RECORD NO. 08-4215

In The
United States Court of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

WILLIAM J. JEFFERSON,

Defendant – Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA**

BRIEF OF *AMICUS CURIAE*
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
IN SUPPORT OF APPELLEE AND AFFIRMANCE OF JUDGMENT BELOW

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No. 08-4215 Caption: United States of America v. William J. Jefferson

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/s/ Melanie Sloan — June 6, 2008
Melanie Sloan (date)

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STATEMENT OF INTEREST

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Rule 29(a) of the Local Rules of the Fourth Circuit, Citizens for Responsibility and Ethics in Washington ("CREW") files this brief as an *amicus curiae* in support of the position of the United States. All parties have consented to the filing of this brief.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principle activities, CREW monitors the activities of members of Congress and, where appropriate, files ethics complaints with Congress. CREW also prepares written reports, including a yearly report that it disseminates publicly about the most unethical members of Congress.

Among CREW's core beliefs are that no public official is above the law and that our nation's laws must be applied equally to all. CREW files its brief as an entity that monitors the legislative branch to ensure that the people are represented by honest officials working for the public interest rather than their own personal pecuniary interests. Toward that end, CREW files its brief to advance a

construction of the Speech or Debate Clause that preserves the ability of law enforcement to prosecute congressional corruption.

STATEMENT OF ARGUMENT

In a society governed by the principle that all people are equal, the Constitution cannot be read to create one class supreme to all others. If this Court finds that prosecutors may not provide a grand jury with evidence of a member of Congress's non-speech or debate activities and that they may not introduce evidence of a member's status, the Court is, in effect, immunizing members of Congress from corruption investigations and prosecutions. Members will be able to freely and without consequence sell their services to the highest bidder. Members of Congress will not be -- as the framers intended -- merely free from intimidation by the executive and a hostile judiciary, they will be unaccountable for criminal behavior that would result in the conviction and incarceration of others, including members of the judicial and executive branches. In a country founded on the rule of law, the courts should not allow any one class of individuals to live lawlessly.

The Speech or Debate Clause was never intended to provide members of Congress with blanket protection from prosecution for criminal acts. "Financial abuses, by way of bribes, perhaps even more than Executive power, [] gravely

undermine legislative integrity and defeat the right of the public to honest representation." U.S. v. Brewster, 408 U.S. 501, 524-25 (1972). Therefore, the Supreme Court has held that the Clause is to be read narrowly enough to guard against the excesses of those who would corrupt the process by corrupting members of Congress. Id. at 525. It protects members from inquiry only into activities integral to the legislative process, not those with merely a nexus to legislative functions. Id. at 528.

In addition, defendant's claims to the contrary, there is no binding precedent suggesting that a legislator's status as a member of Congress and member of certain committees and caucuses is protected by the Speech or Debate Clause. Rather, courts have upheld convictions of legislators when their status as members of Congress has been introduced as evidence. See Brewster, 408 U.S. 501, U.S. v. Johnson, 419 F.2d 56 (4th Cir. 1969); U.S. v. McDade, 28 F.3d 283 (3d Cir. 1994).

As a result, in considering defendant's motion to dismiss, the District Court properly concluded that the indictment was not based on material protected by the Speech or Debate Clause. Accordingly, this Court should affirm the District Court's denial of defendant's motion.

I. THE SPEECH OR DEBATE CLAUSE IS PROPERLY CONSTRUED TO PROTECT LEGISLATORS ONLY FROM INQUIRIES INTEGRAL TO THE LEGISLATIVE PROCESS.

Implicit in the narrow scope of the Speech or Debate Clause is the judgment that "legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons." Gravel v. U.S., 408 U.S. 606, 615 (1972) (*citing* T. Jefferson, Manual of Parliamentary Practice, S. Doc No. 92-1, p. 437 (1971)). Here, by arguing that his indictment must be dismissed because the grand jury heard testimony regarding his status as a member of Congress, Rep. William Jefferson is, indeed, attempting to stand above the law. This Court should make clear that legislators are not beyond the reach of the law by upholding the indictment.

The speech or debate privilege was designed to preserve legislative independence, not supremacy. Brewster, 408 U.S. at 508. In applying the privilege, the Supreme Court has held that the heart of the Clause is speech or debate in either House. Gravel, 408 U.S. at 625. Only matters integral to the deliberative and communicative processes by which members of Congress participate in committee and House proceedings -- the consideration and passage or rejection of proposed legislation or other matters that the Constitution places within the jurisdiction of Congress -- are covered. Id. Courts have extended the

privilege to other matters only "when necessary to prevent direct impairment of such deliberations." Id. (*quoting* U.S. v. Doe, 455 F.2d 753, 760 (1st Cir. 1972)). The Clause has been interpreted to uphold its fundamental purpose of freeing legislators from executive and judicial oversight that realistically threatens to control their conduct as legislators. U.S. v. Helstoski, 442 U.S. 477, 492 (1979); Gravel, 408 U.S. at 618. While conduct within the sphere of legislative activity is protected, "legislative activity" is not all encompassing. Gravel, 408 U.S. at 624, n. 15 (*citing* Tenney v. Brandhove, 341 U.S. 367, 376-77 (1951)). In fact, concerned about creating a class immune from prosecution, the Brewster Court stated, "[w]e would not think it sound or wise, simply out of an abundance of caution to doubly 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." 408 U.S. at 516. Such a sweeping reading, the Court found, would result in few activities a legislator might not be able to relate to the legislative process and, therefore, protect. Id.

Nevertheless, it is clear that the Clause protects legislators from inquiry into legislative acts or the motivation for performance of legislative acts. Brewster, 408 U.S. at 509; U.S. v. Johnson, 383 U.S. 169, 185 (1966). It is not enough, however, for conduct to be merely related to the due functioning of the legislative

process to be protected by the Clause. Brewster, 408 U.S. at 513-14. "A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it." Helstoski, 442 U.S. at 488. Members of Congress "engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause." Brewster, 408 U.S. at 512. The Clause must be interpreted narrowly to prevent members of Congress from being rendered virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their holding office. Id. at 520.

In Brewster, a former United States Senator was charged with accepting bribes in exchange for being influenced in performance of official acts related to postage rate legislation. 408 U.S. at 502. The defendant moved to dismiss his indictment, citing Speech or Debate Clause immunity. Id. at 503. Citing U.S. v. Johnson, the Court explained that a member of Congress may be prosecuted under a criminal statute provided the Government's case does not rely on legislative acts or the motives for legislative acts. Id. at 512. That the conduct in question was accepting a bribe in exchange for promises to perform legislative acts did not require dismissal of the indictment because, in proving its case, the Government did not need to inquire as to how the senator performed any legislative act. Id. at 526.

Rep. William Jefferson, who stands in no different shoes than the defendant in Brewster, is asking this Court to broaden the protections of the Speech or Debate Clause well beyond the parameters set by the Supreme Court. In no case has the Court ever treated the Clause as protecting all conduct relating to the legislative process. Id. at 515. In fact, the Brewster Court declined to expand the breadth of the Clause because the Court had "no doubt that there are few activities in which a legislator engages that he would be unable to somehow 'relate' to the legislative process." Id. at 516. The purpose of the Clause is not, the Court found, "to make Members of Congress super-citizens, immune from criminal responsibility." Id. The Clause applies only if it is necessary to inquire how the member of Congress spoke, debated, voted or did anything else in the chamber or in committee in order to prosecute a criminal violation. Id. at 526.

Nevertheless, defendant is arguing that the Speech or Debate Clause prevents the Government not from introducing evidence of legislative material, but from showing merely that he was in a position to solicit bribes. But "[t]aking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator." Brewster, 408 U.S. at 526. The Speech or Debate Clause does not prohibit inquiry into illegal conduct

"simply because it has some nexus to legislative functions." Id. at 528. Not even "promises by a Member to perform an act in the future" are legislative acts. Helstoski, 442 U.S. at 488.

In U.S. v. Johnson, the Supreme Court stated that no one could legitimately argue that that the Speech or Debate Clause reaches conduct such as an attempt to influence the Department of Justice. 383 U.S. at 172. Brewster extended Johnson, explaining that if a member can be prosecuted for attempting to influence another branch of Government in return for a bribe, a member can also be prosecuted for a promise relating to a legislative act in return for a bribe. 408 U.S. at 524. The Court said that if Congress was uncomfortable with this approach, it was "free to exempt its members from the ambit of federal bribery laws," id., but Congress has yet to accept that challenge. Because the Government only needed to prove that the defendant sought money with knowledge that the donor was paying him compensation for an official act, the Court found inquiry into defendant's legislative performance was not itself necessary. Id. at 527. Evidence of the member's knowledge of the alleged briber's illicit reasons for paying the money was sufficient to carry the case to the jury and did not impinge on the Speech or Debate Clause. Id. Thus, defendant's indictment for taking bribes in connection

with his promise to vote on postage rate legislation was not prohibited by the Clause. Id. at 528-29.

Given Supreme Court precedent, the Government's introduction of evidence to prosecute defendant here in no way runs afoul of the Clause. If a member of Congress can be prosecuted for attempting to influence a government agency or for promising to take future legislative action in return for money, surely defendant can be prosecuted for using his office to advance the business interests of various individuals and corporations in return for money and other things of value. U.S. v. Jefferson, 534 F. Supp. 2d 645, 646-47 (E.D. Va. 2008).

Further, activities the indictment alleges defendant engaged in are political rather than legislative in nature. For example, defendant is alleged to have conducted official travel to foreign countries and held meetings with foreign government officials for the purpose of influencing those officials; to have used congressional staff to create trip itineraries and accompany him on travel; to have contacted both United States and foreign embassies to schedule meetings with foreign government officials; to have obtained entry and exit visas for travelers and otherwise assisted with official travel; to have sent official correspondence on congressional letterhead to foreign government officials; and to have scheduled and participated in meetings with officials of United States agencies to secure

potential financing for the business ventures sought by the companies and business persons. *See* JA31-34, 55-56, 78.

These activities are remarkably similar to what Brewster describes as "political matters" that have never seriously been considered to have the protection afforded by the Speech or Debate Clause. 408 U.S. at 512. Such unprotected activities include constituent services, making appointments with Government agencies, assistance in securing Government contracts, preparing newsletters and news releases and delivering speeches. Id. Further, the Supreme Court specifically has found that attempting to influence the Department of Justice "in no wise related to the due functioning of the legislative process" and was not protected by the Clause. Johnson, 383 U.S. at 172. As a result, material received by the grand jury indicating that defendant was influential with high ranking government officials in Africa does not violate the Clause.

II. PRESENTATION OF EVIDENCE TO THE GRAND JURY REGARDING DEFENDANT'S STATUS AS A MEMBER OF CONGRESS DOES NOT VIOLATE THE SPEECH OR DEBATE CLAUSE

Because the Government has made no attempt to present evidence regarding how defendant spoke on the floor, debated, or voted -- any of which would, indeed, violate the Speech or Debate Clause -- defendant is reduced to arguing that

the mere submission of evidence to the grand jury regarding defendant's status in Congress violates the Speech or Debate Clause. Defendant claims that informing the grand jury of defendant's *status* as a member of Congress and a member of certain committees and caucuses is enough to require a dismissal of the indictment.

This argument flies in the face of Brewster, where the Court found no Speech or Debate Clause violation in an indictment that referenced the defendant's official position as a member of the Senate and the postage rate legislation that he might consider in that capacity. 408 U.S. at 525. In fact, as the Brewster Court noted, 18 U.S.C. § 201 specifically names members of Congress as public officials prohibited from engaging in bribery. Id. at 526. Thus, the prosecution must demonstrate that a defendant is, in fact, a public official in order to meet the elements of the crime. By its essence then, this congressionally passed statute requires prosecutors to introduce evidence that a defendant is a member of Congress. Prosecutors cannot both be required to demonstrate that a defendant is a member of Congress by statute and, at the same time, be prohibited from doing so by the Speech or Debate Clause unless the statute itself is unconstitutional, an argument made neither here nor in any of the cases upon which defendant relies.

Further, the Third Circuit clearly rejected the status argument in U.S. v. McDade, 28 F.3d 283 (3d Cir. 1994). In McDade, Rep. Joseph McDade argued that the Speech or Debate Clause required dismissal of his indictment because it contained references to his position as ranking minority member of both the House Subcommittee on Defense Appropriations and the House Small Business Committee. Id. at 289. He argued the indictment impermissibly used his committee membership and position as a proxy for legislative activity in violation of the Speech or Debate Clause. Id.

Relying on Brewster, the McDade court found that the Speech or Debate Clause "permits a defendant to be prosecuted under an indictment alleging that, as a member of Congress, he or she solicited, agreed to receive, or accepted bribes or illegal gratuities." 28 F.3d at 290. Because such a prosecution requires proof of the defendant's status as a member of Congress, the Third Circuit found Brewster establishes that such proof is permitted. Id. Once it can be established that a defendant is a member of Congress, the McDade court found, "it follows that the Speech or Debate Clause also permits proof of a defendant's status as a member of a congressional committee or as the holder of a committee leadership position." Id. at 290. The McDade court inserted the names of the defendants in Brewster and Helstoski -- in which the Speech or Debate Clause had not prohibited proof of

members' positions in Congress -- into defendant's argument to demonstrate its fallacy. Id. at 294.

As defendant does here, so too Rep. McDade relied on U.S. v. Swindall, 971 F.2d 1531 (11th Cir. 1992), to argue that evidence of his status as a member of particular congressional committees was barred by the Speech or Debate Clause. 28 F.3d at 289. In Swindall, the Eleventh Circuit found that prosecutors had impermissibly relied on Rep. Swindall's committee assignment to demonstrate that he had knowledge of legislative acts – money laundering statutes. 971 F.2d at 1543.

Defendant's interpretation of Swindall as holding that membership on a congressional committee is privileged Speech or Debate material is erroneous. First, contrary to the Swindall court's claim that "the privilege protects legislative status as well as legislative acts," 971 F.2d at 1543, a blanket finding that membership on a congressional committee may not be the subject of inquiry cannot be reconciled with Brewster. In addition, the Third Circuit found that the Swindall court had not banned admission of legislative or committee status in all cases, but simply had intended to prevent prosecutors from inquiring into committee status for the purpose of showing that the member had acquired

knowledge of the contents of the bills considered by his committees. McDade, 28 F.3d at 293.

Because prosecutors in McDade did not propose to use defendant's committee memberships or positions to establish such knowledge, the court found Swindall inapplicable. Id. Instead, the McDade indictment relied on defendant's committee status to show not "that he had actually performed any legislative acts, but to show that he was thought by those offering him bribes and illegal gratuities to have performed such acts and to have the capacity to perform other similar acts." Id. at 293. This is in accord with Brewster, where the Supreme Court found the Clause was not implicated because the prosecution did not need to show that the member of Congress had engaged in any legislative acts, only that he had agreed to take money for promising to do so. 408 U.S. at 526.

Here, as in McDade, the Government did not offer evidence of defendant's committee and caucus memberships to demonstrate any legislative activities in which defendant may have engaged as a result of that membership. Rather, those memberships were relevant to show that those who bribed defendant believed he had relationships with African government officials that he could exploit in return for compensation. Thus, even if -- as the defense contends -- the government was referring to defendant's membership on the Ways and Means Trade

Subcommittee, the Africa Trade and Investment Caucus, or the Congressional Caucus on Nigeria to show defendant's ability to influence legislative acts, this is perfectly permissible. It is taking the bribe, not performance of the illegal agreement, that is the criminal act. Brewster, 408 U.S. at 526. As long as the Government does not introduce evidence regarding what defendant may have done in Congress in the past to earn his bribes, but relies instead on defendant's efforts to trade on his influence with foreign leaders, the Government will not run afoul of the Clause.

Further, defendant's membership in the Africa Trade and Investment Caucus and the Congressional Caucus on Nigeria has no Speech or Debate Clause implications whatsoever. Caucuses formed through the House of Representatives are organized as congressional member organizations and governed under the Rules of the House. See Member's Handbook, http://gop.cha.house.gov/services/membershandbook.shtml#cm. They are groups of members, the primary function of which "is to draw attention to issues of importance to their membership." http://www.house.gov/capuano/issues/committees.shtml Sometimes called task forces or working groups, caucuses can be based on shared affinities or ethnicities, they can be bipartisan and they can include members of both Houses. Caucuses are not congressional committees; they do not consider legislation or hold votes on

legislative matters. Examples include the Congressional Internet Caucus, the Americans Abroad Caucus, the Community College Caucus, the Congressional Mentoring Caucus, the Open Space Caucus and the Congressional Black Caucus. Id.

No case, not even Swindall, has ever suggested much less held that the Speech or Debate clause prohibits discussion of membership in a congressional caucus. Membership in such a caucus is not "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation." See Gravel, 408 U.S. at 625. Extending the privilege to such caucus membership is not "necessary to prevent the indirect impairment of such deliberations." See id. As a result, membership in a caucus is outside the sphere of legislative activity protected by the Clause.

In addition, while some caucuses may have more of a legislative bent (the Patriot Act Reform Caucus) than others (the Former Mayors' Caucus), courts should not be required to review the agenda and history of each particular caucus to determine whether membership should be protected by the Speech or Debate Clause. Similarly, it cannot be that membership in some caucuses will be protected while membership in others will not. Thus, given the non-legislative

nature of caucuses, the Clause does not prevent the grand jury from learning of defendant's membership in the Africa Trade and Investment Caucus and the Congressional Caucus on Nigeria or any of his activities stemming from membership in those caucuses.

CONCLUSION

For the above stated reasons, as well as those set forth in the Government's brief, this Court should affirm the district court's decision denying defendant's motion to dismiss.

Respectfully submitted,

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This Brief of Amicus Curiae has been prepared using:

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