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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA vs. RICHARD G. RENZI, JAMES W. SANDLIN, ANDREW BEARDALL, DWAYNE LEQUIRE, Defendants.	No. 4:08-cr-00212-TUC-DCB (BPV) **MEMORANDUM OF POINTS AND AUTHORITIES AS *AMICUS CURIAE* OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES**

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INTRODUCTION

Pursuant to this Court's Order of November 4, 2008, the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House" or "Leadership Group"),[1] respectfully submits this Memorandum of Points and Authorities as *amicus curiae* to articulate and protect the House's interests – and not to defend defendant Congressman Richard Renzi – in connection with three pre-trial motions filed October 15, 2008, by the Congressman, and the oppositions thereto filed by the Department of Justice ("Department"): (1) Motion to Dismiss the Indictment for Speech or Debate Clause Violations ("Motion to Dismiss"); (2) Motion to Suppress the Title III Wiretap and Search Warrant for Speech or Debate Clause Violations ("Motion to Suppress Wiretap"); and (3) Motion to Suppress Interviews, Consensually Recorded Phone Calls, and Cellular Phone Records for Speech or Debate Clause Violations ("Motion to Suppress Interviews/Phone Calls").

Those motions each concern the Speech or Debate Clause of the Constitution: "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. This Clause – which applies to all activities within the "legislative sphere" and, among other things, privileges Members of Congress absolutely from having to disclose information about legislative activities, and bars the Department absolutely from using a Member's legislative

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[1] The Leadership Group is currently comprised of the Honorable Nancy Pelosi, Speaker of the House; the Honorable Steny H. Hoyer, Majority Leader; the Honorable James E. Clyburn, Majority Whip; the Honorable John Boehner, Republican Leader; and the Honorable Roy Blunt, Republican Whip.

activities to indict or prosecute him – is a fundamental pillar of Congress's independence and critically important to its relationship with the other branches of the federal government. This case concerns the Speech or Debate Clause primarily because of the Department's deliberate interception of information about Congressman Renzi's legislative activities pursuant to a Title III wiretap that captured numerous phone conversations between the Congressman and his aides as well as other Members; the Department's presentation to the original grand jury of substantial amounts of information about Congressman Renzi's legislative activities; and the question of whether and to what extent information about Congressman Renzi's legislative activities was presented to the second grand jury that returned the superseding indictment on November 13, 2008.

The House does not file this memorandum to protect Congressman Renzi from criminal investigation or prosecution; to suggest that he or any other Member of Congress is above the law or immune from prosecution (including with respect to the transactions that form the subject matter of Counts 1-27 and portions of Count 42 of the superseding indictment); or to suggest that no Member of Congress may ever be subject to a Title III wiretap. Rather, the Leadership Group contends that the Department's significant Speech or Debate violations during the investigation of Congressman Renzi (1) require a declaration that the Title III wiretap in this case violated the Constitution and the suppression of all information gathered through or as a result of that wiretap; (2) would have required dismissal of the original indictment, without prejudice; and (3) require the dismissal of Counts 1-27 and portions of Count 42 of the superseding

indictment, without prejudice, if the Court determines that the Department did not sufficiently cleanse its presentation to that grand jury of all privileged Speech or Debate material.

The Leadership Group is well aware that adhering to the Speech or Debate Clause may make the prosecutors' job more difficult in this case. However, the Leadership Group is not suggesting that this case cannot be properly charged and prosecuted. Its aim is only to ensure that the investigation and prosecution complies with the Speech or Debate Clause, which is designed to insure that Members can conduct their legislative duties free from interference or intimidation by either of the other two branches in order to preserve the independence and vigor of the legislative branch essential to our system of separation of powers.

FACTUAL BACKGROUND

Congressman Renzi is a three-term Member of the House from the first congressional district of Arizona. (Congressman Renzi did not run for reelection this year.) During his first two terms, 2003-06, Congressman Renzi served on the House Committee on Resources – now the Committee on Natural Resources – which has jurisdiction over public lands, among other things. *See* Rule X.1(l), Rules of the House of Representatives (110th Cong.).[2]

The Investigation. As the Leadership Group understands the facts, in or about 2006, the Department began investigating Congressman Renzi in connection with

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[2] The Rules of the 108th, 109th and 110th Congresses (2003–04, 2005-06, 2007-08, respectively), are available on-line at http://www.gpoaccess.gov/hrm/.

negotiations in which he participated that related to proposed land exchange legislation. *See generally* John R. Wilke, *Deal Breaker: Land-Swap Plan Causes Trouble for Congressman*, Wall Street Journal, April 21, 2007 at A1. It appears that the Department initially:

- Questioned four former Renzi aides (Legislative Director Joanne Keene and Chiefs of Staff Karen Lynch, James Jayne and Kevin Messner) and one then-current Renzi aide (Legislative Assistant Nicholas Strader) about, among other things, the Congressman's legislative activities, apparently without any advance notice to the Congressman, Motion to Suppress Wiretap at 3-4;[3]

- Obtained from three of the aides (Keene, Lynch, Strader), without the knowledge or consent of the Congressman, documents that defense counsel characterize as "stolen" from Mr. Renzi's office, including "draft legislation, internal congressional email, and Congressman Renzi's daily schedules," Motion to Suppress Interviews/Phone Calls at 3; and

- Directed one of the former staffers (Keene) and others "to secretly record their telephone conversations with Congressman Renzi" which allegedly included "questioning him about his legislative acts," Motion to Suppress Wiretap at 4.

Subsequently, and certainly based at least in part on the information it had obtained earlier about Congressman Renzi's legislative activities, the Department applied *ex parte* to this Court for an order authorizing it to tap a cell phone used by the

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[3] A Chief of Staff is typically the highest-ranking staffer in a Member's personal office, and typically has overall responsibility for overseeing the operations of his or her Member's personal office; advising the Member on legislative, policy and other matters; and managing and directing the other staff in the areas of, for example, legislation, media affairs, correspondence, scheduling and constituent relations. A Legislative Director, who would normally report to the Chief of Staff, typically has direct responsibility for all of a Member's legislative affairs, and would typically carry out this responsibility by managing and supervising several Legislative Assistants who are responsible for a defined portfolio of legislative matters.

Congressman, an application the Court promptly granted. *See* Order Authorizing Interception of Wire Communications (Oct. 26, 2006) (Jorgenson, J.) ("Wiretap Order"). Presumably based on the Department's application, the Wiretap Order's lone provision regarding Speech or Debate material stated:

> In the event a conversation relates directly to pending legislation before the United States Congress, and in order to protect the government's right to "spot check," the monitor will stop listening, and the remaining conversation will be recorded but not reviewed, placed in an envelope and sealed pending a review by an independent group of investigators and/or prosecutors. The one exception to this procedure will be conversations related to the legislation referenced in this affidavit, which will be fully monitored and reviewed. This procedure will be fully briefed at the minimization meeting.

Id. at 6.[4]

The memo the Department provided to the agents monitoring Congressman Renzi's phone calls reflects the Department's incorrect, judicially rejected and unduly narrow view of the Speech or Debate Clause. *See* Memorandum from John Scott, Senior Trial Attorney, Public Integrity Section, Gary Restaino and Michelle Hamilton-Burns, Assistant United States Attorneys, to All Monitors (Oct. 25, 2006) ("Monitoring Memo"). The Monitoring Memo states that the Speech or Debate Clause does not prohibit "monitoring agents from listening to or recording the conversation in which

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[4] It is unclear from the face of the Wiretap Order to what "legislation referenced in this affidavit" refers. Moreover, the public record version of the affidavit submitted in support of the Department's application – Affidavit of Daniel E. Odom in Support of an Application for Interception of Wire Communications (Oct. 26, 2006) – is heavily redacted. However, we assume, for purposes of this memorandum, that "legislation referenced in this affidavit" refers to land exchange legislation sponsored by Congressman Renzi that is referenced in the original and superseding indictments. *See* Motion to Suppress Wiretap at 4.

[privileged legislative] activities are discussed," but only "limits the subsequent evidentiary use of those recorded conversations." *Id*. at 13. The memo also asserts that the Department does "not expect Speech or Debate issues to arise" because Congress would be out of session during the wiretap. *Id*. Finally, the memo asserts that it is permissible to target and deliberately intercept conversations about specific legislation, *i.e.*, "legislation referenced in this affidavit, which will be fully monitored and reviewed." *Id*.

The wiretap was in effect from late October 2006 to late November 2006, during which time the Department "recorded hundreds of phone calls between Congressman Renzi and his legislative aides . . . . [M]any of these conversations reflected discussions about legislative acts." Motion to Suppress Wiretap at 4; *see also id*. at 16-21 (setting out transcriptions of some of these calls). The Department also intercepted numerous conversations between Congressman Renzi and other Members of Congress, including a November 8, 2006 post-election conference call with other Members of the House Republican Conference. *See id*. at 22 & n.11.[5]

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[5] The House Republican Conference is an official House leadership office that is operated, and whose employees are paid, with appropriated funds. *See*, *e.g.*, Legislative Branch Appropriations Act, 2006, Pub. L. No. 109-55, 119 Stat. 565, 569 (appropriating funds for House leadership offices, including Republican Conference). It is the responsibility of the Conference to assist Republican Members of the House by analyzing pending legislation, disseminating documents on legislative issues, and providing support services on matters of public policy, among other things. *See generally* http://www.gop.gov/web/guest/home.

While the Leadership Group is concerned by all unconstitutional intercepts of phone conversations between Congressman Renzi and his aides and other Members, it is particularly disturbed by the Department's outlandish and unjustifiable interception and

While the Department commendably admits that calls involving other Members of Congress "should not have been intercepted," Response to Renzi's Motion to Suppress Evidence Obtained by Electronic Surveillance and Search Warrant at 12 (Nov. 7, 2008) ("Opposition to Motion to Suppress Wiretap"), it is easy to understand how and why this happened in light of the deficiencies in the Wiretap Order and the erroneous instructions provided to the monitoring agents.

The Grand Jury. In the summer of 2007, the Department subpoenaed three former Renzi aides (Keene, Lynch, Messner) to appear before the first grand jury. The Department questioned all three at considerable length about the Congressman's legislative activities, including the drafting of the proposed land exchange legislation, the Congressman's motivations for introducing legislation, and the timing and role of other Members in the introduction of legislation. Motion to Dismiss at 27-35. In addition, the Department placed before the grand jury documents taken from the Congressman's office, apparently without his knowledge or consent, including emails that reflected legislative activity. *Id*. at 29-32; *see also* Motion to Suppress Interviews/Phone Calls at 3. The Department effectively concedes that it placed protected legislative information before the first grand jury. *See* Response to Renzi's Motions to Dismiss Indictment Based on Speech or Debate Clause Violations at 10 (Nov. 7, 2008) ("Opposition to Motion to Dismiss").

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recording – in blatant violation of the Constitution – of a collective conversation between Members from one political party that concerned the leadership and organization of that party's conference in the House in connection with the next Congress. *See infra* at II.A.4.

The Indictments. On February 20, 2008, the original grand jury returned a 35-count indictment against Congressman Renzi, Counts 1-27 of which relate to discussions between Congressman Renzi and private parties regarding legislative land exchanges sought by those private parties. The indictment alleges that the Congressman extorted a corporation and unrelated investment group in connection with property that he proposed be included in the land swap legislation that they sought. On November 13, 2008, a superseding indictment was returned, charging the Congressman with nine additional counts. In both indictments, the grand jury described, among other things, the details of Congressman Renzi's involvement with at least two private parties who sought to enlist his help in introducing and assisting in the passage of land exchange legislation.[6] The Department has now represented that "a different federal grand jury returned [the] superseding indictment." Response to Leadership Group's Motion to Obtain Speech or Debate Instructions at 2 (Nov. 18, 2008). However, it is not clear what constitutionally privileged legislative materials were presented, directly or indirectly, to the second grand jury.

CONGRESS'S ROLE IN LEGISLATING LAND EXCHANGES

Congress has plenary power to regulate the distribution and use of federal public land. U.S. Const. art. IV, § 3, cl. 2 (vesting Congress with power "to dispose of and

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[6] For example, the superseding indictment charges: "Between January 2005 and April 2005 . . . RENZI told Company A's representatives that they should purchase the Sandlin Property and include it in the land exchange proposal." Indictment ¶ 28a; *see also, e.g.*, *id*. ¶ 28j. ("On or about April 16, 2005, RENZI met in the District of Arizona with . . . Investment Group B[ ] to discuss the possibility of RENZI sponsoring a federal land exchange on its behalf.").

make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). "The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'" *United States v. City of S.F.*, 310 U.S. 16, 29-30 (1940) (quoting *Light v. United States*, 220 U.S. 523, 537 (1911)).

One manner in which Congress exercises its Article IV authority is through "land exchanges," the trading of federally owned lands for lands that are owned by corporations, individuals, or state or local governments. "Throughout the history of the West, the federal government has used land exchanges with states, local governments, and private individuals to address various land management issues." Daniel Dansie, Comment, *The Washington County Growth and Conservation Act of 2006: Evaluating a New Paradigm in Legislated Land Exchanges*, 28 J. Land Resources & Envtl. L. 185, 187 (2008). Some land exchanges take place through administrative processes administered by certain federal agencies pursuant to authority delegated to them by statute.[7] Others

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[7] Four federal agencies possess such delegated authority: the Bureau of Land Management ("BLM"), the National Park Service, and the U.S. Fish and Wildlife Service (all within the Department of the Interior), and the U.S. Forest Service ("USFS") in the Department of Agriculture. *See* Ross W. Gorte and Carol Hardy Vincent, *Federal Land Ownership: Current Acquisition and Disposal Authorities*, Cong. Research Serv., Report for Congress, No. RL34273 (Dec. 6, 2007) ("CRS Federal Land Ownership Report"), available on-line at http://www.Congress.gov/ertp/rl/pdf/RL34273.pdf. The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-71 ("FLPMA"), is the principal statutory authority governing land exchanges conducted by BLM and USFS. From 1989-99, BLM and USFS together administered approximately 2,500 land exchanges. *See BLM and the Forest Service: Land Exchanges Need to Reflect Appropriate Value and Serve the Public Interest* at 11 (GAO/RCED-00-73, June 22, 2000), available on-line at http://www.gao.gov/new.items/rc00073.pdf.

take place pursuant to legislation passed directly by Congress and signed by the President for that particular purpose. This latter method, which was pursued in the events relevant to this case, has become increasingly important in recent years. "In recent years, Congress has increasingly addressed land management issues through [direct] legislation." Some of "[t]he legislated solutions Congress has adopted include exchanges of discrete parcels of federal land for discrete parcels of private land, public sales of federal land that generate revenue that federal agencies can use to acquire private land, and combinations of these two methods." *Id*. at 187.

There are many reasons why Congress might choose – and why private parties and public entities might seek – to effectuate particular land exchanges through direct legislation. First, if the proposed transaction involves land in more than one state, direct legislation is required. *See* 43 U.S.C. § 1716(b) (requiring that the federal and non-federal land in a statutory land exchange to be located in the same state). Second, in some cases, no agency has authority to approve the exchange. *See* CRS Federal Land Ownership Report at 2. Third, where land is to be exchanged at other than fair market value, Congress must approve the exchange. *See id*. at 3. And finally, as was apparently the case with the land exchange negotiations in which Congressman Renzi participated, direct legislation is often less cumbersome than an administrative exchange.[8]

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[8] Administrative land exchange under the FLPMA must meet three requirements: (1) the purpose and effect of the exchange must conform to the agency's land use plan, 43 U.S.C. § 1715(b); (2) the values of the lands exchanged must be equal or made equal by the payment of money, *id*. § 1716(b); and (3) the exchange may only be made if the agency determines that the "public interest will be well served by making that exchange."

In the House, the Committee on Natural Resources – formerly the Committee on Resources – has primary jurisdiction over direct land exchange legislation. However, the legislation itself is often prepared or sponsored by a Member of Congress who represents the state in which some or all of the land is located. In some ways, the development of direct land exchange legislation resembles the negotiation of a commercial contract, and extensive negotiations between the private landholder and a Member of the House or Senate are a normal and routine part of the process. *See, e.g., Wash. County Growth and Conservation Act of 2006 and White Pine County Conservation Recreation and Dev. Act of 2006: Hearing on S.3636 and S.3772 Before the Subcomm. on Public Lands and Forests of the S. Comm. on Energy and Natural Res.* , 109th Cong. 8 (2007) (statement of Sen. John Ensign) (explaining "Senator Reid and I have worked tirelessly . . . . [as well as] both our staffs here in Washington as well as our staffs in Nevada, sitting down with all of the stakeholders, everybody from the environmental groups, the local governments, developers, power companies, water companies, Federal, state and local governments . . . ."). It is not unusual for a Member to negotiate regarding the parcels of private property to be included in the exchange proposal. *See, e.g.*, *id*. at 14 (statement of Sen. Reid) (explaining his role in creating a mechanism to increase the amount of privately held land in Pine County; "based on feedback we've received, boundaries…were placed one-tenth of a mile uphill … and 30 feet from the boundary of private land"); *see also* Press Release, U.S. Senator Bob Bennett, Bennett Introduces Washington County Land Bill

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Id. § 1716(a). Congress, in legislating land exchanges directly, is not subject to these requirements.

(Apr. 9, 2008) ("After five years at the table with all interested stakeholders, Congressman Matheson and I have produced a bill that successfully strikes the balance between conservation and growth."), attached as Exhibit 1.

ARGUMENT

To assist the Court in addressing the important issues now before it, we proceed as follows. We first provide a brief overview of the separation of powers principle and the history, scope, purpose and application of the Speech or Debate Clause which implements that principle (Section I). Next we discuss the clear violations of the Speech or Debate Clause that occurred in connection with the wiretap (Section II.A), and the presentation of evidence to the original grand jury (Section II.B). Finally, we explain what remedies are appropriate to address these constitutional violations (Section III).

I. A Brief Constitutional Overview.

A. The Separation of Powers Is a Fundamental Component of Our Constitutional Structure.

"[T]he whole American fabric has been erected" on the principle of separation of powers. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). As the founders wisely insisted, "none of [the three branches of the federal government] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." The Federalist No. 48, at 316 (James Madison) (Random House, Inc. ed. 2000).

The separation of powers is violated when "[o]ne branch . . . interfere[s] impermissibly with the other's performance of its constitutionally assigned functions." *INS v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring); *see also Nixon v. Adm'r. of Gen. Servs.*, 433 U.S. 425, 443 (1977); *Morrison v. Olson*, 487 U.S. 654, 695 (1988). The Framers were acutely aware that simply dividing the federal government into three separate branches would not be sufficient to guarantee American liberty. Accordingly, they incorporated into the Constitution concrete mechanisms to ensure the separation of powers, mechanisms that would "provide some practical security for each [branch], against invasion of the others." The Federalist No. 48, at 316 (James Madison); *see also* The Federalist No. 51, at 331 (James Madison or Alexander Hamilton) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others."). One such mechanism is the Speech or Debate Clause.

B. The Speech or Debate Clause Implements the Separation of Powers by Guaranteeing Legislative Branch Independence.

1. The History and Purpose of the Clause.

The Speech or Debate Clause is rooted in the epic struggle between the Parliament and the Crown in sixteenth- and seventeenth-century England. "Behind [the Clause] lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators." *United States v. Johnson*, 383 U.S. 169, 178 (1966).

> As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. . . . In 1689, the Bill of Rights declared in unequivocal language: "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."

Tenney v. Brandhove, 341 U.S. 367, 372 (1951) (citations omitted). 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. *Id*.[9]

"The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed *independently*." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975) (emphasis added). "[T]he 'central role' of the Clause is to 'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.'" *Id.* (quoting *Gravel v. United States*, 408 U.S. 606, 617 (1972)). Thus, "[i]n the American governmental structure the clause serves the

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[9] The historical record confirms the privilege's roots in the criminal context. *See, e.g.*, Harold Hulme, *The Winning of Freedom of Speech by the House of Commons*, 61 Am. Hist. Rev. 825, 836 (1956); John Reeve, *The Arguments in King's Bench in 1629 Concerning the Imprisonment of John Selden and Other Members of the House of Commons*, 25 J. Brit. Stud. 264, 265 (1986). Although, for obvious reasons, this historical record does not reflect the use of phone taps by the English monarchy against members of Parliament, it does suggest that searches by the Crown of legislators' records – which are directly analogous to modern-day phone taps – was one of the abuses against which the Commons struggled. *See, e.g.*, Christopher Thompson, *The Reaction of the House of Commons in November and December 1621 to the Confinement of Sir Edwin Sandys*, 40 Hist. J. 779, 781-82, 785 (1997); Conrad Russell, *Parliaments and English Politics, 1621-1629* at 122 (1979).

additional function of reinforcing the separation of powers so deliberately established by the Founders." *Johnson*, 383 U.S. at 178.[10]

Because "the guarantees of the [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, the Supreme Court has repeatedly, and "[w]ithout exception . . . read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501-02; *see also Doe v. McMillan*, 412 U.S. 306, 311 (1973); *Gravel*, 408 U.S. at 624.

2. The 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 312-13 (quoting *Gravel*, 408 U.S. at 624-25). The "'sphere of legitimate legislative activity'" includes all activities that are

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[10] *See also United States v. Helstoski*, 442 U.S. 477, 491 (1979) ("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. The English and American history of the privilege suggests that any lesser standard would risk intrusion by the Executive and the Judiciary into the sphere of protected legislative activities."); *Youngblood v. DeWeese*, 352 F.3d 836, 839 (3d Cir. 2004) ("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 . . . ."); *United States v. Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980) ("Like the Speech or Debate Clause, the doctrine of separation of powers 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.").

> 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, 408 U.S. at 625; *see also Eastland*, 421 U.S. at 504.

The courts, broadly construing the concept of legislative activity, "have plainly not taken a literalistic approach in applying the privilege." *Gravel*, 408 U.S. at 617. Thus, the privilege covers all facets of the legislative process, including "[c]ommittee reports, resolutions, and the act of voting," *id.* at 617, as well as committee investigations and hearings. *See Eastland*, 421 U.S. at 504-05; *McMillan*, 412 U.S. at 313. Consistent with a broad construction of "legislative activity" – and most pertinent here – the privilege also extends to preparations for and information gathering in furtherance of, legislative activities, 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.'" *Eastland*, 421 U.S. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)); *see also Miller v. Transam. Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983) ("Obtaining information pertinent to potential legislation . . . is one of the 'things generally done in a session of House,' concerning matters within the 'legitimate legislative sphere.'" (citations omitted)). The privilege protects information gathering through both formal means – such as through committee subpoenas, *Eastland*, 421 U.S. at 504 – and informal means. *See, e.g.*, *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976) (en banc) ("[A]cquisition of knowledge through informal sources is a

necessary concomitant of legislative conduct and thus . . . within the ambit of the [Speech or Debate] privilege").[11]

Beyond legislative activities themselves, the Speech or Debate Clause also protects "'against inquiry into . . . the motivation for those [legislative] acts.'" *Helstoski*, 442 U.S. at 489 (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972)); *see also Johnson*, 383 U.S. at 184-85 (inquiry into Member's motives for engaging in legislative activities "necessarily contravenes the Speech or Debate Clause"). Indeed, the Supreme Court – and numerous circuit courts – have held unequivocally that the question of whether a Congressman's conduct was improperly motivated "is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *Id.* at 180; *see also Miller*, 709 F.2d at 530 (Clause bars "questions about [Member's] motive or legislative purpose"); *Gov't of the Virgin Islands*, 775 F.2d at 522 (same); *United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973) (same).

It necessarily follows that the Speech or Debate Clause applies to activities "'within the legislative sphere' even though the[] conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *McMillan*, 412 U.S. at 312-13 (quoting *Gravel*, 408 U.S. at 624-25).

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[11] *See also Miller*, 709 F.2d at 530 (9th Cir. 1983) (asserting that the privilege encompasses when "[c]onstituents . . . provide data to document their views when urging the Congressman to initiate or support some legislative action"); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421-23 (D.C. Cir. 1995) (documents voluntarily delivered to committee by private citizen protected); *Gov't of the Virgin Islands v. Lee*, 775 F.2d 514, 520-21 (3d Cir. 1985) (fact-finding by individual legislator protected).

Put differently, the Clause is not abrogated and the privilege is not defeated merely because the Department or other litigant alleges that a Member committed a crime or otherwise acted unlawfully. *See Tenney*, 341 U.S. at 377 (maintaining that a "claim of an unworthy purpose does not destroy the privilege").

As the Department correctly notes, however, the privilege does not cover everything Members do. Where the Department can produce non-privileged evidence to support its charges, it may prosecute a Member for a crime that might be incidentally related to a legislative act. For example, in *Brewster*, the Supreme Court permitted the prosecution of a Member of Congress for bribery to proceed where "no inquiry into legislative acts or motivation for legislative acts [wa]s necessary for the Government to make out a prima facie case." 408 U.S. at 525. There, "[t]he illegal conduct [wa]s taking or agreeing to take money for a promise to act in a certain way," and "[t]aking a bribe . . . is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator," "is not an 'act resulting from the nature, and in the execution, of the office,'" and is not "a 'thing said or done by him, as a representative, in the exercise of the functions of that office." *Id.* at 526. Accordingly, the prosecution did not have to "'draw in question the legislative acts of the defendant member of Congress or his motives for performing them.'" *Id.* (citations omitted).[12]

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[12] The Clause also does not cover activities the courts have said are merely "related," but not integral, to the legislative process. Those "merely related" activities include such things as constituent casework and "assistance in securing Government contracts," *Brewster*, 408 U.S. at 512 (dicta); private republication of legislative papers, *Gravel*, 408 U.S. at 626; press statements and constituent newsletters, *Hutchinson v. Proxmire*, 443

3. The Application of the Clause.

In practice, the Speech or Debate privilege has three broad components. *First*, the Clause provides an immunity from prosecution for actions "within the 'legislative sphere.'" *McMillan*, 412 U.S. at 312 (quoting *Gravel*, 408 U.S. at 624-25). *Second*, the Clause bars prosecutors in a criminal case – and parties to a civil suit – against a Member of Congress from using "information as to a legislative act" to advance their case. *Helstoski*, 442 U.S. at 490. *Third*, the Clause provides a non-disclosure privilege. *Gravel*, 408 U.S. at 616; *Miller*, 709 F.2d at 529-30; *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008). This third aspect of the privilege protects Members against being forced to produce privileged records, being forced to testify as to privileged matters, or having privileged legislative information taken from them by legal compulsion. All three of these protections apply in both the criminal and civil contexts. *See, e.g.*, *Helstoski*, 442 U.S. 477 (criminal prosecution); *Eastland*, 421 U.S. 491 (civil suit).

The Supreme Court has drawn no distinctions among these three components. Rather it has stated unequivocally that when the Speech or Debate privilege applies, it is "absolute." *Eastland*, 421 U.S. at 501, 503, 509-10; 510 n.16; *Gravel*, 408 U.S. at 623 n.14; *Barr v. Matteo*, 360 U.S. 564, 569 (1959).

Both the Department and *amicus curiae* Citizens for Responsibility and Ethics in Washington ("CREW") erroneously contend that the protections of the "Speech or

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U.S. 111, 133 (1979); and congressional restaurant administration, *Walker v. Jones*, 733 F.2d 923, 931 (D.C. Cir. 1984).

Debate Clause [are] limited to the evidentiary use of legislative acts." Opposition to Motion to Dismiss at 15. *See also* CREW Memorandum at 10. This argument – that the Clause bars the Department from introducing protected materials into evidence, but does not bar it from obtaining legislative materials by compulsion in the first instance – rests entirely on *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978) ("*Eilberg*"). In *Eilberg*, the Third Circuit – considering an appeal from a denial of a motion to quash a grand jury subpoena to the Clerk of the House which sought the phone records of then-Congressman Joshua Eilberg – said the privilege "when applied to records or third-party testimony is one of nonevidentiary use, not of non-disclosure." *Id*. at 597.

Even on its own terms, however, *Eilberg*'s cramped view of the Speech or Debate Clause is inconsistent with, and would not justify, the Department's presentation to the grand jury of Congressman Renzi's legislative records, or its questioning of the Congressman's aides or third parties about his legislative activities before the grand jury (all of which amounts to "evidentiary use" of the Congressman's legislative activities, which both the Department and CREW concede is barred by the Clause).[13]

Moreover, *Eilberg's* reasoning is not consistent with binding Supreme Court precedent; has been explicitly rejected by the D.C. Circuit (and is not followed by any other circuit); and is no longer followed even in the Third Circuit.

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[13] *Eilberg* specifically noted that the Clause has a testimonial aspect "designed to prevent hostile questioning by the executive branch," 587 F.2d at 596, a fact the Department and CREW neglect to mention. However, *Eilberg* found that aspect of the privilege not implicated in that case because neither the Congressman nor his aides had been subpoenaed. *Id*. at 597.

First, as noted above, the Supreme Court has long insisted that the Speech or Debate Clause be read *broadly*, not narrowly. *See supra* at 15. Moreover, the Court has never drawn any distinction among the various components of the Clause, and it has never suggested a limitation on the scope of the privilege when it does apply. Instead, the Court has made clear that when the Clause applies, it is "absolute." *See supra* at 19.

Second, in the 30 years since *Eilberg* was decided, no other Circuit has adopted its reasoning. And the D.C. Circuit expressly rejected *Eilberg* in *Brown & Williamson*. As that Court explained, "if the touchstone [of the Clause] is interference with legislative activities," it follows that "the nature of the use to which [legislative materials] will be put – testimonial or evidentiary – is immaterial." 62 F.3d at 421. "Documentary evidence can certainly be as revealing as oral communications," *id.* at 420, and "indications as to what Congress is looking at provide[s] clues as to what Congress is doing, or might be about to do." *Id*. Therefore, the D.C. Circuit "d[id] not accept the [the Third Circuit's view in *Eilberg*] that the testimonial immunity of the Speech or Debate Clause only applies when Members or their aides are personally questioned." *Id*. at 418.

The D.C. Circuit reaffirmed this view in the *Rayburn* case which concerned the historically unprecedented search of Congressman William Jefferson's Capitol Hill congressional office, and the Department's seizure of large quantities of congressional records (including thousands of pages of legislative records) which the Congressman had no prior opportunity to review for privilege. In opposing the Congressman's Rule 41 motion, the Department argued that (1) execution of the search warrant was not the kind of compelled disclosure against which the Speech or Debate Clause protects, and (2) the

Clause only protects a Member from having to "testify," and does not protect against the disclosure of his legislative records. The D.C. Circuit rightly rejected both arguments. "We hold that the compelled disclosure of privileged material [*i.e.*, papers and electronic records] to the Executive during execution of the search warrant . . . violated the Speech or Debate Clause." 497 F.3d at 656; *see also id*. at 663. Thus, in describing the privilege as one of "non-disclosure," the Court was simply reaffirming – as many other courts had already held, *see supra* at I.B.2 – that Speech or Debate bars the compelled disclosure of legislative records (as well as compelled testimony). 497 F.3d at 660.[14]

Third, the Third Circuit itself has backtracked from *Eilberg*. In *In re Grand Jury*, 821 F.2d 946 (3d Cir. 1987), that Court, recognizing that the Speech or Debate Clause is "absolute," stated that "[o]ur precedents have *suggested* that the privilege is *primarily* one of non-evidentiary use, not one of non-disclosure." *Id*. at 953 n.4 (emphasis added). Subsequently, in *United States v. McDade*, No. 96-1508 (3d Cir. 1996), the Third Circuit effectively abandoned *Eilberg* by reversing a lower court order which directed the House Committee on Standards of Official Conduct, on the basis of *Eilberg*, to produce to the prosecution records the lower court had concluded were Speech or Debate protected. *See* Order at 1, *United States v. McDade*, No. 96-1508 (3d Cir. 1996), attached as Exhibit 2.

4. Application of the Privilege to Member Aides.

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[14] The Department also asserts that the *Rayburn* Court suggested that "even incidental exposure to protected materials," would necessarily violate the Speech or Debate privilege. Opposition to Motion to Dismiss at 14. *Rayburn* did not say that, and that is not our contention here.

The Speech or Debate Clause "applies 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. For the purpose of construing the privilege, a Member and his or her aide "are to be 'treated as one.'" *Id*. at 616 (citation omitted). As the Supreme Court has recognized,

> it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; . . . the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause . . . will inevitably be diminished and frustrated.

Id. at 616-17 (internal citation omitted).

The aide's Speech or Debate privilege is "viewed, as it must be, as the privilege of the [Member], and invocable only by the [Member] or by the aide on the [Member]'s behalf." *Id*. at 621-22; *see also Miller*, 709 F.2d at 530. Accordingly, an aide may not waive a Member's privilege without the Member's consent. *Gravel*, 408 U.S. at 622 n.13.[15]

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[15] The standard for finding any waiver of the Speech or Debate privilege is extremely high. *Helstoski*, 442 U.S. at 491 ("[W]aiver can be found only after explicit and unequivocal renunciation of the protection. The ordinary rules for determining the appropriate standard of waiver do not apply in this setting."). *See also Johnson*, 383 U.S. at 184-85 (congressman's introduction of legislative speech did not permit prosecutors to rely on speech in indictment and prosecution); *Brown & Williamson*, 62 F.3d at 421 n.11 (congressman did not waive Speech or Debate privilege by "statements made [voluntarily] during a radio broadcast interview"); *Pittston Coal Group, Inc. v. Int'l Union, UMWA*, 894 F. Supp. 275, 278 n.5 (W.D. Va. 1995).

In sum, the Speech or Debate Clause privilege protects Members of Congress from being sued or prosecuted for legislative activities; bars prosecutors from using a Member's legislative acts to indict or convict even if the prosecution is not explicitly centered on legislative activity; and protects Members from being forced to disclose their legislative activities, either by way of testimony or production of documents, or through seizures of documents or confidential non-public communications.

There are, of course, potential costs associated with this broad constitutional protection. "[W]ithout doubt the exclusion of [legislative acts] will make prosecutions more difficult." *Helstoski*, 442 U.S. at 488; *see also Brewster*, 408 U.S. at 516. Notwithstanding, the Supreme Court and the lower courts have held repeatedly that the Speech or Debate Clause must be broadly construed and applied because that was "'the conscious choice of the Framers' buttressed and justified by history." *Eastland*, 421 U.S. at 510 (quoting *Brewster*, 408 U.S. at 516).[16]

That the Framers' "conscious choice" was a wise one is evidenced not only by the enduring vigor of our system of checks and balances, but also by the fact that, while complying with the requirements of the Clause, the Department for more than 200 years

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[16] Speech or Debate is hardly the only constitutional principle we value and protect, notwithstanding potential costs. "[W]e . . . 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).

has managed to successfully investigate, charge and convict Members of Congress who have violated the law.

Furthermore, while the Speech or Debate Clause may make it more difficult for the Department to investigate and prosecute Members of Congress, that does not mean Members cannot be held to account. In fact, Members are subject to investigation and sanctioning by the House Committee on Standards of Official Conduct – and ultimately by the House itself – under the authority of the Discipline Clause of the Constitution. U.S. Const. art. I, § 5, cl. 2.[17] They are also subject to numerous countervailing pressures and disincentives that other citizens do not face, including very significant public disclosure requirements (*e.g.*, campaign donations, personal finances, travel, office expenditures); constant media scrutiny; and an electoral system that requires House Members to face the voters of their districts every two years.

II. The Justice Department Repeatedly and Substantially Violated the Speech or Debate Clause in Investigating Congressman Renzi.

A. The Wiretap Violated the Speech or Debate Clause.

1. The Wiretap Order Compelled Disclosure of Information from Congressman Renzi.

The Wiretap Order constitutes the same kind of compelled disclosure that triggers the protections of the Speech or Debate Clause in both the subpoena, *see e.g.*, *Miller*, 709 F.2d at 528-31, and search warrant contexts. *Rayburn*, 497 F.3d at 656. For Speech or Debate purposes, the forcible compulsion inherent in the Wiretap Order is legally

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[17] *See*, *e.g.*, 148 Cong. Rec. H5375-93 (2002) (House agrees to H.R. Res. 495, 107th Cong. (2002), sponsored by Standards Committee, expelling Member from the House).

indistinguishable from the compulsion inherent in a subpoena or search warrant. A subpoena is a judicial order to produce records or provide testimony; a search warrant is a judicial order to stand aside and permit one's records to be reviewed and seized; and a Title III wiretap order is a judicial order authorizing law enforcement authorities to listen to and seize, by recording, one's conversations. Because subpoenas and search warrants are constitutionally impermissible with respect to protected legislative information, as courts have consistently held they are, so too are Title III wiretap orders constitutionally impermissible with respect to protected legislative information.

Moreover, because the Speech or Debate Clause must "[w]ithout exception . . . [be] read . . . broadly to effectuate its purposes," *Eastland*, 421 U.S. at 501, it is wholly consistent for this Court to include Title III wiretaps within the Clause's purview. The Clause is designed to prohibit "any probing of legislative acts," *Brown & Williamson*, 62 F.3d at 419, and there is no difference between judicially-compelled production of legislative records or testimony under a subpoena (or the Department's reviewing and seizing legislative records pursuant to a judicially-authorized search warrant), on the one hand, and the Department's listening to and seizing, by recording, a Member's legislative conversations, on the other. In all three cases, legislative information absolutely privileged from review or disclosure is taken by force of law.

2. The Wiretap Order Clearly Contemplated the Seizure of Legislative Information.

As discussed above, *supra* at 5-7, the Wiretap Order clearly contemplated that the Department would – and specifically authorized it to – seize legislative information from

Congressman Renzi. *First*, that order limited the definition of privileged legislative conversations to those that "relate[] directly to pending legislation." Wiretap Order at 6. However, the Speech or Debate Clause covers much more than information related to "pending legislation." As noted above, it covers all activities 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, 408 U.S. at 625. Courts have broadly construed this definition to encompass activities that precede the actual introduction of legislation, such as "information-gathering," drafting and negotiating the terms of legislation. *See supra* at I.B.2.

Second, the Wiretap Order specifically authorized the Department to monitor and record conversations related to "the legislation referenced in this affidavit." Wiretap Order at 6. In effect, at the apparent urging of the Department, the Court created a "crime-fraud" exception to the Speech or Debate Clause, like the crime-fraud exception that applies in the attorney-client context. *See, e.g.*, *United States v. Hodge & Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977). However, there simply is no support for this claim in the case law. The Speech or Debate Clause does not permit any such "crime-fraud" exception because it is "absolute" when it applies, *see supra* at 19, 21, and it undoubtedly applies to conversations related to specific legislation, including "the legislation referenced in this affidavit."

Third, the Wiretap Order's minimization procedures permitted seriatim initial reviews by agents of the executive to "spot check" admittedly privileged legislative

conversations to determine if they contained any non-privileged information. As the D.C. Circuit recently made clear, however, such "seriatim initial reviews by agents of the Executive" are "inconsistent with the privilege under the Clause." *Rayburn*, 497 F.3d at 663. These kinds of reviews by the executive branch improperly and unconstitutionally put the executive in charge of determining what is and is not privileged in the first instance.[18]

3. Execution of the Wiretap Order Plainly Resulted in the Department's Monitoring and Recording of Renzi Conversations that Concerned His Legislative Activities.

The Department candidly admits that, in executing the Wiretap Order, it monitored and recorded conversations of Congressman Renzi that reflected his legislative activities. *See* Opposition to Motion to Suppress Wiretap at 12 ("The calls involving aides Patty Roe, Brian Murray, and Nicholas Strader contain legislative discussions."); *id.* (admitting that calls involving other Members of Congress were intercepted and "should not have been intercepted"). This is not surprising in light of the multitude of erroneous legal interpretations in the Monitoring Memo.

At the outset, the memo suggested that Speech or Debate issues do not arise when Congress is not in session. *See* Monitoring Memo at 13. That is patently incorrect because the Speech or Debate privilege does not have a temporal component.

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[18] While the Leadership Group does not have the Department's application for the Wiretap Order, it is clear that the Department misled the Court as to the scope and application of the Clause. *See e.g.* Opposition to Motion to Suppress Wiretap at 3 ("The government took the view then [in applying for the wiretap order], as it does now, that the Speech or Debate privilege 'is one of nonevidentiary use, not of non-disclosure.'"). We have addressed this flawed argument above. *See supra* at I.B.3.

Conversations about legislative activities are protected whether or not Congress is in session. *See*, *e.g.*, *Miller*, 709 F.2d 524 (quashing on Speech or Debate grounds deposition subpoena to *former* Member of Congress).

The Monitoring Memo also, like the Wiretap Order, defined privileged conversations as only those that "relate[] directly to pending legislation before the United States Congress." Monitoring Memo at 13. In effect, the Department eliminated from the privilege all conversations relating to: (1) information gathering that concerned possible future legislation; (2) negotiations of the terms of legislation that had not yet been introduced; (3) the drafting and preparation of bills that had not yet been introduced; (4) the process of organizing, and selecting leaders for, a new Congress; and (5) a host of other matters that the courts have determined are absolutely privileged under the Speech or Debate Clause.

In addition, the Monitoring Memo, like the Wiretap Order, set out a minimization protocol – "to protect the government's right to 'spotcheck'" privileged conversations, Monitoring Memo at 13 – that, by definition, contemplated the Department's monitoring and recording privileged conversations. As noted above, that protocol is also patently inconsistent with the Clause. *See supra* at II.A, (citing *Rayburn*, 497 F.3d at 663). Finally and most importantly, the Monitoring Memo, like the Wiretap Order, claimed an exception to the minimization protocol for "conversations related to the legislation referenced in th[e] affidavit," Monitoring Memo at 13, an exception that is wholly inconsistent with the Speech or Debate Clause privilege which is "absolute" when it applies. *See supra* at 19, 21, 27.

The Department offers essentially three defenses of the Wiretap Order, each of which is unavailing. *First*, the Department's principal contention is that *Rayburn* was wrongly decided and that the Wiretap Order was valid because the Speech or Debate Clause does not provide non-disclosure protection. In addition to relying on the discredited *Eilberg* opinion, which we have already addressed, *supra* at 20-22, the Department claims more particularly that the "execution of a Title III interception order or a search warrant . . . does not result in 'testimony' by the target of the interception or search." Opposition to Motion to Suppress Wiretap at 8. Citing *Andresen v. Maryland*, 427 U.S. 463 (1976), a Fifth Amendment case involving the seizure of business records, the Department essentially contends that intercepting phone conversations does not amount to compulsion and that, therefore, the Clause does not protect such conversations.

This argument improperly conflates the Speech or Debate Clause with the Self-Incrimination Clause of the Fifth Amendment. However, completely different purposes underlie these two constitutional provisions. The latter is designed to preserve "the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth." *Knapp v. Schweitzer*, 357 U.S. 371, 380 (1958). The former concerns, not the dignity and security of the individual, but the very structure of our federal government. It is designed and intended to "insure that the legislative function the Constitution allocates to Congress may be performed independently," *Eastland*, 421 U.S. at 502, and to "reinforc[e] the separation of powers." *Johnson*, 383 U.S. at 178. The Self-Incrimination Clause focuses on the action an individual is

compelled to take in response to government interrogation. The Speech or Debate Clause is framed much more broadly, using the sweeping language that the legislative activities of Congressmen and Senators "shall not be questioned in any other place." U.S. Const. art. I, § 6, cl. 1.[19]

Second, the Department argues that judicial officers who issue Title III wiretap orders are "fully empowered to impose protections on the execution of a Title III order . . . to ensure that no undue interference in legislative activity occurs. The involvement of the judiciary . . . protects against circumstances that will unduly chill legitimate legislative conduct." Opposition to Motion to Suppress Wiretap at 9. While that might be true in the abstract, it obviously did not occur here. *Any* probing of legislative acts constitutes impermissible interference, and the Wiretap Order clearly permitted access to Congressman Renzi's legislative activities, and specifically to all information related to a particular piece of legislation. "The degree of disruption is immaterial. . . . [A]ny probing of legislative *acts* is sufficient to trigger the immunity." *Brown & Williamson*, 62 F.3d at 419 (emphasis in original); *see also MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859-60 (D.C. Cir. 1988); *Miller*, 709 F.2d at 526.[20]

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[19] Indeed, the Department cites no Speech or Debate case that even remotely suggests that the protections of the Clause are limited to "testimony," and the Leadership Group is aware of none.

[20] It is important that the Court understand that the Leadership Group argues here only that the Wiretap Order that applied to Congressman Renzi's cell phone, and the execution of that order, violated the Speech or Debate Clause. The Leadership Group does not maintain that Members of Congress can never be subjected to Title III wiretaps; indeed it acknowledges that they can, provided that appropriate safeguards are put in place in

Third, the Department argues that there was no Speech or Debate violation here because the cell phone tapped was "subscribed to by the Patriot Insurance Agency," a Renzi-family-owned business. Opposition to Motion to Suppress Wiretap at 10. This is irrelevant because the name in which a phone happens to be registered cannot possibly be dispositive. It is a fact of which the Court may take judicial notice that, in this day and age, virtually all Members of Congress use cell phones to an extraordinary degree to conduct legislative business. Members are almost constantly on the move – from attending committee hearings and markups, to debating and voting on the floor of the House, to attending meetings and conferences away from Capitol Hill, to traveling home to their districts, to traveling around their districts to make speeches and meet with constituents – and cell phones, more than any other communication device, enable them to stay connected to their aides and communicate with their fellow legislators. Some Members use House-issued cell phones for this purpose, others use personal cell phones, and still others use both.

We understand from Congressman Renzi's attorneys that the Congressman had only one cell phone, the phone that was the subject of the Wiretap Order, and that he regularly conducted legislative activities over that cell phone. The Department was certainly well aware, when it applied for the order, that Congressman Renzi used his cell phone to conduct legislative activities because, among other things, the Wiretap Order

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advance to ensure that the executive does not overhear or obtain access to privileged conversations. This Court need not determine in this case the precise parameters of such appropriate safeguards.

and Monitoring Memo specifically contemplated the monitoring and recording of legislative conversations. *See also supra* at 4-7 , Motion to Suppress Wiretap at 4, and Motion to Suppress Interviews/Phone Calls at 3 (describing other Department investigative activities – including interviews, secretly records phone conversations, pen registers and toll records – that would have made the Department aware of the Congressman's use of his cell phone).

Accordingly, the Department – which nowhere asserts that it was not aware that Congressman Renzi used the cell phone in question to conduct legislative activities – cannot viably argue that the Speech or Debate Clause does not apply here because the phone happened to be registered in a corporate name.

4. If the Wiretap Order and Its Execution Are Not Declared Unconstitutional, the Resulting Precedent Could Greatly Increase the Potential for Executive Branch Abuse at the Expense of the Legislative Branch.

If the Wiretap Order and the Department's execution of that order are not held to be unconstitutional, the resulting precedent could readily increase the potential for executive branch overreach and abuse at the expense of legislative branch independence. As this Court is certainly aware, vigorous oversight of the executive branch is essential to Congress's ability to check the executive branch's excesses and abuses. If Members knew that their conversations about legislative matters could be monitored by the executive branch – and "legislative" certainly encompasses Congress's oversight activities, [cite] – they might be intimidated out of fear of reprisal to the detriment of the

American people. *See, e.g., United States v. Peoples Temple of the Disciples of Christ*, 515 F. Supp. 246, 249 (D.D.C. 1981).

Even if Members were not chilled in the exercise of their official responsibilities, the resulting precedent could significantly increase tension and conflict between the branches because the executive's access to recorded legislative conversations creates the potential for unbounded political mischief. In this very case, for example, the Department recorded numerous conversations between Congressman Renzi and other Members which dealt with the 2006 Republican Conference leadership elections. *See* Motion to Suppress Wiretap at 22 and n.11. Those kinds of conversations pertain to the establishment of the leadership of the House and necessarily include discussions of legislative strategy and priorities. They are, therefore, by their very nature, extremely sensitive and could easily be misused by the executive for political and other inappropriate purposes.

In short, the potential ramifications of the Court's upholding the Department's position that the Speech or Debate Clause does not include a non-disclosure component are extraordinarily far-reaching and dangerous to the separation of powers and checks and balances that are at the heart of our Constitution.

B. The Department's Questioning of Renzi Aides and Its Presentation of Legislative Records In the Original Grand Jury Violated the Speech or Debate Clause.

The Department violated the non-disclosure and non-use components of the Speech or Debate Clause when it permitted Renzi aides to testify before the original grand jury about the Congressman's legislative activities, and the non-use component

when it introduced in the grand jury internal House emails and other documents from the Congressman's office that discussed proposed legislative land exchanges and the timing of the introduction of such legislation.[21]

1. Constitutionally Protected Testimony.

Congressman Renzi's former Legislative Director Joanne Keene appeared before the original grand jury on July 25, 2007. Motion to Dismiss at 27-32. Although the Constitution prohibited the Department from questioning her about the Congressman's motives for his legislative activities, *Brewster*, 408 U.S. at 525, that is precisely what the Department did. For example, prosecutors solicited information from Ms. Keene about Congressman Renzi's motivation for including the Sandlin Property in proposed land exchange legislation. Among other things, Ms. Keene testified that:

- the Congressman's motive for suggesting the Sandlin Property was that it "'had conservation value, that putting it into federal ownership would benefit Fort Huachuca, and I believe at the time he did mention that The Nature Conservancy had been interested in this property as well.'" Motion to Dismiss at 28 (citation omitted).

- Congressman Renzi told his Chief of Staff, Kevin Messner, in 2003 that they should "'get this land into conservation'" in connection with defense

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[21] The Leadership Group does not have sufficient information concerning the circumstances surrounding the Department's so-called "voluntary" interviews with Congressman Renzi's former aides to take a position on whether any of them violated the Speech or Debate Clause. However, the Leadership Group makes two points regarding these interviews: (1) a Member's aides cannot waive the Member's Speech or Debate privilege and the voluntary statements they offer containing privileged information cannot be used against the Member, *supra* at 23; and (2) as officers of the Court, the prosecutors should encourage a Member's aides not to disclose Speech or Debate protected material and should give fair warning to a witness not to reveal such constitutionally privileged information, without the consent of the Member holding the privilege.

authorization legislation to help Fort Huachuca with its water credits. *Id*. at 28 n.30 (citation omitted).

Ms. Keene also testified about Congressman Renzi's introduction of the Resolution Copper land exchange legislation in May 2005, *id*. at 31, and about draft legislation for a land exchange involving the Aries Group. For example, she testified that:

- the rough draft of the legislation did not include the Sandlin Property as of April 8, 2005, and described a meeting between Congressman Renzi and Philip Aries "at which the Sandlin Property was discussed as a possible addition to the Aries Group's proposed legislation." *Id*. at 30.

- Congressman Renzi's motive for seeking to include the Sandlin Property in the draft legislation was "'that it would be valuable to protect Fort Huachuca, to retire the farming for water conservation.'" *Id*. (citation omitted).

Congressman Renzi's former Chief of Staff Karen Lynch appeared before the original grand jury on August 22, 2007. She testified about her knowledge of land exchange legislation, about an email she sent to Ms. Keene on Congressman Renzi's behalf requesting "'the draft language on the [R]esolution [C]opper'" legislation, and about her specific knowledge of the Resolution Copper and the Aries Group land exchange legislation. *Id*. at 32 (citation omitted).

Congressman Renzi's former Chief of Staff Kevin Messner testified before the original grand jury on August 8, 2007. He testified about:

- the Congressman's motives for introducing land exchange legislation and a proposed amendment to the 2004 Defense Authorization Act. *Id*. at 32-34.

- his role in the legislative process and his work with Congressmen Kolbe and Renzi "to help make the San Pedro river a national conservation area." *Id*. at 32-33.

- his efforts "to facilitate The Nature Conservancy's purchase of the Sandlin Property because it was projected that retiring the agricultural use of the Sandlin Property would conserve approximately 3,000 acre feet of water annually, which was important to the community around the San Pedro river." *Id*. at 33.

- an amendment to the 2004 Defense Authorization Act, dubbed "'the Renzi Rider'," which related to the impact of Fort Huachuca's water use on the San Pedro River. *Id*. at 33 (citation omitted).

- the Congressman's motivation for asking Congressman Kolbe to introduce the Aries Group land exchange legislation, while Congressman Renzi introduced the Resolution Copper land exchange legislation. *Id*. at 34.

- the Arizona's Senators' positions on the Resolution Copper and Aries Group land exchange legislation. *Id*.

These examples of manifest violations of the Speech or Debate Clause are not denied by the Department.

2. Constitutionally Protected Documents.

The Department also presented to the original grand jury significant numbers of internal House emails and other records from Congressman Renzi's office that discussed or related directly to proposed legislative land exchanges. *See* Motion to Dismiss at 29-32; Letter from Gary Restaino to Reid Weingarten at ¶ 6 (May 2, 2008), attached as Exhibit C to Motion to Suppress Wiretap. None of these records were presented to the grand jury with the Congressman's knowledge or consent, and it appears that most, if not all, were taken from his office without his knowledge or consent. *See*, *e.g.*, Motion to Suppress Interviews/Phone Calls at 10 (describing that when Ms. Lynch left her employment with Congressman Renzi, "'she took photo copies of various documents,

made copies of her e-mail and logged on to the e-mail of Jenelle Belland, Renzi's scheduler, and made copies of her e-mail,'" without his knowledge or permission).

These official congressional records concerned or reflected: (1) "the timing of votes, the schedule and agendas for House Committee meetings and legislative mark-up sessions, descriptions of meetings with constituents, lobbyists and others regarding legislation, and other legislative fact-finding trips and meetings," *id*. at 11; (2) "'tasking or communications by Renzi,'" *id*. at 12 (citation omitted); (3) draft statements written for Congressman Renzi regarding a piece of legislation, *id*. at 12; (4) revisions to land exchange legislation, *id*.; (5) "a congressional file regarding one of the legislative land exchanges at issue" here, *id*.; and (6) an email from Ms. Keene to Rep. Kolbe's chief of staff regarding the proposed Aries Group land exchange legislation concerning "mark-ups to the draft legislation and a strategy discussion of how best to pass what Rep. Kolbe's Chief of Staff describes as a 'great bill.'" *Id*. at 13.[22]

* * *

The testimony and records described above all concern Congressman Renzi's legislative activities, and all were absolutely constitutionally protected as to the Congressman. *See supra* at Section II.B.1-2. And all of this information was elicited before, or presented to, the original grand jury by the Department without Congressman Renzi's knowledge and without any waiver by him of his privilege. *See, e.g.*, *Helstoski*,

[22] These emails have been filed under seal, Motion to Dismiss at 6 n.3, and 22 n.23, and, accordingly, we have not had access to review them. Our arguments are based on Congressman Renzi's descriptions of them.

442 U.S. at 491 (waiver of the Speech or Debate privilege, if even possible, must be "explicit and unequivocal"). Accordingly, the Department's use of such testimony and records – such as, for example, grand jury exhibits 7, 8, 11, 12, 14, 20, 26 – was plainly unconstitutional. *See, e.g.*, *Helstoski*, 442 U.S. at 487 ("evidence of a legislative act of a Member may not be introduced by the Government in a prosecution under § 201").[23]

The Department suggests that these flagrant violations were cured by an instruction, delivered to the grand jurors by the same prosecutors who put the offending information before them, presumably advising them to disregard the legislative materials in their deliberations on the draft indictment put before them by the same prosecutors. Opposition to Motion to Dismiss at 10. We still have not seen that instruction because the Court has denied us access to it. *See* Order (Nov. 21, 2008) (reversing Order (Nov. 17, 2008)).

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[23] The same thing is true of documents obtained by the Department from sources outside the Congress which reflect the Congressman's legislative activities. *See, e.g.*, Grand Jury Exhibits 29 (memorandum from Resolution Copper executive stating that "'Mr. Renzi told one of [Resolution Copper's] consultants . . . and Congressman Kolbe (on floor of the House . . .) that he would stand aside and let Kolbe carry the bill in the greater interest of getting it passed this year.'"); 33 ("email between Resolution Copper executives, stating: . . . "all Republican members of the Arizona delegation . . . have signed on as original cosponsors of the Southeast Arizona Land Conservation Act of 2005"); 45 (email between Resolution Cooper executives stating that "'Southeast Arizona Land Exchange and Conservation Act of 2005 was introduced in the House of Representatives and the Senate today. The primary sponsors are Jon Kyl in the Senate and Rick Renzi in the House.'"); 96 (email exchange between land exchange consultants hired by Resolution Copper stating that "'US Senate has held a hearing on our bill and Sen. Jon Kyl is hopeful that a mark-up will be held shortly after the Senate reconvenes in early September. Rep. Rick Renzi, our House sponsor, has refused to request a hearing and move the bill forward.'"). *See generally* Motion to Dismiss at 24-25.

Nevertheless, the Leadership Group is confident that no such instruction could possibly expunge from the grand jurors' minds the substantial amount of legislative materials presented to them or insure that they were not influenced by those materials in returning an indictment – particularly given the Department's exceedingly narrow view of what constitutes protected legislative information. Substantial, repeated and persistent violations of the Speech or Debate Clause cannot so easily be corrected or ignored. In light of these original violations, and as discussed in more detail below, it will be incumbent on this Court, at a minimum – now that a new grand jury has returned a superseding indictment – to review carefully all evidence presented to the new grand jury, both testimonial and documentary, to determine whether and to what extent privileged Speech or Debate materials were presented to that grand jury.

III. The Court Should Suppress All Evidence Obtained From the Unconstitutional Wiretap, and It Should Determine Whether Counts 1-27 and Portions of Count 42 of the Superseding Indictment Must Be Dismissed Without Prejudice.

A. The Court Should Suppress All Evidence Gathered Through or As a Result of the Illegal Wiretap.

The appropriate remedy for the unlawful Wiretap Order and the Department's unconstitutional execution of the wiretap is to suppress all evidence secured as a direct or indirect result of the wiretap. Title III makes clear that when communications have been unlawfully intercepted, both the contents of those communications and their fruits must be suppressed. "Wiretap evidence obtained in violation of [Title III] may not be used at a criminal trial or in certain other proceedings." *United States v. Staffeldt*, 451 F.3d 578, 580 (9th Cir. 2006).

Under 18 U.S.C. § 2515:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . if the disclosure of that information would be in violation of this chapter.

The relevant chapter (119) is violated, *inter alia*, "if the communication was unlawfully intercepted." *Id*. § 2518(10)(a)(i). The statute explicitly authorizes the "suppress[ion of] the contents of any wire or oral communication intercepted," *id*. § 2518(10)(a), if "the communication was unlawfully intercepted." *Id*. § 2518(10)(a)(i).

It is beyond doubt that a "communication [i]s unlawfully intercepted" when the order on which the interception is based patently violates the Speech or Debate Clause. *Cf. United States v. Giordano*, 416 U.S. 505, 524-25 (1974) (§ 2515 reaches constitutional as well as certain statutory violations). As discussed above, the Wiretap Order and the Department's execution of that order clearly contravened the Speech or Debate Clause. *See supra* at Section II.A. Under these circumstances, "[t]he only way to vindicate a member's privilege to be free from improper questioning is to exclude the fruits of such questioning." *United States v. Swindall*, 971 F.2d 1531, 1549 (11th Cir. 1992).

B. The Court Must Review the Evidence Presented to the Second Grand Jury To Determine Whether Counts 1-27 and Portions of Count 42 of the Superseding Indictment Must Be Dismissed Without Prejudice.

The Leadership Group recognizes that "relatively few constitutional challenges to indictments can be raised." *United States v. Zielezinski*, 740 F.2d 727, 729 (9th Cir. 1984). One of the rare circumstances in which such challenges are appropriate, however,

is where a Member's Speech or Debate privilege has been violated before the grand jury. While this Circuit has yet to confront the issue of whether a court may look behind the face of an indictment when it appears that the Speech or Debate Clause has been violated, the Third, Eleventh and D.C. Circuits have all unequivocally held that such action is proper, and indeed, required.[24] "When a violation of the [Speech or Debate] privilege occurs in the grand jury phase, a member's rights under the privilege must be vindicated in the grand jury phase." *Swindall*, 971 F.2d at 1546-47; *see also United States v. Rostenkowski*, 59 F.3d 1291, 1299 (D.C. Cir. 1995) ("at some point the presentation of such material requires the court to dismiss the resulting bill").

In *United States v. Helstoski*, the Third Circuit persuasively explained why courts must look beyond indictments where Speech or Debate challenges are raised. There, the indictment charged a Member with violating the federal public official bribery statute, 18 U.S.C. § 201(c)(1), for allegedly "acting with others to solicit and obtain bribes from aliens in return for introducing private legislation on their behalf." 635 F.2d 200, 202 (3d Cir. 1980). The court considered "whether an indictment based upon evidence protected by the speech or debate clause is valid." *Id*. at 201.

After examining the relevant Supreme Court precedents, the court of appeals asserted that, while in some instances courts are wary of looking behind an indictment where information used "had been obtained in violation of constitutional rights," the

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[24] The Second and Fourth Circuits have noted, but not reached the issue of whether a significant violation "of the Speech or Debate Clause before a grand jury might be used to invalidate an indictment." *United States v. Jefferson*, No. 08-4215, 2008 WL 4868411, at *11 n.8 (4th Cir. Nov. 12, 2008). *See also Myers*, 635 F.2d at 941 n.10.

Supreme Court "carefully distinguished that situation . . . from instances where *what was transpiring* before the grand jury would itself violate a constitutional privilege." *Id.* at 203 (emphasis added).[25] The introduction of Speech or Debate material to the grand jury is a prime example of the latter circumstance. By definition, where the prosecution introduces Speech or Debate material in the grand jury, the prosecution is actually questioning a Member in another place. *See* U.S. Const. art. I, § 6, cl. 1. The challenge therefore is not predicated solely on a *prior* violation.

Speech or Debate Clause violations before the grand jury may be further distinguished because of the acute and essential interests the Clause is designed to protect. As the Third Circuit explained:

> [T]he mere issuance of an indictment has a profound impact on the accused, whether he be in public life or not. Particularly for a member of Congress, however, publicity will be widespread and devastating. Should an election intervene before a trial at which he is found innocent, the damage will have been done, and in all likelihood the seat lost. Even if the matter is resolved before an election, the stigma lingers and may well spell the end to a political career.
>
> Far from being hyperbolic, this evaluation of an indictment's effect is coldly realistic. It cannot be doubted, therefore, that the mere threat of indictment is enough to intimidate the average congressman and jeopardize his independence. Yet, it was to prevent just such overreaching that the speech or debate clause came into being. A hostile executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring or threatening to ignore the privilege in a presentation to a grand jury. Invocation of the constitutional protection at a later stage cannot undo the damage. If it is to serve its purpose, the shield must be raised at the beginning.

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[25] The Third Circuit also noted that "[t]he purposes served by invoking the speech or debate Clause vary greatly from those that the Supreme Court has considered and rejected in other cases seeking to quash indictments." *Id.* at 204.

Helstoski, 635 F.2d at 205. *Cf. Myers*, 635 F.2d at 935-36 (noting the importance of immediately appealing a denial of Speech or Debate protection because, *inter alia*, waiting until after trial would impair a Member's "capacity to represent his constituents").

The Third Circuit's approach comports with the Supreme Court's repeated assertions that "the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Meanor*, 442 U.S. at 508 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)); *see also Powell v. McCormack*, 395 U.S. 486, 502-03, 505 (1969) (Speech or Debate Clause "insure[s] that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions"). Thus, if violations of the Clause occur in the grand jury phase – and therefore result in an improper indictment – the court must remedy those transgressions at the earliest possible stage.[26]

The Department appears to concede that it is appropriate, in certain circumstances, for courts to look beyond the face of the indictment when the Speech or Debate privilege

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[26] Even if the Court were unwilling to look behind the indictment as a constitutional matter, it can and should use its "supervisory power" to dismiss the offending counts of the indictment as a result of the unsavory conduct by the prosecution before the grand jury. *Zielezinski*, 740 F.2d at 729. As this Circuit has stated, "there are three purposes underlying use of the supervisory power: 'to implement a remedy for violation of recognized rights, . . . to preserve judicial integrity . . . and finally, as a remedy designed to deter illegal conduct.'" Id. at 730 (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983). All three factors easily are met here.

has been violated, although it is unclear what standard it believes the Court should employ here. *See* Opposition to Motion to Dismiss at 15-16 (asserting that "incidental" or "inadvertent" use of Speech or Debate evidence does not require dismissal; suggesting that party must be "'prejudiced'" or "grand jury [must] . . . rely on privileged materials" in reaching its decision). The Leadership Group believes that the most appropriate standard that can be gleaned from the case law is that when a significant amount of Speech or Debate material is presented to the grand jury, or when *any* Speech or Debate evidence is presented and is material – either directly or indirectly – to the grand jury's determination to indict the party claiming the privilege, the Court should dismiss the offending charges of the indictment.

It may be unnecessary, however, for the Court in this instance to articulate an exact standard. While it is unclear what specific information was presented to obtain the superseding indictment, there is no doubt that there were numerous, significant and sustained violations of the Speech or Debate Clause before the original grand jury leading to the original indictment. Accordingly, unless the Court, after a thorough review of all materials presented to the second grand jury, determines that the Department managed to extract completely all Speech or Debate material and all information derived from its earlier violations from its presentation to the second grand jury, the Court should dismiss Counts 1-27 and portions of Count 42 of the superseding indictment.[27] On those counts, the original grand jury received substantial evidence of indisputably legislative acts

[27] Obviously, Congressman Renzi, through counsel, should take part in the review of materials presented to the second grand jury.

including, but not limited to, testimony and documents regarding the Congressman's motives for drafting and introducing legislation, the timing and content of the introduction of bills, strategies for the consideration and passage of bills, and communications regarding the content and passage of bills.

In the event the Court determines that some or all of Counts 1-27 and portions of Count 42 of the superseding indictment must be dismissed on Speech or Debate grounds, any such dismissal should be without prejudice. And if the Department subsequently wishes to return charges against Congressman Renzi related to the events described in those counts, it must do so by presenting to an untainted grand jury sufficient evidence that excludes reference to any protected legislative activities.

CONCLUSION

For the foregoing reasons, the Leadership Group respectfully urges this Court to (1) hold that the Wiretap Order and the Department's execution of the wiretap on Congressman Renzi's cell phone violated the Speech or Debate Clause; (2) suppress all information gathered through or as a result of the wiretap; and (3) carefully review all evidence presented to the second grand jury and dismiss the superseding indictment, without prejudice, if the Court determines that the indictment is tainted by the use, directly or indirectly, of Speech or Debate material before the second grand jury.

Respectfully submitted,

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November 24, 2008

Certificate of Service

I certify that on November 24, 2008, I served one copy of the foregoing Memorandum of Points and Authorities as *Amicus Curiae* of the Bipartisan Legal Advisory Group of the U.S. House of Representatives via the ECF system and thereby served copies on the following:

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s/

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Exhibit 1

Case No. 4:08-cr-00212-DCB (BPV)

United States Senator
BOB BENNETT
Utah

Contact: Tara Hendershott. 202-224-5444, Washington. D C . 20510

FOR IMMEDIATE RELEASE
April 09, 2008

BENNETT INTRODUCES WASHINGTON COUNTY LAND BILL

Legislation Receives Support of Key Conservation Groups

WASHINGTON, D.C. –Sen. Bob Bennett (R-Utah) today introduced legislation that addresses the critical land management needs in Utah's Washington County and enjoys a broad base of local and national support.

"After five years at the table with all interested stakeholders, Congressman Matheson and I have produced a bill that successfully strikes a balance between conservation and growth in Washington County," said Bennett. "Parties on all sides of this debate have repeatedly told me it would be impossible to broker a deal on this emotional issue which, for decades, has caused people to dig in their heels. The persistence we've applied now appears to be paying off as our bill has gained extremely diverse support and a very good chance of passing."

Rep. Jim Matheson (D-Utah), who will introduce the legislation in the House of Representatives later this month, said, "This new bill shows that bipartisan effort – with all interested stakeholders – can resolve long-running contentious public land issues in a way that protects the land, the economy and the way of life in Washington County. It's a real breakthrough in my state, following on the heels of the historic Vision Dixie planning process, where the past has been marked by a lot of rhetoric, but not much progress. I am proud of our effort and I'm proud of the collaboration at the local, state and federal level."

The Washington County Growth & Conservation Act of 2008 (S. 2834) was modeled after similar legislation authored by Nevada Senators Harry Reid (D) and John Ensign (R) that addressed growth in Nevada's Clark and Lincoln Counties. The Reid-Ensign bills were approved unanimously in the Senate and the House in 2006.

Senate Majority Leader Harry Reid said, "I am pleased to see so much progress has been made on this legislation. I appreciate Senator Bennett and Congressman Matheson's hard work on this bill."

"The Nevada land bills served as blueprints for this legislation and I am pleased to have the support of Senate Majority Leader Harry Reid in this effort," added Bennett.

Bennett and Matheson are also proud to have received the endorsements of several environmental and conservation groups.

William H. Meadows, president of The Wilderness Society said, "The Wilderness Society is pleased with the strong protection the Washington County Growth & Conservation Act would give to many of southwest Utah's most spectacular wilderness areas, including Cougar Canyon, Doc's Pass, and Black Ridge. This bill is a real improvement over last year's version. We hope that there is now an opportunity to move beyond the polarization over wilderness we have

seen for many years and achieve something lasting and meaningful. We continue to have concerns about other aspects of the bill and look forward to working with Senator Bennett on those issues. I would like to thank Senator Bennett for his leadership and efforts to get us to this point."

"As revised, the Washington County Growth & Conservation Act of 2008 has been greatly improved from the 2006 version and has earned our support," **said Dave Livermore, The Nature Conservancy's Utah State Director.** "If passed, this new bill will go a long way toward protecting the key natural areas which make Washington County such a special place."

To address the needs of one of the fastest growing counties in the country, this legislation is the result of over five years of work including extensive public comment, recommendations from Vision Dixie and data compiled by the Washington County Land Use Planning Process and Working Group. Since the original introduction of the bill in July 2006, numerous suggestions have been received, resulting in significant changes and additional support.

The National Parks Conservation Association (NPCA) also endorsed the bill. NPCA's southwest regional director, David Nimkin, said, "The potential land sales included in this new and improved bill will help generate critical resources, acquire in-holdings, and protect lands adjacent to Zion National Park. We are pleased that the bill requires careful public review for land disposition and incorporates the key principles of the Vision Dixie community planning process."

"I am grateful to members of the conservation community who have been willing to keep the dialogue open and just as importantly, keep it civil," continued Bennett. "I am particularly appreciative of the contributions of the Vision Dixie planning process and the public comments that have helped improve this legislation."

Jim Eardley, chairman of the Washington County Commission, said, "This legislation is the result of a long and intensive collaborative effort and represents historic progress in Utah public land deliberations. While there are some elements of the bill with which we are not entirely comfortable, the overall result is a product which not only provides substantial conservation for our special public lands, but also tangible benefits to the citizens of the County as we face the intense pressure of growth and expansion."

Sen. Orrin Hatch (R-Utah), a cosponsor of the legislation, added, "I believe that Sen. Bennett, working hand-in-glove with local leaders, has crafted comprehensive legislation that balances the needs of the region's families, the environment they cherish, and the economy that sustains them. I am a proud cosponsor of his bill."

Highlights of the Washington County Growth & Conservation Act of 2008 include:

- Addition of 264,394 acres of land to the National Wilderness Preservation System. This will increase the percentage of wilderness acreage in the county from 3.5 percent to 20.5 percent.
- Designation of 165.5 miles of the Virgin River in and adjacent to Zion National Park under the Wild and Scenic Rivers Act, the first such designation in Utah history.
- Creation of two National Conservation Areas in Washington County – Red Cliffs National Conservation Area and Beaver Dam Wash National Conservation Area – to provide long-term protection for the desert tortoise and recreational opportunities on nearly 140,000 acres.
- Disposal of non-environmentally sensitive public land currently identified in the St. George Field Office Resource Management Plan, which represents less than 0.3 percent of lands in Washington County. This legislation authorizes an additional 5,000 acres, which could be

sold only after being identified through the resource management plan process, with full public involvement, and in accordance with the Vision Dixie principles.

- Enhanced management of Off-Highway Vehicle (OHV) use through a comprehensive travel management plan prepared by the Bureau of Land Management (BLM). As part of this comprehensive plan, BLM will designate the High Desert OHV Trail and identify alternatives for a northern transportation route.

Changes to the bill from the 2006 version include:

- Addition of more than 123,000 acres of permanently protected land.
- Removal of utility corridor designations including the Lake Powell pipeline and a northern transportation corridor.
- Reduction of land disposal from approximately 24,300 acres to 9,052 acres.
- Removal of rights-of-way designations, including Ft. Pearce and Cougar Canyon. The bill does not remove the two designations already identified in BLM's resource management plan.
- Development of a county-wide comprehensive travel plan prepared by BLM, which will require BLM to designate the High Desert OHV Trail and identify alternatives for a northern transportation route.

The bill will now be sent to the Senate Committee on Energy and Natural Resources where it will be the subject of hearings.

For more information on the Washington County Land Bill visit http://bennett.senate.gov/special/washcountyland.cfm.

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http://bennett.senate.gov/

Exhibit 2

Case No. 4:08-cr-00212-DCB (BPV)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-1508

UNITED STATES OF AMERICA,

Appellee
v.

JOSEPH M. McDADE,

Defendant

CUSTODIAN OF RECORDS,
COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT,
UNITED STATES HOUSE OF REPRESENTATIVES,
Appellant

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DIRECTING THE PRODUCTION OF RECORDS PURSUANT TO FED.R.CRIM.P. 17(c), AT CRIMINAL NO. 92-249

ARGUED: July 12, 1996
BEFORE: Becker, Stapleton and Greenberg, Circuit Judges.

ORDER

It appearing to the Court that:

(1). The district court has ruled that the documents at issue are protected by the privilege conferred by the Speech or Debate Clause, and that ruling has not been challenged before us;

(2). With this determination made, our decision in In re: Grand Jury Proceedings, 587 F.2d 589 (3d. Cir. 1977) ("Eilberg") neither required nor authorized disclosure to the government;

(3). It was error for the district court to require production of the documents at issue to the government at the time of the district court's order;

It is hereby ORDERED that the portions of the district court's order of June 5, 1996 appealed from are VACATED.*

BY THE COURT:

Circuit Judge

DATED: JUL 12 1996

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*. If in the course of future proceedings, the district court determines that a legitimate issue exists as to whether there has been a valid waiver of the Committee's privilege, nothing here said is intended to preclude the district court from ordering the documents at issue produced for its inspection in camera in connection with the resolution of that issue.