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Irvin B. Nathan, General Counsel
Kerry W. Kircher, Deputy General Counsel
John D. Filamor, Assistant Counsel
Rick A. Kaplan, Assistant Counsel
Katherine E. McCarron, Assistant Counsel
Office of the General Counsel
U.S. House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515-6601
Telephone: (202) 225-9700
Facsimile: (202) 226-1360
irv.nathan@mail.house.gov
kerry.kircher@mail.house.gov

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

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

UNITED STATES OF AMERICA

vs.

RICHARD G. RENZI,
JAMES W. SANDLIN,
ANDREW BEARDALL,
DWAYNE LEQUIRE,

Defendants.

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

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

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INTRODUCTION

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

Those motions each concern the Speech or Debate Clause of the Constitution: “for any Speech or Debate in either House, they [Representatives and Senators] shall not be questioned in any other Place.” U.S. Const. art. I, § 6, cl. 1. This Clause – which applies to all activities within the “legislative sphere” and, among other things, privileges Members of Congress absolutely from having to disclose information about legislative activities, and bars the Department absolutely from using a Member’s legislative

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

1 activities to indict or prosecute him – is a fundamental pillar of Congress’s independence
2 and critically important to its relationship with the other branches of the federal
3 government. This case concerns the Speech or Debate Clause primarily because of the
4 Department’s deliberate interception of information about Congressman Renzi’s
5 legislative activities pursuant to a Title III wiretap that captured numerous phone
6 conversations between the Congressman and his aides as well as other Members; the
7 Department’s presentation to the original grand jury of substantial amounts of
8 information about Congressman Renzi’s legislative activities; and the question of
9 whether and to what extent information about Congressman Renzi’s legislative activities
10 was presented to the second grand jury that returned the superseding indictment on
11 November 13, 2008.
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16 The House does not file this memorandum to protect Congressman Renzi from
17 criminal investigation or prosecution; to suggest that he or any other Member of
18 Congress is above the law or immune from prosecution (including with respect to the
19 transactions that form the subject matter of Counts 1-27 and portions of Count 42 of the
20 superseding indictment); or to suggest that no Member of Congress may ever be subject
21 to a Title III wiretap. Rather, the Leadership Group contends that the Department’s
22 significant Speech or Debate violations during the investigation of Congressman Renzi
23 (1) require a declaration that the Title III wiretap in this case violated the Constitution
24 and the suppression of all information gathered through or as a result of that wiretap; (2)
25 would have required dismissal of the original indictment, without prejudice; and (3)
26 require the dismissal of Counts 1-27 and portions of Count 42 of the superseding
27
28

1 indictment, without prejudice, if the Court determines that the Department did not
2 sufficiently cleanse its presentation to that grand jury of all privileged Speech or Debate
3 material.
4

5 The Leadership Group is well aware that adhering to the Speech or Debate Clause
6 may make the prosecutors' job more difficult in this case. However, the Leadership
7 Group is not suggesting that this case cannot be properly charged and prosecuted. Its aim
8 is only to ensure that the investigation and prosecution complies with the Speech or
9 Debate Clause, which is designed to insure that Members can conduct their legislative
10 duties free from interference or intimidation by either of the other two branches in order
11 to preserve the independence and vigor of the legislative branch essential to our system of
12 separation of powers.
13
14

15 **FACTUAL BACKGROUND**

16
17 Congressman Renzi is a three-term Member of the House from the first
18 congressional district of Arizona. (Congressman Renzi did not run for reelection this
19 year.) During his first two terms, 2003-06, Congressman Renzi served on the House
20 Committee on Resources – now the Committee on Natural Resources – which has
21 jurisdiction over public lands, among other things. *See* Rule X.1(l), Rules of the House
22 of Representatives (110th Cong.).²
23
24

25 The Investigation. As the Leadership Group understands the facts, in or about
26 2006, the Department began investigating Congressman Renzi in connection with
27

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

1 negotiations in which he participated that related to proposed land exchange legislation.

2 *See generally* John R. Wilke, *Deal Breaker: Land-Swap Plan Causes Trouble for*

3
4 *Congressman*, Wall Street Journal, April 21, 2007 at A1. It appears that the Department
5 initially:

- 6 • Questioned four former Renzi aides (Legislative Director Joanne Keene and
7 Chiefs of Staff Karen Lynch, James Jayne and Kevin Messner) and one
8 then-current Renzi aide (Legislative Assistant Nicholas Strader) about,
9 among other things, the Congressman's legislative activities, apparently
10 without any advance notice to the Congressman, Motion to Suppress
11 Wiretap at 3-4;³
- 12 • Obtained from three of the aides (Keene, Lynch, Strader), without the
13 knowledge or consent of the Congressman, documents that defense counsel
14 characterize as "stolen" from Mr. Renzi's office, including "draft
15 legislation, internal congressional email, and Congressman Renzi's daily
16 schedules," Motion to Suppress Interviews/Phone Calls at 3; and
- 17 • Directed one of the former staffers (Keene) and others "to secretly record
18 their telephone conversations with Congressman Renzi" which allegedly
19 included "questioning him about his legislative acts," Motion to Suppress
20 Wiretap at 4.

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

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

1 Congressman, an application the Court promptly granted. *See* Order Authorizing
2 Interception of Wire Communications (Oct. 26, 2006) (Jorgenson, J.) (“Wiretap Order”).
3
4 Presumably based on the Department’s application, the Wiretap Order’s lone provision
5 regarding Speech or Debate material stated:

6
7 In the event a conversation relates directly to pending legislation before the
8 United States Congress, and in order to protect the government’s right to
9 “spot check,” the monitor will stop listening, and the remaining
10 conversation will be recorded but not reviewed, placed in an envelope and
11 sealed pending a review by an independent group of investigators and/or
12 prosecutors. The one exception to this procedure will be conversations
13 related to the legislation referenced in this affidavit, which will be fully
14 monitored and reviewed. This procedure will be fully briefed at the
15 minimization meeting.

16 *Id.* at 6.⁴

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

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

1 [privileged legislative] activities are discussed,” but only “limits the subsequent
2 evidentiary use of those recorded conversations.” *Id.* at 13. The memo also asserts that
3 the Department does “not expect Speech or Debate issues to arise” because Congress
4 would be out of session during the wiretap. *Id.* Finally, the memo asserts that it is
5 permissible to target and deliberately intercept conversations about specific legislation,
6 *i.e.*, “legislation referenced in this affidavit, which will be fully monitored and reviewed.”
7
8
9 *Id.*

10 The wiretap was in effect from late October 2006 to late November 2006, during
11 which time the Department “recorded hundreds of phone calls between Congressman
12 Renzi and his legislative aides [M]any of these conversations reflected discussions
13 about legislative acts.” Motion to Suppress Wiretap at 4; *see also id.* at 16-21 (setting out
14 transcriptions of some of these calls). The Department also intercepted numerous
15 conversations between Congressman Renzi and other Members of Congress, including a
16 November 8, 2006 post-election conference call with other Members of the House
17 Republican Conference. *See id.* at 22 & n.11.⁵

21
22 ⁵ The House Republican Conference is an official House leadership office that is
23 operated, and whose employees are paid, with appropriated funds. *See, e.g.*, Legislative
24 Branch Appropriations Act, 2006, Pub. L. No. 109-55, 119 Stat. 565, 569 (appropriating
25 funds for House leadership offices, including Republican Conference). It is the
26 responsibility of the Conference to assist Republican Members of the House by analyzing
27 pending legislation, disseminating documents on legislative issues, and providing support
28 services on matters of public policy, among other things. *See generally*
<http://www.gop.gov/web/guest/home>.

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

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

8
9 The Grand Jury. In the summer of 2007, the Department subpoenaed three former
10 Renzi aides (Keene, Lynch, Messner) to appear before the first grand jury. The
11 Department questioned all three at considerable length about the Congressman’s
12 legislative activities, including the drafting of the proposed land exchange legislation, the
13 Congressman’s motivations for introducing legislation, and the timing and role of other
14 Members in the introduction of legislation. Motion to Dismiss at 27-35. In addition, the
15 Department placed before the grand jury documents taken from the Congressman’s
16 office, apparently without his knowledge or consent, including emails that reflected
17 legislative activity. *Id.* at 29-32; *see also* Motion to Suppress Interviews/Phone Calls at
18 3. The Department effectively concedes that it placed protected legislative information
19 before the first grand jury. *See* Response to Renzi’s Motions to Dismiss Indictment
20 Based on Speech or Debate Clause Violations at 10 (Nov. 7, 2008) (“Opposition to
21 Motion to Dismiss”).
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26 recording – in blatant violation of the Constitution – of a collective conversation between
27 Members from one political party that concerned the leadership and organization of that
28 party’s conference in the House in connection with the next Congress. *See infra* at
II.A.4.

1 The Indictments. On February 20, 2008, the original grand jury returned a 35-
2 count indictment against Congressman Renzi, Counts 1-27 of which relate to discussions
3 between Congressman Renzi and private parties regarding legislative land exchanges
4 sought by those private parties. The indictment alleges that the Congressman extorted a
5 corporation and unrelated investment group in connection with property that he proposed
6 be included in the land swap legislation that they sought. On November 13, 2008, a
7 superseding indictment was returned, charging the Congressman with nine additional
8 counts. In both indictments, the grand jury described, among other things, the details of
9 Congressman Renzi's involvement with at least two private parties who sought to enlist
10 his help in introducing and assisting in the passage of land exchange legislation.⁶

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14 The Department has now represented that "a different federal grand jury returned [the]
15 superseding indictment." Response to Leadership Group's Motion to Obtain Speech or
16 Debate Instructions at 2 (Nov. 18, 2008). However, it is not clear what constitutionally
17 privileged legislative materials were presented, directly or indirectly, to the second grand
18 jury.
19
20

21 **CONGRESS'S ROLE IN LEGISLATING LAND EXCHANGES**

22 Congress has plenary power to regulate the distribution and use of federal public
23 land. U.S. Const. art. IV, § 3, cl. 2 (vesting Congress with power "to dispose of and
24

25 ⁶ For example, the superseding indictment charges: "Between January 2005 and April
26 2005 . . . RENZI told Company A's representatives that they should purchase the Sandlin
27 Property and include it in the land exchange proposal." Indictment ¶ 28a; *see also, e.g.,*
28 *id.* ¶ 28j. ("On or about April 16, 2005, RENZI met in the District of Arizona with . . .
Investment Group B[] to discuss the possibility of RENZI sponsoring a federal land
exchange on its behalf.").

1 make all needful Rules and Regulations respecting the Territory or other Property
2 belonging to the United States”). “The power over the public land thus entrusted to
3 Congress is without limitations. ‘And it is not for the courts to say how that trust shall be
4 administered. That is for Congress to determine.’” *United States v. City of S.F.*, 310 U.S.
5 16, 29-30 (1940) (quoting *Light v. United States*, 220 U.S. 523, 537 (1911)).

6
7 One manner in which Congress exercises its Article IV authority is through “land
8 exchanges,” the trading of federally owned lands for lands that are owned by
9 corporations, individuals, or state or local governments. “Throughout the history of the
10 West, the federal government has used land exchanges with states, local governments,
11 and private individuals to address various land management issues.” Daniel Dansie,
12 Comment, *The Washington County Growth and Conservation Act of 2006: Evaluating a*
13 *New Paradigm in Legislated Land Exchanges*, 28 J. Land Resources & Envtl. L. 185, 187
14 (2008). Some land exchanges take place through administrative processes administered
15 by certain federal agencies pursuant to authority delegated to them by statute.⁷ Others
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21 ⁷ Four federal agencies possess such delegated authority: the Bureau of Land
22 Management (“BLM”), the National Park Service, and the U.S. Fish and Wildlife Service
23 (all within the Department of the Interior), and the U.S. Forest Service (“USFS”) in the
24 Department of Agriculture. See Ross W. Gorte and Carol Hardy Vincent, *Federal Land*
25 *Ownership: Current Acquisition and Disposal Authorities*, Cong. Research Serv., Report
26 for Congress, No. RL34273 (Dec. 6, 2007) (“CRS Federal Land Ownership Report”),
27 available on-line at <http://www.Congress.gov/ertp/rl/pdf/RL34273.pdf>. The Federal
28 Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-71 (“FLPMA”), is the
principal statutory authority governing land exchanges conducted by BLM and USFS.
From 1989-99, BLM and USFS together administered approximately 2,500 land
exchanges. See *BLM and the Forest Service: Land Exchanges Need to Reflect*
Appropriate Value and Serve the Public Interest at 11 (GAO/RCED-00-73, June 22,
2000), available on-line at <http://www.gao.gov/new.items/rc00073.pdf>.

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

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

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

1 In the House, the Committee on Natural Resources – formerly the Committee on
2 Resources – has primary jurisdiction over direct land exchange legislation. However, the
3 legislation itself is often prepared or sponsored by a Member of Congress who represents
4 the state in which some or all of the land is located. In some ways, the development of
5 direct land exchange legislation resembles the negotiation of a commercial contract, and
6 extensive negotiations between the private landholder and a Member of the House or
7 Senate are a normal and routine part of the process. *See, e.g., Wash. County Growth and*
8 *Conservation Act of 2006 and White Pine County Conservation Recreation and Dev. Act*
9 *of 2006: Hearing on S.3636 and S.3772 Before the Subcomm. on Public Lands and*
10 *Forests of the S. Comm. on Energy and Natural Res. , 109th Cong. 8 (2007) (statement of*
11 *Sen. John Ensign) (explaining “Senator Reid and I have worked tirelessly [as well*
12 *as] both our staffs here in Washington as well as our staffs in Nevada, sitting down with*
13 *all of the stakeholders, everybody from the environmental groups, the local governments,*
14 *developers, power companies, water companies, Federal, state and local governments . . .*
15 *.”). It is not unusual for a Member to negotiate regarding the parcels of private property*
16 *to be included in the exchange proposal. See, e.g., id. at 14 (statement of Sen. Reid)*
17 *(explaining his role in creating a mechanism to increase the amount of privately held land*
18 *in Pine County; “based on feedback we’ve received, boundaries...were placed one-tenth*
19 *of a mile uphill ... and 30 feet from the boundary of private land”); see also Press*
20 *Release, U.S. Senator Bob Bennett, Bennett Introduces Washington County Land Bill*
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28 *Id.* § 1716(a). Congress, in legislating land exchanges directly, is not subject to these requirements.

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

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

16 **A. The Separation of Powers Is a Fundamental Component of Our** 17 **Constitutional Structure.**

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19 “[T]he whole American fabric has been erected” on the principle of separation of
20 powers. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). As the founders
21 wisely insisted, “none of [the three branches of the federal government] ought to possess,
22 directly or indirectly, an overruling influence over the others, in the administration of
23 their respective powers. It will not be denied that power is of an encroaching nature, and
24 that it ought to be effectually restrained from passing the limits assigned to it.” The
25 Federalist No. 48, at 316 (James Madison) (Random House, Inc. ed. 2000).
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1 The separation of powers is violated when “[o]ne branch . . . interfere[s]
2 impermissibly with the other’s performance of its constitutionally assigned functions.”
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4 *INS v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring); *see also Nixon v.*
5 *Adm’r. of Gen. Servs.*, 433 U.S. 425, 443 (1977); *Morrison v. Olson*, 487 U.S. 654, 695
6 (1988). The Framers were acutely aware that simply dividing the federal government
7 into three separate branches would not be sufficient to guarantee American liberty.
8 Accordingly, they incorporated into the Constitution concrete mechanisms to ensure the
9 separation of powers, mechanisms that would “provide some practical security for each
10 [branch], against invasion of the others.” The Federalist No. 48, at 316 (James Madison);
11
12 *see also* The Federalist No. 51, at 331 (James Madison or Alexander Hamilton) (“[T]he
13 great security against a gradual concentration of the several powers in the same
14 department, consists in giving to those who administer each department the necessary
15 constitutional means and personal motives to resist encroachment of the others.”). One
16 such mechanism is the Speech or Debate Clause.
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19 **B. The Speech or Debate Clause Implements the Separation of Powers by**
20 **Guaranteeing Legislative Branch Independence.**

21 **1. The History and Purpose of the Clause.**

22 The Speech or Debate Clause is rooted in the epic struggle between the Parliament
23 and the Crown in sixteenth- and seventeenth-century England. “Behind [the Clause] lies
24 a history of conflict between the Commons and the Tudor and Stuart monarchs during
25 which successive monarchs utilized the criminal and civil law to suppress and intimidate
26 critical legislators.” *United States v. Johnson*, 383 U.S. 169, 178 (1966).
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1 As Parliament achieved increasing independence from the Crown, its
2 statement of the privilege grew stronger. . . . In 1689, the Bill of Rights
3 declared in unequivocal language: “That the Freedom of Speech, and
4 Debates or Proceedings in Parliament, ought not to be impeached or
questioned in any Court or Place out of Parliament.”

5 *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (citations omitted). As a result of the
6 English experience, “[f]reedom of speech and action in the legislature was taken as a
7 matter of course” by the Founders, and reflected in the Speech or Debate Clause of our
8 Constitution. *Id.*⁹

9 “The purpose of the Clause is to insure that the legislative function the
10 Constitution allocates to Congress may be performed *independently*.” *Eastland v. U.S.*
11 *Servicemen’s Fund*, 421 U.S. 491, 502 (1975) (emphasis added). “[T]he ‘central role’ of
12 the Clause is to ‘prevent intimidation of legislators by the Executive and accountability
13 before a possibly hostile judiciary.’” *Id.* (quoting *Gravel v. United States*, 408 U.S. 606,
14 617 (1972)). Thus, “[i]n the American governmental structure the clause serves the
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21 ⁹ The historical record confirms the privilege’s roots in the criminal context. *See, e.g.*,
22 Harold Hulme, *The Winning of Freedom of Speech by the House of Commons*, 61 *Am.*
23 *Hist. Rev.* 825, 836 (1956); John Reeve, *The Arguments in King’s Bench in 1629*
24 *Concerning the Imprisonment of John Selden and Other Members of the House of*
25 *Commons*, 25 *J. Brit. Stud.* 264, 265 (1986). Although, for obvious reasons, this
26 historical record does not reflect the use of phone taps by the English monarchy against
27 members of Parliament, it does suggest that searches by the Crown of legislators’ records
28 – which are directly analogous to modern-day phone taps – was one of the abuses against
which the Commons struggled. *See, e.g.*, Christopher Thompson, *The Reaction of the*
House of Commons in November and December 1621 to the Confinement of Sir Edwin
Sandys, 40 *Hist. J.* 779, 781-82, 785 (1997); Conrad Russell, *Parliaments and English*
Politics, 1621-1629 at 122 (1979).

1 additional function of reinforcing the separation of powers so deliberately established by
2 the Founders.” *Johnson*, 383 U.S. at 178.¹⁰

3
4 Because “the guarantees of the [Speech or Debate] Clause are vitally important to
5 our system of government,” they “are entitled to be treated by the courts with the
6 sensitivity that such important values require.” *Helstoski v. Meanor*, 442 U.S. 500, 506
7 (1979). Accordingly, the Supreme Court has repeatedly, and “[w]ithout exception . . .
8 read the Speech or Debate Clause broadly to effectuate its purposes.” *Eastland*, 421 U.S.
9 at 501-02; *see also Doe v. McMillan*, 412 U.S. 306, 311 (1973); *Gravel*, 408 U.S. at 624.

10 11 12 **2. The Scope of the Clause.**

13 The protections afforded to Members of Congress by the Speech or Debate Clause
14 apply to all activities “within the ‘legislative sphere.’” *McMillan*, 412 U.S. at 312-13
15 (quoting *Gravel*, 408 U.S. at 624-25). The “‘sphere of legitimate legislative activity’”
16 includes all activities that are
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19 ¹⁰ *See also United States v. Helstoski*, 442 U.S. 477, 491 (1979) (“The Speech or Debate
20 Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its
21 purpose was to preserve the constitutional structure of separate, coequal, and independent
22 branches of government. The English and American history of the privilege suggests that
23 any lesser standard would risk intrusion by the Executive and the Judiciary into the
24 sphere of protected legislative activities.”); *Youngblood v. DeWeese*, 352 F.3d 836, 839
25 (3d Cir. 2004) (“Ensuring a strong and independent legislative branch was essential to the
26 framers’ notion of separation of powers The Speech or Debate Clause is one
27 manifestation of this practical security for protecting the independence of the legislative
28 branch”); *United States v. Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980) (“Like the
Speech or Debate Clause, the doctrine of separation of powers serves as a vital check
upon the Executive and Judicial Branches to respect the independence of the Legislative
Branch, not merely for the benefit of the Members of Congress, but, more importantly,
for the right of the people to be fully and fearlessly represented by their elected Senators
and Congressmen.”).

1 an integral part of the deliberative and communicative processes by which
2 Members participate in committee and House proceedings with respect to
3 the consideration and passage or rejection of proposed legislation or with
4 respect to other matters which the Constitution places within the
jurisdiction of either House.

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

6 The courts, broadly construing the concept of legislative activity, “have plainly not
7 taken a literalistic approach in applying the privilege.” *Gravel*, 408 U.S. at 617. Thus,
8 the privilege covers all facets of the legislative process, including “[c]ommittee reports,
9 resolutions, and the act of voting,” *id.* at 617, as well as committee investigations and
10 hearings. *See Eastland*, 421 U.S. at 504-05; *McMillan*, 412 U.S. at 313. Consistent with
11 a broad construction of “legislative activity” – and most pertinent here – the privilege
12 also extends to preparations for and information gathering in furtherance of, legislative
13 activities, because “[a] legislative body cannot legislate wisely or effectively in the
14 absence of information respecting the conditions which the legislation is intended to
15 affect or change.” *Eastland*, 421 U.S. at 504 (quoting *McGrain v. Daugherty*, 273 U.S.
16 135, 175 (1927)); *see also Miller v. Transam. Press, Inc.*, 709 F.2d 524, 530 (9th Cir.
17 1983) (“Obtaining information pertinent to potential legislation . . . is one of the ‘things
18 generally done in a session of House,’ concerning matters within the ‘legitimate
19 legislative sphere.’” (citations omitted)). The privilege protects information gathering
20 through both formal means – such as through committee subpoenas, *Eastland*, 421 U.S.
21 at 504 – and informal means. *See, e.g., McSurely v. McClellan*, 553 F.2d 1277, 1287
22 (D.C. Cir. 1976) (en banc) (“[A]cquisition of knowledge through informal sources is a
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1 necessary concomitant of legislative conduct and thus . . . within the ambit of the [Speech
2 or Debate] privilege”).¹¹
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4 Beyond legislative activities themselves, the Speech or Debate Clause also
5 protects “‘against inquiry into . . . the motivation for those [legislative] acts.’” *Helstoski*,
6 442 U.S. at 489 (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972)); *see also*
7 *Johnson*, 383 U.S. at 184-85 (inquiry into Member’s motives for engaging in legislative
8 activities “necessarily contravenes the Speech or Debate Clause”). Indeed, the Supreme
9 Court – and numerous circuit courts – have held unequivocally that the question of
10 whether a Congressman’s conduct was improperly motivated “is precisely what the
11 Speech or Debate Clause generally forecloses from executive and judicial inquiry.” *Id.* at
12 180; *see also Miller*, 709 F.2d at 530 (Clause bars “questions about [Member’s] motive
13 or legislative purpose”); *Gov’t of the Virgin Islands*, 775 F.2d at 522 (same); *United*
14 *States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973) (same).
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18 It necessarily follows that the Speech or Debate Clause applies to activities
19 “‘within the legislative sphere’ even though the[] conduct, if performed in other than
20 legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal
21 or civil statutes.” *McMillan*, 412 U.S. at 312-13 (quoting *Gravel*, 408 U.S. at 624-25).
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25 ¹¹ *See also Miller*, 709 F.2d at 530 (9th Cir. 1983) (asserting that the privilege
26 encompasses when “[c]onstituents . . . provide data to document their views when urging
27 the Congressman to initiate or support some legislative action”); *Brown & Williamson*
28 *Tobacco Corp. v. Williams*, 62 F.3d 408, 421-23 (D.C. Cir. 1995) (documents voluntarily
delivered to committee by private citizen protected); *Gov’t of the Virgin Islands v. Lee*,
775 F.2d 514, 520-21 (3d Cir. 1985) (fact-finding by individual legislator protected).

1 Put differently, the Clause is not abrogated and the privilege is not defeated merely
2 because the Department or other litigant alleges that a Member committed a crime or
3 otherwise acted unlawfully. *See Tenney*, 341 U.S. at 377 (maintaining that a “claim of an
4 unworthy purpose does not destroy the privilege”).
5

6 As the Department correctly notes, however, the privilege does not cover
7 everything Members do. Where the Department can produce non-privileged evidence to
8 support its charges, it may prosecute a Member for a crime that might be incidentally
9 related to a legislative act. For example, in *Brewster*, the Supreme Court permitted the
10 prosecution of a Member of Congress for bribery to proceed where “no inquiry into
11 legislative acts or motivation for legislative acts [wa]s necessary for the Government to
12 make out a prima facie case.” 408 U.S. at 525. There, “[t]he illegal conduct [wa]s taking
13 or agreeing to take money for a promise to act in a certain way,” and “[t]aking a bribe . . .
14 is not, by any conceivable interpretation, an act performed as a part of or even incidental
15 to the role of a legislator,” “is not an ‘act resulting from the nature, and in the execution,
16 of the office,’” and is not “a ‘thing said or done by him, as a representative, in the
17 exercise of the functions of that office.” *Id.* at 526. Accordingly, the prosecution did not
18 have to “‘draw in question the legislative acts of the defendant member of Congress or
19 his motives for performing them.’” *Id.* (citations omitted).¹²
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26 ¹² The Clause also does not cover activities the courts have said are merely “related,” but
27 not integral, to the legislative process. Those “merely related” activities include such
28 things as constituent casework and “assistance in securing Government contracts,”
Brewster, 408 U.S. at 512 (dicta); private republication of legislative papers, *Gravel*, 408
U.S. at 626; press statements and constituent newsletters, *Hutchinson v. Proxmire*, 443

1 Debate Clause [are] limited to the evidentiary use of legislative acts.” Opposition to
2 Motion to Dismiss at 15. *See also* CREW Memorandum at 10. This argument – that the
3 Clause bars the Department from introducing protected materials into evidence, but does
4 not bar it from obtaining legislative materials by compulsion in the first instance – rests
5 entirely on *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978) (“*Eilberg*”). In
6 *Eilberg*, the Third Circuit – considering an appeal from a denial of a motion to quash a
7 grand jury subpoena to the Clerk of the House which sought the phone records of then-
8 Congressman Joshua Eilberg – said the privilege “when applied to records or third-party
9 testimony is one of nonevidentiary use, not of non-disclosure.” *Id.* at 597.
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13 Even on its own terms, however, *Eilberg*’s cramped view of the Speech or Debate
14 Clause is inconsistent with, and would not justify, the Department’s presentation to the
15 grand jury of Congressman Renzi’s legislative records, or its questioning of the
16 Congressman’s aides or third parties about his legislative activities before the grand jury
17 (all of which amounts to “evidentiary use” of the Congressman’s legislative activities,
18 which both the Department and CREW concede is barred by the Clause).¹³
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21 Moreover, *Eilberg*’s reasoning is not consistent with binding Supreme Court
22 precedent; has been explicitly rejected by the D.C. Circuit (and is not followed by any
23 other circuit); and is no longer followed even in the Third Circuit.
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26 ¹³ *Eilberg* specifically noted that the Clause has a testimonial aspect “designed to prevent
27 hostile questioning by the executive branch,” 587 F.2d at 596, a fact the Department and
28 CREW neglect to mention. However, *Eilberg* found that aspect of the privilege not
implicated in that case because neither the Congressman nor his aides had been
subpoenaed. *Id.* at 597.

1 *First*, as noted above, the Supreme Court has long insisted that the Speech or
2 Debate Clause be read *broadly*, not narrowly. *See supra* at 15. Moreover, the Court has
3 never drawn any distinction among the various components of the Clause, and it has
4 never suggested a limitation on the scope of the privilege when it does apply. Instead, the
5 Court has made clear that when the Clause applies, it is “absolute.” *See supra* at 19.
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8 *Second*, in the 30 years since *Eilberg* was decided, no other Circuit has adopted its
9 reasoning. And the D.C. Circuit expressly rejected *Eilberg* in *Brown & Williamson*. As
10 that Court explained, “if the touchstone [of the Clause] is interference with legislative
11 activities,” it follows that “the nature of the use to which [legislative materials] will be
12 put – testimonial or evidentiary – is immaterial.” 62 F.3d at 421. “Documentary
13 evidence can certainly be as revealing as oral communications,” *id.* at 420, and
14 “indications as to what Congress is looking at provide[s] clues as to what Congress is
15 doing, or might be about to do.” *Id.* Therefore, the D.C. Circuit “d[id] not accept the [the
16 Third Circuit’s view in *Eilberg*] that the testimonial immunity of the Speech or Debate
17 Clause only applies when Members or their aides are personally questioned.” *Id.* at 418.
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20 The D.C. Circuit reaffirmed this view in the *Rayburn* case which concerned the
21 historically unprecedented search of Congressman William Jefferson’s Capitol Hill
22 congressional office, and the Department’s seizure of large quantities of congressional
23 records (including thousands of pages of legislative records) which the Congressman had
24 no prior opportunity to review for privilege. In opposing the Congressman’s Rule 41
25 motion, the Department argued that (1) execution of the search warrant was not the kind
26 of compelled disclosure against which the Speech or Debate Clause protects, and (2) the
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1 Clause only protects a Member from having to “testify,” and does not protect against the
2 disclosure of his legislative records. The D.C. Circuit rightly rejected both arguments.

3
4 “We hold that the compelled disclosure of privileged material [*i.e.*, papers and electronic
5 records] to the Executive during execution of the search warrant . . . violated the Speech
6 or Debate Clause.” 497 F.3d at 656; *see also id.* at 663. Thus, in describing the privilege
7 as one of “non-disclosure,” the Court was simply reaffirming – as many other courts had
8 already held, *see supra* at I.B.2 – that Speech or Debate bars the compelled disclosure of
9 legislative records (as well as compelled testimony). 497 F.3d at 660.¹⁴

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12 *Third*, the Third Circuit itself has backtracked from *Eilberg*. In *In re Grand Jury*,
13 821 F.2d 946 (3d Cir. 1987), that Court, recognizing that the Speech or Debate Clause is
14 “absolute,” stated that “[o]ur precedents have *suggested* that the privilege is *primarily*
15 one of non-evidentiary use, not one of non-disclosure.” *Id.* at 953 n.4 (emphasis added).
16 Subsequently, in *United States v. McDade*, No. 96-1508 (3d Cir. 1996), the Third Circuit
17 effectively abandoned *Eilberg* by reversing a lower court order which directed the House
18 Committee on Standards of Official Conduct, on the basis of *Eilberg*, to produce to the
19 prosecution records the lower court had concluded were Speech or Debate protected. *See*
20 Order at 1, *United States v. McDade*, No. 96-1508 (3d Cir. 1996), attached as Exhibit 2.

21 22 23 24 **4. Application of the Privilege to Member Aides.**

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

1 The Speech or Debate Clause “applies not only to a Member but also to his aides
2 insofar as the conduct of the latter would be a protected legislative act if performed by the
3 Member himself.” *Gravel*, 408 U.S. at 618. For the purpose of construing the privilege,
4 a Member and his or her aide “are to be ‘treated as one.’” *Id.* at 616 (citation omitted).

6 As the Supreme Court has recognized,

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

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

19 The aide’s Speech or Debate privilege is “viewed, as it must be, as the privilege of
20 the [Member], and invocable only by the [Member] or by the aide on the [Member]’s
21 behalf.” *Id.* at 621-22; *see also Miller*, 709 F.2d at 530. Accordingly, an aide may not
22 waive a Member’s privilege without the Member’s consent. *Gravel*, 408 U.S. at 622
23 n.13.¹⁵

24 * * *

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

1 In sum, the Speech or Debate Clause privilege protects Members of Congress
2 from being sued or prosecuted for legislative activities; bars prosecutors from using a
3 Member's legislative acts to indict or convict even if the prosecution is not explicitly
4 centered on legislative activity; and protects Members from being forced to disclose their
5 legislative activities, either by way of testimony or production of documents, or through
6 seizures of documents or confidential non-public communications.
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9 There are, of course, potential costs associated with this broad constitutional
10 protection. “[W]ithout doubt the exclusion of [legislative acts] will make prosecutions
11 more difficult.” *Helstoski*, 442 U.S. at 488; *see also Brewster*, 408 U.S. at 516.
12 Notwithstanding, the Supreme Court and the lower courts have held repeatedly that the
13 Speech or Debate Clause must be broadly construed and applied because that was ““the
14 conscious choice of the Framers’ buttressed and justified by history.” *Eastland*, 421 U.S.
15 at 510 (quoting *Brewster*, 408 U.S. at 516).¹⁶
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18 That the Framers’ “conscious choice” was a wise one is evidenced not only by the
19 enduring vigor of our system of checks and balances, but also by the fact that, while
20 complying with the requirements of the Clause, the Department for more than 200 years
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24 ¹⁶ Speech or Debate is hardly the only constitutional principle we value and protect,
25 notwithstanding potential costs. “[W]e . . . have always held that in criminal cases we
26 would err on the side of letting the guilty go free rather than sending the innocent to jail.
27 We have required proof beyond a reasonable doubt as ‘concrete substance for the
28 presumption of innocence.’” *Johnson v. Louisiana*, 406 U.S. 380, 393 (1972) (quoting *In re Winship*, 397 U.S. 358, 363 (1970)). And we tolerate offensive speech because we
value free speech more. The “suppression of uncongenial ideas is the worst offense
against the First Amendment.” *Hill v. Colorado*, 530 U.S. 703, 746 (2000).

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

3
4 Furthermore, while the Speech or Debate Clause may make it more difficult for
5 the Department to investigate and prosecute Members of Congress, that does not mean
6 Members cannot be held to account. In fact, Members are subject to investigation and
7 sanctioning by the House Committee on Standards of Official Conduct – and ultimately
8 by the House itself – under the authority of the Discipline Clause of the Constitution.
9 U.S. Const. art. I, § 5, cl. 2.¹⁷ They are also subject to numerous countervailing pressures
10 and disincentives that other citizens do not face, including very significant public
11 disclosure requirements (*e.g.*, campaign donations, personal finances, travel, office
12 expenditures); constant media scrutiny; and an electoral system that requires House
13 Members to face the voters of their districts every two years.

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

19 **A. The Wiretap Violated the Speech or Debate Clause.**

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

22 The Wiretap Order constitutes the same kind of compelled disclosure that triggers
23 the protections of the Speech or Debate Clause in both the subpoena, *see e.g., Miller*, 709
24 F.2d at 528-31, and search warrant contexts. *Rayburn*, 497 F.3d at 656. For Speech or
25 Debate purposes, the forcible compulsion inherent in the Wiretap Order is legally
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28 ¹⁷ *See, e.g.*, 148 Cong. Rec. H5375-93 (2002) (House agrees to H.R. Res. 495, 107th
Cong. (2002), sponsored by Standards Committee, expelling Member from the House).

1 indistinguishable from the compulsion inherent in a subpoena or search warrant. A
2 subpoena is a judicial order to produce records or provide testimony; a search warrant is a
3 judicial order to stand aside and permit one's records to be reviewed and seized; and a
4 Title III wiretap order is a judicial order authorizing law enforcement authorities to listen
5 to and seize, by recording, one's conversations. Because subpoenas and search warrants
6 are constitutionally impermissible with respect to protected legislative information, as
7 courts have consistently held they are, so too are Title III wiretap orders constitutionally
8 impermissible with respect to protected legislative information.
9
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11
12 Moreover, because the Speech or Debate Clause must "[w]ithout exception . . .
13 [be] read . . . broadly to effectuate its purposes," *Eastland*, 421 U.S. at 501, it is wholly
14 consistent for this Court to include Title III wiretaps within the Clause's purview. The
15 Clause is designed to prohibit "any probing of legislative acts," *Brown & Williamson*, 62
16 F.3d at 419, and there is no difference between judicially-compelled production of
17 legislative records or testimony under a subpoena (or the Department's reviewing and
18 seizing legislative records pursuant to a judicially-authorized search warrant), on the one
19 hand, and the Department's listening to and seizing, by recording, a Member's legislative
20 conversations, on the other. In all three cases, legislative information absolutely
21 privileged from review or disclosure is taken by force of law.
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23

24
25 **2. The Wiretap Order Clearly Contemplated the Seizure of Legislative
26 Information.**

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

1 Congressman Renzi. *First*, that order limited the definition of privileged legislative
2 conversations to those that “relate[] directly to pending legislation.” Wiretap Order at 6.
3

4 However, the Speech or Debate Clause covers much more than information related to
5 “pending legislation.” As noted above, it covers all activities that are

6 an integral part of the deliberative and communicative processes by which
7 Members participate in committee and House proceedings with respect to
8 the consideration and passage or rejection of proposed legislation or with
9 respect to other matters which the Constitution places within the
jurisdiction of either House.

10 *Gravel*, 408 U.S. at 625. Courts have broadly construed this definition to encompass
11 activities that precede the actual introduction of legislation, such as “information-
12 gathering,” drafting and negotiating the terms of legislation. *See supra* at I.B.2.
13

14 *Second*, the Wiretap Order specifically authorized the Department to monitor and
15 record conversations related to “the legislation referenced in this affidavit.” Wiretap
16 Order at 6. In effect, at the apparent urging of the Department, the Court created a
17 “crime-fraud” exception to the Speech or Debate Clause, like the crime-fraud exception
18 that applies in the attorney-client context. *See, e.g., United States v. Hodge & Zweig*, 548
19 F.2d 1347, 1354 (9th Cir. 1977). However, there simply is no support for this claim in
20 the case law. The Speech or Debate Clause does not permit any such “crime-fraud”
21 exception because it is “absolute” when it applies, *see supra* at 19, 21, and it undoubtedly
22 applies to conversations related to specific legislation, including “the legislation
23 referenced in this affidavit.”
24
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27 *Third*, the Wiretap Order’s minimization procedures permitted seriatim initial
28 reviews by agents of the executive to “spot check” admittedly privileged legislative

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

7
8
9 **3. Execution of the Wiretap Order Plainly Resulted in the**
10 **Department’s Monitoring and Recording of Renzi Conversations**
11 **that Concerned His Legislative Activities.**

12 The Department candidly admits that, in executing the Wiretap Order, it
13 monitored and recorded conversations of Congressman Renzi that reflected his legislative
14 activities. *See* Opposition to Motion to Suppress Wiretap at 12 (“The calls involving
15 aides Patty Roe, Brian Murray, and Nicholas Strader contain legislative discussions.”);
16 *id.* (admitting that calls involving other Members of Congress were intercepted and
17 “should not have been intercepted”). This is not surprising in light of the multitude of
18 erroneous legal interpretations in the Monitoring Memo.
19
20

21 At the outset, the memo suggested that Speech or Debate issues do not arise when
22 Congress is not in session. *See* Monitoring Memo at 13. That is patently incorrect
23 because the Speech or Debate privilege does not have a temporal component.
24

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

1 Conversations about legislative activities are protected whether or not Congress is in
2 session. *See, e.g., Miller*, 709 F.2d 524 (quashing on Speech or Debate grounds
3 deposition subpoena to *former* Member of Congress).
4

5 The Monitoring Memo also, like the Wiretap Order, defined privileged
6 conversations as only those that “relate[] directly to pending legislation before the United
7 States Congress.” Monitoring Memo at 13. In effect, the Department eliminated from
8 the privilege all conversations relating to: (1) information gathering that concerned
9 possible future legislation; (2) negotiations of the terms of legislation that had not yet
10 been introduced; (3) the drafting and preparation of bills that had not yet been introduced;
11 (4) the process of organizing, and selecting leaders for, a new Congress; and (5) a host of
12 other matters that the courts have determined are absolutely privileged under the Speech
13 or Debate Clause.
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17 In addition, the Monitoring Memo, like the Wiretap Order, set out a minimization
18 protocol – “to protect the government’s right to ‘spotcheck’” privileged conversations,
19 Monitoring Memo at 13 – that, by definition, contemplated the Department’s monitoring
20 and recording privileged conversations. As noted above, that protocol is also patently
21 inconsistent with the Clause. *See supra* at II.A, (citing *Rayburn*, 497 F.3d at 663).
22

23 Finally and most importantly, the Monitoring Memo, like the Wiretap Order, claimed an
24 exception to the minimization protocol for “conversations related to the legislation
25 referenced in th[e] affidavit,” Monitoring Memo at 13, an exception that is wholly
26 inconsistent with the Speech or Debate Clause privilege which is “absolute” when it
27 applies. *See supra* at 19, 21, 27.
28

1 The Department offers essentially three defenses of the Wiretap Order, each of
2 which is unavailing. *First*, the Department’s principal contention is that *Rayburn* was
3 wrongly decided and that the Wiretap Order was valid because the Speech or Debate
4 Clause does not provide non-disclosure protection. In addition to relying on the
5 discredited *Eilberg* opinion, which we have already addressed, *supra* at 20-22, the
6 Department claims more particularly that the “execution of a Title III interception order
7 or a search warrant . . . does not result in ‘testimony’ by the target of the interception or
8 search.” Opposition to Motion to Suppress Wiretap at 8. Citing *Andresen v. Maryland*,
9 427 U.S. 463 (1976), a Fifth Amendment case involving the seizure of business records,
10 the Department essentially contends that intercepting phone conversations does not
11 amount to compulsion and that, therefore, the Clause does not protect such conversations.
12

13 This argument improperly conflates the Speech or Debate Clause with the Self-
14 Incrimination Clause of the Fifth Amendment. However, completely different purposes
15 underlie these two constitutional provisions. The latter is designed to preserve “the
16 security of the individual against the exertion of the power of the Federal Government to
17 compel incriminating testimony with a view to enabling that same Government to convict
18 a man out of his own mouth.” *Knapp v. Schweitzer*, 357 U.S. 371, 380 (1958). The
19 former concerns, not the dignity and security of the individual, but the very structure of
20 our federal government. It is designed and intended to “insure that the legislative
21 function the Constitution allocates to Congress may be performed independently,”
22 *Eastland*, 421 U.S. at 502, and to “reinforc[e] the separation of powers.” *Johnson*, 383
23 U.S. at 178. The Self-Incrimination Clause focuses on the action an individual is
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1 compelled to take in response to government interrogation. The Speech or Debate Clause
2 is framed much more broadly, using the sweeping language that the legislative activities
3 of Congressmen and Senators “shall not be questioned in any other place.” U.S. Const.
4 art. I, § 6, cl. 1.¹⁹

6 *Second*, the Department argues that judicial officers who issue Title III wiretap
7 orders are “fully empowered to impose protections on the execution of a Title III order . .
8 . . to ensure that no undue interference in legislative activity occurs. The involvement of
9 the judiciary . . . protects against circumstances that will unduly chill legitimate
10 legislative conduct.” Opposition to Motion to Suppress Wiretap at 9. While that might
11 be true in the abstract, it obviously did not occur here. *Any* probing of legislative acts
12 constitutes impermissible interference, and the Wiretap Order clearly permitted access to
13 Congressman Renzi’s legislative activities, and specifically to all information related to a
14 particular piece of legislation. “The degree of disruption is immaterial. . . . [A]ny
15 probing of legislative *acts* is sufficient to trigger the immunity.” *Brown & Williamson*,
16 62 F.3d at 419 (emphasis in original); *see also MINPECO, S.A. v. Conticommodity*
17 *Servs., Inc.*, 844 F.2d 856, 859-60 (D.C. Cir. 1988); *Miller*, 709 F.2d at 526.²⁰

23
24 ¹⁹ Indeed, the Department cites no Speech or Debate case that even remotely suggests
25 that the protections of the Clause are limited to “testimony,” and the Leadership Group is
26 aware of none.

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

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

15
16
17 We understand from Congressman Renzi’s attorneys that the Congressman had
18 only one cell phone, the phone that was the subject of the Wiretap Order, and that he
19 regularly conducted legislative activities over that cell phone. The Department was
20 certainly well aware, when it applied for the order, that Congressman Renzi used his cell
21 phone to conduct legislative activities because, among other things, the Wiretap Order
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28 advance to ensure that the executive does not overhear or obtain access to privileged
conversations. This Court need not determine in this case the precise parameters of such
appropriate safeguards.

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

8
9 Accordingly, the Department – which nowhere asserts that it was not aware that
10 Congressman Renzi used the cell phone in question to conduct legislative activities –
11 cannot viably argue that the Speech or Debate Clause does not apply here because the
12 phone happened to be registered in a corporate name.
13

14
15 **4. If the Wiretap Order and Its Execution Are Not Declared**
16 **Unconstitutional, the Resulting Precedent Could Greatly Increase**
17 **the Potential for Executive Branch Abuse at the Expense of the**
18 **Legislative Branch.**

19 If the Wiretap Order and the Department’s execution of that order are not held to
20 be unconstitutional, the resulting precedent could readily increase the potential for
21 executive branch overreach and abuse at the expense of legislative branch independence.
22 As this Court is certainly aware, vigorous oversight of the executive branch is essential to
23 Congress’s ability to check the executive branch’s excesses and abuses. If Members
24 knew that their conversations about legislative matters could be monitored by the
25 executive branch – and “legislative” certainly encompasses Congress’s oversight
26 activities, [cite] – they might be intimidated out of fear of reprisal to the detriment of the
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28

1 American people. *See, e.g., United States v. Peoples Temple of the Disciples of Christ,*
2 515 F. Supp. 246, 249 (D.D.C. 1981).

3
4 Even if Members were not chilled in the exercise of their official responsibilities,
5 the resulting precedent could significantly increase tension and conflict between the
6 branches because the executive's access to recorded legislative conversations creates the
7 potential for unbounded political mischief. In this very case, for example, the
8 Department recorded numerous conversations between Congressman Renzi and other
9 Members which dealt with the 2006 Republican Conference leadership elections. *See*
10 Motion to Suppress Wiretap at 22 and n.11. Those kinds of conversations pertain to the
11 establishment of the leadership of the House and necessarily include discussions of
12 legislative strategy and priorities. They are, therefore, by their very nature, extremely
13 sensitive and could easily be misused by the executive for political and other
14 inappropriate purposes.
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18 In short, the potential ramifications of the Court's upholding the Department's
19 position that the Speech or Debate Clause does not include a non-disclosure component
20 are extraordinarily far-reaching and dangerous to the separation of powers and checks
21 and balances that are at the heart of our Constitution.
22

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

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

1 when it introduced in the grand jury internal House emails and other documents from the
2 Congressman's office that discussed proposed legislative land exchanges and the timing
3 of the introduction of such legislation.²¹
4

5 **1. Constitutionally Protected Testimony.**

6 Congressman Renzi's former Legislative Director Joanne Keene appeared before
7 the original grand jury on July 25, 2007. Motion to Dismiss at 27-32. Although the
8 Constitution prohibited the Department from questioning her about the Congressman's
9 motives for his legislative activities, *Brewster*, 408 U.S. at 525, that is precisely what the
10 Department did. For example, prosecutors solicited information from Ms. Keene about
11 Congressman Renzi's motivation for including the Sandlin Property in proposed land
12 exchange legislation. Among other things, Ms. Keene testified that:
13
14

- 15 • the Congressman's motive for suggesting the Sandlin Property was that it
16 "had conservation value, that putting it into federal ownership would benefit
17 Fort Huachuca, and I believe at the time he did mention that The Nature
18 Conservancy had been interested in this property as well." Motion to Dismiss
19 at 28 (citation omitted).
- 20 • Congressman Renzi told his Chief of Staff, Kevin Messner, in 2003 that they
21 should "get this land into conservation" in connection with defense

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

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

3 Ms. Keene also testified about Congressman Renzi's introduction of the
4 Resolution Copper land exchange legislation in May 2005, *id.* at 31, and about draft
5 legislation for a land exchange involving the Aries Group. For example, she testified
6 that:
7

- 8 • the rough draft of the legislation did not include the Sandlin Property as of
9 April 8, 2005, and described a meeting between Congressman Renzi and Philip
10 Aries "at which the Sandlin Property was discussed as a possible addition to
11 the Aries Group's proposed legislation." *Id.* at 30.
- 12 • Congressman Renzi's motive for seeking to include the Sandlin Property in the
13 draft legislation was "that it would be valuable to protect Fort Huachuca, to
14 retire the farming for water conservation." *Id.* (citation omitted).

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

22 Congressman Renzi's former Chief of Staff Kevin Messner testified before the
23 original grand jury on August 8, 2007. He testified about:
24

- 25 • the Congressman's motives for introducing land exchange legislation and a
26 proposed amendment to the 2004 Defense Authorization Act. *Id.* at 32-34.
- 27 • his role in the legislative process and his work with Congressmen Kolbe and
28 Renzi "to help make the San Pedro river a national conservation area." *Id.* at
32-33.

- 1 • his efforts “to facilitate The Nature Conservancy’s purchase of the Sandlin
2 Property because it was projected that retiring the agricultural use of the
3 Sandlin Property would conserve approximately 3,000 acre feet of water
4 annually, which was important to the community around the San Pedro river.”
Id. at 33.
- 5 • an amendment to the 2004 Defense Authorization Act, dubbed ““the Renzi
6 Rider’,” which related to the impact of Fort Huachuca’s water use on the San
7 Pedro River. *Id.* at 33 (citation omitted).
- 8 • the Congressman’s motivation for asking Congressman Kolbe to introduce the
9 Aries Group land exchange legislation, while Congressman Renzi introduced
10 the Resolution Copper land exchange legislation. *Id.* at 34.
- 11 • the Arizona’s Senators’ positions on the Resolution Copper and Aries Group
12 land exchange legislation. *Id.*

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

15 2. Constitutionally Protected Documents.

16 The Department also presented to the original grand jury significant numbers of
17 internal House emails and other records from Congressman Renzi’s office that discussed
18 or related directly to proposed legislative land exchanges. *See* Motion to Dismiss at 29-
19 32; Letter from Gary Restaino to Reid Weingarten at ¶ 6 (May 2, 2008), attached as
20 Exhibit C to Motion to Suppress Wiretap. None of these records were presented to the
21 grand jury with the Congressman’s knowledge or consent, and it appears that most, if not
22 all, were taken from his office without his knowledge or consent. *See, e.g.,* Motion to
23 Suppress Interviews/Phone Calls at 10 (describing that when Ms. Lynch left her
24 employment with Congressman Renzi, ““she took photo copies of various documents,
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1 made copies of her e-mail and logged on to the e-mail of Jenelle Belland, Renzi's
2 scheduler, and made copies of her e-mail," without his knowledge or permission).

3
4 These official congressional records concerned or reflected: (1) "the timing of
5 votes, the schedule and agendas for House Committee meetings and legislative mark-up
6 sessions, descriptions of meetings with constituents, lobbyists and others regarding
7 legislation, and other legislative fact-finding trips and meetings," *id.* at 11; (2) "tasking
8 or communications by Renzi," *id.* at 12 (citation omitted); (3) draft statements written
9 for Congressman Renzi regarding a piece of legislation, *id.* at 12; (4) revisions to land
10 exchange legislation, *id.*; (5) "a congressional file regarding one of the legislative land
11 exchanges at issue" here, *id.*; and (6) an email from Ms. Keene to Rep. Kolbe's chief of
12 staff regarding the proposed Aries Group land exchange legislation concerning "mark-
13 ups to the draft legislation and a strategy discussion of how best to pass what Rep.
14 Kolbe's Chief of Staff describes as a 'great bill.'" *Id.* at 13.²²

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18 * * *

19
20 The testimony and records described above all concern Congressman Renzi's
21 legislative activities, and all were absolutely constitutionally protected as to the
22 Congressman. *See supra* at Section II.B.1-2. And all of this information was elicited
23 before, or presented to, the original grand jury by the Department without Congressman
24 Renzi's knowledge and without any waiver by him of his privilege. *See, e.g., Helstoski,*
25

26
27 ²² These emails have been filed under seal, Motion to Dismiss at 6 n.3, and 22 n.23, and,
28 accordingly, we have not had access to review them. Our arguments are based on
Congressman Renzi's descriptions of them.

1 442 U.S. at 491 (waiver of the Speech or Debate privilege, if even possible, must be
2 “explicit and unequivocal”). Accordingly, the Department’s use of such testimony and
3 records – such as, for example, grand jury exhibits 7, 8, 11, 12, 14, 20, 26 – was plainly
4 unconstitutional. *See, e.g., Helstoski*, 442 U.S. at 487 (“evidence of a legislative act of a
5 Member may not be introduced by the Government in a prosecution under § 201”).²³
6

7
8 The Department suggests that these flagrant violations were cured by an
9 instruction, delivered to the grand jurors by the same prosecutors who put the offending
10 information before them, presumably advising them to disregard the legislative materials
11 in their deliberations on the draft indictment put before them by the same prosecutors.
12
13 Opposition to Motion to Dismiss at 10. We still have not seen that instruction because
14 the Court has denied us access to it. *See* Order (Nov. 21, 2008) (reversing Order (Nov.
15 17, 2008)).
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19 ²³ The same thing is true of documents obtained by the Department from sources
20 outside the Congress which reflect the Congressman’s legislative activities. *See, e.g.,*
21 Grand Jury Exhibits 29 (memorandum from Resolution Copper executive stating that
22 “‘Mr. Renzi told one of [Resolution Copper’s] consultants . . . and Congressman Kolbe
23 (on floor of the House . . .) that he would stand aside and let Kolbe carry the bill in the
24 greater interest of getting it passed this year.’”); 33 (“email between Resolution Copper
25 executives, stating: . . . “all Republican members of the Arizona delegation . . . have
26 signed on as original cosponsors of the Southeast Arizona Land Conservation Act of
27 2005”); 45 (email between Resolution Cooper executives stating that “‘Southeast Arizona
28 Land Exchange and Conservation Act of 2005 was introduced in the House of
Representatives and the Senate today. The primary sponsors are Jon Kyl in the Senate
and Rick Renzi in the House.’”); 96 (email exchange between land exchange consultants
hired by Resolution Copper stating that “‘US Senate has held a hearing on our bill and
Sen. Jon Kyl is hopeful that a mark-up will be held shortly after the Senate reconvenes in
early September. Rep. Rick Renzi, our House sponsor, has refused to request a hearing
and move the bill forward.’”). *See generally* Motion to Dismiss at 24-25.

1 Nevertheless, the Leadership Group is confident that no such instruction could
2 possibly expunge from the grand jurors' minds the substantial amount of legislative
3 materials presented to them or insure that they were not influenced by those materials in
4 returning an indictment – particularly given the Department's exceedingly narrow view
5 of what constitutes protected legislative information. Substantial, repeated and persistent
6 violations of the Speech or Debate Clause cannot so easily be corrected or ignored.
7
8 In light of these original violations, and as discussed in more detail below, it will be
9 incumbent on this Court, at a minimum – now that a new grand jury has returned a
10 superseding indictment – to review carefully all evidence presented to the new grand
11 jury, both testimonial and documentary, to determine whether and to what extent
12 privileged Speech or Debate materials were presented to that grand jury.
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16 **III. The Court Should Suppress All Evidence Obtained From the**
17 **Unconstitutional Wiretap, and It Should Determine Whether Counts 1-27**
18 **and Portions of Count 42 of the Superseding Indictment Must Be Dismissed**
19 **Without Prejudice.**

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

22 The appropriate remedy for the unlawful Wiretap Order and the Department's
23 unconstitutional execution of the wiretap is to suppress all evidence secured as a direct or
24 indirect result of the wiretap. Title III makes clear that when communications have been
25 unlawfully intercepted, both the contents of those communications and their fruits must
26 be suppressed. "Wiretap evidence obtained in violation of [Title III] may not be used at a
27 criminal trial or in certain other proceedings." *United States v. Staffeldt*, 451 F.3d 578,
28 580 (9th Cir. 2006).

1 Under 18 U.S.C. § 2515:

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

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

11 It is beyond doubt that a “communication [i]s unlawfully intercepted” when the
12 order on which the interception is based patently violates the Speech or Debate Clause.
13 *Cf. United States v. Giordano*, 416 U.S. 505, 524-25 (1974) (§ 2515 reaches
14 constitutional as well as certain statutory violations). As discussed above, the Wiretap
15 Order and the Department’s execution of that order clearly contravened the Speech or
16 Debate Clause. *See supra* at Section II.A. Under these circumstances, “[t]he only way to
17 vindicate a member’s privilege to be free from improper questioning is to exclude the
18 fruits of such questioning.” *United States v. Swindall*, 971 F.2d 1531, 1549 (11th Cir.
19 1992).

20
21
22
23 **B. The Court Must Review the Evidence Presented to the Second Grand
24 Jury To Determine Whether Counts 1-27 and Portions of Count 42 of
25 the Superseding Indictment Must Be Dismissed Without Prejudice.**

26 The Leadership Group recognizes that “relatively few constitutional challenges to
27 indictments can be raised.” *United States v. Zieleski*, 740 F.2d 727, 729 (9th Cir.
28 1984). One of the rare circumstances in which such challenges are appropriate, however,

1 is where a Member’s Speech or Debate privilege has been violated before the grand jury.
2 While this Circuit has yet to confront the issue of whether a court may look behind the
3 face of an indictment when it appears that the Speech or Debate Clause has been violated,
4 the Third, Eleventh and D.C. Circuits have all unequivocally held that such action is
5 proper, and indeed, required.²⁴ “When a violation of the [Speech or Debate] privilege
6 occurs in the grand jury phase, a member’s rights under the privilege must be vindicated
7 in the grand jury phase.” *Swindall*, 971 F.2d at 1546-47; *see also United States v.*
8 *Rostenkowski*, 59 F.3d 1291, 1299 (D.C. Cir. 1995) (“at some point the presentation of
9 such material requires the court to dismiss the resulting bill”).
10
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13 In *United States v. Helstoski*, the Third Circuit persuasively explained why courts
14 must look beyond indictments where Speech or Debate challenges are raised. There, the
15 indictment charged a Member with violating the federal public official bribery statute, 18
16 U.S.C. § 201(c)(1), for allegedly “acting with others to solicit and obtain bribes from
17 aliens in return for introducing private legislation on their behalf.” 635 F.2d 200, 202 (3d
18 Cir. 1980). The court considered “whether an indictment based upon evidence protected
19 by the speech or debate clause is valid.” *Id.* at 201.
20
21

22 After examining the relevant Supreme Court precedents, the court of appeals
23 asserted that, while in some instances courts are wary of looking behind an indictment
24 where information used “had been obtained in violation of constitutional rights,” the
25

26
27 ²⁴ The Second and Fourth Circuits have noted, but not reached the issue of whether a
28 significant violation “of the Speech or Debate Clause before a grand jury might be used
to invalidate an indictment.” *United States v. Jefferson*, No. 08-4215, 2008 WL
4868411, at *11 n.8 (4th Cir. Nov. 12, 2008). *See also Myers*, 635 F.2d at 941 n.10.

1 Supreme Court “carefully distinguished that situation . . . from instances where *what was*
2 *transpiring* before the grand jury would itself violate a constitutional privilege.” *Id.* at
3 203 (emphasis added).²⁵ The introduction of Speech or Debate material to the grand jury
4 is a prime example of the latter circumstance. By definition, where the prosecution
5 introduces Speech or Debate material in the grand jury, the prosecution is actually
6 questioning a Member in another place. *See* U.S. Const. art. I, § 6, cl. 1. The challenge
7 therefore is not predicated solely on a *prior* violation.
8

9
10 Speech or Debate Clause violations before the grand jury may be further
11 distinguished because of the acute and essential interests the Clause is designed to
12 protect. As the Third Circuit explained:
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14 [T]he mere issuance of an indictment has a profound impact on the accused,
15 whether he be in public life or not. Particularly for a member of Congress,
16 however, publicity will be widespread and devastating. Should an election
17 intervene before a trial at which he is found innocent, the damage will have
18 been done, and in all likelihood the seat lost. Even if the matter is resolved
19 before an election, the stigma lingers and may well spell the end to a
20 political career.

21 Far from being hyperbolic, this evaluation of an indictment’s effect is
22 coldly realistic. It cannot be doubted, therefore, that the mere threat of
23 indictment is enough to intimidate the average congressman and jeopardize
24 his independence. Yet, it was to prevent just such overreaching that the
25 speech or debate clause came into being. A hostile executive department
26 may effectively neutralize a troublesome legislator, despite the absence of
27 admissible evidence to convict, simply by ignoring or threatening to ignore
28 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.

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

1
2 *Helstoski*, 635 F.2d at 205. *Cf. Myers*, 635 F.2d at 935-36 (noting the importance of
3 immediately appealing a denial of Speech or Debate protection because, *inter alia*,
4 waiting until after trial would impair a Member’s “capacity to represent his
5 constituents”).
6

7 The Third Circuit’s approach comports with the Supreme Court’s repeated
8 assertions that “the Speech or Debate Clause was designed to protect Congressmen ‘not
9 only from the consequences of litigation’s results but also from the burden of defending
10 themselves.’” *Meanor*, 442 U.S. at 508 (quoting *Dombrowski v. Eastland*, 387 U.S. 82,
11 85 (1967)); *see also Powell v. McCormack*, 395 U.S. 486, 502-03, 505 (1969) (Speech or
12 Debate Clause “insure[s] that legislators are not distracted from or hindered in the
13 performance of their legislative tasks by being called into court to defend their actions”).
14 Thus, if violations of the Clause occur in the grand jury phase – and therefore result in an
15 improper indictment – the court must remedy those transgressions at the earliest possible
16 stage.²⁶
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20 The Department appears to concede that it is appropriate, in certain circumstances,
21 for courts to look beyond the face of the indictment when the Speech or Debate privilege
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23
24 ²⁶ Even if the Court were unwilling to look behind the indictment as a constitutional
25 matter, it can and should use its “supervisory power” to dismiss the offending counts of
26 the indictment as a result of the unsavory conduct by the prosecution before the grand
27 jury. *Zielezinski*, 740 F.2d at 729. As this Circuit has stated, “there are three purposes
28 underlying use of the supervisory power: ‘to implement a remedy for violation of
recognized rights, . . . to preserve judicial integrity . . . and finally, as a remedy designed
to deter illegal conduct.’” *Id.* at 730 (quoting *United States v. Hasting*, 461 U.S. 499, 505
(1983). All three factors easily are met here.

1 has been violated, although it is unclear what standard it believes the Court should
2 employ here. *See* Opposition to Motion to Dismiss at 15-16 (asserting that “incidental”
3 or “inadvertent” use of Speech or Debate evidence does not require dismissal; suggesting
4 that party must be “prejudiced” or “grand jury [must] . . . rely on privileged materials”
5 in reaching its decision). The Leadership Group believes that the most appropriate
6 standard that can be gleaned from the case law is that when a significant amount of
7 Speech or Debate material is presented to the grand jury, or when *any* Speech or Debate
8 evidence is presented and is material – either directly or indirectly – to the grand jury’s
9 determination to indict the party claiming the privilege, the Court should dismiss the
10 offending charges of the indictment.
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14 It may be unnecessary, however, for the Court in this instance to articulate an
15 exact standard. While it is unclear what specific information was presented to obtain the
16 superseding indictment, there is no doubt that there were numerous, significant and
17 sustained violations of the Speech or Debate Clause before the original grand jury leading
18 to the original indictment. Accordingly, unless the Court, after a thorough review of all
19 materials presented to the second grand jury, determines that the Department managed to
20 extract completely all Speech or Debate material and all information derived from its
21 earlier violations from its presentation to the second grand jury, the Court should dismiss
22 Counts 1-27 and portions of Count 42 of the superseding indictment.²⁷ On those counts,
23 the original grand jury received substantial evidence of indisputably legislative acts
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28 ²⁷ Obviously, Congressman Renzi, through counsel, should take part in the review of
materials presented to the second grand jury.

1 including, but not limited to, testimony and documents regarding the Congressman's
2 motives for drafting and introducing legislation, the timing and content of the
3 introduction of bills, strategies for the consideration and passage of bills, and
4 communications regarding the content and passage of bills.
5

6 In the event the Court determines that some or all of Counts 1-27 and portions of
7 Count 42 of the superseding indictment must be dismissed on Speech or Debate grounds,
8 any such dismissal should be without prejudice. And if the Department subsequently
9 wishes to return charges against Congressman Renzi related to the events described in
10 those counts, it must do so by presenting to an untainted grand jury sufficient evidence
11 that excludes reference to any protected legislative activities.
12
13

14 **CONCLUSION**

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

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27 s/
28 IRVIN B. NATHAN
General Counsel
KERRY W. KIRCHER

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Deputy General Counsel
JOHN D. FILAMOR
Assistant Counsel

RICHARD A. KAPLAN
Assistant Counsel
KATHERINE E. McCARRON
Assistant Counsel

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

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

November 24, 2008

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Certificate of Service

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

Brian M. Heberlig
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, D.C. 20036-1795

Andrew Levchuk
U.S. Department of Justice
Criminal Division Public Integrity Section
1400 New York Avenue, NW
Washington, D.C. 20530

Gary M. Restaino
U.S. Attorney's Office
40 North Central Avenue
Suite 1200
Phoenix, AZ 85004

s/

Kerry W. Kircher

Exhibit 1

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



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

FOR IMMEDIATE RELEASE
April 09, 2008

BENNETT INTRODUCES WASHINGTON COUNTY LAND BILL

Legislation Receives Support of Key Conservation Groups

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Changes to the bill from the 2006 version include:

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

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

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

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<http://bennett.senate.gov/>

Exhibit 2

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

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-1508

UNITED STATES OF AMERICA,

Appellee
v.

JOSEPH M. McDADE,

Defendant

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

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

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

ORDER

It appearing to the Court that:

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

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

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

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

BY THE COURT:


Circuit Judge

DATED: JUL 12 1996

*. 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.