IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-4215

UNITED STATES OF AMERICA,

Appellee

v.

WILLIAM J. JEFFERSON

Appellant

Appeal from the United States District Court
for the Eastern District of Virginia
at Alexandria

The Honorable T.S. Ellis, III, District Judge

BRIEF OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

The United States does not disagree with defendant's jurisdictional statement. *See* Fed. R. App. P. 28(b).

ISSUE PRESENTED FOR REVIEW

Whether the district court should be affirmed in its denial of defendant's motion to dismiss where, as defendant concedes, the indictment on its face

contains no Speech or Debate material and where the court found that (a) no legislative material had been presented to the grand jury following an exhaustive *in camera* review to which defendant was not entitled, and that (b) even if Speech or Debate material had been presented to the grand jury, there were independent, non-privileged grounds for sustaining the charges in the indictment.

STATEMENT OF THE CASE

On June 4, 2007, an Eastern District of Virginia grand jury returned an indictment charging William J. Jefferson with one count of conspiracy to solicit bribes by a public official, deprive citizens of honest services by wire fraud, and violate the Foreign Corrupt Practices Act (18 U.S.C. § 371); one count of conspiracy to solicit bribes by a public official and deprive citizens of honest services by wire fraud (18 U.S.C. § 371); two counts of solicitation of bribes by a public official (18 U.S.C. § 201); six counts of a scheme to deprive citizens of honest services by wire fraud (18 U.S.C. §§ 1343, 1346); one count of violating the Foreign Corrupt Practices Act (15 U.S.C. § 78dd-2(a)); three counts of Money Laundering (18 U.S.C. § 1957); one count of Obstruction of Justice (18 U.S.C. § 1512(c)(1)); one count of violating the Racketeer Influenced Corrupt Organization Act (18 U.S.C. § 1962(c)); and Forfeiture Allegations (18 U.S.C. §§ 981, 982, 1963; 28 U.S.C. § 2461). On September 7, 2007, defendant moved to

dismiss 14 of the indictment's 16 counts. Defendant alleged that materials protected by the Speech or Debate Clause privilege were used against him in the grand jury. On February 6, 2008, the district court (the Honorable T.S. Ellis, III) denied defendant's motion. *See United States v. Jefferson*, 534 F. Supp. 2d 645, 654-55 (E.D. Va. 2008).

STATEMENT OF FACTS

A. The Charges

On June 4, 2007, a federal grand jury sitting in the Eastern District of Virginia returned a sixteen-count indictment against defendant, William J. Jefferson, a Member of the United States House of Representatives, representing the 2nd Congressional District in the State of Louisiana. JA19-112. The indictment alleges that defendant participated in, among other crimes, at least eleven distinct bribe schemes, from approximately August 2000 through August 2005, in order to unjustly enrich himself and his family members. *Id.* Like other Members of Congress, defendant routinely performed constituent services and even publicized his willingness to do so on his official website. JA173-74. But unlike other Members, defendant traded his performance of these official acts for things of value.

These schemes followed a common pattern wherein defendant solicited various forms of bribe payments from constituent companies and business persons in return for performing a stream of official acts designed to promote the constituent companies' business opportunities in Africa and elsewhere. *See* JA31-34, 55-56, 78. The things of value sought by defendant included monthly fees or retainers, consulting fees, shares of revenue and profit, sales commissions, and stock ownership in the companies seeking his official assistance. *Id.* Defendant's pattern of official acts included: conducting official travel to foreign countries; arranging and attending meetings with U.S. and foreign government officials; using his congressional staff to assist with, and participate in, official travel and to contact U.S. agencies; and sending official correspondence on congressional letterhead. *Id.* Defendant also concealed this illegal conduct through nominee companies formed in family members' names. *Id.* In describing this conduct, the indictment alleges:

B. The Bribe Schemes

The investigation that gave rise to the indictment started with a Northern Virginia businessperson alerting law enforcement to defendant's role in a possibly fraudulent telecommunications deal in Nigeria and his solicitation of a bribe from that businessperson. *See* JA23. That investigation ultimately uncovered that, in

addition to the Nigerian telecommunications deal, defendant had been involved in similar illegal conduct for a number of years. *See* JA53-66, 78. The businesses from which defendant solicited and accepted bribes crossed a wide range of economic and industry sectors.

(i) Telecommunications deals

The indictment describes defendant's involvement in furthering the business of iGate, Inc. ("iGate"), a Louisville, Kentucky telecommunications firm. JA26, 30-52. Defendant solicited the CEO and founder of iGate, Vernon Jackson, to pay a monthly retainer, shares of profits and revenue, and iGate stock to a nominee company in the name of defendant's wife and children. JA22, 35. Jackson agreed to do so, and between January 2001 and August 2005, iGate transferred more than 30 million shares of its stock and paid more than $400,000 to the nominee company.[1] JA35-41. In return for these things of value and while keeping secret his beneficial interest in iGate, defendant met with U.S. government officials at the Export-Import Bank of the United States ("Ex-Im

[1] On May 3, 2006, Jackson pleaded guilty to a two-count criminal information charging him with conspiring to bribe a public official and bribery. Jackson also agreed to cooperate with the government. *United States v. Jackson*, 1:06cr161 (E.D.Va.) (Ellis, J.).

Bank"),[2] in order to advance an approximate $40 million loan guarantee to further iGate's ability to export its products to Africa, JA37; convinced another Member of the U.S. House of Representatives to write a letter of support for iGate, JA35-36; wrote letters on congressional letterhead in support of iGate's business ventures to U.S. and foreign government officials, JA21, 27, 29, 33; caused his congressional staff members to seek assistance from the U.S. Embassy in Nigeria, JA20; and embarked on official travel with staff to meet with foreign government representatives to further iGate's ventures in West Africa, JA20, 29.

In addition to receiving bribes from iGate, in the summer of 2003 defendant sought bribes from Netlink Digital Television ("NDTV"),[3] a Nigerian company that invested in an iGate telecommunications venture in Nigeria. JA36. Without Jackson's knowledge, NDTV agreed to pay defendant and his nominees a percentage of revenue and stock, as well as fees estimated to be worth $1 million, in return for defendant's performance of official acts to further the iGate-NDTV

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[2] The Ex-Im Bank was established by Congress as an agency of the United States to assist in financing the export of U.S. goods and services to international markets. JA23, 132.

[3] NDTV is identified in the indictment as "Nigerian Company A." JA27. While the indictment uses pseudonyms to identify various companies and individuals, *see, e.g.*, JA4-11, the district court orally granted permission at defendant's request to use real names throughout the course of this litigation.

business venture. JA36-37.

When the iGate-NDTV business relationship soured in the spring of 2004, iGate needed another investor. In the summer of 2004, defendant was introduced to a businessperson from McLean, Virginia by one of his former congressional staff members, Brett Pfeffer.[4] JA40. Defendant asked the businessperson to invest in iGate's telecommunications business in Africa. *Id.* After the businessperson agreed to invest millions in the venture, defendant solicited a bribe – first through Pfeffer and later directly – from the businessperson in the form of 5% to 7% of the businessperson's company; these shares were to be given to defendant's family. JA41-42.

Unbeknownst to defendant, however, the businessperson thereafter approached the Federal Bureau of Investigation ("FBI") in March 2005 and became a cooperating witness ("CW"). *See* JA23. Soon thereafter, at the direction and under the supervision of the FBI, CW recorded numerous conversations with defendant, Jackson, and Pfeffer. JA23, 42-52. Over time, defendant's solicitations grew and ultimately he sought the following things of value in

[4] On January 11, 2006, Brett Pfeffer pleaded guilty to a two-count criminal information charging him with conspiring to bribe a public official and bribery. Pfeffer also agreed to cooperate with the government. *United States v. Pfeffer*, 1:06cr10 (E.D.Va.) (Ellis, J.).

exchange for the performance of official acts: a 30% ownership of CW's Nigerian company; a payment of over $7 million from CW to another family-controlled company to be used to fund start up costs and operating expenses for telecommunications ventures in Nigeria and Ghana; and the payment of $1 million to yet another family-controlled company. *See* JA43, 50.

The success of the iGate-CW business venture in Nigeria depended on getting approval from the Nigerian government to access the existing telephone lines at the facilities of the government-controlled telephone company, NITEL. *See* JA42. Defendant and his family – because of their bribe-stock in iGate and CW's companies – stood to make hundreds of millions of dollars if this venture was as profitable as defendant anticipated. *See* JA45. To ensure that access was granted, defendant discussed with CW ways in which bribes could be paid to Nigerian officials, including then Vice President of Nigeria, Atiku Abubakar.[5] JA42-43. During one recorded conversation in May 2005, for example, defendant told CW that the Nigerian business partner, Suleiman Yahyah,[6] had "a lot of folks to pay off" in connection with the venture. JA43. In early June 2005, a wiretap of

[5] Vice President Abubakar is identified in the indictment as "Nigerian Official A." JA23.

[6] Yahyah is identified in the indictment as "Nigerian Businessperson B." JA28.

Jackson's phone intercepted a call from Yahyah expressing concern over gaining access to NITEL's facilities and asking Jackson to have defendant speak with Vice President Abubakar, imploring that defendant "has to move in and move in fast." JA45.

This led defendant to contact Vice President Abubakar through one of Abubakar's wives, who lived in Potomac, Maryland. JA23, 45-46. Later, defendant met with CW and advised that he had provided the vice president's wife with a description of the project and investment information so that Vice President Abubakar would see it and "salivate over what the opportunities are there."[7] JA46. These interactions ultimately led to a July 18, 2005 meeting at the Abubakars' Potomac mansion where defendant met privately with Vice President Abubakar and offered to pay a bribe to him. JA48-49. Immediately following that meeting, defendant told CW that Vice President Abubakar had agreed to accept a bribe. *Id.* The bribe to the vice president was to consist of a "front-end" payment of $500,000 – which, in defendant's words, would ensure that the "little hook is in there" – and a "back-end" payment of at least half of Yahyah's company's share of the profits. JA49. On July 30, 2005, defendant was videotaped by the FBI taking

[7] During this same time period, defendant also undertook various official acts to promote a similar telecommunications venture involving iGate and CW in Ghana. *See* JA44-48.

a briefcase from CW containing $100,000 in cash for delivery to Vice President Abubakar as a partial payment of the $500,000 "front-end" bribe. JA50. A few days later, the FBI executed a search warrant at defendant's Washington, D.C., residence and found $90,000 of the $100,000 in cash hidden in his freezer. *See* JA51-52.

(ii) Deep water offshore oil reserves

Besides the iGate-related bribe schemes, the indictment also alleges that in 2002 defendant agreed to help a businessperson resolve a dispute over oil drilling rights – worth an estimated $300 to $500 million – off the coast of Sao Tome and Principe. JA63-64. As a prerequisite to providing his official assistance, defendant required that the businessperson compensate defendant's brother through another nominee company, which defendant had a congressional staffer, Stephanie Butler,[8] establish. JA26, 63-64. Those demands resulted in a contract in which defendant's brother and a Louisiana lobbyist were to receive "fifty percent of the proceeds" owed to one of the companies involved in the oil rights dispute. JA64. The official acts contemplated in this scheme included meetings with high-ranking Sao Tomean government officials. JA73.

[8] Ms. Butler is identified in the indictment at Paragraph 23 as a "congressional staff member." JA26.

(iii) Waste recycling systems

Another scheme involved a company, which was based in part in Louisiana, that was trying to sell waste recycling systems in Africa and elsewhere. JA64-66. In exchange for performing official acts, defendant required that his brother – and later his son-in-law – receive, through nominee companies, commissions on the sale of waste recycling systems to foreign governments and a share of the revenues from the operation of such systems. *Id*. For example, in February 2004, defendant traveled to West Africa in his official capacity and met with government officials in Nigeria, Equatorial Guinea, Cameroon, and Sao Tome and Principe, promoting, among other things, the waste recycling system. JA66. Defendant later filed a Travel Form with the Clerk of the House of Representatives stating that "[i]n his capacity as Co-Chair of Congressional Nigeria Caucus & Africa Trade & Investment Caucus, Rep. Jefferson led a business delegation to West Africa to explore general investment opportunities & AGOA (Africa Growth & Opportunity Act) opportunities" and acknowledging that this trip, which was paid for, in part, by the waste recycling company, was "in connection with my duties as a Member or Officer of the U.S. House of Representatives." JA66, 193. He did not, however, disclose his or his family's financial interest in the sale of the waste recycling systems. *Id.*

(iv) Development of various plants and facilities

As is further alleged in the indictment, defendant solicited things of value from three related Louisiana construction services companies to be paid to defendant's brother through various nominee companies. JA57-60. Executives from those companies agreed to pay defendant's brother a commission for contracts obtained from certain state governments in Nigeria. *Id.* The contracts defendant – and not his brother – helped these companies pursue, through various official acts, involved: (a) performing a feasibility study for the construction of a sugar plant in Jigawa State, Nigeria; (b) developing various food processing facilities in Kaduna State, Nigeria; and (c) obtaining rights to develop marginal oil fields in Akwa Ibom State, Nigeria. *Id.* Between 2001 and 2002, defendant's brother received more than $21,000 related to the sugar plant in Jigawa State, and he signed a contract in 2001 entitling him to a "bonus of no less than $200,000 -- per marginal oil field and no less than $500,000 -- per offshore oilfield" in Akwa Ibom State. *Id.*

(v) Marginal oil fields, a fertilizer plant, and other projects

Defendant also sought things of value from a Louisiana engineering and oil services company seeking to do business in Nigeria. JA42-45. Once again, defendant solicited for his brother a share of any revenue received by the company

from its development of marginal oil fields, a fertilizer plant, and other miscellaneous projects in Nigeria, all in return for defendant's performance of official acts to advance the company's business projects in Nigeria. *Id.* For example, in May 2002, defendant directed staffer Melvin Spence[9] to contact the U.S. Trade and Development Agency ("USTDA") to inquire about the status of the company's pending application for funding of a feasibility study for a fertilizer project in Akwa Ibom State, Nigeria.[10] *See* JA62-63. Defendant thereafter met about this pending application with USTDA officials to assist the company in obtaining approval. JA63.

(vi) Oil concessions

The indictment further alleges that in May 2002 defendant approached a Washington, D.C.-based business executive and asked if he would agree to participate in efforts to gain oil concessions from the government of Equatorial Guinea. JA86-88. In furtherance of this scheme, defendant had Ms. Butler organize yet another nominee company, which defendant intended to transfer to

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[9] Mr. Spence is identified in the indictment at Paragraph 183 as a "congressional staff member." JA62.

[10] The USTDA was established by Congress as an agency of the United States "to promote United States private sector participation in development projects in developing and middle-income countries." JA24, 132.

the executive. JA25, 86-88. Defendant asked the executive that stock in this nominee company, as well as legal services contracts with the company, be granted to one of defendant's family members, in return for defendant's performance of official acts to advance the efforts of obtaining oil concessions from the government of Equatorial Guinea. JA86.

(vii) Satellite transmission contracts

Defendant also solicited the payment of things of value from the aforementioned business executive and the satellite telecommunications company, which the executive headed as CEO, in return for defendant's performance of official acts to advance the company's efforts to obtain satellite transmission contracts in Botswana, Equatorial Guinea, and the Republic of Congo. JA88-90. Defendant specifically sought a share of the company's gross revenue from these contracts to be paid to a family-controlled company. *Id.*

C. The District Court Proceedings

On September 7, 2007, defendant moved to dismiss fourteen of the sixteen counts of the indictment. JA113-28. He surmised that the Speech or Debate Clause had been violated because the indictment's references to his committee status "suggest that legislative activity was considered by the grand jury." JA121. Because defendant knew that Brett Pfeffer had pleaded guilty, he further assumed

that Pfeffer had testified before the grand jury and that tape recordings between Pfeffer and CW had been played for the grand jury. JA123-24. In addition, defendant surmised that members of his current and former staff had testified in the grand jury about their work on African trade issues. JA116, 122. Based on this conjecture, defendant sought to review all testimony and evidence presented to the grand jury. JA125. Alternatively, defendant contended, the district court should undertake an *"in camera* review of all grand jury transcripts." *Id*.

The government opposed defendant's motion. JA147-58. Nonetheless, to demonstrate "the careful and cautious manner in which the Government conducted itself," to "expedite the ongoing pretrial matters," and to "avoid any last minute motions to dismiss," the government took several precautionary steps. JA151. First, the government informed defendant that Pfeffer did not testify before the grand jury. *Id.* Second, the government disclosed that none of Pfeffer's taped conversations were played before the grand jury. *Id.* Finally, the government made the grand jury transcripts (over 600 pages) of defendant's current and former congressional staff members available to defendant so his counsel could review them for Speech or Debate Clause material. *Id*.

Following his review of over 600 pages of testimony, defendant alleged that three brief passages supported his claim of Speech or Debate violations before

the grand jury. JA159-69, 175. First, defendant cited the preface to a question posed to Stephanie Butler, his District Director in New Orleans, Louisiana, who is responsible for constituent services. JA161. Ms. Butler also organized two of the nominee companies used in some of the bribe schemes. Defendant plucked the following sentence, spoken by a prosecutor, from Ms. Butler's 200 pages of testimony:

> The congressman, through his activities in Congress, has a special knowledge of West Africa, you know, countries in Subsaharan Africa, Gulf of Guinea area.

JA161, JA177-78.[11] Second, defendant singled out the following testimony of

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[11] In a sur-reply, the government supplied the district court with the full context of Ms. Butler's testimony:

> Q. The congressman, through his activities in Congress, has a special knowledge of West Africa, you know, countries in Subsaharan Africa, Gulf of Guinea area. Are you familiar with work he's done on behalf of companies trying to do business in Africa?
>
> A. Not too much, no.
>
> Q. Has he ever asked your assistance for projects in relation to companies attempting to do business in Africa?
>
> A. No, not really. I don't remember everything.

JA178.

Melvin Spence, his senior policy advisor and the staffer who contacted USTDA to check on a pending grant application for a bribe-paying company:

> Q. Was Congressman Jefferson seen as a leader in a particular area of trade by constituents, as far as you know?
>
> A. Africa would be the closest thing. Like AGOA, the Africa[n] Growth and Opportunity Act, which is a preferential trade bill.

JA161, 179. Finally, defendant highlighted the testimony of Lionel Collins, who was defendant's chief of staff for a number of years. This testimony (less than three pages out of nearly 100 pages) followed this question: "And so what kind of relationships did he [defendant] have with government officials in Nigeria?" JA181. Mr. Collins responded by first commenting that African leaders were "thankful to Jefferson for basically being in the forefront of bringing about democracy in Nigeria." JA182. Unsolicited, Mr. Collins then added the following:

> 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, and

> the legislation was very instrumental to the continent of Africa because now we could – the United States could have trading agreements with Africa, and I think the first year of the Act, I think the trading in Africa increased something like $10 billion. So as a result, Congressman Jefferson knew the leaders, the African leaders. When they would come to the United States, they would visit with the President and always come to Capitol Hill, visit with members of Congress, and Jefferson personally knew probably about 30 leaders, heads of state, and all of them were thankful because of his involvement with this legislation that passed, that opened up all kind[s] of trading opportunities with the continent of Africa.
>
> So as a result of that, Congressman Jefferson became known as a member who, basically, his specialty was international trade and, in particular, Africa. So a lot of times when businesses outside Louisiana wanted to do things in Africa, they would come see the congressman because of his contacts with African leaders, African ambassadors, and so forth. And that's why he went to Africa many times and that's why businesses would come and see him.

JA182-83. Thereafter, the prosecutor engaged in the following colloquy with Mr. Collins:

> 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.

JA183.

D. The District Court's Rulings

On November 30, 2007, the district court denied defendant's motion to review grand jury materials and instead ordered an *in camera* review of the grand jury materials not previously provided to defendant. JA221. The government subsequently submitted for the district court's *in camera* review all transcripts of witness testimony not previously disclosed to the defense and all exhibits submitted to the grand jury. Thereafter, on February 6, 2008, following argument on defendant's motion to dismiss, the district court orally denied it. JA303. On February 13, 2008, the district court issued a 15-page memorandum opinion detailing its reasons for the denial. JA305-20.

The district court first explained that "[a]lthough courts are authorized to disclose grand jury matters to a 'defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury,' no such ground was shown here." JA310 (quoting Fed. R. Crim. P. 6(e)(3)(E)(ii)). The district court explained that "[t]he indictment's allegations neither reflect nor

implicate Speech or Debate matters; to the contrary, the indictment alleges and describes criminal conduct that falls well outside the Speech or Debate Clause protection." *Id.*

The district court next enunciated why even *in camera* review was not necessary. "*[I]n camera* inspection of grand jury matters is required only on a showing that there is a reason to believe Speech or Debate materials were presented to the grand jury." JA310-11 (citing *United States v. Rostenkowski*, 59 F.3d 1291, 1313 (D.C. Cir. 1995)). Again, the court held, defendant had made "no such showing." JA311. Nonetheless, "out of an abundance of caution," the court noted, it had conducted an *in camera* review of the non-staffer grand jury materials; the court took this cautious step because of the importance of the Speech or Debate Clause protection. *Id.*

Thereafter the court began its substantive analysis of defendant's motion by defining the Speech or Debate Clause's purpose: "to ensure that Members of Congress are able to perform their legislative functions unburdened by fear of civil suit or criminal arrest and prosecution." JA314. The privilege thus "applies only to those activities integral to a Member's legislative function, *i.e.*, activities that are integral to the Member's participation in the drafting, consideration, debate, and passage or defeat of legislation." *Id.* (internal footnotes omitted). As

examples of unprotected legislative activities, the district court quoted from *Gravel v. United States*, 408 U.S. 606, 625 (1972): "'Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies . . . but such conduct, though generally done, is not protected legislative activity.'" JA314. The district court also recognized the evidentiary limits reflected in the Speech or Debate Clause's protections. "[T]he government may not introduce evidence of a Member's legislative acts to prove an element of a criminal charge," but the government "may rely on acts 'casually or incidentally related to legislative affairs but not part of the legislative process itself.'" JA315 (quoting *United States v. Brewster*, 408 U.S. 501, 528 (1972)).

With these guiding principles in mind, the court explained, it had reviewed *in camera* the grand jury record (exclusive of the staffer grand jury testimony, *see supra*) and found "no infringement of the Speech or Debate Clause in the issuance of the indictment." JA315. This made perfect sense, the court noted, because the face of the indictment did "not concern defendant's involvement in the consideration and passage or rejection of legislation." JA315-16. Rather, the face of the indictment was concerned only with "allegedly criminal non-legislative activities," such as defendant's "meeting with American and foreign government officials to promote private business ventures in return for bribes, performing

official travel to promote private business ventures in return for bribes, and making use of his congressional staff to promote private business ventures in return for bribes."[12] *Id.*

Finally, the district court considered the staffer grand jury testimony – Butler, Spence and Collins – highlighted by defendant.

As to that portion of the Butler transcript where the government prefaced its question with a statement ("[t]he congressman, through his activities in Congress, has a special knowledge of West Africa"), the court held that this statement and the subsequent query did not entrench on defendant's Speech or Debate Clause privilege: the "inquiry simply relates to defendant's influence and status, matters only incidentally related to defendant's past legislative activities that may be relevant to the motivation some persons might have to bribe defendant, as alleged in the indictment." JA317. Such a query, the court held, did not amount to questioning about defendant's legislative activities in Congress. JA316-17.

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[12] The court noted that the grand jury materials did contain references to defendant's status as a congressman and as a member of various committees. JA316. However, the court also noted, "mere reference in the indictment to defendant's status as a Member of Congress does not offend the Speech or Debate Clause, provided, of course, that neither the indictment nor the prosecution entails inquiry into defendant's participation in the consideration and passage of legislation." *Id.* (citing *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994)).

The district court next considered the exchange between Mr. Spence and a prosecutor, where, in response to a query about whether defendant was seen by constituents as a "'leader in a particular area of trade,'" Mr. Spence identified Africa as the closest thing – "'[l]ike AGOA, the Africa Growth and Opportunity Act, which is a preferential trade bill.'" JA318. The district court rejected defendant's argument that this exchange violated the Speech or Debate Clause, noting that the reference to AGOA was not a reference to his involvement in considering and passing the Act, but rather "to another aspect of defendant's status and experience that might induce persons to offer him bribes in return for official acts." *Id.* In particular, the district court rejected defendant's claim that, because defendant's expertise related to AGOA was derived from his legislative acts, any reference to the expertise violated the Speech or Debate Clause. *Id.* "[A]ll of a Member's expertise, influence, and even status derive, ultimately, from his or her legislative acts, and of course a Member's status and influence as a Member of Congress are precisely the incentive and reason a person may seek to offer him bribes." *Id.*

Lastly, the court considered the grand jury testimony of Mr. Collins about defendant's 1997 trip to Nigeria. As the court noted, Mr. Collins's response "made reference to defendant's participation in 'moving the legislation [namely

AGOA] through the Congress' which resulted in relationships with 'African leaders.'" JA319. This reference to defendant's role in passing legislation did not constitute an "infringement of the Clause," the court held, because "Collins's reference to defendant's role in securing passage of the AGOA was neither material nor relevant to the criminal conduct alleged in the indictment. Put differently, defendant is not being questioned in this proceeding about his vote or role in the AGOA legislation." *Id.* Further, the court recognized, Mr. Collins's answer was "unprompted; it did not result from an inquiry into defendant's legislative activities, and it did not result in any further inquiry" by the government lawyer or the grand jury.[13] JA319-20.

Thus, the district court concluded, neither "the references to defendant's status in the grand jury materials nor the passages cited by defendant from the transcripts . . . constitute an infringement of the Speech or Debate Clause that would require dismissal of the indictment." JA320.

SUMMARY OF ARGUMENT

Just as Judge Ellis did, this Court should reject defendant's attempt to

[13] In the alternative, the court held, even if Mr. Collins's reference to the AGOA legislation somehow constituted questioning about privileged activity, it did not render the indictment or grand jury proceeding constitutionally infirm because "there are independent, non-privileged grounds sustaining the charges in the indictment." JA319 (citing *McDade*, 28 F.3d at 300).

impugn the integrity of the grand jury process culminating in the pending sixteen-count indictment. The grand jury was presented no privileged Speech or Debate Clause materials. Instead, as the face of the indictment reflects, the grand jury heard voluminous amounts of non-privileged evidence relating to defendant's criminal conduct, namely, bribes solicited by defendant in exchange for his performance of official non-legislative acts. As Judge Ellis succinctly stated, the face of the 94-page indictment "alleges and describes criminal conduct that falls well outside the Speech or Debate Clause protection." JA310.

Nonetheless, to allay any concerns about the Speech or Debate privilege, the government provided defendant with access to the grand jury transcripts of all of his current or former staffers. JA309-10. In the same vein, Judge Ellis reviewed *in camera* the remaining – non-staffer – grand jury materials, which included a "substantial number of witness testimony transcripts and document exhibits." JA311. Judge Ellis did not have to engage in this review as defendant had failed to demonstrate any reason to believe that Speech or Debate materials were presented to the grand jury. But he did so "out of an abundance of caution" because of the importance of the Speech or Debate Clause protection. JA311. Following this *in camera* review, Judge Ellis correctly concluded that the grand jury record betrayed no privileged Speech or Debate materials, but, rather, focused

sharply on "criminal non-legislative activities." JA316.

Despite the non-privileged nature of the indictment itself and the district court's considered analysis and review, defendant still contends that fourteen of sixteen counts should be dismissed. Relying on a patchwork of quotes culled from the grand jury testimony of just three of defendant's many staffers who testified before the grand jury, he argues that dismissal of the bribery-related counts of the indictment is warranted because "evidence of Congressman Jefferson's legislative activities was presented to the grand jury." Br. at 18. He is wrong. In leveling this charge, defendant ignores, among other things, the Supreme Court's admonishment that the "[t]he Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions." *Brewster*, 408 U.S. at 528. Applying the correct legal standards, Judge Ellis recognized this crucial and carefully drawn distinction and properly rejected defendant's unwarranted cries for dismissal. This Court should affirm that ruling.

ARGUMENT

THE DISTRICT COURT CORRECTLY DENIED DEFENDANT'S MOTION TO DISMISS

Defendant contends that the district court should have dismissed the bribery-related counts because "evidence of Congressman Jefferson's legislative activities was improperly presented to the grand jury." Br. at 17. In addition, he

claims that the district court failed to apply the proper standard during its *in camera* review of the grand jury materials (*i.e.,* its "'lens was too narrow'") and that the court should have insisted that the government also produce "the prosecutors' instructions and arguments to, and colloquy with, the grand jury." *Id.* at 21-22. The district court, however, did not err. The district court properly found that the indictment itself "alleges and describes criminal conduct that falls well outside the Speech or Debate Clause protection" and that the "grand jury record leading to defendant's indictment . . . discloses no infringement of the Speech or Debate Clause in the issuance of the indictment." JA310, 315.

A. Standard of Review

The "scope of the immunity the Speech or Debate Clause affords" is a "pure question of law" that this Court reviews *de novo*. *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988). But whether the district court should have conducted an *in camera* review of grand jury materials and whether that review should have included the prosecutors' instructions and arguments to the grand jury are decisions reserved to the district court's discretion. *See Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 228 (1979).

B. Applicable Legal Principles

Article I, Section 6, Clause 1 of the United States Constitution provides

that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." The purpose of the Speech or Debate Clause is to ensure that Members of Congress can perform their legislative duties without fear that they will be sued or prosecuted for legislative acts. *See United States v. Johnson*, 383 U.S. 169, 180-81 (1966); *Tenny v. Brandhove*, 341 U.S. 267, 373 (1951); *Rostenkowski*, 59 F.3d at 1302.

But the Clause "does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases." *Gravel*, 408 U.S. at 626. The "speech or debate privilege was designed to preserve legislative independence, not supremacy." *United States v. Brewster*, 408 U.S. 501, 508 (1972). Put another way, its design was not "to make Members of Congress super-citizens, immune from criminal responsibility." *Id.* at 516. Rather, the Clause protects only those activities that are "an integral part of the deliberative and communicative processes by which Members participate" in their constitutionally-mandated duties. *Gravel*, 408 U.S. at 625; *see also Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995) ("[T]he constitutional protection for acts within the legislative sphere does not extend to all conduct *relating* to the legislative process, but only to those activities that are clearly a part of the legislative process -- the *due* functioning of the process." (internal citations

omitted)).

Critically, the Clause "does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions." *Brewster*, 408 U.S. at 528 (Clause does not "prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself."); *Brown & Williamson*, 62 F.3d at 415 ("Malfeasance by a Member does not fall within the legislative sphere simply because it is associated with congressional duties."). Instead, "a Member of Congress may be prosecuted under a criminal statute *provided* that the government's case does not rely on legislative acts or the motivation for legislative acts." *Brewster*, 408 U.S. at 512 (emphasis added).

Providing boundaries to the term "legislative acts," the Supreme Court has noted: "[t]hat [Members] generally perform certain acts in their official capacity as [legislators] does not necessarily make all such acts legislative in nature." *Gravel*, 408 U.S. at 625. Indeed, there is a gamut of so-called constituent services that are not protected by the Speech or Debate Clause:

> These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for

> future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.

Brewster, 408 U.S. at 512; *see also Hutchinson v. Proxmire*, 443 U.S. 111, 121 n.10, 131 (1979) (no legislative immunity for attempts to influence conduct of executive agencies); *Gravel*, 408 U.S. at 625-27 (private publication of committee meeting records unprotected); *Johnson*, 383 U.S. at 172 (no protection for attempts to influence officials of another branch of government); *United States v. Biaggi*, 853 F.2d 89, 103-04 (2d Cir. 1988) (congressional travel generally not covered by Clause even when travel is related to legislative process); *United States v. Myers*, 692 F.2d 823, 849 (2d Cir. 1982) (filing financial disclosure reports not protected); *see generally Gravel*, 408 U.S. at 625 (Members "may cajole, and exhort with respect to the administration of a federal statute – but such conduct, though generally done, is not protected legislative activity.").

Finally, "proof of legislative status, including status as a member or ranking member of a committee, is not prohibited by the Speech or Debate Clause." *McDade*, 28 F.3d at 289 (Alito, J.). Indeed, a Member's "status" as a congressman or a sitting committee member may be utilized by the government "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.

C. Applying the Proper Legal Standard, the District Court Correctly Concluded that the Grand Jury Record Disclosed No Infringement of the Speech or Debate Clause in the Issuance of the Indictment

Defendant does not now argue that the face of the indictment reflects or implicates Speech or Debate Clause materials. Nor could he.[14] As the district court rightly found, the 16-count, 94-page indictment "describes criminal conduct that falls well outside the Speech or Debate Clause protection." JA310.

In arriving at this conclusion, the district court's opinion demonstrates a keen understanding of the myriad precedents holding that constituent services, which are at the heart of this case and central to the government's theory, may be routinely performed as part of a Member's job, but are not legislative acts and, therefore, are not protected by the Speech or Debate Clause. *See Brewster,* 408 U.S. at 512; *Gravel,* 408 U.S. at 624-25; *McDade*, 28 F.3d at 300. The indictment thus shows that defendant repeatedly solicited bribes in return for the performance of non-legislative acts, which are precisely the type of "'errands' performed for constituents" that are not protected by the Speech or Debate Clause. *See Brewster*,

[14] Defendant also conceded this point below. JA250, 263.

408 U.S. at 512.[15] These official acts include traveling to foreign countries, meeting with foreign government officials, using congressional staff members to create itineraries, contacting U.S. and foreign embassies, obtaining entry and exit visas for travelers, sending official correspondence on congressional letterhead, and coordinating with U.S. government agencies to help secure financing. *See, e.g.,* JA33-34, 55-56.

Given that the face of the indictment nowhere touches upon protected Speech or Debate Clause material, defendant is forced to allege that the government nevertheless brought protected materials before the grand jury. Br. at 18. He then contends that because this testimony was "relevant to the bribery allegations," dismissal of these counts is mandated. *Id.* As we show below, he is wrong.

(i) Speech or Debate Clause material was not presented to the grand jury

Even though the government was not required to do so, we made all of the staffers' grand jury transcripts available to defendant for his review. JA151. From these 600-some pages of grand jury transcripts, defendant has seized on fragments

[15] Even defendant's congressional website has a page entitled "Constituent Services Guide." There, defendant reminds citizens that "we are here to help constituents deal with federal agencies . . . . We can also help you obtain assistance from federal agencies that promote U.S. exports." JA173.

of testimony of three of his staff members – Collins, Spence, and Butler. These transcripts, he erroneously contends, show that the "grand jury heard privileged legislative material in support of the bribery-related counts in the indictment." Br. at 31. These isolated strands of testimony do not carry the weight defendant assigns them. Indeed, these testimonial fragments support the opposite conclusion, *viz.,* the government's lengthy investigation into defendant's criminal activities was conducted with exacting and scrupulous attention to respecting defendant's Speech or Debate Clause privilege.

To address the dearth of evidence supporting his allegations, defendant now tries to inextricably link his "influence" to his role in the 1997 AGOA legislation, so that any subsequent exercise of influence concerning the continent of Africa is a "privileged legislative act." Br. at 20. In this regard, defendant contends his AGOA-derived "influence" is the linchpin of the eleven distinct bribe schemes described in the indictment. *See, e.g.*, Br. at 19 ("Congressman Jeffersons' legislative activities and the influence he derived from them is central to the bribery allegations in the indictment."). Indeed, he goes so far as to try to substitute his definition of "influence" for the term "official act," thereby making it an element of bribery under Section 201. *See, e.g.*, Br. at 2, 19. And finally, finding minimal evidence to support his argument, defendant advocates for a

threshold for dismissal that, if adopted by this Court, would make the prosecution of Members for even the most egregious malfeasance all but impossible. *Id*. at 30 ("plausible" that "grand jurors took" legislative-act material "into consideration"). The facts and the law do not support such a result, and this Court should reject defendant's attempt to cloak all of his post-2000, bribery-induced constituent acts in some sort of AGOA-derived immunity.

As an initial matter, a Member's influence can come from a host of sources beyond involvement with legislation, including simple membership in the U.S. House of Representatives, committee status, seniority, representation of a well-known district, public persona, and career prior to Congress. Thus, defendant's attempt to exclusively equate influence with legislation rings hollow. Moreover, in spite of the repetition in his brief that defendant's influence (*i.e.*, involvement with AGOA) "lies at the heart of the bribery schemes," "is the crux of the bribery schemes," and "is central to the bribery allegations in the indictment," the record does not support such grand claims. Br. at 11, 13, 19. In fact, rather than the record being replete with references to AGOA and other legislation – which defendant claims is the basis for his influence and the entire government's case – the indictment does not mention AGOA, nor any other piece of legislation for that matter.

This, of course, is not surprising given that the indictment does "not concern defendant's involvement in the consideration and passage or rejection of legislation." JA316. In fact, beyond the two pages of Mr. Collins's testimony (which we discuss below), plucked from a significant grand jury record accumulated over a multi-year investigation, defendant has precious little to rely on in claiming that defendant's involvement with AGOA lies at the heart of the government's case. For example, defendant points to a single clause in a prefatory remark before a question was asked of Ms. Butler, which clause did not even mention AGOA or any other legislation. Br. at 13. He also points to a mere three sentences in an exchange with Melvin Spence that does not discuss defendant's involvement in the passage of AGOA. *Id*. Desperate for further evidence with which to cobble together an argument, defendant cites to pleadings and even an expert disclosure notice that post-date the return of the indictment and which, at any rate, do not support defendant's claims. This fundamental lack of evidence, however, does not stop defendant from claiming that "the prosecution has repeatedly tied the Congressman's legislative activities to the charges." Br. at 31. Rather than attribute this crucial lack of evidence to the scrupulous attention paid to the Clause by the government in conducting the investigation, defendant claims that this "crux of the bribery schemes" was just "not necessary to repeat." Br. at

40-41. This fig leaf, however, cannot hide the factual weaknesses of this claim. Analysis of the heart of defendant's present claim – Mr. Collins's grand jury testimony – amply demonstrates this.

Mr. Collins was asked the following question in the grand jury: "And so what kind of relationships did he [defendant] have with government officials in Nigeria?" JA181. In response, Mr. Collins first stated that African leaders were "thankful to Jefferson for basically being in the forefront of bringing about democracy in Nigeria." JA182. In addition, without any further questioning by the prosecutor, Mr. Collins also described a 1997 trip that defendant took to Africa: "the purpose of the trip was they were considering legislation dealing with the African growth and opportunity, a trade bill dealing with Africa." JA182. Mr. Collins continued: "Congressman Jefferson was very instrumental in moving the legislation through the Congress, and it was voted on by the House and Senate side." JA182. Mr. Collins then connected this piece of legislation to defendant's familiarity with various "African leaders," who were "thankful" for this particular piece of legislation. JA182. As Mr. Collins further opined, defendant's familiarity with the African leaders via his work on the AGOA legislation meant, in turn, that "a lot of times when businesses outside Louisiana wanted to do things

in Africa, they would come see the congressman because of his contacts with African leaders, African ambassadors, and so forth." JA182-83. At the conclusion of this testimony, government counsel then asked Mr. Collins if all this meant that Jefferson was "very influential with high-ranking government officials in Nigeria." JA183. Mr. Collins responded in the affirmative.

Based on these 40 or so lines of grand jury testimony (out of the hundreds of pages of staffer testimony heard by the grand jury over the course of this multi-year investigation), defendant now argues that 14 of the 16 counts of the indictment should be dismissed – *i.e.*, "the government's *entire case* is premised upon an alleged use of influence in exchange for the promise of something of value" and Mr. Collins's "testimony about Congressman Jefferson's legislative activities" established this "influence." Br. at 19-20 (emphasis added). This argument betrays a fundamental misrepresentation of (a) the core of the government's criminal case against defendant (*see infra* at 37-39); and (b) the legal standard by which the necessity for dismissal is measured (*see infra* at 53-60).

The government's criminal case against defendant depends on the myriad constituent-based, non-legislative official acts that defendant took in return for bribes, not his "alleged influence with African officials." Br. at 36. Thus, for

example, as the indictment alleges, without revealing his beneficial interest in iGate garnered through bribes (*e.g.*, over 30 million shares of stock, monthly retainer fees, and profit sharing), defendant met with U.S. government officials at the Ex-Im Bank in order to help secure a $40 million loan guarantee to further iGate's ability to export its product to Africa. JA35-41. Similarly, in return for a percentage of one Louisiana company's revenue, defendant had Mr. Spence make inquiries of USTDA about the status of a pending application for funding, and defendant also attended meetings with USTDA officials to further advance the application. JA42-45. Further, in return for, among other things, bribes from iGate and bribes expected from CW, defendant performed official acts to advance iGate and CW's business ventures, including arranging and conducting meetings with Nigerian government officials and sending letters on congressional letterhead. *See* JA42-52. In this regard, the grand jury's indictment depends on no legislative acts, but on numerous official acts "in no wise related to the due functioning of the legislative process." *Johnson*, 383 U.S. at 172. "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." *Brewster*, 408 U.S. at 526.

There is little doubt that the persons who agreed to pay these many bribes to defendant did so because, among other things, he was a sitting Congressman

and he knew African leaders. This is essentially all that Mr. Collins said in the grand jury testimony defendant now trumpets. JA318 (district court recognized, "[a]ll of a Member's expertise, influence, and even status derive, ultimately, from his or her legislative acts, and of course a Member's status and influence as a Member of Congress are precisely the incentive and reason a person may seek to offer him bribes"). But, "Speech or Debate immunity does not apply so broadly" as to "immunize a Member of Congress from all scrutiny regarding any activity conducted during his or her term of office." *Id.* In this regard, then, Mr. Collins's reference to defendant's AGOA legislation did not constitute anything even remotely approaching a violation of the Speech or Debate Clause. *See also McDade*, 28 F.3d at 293 ("[T]he indictment relies on defendant's committee status, not to show that he 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." (emphasis added)).

Through sheer repetition, defendant nonetheless attempts to make "influence" an element of the bribery charges.[16] He does this, presumably,

[16] Br. at 19 ("[T]he government's entire case is premised upon an alleged use of influence in exchange for the promise of something of value."). *See also id.* at 2, 6, 11, 19, 39.

because of the analysis in *Swindall*, which found that evidence of a legislative act was an essential element of proof and therefore violated the Speech or Debate Clause. *United States v. Swindall*, 971 F.2d 1531, 1549 (11th Cir. 1992). "Influence" as defined by defendant, however, is not an element of these offenses. *See* 18 U.S.C. § 201(b)(2)(A). The "influence" referred to in Section 201(b)(2)(A) relates to the possibility that defendant himself had been influenced in the performance of an official act, not that defendant had some type of legislatively-derived (*e.g.*, AGOA) influence over others (*e.g.*, U.S. and foreign officials). Thus, to the extent that Mr. Collins's grand jury testimony identified defendant's work on a piece of 1997 legislation as one of the reasons why certain business persons might thereafter "come see the congressman," this connection did not violate defendant's Speech or Debate Clause privilege. Indeed, if the sweeping contrary claims of defendant were accepted by this Court, they "would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their holding office." *Brewster*, 408 U.S. at 520.[17]

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[17] Taken to its logical extreme, defendant's argument would apply to virtually every case where a Member of Congress was charged with taking or soliciting bribes in return for performing official acts in attempting to influence government agencies. Yet, as we know, such prosecutions have been approved time and again. *See, e.g., Johnson*, 383 U.S. at 172 (attempt "to influence the

In any case, as the district court also rightly noted, Mr. Collins's "statement was unprompted" in that it "did not result from an inquiry into defendant's legislative activities." JA319. Simply put, the prosecutor did not ask Mr. Collins about defendant's legislative activities because legislative activities have nothing to do with the allegations contained in the indictment or the government's theory of its case, which centers on defendant's solicitation of bribes in return for his performance of non-legislative official acts, *i.e.*, constituent services. It was Mr. Collins who volunteered the fact that defendant's constituents might come to see defendant because of defendant's familiarity with certain African leaders which, in turn, emanated – in part – from his 1997 work on the AGOA legislation. JA181-83, 319-20. The unsolicited, voluntary nature of Mr. Collins's testimony constitutes an additional reason to affirm the district court's ruling. *See, e.g.*, *Biaggi*, 853 F.2d at 103 (rejecting claim of Speech or Debate Clause violation at trial because, *inter alia*, "the government initially sought to focus on nonlegislative reasons for Biaggi's trips and did not initiate the exploration of his legislative factfinding activity"; rather, "the factfinding activity was first mentioned by Biaggi's aide in a volunteered statement when no question

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Department of Justice . . . in no wise related to the due functioning of the legislative process"); *Brewster*, 408 U.S. at 528 (making of appointments with government agencies not protected).

from the government was pending").[18]

Thus, the district court was correct when it declared that Mr. Collins's testimony did not constitute an infringement of the Clause. JA319-20. Similarly, the court did not err when it rejected defendant's claims stemming from the grand jury testimony of staff members Ms. Butler and Mr. Spence. JA317-19. In his brief, defendant does not now make separate claims predicated on these grand jury excerpts. Instead, he cites to them simply as part of the fragile "proof" of his "influence" argument, that is, "the prosecutors addressed the same point when questioning other staffers." Br. at 43; *see also id.* at 40-41. Trying to connect these three witnesses' testimony to support his influence argument underscores the weakness in his argument: these hand-picked sentences are unrelated to each other in time and substance. Ms. Butler's testimony was a year after Mr. Collins testified, and Mr. Spence's testimony pre-dated Mr. Collins' testimony by months. JA177-79. Rather than being "central" to the government's case, these isolated statements demonstrate the exact opposite.

At any rate, as the defendant concedes, Ms. Butler never affirmatively

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[18] Indeed, we note that a contrary finding might encourage the dubious practice of congressional aides, or other witnesses sympathetic to a Member under grand jury investigation, to endeavor to intentionally insert legislative matters before the grand jury in order to cause a Speech or Debate Clause violation.

referenced legislative acts. *See* Br. at 51. Rather, defendant cites to the Butler transcript because, in just one of its many questions to Ms. Butler, the government made prefatory reference to defendant's "activities in Congress." *See id.* at 13. Specifically, the government attorney asked Ms. Butler the following: "The Congressman, through his activities in Congress, has a special knowledge of West Africa, you know countries in Subsaharan Africa, Gulf of Guinea area. Are you familiar with work he's done on behalf of companies trying to do business in Africa?" JA178. In response, Ms. Butler stated that she had no such familiarity with defendant's African work. *Id*. As the district court rightly concluded, this question simply amounted to an attempted – permissible – inquiry about the "defendant's influence and status." JA317.

Mr. Spence's testimony was to the same effect. He indicated that defendant was seen by constituents as a leader in African trade – "[l]ike AGOA, the Africa Growth and Opportunity Act, which is a preferential trade bill." JA179. Again, the district court correctly held that "the reference was to another aspect of defendant's status and experience that might induce persons to offer him bribes in return for official acts," *e.g.,* a perfectly permissible area of inquiry. JA318; *see McDade*, 28 F.3d at 293.

In sum, the Speech or Debate Clause is only violated when "the

Government's case . . . rel[ies] on legislative acts or the motivation for legislative acts." *Brewster*, 408 U.S. at 512. As we have shown, the government's criminal case does not "rely" on such privileged materials. Instead, the government's case relies on the myriad constituent-based, official acts that defendant performed in exchange for the staggering amounts of shares and monies he and his family sought or received. *See*, *e.g.*, *United States v. Myers*, 635 F.2d 932, 937 (2d Cir. 1980) ("This case is unlike *Johnson*, where the prosecution was 'dependent' on prohibited inquiries as to the circumstances surrounding and motivation for legislative action, there a speech on the house floor, and precisely like *Brewster*, where the indictment alleged acceptance of money in return for a promise to take legislative action." (internal citation omitted)).

(ii) The district court did not apply an erroneous legal standard to its in camera review of the grand jury record

Even though the district court was not required to review the entire universe of non-staffer grand jury testimony, it did. In this regard, the judge emphasized that he ordered the production of the grand jury materials for *in camera* review "out of an abundance of caution" because, among other things, "the Speech or Debate Clause protection afforded legislators is so important." JA311. Defendant now argues that the court's *in camera* review cannot be trusted because "it was using an incorrect lens, one that was too narrowly focused." Br. at

55. Defendant is mistaken. As its careful opinion reflects, the district court correctly understood the contours of the Speech or Debate privilege. Accordingly, this Court should defer to the district court's discretionary *in camera* review of the non-staffer grand jury record and, further, decline defendant's present invitation to re-review the voluminous record.

As an initial matter, it is important to recognize that defendant received more than he was entitled to when the district court, out of an abundance of caution, took on the significant burden of personally reviewing the "substantial number of witness testimony transcripts and document exhibits" submitted for *in camera* review. *See* JA311. To obtain the right to an *in camera* review of the grand jury record, it was incumbent upon defendant to show – at a minimum – "at least some reason to believe that protected information was used to procure his indictment." *Rostenkowski*, 59 F.3d at 1313. As the district court correctly concluded, defendant did not make such showing.[19] JA130-11, 267 ("I did so not

[19] At several junctures in his brief, defendant launches oblique attacks on this procedural aspect of the court's ruling. *See* Br. at 28 n.9, 61. This Court should reject these vague challenges to the district court's ruling about the necessity for *in camera* review. First, the challenge is essentially moot to the extent that, as we explain in the text, the district court ultimately ended up reviewing all of the non-staffer grand jury materials and defendant himself (via counsel) was given access to the remaining – staffer – transcripts. And, second, as we additionally show in the text, the district court was correct when it ruled that the *Rostenkowski* threshold had not been met by defendant.

because I had been persuaded that there was any connection between the speech and debate activities and the indictment; not because -- in other words, I didn't see smoke and then decide that I wanted to go look to see if there was really fire. I saw no smoke."). Though the government provided defendant with over 600 pages of staffer grand jury transcripts, defendant could only point to the isolated Spence, Collins, and Butler excerpts as proof that the entire grand jury record had to be reviewed *in camera*. As we have already demonstrated, *see supra*, these fragmentary pieces of testimony came nowhere close to impinging on defendant's Speech or Debate Clause privilege. At most, these excerpts reflected isolated references to defendant's status, which is entirely permissible, *see McDade*, 28 F.3d at 289, or constituted "inquiry into activities that [we]re casually or incidentally related to legislative affairs," which is also permissible, *see Brewster*, 408 U.S. at 528. Nonetheless, although defendant received the benefit of an *in camera* review that he was not even entitled to, he now complains about the quality of that review. As we show, the quality of the district court's *in camera* review is beyond reproach.

Consistent with the governing Supreme Court precedents, the district court explained that "the boundaries of the immunity conferred by the Clause are defined and limited by the purpose of the Clause" and that the purpose "is to

ensure that Members of Congress are able to perform their legislative functions unburdened by fear of civil suit or criminal arrest and prosecution." JA313-14. This, in turn, means that "the privilege applies only to those activities integral to a Member's . . . participation in the drafting, consideration, debate, and passage or defeat of legislation." JA314. In this regard, the district court's enunciation of the governing Speech or Debate standards is in strict accord with the Supreme Court's precedents. *See, e.g., Brewster*, 408 U.S. at 526 (In assessing whether a § 201 prosecution violates the Clause, "[t]he question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute.").

Defendant, however, attacks the legal template the district court applied to its *in camera* review, contending that the court ignored (a) the "clear statement in *Brewster* that the [Speech or Debate] Clause prohibits inquiry into 'the motivation for legislative acts' as well as legislative acts themselves" and (b) *Gravel's* purportedly "expansive" reading of the Clause. Br. at 56-57. From this premise, defendant thus asserts that "[t]here is reason to believe that the trial court's adoption of this narrow view of the Speech or Debate Clause led it to miss legislative material in the record." *Id.* at 57. Defendant is grasping at straws.

As an initial matter, we note that "[t]rial judges are presumed to know the law and to apply it in making decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584 (2002). Nothing in the district court's opinion suggests that this presumption should be dispensed with here. To the contrary, everything about the district court's studious opinion supports the opposite conclusion: the court carefully considered all of defendant's arguments in the proper light of the governing Speech or Debate Clause precedents. First, the court explicitly acknowledged the significant nature of defendant's Speech or Debate Clause protection. Indeed, it was the court's recognition of this "important" privilege that caused it to take on the burdensome *in camera* review. *See* JA310-11. Second, as even the most cursory glance at the court's opinion reveals, the district court studied and reviewed all of the pertinent Speech or Debate Clause precedents, including *Gravel*. *See* JA311-15. Third, as we have demonstrated above, the court's articulation of the governing standards perfectly coalesces with the Supreme Court's articulation of these standards. That the district court may not have expressly catalogued every potential protected legislative activity does not mean that this Court can presume the district court was not sensitive to lurking dangers. This is certainly true when every action the district court took – including, in particular, the judge's decision to shoulder the

significant *in camera* task that defendant could not justify – demonstrated the court's keen awareness of the important issues before it. JA276, 311.

As such, the district court, in its discretion, conducted an appropriate *in camera* review while applying the correct legal standard. This Court need not replicate the *in camera* review that the district court has already conducted. Just as was the case below, defendant has utterly failed to meet his burden and provide "some reason to believe that protected information was used to procure his indictment." *See Rostenkowski*, 59 F.3d at 1313. Rather, defendant's present claim to appellate "*in camera* review" essentially boils down to a claim that every Member of Congress – simply because of his status – is entitled to such extraordinary review. This is not the law. *Id*. (permitting *in camera* review in the absence of an articulated basis to believe protected information was "used to procure" indictment would "fail to strike an appropriate (indeed any) balance between the grand jury's 'functional independence from the Judicial Branch,' and a Congressman's right to be free from prosecution for his legislative acts" (citation omitted)).

(iii) The district court did not abuse its discretion in declining to order the government to transcribe and produce for in camera review the government's "instructions and argument to the grand jury"

Finally, defendant complains that the "government did not provide the

court with the prosecutors' colloquies with and instructions to the grand jury." Br. at 59. Thus, he contends, "without the government's arguments and instructions, the review mandated by *Rostenkowski* and ostensibly undertaken by the trial court was inadequate and incomplete." *Id.* at 61. This Court must reject this brazen complaint that the district court's *in camera* review was somehow "incomplete."

This claim rings hollow in light of defendant's unprecedented access to the grand jury testimony of his current and former staff members and the district court's *in camera* review of huge volumes of materials, neither of which defendant was entitled to in the first place. For our part, the government took what we believe to be the unprecedented step of providing defendant – months before trial – with access to hundreds of pages of staffer grand jury transcripts. Certainly, the government was not required to take such profoundly accommodating measures. *Rostenkowski*, 59 F.3d at 1313 ("'long-established policy' in favor of grand jury secrecy"). Thus, Fed. R. Crim. P. 6(e)(3)(E)(ii) permits discretionary disclosure of grand jury materials only where a defendant "shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." But we did so anyway to allay defendant's concerns and expedite the proceedings, providing grand jury transcripts for seven of his former or current staffers. *See* JA151, 309-10. For its part, the district court undertook an exhaustive *in camera*

review of all the other portions of the extant grand jury record. The court did this even though, as we have demonstrated above, defendant utterly failed to provide "some reason to believe that protected information was used to procure his indictment." *Rostenkowski*, 59 F.3d at 1313.[20] In sum, at least one pair of eyes – either defendant's (via his counsel) or the district court judge's – has looked over every transcript page of testimony heard by the indicting grand jury. Nonetheless, defendant now complains that because the district court did not force the government to obtain any of the "prosecutors' arguments and instructions to the grand jury," which had been recorded but not transcribed, the *in camera* review was incomplete. Br. at 63.

In support of his claim, defendant posits that the "prosecutors' colloquies with the grand jurors . . . could very well have included additional Speech or Debate material." *Id*. at 62. To the extent that defendant is suggesting that the district court was required to order the production of these portions of the grand

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[20] In his brief, defendant cites *Rostenkowski* for the premise that the government could "inflame" a grand jury to indict using legislative references even though there was no reference to legislative acts on the face of the indictment. Br. at 27, 30 n.10. But, below, defendant disavowed reliance on such an argument. During the February 6, 2008 hearing, counsel represented the following: "[W]hen I talked about the possibility of Speech or Debate material being used to inflame a grand jury . . . [t]hat is not what we say happened here." JA262.

jury record in order to rebut this rank speculation, he has things doubly backwards. First, his present argument ignores the fact that a presumption of regularity attaches to grand jury proceedings. *See, e.g., United States v. Mechanik,* 475 U.S. 66, 75 (1986). Indeed, an indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is sufficient to call for a trial of the charges on the merits. *Costello v. United States*, 350 U.S. 359, 363 (1956). As the district court recognized, requiring the transcription and then review of the prosecutors' colloquies with the grand jury would be tantamount to requiring judicial review in every criminal case involving a member of Congress "even where, as here, there is no reason to believe either from the contents of the indictment or otherwise that Speech or Debate material was presented to or relied upon by the grand jury." JA342. Second, though defendant elides this point, the case law is clear: it is defendant who "must show that the Government has relied upon privileged material," *Rostenkowski*, 59 F.3d at 1300, not the other way around. Finally, in light of the complete dearth of privileged Speech or Debate material in either the indictment or the grand jury evidence, there is no basis to believe, save defendant's sheer speculation, that the prosecutors took an entirely different approach to their grand jury arguments and instructions.

Accordingly, in the absence of a credible claim that prosecutors had

discussed Speech or Debate material in instructing the grand jury, the district court did not abuse its discretion in finding that those portions of the record did not have to be transcribed and produced for *in camera* review. JA311 n.7.

D. Even Assuming *Arguendo* That Some Protected Speech or Debate Clause Materials Were Presented to the Grand Jury, Dismissal of the Bribery-Related Counts of the Indictment Is Not Warranted

Even if defendant could demonstrate that some incidental or unsolicited Speech or Debate evidence was inadvertently introduced in the grand jury, the dramatic step of dismissal of the bribery-related counts of the indictment would still be inappropriate.

In *United States v. Johnson*, 419 F.2d 56, 58 (4th Cir. 1969), this Court considered whether, if a grand jury has improperly heard protected Speech or Debate Clause material, all of the counts of conviction must be dismissed. This Court answered that question in the negative. In the first appeal of the *Johnson* matter, this Court had concluded that Representative Johnson was entitled to dismissal of the conspiracy count of his indictment because it was "based in part on a speech he made in Congress." *Id.* Following a new trial on the non-conspiracy counts of the indictment, Representative Johnson appealed again, arguing the "counts of the indictment on which he was convicted [we]re invalid because the grand jury that returned them heard evidence concerning his

Congressional speech." *Id.* This Court rejected that claim, noting that the "count of the indictment that dealt with the speech was dismissed, and the speech played no part in the proof of the remaining counts." *Id.* This was the case, this Court held, even though "the government conceded that testimony concerning the speech constituted about 17 percent of all grand jury testimony." *Id*. at 59. Indeed, this Court rejected defendant's claim that the remaining – non-conspiracy – counts were "invalid" while simultaneously "[r]ecognizing that this [legislative-act] evidence was a *substantial part* of all that the grand jury heard." *Id.* (emphasis added); *see also United States v. Dowdy*, 479 F.2d 213, 223-24 (4th Cir. 1973) (though "overt acts 20-23 . . . transgress[ed] the speech or debate clause" this Court held "it does not follow that counts one and two should be dismissed because of the inclusion of this improper matter" as "the offending overt acts could have been stricken and the *counts would still be legally sufficient*" (emphasis added)).[21]

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[21] Other courts, including the Supreme Court, agree with this Court's logic and reasoning. *See, e.g.*, *Johnson*, 383 U.S. at 185 ("With all references to [privileged materials] eliminated [from the indictment], we think the Government should not be precluded from a new trial on this count."); *McDade*, 28 F.3d at 300 (even if two overt acts were alleged in violation of the Clause, "numerous other overt acts" supported the indictment); *Myers*, 635 F.2d at 941 ("Normally, an indictment is not subject to dismissal on the ground that there was 'inadequate or incompetent' evidence before the grand jury. This rule has been specifically applied to reject a claim that a grand jury heard some evidence protected by the

In light of the above, the district court was entirely correct when it declared that "settled precedent holds that a reference to privileged activity does not render an indictment – or grand jury proceeding – constitutionally infirm, provided there are independent, non-privileged grounds sustaining the charges in the indictment." JA319 (citing *McDade*, 28 F.3d at 300). To say that there are "independent, non-privileged grounds" to support the bribery-related counts of the indictment is a profound understatement.

As we have already demonstrated, the excerpts from the Spence, Collins, and Butler transcripts did not constitute privileged Speech or Debate Clause material. However, even if they did, there can be little doubt that this testimony was a *de minimis* part of the extensive grand jury record. Indeed, even if one assumes *arguendo* that every single line of staffer grand jury material cited by defendant constitutes privileged Speech or Debate Clause material, this testimony, at most, adds up to three pages of transcript. By way of comparison, we note that just the staffer portion of the grand jury record alone surpasses 600 pages of testimony. This means that the arguable Speech or Debate material amounted to

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Speech or Debate Clause." (citations omitted)); *cf. United States* v. *Helstoski*, 635 F.2d 200, 205 (3d Cir. 1980) (dismissing indictment where "improper introduction of privileged matter *permeated the whole proceeding*" (emphasis added)).

less than 1% of just the staffer grand jury record. And, certainly it can be assumed that the staffer grand jury record would reflect the richest vein of potential Speech or Debate Clause material.[22] In sum, even assuming *arguendo* that some protected Speech or Debate material found its way into the grand jury room, this Court can conclude, just as the district court concluded, that sufficient independent, non-privileged material supported each of the 14 challenged counts of the indictment.

Defendant reaches the opposite conclusion via a misapplication of two precedents, the Eleventh Circuit's decision in *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1992), and the unpublished district court opinion of *United States v. Durenberger*, No. 3-93-65, 1993 WL 738477 (D. Minn. Dec. 3, 1993). Defendant suggests that these precedents require dismissal when "the legislative acts were *relevant* to the decision to indict" or if it "is '*plausible*' that the jurors

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[22] At various points in his brief, defendant speculates about the possibility that certain of the government's "summary witness[es]" likely "could have" put protected Speech or Debate materials before the grand jurors. *See* Br. at 10 n.2, 14 n.4. However, as defendant elsewhere concedes in his brief, in connection with the defendant's suppression motions, the "government produced Jencks material consisting of the grand jury transcript of the lead case agent." *Id.* at 15 n.6. And, defendant has nowhere suggested that this grand jury transcript reflected Speech or Debate Clause materials. In this regard, then, this Court can ignore defendant's unsupported speculation about the possible ways in which other Speech or Debate material might have been smuggled before the grand jury. Not only is this pure supposition, but the extant record – in the form of, *inter alia*, the "lead case" agent's grand jury transcript – belies the claim. *See Rostenkowski*, 59 F.3d at 1300.

relied upon the privileged material."[23] Br. at 29-30 (emphasis added). If so, defendant contends, then "the member has been exposed to liability on the basis of his legislative acts in violation of the Clause." *Id.* at 30. Defendant has distorted the governing standards.

Consider first the Eleventh Circuit's decision in *Swindall*. In that case, the appellate court held that improper Speech or Debate evidence required dismissal of the indictment because such "evidence was an *essential element of proof* with respect to the affected counts." 971 F.2d at 1549 (emphasis added). That holding has no application here. As previously discussed herein, the testimony of which defendant complains is not evidence of *any* element of the charged offenses.

Swindall actually supports the district court's conclusion that a mere "reference" to Speech or Debate Clause material does not render an indictment constitutionally infirm. Consistent with governing Supreme Court Speech or Debate Clause precedents, the *Swindall* court announced that "[a] member's Speech or Debate privilege is violated if the Speech or Debate material exposes the member to liability." *Id.* at 1548. However, as the *Swindall* court hastened to

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[23] Defendant further stretches the holding in *Swindall* when he suggests that "relevant" in this context, ought to be guided by the definition found in Rule 401 of the Federal Rules of Evidence. Br. at 35 n.12. Such an unprecedented expansion of the Speech or Debate Clause would result in immunity for almost every Member of Congress faced with bribery charges. *See* n.17 *supra.*

add, "a member is not necessarily exposed to liability *just because the grand jury considers improper Speech or Debate material*." *Id.* (emphasis added). Put another way, "[i]f reference to a legislative act is *irrelevant to the decision to indict*," the *Swindall* court noted, "the improper reference has not subjected the member to criminal liability." *Id.* (emphasis added).

Defendant attempts to turn *Swindall* on its head when he announces that *Swindall* means that "the proper inquiry [i]s whether the evidence of legislative acts was relevant to the charges in the indictment." Br. at 22. "Relevance to the decision to indict," however, does not translate to "relevance to the charges in the indictment," as defendant suggests. The former statement requires relevance to an essential element of proof, *Swindall*, 971 F.2d at 1549, the latter, it could be argued, requires only creative lawyering to infer some connection, no matter how remote, to a charge in the indictment.

Similarly, the unpublished *Durenberger* decision cannot support the weight defendant assigns it. In that case, Senator Durenberger appeared before the Select Committee on Ethics "as a United States senator under investigation for alleged misconduct." 1993 WL 738477, at *2. Thereafter, as a part of its investigation, the government submitted to the grand jury "selected pages" from the report issued by the ethics committee. *Id.* at *1. In addition, the government

also submitted pages from the "Report of Special Counsel on Senate Resolution 311," which also "pertain[ed] to [the Senator's] alleged misconduct." *Id.* These reports "accompanied the testimony of an important and prominent witness" before the grand jury. *Id.* at *2. For this reason, the district court concluded, "[i]t seems . . . 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." *Id.* On those facts, the district court reasoned, dismissal of the indictment was mandated. *Id.* at *4. The district court, however, dismissed the indictment without prejudice because "reliance upon the offensive evidence does not appear to be necessary." *Id.* at *5.

Durenberger does not support defendant's test for dismissal. First, to the extent the *Durenberger* court held dismissal of the indictment was required even though the privileged material was not "necessary" to the dismissed counts, that holding was erroneous. It flies in the face of the unbroken string of precedents outlined above, all of which ask only whether sufficient, independent evidence supported the counts of the indictment. Second, the *Durenberger* court's conclusion that the grand jury heard protected materials has been specifically criticized: "[T]he Supreme Court has never decided if the Speech or Debate

Clause protects a Member's testimony given in a personal capacity to a congressional committee. We conclude that it does not . . . ." *United States v. Rose,* 28 F.3d 181, 189 (D.C. Cir. 1994). Finally, even if the unpublished *Durenberger* decision still has any force in the wake of *Rose*, it is easily distinguished because nothing even remotely akin to a "Member's testimony" was proferred to this grand jury. As the face of the indictment alone makes clear, defendant is being held accountable only for non-legislative, constituent-based activities, *e.g.,* official acts that he took in return for bribes. Such conduct is clearly exempt from the Clause's protection: "Depriving the Executive of the power to . . . punish bribery of Members of Congress is unlikely to enhance legislative independence." *Brewster,* 408 U.S. at 525. Accordingly, the district court was correct in finding that none of the testimony cited by defendant, even if it contained some Speech or Debate material, rendered the bribery-related counts of the indictment subject to dismissal.[24]

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In sum, the district court and the government went to great lengths to

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[24] Even if this Court were to disagree entirely with the foregoing analysis, it would not necessarily mean (as the defendant contends) that fourteen counts would have to be dismissed. For example, we note that Count One of the indictment charges a conspiracy with multiple objects, including two objects that do not depend on proof of a Section 201 bribery scheme.

ensure that the constitutional rights and privileges of a Member of the U.S. House of Representatives were treated with the utmost respect. Even though defendant could not justify an *in camera* review, the district court undertook one. And, even though defendant had no right personally to review the staffer transcripts, the government allowed him to do so. At the end of this process, the district court properly concluded that neither the allegations contained on the face of the indictment nor the materials presented to the grand jury reflect or implicate Speech or Debate matters.

CONCLUSION

For the above stated reasons, this Court should affirm the district court's decision denying defendant's motion to dismiss.

Respectfully submitted,

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

If this Court decides that expedition of a decision will be facilitated by not holding oral argument, the government would not be adverse to this Court ruling on the briefs submitted by the parties. However, if this Court decides oral argument is appropriate, we respectfully suggest that, consistent with the expedited briefing schedule, such argument should also be expedited.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that this brief has been prepared using Corel WordPerfect 12, Times New Roman, 14 point font size.

I further certify that this brief does not exceed 14,000 words (specifically 13,707 words) as counted by Word Perfect 12's word count, exclusive of the Table of Contents, Table of Authorities, the Statement Regarding Oral Argument, the Certificate of Compliance, and the Certificate of Service.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line printout.

s/ Mark D. Lytle
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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2008, I electronically filed the foregoing 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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I further certify that on May 30, 2008 that I have mailed the foregoing document by First-Class Mail, postage prepaid, to all case participants at the above-listed address. In addition, eight paper copies of the same document were manually filed with the Clerk of the Court by United States Mail.

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