if the Speech or Debate material exposes the member to liability." 971 F.2d at 1548. This is precisely what occurred here. The grand jury heard testimony that Congressman Jefferson had substantial influence in Africa as a direct result of his activities in support of African trade legislation. Proof that Mr. Jefferson actually had influence in Africa supports the government's theory that he was selling influence to businesses seeking projects in Africa. The grand jury was thus permitted to rely on the evidence of legislative activities, and the government's use of this evidence exposed Congressman Jefferson to liability and to the burden of defending himself against the bribery charges. This is a violation of the Speech or Debate Clause that requires dismissal of the 14 affected counts. *See Swindall*, 971 F.2d at 1547 (privilege violated "when reference to Speech or Debate material was used as critical evidence leading to [member's] indictment").

This analysis of the impact of Collins' testimony is firmly supported by *United States v. Dowdy*, 479 F.2d 213 (4th Cir. 1973). The panel asserts that Mr. Jefferson's reliance on *Dowdy* was misplaced, because *Dowdy* was a post-trial appeal that does not hold that a court can look behind an indictment to determine whether Speech or Debate material was introduced in the grand jury. 2008 WL

4868411, at *11. But the panel misapprehended the reasons for the defense's reference to *Dowdy*. In its consideration of the evidence introduced at trial, *Dowdy* recognized that the use of Speech or Debate material that is relevant to the charges against the defendant and may have been relied on by the jury required reversal of the convictions on the affected counts. "The erroneously admitted evidence of legislative acts was arguably relevant to proof of bribery, and we cannot confidently say that the jury did not consider it in finding guilt." 479 F.2d at 227. "Since we cannot say that the jury did not" rely on the improper evidence, the convictions on these counts had to be set aside. *Id.*

The same approach must be applied to the introduction of Speech or Debate evidence in the grand jury. Because the Speech or Debate privilege protects a Member of Congress from having to defend himself, as well as from conviction, the improper introduction of legislative evidence that that grand jury may have relied on in determining to indict – as occurred here – requires dismissal of the affected counts, just as, per *Dowdy*, the improper introduction of legislative evidence that a trial jury may have relied on in finding guilt requires reversal of the convictions.

Rehearing this case *en banc* will allow the court to re-assess the panel decision that it was barred from looking behind the indictment, and to fully consider Congressman Jefferson's challenge to the use of Speech or Debate

evidence in the grand jury. This is a significant constitutional issue that directly implicates the scope and purposes of the Speech or Debate Clause, and that will have ramifications in any prosecution of a Member. It is important to note, moreover, that following *Rostenkowski*, *Helstoski* and *Swindall* would not immunize a Congressman for anything he does while in office, nor would it place insuperable burdens on law enforcement. The only question is what evidence the government may use while pursuing charges relating to a Congressman's conduct. "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." *Helstoski*, 635 F.2d at 206.

CONCLUSION

The Court should grant rehearing *en banc* in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2008, I electronically filed the foregoing Petition for Rehearing *En Banc* 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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