Nos. 10-10088, 10-10122

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross-Appellant,

v.

RICHARD G. RENZI,

Appellant/Cross-Appellee.

MOTION OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* WITHIN THE WORD LIMITS APPLICABLE TO PARTIES' PRINCIPAL BRIEFS

IRVIN B. NATHAN, General Counsel
KERRY W. KIRCHER, Deputy General Counsel
CHRISTINE M. DAVENPORT, Assistant Counsel
JOHN D. FILAMOR, Assistant Counsel
KATHERINE E. McCARRON, Assistant Counsel
ARIEL B. WALDMAN, Assistant Counsel

Office of General Counsel, U.S. House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515-6601
202/225-9700

Counsel for *Amicus Curiae* the Bipartisan Legal Advisory Group of the United States House of Representatives

June 24, 2010

Pursuant to Federal Rule of Appellate Procedure 29(d) and Circuit Rule 32-2, the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("the House")[1] respectfully moves for leave to file its brief *amicus curiae*, attached, subject to the 14,000 word limit applicable to parties' principal briefs. Absent this Court's permission, an amicus brief filed in this Court may contain no more than 7,000 words, while parties' principal briefs may contain up to 14,000 words. *See* Fed. R. App. P. 29(d), 32(a)(7)(B). All parties in this appeal consent to the filing of *an* amicus brief by the House.[2] Appellant former Congressman Richard Renzi consents to the relief sought in this motion. The Department of Justice opposes the motion. For the reasons discussed below, the motion should be granted.

This is a complex case of substantial public importance, and in particular of substantial institutional importance to the House. The appeal raises a number of questions concerning the Speech or Debate Clause of the Constitution, U.S. Const. art. I, § 6, cl. 1 ("for any Speech or Debate in either House, they [Representatives and Senators] shall not be questioned in any other Place"), as that Clause relates to

---

[1] The Bipartisan Legal Advisory 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 A. Boehner, Republican Leader, and the Honorable Eric Cantor, Republican Whip. This group articulates the House's institutional position in litigation matters.

[2] Accordingly, the House need not seek leave to file an amicus in this appeal. *See* Fed. R. App. P. 29(a).

a federal investigation and prosecution of a former Member of the House for events that occurred when he was serving in the House. The Speech or Debate Clause is designed to guarantee Congress's independence, and thus its construction by the judiciary is of enormous institutional importance to the House and the Senate, to our constitutional system, and to the public. *See Helstoski v. Meanor*, 442 U.S. 500, 506 (1979); *see also* Brief *Amicus Curiae* of the Bipartisan Legal Advisory Group of the United States House of Representatives at 1-3 (Statement of Interest) (attached). The construction of the Clause adopted by the district court in a series of rulings – at the behest of the Department of Justice – misconstrues the Clause in a number of important respects that have significant ramifications for the House.

The House's brief addresses a number of issues either not addressed or only touched on briefly in Appellant's opening brief, including, though not limited to, the non-disclosure privilege of the Speech or Debate Clause and the underlying jurisprudence of the Supreme Court, this Court, and the D.C. Circuit, as well as the House's perspective regarding how the Department's investigative conduct repeatedly violated the Clause and the remedies that are appropriate on remand. The House could not fully articulate its unique institutional perspective in a brief limited to 7,000 words.

Accordingly, the House respectfully requests that this Court grant the motion.

Respectfully submitted,

s/ Irvin B. Nathan
IRVIN B. NATHAN
General Counsel
KERRY W. KIRCHER
Deputy General Counsel
CHRISTINE M. DAVENPORT
Assistant Counsel
JOHN D. FILAMOR
Assistant Counsel
KATHERINE E. McCARRON
Assistant Counsel
ARIEL B. WALDMAN
Assistant Counsel

Office of General Counsel
U.S. House of Representatives
219 Cannon House Office Bldg.
Washington, D.C. 20515-6601
202/225-9700

Counsel for *Amicus Curiae*, the Bipartisan Legal Advisory Group of the U.S. House of Representatives

June 24, 2010

CERTIFICATE OF SERVICE

I certify that on June 24, 2010, I served one copy of the foregoing motion via the Ninth Circuit's CM/ECF system and thereby served copies on counsel to all parties in this case.

s/ Ariel B. Waldman
Ariel B. Waldman

June 24, 2010

Nos. 10-10088, 10-10122

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross-Appellant,

v.

RICHARD G. RENZI,

Appellant/Cross-Appellee.

BRIEF *AMICUS CURIAE* OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF REVERSAL

IRVIN B. NATHAN, General Counsel
KERRY W. KIRCHER, Deputy General Counsel
CHRISTINE M. DAVENPORT, Assistant Counsel
JOHN D. FILAMOR, Assistant Counsel
KATHERINE E. McCARRON, Assistant Counsel
ARIEL B. WALDMAN, Assistant Counsel

Office of General Counsel
U.S. House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515-6601
202/225-9700

Counsel for *Amicus Curiae* Bipartisan Legal Advisory Group of the United States House of Representatives

June 24, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Authorities

Statutory Authorities

Legislative Authorities

Other Authorities

INTEREST OF *AMICUS CURIAE*

The Bipartisan Legal Advisory Group of the United States House of Representatives ("the House") respectfully submits this brief to urge this Court to uphold and protect the House's vital interests in the Constitution's Speech or Debate Clause.[1] The Clause provides that as to Members of the Senate and the House, "for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The Clause is a fundamental pillar of Congress's independence and its ability to serve the American people free from interference and intimidation by the executive and judicial branches.

Properly understood, the Clause protects Members of Congress from being sued or prosecuted for legislative activities; bars prosecutors from inquiring into motives for taking legislative acts or using a Member's legislative acts to indict or convict; and, contrary to the dangerous holdings of the district court in this case, protects Members from being forced by any executive agency, including the Department of Justice, to disclose their

[1] The Bipartisan Legal Advisory 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 A. Boehner, Republican Leader, and the Honorable Eric Cantor, Republican Whip. This group articulates the House's institutional position in litigation matters.

legislative activities, whether by compelled testimony or production of documents, or through seizures of documents that concern legislative activities.

The House is well aware that adhering to the Speech or Debate Clause may make prosecutors' jobs more difficult. But, as the Supreme Court has observed repeatedly, the Framers concluded that such protection was necessary to preserve and protect the independence of the legislative branch. Thus, "it was part of the common law, adopted as the law of this land, that . . . representatives, in the discharge of their functions, should be free from the *cognizance or coercion* of the coordinate branches, Judiciary and Executive." 8 The Writings of Thomas Jefferson 322 (Ford ed. 1904) (emphasis added). The district court's rulings, however, converted and diminished the protections of the Speech or Debate Clause into a mere rule of evidence, to be invoked by a Member of Congress at trial. Those rulings cannot stand.

The House respects the important law enforcement interests at stake here. It does *not* defend the alleged conduct of former Congressman Richard Renzi, nor does it seek to protect him from criminal investigation or prosecution in this or any other matter. Violations of federal criminal laws should be (and consistently are) vigorously prosecuted by the Department of

Justice. The House emphatically does *not* suggest that Mr. Renzi or any other present or former Member of Congress is above the law, or immune from prosecution or from a properly authorized and administered wiretap. The House's aim, rather, is to ensure that such investigations and prosecutions comply with the Speech or Debate Clause.

INTRODUCTION

The Department of Justice repeatedly and flagrantly violated the Speech or Debate Clause. The Department's unconstitutional conduct, facilitated and ultimately endorsed by the district court, requires this Court to reverse the lower court in order to vindicate the important interests that the Clause serves to protect. The Department's seizure and use of, and reliance on, information about legislative acts — including its wiretapping of the Congressman's phone calls and ultimately its presentation to the grand jury of evidence about the Congressman's legislative activities and his motivations — has permeated its investigation and prosecution.

This Court should repudiate and vacate the Speech or Debate rulings of the district court, which largely endorsed the Department's actions. In its remand order, this Court should direct the district court to: (1) require that all evidence gathered through or as a result of the unconstitutional wiretap be suppressed; and (2) dismiss, without prejudice, the Speech or Debate-

tainted portions of the currently operative Second Superseding Indictment.

The Speech or Debate Clause provides an important check against intrusions on legislative independence. This Court must enforce that check to ensure both that constitutional limits are observed on remand in this case and that in future investigations of public officials, the Constitution's separation of powers is not violated, as it was so egregiously here.

BACKGROUND

A. Land Exchange Legislation in Congress

Article IV of the Constitution vests Congress with plenary power to regulate the distribution and use of federally owned land. *See* U.S. Const. art. IV, § 3, cl. 2; *United States v. City of S.F.*, 310 U.S. 16, 29-30 (1940). This is a constitutional function of substantial practical importance, as the federal government owns more than 600 million acres of land, comprising more than a quarter of the land in the United States. *See* Kristina Alexander & Ross W. Gorte, *Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention*, Cong. Research Serv., Report for Congress, No. RL34267 at 7-8 (Jan. 12, 2010). One manner in which Congress exercises its constitutional authority over federally owned lands is through legislative land exchanges — the trading via statute of

federally owned lands for lands owned by corporations, individuals, or state or local governments.

B. Richard Renzi

In 2002, Richard Renzi was elected to the House of Representatives, representing the first congressional district of Arizona. He was reelected in 2004 and 2006, and did not seek reelection in 2008. During his first two terms, Renzi served on the House Committee on Resources (now known as the House Committee on Natural Resources), which plays a central role in the House's development of land exchange legislation.

C. The Department's Intercept and Use of Evidence of Legislative Activities

The central criminal charges against Renzi are that, while serving in Congress, he allegedly extorted or attempted to extort private entities in connection with property that he proposed be included in the land exchange legislation that they sought. Renzi's opening brief sets forth the background concerning the Department's criminal investigation and prosecution, which we do not repeat. What bears emphasis is that in pursuing its case, the Department intercepted, used, and relied extensively on evidence of Renzi's legislative activities.

1. Consensual Interviews and Recordings Made By Aides

In or about 2006, the Department opened an investigation of then-Congressman Renzi in connection with certain land exchange legislation involving the Resolution Copper Corporation that he had introduced in the House of Representatives in 2005, *see* Southeast Arizona Land Exchange and Conservation Act of 2005, H.R. 2618, 109th Cong. (1st Sess. 2005); 151 Cong. Rec. E1087, E1093 (daily ed. May 25, 2005).[2] The Department initially questioned four former senior Renzi aides — including his former Legislative Director and three of his former Chiefs of Staff — and one then-current Renzi aide, a Legislative Assistant. *See* Doc. 458 at 16 (findings of fact adopted by Doc. 574); Doc. 86 at 27-35. Far from advising the aides *not* to divulge information protected by the Congressman's constitutional rights, Department personnel actively sought information about the Congressman's legislative activities concerning the land exchange bills.

Through these interviews, the Department obtained from three of the aides, without the knowledge or consent of the Congressman, documents taken from his office, including "draft legislation, internal congressional

[2] In addition, Congressman Renzi submitted to the Office of Legislative Counsel of the House of Representatives a draft of a similar bill, this one concerning the Aries Group, which was never introduced. *See* Appellant's Br. at 9-10.

email, and Congressman Renzi's daily schedules," Doc. 458 at 20; Doc. 387 at 30-31. In addition, the Department directed Renzi's former Legislative Director "to secretly record [her] telephone conversations with Congressman Renzi," which included conversations about his legislative acts, including a chronology of Renzi's involvement with the land exchange bills at issue, and his motivations for supporting the legislation. *See* Doc. 458 at 2, 14-15, 20; Doc. 574 at 2.

2. Wiretap Order and Monitoring Memorandum

Subsequently, the Department applied *ex parte* to the district court for an order authorizing it to tap a cell phone used by Renzi. The resulting 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.*

Order ("Wiretap Order"), Appellant's Br., Exhibit A at 6 (emphasis added).[3]

[3] Although the House does not have access to the unredacted Wiretap Order, the phrase "legislation referenced in this affidavit" appears to refer to land exchange legislation concerning the Resolution Copper Corporation and/or the Aries Group considered by then-Congressman Renzi. *See*

Based on the Department's representations — which as explained below represented a badly flawed understanding of the Speech or Debate Clause — the Court granted the application.

To implement the Wiretap Order, the Department provided a Monitoring Memorandum, Appellant's Br., Exhibit B (the "Memo"), to the agents monitoring Congressman Renzi's phone calls. The Memo, tracking the Wiretap Order, provided that the Speech or Debate Clause does *not* prohibit "monitoring agents from listening to or recording the conversation in which [privileged legislative] activities are discussed," but only "limits the *subsequent evidentiary* use of those recorded conversations." *Id*. at 13 (emphasis added). The Memo also asserted, illogically, that the Department does "not expect Speech or Debate issues to arise," since Congress would be out of session during the period the wiretap was in place. *Id*. Finally, the Memo instructed that it was permissible to target and deliberately intercept conversations about specified legislation, *i.e.*, conversations about the "[land exchange] legislation referenced in this affidavit, which will be fully monitored and reviewed." *Id*.

Appellant's Br. at 13-14 ("[C]onversations regarding legislation would be screened by a 'taint team' with the exception that 'conversations related to the [RCC or Aries land-exchange] legislation . . . will be fully monitored and reviewed.'") (quoting Application For Interception Of Wire Recordings (Oct. 26, 2006)).

In the period during which the wiretap was in effect — from October 27, 2006 to November 24, 2006 — the Department intercepted hundreds of calls that included discussions of legislative activities. These intercepted calls can be divided into three categories. First, the Department recorded hundreds of phone calls between Congressman Renzi and his legislative aides. Doc. 458 at 16; Doc. 574 at 5; Doc. 89 at 4. Second, the Department intercepted sixteen phone calls between Renzi and other Members of Congress — many of which, as the district court later noted, revealed privileged legislative activities and were not filtered out or withheld from the prosecution. Doc. 458 at 17. Third, the Department intercepted a November 8, 2006 post-election conference call between Renzi and other Members of the House Republican Conference. *See* Doc. 89 at 22 & n.11.[4]

In addition, the FBI wiretapping team recorded, reviewed, and retained the recordings of calls that were protected by the attorney-client privilege. Subsequently, after a badly executed minimization process, *see* Doc. 594, the prosecution team reviewed at least six of Renzi's attorney-client privileged phone calls, including four to Renzi's personal attorney,

[4] The Republican Conference is an official House leadership office. *See* Legislative Branch Appropriations Act, 2010, Pub. L. 111-68, tit. 1, 123 Stat. 2023, 2024 (2009). The responsibilities of its employees include analyzing and advising members on legislation.

one to Renzi's then-defense counsel, and part of a call to his election law counsel. *Id*. Subsequently, the district court suppressed the content, though not the fruits, of the entire Title III wiretap as a consequence of the Department's misconduct in connection with attorney-client communications. Doc. 696 at 6-8.[5]

3. Grand Jury Proceedings

The Department subpoenaed three former Renzi aides to appear before the first grand jury. The Department questioned all three at length about the Congressman's legislative activities, including the 2005 drafting of certain of the land exchange bills in question;[6] the Congressman's motive for introducing legislation; and the timing and nature of other Members' roles in that legislation. Doc. 86 at 27-35. The Department placed before the grand jury documents taken from the Congressman's office without his knowledge or consent, including emails that reflected legislative activity. The grand jury also received evidence from the Title III wiretaps. Doc. 458 at 20.

[5] As explained in Section IV(A) *infra*, the Speech or Debate issues in this appeal are not mooted by the district court's suppression order on attorney-client grounds.

[6] That legislation was ultimately introduced a second time by Renzi. *See* Southeast Arizona Land Exchange and Conservation Act of 2006, H.R. 6373, 109th Cong. (2d Sess. 2006).

The grand jury returned a 35-count indictment against Congressman Renzi, Counts 1-27 of which related to allegations that Renzi extorted two companies in connection with private property that he proposed be included in the land swap legislation they sought. The Department subsequently convened a second grand jury that returned a First Superseding Indictment, charging Renzi with nine additional counts. Doc. 178; Doc. 188 at 2; Doc 387 at 2. Subsequently, that same second grand jury returned a Second Superseding Indictment ("SSI"). *See* Doc. 466; Appellant's Br. at 20.

D. The District Court's Speech or Debate Clause Rulings

The district court ruled on a number of motions concerning the Speech or Debate Clause. Of greatest concern to the House, and underlying each of those orders, was the court's ruling that the Speech or Debate privilege is *not* one of "non-disclosure," but rather is merely one of non-evidentiary use. Doc. 303 at 8; Doc. 387 at 34; Doc. 458 at 9. Under the district court's interpretation of the Clause, Members of Congress are *not* protected by the Clause against being forced (or having their legislative aides forced or induced) to produce Speech or Debate-privileged records, being forced to testify as to privileged matters, or having privileged legislative information seized from them; and the executive branch is free to

use such legislative information so obtained so long as the prosecution does not introduce it at trial.

The district court's erroneously narrow construction of the Speech or Debate Clause, and in particular its conclusion that the Clause does *not* provide to Members of Congress a non-disclosure privilege for legislative information, underlies its four principal rulings on Renzi's motions concerning the Clause.

1. The district court denied Renzi's motions to suppress on Speech or Debate grounds the Title III wiretap, the resulting search warrant for his business office, and certain interviews, phone calls, and cellular phone records. Doc. 574.

2. The district court denied Renzi's motion for a *Kastigar* hearing. Doc. 322. In this context, such a hearing would involve the Department having the burden of showing that "the evidence it proposed to use was derived from a legitimate source wholly independent of" evidence derived from unconstitutionally obtained evidence. *In re Grand Jury Proceedings*, 9 F.3d 1389, 1390 (9th Cir. 1993) (explaining a *Kastigar* hearing in the Fifth Amendment context). The district court, in denying reconsideration of this ruling, expressed the extraordinary opinion that the Speech or Debate

privilege does not *apply at all* to executive branch investigations into criminal activity. *See* Doc. 619 at 5.

3. The district court denied Renzi's motion to suppress the consensual recordings, and the Government's use of pen registers, trap and trace devices and toll records. Doc. 458 at 21. Despite its finding that "the use of each of these devices can result in Speech or Debate Clause violations," the court concluded that suppressing them would "offend[]" the district court's "notions of the principle of fair play and substantial justice." *Id.* The district court thus denied the motion, and ruled instead that Renzi may at most move *in limine* at *trial* to exclude from evidence the Speech or Debate-privileged information. *Id.* at 22.

4. Finally, the district court denied Renzi's motions to dismiss any part of the SSI for Speech or Debate violations. Doc. 573. With respect to the Speech or Debate-protected materials placed before the grand jury, the district court engaged in a harmless error analysis. It first found that "even if the grand jury heard testimony about Renzi's motivation for drafting and introducing legislation, . . . the charges in the superseding indictment would be sufficient with such testimony and exhibits excised." Doc. 387 at 28-29. The court also found that even if Renzi were engaged in information gathering for legislation, this activity is not protected because "there is no

evidence presented of any legislative act at the end of the information gathering venture here, there is no piece of legislation drafted by Renzi." Doc. 387 at 30. Based on this patently incorrect factual premise — as noted, Renzi had *twice* introduced certain of the land exchange bills in question, once in 2005, and again in 2006[7] — which was also legally incorrect for reasons set forth below in Section II *infra*, and its legal conclusion that Speech or Debate does *not* provide a non-disclosure protection or even an effective protection against evidentiary use before a grand jury, the district court concluded that the case should proceed to trial. Doc. 573 at 14.

ARGUMENT

The district court's critical errors in interpreting and applying the Speech or Debate Clause require reversal, and the Department's wholesale and repeated violations of the Clause warrant dismissal, without prejudice, of the Speech or Debate-tainted counts of the indictment, as well as suppression of the wiretap and its fruits. In Section I, we provide an

[7] That same land exchange legislation — concerning the Resolution Copper Corporation — was introduced for a third time in the House, with Congressman Pastor of Arizona as its sponsor. *See* Southeast Arizona Land Exchange and Conservation Act of 2007, H.R. 3301, 110th Cong. (1st Sess. 2007). Senators Kyl and McCain introduced a companion bill in the Senate. *See* 151 Cong. Rec. S5859, S5931 (daily ed. May 25, 2005); 152 Cong. Rec. S2429, S2472 (daily ed. Mar. 28, 2006). The bills stalled in committee.

overview of how the Clause serves to implement the Constitution's separation of powers and to protect legislative independence. In Section II, we show that the Clause provides Members of Congress with a non-disclosure privilege. We then show in Section III how the Department repeatedly violated the Clause. Finally, Section IV explains that the issues on appeal from the Department's Speech or Debate violations are not mooted by the district court's order suppressing the wiretap on the basis of the Department's violations of the attorney-client privilege, and discusses the remedies that are appropriate on remand to redress the Department's constitutional violations.

I. The Speech or Debate Clause Implements the Constitution's Separation of Powers Principle.

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

The "whole American fabric has been erected" on the structure of constitutional separation of powers. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). The "principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). According to the Founders' constitutional design, none of the three branches of the federal government

is to "possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers," because "that power is of an encroaching nature, and . . . ought to be effectually restrained from passing the limits assigned to it." The Federalist No. 48 (James Madison). The principle of separation of powers is, accordingly, violated when "[o]ne branch . . . interfere[s] impermissibly with the other's performance of its constitutionally assigned function." *INS v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring in judgment); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

The Framers incorporated into the Constitution concrete mechanisms to implement the separation of powers, mechanisms that would "provide some practical security for each [branch], against the invasion of the others." The Federalist No. 48 (James Madison). One such practical mechanism is the Speech or Debate Clause.

B. The Clause Implements the Separation of Powers Principle by Protecting Legislative Branch Independence.

The Clause's core purpose, rooted in the English experience, is to protect legislative independence from the encroachment of the executive and judicial branches. The Clause's history stems from the epic struggle between the Parliament and the Crown in sixteenth- and seventeenth-century England, during which "monarchs utilized the criminal and civil law to

suppress and intimidate critical legislators." *United States v. Johnson*, 383 U.S. 169, 178 (1966). In 1689, the English 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) (internal 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 first in the Articles of Confederation and then in the Speech or Debate Clause of the Constitution. *Id.*

Accordingly, as the Supreme Court has long recognized, the "purpose of the Clause is to [e]nsure 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). The Clause's "'central role'" 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)). The Clause thus "reinforce[es] the separation of powers so deliberately established by the Founders." *Johnson*, 383 U.S. at 178.

C. The Clause Protects All Activities Within the Legislative Sphere, Without Exception.

In accordance with the Clause's purposes, the Supreme Court has recognized that its protections apply to *all* activities by Members of Congress "within the 'legislative sphere.'" *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973) (quoting *Gravel*, 408 U.S. at 624-25). This sphere includes 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.

Because the guarantees of the 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; *see also McMillan*, 412 U.S. at 311; *Gravel*, 408 U.S. at 618, 624.

The Clause's protections thus encompass all facets of the legislative process, including "[c]ommittee reports, resolutions, and the act of voting," *Gravel*, 408 U.S. at 617, committee investigations and hearings, *see*

Eastland, 421 U.S. at 504-05; *McMillan*, 412 U.S. at 313, 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).

Beyond legislative acts themselves, the Clause also protects "'against inquiry into . . . the *motivation* for those [legislative] acts.'" *United States v. Helstoski*, 442 U.S. 477, 489 (1979) (emphasis added) (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972)). The Supreme Court has held unequivocally that the question of whether a Congressman's conduct in engaging in a legislative act was improperly motivated "is *precisely* what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *Brewster*, 408 U.S. at 538; *see also Johnson*, 383 U.S. at 184-85 (inquiry into Member's motives for engaging in legislative activities "necessarily contravenes" the Clause); *Miller*, 709 F.2d at 530.

Importantly, the Clause does *not* protect everything that Members of Congress do. Where the Department or another litigant can produce non-privileged evidence to support its charges or claims against a Member, they

may prosecute those charges or claims even where the Member's alleged conduct is incidentally related to a legislative act. For example, the Supreme Court has permitted the prosecution of a Congressman 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." *Brewster*, 408 U.S. at 525. Further, the Clause does not privilege activities that are merely "related," but not *integral*, to the legislative process, for example constituent casework and assistance in securing government contracts,[8] private republication of legislative papers,[9] and distribution of press statements and constituent newsletters.[10]

However, where activities *are* "within the 'legislative sphere,"' the Clause's protections fully apply "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). Put differently, there is no crime-fraud exception to the Clause. It is long-established that the Clause is *not*

[8] *Brewster*, 408 U.S. at 512.

[9] *Gravel*, 408 U.S. at 626.

[10] *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979).

abrogated and the privilege is *not* defeated merely because the Department or another litigant alleges that a Member committed a crime or otherwise acted with bad intent. *See, e.g., Tenney*, 341 U.S. at 377. Rather, the Court has stated, repeatedly and unequivocally, that when the activity in question is within the legislative sphere and the Speech or Debate privilege thus applies, the protection it provides is "*absolute*." *Eastland*, 421 U.S. at 501, 503, 509-10, 510 n.16 (emphasis added); *Gravel*, 408 U.S. at 623 n.14; *Barr v. Matteo*, 360 U.S. 564, 569 (1959).

D. The Member's Speech or Debate Privilege Applies to Aides and May Only Be Waived by the Member.

The 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 Speech or Debate purposes, a Member and his or her aide "are to be 'treated as one.'" *Id*. at 616 (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. And if the privilege can be waived, the standard for such waiver is extraordinarily

high, requiring a showing that the Member provided an "explicit and unequivocal renunciation of the protection." *Helstoski*, 442 U.S. at 491.

II. The Clause Provides a Non-Disclosure Privilege.

The Clause's purposes are implemented through three distinct protections, the third of which is the focus here. First, the Clause provides *immunity* from liability for actions "within the legislative sphere." *McMillan*, 412 U.S. at 312 (internal quotations omitted). Second, the Clause provides an evidentiary *non-use* protection, *i.e*. 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, as amplified below, the Clause also provides a *non-disclosure* privilege, meaning that Members and their legislative aides are protected against being forced to produce privileged records or to testify as to privileged matters, and are protected from having privileged legislative information seized from them without their consent. The district court critically failed to recognize this third protection, and held that the Clause does *not* bar the Department in a criminal investigation from obtaining legislative materials by stealth or compelled disclosure and then reviewing, considering, and making non-evidentiary use of those materials. As we now

show, that conclusion conflicts with the Clause as definitively construed by the Supreme Court and this Court; would, if adopted, create an unwarranted circuit split with a line of well-reasoned D.C. Circuit decisions; and is not supported by the decisions on which the court below relied.

A. The Clause's Text, Purposes, and Supreme Court Interpretations Support the Non-Disclosure Privilege.

The plain language of the Speech or Debate Clause contrasts sharply with that of the Fifth Amendment privilege against self-incrimination — for which "use" immunity suffices. The Fifth Amendment, which provides that no person "shall be compelled in any criminal case to be a witness against himself," U.S. Const., amend. V, speaks only of protecting the privilege-holder against consequences of criminal cases against himself, so that "use" of his testimony in other kinds of cases, where it is without incriminating consequences, is anticipated and allowed. In contrast, the Clause expressly protects Members from being "questioned in *any* other place," U.S. Const. art. I, § 6, cl. 1 (emphasis added), without the requirement that the "question" be in a "criminal case . . . against himself," or indeed any kind of "case." The Clause is thus, by its terms, a *general* privilege against a Member being questioned, and not just a "use" privilege or rule of evidence.

Further, the Supreme Court has long insisted that the Clause be read *broadly*, consistent with the Clause's purposes of promoting legislative

independence and the separation of powers. The Court has never suggested a limitation on the scope of the privilege when it applies, and has made abundantly clear that when the Clause applies, its protections are "absolute." *See supra* at § IC.

The Court's opinions in *Gravel* and *Eastland* are instructive. *Gravel* held in the context of a grand jury subpoena to a Senator's aide that because the Clause protected the Senator (through his aide) from being "question[ed] elsewhere than in the Senate, with respect to the events occurring at" a legislative subcommittee hearing, the aide could not be questioned on that topic before the grand jury. 408 U.S. at 615 ("[T]his claim is incontrovertible"). The fact that the questioning would not occur at trial did not alter the Court's conclusion.

Similarly, *Eastland* observed that the Clause's comprehensive applicability is supported by the "absoluteness of the terms 'shall not be questioned' and the sweep of the Clause's term 'in any other Place.'" 421 U.S. at 503. *Eastland* held that in light of the Clause's text and purposes, for actions "within the legitimate legislative sphere," the Clause is an "absolute" bar to interference. *Id.* at 506; *id.* at 510 (citing *Gravel*, 408 U.S. at 624-54). Applying that standard, *Eastland* held that the lower courts had been correct in refusing to compel an aide to a Senate subcommittee to disclose at a

deposition certain privileged "information [that] 'ha[d] been received by him pursuant to his official duties.'" *Id.* at 499 n.13. The fact that the plaintiffs were not at that juncture seeking to use the aide's information against Members did not enter into the Court's analysis. Again, the Member's being compelled (through the aide) to produce information revealing legislative activities to an entity outside of Congress was sufficient to invoke the privilege.[11]

Moreover, the Court repeatedly has explained that the privilege exists *not* for the personal or private benefit of Members, or to ensure fair trials, but for the purposes of safeguarding Congress's *institutional* role in our government. *See Brewster*, 408 U.S. at 507. The Court has thus noted that in regard to legislative activities, where "*power* is . . . brought to bear on Members of Congress" by an official from another branch of the federal government, legislative independence is "imperiled." *Eastland*, 421 U.S. at 503 (emphasis added). That is just as true when the Department questions a Member (or his aides) about legislative activities, secretly records legislative

[11] Similarly, in *Dennis v. Sparks*, 449 U.S. 24 (1980), the Court, in contrasting immunities available to a judge with those provided to Members of Congress, described the Clause as providing a "constitutionally based privilege immunizing [Members of Congress] from being required to testify about their [legislative] conduct in third-party litigation." *Id.* at 30 (citing *Gravel*, 408 U.S. at 616-17).

conversations, or seizes legislative records, as it is when the Department uses legislative activities as evidence. In short, allowing a Member's conversations about legislation to be secretly recorded by the executive branch so long as they are not used in evidence at trial is manifestly inconsistent with the Clause as construed by the Supreme Court.

B. This Court's Decision in *Miller* Supports the Non-Disclosure Protection.

In *Miller*, a plaintiff in an action against a non-congressional defendant sought to compel a former Congressman to testify at a deposition about the circumstances of his placing materials in the Congressional Record years earlier. 709 F.2d 524. There was thus no issue of use against the Congressman. This Court nonetheless held that enforcement of the subpoena would result in questioning about a legislative act and would therefore be inconsistent with the Clause's purposes. *Id.* at 528. *Miller* held that even though the subpoena against a former Member would not interfere with current congressional activities, the subpoena had to be quashed because "[o]nce the legislative-act test is met, the privilege is absolute," *id.* at 529 (citing *Eastland*, 421 U.S. at 503), since "*[a]ny* questioning about legislative acts . . . ha[s] a chilling effect on" the "freedom of speech" of

Members of Congress, *Miller*, 709 F.2d at 528 (emphasis added).[12] *Miller*'s recognition that it is the protection of congressional integrity and independence that underlies the Clause entirely supports the notion that the Clause prevents compelled disclosure (or seizure) of legislative information from a Member — whether in the form of oral testimony or documents — since that compelled disclosure, if permitted, would likewise have a "chilling" or otherwise intimidating effect on Members. The district court's reading to the contrary is plainly inconsistent with *Miller*.

C. Executive Branch Abuse of Wiretaps Reinforces the Need for the Clause's Non-Disclosure Protection.

The threats to legislative independence from compelled, secret seizures of information about legislative activities are, if anything, *more* serious in the modern era of technology-enabled surveillance and seizure. Several (non-exhaustive) examples highlight the importance of protecting

[12] The district court seized on *Miller*'s "freedom of speech" language to conclude that *Miller* is inconsistent with a non-disclosure privilege. Doc. 572 at 8. That badly misreads this Court's use of that phrase, which occurred in the context of explaining why the Speech or Debate privilege barred a subpoena seeking to compel evidence of legislative acts against a former Member of Congress, and was followed by this Court's conclusion that "[a]ny questioning about legislative acts . . . would interfere by having a chilling effect on Congressional freedom of speech." 709 F.2d at 528 (internal citations omitted).

Speech or Debate interests as against executive branch abuse in the wiretap context.

For example, during the forty-eight years that J. Edgar Hoover served as FBI Director, as documented in later congressional oversight hearings, "Congressmen and members of Congressional staffs [were] wiretapped," and the FBI created and maintained dossiers on every Member of Congress and used them for political purposes. *See* Staff of S. Comm. on Foreign Relations Subcomm. on Surveillance & S. Judiciary Comm. Subcomm. on Admin. Practice & Procedure, 94th Cong., Staff Report on Warrantless Wiretapping & Surveillance (Comm. Print 1975).

Similarly, in 1961, the Kennedy administration claimed to be concerned that representatives of a foreign government were attempting to exert unlawful influence over the House Agriculture Committee in connection with sugar quota legislation. *See* S. Rep. No. 94-755 at 64-65, 227, 233 (1976) ("Church Report"). The executive branch (through the FBI) installed a microphone in the hotel room where Congressman Harold Cooley was meeting with a foreign representative. *Id*. at 60-61, 61 n.233. It also (with the Attorney General's approval) installed wiretaps on the residential telephone of the Clerk of the House Agriculture Committee and others, ostensibly for "foreign intelligence" purposes. *Id*. at 227. After the

administration's preferred sugar-related legislation was passed, the wiretaps were discontinued. *Id*. at 64 & n.262. The Church Committee later concluded that while the wires "produced no information of value" to the law enforcement mission, they "generated information which was potentially useful to the Kennedy administration for purely political purposes relating to the legislative process." *Id*. at 64 n.262, 65, 233-34. These practices illustrate the recurring danger of the executive branch's use of wiretaps to intimidate members of Congress, the type of threat the Clause is specifically designed to combat.[13]

D. Well-Reasoned Decisions of the D.C. Circuit Hold that the Clause Provides a Non-Disclosure Privilege.

The D.C. Circuit, in a line of cases over two decades applying *Gravel* and *Eastland*, has held repeatedly that the Clause includes a non-disclosure privilege. This holding is reflected most recently in *United States v.*

---

[13] Indeed, just last year, the press reported that current or former employees of the Department of Justice had leaked the contents of an electronically intercepted conversation of Congresswoman Jane Harman. *See, e.g.*, Jeff Stein, *Wiretap Recorded Rep. Harman Discussing Aid for AIPAC Defendants*, Congressional Quarterly, Apr. 19, 2009. The conversation allegedly related to a controversial criminal prosecution of two former officials of AIPAC. Shortly after the press reports appeared, the Department dismissed the criminal case against the former AIPAC officials. These wiretap leaks gave rise to substantial concern that they were motivated by Department personnel's desire to embarrass or injure Congresswoman Harman politically.

Rayburn House Office Bldg, which concerned the historically unprecedented search of Congressman William Jefferson's congressional office, and the Department's seizure of congressional records (including thousands of pages of legislative records), which the Congressman had no prior opportunity to review for privilege. 497 F.3d 654 (D.C. Cir. 2007). *Rayburn* "h[e]ld 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." *Id.* at 656; *see also id*. at 663; *id.* at 660 (citing *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) (in turn analyzing *Eastland* and citing *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 860 (D.C. Cir. 1988))).

Rayburn built on the D.C. Circuit's 1995 decision in *Brown* which, following a close analysis of the Supreme Court's decisions and *Miller*, *see* 62 F.3d at 418-20, explained that because "the touchstone" of legislative privilege "is interference with legislative activities," which can be impaired by *any disclosure at all*, another party's intended *purpose* for seeking or obtaining privileged documents is "immaterial," *id.* at 421 (emphasis added). *Brown* thus reasoned that "[d]ocumentary evidence can certainly be as revealing as oral communications," 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*. at 420.

The D.C. Circuit's decision in *Brown*, in turn, built on its 1988 decision in *MINPECO*, which quashed on Speech or Debate grounds a subpoena to a congressional subcommittee for documents. 844 F.2d at 859. In *MINPECO*, the subpoenaing defendants claimed that the subcommittee's report (which the defendants expected to be used against them at trial) did not accurately reflect the testimony given. *Id.* The Court held that a Member need not show that he or she is a party in a suit to invoke the protections of the Clause. Rather, relying on the Clause's purposes as construed in *Eastland* and *Gravel*, *id.* at 859-62, and adopting "the broader view of the Clause's purpose that is expressed in *Miller*," *id.* at 860, it concluded that the sole salient question was whether the subpoena inquired into legislative conduct, *id.* at 862 (citing *Miller*, 709 F.2d at 529). Because the subpoena did so, the D.C. Circuit held that it violated the Clause. *MINPECO*, 844 F.2d 862.

We respectfully submit that this Court should follow these D.C. Circuit decisions, just as the D.C. Circuit followed this Court's decision in *Miller*. Because of its location, the D.C. Circuit has frequently ruled on

Speech or Debate issues.[14] Like other areas of law in which this Court has harmonized its decisions with the D.C. Circuit,[15] doing so here is warranted. The analysis in the D.C. Circuit's decisions addressing the non-disclosure component of the Clause is persuasive and is clearly consistent with the Clause's purposes, the decisions of the Supreme Court, and this Court's decision in *Miller*. Adhering to the Clause's non-disclosure component will thus both be correct and avoid generating unnecessary confusion in the constitutional law governing compelled disclosure of legislative materials.

E. The Authorities Relied on by the District Court Do Not Support Its Holding.

In holding that the Clause does not include a non-disclosure privilege, the district court relied on three Third Circuit decisions and on the concurring opinion in *Rayburn*. *See* Doc. 303 at 4 (citing *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980); *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978) ("*Eilberg*"); *In re Grand Jury Proceeding*, 563 F.2d

[14] Since 1980, the D.C. Circuit has issued at least sixteen opinions addressing the Speech or Debate Clause. *See* Appendix at Exhibit A (collecting decisions).

[15] *See, e.g.*, *Milner v. U.S. Dep't of the Navy*, 575 F.3d 959, 964-65 (9th Cir. 2009) (adopting D.C. Circuit analysis in FOIA context); *Maldondao v. Dep't of Agric.*, 154 F.3d 1086, 1088 (9th Cir. 1998) (administrative law); *Cort v. Crabtree*, 113 F.3d 1081, 1084 & n.2 (9th Cir. 1997) (same).

577 (3d Cir. 1977) ("*Cianfrani*"); Doc. 322 at 5-7 (citing *Rayburn*, 497 F.3d at 662-666 (Henderson, J., concurring in judgment)). None of those opinions support the district court's holding.

1. The Third Circuit Decisions Relied on by the District Court Do Not Support Its Holding.

Cianfrani and *Helstoski* plainly offer no support to the district court's interpretation of the Clause. The court in *Cianfrani* was explicit that in commenting on the non-disclosure issue, it was *not* dealing with the Speech or Debate Clause, but only with the "federal common law privilege" that, *un*like the Speech or Debate Clause, is applicable to state legislators. 563 F.2d at 584. *Helstoski* dismissed the indictment of a Member on Speech or Debate grounds, 635 F.2d at 205, hardly support for the notion that Speech or Debate is a mere rule of evidence.

The earlier *Eilberg* decision, on which the district court relied, is no longer followed in the Third Circuit or in any other jurisdiction. In that 1978 decision, the Third Circuit stated that the privilege "when applied to records or third-party testimony is one of nonevidentiary use, not of non-disclosure." *Eilberg*, 587 F.2d at 597. However, in *United States v. McDade*, the Third Circuit effectively abandoned *Eilberg* by reversing a lower court order directing a committee of the House, on the basis of *Eilberg*, to produce to the Department records the lower court had concluded were Speech or

Debate-protected. *See* Order at 1, *United States v. McDade*, No. 96-1508 (3d Cir. July 12, 1996), Appendix at Exhibit B (stating that *Eilberg* "neither required nor authorized disclosure to the government"). Further, *Eilberg*'s extremely narrow view of Speech or Debate has been explicitly rejected by the D.C. Circuit. *See Brown*, 62 F.3d at 420 ("We do not accept the [view in *Eilberg*] that the testimonial immunity of the Speech or Debate Clause only applies when Members or their aides are personally questioned."). And, in the three decades since it was issued, *Eilberg* has not been followed by a single appellate court.

2. The *Rayburn* Concurrence Rests on Faulty Assumptions.

The single-judge concurring opinion in *Rayburn* also does not support the district court's holding. Setting aside that the concurrence was not the opinion of the court, the concurrence's reasoning rests on two faulty assumptions, and is entitled to no weight.

a. The concurrence rests on faulty assumptions about the consequences of the non-disclosure protection.

The *Rayburn* concurrence (and the district court's decisions) rest on a fundamentally incorrect premise about the Speech or Debate Clause. The Clause's non-disclosure component does *not*, contrary to those opinions' premises, create "super-citizens, immune from criminal responsibility" or

"safe-havens, such as congressional offices, that are free from criminal investigative searches." Doc. 322 at 7-8 (discussing *Rayburn* concurrence). It is simply not correct to assume that a non-disclosure privilege under the Clause means that Members cannot successfully be prosecuted, that congressional offices can never be searched, or that Members can never be wiretapped. Rather, as the D.C. Circuit explained in *Rayburn*, and as confirmed by common sense, such law enforcement tools may be used. But the Department in using those tools must respect the Constitution, including the Speech or Debate Clause.[16] That did not happen here.

There are, of course, potential costs associated with the Clause's broad constitutional protections, including its non-disclosure protection. As the Supreme Court has recognized, "without 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.[17] Notwithstanding, the Court has

---

[16] The precise metes and bounds by which such tools can be used need not be decided in this case, in which the Department clearly exceeded the bounds of the Constitution. *Cf. Rayburn*, 497 F.3d at 663 ("[H]ow that [Speech or Debate] accommodation is to be achieved is best determined by the legislative and executive branches in the first instance.").

[17] Legislative independence is hardly the only constitutional principle our system protects, notwithstanding potential costs to the criminal justice system. For example, our criminal constitutional law has long required proof beyond a reasonable doubt in criminal cases, even though this proof requirement causes us to "err on the side of letting the guilty go free."

held repeatedly that the Clause must be broadly construed and applied because that was "the conscious choice of the Framers," as "buttressed and justified by history." *Eastland*, 421 U.S. at 510 (internal quotations omitted). Indeed, the Court in *Eastland* considered and *rejected* Speech or Debate arguments nearly identical to the ones made by the district court here — "the familiar argument that the broad protection granted by the Clause creates a potential for abuse," *id.* — on the grounds that to accept such an argument "would create an exception not warranted by the language, purposes, or history of the Clause." *Id.*

The wisdom of the Framers' "conscious choice," *id.*, is evidenced not only by the enduring vigor of our system of checks and balances, but also by the fact that the Department has consistently obtained convictions against Members of Congress all without trampling constitutional boundaries.[18] Indeed, in *Rayburn* itself, notwithstanding the dire predictions of the concurrence and the Justice Department regarding the effect of the non-

---

Johnson v. Louisiana, 406 U.S. 380, 393 (1972). Similarly, the First Amendment provides certain rights to free speech, the Fourth Amendment provides a right against unreasonable searches and seizures, and the Fifth Amendment provides a right against self-incrimination. Each of these constitutional rights exacts a cost to the likelihood of convicting criminal defendants, but the enforceability of these rights is well-established.

[18] For example, in the past twenty-five years, the Department has secured convictions of at least eighteen current or former Members of Congress.

disclosure privilege,[19] and following a trial where, pursuant to the D.C Circuit's ruling, the Department did not have access to the Speech or Debate materials in question, Jefferson was convicted on eleven criminal counts. *See* Judgment, *United States v. Jefferson*, No. 07-209, 534 F. Supp. 2d 645 (E.D. Va. Nov. 13, 2009), Appendix at Exhibit C, *appeal docketed*, No. 09-5130 (4th Cir. Dec. 1, 2009).

b. The concurrence rests on faulty history.

The *Rayburn* concurrence also rests on a second incorrect premise. In a passage seized on by the district court, the concurrence concluded that the Clause must not have a non-disclosure component because "this would jeopardize law enforcement tools that have never been considered problematic." Doc. 322 at 7 (citing *Rayburn*, 497 F.3d at 671-72 (Henderson, J., concurring)). On its list of tools that in its opinion have "never been considered problematic" was surveillance of Members and aides "who might discuss legislative matters with another Member or staffer." *Id.*

[19] *See* Petition for Writ of Certiorari, *United States v. Rayburn House Office Bldg.*, 2008 WL 618085, at 3 (Mar. 6, 2008) ("[I]nvestigations of corruption in the Nation's capital and elsewhere will be seriously and perhaps even fatally stymied."). The petition was denied. 128 S. Ct. 1738 (Mar. 31, 2008).

That assertion misreads history. As noted above, the Church Committee, among others, found it problematic that the executive branch misused its power to intercept electronically confidential communications of or with Members. Further, the concurrence's assessment is also at odds with the history that led Congress to pass the wiretap statute itself. In response to perceived abuses — including those expressed in the Supreme Court's constitutionally based criticism of the New York eavesdropping statute[20] — and to growing public concern over the government's improper use of wiretaps, Congress in 1968 passed a federal wiretapping statute in Title III of the Omnibus Crime Control and Safe Streets Act. *See* Pub. L. No. 90-351, Title III, 82 Stat. 197, 211 (1968) (codified as amended at 18 U.S.C. §§ 2510-2522). As the Court later noted, the "purpose of the [1968] legislation . . . was," accordingly, "to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act." *United States v. Giordano*, 416 U.S. 505, 515 n.6 (1974). It is thus clear that wiretaps and other methods of

[20] *See, e.g.*, *Berger v. New York*, 388 U.S. 41, 62 (1967) ("[I]ndiscriminate use of [electronic eavesdropping] devices in law enforcement raises grave constitutional questions . . . .") (citing *Lopez v. United States*, 373 U.S. 427, 441 (1963)).

secret surveillance have regularly been considered "problematic" — by Congress and by the Judiciary.

***

In sum, under our constitutional system, the Speech or Debate Clause not only protects Members from being sued or prosecuted for legislative activities and from having their legislative acts introduced in evidence against them, but it also privileges them from being forced to *disclose* their legislative activities, either by way of their (or their legislative aides') testimony or by way of compelled production or seizure of documents or communications. The non-disclosure privilege of the Clause is necessary to ensure that the Clause's purposes are served, and for that reason it falls squarely within the protections of this critical provision of the Constitution.

III. The Justice Department Repeatedly and Substantially Violated the Clause in This Case.

A. The Wiretap Violated the Speech or Debate Clause.

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

The Wiretap Order that resulted from the Department's *ex parte* application to the district court constituted compelled disclosure in violation of the Clause. For Speech or Debate purposes, the forcible compulsion inherent in the Wiretap Order is indistinguishable from the compulsion

inherent in a subpoena or search warrant. *See United States v. Gillock*, 445 U.S. 360, 360 (1980) (assuming Speech or Debate would apply to conversations illicitly recorded). The Clause is designed to prohibit "any probing of legislative acts," *Brown*, 62 F.3d at 419, and there is no difference for constitutional purposes between (i) judicially-compelled production of legislative records or testimony under a subpoena or a search warrant, *see, e.g.*, *Miller*, 709 F.2d at 528-31; (ii) the Department's reviewing and seizing legislative records pursuant to a judicially-authorized search warrant, *see Rayburn*, 497 F.3d at 656; and (iii) the Department's seizing, recording, listening to and using in its investigation a Member's legislative conversations. In all three cases, legislative information that is absolutely privileged from review, disclosure, or investigative use is seized under color of law in violation of the Constitution.[21]

[21] The district court was thus plainly in error in its stated legal conclusion that the Clause's protections do not apply in the context of executive branch investigations into criminal activity. *See* Doc. 619 at 5. Such a ruling would turn the "investigation" stage of a prosecution into a Constitution-free zone, in which the executive branch would not be bound by the Speech or Debate privilege when it sought Title III wiretaps or when it made derivate use of the evidence seized to further investigate a Member. This reading of the Clause's privileges is foreclosed by the Supreme Court's decisions discussed above.

2. The Wiretap Order Specifically Permitted the Seizure of Legislative Communications.

The Wiretap Order contemplated that the Department would – and, remarkably, specifically *authorized* it to – seize legislative information from Congressman Renzi, in three respects.

First, that order limited the definition of privileged legislative conversations to those that "relate[] directly to pending legislation." Wiretap Order at 6. However, the Clause protects much more than information "related[d] directly to pending legislation." It protects *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." *Gravel*, 408 U.S. at 625. It does not matter whether a bill on the subject has yet been introduced. *See, e.g.*, *Eastland*, 421 U.S. at 504-505 (in applying Speech or Debate immunity to bar an action for injunction of a congressional subcommittee and its members and staff of a *pre*-legislative investigation, noting that "[t]o conclude that the power of inquiry is other than an integral part of the legislative process would be a miserly reading of the Speech or Debate Clause in derogation of the 'integrity of the legislative process'") (quoting *Brewster*, 408 U.S. at 524)).

Second, the Wiretap Order 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 adopted a "crime-fraud" exception to the 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, the notion of a crime-fraud or bad-faith exception to the Speech or Debate Clause is irreconcilable with the language and logic of the Supreme Court's cases. *See McMillan*, 412 U.S. at 312-13 (where activities *are* "'within the legislative sphere,'" the Clause's protections fully apply "even though the[] conduct, if performed in *other* than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes.") (quoting *Gravel*, 408 U.S. at 624-25) (emphasis added); *Johnson*, 383 U.S. at 177 ("The conspiracy theory depended upon a showing that the speech was made solely or primarily to serve private interests, and that *Johnson in making it was not acting in good faith* . . . . We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch . . . violates the express language of the Constitution and the policies which underlie it.") (emphasis added); *Eastland*, 421 U.S. at 509 ("[R]espondents argue that the purpose of the

subpoena was to harass" and "[t]heir theory seems to be that the subpoena cannot be protected by the Clause. . . . That approach, however, ignores the absolute nature of the speech or debate protection and our cases which have broadly construed that protection."); *Tenney*, 341 U.S. at 377 ("[A] claim of an unworthy purpose does not destroy the privilege.").

Rather, there is no basis for a crime-fraud exception to the Clause, and indeed such a rule would be counter to its purposes and contravene the well-established rule that the Clause's privilege is absolute when it applies. Without doubt, the Clause applies to conversations related to specific legislation, even where (and especially where) the legislation is being scrutinized in a criminal investigation. In authorizing a regime that assumed away such protection for the land exchange bills on which the investigation focused, the district court, at the Department's behest, violated the Clause.

Third, the Wiretap Order's minimization procedures permitted initial reviews by agents of the executive to "spot check" privileged legislative conversations to determine if they contained any non-privileged information. 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 put the *executive* in charge of determining what *is* and what is *not* privileged

legislative information in the first instance and after the privileged information has been purposefully seized. That arrangement cannot be squared with the Constitution.

3. The Execution of the Wiretap Order Resulted in the Department's Monitoring and Recording of Renzi Conversations Revealing Legislative Activities.

The Wiretap Order and Memo's badly flawed approach to the Clause resulted, quite predictably, in the Department's egregiously violating the Clause in executing the wiretap. At the outset, the Memo suggested that Speech or Debate issues do not arise when Congress is not in session, and thus the Department did not even purport to minimize Speech or Debate material during congressional recess. *See* Memo at 13. That was incorrect because the Speech or Debate privilege does not have a temporal component. 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 a deposition subpoena to a former Member).

Further, the Memo, like the Wiretap Order, defined privileged conversations as only those that "relate[] directly to pending legislation." Memo at 13. In effect, the Department in its execution of the wiretap operated on the assumption that Speech or Debate does *not* privilege: (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; or (4) the process of organizing, and selecting leaders for, a new Congress. There is no basis for any such carve-outs from the "absolute nature of the speech or debate protection and [Supreme Court] cases which have broadly construed that protection." *Eastland*, 421 U.S. at 509.

In addition, the Department's minimization protocol – "to protect the government's right to 'spotcheck'" privileged conversations, Memo at 13 – by *definition* contemplated the Department would monitor and record privileged conversations. As noted above, that protocol is also patently inconsistent with the Clause.

Finally, the Department claimed an exception to the minimization protocol for "conversations related to the legislation referenced in th[e] affidavit." Memo at 13. Put another way, for the land exchange legislation identified in the Wiretap Order, *the Department proposed, and the district court approved, a regime of no Speech-or-Debate minimization whatsoever.* That protocol and the intercepts by the wiretap that resulted were wholly

inconsistent with the language, purposes and Supreme Court decisions construing the privilege, as set forth above.[22]

The district court in denying the motion to suppress the wiretap on Speech or Debate grounds relied on and adopted three rationales given by the Magistrate Judge, none of which render the wiretap constitutionally valid.

First, the district court found that the "passive interception" by the wiretap does not implicate the Clause. Doc. 458 at 10; Doc. 574. That is incorrect. The Wiretap Order clearly permitted the executive branch to seize communications concerning constitutionally protected legislative activities, and specifically concerning information related to a particular piece of legislation. Such interception — especially of a purposeful, sustained nature — is patently inconsistent with the Clause. *Accord Miller*, 709 F.2d at 529 ("[O]nce the legislative-act test is met," *any* questioning about legislative

[22] For substantially the same reasons that the wiretap violated the Clause, the Department plainly violated the Clause when it directed a former aide to the Congressman to "to secretly record [her] telephone conversations with Congressman Renzi," and directed her to ask the Congressman questions about his legislative acts, including the chronology of Renzi's involvement with the land exchange legislation at issue and his motivations for supporting the legislation. *See* Doc. 458 at 2, 14-15, 20; Doc. 574 at 2. In effect, the Department deputized the former aide to seize this legislative information, and in so doing "question[ed]" the Congressman in violation of the Clause's absolute bar.

acts is barred by the Clause "because the privilege is absolute.") (emphasis added); *Brown*, 62 F.3d at 419 ("[A]ny probing of legislative acts is sufficient to trigger the immunity.") (emphasis in original omitted).

Second, the district court relied on the fact that even if the wiretap implicated Renzi's testimonial privilege, the interception was subject to "prior judicial oversight." Doc. 458 at 11. This is true, but does not make the Wiretap Order valid. While the gate-keeping role of a supervising judge in the abstract might — indeed should — help avoid constitutional violations by a wiretap order, it plainly did not do so here.[23]

Third, the district court relied on the fact that the tapped phone was registered to Renzi's family insurance business, and not to Renzi's House office. Doc. 458 at 10-11. But the name in which a phone happens to be registered is irrelevant to an analysis of whether the words spoken into that phone constitute legislate activities. It is a fact of which the Court may take judicial notice that virtually all Members of Congress use cell phones and

---

[23] For example, the Magistrate Judge illogically assumed that as to the wiretap "it was highly unlikely that communications concerning legislative acts that had already been performed related to this investigation would be intercepted." Doc. 458 at 11. But that assumption made no sense, since the wiretap was in place during October and November 2006, well *after* the Resolution Copper Corporation legislation had been introduced by Renzi in 2005, *see* Southeast Arizona Land Exchange and Conservation Act of 2005, H.R. 2618, 109th Cong. (1st Sess. 2005).

other wireless devices to an extraordinary degree to conduct legislative business. Members are almost constantly on the move – attending committee hearings and markups, debating and voting on the floor, attending meetings away from Capitol Hill, and traveling to and within their districts. Cell phones enable them to stay connected to their aides and fellow legislators. Some Members use House-issued cell phones for this purpose, others use personal cell phones, and still others use both. And indeed, the Department was aware 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. *See* Doc. 89 at 4. The Department was further aware of the likelihood that Congressman Renzi used his cell phone to conduct legislative activities as shown by, among other things, the fact that the Wiretap Order and Memo specifically contemplated the monitoring and recording of legislative conversations. *See id*.; Doc. 90 at 3. The district court thus erred in suggesting that there is any less support for applying the Clause's testimonial privilege because Renzi's phone was registered in a corporate name.

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

Since the House lacks access to all that transpired before the grand jury, what follows is a non-exhaustive description, based on the pleadings, of the Speech or Debate violations before the grand jury. The Department's Speech or Debate violations before the grand jury occurred both with respect to witness testimony and with respect to documents.

1. Constitutionally Protected Testimony

The Department violated the Clause's non-disclosure and non-use components when it permitted testimony about the Congressman's legislative activities to be placed before the grand jury.

For example, Congressman Renzi's former Legislative Director appeared before the original grand jury. Doc. 86 at 27-32. Although the Constitution prohibited the prosecutors from questioning her about the Congressman's motives for his legislative activities, *Brewster*, 408 U.S. at 525, that is precisely what the prosecutors did. They solicited information from her about Congressman Renzi's motivation for including the particular property Renzi allegedly demanded be in the land exchange legislation. Among other things, the former Legislative Director testified that the Congressman's motive for suggesting the selected property was that it "had

conservation value." Doc. 86 at 28, and that the Congressman told his Chief of Staff in 2003 that they should "'get this land into conservation'" in connection with certain defense authorization legislation. *Id*. at 28 n.30 (internal citations omitted).

The former aide also testified about Congressman Renzi's introduction of the land exchange legislation in May 2005, *id*. at 31, and about draft legislation for a proposed land exchange for the Aries Group. For example, she testified that the rough draft of the Aries legislation did not include certain property as of April 8, 2005 and that Renzi's motive for seeking to include certain property in the draft legislation was "'that it would be valuable to protect Fort Huachuca, to retire the farming for water conservation.'" *Id*. at 30 (citation omitted).

In addition, one of Congressman Renzi's former Chiefs of Staff testified about her knowledge of land exchange legislation, about an internal office email she sent on Renzi's behalf requesting "'the draft language on" the land exchange legislation, and about her specific knowledge of that legislation. *Id*. at 32 (citation omitted).

And another of Renzi's former Chiefs of Staff 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 then-Congressmen Kolbe and Renzi "to help make the San Pedro river a national conservation area." *Id*. at 32-33;

- the Congressman's motivation for asking that Congressman Kolbe introduce certain land exchange legislation, while Congressman Renzi introduced different, related land exchange legislation. *Id*. at 34; and

- the Arizona's Senators' positions on the several proposed land exchange legislation options at the time. *Id*.

All of this testimony clearly violated the Speech or Debate Clause.

2. Constitutionally Protected Documents

The Department violated the Clause's non-use component when it introduced in the grand jury internal House emails and other documents taken from the Congressman's office that discussed proposed legislation. The prosecutors presented to the original grand jury significant numbers of internal House emails and other records from Congressman Renzi's office discussing or directly relating to proposed legislative land exchanges. *See* Doc. 86 at 29-32. 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) draft statements written for Congressman Renzi regarding a piece of legislation,

id. at 12; (3) revisions to land exchange legislation, *id*.; (4) "a congressional file regarding one of the legislative land exchanges at issue" here, *id*.; and (5) an email from Renzi's Legislative Director to then-Congressman Kolbe's Chief of Staff 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.

These records and testimony all concerned Congressman Renzi's legislative activities, and all were absolutely protected as to the Congressman. And all of this information was obtained in the investigation and then elicited before, or presented to, the original grand jury by the Department without Congressman Renzi's knowledge and unquestionably without any waiver by him of his privilege. *See, e.g.*, *Helstoski*, 442 U.S. at 491. Accordingly, the Department's use of such testimony and records blatantly violated the Clause.[24]

[24] The same thing is necessarily true of documents obtained by the Department from sources outside of Congress which reflect the Congressman's legislative activities, including his motivations for legislative acts. *See, e.g.*, Grand Jury Exhibit 29 ("'Mr. Renzi told . . . 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.'"); *see also* Exs. 33; 45 and 96. Non-use means non-use, regardless of the source of evidence.

IV. To Remedy the Department's Rampant Constitutional Violations, the Wiretap Results Should Be Suppressed, and the Tainted Counts of the Indictment Should Be Dismissed, Without Prejudice.

A. Suppression of All Evidence Gathered Through or as a Result of the Illegal Wiretap is Warranted.

On remand, this Court should instruct the district court on Speech or Debate grounds to suppress both the contents of and the evidentiary fruits secured as a direct or indirect result of the wiretap.

As an initial matter, we note that the district court's order suppressing the contents of the wiretap on the ground of the Department's violations of the attorney-client privilege does not moot the Speech or Debate issues in this interlocutory appeal.[25] The Speech or Debate issues presented in the appeal are not limited to whether the wiretap's contents must be suppressed, in at least three respects. First, the Speech or Debate issues implicate the

---

[25] As noted above, the district court found that the Department committed serious misconduct by improperly recording, reviewing, and maintaining calls protected by the attorney-client privilege. Doc. 696 at 6-8. Worse still in this regard, the Department, as noted by the court below, "failed in its duty of candor to the Supervising Court." *Id.* at 23. Because the Department seized attorney-client privileged evidence beyond what was authorized, the district court found that the privileged communications were unlawfully intercepted in violation of Renzi's Fourth Amendment rights and should be suppressed. *Id.* Further, the district court found that the Department had committed "unreasonable violation[s] of Title III and the Fourth Amendment," and that "suppression of the entire Title III intercept is warranted as a sanction" for its misconduct and misrepresentations. *Id.*

question of whether suppression of both the contents *and* fruits of the wiretap is warranted, whereas only the contents of the tap are currently suppressed under the district court's order concerning the attorney-client privilege violations. Second, the Speech or Debate issues implicate the question of whether the Department's constitutional violations warrant dismissal of some or all of the SSI. Third, because under 18 U.S.C. § 3731 the Department may seek interlocutory pre-trial review by this Court of a suppression order, the suppression order concerning the attorney-client issues could, on this Court's review, be reversed (though it should not be).

This Court should on Speech or Debate grounds require the suppression of the entire wire as well as its fruits to deter the Department from violating the Constitution in future investigations involving Members of Congress. Without question, the Department's unconstitutional execution of the wiretap in violation of the Clause independently warrants such suppression. The statute authorizes the "suppress[ion of] the contents of any wire or oral communication intercepted" if "the communication was unlawfully intercepted." 18 U.S.C. § 2518(10)(a)(i). When the order on which an interception is based violates the Constitution, a "communication [i]s unlawfully intercepted" for purposes of the wiretap statute. *See Giordano*, 416 U.S. at 524-25. This rule applies with equal force where it is

the Speech or Debate Clause that has been violated. *See Gillock*, 445 U.S. at 360. The statute governing wiretaps makes clear that when communications have been unlawfully intercepted, both the contents of those communications and "the fruits" must be suppressed. *United States v. Swindall*, 971 F.2d 1531, 1549 (11th Cir. 1992). As established above, the Wiretap Order and the Department's execution of it contravened the Clause. Accordingly, the Department's pervasive Speech or Debate violations warrant suppression of the wiretap and its fruits.[26]

B. The Case Should be Remanded with Instructions for the District Court to Dismiss Counts 1-27 and Count 47 of the Second Superseding Indictment.

"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

---

[26] The Department also violated Title III by failing to minimize non-pertinent conversations, further justifying suppression. Just as evidence recorded in violation of the Constitution must be suppressed, "[w]iretap evidence obtained in violation of [Title III] may not be used at a criminal trial . . . ." *United States v. Staffeldt*, 451 F.3d 578, 580 (9th Cir. 2006). Title III only permits the Department to intercept conversations concerning the crimes specifically enumerated at 18 U.S.C. § 2516. *See, e.g., United States v. Simels*, No. 08-640, 2009 WL 4730232, at *5 (E.D.N.Y. Dec. 4, 2009). The Department failed to minimize not *only* privileged conversations, but also non-pertinent conversations — such as, for example, Renzi's conference call with the Republican leadership. Such conversations were "non-pertinent" to the extortion-related allegations and should have for that reason as well been minimized, but they were not. Suppression is the appropriate remedy for such violations. *See id.* at *4-5.

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"); *United States v. Durenburger*, No. 3-93-65, 1993 WL 738477, at *4 (D. Minn. Dec. 3, 1993). And, as a number of circuits have held, challenges to the indictment are appropriate where a Member's Speech or Debate privilege has been pervasively violated before the grand jury. While this Circuit has yet to address this issue, the Third, Eleventh, and D.C. Circuits have all unequivocally held a court may look behind the face of an indictment when it appears that the Speech or Debate Clause has been violated. No circuit has held otherwise, and this court should adopt the other circuits' approach, which is consistent with the Clause's purposes.[27]

In *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 for allegedly "acting with others to solicit and obtain bribes from aliens in return for introducing private legislation on their

[27] The Second and Fourth Circuits have noted but not reached the issue. *See United States v. Myers*, 635 F.2d 932, 941 n.10 (2d Cir. 1980); *United States v. Jefferson*, No. 08-4215, 2008 WL 4868411, at *11 n.8 (4th Cir. Nov. 12, 2008).

behalf." *Helstoski*, 635 F.2d at 202. The court considered "whether an indictment based upon evidence protected by the speech or debate clause is valid," *id*. at 201, and concluding that it was not, held that dismissal of the indictment was proper, since there had been "wholesale violation[s] of the speech or debate clause before a grand jury," *id.* at 205.

The Third Circuit noted 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 Supreme Court has "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). Because in *Helstoski* "the evidence of past legislative acts that the [Department] introduced against the congressman . . . directly contravened the speech or debate clause," the Third Circuit concluded that since "the guarantees of the clause are vital to our system of government and should be treated with the sensitivity that such important values require . . . [w]e need not do more here than take the language of the Constitution at face value to find that violations did occur at the grand jury stage." *Id.* at 204 (citing *Helstoski*, 442 U.S. at 506) (internal quotation marks omitted). Where prosecutors introduce protected legislative activity material in the grand jury, they have engaged in prohibited "question[ing]"

of a Member of the House or Senate in a "place" other than Congress, s*ee* U.S. Const. art. I, § 6, cl. 1; *see also Swindall*, 971 F.2d at 1547, and the violation has taken place *in* the grand jury.

Speech or Debate violations before a grand jury are further distinguished from other constitutional contexts in which the Court has hesitated to look past the face of the indictment:

> [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. *** 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.*

Helstoski, 635 F.2d at 205 (emphasis added).[28] For these reasons, when a non-trivial amount of Speech or Debate material is presented to the grand

[28] A state within this Circuit offers perhaps the most vivid recent example (though outside the Speech or Debate context) of the profound effect of an indictment on a Member of Congress. After Senator Stevens from Alaska was indicted and convicted, he was defeated in his 2008 re-election bid, and

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 dismissal of the offending charges of the indictment is warranted.

Here, although the House has not been provided with access to the grand jury exhibits, there can be little doubt that, as demonstrated in § IV(A), *supra*, there were *numerous, significant, and sustained* violations of the Speech or Debate Clause in the Department's execution of the wiretap and its assembly of the evidence before the original grand jury leading to the original indictment. Moreover, those violations were not cured when the Department convened a second grand jury. Counts 1-27, as well as those portions of Count 47 of the SSI — concerning the allegations that Renzi extorted two companies in connection with property that he proposed be included in the land swap legislation that they sought — are the subject of evidence plainly obtained in violation of the Clause.[29] On those counts, the

---

though his conviction was overturned based on the Department's discovery misconduct, *see* Order at 1, *United States v. Stevens*, No. 08-231 (D.D.C. Apr. 7, 2009), Appendix at Exhibit D, the damage had been done.

[29] Count 47 of the SSI contains allegations previously contained in Count 42 of the superseding indictment, which the Department partially renumbered in generating the SSI, and concerns in part the allegations that underlie Counts 1-27. The House takes no position as to whether there is a basis for

first grand jury received substantial evidence of indisputably legislative acts 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.

Further, the Department's presentation to the second grand jury — which issued the SSI — was likewise permeated with evidence regarding Congressman Renzi's development of the land-exchange legislation that tainted its presentation to the first grand jury. Although the Department did not present the testimony of Congressman Renzi's aides to the second grand jury, the Department introduced the same grand jury exhibits, with the exception of eleven exhibits. *See* Appellant's Br. at 18. In so doing, the Department by all appearances presented the second grand jury with numerous documents describing Members' legislative motivation. *See id*. at 18-19. The documents the Department presented to the second grand jury included numerous emails to Renzi's aides discussing legislation. *See id.* at

---

dismissal of the remaining counts, which concern principally the allegations regarding insurance fraud. *Cf.* Doc. 387 at 34 (the Magistrate Judge stating that "if the Court were to accept Renzi's assertions, . . . the only counts implicated by such a ruling would be the land fraud counts").

19. Moreover, the exhibits presented to the second grand jury included correspondence between Renzi's aides and other Members' offices discussing Congressman Renzi's development of the proposed bills. *Id.* In light of the substance of the public corruption counts against Renzi, and the disturbingly narrow view embraced by the Department and the district court of the Clause's application, there is no reason to believe that a constitutionally sufficient cure was in place for the grand jurors on the second grand jury. Accordingly, those counts — 1 through 27 and 47 of the currently-operative SSI — should be dismissed. *See Swindall*, 971 F.3d at 1549; *Helstoski*, 635 F.2d at 205.[30]

Not only will dismissal (at least partially) remedy the Department's Speech or Debate violations, it will send the appropriate deterrent signal in this closely watched case of public importance. The need for, and public interest in, deterrence is particularly evident here. Along with the

[30] Even if, contrary to the precedents outlined above, the Court were unwilling to look behind the indictment as a constitutional matter, it can and should use its well-established supervisory power to dismiss the offending counts of the indictment as a result of the unsavory conduct by the Department's prosecutors before the grand jury. *See United States v. Zielezinski*, 740 F.2d 727, 729 (9th Cir. 1984). "[T]here 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 (internal quotations omitted). All three factors are easily met here.

Department's substantial Speech or Debate violations, the Department "failed in its duty of candor to the Supervising Court." Doc. 696 at 23. Further, the Department not only committed misconduct and violated the Fourth Amendment by seizing attorney-client communications to which it was not entitled, *id.*, but also may well have violated applicable ethics rules.[31] Absent meaningful sanctions, the Department will have little incentive to avoid such misconduct in the future.

While it is clear that partial dismissal of the indictment is warranted, such dismissal should be *without* prejudice. If the Department subsequently wishes to return charges against Congressman Renzi related to the events described in Counts 1-27 and Count 47, it may do so. But it must do so by

[31] The conduct of the Department's prosecutors also gives rise to substantial concern that they violated applicable ethics rules. 28 U.S.C. § 530B provides that "the Government shall be subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney's duties." Both the Arizona and District of Columbia Rules of Professional Conduct provide in their respective Rules 4.4 that an attorney shall not use methods of obtaining evidence that violate the legal rights of an individual. But as set forth above, the methods used by the prosecutors to intercept Renzi's phone conversations violated Renzi's rights. Just as a lawyer may not induce an unrepresented person to reveal attorney-client privileged communications, *see, e.g., Union Pacific R. Co. v. Mower*, 219 F.3d 1069, 1072 n.2 (9th Cir. 2000), a prosecutor likewise may not entice a current or former legislative aide to reveal Speech or Debate-privileged matters without the knowing consent of the Member who holds the privilege.

presenting to an untainted grand jury sufficient evidence that excludes reference to any privileged documents or any protected legislative activities, and does not rely, directly or indirectly, on the evidence secured as a direct or indirect result of the unconstitutional wiretap.

CONCLUSION

The Speech or Debate rulings of the district court should be reversed. On remand, the Court should order that the district court suppress on Speech or Debate grounds all evidence gathered through or as a direct or indirect result of the wiretap, and should order that the district court dismiss, without prejudice, Counts 1-27 and 47 of the SSI.

Respectfully submitted,

s/ Irvin B. Nathan
IRVIN B. NATHAN
General Counsel
KERRY W. KIRCHER
Deputy General Counsel
CHRISTINE M. DAVENPORT
Assistant Counsel
JOHN D. FILAMOR
Assistant Counsel
KATHERINE E. McCARRON
Assistant Counsel
ARIEL B. WALDMAN
Assistant Counsel

Office of General Counsel
U.S. House of Representatives

Counsel for *Amicus Curiae* the
Bipartisan Legal Advisory Group of
the U.S. House of Representatives

June 24, 2010

CERTIFICATE OF COMPLIANCE

The House has filed concurrently with this brief a motion for leave to file a brief *amicus curiae* containing no more than 14,000 words. If that motion is granted, this brief will comply with the Court's Order granting the motion as well as with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) but including the Abbreviations Key.

This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

s/ Ariel B. Waldman

DATED: June 24, 2010

CERTIFICATE OF SERVICE

I certify that on June 24, 2010, I served one copy of the foregoing *Brief Amicus Curiae of the Bipartisan Legal Advisory Group of the United States House of Representatives* via the Ninth Circuit's ECF system and thereby served all parties in this case.

s/ Ariel B. Waldman

APPENDIX INDEX

EXHIBIT A

Decisions of the District of Columbia Circuit Since 1980
Addressing the Speech or Debate Clause

1. *United States v. Carney*, 665 F.2d 1064 (D.C. Cir. 1981), *overruled by United States v. Rostenkowski*, 59 F.3d 1291 (1995);

2. *Paisley v. CIA*, 712 F.2d 686 (D.C. Cir. 1983), *vacated in part*, 724 F.2d 201 (1984);

3. *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984);

4. *S. Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984);

5. *McSurely v. McClellan*, 753 F.2d 88 (D.C. Cir. 1985);

6. *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), *abrogated by Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1 (2006);

7. *Chastain v. Sundquist*, 833 F.2d 311 (D.C. Cir. 1987);

8. *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856 (D.C. Cir. 1988);

9. *United States v. Rose*, 28 F.3d 181 (D.C. Cir. 1994);

10. *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995);

11. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995);

12. *United States v. Levine*, No. 95-3038, 1995 WL 761834 (D.C. Cir. Dec. 4, 1995);

13. *Schreibman v. Holmes*, No. 98-5136, 1999 WL 963070 (D.C. Cir. Sept. 13, 1999);

14. *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1 (D.C. Cir. 2006);

15. *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007);

16. *In re Grand Jury Subpoenas*, 571 F.3d 1200 (D.C. Cir. 2009).

EXHIBIT B

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

---

*. 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.

EXHIBIT C

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Alexandria Division

UNITED STATES OF AMERICA

V.

Case Number: 1:07cr00209-001

USM Number: 72121-083

William J. Jefferson,
Defendant.

Defendant's Attorney: Amy Jackson, Esq.
Robert Trout, Esq. and Gloria Solomon, Esq.

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty on Counts 1, 2, 3, 4, 6, 7, 10, 12, 13, 14, and 16 of the Indictment.

The defendant is adjudicated guilty of these offenses:

Title and Section	Nature of Offense	Offense Class	Offense Ended	Count
18 U.S.C. 371	Conspiracy to Solicit Bribes by a Public Official, Deprive Citizens of Honest Services by Wire Fraud, and Violate the Foreign Corrupt Practices Act	Felony	08/31/2005	1
18 U.S.C. 371	Conspiracy to Solicit Bribes by a Public Official and Deprive Citizens of Honest Services by Wire Fraud	Felony	03/31/2005	2
18 U.S.C. 201(b)(2)(A) and (2)	Solicitation of Bribes by a Public Official	Felony	08/31/2005	3-4
18 U.S.C. 1343, 1346 and (2)	Scheme to Deprive Citizens of Honest Services by Wire Fraud	Felony	05/15/2005	6
18 U.S.C. 1343, 1346 and (2)	Scheme to Deprive Citizens of Honest Services by Wire Fraud	Felony	06/23/2005	7
18 U.S.C. 1343, 1346 and (2)	Scheme to Deprive Citizens of Honest Services by Wire Fraud	Felony	07/06/2005	10
18 U.S.C. 1957 and 2	Money Laundering	Felony	06/24/2005	12
18 U.S.C. 1957 and 2	Money Laundering	Felony	06/27/2005	13
18 U.S.C. 1957 and 2	Money Laundering	Felony	07/26/2005	14
18 U.S.C. 1962(c)	Racketeer Influenced Corrupt Organization, Pattern of Racketeering Activity (RICO)	Felony	08/31/2005	16

The defendant was found not guilty on Counts 5, 8, 9, 11 and 15 of the Indictment.

As pronounced on November 13, 2009, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to 18 U.S.C. 3553 and the Sentencing Reform Act of 1984.

It is ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Signed this 13th day of November 2009.

/s/
T. S. Ellis, III
United States District Judge

Defendant's Name: William J. Jefferson
Case Number: 1:07cr00209-001

IMPRISONMENT

The defendant is hereby committed into the custody of the United States Bureau of Prisons to be imprisoned for a total term of: SIXTY (60) Months as to Counts 1 and 2, ONE HUNDRED FIFTY-SIX (156) Months as to Counts 3, 4, 6, 7, 10 and 16, and ONE HUNDRED TWENTY (120) Months as to Counts 12, 13 and 14, all of these terms to run concurrently with one another, for a total custody sentence of ONE HUNDRED FIFTY-SIX (156) Months, with credit for time already served in connection with the instant offenses, pursuant to 18 U.S.C. 3585(b), as computed by the Bureau of Prisons.

The Court makes the following recommendation to the Bureau of Prisons:

That defendant be designated to serve his sentence at a camp that is near New Orleans, LA, so that he may remain close to his family.

The Court stays the execution of the defendant's sentence pending appeal.

The defendant shall voluntarily surrender to the United States Marshal's Office or the designated facility as directed by the Probation Officer and the Bureau of Prisons.

RETURN

I have executed this judgment as follows:_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

Defendant's Name: William J. Jefferson
Case Number: 1:07cr00209-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: Three (3) Years as to each of Counts 1, 2, 3, 4, 6, 7, 10, 12, 13, 14, and 16, these terms to run concurrently with one another.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess or use a controlled substance.

The mandatory drug testing condition is suspended, based on the court's determination that the defendant presents a low risk of future substance abuse.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any special conditions of supervision.

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days before any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or as an agent of a law enforcement agency without the permission of the Court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant's Name: **William J. Jefferson**
Case Number: **1:07cr00209-001**

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, pursuant to this Judgment, the defendant shall also comply with the following additional special conditions:

1) The defendant must provide the Probation Officer with access to all requested financial information.

2) The Court waives the mandatory drug testing requirement. However, this does not preclude the Probation Officer from administering drug tests as he/she deems appropriate.

Defendant's Name: **William J. Jefferson**
Case Number: **1:07cr00209-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

Count	Assessment	Fine	Restitution
1	$100.00	$0.00	$0.0
2	$100.00	$0.00	$0.0
3	$100.00	$0.00	$0.0
4	$100.00	$0.00	$0.0
6	$100.00	$0.00	$0.0
7	$100.00	$0.00	$0.0
10	$100.00	$0.00	$0.0
12	$100.00	$0.00	$0.0
13	$100.00	$0.00	$0.0
14	$100.00	$0.00	$0.0
16	$100.00	$0.00	$0.0
TOTALS:	**$1,100.00**	**$0.00**	**$0.0**

The Court waives the cost of prosecution, incarceration, and supervised release.
Order of Forfeiture entered November 13, 2009.

Defendant's Name: **William J. Jefferson**
Case Number: **1:07cr00209-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

The special assessment shall be due in full immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment (2) restitution principal (3) restitution interest (4) fine principal (5) fine interest (6) community restitution (7) penalties and (8) costs, including cost of prosecution and court costs.

Nothing in the court's order shall prohibit the collection of any judgment or fine by the United States.

AO 245B (Rev. 12/03)(VAED rev. 2) Judgment in a Criminal Case
Statement of Reasons - Page 1

Case Number: 1:07cr00209-001
Defendant's Name: William J. Jefferson

STATEMENT OF REASONS

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A __ The Court adopts the presentence investigation report without change.

B X The Court adopts the presentence investigation report with the following changes.
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.) (Use page 4 if necessary.)

1 X Chapter Two of the U.S.S.G. Manual determinations by court (including changes to base offense level or specific offense characteristics): Court declined to apply a 2-level enhancement to defendant's offense level pursuant to U.S.S.G. §2C1.1(b)(4)(A), as originally recommended by the probation officer.

2 __ Chapter Three of the U.S.S.G. Manual adjustment determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance or responsibility):

3 __ Chapter Four of the U.S.S.G. Manual determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4 __ Additional Comments or Findings (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions. Specify

C __ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P.32.**

II COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)

A X No count of conviction carries a mandatory minimum sentence.

B __ Mandatory minimum sentence imposed.

C __ One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on

__ findings of fact in this case

__ substantial assistance (18 U.S.C. § 3553(e))

__ the statutory safety valve (18 U.S.C. § 3553(f))

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):

Total Offense Level: 39
Criminal History Category I
Imprisonment Range: 262 to 327 months; Cts. 1 and 2: 60 months; Cts. 3 and 4: 180 months; Cts. 12-14: 120 months; Ct. 16: 240 months.
Supervised Release Range: 2 to 3 years as to Cts. 1-4, 12-14 & 16; 3 to 5 years as to Cts 6, 7 & 10.
Fine Range: $25,000.00 to $5,647,841.64 as to Cts. 1, 2, 6, 7, 10 & 16; $250,000.00 or not more than 3 times the monetary equivalent of the thing of value (whichever is greater) as to Cts. 3 & 4; $250,000.00 or twice the amount of the criminally derived property involved as to Cts. 12 & 14.

X Fine waived or below the guideline range because of inability to pay.

AO 245B (Rev. 12/03)(VAED rev. 2) Judgment in a Criminal Case
Statement of Reasons - Page 2

Case Number: **1:07cr00209-001**
Defendant's Name: **William J. Jefferson**

STATEMENT OF REASONS

IV ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one.)

A _ The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.
B _ The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons. (Use page 4 if necessary.)

C _ The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual. (Also complete Section V.)
D X The court imposed a sentence outside the advisory sentencing guideline system. (Also complete Section VI.)

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (If applicable.)

A **The sentence imposed departs (Check only one.):**
_ below the advisory guideline range
_ above the advisory guideline range

B **Departure based on (Check all that apply.):**

1 **Plea Agreement (Check all that apply and check reason(s) below.):**
_ 5K1.1 plea agreement based on the defendant's substantial assistance
_ 5K3.1 plea agreement based on Early Disposition or "Fast-track" Program
_ binding plea agreement for departure accepted by the court
_ plea agreement for departure, which the court finds to be reasonable
_ plea agreement that states that the government will not oppose a defense departure motion

2 **Motion Not Addressed in a Plea Agreement (Check all that apply and check reason(s) below.):**
_ 5K1.1 government motion based on the defendant's substantial assistance
_ 5K1.1 government motion based on the defendant's substantial assistance
_ government motion for departure
_ defense motion for departure to which the government has not objected
_ defense motion for departure to which the government has objected

3 **Other**
_ Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

C **Reason(s) for Departure (Check all that apply other than 5K1.1 or 5K3.1.)**

_ 4A1.3 Criminal History Adequacy
_ 5H1.1 Age
_ 5H1.2 Education and Vocational Skills
_ 5H1.3 Mental and Emotional Condition
_ 5H1.4 Physical Condition
_ 5H1.5 Employment Record
_ 5H1.6 Family Ties and Responsibilities
_ 5H1.11 Military Record, Charitable Services, Good Works
_ 5K2.0 Aggravating or Mitigating Circumstances
_ 5K2.1 Death
_ 5K2.2 Physical Injury
_ 5K2.3 Extreme Psychological Injury
_ 5K2.4 Abduction or Unlawful Restraint
_ 5K2.5. Property Damage or Loss
_ 5K2.6 Weapons and Dangerous Instruments
_ 5K2.7 Disruption of Government Function
_ 5K2.8 Extreme Conduct
_ 5K2.9 Criminal Purpose
_ 5K2.10 Victim's Conduct
_ 5K2.11 Lesser Harm
_ 5K2.12 Coercion and Duress
_ 5K2.13 Diminished Capacity
_ 5K2.14 Public Welfare
_ 5K2.16 Voluntary Disclosure of Offense
_ 5K2.17 High-Capacity Semiautomatic Firearm
_ 5K2.18 Violent Street Gang
_ 5K2.20 Aberrant Behavior
_ 5K2.21 Dismissed and Uncharged Conduct
_ 5K2.22 Age or Health of Sex Offenders
_ 5K2.23 Discharged Terms of Imprisonment
_ 5K3.1 Early Disposition, "fast-track" Program
_ Other guideline basis (e.g., 2B1.1 commentary

D **Explain the facts justifying the departure. (Use page 4 if necessary.)**

Case Number: 1:07cr00209-001
Defendant's Name: William J. Jefferson

STATEMENT OF REASONS

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM (Check all that apply.)

A **The sentence imposed departs (Check only one.):**
- X below the advisory guideline range
- _ above the advisory guideline range

B **Sentence imposed pursuant to (Check all that apply.):**

1 **Plea Agreement (Check all that apply and check reason(s) below.):**
- _ binding plea agreement for a sentence outside the advisory guideline system accepted by the court
- _ plea agreement for a sentence outside the advisory guideline system, which the court finds to be reasonable
- _ plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the advisory guideline system

2 **Motion Not Addressed in a Plea Agreement (Check all that apply and check reason(s) below.):**
- _ government motion for a sentence outside of the advisory guideline system
- _ defense motion for a sentence outside of the advisory guideline system to which the government did not object
- _ defense motion for a sentence outside of the advisory guideline system to which the government objected

3 **Other**
- X Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

C **Reason(s) for Sentence Outside the Advisory Guideline System (Check all that apply.)**
- X the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
- X to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C § 3553(a)(2)(A))
- X affords adequate deterrence to criminal conduct (18 U.S.C § 3553(a)(2)(B))
- X protects the public from further crimes of the defendant (18 U.S.C § 3553(a)(2)(C))
- _ provides the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C § 3553(a)(2)(D))
- X avoids unwarranted sentence disparities (18 U.S.C § 3553(a)(6))
- _ addresses the need to provide restitution to victims to provide restitution to any victims of the offense (18 U.S.C § 3553(a)(7))

D **Explain the facts justifying a sentence outside the advisory guideline system. (Use page 4 if necessary.)**

AO 245B (Rev. 12/03)(VAED rev. 2) Judgment in a Criminal Case
Statement of Reasons - Page 4

Case Number: 1:07cr00209-001
Defendant's Name: William J. Jefferson

STATEMENT OF REASONS

VII COURT DETERMINATIONS OF RESTITUTION

A [X] Restitution is not applicable.

B Total Amount of Restitution:

C Restitution not ordered (Check only one.):

1 [ ] For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

2 [ ] For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing precess under 18 U.S.C. § 3663A(c)(3)(B).

3 [ ] For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

4 [ ] Restitution is not ordered for other reasons:

C [ ] Partial restitution is ordered under 18 U.S.C. § 3663(c) for these reasons:

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable.)

The sentence is imposed for the reasons stated from the Bench, pursuant to 18 U.S.C. 3553, with the advisory guidelines being one factor the Court took into account in the Section 3553 analysis.

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

Date of Imposition of Judgment: November 13, 2009

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

THEODORE F. STEVENS,

Defendant.

No. 08-cr-231 (EGS)

ORDER

At the direction of the Attorney General, on April 1, 2009, a newly-appointed team of prosecutors filed a Motion to Set Aside the Verdict and Dismiss the Indictment, citing the failure to produce notes taken by prosecutors in an April 15, 2008 interview of Bill Allen. At a hearing on April 7, 2009, the government conceded that these notes contained information that the government was constitutionally required to provide to the defense for use at trial. Despite repeated defense requests and the Court's repeated admonitions to provide exculpatory information, the notes were not produced to the defense until March 25-26, 2009, nearly five months after trial. The Court will grant the Motion.

There was never a judgment of conviction in this case. The jury's verdict is being set aside and has no legal effect.

The government's Motion is GRANTED. The verdict is hereby set aside and the indictment is hereby dismissed with prejudice. See Fed. R. Crim. P. 48(a).

IT IS SO ORDERED.

April 7, 2009

Emmet G. Sullivan
United States District Judge