No. 08-1059

In the Supreme Court of the United States

WILLIAM J. JEFFERSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a facially valid indictment against a former Member of Congress was subject to dismissal based on petitioner's claim that the grand jury heard evidence that was privileged under the Speech or Debate Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 546 F.3d 300. The opinion of the district court (Pet. App. 36a-56a) is reported at 534 F. Supp. 2d 645.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2008. A petition for rehearing was denied on December 12, 2008 (Pet. App. 33a). The petition for a writ of certiorari was filed on February 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury sitting in the Eastern District of Virginia returned a 16-count indictment against petitioner,

who was then a Member of the United States House of Representatives. Pet. App. 36a. The indictment charges petitioner with one count of conspiring to solicit bribes while serving as a public official, deprive citizens of honest services by wire fraud, and violate the Foreign Corrupt Practices Act of 1977, 15 U.S.C. 78dd-1 *et seq.*, in violation of 18 U.S.C. 371; one count of conspiring to solicit bribes while serving as a public official and deprive citizens of honest services by wire fraud, in violation of 18 U.S.C. 371; two counts of soliciting bribes while serving as a public official, in violation of 18 U.S.C. 201(b)(2)(A); six counts of wire fraud, in violation of 18 U.S.C. 1343 and 1346; one count of violating the Foreign Corrupt Practices Act of 1977, in violation of 15 U.S.C. 78dd-2(a); three counts of money laundering, in violation of 18 U.S.C. 1957; one count of obstructing justice, in violation of 18 U.S.C. 1512(c)(1); and one count of racketeering, in violation of 18 U.S.C. 1962(c). C.A. App. 19-112. Petitioner moved to dismiss 14 of the 16 counts of the indictment. *Id.* at 113-128; see Pet. 9, 21 n.8. The district court denied that motion, Pet. App. 36a-56a, and the court of appeals affirmed on interlocutory review, *id.* at 1a-32a.

1. The indictment alleges that, from January 2001 to August 2005, petitioner engaged in "seven separate bribery schemes." C.A. App. 30; see Pet. App. 3a. First, the indictment alleges that petitioner solicited bribes from Vernon Jackson, the president of iGate Incorporated (iGate), a Kentucky-based corporation, to promote iGate's telecommunications technology in certain African countries. In return for payments of money and iGate shares to a company controlled by his spouse, petitioner sent letters on official letterhead, conducted offi-

cial travel, and met with foreign government officials to promote iGate's technology. *Id.* at 4a.

Second, the indictment alleges that petitioner solicited bribes from Netlink Digital Television (Netlink), a Nigerian corporation that was pursuing a telecommunications venture in Nigeria and elsewhere in Africa. In return for stock, fees, and a share of Netlink's revenue, petitioner performed various official acts, including meeting with Nigerian government officials to promote Netlink's business. Pet. App. 4a.

Third, the indictment alleges that petitioner induced Lori Mody, a Virginia-based businesswoman, to finance a telecommunications project in Africa using iGate's technology. According to the indictment, petitioner solicited bribes from Mody in the form of money and shares in companies she controlled. In return, petitioner promoted Mody's companies in Nigeria and Ghana, sent letters on official letterhead, conducted official travel, met with and offered to bribe foreign officials, and introduced Mody to officials of the Export-Import Bank of the United States (Ex-Im Bank), from which Mody sought financial assistance. Pet. App. 4a-5a.

Fourth, the indictment alleges that petitioner solicited and received bribes from businessman George Knost and various companies with which Knost was affiliated. In return, petitioner met separately with officials of the Ex-Im Bank and Nigerian government officials to promote the interests of Knost's companies. Pet. App. 6a.

Fifth, the indictment alleges that petitioner solicited and received bribes from businessman John Melton and TDC Energy Overseas, Inc. (TDC). In return, petitioner performed various official acts, including meeting with Nigerian officials to promote TDC's business and

meeting with officials of the United States Trade Development Agency (Agency) to encourage the Agency to grant TDC financial assistance for TDC's Nigerian oil field project. Pet. App. 6a.

Sixth, the indictment alleges that petitioner used an intermediary to solicit, and in fact received, bribes from businesswoman Noreen Wilson. In return, petitioner used his office to assist in resolving a dispute over oil exploration rights in the waters off Sao Tome and Principe. Pet. App. 6a.

Seventh, the indictment alleges that petitioner solicited and received bribes from Life Energy Technology Holdings, a Delaware corporation. In return, petitioner conducted official travel to various countries and met with government officials to promote the company's technology. Pet. App. 7a.

2. a. Before trial, petitioner filed a motion requesting that the government be directed to provide all grand jury materials to his attorneys so that they could assess whether evidence of his legislative acts had been presented to the grand jury in violation of the Speech or Debate Clause of the United States Constitution (U.S. Const. Art. I, § 6, Cl. 1). Petitioner also requested that the district court conduct an *in camera* review of all grand jury transcripts for the same purpose. Petitioner asserted that, if evidence about his legislative acts had been presented to the grand jury, and if such evidence had been relevant to the grand jury's decision to indict, the district court was obligated to dismiss the indictment. Pet. App. 8a-9a.

In its response to petitioner's motion, the government denied that the grand jury had heard or considered any Speech or Debate Clause material and asserted that it was not obligated to disclose any material from

the grand jury proceedings. Pet. App. 9a; C.A. App. 152-154. Nevertheless, "[o]ut of an abundance of caution," the government took two steps to assuage petitioner's concerns. Pet. App. 9a. First, the government informed petitioner that a certain former staffer had not testified before the grand jury and that certain recorded statements by that staffer had not been presented to the grand jury. Second, the government made available to petitioner more than 600 pages of grand jury transcripts by petitioner's current and former staff members. *Id.* at 9a & n.4.

b. After reviewing the transcripts, petitioner identified three excerpts that he alleged violated the Speech or Debate Clause. The first excerpt was from the testimony of Lionel Collins, petitioner's former chief of staff, who testified that petitioner was "very instrumental in moving the [African Growth and Opportunity Act (AGOA), 19 U.S.C. 3701 *et seq.*,] through the Congress." Pet. App. 9a-10a; see C.A. App. 181-183. The second excerpt was from the testimony of Melvin Spence, a former staff member, who testified that petitioner was a leader in the area of African trade and cited as an example "the African Growth and Opportunity Act." Pet. App. 9a-10a. The third excerpt was from the examination of Stephanie Butler, a then-current staff member. During Butler's examination, a prosecutor prefaced a question by stating that petitioner, "through his activities in Congress, has a special knowledge of West Africa." *Id.* at 9a-11a.

c. The district court denied petitioner's request for an order directing disclosure of all grand jury transcripts to defense counsel. The district court also denied petitioner's request that it conduct an *in camera* review of the entire grand jury record. The district court

agreed, however, to conduct an *in camera* review of all grand jury materials that had not been provided to petitioner, with the exception of any arguments or instructions offered to the grand jury by the prosecutors, which had not been transcribed and were not available. Pet. App. 11a & n.5, 44a n.7.

d. After reviewing the remaining transcripts, the district court denied petitioner's motion to dismiss the indictment. Pet. App. 36a-56a. The court first concluded that petitioner had no legal entitlement to have any grand jury material provided to defense counsel or to have the court itself conduct an *in camera* review. The district court acknowledged that "courts are authorized to disclose grand jury matters to a 'defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.'" *Id.* at 43a (quoting Fed. R. Crim. P. 6(e)(3)(E)(ii)). But the court determined that "no such ground was shown here" because "[t]he indictment's allegations neither reflect nor implicate Speech or Debate matters." *Ibid.* The court also stated that petitioner's "request for *in camera* review warranted denial" because petitioner had made "no [threshold] showing" that there was "reason to believe Speech or Debate materials were presented to the grand jury." *Ibid.* The district court stated that it had conducted its *in camera* review of the grand jury materials only "because the Speech or Debate Clause protection afforded legislators is so important, and out of an abundance of caution." *Id.* at 43a-44a.

The district court explained that the Speech or Debate Clause "applies only to those activities integral to a Member's legislative function, *i.e.*, activities that are integral to the Member's participation in the drafting,

consideration, debate, and passage or defeat of legislation." Pet. App. 48a (footnote omitted). The court further explained that Speech or Debate immunity "does not extend to a Member's non-legislative actions" and "is not a license to commit crime." *Id.* at 48a-49a. The court stated that "it is well settled that the government may not introduce evidence of a Member's legislative acts to prove an element of a criminal charge." *Id.* at 49a. It also noted, however, that "the government may rely on acts 'causally or incidentally related to legislative affairs but not part of the legislative process itself.'" *Ibid.* (quoting *United States* v. *Brewster*, 408 U.S. 501, 528 (1972)).

The district court found that "[t]he grand jury record * * * discloses no infringement of the Speech or Debate Clause in the issuance of the indictment." Pet. App. 50a. The court concluded that "the schemes and facts alleged" in the indictment "do not concern [petitioner's] involvement in the consideration and passage or rejection of legislation," and it observed that "the grand jury record reviewed focused sharply on these allegedly criminal non-legislative actions." *Ibid.* The court acknowledged that "the grand jury materials submitted for review do contain references to [petitioner's] status as a congressman and as a member of various congressional committees," but it concluded that such references "do[] not offend the Speech or Debate Clause" so long as "neither the indictment nor the prosecution entails inquiry into [petitioner's] participation in the consideration and passage of legislation." *Id.* at 50a-51a (citing *United States* v. *McDade*, 28 F.3d 283 (3d Cir. 1994) (Alito, J.), cert. denied, 514 U.S. 1003 (1995)).

The district court also held that none of the three excerpts identified by petitioner "constitute an infringe-

ment of the Speech or Debate Clause that would require dismissal of the indictment." Pet. App. 56a. The court determined that the prosecutor's remark about petitioner's "activities in Congress" when questioning Butler had involved petitioner's "influence and status" and that those matters were "only incidentally related to [petitioner's] past legislative activities" and "may [have] be[en] relevant to the motivation some persons may have [had] to bribe [petitioner]." *Id.* at 52a-53a. The court concluded that "Spence's reference to the AGOA was not a reference to [petitioner's] involvement in the consideration and passage of [that legislation]," but rather was "another aspect of [petitioner's] status and experience that might induce persons to offer him bribes in return for official acts." *Id.* at 53a-54a.

The district court also found that Collins's reference to petitioner's "participation in 'moving the [AGOA] through the Congress'" was "no infringement of [the Speech or Debate] Clause." Pet. App. 55a. The court explained that Collins's "reference to [petitioner's] role in securing passage of the AGOA is neither material nor relevant to the criminal conduct alleged in the indictment" and that petitioner "is not being questioned in the proceeding about his vote or role in the AGOA legislation." *Ibid.* The court also stated that "a reference to privileged activity does not render an indictment—or a grand jury proceeding—constitutionally infirm, provided there are independent, non-privileged grounds sustaining the charges in the indictment." *Ibid.* (citing *McDade*, 28 F.3d at 300). Finally, the court observed that "Collins's statement was unprompted," "did not result from an inquiry into [petitioner's] legislative activities," and "did not result in any further inquiry into

legislative activities by the [prosecutor] or the grand jury." *Id.* at 55a-56a.

3. Petitioner appealed the district court's order denying his motion to dismiss the indictment. Pet. App. 2a; see *Helstoski* v. *Meanor*, 442 U.S. 500, 507-508 (1979) (stating that a district court's denial of a motion to dismiss an indictment on Speech or Debate Clause grounds is immediately appealable under the collateral order doctrine).

The court of appeals affirmed. Pet. App. 1a-32a. The court first rejected petitioner's claim that *United States* v. *Swindall*, 971 F.2d 1531 (11th Cir. 1992), cert. denied, 510 U.S. 1040 (1994), holds that "*any* mention of Speech or Debate Clause material in a grand jury proceeding mandates the dismissal of all charged offenses that relate to such evidence." Pet. App. 23a. The court of appeals concluded that petitioner's reliance on *Swindall* was "misplaced," because *Swindall* had involved a situation where "[t]he government [had] used [the defendant's] legislative activities to prove an element of the perjury offense" and had conceded that the defendant's "legislative activities were 'critical' to the prosecution." *Id.* at 24a-25a & n.7. In contrast, the court explained, petitioner "has not contended that the Indictment references his legislative acts, or that a successful prosecution will require the government to prove such acts." *Id.* at 25a.

The court of appeals stated that it "agree[d]" with the district court's view "that the controlling authorities did not compel" the sort of "comprehensive review" of grand jury materials that the district court permitted and conducted in this case. Pet. App. 31a. The court explained that "[t]he principle of grand jury independence is firmly rooted and jealously protected in our fed-

eral system of justice," *id.* at 25a, and that, as a result, "a facially valid indictment is not subject to dismissal simply because the grand jury may have considered improper evidence, or because it was presented with information or evidence that may contravene a constitutional privilege," *id.* at 26a (citing, *inter alia*, *Costello* v. *United States*, 350 U.S. 359, 363 (1956)). The court of appeals noted that it had previously held "that a grand jury will not be deemed biased solely because it heard some evidence related to congressional speech," and it concluded that it was "not entitled to review the grand jury record in [petitioner's] case [because] the Indictment simply does not question any legislative acts." *Id.* at 28a (citing *United States* v. *Johnson*, 419 F.2d 56 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970)). The court noted that two other courts of appeals had "observed, in *dicta*, that a *pervasive* violation of the Speech or Debate Clause before a grand jury might be used to invalidate an indictment." *Id.* at 30a n.8 (citing *United States* v. *Rostenkowski*, 59 F.3d 1291, 1300 (D.C. Cir.), supplemented, 68 F.3d 489 (D.C. Cir. 1995), and *United States* v. *Helstoski*, 635 F.2d 200, 205 (3d Cir. 1980)). The court of appeals stated that it had "no reason to reach such an issue" in this case, however, because petitioner "ha[d] made no such assertion." *Id.* at 31a n.8.

The court of appeals stated that, "[i]n these circumstances, we are satisfied that the district court, in conducting the pretrial proceedings, accorded [petitioner] every substantive and procedural protection to which he was entitled." Pet. App. 31a. The court of appeals noted that, having decided "to analyze the [three] Excerpts [identified by petitioner] and review *in camera* certain grand jury materials," the district court "concluded that the grand jury had not considered any Speech or Debate

material." *Ibid.* The court of appeals stated that, "[u]nder the facts of this case," the district court's actions had been "within its discretion and entirely appropriate." *Ibid.* The court also stated that, "[w]ith the foregoing principles in mind," it was "content to reject [petitioner's] request for further review of the grand jury record." *Ibid.*

4. Petitioner filed a petition for rehearing en banc. That petition was denied after no judge requested a vote on it. Pet. App. 33a. Petitioner's trial is scheduled to begin on May 26, 2009. No. 1:07cr209 (E.D. Va. Jan. 15, 2009).

ARGUMENT

Petitioner contends (Pet. 13-33) that the facially valid indictment in this case must be dismissed because Speech or Debate Clause material was presented to the grand jury. The court of appeals' interlocutory decision is correct and does not conflict with the decisions of this Court or of another court of appeals. Further review is not warranted.

1. As an initial matter, petitioner substantially overstates the court of appeals' holding. Contrary to petitioner's assertions, the court of appeals did not hold that a Member of Congress "*cannot* challenge an indictment on" the ground that the government presented Speech or Debate Clause material to the grand jury. Pet. 13 (emphasis added).

To the contrary, the court of appeals expressly acknowledged that other courts had suggested that a Member who makes a sufficiently compelling showing that a Speech or Debate Clause violation occurred before a grand jury might be entitled to dismissal of an indictment on that ground and it left that question open. See Pet. App. 30a-31a n.8. In addition, although the

court of appeals stated that the district court had accorded petitioner's Speech or Debate Clause claim a more "comprehensive review" than was required, *id.* at 31a, the court of appeals did not state that such claims never warrant review. Finally, the court of appeals' conclusion (*ibid.*) that the district court acted "within its discretion" in deciding to analyze the excerpts from the grand jury transcript identified by petitioner and to review other portions of the transcript *in camera* is directly at odds with the notion that the principle of grand jury independence categorically bars any review of a grand jury proceeding to determine whether the indictment rested on Speech or Debate Clause material. For that reason, petitioner's contention (Pet. 22) that the court of appeals' "decision places no check on a prosecutor's ability to introduce privileged legislative materials in the grand jury" is unfounded.

2. For the reasons explained above, the court of appeals' opinion is properly understood as holding that, regardless of whether there may be circumstances in which a Speech or Debate Clause violation before a grand jury could warrant dismissal of a facially valid indictment, those circumstances are not present in this case. That holding is correct.

The Speech or Debate Clause provides that, "for any Speech or Debate in either House, [Members] shall not be questioned in any other Place." U.S. Const. Art. I, § 6, Cl. 1. The purpose of the Speech or Debate Clause is to ensure that Members of Congress can perform their legislative duties without fear that they will be sued or prosecuted for them. See *United States* v. *Johnson*, 383 U.S. 169, 180-181 (1966). The Speech or Debate Clause "does not purport to confer a general exemption upon Members of Congress from liability or process in

criminal cases." *Gravel* v. *United States*, 408 U.S. 606, 626 (1972). Rather, it protects only those activities that are "an integral part of the deliberative and communicative processes by which Members participate" in their constitutionally-mandated duties. *Id.* at 625. Accordingly, a Member may be prosecuted for a crime provided that "the Government's case does not rely on legislative acts or the motivation for legislative acts." *United States* v. *Brewster*, 408 U.S. 501, 512 (1972). In particular, the Court has made clear that the Speech or Debate Clause does not apply to the "wide range of legitimate 'errands'" that Members routinely perform for their constituents as part of their job but that are not legislative acts. *Ibid.* Nor does the Clause prohibit "proof of legislative status, including status as a member or ranking member of a committee." *United States* v. *McDade*, 28 F.3d 283, 289 (3d Cir. 1994) (Alito, J.), cert. denied, 514 U.S. 1003 (1995).

Petitioner does not contend that the indictment in this case refers to any legislative acts or that the government will have to rely on such acts at trial in order to prove any allegation in the indictment. Rather, the indictment charges petitioner with repeatedly soliciting bribes in return for the performance of *non-legislative* acts—*i.e.*, precisely the type of "'errands' performed for constituents" that this Court held in *Brewster* are not protected by the Speech or Debate Clause. 408 U.S. at 512.

Petitioner asserts (Pet. 29) that "[t]here 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." But, as the court of appeals noted, "the [district] court concluded that the grand jury had not *considered* any Speech or Debate Clause mate-

rial." Pet. App. 31a (emphasis added). Although the court of appeals did not expressly state that it agreed with that conclusion, it did state that it was "satisfied that the district court * * * accorded [petitioner] every substantive and procedural protection to which he was entitled," and that it was "content to reject [petitioner's] request for *further* review of the grand jury record." *Ibid.* (emphasis added).

At any rate, petitioner's claim that the grand jury heard some information that is covered by the Speech or Debate Clause does not warrant dismissal of the indictment. Out of more than 600 pages of grand jury transcripts that covered all of the testimony of his current and former congressional aides, petitioner relies in this Court (Pet. 29-31) on a single answer given by his former chief of staff, Lionel Collins.[1] The prosecutor asked Collins the following question: "And so what kind of relationship did [petitioner] have with government officials in Nigeria?" C.A. App. 181. In answering that question, Collins first stated that African leaders were "thankful to [petitioner] for basically being in the forefront of bringing about democracy in Nigeria." *Id.* at 182. Without any further questioning by the prosecutor, Collins then described a 1997 trip that petitioner took to Africa and stated that "the purpose of the trip was they were considering legislation dealing with the African growth and opportunity, a trade bill dealing with Africa. [Petitioner] was very instrumental in moving the legislation through the Congress, and it was voted on by the House

[1] Petitioner makes only passing references (see, *e.g.*, Pet. 7, 9) to the Spence and Butler excerpts in his petition for a writ of certiorari. In any event, the district court correctly found that neither of those excerpts contained any Speech or Debate Clause material. Pet. App. 51a-54a.

and Senate side. It passed." *Ibid.* Collins went on to connect this piece of legislation to petitioner's familiarity with various "African leaders" who were "thankful" to him and to petitioner's reputation as a Member whose "specialty was international trade and, in particular, Africa." *Ibid.*[2]

Although Collins referred in his testimony to petitioner's performance of a legislative act (helping move the AGOA through Congress), that reference did not require dismissal of the indictment. First, as the district court found, Pet. App. 16a, 55a-56a, the reference was unsolicited, because the prosecutor's question— "what kind of relationship did [petitioner] have with government officials in Nigeria?" C.A. App. 181—did not seek testimony about any legislative act. See *United States* v. *Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988) (rejecting Speech or Debate Clause claim in part because the government "did not initiate the exploration of" the Member's legislative act; rather, the act "was first mentioned by [the Member's] aide in a volunteered statement"), cert. denied, 489 U.S. 1052 (1989).

Second, the district court correctly concluded that Collins's isolated and unsolicited reference to the enactment of AGOA was "neither material nor relevant to the *criminal conduct* alleged in the indictment." Pet. App. 55a (emphasis added). The federal bribery statute, 18 U.S.C. 201(b)(2)(A), makes it a crime for a public official, with a corrupt intent, to solicit or receive a bribe in return for being influenced in the performance of an official act. As reflected in the indictment and discussed

[2] At the conclusion of this testimony, the prosecutor asked Collins: "So it's an understatement to say [petitioner] was very influential with high-ranking government officials in Nigeria?," and Collins answered in the affirmative. C.A. App. 183.

above, the government's case against petitioner in the grand jury rested on evidence of numerous solicitations of bribes by petitioner and a wide variety of non-legislative official acts that petitioner allegedly performed in return for bribes, including meeting repeatedly with government officials in Africa. The question of how petitioner initially came to have relationships with the African officials—which occurred years before the commencement of the charged conduct—certainly was not the conduct for which petitioner was "being questioned in th[e] proceeding." Pet. App. 55a.

Third, the government's case in the grand jury did not, in any sense, "rely," *Brewster*, 408 U.S. at 512, or "depend[]," *Johnson*, 383 U.S. at 184, on the unsolicited reference to a single legislative act. The criminal acts were (and must be) established without reference to legislative activity in which petitioner engaged. Accordingly, that tangential reference did not "subject [petitioner] to liability" in violation of the Speech or Debate Clause. *United States* v. *Swindall,* 971 F.2d 1531, 1548 (11th Cir. 1992), cert. denied, 510 U.S. 1040 (1994); accord *United States* v. *Myers*, 635 F.2d 932, 941 n.10 (2d Cir.) (declining to consider claim that Speech or Debate Clause material was presented to the grand jury, because the defendant had failed to show that "the grand jury [lacked] sufficient competent evidence to establish probable cause"), cert. denied, 449 U.S. 956 (1980); *United States* v. *Johnson*, 419 F.2d 56, 58-59 (4th Cir. 1969) (rejecting Speech or Debate Clause challenge to certain counts even though protected material constituted a "substantial part" of the evidence the grand jury

heard), cert. denied, 397 U.S. 1010 (1970).[3] Especially in light of the principle of grand jury independence and the presumption of regularity that attaches to grand jury proceedings, see *United States* v. *Mechanik*, 475 U.S. 66, 75 (1986) (O'Connor, J., concurring in the judgment); *Costello* v. *United States*, 350 U.S. 359, 362 (1956); *United States* v. *Johnson*, 319 U.S. 503, 513 (1943), petitioner would have needed to make a far stronger showing in order to raise the question of whether, and under precisely what circumstances, Speech or Debate Clause violations before a grand jury could potentially warrant the dismissal of a facially valid indictment.

3. Petitioner has failed to demonstrate that the court of appeals' decision rejecting his Speech or Debate Clause claim conflicts with the decisions of another court of appeals. The court of appeals specifically distinguished each of the three court of appeals decisions with which petitioner asserts a conflict. Compare Pet. 15-20,

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[3] Petitioner's assertion (Pet. 32 n.10) that "[i]t cannot be concluded that the grand jury did not rely on this evidence or treat it as important when the prosecutors' colloquies with and instructions to the grand jury were not provided for the court for review" is without merit. As the D.C. Circuit has explained, "the burden of proof is the other way round: the Member must show that the Government has relied upon privileged material." *United States* v. *Rostenkowski*, 59 F.3d 1291, 1300, supplemented, 68 F.3d 489 (1995). As both the district court (Pet. App. 44a n.7) and the court of appeals (*id.* at 11a n.5) explained, any such colloquies and instructions were not transcribed and were not available for inspection. Nor did petitioner provide any threshold basis for thinking that those materials would support a Speech or Debate claim. To the extent that petitioner can be understood to challenge the justification for not transcribing those portions of the grand jury record, that fact-bound claim would not merit this Court's review.

with Pet. App. 23a-24a & n.7, 30a n.8.[4] In addition, petitioner has failed to identify any case in which a court of appeals ordered dismissal of an indictment because of a grand jury witness's isolated and unsolicited reference to a legislative act bearing on an incidental matter.

There is no conflict between the court of appeals' decision in this case and *United States* v. *Rostenkowski*, 59 F.3d 1291 (D.C. Cir.), supplemented, 68 F.3d 489 (D.C. Cir. 1995). *Rostenkowski* did not order the dismissal of an indictment based on a Speech or Debate Clause violation. To the contrary, *Rostenkowski* held that a district court had not erred in refusing to conduct any *in camera* review of the grand jury materials in that case. *Id.* at 1294, 1300-1301. In concluding that it had jurisdiction to consider the defendant's interlocutory appeal under the collateral order doctrine, the D.C. Circuit did hold that "*at some point* the presentation of [Speech or Debate Clause] material [to a grand jury] requires the court to dismiss the resulting bill," and it observed that "[e]ven the Government seems willing to concede that *pervasive* violations of the Speech or Debate Clause before the grand jury would invalidate the indictment." *Id.* at 1299 (emphasis added); see *id.* at 1300 ("[W]e conclude that *at least under some circumstances* the Speech or Debate Clause prohibits not only reference to protected material on the face of the indictment but also the use of that material before the grand jury.") (emphasis added). But the *Rostenkowski* court also made clear that it "express[ed] no view upon the question of *when* the presentation of Speech or Debate

[4] Petitioner's reliance (Pet. 14 n.6) on a 15-year-old unpublished district court decision does not merit this Court's review.

Clause material to a grand jury invalidates a facially valid indictment." *Id.* at 1298-1299 (emphasis added).

In this case, the court of appeals expressly left open the possibility that at some point the presentation of Speech or Debate Clause material to a grand jury may require dismissal of a facially valid indictment. Pet. App. 30a n.8. In addition, *Rostenkowski* had no occasion to—and did not—decide whether the sort of fleeting and unsolicited statements at issue in this case would require dismissal of such an indictment. As a result, the court of appeals' decision in this case does not conflict with *Rostenkowski*.[5]

There is likewise no conflict with *United States* v. *Helstoski*, 635 F.2d 200 (3d Cir. 1980). In *Helstoski*, the district court had reviewed the grand jury transcripts, including Congressman Helstoski's own testimony. *Id.* at 202. Based on that review, the district court had found that "the evidence violating the speech or debate clause was so extensive that it completely infected those proceedings," *ibid.*, had "permeated the entire grand jury process," *ibid.*, and "was a substantial factor underlying the indictment," *id.* at 204. The *Helstoski* court thus framed the question before it as "whether, despite *wholesale violation* of the speech or debate clause be-

[5] Petitioner quotes language from *Rostenkowski* that expressed concern about a prosecutor "procur[ing] an indictment by inflaming a grand jury against a Member upon the basis of his Speech or Debate, subject only to the necessity of avoiding any reference to the privileged material on the face of the indictment." Pet. 16 (quoting *Rostenkowski*, 59 F.3d at 1298); see Pet. 25. Before the district court, however, petitioner acknowledged that he was not asserting that anything of that sort occurred here. C.A. App. 262 (defense counsel stating: "[W]hen I talked about the possibility of Speech or Debate material being used to inflame a grand jury, that was in response to the [district] [c]ourt's hypothetical. That is not what we say happened here.")

fore a grand jury, an indictment based on the evidence can survive," *id.* at 205 (emphasis added), and it concluded that dismissal of certain counts was required under those circumstances, *id.* at 206.

As the court of appeals correctly observed in this case (Pet. App. 30a n.8), petitioner has neither alleged nor shown that Speech or Debate Clause violations "permeated the whole [grand jury] proceedings." *Helstoski*, 635 F.2d at 205. As a result, the court of appeals had "no reason to"—and did not—"reach such an issue." Pet. App. 31a n.8.

Finally, the court of appeals' decision in this case does not conflict with the Eleventh Circuit's decision in *Swindall*. As the court of appeals correctly explained (Pet. App. 23a-25a), in *Swindall*, "Speech or Debate material was used as critical evidence leading to [Congressman Swindall's] indictment" and subsequent conviction. *Swindall*, 971 F.2d at 1547; see Pet. App. 24a-25a (explaining that the government "used [Congressman Swindall's] legislative activities to prove an element of the perjury offenses" with which he was charged); *Swindall*, 971 F.2d at 1549. The *Swindall* court also concluded that Congressman Swindall had been "subjected to improper questioning before the grand jury" and that "the decision to indict was inextricably linked to the grand jury's impressions of Swindall's answers to improper questions." *Ibid.* The court stated that "[t]he AUSA's impermissible questioning of Swindall before the grand jury eliminate[d] any doubts about the appropriateness of dismissal that might have lingered had the AUSA merely introduced evidence of Swindall's committee memberships." *Id.* at 1549-1550.

As the court of appeals correctly explained, petitioner's "reliance on the *Swindall* decision is misplaced."

Pet. App. 24a. Petitioner "has not contended that the Indictment refers to his legislative acts, or that a successful prosecution will require the government to prove such acts." *Id.* at 25a. In addition, petitioner did not testify before the grand jury, so there can be no contention that he was personally subjected to improper questioning, much less improper questioning that could have influenced the grand jury's decision to indict.[6] The court of appeals' decision thus does not conflict with *Swindall*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] *Swindall* also emphasized that an indictment need not invariably be dismissed when a "grand jury considers improper Speech or Debate material" and stated that "[i]f reference to a legislative act is irrelevant to the decision to indict, the improper reference has not subjected the member to criminal liability." 971 F.2d at 1548. As the district court correctly explained (Pet. App. 55a), even if some of the material in the Collins's excerpt constituted Speech or Debate Clause material, the material in question was "neither material nor relevant to the criminal conduct alleged in the indictment," and thus could not have affected the decision to indict.