Judge upholds unprecedented raid on US Congressional office

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On July 10, United States District Court Judge Thomas Hogan ruled that the search warrant served on May 20 on the office of US House of Representatives member William Jefferson did not violate the "Speech or Debate Clause" of the US Constitution or the separation of powers between the branches of the federal government.

In upholding the unprecedented raid of a congressional office by the Bush Justice Department, Judge Hogan upheld the authority of the executive branch, and argued that barring such searches of lawmakers' offices would have the effect of turning Capitol Hill into a "taxpayer-subsidized sanctuary for crime."

Jefferson, a Democrat, is being investigated for bribing domestic and foreign public officials. On May 18, the US Justice Department sought and obtained from Judge Hogan a warrant to search Jefferson's office in the House Rayburn Office Building The FBI promptly raided the office, seizing two boxes of documents and a computer hard drive.

Although Congressional graft has always existed, the executive branch had never in the history of the American republic engaged in such conduct. The raid resulted in a political firestorm. Widespread Congressional demands for return of the material seized by the FBI split the administration. Vice President Cheney and his clique agreed with that demand, while Attorney General Alberto Gonzalez and others in the US Justice Department threatened to resign if those demands were met. President Bush then ordered the US Solicitor General to sequester the material for 45 days.

Jefferson filed an emergency motion with Judge Hogan on May 24 to preclude FBI agents and the Justice Department from reviewing the material. The Bipartisan Legal Advisory Group of the House of Representatives, which represents the official position of the House, filed a "friend of the court" brief in support of Jefferson's motion.

In ruling on the motion, Judge Hogan acknowledged the history and purpose of the Speech or Debate Clause of Section 6 of Article 1 of the Constitution. Its predecessor in the English Bill of Rights of 1689 arose in response to efforts of the Tudor and Stuart monarchs to suppress and intimidate members of the Commons house of the English parliament. The clause was designed to protect the independence and integrity of the legislature against prosecution by an unfriendly executive and hostile judiciary. It serves the additional purpose of reinforcing separation of powers designed by the founders of the Republic. Thus courts in the past have read the clause broadly, rendering legislative material absolutely privileged from review or disclosure by another branch of government.

Despite this history, Judge Hogan ruled that the warrant and its execution violated neither the clause nor separation of powers considerations. He reasoned that the clause was directed not at legislative activity, but rather at unrelated criminal activity, and that Jefferson and Congress did not have power to determine which material was properly subject to turnover, at least without review by the "neutral" third branch of government, the judiciary. Indeed, according to Hogan's ruling, permitting Congress to do so would itself violate separation of powers and infringe on the role of the judiciary.

Judge Hogan, however, did not require a judicial officer to review the material in order to segregate out protected legislative matters, as some other courts have required when seizure is directed at material that may be protected by absolute privileges, such as communications between attorneys and their clients.

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Instead he let stand the approach under which a "filter team" of Department of Justice lawyers and FBI agents who were not assigned to the criminal investigation of Jefferson reviewed the material seized from his office, including records and documents related to legislation, committee work and the internal deliberations of the House Democratic caucus, to decide what they thought should be unprotected.

Hogan glibly stated that the fact "some privileged material" was "incidentally captured" does not constitute an unlawful intrusion. However, his characterization of that executive branch review as of "mere incidental" concern totally begs the question of its constitutionality.

Judge Hogan attempted to buttress his conclusion by referring to a prior court case shielding members of Congress from having to provide testimony about their legislative deliberations and speech. According to Hogan, while a subpoena to Jefferson would have been unconstitutional because it would have required him in effect to state what material was responsive, a warrant did not require him to say anything. That is without doubt a dubious and slender reed on which to determine a question of such far-reaching constitutional import.

Hogan's ruling dismissed Jefferson's position that the government had other less intrusive means to obtain the material sought by the warrant. Hogan simply dismissed the notion that any such obligation existed. By this conclusion the court ignored that at the time of the raid counsel for the House of Representatives was negotiating a resolution of the dispute over the seized material with the Justice Department.

The court further ignored the fact that according to the government's own affidavit filed to obtain the search warrant, the FBI already had overwhelming evidence of Jefferson's guilt, including videotape of him receiving $100,000 in such activity, $90,000 of which was found in his home refrigerator. According to Judge Hogan the government still had a compelling need for the material such that the warrant was reasonable under the Fourth Amendment.

That the absence of a real and immediate need for the warrant was of no moment in determining the constitutional questions shows that the warrant, and the judicial decision upholding it, were motivated by other political considerations. While targeting a Democrat was undoubtedly a political consideration given the influence-peddling Republican scandals in recent months, the unprecedented raid on Congress was without doubt a further calculated move toward bolstering unchecked executive power. The ruling in the Jefferson case shows, as did the dissent of US Justice Clarence R. Thomas in the recent *Hamdan* decision by the Supreme Court, that many in the judicial branch are prepared to go along with that drive.

The separation of powers embedded in the US Constitutional structure was most of all directed at abuses of the power of the executive. Now ever wider layers of the political elite are prepared to junk a structure founded on three "co-equal" branches of government so as to move further toward the establishment of a presidential dictatorship.

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