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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

IN RE SPRINGFIELD GRAND JURY INVESTIGATION.	)	Case No. 15-MC-3005 **UNDER SEAL**

MEMORANDUM OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE*

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INTRODUCTION

The Department of Justice contends in this case that records created or received by Aaron Schock and/or his staff during the course of Schock's service in the U.S. House of Representatives as the elected representative of the 18th congressional district of Illinois ("Schock Personal Office Congressional Records") do not belong to him. Rather, the Department says, the Schock Personal Office Congressional Records are the property of some "collective entity" that is legally distinct from Mr. Schock. *See* Gov't's Mot. for Order to Aaron Schock to Show Cause . . . and Resp. to Schock's Mot. for Clarification or Modification ¶ 72 (June 13, 2015) (# 15) ("Show Cause Motion").

The Department's purpose in so contending is clear: It seeks to avoid former Congressman Schock's assertion of a Fifth Amendment act-of-production privilege as to all or some of the Schock Personal Office Congressional Records. However, the Department's legal and analytical bases for so contending are anything but clear. Indeed, the Department struggles to identify exactly who or what *is* the "collective entity" to whom the Schock Personal Office Congressional Records supposedly belong. At one point, the Department suggests that everyone who works in "a Congressional office" (presumably the Member and his employees) comprise the "collective entity." *Id.*; *see also id.* ¶ 73 ("government officials"). At another point, the Department suggests that the "collective entity" is "the represented" or the "people," *id.* ¶ 72, meaning perhaps the 700,000-plus constituents who live in the 18th congressional district, or perhaps the 320,000,000-plus souls who comprise the American body politic.[1] And at yet another point, the Department suggests that "the government" is the "collective entity," *id.*,

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[1] *See* U.S. Census Bureau, My Congressional District, http://www.census.gov/myced/# (select "Illinois" and then "Congressional District 18") (last visited July 27, 2015); U.S. Census Bureau, U.S. and World Population Clock, http://www.census.gov/popclock/ (last visited July 27, 2015).

meaning perhaps the Legislative Branch, perhaps the Executive Branch, perhaps the Judicial Branch, perhaps all three – the Department is not clear. *See generally* U.S. Const. arts. I-III.

There is, of course, a reason why the Department struggles to identify a "collective entity" – and that is because there isn't one. As explained below:

1. Whether an individual (including a current or former Member of Congress) may assert an act-of-production privilege turns, as a constitutional matter, on who (or what) owns the records. *See infra* Argument, Part I.

2. Members of Congress are the exclusive owners of the congressional records they (or the members of their staffs) create or receive during their service in office, *see infra* Argument, Part II, meaning that, with respect to those records, the Members are protected by the Fifth Amendment to the same extent as every other "person." *See* U.S. Const. amend V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

3. To the extent any "collective entity" analysis still is appropriate – notwithstanding the clear answer to the ownership question – there is no legally cognizable "collective entity" to whom the Schock Personal Office Congressional Records belong, and for whose benefit the former Congressman holds those records in a purely custodial capacity. *See infra* Argument, Part III.

Amicus curiae the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") recognizes that this Court, on June 25, 2015, found that

> Congressional offices are more akin to a corporation than a sole proprietorship. The Congressional Records were created and maintained on behalf of the Congressional office as a collective entity. Therefore, those records are held in a representative capacity.

Sealed Op. at 20-21 (June 25, 2015) (#22). The House respectfully suggests that this conclusion is incorrect. Accordingly, to the extent the Court may be inclined to revisit this issue, *see id.*

at 21 (noting "paucity of case law on whether the Congressional offices are collective entities"), the House proffers the analysis below.

The House does not submit this memorandum for the purpose of defending or protecting former Congressman Schock. Rather, it does so because of the House's own substantial institutional interest in the ownership/"collective entity" issue. *See* Unopposed Mot. of the [House] for Leave to File *Amicus Curiae* Mem. (July 27, 2015). Moreover, in the event the Court elects to alter its position on the ownership/collective entity issue, the House also wishes to make clear that it takes no position on the application of the act-of-production privilege to any particular record(s).

ARGUMENT

I. The Fifth Amendment Act-of-Production Privilege Turns on Ownership.

The Fifth Amendment protects individuals from "compelled production of [their] personal papers and effects" when such production would incriminate them. *Bellis v. United States*, 417 U.S. 85, 87 (1974). Certain "collective entities," however, do not enjoy Fifth Amendment protections. These "collective entities" are not natural people, but rather are "organization[s] which [are] recognized as . . . independent entit[ies] apart from [their] individual members." *Id.* at 92. Consequently, "an individual cannot rely upon the [Fifth Amendment] privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." *Id.* at 88; *see also id.* at 90 ("[N]o artificial organization may utilize the personal privilege against compulsory self-incrimination . . . .").

This distinction between individuals and "collective entities" turns as an initial matter on ownership: Are the records at issue owned by a natural person who constitutionally is entitled to

assert a Fifth Amendment privilege, or are the records owned by a separate legal entity which is not so entitled? *See In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d 255, 260 (3d Cir. 2015) ("collective entity doctrine" more "concerned with the nature of the entity that owns the documents"); *Amato v. United States*, 450 F.3d 46, 50-51 (1st Cir. 2006) ("[T]he collective-entity doctrine focuses on . . . the status of the records, i.e., corporate or individual . . . . [R]epresentatives of collective entities . . . possess no Fifth Amendment privilege to refuse to produce records that belong to collective entities, including corporate records."); *In re Grand Jury Proceedings*, 727 F.2d 941, 944 (10th Cir. 1984) (*Bellis* "repeated[ly] emphasi[zed] . . . the absence of an ownership interest" in the documents, which were "not subject to the exclusive control of the person to whom the subpoena was issued").[2]

For instance, a business sole proprietor is entitled to invoke the Fifth Amendment act-of-production privilege with respect to his business's records because he – not some separate legal entity – owns them, exclusively. *See Bellis*, 417 U.S. at 87-88; *Braswell v. United States*, 487 U.S. 99, 111 n.5 (1988) ("A sole proprietor does not hold records in a representative capacity."); *see, e.g., United States v. Doe*, 465 U.S. 605, 606, 612-14 (1983) (affirming on Fifth Amendment act-of-production grounds lower court's quashal of grand jury subpoenas, directed to owner of sole proprietorships, seeking production of business records). The sole owner of a corporation, by contrast, cannot assert this privilege because the business's records belong to a distinct legal entity – the corporation – and the owner holds them in a representative, custodial capacity only. *See, e.g., Braswell*, 487 U.S. at 104; *S.E.C. v. Narvett*, 16 F. Supp. 3d 979, 981 (E.D. Wis. 2014)

[2] *See also Fisher v. United States*, 425 U.S. 391, 411 (1976) ("This Court has also time and again allowed subpoenas against the custodian of corporate documents or those *belonging* to other collective entities such as unions and partnerships . . . ." (emphasis added)); *Bellis*, 417 U.S. at 98 (records sought were, "under state law, . . . partnership property, and petitioner's interest in partnership property [was] a derivative interest subject to significant limitations"); *United States v. White*, 322 U.S. 694, 699 (1944) ("Such records and papers [of collective entities] are not the private records of the individual members or officers of the organization.").

(privilege did not protect individual who was "corporate defendant's bookkeeper; . . . record-keeper; . . . only employee; and . . . only shareholder" (quotation marks omitted)); *see also Bellis*, 417 U.S. at 90 ("[A]n artificial entity can only act to produce its records through its individual officers or agents . . . .").

Implicit in Fifth Amendment "collective entity" case law is the precept that a "collective entity" must pre-exist the demand for records in an individual's possession. A "collective entity" cannot be divined for the sole purpose of end-running a natural person's Fifth Amendment rights. A true "collective entity" exists independent of any Fifth Amendment consequences.

II. The Schock Personal Office Congressional Records Are Owned Exclusively by Former Congressman Schock.

A. Members' Congressional Records Are Their Personal Property Under the Rules and Practices of the House.

The Rules of the House draw a clear distinction between the records of House committees and officers ("House Records"), on the one hand, and Members' congressional office records, on the other. *See* Rule VII.6, Rules of the U.S. House of Representatives, 114th Cong. (2015) ("House Rules"), *available at* http://clerk.house.gov/legislative/house-rules.pdf.[3] The former belong to the House and are subject to House Rules regarding preservation, access, and archiving. *See generally* House Rule VII.1-VII.5. The latter, however, do not belong to the House because Rule VII expressly defines them to *not* be House Records. *See* House Rule VII.6 (excluding from definition of House "record" any "record of an individual Member, Delegate, or Resident Commissioner").[4]

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[3] "Officers," for purposes of Rule VII, are the four individuals elected by the Members of the House pursuant to House Rule II, *see* House Rule VII.6(b), namely, the Clerk, the Sergeant-at-Arms, the Chief Administrative Officer, and the Chaplain, *see* House Rule II.1.

[4] The express distinction between House records, on the one hand, and individual Member congressional records, on the other, is nothing new. *See, e.g.*, Rule VII, Rules of the U.S. House of Representatives, 113th Cong. (2013), attached at Tab 1; Rule VII, Rules of the U.S. House of Representatives, 112th

House Rule VII, like all House Rules, is a product of Congress's rulemaking power. *See* U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . ."). The Rulemaking Clause constitutes a "broad grant of authority," *Consumer's Union of U.S., Inc. v. Periodical Correspondents' 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).

Consistent with Rule VII (and its predecessors), the House long has deemed Member congressional records to be the "personal property" of the Member who receives or creates them. *See, e.g.*, H. Con. Res. 307 (110th Cong.) (2008) ("[B]y custom [Member personal office congressional records] are considered the personal property of the Member who receives and creates them, and it is therefore the Member who is responsible to decide on their ultimate disposition . . . ."), attached as Ex. B to Elliott Decl.; H. Rep. No. 100-1054, at 14 (1988) ("Members' papers have been regarded as their personal property. . . ."), attached as Ex. C to Elliott Decl.; H. Rep. No. 99-994, at 5 (same), attached as Ex. D to Elliott Decl.[5]

Cong. (2011), attached at Tab 2; Rule VII, Rules of the U.S. House of Representatives, 111th Cong. (2009), attached as Tab 3; Rule VII, Rules of the U.S. House of Representatives, 106th Cong. (1999), attached as Tab 4.

The predecessor to House Rule VII – former House Rule XXXVI – implicitly distinguished between House records and individual Members' records. *See, e.g.*, Rule XXXVI, Rules of the U.S. House of Representatives, 105th Cong. (1997), attached as Tab 5; H. Rep. No. 99-994, at 5 (1986) (highlighting implicit distinction in Rule XXXVI between "papers of the committees and departments of the House" and "files of a Member's congressional office"), attached as Ex. D to Decl. of Farar P. Elliott (July 24, 2014) ("Elliot Declaration"), attached at Tab 6.

[5] The Senate takes the same view with respect to its individual Senators' records. *See* U.S. Senate, Secretary of the Senate, Records Management Handbook for United States Senators and Their Archival Repositories, S. Pub. 109-19, at 5 (2006) ("By tradition and practice, senators' papers are the private property of the individual member."), attached at Tab7.

Consistent with House Rule VII, and with the House's longstanding institutional treatment of Member personal records, the Clerk of the House has promulgated guidelines to assist Members in managing, and ultimately disposing of, their respective personal office records. These guidelines recognize that "a Member's official papers," which "include records that are created or received as part of his or her career in the U.S. House of Representatives," are not "official records of the House of Representatives" and, "[t]herefore, . . . are the property of the Member . . . ." Office of Art and Archives, Office of the Clerk of the United States House of Representatives, Records Management Manual for Members at 1 (Feb. 2014) ("Records Manual"), attached as Ex. A to Elliott Decl; *see also id.* at 3 ("records generated by the Member's office belong to the Member").

The Records Manual also acknowledges the enduring and encouraged practice – wholly consistent with each Member's exclusive and total ownership interest in his or her congressional records – that "[m]any Members transfer their records to a research repository, such as a college or university, at the end of their congressional service." *Id.* at 2; *see also* H. Con. Res. 307 ("[E]ach Member of Congress should be encouraged to arrange for the deposit or donation of the Member's own noncurrent Congressional papers with a research institution that is properly equipped to care for them, and to make these papers available for educational purposes at a time the Member considers appropriate."). Indeed, the Records Manual emphasizes that "only a Member of Congress – or in the case of a deceased Member, his or her heir(s) – can donate congressional papers." Records Manual at 17.[6]

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[6] For example, former Congressman Schock's predecessor, former Congressman Ray LaHood, donated his congressional papers to the Dirksen Congressional Center in Pekin, Illinois. *See* Dirksen Center, The Dirksen Center's History: Selected Milestones, http://www.dirksencenter.org/print_dcc_history.htm (noting that in 2008 "[t]he Center receive[d] major portions of the Ray LaHood Papers").

Such inter vivos transfers are commonplace. *See, e.g.*, Press Release, University of Michigan, Former Congressman John Dingell Donates Archive to U-M Bentley Historical Library (May 6, 2015),

Not surprisingly, in day-to-day practice, the House treats Member congressional records as their personal property, and Members exercise control over their records consistent with exclusive ownership of those records. *See* Elliott Decl. ¶ 7.

Accordingly, because House Rules "ha[ve] the force of law," *Shape of Things to Come, Inc. v. Cnty. of Kane*, 588 F. Supp. 1192, 1193 (N.D. Ill. 1984); *accord Randolph v. Willis*, 220 F. Supp. 355, 358 (S.D. Cal. 1963), any ruling that former Congressman Schock does not own the Schock Personal Office Congressional Records would unconstitutionally intrude upon the House's rulemaking powers, *see United States v. Ballin*, 144 U.S. 1, 5 (1892) (congressional rules, within constitutional limits, are "absolute and beyond the challenge of any other body or tribunal"); *see also Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892) (declining to look behind House enrollment of bill to determine whether House followed internal rules in doing so).

B. The Department's Contrary Arguments Are Unavailing.

The Department ignores the House Rules, the Clerk's guidelines, the real day-to-day control that Members exercise over their congressional records, and the House's history and customs with respect to its treatment of such records. Instead, the Department likens Members' congressional records to generic "government records" generated by a generic "government agency," Show Cause Mot. ¶¶ 70-72, a false equivalency for at least three reasons.

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http://ns.umich.edu/new/releases/22878-former-congressman-john-dingell-donates-archive-to-u-m-bentley-historical-library; Kennesaw State University, U.S. Rep. Gingrey Donates Papers to Kennesaw State (Dec. 6, 2014), https://web.kennesaw.edu/news/stories/us-rep-gingrey-donates-papers-kennesaw-state; Press Release, Illinois College, Paul Findley Collection Donated to Illinois College (Nov. 25, 2013), http://www.ic.edu/RelId/631270/ISvars/default/Paul_Findley_Collection_donated_to_Illinois_College.htm; Press Release, Indiana University, Rep. Mike Pence Donates Congressional Papers to IU's Modern Political Papers Collection (Dec. 28, 2012), http://newsinfo.iu.edu/news/page/normal/23630.html; *see also Morrison v. Comm'r of Internal Revenue*, 71 T.C. 683, 685, 691-92 (1979) (declining to permit Member to claim federal income tax deduction for donation of congressional records to educational institutions after he left office because of lack of any discernible tax basis in such records, but assuming that Member owned those records and, therefore, was entitled to make the donation), *aff'd*, 611 F.2d 98 (5th Cir. 1980).

First, executive branch records – including records of the President – belong to the United States government by virtue of statutes. For instance, the Presidential Records Act of 1978, 44 U.S.C. §§ 2201-07, overrides "the tradition of private ownership of presidential papers and the reliance on volunteerism to determine the fate of their disposition," H. Rep. No. 95-1487, at 2 (1978), and instead vests "the United States" with "complete ownership, possession, and control of Presidential records," 44 U.S.C. § 2202. Indeed, the federal judiciary has rejected the theory – indistinguishable from the theory advanced by the Department here with respect to the Schock Personal Office Congressional Records – that the President "held his presidential papers as 'a trustee for the American People'" prior to the passage of the Presidential Records Act. *Nixon v. United States*, 978 F.2d 1269, 1270 (D.C. Cir. 1992). The D.C. Circuit affirmed that, *in the absence of a statute*, the President (like Members of Congress) "had a well grounded expectation of ownership" in his official papers, *id.*, which interest (like the interest enjoyed by Members of Congress) derived from "[h]istory, custom, and usage," *id.* at 1277, 1284; *compare id.* at 1279 (noting that "[t]he incidents of Presidents disposing of their papers by gift or devise are clear examples of conduct inconsistent with public ownership"), *with supra*, note 6 (noting incidents of Members disposing of their papers by gift or devise).

Similarly, the Federal Records Act, 44 U.S.C. § 3101, *et seq.*, "ma[kes] it clear that . . . ownership of *agency records* [is] in the United States," *Nixon*, 978 F.2d at 1283; *see* 44 U.S.C. § 3101 (imposing restrictions on "records" of "[f]ederal agenc[ies]"). The Federal Records Act does not apply to Congress. *See* 44 U.S.C. § 2901(14) (defining "Federal Agency" to "mean[] any executive agency or any establishment in the legislative or judicial branch of the Government (*except* the Supreme Court, the Senate, *the House of Representatives*, and the

Architect of the Capitol and any activities under the direction of the Architect of the Capitol)" (emphases added)).

No statute comparable to the Presidential Records Act or the Federal Records Act applies to the Schock Personal Office Congressional Records, and no statute purports to diminish or destroy the personal ownership interest each Member of Congress enjoys in his or her congressional papers.

Second, while federal law commands "[t]he head of each Federal agency" to "preserve" agency records, 44 U.S.C. § 3101, that statute, as noted above, does not apply to Members of Congress. Members' personal congressional records are maintained solely at individual Members' discretion and direction. *Cf.* House Rule VII (imposing archiving obligations with respect to committee and House officer records, but expressly exempting from those obligations "record[s] of an individual Member, Delegate, or Resident Commissioner"). While, as discussed above, the Clerk provides guidance for Members' handling of their records, *see generally* Records Manual, that guidance concerns only records that Members *choose* to maintain; it does not impose any record-keeping obligations on Members. Accordingly, the Department is wrong when it says – without citation to any authority – that Members assume an obligation to maintain records "based on [the] voluntary choice to serve as a U.S. Representative . . . subject to the rules and regulations of the House." Show Cause Mot. ¶ 76.

Third, unlike executive branch records – which the Freedom of Information Act ("FOIA") requires "[e]ach agency" to "make available to the public" in many instances, 5 U.S.C. § 552(a) – a Member's personal congressional records are not subject to FOIA or any other public disclosure mandate, *see* 5 U.S.C. § 551(1)(A) (excluding "the Congress" from definition of "agency" covered by FOIA).

Accordingly, the Department's reliance on *In re Sealed Cases (Government Records)*, 950 F.2d 736 (D.C. Cir. 1991), *see* Show Cause Mot. ¶ 70, is wholly misplaced. The Court's holding there, that an executive agency employee could not assert a privilege as to records that "belong[ed] . . . to the government agency," 950 F.2d at 740, is as unremarkable as it is inapplicable to Members of Congress.

III. A Member's Congressional Office Is Not a "Collective Entity."

Former Congressman Schock clearly owns the Schock Personal Office Congressional Records and, under applicable case law, that should be the end of the matter. *See supra*, Argument, Part I. However, in light of the Court's conclusion that "Congressional offices are collective entities" because they are "more akin to a corporation than a sole proprietorship," Sealed Op. at 20-21, we now explain why the opposite actually is the case: A Member's office is far more akin to a sole proprietorship than to a corporation.

First, a Member's office is organized entirely around the Member who, as the elected representative of his district, is a constitutional officer. *See* U.S. Const. art I, § 2, cl. 1. The Member's defining constitutional power – the power to cast votes – belongs exclusively to the Member and no one else. *See* House Rule III.2(a) ("A Member may not authorize any other person to cast the vote of such Member or record the presence of such Member in the House or the Committee of the Whole House on the state of the Union."); *id.* Rule III.2(b) (" No other person may cast a Member's vote or record a Member's presence in the House or the Committee of the Whole House on the state of the Union."). And in the conduct of their representational and legislative duties, as well as how they choose to carry out those responsibilities (including through whatever staff they choose to hire), Members answer to no one except, perhaps, their

constituents if they choose to seek reelection (just as sole proprietors answer to no way except, perhaps, their customers if they wish to stay in business).

Second, the manner in which a Member organizes and structures his or her congressional office is left entirely to the Member's discretion, bounded principally by the House Rules and the regulations promulgated thereunder, which rules and regulations apply to the Members individually (and which do not presuppose the existence of any "collective entity"). "Each Member is the employing authority" for his office and "determines the terms and conditions of employment and service for [her or her] staff."[7] This authority includes the power to make policies regarding the number of staff; job duties and salaries for staff; office management; who will speak to the press; who, if anyone, will accept service of process for the Member; and the organization and maintenance of office records. Staff salaries are paid from the Members' Representational Allowance ("MRA"), a statutorily appropriated allowance which each Member receives annually to run his or her congressional office. *See* 2 U.S.C. §§ 5321, 5341. Additionally, "[t]he official appointment of each employee requires the Member's signature on the payroll authorization form,"[8] and Members "may adjust, in any month, an employee's pay to reflect exceptional, meritorious, or less than satisfactory service."[9]

Third, constitutional privileges, like the Speech or Debate Clause privilege, U.S. Const. art. I, § 6, cl. 1, accrue to Members individually, not to the "office" of each Member. *See United States v. Cisneros*, 169 F.3d 763, 770 (D.C. Cir. 1999) (explaining that Speech or Debate Clause

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[7] Committee on House Administration, Members' Congressional Handbook ("Members' Handbook") at *Staff-General*, *available at* http://cha.house.gov/handbooks/members-congressional-handbook#Members-Handbook-Staff-General. All employment in the House is at-will. *See* U.S. House of Representatives, Employment Information, http://www.house.gov/content/jobs/.

[8] Members' Handbook at *Pay-Appointment*, http://cha.house.gov/handbooks/members-congressional-handbook#Members-Handbook-Pay-Appointment.

[9] Members' Handbook at *Pay-Pay Adjustments*, http://cha.house.gov/handbooks/members-congressional-handbook#Members-Handbook-Pay-Adjustments.

"confer[s] a personal privilege on individual legislators"). Although congressional staffers sometimes may invoke this constitutional privilege – typically when they do their Member's legislative bidding – a staffer's "claim of privilege" is wholly derivative of the Member's privilege, and "can be repudiated and thus waived by the [Member]." *Gravel v. United States*, 408 U.S. 606, 622 & n.13 (1972).

Fourth, as the Clerk's guidance makes explicit, a Member's employees have no ownership rights in congressional office records. *See* Records Manual at 3 ("Staff should be aware from the beginning that the records generated by the Member's office belong to the Member. New staff, both in the Washington, D.C., office and in district offices, should be briefed about the records ownership policy.").

Fifth, the Member's "office" ceases to exist when the Member leaves office. And when a Member does leave office, his or her successor has no right to the Member's records. *See* 2 U.S.C. § 5346(a) (authorizing shipment of Member's records, at House's expense, "to any location designated by such Member in the district represented by the Member").

Sixth, Members enter into leases for district office space, leases of vehicles for official use, and other contracts to obtain goods and services for official purposes, in their own individual names, not in the names of their "offices." *See In re Grand Jury Subpoena John Doe, No. 05GJ1318*, 584 F.3d 175, 185 n.15 (4th Cir. 2007) (unsealed Oct. 14, 2009). And when a Member's official expenditures exceed his or her MRA, the Member is *personally* liable for repaying the excess to the Treasury – even after leaving office.[10]

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[10] *See* Members' Handbook at *MRA-Overspending*, http://cha.house.gov/handbooks/members-congressional-handbook#Members-Handbook-MRA-Overspending ("Each Member is personally responsible for the payment of any official and representational expenses incurred that exceed the authorized MRA. If a Member incurs an obligation to the U.S. House of Representatives and the amount of the obligation incurred exceeds the MRA, the Member shall pay the obligation from personal funds. If the Member fails to pay the obligation voluntarily, the [Chief Administrative Officer of the House of

Seventh, with one narrow exception, *see infra* at pp. 14-15, there is nowhere in the law a legal entity known as the "office" of a Member of Congress.

For all these reasons, a Member's office is necessarily identified with and centered on one – and only one – natural person. It is unlike "collective entities" which have an impersonal character distinct from that of any particular individual, a board or other formal management structure, and perpetual existence. Moreover, unlike executive branch agencies and corporations, a Member's congressional office does not hold itself out to the public as an organizational entity separate and apart from the Member individually.

In reaching the opposite conclusion, the Court relied on three factors: (i) the Congressional Accountability Act ("CAA"), which applies to Members of Congress certain labor and employment laws, violations of which may give rise to civil claims against "the personal office of a Member," Sealed Op. at 19 (citing 2 U.S.C. § 1301(9)); (ii) the general restrictions placed on "Congressional offices . . . [by] the rules and regulations established by the House," *id.* at 18; and (iii) the Clerk's supervision of any continuing functions of a Member's personal office when a Member dies, resigns, is incapacitated, or is expelled, until a successor is elected, *see id.* at 18-19. Respectfully, none of these factors support the conclusion that congressional offices are collective entities.

1. The CAA creates a fictional entity – the "employing office," 2 U.S.C. § 1301(9) – that may be sued for alleged violations of the CAA, *see id.* §§ 1405(a), 1408(b), for the *sole* purpose of shielding Members from what otherwise would be their personal monetary liability for violations of the CAA, *see* H. Rep. No. 103-650, pt. 2, at 8, 24 (1994) ("Subsection (h), as noted

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Representatives] will deduct the amount owed from any pay, mileage, or expense money due to the Member in the case of a sitting Member or through an administrative offset or legal action in the case of a former Member.").

above, protects Members of Congress and their agents, as well as any other head of an employing office, from personal liability for payment of compensation arising out of a violation of laws made applicable under the Act."). That is, in the absence of this discrete legal fiction, Members of Congress would be wholly indistinguishable from sole proprietors who personally must defend themselves against employment law claims by their employees.

Not only does the CAA not support the idea that Member "offices" are "collective entities," it actually supports the opposite conclusion. If Members' "offices" were pre-existing legal entities – as the Department seems to maintain – then there would have been no need or reason for Congress to have created the legal fiction of the "employing office" for purposes of the CAA.[11]

2. The fact that the Rules of the House apply to Members and govern certain aspects of Members' conduct of their office affairs is simply not relevant here. The Rules of Professional Responsibility apply to attorneys who organize their practices as sole proprietors, just as do the rules of this Court apply to attorneys who practice before it, including attorneys who practice as sole proprietors. But those rules do not transform a law practice organized as a sole proprietorship into a partnership or an LLC. The rules simply are not relevant to the "collective entity" question.

3. Finally, the Clerk's temporary perpetuation of certain *functions* of a defunct congressional office, *see* House Rule II.2(i)(1) (vesting Clerk with authority to "supervise" staff and "manage" office of Member who resigns), likewise cannot transform that office into a

[11] Nor does the mere fact that the CAA makes certain employment laws applicable to Member conduct, *see* Sealed Op. at 19, transform a Member's "office" into a "collective entity" any more than does the application of such laws to sole proprietors transform them into corporations. *See, e.g.*, 740 Ill. Comp. Stat. Ann. §§ 174/5, 174/20 (prohibiting "employer[s]" – defined to include "an individual, sole proprietorship, . . . [and] corporation" – from "retaliat[ing] against an employee for refusing to participate in an activity that would result in a violation of a State or federal law, rule, or regulation").

"collective entity." It is important to understand here that the Clerk is not now operating the "Office of Congressman Aaron Schock," or even the "Office of Former Congressman Aaron Schock." Rather, she is operating the "Office of the Eighteenth Congressional District of Illinois. *See* http://clerk.house.gov/member_info/vacancies_pr.aspx?pr=house&vid=93. Accordingly, the Clerk's supervisory and management responsibilities in this regard simply are not relevant to the "collective entity" issue. After all, a sole proprietor's fiduciary sometimes can continue the sole proprietorship after the sole proprietor's death, typically to wind down the business. *See* 2 Frederick K. Hoops et al., Family Estate Planning Guide § 23:3 (4th ed. 2014); *see, e.g.*, *In re Estate of Hammond*, 997 N.Y.S.2d 761, 762-63 (N.Y. App. Div. 2014) (decedent's heirs properly could continue to operate his "solely-owned business . . . for several years" after decedent's death with his "authorization" to do so). The Clerk serves a similar purpose for a limited time. *See* House Rule II.2(i)(1) ("until a successor is elected").

CONCLUSION

The Department says that recognizing and respecting a Member of Congress's exclusive ownership interest in his or her congressional papers will "stymie[]" the Department's "ability . . . to enforce the law." Show Cause Mot. ¶ 73. But that is certainly not an argument in favor of the Court finding a "collective entity." While recognition of Fifth Amendment privilege may make the Department's job more difficult, that is true of all privileges that the law recognizes and that we respect because of the important policies those privileges promote. Indeed, that is the Fifth Amendment's "clear intent." *Hill v. Philpott*, 445 F.2d 144, 149-50 (7th Cir. 1971). The Department's obligation is to enforce the laws *within the confines established by our Constitution*, and neither the fact that it really wants the Shock Personal Office

Congressional Records, nor any of the other arguments it has advanced, justify distorting the Constitution.

Moreover, the Department's fear stems from its mistaken view that recognizing and respecting former Congressman Schock's ownership interest in the Schock Personal Office Congressional Records would somehow "extend[] a personal Fifth Amendment privilege" over a Member's congressional records that does not otherwise exist. Show Cause Mot. ¶ 73. Not so. By rejecting the Department's strained "collective entity" arguments, this Court will simply reaffirm that Members remain "Citizen[s] of the United States," U.S. Const. art. I, § 2, cl. 2, who do not forfeit their constitutional rights simply "based on [the] voluntary choice to serve as a U.S. Representative," Show Cause Mot. ¶ 76.

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