



Written by [Thomas R. Eddlem](#) on January 19, 2011

FBI Wiretapping of Congressmen Curtailed

The *Washington Post* [explained](#): "In 2007, the U.S. Court of Appeals for the District of Columbia said FBI agents violated the speech or debate clause when they conducted an unprecedented search of Jefferson's Capitol Hill office. Executive branch agents cannot review privileged legislative materials without the the consent of the member of Congress, a three-judge panel ruled.... The Supreme Court declined to hear the case, which had the effect of making the restrictions law in the District." The congressman, Louisiana Representative William Jefferson, was [convicted](#) of bribery charges in 2009 despite the ruling over wiretapping issues.



But that hasn't stopped the executive branch from complaining that they should be able to tap anyone's telephone and electronic equipment. "Its effect is to critically undermine the Executive Branch's ability to investigate and prosecute corrupt activity in and affecting the Legislative Branch," Justice Department lawyers wrote in their December 2007 brief, [according to](#) the *Washington Post*. The *Post* [summarized](#) that "they said that vital investigative techniques could be compromised and that they might be forced to give lawmakers notice before the FBI searched their homes, vehicles or briefcases."

And while warrantless wiretapping of America's citizens on an everyday basis has generated a veritable "ho-hum" from most members of Congress, the assertion that the White House could wiretap *their* phones with a warrant has sent congressional leaders of both parties into conniptions. "House lawyers," the *Post* [reported](#), "who have aggressively countered the Justice Department in a number of investigations, have tried for two years to get the Obama administration to agree to limitations in Capitol Hill searches. But sources familiar with the negotiations said the talks broke down in the fall."

The dispute is based upon [Article I, Section 6](#) of the U.S. Constitution. which reads that members of Congress "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." The law gives members of Congress immunity from most prosecutions by the executive branch while Congress is in session, largely so that the business of Congress can continue uninterrupted.

The measure was deemed necessary by the Founding Fathers to prevent what had happened from time to time in England, where, for example, the British King James II arrested unfriendly members of Parliament for making speeches and prosecuted them in courts he controlled using phony libel charges. The English concept of legislative immunity was codified in the English Bill of Rights (1689), which served as the model for the U.S. Bill of Rights. The English Bill of Rights [charged](#) James II, the last English Catholic king, with securing the "assistance of diverse evil counselors, judges and ministers employed by him" and using them to "subvert and extirpate the Protestant religion and the laws and



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liberties of this kingdom."

The English Bill of Rights' remedy for this royal abuse [was](#) "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

Even today, it's not out of the realm of possibility for a President to conspire to arrest certain potentially criminal congressmen on the eve of a close and controversial vote in the hope of turning the result of the vote. Certainly there have been enough [congressional criminals](#) to warrant arrests:

Last year, House members voted New York Congressman [Charlie Rangel guilty](#) of 11 ethics violations, which included using his office to solicit donations for his campaign and failing to disclose more than half a million dollars in assets abroad. As mentioned above, Louisiana Congressman [William J. Jefferson](#) was sentenced in 2009 for taking a bribe after having been found with \$90,000 hidden in his freezer. In 2005, [Randy "Duke" Cunningham](#) resigned after conceding he took bribes from defense contractors. Many congressmen have been arrested for driving under the influence, such as [John Sweeney](#), [Vito Fossella](#), [etc.](#)).

And congressmen have learned to lean on their immunity as a way to avoid prosecution for crimes for which common people would face legal consequences. Perhaps the most egregious case was that of Rhode Island Representative Patrick Kennedy, who [crashed](#) his 1997 Mustang into the median of a District of Columbia highway at 2:45 a.m., May 4, 2006. Kennedy claimed to be ["late for a vote"](#) in Congress, and was driven home by D.C. police. Later, he claimed not to be drunk, as the D.C. police officer on the scene suspected. Rather, he claimed to be disoriented from the prescription drugs Ambien and Phenergan, although anonymous tipsters had placed him in the local Hawk & Dove bar before the accident.

Patrick Kennedy, who [acknowledged a history of alcohol abuse two years later](#), checked himself into the Mayo Clinic's rehabilitation facility the day after the accident. Of course, prescription drugs Ambien and Phenergan generally do not require rehab to kick dependency.

Modern-day members of Congress have taken this limited immunity — a necessary and appropriate preventative medicine — and implied it constitutes complete immunity from prosecution for crimes. But perhaps it will highlight the plight of the common American, who can be wiretapped without a warrant (a violation of the [Fourth Amendment](#) to the U.S. Constitution) for no reason whatsoever.



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