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February 13, 2008

**BY FAX (202/588-5020) AND FIRST-CLASS MAIL**

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Executive Director  
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Dear Ms. Sloan:

We write in response to your January 28, 2008 letter to the Honorable Nancy Pelosi, Speaker of the U.S. House of Representatives. Your letter asserts that the House leadership and this office are “improperly shielding members of Congress from criminal investigation and prosecution through an expansive interpretation of the Speech or Debate Clause.”

We respectfully disagree. This office has consistently and uniformly taken measured and responsible positions in its efforts to uphold the Speech or Debate Clause of the U.S. Constitution, a vital pillar of Congress’ independence and the proper separation of powers among the three branches of the federal government. The positions taken by this office are not designed, and have not had the effect, of shielding any Member from the criminal justice system.

As an initial matter, we agree with you that the “Speech or Debate Clause was not intended to prevent the investigation and indictment of a member of Congress who accepted a bribe.” The House leadership shares this view, and this office has not taken – or been urged to take – a contrary position. We also agree with your more general assertion that “Members of Congress are not above the law.”

The Justice Department’s record of successfully prosecuting public corruption cases is a testament to that fact and to the fact that Speech or Debate assertions have not had an adverse effect on the Department’s ability to prosecute Members of Congress. More than 35 Members of Congress have been successfully prosecuted in the last 30 years. We are not aware of a single case where a Member charged with a crime was not convicted as a result of the unavailability of evidence shielded by the Speech or Debate Clause, nor are we aware of any case in which a Member who would otherwise have been charged with a crime was not charged because of his or her assertion of the Speech or Debate privilege.

As you know, the fundamental purpose of the Speech or Debate Clause is to insure that

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*the legislative function* that the Constitution allocates to Congress may be performed independently of the other two branches. In other words, the Speech or Debate Clause is one of many ingenious mechanisms by which the Founders turned into a practical reality the grand principle of separation of powers which underlies the entire Constitution and permits our government to function with an effective system of checks and balances. The Clause, as construed by the judiciary, does this in practice by (i) providing immunity – both civil and criminal – for actions taken by legislators within the “legislative sphere;” (ii) barring prosecutors in a criminal case – and parties to a civil case – against a Member of Congress from advancing their case by using information as to a legislative act; and (iii) protecting Members of Congress and their staffs from being forced to testify about, or produce documents related to, legislative matters.

Over the past two centuries, the Supreme Court has repeatedly acknowledged the fundamental importance of the Clause. For example, the Court has deemed “absolute” the protections provided by the Clause. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 501, 503, 507, 509-10, 510 n.16 (1975). It has insisted that the Clause be construed “broadly to effectuate its purposes.” *Id.* at 501. And it has stressed that, because “the guarantees of th[e] Clause are vitally important to our system of government,” they must be treated “by the courts with the sensitivity that such important values require.” *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979).<sup>1</sup>

At this point in our nation’s history, the broad outlines and reach of the Clause are clear and widely accepted by the judiciary as well as by knowledgeable students of the federal government. That judicially sanctioned construction of the Clause both protects Members of Congress in the conduct of their legislative duties and thereby preserves the independence of the legislative branch, on the one hand, and preserves the ability of prosecutors to investigate and prosecute cases of public corruption, on the other hand. *See, e.g., U.S. v. Rayburn House Office Bldg., Room 2113*, 497 F.3d 654 (D.C. Cir. 2007).

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<sup>1</sup> Historically, as I am sure you know, the Speech or Debate Clause is rooted in 16<sup>th</sup> and 17<sup>th</sup> century England when the House of Commons struggled against the efforts of successive Tudor and Stuart monarchs to use the criminal and civil laws to suppress and intimidate critical legislators. The English Parliament’s long struggle resulted, in 1689, in the declaration in the English Bill of Rights that “Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.” As a result, when our Constitution was drafted nearly 100 years later, freedom of speech and action in the legislature was accepted as a matter of course by the Founders, and reflected with very little debate in the Speech or Debate Clause.

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All of the recent criminal cases in which this office has played a role have concerned the non-disclosure component of the Clause. And, in all of these cases, this office has not represented any Member or staffer who was or is a subject or target of the investigation. The office's role has been limited to representing the House or uninvolved staffers, officers or other House entities as witnesses or amici in connection with subpoenas seeking to require the production of legislative documents or testimony. This office has sought to ensure that the Clause is construed in a manner that preserves the place of the Congress in our constitutional structure as a co-equal branch. That is entirely appropriate since the manner in which the Speech or Debate Clause is construed has enormous ramifications for the institution of the House and the ability of the Congress to perform its constitutionally-mandated duties, above and beyond the facts of any particular case.

Moreover, this office has cooperated extensively with the Justice Department and other law enforcement agencies, to the extent it was able to do so consistently with the Speech or Debate Clause, in connection with various recent criminal investigations. While we cannot comment specifically on the on-going grand-jury investigations cited in your letter, we can comment on certain public matters that your letter references. For example, the Wilkes case was not a prosecution of a Member of Congress, and the subpoenas which this office moved to quash on behalf of 12 Members of the House were issued by the defendant, not by the prosecution. With respect to the Foley matter, you should be aware that this office's communications with the Florida Department of Law Enforcement have been released to the press and are matter of public record. They demonstrate this office's commitment to cooperating with law enforcement agencies whenever it is possible to do so consistent with the Speech or Debate Clause.

Another public case, which your letter references and which is particularly instructive, is the *Rayburn House Office Bldg.* case. That case involved the historically unprecedented search of a sitting Member's congressional office in May 2006. Prior to that, the executive branch had *never* found it appropriate to search a congressional office on Capitol Hill to obtain evidence for a criminal prosecution. Notwithstanding that history, this office did not claim that a congressional office was exempt from a judicially authorized search. Rather, it argued that searches are permissible, provided that they are conducted in a manner that respects the legislative privilege provided by the Speech or Debate Clause, a position with which the D.C. Circuit of Appeals has agreed. *See Rayburn House Office Bldg.*, 497 F.3d at 662-63.

Furthermore, this office, at the direction of the House leadership, has affirmatively reached out to the Justice Department – both in the summer of 2006 and within the past several months – in an effort to negotiate procedures and protocols by which future searches of congressional offices could be conducted consistent with the requirements of the Speech or Debate Clause. The Attorney General recently testified about these negotiations and agreed that it is preferable for the two political branches to work out such procedures, without the need to

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resort to litigation. Before these efforts have come to fruition, however, the Justice Department is now seeking to involve the Supreme Court in developing procedures for prospective searches and other investigative tools under a standard that would radically shrink the scope of the Speech or Debate Clause. *See* Petition for a Writ of Certiorari in *U.S. v. Rayburn House Office Bldg., Room 2113*, No. 07-816 (S. Ct. Dec. 19, 2007). Indeed, the petition is not seeking relief for the Jefferson criminal trial, but rather it seeks what amounts to an advisory opinion to help it execute searches against unknown Members in the future if a perceived need arises.

In essence, the petition asks the Court to reverse well-established precedents and hold that legislative documents are not protected from compelled disclosure to the executive branch (among others). If adopted, this position would effectively gut the critically important Speech or Debate Clause by enabling any party – not just the Department in a criminal case – to compel disclosure of documents in congressional offices that contain legislative plans, strategies or discussions – no matter how sensitive or fundamentally legislative in nature – so long as that party does not seek to introduce the documents, or the information contained in them, in court proceedings. The Department’s position is a frontal assault on the independence of a co-equal branch of government that the Speech or Debate Clause was designed to guarantee. The fundamental role of this office is to assist the House in resisting this and similar efforts by the executive branch to aggrandize power at the expense of the legislative branch.


We acknowledge that, at times, the Speech or Debate Clause, when invoked by a Member, may have the effect of making investigations marginally more difficult or time-consuming. However, as the Supreme Court has pointed out, that was “the conscious choice of the Framers, buttressed and justified by history.” *Eastland*, 421 U.S. at 510. And, as noted above, the historical record plainly demonstrates that the Department is capable of successfully investigating, charging and convicting Members of Congress without overstepping its constitutional bounds. Furthermore, the Speech or Debate Clause is not the only constitutional or legal principle that may have the practical effect of making criminal investigations more difficult. So does, for example, the Fifth Amendment privilege against self-incrimination, the Fourth Amendment’s prohibition of unreasonable searches and seizures, the Sixth Amendment’s right to counsel, and the common law attorney-client privilege protections.

We believe that any fair reading of the briefs and pleadings this office has filed concerning the Speech or Debate Clause will reveal that the positions articulated are constitutionally reasonable, well within the bounds of existing case law, designed to preserve Congress’ independence, and not designed to protect any individual Member from investigation or prosecution.

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Thank you for your interest in our work and your attention to our reply.

Sincerely,



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General Counsel



Kerry W. Kircher  
Deputy General Counsel