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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

v.

BRENT R. WILKES, ET AL.,

Defendants.

Case No.: 07CR00330-LAB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF 12 MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES TO QUASH SUBPOENAS

Judge: Larry Alan Burns
Courtroom: 9, 2nd Floor
Hearing Date: Oct. 1, 2007
Hearing Time: 2:00 p.m.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF 12 MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES TO QUASH SUBPOENAS

Defendant Brent Wilkes has issued trial subpoenas to 12 Members of the U.S. House of Representatives: Congressmen Roy Blunt, Norman Dicks, John Doolittle, J. Dennis Hastert, Peter Hoekstra, Duncan Hunter, Darrell Issa, Joe Knollenberg, Jerry Lewis, John Murtha, Silvestre Reyes and Jerry Weller. All 12 subpoenas – which are dated August 13, 2007, but were not served until September 5, 2007 – command the Members to whom they are directed to testify on October 2. Four of the 12 subpoenas – those directed to Congressmen Hunter, Lewis, Murtha and Reyes – also command the production of documents.[1]

The 12 subpoenas are legally insufficient for a host of reasons: (i) the information sought is absolutely privileged from compelled disclosure by the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1; (ii) the information sought does not appear to be relevant; (iii) compliance is barred by Rule VIII, Rules of the U.S. House of Representatives (110th Cong.);[2] (iv) with respect to the ad testificandum aspects of the subpoenas, there are no "extraordinary circumstances" –

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[1] Copies of the 12 subpoenas are attached collectively as Attachment A-1 to the Declaration of John D. Filamor (Sept. 24, 2007), attached as Exhibit A. A thirteenth subpoena, issued to Congressman Ike Skelton, has since been withdrawn.

We were advised by an investigator for Mr. Wilkes' counsel, Mark Geragos, that Wilkes has also issued trial subpoenas for Senators Larry Craig, Daniel Inouye, Carl Levin and Jay Rockefeller, and for White House Chief of Staff Joshua Bolten, Secretary of Defense Robert Gates and Deputy Secretary of Defense Gordon England. *See* Filamor Declaration at ¶ 7. We do not know whether any of these subpoenas have been served.

[2] The Rules of the 110th Congress are available on-line at http://www.gpoaccess.gov/hrm/browse_110.html.

required to compel Members of Congress to testify – present here; (v) with respect to the ad testificandum aspects of the subpoenas, the Members cannot be compelled to testify on days when the House is in session; (vi) with respect to the duces tecum aspects of the subpoenas, the subpoenas are vague, overbroad and unduly burdensome; (vii) with respect to the duces tecum aspects of the subpoenas to Congressmen Murtha and Reyes, the subpoenas are procedurally defective because they call for the production of committee documents only, but are directed to those Members in their individual capacities; and (viii) witness fees and mileage allowances were not tendered.

Given the obvious legal insufficiencies of the subpoenas, the high political profiles of the subpoena recipients (as well as the four Senators and three executive branch officials for whom subpoenas have apparently also been issued), and the fact that neither Mr. Wilkes nor his attorneys have ever contacted any of the 12 Members to ascertain whether they had any information that is relevant, non-privileged and admissible at trial, Filamor Declaration at ¶ 10, it seems likely that the subpoenas were issued for some reason(s) other than securing testimony or documentary evidence at trial.

FACTUAL BACKGROUND

According to the Superseding Indictment (May 10, 2007), Wilkes and co-defendant John Michael are charged with 26 counts of conspiracy, honest services wire fraud, bribery of a public official, money laundering, unlawful money transactions, and obstruction of justice, all arising out of an alleged corrupt scheme involving former Congressman Randy "Duke" Cunningham.

Mr. Wilkes' trial is scheduled to begin on October 2, 2007.

On September 6, the day after we accepted service of the subpoenas for the 12 Members, we asked Mr. Geragos to tell us what testimony he sought, and how such testimony (and the documents subpoenaed) would be relevant to the case. Letter from John D. Filamor, Esq. to Mark Geragos, Esq. (Sept. 6, 2007), attached as Attachment A-2 to Filamor Declaration. Mr. Geragos declined to provide us with that information. Letter from Mark Geragos, Esq. to John D. Filamor, Esq. (Sept. 11, 2007), attached as Attachment A-3 to Filamor Declaration.

On September 19, we wrote again in an effort to address Mr. Geragos' expressed concerns, explaining that "[w]e do not need to know the precise questions you intend to ask or even details of the areas on which you propose to examine the Members. We do need to know in general terms the topics on which you propose to examine the Members. We think this can be done in a way that avoids disclosing your defense strategy." Letter from Kerry W. Kircher, Esq. to Mark Geragos, Esq. (Sept. 19, 2007), attached as Attachment A-4 to Filamor Declaration. On September 21, Mr. Geragos advised us by telephone that he was interested in testimony concerning the congressional appropriations process and how it works.

The Document Subpoenas

The document subpoenas to Congressmen Hunter and Lewis are identical and seek three categories of documents: category a. – appropriation, authorization and/or earmark requests relating to programs of interest to various parties, including former Congressman Cunningham, Mr. Wilkes and ADCS, Inc.; category b. – documents regarding "Bribery of Duke Cunningham,

yourself or other members of congress or government by Brent Wilkes, Mitch Wade or anyone else;" and category c. – documents evidencing bribes "offered to you or accepted by you." Attachment A-1 to Filamor Declaration. Congressmen Hunter and Lewis have no documents responsive to categories b. or c. Congressman Hunter may have some documents responsive to category a.

The document subpoenas to Congressmen Murtha and Reyes – Chairmen, respectively, of the Subcommittee on Defense of the House Committee on Appropriations, and the House Permanent Select Committee on Intelligence – are virtually identical. Both seek four categories of *committee* documents: category a. – committee investigative reports relating to interactions between former Congressman Cunningham, Mitch Wade and Brent Wilkes; categories b. and c. – supporting documentation for any such report; and category d. – correspondence between committee Members and staff and former Congressman Cunningham, Mitch Wade or Brent Wilkes "regarding any attempt to benefit projects or companies owned by or related to Brent R. Wilkes or Mitch Wade."[3] Attachment A-1 to Filamor Declaration. Leaving aside the fact that the subpoenas to Congressmen Murtha and Reyes are procedurally defective because they name the two Members in their individual capacities but seek *committee* documents – *see infra* at Section VII – the Appropriations Committee has no documents responsive to categories a.-c. inasmuch as it never prepared any investigative report of the sort described in category a.

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[3] The subpoena to Chairman Murtha contains an additional sentence in category d.: "Any and all documented requests for appropriation earmarks or other funding requests for these companies or individuals or related entities." Attachment A-1 to Filamor Declaration.

Earlier this year, in connection with its investigation of Mr. Wilkes and others, the U.S. Attorney's Office ("USAO") asked to review certain Appropriations, Intelligence and House Armed Services Committee documents related to former Congressman Cunningham and/or certain Defense Department programs. The three Committees voluntarily permitted USAO to review some of their documents – some of which were classified – pursuant to non-waiver-of-privilege agreements. Subsequently, pursuant to the same non-waiver agreements, the Appropriations and Armed Services Committees produced to USAO 473 pages and approximately 1300 pages, respectively, of unclassified materials that USAO had reviewed and requested be produced. We have been advised by USAO that copies of all materials produced to it by those two Committees have been provided to Mr. Wilkes' legal defense team.

ARGUMENT

I. The Speech or Debate Clause Protects the Members Absolutely from Compelled Disclosure of Legislative Information.

The Speech or Debate Clause – "for any Speech or Debate in either House, they [Representatives and Senators] shall not be questioned in any other Place," U.S. Const. art. I, § 6, cl. 1 – provides an absolute privilege against compelled disclosure of the legislative information and records which Mr. Wilkes seeks from the 12 Members. Indeed, while it is not uncommon for criminal defendants and other litigants to seek such information from congressional parties and entities for use in court, no court has ever compelled such disclosure, and this Court should not do so here.

A. Brief Constitutional Overview.

1. History and Purpose of the Clause. The Speech or Debate privilege is rooted in the epic struggle for parliamentary independence in 16th- and 17th-century England, a struggle that culminated in 1688 in the English Bill of Rights which guaranteed to Parliament the "Freedom of Speech, and Debates or Proceedings" against any "impeach[ment] or question[ing] in any Court or Place out of Parliament." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (citation omitted). *See also U.S. v. Johnson*, 383 U.S. 169, 178 (1966) (describing efforts of Tudor and Stuart monarchs to use criminal and civil laws "to suppress and intimidate critical legislators").

As a result of the English experience, "[f]reedom of speech and action in the legislature was taken as a matter of course" by the Founders, and reflected in the Speech or Debate Clause of our Constitution. *Tenney*, 341 U.S. at 372-73. The Clause was intended by the Founders "to [e]nsure that the legislative function the Constitution allocates to Congress may be performed independently . . . . [T]he 'central role' of the Clause is to 'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary . . . .'" *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975) (quoting *Gravel v. U.S.*, 408 U.S. 606, 617 (1972)). *See also Johnson*, 383 U.S. at 178 ("In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established

by the Founders.").[4]

Because "the guarantees of th[e Speech or Debate] Clause are vitally important to our system of government," they "are entitled to be treated by the courts with the sensitivity that such important values require." *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979). Accordingly, "[w]ithout exception," the Supreme Court has "read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501. *See also Doe v. McMillan*, 412 U.S. 306, 311 (1973); *Gravel*, 408 U.S. at 624; *Johnson*, 383 U.S. at 179; *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).[5]

2. Scope of the Clause. The protections afforded to Members of Congress by the Speech or Debate Clause apply to all activities "within the 'legislative sphere,'" *McMillan*, 412 U.S. at 312 (quoting *Gravel*, 408 U.S. at 624-25), which includes all activities that are

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[4] *See also Youngblood v. DeWeese*, 352 F.3d 836, 839 (3d Cir. 2003) ("Ensuring a strong and independent legislative branch was essential to the framers' notion of separation of powers . . . . The Speech or Debate Clause is one manifestation of this practical security for protecting the independence of the legislative branch."); *U.S. v. Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980) ("[T]he Speech or Debate Clause . . . serves as a vital check upon the Executive and Judicial Branches to respect the independence of the Legislative Branch, not merely for the benefit of the Members of Congress, but, more importantly, for the right of the people to be fully and fearlessly represented by their elected Senators and Congressmen.").

[5] This broad reading has included extending the protections of the Clause "not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel*, 408 U.S. at 618. It has also included extending the protections of the Clause beyond the criminal context where it originated, *Johnson*, 383 U.S. at 180-82, to the private civil context because a "private civil action . . . creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks . . . ." *Eastland*, 421 U.S. at 503. *See also Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528 (9th Cir. 1983).

> "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."

Eastland, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625). *See also Kilbourn*, 103 U.S. at 204 (Clause encompasses anything "generally done in a session of the House by one of its members in relation to the business before it.").

The courts have broadly construed the concept of "legislative activity" to include much more than words spoken in debate. The cases "have plainly not taken a literalistic approach in applying the privilege. . . . Committee reports, resolutions, and the act of voting are equally covered." *Gravel*, 408 U.S. at 617. Similarly, committee investigations and hearings have been held to be activities within the legislative sphere, *Eastland*, 421 U.S. at 491, as has information gathered in furtherance of legislative responsibilities because "'[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'" *Id.* at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)). *See also Brown & Williamson v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) ("The [Speech or Debate] privilege also permits Congress to conduct investigations and obtain information without interference from the courts . . . ."); *Gov't of Virgin Islands v. Lee*, 775 F.2d 514, 521 (3d Cir. 1985) ("[F]act-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation.").

3. Functioning of the Clause. In practice, the Speech or Debate privilege comprises three broad protections, two of which are not particularly relevant here: (i) an immunity from lawsuits or prosecutions for all actions "within the 'legislative sphere,'" *McMillan*, 412 U.S. at 312 (citation omitted), and (ii) a use immunity which bars prosecutors in criminal cases – and parties in civil suits – from advancing cases or claims against Members by "[r]evealing information as to a legislative act." *U.S. v. Helstoski*, 442 U.S. 477, 490 (1979). *See also Johnson*, 383 U.S. at 173.

The third protection, which is of considerable relevance here, is a non-disclosure privilege. This privilege operates to protect Members (and their aides) from being compelled to testify as to privileged matters and from being compelled to produce privileged documents. *Gravel*, 408 U.S. at 615-16; *Helstoski*, 442 U.S. at 484-86; *U.S. v. Rayburn House Office Bldg., Room 2113*, __ F.3d __, No. 06-3105, 2007 WL 2275237, at *1, *5-6 (D.C. Cir. Aug. 3, 2007), *petition for reh'g en banc pending*.[6]

The Supreme Court draws no distinctions between these three components. Rather, it has stated unequivocally that when the Speech or Debate applies, it is "absolute."

> The question to be resolved is whether the actions of the petitioners fall within the "sphere of legitimate legislative activity." If they

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[6] *See also Dennis v. Sparks*, 449 U.S. 24, 30 (1980); *Gravel*, 408 U.S. at 615-16; *Miller*, 709 F.2d at 528-29 – Testimony. *Brown & Williamson*, 62 F.3d at 420; *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859-61 (D.C. Cir. 1988); *Pentagen Technologies Int'l, Ltd. v. Committee on Appropriations*, 20 F. Supp. 2d 41, 43-44 (D.D.C. 1998) , *aff'd*, 194 F.3d 174 (D.C. Cir. 1999) (per curiam); *U.S. v. Peoples Temple of the Disciples of Christ*, 515 F. Supp. 246, 248-49 (D.D.C. 1981) – Documents.

> do, the petitioners "shall not be questioned in any other Place" about those activities since *the prohibitions of the Speech or Debate Clause are absolute.*

Eastland, 421 U.S. at 501 (emphasis added). *See also id.* at 503, 507, 509-10, 510 n.16; *Gravel*, 408 U.S. at 623 n.14; *Barr v. Matteo*, 360 U.S. 564, 569 (1959); *Brown & Williamson*, 62 F.3d at 421 ("A party is no more entitled to compel congressional testimony – or production of documents – than it is to sue congressmen."); *MINPECO*, 844 F.2d at 859 ("A litigant does not have to name members or their staffs as parties to a suit to distract them from their legislative work. Discovery procedures can prove just as intrusive.").[7]

B. The 12 Subpoenas Seek Legislative Information.

As discussed above, we know what documents Mr. Wilkes seeks: the four duces tecum subpoenas call for records regarding "appropriation requests, earmarks or authorization

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[7] The courts have explained many times that if records of and Member testimony about legislative activities could be obtained by subpoena, this would interfere with Congress legislative responsibilities by (i) hindering its ability to obtain information by discouraging witness cooperation, (ii) discouraging vigorous congressional investigation and oversight by distracting Members from those responsibilities; (iii) chilling the candid exchange of views and information among Members and staff; and (iv) enabling outside parties to drown congressional offices in a flood of subpoenas. *See, e.g.*, *Eastland*, 421 U.S. at 503; *Miller*, 709 F.2d at 528 ("*[a]ny* questioning about legislative acts . . . would 'interfere' [with legislative activities] by having a chilling effect on Congressional freedom of speech") (emphasis added); *Rayburn House Office Bldg.*, No. 06-3105, 2007 WL 2275237 at *6 ("[A] key purpose of the privilege is to prevent intrusions in the legislative process and . . . the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put." "[T]he possibility of compelled disclosure may . . . chill the exchange of views with respect to legislative activity. This chill runs counter to the Clause's purpose of protecting against disruption of the legislative process."); *MINPECO*, 844 F.2d at 859; *Peoples Temple*, 515 F. Supp. at 249.

requests," records regarding the Members' performance of their official duties as "member[s] of the legislature;" investigative reports and supporting documentation; correspondence between committee Members and/or staffers and former Congressman Cunningham, Wade or Wilkes regarding attempts to benefit Wilkes or Wade (obviously referring to appropriations requests and legislation); and records regarding appropriations earmarks or other funding requests (obviously a part of the legislative appropriations process). Attachment A-1 to Filamor Declaration. These records, to the extent they exist, are quintessentially legislative and, therefore, Speech or Debate protected. The question is not even close. *See supra* at Section I.A.

With respect to testimony, we know less. However, this Court can certainly surmise from the types of documents Mr. Wilkes has requested – and from Mr. Geragos' September 21 representation to counsel that he is interested in testimony concerning the congressional appropriations process, *see supra* at 2-3 – that the testimony Wilkes seeks to elicit is also quintessentially legislative in nature and, therefore, constitutionally protected.

Even if there might be some documents responsive to the subpoenas that are not legislative, and even if Wilkes might seek to elicit some relevant, admissible testimony that was not privileged – and we do not think that either is so – the subpoenas must still be quashed because the information they seek is overwhelmingly, if not exclusively, legislative. As the D.C. Circuit has explained:

> [E]ven though the language of the subpoenas is broad enough to encompass documents that do not relate to the [subpoenaing parties'] stated objective [of inquiring into legislative matters], the effect of their literal enforcement would be to authorize a fishing

> expedition into congressional files. For a court to authorize such open-ended discovery in the face of a claim of privilege and in the absence of any information to suggest the likely existence of nonprivileged information would appear inconsistent with the comity that should exist among the separate branches of the federal government. Such action would also be inconsistent with Supreme Court decisions that make clear that the Speech or Debate Clause, designed to preserve the independence and integrity of the Legislative Branch, [is to be] read broadly to effectuate its purposes.

MINPECO, 844 F.2d at 862-63 (internal quotations and citations omitted). *See also United Transp. Union v. Springfield Terminal Ry. Co.*, 132 F.R.D. 4, 6 (D. Me. 1990) ("Although the internal communications may discuss unprotected activities, their purpose may well be legislative in whole or in part. The purpose of the clause would be ill-served if legislators and their staffs had to search through their internal correspondence, memoranda, notes and collective memories to determine whether a given document had a legislative, non-legislative, or mixed purpose.").

Accordingly, because the information Wilkes seeks is legislative, it is absolutely privileged and the subpoenas must be quashed. *Miller*, 709 F.2d at 529 ("Once the legislative-act test is met, the privilege is absolute."); *Brown & Williamson*, 62 F.3d at 419 ("*[A]ny* probing of legislative acts is sufficient to trigger the privilege.") (emphasis added); *Peoples Temple*, 515 F. Supp. at 249 ("The Supreme Court has rarely spoken with greater clarity." "Once it is determined . . . that the [Member's] actions fall within the 'legitimate legislative sphere,' judicial inquiry is at an end." (quoting *Eastland*, 421 U.S. at 503)).[8]

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[8] We recognize that privilege objections in the testimonial context are normally made on a (continued...)

C. Wilkes' Alleged Need for the Information Is Irrelevant.

In his September 11 letter, Mr. Geragos contended that the subpoenaed information is not Speech or Debate privileged because Mr. Wilkes needs the information to vindicate his "Sixth Amendment right to compulsory process [and] his right to a fair trial." Even if that is true, it is irrelevant because the Speech or Debate Clause is absolute.

"The Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government." *Helstoski*, 442 U.S. at 491. *See also id.* at 488 ("[W]ithout doubt the exclusion of such evidence will make prosecutions more difficult."). The *Eastland* Court rejected a similar argument in the civil context:

> [Respondents'] theory seems to be that once it is alleged that First Amendment rights may be infringed by congressional action the

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[8](...continued)
question-by-question basis. However, that is not appropriate where, as here, it is apparent in advance that the subpoenas seek to elicit only privileged information. *See, e.g.*, Order in *U.S. v. Moussaoui*, Crim. No. 01-4555-A (E.D. Va. March 2, 2006) (quashing in advance of trial, on Speech or Debate grounds, testimonial subpoena to Member of Congress), attached as Exhibit B. In general, pretrial rulings on Speech or Debate issues are highly desirable in the context of trial subpoenas because of the potential for disruption at trial that could arise from the fact that (i) attorneys for non-party legislators would have to be present in court to make objections and, more importantly, (ii) legislators are entitled to immediately appeal adverse Speech or Debate rulings. *See, e.g.*, *McSurely v. McClellan*, 521 F.2d 1024, 1032 n.25 (D.C. Cir. 1975), *reh'g granted*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), *cert. granted*, 434 U.S. 888 (1977), *cert. dismissed. sub nom. McAdams v. McSurely* 438 U.S. 189 (1978) ("[I]n a case such as this involving the invocation of a privilege [*i.e.*, Speech or Debate] central to the separation of powers between the legislative, executive, and judicial branches, we think that requiring a United States Senator to hold himself in contempt in order to protect the privilege would be "a course unseemly at best." (quoting *Nixon v. Sirica*, 487 F.2d 700, 707 n. 21 (D.C. Cir. 1973))).

> Judiciary may intervene to protect those rights; the Court of Appeals seems to have subscribed to that theory. That approach, however, ignores the absolute nature of the speech or debate protection and our cases which have broadly construed that protection.
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> . . . .
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> In some situations we have balanced First Amendment rights against public interests[], but those cases did not involve attempts by private parties to impede congressional action where the Speech or Debate Clause was raised by Congress by way of defense. . . . Where we are presented with an attempt to interfere with an ongoing activity by Congress, and that activity is found to be within the legitimate legislative sphere, balancing plays no part.

421 U.S. at 509-10 and n.16. Are there potential costs associated with such a broad protection? Of course. But that was "'the conscious choice of the Framers,' buttressed and justified by history." *Eastland*, 421 U.S. at 510 (quoting *U.S. v. Brewster*, 408 U.S. 501, 516 (1972)).[9]

Accordingly, because the Speech or Debate Clause applies to the information Mr. Wilkes seeks, any potential adverse impact he may experience is irrelevant. *See U.S. v. Ehrlichman,* 389 F. Supp. 95, 97 (D.D.C. 1974), *aff'd on other grounds sub nom. U.S. v. Liddy*, 542 F.2d 76 (D.C. Cir. 1976) (defendant's attempt to obtain statements made by prosecution witness in executive

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[9] Speech or Debate, of course, is hardly the only constitutional principle we value and protect, notwithstanding associated costs. For example, we "have always held that in criminal cases we would err on the side of letting the guilty go free rather than sending the innocent to jail. We have required proof beyond a reasonable doubt as 'concrete substance for the presumption of innocence.'" *Johnson v. Louisiana*, 406 U.S. 380, 393 (1972) (quoting *In re Winship*, 397 U.S. 358, 363 (1970)). And we tolerate offensive speech because we value free speech more. "The suppression of uncongenial ideas is the worst offense against the First Amendment." *Hill v. Colorado*, 530 U.S. 703, 746 (2000).

session hearing before House subcommittee barred by Speech or Debate Clause).[10]

II. The Testimony and Documents Sought Do Not Appear To Be Relevant.

"Evidence which is not relevant is not admissible," Fed. R. Evid. 402, and subpoenas for testimony may be quashed where the witnesses "have no material testimony to give." *Lucas v. Superior Court,* 203 Cal. App. 3d 733, 740 (Cal. Ct. App. 1988). "Obviously, the right to subpoena witnesses . . . does not authorize the indiscriminate use of the process of the court to call witnesses whose testimony could not possibly be received or which is grossly cumulative. . . ." *People v. Fernandez,* 222 Cal. App. 2d 760, 768-69 (1963).

Given the broad, fishing-expedition quality to the four document subpoenas; the paucity of information we have received from Mr. Geragos on the testimony he seeks to elicit from the 12 Members; and the fact that Mr. Wilkes also seeks to bring before this Court four U.S. Senators and three very high-ranking executive branch officials, *see supra* at note 1, we have no reason to think – and the Court has no reason to conclude – that any of the 12 Members has any first-hand personal knowledge, or any documents, that would be relevant in this case.

While we may have more to say on this subject if and when Mr. Geragos responds to this

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[10] In any event, we do not agree that Mr. Wilkes' constitutional rights will be adversely impacted here because, as noted above, he already has the same committee documents the prosecution has, and the prosecution does not have the other information he seeks. *See, e.g., Calley v. Callaway*, 519 F.2d 184, 223 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976) ("The basic import of *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] is not that there is an abstract right on the part of the defendant to obtain all evidence possibly helpful to his case, but rather that there is an obligation on the part of the prosecution to produce certain evidence actually or constructively in its possession . . . .").

motion, currently there is every indication that the subpoenas should be quashed on the ground that they do not seek relevant evidence.

III. House Rule VIII Bars Compliance With the Subpoenas.

House Rule VIII authorizes Members of the House to respond to judicial subpoenas *only* if they are able to determine, among other things, that the information sought is "material and relevant" and "not privileged." Rules of the U.S. House of Representatives (110th Cong.).

The Rules of the House are promulgated pursuant to the Rulemaking Clause, U.S. Const., art, I, § 5, cl. 2, which is a "broad grant of authority," *Consumer's Union of the United States, Inc. v. Periodical Correspondent's Ass'n*, 515 F.2d 1341, 1343 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976), that sits "[a]t the very core of our constitutional separation of powers." *Walker v. Jones*, 733 F.2d 923, 938 (D.C. Cir. 1984) (MacKinnon, J., concurring in part and dissenting in part), *cert. denied*, 469 U.S. 1036 (1984). The Supreme Court has stated that rules promulgated pursuant to the Rulemaking Clause, so long as they are constitutional, are "absolute and beyond the challenge of any other body or tribunal." *U.S. v. Ballin*, 144 U.S. 1, 5 (1892). *See also U.S. v. Smith*, 286 U.S. 6, 33 (1932); *Shape of Things to Come, Inc. v. County of Kane*, 588 F. Supp. 1192, 1193 (N.D. Ill. 1984) (rules promulgated pursuant to the Rulemaking Clause "have the force of law"); *Randolph v. Willis*, 220 F. Supp. 355, 358 (S.D. Cal. 1963) (same).

In this case, Rule VIII bars the Members' compliance with the subpoenas both because the information sought is constitutionally privileged, *see supra* at Section I, and because the Members have concluded – based on the information available to them – that the testimony and

documents they are being directed to provide are not "material and relevant."[11]

IV. The Members May Not Be Compelled to Testify Absent "Extraordinary Circumstances," and Wilkes Has Not Demonstrated That Such "Extraordinary Circumstances" Are Present Here.

Highly-placed public officials may not be required to provide testimony absent compelling or extraordinary circumstances. *See, e.g., In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) ("It is a settled rule . . . that 'exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted.'" (quoting *In re Office of Inspector General, R.R. Retirement Bd.*, 933 F.2d 276, 278 (5th Cir. 1991) (per curiam))). As *State Board of Pharmacy v. Superior Court,* 78 Cal. App. 3d 641, 644-45 (Cal. App. 1978), noted, "[t]his view has several times been confirmed, and insofar as we can determine never rejected, by the courts of this nation."[12]

Members of Congress are "high ranking government officials" for this purpose, as several courts have held. *See, e.g., Cano v. Davis*, No. CV 01-08477, Order Granting Motions to Quash Subpoenas Ad Testificandum and Duces Tecum Served on Congressmen Berman, Filner, and Sherman at 2, 3 (C.D. Cal. March 28, 2002) ("exceptional circumstances" necessary to compel discovery from Members of Congress), attached as Exhibit C; *Bardoff v. U.S.*, 628 A.2d 86, 90

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[11] The Members notified the House, pursuant to Rule VIII, of their receipt of the subpoenas and their determinations that those subpoenas are not consistent with the privileges and rights of the House. *See* 153 Cong. Rec. H10416-18 (daily ed. Sept. 17, 2007).

[12] This body of case law derives from *U.S. v. Morgan*, 313 U.S. 409, 422 (1941), which opined, in dicta, that the Secretary of Agriculture should not have been called to testify in a proceeding which challenged one of his administrative orders because of separation of powers concerns.

(D.C. 1993) (affirming trial court order quashing subpoenas to Senators and Senate Committee counsel on ground, among others, that defendants "failed to proffer any reason why others present who did not hold such high offices could not provide the testimony"); *Springfield Terminal Ry. Co. v. United Transp. Union*, No. 89-0073, 1989 WL 225031, at *2 (D.D.C. 1989) (refusing to compel Congressman to submit to deposition or produce documents because discovery would "disrupt [his] work as the ranking Minority Member of the House Appropriations Committee").

The policy reason that "the practice of calling high officials as witnesses should be discouraged," is simple and "obvious[: h]igh ranking government officials have greater duties and time constraints than other witnesses." *In re United States of America (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993). *See also Warzon v. Drew*, 155 F.R.D. 183, 185 (E.D. Wis. 1994), *aff'd*, 60 F.3d 1234 (7th Cir. 1995) ("The immunity is warranted because such officials must be allowed the freedom to perform their tasks without the constant interference of the discovery process.").

What "extraordinary circumstances" would permit Mr. Wilkes to compel the one or more of the 12 Members to testify here (leaving aside the other considerations discussed in this memorandum)? The cases suggest that at least three factors must be present: 1) the information sought must not be obtainable elsewhere; 2) the information sought must be essential (not merely relevant) to the party's case; and 3) provision of the testimony must not interfere with the Member's government responsibilities. *See, e.g., In re FDIC*, 58 F.3d at 1062 (If testimony is

available from alternate witness, "it will be the rarest of cases . . . in which exceptional circumstances can be shown."); *Hankins v. City of Philadelphia*, No. 95-1449, 1996 WL 524334, at *1 (Ed. Pa. 1996) ("[P]arty . . . must demonstrate that testimony [of high ranking government official] is likely to lead to the discovery of admissible evidence, is essential to that party's case and that this evidence is not available through any alternative source or less burdensome means."); *Marisol A. v. Giuliani*, No. 95-10533, 1998 WL 132810, at *2-3 (S.D.N.Y. 1998) ("Depositions . . . are permitted [only] upon a showing that: (1) the deposition is necessary in order to obtain relevant information that cannot be obtained from any other source and (2) the deposition would not significantly interfere with the ability of the official to perform his governmental duties. . . . [W]hen applying the first prong, courts only permit the deposition of a high ranking government official if he has unique personal knowledge that cannot be obtained elsewhere.").

Requiring Members to appear at trial in San Diego obviously would interfere with their congressional duties. While we understand this problem might be alleviated, in part, by permitting Members to testify by telephone, that would not eliminate the problem because demands on their time are particularly heavy at this time of year as Congress works long hours to complete its legislative business before adjourning for this session. *See, e.g.*, Jennifer Yanchin, *House Plans Busy 10 Weeks*, Roll Call, Sept. 17, 2007, at 1, attached as Exhibit D. Indeed, the House currently has votes scheduled the entire month of October except on weekends, Columbus Day and October 29-31. *See* Office of the Majority Leader, 2007 Legislative

Calendar, http://www.majorityleader.gov/calendar/. If the current target adjournment date of October 26 does not hold, then votes undoubtedly will be scheduled in the days (and possibly weeks) thereafter.

Furthermore, Mr. Wilkes has not demonstrated that the information he seeks is essential – or even relevant – to his case, or that the information he seeks is not obtainable elsewhere. Indeed, if, as Mr. Geragos suggested, Wilkes is interested in eliciting testimony concerning the congressional appropriations process and how it works, there are many non-Members who could provide such testimony: academicians, congressional scholars, former Members and former staffers, to name just a few.

Accordingly, in the absence of a showing of "extraordinary circumstances," the ad testificandum aspects of the 12 subpoenas must be quashed.

V. Requiring Members to Appear When the House Is in Session Would Violate Their Constitutional Responsibilities.

House Rules require Members to attend and to vote when the House is in session. House Rule III.1 ("Every Member shall be present within the Hall of the House during its sittings, unless excused or necessarily prevented, and shall vote on each question put . . . ."); House Rule III.2(a) ("A Member may not authorize any other person to cast his vote or record his presence in the House . . . ."). This rule, which is also promulgated pursuant to the Rulemaking Clause and therefore has the force of law, *supra* at Section III, is rooted in article I of the Constitution: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller number may

adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide." U.S. Const., art. I, § 5, cl. 1. In addition, of course, Members perform a constitutional function every time they cast a vote as the representative of the interests of their constituents.

Accordingly, requiring Members to appear in Court to testify at a time when the House is in session would force them to violate their constitutional responsibilities and effectively disenfranchise their constituents during the period of the Members' absence from the House. As noted above, the House currently has votes scheduled for most of the remaining weekdays during the month of October. *See supra* at Section IV.

VI. The Four Duces Tecum Subpoenas Are Vague, Overbroad and Unduly Burdensome.

The four duces tecum subpoenas to Congressmen Hunter, Lewis, Murtha and Reyes must also be quashed because they are vague, overbroad, and unduly burdensome. *See* Fed. R. Crim. P. 17(c)(2) ("[T]he court may quash or modify the subpoena if compliance would be unreasonable or oppressive.").

The duces tecum subpoenas are insupportably vague and overbroad because they use a host of uncertain and undefined terms and phrases including: "your offices [sic] knowledge or support of requests or efforts to support;" "any other action to benefit programs, contracts, projects or other items;" "other related entities or individuals;" "Brent R. Wilkes, Mitch Wade or others;" "yourself or other members if congress or government;" "Brent Wilkes, Mitch Wade or anyone else;" "entertainment or other travel, goods or services;" "special treatment;" "committee

interaction;" "supporting information;" "anything the committee or staff did;" "any other entity or individual related to them;" "all other information;" and "these companies or individuals or related entities." Attachment A-1 to Filamor Declaration. As a result, the Members could not even begin to determine the limits of the universe of documents that are being sought, let alone precisely what documents are responsive.

The duces tecum subpoenas are also unduly burdensome because they would require the Members to guess at what documents are being sought, to search for what appears to be an extremely broad range of documents, and to do so at a time when Congress is particularly busy.

VII. The Duces Tecum Subpoenas to Congressmen Murtha and Reyes Are Procedurally Defective Because the Subpoenas Seek Committee Documents, but Are Directed to the Members in Their Individual Capacities.

The duces tecum subpoenas to Congressmen Murtha and Reyes should also be quashed as procedurally defective because those subpoenas, on their face, call for the production only of Appropriations and Intelligence Committee documents, respectively, but are directed to the two Members in their individual capacities.

Documents generated and collected by Members in their capacities as individual Members and representatives of their congressional districts, are the personal property of the Members, and they have exclusive possession, custody and control of those documents. The Clerk of the House – elected each Congress, pursuant to House Rule II – has promulgated guidelines to assist Members in managing, and ultimately disposing of, their office records. Those guidelines confirm that "th[e] files generated by a Member's congressional office and

accumulated by the office during the Member's service. . . . are the property of the Member." Records Management Manual . . . . 1.1, available on-line at http://clerkhouse.house.gov/archiveInfo/memberOfc/manuallowres.pdf. *See also id.* 1.8 ("[T]he records generated by the Member's office belong to the Member."); H.R. Rep. No. 100-1054 at 14 (Oct. 4, 1988) ("Members' papers have been regarded as their personal property. . . ."); H.R. Rep. No. 99-994 at 5 (Oct. 14, 1986) (same). Because Members own their records, legal title passes to their heirs when they die. Records Management Manual . . . . 6.2. Indeed, many Members donate their congressional records to educational institutions when they leave office. *See Morrison v. Comm'r of Internal Revenue*, 71 T.C. 683, 685 (1979), *aff'd*, 611 F.2d 98 (5th Cir. 1980).

Committee documents, by contrast, are the property of the House. *See* House Rule XI.2(e)(2)(A) ("all committee hearings, records, data, charts, and files shall be kept separate and distinct from the congressional office records of the member serving as its chairman. Such records shall be the property of the House . . . ."). *See also* House Rule VII.1 ("chairman of each committee" and "each officer of the House" shall transfer any noncurrent records to the Clerk of the House for archiving), House Rule VII.6 ("In this rule the term 'record' means any official, permanent record of the House (other than a record of an individual Member . . .) . . . .").

This means that subpoenas for committee records must be issued to a particular committee or to the "custodian of record" for a particular committee. Because the subpoenas to Congressmen Murtha and Reyes are directed to them only in their individual capacities, the

subpoenas are procedurally defective and must be quashed.

The fact that the document schedules for the two subpoenas identify these Members as the Chairmen of a House subcommittees and committee, respectively, does not cure the defect. At best, the subpoenas are ambiguous and, under these circumstances, that ambiguity must be construed *against* Mr. Wilkes, *See, e.g.*, *Alexander v. FBI*, 186 F.R.D. 21, 41-42 (D.D.C. 1998) ("In cases where subpoenas fail to make the necessary distinction between production of documents held in a personal capacity or in the capacity of a custodian of documents, courts have construed the subpoena against the drafter" – construing subpoena to "Mr. Terry F. Lenzner, Chairman" to apply to Mr. Lenzner in his individual capacity only, not in his capacity as custodian of records for company he chaired); *In re Grand Jury Subpoena Duces Tecum, August 1986*, 658 F. Supp. 474, 481 (D. Md. 1987) (subpoenas "directed in the disjunctive to either one of the Does or, alternatively, to the custodian of the corporation whose documents have been requested" was "needless[ly] confus[ing]" and would be construed against drafter, *i.e.*, to seek records held in individual rather than representative capacity).

VIII. All 12 Subpoenas Are Procedurally Defective Because No Fees Were Tendered.

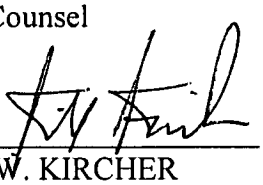
Finally, all 12 subpoenas are procedurally defective, and must therefore be quashed, because they were not accompanied by witness-attendance fees and the appropriate legal mileage allowances, as required by Fed. R. Crim. P. 17(d), and 28 U.S.C. §§ 1821, 1825. *See* Filamor Declaration at ¶ 6; *U.S. v. Moore*, 225 F.3d 637, 644 n.2 (6th Cir. 2000).

CONCLUSION

For all the foregoing reasons, the trial subpoenas to Congressmen Roy Blunt, Norman Dicks, John Doolittle, J. Dennis Hastert, Peter Hoekstra, Duncan Hunter, Darrell Issa, Joe Knollenberg, Jerry Lewis, John Murtha, Silvestre Reyes and Jerry Weller should be quashed.

Respectfully submitted,

GERALDINE R. GENNET
General Counsel



KERRY W. KIRCHER
Deputy General Counsel
DAVID PLOTINSKY
Assistant Counsel
CHRISTINE M. DAVENPORT
Assistant Counsel
JOHN D. FILAMOR
Assistant Counsel
Office of General Counsel
U.S. House of Representatives

Counsel for Non-Parties 12 Members of the U.S. House of Representatives

September 24, 2007

Exhibit A

Geraldine R. Gennet, General Counsel
Kerry W. Kircher, Deputy General Counsel
David Plotinsky, Assistant Counsel
Christine M. Davenport, Assistant Counsel
John D. Filamor, Assistant Counsel
Office of General Counsel

U.S. House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1630 (facsimile)

Counsel for Non-Parties 12 Members of the U.S. House of Representatives

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA v. BRENT R. WILKES, ET AL., Defendants.	Case No.: 07CR00330-LAB DECLARATION OF JOHN D. FILAMOR Judge: Larry Alan Burns Courtroom: 9, 2nd Floor Hearing Date: Oct. 1, 2007 Hearing Time: 2:00 p.m.

1. I am more than 18 years old, a citizen of the United States, and competent to make this Declaration. I have first-hand personal knowledge of the matters stated herein.

2. I am, and have been for more than five years, Assistant Counsel in the Office of General Counsel, U.S. House of Representatives ("OGC"). I and the other attorneys in OGC, among other things, represent Members of the House in litigation arising out of their performance of their official duties.

3. In the above-captioned case, OGC represents the Honorable Roy Blunt, Norman Dicks, John Doolittle, J. Dennis Hastert, Peter Hoekstra, Duncan Hunter, Darrell Issa, Joe Knollenberg, Jerry Lewis, John Murtha, Silvestre Reyes, Ike Skelton and Jerry Weller. All 13 of these Members have received trial subpoenas directed to them by defendant Brent R. Wilkes. The subpoena to Congressman Skelton has since been withdrawn. True and complete copies of

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(Exhibit A)

the remaining 12 subpoenas and an accompanying cover letter, dated September 5, 2007, are attached collectively as Attachment A-1.

4. On or about August 31, 2007, I spoke with Scott Ross who identified himself as an investigator for Mr. Wilkes' counsel, Mark Geragos. Mr. Ross informed me that he was attempting to serve trial subpoenas on Mr. Wilkes's behalf on Congressmen Blunt, Dicks, Doolittle, Hastert, Hoekstra, Hunter, Issa, Knollenberg, Lewis, Murtha, Reyes and Skelton, and he asked whether I would accept service of their subpoenas.

5. On September 5, 2007, I informed Mr. Ross that OGC was authorized to accept service of the subpoenas to Congressmen Blunt, Dicks, Doolittle, Hastert, Hoekstra, Hunter, Issa, Knollenberg, Lewis, Murtha, Reyes and Skelton. At that time, Mr. Ross informed me that he was also attempting to serve a trial subpoena on Mr. Wilkes's behalf on Congressman Jerry Weller. I subsequently advised Mr. Ross that OGC was authorized to accept service of the subpoena to Congressman Weller. I also advised Mr. Ross that OGC would accept service of the 13 subpoenas by fax. Mr. Ross faxed the 13 subpoenas to OGC that day.

6. In the course of my conversations with Mr. Ross on August 31 and September 5, we never discussed witness fees or mileage allowances for the subpoenaed Members. To date, no witness fees or mileage allowances have been tendered to any of the subpoenaed Members.

7. In the course of my conversations with Mr. Ross on August 31 and September 5, he advised me that he was also attempting to serve subpoenas on Mr. Wilkes' behalf on Senators Larry Craig, Daniel Inouye, Carl Levin and Jay Rockefeller, and on White House Chief of Staff Joshua Bolten, Secretary of Defense Robert Gates and Deputy Secretary of Defense Gordon England.

8. On September 6, 2007, I wrote to Mr. Geragos. On September 11, 2007, Mr. Geragos responded to my September 6 letter. True and complete copies of these two letters are attached as Attachments A-2 and A-3, respectively.

9. On September 19, 2007, following a September 18 phone conversation with Mr. Geragos, Deputy General Counsel Kerry W. Kircher wrote to Mr. Geragos. A true and complete copy of that letter is attached as Attachment A-4.

10. Mr. Kircher and I consulted with high-ranking aides or representatives for Congressmen Blunt, Dicks, Doolittle, Hastert, Hoekstra, Hunter, Issa, Knollenberg, Lewis, Murtha, Reyes and Weller, and each has advised us that their Members were never contacted by Mr. Wilkes or his attorneys to ascertain whether their Members had any information that would be relevant, non-privileged and admissible at trial.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Washington, D.C. this 24th day of September 2007.

JOHN D. FILAMOR

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(Exhibit A)

Attachment A-1

GERAGOS & GERAGOS

A PROFESSIONAL CORPORATION
LAWYERS
39TH FLOOR
644 SO. FIGUEROA STREET
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 625-3900
FACSIMILE (213) 625-1600

FAX COVER SHEET

From: Scott Ross
Client/Matter: USA v. Brent Wilkes
Service of Trial Subpoenas - US Congressmen
Date: September 5, 2007
Pages: (INCLUDING COVER) 21 pages

RECIPIENT	FACSIMILE NUMBER
John Filamor, Office of General Councel	202.226.1360

COMMENTS:

Thank you for all of your help. Please call if you have any questions.

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT (213)625-3900

31
(Exhibit A)

GERAGOS & GERAGOS
A PROFESSIONAL CORPORATION
LAWYERS
644 SOUTH FIGUEROA STREET
LOS ANGELES, CALIFORNIA 90017-3411
TELEPHONE (213) 625-3900
FACSIMILE (213) 625-1600
GERAGOS@GERAGOS.COM

September 5, 2007

John Filamor
Office of General Counsel
219 Cannon - House Office building
Washington DC 20515

Re: United States vs. Brent Wilkes, Case 07-CR00330-LAB

Dear Mr. Filamor,

Enclosed please find the subpoenas we discussed for the following United States Congressmen: Darrell Issa; Norman Dicks; John Doolittle; Roy Blunt; J. Dennis Hastert; Jerry Lewis; Duncan Hunter; John Murtha; Silvestre Reyes; Ike Skelton; Jerry Weller; Peter Hoekstra; and Joe Knollenberg. Thank you for accepting service by fax. This letter will serve as the proof of service for these trial subpoenas.

Additionally, please be advised that several of the notices to appear are accompanied by a list of documents being requested, and subsequently act as an accompanying Subpoena Duces Tecum.

Also, please note the appearance date is set for October 2, 2007. I understand this to be a good date. I will certainly keep you apprised should that change.

Sincerely yours,

Scott J. Ross
Investigator
GERAGOS & GERAGOS

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(Exhibit A)

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES of AMERICA

V.

BRENT R. WILKES

SUBPOENA IN A CRIMINAL CASE

Case Number: 07-CR-00330 - LAB

TO: DARRELL ISSA

☑ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE	COURTROOM
880 Front St. San Diego, CA 92101	Courtroom 9, 2nd Floor
	DATE AND TIME 10/2/07 9:00 am

☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): 10/02/2007

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
W. Samuel Hamrick, Jr.	AUG 13 2007
(By) Deputy Clerk L. OBERND	

(SEAL)

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Mark J. Geragos, Esq. (SBN 108325) (213) 625-3900
644 So. Figueroa Street, Los Angeles, CA 90017

33
(Exhibit A)

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES of AMERICA

V.

BRENT R. WILKES

SUBPOENA IN A CRIMINAL CASE

Case Number: 07-CR-00330 - LAB

TO:

NORM DICKS

☑ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE	COURTROOM
880 Front St. San Diego, CA 92101	Courtroom 9, 2nd Floor
	DATE AND TIME 10/02/07 9:00 am

☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
W. Samuel Hamrick, Jr.	AUG 13 2007
(By) Deputy Clerk	

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Mark J. Geragos, Esq. (SBN 108325) (213) 625-3900
644 So. Figueroa Street, Los Angeles, CA 90017

34 (Exhibit A)

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES of AMERICA

V.

BRENT R. WILKES

SUBPOENA IN A CRIMINAL CASE

Case Number: 07-CR-00330 - LAB

TO: JOHN DOOLITTLE

☑ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE	COURTROOM
880 Front St. San Diego, CA 92101	Courtroom 9, 2nd Floor
	DATE AND TIME 10/02/07 9:00 am

☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
W. Samuel Hamrick, Jr.	AUG 13 2007
(By) Deputy Clerk	

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Mark J. Geragos, Esq. (SBN 108325) (213) 625-3900
644 So. Figueroa Street, Los Angeles, CA 90017

35
(Exhibit A)

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES of AMERICA

V.

BRENT R. WILKES

SUBPOENA IN A CRIMINAL CASE

Case Number: 07-CR-00330 - LAB

TO:

ROY BLUNT

☑ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE	COURTROOM
880 Front St. San Diego, CA 92101	Courtroom 9, 2nd Floor
	DATE AND TIME 10/02/07 9:00 am

☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
W. Samuel Hamrick, Jr.	AUG 13 2007
(By) Deputy Clerk L. ORTEGO	

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Mark J. Geragos, Esq. (SBN 108325) (213) 625-3900
644 So. Figueroa Street, Los Angeles, CA 90017

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(Exhibit A)

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES of AMERICA

V.

BRENT R. WILKES

SUBPOENA IN A CRIMINAL CASE

Case Number: 07-CR-00330 - LAB

TO:

J. DENNIS HASTERT

☑ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE	COURTROOM
880 Front St. San Diego, CA 92101	Courtroom 9, 2nd Floor
	DATE AND TIME 10/02/07 9:00 am

☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

U.S. MAGISTRATE JUDGE OR CLERK OF COURT W. Samuel Hamrick, Jr.	DATE AUG 13 2007
(By) Deputy Clerk	

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Mark J. Geragos, Esq. (SBN 108325) (213) 625-3900
644 So. Figueroa Street, Los Angeles, CA 90017

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(Exhibit A)

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES of AMERICA

V.

BRENT R. WILKES

SUBPOENA IN A CRIMINAL CASE

Case Number: 07-CR-00330 - LAB

TO:

JERRY LEWIS, U.S. HOUSE of REPRESENTATIVES

☑ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE	COURTROOM
880 Front St. San Diego, CA 92101	Courtroom 9, 2nd Floor
	DATE AND TIME 10/02/07 9:00 am

☑ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

SEE ATTACHED LIST OF ITEMS

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
W. Samuel Hamrick, Jr.	AUG 13 2007
(By) Deputy Clerk	

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Mark J. Geragos, Esq. (SBN 108325) (213) 625-3900
644 So. Figueroa Street, Los Angeles, CA 90017

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(Exhibit A)

The Honorable Jerry Lewis, U.S. House of Representatives

a. Any and all correspondence, notes, calendar entries, emails, or other documentation of your offices knowledge or support of requests or efforts to support appropriation requests, earmarks, authorization requests, or any other action to benefit programs, contracts, projects or other items to benefit or of interest to Duke Cunningham, Brent R. Wilkes, ADCS, Inc., Group W Advisors, Inc., Joel Combs, Mitch Wade, MZM Inc., or other related entities or individuals.

b. Regarding the unsubstantiated allegations of Bribery of Duke Cunningham by Brent R. Wilkes, Mitch Wade or others, please provide all information, notes, calendar entries, emails or other documentation regarding any and all knowledge you have of Bribery of Duke Cunningham, yourself or other members of congress or government by Brent Wilkes, Mitch Wade or anyone else.

c. Provide documentation of all political contributions, meals, entertainment or other travel, goods or services offered to you or accepted by you in exchange for the performance of your duty as a member of the legislature or in exchange for any special treatment afforded by you to anyone providing any of the above listed items.

RECEIVED TIME SEP. 5. 3:03PM

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES of AMERICA

V.

BRENT R. WILKES

SUBPOENA IN A CRIMINAL CASE

Case Number: 07-CR-00330 - LAB

TO:

DUNCAN HUNTER

☑ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE	COURTROOM
880 Front St. San Diego, CA 92101	Courtroom 9, 2nd Floor
	DATE AND TIME 10/02/07 9:00 am

☑ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

SEE ATTACHED LIST OF ITEMS

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
W. Samuel Hamrick, Jr.	AUG 13 2007
(By) Deputy Clerk L. OLIVERNO	

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Mark J. Geragos, Esq. (SBN 108325) (213) 625-3900
644 So. Figueroa Street, Los Angeles, CA 90017

40
(Exhibit A)

The Honorable Duncan Hunter, U.S. House of Representatives

a. Any and all correspondence, notes, calendar entries, emails, or other documentation of your offices knowledge or support of requests or efforts to support appropriation requests, earmarks, authorization requests, or any other action to benefit programs, contracts, projects or other items to benefit or of interest to Duke Cunningham, Brent R. Wilkes, ADCS, Inc., Group W Advisors, Inc., Joel Combs, Mitch Wade, MZM Inc., or other related entities or individuals.

b. Regarding the unsubstantiated allegations of Bribery of Duke Cunningham by Brent R. Wilkes, Mitch Wade or others, please provide all information, notes, calendar entries, emails or other documentation regarding any and all knowledge you have of Bribery of Duke Cunningham, yourself or other members of congress or government by Brent Wilkes, Mitch Wade or anyone else.

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(Exhibit A)

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES of AMERICA

V.

BRENT R. WILKES

SUBPOENA IN A CRIMINAL CASE

Case Number: 07-CR-00330 - LAB

TO:

JOHN P. MURTHA

☑ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE	COURTROOM
880 Front St. San Diego, CA 92101	Courtroom 9, 2nd Floor
	DATE AND TIME 10/02/07 9:00 am

☑ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

SEE ATTACHED LIST OF ITEMS

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
W. Samuel Hamrick, Jr.	AUG 13 2007
(By) Deputy Clerk L CERINO	

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Mark J. Geragos, Esq. (SBN 108325) (213) 625-3900
644 So. Figueroa Street, Los Angeles, CA 90017

42 (Exhibit A)

John P. Murtha, Chairman, U.S. House of Representatives Committee on Appropriations Sub-Committee on Defense

a. The full text of any report resulting from a committee or external investigation into committee interaction with Congressman Duke Cunningham, Mitch Wade, or Brent Wilkes.

b. The supporting information for any such report including but not limited to interviews with staff and members, emails, correspondence, authorization requests, appropriation requests, staff notes, notes or minutes of markups, notes or minutes of hearings which explain the alleged requests by or anything the committee or staff did for Brent Wilkes, ADCS, Inc. or any other entity or individual related to them.

c. The supporting information for any such report including but not limited to interviews with staff and members, emails, correspondence, authorization requests, appropriation requests, staff notes, notes or minutes of markups, notes or minutes of hearings which explain the alleged requests by or anything the committee or staff did for Mitch Wade, MZM, Inc. or any other entity or individual related to them.

d. Any and all other information or correspondence between the Committee staff or Members with Duke Cunningham or his staff, Mitch Wade and his employees or agents and Brent R. Wilkes and his employees or agents regarding any attempt to benefit projects or companies owned by or related to Brent R. Wilkes or Mitch Wade. Any and all documented requests for appropriation earmarks or other funding requests for these companies or individuals or related entities.

(Exhibit A)

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES of AMERICA

V.

BRENT R. WILKES

SUBPOENA IN A CRIMINAL CASE

Case Number: 07-CR-00330 - LAB

TO:

SILVESTRE REYES

☑ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE	COURTROOM
880 Front St. San Diego, CA 92101	Courtroom 9, 2nd Floor
	DATE AND TIME 9:00 am

☒ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): 10/02/07

SEE ATTACHED LIST OF ITEMS

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
W. Samuel Hamrick, Jr.	AUG 13 2007
(By) Deputy Clerk	

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Mark J. Geragos, Esq. (SBN 108325) (213) 625-3900
644 So. Figueroa Street, Los Angeles, CA 90017

44
(Exhibit A)

Silvestre Reyes, Chairman, U.S. House of Representatives

Permanent Select Committee on Intelligence

a. The full text of any and all reports or documentation resulting from the investigation of Congressman Duke Cunningham, Mitch Wade, and Brent Wilkes and their interaction with the committee.

b. The supporting information for each report including but not limited to interviews with staff and members, emails, correspondence, authorization requests, appropriation requests, staff notes, notes or minutes of markups, notes or minutes of hearings which explain the alleged requests by or anything the committee or staff did for Brent Wilkes, ADCS, Inc. or any other entity or individual related to them.

c. The supporting information for the report including but not limited to interviews with staff and members, emails, correspondence, authorization requests, appropriation requests, staff notes, notes or minutes of markups, notes or minutes of hearings which explain the alleged requests by or anything the committee or staff did for Mitch Wade, MZM, Inc. or any other entity or individual related to them.

d. Any and all other information or correspondence between the Committee staff or Members with Duke Cunningham or his staff, Mitch Wade and his employees or agents and Brent R. Wilkes and his employees or agents regarding any attempt to benefit projects or companies owned by or related to Brent R. Wilkes or Mitch Wade.

45
(Exhibit A)

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES of AMERICA

V.

BRENT R. WILKES

SUBPOENA IN A CRIMINAL CASE

Case Number: 07-CR-00330 - LAB

TO:

JERRY WELLER

☑ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE	COURTROOM
880 Front St. San Diego, CA 92101	Courtroom 9, 2nd Floor
	DATE AND TIME 10/02/07 9:00 am

☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

U.S. MAGISTRATE JUDGE OR CLERK OF COURT W. Samuel Hamrick, Jr.	DATE AUG 13 2007
(By) Deputy Clerk	

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Mark J. Geragos, Esq. (SBN 108325) (213) 625-3900
644 So. Figueroa Street, Los Angeles, CA 90017

46
(Exhibit A)

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES of AMERICA

V.

BRENT R. WILKES

SUBPOENA IN A CRIMINAL CASE

Case Number: 07-CR-00330 - LAB

TO:
PETER HOEKSTRA

☑ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE	COURTROOM
880 Front St. San Diego, CA 92101	Courtroom 9, 2nd Floor
	DATE AND TIME 10/02/07 9:00 am

☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
W. Samuel Hamrick, Jr.	AUG 13 2007
(By) Deputy Clerk L. SERENO	

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:
Mark J. Geragos, Esq. (SBN 108325) (213) 625-3900
644 So. Figueroa Street, Los Angeles, CA 90017

47
(Exhibit A)

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES of AMERICA

V.

BRENT R. WILKES

SUBPOENA IN A CRIMINAL CASE

Case Number: 07-CR-00330 - LAB

TO:

JOE KNOLLENBERG

☑ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE	COURTROOM
880 Front St. San Diego, CA 92101	Courtroom 9, 2nd Floor
	DATE AND TIME 10/02/07 9:00 am

☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
W. Samuel Hamrick, Jr.	AUG 13 2007
(By) Deputy Clerk	

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Mark J. Geragos, Esq. (SBN 108325) (213) 625-3900
644 So. Figueroa Street, Los Angeles, CA 90017

48
(Exhibit A)

Attachment A-2

GERALDINE R. GENNET
GENERAL COUNSEL

KERRY W. KIRCHER
DEPUTY GENERAL COUNSEL

DAVID PLOTINSKY
ASSISTANT COUNSEL

CHRISTINE DAVENPORT
ASSISTANT COUNSEL

JOHN D. FILAMOR
ASSISTANT COUNSEL

U.S. HOUSE OF REPRESENTATIVES
OFFICE OF THE GENERAL COUNSEL
219 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6532
(202) 225–9700
FAX: (202) 226–1360

September 6, 2007

BY EMAIL, FACSIMILE (213-625-1600), AND FIRST-CLASS MAIL

Mark J. Geragos, Esq.
Geragos & Geragos, P.C.
39th Floor
644 South Figueroa Street
Los Angeles, CA 90017-3411

Re: ***U.S. v. Brent Wilkes, No. 07-CR-330 (S.D. Cal.)***

Dear Mr. Geragos:

I write on behalf of Representatives Roy Blunt, Norman Dicks, John Doolittle, J. Dennis Hastert, Peter Hoekstra, Duncan Hunter, Darrel Issa, Joe Knollenberg, Jerry Lewis, John Murtha, Silvestre Reyes, Ike Skelton, and Jerry Weller, regarding the trial subpoenas you issued to them in the above-referenced matter. Your investigator, Scott Ross, indicated that you were issuing these subpoenas to the Members in their official capacities as Members of Congress, but Mr. Ross was unable to elaborate as to what testimony you seek from each Member.

This information is necessary because Rule VIII of the Rules of the House of Representatives (copy attached) authorizes House Members and employees to respond to judicial subpoenas *only* if they are able to determine, among other things, that the information sought is "material and relevant." House Rule VIII was promulgated pursuant to the Rulemaking Clause of the Constitution. U.S. Const., art. I, § 5, cl. 2. *See also United States v. Ballin*, 144 U.S. 1, 5 (1892) (rules promulgated pursuant to the Rulemaking Clause, within constitutional limitations, are "absolute and beyond the challenge of any other body or tribunal"); *United States v. Smith*, 286 U.S. 6, 33 (1932); *Shape of Things to Come, Inc. v. County of Kane*, 588 F. Supp. 1192, 1193 (N.D. Ill. 1984) (rules promulgated pursuant to the Rulemaking Clause "have the force of law"); *Randolph v. Willis*, 220 F. Supp. 355, 358 (S.D. Cal. 1963) (same). Without this information, the Members will be unable to make the determinations required under House Rule VIII and will therefore be unable to respond to your subpoenas.

Accordingly, please specifically describe in writing what testimony you intend to seek from each Member and why you think such testimony would be relevant to your case. In addition, with respect to the document aspects of the subpoenas you issued to Representatives Hunter, Lewis, Murtha, Reyes, and Skelton, please specifically describe in writing why you think the documents you seek would be relevant to your case.

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(Exhibit A)

We also need this information to determine whether the testimony you seek is protected from compelled disclosure by the Speech or Debate Clause of the Constitution, U.S. Const., art. I, § 6, cl. 1, which provides absolute protection for legislative activities. *See, e.g., Eastland v. United States Serviceman's Fund*, 421 U.S. 491 (1975); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 529 (9th Cir. 1983). (It appears that many, if not all, of the documents you seek fall under this privilege.)

Because the return date of the subpoenas you issued is October 2, 2007, please send your written response to me by facsimile and/or email by the close of business on September 11, 2007. Presumably you already know what specific information you intend to seek from the Members you have subpoenaed and why you think that information would be relevant to your case, so you should easily be able to respond by this date.

Please let me know if you have any questions. I look forward to hearing from you.

Sincerely,

John Filamor
Assistant Counsel

Attachment

cc: Honorable Roy Blunt
Honorable Norman Dicks
Honorable John Doolittle
Honorable J. Dennis Hastert
Honorable Peter Hoekstra
Honorable Duncan Hunter
Honorable Darrel Issa
Honorable Joe Knollenberg
Honorable Jerry Lewis
Honorable John Murtha
Honorable Silvestre Reyes
Honorable Ike Skelton
Honorable Jerry Weller

RULES

of the

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

PREPARED BY

Lorraine C. Miller

Clerk of the House of Representatives

MAY 24, 2007

(Rev. 5-24-07)

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(Exhibit A)

(2) An investigative record that contains personal data relating to a specific living person (the disclosure of which would be an unwarranted invasion of personal privacy), an administrative record relating to personnel, or a record relating to a hearing that was closed under clause 2(g)(2) of rule XI shall be made available if it has been in existence for 50 years.

(3) A record for which a time, schedule, or condition for availability is specified by order of the House shall be made available in accordance with that order. Except as otherwise provided by order of the House, a record of a committee for which a time, schedule, or condition for availability is specified by order of the committee (entered during the Congress in which the record is made or acquired by the committee) shall be made available in accordance with the order of the committee.

(4) A record (other than a record referred to in subparagraph (1), (2), or (3)) shall be made available if it has been in existence for 30 years.

4. (a) A record may not be made available for public use under clause 3 if the Clerk determines that such availability would be detrimental to the public interest or inconsistent with the rights and privileges of the House. The Clerk shall notify in writing the chairman and ranking minority member of the Committee on House Administration of any such determination.

(b) A determination of the Clerk under paragraph (a) is subject to later orders of the House and, in the case of a record of a committee, later orders of the committee.

5. (a) This rule does not supersede rule VIII or clause 11 of rule X and does not authorize the public disclosure of any record if such disclosure is prohibited by law or executive order of the President.

(b) The Committee on House Administration may prescribe guidelines and regulations governing the applicability and implementation of this rule.

(c) A committee may withdraw from the National Archives and Records Administration any record of the committee delivered to the Archivist under this rule. Such a withdrawal shall be on a temporary basis and for official use of the committee.

Definition of record

6. In this rule the term "record" means any official, permanent record of the House (other than a record of an individual Member, Delegate, or Resident Commissioner), including—

(a) with respect to a committee, an official, permanent record of the committee (including any record of a legislative, oversight, or other activity of such committee or a subcommittee thereof); and

(b) with respect to an officer of the House elected under rule II, an official, permanent record made or acquired in the course of the duties of such officer.

Withdrawal of papers

7. A memorial or other paper presented to the House may not be withdrawn from its files without its leave. If withdrawn certified copies thereof shall be left in the office of the Clerk. When an act passes for the settlement of a claim, the Clerk may transmit to the officer charged with the settlement thereof the papers on file in his office relating to such claim. The Clerk may lend temporarily to an officer or bureau of the executive departments any papers on file in his office relating to any matter pending before such officer or bureau, taking proper receipt therefor.

RULE VIII

RESPONSE TO SUBPOENAS

1. When a Member, Delegate, Resident Commissioner, officer, or employee of the House is properly served with a judicial or administrative subpoena or judicial order directing appearance as a witness relating to the official functions of the House or for the production or disclosure of any document relating to the official functions of the House, such Member, Delegate, Resident Commissioner, officer, or employee shall comply, consistently with the privileges and rights of the House, with the judicial or administrative subpoena or judicial order as hereinafter provided, unless otherwise determined under this rule.

2. Upon receipt of a properly served judicial or administrative subpoena or judicial order described in clause 1, a Member, Delegate, Resident Commissioner, officer, or employee of the House shall promptly notify the Speaker of its receipt in writing. Such notification shall promptly be laid before the House by the Speaker. During a period of recess or adjournment of longer than three days, notification to the House is not required until the reconvening of the House, when the notification shall promptly be laid before the House by the Speaker.

3. Once notification has been laid before the House, the Member, Delegate, Resident Commissioner, officer, or employee of the House shall determine whether the issuance of the judicial or administrative subpoena or judicial order described in clause 1 is a proper exercise of jurisdiction by the court, is material and relevant, and is consistent with the privileges and rights of the House. Such Member, Delegate, Resident Commissioner, officer, or employee shall notify the Speaker before seeking judicial determination of these matters.

4. Upon determination whether a judicial or administrative subpoena or judicial order described in clause 1 is a proper exercise of jurisdiction by the court, is material and relevant, and is consistent with the privileges and rights of the House, the Member, Delegate, Resident Commissioner, officer, or employee of the House shall immediately notify the Speaker of the determination in writing.

5. The Speaker shall inform the House of a determination whether a judicial or administrative subpoena or judicial order described in clause 1 is a proper exercise of jurisdiction by the court, is material and relevant, and is consistent with the privileges and rights of the House. In so informing the House, the Speaker shall generally describe the records or information sought. During a period of recess or adjournment of longer than three days, such notification is not required until the reconvening of the House, when the notification shall promptly be laid before the House by the Speaker.

6. (a) Except as specified in paragraph (b) or otherwise ordered by the House, upon notification to the House that a judicial or administrative subpoena or judicial order described in clause 1 is a proper exercise of jurisdiction by the court, is material and relevant, and is consistent with the privileges and rights of the House, the Member, Delegate, Resident Commissioner, officer, or employee of the House shall comply with the judicial or administrative subpoena or judicial order by supplying certified copies.

(b) Under no circumstances may minutes or transcripts of executive sessions, or evidence of witnesses in respect thereto, be disclosed or copied. During a period of recess or adjournment of longer than three days, the Speaker may authorize compliance or take such other action as he considers appropriate under the circumstances. Upon the reconvening of the House, all matters that transpired under this clause shall promptly be laid before the House by the Speaker.

7. A copy of this rule shall be transmitted by the Clerk to the court when a judicial or administrative subpoena or judicial order described in clause 1 is issued and served on a Member, Delegate, Resident Commissioner, officer, or employee of the House.

8. Nothing in this rule shall be construed to deprive, condition, or waive the constitutional or legal privileges or rights applicable or available at any time to a Member, Delegate, Resident Commissioner, officer, or employee of the House, or of the House itself, or the right of such Member, Delegate, Resident Commissioner, officer, or employee, or of the House itself, to assert such privileges or rights before a court in the United States.

RULE IX

QUESTIONS OF PRIVILEGE

1. Questions of privilege shall be, first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; and second, those affecting the rights, reputation, and conduct of Members, Delegates, or the Resident Commissioner, individually, in their representative capacity only.

2. (a)(1) A resolution reported as a question of the privileges of the House, or offered from the floor by the Majority Leader or the Minority Leader as a

Attachment A-3

GERAGOS & GERAGOS

A PROFESSIONAL CORPORATION
LAWYERS
644 SOUTH FIGUEROA STREET
LOS ANGELES, CALIFORNIA 90017-3411
TELEPHONE (213) 625-3900
FACSIMILE (213) 625-1600
GERAGOS@GERAGOS.COM

FAX COVER SHEET

From: Mark J. Geragos
Client/Matter: United States vs. Brent Wilkes
Case number 07-CR-0330-LAB
Date: September 11, 2007
Pages: 3 (INCLUDING COVER)

RECIPIENT	FACSIMILE NUMBER
John D. Filamor, Esq.	(202) 226-1360

COMMENTS:

Attached is a letter dated September 11, 2007 in response to Mr. Filamor's letter of September 6, 2007.

Please call our offices should you have any questions.

Thank you.

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(Exhibit A)

GERAGOS & GERAGOS
A PROFESSIONAL CORPORATION
LAWYERS
644 SOUTH FIGUEROA STREET
LOS ANGELES, CALIFORNIA 90017-3411
TELEPHONE (213) 625-3900
FACSIMILE (213) 625-1600
GERAGOS@GERAGOS.COM

September 11, 2007

Via Facsimile to 202-226-1360, and U.S. Mail
John D. Filamor, Esq.
Assistant Counsel
U.S. House of Representatives
Office of the General Counsel
219 Cannon House Office Building
Washington, DC 20515-6532

Re: *United States vs. Brent Wilkes, et al.*, 07-CR-0330-LAB

Dear Mr. Filamor:

Thank you for your letter of September 6, 2007 regarding the trial subpoenas to Roy Blunt, Norman Dicks, John Doolittle, J. Dennis Hastert, Peter Hoekstra, Duncan Hunter, Darrel Issa, Joe Knollenberg, Jerry Lewis, John Murtha, Silvestre Reyes, Ike Skelton, and Jerry Weller issued at the request of the defendant in the above-referenced criminal action. Your letter suggests that those gentlemen may not comply with the subpoenas unless the defense explains, in detail, what it intends to ask them at trial. We decline to do so, and call on the witnesses to obey the order of the court in the subpoenas, and appear at trial as called for.

The right of an accused to compulsory process for obtaining witnesses in his favor is guaranteed under the Sixth Amendment of the United States Constitution, and has been regarded as one of "the most basic ingredients of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Likewise the accused is guaranteed due process of law in any criminal prosecution.

Our preliminary research discloses no authority holding that either Rule VIII of the Rules of the House of Representatives, or the Speech or Debate Clause of the Constitution, trumps an accused's Sixth Amendment right to compulsory process or his right to a fair trial.

Specifically, requiring a defendant to disclose what testimony he seeks from a

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(Exhibit A)

September 11, 2007

GERAGOS & GERAGOS

series of witnesses before the prosecution presents its case will necessarily reveal the defense's trial strategy and tactics. That would unfairly prejudice the defense, and undermine the right to a fair trial.

Indeed, I have spoken with the AUSA in this matter, Phillip Halpern, who has informed me that he is in contact with your office. This obviously raises significant concerns regarding the prosecution's access to defense strategy and tactics that you request be disclosed prematurely. As you know, the defense has no obligation to inform the prosecution of their pretrial and trial strategy. In fact in the companion case *United States vs. Foggo and Wilkes*, USDC (D.C. Cal.) Case No. 07CR0329-LAB, which involves the Classified Information Procedures Act (the "CIPA"), the court has already ruled that the US attorney has no right to defense information as to their strategy, nor does the defense need to proffer information as to the defense's reasons for obtaining classified information.

Accordingly, please let me know whether these witnesses will comply with the subpoenas issued to them.

Very truly yours,

Mark J. Geragos
GERAGOS & GERAGOS

MJG:tg

57
(Exhibit A)

Attachment A-4

GERALDINE R. GENNET
GENERAL COUNSEL

KERRY W. KIRCHER
DEPUTY GENERAL COUNSEL

DAVID PLOTINSKY
ASSISTANT COUNSEL

CHRISTINE DAVENPORT
ASSISTANT COUNSEL

JOHN D. FILAMOR
ASSISTANT COUNSEL

U.S. HOUSE OF REPRESENTATIVES
OFFICE OF THE GENERAL COUNSEL
219 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6532
(202) 225-9700
FAX: (202) 226-1360

September 19, 2007

BY FACSIMILE (213-625-1600)

Mark J. Geragos, Esq.
Geragos & Geragos, P.C.
39th Floor
644 South Figueroa Street
Los Angeles, CA 90017-3411

Re: ***U.S. v. Brent Wilkes, No. 07-CR-330 (S.D. Cal.)***

Dear Mark:

I write to follow up on yesterday's conversation. As you know, we previously asked you to advise us what testimony you seek from the 13 House Members you subpoenaed to enable them to make the determinations required by House Rule VIII. Your September 11 letter declined to do so because, you said, you did not want to disclose your defense strategy. That position appears to be based on your assumption that we need to know "in detail, what [you] intend[] to ask [the Members] at trial."

That is incorrect. We do not need to know the precise questions you intend to ask or even details of the areas on which you propose to examine the Members. We do need to know in general terms the topics on which you propose to examine the Members. We think this can be done in a way that avoids disclosing your defense strategy.

I understand from our conversation yesterday, in which we discussed different options for resolving this issue, that if you do not disclose anything to us in advance of our moving on behalf of the 13 Members to quash the subpoenas, you will disclose that information in your opposition and that you will ask Judge Burns to seal your opposition. That, of course, is your prerogative.

On another topic, I understand that you will be asking Judge Burns today to postpone the trial. Please advise us as soon as possible how he rules.

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(Exhibit A)

Thanks for your attention. I look forward to hearing from you.

Sincerely,

Kerry W. Kircher

cc: Honorable Roy Blunt
Honorable Norman D. Dicks
Honorable John T. Doolittle
Honorable J. Dennis Hastert
Honorable Peter Hoekstra
Honorable Duncan Hunter
Honorable Darrell E. Issa
Honorable Joe Knollenberg
Honorable Jerry Lewis
Honorable John P. Murtha
Honorable Silvestre Reyes
Honorable Ike Skelton
Honorable Jerry Weller

Exhibit B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Criminal No. 01-455-A
v.	)	
	)	
ZACARIAS MOUSSAOUI,	)	
	)	
Defendant.	)	

ORDER

Before the Court is the Motion of U.S. Representative Curt Weldon to Quash Subpoena (Docket #1584), in which Representative Weldon objects to being called to give testimony about or provide documents collected during his investigation of the government's "Able Danger" program. The government has filed a related Motion In Limine to Exclude the Testimony of Proposed Defense Witnesses Related to the Able Danger Program (Docket #1619) ("Motion to Exclude"), in which it seeks a ruling preventing the defense from calling three witnesses with personal knowledge of the "Able Danger" program.[1]

On January 23, 2006, a trial subpoena was issued to

[1]The government's Motion to Exclude was filed under seal, because it reveals the names of potential defense witnesses. Because the Motion to Quash was not filed under seal, without objection from the defense, it is clearly a matter of public knowledge that the defense may wish to call witnesses knowledgeable about the "Able Danger" program. Therefore, the Court will address both motions in this unsealed Order.

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(Exhibit B)

Representative Weldon commanding him to appear at this court on March 6, and to bring any documents in his possession referring or relating to the "Able Danger" program, or to any of the September 11 hijackers. Representative Weldon objects to the subpoena on the grounds that as a member of Congress, his privilege under the Speech and Debate Clause of the United States Constitution immunizes him from being compelled to give testimony or provide documents in this case.[2] Representative Weldon also states that he is no longer in possession of the chart that the defense seeks.[3] The defendant objects to the Motion to Quash arguing that by discussing his knowledge of the "Able Danger" program in public, non-legislative fora such as The Oprah Winfrey Show, Representative Weldon has waived any privilege he may have had.

The Speech and Debate Clause provides a very strong protection to members of Congress against being questioned about activities that are "within the sphere of legitimate legislative activity." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501 (1975). If the court finds that the activities at issue are

---

[2]The Speech and Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl.1.

[3]Although the subpoena is more broadly written, the defense has expressed a particular interest in a chart referenced by Representative Weldon in his book, Countdown to Terror, and described in various newspaper articles.

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(Exhibit B)

within the sphere of legitimate legislative activity, then "the prohibitions of the Speech or Debate Clause are absolute" and the representative may not be questioned about them, other than by the Congress itself. Id. Legitimate legislative activity has been defined by the Supreme Court as matters that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, 408 U.S. 606, 625 (1972). Much, if not all, of the information responsive to the subpoena can be expected to have come from Representative Weldon's legitimate legislative activity of investigating a project that is clearly a proper subject for Congressional legislation.

It is also clear that Representative Weldon's public discussion of his "Able Danger" investigation is not sufficient to waive the privilege of the Speech and Debate Clause in the context of this subpoena. The Supreme Court has held that any such waiver "can be found only after explicit and unequivocal renunciation of the protection." United States v. Helstoski, 442 U.S. 477, 491 (1979). Representative Weldon's public statements about the "Able Danger" program never referenced, let alone renounced, the Representative's privilege under the Speech and

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(Exhibit B)

Debate Clause. Based on these considerations, the Court does not find that the privilege has been waived. Accordingly, the subpoena will be quashed.

This decision will not prejudice the defendant because clearly Representative Weldon possesses no first hand knowledge of the government's "Able Danger" program. Anything he knows about the program either came from witnesses with more direct knowledge or the document which he no longer possesses. That document can certainly be subpoenaed from Stephen Hadley, the person to whom Representative Weldon says he gave the document. Moreover, as demonstrated by the government's Motion to Exclude, the defense has also subpoenaed three witnesses with first-hand knowledge of the "Able Danger" program. These persons can provide much, if not all, of the information that the defense could expect to obtain from Representative Weldon.

In its Motion to Exclude, the government argues that the entire "Able Danger" issue is not relevant to this case, and, even if relevant, allowing the defense to raise this issue will cause substantial delay and confuse the jury. The government also forcefully argues that no chart linking Mohammed Atta to Al Qaeda ever emerged from the "Able Danger" program, a contention disputed by the potential witnesses.[4] What knowledge the

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[4]This contention is also disputed by Representative Weldon, who has stated in press reports that he viewed such a chart. See Deft's Opp. To Rep. Curt Weldon's Mot. to Quash Subpoena.

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(Exhibit B)

government possessed before September 11 regarding members of Al Qaeda, and specifically links between Al Qaeda and the eventual hijackers, is a key issue in dispute in this death penalty trial. Accordingly, the Court finds that the information to be elicited from the three "Able Danger" witnesses is sufficiently relevant to the case, and that its relevance is not outweighed by considerations of confusion and waste of time. Therefore, the government's Motion to Exclude is DENIED. Accordingly, it is hereby

ORDERED that the Motion of U.S. Representative Curt Weldon to Quash Subpoena be and is GRANTED, and the subpoena is hereby QUASHED, and it is further

ORDERED that the government's Motion to Exclude be and is DENIED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 2nd day of March, 2006.

/s/

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

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(Exhibit B)

Exhibit C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

P SEND

CIVIL MINUTES - GENERAL

Case No.: CV 01-08477 MMM (RCx) Date: March 28, 2002

Title: *Cano, et al. v. Davis, et al.*

DOCKET ENTRY

PRESENT:

HONORABLE STEPHEN REINHARDT, UNITED STATES CIRCUIT JUDGE;
HONORABLE CHRISTINA SNYDER, UNITED STATES DISTRICT JUDGE;
HONORABLE MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE

Anel Huerta **Deputy Clerk**	**N/A** **Court Reporter**
Attorneys Present for Plaintiff(s): None	**Attorneys Present for Defendant(s):** None

PROCEEDINGS: Order Granting Motions To Quash Subpoenas Ad Testificandum And Duces Tecum Served On Congressmen Berman, Filner, And Sherman

Pursuant to the stipulation of counsel, Local Rule 7-15 and Rule 78 of the Federal Rules of Civil Procedure, the court vacated the March 26, 2002 hearing on the motions of Congress Members Howard Berman, Brad Sherman and Bob Filner to quash the subpoenas ad testificandum and duces tecum served on them by plaintiffs, and found the matter suitable for decision without oral argument. Having considered the briefs submitted by counsel, the court grants the motions as set forth below.

On February 13, 2002, plaintiffs served a staff member in Congress Member Sherman's Woodland Hills office with subpoenas compelling him to appear for deposition and produce documents.[1] The subpoena ad testificandum noticed Sherman's deposition in Los Angeles on March 14, 2002, when Sherman was scheduled to be in Washington D.C.[2] The subpoena duces tecum required production by Sherman, his agents and staff of a broad range of documents

[1]See Memorandum of Law In Support of motion to Quash Third Party Subpoenas to Congressman Brad Sherman ("Sherman Mot.") at 3:16-19.

[2]See *id.* at 4:34; Ex. A.

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(Exhibit C)

regarding the 2000-2001 redistricting process.[3] On February 14, 2002, plaintiffs served subpoenas on Congress Member Berman's District Office in Mission Hills. While plaintiffs notified the parties that they planned to serve subpoenas on Congress Member Filner, such service has not been effected to date.[4]

"Exceptional circumstances" are necessary to compel discovery from high ranking government officials. See *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993) (per curiam) (holding that high ranking government officials ". . .'should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.'. . . [They] have greater duties and time constraints than other witnesses . . . ," quoting *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)). See also *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (affirming "a settled rule . . . that 'exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted,'" quoting *In re Officer of Inspector General*, 933 F.2d 276, 278 (5th Cir. 1991)); *Kyle Engineering Company v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) ("Heads of government agencies are not normally subject to deposition").

Courts have articulated a variety of factors relevant in assessing whether exceptional circumstances are present. Among the factors courts examine is whether the high ranking official "possess information essential to [the] case which is not obtainable from another source . . . ." *In re United States (Reno)*, 197 F.3d 310, 314 (8th Cir. 1999) (citing *In re FDIC*, *supra*, 58 F.3d at 1062). The Eighth Circuit, in fact, has gone so far as to state that the party seeking discovery must "show an entitlement to the relief sought in the case." *In re United States (Reno)*, *supra*, 197 F.3d at 314. See also *In re FDIC*, *supra*, 58 F.3d at 1062 (denying defendants the right to depose high ranking officials of the FDIC after the agency brought a declaratory relief action because there was not "a strong showing of bad faith or improper behavior" in the record, "notwithstanding Pacific Union's allegations of misconduct (including conspiracy and cover-up) and assertions of gross abuse of power by government agencies and officials").

Plaintiffs assert that the Congress Members possess evidence relevant to the California Legislature's intent in enacting the redistricting plan, and that such evidence is relevant both to their Fourteenth Amendment and Voting Rights Act claims. It is clear, however, that with respect to both species of claim, plaintiffs must, in addition to proving intent, also prove that the Legislature's redistricting plan had a discriminatory effect on Latino voters. See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) ("Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter"); *Davis*

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[3]See *id.* at 4:5-8; Ex. B.

[4]See Memorandum in Support of Motion of Congressmen Filner and Berman to Quash Subpoenas ("Berman/Filner Mot.") at 5:14-24. Neither the Berman nor the Sherman subpoena was properly served as required by Rule 45 of the Federal Rules of Civil Procedure.

v. Bandemer, 478 U.S. 109, 127 (1986) (to prevail on Fourteenth Amendment vote dilution claim, plaintiffs must prove intentional discrimination against an identifiable political group; and an actual discriminatory effect on that group); *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) ("Even where there has been a showing of intentional discrimination, plaintiffs must show that they have been injured as a result").

The Senate defendants have filed motions for summary judgment asserting that plaintiffs cannot raise a triable issue of fact regarding the discriminatory effect of the redistricting plan in the challenged State Senate and Congressional districts. Defendants' motions also challenge, *inter alia*, the legal merit of plaintiffs' claim under *Shaw v. Reno*, 509 U.S. 630 (1993). The Congress Members argue that, until these motions are decided, and it is determined both that plaintiffs have adduced sufficient evidence of discriminatory effect to move beyond summary judgment, and that plaintiffs' *Shaw* claim is legally tenable,[5] they cannot demonstrate that the Congress Members' deposition testimony is "essential" to their case. They argue further that plaintiffs cannot make a sufficient showing of entitlement to relief on the merits to warrant compelling the discovery under the "exceptional circumstances" standard applicable to high ranking officials.

The Supreme Court has cautioned that district courts adjudicating legislative redistricting claims must be mindful of "the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at various stages of litigation and determining whether to permit discovery or trial to proceed." *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995). Coupled with the "exceptional circumstances" standard applicable to depositions and discovery requests served on high ranking government officials, *Miller* counsels that the present subpoenas be quashed until such time following disposition of defendants' summary judgment motions as the court determines that discovery regarding issues of intent is appropriate.[6]

Initials of Deputy Clerk

cc: **Counsel of record (or parties)**

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[5]Defendants have raised substantial questions as to whether the challenged districts are of the type that can be the subject of a successful *Shaw* claim. The court believes it prudent to resolve that legal issue before addressing the factual merits of the claim or authorizing discovery relevant to it.

[6]It is true, as plaintiffs note, that the court, in its order denying plaintiffs' application for temporary restraining order, stated that it believed plaintiffs presented sufficiently serious questions to make the case a fair ground for litigation. The court also stated, however, that it could not conclude on the limited record before it that plaintiffs would probably succeed on the merits of their claims. It is precisely the limited nature of the temporary restraining order record that leads the court to conclude that any assessment as to whether the Congress Members' testimony is "essential" should await resolution of the pending summary judgment motions.

Exhibit D

ROLL CALL

House Plans Busy 10 Weeks

September 17, 2007
By Jennifer Yachin,
Roll Call Staff

House Democratic leaders plan a full schedule as the final months of the first session of the 110th Congress wind down, while the chamber awaits Senate action on annual spending legislation.

According to one source, Speaker Nancy Pelosi (D-Calif.) outlined a 10-week work period leading up to the Thanksgiving holiday at a Democratic Caucus meeting earlier this month, and several Democrats confirmed that anticipations are for the session to wrap up in mid-November.

"We have a laundry list of things that committees would like to see passed out of the House and aren't necessarily things we think will be acted on by the Senate this year," acknowledged a leadership aide, who asked not to be identified. "There's certainly work to keep us busy."

"That being said, that doesn't mean we'll be here until Christmas passing out smaller bills that the committees have produced," the aide added, stating that leadership is cognizant that Members will want to return to their districts before the end of the year.

As the House awaits Senate action on a significant portion of the agenda, including nine of the 12 fiscal 2008 appropriations bills, Democratic leaders expect to move remaining big-ticket items including an energy measure focused on global warming, renewal of the No Child Left Behind education bill and the Head Start program, as well as reforms to the Foreign Intelligence Surveillance Act.

Other possibilities include a wide-ranging tax package that would provide relief from the alternative minimum tax.

In addition, the chambers must still negotiate an energy package passed by the House in late August, as well as an expansion of children's health insurance.

More immediately, the House will continue its ongoing debate over the Iraq War when it debates the supplemental spending bill, and the Democratic leadership is expected to decide this week what related measures — such as a proposal to increase time between troop deployments — it will take up in an ongoing effort to wind down U.S. involvement.

Without the fiscal 2008 appropriations bills completed, the House must also complete a continuing resolution before Sept. 30. Several Democratic sources said that measure likely will be written to support government operations for at least four weeks, and possibly into mid-November. The White House has vowed to veto numerous spending bills, setting up a potential showdown with Congress before the measures are signed into law.

"We're building on the success of the first seven months. Critical pieces of legislation remain including energy independence [and] health care for children," said a second Democratic aide, who also requested anonymity. "They require a lot of negotiations and behind-the-scenes work, but they'll be major victories when they go to the president for his signature."

While the Senate has scheduled an early October recess week following Columbus Day, the House has yet to follow suit, although Democratic leaders have not ruled out the possibility.

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(Exhibit D)

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on September 24, 2007, I caused to be served one copy of the foregoing Memorandum of Points and Authorities in Support of Motion of 12 Members of the U.S. House of Representatives to Quash Subpoenas by email (.pdf format) and by overnight courier on:

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