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20
21 UNITED STATES DISTRICT COURT
22 DISTRICT OF ARIZONA

23 UNITED STATES OF AMERICA,
24
25 Plaintiff,

26 vs.

27 RICHARD G. RENZI,
28 JAMES W. SANDLIN,
ANDREW BEARDALL,
Defendants.

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

**DEFENDANT RICHARD RENZI'S
MOTION TO DISMISS THE
INDICTMENT FOR SEPARATION
OF POWERS VIOLATIONS**

ORAL ARGUMENT REQUESTED

21 Defendant Richard G. Renzi, by and through counsel, respectfully moves this
22 Court to dismiss the Indictment based on the improper actions of the Executive Branch.
23 During this investigation, the Justice Department violated fundamental separation of
24 powers principles by trampling upon Congressman Renzi's rights under the Speech or
25 Debate Clause, by influencing his 2006 Congressional election through leaked
26 information, and by creating, at minimum, the appearance that the Department's
27 investigative actions were motivated by improper political considerations—including by
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1 executing a search on Congressman Renzi's family insurance business on the very same
2 day that Attorney General Gonzales attempted to save his job during Congressional
3 testimony about the firings of certain U.S. Attorneys.

4 When considered in the context of the other violations here, including the
5 unlawful monitoring of attorney-client privileged and non-pertinent phone calls and the
6 misleading statements made to the Court in order to secure the Title III wiretap and
7 search warrant, the actions of the Executive Branch demonstrate a reckless disregard for
8 constitutional and criminal processes. The only adequate remedy is dismissal of the
9 Indictment.
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11 Congressman Renzi requests oral argument on this motion. A proposed order is
12 attached.
13

14 DATED this 15th day of October, 2008.

15
16
17 /s/ Kelly B. Kramer

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1 **MEMORANDUM**

2 **INTRODUCTION**

3 The separation of powers principles inherent in our structure of government were
4 designed to ensure an independent legislature as a check on the power of the executive.
5 In this investigation, the Executive Branch violated basic separation of powers
6 principles. Among other things, the Department of Justice unconstitutionally obtained
7 and used materials protected by the Speech or Debate Clause, improperly influenced a
8 hotly contested Congressional election, unconstitutionally obtained and used materials
9 protected by the attorney-client privilege, and took investigative actions that appear to
10 have been timed to promote the Department's political interests.
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13 Viewed in isolation, the Executive Branch officials' actions violated numerous
14 discrete constitutional provisions and criminal rules, which are the bases of several of
15 Congressman Renzi's other motions filed today. But when the government's conduct is
16 examined in its totality, it becomes clear that the Executive Branch engaged in conduct
17 that is inimical to the separation of powers doctrine. The only appropriate remedy for
18 these violations and the government's misconduct is dismissal of the Indictment.
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21 **BACKGROUND**

22 **I. MEDIA LEAKS ATTRIBUTED TO THE DEPARTMENT OF JUSTICE**
23 **INFLUENCED THE 2006 MID-TERM CONGRESSIONAL ELECTIONS**

24 In October 2006, about one month before the mid-term Congressional elections,
25 rumors began circulating that Congressman Renzi was under federal investigation. One
26 web site falsely claimed that the FBI had wiretapped Congressman Renzi, and that the
27 U.S. Attorney for the District of Arizona, Paul Charlton, was "sitting on an indictment"
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1 related to a Cochise County land exchange that would be returned immediately after the
2 election. *See* Ex. A (Posting to Daily Kos blog, Oct. 21, 2006, 03:38:33 PM PDT).

3 Another article falsely claimed that the government had Congressman Renzi on tape
4 saying he would not “support the land transaction unless his former business partner
5 score[d] big bucks.” *See* Ex. B (Posting to Daily Kos blog, Oct. 22, 2006, 03:16:24 PM
6 PDT).

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8 Within days, federal law enforcement sources confirmed to major media outlets
9 that the U.S. Attorney’s Office in Arizona was conducting an investigation. On October
10 24, 2006, the Associated Press reported that “a law enforcement official in Washington”
11 had confirmed an investigation into a land exchange. *See* Ex. C (Jennifer Talhelm,
12 *Officials Scrutinize Ariz. Land Deal*, BOSTON GLOBE, Oct. 24, 2006). The next day, *The*
13 *Washington Post* cited “federal law enforcement sources” as confirming an investigation
14 into whether Congressman Renzi had “twice pressured landowners to buy a 480-acre
15 parcel owned by his former business partner, a major backer of Renzi's political
16 campaign....” *See* Ex. D (Jonathan Weisman and Dan Eggen, *Lawmaker’s Influence in*
17 *Land Deals Probed*, WASH. POST, Oct. 25, 2006). *The New York Times* also reported
18 that “law enforcement officials” had confirmed an investigation into whether
19 Congressman Renzi had helped steer defense contracts to a firm that employed his
20 father, a retired Army General, even though no such investigation ever existed. *See* Ex.
21 E (David Johnston, *Congressman From Arizona Is the Focus of an Inquiry*, N.Y. TIMES,
22 Oct. 25, 2006).
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1 The late-cycle leaks about this and other investigations involving sitting
2 Republican lawmakers caused great concern. On October 26, 2006, *Roll Call* reported
3 that Republican Party operatives were worried that “rogue elements” within the “Public
4 Integrity Unit” were seeking to influence the mid-term elections and control of the
5 Congress by leaking information about ongoing corruption investigations involving
6 Republicans. See Ex. F (John Bresnahan, *Pre-Vote Leaks Rankle GOP*, ROLL CALL,
7 Oct. 26, 2006). The election-season leaks grew so severe that senior Executive Branch
8 officials, including the Director of the Federal Bureau of Investigation and senior Justice
9 Department officials, reportedly issued warnings to federal agents and attorneys about
10 the serious damages that leaks inflicted upon investigations. See Ex. G (David Johnston,
11 *Leaks About Lawmakers Prompt Warnings*, N.Y. TIMES, Nov. 2, 2006) and Ex. H
12 (Dennis Wagner and Billy House, *Inquiry on Renzi: Real Deal or Campaign Trickery?*
13 *Justice Official Cautions Not to Jump to Conclusions About Investigation*, ARIZ.
14 REPUB., Oct. 26, 2006).

18 Even as it issued these warnings, however, the Justice Department was leaking
19 information to the media from Washington, D.C. When the Criminal Division’s
20 Assistant Attorney General became aware of media interest in the investigation of
21 Congressman Renzi, she responded by having her Chief of Staff brief the Department’s
22 media spokesman about the investigation, while cautioning him that some of the media
23 allegations were “not accurate.” See Ex. I (OIG-OPR REPORT: AN INVESTIGATION INTO
24 THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, Sept. 2008, at 238). Then, on
25 October 26, 2006, *The Arizona Republic* reported that a Justice Department official in
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1 Washington had contacted two different newspapers to say that “chunks of stuff” in
2 their stories were wrong. *See* Ex. H, *supra*. The newspaper’s report quoted the official
3 as saying: “Be careful. I can confirm to you a very early investigation. But I want to
4 caution you not to chop this guy’s [Renzi’s] head off.” *Id.*

5
6 The Justice Department’s leaks and counter-leaks had predictable effects on
7 Congressman Renzi’s reelection bid. Before the first media reports, Congressman Renzi
8 enjoyed a 13 point lead in the polls. *See* Ex. J (Press Release, Northern Arizona
9 University, Renzi Continues to Lead in CD 1 Race, Oct. 24 , 2006). After the stories
10 hit, Congressman Renzi’s lead evaporated, *see* Ex. K (Catharine Richert, *Ariz. Roundup:*
11 *Democrats Pull Even In 1st, 5th Districts*, N.Y. TIMES, Nov. 2, 2006), but, aided in part
12 by the Justice Department’s caution that the press not chop his head off, Congressman
13 Renzi went on to win election to his third term in Congress by eight percentage points.

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15 **II. THE JUSTICE DEPARTMENT OBTAINED A WIRETAP ORDER**
16 **BASED ON MISLEADING AND INCOMPLETE INFORMATION AND**
17 **ABUSED THE RESULTING WIRETAP**

18 On October 19, 2006, the U.S. Attorney’s Office for the District of Arizona
19 sought permission from the Justice Department to put up a Title III wiretap on a cell
20 phone used by Congressman Renzi. *See* Ex. I, *supra* (OIG-OPR Report at 238-39).
21 Despite the Assistant Attorney General’s expressed concerns about the Speech or
22 Debate Clause issues, and the proximity of the request to the Congressional elections,
23 the Department approved the request to seek the wiretap on October 26, 2006. *See id.*

1 **A. The Justice Department Made False And Misleading Statements To**
2 **Obtain Its Wiretap Order**

3 As set forth in Congressman Renzi’s Motion To Suppress Unlawfully Obtained
4 Wiretap And Search Warrant Evidence And For A *Franks* Hearing (filed today), the
5 government misled the reviewing Court in its wiretap application.

6 In seeking the wiretap, for example, the government claimed that Congressman
7 Renzi had caused an investor to pay a premium for the San Pedro Property. What the
8 government failed to disclose to the court was that the very same investor who once
9 made this claim had repeatedly repudiated that position in subsequent recorded
10 conversations. *See id.* Similarly, the government claimed in its wiretap application that
11 Congressman Renzi had improperly “coached” witnesses, even though it is clear from
12 the actual recorded conversations that Congressman Renzi did no such thing. *See id.*
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15 In short, the government made false statements to the reviewing court, and kept
16 exculpatory evidence from the court, so that it could obtain approval for its requested
17 wiretap. *See id.*

18 **B. The Justice Department Violated the Speech or Debate Clause By**
19 **Wiretapping Calls Involving Members Of Congress And Staff**

20 In its wiretap application, the government advised the Court that it “did not
21 expect Speech or Debate Clause issues to arise given the timing of [the] application.”
22 *See Sealed Ex. 2 (Affidavit of Daniel E. Odom in Support of an Application for*
23 *Interception of Wire Communications ¶ 105(c)).* The government additionally
24 represented that it would not monitor calls that were “directly related to pending
25 legislation”—except for the legislation most relevant to this case—but would instead
26 record them for later review by a “taint team.” *See id.*
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1 Once the government obtained the wiretap order, however, it disregarded the
2 Speech or Debate Clause. In the days after the election, the government recorded
3 dozens of sensitive conversations concerning House leadership races, the organization
4 of the new Congress, and pending legislative priorities, including the following calls:

- 5 • Days after the election, the Justice Department recorded portions of a
6 conference call involving the House of Representatives' *entire Republican*
7 *conference* (Calls 2869 & 2871);
- 8 • The Justice Department recorded calls in which Congressman Renzi
9 engaged in sensitive discussions concerning the leadership and direction of
10 the House Republican Party with other members of Congress, *including*
11 *candidates for the leadership* (Calls 2771, 2778, 2783, 2877, 2902, 2984,
12 3002, 3058, 3065, 3240, 3822); and
- 13 • The Department recorded more than a dozen calls in which Congressman
14 Renzi spoke with current and former staff about political developments
15 and legislative priorities (Calls 2863, 2969, 3014, 3044, 3122, 3127, 3261,
16 3355, 3397, 3417, 3421, 3422, 3466, 3761, 3812).

17 Contrary to Agent Odom's representations in obtaining the Wiretap Order, the
18 government did not refer any of these calls to a "taint team" for further review. Instead,
19 the calls remained unprotected at all times in the hands of the Justice Department.
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21 **C. The Justice Department Abused Its Authority By Unlawfully**
22 **Recording Privileged Calls And Non-Pertinent Calls**

23 The Fifth and Sixth Amendments guarantee a suspect the effective assistance of
24 counsel, which includes a right to private consultation with counsel. In deference to
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1 these privilege and personal privacy interests, Title III requires the government to
2 conduct wiretapping “in such a way as to minimize the interception of communications
3 not otherwise subject to interception...” 18 U.S.C. § 2518.

4 Notwithstanding these requirements, the government in this case wrongfully
5 recorded more than 50 calls protected by the attorney-client privilege. It then used
6 many of these calls in its investigation, despite knowing that they were privileged.
7 When Congressman Renzi discovered these recordings, the government attempted to
8 explain the problem away by asserting, *incorrectly*, that most of the calls involved a
9 “law trained but unlicensed” political consultant. In reality, all of the relevant calls were
10 between lawyer and client, and none of them should ever have been recorded, let alone
11 used or transcribed. *See* Motion To Dismiss The Indictment Based On The
12 Government’s Unlawful Recording Of Privileged Counsel Calls (filed today).

13 The government also recorded, without minimization, literally hundreds of non-
14 pertinent calls,¹ many of which were highly personal and never should have been
15 recorded, either. For example, the government monitored and even transcribed personal
16 calls between Congressman Renzi and his wife, notwithstanding the spousal privilege.
17 *See, e.g.*, Call No. 1989. The government also recorded calls between Congressman
18 Renzi and his family, including a conversation with his young daughter about her
19 Thanksgiving outfit and a call with his brother about his family’s Thanksgiving plans.

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¹ All told, the government intercepted 1,270 communications, of which it deemed only 82 to be “pertinent.” The remaining 1,188 communications—more than 93% of the calls—were deemed “non-pertinent.” Disturbingly, however, the agents monitored the *entirety* of more than 850 of these “non-pertinent” calls, without any minimization. By failing to minimize these calls, the government violated Title III.

1 *See, e.g.*, Call Nos. 3842 & 3777. Still worse, the government recorded, without
2 minimization, at least one call in which a ranking official discussed with Congressman
3 Renzi sensitive national security information.

4 **III. THE JUSTICE DEPARTMENT SECRETLY OBTAINED DOCUMENTS**
5 **FROM STAFFERS AND QUESTIONED THEM ABOUT**
6 **CONGRESSMAN RENZI'S LEGISLATIVE ACTS**

7 Even putting aside the wiretap, the Justice Department's investigative tactics
8 showed no regard for the Speech or Debate Clause. The government used a former
9 member of Congressman Renzi's staff as an informant throughout much of the
10 investigation. Agents debriefed her repeatedly about her work in Congressman Renzi's
11 office, including her work in developing the land exchange legislation at issue in the
12 Indictment. At the government's direction, she questioned members of Congressman
13 Renzi's staff about current and historic legislative issues, and recorded conversations
14 with Congressman Renzi, his staff, and others in which she elicited information about
15 Congressman Renzi's motives for supporting land exchange legislation.
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18 The government separately questioned current and former members of
19 Congressman Renzi's staff about legislative matters. The government compelled three
20 former staffers (including the informant) to testify before the grand jury, and it also
21 interviewed at least two then-current staffers about their work in Congressman Renzi's
22 office, including their roles in developing land exchange legislation. Neither
23 Congressman Renzi nor the House of Representatives was given the opportunity to
24 assert the protections of the Speech or Debate Clause prior to the grand jury appearances
25 or interviews.
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1 At the government's request or direction, current and former staffers provided to
2 it Congressional documents, including draft bills and internal e-mail exchanges, without
3 Congressman Renzi's knowledge or approval. The government used some of these
4 stolen documents in the grand jury, despite knowing that Congressman Renzi had not
5 authorized their release. Once again, neither Congressman Renzi nor the House of
6 Representatives was given the opportunity to assert the protections of the Speech or
7 Debate Clause.
8

9 **IV. THE JUSTICE DEPARTMENT SEARCHED CONGRESSMAN RENZI'S**
10 **FAMILY BUSINESS DURING ATTORNEY GENERAL GONZALES'**
11 **CONGRESSIONAL TESTIMONY ABOUT THE U.S. ATTORNEY**
12 **FIRING SCANDAL**

13 After the 2006 elections, Attorney General Alberto Gonzales demanded the
14 resignations of eight U.S. Attorneys, including Paul Charlton, the U.S. Attorney for the
15 District of Arizona. The matter has resulted in numerous Congressional hearings, an
16 internal Justice Department investigation, and, most recently, the appointment of a
17 special prosecutor to determine whether the Attorney General violated the criminal laws.
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19 The Attorney General was not able to explain why this group of U.S. Attorneys
20 was fired. Some suggested that he sought the resignation of these U.S. Attorneys to
21 squelch corruption investigations involving Republican lobbyists or officeholders, such
22 as the investigation of Congressman Renzi. (The Justice Department's Office of
23 Inspector General recently concluded that no such thing occurred in the context of the
24 Renzi investigation.) True or not, however, these allegations led many in Congress,
25 Republicans and Democrats alike, to lose confidence in the Attorney General.
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1 To save his job, the Attorney General was under pressure to reassure the
2 Congress that the Justice Department would pursue public corruption cases with vigor.
3 *See Ex. L (Dan Eggen and Paul Kane, Gonzales Prepares to Fight for His Job in*
4 *Testimony, WASH. POST, Apr. 5, 2007).* Accordingly, Attorney General Gonzales spent
5 “extensive time” preparing for a “pivotal” hearing before the Senate Judiciary
6 Committee. *Id.* Because he was concerned about the perception that the firings had
7 been motivated by a desire to protect Republican office holders, he also traveled the
8 country to “reassure” the “U.S. Attorney community” that they should not be concerned
9 that they had been “too strong” in prosecuting political corruption cases. *See Ex. M*
10 *(Gonzales Testifies Before Senate Panel, Part II, WASH. POST, April 19, 2007, at 27-28).*

13 As if to underscore this point, the Department of Justice executed two high-
14 profile searches involving members of Congress in conjunction with the Attorney
15 General’s “pivotal” Senate testimony. On April 18, 2007, *The Washington Post* broke
16 the news that the Justice Department had searched the home of Congressman John
17 Doolittle, a Republican from California, just days earlier. *See Ex. N (James Grimaldi*
18 *and Susan Schmidt, FBI Searches Congressman’s Home, WASH. POST, Apr. 18, 2007).*
19 Then, on April 19, 2007, during the Attorney General’s testimony before the Senate
20 Judiciary Committee, the Justice Department hurriedly executed a search at
21 Congressman Renzi’s family insurance business, without even signing the warrant
22 papers, even though Congressman Renzi’s counsel had advised the U.S. Attorney’s
23 Office that Congressman Renzi would cooperate with the investigation. *See Ex. O*
24 *(Susan Ferrechio, Renzi’s Business, Doolittle’s House Searched; GOP Responds*
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1 *Quickly*, CONG. Q., Apr. 19, 2007) and Ex. P (Mike Sunnucks, *FBI Raids Renzi*
2 *Insurance Business*, PHOENIX BUS. J., Apr. 20, 2007). Political observers immediately
3 alleged that the search at Congressman Renzi's family business had been motivated by a
4 "political calculation." *See* Ex. P, *supra*.

5
6 The Department of Justice's actions had immediate impacts on the workings of
7 the House of Representatives. Within days of the searches, Congressmen Renzi and
8 Doolittle both stepped down from committee assignments. *See* Ex. Q (Neil A. Lewis,
9 *2nd House Republican Yields Committee Post*, N.Y. TIMES, Apr. 21, 2007).

10
11 **V. NEWS OF THE SEALED INDICTMENT WAS LEAKED TO THE**
12 **MEDIA BEFORE THE DEPARTMENT OF JUSTICE'S PRESS**
13 **CONFERENCE ANNOUNCING THE CHARGES**

14 The government's improper investigation culminated in a sealed indictment that
15 was returned on February 20, 2008, the same day that Congressman Renzi buried his
16 father, General Eugene Renzi, at Arlington National Cemetery. Remarkably, the
17 government appears to have leaked news of the sealed indictment almost immediately.
18 *The Arizona Republic* promptly contacted Congressman Renzi seeking comment on his
19 indictment, about which he was ignorant until it was unsealed the next morning. *See* Ex.
20 R (Robert Anglen and Dennis Wagner, *Rep. Renzi Indicted Over Arizona Land Deal*,
21 ARIZ. REPUB., Feb. 22, 2008).

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23 Of course, the leaked news about the indictment guaranteed the Department of
24 Justice maximum media attendance at its February 22, 2008 press conference, where the
25 U.S. Attorney announced the charges.
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ARGUMENT

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2 The government’s conduct demonstrated flagrant disregard for the separation of
3 powers. The Department of Justice repeatedly violated the Speech or Debate Clause, a
4 core constitutional provision ensuring the separation of powers. The Department also
5 appears to have improperly influenced a hotly contested Congressional election, to have
6 unconstitutionally obtained and used materials protected by the attorney-client privilege
7 as guaranteed by the Fifth and Sixth Amendments, and to have taken investigative
8 actions that appear to have been timed to promote the Department’s political interests.
9
10 The government’s intentional or reckless disregard for basic constitutional separation of
11 power principles requires dismissal of the Indictment in the exercise of the Court’s
12 supervisory powers.
13

14 **I. THE COURT MAY DISMISS THE INDICTMENT UNDER ITS**
15 **SUPERVISORY POWERS BASED ON THE GOVERNMENT’S**
16 **INTENTIONAL OR RECKLESS DISREGARD FOR SEPARATION OF**
17 **POWERS PRINCIPLES**

18 Districts court may dismiss indictments with prejudice, even if the conduct in
19 question does not rise to the level of a due process violation, using their supervisory
20 powers. *United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008). District courts
21 may exercise their “supervisory power ‘to implement a remedy for the violation of a
22 recognized statutory or constitutional right; to preserve judicial integrity by ensuring
23 that a conviction rests on appropriate considerations validly before a jury; and to deter
24 future illegal conduct.’” *Chapman*, 524 F.3d at 1085 (quoting *United States v. Simpson*,
25 927 F.2d 1088, 1090 (9th Cir. 1991)).
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1 However, because “[d]ismissing an indictment with prejudice encroaches on the
2 prosecutor’s charging authority,’ this sanction may be permitted only ‘in cases of
3 flagrant prosecutorial misconduct.’” *Chapman*, 524 F.3d at 1085 (quoting *United States*
4 *v. Simpson*, 927 F.2d 1088, 1091 (9th Cir. 1991)). While accidental or merely negligent
5 government conduct cannot establish “flagrant misbehavior,” “reckless disregard” for
6 the government’s constitutional obligations suffices. *Chapman*, 524 F.3d at 1085.

8 **A. The Executive Branch Violated Core Separation Of Power Principles**

9 The Constitution contains various structural features designed to ensure an
10 independent legislature. The Constitution grants the Congress exclusive power “to
11 determine the Rules of its Proceedings, punish its members for disorderly behavior, and,
12 with the concurrence of two thirds, expel a member.” U.S. CONST. art. I, § 5, cl. 2. The
13 Speech or Debate Clause further provides that no member of Congress shall be
14 “questioned in any other place” for “any speech or debate in either House.” *Id.* art. I, §
15 6. These structural features protect legislators from “prosecution by an unfriendly
16 executive” and “conviction by a hostile judiciary.” *United States v. Johnson*, 383 U.S.
17 169, 179 (1966). They represent one manifestation of the founders’ concern about
18 ensuring an independent legislature. *See id.*

21 **1. The Executive Branch Violated the Speech or Debate Clause**

22 As set forth more fully in Congressman Renzi’s Motion to Dismiss the
23 Indictment for Speech or Debate Clause Violations filed today, the Speech or Debate
24 Clause provides that Members of Congress enjoy complete immunity from prosecution
25 for their legislative acts. *See Johnson*, 383 U.S. at 184-85. To implement this
26 immunity, the Speech or Debate Clause imposes substantive restrictions on the manner
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1 in which the Executive Branch may conduct investigations. The Executive Branch may
2 not question a person about a member's legislative acts (*see Gravel v. United States*, 408
3 U.S. 606, 615-16 and 628-29 (1972)); may not take investigative actions that will cause
4 the executive to be exposed, even temporarily, to legislative act evidence (*see United*
5 *States v. Rayburn House Office Building*, 497 F.3d 654, 660 (D.C. Cir. 2007)); and may
6 not introduce or rely upon any evidence against a member of Congress at trial or before
7 the grand jury if it refers to legislative acts. *See United States v. Helstoski*, 442 U.S.
8 477, 487 (1979).

10 In this case, the Justice Department violated each of these bedrock rules.

11
12 **a. The Justice Department's Wiretap Violated the Speech**
13 **or Debate Clause**

14 The Justice Department's approach to and use of the wiretap against
15 Congressman Renzi was inconsistent with the Speech or Debate Clause. To begin with,
16 the Justice Department had no basis for asserting that the wiretap was not likely to
17 implicate the Speech or Debate Clause merely because Congress was out of session.
18 *See Sealed Ex. 2 (Title III Affd. ¶ 105(c))*. The Speech or Debate Clause prohibits
19 inquiry into a member's motivations for legislation current or historic; it is not limited to
20 "pending legislation," as Agent Odom's affidavit implied. *Id.* If anything, the timing of
21 the application all but ensured that the Executive Branch would be exposed to sensitive
22 discussions about the leadership of the House of Representatives and the Republican
23 Party's legislative priorities and strategies.

26 Moreover, the "taint team" outlined in the Justice Department's wiretap
27 application never could have cured the Speech or Debate Clause problems posed by
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1 wiretaps of members of Congress. Like searches of congressional offices, wiretaps
2 allow the Executive Branch to review privileged materials with the member's
3 knowledge or consent. But as the D.C. Circuit explained in *Rayburn*, an investigative
4 technique that allows "agents of the Executive to review privileged materials without the
5 Member's consent violates the Clause." 497 F.3d at 663.
6

7 Even if taint teams were not illegal, the Justice Department's proposed
8 procedures were plainly inadequate. Those procedures allowed the Justice Department
9 to "fully monitor[] and review[]" conversations about the land exchange legislation most
10 relevant to this case. The protections of the Speech or Debate Clause, however, are
11 "absolute," *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975), and
12 admit of no balancing or exceptions. *See Rayburn*, 497 F.3d at 662. The Executive
13 Branch cannot simply ignore the Clause's protections because they inconvenience their
14 investigative processes.
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17 Finally, it appears that the "taint team" procedures set out in the wiretap
18 application were never actually implemented, at least with respect to conversations that
19 implicated the Speech or Debate Clause. In fact, the government *did not refer a single*
20 *call* to a taint team as potentially privileged under the Speech or Debate Clause.
21

22 **b. The Justice Department Violated the Speech or Debate**
23 **Clause by Compelling Testimony from Congressional**
24 **Staff**

25 The Justice Department secretly compelled three of Congressman Renzi's
26 legislative aides to testify before the grand jury. In reckless disregard of established
27 precedents, the Justice Department never gave Congressman Renzi the opportunity to
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1 assert the protections of the Speech or Debate Clause. *See, e.g., Gravel*, 408 U.S. at
2 621-22 (when a member's aide is compelled to testify, either the member or the aide
3 may invoke the Clause).

4 The Justice Department compounded these violations by eliciting evidence of
5 legislative acts during its questioning of these legislative aides before the grand jury.
6 Under the Clause, neither a Member nor his aide may be questioned about the
7 motivation for, or the performance of, a legislative act. *Johnson*, 383 U.S. at 173-76 and
8 184-85; *Gravel*, 408 U.S. at 629. But as set forth in Congressman Renzi's Motion to
9 Dismiss the Indictment for Speech or Debate Clause Violations (filed today), the Justice
10 Department asked specific and detailed questions about Congressman Renzi's
11 motivations and strategy in connection with several different pieces of legislation,
12 including the land exchange legislation that underlies the Indictment.
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16 **c. The Justice Department Violated the Speech or Debate**
17 **Clause by Using Internal Congressional Documents in**
18 **the Grand Jury**

19 The Justice Department used as grand jury exhibits internal Congressional
20 documents, including internal Congressional e-mails and draft legislation. As the
21 government well knew, at least some of these documents were stolen from Congressman
22 Renzi's office. *See, e.g., Defendant Richard G. Renzi's Motion To Suppress Interviews,*
23 *Consensually Recorded Phone Calls, And Cellular Phone Records For Speech Or*
24 *Debate Clause Violations*, 9-13 (filed today). Yet the government never provided
25 Congressman Renzi any opportunity to assert the protections of the Speech or Debate
26 Clause, which plainly extends to "evidence of discussions and correspondence which
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1 describe and refer to legislative acts.” *Helstoski*, 442 U.S. at 486; *Rayburn*, 497 F.3d at
2 668 (holding that the Clause’s non-disclosure protection extends to “records, [both]
3 paper and electronic, of legislative acts”). There is no justification for the government’s
4 use of stolen and plainly privileged documents in its investigation or, still worse, in the
5 grand jury.
6

7 **2. The Executive Branch Undermined the Legitimacy and** 8 **Independence of the Legislative Branch**

9 The separation of powers principles inherent in our structure of government were
10 designed to ensure an independent legislature as a check on the power of the executive.
11 In this case, however, the Justice Department violated these separation of powers
12 principles by improperly influencing a Congressional election and by creating, at
13 minimum, the appearance that its investigative actions were linked to political
14 considerations.
15

16 **a. The Executive Branch Improperly Influenced the 2006** 17 **Congressional Election**

18 As recounted above, in the weeks leading up to the 2006 Congressional election,
19 sources within the Justice Department not only confirmed the existence of an
20 investigation involving Congressman Renzi, but also affirmatively contacted the media
21 to warn them “not to chop [Renzi’s] head off.” *See* Ex. H. This conduct violated not
22 only Rule 6(e) of the Rules of Criminal Procedure, but also the Hatch Act, 5 U.S.C. §
23 7321 *et seq.*,² as well as basic separation of powers principles.
24

25
26 ² In general, the Hatch Act “limits the political activities of federal employees in the
27 interests of promoting efficient, merit-based advancement, *avoiding the appearance of*
28 *politically-driven justice*, preventing the coercion of government workers to support
political positions, and foreclosing use of the civil service to build political machines.”
Burrus v. Vegliante, 336 F.3d 82, 85–86 (2d Cir. 2003) (emphasis added).

1 Federal prosecutors may not interfere, directly or indirectly, with the election of
2 members of Congress. One court underscored this point by invalidating on
3 constitutional grounds a provision in a federal plea agreement that would have required
4 a member of Congress to resign his seat and to refrain from future campaigns. *See*
5 *United States v. Richmond*, 550 F. Supp. 605, 608 (E.D.N.Y. 1982). As the court
6 recognized, granting federal prosecutors power over congressional elections would
7 create “an opportunity for an assault on the composition and integrity of a coordinate
8 branch of government.” *Id.* at 609. “Taken together, investigative techniques such as
9 those used in the Abscam cases, the enormous spectrum of criminal laws that can be
10 violated, the powerful investigative and prosecutorial machine available to the
11 executive, and forced resignations through plea bargaining would provide an intolerable
12 threat to a free and independent Congress.” *Id.*

13
14
15
16 By leaking information about supposedly secret grand jury investigations in the
17 days leading up to an election, federal law enforcement sources invariably and
18 impermissibly impact elections. Reckless or intentional leaks, as appear to have been
19 the case here, violate constitutional separation of powers principles.

20
21 **b. The Executive Branch Appears to Have Timed Searches**
22 **Involving Two Congressman to Buttress the Attorney**
23 **General’s Political Standing with the Congress**

24 In the spring of 2007, a beleaguered Attorney General struggled to convince the
25 Congress that he had not acted improperly by dismissing *en masse* a group of eight U.S.
26 Attorneys. Many charged that the firings were intended to protect Republican office
27 holders, like Congressman Renzi, who were involved in corruption investigations. In
28

1 apparent response to these concerns, the Justice Department executed search warrants at
2 Congressman Doolittle's home and at Congressman Renzi's family business.

3 By timing the search of Congressman Renzi's family business to coincide with
4 Attorney General Gonzales' testimony, the Department of Justice created, at minimum,
5 the perception that its investigation had been influenced by improper political
6 considerations. Moreover, the searches immediately and substantially impacted the
7 operations of the House of Representatives. Congressman Renzi immediately stepped
8 down from his seat on the House Intelligence Committee, which has significant
9 oversight authority over the Department of Justice, and Congressman Doolittle stepped
10 down from his seat on the House Appropriations Committee, upon whose funding the
11 Department of Justice relies.
12
13

14 **II. THE COURT SHOULD REMEDY THESE CONSTITUTIONAL**
15 **VIOLATIONS BY DISMISSING THE INDICTMENT**

16 The Justice Department's reckless disregard for basic separation of powers
17 principles in the conduct of this investigation demands a meaningful sanction: the
18 dismissal of the Indictment with prejudice. No other sanction can remedy the Justice
19 Department's actions and deter future illegal conduct.
20

21 There are no adequate trial-related remedies in this case. Suppression of the
22 privileged materials, for example, would be inadequate, because privileged materials
23 cannot be introduced into evidence irrespective of the violation. Nor would the
24 disqualification of the prosecution team be sufficient, since the government's
25 misconduct involved both local prosecutors and high-ranking Department officials in
26 Washington.
27
28

1 In this case, the Justice Department failed to recognize the limits of its authority.
2 It falls upon this Court to check the Executive Branch's conduct by dismissing the
3 Indictment. While a dramatic remedy, dismissal is necessary here to protect the
4 Congress and our citizens from an unbounded executive power.
5

6 **CONCLUSION**

7 For the foregoing reasons, the Court should dismiss the Indictment, with
8 prejudice, in the exercise of its supervisory powers.
9

10 Respectfully submitted,

11
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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2008, a true and correct copy of Defendant Richard G. Renzi’s Motion to Dismiss the Indictment for Separation of Powers Violations, and accompanying memorandum and exhibits, were electronically transmitted to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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