jurisprudence

Mr. Jefferson, Meet Mr. Jefferson

What the framers would say about raids on congressional offices.

By Akhil Reed Amar

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William Jefferson and his congressional colleagues are crying foul about an executive-branch search of his Capitol-complex office. How would Thomas Jefferson and his colleagues—the Founding Fathers—have viewed the matter?

Consider first what the framers wrote about congressional privileges in Article I, Section 6 of the Constitution:

> Senators and Representatives … shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The opening language here might initially seem promising for (William) Jefferson. The clause seems to broadly immunize Congress members from arrest when Congress is in session. If Jefferson can't even be arrested for various crimes, how can his premises be searched in a criminal investigation?

But on closer inspection, the clause does not insulate sitting Congress members from ordinary criminal arrest and prosecution. No arrest-immunity exists whenever a congressman stands accused of "Treason, Felony, [or] Breach of the Peace"—and the last phrase was, according to the canonical jurist William Blackstone, a catchall term of art that effectively covered all crimes. Following Blackstone, the U.S. Supreme Court has read the catchall expansively in leading cases decided in 1908 and 1972. Thus, sitting congressmen enjoy no special immunity from arrests in ordinary criminal cases.

So, what did the Arrest Clause actually privilege? Basically, it insulated a sitting congressman from certain *civil* lawsuits brought by private plaintiffs seeking a court order that would physically "arrest" the defendant, with the effect (and perhaps purpose) of removing the congressman from the floor and thus disenfranchising his constituents. As Thomas Jefferson explained in his famed *Manual of Parliamentary Practice*: "When a representative is withdrawn from his seat by summons, the people, whom he represents, lose their voice in debate and vote." The theory was that one private litigant should not be allowed to undo the votes of thousands.

None of what T.J. said helps W.J. W.J. is a target of a criminal corruption investigation, and if criminally charged, he would have no more Arrest Clause protection than any of the countless other sitting Congress members who have been criminally prosecuted over the years—Dan Rostenkowski, Duke Cunningham, and Tom DeLay, to name just three.

Since W.J. has no immunity from an ordinary criminal arrest, it is hard to see why he has some kind of blanket immunity from an ordinary criminal search to uncover evidence of his suspected crime. If other white-collar suspects are vulnerable to office searches, why is William Jefferson any different?

What about the remainder of Article I, Section 6, which specifically protects congressional "Speech or

Debate"? Here, too, the language provides little shelter for W.J.

Essentially, this is a clause about political expression. In 18th-century England, Parliament (whose name derives from the French verb *parler*, to speak) was a speech spot—a parley place, a venue in which free speech needed to prevail, and thus where no member was properly subject to civil or criminal prosecution for libel as a result of something he said on the floor. In the famous English Bill of Rights of 1689, this principle was codified in language that used the very words "freedom of speech." In the 1770s and 1780s, various state constitutions used similar language to affirm the right of legislators to speak freely.

At the Founding, Thomas Jefferson and his ally James Madison famously argued that Article I, Section 6 did not go far enough. As Madison explained, in America sovereignty resided in the people, not in Parliament or Congress. The entire sovereign citizenry, and not just congressmen, deserved the right to speak and debate freely, without fear of civil or criminal liability for expressing their political opinions. Backed by Jefferson, Madison helped draft the First Amendment so as to extend this narrow freedom of speech beyond the Capitol. A few years later, Madison (again backed by Jefferson) famously argued that the amendment meant what it said: All Americans had a right to speak freely, and thus the Sedition Law of 1798 (which criminalized certain expressions of opinion) was unconstitutional. This is the view that has prevailed in the court of history, and in the Supreme Court.

But it is a huge leap from absolute freedom of speech to absolute freedom from search. Under the Free Speech Clause of the First Amendment, there is no general right to shield one's office entirely from any and all criminal investigations. Why should we read the Free Speech Clause of Article I any differently? Since there is no evidence that William Jefferson was searched because of any of his speeches, the Speech and Debate Clause is irrelevant.

This brings us to the Fourth Amendment—which guarantees Americans' right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This might seem more promising for W.J., but today's judges have missed the promise implicit in the original language.

The amendment's words highlight the special need to protect "papers" above and beyond all other personal "effects." Much of the anxiety about the W.J. search focuses on the risk of abuse if executive officials are allowed to rummage through a congressional office—which may be filled with documents unrelated to the criminal investigation—and may contain mountains of confidential material concerning W.J.'s constituents and colleagues. Paper searches are different from, say, drug searches. To test whether a suspicious powder is contraband, investigators can do an unobtrusive litmus test. But to see whether a particular paper is relevant to a criminal investigation, investigators often have to read the paper itself—thereby imperiling privacy.

At the Founding, English judges were particularly hostile to "paper searches." (One landmark case involved the rifling of Parliament member John Wilkes' private papers in his residence.) But today's judges have been less protective of papers so long as the search was authorized by a judicial warrant (as was the William Jefferson search). This overconfidence in warrants would have disturbed (Thomas) Jefferson's generation.

A decade ago, I argued in the *Harvard Law Review* that special safeguards above and beyond warrants should apply when there is a particularly high risk that various papers will implicate confidential information of innocent third parties—as is likely when a newspaper office is searched, or an attorney's office, or a priest's office. I suggested that such searches should be conducted by special judicial masters or magistrates, who would prevent roving executive eyes from snooping into papers that are irrelevant to the investigation

at hand. But so far, courts have not generally required such special safeguards and neither has Congress. So, here, too, W.J. may be out of luck.

Finally, let's consider issues of constitutional structure and etiquette above and beyond the naked constitutional text and original intent. Not all constitutional privileges are textual. For example, executive privilege has a proper place in our law, even though no text clearly defines it, and it is widely agreed that a sitting president enjoys immunity from ordinary criminal prosecution, even though no clause says this explicitly.

The functional argument for Capitol-complex search-immunity thus pivots on the risks of executive overreaching and intrusion into legislative privacy. These risks would be equally relevant if the FBI had searched W.J.'s home computer and home office, yet none of his allies seems to think that his home was categorically off-limits. (One could argue that the Fourth Amendment creates special protections of the Capitol building itself because it speaks of the right of "the people" to be secure in "their … houses" and the Capitol is the "house" of "the people"—but this will strike many as mere wordplay.)

Ultimately, if we want to consider the search of W.J.'s office as uniquely impermissible, we are left with a blunt intuition about the uniqueness of certain physical spaces; a separation of spaces rather than separation of powers. Various congressional barons insist that they are the lords of their castle: Congress must be the master of its own building—just as courts have special powers over misconduct in the courtroom itself—and just as special rules apply on embassy grounds or in church sanctuaries.

This crude territorial notion seems outdated in a world where so much activity occurs in cyberspace. (Should it truly matter whether W.J.'s computer is physically located in the House or in his home?) But there is an interesting history here that may help explain the intensity of the initial congressional reaction: Beginning with Thomas Jefferson, presidents for more than a century declined to physically appear in the Capitol. Instead, they simply sent written messages to Congress. Yet today, this squeamishness about executives in the Capitol building seems rather quaint. Ever since Woodrow Wilson, presidents have regularly appeared before Congress in Congress' own space. George Washington did so at the Founding—and so did John Adams. Jefferson's disinclination to follow their lead may have had more to do with his dislike of public speaking than with any strong separation of powers principle.

There remains, however, one ominous historical episode that President Bush's advisers would do well to consider. In January, 1642, King Charles I personally entered the House of Commons, along with several hundred soldiers, in search of five members whom he intended to arrest and prosecute. The members, however, had flown the coop. When the king demanded to know where the five had gone, the speaker of the House fell on his knees and replied: "May it please your Majesty, I have neither eyes to see nor tongue to speak in this place but as the House is pleased to direct me, whose servant I am here." The speaker "*in this place*" considered himself bound by the legislature and not the king, duty-bound to side with his branch and against His Majesty.

The rest is history. Thanks largely to Charles' rash and unprecedented physical trespass into the House of Commons, a bloody civil war soon broke out between the king and the Parliament—a war that eventually cost the king his head.

So, even if William Jefferson and his congressional colleagues do not have a winning constitutional argument, the president and his men might do well to tread lightly.

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