UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	
	)	**Docket No. 08-4215**
v.	)	**(1:07-cr-00209-TSE)**
	)	
WILLIAM J. JEFFERSON,	)	
	)	
Appellant.	)	

REPLY IN SUPPORT OF
MOTION FOR STAY OF MANDATE

Appellant William J. Jefferson respectfully submits this reply in response to the government's opposition to his motion to stay issuance of the mandate pending filing of a petition for a writ of certiorari.

The government relies on cases from other circuits stating the standard for a stay pending certiorari. Mr. Jefferson does not concede that those decisions define the appropriate test in this court. But in any event, his motion addressed the factors considered by those decisions, and demonstrated that this case presents a substantial question, that there is a reasonable probability that certiorari will be granted, that there is a "fair prospect" that the judgment of this court will be reversed, and that Mr. Jefferson will suffer irreparable injury if a stay is not granted. Mr. Jefferson has, therefore, established that a stay is warranted under

Local Rule 41, which provides that "[t]he motion must present a substantial question or set forth good or probable cause for a stay."

In its opposition, the government does not attempt to challenge the constitutional importance of the Speech or Debate issue raised by this appeal. Instead, it asserts that by denying Mr. Jefferson's petition for rehearing *en banc*, this court has already determined that the conflict among the circuits identified by appellant does not warrant a grant of certiorari. Appellant respectfully submits that the government reads too much into the denial, which was not accompanied by an opinion.

Moreover, the government's argument (which it asserts only in a footnote) that the panel decision did not raise any conflict among the courts of appeals is unfounded. The panel clearly concluded that it was barred from looking behind the indictment to determine whether Speech or Debate material was improperly presented to the grand jury. *See United States v. Jefferson*, 546 F.3d 300, 313 (4th Cir. 2008). Relying on *United States v. Costello*, 350 U.S. 359 (1956), and *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), as well as other cases, the panel stated that, "Bounded by such precedent, we are likewise *not entitled to review the grand jury record* in Jefferson's case … ." 546 F.3d at 313 (emphasis added). This position is in direct conflict with the decisions in *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), *United States v. Swindall*, 971 F.2d 1531 (11th Cir.

1992), and *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980). While the panel commented on the district court's assessment of the grand jury record, it did not conduct its own review of that record or address the district court's conclusions about the challenged evidence. The panel's determination that it could not go behind the indictment was, therefore, the controlling holding of the case.

Other than citing the denial of the rehearing petition, the government's opposition does not deal with the merits of the appeal at all. In particular, the government does not address the issues raised by the panel's reliance on *Costello* and *United States v. Calandra*, 414 U.S. 338 (1974). As Mr. Jefferson has demonstrated, other courts of appeals have held that these cases are not controlling when grand jury evidence is challenged on Speech or Debate grounds. The distinction between Fourth and Fifth Amendment concerns and the unique concerns underlying the Speech or Debate Clause as it has been interpreted by the Supreme Court raises a serious possibility that the Supreme Court will disagree with the panel's reliance on *Costello* and *Calandra*. Certainly there is a "fair prospect" that the Court will reject the panel's view that a court cannot look behind an indictment to determine whether it was improperly obtained through the use of evidence of legislative acts covered by an absolute privilege.

Finally, the government's arguments regarding irreparable injury largely miss the point. The defendant's ability to object to the introduction of Speech or

Debate evidence at trial was never the issue here. Instead, the question is whether a legislator (whether current or former) may be forced to stand trial at all on an indictment obtained in violation of the Clause. The government does not, as it could not, contest that the Supreme Court's decision in *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979), establishes Mr. Jefferson's right to avoid trial on an improper indictment. Once a trial takes place, the injury caused by exposure to trial cannot be undone, even if he is acquitted or a conviction is subsequently reversed. Although the government asserts that it will be prejudiced by having to wait until a certiorari petition is considered, it offers no specifics in support of this claim. Under these circumstances, the court need not even reach a balancing of the equities, which in any event weighs in favor of the relatively short stay requested here.

Accordingly, Mr. Jefferson respectfully submits that issuance of the mandate should be stayed for 90 days pending the filing of a petition for a writ of certiorari.

Respectfully submitted,

/s/ Robert P. Trout

Robert P. Trout
Amy Berman Jackson
Gloria B. Solomon
TROUT CACHERIS, PLLC
1350 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20036
Phone: (202) 464-3300
Fax: (202) 464-3319

Attorneys for Appellant
WILLIAM J. JEFFERSON

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2008, I electronically filed the foregoing Reply in Support of Motion for Stay of Mandate 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:

Mark Lytle
mark.lytle@usdoj.gov
Rebeca H. Bellows
becky.bellows@usdoj.gov
David B. Goodhand
david.b.goodhand@usdoj.gov
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, Virginia 22314

Charles E. Duross
charles.duross@usdoj.gov
U.S. Department of Justice
1400 New York Avenue, N.W.
Washington, D.C. 20005

Melanie Sloan
msloan@citizensforethics.org
Citizens for Responsibility and
Ethics in Washington
1400 Eye Street, N.W.
Washington, D.C. 20005

/s/ Robert P. Trout

Robert P. Trout