

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

**UNITED STATES OF AMERICA,** )  
 )  
 **Appellee,** )  
 ) **Docket No. 08-4215**  
 **v.** ) **(1:07-cr-00209-TSE)**  
 )  
 **WILLIAM J. JEFFERSON,** )  
 )  
 **Appellant.** )

**MOTION FOR STAY OF MANDATE**

Pursuant to Rule 41(d)(2) of the Federal Rules of Appellate Procedure and Local Rule 41, appellant William J. Jefferson respectfully moves this Court to stay issuance of the mandate in this matter. Appellant seeks a stay of 90 days pending filing of a petition for a writ of certiorari with the Supreme Court. The government has been informed of this motion, and opposes the relief sought.

This appeal concerns Congressman Jefferson's motion to dismiss the indictment against him on the grounds that it was obtained through use of privileged Speech or Debate evidence in the grand jury. On November 12, 2008, the panel issued its decision affirming the district court's denial of the motion to dismiss. Congressman Jefferson filed a petition for rehearing *en banc* on November 26, 2008. The Court denied the petition on December 12, 2008. The mandate has not yet issued.

This case raises a critical constitutional question involving the scope of the protection afforded to legislators by the Speech or Debate Clause: Is a court barred from examining the evidence presented to a grand jury investigating a United States Congressman to determine whether a facially-valid indictment should be dismissed because it was obtained through the use of privileged legislative material in violation of the Clause? The Supreme Court has not yet resolved this question. The panel's conclusion – that a court has no such power – is in direct conflict with the decisions of other courts of appeals that have addressed the issue, and fails to give appropriate weight to the purposes of the Speech or Debate Clause as they have been defined by the Supreme Court. Moreover, under clear Supreme Court precedent, requiring Mr. Jefferson to go to trial on an indictment obtained in violation of the Clause would cause him irreparable constitutional injury. Under these circumstances, appellant respectfully submits that this Court should stay the mandate pending certiorari in order to allow the Supreme Court to consider this matter before the case proceeds any further.

### **Argument**

Rule 41(d)(2) provides that a party seeking to stay issuance of the mandate must show that “the certiorari petition would present a substantial question and that

there is good cause for a stay.”<sup>1</sup> Although the Court denied the petition for rehearing *en banc*, a stay is nevertheless amply warranted here.

**A. There is a Clear Circuit Conflict on the Constitutional Issue Raised in this Case.**

Mr. Jefferson’s certiorari petition will present a substantial question. The panel here held that a facially-valid indictment was not subject to challenge on the grounds that evidence protected by the Speech or Debate privilege was presented to the grand jury. As set forth in more detail in Congressman Jefferson’s petition for rehearing *en banc*, this holding is in direct conflict with the D.C. Circuit’s decision in *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), the Eleventh Circuit’s decision in *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1992), and the Third Circuit’s decision in *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980). Each of these decisions held that a court can look behind an indictment and examine the testimony and exhibits used in the grand jury to determine whether the Speech or Debate Clause had been violated. The existence of this circuit conflict on a key constitutional question provides compelling grounds for a grant of certiorari. *See* Rule 10, Rules of the Supreme Court.

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<sup>1</sup> *See also* Local Rule 41 (motion must show “that it is not frivolous or filed merely for delay;” and “must present a substantial question or set forth good or probable cause for a stay”).

Further, there is a reasonable possibility that the judgment of the panel will be reversed. The panel's conclusion that it could not examine the evidence introduced in the grand jury was based on precedent developed under the Fourth and Fifth Amendments, particularly *United States v. Costello*, 350 U.S. 359 (1956), and the later decision in *United States v. Calandra*, 414 U.S. 338 (1974). But those cases are not controlling in a challenge under the Speech or Debate Clause.

As described in more detail in the petition for rehearing *en banc*, the D.C. Circuit in *Rostenkowski* concluded that *Costello* and *Calandra* did *not* foreclose a review of grand jury evidence to determine whether privileged legislative material had been improperly used, because their general propositions regarding facially valid indictments are not applicable "where they would undermine the important purposes served by the Speech or Debate Clause." *Rostenkowski*, 59 F.3d at 1298. The courts in *Swindall* and *Helstoski* also distinguished *Calandra* on the grounds that it arose under the Fourth Amendment, not the Speech or Debate Clause. They noted that the use of evidence obtained contrary to the Fourth Amendment involved only a past abuse, while the introduction of Speech or Debate material against a Congressman in the grand jury would itself be a violation of the constitutional privilege. *See Swindall*, 971 F.2d at 1547; *Helstoski*, 635 F.2d at 204. And as the Third Circuit further explained, "[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.

The approach taken by these courts flows directly from Supreme Court case law recognizing the unique nature of the Speech or Debate Clause. As the Supreme Court has stated, 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). The Clause “serves the additional function of reinforcing the separation of powers so deliberately established by the Founders,” *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 502 (1975), since it was designed “to preserve the Constitutional structure of separate, co-equal, and independent branches of government.” *United States v. Helstoski*, 442 U.S. 477, 491 (1979). To accomplish these purposes, the Clause bars the use of evidence of legislative activity against a legislator: “Revealing information as to a legislative act ... to a jury would subject a Member to being ‘questioned’ in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause.” *United States v. Helstoski*, 442 U.S. at 490. Where the Speech or Debate privilege applies, it is “absolute.” *Eastland*, 421 U.S. at 509.

The decisions of the other circuits in *Rostenkowski*, *Swindall* and *Helstoski* correctly recognize that Congressional independence may be threatened by the use of evidence of legislative activity in the grand jury, as well as at trial. They

correctly conclude that in order to fully vindicate the purposes of the Clause a court must, therefore, have the ability to examine the evidence presented to a grand jury and to dismiss an indictment that was improperly obtained with privileged evidence. The panel decision, in contrast, would allow the prosecution to use legislative evidence in the grand jury with impunity. This result is inconsistent with the Supreme Court's emphasis on the importance of the Speech or Debate privilege to the constitutional structure of government and its clear statement that the privilege is "absolute." Accordingly, there are reasonable grounds to believe that the Supreme Court will disagree with the panel.

**B. A Stay is Necessary to Prevent Irreparable Injury.**

Not only will the certiorari petition present a substantial question, there is good cause for a stay here. Congressman Jefferson will suffer irreparable injury if his position is ultimately upheld but he is required to stand trial before his appeal is finally resolved. As the Supreme Court has clearly stated, one of the unique attributes of the Speech or Debate Clause is that it protects a legislator from having to *defend* against charges obtained in violation of the Clause, as well as against conviction. "[T]he Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979), *quoting*, *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). For that reason, the Court found

that denial of a Congressman's motion to dismiss an indictment on Speech or Debate grounds was subject to interlocutory review:

... if a Member "is to avoid *exposure* to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his ... challenge to the indictment must be reviewable before ... exposure [to trial] occurs."

*Helstoski v. Meanor*, 442 U.S. at 508, quoting, *Abney v. United States*, 431 U.S. 651, 662 (1977).<sup>2</sup>

Thus, Congressman Jefferson is entitled to avoid even being tried on an indictment obtained in violation of the Speech or Debate Clause. Once a trial takes place, this injury cannot be undone, even if he is acquitted or a conviction is subsequently reversed. Granting a stay pending certiorari, by contrast, will not compromise the conduct of a trial should one be necessary, or otherwise result in any harm. Given the danger that irreparable constitutional injury will occur in the absence of a stay, the balance of the equities weighs decisively in favor of a stay in this instance.

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<sup>2</sup> *Helstoski v. Meanor* involved a motion to dismiss an indictment on the grounds, *inter alia*, that the grand jury had improperly heard evidence of legislative acts. The Supreme Court's holding that denial of such a motion is immediately appealable, because a legislator has the right not to be tried on an indictment obtained in violation of the Clause, also supports the conclusion that an inquiry into the improper use of Speech or Debate evidence in the grand jury is not precluded by *Costello* or *Calandra*.

**Conclusion**

Accordingly, Congressman Jefferson respectfully submits that issuance of the mandate should be stayed for 90 days pending the filing of a petition for a writ of certiorari.

Respectfully submitted,

/s/ Robert P. Trout

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## CERTIFICATE OF SERVICE

I hereby certify that on December 16th, 2008, I electronically filed the foregoing Motion for Stay of Mandate 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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