ORAL ARGUMENT SCHEDULED FOR MAY 15, 2007

No. 06-3105

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

RAYBURN HOUSE OFFICE BUILDING, ROOM 2133,
WASHINGTON D.C. 20515,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF JUDICIAL WATCH, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE UNITED STATES OF AMERICA URGING AFFIRMATION

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April 6, 2007

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

In accordance with D.C. Cir. R. 28(a)(1), counsel for *amicus curiae* hereby certify as follows:

A. Parties and Amici

All parties, intervenors, and *amici* appearing before the District Court and this Court are listed in the Brief of Appellee, with the one exception being Judicial Watch, Inc. On March 22, 2007, Judicial Watch, Inc. moved for leave to file a notice of intent to participate as *amicus curiae*. The U.S. Court of Appeals for the District of Columbia Circuit granted the motion on March 30, 2007.

B. Rulings Under Review

References to the rulings at issue appear in the Brief of the Appellee.

C. Related Cases

Counsel for *amicus curiae* are unaware of any related cases pending in any court.

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CERTIFICATE PURSUANT TO D.C. CIRCUIT RULE 29(d)

The undersigned counsel hereby certifies that a separate brief is necessary to set forth the views of *amicus curiae* Judicial Watch, Inc., which is a non-profit organization that seeks to seeks to promote integrity, transparency, and accountability in government, politics, and public life and therefore has a unique perspective on the issues raised by this appeal.

Meredith Di Liberto

Meredith L. Di Liberto

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INTEREST OF *AMICUS CURIAE*

Judicial Watch, Inc. is a not-for-profit organization that seeks to promote integrity, transparency, and accountability in government, politics, and public life. In furtherance of these goals, Judicial Watch, Inc. regularly monitors significant developments in the court system and the law, pursues public interest litigation, and files *amicus curiae* briefs on issues of public concern, among other activities. Judicial Watch, Inc. is participating as an *amicus curiae* in this matter for two separate but related reasons. First, in general terms, Judicial Watch is concerned about the proper application of the Speech or Debate Clause and privileges contained therein. Second, as an organization that seeks to fight government corruption, Judicial Watch, Inc. is particularly concerned with attempts by legislators to use the Speech or Debate Clause to avoid scrutiny of their non-legislative acts and to thwart legitimate law enforcement efforts to root out corruption in government.

SUMMARY OF THE ARGUMENT

The U.S. Constitution grants to federal legislators absolute immunity from being questioned in any place other than the House of Representatives or Senate. U.S. Const. art. I, § 6, cl. 1. Since 1789, the Speech or Debate Clause has provided Members of Congress with a safe haven from "intimidation by the

executive and accountability before a possible hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 181 (1966). Because of the absolute nature of Speech or Debate Clause immunity, it is of the utmost importance that the privileges arising thereunder are applied in an exacting manner and only where consistent with the intent and purpose of the Clause. In this case, Congressman Jefferson has failed to demonstrate that the actions under scrutiny by federal law enforcement officials and the records sought by the search warrant fall within the "legitimate legislative sphere." Consequently, the privileges of the Speech or Debate Clause do not apply.

ARGUMENT

I. The Constitutional Importace of the Speech Or Debate Clause.

In *United States v. Johnson*, 383 U.S. 169, 177 (1966), the U.S. Supreme Court noted that the Speech or Debate Clause "was approved at the Constitutional Convention without discussion and without opposition." *Id.* (citing II Records of the Federal Convention 246 (Farrand ed. 1911). The lack of discussion and debate should not be mistaken for a lack of significance, however. Impressed by the tradition of the speech and debate privileges incorporated into the English legal system, which had assisted in abating the monarchical conflicts of seventeenth-century England, the Founders thought the Speech or Debate Clause a significant

tool for affecting the separation of powers. As Thomas Jefferson and James Madison explained:

> In order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive...

8 *Works of Thomas Jefferson* 322-23 (1797), reprinted in Philip B. Kurland & Ralph Lerner, 2 *The Founders' Constitution* 336 (1987).

In *Kilbourn v. Thompson*, 103 U.S. 168 199 (1881), the first case to address the Speech or Debate Clause, the U.S. Supreme Court declared:

> These [speech and debate] privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.

Id. at 203.

American jurisprudence since *Kilborn* has maintained the Founders' understanding of the Speech or Debate Clause's original purpose. In a series of cases, the Supreme Court has reaffirmed the purpose and importance of the Speech or Debate Clause as originally understood by the Founders:

> The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of

> Members of the Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.

United States v. Brewster, 408 U.S. 501, 507 (1972).

> [T]he central role of the Speech or Debate Clause – to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary...

Gravel v. United States, 408 U.S. 606, 617(1972).

> The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.

Doe v. McMillian, 412 U.S. 306, 311 (1973)

> In our system 'the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.'

Eastland v. U.S. Serviceman's Fund, 421 U.S. 491, 502 (1975) (citing *Johnson*, 383 U.S. at 178.

> The Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government.

United States v. Helstoski, 442 U.S. 477, 491 (1979).

Recognizing the constitutional importance of the Speech or Debate Clause and valuing its intent, however, necessarily requires adherence to its scope and

purpose. Indeed, the Supreme Court has cautioned against extending the Speech or Debate privileges beyond the clause's purposes and placing the legislature above the law, *Gravel*, 408 U.S. at 615. It has also cautioned against making Members of Congress "super-citizens." *Brewster*, 408 U.S. at 516.

II. The Constitutional Application of the Speech Or Debate Clause.

The Supreme Court's cautionary words in *Gravel* and *Brewster* are best understood in light of the absolute nature of the Speech or Debate Clause. *See Eastland*, 421 U.S. at 503. Because "absolute official immunity" is such a powerful device, it must be applied with great caution in order to avoid placing any one branch of government above the law. As articulated by this Court in *Fields v. Johnson*, 459 F.3d 1, 7 (D.C. Cir. 2006), the Supreme Court has described its "'absolute official immunity' jurisprudence as 'quite sparing,' citing as examples legislative immunity under the Speech or Debate Clause and Presidential immunity under *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)," (citing *Forrester v. White*, 484 U.S. 219, 224-25 (1988)). The Supreme Court has further held that:

> Absolute immunity, however, is 'strong medicine, justified only when the danger of [officials' being] deflect[ed from the effective performance of their duties] is very great.'

Forrester, 484 U.S. at 230 (citing *Forrester v. White*, 729 F.2d 647, 660 (7th Cir. 1986) (Posner, J., dissenting).

In order to protect against a legislature of "super-citizens," who are above the law, Speech or Debate Clause jurisprudence requires that the protection of the clause be applied sparingly and only in accordance with the clause's original intent and purpose. Extending the scope of any absolute immunity, or applying it outside its intent or purpose, would result in an unconstitutional encroachment on the separation of powers. As the Supreme Court has declared:

> We would not think it wise, simply out of an abundance of caution to double insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process.

Brewster, 408 U.S. at 516.

This constitutional "check" on the absolute nature of Speech or Debate Clause immunity is not trivial – it is as absolute as the privileges themselves. Thus, in order to properly assert the privileges of the Speech or Debate Clause, a Member must demonstrate that he or she is "acting within the 'legitimate legislative sphere.'" *Eastland*, 421 U.S. at 503 (citing *Doe*, 412 U.S. at 314).[1]

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[1] As with applying any privilege, it is the Member's burden to demonstrate that a Speech or Debate Clause privilege applies to his or her conduct. *See United States v. Legal Services*, 249 F.3d 1077 (D.C. Cir. 2001); *Friedman v. Shields*, 739 F.2d 1336, 1341 (D.C. Cir. 1984).

The legitimate legislative sphere consists of those legislative acts that are "clearly a part of the legislative process – the due *functioning* of the process." *Brewster*, 408 at 516 (emphasis in original). In other words, to be considered a legislative act, the act must be "integral" to the legislative process. *Fields*, 459 F.3d at 9. Clearly not all acts performed by a legislator are legislative acts. As this Court explained in *Fields*:

> The Speech or Debate Clause therefore 'does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions,' or because it is merely 'related to,' as opposed to 'part of,' the 'due functioning' of the 'legislative process.'

Id. at 10 (citing *Brewster*, 408 U.S. at 514, 528). Anything even "peripherally related to" or "casually or incidentally related to" the legislative process is not protected by the Speech or Debate Clause. *Brewster*, 408 U.S. at 520, 528.

In addition to these general principles regarding the application of the lauses's privileges, both the Supreme Court and this Court have held that certain conduct and acts by legislators are not part of the legislative process and, therefore, are not protected by the Speech or Debate Clause. Among the conduct and acts not protected by the Speech or Debate Clause are the following: "assistance in securing Government contracts," "preparing so-called 'news letters' to constituents," "news releases," and "speeches delivered outside Congress,"

(*Brewster*, 408 U.S. at 512), and "constituent services," and "communications with government agencies." *United States v. Rose*, 28 F.3d 181, 188 (D.C. Cir. 1994). These acts, though entirely legitimate, "are political matters" which are not afforded the protection of the Speech or Debate Clause. *Brewster*, 408 U.S. at 512. In addition to these legitimate but non-legislative activities, the Supreme Court also has held that "taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." *Id.* at 526.

III. The Actions of Congressman Jefferson Under Scrutiny Were Not Legislative Activities, and, Therefore, Are Not Protected By the Speech or Debate Clause.

In order for Congressman Jefferson to enjoy the protection afforded by the Speech or Debate Clause, it is incumbent upon him to demonstrate first that one or more of the clause's privileges apply; he must show that his actions were legislative activities. However, Congressman Jefferson's brief is completely devoid of this analysis; he simply fails to carry this burden. Rather, he bypasses the burden while repeatedly asserting the absoluteness of Speech or Debate Clause immunity. Failing to demonstrate the applicability of the Speech or Debate Clause is reason enough to affirm the District Court's ruling.[2] A second and compelling

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[2] In his brief, Congressman Jefferson argues the District Court's ruling "directly contravened this court's decision in *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995)." Brief of Congressman William J.

reason to affirm the District Court's ruling is that the actions of Congressman Jefferson that are under scrutiny were not, in fact, legislative activities at all, and, therefore, are not protected by the Speech or Debate Clause.

In the affidavit in support of the government's application for a search warrant, Special Agent Timothy R. Thibault describes with great specificity the "official acts" performed by Congressman Jefferson that are under investigation. JA at 0013-0015. While parts of the publicly available version of the affidavit have been redacted, more than enough information has been disclosed to demonstrate that Congressman Jefferson's actions were not legislative acts.

According to the affidavit, Congressman Jefferson's actions include: communicating with both the President and the Vice President of Nigeria; sending

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Jefferson at 11. This is simply not the case. Far from recognizing a blanket prohibition against discovery of documents in the possession of a legislator, *Brown & Williamson* affirmed the U.S. Supreme Court's holding that the Speech or Debate Clause "protects only those congressional acts properly thought to fall within the legislative function." *Id.* at 415. This Court further held that "malfeasance by a Member does not fall within the legislative sphere simply because it is associated with congressional duties." *Id.* At issue in *Brown & Williamson* was an attempt by a private litigant to subpoena certain stolen records subsequently provided to a member of a congressional subcommittee investigating the subject matter of the records – conduct that clearly constitutes legitimate legislative activity. The stark difference between *Brown & Williamson* and this case is that the legislators in *Brown & Williamson* demonstrated that their conduct clearly involved acts within the legislative sphere, while Congressman Jefferson has not.

an official letter to the Nigerian Vice President seeking his assistance in overcoming opposition to the iGate business venture; assisting the government's witness to obtain loan guarantees for the Nigerian and Ghanian business ventures; writing an official letter to the Vice President of Ghana to obtain approval for his business venture; traveling to Ghana to meet with high-ranking officials to obtain approval for his business venture; using his congressional staff to plan his Ghana trip and obtain travel documents for those traveling; communicating with the U.S. Embassy and U.S. Ambassador to Ghana about his trip and scheduling meetings with Ghanian government officials; soliciting substantial amount of capital from the government witness to back his business venture and making the alleged payment of bribes to high-ranking foreign government officials to promote his business ventures in Africa. JA at 0013-0015.

None of the above-mentioned actions are legislative. It is difficult to discern if many of them are even official. Clearly, some of Congressman Jefferson's alleged actions are not official – *e.g.*, bribing high-ranking foreign officials. JA at 0014. All of the actions allegedly taken by Congressman Jefferson were allegedly for the sole purpose of using his status as a U.S. Congressman to solidify a business venture in which he stood to make millions of dollars. JA at 0025, 0027 (referring to the profit share from iGate and the equity stake in the

Nigerian company). Such actions are anything but official. Yet, even if some of these actions could be described as official, they are clearly not legislative.[3]

There is nothing about communicating with the Presidents and Vice Presidents of Nigeria and Ghana while seeking foreign assistance in overcoming opposition to a business venture that is integral to Congressman Jefferson's accomplishing his constitutionally delegated duties or to the legislative process. *Brewster*, 408 U.S. at 516. Similarly, assisting an individual with obtaining loan guarantees for Nigerian and Ghanian business ventures and soliciting a substantial amount of capital from that individual to back those business venture are not clearly a part of the legislative process. *Id.* Congressman Jefferson simply failed to demonstrate that the acts under scrutiny fall within the legitimate legislative sphere.

Additionally, there is nothing legislative about the types of records sought, and retrieved, pursuant to the search warrant. While the specific list of items sought in the search has been redacted, Special Agent Thibault describes generally

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[3] Whether Congressman Jefferson was attempting to use his official office for his own personal gain is secondary. Even if Congressman Jefferson was attempting to accomplish legitimate legislative goals, this Court has held that, "the Speech or Debate Clause protects conduct that is integral to the legislative *process*, not a Member's legislative *goals*." *Fields*, 459 F.3d at 12 (emphasis in original).

the types of records sought by the search warrant: correspondence to/from the congressman, communications, faxes, notes and other forms of communications, logs and/or ledgers related to visitors received by the congressman, travel records and vouchers, as well as communications related to travel by a congressman, and copies of travel disclosure forms, telephone records and/or messages related to telephone calls received in the office, power point presentations used in iGate meetings that took place in Congressman Jefferson's office, and a file folder labeled "Ghana" containing information and documents related to Congressman Jefferson's trip to Ghana to solicit support for iGate. JA at 0070-0072. As with his actions, Congressman Jefferson has failed to demonstrate that the records searched and removed from his office fall within the legitimate legislative sphere.

In addition to a review of the facts set forth in the government's affidavit, the most obvious sign of a lack of any legitimate legislative purpose is the fact that Congressman Jefferson himself fails to articulate any such purpose in his brief. This omission speaks volumes.

Morever, this Court recently had occasion to revisit the Speech or Debate Clause and the necessary connection between congressional acts and the legislative process. In *Fields*, the Court reviewed its holding in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986). In

Browning, the Court had held that the Speech or Debate Clause protects Members from lawsuits "challenging personnel decisions concerning employees ... who assist Members in performing legislative functions." *Fields*, 459 F.3d at 7. After reviewing *Browning* in light of the Supreme Court's Speech or Debate Clause precedent, the Court concluded that the presumption it relied on in *Browning* – namely, that employees assisting in the performance of legislative functions were always an "integral part of the deliberative and communicative processes" – was "at a minimum, overinclusive and therefore inconsistent with the Court's practice of being "careful not to extend the scope of the protection further than its purposes require." *Fields*, 459 F.3d at 11 (internal citations omitted). *Fields* was a return to a more searching, restrained application of the Speech or Debate Clause.

In *Fields*, the Court held that, in order to qualify for immunity under the Speech or Debate Clause, it is necessary to "determine on what actions a plaintiff sought to predicate liability." *Id.* at 14. In *Fields*, a civil case, the Court pointed to the pleadings as a source of that information. In this case, which arises from a criminal investigation, the affidavit in support of the government's application for a search warrant supplies the necessary information. As demonstrated above, the actions allegedly taken by Congressman Jefferson that serve as the predicate for the government's criminal investigation clearly are not legislative acts.

The search of Congressman Jefferson's congressional office and the retention of the records obtained as a result of the search thus do not violate the Speech or Debate Clause. At no point will it become necessary to inquire into how Congressman Jefferson spoke, debated, or voted in chamber or in committee. *See Brewster*, 408 U.S. at 526. While it appears that some non-responsive materials may have been reviewed or retained because of the search, it does not taint the whole search. As the U.S. Supreme Court held in *Helstoski*, there is "nothing in our opinion, by any conceivable reading, [that] prohibits excising references to legislative acts, so that the remainder of the evidence would be admissible." *Helstoski*, 442 U.S. at 489. While a Filter Team may not be a perfect solution to the dilemma posed by the alleged misuse of a congressional office for criminal activity, or to maintain records of such activity, allowing a Member of Congress to thwart a legitimate criminal investigation and challenge the execution of an undisputedly proper search warrant by asserting that the entire contents of his or her congressional office enjoy absolute immunity is a misapplication of the Speech or Debate Clause.

CONCLUSION

For the foregoing reasons, Judicial Watch, Inc. respectfully requests that the District Court's decision be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(c), (d) and 32 of the Federal Rules of Appellate Procedure, I hereby certify that the forgoing Brief of *Amicus Curiae* is proportionally spaced, has a typeface of 14 points or more and contains 3,223 words.

Meredith Di Liberto

Meredith L. Di Liberto

CERTIFICATE OF SERVICE

I hereby certify that on April 6th, 2007, true and complete copies of the forgoing BRIEF OF JUDICIAL WATCH, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE UNITED STATES OF AMERICA URGING AFFIRMATION were served via first-class U.S. mail, postage prepaid on:

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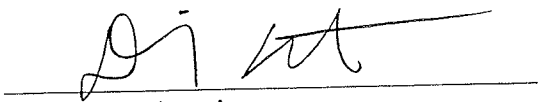

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