

The unconstitutional Saturday night raid

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The president's nominee to be the next attorney general of the United States would do well to hold to the traditional view of the separation of powers as envisioned by the creators of our unique form of democracy. The regime at the Justice Department that launched the now infamous FBI Saturday night raid on Rep. William Jefferson's (D-La.) office in May of 2006 is now mostly gone.

The judicial branch continues to be the arbiter of this balance of power and its ruling last month that the raid was unconstitutional was a stunning rebuke to the Department of Justice and a clear affirmation of our system of separation of powers. The issue before the court was the scope of the Constitution's Speech or Debate Clause: "For any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." Although most Americans have probably never heard of it, that deceptively simple provision is a major bulwark of American liberty.

The Founding Fathers, remembering the Tudor and Stuart monarchs' abuses of the House of Commons, drew directly from the English Bill of Rights - "That the freedom of speech, and Debates or Proceedings in Parliament, ought not be impeached or questioned in any Court or place out of Parliament." They incorporated it into the Constitution with little debate or disagreement.

The Speech or Debate Clause is one of many ingenious practical mechanisms by which the separation-of-powers principle, so fundamental to our liberty, is made to work. The Speech or Debate Clause guarantees the legislative branch independence by, among other things, protecting members of Congress from being questioned about their legislative activities or being compelled to disclose legislative records. The court's ruling in the Jefferson case rested firmly on this constitutional foundation in holding that the search of his office must have resulted in the disclosure of legislative materials to the executive branch; that such compelled disclosure undercuts legislative independence; and that, therefore, all legislative materials seized by the FBI from Jefferson's office must be returned to him.

The court's decision also vindicates then-Speaker Dennis Hastert's (R-Ill.) courageous opposition to the Justice Department's unprecedented power grab. On the heels of the raid, Hastert and then-Democratic leader - now Speaker - Nancy Pelosi (D-Calif.) issued a rare joint press release condemning the raid as unconstitutional and demanding the return of the seized documents. This was in the face of near-universal opposition by the punditocracy and editorial pages in America, many of their own colleagues, as well as polls suggesting that more than 85 percent of Americans believed the raid was appropriate. In speaking out against the raid, Hastert and Pelosi were not trying to protect Jefferson or other members of the House from prosecution, as many suggested. Rather, in the very best tradition of the House leadership, they put aside their political differences - less than six months out from a hotly contested election - to defend a constitutional principle of supreme importance to our system of separation of powers.

The effort by some unidentified Justice Department official to intimidate Hastert - after he condemned the raid and the president had ordered the materials sealed until the court could rule - by suggesting that Hastert too might be under investigation is simply one example of why legislative independence is so important and why the Speech or Debate Clause really matters. The coincidence of this leak and the resulting furor caused the Justice Department to admit on the record that there was no such investigation. We thought then, and we think now, that the two leaders' condemnation of the FBI's Saturday night raid was one of the most politically courageous actions we have ever witnessed. All members of the House - indeed, all Americans - owe them, and the D.C. Circuit Court of Appeals, our gratitude.

Had the raid stood unchallenged, the executive branch's breach of the Speech or Debate Clause doctrine would have stood. While the Jefferson case seemed fairly innocuous, the future could have held frightening possibilities - not the least of which could have been a future president who might have used the Jefferson raid as precedent to intimidate legislators opposed to his or her agenda. The court's decision is an important landmark for a free government dependent on checks and balances by equal branches of government. It reaffirmed the boundaries to enable the Congress, especially the House of Representatives, to meaningfully fulfill its constitutionally mandated role by confirming its independence under the Constitution. Notwithstanding the politics of the moment and potential aggressive executive action, Hastert and the Congress stood on historically and constitutionally solid ground. And the federal appeals court agreed - perhaps, just the way the Founding Fathers imagined.

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