No. 08-4215

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM J. JEFFERSON,

Appellant.

Appeal From The United States District Court
For The Eastern District Of Virginia
Alexandria Division

REPLY BRIEF OF APPELLANT WILLIAM J. JEFFERSON

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SUMMARY

The government's brief fails to address the issues presented by this appeal either directly or candidly. The government does not acknowledge the indisputable fact that the grand jury heard evidence of Congressman Jefferson's legislative activities in this case, and that the prosecutor then specifically underscored the connection between those activities and the development of Congressman Jefferson's "influence" abroad. The government attempts to minimize the importance of the testimony by straining to recast its case in terms that flatly contradict its prior pleadings, and by denying that the use of influence – which is central to the prosecution – has anything to do with the case. It also attempts to minimize the importance of the constitutional violation by mischaracterizing the testimony as a mere reference to the Congressman's "status" and not his legislative activities. But these arguments cannot save the district court's flawed decision.

In reply to the government's brief, Congressman Jefferson submits:

- The Speech or Debate Clause is violated when evidence of a Member's legislative activities is presented to the grand jury.

- Evidence of Congressman Jefferson's privileged legislative activities was presented to the grand jury in this case through the testimony of Lionel Collins and others.

- The testimony in question was not simply a reference to the Congressman's status as a member of certain committees – it detailed privileged activities in which he engaged in order to advance a piece of trade legislation.

- The prosecution expressly used the testimony of Lionel Collins and others to establish that Mr. Jefferson became "very influential" in Africa through his legislative activities involving trade with Africa.

- This evidence was directly related to, and part of the proof of, the 14 bribery related counts, all of which allege that Congressman Jefferson agreed to use his influence, primarily in Africa, in return for something of value.

- This constitutional violation underlying the indictment requires the dismissal of all of the tainted counts.

The trial court's decision denying Congressman Jefferson's motion to dismiss should be reversed on these grounds. But if this Court disagrees, the decision cannot be upheld unless and until the entire record of the proceedings before the grand jury, including the prosecutors' colloquies with the jurors, has been reviewed applying the appropriate legal standard.

ARGUMENT

I. Evidence of Privileged Legislative Acts Was Presented to the Grand Jury in Violation of the Speech or Debate Clause.

A. The grand jury heard testimony about privileged legislative activities.

The government's brief repeatedly asserts that no evidence of legislative activity protected by the Speech or Debate Clause was brought before the grand jury. *See* Gov't Brief at 25 ("The grand jury was presented no privileged Speech or Debate Clause materials"); 32 (allegation that government "brought protected materials before the grand jury" is wrong); 52 (there was "a complete dearth of privileged Speech or Debate material in either the indictment or the grand jury evidence").

But the government's claim is demonstrably untrue. Lionel Collins, a former member of Congressman Jefferson's staff, testified in the grand jury, and his testimony expressly addressed the Congressman's involvement in the passage of the African Growth and Opportunity Act ("AGOA"), a major trade bill:

> And then a second thing, as I mentioned, a trip in 1997, the purpose of the trip was they were considering legislation dealing with the African growth and opportunity, a trade bill dealing with Africa. Congressman Jefferson was very

> instrumental in moving the legislation through the Congress, and it was voted on by the House and Senate side. It was passed.
>
> Congressman Jefferson had a lot of the African ambassadors involved in the legislation and so forth . . . . So as a result, Congressman Jefferson knew the leaders, the African leaders. . . .

JA 182.

The prosecution immediately followed up on this testimony with questions designed to establish a connection between Congressman Jefferson's legislative activities and his influence with African officials:

> Q. So it's an understatement to say he was very influential with high-ranking government officials in Nigeria?
>
> A. Nigeria, but Africa – I can list about 20 countries that he knew the leaders and influential – and when the leaders would come to the United States, they would visit him.
>
> Q. And would you say Congressman Jefferson was one of the most influential members of Congress with respect to African nations?
>
> A. Probably so, yes, on the trade side, international trade.

JA 183.

The Speech or Debate Clause covers all acts within the "legislative sphere." *Gravel v. United States*, 408 U.S. 606, 624-25 (1972). This includes all activities that are "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." *Id.* at 625. There is no doubt that Collins' testimony – which describes Congressman Jefferson's support for AGOA, his key role in obtaining its passage, and some of the methods he used in that effort – is evidence of legislative activities within the meaning of the Clause. Indeed, in discussing this testimony, the trial court acknowledged that "a Member's role in passing legislation is the sort of legislative activity protected by the Clause." JA319.

Nevertheless, the government asserts that Collins essentially testified only that Mr. Jefferson "was a sitting Congressman and he knew African leaders" – in other words, that his testimony is no more than a reference to the Congressman's status. *See* Gov't Brief at 38-39. The government strains to re-write Collins' testimony in this manner in an effort to bring this case under *United States v. McDade*, 28 F.3d 283, 293 (3d Cir. 1994), which held that mere references to a Congressman's committee status do not necessarily violate the Clause. But the government's argument ignores the plain fact that Collins' testimony is

not limited to the Congressman's status – instead, it expressly describes legislative activities. Put bluntly, the government's claim that this testimony does not constitute Speech or Debate material is simply not credible.

The government's observation that the indictment does not describe any protected legislative conduct is irrelevant. Congressman Jefferson has never asserted that the indictment includes legislative acts. Indeed, it is his position that the indictment fails to allege any "official acts" within the meaning of the bribery statute at all. But the fact that the acts enumerated in the indictment do not constitute legislative acts does not end the inquiry. The law is clear that violations of the Speech or Debate Clause *in the grand jury* may themselves require dismissal of an indictment. *See United States v. Swindall*, 971 F.2d 1531, 1547 (11th Cir. 1992); *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980); *United States v. Durenberger*, 1993 WL 738477, *1 (D. Minn. Dec. 3, 1993). And it is clear that in appropriate cases, courts must look behind the face of an indictment to determine whether such violations have occurred. *See United States v. Rostenkowski*, 59 F.3d 1291, 1298 (D.C. Cir. 1995).

In this case, the government violated the Constitution by using Collins' testimony about Congressman Jefferson's legislative activities to establish that the Congressman had developed influence in the area of African trade – the influence that he allegedly sold in the bribe schemes charged in the indictment. The evidence was used to offer the grand jury a particular reason to conclude that Mr. Jefferson was "very influential" – indeed, in the prosecutor's words, "one of the most influential members of Congress" – in Africa, and that reason was his legislative activity on behalf of African trade. The evidence of Congressman Jefferson's legislative efforts and accomplishments was the specific source identified for the unique influence he was allegedly able to exert and the "special knowledge" that, according to the prosecution, he enjoyed.[1] Such reliance on privileged legislative activity as part of the government's case is prohibited by the Speech or Debate Clause. *See Durenberger*, 1993 WL 738477, *1 citing *United States v. Helstoski*, 442 U.S. 477, 500 (1979)).

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[1] *See* JA 178, questioning of Stephanie Butler ("The congressman, through his activities in Congress, has a special knowledge of West Africa ….").

In attempting to avoid the consequences of the constitutional violation here, the government profoundly mischaracterizes Congressman Jefferson's arguments and even its own position in this litigation. The government insists that Congressman Jefferson is trying to transform every exercise of influence into a privileged legislative act, that he is trying to rewrite the bribery statute, and that he is trying to cloak every act with which he is charged in some sort of "AGOA-derived immunity." Gov't Brief at 34.[2] But none of these exaggerated arguments appear anywhere in Congressman Jefferson's brief. Instead, his argument is focused on the grand jury's improper receipt of evidence of

[2] Indeed, the government's characterization turns the defense position with regard to the bribery statute on its head. Congressman Jefferson moved to dismiss the bribery counts for failure to allege an offense because the government is advancing an expansive view of the bribery statute that cannot be squared with its literal terms, and the alleged attempts to exercise influence are not official, much less legislative, acts at all.

his privileged legislative activities to prove his influence, which is a key part of the government's bribery case.[3]

B. The Collins testimony about privileged legislative acts was directly related to the bribery charges.

The government claims that Lionel Collins' testimony has no relevance to the bribery charges because, it says, its case is not based on Congressman Jefferson's alleged influence with African officials. *See, e.g.*, Gov't Brief at 37. But this claim is as lacking in credibility as the claim that no Speech or Debate material was brought before the grand jury. In fact, Collins' testimony was directly related to, and part of the government's proof of, an element of the 14 bribery-related offenses charged in the indictment.

An essential element of the crime of bribery is that the defendant sought or received something of value corruptly in return for being

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[3] The amicus brief filed by Citizens for Responsibility and Ethics in Washington ("CREW") argues that the Clause does not preclude use of evidence of non-legislative activities in the grand jury, and that evidence of Congressman Jefferson's status alone is insufficient to require dismissal of the indictment. Because this appeal is not based on use of non-legislative evidence or mere status, these arguments require no response.

influenced *in the performance of an "official act." See* 2 O'Malley, *et al.*, Federal Jury Practice and Instructions, § 27.05 (5th Ed. 2000) (emphasis added). Whether or not the government now chooses to loosely characterize the acts enumerated in the indictment as "constituent service," those acts all involve Congressman Jefferson's alleged use of his influence to get other people – mostly foreign government officials, and a few U.S. government officials – to do something, in return for things of value.

In fact, it is the government itself that has repeatedly described this case as one involving the sale of influence. During the hearing on this motion in the trial court, the government argued that dismissing the instant indictment on Speech or Debate grounds would provide a barrier to prosecution "whenever a congressman is charged with using influence in return for things of value." JA 265. Obviously, the prosecutor understood and intended that his characterization was meant to apply to the case he was arguing at the moment.

The government's other pleadings also make it clear that the prosecution – not the defense – has consistently equated the alleged use

of influence with the official act element of bribery.[4] Congressman Jefferson moved to dismiss the bribery charges for failure to allege any official acts. In its opposition, the government insisted that its allegations made out a bribery case specifically because they charged a sale of influence. To demonstrate the sufficiency of the allegations, the government pointed out: "the Indictment is also replete with allegations of Defendant Jefferson engaging in official travel to foreign countries and meeting with foreign officials for the purpose of influencing those officials," JA 133; and "the Indictment alleges specific instances where Defendant Jefferson, in his capacity as a Member of

[4] *See also* Appellant's Brief at 36-38. The fact that these pleadings were written after the indictment was returned does not, as the government suggests, make them irrelevant. They plainly reveal the government's initial approach to the case and the theory underlying the prosecution.

the United States House of Representatives, sought to directly influence … United States government agencies." JA 131. [5]

In its bribery opposition, the government also specifically focused on influence to refute the defendant's position that contacts with executive agencies and foreign officials could not constitute "official acts" because a Congressman has no authority over the decisions of those agencies and officials. The government quoted *United States v. Carson*, 464 F.2d 424, 433 (2d Cir. 1972), for the proposition that the bribery statute covers "*any situation in which the advice or recommendation of a government employee would be influential, irrespective of the employee's specific authority (or lack of same) to make a binding decision.*" JA 138 (emphasis by government). Thus, the

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[5] *See also* JA138 (discussing the "tremendous influence" that Mr. Jefferson exerted over U.S. trade credit agencies and foreign government officials in West Africa). Further, in opposition to the motion to dismiss the conspiracy counts, the government stated that the bribery conspiracy set forth in Count One had "one overarching goal – the pursuit of telecommunications business through the use of Defendant Jefferson's status and influence as a Member of Congress with various United States and foreign officials." Government's Opposition to Defendant's Motion to Dismiss Conspiracy Counts One & Two, at 5 (Dkt #59).

government insisted that it was Congresman Jefferson's influence that brought his contacts with foreign officials and U.S. agencies under the bribery statute.[6]

So, while Congressman Jefferson has consistently maintained that use of influence does not constitute an official act as that term is defined in the bribery statute, the government has consistently taken the position that use of influence is sufficient, and that use of influence is what it has alleged. Collins' testimony concerning Congressman Jefferson's influence was directly related to this effort to establish an essential element of the offense as the prosecution conceived it, and the government's new suggestion that its case does not depend on

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[6] The Statement of Facts in the government's brief also reveals an effort to create the false impression that this case is not about the use of influence. The government describes the indictment: "Defendant's pattern of official acts included: conducting official travel to foreign countries; [and] arranging and attending meetings with U.S. and foreign government officials ...." Gov't Brief at 4. But the indictment actually alleges that the official acts consisted of "meeting with foreign government officials *for the purpose of influencing those officials*." JA 33, 55 (emphasis added). The government's selective summary of the allegations cannot alter the plain language of the indictment or transform the true nature of its case.

Congressman Jefferson's influence is highly disingenuous. When the prosecution expressly relied upon the Collins testimony about Congressman Jefferson's legislative activities to establish his influence to the grand jury, the government violated the Speech or Debate Clause. *See Helstoski*, 442 U.S. at 487; *United States v. Brewster*, 408 U.S. 501, 512 (1972).

In a last ditch effort, the government also asserts that Collins' testimony should be ignored because it was "unsolicited" and "voluntary." Gov't Brief at 41.[7] But the prosecutors had the opportunity to interview Collins before they put him into the grand jury. The fact that they could preview the testimony he would give in response to their questions makes the suggestion that they did not know that he would tie the Congressman's influence with African leaders to his legislative

[7] The government attempts to demonstrate the dangers of concluding that voluntary testimony may violate the Speech or Debate Clause by positing that unscrupulous Congressional staffers might voluntarily interject legislative material into their grand jury testimony in order to immunize Congressmen under investigation. *See* Gov't Brief at 42 n.18. This claim is, to put it mildly, purely speculative, and it is based on the false assumption that prosecutors are powerless to interrupt or excuse their witnesses or otherwise distance themselves from unwanted testimony.

work suspect. The government's brief offers no refutation of, or even response to, this point.

Moreover, the notion that the testimony was spontaneously offered by the witness to the surprise of the prosecution is belied by the record of what actually transpired. When Collins talked – at some length – about legislative activities, the prosecutor did not stop him or caution the grand jurors to disregard his testimony. Instead, when Collins concluded, the prosecutor used the testimony about AGOA as the foundation for the next questions, which established that as a result of the legislative activities, Congressman Jefferson developed significant influence with African leaders. JA 183. The prosecutors also brought up the legislatively derived influence with Spence and Butler. JA 179, 178. The government's deliberate use of the evidence fatally

undercuts its claim that the Collins testimony was unsolicited and tangential to its case.[8]

Further, the evidence of Congressman Jefferson's membership on committees and caucuses dealing with African trade, and the cited passages from the testimony of Melvin Spence and Stephanie Butler, compounded the violation of the Clause here. Although the government insists that such mentions of the Member's status are permitted by *McDade*, in fact, *McDade* and *Swindall* establish that even references to committee status can violate the Speech or Debate Clause depending on their purpose. It is notable that the government's brief nowhere acknowledges that the indictment specifies – and therefore that the grand jury also heard – that Congressman Jefferson **"**was a Member of the Committee on Ways and Means, Subcommittee on Trade; Member

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[8] This case is distinguishable from *United States v. Biaggi*, 853 F.2d 89 (2d Cir. 1988), the only authority cited by the government to support its claim that a volunteered statement cannot give rise to a Speech or Debate violation. In *Biaggi*, the testimony was actually volunteered – it was offered while no question from the government was pending. 853 F.2d at 103. Moreover, Biaggi then deliberately declined to raise Speech or Debate objections for strategic reasons because the testimony supported a theory of the defense. *Id.* In this case, Congressman Jefferson has consistently asserted his Speech or Debate privilege.

of the Committee on the Budget; Co-Chair of the Africa Trade and Investment Caucus; and Co-Chair of the Congressional Caucus on Nigeria." JA 20, ¶ 3. The references to these particular committees and caucuses reinforced the Speech or Debate evidence connecting his influence to his legislative acts, and re-emphasized the relevance of his influence to the bribery charges.[9] The testimony of Melvin Spence similarly reinforced the connection between Congressman Jefferson's leadership in the area of African trade and AGOA. The government's question to Stephanie Butler also directed the grand jury's attention to the link between Mr. Jefferson's activities in Congress and his expertise in African trade.

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[9] The CREW brief argues that membership in caucuses cannot be protected by the Clause because caucuses do not consider legislation or hold votes. But caucuses are formed by Members "in order to pursue common legislative objectives" (Members' Handbook, "Congressional Member Organizations," at 55; available at http://cha.house.gov/PDFs/MembersHandbook.pdf), and caucus activities may therefore fall within the legislative sphere. Moreover, in this case, the references to Mr. Jefferson's particular caucus memberships emphasized the connection between his legislative activities and his influence in African trade. And the defense does not rely solely on the references to caucus memberships in any event.

Thus, the record, including the Collins testimony, clearly shows that the government went beyond acceptable references to status in the grand jury and used evidence protected by the Speech or Debate Clause to establish the Congressman's influence and advance its allegation that he sold that influence. In response to this record, the government resorts to repeating its usual parade of horribles: if the court grants this defendant's motion to dismiss, the government will never be able to prosecute anyone. But the vindication of the Clause here will not immunize a Congressman for anything he does while in office, nor will it place insuperable burdens on law enforcement. The only question is what evidence the government may use while pursuing charges relating to a Congressman's conduct. "All that is required is that in presenting material to the grand jury the prosecutor uphold the Constitution and refrain from introducing evidence of past legislative acts or the motivation for performing them." *Helstoski*, 635 F.2d at 206. Because the government failed to obey this straightforward command in this case, the Speech or Debate Clause was infringed, and the trial court's conclusion to the contrary was erroneous as a matter of law.

II. The Violation of the Clause That Occurred Here Requires Dismissal of the Bribery-Related Counts in the Indictment.

Although the government refuses to acknowledge that Speech or Debate material was presented to the grand jury, it also argues, relying primarily on *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), that even if it was, the trial court correctly determined that dismissal of the bribery-related counts in the indictment was not required because there were "independent, non-privileged grounds" sustaining the charges. But *Johnson* and the other cases cited by the government do not support that conclusion.

The indictment in *Johnson* included a conspiracy count that was based, in part, on a speech Johnson made in Congress. That count was dismissed after Johnson's initial trial, and Johnson was re-tried on the other counts in the indictment, "which had nothing to do with his speech." 419 F.2d at 58. After conviction, Johnson argued that the remaining counts were invalid because "the grand jury which indicted him was biased because it heard testimony of his Congressional speech." *Id.* The court rejected the claim that the introduction of constitutionally impermissible evidence could invalidate even the

unrelated counts. "The count of the indictment that dealt with the speech was dismissed, and the speech played no part in proof of the remaining counts." *Id.*

Here, Congressman Jefferson is not asserting that the grand jury was biased against him or that charges unrelated to the bribery allegations should be dismissed. Instead, he is seeking only the remedy approved in *Johnson:* dismissal of those counts to which the privilege evidence pertained.[10]

The other cases relied on by the government are similarly distinguishable. In *United States v. Dowdy*, 479 F.2d 213 (4th Cir.

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[10] Congressman Jefferson's motion called for the dismissal of the bribery counts (Counts 3 and 4) and the honest services wire fraud counts (Counts 5-10), which allege a bribery scheme based on his use of influence. He seeks the dismissal of the money laundering counts, which allege transactions involving the proceeds of the crime of bribery (Counts 12 – 14), and the RICO count (Count 16), which involves predicate acts of bribery, wire fraud based on bribery, and monetary transactions in bribery proceeds. He seeks the dismissal of Count 2, which alleges a conspiracy to commit bribery and wire fraud based on bribery. Count 1 alleges a three-pronged conspiracy to violate the bribery, wire fraud, and Foreign Corrupt Practices Act statutes, but only the FCPA allegation is untainted by the privileged material. The motion did not seek the dismissal of the substantive FCPA count (Count 11) or the obstruction of justice count (Count 15).

1973), the court found that four overt acts based on Speech or Debate material, which were among a total of more than 20 overt acts, could be stricken without affecting the sufficiency of the conspiracy counts, because conspiracy requires proof of only one overt act. *Id.* at 224. *McDade* also dealt with several tainted overt acts in conspiracy counts that included numerous other overt acts that were unaffected by the privileged matter.[11] In this case, by contrast, the Speech or Debate evidence did not relate only to segregable portions of the challenged counts. Instead, it was used to establish the fundamental issue of Congressman Jefferson's influence, the sale of which is alleged in all of the counts relating to bribery.

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[11] The Supreme Court's decision in *United States v. Johnson*, 383 U.S. 169 (1966), which came after Johnson's first trial, also does not support the government's position. There, the court held that retrial of the conspiracy count after removal of all references to the defendant's protected speech would be permissible because the count also alleged a second object wholly unrelated to the speech. 383 U.S. at 185. Finally, *United States v. Myers*, 635 F.2d 932, 941 (2d Cir. 1980), citing the Fourth Circuit's holding in *Johnson*, rejected a claim that an indictment should be dismissed simply because the grand jury heard "some evidence" of legislative acts.

Rather than *Johnson* and the other cases cited by the government, it is *Swindall* and *Durenberger* that govern here. These decisions correctly recognize that when the grand jury has heard evidence of privileged legislative activities that is relevant to its decision to indict, the Speech or Debate Clause has been violated and dismissal of the affected counts is required.

Contrary to the contentions in the government's brief, *Swindall* does not limit dismissal of an indictment only to those situations where the Speech or Debate evidence is the sole evidence proffered to establish an essential element of the charge. *Swindall's* analysis is based on the fundamental proposition that Congressman Jefferson seeks to apply here: the "Speech or Debate privilege is violated if the Speech or Debate material exposes the member to liability." 971 F.2d at 1549. *Swindall* did recognize that not every use of Speech or Debate material is a violation of the Clause: "[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." *Id.* But it follows, then, that where the evidence of a legislative act *is* relevant to the decision to indict, the Clause has been infringed. In this case, the testimony about

legislative acts was not tangential or incidental to the matters before the grand jury; as detailed above, it was directly related to the bribery theory that underlies the entire case – Congressman Jefferson's alleged use of his influence in return for something of value.

After laying out the applicable standard, the court in *Swindall* offered some examples of ways in which the use of Speech or Debate material in the grand jury could violate the Clause and require dismissal of the indictment. In *Helstoski*, it said, dismissal was required because "improper use of Speech or Debate material was so widespread, it was inseparable from the indictment …." 971 F.2d at 1549. In the case before it, the improper Speech or Debate evidence was fatal to the indictment because "evidence of Swindall's legislative acts was an essential element of proof with respect to the affected counts." 971 F.2d at 1549. But that was not the only reason. The court also noted that Swindall had testified before the grand jury, and that "[t]he impressions formed by the grand jury that Swindall was lying *were based in part on the AUSA's questioning of the Congressman about Speech or Debate matters*." 971 F.2d at 1549 (emphasis added). So, the court concluded,

> With respect to the affected counts, no new indictment can issue from an excised transcript of Swindall's grand jury

> testimony because the decision to indict was inextricably linked to the grand jury's impressions of Swindall's answers to improper questions.

971 F.2d at 1549.

In this case, the particular privileged evidence involved was relevant to the bribery charges as they were uniquely conceived and presented by the prosecution, and, as in *Swindall*, it formed part of the basis for the grand jury's decision. Thus, Congressman Jefferson was exposed to liability in violation of the Clause, and the indictment should be dismissed.

The decision in *Durenberger* further establishes that the Speech or Debate evidence presented to the grand jury need not rise to the level of the sole source of proof of an essential element of the government's case before the dismissal of an indictment is required. In *Durenberger*, portions of Senate reports on an investigation into Durenberger's conduct were provided to the grand jury. The court held that this violated the Clause even though it was possible that the grand jurors never saw the documents:

> Considering that the government submitted hundreds of pages of exhibit materials, *it is conceivable that the grand jury never found, let alone read, the selected pages from the Reports*. .... It seems *equally plausible* that the grand jury

> members attached great significance to the factual findings of the Select Committee on Ethics and Special Counsel and relied on the Reports to justify, in whole or in part, its indictment against Durenberger. *Because no one – including government counsel – knows what weight, if any, the grand jury attached to the selected pages from the Reports,* I cannot find that the constitutional error was harmless.

1993 WL 738477, * 2 (emphasis added).

The court noted that the situation before it was factually distinct from both *Swindall* and *Helstoski*, in that the legislative material used in the grand jury was neither an essential element of proof nor widespread. 1993 WL 738477, *3. Nevertheless, the court concluded that the underlying purposes of the Speech or Debate Clause, described by the Supreme Court in *Gravel*, 408 U.S. at 616, required dismissal of the indictment. *Id.* at *4.

The government asserts that the holding in *Durenberger* is erroneous in light of *Johnson* and similar authorities. But this assertion ignores the important distinction between cases where the impact of Speech or Debate evidence can be confined to particular acts or counts, and those where it is directly relevant to and inseparable from the proof of the challenged counts.

The government is similarly mistaken in its claim that *Durenberger* has no remaining validity in light of *United States v. Rose*, 28 F.3d 181 (D.C. Cir. 1994). While *Rose* disagrees with *Durenberger's* conclusion that a Senator's testimony before the Ethics Committee is protected by the Clause, 28 F.3d at 189, it does not even address, let alone reject, *Durenberger's* analysis of the remedy to be applied when protected evidence *is* presented to the grand jury. Indeed, the D.C. Circuit subsequently cited *Durenberger* for the proposition that submission of Speech or Debate material to the grand jury may require dismissal of an indictment. *Rostenkowski*, 59 F.3d at 1298.

This case does not raise a close question of whether or not the evidence actually falls within the "legislative sphere." The testimony described clearly privileged activities: Congressman Jefferson's participation in the passage of legislation – the very thing that is protected by the Clause. It would interfere with the legislative process if Members had to be concerned that their actions with respect to specific bills could be used as evidence by an executive seeking to obtain indictments against them. Since privileged material was presented to the grand jury as part of the government's proof of a key element of its

case, Congressman Jefferson was exposed to liability on the basis of his Speech or Debate in violation of the constitution.

The fact that Mr. Jefferson has pointed to only a few passages of testimony that dealt with legislative matters is also not dispositive.[12] The *Durenberger* court ordered dismissal based solely on an 11-page exhibit, and in that case the record did not establish, as it does here, that the prosecutors had drawn the grand jurors' attention to the information. More importantly, as the Supreme Court has stated in no uncertain terms, where the Speech or Debate privilege applies, it is "absolute." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509 (1975). *See also Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 419 (D.C. Cir. 1995). Once the privilege has been violated in a manner that exposes a legislator to liability on the basis of his

[12] The defense, of course, has only had access to a small portion of the record, and some of the record was never transcribed at all. Moreover, a number of the staff transcripts that the government permitted the defense to review dealt not with the charges in the indictment, but with issues relating to subpoenas served on Congressman Jefferson's office. Thus, it is of no moment that these transcripts contained no legislative material.

legislative acts, no balancing test can be applied. Because that is what happened here, the bribery-related counts must be dismissed.

III. The Review of the Grand Jury Record Was Appropriate Under *Rostenkowski,* But In Conducting the Review, the Trial Court Did Not Properly Apply the Speech or Debate Clause.

As the government recognizes, *Rostenkowski* provides that a Member of Congress seeking to dismiss an indictment on Speech or Debate grounds is entitled to *in camera* review of the grand jury record if the Member can "provide, either from the allegations of the indictment or from some other source, at least some reason to believe that protected information was used to procure his indictment." 59 F.3d at 1313. In this case, the district court decided to review the transcripts of the grand jury testimony, but then subsequently held that Congressman Jefferson was not entitled to the review after all. JA 310-311. The government asserts that the question of Congressman Jefferson's right to a review of the record is "essentially moot" because the trial court actually read the transcripts. Gov't Brief at 45 n.19. Congressman Jefferson agrees that since the court based its decision on its consideration of the transcripts, that analysis is part of the case and subject to review on appeal. But the government objects to any further

review of the record by this Court. Since the government relies on the district court's erroneous conclusion that Congressman Jefferson did not meet the *Rostenkowski* standard, *see* Gov't Brief at 49, Congressman Jefferson addresses that ruling here.

Congressman Jefferson provided the trial court with more than enough evidence to show that there was "at least some reason to believe that protected information was used to procure his indictment." Indeed, the defense provided direct evidence that testimony regarding legislative activities was *actually presented* to the grand jury; no more should be required. But even before the discovery of this evidence, Congressman Jefferson was able to point to facts demonstrating the likelihood that protected information was used. First, the indictment made specific reference to Congressman Jefferson's membership on committees and caucuses dealing with trade with Africa, and also alleged that he participated in the bribery schemes as a member of these committees and caucuses. Second, the recorded conversations of Brett Pfeffer, a former staff member who is now cooperating with the government, reveal that he spoke repeatedly about the Congressman's legislative activities. Although the grand jury did not hear testimony

from Pfeffer or the recordings of his conversations, information obtained from Pfeffer or the tapes must have been presented to the grand jury by a summary witness in order to support the allegations in the indictment. Lori Mody, the government's key cooperating witness and the other party to the conversations with Pfeffer, also could have discussed his descriptions of the Congressman's legislative activities in her testimony. In addition, the FBI agents who investigated Congressman Jefferson's activities presumably provided testimony. On this record, the showing went well beyond "at least some reason to believe," and Congressman Jefferson was plainly entitled to have the trial court review the grand jury record to determine whether it contained additional Speech or Debate material.

While the district court did review the remaining witness transcripts, it applied an incorrect legal standard in doing so. The court defined the scope of protected Speech or Debate material to be narrower

than set forth in the governing Supreme Court precedents.[13] In addition, the court's decision reveals important gaps in its understanding of the reach of the Clause. First, the district court expressed the view that if a Member is not charged for his role or vote on particular legislation, then any evidence of legislative acts is "neither material nor relevant" to the indictment. JA 319. This reflects a misreading of Speech or Debate principles, and suggests that in conducting its review, the court focused too narrowly on the question of whether any of the charges were based directly on legislative activities. Additionally, the trial court concluded that the testimony of Melvin Spence, which expressly referred to AGOA, was not Speech or Debate material as defined by the court. *See* JA 318. It appears, therefore, that the trial court would not have identified other references in the

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[13] The government cites *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002), for the proposition that "[t]rial judges are presumed to know the law and to apply it in making decisions." But *Walton* was comparing the capacities of judges and juries to apply vague statutes in making sentencing decisions. Obviously, the presumption does not mean that every decision by a trial court correctly applies the law.

transcripts to AGOA or any other legislation as even raising Speech or Debate concerns.

The government exaggerates when it claims that the defense's position is that every Member of Congress is entitled to *in camera* review of grand jury transcripts simply on the basis of his status. Not only did Mr. Jefferson demonstrate real grounds for his concern that Speech or Debate material could have been presented to the grand jury, but he provided proof that Speech or Debate evidence *actually was presented*. The trial court's post-review, and possibly flawed, conclusion that no other legislative evidence was presented to the grand jury does not undermine the validity of that showing. And given the trial court's cramped understanding of the scope of the Speech or Debate Clause, and its dismissive treatment of the specific instances of testimony relating to legislative matters identified by the defense, this Court cannot affirm the trial court's ruling without conducting its own review of the transcripts applying the proper legal standard.

IV. The Trial Court Should Have Reviewed the Prosecution's Instructions And Argument to the Grand Jury.

The government's discussion of the trial court's failure to review the prosecutors' instructions and arguments to the grand jury completely ignores what happened in this case. On February 6, 2008, the parties were before the trial court on another issue, and the court called for argument on the Speech or Debate motion. JA 229. The defense argued that under the court's November 30, 2007 Order, which required the government to submit "those portions of the grand jury record that have not been provided to the defendant" (JA 221), the instructions and arguments should have been submitted and included in the court's review. The court then asked the government if it could deliver the missing material within 30 minutes. The government replied that it could not because it had never ordered that those portions of the record be transcribed. JA 265-66. The court then proceeded to rule on an incomplete record. Mr. Jefferson submits that this fact alone – which the government's brief does not address – is an abuse of discretion requiring reversal of the decision below.

Moreover, there is no merit to the government's claim that Mr. Jefferson's argument for review of these materials is based on "rank speculation." The record in this case conclusively establishes that Speech or Debate evidence was introduced in the grand jury and tied to a key element of the government's case.[14] There is thus substantial reason to believe that the prosecution discussed this evidence and its implications with the grand jurors.

The government cites *Costello v. United States*, 350 U.S. 359, 363 (1956), for the principle that facially valid indictments are sufficient to call for a trial of the charges on the merits. But *Costello* does not apply where the Speech or Debate Clause is violated in the grand jury. *See United States v. Helstoski*, 635 F.2d at 204; *United States v. Rostenkowski*, 59 F.3d at 1298 (recognizing general propositions regarding facially valid indictments, but stating "we do not think they

[14] The government relies on the general presumption of regularity attached to grand jury proceedings, *see United States v. Mechanik*, 475 U.S. 66, 75 (1986) (concurring opinion), but the presumption is overcome by this specific proof, and by the need to vindicate the Constitutional purposes underlying the Clause.

are applicable where they would undermine the important purposes served by the Speech or Debate Clause").

Since under *Rostenkowski*, the Congressman was entitled to an *in camera* review of the grand jury proceedings, there is no principled justification for the omission of the prosecutors' colloquies. Without completing this review, the trial court could not fairly conclude that no Speech or Debate violations occurred in the grand jury, or that the Speech or Debate evidence that was introduced was irrelevant and immaterial to the government's case. Accordingly, the trial court erred when it declined to review these portions of the grand jury record.

CONCLUSION

The district court's Order of February 6, 2008 should be reversed, and Counts 1-10 (with the exception of the FCPA portion of Count 1), 12-14 and 16 of the indictment should be dismissed. If the Court determines that these counts cannot be dismissed on the basis of the existing record, then it should reverse the trial court's order and remand this matter so that the remainder of the grand jury record can be reviewed for Speech or Debate material.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure, the undersigned counsel for appellant certifies that the accompanying brief is printed in 14 point typeface, with serifs, and, including footnotes, contains no more than 7,000 words. According to the word-processing system used to prepare the brief, Microsoft Word, it contains 6,878 words.

/s/ Robert P. Trout

Robert P. Trout

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2008, I electronically filed the foregoing brief 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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