UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	)	
	)	**No. 2:15-cr-155**
v.	)	**Hon. William H. Walls**
	)	
ROBERT MENENDEZ and SALOMON MELGEN,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' CONSOLIDATED OPPOSITION TO DEFENDANT MENENDEZ'S MOTIONS TO DISMISS PREDICATED ON AN ASSERTION OF THE SPEECH OR DEBATE CLAUSE
(Mot. Nos. 1, 2, 4, & 13; Dkt. Nos. 48, 49, 51, & 60)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

TABLE OF EXHIBITS

INTRODUCTION

The indictment charges that in exchange for numerous things of value, defendant Robert Menendez provided defendant Salomon Melgen with official acts falling into three categories. The first involves defendant Menendez's assistance on behalf of the tourist and student visas of defendant Melgen's young, foreign girlfriends. The second involves defendant Menendez advocating to HHS officials on behalf of defendant Melgen in his $8.9 million Medicare billing dispute. And the third involves defendant Menendez pressuring Executive Branch officials to help enforce defendant Melgen's contract with the Government of the Dominican Republic. All three categories describe defendant Menendez leveraging the power of his public office—including the substantial time and resources of 13 staffers—to influence the Executive Branch and advance the personal and financial interests of a man who lives over 1,000 miles from the state defendant Menendez was elected to represent. Defendant Menendez contends that the second and third categories of official acts are protected by the Speech or Debate Clause, and moves for dismissal of the indictment. In doing so, he asserts legal theories that have been firmly rejected and advances an interpretation of the Speech or Debate Clause with no limiting principle. Simply put, the Speech or Debate Clause does not provide United States Senators with a constitutional right to accept bribes, nor does it provide constitutional protection for attempting to influence the Executive Branch for the benefit of a wealthy benefactor. Defendant Menendez's errands on behalf of defendant Melgen are not legislative activity, and he cannot hide his corrupt conduct behind the Constitution that bestows on him the very power that he abused. Defendant Menendez's motions to dismiss based on assertions of the Speech or Debate Clause should be denied.

I. THE LIMITS OF THE SPEECH OR DEBATE CLAUSE ARE WELL DEFINED.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1. The "central role" of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," but it "also prevents disruption of Congressional operations by preventing distractions or interference with ongoing activity." *In re Grand Jury*, 821 F.2d 946, 952 (3d Cir. 1987) (internal quotation marks omitted). The Clause is not, however, a blanket protection shielding members of the Legislative Branch from any Executive Branch investigation. As the Supreme Court has explained,

> We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to "relate" to the legislative process. Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility.

United States v. Brewster, 408 U.S 501, 516 (1972).

Balancing separation-of-powers concerns with the need to ensure that legislators are not above the laws they pass, courts have limited the Clause only to "speech or debate in either House" and other acts that fall squarely within the "legislative sphere." *Gravel v. United States*, 408 U.S. 606, 624-25 (1972). Accordingly, the key to whether the Speech or Debate Clause applies is whether the acts in question constitute "legislative activity." *See id.* at 625. "A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it." *Brewster*, 408 U.S. at 512. This does not include all activities that legislators conduct—"[t]he Speech or Debate Clause does not immunize every official act performed by a member of

Congress." *United States v. McDade*, 28 F.3d 283, 295 (3d Cir. 1994). Rather, the Clause only protects 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.

More specifically, because the Speech or Debate Clause is rooted in separation-of-powers principles, its protection does not extend to Legislative attempts to influence Executive actions, as those actions are the domain of the Executive and not the Legislative Branch of government. *See United States v. Johnson*, 383 U.S. 169, 172 (1966) ("No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice [to dismiss pending indictments], that is in no wise related to the due functioning of the legislative process."). As the Supreme Court has explained,

> That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity.

Id.; *see also Hutchinson v. Proxmire*, 443 U.S. 111, 121 n.10 (1979) ("Regardless of whether and to what extent the Speech or Debate Clause may protect [legislators'] calls to federal agencies seeking information, it does not protect attempts to influence the conduct of executive agencies."); *Doe v. McMillan*, 412 U.S. 306, 313 (1973) (reaffirming that "protected legislative activity" does not encompass circumstances in which "Members of Congress . . . [are] in touch with and seek to influence the Executive Branch of Government" (internal quotation marks omitted)). In fact, the Third Circuit noted that "[t]he Supreme Court has repeatedly stated that the Speech or Debate

Clause does not apply to efforts by members of Congress to influence the Executive Branch." *McDade*, 28 F.3d at 299.

Importantly, the Speech or Debate Clause protects only historical, or completed, legislative acts. It does not protect future legislative acts—whether promised, threatened, or contemplated. *See, e.g.*, *United States v. Renzi*, 651 F.3d 1012, 1022 (9th Cir. 2011) ("Completed 'legislative acts' are protected; promises of future acts are not."). Although core legislative functions like introducing or voting on a bill are protected Speech or Debate activity, the promise to perform a core legislative function in the future is unprotected. *See Brewster*, 408 U.S. at 528-29 (holding that a Member of Congress may be prosecuted for accepting a bribe in exchange for a promised vote on legislation). Therefore, an act that is merely a precursor to a legislative act is not itself a legislative act. *See United States v. Helstoski*, 442 U.S. 477, 490 (1979) ("But it is clear from the language of the Clause that protection extends only to an act that has already been performed. A promise to deliver a speech, to vote, or to solicit other votes at some future date is not 'speech or debate.' Likewise, a *promise* to introduce a bill is not a legislative act." (emphasis in original)).

The Supreme Court has also declared that the Speech or Debate Clause does not extend to a legislator's casework, constituent services, or favors for campaign donors, including advocacy to the Executive Branch. *See Brewster*, 408 U.S. at 512 (explaining that the "wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress" do not constitute "the purely legislative activities protected by the Speech or Debate Clause" because they are "political in nature rather than legislative").

With this guidance from the Supreme Court, the Third Circuit has identified the following limited "spectrum" of activities protected by the Speech or Debate Clause:

> Activities at one end of this spectrum, such as committee hearings, are clearly protected by the Speech or Debate Clause. . . . Activities at the other end of the spectrum, such as routine casework for constituents, are just as clearly not protected. . . . Whether the Speech or Debate Clause shields forms of "oversight" falling between these extremes—for example, letters or other informal communications to Executive Branch officials from committee chairmen, ranking committee members, or other committee members—is less clear.

McDade, 28 F.3d at 300 (citations omitted). In this framework, legislative acts include "voting for a resolution . . . ; subpoenaing and seizing property and records for a committee hearing . . . ; preparing investigative reports . . . ; addressing a congressional committee . . . ; and, of course, speaking before the legislative body in session." *Youngblood v. DeWeese*, 352 F.3d 836, 840 (3d Cir. 2003) (citations omitted). By contrast, "political activities," or "acts that are 'casually or incidentally related to legislative affairs but not a part of the legislative process itself'" are not protected. *Id.* (quoting *Brewster*, 408 U.S. at 512, 528). The burden of establishing application of the Speech or Debate Clause falls on the individual claiming its protections. *In re Grand Jury (Robert Menendez)*, 608 F. App'x 99, 101 (3d Cir. 2015) ("[T]he burden of proof resides with the Member of Congress as the proponent of the privilege."); *see also Renzi*, 651 F.3d at 1030 ("[W]e think it incumbent on Renzi to bring to our attention those specific exhibits that cause him concern [regarding the Speech or Debate Clause].").

Defendant Menendez interprets *McDade*'s less clear middle category of conduct as enjoying the protection of the Speech or Debate Clause. *See* Dkt. No. 48-1 at 9. That, however, is not an interpretation supported by the language of the opinion. Indeed, the Third Circuit did not rule that conduct falling into this middle category was protected by the Speech or Debate Clause. Rather, the middle category is merely conduct that is neither manifestly legislative nor manifestly

non-legislative. *See McDade*, 28 F.3d at 300. Therefore, further inquiry is required to determine the nature of its content so that a court can accurately assess its legislative or non-legislative character. *In re Grand Jury (Robert Menendez)*, 608 F. App'x at 101; *Gov't of Virgin Islands v. Lee*, 775 F.2d 514, 517 (3d Cir. 1985) (holding that a court may inquire into whether an act was, "in fact, legislative in nature").

The Supreme Court has recognized that, naturally, some meetings and conversations will involve conduct that is protected by the Speech or Debate Clause and conduct that is not protected by the Speech or Debate Clause. The mixed nature of the conduct does not transform the unprotected activity into protected activity. Rather, in such occasions, the Supreme Court has endorsed the excising of protected statements from communications and meetings that contain unprotected statements. *See Helstoski*, 442 U.S. at 488 n.7 (1979) ("Nothing in our opinion, by any conceivable reading, prohibits excising references to legislative acts, so that the remainder of the evidence would be admissible. This is a familiar process in the admission of documentary evidence.").

In support of his contention that "Speech or Debate Clause immunity is broad," Dkt. No. 48-1 at 4, defendant Menendez asserts that "it is generally true that the Speech or Debate Clause forbids not only inquiry into acts that are manifestly legislative but also inquiry into acts that are *purportedly* legislative, *even to determine if they are legislative in fact*." Dkt. No. 48-1 at 6 (emphases in original) (quotation marks omitted). He further represents that "[b]ecause the Clause forbids inquiry into acts which are purportedly or apparently legislative, immunity attaches once a court concludes legislative activity was *apparently* being performed." Dkt. No. 48-1 at 7 (emphasis in original) (quotation marks omitted). Defendant Menendez borrows this language from *United States v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988), and *United States v. Dowdy*, 479

F.2d 213, 226 (4th Cir. 1973), to establish that so long as conduct is *purportedly* legislative, it enjoys the full protection of the Speech or Debate Clause. Indeed, in advancing his broad interpretation of the Speech or Debate Clause, defendant Menendez relies heavily on this point throughout his brief in an effort to push his conduct behind the Clause's protective shield. *See* Dkt. No. 48-1 at 6, 7, 9-12.

Defendant Menendez fails to advise the Court, however, that the Third Circuit rejected this contention thirty years ago in *Lee*, even though he relies on *Lee* elsewhere in his motions. Specifically, in *Lee*, the Third Circuit expressed that "to the extent that the *Dowdy* decision would bar inquiry into purportedly legislative acts for the purpose of determining whether the acts are, in fact, legislative, *we decline to follow it*." *Lee*, 775 F.2d at 524 (emphasis added). In so holding, the Third Circuit emphasized that "the cloak of immunity will not serve as a shield for non-legislative acts." *Id.* at 526; *see also In re Grand Jury (Robert Menendez)*, 608 F. App'x at 101 (observing that "[m]ere assertions that the Clause applies are insufficient").

Every act the indictment alleges defendant Menendez and his 13 staffers took for the benefit of defendant Melgen was designed and intended to influence the Executive Branch in defendant Melgen's favor. The Speech or Debate Clause does not protect defendant Menendez from its charges.

II. THE SPEECH OR DEBATE CLAUSE DOES NOT PROTECT DEFENDANT MENENDEZ FROM THE GRAND JURY'S INDICTMENT. (Mot. No. 1, Dkt. No. 48; Mot. No. 2, Dkt. No. 49.)

In his eagerness to dismiss the indictment, defendant Menendez has taken the position that all of his conduct consists of legislative acts, *see* Dkt. No. 48-1, while none of his conduct consists of official acts, *see* Dkt. No. 57-1. In his motion arguing that the indictment failed to allege an

official act, he acknowledges and emphasizes the principle he contests in his Speech or Debate motions. Specifically, in his official act motion, he says the following:

> A Senator's advocacy to Executive Branch officials with respect to how *those officials* decide matters within the Executive Branch simply does not concern any official responsibility the Senator holds as a Member of the Legislative Branch, and the "question, matter, cause, suit, proceeding or controversy" that are charged were never "pending" before the Senator and would never come before him in his "official capacity."

Dkt. No. 57-1 at 10 (emphasis in original) (quoting 18 U.S.C. § 201(a)(3)). In light of the Supreme Court's definition of "legislative act"—"an act generally done in Congress in relation to the business before it," *Brewster*, 408 U.S. at 512—defendant Menendez has conceded that the indictment charges only non-legislative conduct unprotected by the Speech or Debate Clause. For this reason alone, the Court should deny defendant Menendez's motions to dismiss alleging violations of the Speech or Debate Clause.

Defendant Menendez's attempts to influence Executive Branch officials on behalf of defendant Melgen's personal and financial interests are indeed not protected by the Speech or Debate Clause, and the indictment exclusively alleges conduct that is far outside the legislative sphere. The language of the indictment, which draws heavily from contemporaneous emails by defendant Menendez and his staff, establishes that at the time defendant Menendez was performing the charged acts, he and his staff fully understood that they were undertaken for one purpose: to assist defendant Melgen. Indeed, the indictment is replete with examples of defendant Menendez using the power of his Senate office to influence Executive Branch officials on behalf of defendant Melgen. In his briefs, defendant Menendez uses legislative buzz words in an effort to re-write history and characterize his pre-indictment conduct as core Speech or Debate activity. His post-indictment efforts to redefine his pre-indictment conduct, however, are unavailing.

There is no doubt that having served as a United States Senator since 2006, defendant Menendez has performed numerous acts protected by the Speech or Debate Clause, such as giving speeches from the Senate floor, introducing legislation, chairing subcommittee hearings, and voting for bills. Some of this protected legislative activity includes advocacy on behalf of defendant Melgen, such as chairing a Senate subcommittee hearing in which he raised defendant Melgen's contract dispute with the Dominican Republic. None of those protected legislative acts are included in the indictment. In his motion, defendant Menendez seeks to relate his unprotected advocacy on behalf of defendant Melgen to these protected legislative acts, such as a 2006 speech from the Senate floor, *see* Dkt. No. 48-1 at 26, or the introduction of an amendment the same year, *see* Dkt. No. 48-1 at 26. The Supreme Court, however, has held that the Speech or Debate Clause does not "include all things in any way related to the legislative process." *Brewster*, 408 U.S. at 516 ("Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process."). Defendant Menendez's extensive motions illustrate the point that a legislator can, indeed, attempt to relate any activity to the legislative process. The indictment, however, charges only non-legislative activity, and the Speech or Debate Clause cannot save defendant Menendez from facing a jury of his peers on those charges.

A. Defendant Menendez's Attempts To Influence Executive Branch Officials on Behalf of Defendant Melgen's $8.9 Million Medicare Billing Dispute are Not Protected by the Speech or Debate Clause.

The indictment charges that defendant Menendez sought to influence officials at the U.S. Department of Health and Human Services (HHS) and the Centers for Medicare and Medicaid Services (CMS), a component of HHS, on behalf of defendant Melgen in his $8.9 million Medicare billing dispute. In pre-indictment litigation, the Third Circuit ruled that "[t]hese communications

are not manifestly legislative acts because they are informal communications with Executive Branch officials." *In re Grand Jury (Robert Menendez)*, 608 F. App'x at 101. A review of the 68-page indictment confirms that not only are these communications not manifestly legislative acts, they are clearly not protected by the Speech or Debate Clause.

The indictment plainly alleges that defendant Menendez's communications with HHS officials were attempts to influence them regarding defendant Melgen's financial dispute. In his brief, defendant Menendez concedes that his meetings with Executive Branch officials at HHS and CMS were indeed prompted by defendant Melgen. Specifically, he acknowledges that "[i]n June 2009, Senator Menendez alerted his staff to a Medicare issue concerning the repackaging or multi-dosing of the drug Lucentis that involved his 'close personal friend,' Dr. Melgen." Dkt. No. 48-1 at 13-14. The precise language of that alert to his staff, however, is dramatically different from defendant Menendez's description of it in his motion. As alleged in the indictment:

> On or about June 12, 2009, after MELGEN learned that an audit of his Medicare billing was likely to result in a multi-million dollar overpayment finding, MENENDEZ emailed Staffer 10, his Legislative Assistant handling health care issues. The email's subject line was "Dr. melgen." In the email, MENENDEZ instructed Staffer 10 to "[p]lease call him asap at [REDACTED] re a Medicare problem *we need to help him with.*"

Dkt. No. 1 (Indictment), ¶ 148 (emphasis added) (redaction in Indictment).

By tying his meetings with HHS officials to this June 2009 contact, defendant Menendez concedes that the purpose of those meetings was indeed to "help him," *i.e.*, defendant Melgen. This email does not describe a broad policy issue, request fact-finding, or exercise legislative oversight. Rather, it describes a "Medicare problem" afflicting one person, and instructs that "we need to help him." Confirming this singular purpose of his meetings with HHS officials, defendant Menendez's staffer replied that evening that she and the Deputy Chief of Staff had called defendant

Melgen twice that day and were "looking into how [they could] be helpful." *Id.* ¶ 149 (internal quotation marks omitted).

The indictment further alleges that on July 22, 2009, the Deputy Chief of Staff emailed defendant Menendez to inform him, "As you know we've been working on the Melgen case everyday and just this morning got an update from his lawyer that we expect a response to be made public this week." *Id.* ¶ 162 (internal quotation marks omitted). In the same email, the Deputy Chief of Staff proposed a meeting with defendant Menendez to update him in person, followed by a call to HHS. *Id.* Contrary to defendant Menendez's effort to re-characterize his conduct now that he faces an indictment, it was abundantly clear to all involved that Menendez and his staff were "working on the Melgen case" and not on some legislative activity.

Defendant Menendez's call to HHS—specifically to Jonathan Blum, the Director and Acting Principal Deputy of CMS—occurred just five days later. The indictment makes clear that defendant Menendez sought to influence Mr. Blum regarding the Melgen case, and that defendant Menendez met with defendant Melgen's lobbyist to prepare for the call. *Id.* ¶¶ 163-69.

The indictment further alleges that in 2011, defendant Menendez brought defendant Melgen's Medicare problem to the attention of Senator Tom Harkin "so that MELGEN could personally solicit [his] assistance with his Medicare billing dispute." *Id.* ¶ 185. Significantly, the indictment alleges that in an email from Daniel O'Brien, defendant Menendez's Chief of Staff, to Senator Harkin's Chief of Staff regarding the proposed meeting, Mr. O'Brien noted that "[t]he doctor Senator Menendez spoke to [Senator Harkin] about is Dr. Sal Melgen," emphasizing that "CMS is pursuing Dr. Melgen for a matter around dosing procedures and relevant charges to Medicare." *Id.* ¶ 186 (internal quotation marks omitted). Again, it was clear to all involved that this was about defendant Melgen's dispute, and nothing more.

The indictment further alleges that on June 7, 2012, defendant Menendez met with Marilyn Tavenner, the Acting Administrator of CMS, where he "raised the issue at the core of MELGEN's Medicare billing dispute" and "advocated on behalf of the position favorable to MELGEN in his Medicare billing dispute." *Id.* ¶ 200. Notably, just two days earlier, defendant Menendez met with defendant Melgen's lobbyist in order to prepare for the meeting. *Id.* ¶ 199.

Just a few weeks after his meeting with Acting Administrator Tavenner, defendant Menendez had a follow-up phone call with her, during which he continued to cajole her regarding defendant Melgen's "Medicare problem." *Id.* ¶ 204. Two days before the call, Michael Barnard, defendant Menendez's Legislative Assistant in charge of health care matters, and defendant Melgen's lobbyist drafted a memorandum to prepare defendant Menendez for the call. One talking point in the memorandum noted that "[w]e're talking about payments made in 2007-2008," the precise years in which defendant Melgen was found to have received approximately $8.9 million in Medicare overpayments. *Id.* ¶ 202 (internal quotation marks omitted). Another talking point argued that CMS was "admitting that these policies didn't exist before and don't apply during the 2007-2008 period. Therefore, they don't have any bearing on the issue at hand." *Id.* (internal quotation marks omitted). The "issue at hand," as made clear from these emails and memoranda, was defendant Melgen's $8.9 million Medicare billing dispute.

Confirming this inference, after defendant Menendez's call with Acting Administrator Tavenner, defendant Melgen's lobbyist emailed Mr. Barnard and Mr. O'Brien, "[L]et me know if you hear back from [Tavenner's] office -- at some point I have to make a decision whether to recommend to the doctor to go to court rather than wait any longer. I did not want to take any action until I knew that other avenues were shut down." *Id.* ¶ 208 (internal quotation marks omitted).

Defendant Menendez was unsuccessful in his efforts to influence Acting Administrator Tavenner and, as a result, he "stated that he would speak directly with the Secretary of HHS about the matter." *Id.* ¶ 204. One week later, that is precisely what happened. Specifically, defendant Menendez arranged, via another Senator's office, for a meeting to be requested with Secretary Kathleen Sebelius. *See id.* ¶ 209. Three days later, defendant Menendez's Chief of Staff emailed defendant Menendez asking if he had informed defendant Melgen that they were organizing a meeting with Secretary Sebelius. Defendant Menendez responded, "Haven't told Dr Melgen yet. Prefer to know when we r meeting her so that I don't raise expectation just in case it falls apart." *Id.* ¶ 210 (internal quotation marks omitted).

The day before his meeting with Secretary Sebelius, defendant Menendez spoke with defendant Melgen's lobbyist to prepare. *Id.* ¶ 215. While meeting with Secretary Sebelius, defendant Menendez "advocated on behalf of Melgen's position in his Medicare billing dispute, focusing on Melgen's specific case and asserting that Melgen was being treated unfairly." *Id.* ¶ 216. After the meeting, defendant Melgen's lobbyist emailed Mr. Barnard and Mr. O'Brien, saying, "I have spoken with [the] doctor and understand that the meeting with the Secretary was quite 'lively.'" *Id.* ¶ 217 (internal quotation marks omitted). Further confirming that the meeting was indeed an effort to influence Secretary Sebelius regarding defendant Melgen's "Medicare problem," several weeks later defendant Melgen's lobbyist emailed Mr. Barnard asking if he "had heard back from [Sebelius's] office following the meeting last month." *Id.* ¶ 218 (internal quotation marks omitted).

These charged acts are unprotected efforts to influence the Executive Branch regarding defendant Melgen's multi-million dollar Medicare billing dispute. To avoid the inescapable conclusion that his communications with CMS and HHS officials constituted unprotected activity,

defendant Menendez tries to characterize his efforts as something inconsistent with what the indictment alleges and contrary to what the evidence supports. Specifically, he tries to reclassify his meetings with HHS officials as "policy-related," *e.g.*, Dkt. No. 48-1 at 16, legislative oversight, *id.* at 2, and legislative fact-finding, *id.* at 5 n.4, asserting categorically that the "Medicare reimbursement policy issues are immunized," *id.* at 13. *See also* Dkt. No. 48-1 at 16 ("The Senator and his staff contacted federal agencies as part of their investigation and oversight on these policy issues.").

To read defendant Menendez's arguments, one would think that the word "policy" had some talismanic effect under the law of Speech or Debate immunity. It does not. While the 68-page indictment includes the word "policy" 10 times, four of which in job titles, defendant Menendez's 32-page Speech or Debate motion hinges almost entirely on the word "policy," repeating the word 104 times in 32 pages. Dkt. No. 48 (Mot. No. 1). For example, he states the following:

> The prosecution is presenting only one side of the *policy* debate in the Indictment in an effort to suggest that Senator Menendez was wrong as a matter of *policy*. But neither questions of guilt nor immunity turn on how the Court judges that *policy* debate. Indeed, the Court has no reason to wade into that *policy* debate at all. The relevant point, confirmed by the prosecution highlighting one side of the *policy* debate in the Indictment, is that this was a *policy* debate between the Senator and the Executive Branch. The fact that the Senator was engaging the Executive Branch on a *policy* level, in an effort to be better informed and to exercise oversight on *policy* issues, makes this a legislative activity shielded by the Speech or Debate Clause.

Dkt. No. 48-1 at 22 n.18 (emphases added). Invocation of the word "policy," however, has never been recognized as the determinative factor in deciding whether conduct is shielded by the Speech or Debate Clause. There is no doubt that legislators may be very creative in devising policy justifications for the positions they take, but the mere fact that defendant Menendez may have contrived policy arguments to justify his efforts to influence the Executive Branch in favor of

defendant Melgen does not bring those efforts to "cajole" within the protections of the Speech or Debate Clause. Whatever word he uses to describe them, his efforts to influence the Executive Branch's policy and positions to favor his benefactor were unprotected activity. *See, e.g.*, *Hutchinson*, 443 U.S. at 121 n.10; *McMillan*, 412 U.S. at 313; *Gravel*, 408 U.S. at 625; *Johnson*, 383 U.S. at 172.

One example illustrates the weakness in defendant Menendez's argument. He notes that "the Indictment alleges that the Senator's staff reached out to 'advocate for Melgen' by asking CMS if it 'would be issuing a new policy that would affect the future coverage of Lucentis in Florida,'" asserting that "this is 'policy' directed information gathering and protected by the Speech or Debate Clause." Dkt. No. 48-1 at 18. Defendant Menendez omits, however, the rest of the email chain. Specifically, the indictment alleges that after receiving a response from CMS, one staffer emailed another, "Yeah, but what are they talking about being in the works . . . . a decision on Melgen specifically? *I think we have to weigh in on his behalf . . . . to say they can't make him pay retroactively.*" Dkt. No. 1 (Indictment), ¶ 159 (emphasis added) (ellipses in original). What defendant Menendez now attempts to characterize as "policy" was, in fact, understood by everyone at the time to be an effort to influence CMS in favor of defendant Melgen. There is nothing remotely "legislative" about this activity.

Defendant Menendez also seeks to characterize his communications with HHS officials as "legislative oversight" or "legislative fact-finding," contending that these meetings are categorically protected by the Speech or Debate Clause because "they concern legislative oversight on matters of policy." Dkt. No. 49-1 at 13; *see also id.* ("[T]he Sebelius meeting concerned legislative oversight on matters of Medicare policy."). This amorphous standard raises the same constitutional fear expressed by the Supreme Court in *Brewster*—namely, that there are "few

activities in which a legislator engages that he would be unable to somehow 'relate' to the legislative process." *See Brewster*, 408 U.S at 516. Defendant Menendez demonstrates the weakness of his interpretation when he argues that "the fact that the information sought by Senator Menendez *related* to Medicare policy on multi-dosing is all that matters for purposes of the Speech or Debate Clause." Dkt. No. 49-1 at 15 (emphasis added). This is nothing but a limitless and malleable interpretation of a constitutional immunity that is, in fact, carefully defined.

Moreover, defendant Menendez's casework for defendant Melgen is simply not the sort of oversight or fact-finding protected by the Speech or Debate Clause, to the extent such activity is protected at all. To the contrary, it is exactly the sort of effort to influence the Executive Branch that courts have consistently held to be outside the scope of the Clause's protection. *See, e.g.*, *Hutchinson*, 443 U.S. at 121 n.10 ("Regardless of whether and to what extent the Speech or Debate Clause may protect calls to federal agencies seeking information, it does not protect attempts to influence the conduct of executive agencies."); *Chastain v. Sundquist*, 833 F.2d 311, 314-15 (D.C. Cir. 1987) (holding that letters to the Attorney General that "did not seek information or otherwise attempt to aid a congressional investigation" but "[r]ather . . . attempted to influence the conduct of federal agencies" were unprotected).

In addition, defendant Menendez argues he is protected by the Clause because, he asserts, he omitted defendant Melgen's name from his meetings with HHS officials. *See* Dkt. No. 48-1 at 17, 25. As a preliminary matter, that assertion is in dispute, but more importantly, it is constitutionally insignificant whether, while he was exhorting the Executive Branch, defendant Menendez identified defendant Melgen by name. Merely omitting a political donor's name from an effort to influence the Executive Branch on behalf of that donor does not transform that effort from an unprotected attempt to influence into some other, protected act. Regardless of whether he

avoided mentioning the name "Melgen," the fact is that defendant Menendez met with defendant Melgen's lobbyist before each meeting with HHS officials and then, through his advocacy to those officials, provided defendant Melgen with another "avenue" to avoid litigation on the merits, *see* Dkt. No. 1 (Indictment), ¶ 208. Whatever defendant Menendez may now claim, the Executive Branch officials he petitioned (as well as the other Senators involved) understood that it was all about defendant Melgen.

Ultimately, the law is unequivocal: "[t]he Supreme Court has repeatedly stated that the Speech or Debate Clause does not apply to efforts by members of Congress to influence the Executive Branch." *McDade*, 28 F.3d at 299. Although defendant Menendez "may cajole, and exhort [CMS and HHS] with respect to the administration of a federal statute," his "conduct . . . is not protected legislative activity." *Gravel*, 408 U.S. at 625. Cajoling an Executive agency to reconsider a decision harmful to a political donor is precisely the sort of activity that courts have repeatedly deemed to be unprotected. *See, e.g.*, *United States v. Jefferson*, 546 F.3d 300, 304, 313 (4th Cir. 2008) (holding that an indictment alleging that a Congressman met with United States Trade Development Agency (USTDA) officials to encourage the USTDA to grant a company financial assistance "simply does not question any legislative acts"); *Johnson*, 383 U.S. at 171-72 (noting that Congressmen "exert[ing] influence on the Department of Justice to obtain the dismissal of pending indictments" was "in no wise related to the due functioning of the legislative process" and therefore unprotected activity).

In addition to his "policy" and "legislative oversight" arguments, defendant Menendez asserts yet another basis for protecting his meetings with Acting Administrator Tavenner under the Speech or Debate Clause—that seven months earlier she had been nominated to a Senate-confirmed position. *See* Dkt. 48-1 at 20, 22-23. Although defendant Menendez now represents

that the purpose of his meeting with Acting Administrator Tavenner was to vet her in advance of a confirmation vote, *id.* at 20, when he met with her in June 2012, no Committee vote or confirmation hearing had even been scheduled. Sarah Kliff, "Meet Marilyn Tavenner, the Medicare Nominee No One Expects to Win Confirmation," *Wash. Post* (Feb. 8, 2013), http://www.washingtonpost.com/news/wonkblog/wp/2013/02/08/meet-marilyn-tavenner-the-medicare-nominee-no-one-expects-to-win-confirmation/ (last visited Aug. 24, 2015) ("The Senate Finance Committee had a whole year to act on Tavenner's first nomination, submitted in November 2011. No dice. This time around, don't expect anything different."). In fact, by the time the legislative session ended, no hearing had been held (or even scheduled) on her nomination. *Id.* Tavenner's nomination, therefore, expired, and she had to be renominated during the next legislative session, in 2013. *Id.* Defendant Menendez, however, declares that because it was part of his constitutional duty to advise and consent on nominees such as Tavenner, the entire substance of his meetings with her while the nomination was pending is protected Speech or Debate activity.

As a preliminary matter, the Government does not contend that vetting a nominee for confirmation is never protected by the Speech or Debate Clause, and the Court need not decide that issue in order to find that the Clause does not protect defendant Menendez's advocacy for defendant Melgen's position while meeting with Acting Administrator Tavenner. At the time of the meeting, she was not just a nominee; she was an active Executive Branch official. Therefore, even assuming that any part of the meeting was focused on vetting, when defendant Menendez transitioned during that meeting from vetting her nomination to seeking to influence her decisionmaking as the Acting Administrator of CMS, he transitioned from potentially protected activity into clearly unprotected activity. Indeed, as noted above, the Supreme Court has endorsed the excising of protected statements from conversations and meetings that contain unprotected

statements. *See Helstoski*, 442 U.S. at 488 n.7 ("Nothing in our opinion, by any conceivable reading, prohibits excising references to legislative acts, so that the remainder of the evidence would be admissible. This is a familiar process in the admission of documentary evidence."). Otherwise, Senators would be able to shield unprotected acts by bookending them with protected ones—a means of immunizing criminal activity that the Supreme Court has refused to legitimize. The fact that Tavenner's pending nomination may have provided defendant Menendez with a pretext for yet another opportunity to go to bat for defendant Melgen, or that he may even have viewed it as leverage to achieve his goal, does nothing to change the fact that, in his contacts with Tavenner, he attempted to influence the Executive Branch in favor of defendant Melgen. That is not protected activity.

While defendant Menendez relies on Tavenner's nomination to shield his meetings with her, he has no such basis for invoking the Clause to shield his meeting with the already-confirmed Secretary Sebelius, with whom he met only a few weeks later on the same issue. The fact that he met with Acting Administrator Tavenner and Secretary Sebelius just a few weeks apart on the same issue, and met with defendant Melgen's lobbyist to prepare for both meetings, indicates that defendant Menendez's meetings with both officials were indeed efforts to influence them regarding defendant Melgen's $8.9 million Medicare billing dispute. This inference is strengthened by the fact that defendant Menendez told Acting Administrator Tavenner, during a call following up on their meeting, that "he would speak directly with the Secretary of HHS about the matter." Dkt. No. 1 (Indictment), ¶ 204. In fact, defendant Menendez confirmed that the meetings were about defendant Melgen's case when he emailed his Chief of Staff that he intended to notify defendant Melgen about the meeting with Secretary Sebelius once it was scheduled. *See id.* ¶ 210.

Defendant Menendez's meetings with HHS officials were efforts to influence Executive Branch officials in order to obtain a favorable outcome for defendant Melgen in his $8.9 million "Medicare problem." Thus, they are not protected by the Speech or Debate Clause.

B. Defendant Menendez's Attempts to Influence Executive Branch Officials on Behalf of Defendant Melgen in his Foreign Contract Dispute are Not Protected by the Speech or Debate Clause.

The indictment charges that defendant Menendez sought to influence officials at the U.S. Department of State and U.S. Customs and Border Protection (CBP) on behalf of defendant Melgen in his contract dispute with the Dominican Republic. Defendant Melgen had purchased a pre-existing contract to provide container screening services at ports in the Dominican Republic. The Dominican government refused to honor that contract, and the indictment alleges that defendant Melgen sought defendant Menendez's assistance in securing its enforcement.

The indictment alleges that defendant Menendez met with the Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs, during which he tried to influence the Assistant Secretary to pressure the Dominican government to honor the contract with defendant Melgen. Dkt. No. 1 (Indictment), ¶¶ 117, 123-31. Specifically, during the meeting, defendant "Menendez questioned the Assistant Secretary about the contract dispute between Melgen and the Dominican Republic. Menendez expressed dissatisfaction with INL's lack of initiative in enforcement of the contract." *Id.* ¶ 124. At the conclusion of the meeting, defendant Menendez "threatened to call [the Assistant Secretary] to testify at an open hearing." *Id.* ¶ 129 (internal quotation marks omitted).

The indictment also alleges that defendant Menendez instructed a staffer to send an email to CBP asking that they "hold[] off on the delivery of [container shipment scanning/monitoring] equipment." *Id.* ¶¶ 132-43 (internal quotation marks omitted). This request was beneficial to

defendant Melgen because a donation of equipment from CBP would have undermined the value of his contract and significantly reduced the likelihood of its enforcement.

These are clearly efforts to influence Executive Branch officials regarding a specific contract dispute involving a single political donor. That they may relate to the same topical areas in which defendant Menendez has taken historical legislative acts is of no moment. The fact that defendant Melgen's contract with the Dominican government involves a port, for instance, is not sufficient to trigger application of the Speech or Debate Clause. *See* Dkt. No. 48-1 at 29 ("The Indictment makes numerous allegations concerning Senator Menendez's efforts to improve port security in the Dominican Republic, all of which are immunized by the Speech or Debate Clause because they clearly involve United States policy on port security."). Again, whether or not defendant Menendez may have been able to imagine a policy rationale for placing the responsibility for Dominican port security in the hands of an opthamologist from Florida, the Speech or Debate Clause does not protect his efforts to influence the Executive Branch in furtherance of his purported policy.

Defendant Menendez, nevertheless, argues that these acts are protected by the Speech or Debate Clause, continuing to advance his broad interpretation of the Clause as shielding all conduct related to "policy" and "oversight." Dkt. No. 48-1 at 31-32 (arguing CBP email is protected by Speech or Debate Clause because it was "a policy-based inquiry" and he asked for a "briefing"). Under his legal theory, the linchpin to applicability of the Speech or Debate Clause is whether an act can be described as "oversight on policy issues." *See* Dkt. No. 49-1 at 5 ("In Senator Menendez's view, this [January 11, 2013,] email chain is protected by the Speech or Debate Clause because it is oversight on policy issues related to port security."). Unhelpfully, defendant Menendez fails to provide a workable definition of "oversight" or "policy," nor does he

provide any sort of limiting principle that clearly divides protected conduct from unprotected conduct.

Defendant Menendez's broad interpretation of the Speech or Debate Clause is merely a substitute for the "relate" interpretation that the Supreme Court rejected in *Brewster*. *See Renzi*, 651 F.3d at 1021 ("Reacting to an increasingly broad invocation of the Clause, the Court clarified that it had never indicated that 'everything that "related" to the office of a Member was shielded by the Clause.'") (quoting *Brewster*, 408 U.S. at 513-14). That his interpretation is similarly deficient is best illustrated by the fact that defendant Menendez devotes the majority of his analysis in this section of his brief to recounting past legislative acts that are clearly protected by the Speech or Debate Clause, though just as clearly not alleged in the indictment. *See* Dkt. No. 48-1 at 26-29 (describing defendant Menendez's 2006 speech from the Senate floor, 2006 introduction of an amendment, and 2011 subcommittee hearings, among others). He begins his analysis with descriptions of these acts, however, in an effort to relate the charged conduct to them. That is not the standard. Merely because a United States Senator performs a legislative act on one topic (*e.g.*, port security), does not mean that every non-legislative act the Senator takes related to that topic is protected by the Speech or Debate Clause. The limitless nature of defendant Menendez's interpretation would effectively immunize all conduct performed by Members of Congress and their staff.

Defendant Menendez also asserts that his meeting with the Assistant Secretary regarding defendant Melgen's contract dispute is protected by the Speech or Debate Clause because he threatened to call the Assistant Secretary to testify at an open hearing if he did not get what he wanted. Dkt. No. 49-1 at 10 ("Placing the issue even more squarely in the legislative sphere, it is repeatedly noted that Senator Menendez said he would 'call a hearing' in the Senate to get answers

to his questions if he did not receive answers promptly."); *see also* Dkt. No. 48-1 at 31 ("Calling a congressional hearing obviously lies at the heart of legislative—and therefore protected—activity."). This analysis, however, ignores the constitutional distinction between past legislative acts and promised (or threatened) future legislative acts, with the former protected and the latter unprotected. Therefore, although holding a hearing is a legislative act, threatening to call a hearing in the future is not. *See, e.g.*, *Renzi*, 651 F.3d at 1022 ("Completed 'legislative acts' are protected; promises of future acts are not.") (citing *Helstoski*, 442 U.S. at 489-90).

The law is clear that no matter how emphatically expressed, threats of future legislative activity do not transform otherwise unprotected attempts to influence the Executive Branch into legislative acts. *See Helstoski*, 442 U.S. at 490 ("But it is clear from the language of the Clause that protection extends only to an act that has already been performed. A promise to deliver a speech, to vote, or to solicit other votes at some future date is not 'speech or debate.' Likewise, a promise to introduce a bill is not a legislative act."); *Brewster*, 408 U.S. at 502, 528-29 (holding that "a Member of Congress may be prosecuted . . . for accepting a bribe in exchange for a promise relating to an official act"). Therefore, a threat to perform some future legislative act is not protected by the Speech or Debate Clause, and an act that is merely "a precursor" to a legislative act is not a legislative act itself.

The Ninth Circuit's recent opinion in *Renzi* addressed and rejected an argument that is strikingly similar to the one defendant Menendez advances here. In *Renzi*, an indictment charged former Arizona Congressman Richard Renzi, a member of the U.S. House Committee on Natural Resources, with "offer[ing] two private parties a *quid pro quo* deal" in which he agreed to sponsor a land exchange bill if the parties purchased private land in a sale that would benefit Renzi. 651 F.3d at 1016. Renzi argued that the indictment should be dismissed because the charges stemmed

from "legislative acts" and would require the government to introduce "legislative act" evidence. *Id.* at 1019. Specifically, he argued that his negotiations "with private entities over future legislation" were preparation for legislative activity "analogous to discourse between legislators over the content of a bill and must be considered a protected 'legislative act' under a broad construction of the Clause." *Id.* at 1022.

Rejecting Renzi's argument, the court applied *Brewster* to conclude that his actions were not shielded by the Speech or Debate Clause, because "a Member's pre-legislative act negotiations with private parties" do not constitute "legislative acts." *Id.* at 1023. Specifically, the court ruled that Renzi's preparation for a legislative package and promise to introduce that bill were not protected by the Clause, as "[t]he question is whether it is necessary to inquire into how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of [the] statute," and it was not necessary to prove that Renzi actually performed a legislative act to prove that he committed bribery and extortion. *Id.* at 1025 (quoting *Brewster*, 408 U.S. at 526 (internal quotation marks omitted)). Like Renzi's preparation for the introduction of a bill, defendant Menendez's preparation for his meetings with Executive Branch officials—and the meetings themselves, which according to defendant Menendez, were precursors to potential hearings—are similarly unprotected.

Although defendant Menendez ultimately chaired a hearing in July 2012 in which he raised defendant Menendez's contract dispute in the Dominican Republic with a State Department official, *see* Dkt. No. 48-1 at 28, that does not alter the analysis. There is no dispute that this hearing is protected legislative activity, and for that reason, the Government deliberately omitted it from the indictment. Accordingly, while the July 2012 hearing is protected, the April 2012 threat to hold a hearing is not. *See Brewster*, 408 U.S. at 526, 528-29.

Defendant Menendez's contacts with State and CBP officials were efforts to influence Executive Branch officials in order to benefit defendant Melgen in his foreign contract dispute. Thus, they are not protected by the Speech or Debate Clause.

III. THE THIRD CIRCUIT'S PRE-INDICTMENT ORDER DID NOT PRECLUDE THE GRAND JURY'S INDICTMENT. (Mot. No. 2, Dkt. No. 49.)

Although defendant Menendez filed one motion to dismiss the indictment alleging that the charges require presenting evidence protected by the Speech or Debate Clause, see Dkt. No. 48-1 (Mot. No. 1), he has filed a separate motion to dismiss alleging that in order to obtain the indictment, the Government presented to the grand jury evidence protected by the Speech or Debate Clause, *see* Dkt. No. 49-1 (Mot. No. 2). This motion is redundant and unnecessary, as all substantive arguments are repeated in the first Speech or Debate motion. *See* Dkt. No. 49-1 (Mot. No. 2) at 3 n.1 ("Given that the evidence presented to the grand jury (addressed in this motion) is the basis for what is charged in the Indictment (MTD No. 1), the issue as to what is privileged under the Speech or Debate Clause is the same under both motions."). That being said, the Government wishes to address the defendant's inaccurate characterization of the Third Circuit's prior order in this case and its impact on the indictment. *See* Dkt. No. 49-1 at 1.

The pre-indictment litigation in the district court and before the Third Circuit addressed the narrow issue of whether staffers for defendant Menendez would be compelled to answer specific questions before the grand jury. The district court granted the Government's motion to compel, and the Third Circuit merely remanded to the district court, with instructions to make further findings of fact explaining why the acts in question are not legislative in nature. Given the detailed indictment that now exists, there is a full record for this Court to consider.

During the grand jury investigation, defendant Menendez's staffers made numerous assertions of the Speech or Debate Clause to avoid answering questions about defendant

Menendez's assistance to defendant Melgen. These assertions and the ensuing litigation over their validity delayed the grand jury's indictment by many months. *See* Exs. 1 & 2. Indeed, ten months elapsed between the day defendant Menendez's staffers were subpoenaed and the date of the Third Circuit order. In granting the Government's motion to compel, the Honorable Judge Anne Thompson issued an order noting that the "Supreme Court has instructed that '[i]n no case has this Court ever treated the [Speech or Debate] Clause as protecting all conduct *relating* to the legislative process.' *United States v. Brewster*, 408 U.S. 501, 515 (1972) (emphasis in original)." Ex. 3 at 2 (alterations in J. Thompson Order). Judge Thompson also quoted the Third Circuit's observation that the "Supreme Court has repeatedly stated that the Speech or Debate Clause does not apply to efforts by members of Congress to influence the Executive Branch." *Id.* (quoting *United States v. McDade*, 28 F.3d 283, 299 (3d Cir. 1994)). Consequently, Judge Thompson ruled:

> Senator Menendez's meetings and communications with Executive Branch officials to assist Dr. Salomon Melgen in resolving his Medicare billing dispute, and preparatory meetings with representatives of Dr. Melgen held in advance of those meetings and contacts with Executive Branch officials, are unprotected by the Speech or Debate Clause. Similarly, Senator Menendez's and his staff's efforts to persuade CBP not to take an act that would adversely affect Dr. Melgen's financial interests is unprotected by the Speech or Debate Clause.

Id.

Defendant Menendez appealed that order. After an expedited appeal, the Third Circuit vacated and remanded with instructions to "make specific factual findings about the communications implicated by the grand jury questions," ruling that there were insufficient factual findings in the district court's three-page order to adequately review the decision. *In re Grand Jury (Robert Menendez)*, 608 F. App'x at 101 ("At this stage, we cannot adequately evaluate the District Court's decision because it did not fully explain the basis for its factual determination that the acts here are not legislative.").

Defendant Menendez mischaracterizes the scope of what was presented to the Third Circuit. At issue was merely the Government's effort to compel a staffer to answer 50 questions. In fact, by the time the parties reached oral argument, that number was reduced to approximately 30 questions, in light of defendant Menendez's evolving interpretation and assertion of the Speech or Debate Clause. *See id.* at 102 n.4 (noting that defendant Menendez withdrew his Speech or Debate assertion to 20 of the 50 questions). The limited issue before the Third Circuit was whether a staffer could be compelled to answer specific questions. *See id.* at 101. As the indictment reflects, the grand jury ultimately did not need that staffer's answers to those particular questions in order to find probable cause, and securing answers to those questions would have unnecessarily delayed the indictment for many more months of continued litigation while the statute of limitations expired on a number of substantive counts.

Defendant Menendez mischaracterizes the issue before the Third Circuit as "what [the Government] would need to prove to overcome the Speech or Debate privilege." Dkt. No. 49-1 at 2. Although post-indictment defendant Menendez seeks to expand the scope of the issue before the Third Circuit, pre-indictment he conceded the narrow scope of the appeal. *See* Reply Br. of Appellant at 8 n.10, *In re Grand Jury (Robert Menendez)*, 608 F. App'x 99 (No. 14-4678), Dkt. No. 03111877348 (representing that "[t]his appeal concerns *only* the specific questions posed to witnesses") (emphasis added).

In his motion, defendant Menendez mischaracterizes the eight-page Third Circuit decision. *See* Dkt. No. 49-1 at 3-4. Specifically, defendant Menendez inaccurately represents that the Third Circuit "reversed" Judge Thompson's order, Dkt. No. 49-1 at 2, and the Government "lost," Dkt. No. 49-1 at 1. Neither is true. The Third Circuit merely vacated the order and remanded for more "specific factual findings" regarding the decision that defendant Menendez's conduct was not

protected by the Speech or Debate Clause. *In re Grand Jury (Robert Menendez)*, 608 F. App'x at 101. Nowhere in the Third Circuit's opinion is the word "reverse" to be found. Defendant Menendez also inaccurately represents that "[t]he Third Circuit rejected the prosecution's broad claim that its labelling the actions of Senator Menendez and his staff 'advocacy' would lift the protections of the Speech or Debate Clause." Dkt. No. 49-1 at 3; *see also* Dkt. No. 49-1 at 4 ("[T]he Third Circuit had rejected the argument that prosecutors could circumvent the Speech or Debate Clause by simply labelling the conduct 'advocacy.'"). Notably, defendant Menendez does not provide a citation to support this summary of the Third Circuit's order, which is understandable given that it is not, in fact, in the Third Circuit's order. In fact, the word "advocacy" does not appear anywhere in the decision.

Defendant Menendez also mischaracterizes the substance of the opinion. In his motion, defendant Menendez represents that "[t]he Third Circuit observed that both sides seemed to have some evidence supporting their side, including evidence raised by Senator Menendez suggesting 'the discussions [with Secretary Sebelius and Acting Administrator Tavenner] focused on policy, not Dr. Melgen's case.'" Dkt. No. 49-1 at 2 (quoting *In re Grand Jury (Robert Menendez)*, 608 F. App'x at 101 n.3). Defendant Menendez, however, misleadingly attributes this observation to the Third Circuit when, in fact, the Third Circuit was merely summarizing defendant Menendez's position. The full quote from the Third Circuit's order reads as follows: "*Senator Menendez counters* that the discussions focused on policy, not Dr. Melgen's case." *Id.* Defendant Menendez is erroneously attributing his view of the facts to the Third Circuit.

In perhaps his most brazen misrepresentation of the Third Circuit's opinion, defendant Menendez asserts that "[i]n this very case, the Third Circuit recognized that 'informal legislative fact-finding and informal oversight' *are protected*." Dkt. No. 48-1 at 5 n.4 (emphasis added)

(quoting *In re Grand Jury (Robert Menendez)*, 608 F.3d App'x at 101). The Third Circuit, however, said no such thing. Rather, it said the following:

> But other acts, such as informal legislative fact-finding and informal oversight, *are not manifestly legislative*, and indeed can look very much like *unprotected political acts*. In these latter cases, district courts must make factual findings regarding the content and purpose of the acts and communications in question to assess their legislative or non-legislative character.

In re Grand Jury (Robert Menendez), 608 F. App'x at 101 (emphases added). Defendant Menendez's manipulation of this unambiguous language further undermines his argument regarding the application of the Speech or Debate Clause.

Notably, defendant Menendez also ignores the Third Circuit's language emphasizing the Supreme Court's endorsement of excising protected statements from communications or conduct that also includes unprotected statements. Importantly, the Third Circuit ruled:

> Where an act or communication has some legislative and non-legislative components, the correct approach is *not* to conclude that the act or communication is entirely legislative and covered by the Clause or entirely non-legislative and unprotected by the Clause. Rather, the legislative components should be separated from the non-legislative components, if possible, and the latter may be the subject of questioning.

Id.

Defendant Menendez's attempt to rewrite the Third Circuit's order, like his attempt to rewrite the grand jury's indictment, is telling. The validity of his Speech or Debate argument is conditioned upon his revisions to both documents. The fact is that the indictment charges unprotected activity, and the Third Circuit order did not preclude the grand jury from returning it.

The Speech or Debate issue presented here, post-indictment, is substantively and procedurally different from the Speech or Debate issue presented there, pre-indictment. The two matters are in dissimilar procedural postures, and here the Court has a more complete record. The Third Circuit was merely presented with a list of, ultimately, 30 questions from which to determine

whether the unknown answers might implicate the Speech or Debate Clause. Here, the Court has a 68-page, 275-paragraph indictment that details evidence, emails, and witness statements that form the basis for the charges.

The Third Circuit's order did not compel continued litigation or foreclose the grand jury from returning an indictment. Defendant Menendez's Speech or Debate assertions had already delayed the investigation by many months, *see* Exs. 1 & 2, and continued litigation over whether his staffer would be compelled to answer a few questions would have unnecessarily delayed the investigation by many more months. The Government is not obligated to wait by the phone and watch the statute of limitations expire while defendant Menendez equivocates over whether he will permit his staffers to answer the grand jurors' questions. *See* Dkt. No. 49-1 at 7 ("[T]he Senator's counsel made clear to the Department there *could* be a use privilege objection under the Clause concerning that email chain *down the road*.") (emphases added).

Although the Third Circuit's order is not precedential and addresses a specific issue different from the one presented here, it is instructive. Judge Thompson's analysis was sound, but there were insufficient factual findings in her three-page order for the court to adequately review her analysis. Here, the Court is presented with a detailed indictment that defines the charges against defendant Menendez and previews the evidence necessary to prove those charges. In short, the Court has an ample record from which to make specific factual findings that the indictment does not charge or require the presentation of evidence protected by the Speech or Debate Clause.

IV. THE GOVERNMENT PROPERLY INSTRUCTED THE GRAND JURY ON THE SPEECH OR DEBATE CLAUSE. (Mot. No. 4, Dkt. No. 51.)[1]

During this investigation, the Government conscientiously and accurately instructed the grand jury regarding the Speech or Debate Clause. The Government explained, for example, that the Speech or Debate Clause is "such an important privilege and such an important part of the Constitution that we want to make sure that we are treading carefully and not eliciting testimony about something when the senator does not intend to waive it." Ex. 4 at 27:22-28:1. When the grand jury wanted to proceed with the examination of one of defendant Menendez's staffers after she equivocated about a non-assertion of the Speech or Debate Clause, the Government cautioned the grand jury that "whether she's prepared to answer the questions doesn't affect a speech or debate assertion because the speech or debate clause privilege is held not by this witness but by Senator Menendez. And so this witness can't waive that privilege assertion for the Senator." *Id.* at 26:7-12. After the grand jury heard one witness assert the Speech or Debate Clause a number of times, the Government provided the following admonishment:

> Before we bring in the next witness, let me just stay [sic] a couple of things. You've heard references to attorneys for Senator Menendez and you have seen this witness invoke some privileges. It may have just been one that he invoked, the Speech or Debate Clause. I do want to advise you that there is nothing improper with simply retaining an attorney. Having an attorney is a constitutional right, and there are perfectly legitimate reasons why someone who may be innocent would retain an attorney. And so, you should not make any negative inference against Senator Menendez merely because he has attorneys. You also should not make any negative inference simply because a witness is asserting certain privileges in response to certain questions. And I guess that's probably all I'll say about that. I just want to make sure that there are no negative inferences that are being made against Senator Menendez or anyone else based on either the assertion of privileges or the fact that Senator Menendez has an attorney.

[1] Defendant Melgen joined the motion to dismiss the indictment on grounds that the grand jury was erroneously instructed as to the law concerning the Speech or Debate Clause. Dkt. No. 51-1.

Ex. 5 at 63:22-64:15. When one grand juror asked for a review of the Speech or Debate Clause, the Government explained that the "Speech or Debate Clause is a provision in the Constitution, which says that members of the House or Senate cannot be called into question for their speech or debate." *Id.* at 64:20-23; *cf.* U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place."). The Government went on to explain that "it has been interpreted to apply to staffers of a Senator or a member of the House." Ex. 5 at 64:24-25; *cf. Gravel*, 408 U.S. at 618 ("[T]he Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."). Consistent with Supreme Court precedent, the Government clarified that "it has been limited to legislative activity. In other words, the term 'speech or debate' has been interpreted to apply only to legislative activity, not necessarily everything a U.S. Senator or a member of Congress does in his official capacity as a U.S. Senator, only to legislative activity." Ex. 5 at 64:25-65:6; *cf. Gravel*, 408 U.S. at 624-25 ("But the Clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature."). The Government concluded its admonishment with the following:

> I want to make sure that I, I don't give you too much law on the Speech or Debate Clause because this is not an issue for you all to decide. You all should not be deciding whether or not this is about an invalid assertion of the Speech or Debate Clause. That's an issue that if we need to raise, we'll bring it before a judge, and the judge will make a determination. But that's why I say, I don't want you to make any adverse inferences based on the assertions. I don't want you all to decide this is a valid or this is not a valid assertion.

Ex. 5 at 65:13-23; *cf. Renzi*, 651 F.3d at 1020 (holding that "[w]hether the Clause precludes Renzi's prosecution is a question of law," and ruling that "[l]ike our sister circuits, we see no reason to treat motions founded on the Speech or Debate Clause any differently") (citations omitted).

The defendants nevertheless argue that the indictment should be dismissed because the "prosecutors erroneously instructed the grand jury on Speech or Debate Clause immunity." Dkt. No. 51-1 at 5. Despite the specific guidance described above, the defendants assert that the Government explained "in only a very generic way what is covered," *id.* at 9, and left the grand jury with "a misimpression of the law," *id.* at 8. Specifically, the defendants object to the Government's advisement that the application of the Speech or Debate Clause is a legal issue for a court, rather than a jury, to decide. *See id.* ("[T]he grand jury should have been told that the reason the Speech or Debate Clause is so important is that it is a source of immunity, and the grand jury cannot consider anything that is covered by the Clause as a basis for bringing any charge."). It is well-settled law, however, that facially valid indictments are entitled to a presumption of regularity. *See Costello v. United States*, 350 U.S. 359, 363 (1956).

As a preliminary matter, the premise of the defendants' argument here provides an independent basis for denying the defendants' substantive motions to dismiss alleging violations of the Speech or Debate Clause. *See* Dkt. Nos. 48 (Mot. No. 1) & 49 (Mot. No. 2). The defendants' argument would require the jury, as a finder of fact, to determine the scope and application of the Speech or Debate Clause. If the legal premise supporting the defendants' argument were valid, then we would proceed immediately to trial and ask the petit jury to decide whether the Speech or Debate Clause protects defendant Menendez's conduct, just as defendant Menendez asserts that the grand jury should have been the ultimate decisionmaker regarding the scope and application of the Speech or Debate Clause to this indictment.

It is axiomatic, however, that the application of a constitutional privilege is a legal issue for the court, rather than the jury, to decide. The Government is not aware of any court that has held that the application of the Speech or Debate Clause is a question of fact for the jury to decide.

The grand jury is the pre-indictment finder of fact, and is not burdened with resolving complex constitutional issues. *See United States v. Shoup*, 608 F.2d 950, 960 (3d Cir. 1979) ("It is not the grand jury's role to decide questions of law.")

The weakness of the defendants' argument is best illustrated by the cases on which they rely to support it. Specifically, the defendants rely on three cases, none of which are helpful. First, the defendants point to *United States v. Stevens*, 771 F. Supp. 2d 556 (D. Md. 2011), a case in which the indictment was dismissed because the prosecutors erroneously advised the grand jury not to consider evidence of an advice of counsel defense where advice of counsel negated the intent element of the alleged crime. *See* Dkt. No. 51-1 at 11-13. Essential to the court's decision was the fact that "the advice of counsel 'defense' negates the defendant's wrongful intent, and therefore demonstrates an absence of an element of the offense—*mens rea*." 771 F. Supp. 2d at 566. In other words, "[t]he question went to the heart of the *intent* required to indict." *Id.* at 568 (emphasis added). The Speech or Debate Clause does not negate intent and is not an element of any charged offense for the jury to find.

Stevens illustrates the infirmity of the defendants' argument. Advice of counsel and the negation of intent are questions of fact for the jury to decide, not questions of law. This point is illustrated by the fact that the defendant in *Stevens* filed no Rule 12 motions to dismiss that advanced the advice of counsel defense as a pretrial legal bar to the charges, *id.* at 560, because it goes directly to the elements of the offense, requires the presentation of evidence, and is a question for the jury to decide. By contrast, and as the defendants' Speech or Debate motions demonstrate, *see* Dkt. Nos. 48 (Mot. No. 1) & 49 (Mot. No. 2), the application of the Speech or Debate Clause is a question of law for the Court to decide. *See Renzi*, 651 F.3d at 1020. *Stevens* is not helpful,

therefore, to the defendants and, in fact, demonstrates why the Government's instructions to the grand jury were accurate.

Second, the defendants assert that "[t]he situation here is analogous to the erroneous instruction that led to the dismissal of the indictment in *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977)." Dkt. No. 51-1 at 10. This case, however, is nothing like *Braniff Airways*. There, the court identified the following grounds for dismissal: (1) the prosecution presented unsworn summaries and excerpts of transcripts to the grand jury, *id* at 583-84, 589; (2) the prosecution instructed the court reporter "not to record anything which took place in the grand jury room except the testimony of live witnesses," *id.* at 583; (3) the repeated presence in the grand jury of an unauthorized observer, who had personal involvement in the matters under investigation, *id.* at 582-83, 589; (4) the lack of specificity in the indictment and its failure to "state the essential elements of the crime which is charged," *id.* at 585, 589; and (5) the failure to advise the grand jury of possible immunity under the very statute under which the defendants were charged, *id.* at 586. In developing their analogy, the defendants ignore the first four bases and amplify the fifth. Notably, however, the immunity at issue in *Braniff Airways* was specific to the very statute with which the defendants were charged, and went to the criminality of their conduct, thereby negating the elements of the charged offenses. *See id.* at 586 (finding that the immunity provision was "exculpatory information which the grand jury was entitled to have before it in order to determine whether the defendants had committed a crime"). In other words, the prosecutors simply presented the grand jury with an incomplete instruction on the elements of the charged crime. Similar to *Stevens*, the immunity at issue in *Braniff Airways* was not strictly a legal issue to be decided by a court. Rather, it was a factual issue with specific, statutorily defined elements to be found by a jury. *Id.*

Third, the defendants cite *United States v. Breslin*, 916 F. Supp. 438, 445-46 (E.D. Pa. 1996), as a case in which the court "dismiss[ed the] indictment for [a] flawed legal instruction by [the] prosecutor." Dkt. No. 51-1 at 11. *Breslin*, however, has no application to this case. There, the objectionable conduct leading to the indictment's dismissal included the following: (1) "the prosecutor attempted to bond with the grand jurors by providing them with donuts," 916 F. Supp. at 442; (2) "the prosecutor pressured the jury by stating the statute of limitations was about to run on some of the charges," *id.*; (3) "the prosecutor often made characterizations of the evidence and inserted his own opinions," *id.*; (4) "the prosecutor referred to a *Frontline* television documentary involving one of the defendants" that was not flattering, *id.*; and (5) "[p]erhaps the most disturbing thing occurred when the prosecutor stated that the grand jury did not have to agree with everything in the indictment; only the 'critical' parts," *id.* at 445. The flawed legal instructions in *Breslin*—that the grand jury did not have to agree with everything in the indictment; only the "critical" parts—are strikingly dissimilar to the Government's conscientious and accurate instructions to the grand jury here. Indeed, *Breslin* has no similarities with this case, as none of the conduct there is even alleged here.

The Government properly instructed the grand jury on the Speech or Debate Clause, and the defendants' argument here should be rejected.

V. THE SPEECH OR DEBATE CLAUSE DOES NOT PROTECT DEFENDANT MENENDEZ'S PARTICIPATION IN A SCHEME TO CONCEAL MATERIAL FACTS. (Mot. No. 13, Dkt. No. 60.)

The United States Senate Financial Disclosure Reports advise that "[t]his Financial Disclosure Statement is required by the Ethics in Government Act of 1978 [(EIGA)], as amended." Ex. 6. The first page of the form—just above the signature field—provides the following warning: "Any individual who knowingly and willfully falsifies, or who knowingly and willfully fails to

file this report may be subject to civil *and* criminal sanctions. (See 5 U.S.C. app. 6, 104, and 18 U.S.C. 1001.)." *Id.* (emphasis added). During the course of the charged conspiracy, defendant Menendez omitted from his signed forms numerous reportable gifts and things of value that he received from defendant Melgen, while certifying that the forms were "true, complete and correct." Ex. 6. As such, the grand jury returned an indictment charging him with, among other things, engaging in a scheme to conceal material facts, in violation of 18 U.S.C. § 1001(a)(1). *See* Dkt. No. 1 (Indictment), ¶¶ 266-72.

Defendant Menendez nevertheless contends that the conduct charged in Count Twenty-Two is protected by the Speech or Debate Clause. In developing his argument, he avers that preparing, completing, and filing his financial disclosure forms are legislative acts, and therefore protected by the Speech or Debate Clause. *See* Dkt. No. 60-1 at 26 (asserting that the "filing of his financial disclosure forms is an act taken within the legislative sphere and is thus protected by the Speech or Debate Clause."). It is difficult to imagine, however, that United States Senators concealing reportable gifts from the public was what the Framers had in mind when they drafted the Speech or Debate Clause, particularly when the gift is from a non-constituent and the Senator is using the power of his public office to advance that non-constituent's personal and financial interests.

Defendant Menendez suggests to the Court that the "case law in this area is sparse," Dkt. 60-1 at 26, but he fails to cite—or even acknowledge—the circuit and district court opinions that have expressly addressed this issue and rejected his claim. More than thirty years ago, the Second Circuit unequivocally rejected a former Congressman's Speech or Debate Clause challenge to the admission of his EIGA financial disclosure report, in which he "falsely listed his $5,000 share of [a] bribe as a 'consulting fee,'" as evidence in his corruption trial. *United States v. Myers*, 692

F.2d 823, 849 (2d Cir. 1982). The Second Circuit explained that the Clause protects only "legislative acts" that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings"—which did not include "[d]isclosure of income from sources other than employment by the United States." *Id.* In doing so, the court likened the defendant's filing of the false financial disclosure reports to the "falsification of similar statements" courts had previously found unprotected from prosecution. *Id.* (citing *United States v. Bramblett*, 348 U.S. 503 (1955) (concerning a false statement to the House Disbursing Office) and *United States v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979) (concerning a false statement to the House Office of Finance)).

Soon thereafter, the D.C. Circuit also affirmed that the Speech or Debate Clause does not protect a Congressman's filing of a financial disclosure form. *See United States v. Hansen*, 566 F. Supp. 162 (D.D.C. June 17, 1983), *aff'd*, No. 83–1689 (D.C. Cir. Aug. 1, 1983) (unpublished order). In *Hansen*, the defendant, a U.S. Congressman, was charged with making false statements on his financial disclosure forms, in violation of Section 1001. *Id.* at 163. The defendant argued to the district court—as the defendants do here—that the Speech or Debate Clause barred his prosecution. *Id.* The district court categorically denied his claim, explaining that the "filing of an EIGA report is not a 'legislative act,' nor bears upon a legislator's motivation for any legislative act." *Id.* at 169. The court specifically rejected the precise argument that the defendants raise here—namely, that filing constitutes legislative activity "because the Constitution confers upon each House the authority to discipline its members[,] . . . and because the House may discipline its members for matters relating to financial disclosure reports filed with its Clerk." *Id.* at 169; *see also* Dkt. No. 60-1 at 25-26. The court explained,

> Any suggestion that Congress intended that discipline of members for failures to comply with EIGA's provisions be kept an in-house matter is completely belied by

> the fact that Congress specifically opened the act's disclosure requirements up to external scrutiny by vesting in the Attorney General the authority . . . to bring civil actions to prosecute violations of those requirements. Moreover, that EIGA is a three-branch plan in which officials of the executive and judicial branches have equal disclosure obligations to those of legislative branch officials demonstrates that the disclosure requirements have a broader purpose than mere internal policing but also concern the public's right to know about the financial interests of its governmental leaders.

Id. at 171. The D.C. Circuit affirmed the district court's Speech or Debate order on interlocutory appeal. *See United States v. Hansen*, 772 F.2d 940, 943 (D.C. Cir. 1985) (citing the unpublished order). Almost ten years later, the D.C. Circuit favorably cited *Hansen* when holding that statements by a Congressman to the House Ethics Committee concerning his financial disclosures were not protected by the Speech or Debate Clause. *See United States v. Rose*, 28 F.3d 181, 189 (D.C. Cir. 1994). Taken together, these cases stand for the proposition that a Senator's failure to disclose personal gifts he received on his financial disclosure forms is simply not legislative activity shielded by the Speech or Debate Clause. Their absence from defendant's motion is telling.

Defendant Menendez also advances the legal theory that adoption of a federal statute in the Senate's body of administrative rules precludes the Executive Branch's authority to enforce the adopted statute. *See* Dkt. No. 60-1 at 18-21, 25-26 (arguing that the Senate has exclusive jurisdiction to discipline its Members for improperly reporting their financial information because it has adopted EIGA into its rules). His proposed analysis would create a loophole for Members of Congress to circumvent the United States Criminal Code. For example, the Senate Ethics Manual makes clear that Members may face internal disciplinary procedures if they accept bribes or gratuities in violation of federal criminal statutes. *See* SENATE ETHICS MANUAL, S. Pub. 108-1, 108th Cong, 1st Sess., at 58 (2003), *available at* http://www.ethics.senate.gov/downloads/pdffiles/manual.pdf (last visited August 24, 2015).

("Violation of these [bribery and illegal gratuity] laws may also lead to disciplinary action by the Senate."). But no one can credibly claim that by including a prohibition of bribes and illegal gratuities in the Senate Ethics Manual, the Executive Branch loses its ability to prosecute United States Senators when they violate the federal bribery or illegal gratuities statutes under 18 U.S.C. § 201. That, however, is the natural extension of defendant Menendez's legal theory. Administrative and criminal sanctions are not mutually exclusive, and civil enforcement—or non-enforcement—of an administrative rule by the United States Senate does not preclude criminal enforcement of a federal statute by the Executive Branch.

Relatedly, defendant Menendez argues that "these filings are required by a rule of the Senate, and the Senate alone has the authority to discipline Senator Menendez for any violation of its rules." Dkt. No. 60-1 at 1. Defendant Menendez misunderstands the nature of the charges. The grand jury did not indict him for violating a Senate rule. Rather, Count Twenty-Two charges him with violating a federal criminal statute—the very statute identified above his signature on every false financial disclosure form that he filed, *see, e.g.* Ex. 6. Moreover, it is not merely "a rule of the Senate" that compels the truthful and complete disclosure of the information on the financial disclosure forms. It is compelled by the Ethics in Government Act—a federal statute. 5 U.S.C. App. 4 §§ 101-111.

In his analysis, defendant Menendez misconstrues the relationship between the Senate rules and the statutory disclosure requirements of EIGA. The Ethics in Government Act—not the Senate rules—creates the legal duty to file annual financial disclosure forms and articulates the requirements for reporting. *See* 5 U.S.C. App. 4 §§ 101, 102(a)(2)(A); SENATE ETHICS MANUAL at 62 (citing EIGA as the source of a Senator's disclosure requirements and noting that whether a gift must be disclosed under EIGA is a question independent from whether the Senate rules allow

that gift's acceptance). It is thus EIGA that defines which gifts must be reported and which may not; and whether a gift is reportable turns on factual questions regarding who provided the gift to the public official, for what purpose it was given, and the dollar value of the gift. *See, e.g.*, 5 U.S.C. App. 4 § 102(a)(2)(A). The Senate's internal, administrative rules have no impact on the statutory requirements compelling the public reporting of gifts, and no relevance to this case.

In developing his Speech or Debate argument, defendant Menendez advances a view of the United States Senate at odds with its democratic origins. In his motion, defendant Menendez envisions the United States Senate as an exclusive, powerful club subject only to its own rules and its own discretionary enforcement of those rules. *See* Dkt. No. 60-1 at 27-28 ("Senator Menendez's financial disclosure filings are protected by the Speech or Debate Clause because they were made in compliance with a Senate rule designed to allow the Senate to police its own members for official misconduct or abuse of office."); *but see United States v. Renzi*, 769 F.3d 731, 736 (9th Cir. 2014) ("Congressmen may write the law, but they are not above the law."). The mere fact that Senate rules incorporate the disclosure requirement found in the Ethics in Government Act does not decriminalize an otherwise applicable criminal statute or sweep otherwise unprotected activity under the protective shade of the Speech or Debate Clause.

Defendant Menendez's scheme to conceal the gifts he solicited and accepted from defendant Melgen is not legislative activity, and his challenge to Count Twenty-Two on Speech or Debate grounds should be rejected.

CONCLUSION

Defendant Menendez's broad, unprincipled interpretation of the Speech or Debate Clause is a blueprint for immunizing criminal activity on Capitol Hill. Under defendant Menendez's interpretation, all a Member of Congress—or staffer—would have to do in order to shield his illegal activity from criminal prosecution is insert the word "policy" into a corrupt conversation, mention an unrelated bill in an unlawful email, write something legislative on a calendar entry for an illicit gathering, threaten to hold a hearing at the conclusion of a meeting, or ask for a briefing at the end of an effort to influence the Executive Branch. Or simply squeeze all criminal conduct into defendant Menendez's limitless sphere of legislative oversight or fact-finding. According to defendant Menendez, these tricks are sufficient to turn otherwise unprotected conduct into protected legislative activity. *See* Dkt. No. 49-1 at 8 ("The prosecution cannot establish a *quid pro quo* in this manner because the alleged '*quo*' (the CBP email exchange) is immunized by the Speech or Debate Clause."). In effect, it is an interpretation that would render Members of Congress "super-citizens, immune from criminal responsibility" and above the laws they pass, accountable only to each other. That, of course, is not consistent with the established limits of the Speech or Debate Clause. Rather, it is the argument of a defendant struggling to construct a post-indictment definition of legislative activity that might protect his pre-indictment conduct.

The plain language of the indictment, as well as the evidence supporting it—much of it quoted in the indictment itself—establishes that the *quo* charged in the indictment falls far outside the boundaries of legislative activity. Specifically, defendant Menendez's efforts to influence Executive Branch officials was for the purpose of benefitting defendant Melgen's personal and financial interests. His criminal conduct is not protected by the Speech or Debate Clause.

Accordingly, the Government respectfully requests that this Court deny the defendants' motions to dismiss predicated on alleged violations of the Speech or Debate Clause.

Respectfully submitted this 24th day of August, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record for the defendants.

Dated: August 24, 2015

s/ Peter Koski
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