Will Congress Buck Administration's Latest Abuse of Constitutional Powers?

by Carl Osgood and Nancy Spannaus

In the wake of the aggressive Congressional opposition, led by Republicans, to the unconstitutional midnight raid carried out by the FBI against the offices of Rep. William Jefferson (D-La.), Administration sources told the media that Attorney General Alberto Gonzales, FBI Director Robert Mueller, and Deputy Attorney General Paul J. McNulty had threatened to resign if President Bush failed to uphold their raid. Lyndon LaRouche had an immediate response: If they wish to be helpful to the President, in this, his hour of need, all three *should* resign.

In fact, it's not at all clear that the President will back up the raid, which was a blatant violation of the Constitution's protections of the Legislative branch. Within hours, Bush announced that the materials seized in the raid should be placed under seal, until the legal issues were resolved.

But this action did not stop the Republican Chairman of the House Judiciary Committee, Rep. James Sensenbrenner (R-Wisc.), from convening an extraordinary hearing the day after Memorial Day, when Congress was technically out of session. The subject was the FBI's violation of Article I, Section 6, of the Constitution, which protects members of Congress from arrest or prosecution for anything that they say during the course of legislative business. Sensenbrenner took testimony from three Constitutional scholars and a former member of Congress (all of whom opposed the raid), and declared that this was only the first of three hearings to be held on the subject.

The final hearing will call Gonzales and Mueller themselves.

It should be obvious that this is an open-and-shut case. The Framers, seeing before them—among other things—the intimidation of members of the British Parliament by the monarchy and other forces, gave members of Congress the explicit privilege of immunity for their "speeches and debates." Despite much talk of "executive privilege" of late, neither the Judiciary nor the Executive Branch has any privilege specified in the Constitution; only the Legislature has. And this privilege has long been correctly interpreted by courts to cover all written and oral work-product prepared in the legislative process, not merely public speeches on the floor or in committee. That is why no such raid has ever been conducted for the last 219 years.

This raid on Congress, Lyndon LaRouche said, amounted to "the end of a dying regime." He said that it was grounds for impeachment of Attorney General Gonzales.

An Extraordinary Hearing

With at least six members of Congress present, Sensenbrenner, in his opening statement, placed the raid in the context of the "speech or debate" clause of Article I, Section 6, of the Constitution. We include the bulk of his remarks below, along with excerpts of the statement by ranking Democrat John Conyers (Mich.). These are followed by portions of the presentations by the three law professors who testified: Prof. Charles Teifer of the University of Maryland, who also served as Counsel to the House of Representatives from 1984 to 1995; Prof. Jonathan Turley of Georgetown University Law School; and former Reagan-era Deputy Attorney General Bruce Fein.

The Next Step

It was only about one year ago that Congress, in that case the Senate, acted decisively and bipartisanly to stop another attack on the Constitutional separation of powers, by blocking Vice President Cheney's threat to end filibusters with the "nuclear option." Now that the Constitution is challenged again, Congress as a whole cannot afford not to act.

The Administration itself is in quite a bind. Press leaks have suggested that the raid was actually *opposed* by the foremost proponent of Presidential dictatorial powers, Vice President Cheney's Chief of Staff David Addington. According to one high-level Washington source, the reason was his opposition to any action by the Department of Justice in its own right, because, as in the case of the appointment of Independent Counsel Patrick Fitzgerald, it might be a threat to the Administration itself.

It is widely known, of course, that the Department of Justice has a good number of other Congressmen in its sights, including Republicans. Some high-level Washington sources indicate that number could rise to as many as 20. But it would be wrong to see, as the public largely does, the bipartisan opposition to the raid as merely self-protective. What is at stake is the Constitutional separation of powers, no more, no less.

Documentation

The Sensenbrenner Hearings

These are excerpts from the House Judiciary Committee hearing May 30, 2006, on the FBI raid on the Congressional office of Rep. William Jefferson.

Rep. James Sensenbrenner (R-Wisc.), Chairman: On May 20th and 21st, for the first time in 219 years, the Department of Justice entered a Capitol Hill office and removed documents and materials without the involvement of a single legal representative of Congress. Exactly what was taken is known only to the Department of Justice.

Certainly, any member of Congress who has committed a crime should be prosecuted for his criminal acts. But the issues involved in this unprecedented action by the executive branch transcend any particular member.

A constitutional question is raised when communications between members of Congress and their constituents, documents having nothing whatsoever to do with any crime, are seized by the executive branch without constitutional authority.

This seizure occurred without so much as lawyers or representatives of Congress being allowed to simply observe the search and how it was conducted. Neither was anyone representing the institutional interests of Congress allowed to make a case before a judge raising these important separation of powers issues.

Our founding fathers Thomas Jefferson and James Madison made clear that a general legislative constitutional safeguard designed to prevent encroachments by the executive branch upon the legislative branch is embodied in Article I, Section 6, Clause 1 of the Constitution, which provides, "The senators and representatives shall not be questioned for any speech or debate in either house."

The purpose of the speech or debate clause was aptly summarized by the Supreme Court in *Eastland v. U.S. Servicemen's Fund,* in which it stated: "The central role of the clause is to prevent intimidation of legislators by the executive and accountability before a possibly hostile judiciary". . . .

In the case of Representative William J. Jefferson, the search warrant the Justice Department obtained from the federal judge allowed for his congressional office to largely be combed over, with materials including computer hard drives placed in the sole possession of the Department of Justice.

The materials taken very likely include communications created in the course of legitimate legislative process that have nothing to do whatsoever with the criminal inquiry into Representative Jefferson's activities.

The Justice Department had the ability to seek enforcement of their federal grand jury subpoena in federal court to obtain the same documents seized from Congressman Jefferson's Capitol Hill office but chose not to do so. The Justice Department has historically used grand jury subpoenas to obtain documents relevant to a criminal investigation of a congressman or senator. . . .

Rep. John Conyers, Jr. (D-Mich), Ranking Member: This is a historic moment in the House of Representatives. I've been on the Judiciary Committee for four decades now, and never has anything of this nature come to our attention and require that we try to bring the three branches of government into more harmony.

Now, there's no doubt that members of Congress are not above the law. The Public Integrity Unit at the Department of Justice is an aggressive, professional unit. They've convicted one member of Congress this year already, and have several pending investigations. They have the full power of not only the Federal Bureau of Investigation, but the grand jury behind them. And they can be quite persuasive and resourceful when they're interested in obtaining evidence or witnesses in corruption investigations.

But the procedures employed on the Saturday night in question where sloppy at best but reckless at worst.

What we have brought down on our heads is 219 years in which, in this history of the United States, have been able to avoid the spectacle of the Federal Bureau of Investigation swooping down into the Capitol in direct confrontation with another duly empowered police force.

Ten days after the fact, we have yet to be told why the pending subpoena against a member could not have been enforced consistent with the law. We've never been told why this search had to be done in the middle of the night, at a time when the constitutional representatives of this body were unreachable.

And we've never learned why the member in question was not permitted to have his attorneys present while his offices were searched for some 18 hours. . . .

Rep. Robert C. Scott (D-Va.): . . . But there is a concern with this because this kind of search hasn't happened in the history of the United States. Over 200 years, it hasn't happened. It didn't happen in Representative Cunningham's case. It hadn't happen in any Abramoff investigations. It didn't happen when Representative Traficant was accused of taking kickbacks right from his office. Wasn't used in the bank scandal or even Abscam.

What is so special about this case that this procedure had to be used?

It is also a concern about the breadth of the subpoena. I think the analysis would be different in the subpoena had been based on the fact that a reliable informant had said that, "There's evidence that can be found in the lower left-hand drawer." Say, the money was there. They went in, executed the search warrant, came out with the money, and left.

I think the analysis would be a little different than the FBI staying there for 18 hours, rummaging through everything, including documents, which you have to read all the documents to know what you have, which means all of the sensitive information, all of your sources, if you're having an impeachment inquiry, all of that information gets to be read, sensitive information from constituents, all is read before you can get to anything that you know you might use. . . .

Charles Tiefer, Professor, University of Baltimore School fo Law: I was solicitor and deputy general of the House in 1984-1995. That's the office that represents the bipartisan leadership group of the House of Representatives in court.

The framers' purpose in the speech or debate clause of the Constitution was, "to prevent intimidation by the executive," of the Congress. That's the Supreme Court's term, "intimidation." And the clause applies to all the records in the Congress of legislative activities: not just floor speeches and bills, but most of the work in committees and legislative caucuses.

Its privilege is not that it puts members above the law. Members are frequently investigated, frequently charged, frequently tried, frequently convicted. But it is an absolute privilege against law enforcers getting or seeing or using the legislative records I just talked about.

During my 11 years in service for the House and 4 years in a similar Senate office before then, many investigations occurred successfully of members of Congress. I cited some of them in my testimony. They started with Abscam, which occurred soon after I started work. We had Congressman Flake, Congressman Biaggi, Congressman Rostenkowski, Congressman Swindoll, Congressman McDade. Several of these were acquitted, several of these were convicted. The process succeeded, it worked.

Not during that time, not before then, not since then in two centuries has the Justice Department ever resorted to a raid on Congress to get its evidence.

Now, this raid had all the elements of unconstitutional executive intimidation. It breached what I have just described, a previously sacrosanct constitutional tradition. Without—not just without a showing of a unique necessity, but not even a claim of unique necessity. . . .

And now we look at those methods. What were those methods? I think that the opening statements of the chair and the ranking member and the other members have ably brought out what was involved in those methods: sweeping, indiscriminate wholesale search by the FBI of the entire office of this member for 18 hours during the night and the downloading of the whole hard drive of his computer, besides carting away reams of documents.

When you take the whole computer of a member of Congress, that means you're catching countless innocent constituents in there in your dragnet.

And since every congressional office contains extensive privileged legislative materials—because that's what the members are here to do, legislative work—that means that there inevitably was a wholesale constitutional violation, a wholesale intrusion by executive agents, in an intimidating way, of legislative materials.

Furthermore, there was the exclusion of the House counsel even as a mere observer, and neither the representative nor any counsel were enabled to make privileged objections. Instead, the Justice Department appointed itself to look into everything and to decide for itself what was privileged. . . .

Jonathan Turley, Professor of Law, George Washington University Law School: There have been very few times that this House has faced a moment of self-definition, where your identity and your independence are at issue.

The raid on this office of Representative Jefferson represents a profound and almost gratuitous insult to a coequal branch of government. In the history of this country, no President has ever ordered or allowed a search of the office of a sitting member of this House.

Now, there's a reason for that, that over 200 years this hasn't occurred. It's not because there has been a lack of interest of criminal investigators; there have been many investigations and many prosecutions. But there has been a tradition of mutual respect and mutual restraint between the branches. What occurred on that Saturday night shattered that tradition. . . .

And by the way, there's this great irony that in this administration there seems to be no limits as to claims of what executive privilege means; that executive privilege covers the Vice President, covers everything that comes within a mile of the White House.

Executive privilege isn't mentioned in the Constitution; it was created by the courts. And yet you have this robust interpretation. But the privilege that is mentioned, apparently is too small to even slow an FBI raid on an office.

Bruce Fein, former Reagan-Bush Justice Department official: Mr. Chairman and members of this committee, checks and balances are every bit as indispensable to our civil liberties as the Bill of Rights. And yet the Bush Administration has been bent on a scheme for years of reducing Congress

to akin to an extra in a Cecil B. DeMille political extravaganza: signing statements that are the equivalent of line-item vetoes; the assertion of executive privilege to deny Congress any authority to oversee executive branch operations; a claim of inherent presidential authority to flout any statute that he thinks impedes his ability to gather foreign intelligence, whether opening mail, conducting electronic surveillance, breaking and entering, or committing torture.

This latest use of a search warrant by the executive branch to rummage through the files of a member's office is simply an additional instrument of the Bush Administration to cow Congress.

It is exceptionally important that the Congress respond clearly and authoritatively with a statute that rejects the authority of the executive branch, whether or not a search warrant is authorized by a judge, to look through the files of a member's office and glance at legislative protected materials under the speech or debate clause.

That kind of authority can be abused to intimidate, to cow Congress into submission to executive desires.

Principles unchecked lie around like loaded weapons, and they will be used for political purposes whenever an urgent need is claimed by the incumbent. That's why it's so important to reject the principle involved in the search warrant, not focus on the details of the Jefferson warrant and search.

The speech or debate clause is violated whenever the executive branch would obtain a search warrant that would require reading the files of a member's office in order to determine whether any of the documents fit the demands of the search warrant. And that's the only way in which a search warrant for documents can be implemented. You have to read every file to know whether or not it identifies something in the search warrant. And that, inescapably, means when you're searching a legislative office, you must come across speech- or debate-protected materials.

Impeachement

Rep. Darrell Issa (R-Calif.): We have—and I hope this is appropriately controversial—we have the power to impeach the attorney general. We have the power to impeach that particular judge who decided that our body, particularly even our own very small police force, had no powers to stop the other two branches. . . .

Turley: But I also want to encourage you that the framers gave you the ability of self-defense. You have appropriations authority, oversight authority, you have, ultimately, the impeachment authority. And I don't consider that to be such a trivial question. I think that when you have an offense that strikes at the separation of powers, you're talking about something that threatens the very stability of the system. You have those powers, and I hope that you will use them, because the framers expected that you would jealously protect your own authority, because I promise you the other branches are not likely to do so with as equal vigor. . . .

Enron Trial

Lay, Skilling Convicted; Criminal System Remains

by Harley Schlanger

As one who has been watching Enron closely since the mid-1990s, I cannot say I was surprised by the convictions last week of founder and CEO Ken Lay, and his protégé and former CEO, Jeffrey Skilling. In their trial in a Houston federal court, the jury found Lay guilty on all six counts against him, and Skilling guilty on 19 of 28 counts. The sentencing is set for Sept. 11, 2006, and both men face the real possibility of spending the rest of their lives in prison.

Attorneys for the two are expected to file appeals of their convictions. The appeal process will likely be the final public act of the two, whose fall from power was meteoric. At one time, Enron was the seventh-largest corporation in the United States. It was hailed by Wall Street as the new corporate model, praised in the financial media as the nation's "most innovative" company. Its corporate leaders proclaimed it to be on the verge of becoming the "World's Greatest Company."

When Enron was flying high, Lay and Skilling could do no wrong. They were the super-stars of the new era of a deregulated post-industrial "market" economy. They were described in terms usually reserved for our nation's military heroes—as bold and brilliant, creative and fearless. Lay was a close friend of the first President Bush, and "Dubya" Bush knew him as "Kenny Boy." Though the younger Bush flew around Texas in one of Enron's private jets during his campaign for Governor of Texas, he now seems to have short-term memory loss when Lay's name is mentioned!

Lay was also on the short list of "advisors" to Vice President Cheney, who included him among his inner circle during his secretive efforts, in 2001, to pass the most cartel-friendly energy legislation in U.S. history. Cheney, who is not known for his sense of irony, saw no problem with Lay serving in this capacity at the exact moment Enron was leading a pack of corporate pirates in looting California, "gaming" the system while causing rolling blackouts statewide through its illegal practice of withholding electricity during times of peak demand.

Synarchy and Empire

Since the late 1990s, my colleague at the *Executive Intelligence Review,* John Hoefle, and I have chronicled Enron's role in pushing through the total deregulation of not just