No.

In the Supreme Court of the United States

RICHARD G. RENZI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether legislative fact-finding by an individual Member of Congress is a legislative act protected by the Speech or Debate Clause.

2. Whether a Member of Congress' official actions to develop, evaluate, and draft legislation that are undertaken prior to the formal introduction of a bill are legislative acts protected by the Speech or Debate Clause.

3. Whether a Member of Congress can waive the protections of the Speech or Debate Clause only by explicitly and unequivocally renouncing them.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Richard G. Renzi, a defendant-appellant below. James W. Sandlin was also a defendant-appellant below.

Respondent is the United States of America, the appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, former United States Representative Richard G. Renzi, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals in the post-trial appeal (App., *infra*, 1a-54a) is reported at 769 F.3d 731. The opinion of the court of appeals in the interlocutory appeal (App., *infra*, 55a-106a) is reported at 651 F.3d 1012. The memorandum opinion of the district court denying Renzi's post-trial motions (App., *infra*, 107a-151a) is unreported. The memorandum opinion of the district court denying Renzi's motion to dismiss the indictment (*id.* at 152a-173a) is reported at 686 F. Supp. 2d 956.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2014. A timely petition for rehearing en banc was denied on December 1, 2014. App., *infra*, 174-175a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, provides that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."

STATEMENT

This case concerns the scope and operation of the Speech or Debate Clause, "an important element of the Constitution's separation of powers." *Howard* v.

Office of Chief Admin. Officer of U.S. House of Representatives, 720 F.3d 939, 953 (D.C. Cir. 2013) (Kavanaugh, J., dissenting). Before his trial on public-corruption charges relating to land-exchange legislation, former Congressman Richard Renzi asserted that the indictment against him violated the Clause because it necessarily put at issue his legislative acts. At trial, he objected to the prosecution's use of legislative-act evidence as part of its case.

In two decisions, before and after trial, the Ninth Circuit rejected Renzi's claims. In doing so, it misinterpreted this Court's precedent on what constitutes a "legislative act." It also disregarded this Court's explicit-waiver rule for determining whether a Member of Congress has abandoned the Clause's protections. The Ninth Circuit's rulings conflict with this Court's Speech or Debate Clause jurisprudence in three significant respects.

First, this Court holds that fact-finding and information-gathering is protected by the Clause, because those activities are essential to the legislative process. *Eastland* v. *U.S. Servicemen's Fund*, 421 U.S. 491, 504-507 (1975). The Ninth Circuit drew an untenable distinction between fact-finding by committees, which it acknowledged was protected, and fact-finding by individual Members, which it held was not, at least when any part of the fact-finding is alleged to have been criminal.

Second, this Court has consistently defined the "legislative acts" protected by the Clause as those "act[s] generally done in Congress in relation to the business before it," as well as the Member's "motivation for those acts." *United States* v. *Brewster,* 408 U.S. 501, 512 (1972). Under this standard, a Member's development and assessment of draft legislation

and a decision whether to introduce a bill are protected legislative acts. The Ninth Circuit held otherwise, ruling that the Clause does not protect actions taken by Members on a bill before it is formally introduced.

Third, this Court employs a bright-line rule for assessing whether a Member has waived the Clause's protections: such a waiver can occur, if at all, only if a Member "explicit[ly] and unequivocal[ly]" renounces them. *United States* v. *Helstoski*, 442 U.S. 477, 491 (1979). The Ninth Circuit ruled that, by cross-examining prosecution witnesses, Members can "open the door" to the admission of otherwise inadmissible legislative-act evidence—a theory of *implied* waiver.

Each of these rulings is irreconcilable with the teachings of this Court. Each also conflicts with decisions of other courts of appeals. None finds any basis either in the text of the Clause or in logic. And if left intact, all of these rulings would dramatically weaken the Clause's protections and create uncertainty about its application.

This Court's review is necessary. The Ninth Circuits' rulings fundamentally misinterpret a critical structural guarantee in the Constitution and thereby threaten the independence of the Legislative Branch. Review is particularly warranted because, in the 35 years since this Court last addressed the Speech or Debate Clause, the courts of appeals have become deeply divided over its scope and operation.

A. Legal Background

1. The Speech or Debate Clause "insure[s] the historic independence of the Legislative Branch," which is "essential to our separation of powers."

Brewster, 408 U.S. at 525. Its purpose is not "to make Members of Congress super-citizens." *Id.* at 516. "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Tenney* v. *Brandhove,* 341 U.S. 367, 377 (1951).

As Judge Kavanaugh recently explained in concurring in a decision to quash a grand jury subpoena,

> the Framers drafted and ratified the Speech or Debate Clause to serve as a robust shield against intimidation of legislators by the Executive or from private citizen suits ***. In the context of a specific case, the need for evidence usually will seem weightier than those long-term structural safeguards. But courts must respect the constitutional balance between the Legislative and Executive Branches regardless of the perceived needs of the moment.

In re Grand Jury Subpoenas, 571 F.3d 1200, 1207-1208 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

When it applies, the Speech or Debate Clause applies absolutely. *Eastland*, 421 U.S. at 501. It confers on individual legislators at least three important protections: (1) immunity from prosecution and lawsuits for legislative acts, see *United States* v. *Johnson*, 383 U.S. 169, 182 (1966); (2) a testimonial privilege protecting Members of Congress and their aides from being required to testify about legislative acts, *Gravel* v. *United States*, 408 U.S. 606, 615-616, 628-629 (1972); and (3) an evidentiary privilege barring prosecutors and parties in civil suits from introducing legislative-act evidence from any source against Members, *Helstoski*, 442 U.S. at 487.

To achieve the Clause's principal objective—protecting individual legislators from executive and judicial interference—this Court has "[w]ithout exception *** read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501. The Court has thus held that the Clause protects not just "literal speech or debate," but all "legislative acts," including Members' motives for performing these acts. *Id.* at 501-504; see also *Gravel*, 408 U.S. at 617 (Court has "not taken a literalistic approach in applying the privilege").

This Court has "consistently *** defined" "legislative acts" as "those things 'generally done in a session of the House by one of its members in relation to the business before it,' or things 'said or done by him, as a representative, in the exercise of the functions of that office.'" *Brewster*, 408 U.S. at 512-513 (quoting *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1881), and *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808)). The Court has also said that legislative acts include those that are "an integral part of the deliberative and communicative processes" by which Members carry out their constitutional duties. *Gravel*, 408 U.S. at 625.

Applying this standard, the Court has found that "delivering an opinion, uttering a speech, or haranguing in debate" are legislative acts. *Tenney*, 341 U.S. at 374. So, too, are proposing and voting on legislation, *Brewster*, 408 U.S. at 526; preparing, publishing, and using a legislative report, *Doe* v. *McMillan*, 412 U.S. 306, 312-313 (1973); engaging in fact-finding and issuing subpoenas regarding matters of potential legislation, *Eastland*, 421 U.S. at 504; and preparing for, holding, and introducing materials at hearings, *Gravel*, 408 U.S. at 629.

2. Congress has plenary jurisdiction over federal lands. Under the Property Clause of the Constitution, Congress may "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

One way that Congress exercises this authority is through legislative land exchanges, in which public property is swapped for private property. Developing land-exchange legislation requires negotiations with the owners of the private land and engagement with a wide range of stakeholders. See, *e.g., Wash. Cnty. Growth and Conservation Act of 2006 and White Pine Cnty. Conservation Recreation and Dev. Act of 2006: Hearing on S. 3636 and S. 3772 Before Subcomm. on Public Lands and Forests of S. Comm. on Energy and Natural Res.*, S. Hrg. 109-792 at 3 (2007) (statement of Sen. Bennett) (describing White Pine County bill as "the result of more than two years of work by a diverse group of stakeholders"). This process demands extensive fact-finding by the sponsoring Members. See, *e.g.*, *id.* ("my staff have literally walked over every inch of the lands that we're talking about here").

B. Factual Background

1. Renzi represented Arizona's first congressional district. App., *infra*, 58a. One of his legislative priorities was Fort Huachuca, an army base in southeastern Arizona. Renzi had deep ties to the Fort: he had grown up there and his father had served as one of its commanding officers. Pet. C.A.E.R. 194. Renzi also knew, from his work on the Intelligence Committee, that the Fort was "essential to the national security." *Id.* at 127.

Ground-water shortages threatened the Fort's viability. Pet. C.A.E.R. 183. As a freshman Member, Renzi proposed and passed legislation, popularly known as the "Renzi rider," exempting the Fort from responsibility for off-base water usage. *Id.* at 163. While this helped the Fort, it still faced an uncertain future because of environmental litigation, *id.* at 163-164, and review by the Base Realignment and Closure Commission. *Id.* at 127.

In 2005, two private groups approached Renzi about enacting land-exchange legislation. The first, the Resolution Copper Company (RCC), sought federal land for copper mining. Pet. C.A.E.R. 255-256. The second, an investment group led by Philip Aries, wanted federal land for real-estate development. *Id.* at 208.

Renzi and his staff met with each group. Pet. C.A.E.R. 230, 257. Renzi knew that an alfalfa farm near the Fort was the last major agricultural water user in the region. *Id.* at 127. He also knew that retiring water usage on the farm would be in the public interest, because it would help both to preserve the threatened San Pedro River and to ensure Fort Huachuca's viability. *Id.* Renzi thus urged both groups to include the farm in their proposed packages of private lands. In these meetings, Renzi did not disclose that the farm's owner, James Sandlin, owed him money on an unrelated debt. App., *infra*, 10a-12a.[1]

2. Renzi met with RCC several times. App., *infra*, 10a-11a. Seeing little progress in the discus-

[1] Renzi had disclosed the debt on his Congressional Financial Disclosure Form. Dist. Ct. Dkt. 1364 at 20-25.

sions, Renzi told RCC's general manager in April 2005 that he would not support RCC's proposed bill unless it included the alfalfa farm, telling him "no Sandlin property, no bill." Pet. C.A.E.R. 245. RCC decided not to pursue the property. *Id.* at 246. Renzi nonetheless introduced RCC's bill, without the farm, in May 2005. *Id.* at 250.

In the meantime, Renzi's District Director, Joanne Keene, arranged a meeting between Renzi and Aries to discuss Aries' proposed bill. Before that meeting, Keene had submitted the draft bill, which included the alfalfa farm in the package of private lands that Aries would assemble, to the House of Representatives' Office of Legislative Counsel. Pet. C.A.E.R. 193. Renzi responded enthusiastically. He told Aries that he would use a "free pass" to move the legislation through the Natural Resources Committee if it included the farm. *Id.* at 228-229.

Aries subsequently agreed to purchase the farm for $4.5 million. Pet. C.A.E.R. 242.[2] After receiving a $1 million escrow payment, Sandlin wrote a $200,000 check to Renzi Vino, Inc., which was deposited into the account of Renzi's family's insurance agency. *Id.* at 201.

Over the next several months, Renzi's office and Aries continued to discuss the bill, sending "many drafts back and forth." Resp. C.A.E.R. 261. Renzi ultimately decided not to introduce it. App., *infra*, 16a.

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[2] Before the sale closed, a third party offered to buy the farm from Aries for $5.2 million. Hoping to earn more through a land exchange, Aries declined the offer. Pet. C.A.E.R. 242.

C. Proceedings Below

1. In September 2009, Renzi and Sandlin were charged in a second superseding indictment with, among other things, Hobbs Act extortion and honest-services wire fraud. Pet. C.A.E.R. 423-468. The indictment alleged that Renzi and Sandlin used Renzi's public office to compel RCC and Aries to purchase the Sandlin property in order to obtain Renzi's support for their land-exchange bills. *Id.* at 459.

Renzi moved to dismiss the public-corruption charges, contending that they put at issue his "legislative acts." He argued, in particular, that a trial would necessarily and impermissibly put at issue the motive for his legislative fact-finding. App., *infra,* 153a-154a. The district court denied the motion to dismiss. *Id.* at 172a.

2. Renzi filed an interlocutory appeal, arguing, among other things, that an individual Member's fact-finding regarding potential legislation is a legislative act protected by the Speech or Debate Clause. App., *infra*, 77a. The Ninth Circuit affirmed in relevant part. *Id.* at 55a-106a.

In rejecting Renzi's claim, the Ninth Circuit found it "significant" that this Court had never expressly held that the Speech or Debate Clause protects an individual Member's fact-finding. App., *infra*, 78a n.10. The court of appeals then cabined its prior precedent, which had recognized that individual fact-finding *is* protected, by stating that the court had not previously addressed whether that activity is protected when any part of the fact-finding is alleged to have been criminal. *Id.* at 78a-79a. It concluded that individual fact-finding is *not* protected in that circumstance. *Id.* The court of appeals expressly

noted, however, that it would have reached a different result if this Court had previously held that the Clause protects an individual Member's fact-finding. "Were the [Supreme] Court to have extended Clause protection to prelegislative investigations and fact-finding by individual Members," the Ninth Circuit said, "we would agree [with Renzi]. However, it has not." *Id.* at 79a n.12.

3. Renzi filed a petition for certiorari. In opposing the petition, the Solicitor General acknowledged that "courts of appeals disagree about whether the Speech or Debate Clause protects informal information-gathering by individual Members" but argued (among other things) that "the interlocutory posture of this case counsels against reviewing at this time petitioner's claim that the prosecution against him is based on his legislative acts." 11-557 Opp. 26, 30. This Court denied certiorari. *Renzi* v. *United States*, 132 S. Ct. 1097 (2012).

4. The ensuing trial focused not so much on what Renzi did as on why he did it. The prosecution argued that Renzi had pushed RCC and Aries to include Sandlin's alfalfa farm in their proposals because the sale of the farm would allow Sandlin to repay a debt to Renzi. Renzi argued that he had urged both groups to include the alfalfa farm as part of his good-faith efforts to protect Fort Huachuca.

The prosecution had no smoking gun. RCC's general manager testified that Renzi had demanded that RCC include the farm in its bill. App., *infra* 14a. But he conceded, on cross-examination, that Renzi had introduced the bill, without the farm, a month later. Pet. C.A.E.R. 250. Aries testified that Renzi had promised to move his bill through Committee but had never followed through. App., *infra*

12a-13a. On cross-examination, however, he testified that Renzi did not do so because RCC had complained that Aries' proposal was receiving preferential treatment. Resp. C.A.E.R. 284-285.

That set the stage for the prosecution to call Keene, Renzi's former District Director. Over Renzi's Speech or Debate Clause objections, the prosecution elicited two vital pieces of testimony from Keene:

- that, even though the RCC project was good public policy, Renzi was not as "excited" about it as he "should have been" given the benefits to his district, App., *infra*, 22a-23a n.21; and
- that Renzi privately told Keene that he had decided not to introduce the Aries legislation because he was concerned about a then-pending investigation of Congressman Randall "Duke" Cunningham, *id.* at 25a n.22.

Renzi was found guilty of 17 of the operative indictment's 48 counts, including many of the public-corruption charges. He was sentenced to 36 months of imprisonment. App., *infra*, 15a.[3]

5. Renzi appealed, arguing, among other things, that the prosecution violated the Speech or Debate Clause by eliciting Keene's testimony about the RCC and Aries bills. App., *infra*, 21a. The Ninth Circuit affirmed. *Id.* at 1a-54a.

In rejecting the Speech or Debate Clause claims, the Ninth Circuit concluded that Renzi had "opened the door" to Keene's testimony when his counsel cross-examined RCC's general manager and Aries.

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[3] The other charges, relating to Renzi's family's insurance agency, are no longer at issue.

App., *infra*, 26a-29a. The court of appeals acknowledged that Renzi had not explicitly renounced the Clause's protections, as this Court's decision in *Helstoski* requires, but asserted that *Helstoski*'s rule does not apply in the trial setting. *Id.* at 25a-26a. In the alternative, the Ninth Circuit held that Keene's testimony was not protected because it related to actions that Renzi took *before* he introduced any bill. *Id.* at 27a n.24.

REASONS FOR GRANTING THE PETITION

This Court has not decided a Speech or Debate Clause case in more than a third of a century. During that time, the circuits have become deeply divided on fundamental issues, including the breadth and scope of the Clause and how to administer its protections at trial. This petition squarely presents three such questions: whether the Clause protects fact-finding by an individual Member; whether the protections of the Clause attach before legislation is introduced; and whether a waiver of the Clause's protections must be explicit and unequivocal.

These questions have important implications for legislative independence and the separation of powers. Unless this Court intervenes, those fundamental constitutional interests will be undermined by uncertainty about potential liability for legislative conduct. Members of Congress, moreover, will represent their constituents under different rules depending on the states in which they are elected.

Because the Ninth Circuit decided these Speech or Debate Clause questions in a way that conflicts with decisions of this Court and other courts of appeals, because the Ninth Circuit employed severely flawed reasoning in doing so, because the questions

are exceptionally important, and because this is an ideal case for deciding them, this Court should grant review.

I. THE NINTH CIRCUIT DECIDED THREE SPEECH OR DEBATE CLAUSE QUESTIONS IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND EMPLOYED FLAWED REASONING IN DOING SO

A. The Court Should Grant Review To Decide Whether Fact-Finding By An Individual Member Is A Legislative Act Protected By The Clause

In the interlocutory appeal, the Ninth Circuit held that the Speech or Debate Clause does not protect information-gathering or fact-finding by an individual Member of Congress, at least when part of it is alleged to be criminal. App., *infra*, 77a-80a. That holding conflicts with decisions of other courts of appeals and rests on an untenable distinction between individual Members and congressional committees that has no basis either in the Constitution or in logic.

1. There is a conflict

The Ninth Circuit's decision exacerbates a circuit conflict on whether an individual Member's fact-finding is a protected legislative act. Relying on this Court's decision in *Eastland*, the Second, Third, and D.C. Circuits have held that it is. The Tenth Circuit has held that it is not. And the Ninth Circuit has held that an individual Member's fact-finding is a protected legislative act in some instances but not others.

a. The Third Circuit holds that fact-finding by individual Members is a protected legislative act because it is essential to the legislative process. As that court explained in *Government of the Virgin Islands* v. *Lee*, 775 F.2d 514 (3d Cir. 1985),

> fact-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation. As such, fact-finding occupies a position of sufficient importance in the legislative process to justify the protection afforded by legislative immunity. Legislators must feel uninhibited in their pursuit of information, for "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change…."

Id. at 521 (quoting *McGrain* v. *Daugherty*, 273 U.S. 135, 175 (1927); ellipsis added by court).[4]

The Second Circuit also protects an individual Member's fact-finding and information-gathering. In *United States* v. *Biaggi*, 853 F.2d 89 (2d Cir. 1988), that court ruled that then-Congressman Biaggi's legislative fact-finding—specifically, meetings with

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[4] While *Lee* involved legislative immunity for Virgin Islands legislators, it found "the interpretation given to the Speech or Debate Clause of the Federal Constitution" to be "highly instructive" and, like both parties in the case, "relied on authorities interpreting the Speech or Debate Clause." 775 F.2d at 520 & n.8. The case has been treated as precedent in Speech or Debate Clause cases in the Third Circuit. See, *e.g., United States* v. *McDade*, 827 F. Supp. 1153, 1168 (E.D. Pa. 1993), aff'd in part, dismissed in part, 28 F.3d 283 (3d Cir. 1994).

county officials and employees of a health-maintenance organization while traveling from his district—were protected legislative acts. *Id.* at 102-103. (By contrast, the Second Circuit rejected Biaggi's claim that his travel to these meetings was also protected, on the ground that travel, in and of itself, is not a part of the legislative process. *Id.* at 104.)

The law in the D.C. Circuit is the same. In *In re Grand Jury Subpoenas*, 571 F.3d 1200, that court considered whether a grand jury could obtain a Member's testimony before, and written submissions to, the House Ethics Committee regarding privately sponsored travel. The Member resisted the subpoena on the theory that the travel in question "was for the purpose of legislative fact-finding." *Id.* at 1203. Reaffirming that "[l]egislative fact-finding is *** a protected activity," the D.C. Circuit held that the materials were protected by the Speech or Debate Clause. *Id.* at 1202-1203.

In so holding, the D.C. Circuit relied on *McSurely* v. *McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), which emphasized that "information gathering, whether by issuance of subpoenas or *field work by a Senator or his staff*, is essential to informed deliberation over proposed legislation." *Id.* at 1286 (emphasis added). *McSurely* found that "[t]he acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly." *Id.* at 1287 (internal quotation marks omitted).

b. The Ninth Circuit initially reached the same conclusion. In *Miller* v. *Transamerican Press, Inc.*,

709 F.2d 524 (9th Cir. 1983), it concluded that "[o]btaining information pertinent to potential legislation or investigation is one of the 'things generally done in a session of the House' concerning matters within the 'legitimate legislative sphere.'" *Id.* at 530 (quoting *Kilbourn*, 103 U.S. at 204, and *Eastland*, 421 U.S. at 503). The Ninth Circuit thought it imperative to treat an individual Member's fact-gathering as a legislative act because doing otherwise "would chill speech and debate on the floor," causing Members to "censor [their] remarks or forgo them entirely." *Id.* at 531.

In the interlocutory appeal in this case, however, the Ninth Circuit cut back on *Miller* by refusing to treat an individual Member's fact-gathering as a legislative act if any part of the fact-gathering is alleged to have violated a criminal law. App., *infra*, 77a-80a. The court acknowledged that this required an inquiry into a Member's motive for performing the legislative act, which is not permitted under this Court's precedent, but found that such an inquiry was permissible in the context of an individual Member's fact-finding because this Court has never expressly held such fact-gathering to be a protected legislative act in the first place. *Id.* at 79a n.12.

c. The Tenth Circuit's rule is that an individual Member's fact-gathering is not a protected legislative act. In *Bastien* v. *Office of Campbell*, 390 F.3d 1301 (10th Cir. 2004), that court found that the Speech or Debate Clause protects only official or formal investigations conducted by a congressional body. See *id.* at 1315 (protections of Clause "have always been confined within the limits of formal, official proceedings."). Like the Ninth Circuit in this case, the Tenth Circuit found it significant that this Court had

never expressly addressed whether "Speech or Debate Clause immunity extends to informal information gathering by individual members of Congress." *Id*. at 1316. It dismissed this Court's discussions of the importance of information-gathering as merely "for the purpose of establishing that such activity is a proper congressional function and, when conducted by a committee, should be treated just [like] voting and debating legislation." *Id*.

d. If an individual Member's fact-gathering is protected by the Speech or Debate Clause, as the Second, Third, and D.C. Circuits have held, this case would have been decided differently. Indeed, the Ninth Circuit expressly acknowledged that it would have barred Renzi's prosecution if this Court had squarely held that an individual Member's fact-finding is protected. App., *infra*, 79a n.12. Even if the prosecution could have survived in some form or fashion, the evidence at trial would have been materially different, as the Speech or Debate Clause would have precluded the admission of much of the testimony about meetings and other communications between Renzi, on the one hand, and RCC and Aries, on the other.

2. The decision below is wrong

The Ninth Circuit erred in denying the protections of the Speech or Debate Clause to an individual Member's fact-finding. As this Court observed in *Eastland*, a "'legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'" 421 U.S. at 504 (quoting *McGrain*, 273 U.S. at 175). If allowed to stand, the Ninth Circuit's rule would impair Congress' ability to acquire information necessary for the drafting of leg-

islation and dilute the power of democratically elected representatives.

a. The Ninth Circuit's rule is flawed in multiple respects. First, the Speech or Debate Clause protects *individual* "Senators and Representatives." U.S. Const. art. I, § 6, cl. 1. It makes no mention of committees, which are creatures of the House rules, not of the Constitution. See U.S. Const. art. 1, § 5, cl. 2 (authorizing House and Senate to "determine the Rules of its Proceedings"). Committees facilitate the actions of individual Members and the body as a whole, but they have no authority other than that derived from the Members or the body. See, *e.g.*, *McGrain*, 273 U.S. at 158. The responsibility for conduct within a committee likewise is the Member's. See *McMillan*, 412 U.S. at 312.

Whether a Member makes inquiries through a committee or independently therefore has no constitutional significance. The Ninth Circuit's contrary rule turns the constitutional structure on its head: it would deprive individual Members of protections because they did not undertake fact-finding within a structure that has no import or authority beyond that bestowed on it by the Members themselves.

Second, the Ninth Circuit's rule undervalues the role of individual Members in the legislative process. The people elect Members, not committee chairs, and legislation cannot exist unless and until an individual Member decides that it is worth pursuing. Individual fact-finding informs and supports that decision. It should be encouraged and protected, not threatened with possible Executive Branch scrutiny.

The Ninth Circuit's contrary rule presumes that committees have a monopoly on wisdom about proper

topics for investigation. But investigations and reports by individual Members play an important role in setting the agenda for committees or the body as a whole. See, *e.g.*, U.S. Senator Kirsten Gillibrand, *Agenda: Improving Food Safety* (visited Feb. 26, 2015) (publishing new report by her office into cases of food poisoning in New York state and recommending legislative response), http://www.gillibrand.senate.gov/agenda/improving-food-safety. A Member's individual fact-finding should receive the same protection as a formal committee inquiry.

Third, the Ninth Circuit's rule fails to account for political happenstance. Under that rule, an individual Member cannot reliably engage in protected fact-gathering without first obtaining authorization from a committee. Committees, however, are typically controlled by the majority party. Members in the minority party could find themselves unable to conduct protected fact-finding merely because the topics of interest to them do not fit within the scope of the committee agenda set by the majority party. Constitutional protections should not depend on these kinds of political factors.

Finally, the Ninth Circuit's rule relies upon an unrealistic distinction between committee proceedings and the actions of individual Members. This Court's decision in *Gravel* makes clear that there is no great distance between the action of an individual Member and the proceedings of a committee. The Executive Branch alleged there that the subcommittee hearing in question was itself irregular and held late in the evening. 408 U.S. at 609-611. The Court also reported that the staff member at issue was hired only that morning and that the topic of the Vietnam War was addressed at a hearing of the "Sub-

committee on Buildings and Grounds of the Senate Public Works Committee." *Id.* at 609. In short, the subcommittee was just a vehicle for an individual Member. Protecting the actions of such a subcommittee, but not the equivalent actions of a Member, would be empty formalism that does not address the "realistic[] threat[s]" to legislative independence that Members face. *Id.* at 616, 618.

b. That the Ninth Circuit said that fact-finding by an individual Member is unprotected only when some part of it is alleged to be criminal, App., *infra*, 78a, cannot save its rule. The protections of the Clause would be meaningless if they could be stripped from an entire investigation simply because some part of it was alleged to be criminal. Indeed, the court of appeals itself appears to have recognized as much, acknowledging that it would have reached a different conclusion if this Court had previously held that fact-finding by an individual Member is protected. See *id.* at 79a n.12.

B. The Court Should Grant Review To Decide Whether A Member's Official Actions To Develop, Evaluate, And Draft Legislation That Are Undertaken Prior To The Formal Introduction Of A Bill Are Legislative Acts Protected By The Clause

In the post-trial appeal, the Ninth Circuit held that the Speech or Debate Clause does not protect a Member's work on legislation before it is formally introduced, including the Member's assessment of a draft bill or decision not to introduce a bill. App., *infra*, 27a n.24. This holding conflicts with decisions of other courts of appeals, has no basis in decisions of

this Court, disregards the Clause's text, and is irreconcilable with the realities of the legislative process.

1. There is a conflict

a. In *Yeldell* v. *Cooper Green Hospital, Inc.*, 956 F.2d 1056 (11th Cir. 1992), the Eleventh Circuit considered whether "the act of refusing to introduce legislation for a vote is one which entitles the [legislator] to legislative immunity." *Id.* at 1063. It concluded that the decision not to introduce legislation is "an important part of the process by which legislators govern legislation" and indeed "one of the most purely legislative acts that there is." *Id.* The court explained that a contrary rule would undermine the democratic process. See *id.* It thus held that "the decision *** not to introduce a piece of legislation *** is legislative activity protected by *** legislative immunity." *Id.* at 1063-1064.[5]

The Third Circuit, similarly, has held that advocating for legislation prior to its introduction is a legislative act. In *Baraka* v. *McGreevey*, 481 F.3d 187 (3d Cir. 2007), the poet laureate of New Jersey brought suit against the governor for "advocat[ing]

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[5] *Yeldell* involved legislative immunity for *state* legislators but recognized that that form of immunity is applied "in essentially the same fashion" as the immunity for national legislators found in the Speech or Debate Clause. *Yeldell*, 956 F.2d at 1061. Indeed, this Court itself "generally ha[s] equated the legislative immunity to which state legislators are entitled *** to that accorded Congressmen under the Constitution." *Supreme Court of Va.* v. *Consumers Union of U.S., Inc.*, 446 U.S. 719, 733 (1980). Courts thus "have relied on Speech or Debate Clause precedents to define the doctrinal boundaries of state legislative immunity under the federal common law," *Nat'l Ass'n of Social Workers* v. *Harwood*, 69 F.3d 622, 631 (1st Cir. 1995)—and vice versa.

and orchestrat[ing] the legislation" that abolished the position of poet laureate. *Id.* at 197. The Third Circuit concluded that the actions of the governor "in *proposing* and advocating the repealer are properly characterized as legislative." *Id.* (emphasis added). The court drew no distinction between the governor's advocacy prior to and after the bill's introduction.[6]

The issue decided against Renzi in the Ninth Circuit—whether work on legislation before it is introduced is protected—thus would have been decided in his favor in the Third and Eleventh.

b. Nor does the Ninth Circuit's categorical approach find any support in the decisions of this Court, which has recognized that investigations into possible legislation are protected by the Speech or Debate Clause. See *Eastland*, 421 U.S. at 505 ("To conclude that the power of inquiry is other than an integral part of the legislative process would be a miserly reading of the Speech or Debate Clause in derogation of the 'integrity of the legislative process.'" (quoting *Brewster*, 408 U.S. at 524)). Such investigations typically take place *before* any legislation is ever drafted or introduced.

Indeed, far from having suggested that the Clause's protections attach only when a bill is formally introduced, this Court has recognized that "legislative acts" include "the deliberative and communicative *processes*" by which Members participate in House proceedings. *Gravel*, 408 U.S. at 625 (emphasis added). The Ninth Circuit should have as-

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[6] *Baraka* involved an assertion of an analogous state-law privilege and actions by a member of the executive branch acting in a legislative capacity. *Baraka*, 481 F.3d at 195-196.

sessed a Member's consideration of a draft bill or decision not to introduce it against that standard—which it readily meets. See, *e.g., Jewish War Veterans of the United States* v. *Gates*, 506 F. Supp.2d 30, 53 (D.D.C. 2007) ("drafting of legislation" is "indisputably legislative"). Instead, the Ninth Circuit imposed a new and indefensible categorical rule.

The Ninth Circuit mistakenly read *Brewster* to deny the Clause's protections to a Member's work on a bill before its introduction. App., *infra*, 30a n.24. *Brewster* holds that a *promise* to perform a legislative act is not itself a legislative act. See 408 U.S. at 525-529. But nothing in *Brewster* suggests that the Clause's protections are inapplicable to other kinds of pre-introduction conduct. If the Court had intended to exempt all pre-introduction conduct, it would have said so directly; indeed, four of the five charges against that Senator involved bills that were not yet pending. See *id.* at 502-503. And this Court would not have adopted a definition of "legislative act"—"an act generally done in Congress in relation to the business before it," *id.* at 512—that easily encompasses a Member's development and assessment of legislation *before* it is introduced.

2. The decision below is wrong

Apart from its irreconcilability with this Court's precedent, the Ninth Circuit's rule has no basis in the text of the Clause, which refers to "Speech or Debate." Those actions obviously can encompass both introduced and *contemplated* legislation. Two Members, for example, might debate previously introduced legislation. One might support the bill as introduced, with the other pushing for specific changes accomplished in a different bill that has not yet been introduced in Congress. Any lesser protection for the

latter Member's work on draft legislation would be arbitrary and irrational.

The Ninth's Circuit's rule is wrong for other reasons as well. Legislation does not spring fully formed like Athena from the minds of Members. The legislative process is just that—*a process*. It can begin in many ways. A Member might personally decide that a legislative idea merits pursuit, for example, or a constituent might bring a new issue to the Member's attention. The Member and staff then typically would engage with stakeholders to assess the need for legislation and the potential of different approaches. A Member might assemble and alter the draft text as a result of this process before ultimately deciding whether to introduce the bill. Such conduct is integral to the "due functioning" of the legislative process, *Brewster*, 408 U.S. at 516, and deserves the protections of the Speech or Debate Clause. In multiple respects, the Ninth Circuit's contrary rule is unreasonable and unworkable.

First, like the Committee structure, bill introduction is a creature of congressional rules, not the Constitution. Under the original House Rules, for example, a bill would be considered introduced only if the House did not vote to reject it after its first reading. See 1 Annals of Cong. 102-106 (1789). Today, by contrast, any Member of the House may introduce a bill simply by providing it to the House Clerk for referral. See Rules of the House of Representatives, Rule XII(7)(a) (Jan. 6, 2015), available at http://rules.house.gov/sites/republicans.rules.house.gov/files/114/PDF/House-Rules-114.pdf. Protection for the legislative acts of individual Members should not be beholden to the rules chosen by each House.

Second, the Ninth Circuit's rule would discourage individual Members from taking the laboring oar on legislative drafting. Paradoxically, the work of the introducing Member before introduction would not be protected under the rule, whereas the casual engagement of another Member afterwards would be. The Ninth Circuit's rule would thereby deprive the most deserving Members of Speech or Debate Clause protections.

Third, the Ninth Circuit's rule would expose Congress to investigations, intrusive litigation, and third-party discovery demands. Under its rule, for example, a prosecutor or private litigant could compel testimony from:

- a Committee Chair or House leadership concerning what a Member said about a bill before it was introduced;
- Members or staff concerning conversations about bill sponsorship; or
- Members or staff about each detail of the development of legislation, as well as the Member's attitude toward the draft bill.

Finally, the Ninth Circuit's rule would lead to absurd results. Legislation frequently is introduced in multiple versions in both Houses at different times before it is passed into law. The Ninth Circuit's rule would not protect a Senator's work on draft companion legislation even if a Representative had introduced an identical—and protected—version in the House. The Ninth Circuit's rule thus would give Members different protections for work on the same bill. Distinguishing between introduced and draft legislation cannot withstand scrutiny. It does not fit the "complexities of the modern legislative

process" and does not address the "realistic[] threat[s]" to a Member's legislative independence. *Gravel*, 408 U.S. at 616, 618.

C. The Court Should Grant Review To Decide Whether Waiver Of The Protections Of The Clause Requires An Explicit And Unequivocal Statement

In the post-trial appeal, the Ninth Circuit also held that, regardless of whether the protections of the Speech or Debate Clause extend to actions taken before a bill is introduced, those protections can be waived when, as the court of appeals believed was true here, a Member of Congress "open[s] the door" to the introduction of legislative-act evidence in cross-examining prosecution witnesses. App., *infra*, 21a-29a. The Ninth Circuit's holding squarely conflicts with this Court's decision in *Helstoski*, cannot be reconciled with the D.C. Circuit's approach to the Speech or Debate Clause, and ignores the structural role of the Clause.

1. There is a conflict

a. In *Helstoski*, this Court considered whether a Member of Congress had waived his Speech or Debate Clause protections by testifying before and producing documents to a federal grand jury and by acknowledging that his grand jury testimony could be used against him in court. 442 U.S. at 480. Finding that the Clause could be waived, if at all, only upon an "explicit and unequivocal renunciation" of its protections, the Court held that there was no waiver. *Id.* at 491.

To explain its holding, this Court invoked the Clause's history and purpose. The Speech or Debate Clause, it said, "was designed neither to assure fair

trials nor to avoid coercion" but "to preserve the constitutional structure of separate, coequal, and independent branches of government." *Helstoski*, 442 U.S. at 491. Because of its important structural role, the Court found that "[t]he ordinary rules for determining the appropriate standard of waiver" do not apply in the Speech or Debate context. *Id.* Assuming that waiver was even possible, the Court required an "explicit and unequivocal" waiver. *Id.* The Court reasoned that "any lesser standard would risk intrusion by the Executive and the Judiciary into the sphere of protected legislative activities." *Id.*

This rule is not limited to grand jury proceedings—the context in which *Helstoski* happened to arise. The decision held, broadly and without qualification, that any waiver of the Clause's protections must be "explicit and unequivocal." *Helstoski*, 442 U.S. at 491. The Court then applied this rule in two different contexts: the congressman's purported individual waiver before the grand jury, *id.* at 492, and Congress' purported institutional waiver through enactment of the bribery statute under which Helstoski was charged, *id.* at 493.

No court has ever found a waiver under this standard. See *Brown & Williamson Tobacco Corp.* v. *Williams*, 62 F.3d 408, 421 n.11 (D.C. Cir. 1995); *Rangel* v. *Boehner*, 20 F. Supp. 3d 148, 181-183 (D.D.C. 2013); *Pittston Coal Grp., Inc.* v. *Int'l Union, Mine Workers of America*, 894 F. Supp. 275, 278 n.5 (W.D. Va. 1995).

b. Rather than following *Helstoski*, the Ninth Circuit created a new standard based on principles of fairness. "Importantly," the court of appeals said, it was Renzi who "opened the door" to legislative-act evidence by "inject[ing] into his trial whether and to

what extent he supported" the land-exchange legislation. App., *infra*, 27a-28a. The court reasoned that it "ma[de] sense" to allow such testimony because a Member should not be able to "claim the protections of the privilege" when he "himself introduce[d] the violative evidence." *Id.* at 24a.

The Ninth Circuit's fairness-based approach is fundamentally incompatible with *Helstoski*. The Speech or Debate Clause simply was not designed "to assure fair trials" and, accordingly, the "ordinary rules for determining the appropriate standard of waiver" do not apply. *Helstoski*, 442 U.S. at 491.

In fact, under the Ninth Circuit's approach, Helstoski's conduct would have worked a waiver. Not only did he repeatedly appear before the grand jury in the hopes of avoiding an indictment, he also acknowledged that the testimony and documents he provided could be used against him *at trial*. See *Helstoski*, 442 U.S. at 480-481. Yet because this Court was focused on the Clause's structural role, not fairness in any one proceeding, it found no waiver.

This Court's concern with preserving legislative independence prompted it to adopt a rule that ensures that waiver decisions are made only by legislators, not by a "possibly hostile judiciary." *Gravel*, 408 U.S. at 617. By authorizing the judiciary to find implied waivers of the Clause's protections based on the vagaries of an individual trial, the Ninth Circuit reached precisely the opposite result.

c. The Ninth Circuit's decision also conflicts with the D.C. Circuit's approach to managing litigation in which Congress or its Members put forward legislative-act evidence in defending claims. See *Howard*,

720 F.3d at 950-951; *Fields* v. *Office of Eddie Bernice Johnson*, 459 F.3d 1, 13 (D.C. Cir. 2006) (en banc). Under the D.C. Circuit's case law, Members are permitted to introduce legislative-act evidence in their own defense without waiving the Clause's protections or "opening the door" to rebuttal evidence.

The D.C. Circuit's approach is well illustrated in *Howard*. There, a former staffer filed an employment-discrimination claim against the House of Representatives. Her cause of action did not implicate a legislative act. One of the House's defenses, however, was that it terminated her employment because she had performed a legislative act poorly. This defense did not "open the door" to rebuttal evidence on the point; rather, the plaintiff was barred from contesting its veracity. See 720 F.3d at 951.

Under this approach, Renzi's case would have been decided differently. His cross-examinations of Aries and RCC's general manager would not have "opened the door" to rebuttal evidence regarding his legislative activities and the prosecution thus would not have been entitled to elicit Keene's challenged testimony. The conflict between the two circuits is stark.

d. No other court of appeals has held that a Member may waive the protections of the Speech or Debate Clause through cross-examination. Three courts have stated in dicta that a Member who chooses to testify about legislative acts would "subject[] himself to cross-examination" on those points. *United States* v. *McDade*, 28 F.3d 283, 294-295 (3d Cir. 1994); accord *United States* v. *Rostenkowski*, 59 F.3d 1291, 1303 (D.C. Cir. 1995); *United States* v. *Myers*, 635 F.2d 932, 942 (2d Cir. 1980). But they did so in the context of a challenge to an indictment

based on the theory that a defendant-Member might elect to testify in his defense about legislative acts. None of those cases had reached trial, let alone considered the actual effect of questions asked during the cross-examination of prosecution witnesses.

These cases, moreover, are easily reconciled with *Helstoski*. When defendants elect to testify in ordinary criminal cases, trial courts often advise them, outside the presence of the jury, of their Fifth Amendment rights. One way of ensuring compliance with *Helstoski* would be for trial courts to engage in a similar colloquy when Member-defendants elect to testify. Under this approach, to ensure that a Member's waiver is explicit and unequivocal, the trial court would advise the Member, on the record but outside the presence of the jury, of his or her right not to be questioned about legislative acts and warn the Member that testifying about them would waive that right. If the Member then declined to waive the Clause's protections, the trial court would use appropriate evidentiary rules to prevent unfair prejudice. The same basic approach could be extended to cross-examination.

2. The decision below is wrong

Helstoski correctly established a higher standard for waiving the protections of the Speech or Debate Clause. The Clause protects individual Members, but it also serves a more important structural purpose. An allegation of gamesmanship by a particular Member does not justify undermining that structural protection.

The risks posed by the Ninth Circuit's rule are especially high given the uncertainty about where the limits of the Clause's protections lie. Under an

implied-waiver rule, Members would be forced to attempt to discern the boundaries of those protections, gamble on how closely to approach the perceived boundaries, and then hope that a waiver will not be worked, according to a post-hoc judicial evaluation, in some unexpected way. The effect of the Ninth Circuit's rule thus would be to subject the protections of the Clause to the very type of gamesmanship at trial that the Ninth Circuit purportedly wishes to prevent. The Speech or Debate Clause was intended to be more than another element of trial strategy; it was meant to ensure legislative independence. The Clause will not perform that function if Members cannot have confidence that its protections will not disappear unexpectedly at trial.

The Ninth Circuit's rule also ignores a distinguishing feature of the Clause. Unlike familiar trial privileges, the protections of the Clause depend in part on the presumption that the judicial forum itself may be hostile to the Member—and, presumably, to the privilege that the Member would assert. See, *e.g.*, *Johnson*, 383 U.S. at 179. Allowing a hostile judiciary to determine when there has been an "implied waiver" of the Clause's protections would substantially undermine their value.

Finally, even if a Member's testimony alone could work a waiver, counsel's cross-examination of prosecution witnesses cannot. While the defendant alone decides whether to testify, counsel controls the cross-examination. *Wainwright* v. *Sykes,* 433 U.S. 72, 93 & n.1 (1977) (Burger, C.J., concurring). Yet under the Ninth Circuit's approach, a Member-defendant would be deprived of the protections of the Speech or Debate Clause if, in the after-the-fact opinion of a reviewing court, the Member's counsel strayed into

protected territory during cross-examination. The protections of the Clause are too important to be denied on that basis.

II. THE SPEECH OR DEBATE CLAUSE QUESTIONS ARE IMPORTANT

The Speech or Debate Clause is "vitally important to our system of government" in general, *Helstoski* v. *Meanor*, 442 U.S. 500, 506 (1979), and "fundamental to the system of checks and balances" in particular, *United States* v. *Gillock* , 445 U.S. 360, 369 (1980). This Court has not decided a Speech or Debate Clause case in more than 35 years. During that time, substantial disagreements have developed among the courts of appeals over foundational questions about the scope and administration of the Clause's protections. The Court should clarify the bounds of those protections, as well as how they should be administered at trial.

The Clause plays a critical role in ensuring the legislative independence of Members of Congress. The seventeenth-century disputes between English kings and Parliament underscored the need to protect individual legislators from retaliation by the Executive. See *Tenney*, 341 U.S. at 372-373. The drafters of the federal and state constitutions well understood this history of strategic prosecutions by a hostile Executive, as well as the dangers of a hostile Judiciary. See, *e.g.*, *id.* at 372-377. These dangers persist. See*, e.g.*, 160 Cong. Rec. S1490 (Mar. 11, 2014) (statement of Sen. Feinstein) (describing reported decision by CIA to refer Senate staff for prosecution during dispute over committee investigation into agency's activities).

By protecting the independence of individual Members, the Clause also plays an important role in the system of separated powers. Individual Members will be far more willing to contest Executive overreach if they need not fear retaliatory prosecutions. Conversely, the Executive has far less opportunity to intimidate a Member if the Clause prevents any effort at prosecution. The Clause thus encourages the political resolution of disputes between the Executive and Legislative Branches, which is where such conflicts belong. See, *e.g.*, *Executive Privilege—Secrecy in Government: Hearings Before Subcomm. on Intergovernmental Relations of S. Comm. on Gov't Operations*, 94th Cong. 87 (1975) (statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel) (describing the "hurly-burly, the give-and-take of the political process between the legislative and the executive").

The Speech or Debate Clause questions presented in this case are especially important. This Court has emphasized repeatedly that the Clause should be interpreted broadly. Whether a lower court may depart from that principle, and except from the protections of the Clause fact-finding by an individual Member or work on legislation that has not yet been introduced, is a question of fundamental importance. Answering that question in favor of the Executive Branch, as the Ninth Circuit has done, opens substantial gaps in the Clause. It is only a matter of time before they are exploited by a hostile Executive or private litigants with no concern for the separation of powers.

Whether and how a Member may waive the protections of the Clause through cross-examination of a prosecution witness also is a question of particular

importance. If left undisturbed, the Ninth Circuit's decision would force Member-defendants either (a) to avoid questioning prosecution witnesses in a manner that a court could construe as a waiver or (b) to risk losing the protections of the Clause. This dilemma would significantly weaken the Clause as a guardian of legislative independence. No longer robust and reliable, the protections of the Clause would be undependable to the point of vanishing with one misstep by counsel. It was exactly this result—and the inevitable chilling of legislative conduct that would ensue—that *Helstoski* intended to prevent.

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR DECIDING THE SPEECH OR DEBATE CLAUSE QUESTIONS

This case has no feature that makes it an unsuitable vehicle for this Court's review. Quite the contrary.

First, unlike when Renzi filed his prior petition for certiorari, the case is no longer in an interlocutory posture. Cf. 11-557 Opp. 30 (arguing that "the interlocutory posture of this case counsels against review[] at this time"). There is now a full trial record, a final judgment, and two Ninth Circuit opinions addressing the Speech or Debate Clause issues that arose before and during trial at considerable length. Compare, *e.g., Va. Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) (explaining that review on important question of constitutional law should be denied because of interlocutory posture of case), with *United States* v. *Virginia*, 516 U.S. 910 (1995) (granting review on that question after final judgment).

Second, resolution of the questions presented in the petition would be outcome-determinative. If Renzi were to prevail on the first question, he would be entitled to dismissal of the public-corruption charges—or at the very least a new trial with very different evidence. See *supra* p. 17. As the Ninth Circuit itself acknowledged, "[w]ere th[is] Court to *** extend[] Clause protection to prelegislative investigations and fact-finding by individual Members," Renzi would be entitled to relief. App., *infra*, 79a n.12.

If Renzi were to prevail on the second and third questions—if this Court were to hold that activities preceding the formal introduction of a bill are protected and that waiver of those protections must be clear and unequivocal—Renzi would be entitled to a new trial without Keene's testimony. The Ninth Circuit did not suggest that any error in the admission of that evidence was harmless—despite the prosecution's argument that it was, Resp. C.A. Br. 36-39, and despite the court's conclusion that *other* asserted errors had no effect on the verdict, App., *infra*, 30a-35a. In fact the Speech or Debate Clause errors were *not* harmless (even assuming that traditional harmless-error analysis applies), because Keene's testimony addressed the key issue in the case: whether Renzi acted to protect Fort Huachuca or instead corruptly traded official acts for payment. See *supra* pp. 10-11.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2015

APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RICHARD G. RENZI,
Defendant-Appellant.

No. 13-10588

D.C. No.
4:08-cr-00212-
DCB-BPV-1

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES W. SANDLIN,
Defendant-Appellant.

No. 13-10597

D.C. No.
4:08-cr-00212-
DCB-BPV-2

OPINION

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Argued and Submitted
June 17, 2014—Seattle, Washington

Filed October 9, 2014

Before: Richard C. Tallman,
Consuelo M. Callahan, and
Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Tallman;
Special Concurrence by Judge Ikuta

COUNSEL

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Kerry W. Kircher (argued), General Counsel; William Pittard, Deputy General Counsel; Todd B. Tatelman, Mary Beth Walker, Eleni M. Roumel, and Isaac B. Rosenberg, Assistant Counsel, Office of General Counsel, United States House of Representatives, Washington, D.C., for Amicus Curiae Bipartisan Legal Advisory Group of the United States House of Representatives.

OPINION

TALLMAN, Circuit Judge:

Congressmen may write the law, but they are not above the law. Former Arizona Congressman Richard Renzi learned this lesson the hard way when he was convicted by jury on charges of conspiracy, honest-services fraud, extortion, money laundering, making false statements to insurance regulators, and racketeering. Now Renzi and codefendant James Sandlin appeal their convictions and sentences, asserting that the evidence was insufficient to support the verdict. Renzi further argues that his convictions were predicated on serial violations of his constitutional rights, including violations of his Congressional Speech or Debate Clause privilege. We reject their arguments and affirm both convictions and sentences.

I

The United States brought insurance fraud charges against Renzi, public corruption charges against Renzi and Sandlin, and a racketeering charge against Renzi. The evidence showed that Renzi, who owned and operated an insurance agency, misappropriated clients' insurance premiums to fund his congressional campaign, and lied to insurance regulators and clients to cover his tracks.[1] The public corruption charges were based on Renzi and Sandlin's involvement in a conspiracy to extort private businesses to purchase land owned by Sandlin

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[1] Because Renzi and Sandlin challenge the sufficiency of the evidence to support their convictions, the facts we recite are based on the evidence from the trial viewed in the light most favorable to support the jury's verdict. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

in exchange for Renzi's promise to support favorable federal land exchange legislation. Finally, the evidence established that Renzi used his insurance business as an enterprise to conduct a pattern of racketeering activity by diverting clients' insurance premiums for his personal use, facilitating an extortionate land transfer, and laundering its proceeds.

A

In the early 2000s, Renzi owned and operated Renzi & Company (R&C),[2] an insurance agency specializing in obtaining insurance coverage for nonprofit organizations and crisis pregnancy centers.[3] R&C obtained group insurance coverage for its clients through brokers who worked on behalf of insurance carriers. R&C used two primary brokers: (1) North Island Facilities, which secured insurance coverage through Safeco Insurance Company, and (2) Jimcor Agency, which secured insurance coverage through both United States Liability Insurance Company and Royal Surplus Lines Insurance Company. R&C collected yearly premiums from its clients and, after keeping a small percentage as a profit, remitted those premiums to the broker. After taking their commission, the broker (either North Island or Jimcor) remitted the remainder of the premium to the insurer—either Safeco, United States Liability, or Royal Surplus.

On December 10, 2001, Renzi publicly announced his candidacy for a seat in the United States House of Representatives serving Arizona's First Congressional District. The very next day, Renzi began di-

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[2] R&C became known as Patriot Insurance Agency after 2002.

[3] Crisis pregnancy centers are organizations that counsel women regarding alternatives to abortion.

verting cash from R&C to fund his congressional campaign. Between December 2001 and March 2002, Renzi transferred over $400,000 from R&C to his "Rick Renzi for Congress" account. To avoid campaign disclosure regulations, Renzi claimed the money as a personal loan to the Renzi campaign. But most of the diverted funds were directly traceable to insurance premiums R&C had collected from clients.[4]

In April 2002, North Island sent R&C an invoice for $236,655.90 to bind annual Safeco coverage for R&C's clients. R&C had already collected the insurance premiums from its clients. But it had funneled those premiums to Renzi's congressional campaign. Because R&C no longer had the money, Renzi did not allow Aly Gamble, R&C's Senior Underwriter, to pay North Island.[5] Two months later, Safeco warned R&C that it planned to cancel R&C's policies for nonpayment. Another month passed with no response from R&C.

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[4] At trial, Renzi suggested that the money he withdrew from R&C to fund his congressional campaign was simply R&C's repayment of a prior loan Renzi had made to the company. Renzi did not provide any documentation to support this contention. By its verdict, the jury rejected his defense.

[5] At trial, Renzi attributed the nonpayment of premiums to a coverage dispute with Safeco over Safeco's decision to deny a claim in part because the crisis pregnancy centers offered religious counseling. Because religious counseling was central to the mission of the crisis pregnancy centers, which was to educate women about alternatives to abortion, Renzi claimed that he interpreted Safeco's position as a decision to deny coverage for all claims brought by crisis pregnancy centers. Based on the outcome at trial, the jury did not believe Renzi's alternative explanation.

In July 2002, Safeco began sending cancellation notices to R&C's clients. With cancellation notices in hand, worried clients began calling R&C. Gamble fielded these calls. To respond to client concerns, Renzi dictated a letter to Gamble, which she sent to clients later that month. The letter stated that, because "spiritual counseling was no longer covered" under Safeco's policy, R&C had "replaced" Safeco with "the Jimcor Insurance Company." The letter promised that clients would experience "no lapse in coverage." Attached to each letter was a new certificate of liability insurance ostensibly from "Jimcor Insurance Company." The certificate listed a policy number, policy limits, and effective policy dates.

None of this was true: Jimcor was not an insurance company,[6] and the new certificates were entirely fabricated. Gamble testified that at Renzi's request, she inserted random policy numbers, cut and pasted Safeco's policy limits, and chose Safeco's August 2002 cancellation date as the effective date of the new fake policy. Then, at Renzi's direction, Gamble sent out at least 74 of these letters and phony insurance certificates, but only to clients who had called R&C to voice concern.

North Island continued to formally demand payment of premiums from R&C. In October 2002,

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[6] While Jimcor Agency was a broker for some of R&C's policies, Jimcor was not a broker for these particular policies (which were brokered by North Island on behalf of Safeco). And importantly, although Jimcor Agency was a broker, meaning that it worked on behalf of clients to obtain insurance coverage for them from insurance companies, it was not an insurer or working on behalf of an insurance company to provide insurance policies or indemnify policy holders who experienced a covered loss.

with no payments in hand and no response from R&C, North Island notified state insurance regulators in Virginia and Florida of R&C's nonpayment. Clients began receiving calls from these state insurance regulators.

In early November, R&C sent another letter to its clients, signed by Gamble on behalf of R&C's Interim President Andrew Beardall.[7] The letter again reassured clients that they were "properly insured" with "no lapses in coverage." These statements were also false—at that time clients had no insurance coverage at all. Instead, between August and November 2002, R&C adjusted all insurance claims internally, paying clients directly for any outstanding claims.

On November 5, 2002, Renzi was elected to the United States House of Representatives. A few weeks later, Renzi received a $230,000 gift from his father. That same day, R&C paid the full amount due to North Island: $236,655.90. After receiving full payment, Safeco decided to retroactively reinstate all of R&C's policies.

But R&C's troubles were just beginning. In early 2003, R&C received a letter from the Virginia State Corporate Commission Bureau of Insurance. In the letter, the Bureau of Insurance asked R&C to explain why it had collected client premiums but failed to remit them to North Island, and why it had issued certificates of insurance showing that coverage had been placed through Jimcor, which is not an insur-

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[7] Beardall, Renzi's law school friend and classmate, took over as the Interim President of R&C while Renzi was occupied with his congressional campaign. However, Gamble testified that Renzi remained involved in R&C's day-to-day operations even after he was elected to Congress.

ance company. In March 2003, Renzi responded by letter on behalf of R&C. Renzi's letter attributed the withheld payments to an ongoing coverage dispute with Safeco, and claimed that "a member of the office staff" had "mistakenly typed 'Jimcor'" when generating the certificates. The letter characterized the mistake as an "inadvertent computer slip."

In early spring, R&C received another letter—this time, from the Florida Department of Insurance—inquiring as to why premiums collected by R&C had not been remitted to Safeco. R&C responded in a letter signed by Beardall. Again, R&C blamed the faulty certificates on a "computer error by a member of the office staff." R&C stated that the Safeco insurance policies were "in force for the whole year without any lapses." At trial, Gamble testified that there was no "inadvertent computer slip." She confirmed that Renzi himself had instructed her to create the fake certificates, insert the false coverage information, and send the certificates to complaining clients.

In May 2003, R&C surrendered its Virginia insurance license to avert penalties. R&C chose not to renew its Florida license. As a result, the Florida Department of Insurance took no further action against R&C.

B

The public corruption counts arose out of Renzi and Sandlin's long-time friendship and business relationship.[8] From 2001 to 2003, Renzi and Sandlin were partners in a real estate development company,

[8] Sandlin's wife was a close friend with Renzi in high school, and Sandlin worked on Renzi's election campaign.

Fountain Realty and Development, Inc., based in Kingman, Arizona. In February 2003, shortly after his election to Congress, Renzi sold Sandlin his share of the company. Sandlin paid Renzi in part with an $800,000 promissory note, payable in annual installments through September 2007 at five percent interest.

During this time, Sandlin also owned a 640-acre parcel (the "Sandlin tract") in southeastern Arizona, near the San Pedro River and within the watershed of the United States Army's Fort Huachuca ("the Fort"). Sandlin had been leasing the tract to an alfalfa farmer, who was using an excessive amount of water (1,846 acre feet per year) in a region that was facing chronic water shortages. Water conservation was a high priority for Fort Huachuca because the Fort conducted important training and was facing local controversy over its water usage. At the same time, the Fort was being reviewed by the Base Realignment and Closure Commission ("BRACC") and was under a federal court order to reduce its water consumption.

In 2004, the Resolution Copper Company ("RCC") acquired land and mineral rights to a large copper deposit located near Superior, Arizona. RCC was planning to extract the copper, but first wanted to secure ownership of an adjacent parcel of land owned by the United States Forest Service. RCC began talking with Congressman James Kolbe about sponsoring a federal land exchange bill.[9] But Kevin

[9] A federal public land exchange is a real estate transaction in which a property owner exchanges privately-owned land for federal public land. Such exchanges require congressional approval.

Messner, Renzi's Chief of Staff, told Renzi that he should be the one to introduce RCC's exchange, as Messner believed that the exchange could help Renzi gain political support during Renzi's upcoming reelection campaign. The RCC land exchange proceeded no further that year, but RCC and Renzi agreed to touch base again after the election.

1

By the time Renzi was reelected to Congress in early 2005, he had secured a seat on the House Natural Resources Committee, which was responsible for land exchanges requiring legislative approval.[10] At a private meeting in January 2005, RCC executive Bruno Hegner asked Renzi which lands RCC should consider purchasing to exchange with the government for the Forest Service parcel. Renzi "nonchalant[ly]" mentioned the Sandlin tract, but he did not disclose his relationship with Sandlin, nor did he disclose the fact that Sandlin owed him $700,000 in principal on the $800,000 note. Hegner testified that, although RCC would not have been interested in the Sandlin property absent Renzi's suggestion, RCC began negotiating with Sandlin.

Renzi and Hegner met again in February 2005. Hegner testified that in this meeting, Renzi was insistent about the importance of RCC acquiring the Sandlin property and including it in the land exchange. Renzi stressed that acquiring the Sandlin property would benefit national security, because decreasing water usage on the Sandlin property was

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[10] Before the United States House of Representatives could take a floor vote on proposed legislation, the Natural Resources Committee needed to approve the proposed land exchange legislation, with a recommendation that the bill be passed into law.

critical to Fort Huachuca's sustainability. Tom Glass, an RCC consultant who also attended the meeting, asked Renzi if he had a business relationship with Sandlin. Hegner testified that Renzi became visibly aggravated and insisted that, although he had sold a piece of property to Sandlin many years ago, "there was no business relationship."

Ultimately, RCC's negotiations with Sandlin were not fruitful. In March 2005, Hegner advised Renzi that RCC was unable to reach an agreement with Sandlin because Sandlin was insisting upon unreasonable terms. Later that day, Sandlin sent Hegner a fax stating, "I just received a phone call from Congressman Renzi's office. They have the impression I haven't been cooperative concerning this water issue. I feel I have been very cooperative . . . . I still want to cooperate."

Negotiations continued, albeit unsuccessfully. When Hegner told Renzi that he was continuing to have trouble with Sandlin, Renzi responded with the key ultimatum: "No Sandlin property, no bill." Hegner immediately understood this to mean that Renzi would not sponsor RCC's legislative land swap proposal unless RCC included the Sandlin property in the land exchange. Hegner asked, "What if I can't get this done?" Renzi replied, "That would be a topic for another conversation," and hung up. In shock, Hegner mailed himself a sealed note memorializing the conversation. That same day, Hegner learned that Renzi and Sandlin had been joint shareholders in an Arizona business. As a result, RCC decided not to pursue the Sandlin tract.

In May 2005, Renzi introduced a federal land exchange bill featuring RCC that did not include the

Sandlin property. No action was ever taken on the bill.

2

In April 2005, Philip Aries of The Aries Group approached Joanne Keene, Renzi's District Director, to discuss the possibility of Renzi sponsoring a federal land exchange bill. Keene put Aries in contact with Sandlin, and Aries and Sandlin spoke on the phone on April 14 for about 28 minutes. That same day, Sandlin exchanged nine phone calls with Renzi.

The next day, Aries proposed to trade petrified forest parcels in Renzi's district for federal land near Florence, Arizona. Renzi did not seem interested in the forest parcels, but emphasized that the Sandlin tract was of critical importance in resolving Fort Huachuca's water issues. Renzi told Aries that each congressional term, he could prioritize a single land exchange to pass directly through the Natural Resources Committee. He promised Aries: "If you include the Sandlin piece in your exchange, I will give you my free pass." Once again, Renzi did not mention his preexisting relationship with Sandlin.

During the negotiation period, Aries emphasized to Keene that he was "going way out on a limb at the request of Congressman Renzi," and that he was "putting [his] complete faith in Congressman Renzi and [Keene] that this is the correct decision." At trial, Aries testified that The Aries Group "had no interest" in owning the Sandlin tract, and would not have bought the tract absent Renzi's promise. But within a few weeks, Aries and Sandlin had reached a deal. Aries agreed to purchase 480 acres of Sandlin's property for $4.5 million. Aries sent a $1 million deposit in two $500,000 installments on May 3 and May 5, 2005. On May 5, Sandlin immediately wrote a

$200,000 check payable to Renzi Vino, an Arizona wine company owned by Renzi. Renzi then deposited the check into a bank account of Patriot Insurance.[11] Renzi's 2005 public financial disclosure statement did not report Sandlin's payment.

In early September 2005, Renzi sent a letter to Sandlin stating that the $800,000 promissory note—for the prior sale of Renzi's stake in their joint business—was "due and payable" for $532,708.33 because Sandlin had recently sold some Kingman property.[12] Sandlin immediately took out a loan from two close friends. He then wrote a check for $533,000 to Patriot Insurance with the notation: "insurance payment." Renzi deposited the check. Again, Renzi did not report this payment on his 2005 financial disclosure form.

The Aries Group closed escrow on the Sandlin tract on October 7, 2005. Aries paid Sandlin $1.5 million in principal, plus about $153,000 in interest.[13] A federal land exchange bill with Aries was never introduced.

In October 2006, Aries received a message from a *Phoenix New Times* reporter asking about Aries' dealings with Renzi and Sandlin. Sandlin instructed Aries to call the reporter back, deny that "Rick was the one pushing this land," and instead state that it

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[11] R&C was known as Patriot Insurance Agency at this time.

[12] The evidence established that Sandlin had sold parcels in Kingman, Arizona. However, the promissory note between Renzi and Sandlin was not secured by any property and did not authorize Renzi to demand full repayment before the due date of September 2007.

[13] Shortly after the closing, Aries received an offer to resell the Sandlin tract at a profit of more than $700,000.

was The Nature Conservancy that was "pushing the land deal."[14] Sandlin falsely assured Aries that Renzi did not "receive [ ] proceeds from the closing" with the Aries Group, and insisted that "Rick was involved in that land in no way, shape, or fashion."

C

After an extensive investigation, two federal grand juries returned indictments against Renzi. The second superseding indictment against Renzi and his codefendants was returned on September 22, 2009. In June 2013, following a 24-day jury trial with 45 witnesses, Renzi was convicted on 17 of 32 counts of public corruption, insurance fraud, and racketeering, and Sandlin was convicted on 13 of 27 counts of public corruption.[15] Granting a substantial downward

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[14] In March 2004, The Nature Conservancy, an environmental group with a strong interest in preserving the San Pedro River, had expressed a desire to purchase the Sandlin property in order to retire its water usage. But after the Conservancy conducted an appraisal of the land, it was unable to strike a deal with Sandlin, who sought a price "way outside of the market values." Later, Aries testified that he sought the Conservancy's endorsement of his purchase of the Sandlin tract since the Conservancy was committed to helping Fort Huachuca acquire water rights.

[15] Specifically, Renzi and Sandlin were convicted on one count of conspiracy to commit honest-services wire fraud and extortion (18 U.S.C. § 371), six counts of honest-services wire fraud (18 U.S.C. § 1343, 1346), two counts of extortion under color of official right (18 U.S.C. § 1951), one count of conspiracy to commit money laundering (18 U.S.C. § 1956(h)), one count of concealing illegal proceeds (18 U.S.C. § 1956(a)(1)(B)(i)), and two counts of transacting in criminally derived funds (18 U.S.C. § 1957). The jury also convicted Renzi on one count of conspiracy to make a false statement to insurance regulators (18 U.S.C. § 371), two counts of making false statements to insurance reg-

variance, the district court sentenced Renzi to 36 months of imprisonment.[16] The district court sentenced Sandlin to 18 months of imprisonment. We have jurisdiction over their appeals under 28 U.S.C. § 1291.

II

Renzi first challenges his extortion and honest-services fraud convictions. Renzi contends that the evidence is insufficient to sustain his convictions because the government failed to prove that he or Sandlin solicited or received "something of value" in exchange for his promise to support land exchange legislation. Renzi points to the fact that The Aries Group paid Sandlin a fair market price for the property, and Sandlin then used the proceeds to repay Renzi on a legitimate debt. According to Renzi, the extortion and honest-services fraud convictions cannot be sustained because the parties engaged in an equal value exchange. We disagree.

We review the district court's interpretation of the statute de novo. *United States v. McFall*, 558 F.3d 951, 956 (9th Cir. 2009). In reviewing the sufficiency of the evidence, we consider "whether, after

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ulators (18 U.S.C. § 1033(a)(1)), and one count of racketeering (18 U.S.C. § 1962(c)).

[16] Renzi's codefendants, Beardall and Dwayne Lequire (R&C's accountant), were also indicted. A jury acquitted Beardall of conspiracy and three counts of insurance fraud. A separate jury convicted Lequire of conspiracy and eight counts of insurance fraud. On appeal, we reversed Lequire's convictions and entered a judgment of acquittal after concluding that Lequire had not violated 18 U.S.C. § 1033(b). *See United States v. Lequire*, 672 F.3d 724, 731 (9th Cir. 2012) (concluding that one cannot "embezzle" funds that are not held "in trust" for another). In response to *Lequire*, the district court dismissed the insurance-embezzlement charges against Renzi.

viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1163–64 (9th Cir. 2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

A

The Hobbs Act criminalizes extortion, defined in relevant part as "the obtaining of property from another, with his consent, . . . under color of official right." 18 U.S.C. § 1951(b)(2). The Hobbs Act defines "property" as "something of value" that can be exercised, transferred, or sold. *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 405 (2003); *McFall*, 558 F.3d at 956. At common law and still today, the prototypical example of "something of value" has been money. See *Sekhar v. United States*, — U.S. —, 133 S. Ct. 2720, 2724 (2013) ("Extortion require[s] the obtaining of items of value, typically cash, from the victim." (citing cases)).

The evidence at trial established the following: Aries testified that The Aries Group "had no interest" in owning the Sandlin property, but purchased it because Renzi promised a "free pass" through the Natural Resources Committee if the Sandlin property was included in Aries' land exchange. Immediately after Aries sent Sandlin a $1 million deposit, Sandlin wrote Renzi a $200,000 check to Renzi Vino, which Renzi deposited into a Patriot Insurance bank account. Renzi's required public financial disclosures never reported this payment. This evidence is sufficient for a rational juror to find that Renzi received money from The Aries Group, through Sandlin, knowing that the payment was made in exchange for Renzi's improper promise to pass federal land ex-

change legislation in The Aries Group's favor. *See Evans v. United States*, 504 U.S. 255, 268 (1992). Under the Hobbs Act, nothing more is required.

Renzi contends that because he was entitled to receive money from Sandlin under the terms of the promissory note, the $200,000 payment from Sandlin cannot constitute "something of value." Not only does Renzi's argument downplay the role his public position played in helping him collect a private debt earlier than would otherwise have been the case, Renzi's argument is premised on a fundamental misunderstanding of the Hobbs Act. First, "it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom." *United States v. Panaro*, 266 F.3d 939, 948 (9th Cir. 2001) (internal quotation marks omitted). The extortion was complete once the proceeds reached Sandlin. *See McFall*, 558 F.3d at 956 (recognizing that the public official himself or a third party acting in concert with the public official must obtain the property of which the victim is deprived).

Second, the existence of a prior debt between Renzi and Sandlin is immaterial to the fact that, together, Renzi and Sandlin obtained property—i.e., money—from The Aries Group that they were not otherwise entitled to receive through Renzi's official position. Even if Renzi was owed money from Sandlin, he was in no way entitled to obtain that money from The Aries Group using the threat of withholding action on a public bill. Under Renzi's narrow reading of the statute, an official could always insulate himself from Hobbs Act liability by directing the extortion victim's payments to any third party who owed the official money. Such an interpretation defies the plain language of the statute and

fails to comport with the statute's purpose: to guard against the misuse of public office for personal gain. *Evans*, 504 U.S. at 260–61.

Renzi next argues that an equal value exchange cannot constitute "something of value" because there was no net loss to the victim. Here, Renzi notes, the parties engaged in an equal value exchange because The Aries Group paid Sandlin a fair market price for the property. According to Renzi, because the Sandlin property was not sold at an inflated price, there can be no extortion. We find no support for Renzi's argument in the statute or in the case law. The Hobbs Act requires the government to prove only that "a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans*, 504 U.S. at 268. We conclude that Renzi obtained a $200,000 payment from Aries that he was not otherwise entitled to receive. The government met its burden under the statute. Thus, we affirm Renzi's convictions on this count.[17]

B

A similar analysis governs Renzi's honest-services fraud conviction. Under 18 U.S.C. § 1346, an official is guilty of honest-services fraud if he accepts something of value in exchange for an official act. 18 U.S.C. § 1346; *Skilling v. United States*, 561 U.S. 358, 412–13 (2010) (noting that § 1346 "draws content . . . from" 18 U.S.C. § 201(b), which prohibits corruptly accepting "anything of value"). The phrase "anything of value" has been interpreted broadly to

[17] Sandlin joins in Renzi's briefing on this point. For the same reason we find Renzi's arguments unavailing, we affirm Sandlin's convictions on this basis.

carry out the congressional purpose of punishing the abuse of public office. *United States v. Williams*, 705 F.2d 603, 623 (2d Cir. 1983). Thus, "thing of value" is defined broadly to include "the value which the defendant subjectively attaches to the items received." *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986).

The evidence was sufficient for a reasonable jury to find that Renzi received a "thing of value"—money—in exchange for his promise to perform an official act—utilizing his influence to move the bill through Congress. We reject Renzi's argument that he "merely entered into an economic exchange." *Id.* at 1304. The money had subjective value to Renzi, not only because it was a $200,000 payment, but because it was the early repayment of a large private debt. "The purpose of Section 201(g) is to reach all situations in which a government agent's judgment concerning his official duties may be clouded by the receipt of an item of value given to him by reason of his position." *Id.* Here, Renzi received money from The Aries Group that he was not otherwise entitled to receive. This money clouded his judgment in performing his official duties and deprived his constituents of the honest services of their elected representative. We affirm his conviction on this count.[18]

C

Renzi also faults the jury instructions for failing to identify the specific "thing of value" at issue. He asserts that this omission makes it impossible to know whether the jury's verdict rests on proper grounds. Because Renzi failed to object to the jury

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[18] We also affirm Sandlin's convictions as an aider and abettor on this count

instruction at trial, we review for plain error. See *United States v. Treadwell*, 593 F.3d 990, 996 (9th Cir. 2010); Fed. R. Crim. P. 52(b).

The Ninth Circuit's pattern jury instruction for bribery "recommend[s]" that the district court "specifically describe the thing of value just as it is described in the indictment to avoid a variance."[19] 9th Cir. Crim. Jury Instr. 8.12, Cmt. (2010). However, the recommendation is just that—a recommendation. Neither the pattern jury instruction nor any controlling precedent requires the district court to identify the thing of value, especially where variance from the indictment is not at issue.

Renzi notes that fatal variance could be at issue, pointing to *United States v. Choy*, 309 F.3d 602 (9th Cir. 2002). In *Choy*, although the indictment alleged that the "thing of value" was $5,000, the government at trial urged an uncharged and legally invalid theory—that the "thing of value" was the purchase of computer equipment that enabled a public official to receive a bribe. *Id.* at 605. Finding that "[t]he theory on which he was convicted constituted a fatal variance from the offense alleged in the indictment," we reversed. *Id.* at 607.

But Renzi's case is notably different from *Choy*. Here, the government's theory of conviction has remained consistent since the beginning: the "thing of value" has always been "money . . . to Sandlin, part

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[19] A variance occurs when the evidence offered at trial proves facts materially different from those alleged in the indictment. *See United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984). A variance requires reversal only if it prejudices a defendant's substantial rights. *See United States v. Adamson*, 291 F.3d 606, 616 (9th Cir. 2002).

of which goes to Renzi." The indictment alleged that "Sandlin paid Renzi $733,000 from the proceeds of the sale of the Sandlin property." Because the evidence at trial did not "prove[] facts materially different from those alleged in the indictment," no variance is at issue. *Von Stoll*, 726 F.2d at 586. Accordingly, we find no error, let alone plain error, in the uncontested jury instructions.[20]

III

Renzi argues that the district court erred by allowing testimony from his former District Director, Joanne Keene, in violation of his Speech or Debate Clause privilege. He also asserts that the district court prevented Renzi from presenting a complete defense by erroneously protecting Congressman Jim Kolbe's Speech or Debate privilege at Renzi's expense, and by improperly excluding evidence under the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3. As a result, Renzi contends, he is entitled to a new trial.

We review *de novo* whether evidence at trial caused a member of Congress to be "questioned" about his legislative acts. *United States v. Swindall*, 971 F.2d 1531, 1543 (11th Cir. 1992).

A

Renzi first argues that his former District Director, Joanne Keene, presented testimony to the jury in violation of the Speech or Debate Clause. Specifically, Renzi challenges two pieces of testimony: (1) Keene's testimony that Renzi "did not seem very excited and interested in the Resolution Copper exchange" when Sandlin's tract was no longer a part of

[20] Likewise, we affirm Sandlin's convictions on this basis.

it,[21] and (2) Keene's testimony that Renzi told her in fall 2005 that "he wanted to put the brakes on . . . Mr. Aries' land exchange because" Congressman Duke Cunningham had been indicted for public corruption.[22] Renzi claims that this testimony inquired

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[21] The full exchange was as follows:

Q: Do you recall any conversations with Mr. Renzi around April of 2005 concerning his view of whether he should be involved in the Resolution land exchange?

Mr. Kramer: We have an objection on this.

The Court: Overruled.

By Mr. Harbach:

Q: You may answer.

A: I recall not any specific discussions, but he did not seem very excited and interested in the Resolution Copper exchange.

Q: In your opinion, do you think he should have been?

A: Yes.

Q: Why?

A: At that time, I felt it was a good exchange and it had a lot of good components to it, and I thought it was something that would be good for our congressional district.

[22] The full exchange was as follows:

Q: Ms. Keene, do you know who Duke Cunningham is?

A: Yes.

Q: Who is Duke Cunningham?

A: Mr. Duke Cunningham was a former member of Congress.

Q: Do you recall a conversation with Mr. Renzi in the fall of 2005 where Mr. Cunningham's name was mentioned?

A: Yes, I do.

Q: Tell us about that conversation.

into his legislative acts in violation of the Speech or Debate Clause and, as a result, he is entitled to a new trial.

In determining whether Keene's testimony concerned Renzi's protected legislative acts, we must revisit the contours of the Speech or Debate Clause. In *Renzi I*, we concluded that Renzi's negotiations with private parties did not constitute protected "legislative acts." *United States v. Renzi* [*Renzi I*], 651 F.3d 1012, 1022 (9th Cir. 2011). We made clear that promises or actions associated with future legislation are not covered by the Clause. *Id.* ("Completed 'legislative acts' are protected [by the Clause]; promises of future acts are not."). Here, we consider whether, when Renzi himself introduced evidence of his own legislative acts through the cross-examination of government witnesses, the government was then entitled to rebut that evidence.

The Speech or Debate Clause provides that, "for any Speech or Debate in either House, [a member of Congress] shall not be *questioned* in any other Place." U.S. Constitution, Art. I, § 6, cl. 1 (emphasis added). Evident from its plain language, the focus is on the improper *questioning* of a Congressman. As such, the Clause is violated when the government reveals legislative act information to a jury because this "would subject a Member to being 'questioned' in

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A: It was a conversation during that time Mr. Cunningham, I believe, was indicted for public corruption as a sitting member of Congress, and Mr. Renzi, I am not sure where he was, but he was patched to me, we talked on the phone. And he said at that time that he wanted to put the brakes on this land exchange, on Mr. Aries' land exchange because of what was happening with Duke.

a place other than the House or the Senate." *United States v. Helstoski*, 442 U.S. 477, 490 (1979).

In line with *Helstoski's* holding, our sister circuits have recognized that "a member is not 'questioned' when he or she chooses to offer rebuttal evidence of legislative acts." *United States v. McDade*, 28 F.3d 283, 294–95 (3d Cir. 1994); *see also United States v. Myers*, 635 F.2d 932, 942 (2d Cir. 1980). The rationale makes sense: a Congressman cannot claim the protections of the privilege when he himself introduces the violative evidence. However, *McDade* recognized that this is a double-edged sword. Although a Congressman may introduce evidence of his own legislative acts, "he thereby subjects himself to cross-examination" on those points. *McDade*, 28 F.3d at 295; *see also United States v. Rostenkowski*, 59 F.3d 1291, 1303 (D.C. Cir. 1995).

In *McDade*, a member of Congress sought dismissal of his indictment on the grounds that the indictment would "force him to introduce evidence of legislative acts in order to refute the charges against him." *McDade*, 28 F.3d at 294. The court was not sympathetic to McDade's concerns. There are times, the court recognized, that a member of Congress may find it advantageous to introduce evidence of his own legislative acts. For instance, a member who "is charged with accepting a bribe in exchange for supporting certain legislation" may "find it tactically beneficial to introduce evidence of his or her assertedly legitimate reasons" for ultimately supporting the legislation. *Id*. This is permissible under the Clause, the court reasoned, because the member himself chose to introduce such evidence. But in doing so, the member "subjects himself to cross-examination" on these points. *Id*. at 295.

We agree with the Second, Third, and D.C. Circuits. We hold that, if a member of Congress offers evidence of his own legislative acts at trial, the government is entitled to introduce rebuttal evidence narrowly confined to the same legislative acts, and such rebuttal evidence does not constitute questioning the member of Congress in violation of the Clause.[23]

Renzi and the Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives, appearing as amicus curiae, contend that our conclusion amounts to a contention that Renzi, by introducing evidence of his own legislative acts, waived his Speech or Debate privilege. This, Renzi and BLAG contend, cannot be because the Supreme Court has held that waiver, if even possible, "can be found only after explicit and unequivocal renunciation of the [Speech or Debate Clause] protection." *Helstoski*, 442 U.S. at 490–91. We understand *Helstoski's* admonition. But we find the limited rebuttal evidence at issue here distinct from a waiver of the Speech or Debate privilege based on a willingness to testify before a grand jury.

In *Helstoski*, a Congressman charged with conspiracy volunteered legislative act evidence to the grand jury in response to the prosecutor's questioning on multiple occasions. *Id*. at 480–82. At trial, the

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[23] In light of our holding, it is irrelevant that Renzi elicited legislative act testimony from other witnesses rather than testifying himself at trial. Renzi's decision to elicit legislative act testimony from a third party does not shield him from the government's introduction of rebuttal evidence any more than a congressman who testifies about his own legislative acts is shielded from cross-examination regarding those acts. *See McDade*, 28 F.3d at 294.

government contended that Helstoski had waived the protections of the Clause by testifying before the grand jury and voluntarily producing documentary evidence of legislative acts. *Id*. at 490–92. The Court disagreed. It concluded that "Helstoski's words and conduct cannot be seen as an explicit and unequivocal waiver of his immunity from prosecution for legislative acts[.]" Id. at 492. But there, the Court was concerned about whether Helstoski's introduction of legislative acts in response to questioning by a prosecutor in front of a grand jury triggered a waiver of Helstoski's evidentiary privilege at trial. The Court had no occasion to decide whether a Member is "questioned" in violation of the Clause where, as here, he has the opportunity to introduce testimony in his own defense and decides to open the door at trial by introducing evidence of his legislative acts.

We now turn to the specific evidence at issue.

1

We first address the challenged piece of testimony concerning Renzi's support for The Aries Group's legislation. On cross-examination of Aries, Renzi elicited that he had "cooled his support" for Aries' land exchange legislation in the summer of 2006, after RCC complained that Aries' exchange "seemed to be moving more quickly than theirs." In Keene's testimony the next day, the government elicited an alternative explanation as to why Renzi's ardor had cooled. When Keene and Renzi became aware that Congressman Cunningham was being prosecuted for public corruption, Renzi told Keene that "he wanted to put the brakes on" the Aries exchange because he had learned that Duke Cunningham was being indicted for public corruption. This testimony directly rebutted the legislative act testimony elicited by

Renzi himself regarding Renzi's true reasons for backing off of his support. We conclude that Renzi's introduction of this evidence opened the door for the government to introduce rebuttal evidence on this point. [24]

We recognize, as we must, that "the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch." *United States v. Brewster*, 408 U.S. 501, 516 (1972). But the Clause has its limits. "[N]o more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility." Id.

Importantly, it was Renzi himself who injected into his trial whether and to what extent he support-

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[24] Even if Renzi had not opened the door for the challenged testimony, we would conclude that neither piece of evidence he challenges is protected by the Clause. Keene's statement that Renzi "wanted to put the brakes on" the Aries exchange because he had learned that Duke Cunningham was being indicted for public corruption was made before Renzi made good on his promise to introduce a federal land exchange bill that included tracts owned by the Aries Group. Therefore, the testimony concerned only Renzi's "promise to perform an act in the future," which is not a legislative act. *Helstoski*, 442 U.S. at 489. Nor is Keene's statement that Renzi "did not seem very excited and interested in the Resolution Copper exchange," which was based on her observation of Renzi before he introduced the RCC bill, protected by the Clause. Again, Renzi's fading enthusiasm for his promise to introduce the RCC bill in the future is not a protected legislative act. Id. While Renzi argues that under *United States v. Brewster*, 408 U.S. 501 (1972), deciding whether to support legislation is "clearly a part of the legislative process," *Brewster* suggests that a legislator's decision to vote against a bill after it has been introduced may be a protected legislative activity. *See id*. at 526–27.

ed the Aries exchange within Congress. Now, Renzi seeks the protections of the Speech or Debate Clause, claiming the government was not allowed to rebut Aries' testimony and offer the jury another possible reason Renzi cooled his support for the land exchange—Duke Cunningham had been indicted and Renzi did not want to be next. Taking our guidance from McDade, we conclude that Renzi opened the door to the limited rebuttal testimony adduced from Keene at trial by cross-examining Aries on the same issue. In response, the prosecution properly confined its rebuttal to the one material point at issue: that the real reason Renzi cooled his support for the land exchange was not because RCC had complained, but because Cunningham had been indicted for corruption. In light of the foregoing, we conclude that Renzi was not impermissibly "questioned" about his legislative acts in violation of the Clause.

2

The second piece of challenged testimony concerned Renzi's handling of the RCC land exchange after Renzi learned that Hegner would not purchase the Sandlin property. During cross-examination of Hegner, Renzi elicited that he had "signed on to sponsor the [RCC] bill" even though the bill no longer included the Sandlin property. Renzi further elicited testimony that he did, in fact, introduce the bill in late May 2005, although the bill did not move forward. Renzi's purpose in introducing this legislative act testimony was to show that he continued to support the RCC exchange even after Hegner refused to purchase the Sandlin property.

Two days later, Keene testified. When asked whether she recalled any conversations with Renzi around April 2005 concerning his views about the

RCC land exchange, Keene stated that Renzi "did not seem very excited and interested in the Resolution Copper exchange." Keene's testimony was directly responsive to Hegner's testimony that Renzi spearheaded the introduction of the RCC bill. Because Renzi himself elicited this legislative act testimony through cross-examination of Hegner, we conclude that the government was permitted to provide rebuttal evidence on this narrow point: whether Renzi truly supported RCC's bill within Congress without the *quid pro quo* involving acquisition of the Sandlin property. Because Renzi was not impermissibly questioned in violation of the Clause, we find no Speech or Debate Clause violation.[25]

B

Kevin Messner was Renzi's Chief of Staff from May 2003 to November 2004, before then serving as Congressman Kolbe's Chief of Staff. Because Congressman Kolbe invoked his legislative privilege, the district court precluded Renzi from questioning Messner about Kolbe's legislative acts. Renzi now argues that the district court inconsistently applied the Speech or Debate Clause by allowing Keene to testify extensively about her work in Renzi's office but prohibiting Messner from testifying about his interactions with Renzi while Messner was serving as Kolbe's Chief of Staff. Renzi argues that the district court's failure to balance Kolbe's Speech or Debate

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[25] Sandlin also argues that the district court's improper admission of evidence in violation of Renzi's Speech or Debate privilege somehow implicates his convictions. We need not decide whether Sandlin is entitled to seek refuge under Renzi's Speech or Debate privilege. Since Renzi is not entitled to relief under the Clause, neither is Sandlin.

privilege against Renzi's right to present a defense violated Renzi's Fifth and Sixth Amendment rights.

As a general principle, under the Fifth and Sixth Amendments, a criminal defendant is guaranteed "a meaningful opportunity to present a complete defense." *United States v. Stever*, 603 F.3d 747, 755 (9th Cir. 2010) (internal quotation marks omitted). However, while Renzi may waive his own Speech or Debate privilege, he cannot waive the privilege of another Congressman. *See U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1374–75 (2d Cir. 1988) ("[T]he testimonial privilege that members of Congress enjoy under the Speech or Debate Clause of the Constitution, art. I, § 6, cannot be waived by another member[.]"). This is so because, "[i]f the Clause applies, it applies absolutely," and there is no "balancing of interests." *Renzi I*, 651 F.3d at 1038 (citing *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509–10 (1975) (recognizing the "absolute nature of the speech or debate protection")). We conclude that Renzi's right to present a defense cannot override the Speech or Debate privilege of another Congressman.

Messner's proposed testimony concerned conversations between Kolbe and Renzi regarding the proposed Aries bill. These conversations took place while Messner was working in Kolbe's office. Because this testimony directly implicated Kolbe's legislative activities, the district court correctly refused to allow Messner's testimony. The district court was not permitted to weigh Kolbe's privilege against Renzi's right to present a defense.

Moreover, any additional testimony about the benefits of including Sandlin's property in a land exchange would have been largely cumulative and of

limited relevance. For weeks, Renzi elicited from government and defense witnesses that Fort Huachuca played a vital role in national security, that the Fort's water usage was a concern, and that retiring water usage on Sandlin's tract would aid the Fort. The parties stipulated to those facts.[26] At Renzi's request, the court even admitted an April 2005 email from Messner to Keene, in which Messner expressed support for the Aries bill because the land exchange would greatly help the Fort. Any additional testimony on these points would have been largely cumulative.

We hold that the district court properly declined to balance Congressman Kolbe's Speech or Debate privilege against Renzi's right to present a defense.[27]

C

Renzi also maintains he was unable to present a complete defense because the district court excluded certain classified materials regarding Renzi's personal connection to Fort Huachuca and his knowledge of its strategic value. According to Renzi, the excluded evidence would have shown that his insistence on including the Sandlin property in the

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[26] At trial, the government stipulated that: (1) "Fort Huachuca's mission was essential to the national security of the United States," (2) "At all times relevant to the indictment, Fort Huachuca was mandated to reduce water usage in the Upper San Pedro Basin," (3) "The Sandlin Property was the last large agricultural water user in the area around the Fort's watershed," and (4) "Retiring the water usage on the Sandlin property was thus in the public interest and of value to Fort Huachuca."

[27] To the extent that Sandlin also joins Renzi on this issue, we reject Sandlin's challenge as well.

land exchange was motivated by his desire to protect the Fort and its important activities.

Under the Classified Information Procedures Act (CIPA), the government "may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial." 18 U.S.C. App. 3, § 6(a). The district court reviewed the classified material *in camera* and held a hearing on the defense request. CIPA does not "alter the substantive rules of evidence, including the test for relevance: thus, it also permits the district court to exclude irrelevant, cumulative, or corroborative classified evidence." *United States v. Passaro*, 577 F.3d 207, 220 (4th Cir. 2009). If the court authorizes disclosure of the classified information, the government may move to substitute for such classified evidence "a statement admitting relevant facts," so long as the statement "will provide the defendant with substantially the same ability to make his defense." 18 U.S.C. App. 3, § 6(c)(1). We review the district court's exclusion of classified information for abuse of discretion. *United States v. Miller*, 874 F.2d 1255, 1275 (9th Cir. 1989).

We have carefully reviewed the classified materials filed with this case and conclude the district court did not abuse its discretion by excluding them. Although these materials may have some limited relevance, they are cumulative of the evidence Renzi actually presented at trial. *See* Fed. R. Evid. 403. Indeed, the evidence introduced at trial provided a detailed narrative of how Renzi came to learn of the Fort's activities and their importance to national security. The defense successfully introduced evidence including: (1) the information contained in a detailed

PowerPoint presentation regarding the Fort's activities that had been shown to Renzi at a February 2003 briefing in Washington, D.C., (2) Matt Walsh's testimony regarding Renzi's multi-day visit to the Fort in January 2004,[28] and (3) a copy of Renzi's itinerary from that visit. The parties also entered the detailed stipulation regarding the training programs and activities that take place at the Fort. The evidence cumulatively provided Renzi with "substantially the same ability to make his defense" as he would have had if the court had allowed the introduction of the classified information itself. 18 U.S.C. App. 3, § 6(c)(1); cf. *United States v. Sedaghaty*, 728 F.3d 885, 905 (9th Cir. 2013) (noting discovery substitution "need not be of precise, concrete, equivalence," so long as it placed defendant "as nearly as possible, in the position he would be in if the classified information . . . were available to him" (internal quotation marks omitted)).

Accordingly, we conclude the district court did not abuse its discretion in excluding the actual classified information. Renzi introduced ample similar evidence supporting his theory of the case, the district court handled the issue appropriately in conformance with the statute, and there was no constitutional violation.

IV

Renzi contends that the government knowingly elicited false testimony during its direct examinations of Philip Aries and Joanne Keene in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). On direct ex-

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[28] Over the government's objection, Walsh even testified that Renzi was invited to visit Guantanamo Bay and observe in the field interrogators trained at Fort Huachuca.

amination, Aries testified that he did not know about the Sandlin property prior to meeting with Renzi on April 15, 2005. On cross-examination, the defense confronted Aries with Sandlin's phone records, which revealed that Aries and Sandlin had spoken the day before for 28 minutes. Aries acknowledged that he had "made a mistake by one day." A few days later, Keene testified that Renzi "brought up" the Sandlin tract to Aries at the April 15 meeting and that "there was a discussion about getting [Sandlin's] contact information" for Aries. Once again, the defense confronted Keene with Sandlin's phone records. In response, Keene conceded her lack of certainty, and acknowledged that she was "not sure how the contact information was exchanged."

A defendant's due process rights are violated when a conviction is obtained through the knowing use of false testimony. To establish a *Napue* violation, a defendant must show: (1) that the testimony was actually false, (2) that the government knew or should have known that it was false, and (3) that the testimony was material, meaning there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Houston*, 648 F.3d 806, 814 (9th Cir. 2011). The district court found that Aries and Keene were, at worst, honestly mistaken and did not perjure themselves.

We consider Renzi's *Napue* claim *de novo*, but we review factual determinations underlying the ruling for clear error. See, e.g., *United States v. Inzunza*, 638 F.3d 1006, 1020 (9th Cir. 2009).

We conclude that Renzi has failed to prove the third prong of *Napue* because there is not a "reasonable likelihood" that Aries' or Keene's statements af-

fected the jury's judgment. *See Houston*, 648 F.3d at 814. First, defense counsel effectively attacked the credibility of Aries and Keene on cross-examination. *Id*. (finding no reasonable likelihood that false testimony affected the jury where "[d]efense counsel effectively attacked [the witness's] credibility"). Second, whether or not Sandlin spoke to Aries on April 14 or April 15 was of marginal relevance when compared to Renzi's promises (a "free pass" through the Natural Resources Committee) at the April 15 meeting. The primary dispute at trial was not *whether* Renzi pushed Sandlin's tract on Aries, but why. The jury could reasonably conclude that Renzi, not Aries, pushed the tract at the meeting, even though Aries had heard about the tract from Sandlin the day prior. Because the statements were not "material," we conclude that no *Napue* violation occurred.[29]

We also question whether Renzi met the first two prongs of the *Napue* test. Mere inconsistencies or honestly mistaken witness recollections generally do not satisfy the falsehood requirement. See *United States v. Bagley*, 473 U.S. 667, 678 (1985). Renzi has provided no evidence that Keene or Aries knew their testimony was inaccurate. Moreover, although the existence of the phone records allow for the possibility that the prosecutors knew, or should have known, that Keene and Aries might testify falsely, there is no evidence that the prosecutors actually knew they would. This distinguishes the situation from that present in *Hayes v. Brown*, 399 F.3d 972, 980–81 (9th Cir. 2005) (en banc), where the prosecutor deliberately withheld relevant information from his witness. Accordingly, we doubt that Renzi has met the

[29] Likewise, we reject Sandlin's arguments on this basis.

first two prongs of the *Napue* test but do not decide the issue as he has not met the third prong of the test.

V

We next address whether Renzi is entitled to a judgment of acquittal or a new trial on the insurance fraud counts. Renzi was convicted of conspiring to violate and violating 18 U.S.C. § 1033(a)(1) by lying to Virginia and Florida insurance regulators. The statute prohibits a person "engaged in the business of insurance" from "knowingly, with the intent to deceive, mak[ing] any false material statement" "in connection with any financial reports or documents presented to any insurance regulatory official."[30] 18 U.S.C. § 1033(a)(1)(A). Renzi contends that the evidence presented at trial was insufficient to support his insurance fraud convictions because the government failed to prove that R&C was "engaged in the business of insurance" or that the two letters sent to Virginia and Florida insurance regulators qualify as "financial" documents. Renzi also argues that he is entitled to a new trial because the district court misinstructed the jury on the meaning of the term

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[30] In its entirety, 18 U.S.C. § 1033(a)(1) reads:

> Whoever is engaged in the business of insurance whose activities affect interstate commerce and knowingly, with the intent to deceive, makes any false material statement or report or willfully and materially overvalues any land, property or security—(A) in connection with any financial reports or documents presented to any insurance regulatory official or agency or an agent or examiner appointed by such official or agency to examine the affairs of such person, and (B) for the purpose of influencing the actions of such official or agency or such an appointed agent or examiner, shall be punished as provided in paragraph (2).

"financial reports or documents." For the reasons that follow, we deny Renzi the relief he seeks.

We review the sufficiency of the evidence *de novo* to determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Chung*, 659 F.3d 815, 823 (9th Cir. 2011) (citing *Jackson*, 443 U.S. at 319).

A

For over ten years, Renzi served as the owner and operator of R&C, an insurance agency that marketed and sold insurance policies, approved applicants for insurance, issued certificates of insurance, and collected premiums on behalf of insurance carriers. Now, Renzi contends that his insurance fraud conviction under § 1033(a)(1) cannot stand because R&C was not "engaged in the business of insurance" as required by the statute. We conclude otherwise. A rational juror could have found that R&C, an insurance agency, was engaged in the business of insurance.

The statute defines the term "business of insurance" broadly to mean the writing of insurance or reinsuring of risks "by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons[.]" 18 U.S.C. § 1033(f)(1). An "insurer" is "any entity the business activity of which is the writing of insurance or the reinsuring of risks, and includes any person who acts as, or is, an officer, director, agent, or employee of that business." *Id.* § 1033(f)(2).

The statute is not a model of clarity. Nonetheless, we read the statute to require that, to be "engaged in the business of insurance," R&C must either: (1) write insurance or reinsure risks, and meet the definition of an "insurer" under § 1033(f)(2); (2) conduct acts necessary or incidental to writing or reinsuring; or (3) conduct any activity, as long as the person is, acts as, or is authorized to act on behalf of, an officer, director, agent, or employee of an insurer. *See United States v. Segal*, 495 F.3d 826, 836 (7th Cir. 2007) (concluding that defendant, an independent insurance broker, was "engaged in the business of insurance as that term is broadly defined in the statute to include 'all acts necessary or incidental to such writing or reinsuring'"); *Beamer v. NETCO Inc.*, 411 F. Supp. 2d 882, 889 (S.D. Ohio 2005) (recognizing that the "business of insurance" includes "all acts necessary or incidental to such writing or re[insuring]").

We conclude that the evidence introduced at trial was sufficient for a rational juror to find that R&C was "engaged in the business of insurance" because Aly Gamble, R&C's Senior Underwriter, testified that R&C was authorized to act on behalf of insurer Royal Surplus Lines Insurance Company. Gamble explained that Royal Surplus had one policy for R&C's numerous clients, an "aggregate" or "master" policy. She testified that R&C would inquire as to whether its new clients were qualified for coverage under that policy. If so, R&C would accept their funds and issue a binding certificate of insurance almost immediately. After R&C took these steps, the new clients "actually had insurance" and were "bound." A binder gives "an insured temporary coverage while the application for an insurance policy is being processed or while the formal policy is being

prepared." BLACK'S LAW DICTIONARY 190 (9th ed. 2009). Thus, Gamble's testimony established that Royal Surplus was bound to provide insurance coverage for the new client. Viewing this testimony in the light most favorable to the prosecution, *Nevils*, 598 F.3d at 1163–64, a reasonable juror could conclude R&C acted on behalf of Royal Surplus by binding it to insuring new clients, and therefore R&C was engaged in the "business of insurance." Accordingly, even giving "business of insurance" the most narrow definition possible, we have no doubt that R&C falls under the realm of the statute.

Alternatively, we conclude that R&C conducted acts necessary or incidental to the writing of insurance or reinsuring of risks. R&C: (1) marketed, developed, and sold Safeco insurance policies, (2) issued certificates of insurance to clients, (3) underwrote insurance applications, (4) collected insurance premiums from clients and passed those premiums on to Safeco, and (5) reported pending claims to Safeco. All of these actions are "necessary or incidental" to the writing of insurance. R&C even went so far as to issue fake insurance certificates to clients, which listed Renzi as Jimcor Insurance Company's "authorized representative." And during the period of time when clients were not covered by any policy, R&C paid clients directly after purportedly adjusting any outstanding claims.

While Renzi asks us to interpret the term "business of insurance" narrowly, we find that such an interpretation is contrary to the definition itself, which is considerably broader than just insurers who issue policies and take on risk. Indeed, the statute covers insurers, agents of insurers, and even those who act as agents of insurers. *See* 18 U.S.C. § 1033(f)(1).

Moreover, such a narrow definition is contrary to the statute's broad purpose, which was to "make it a Federal crime to defraud, loot, or plunder an insurance company." See 139 Cong. Rec. E209–04, E210 (Statement of Rep. Dingell).

If it looks like an insurance agency and acts like an insurance agency, it's probably engaged in the business of insurance. A rational juror could have found that R&C, which went so far as to issue fraudulent insurance policies to dupe unwitting clients into believing they were fully insured, was engaged in the "business of insurance" as the term is broadly defined in § 1033(f)(1).

B

After receiving inquiries from Virginia and Florida insurance regulators, R&C responded in two letters, which stated that the fake "Jimcor" certificates were the result of an accidental computer error by a member of the office staff, that the nonpayment of premiums was due to a coverage dispute with Safeco, and that clients suffered no lapses in coverage during this time. Renzi contends that these letters do not qualify as "financial . . . documents" within the meaning of 18 U.S.C. § 1033(a)(1)(A). We disagree.

The statute does not define the phrase "financial . . . documents,"[31] and case law provides only sparse guidance on how to interpret this phrase. After considering the plain language of the terms, we conclude

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[31] The statute is ambiguous as to whether the term "financial" modifies both "reports" and "documents." We assume without deciding that "financial" modifies both terms. *See United States v. Segal*, No. 02-cr-112, 2004 WL 2931331, at *4 n.10 (N.D. Ill. Dec. 13, 2004) ("We also find that the term 'financial' modifies both reports and documents.").

that a "financial . . . document" includes documents relating to the "management of money." BLACK'S LAW DICTIONARY 631 (9th ed. 2009). This covers more than just a balance sheet or an income statement. It includes any document that relates to the financial health of a company.

The letters R&C sent to insurance regulators qualify as "financial . . . documents" because they relate to the "management of money" and R&C's financial health. The letters were an attempt to conceal Renzi's failure to forward insurance premiums to the insurance carriers because they had been diverted to his congressional campaign. The letters were also designed to conceal that Renzi's insureds had no legitimate insurance coverage for a portion of the year after Safeco issued cancellation notices. These letters concealed R&C's financial problems and sought to mislead insurance regulators as to whether Renzi should maintain his licensed insurance agent status.

Moreover, false statements within the letters (namely, that "[t]here was a delay in payment due to [a] dispute," but "[a]ll the while, the clients had insurance that was active and available to them") had important financial implications. Had the letters been composed truthfully, they would have revealed that Renzi had redirected clients' insurance premiums into his congressional campaign, and that clients' insurance coverage with Safeco had lapsed for a few months based on nonpayment. This attempt to conceal R&C's financial issues directly related to R&C's "management of money." Our decision comports with the purpose of § 1033(a), which was to punish knowing falsehoods that obstruct the investigations of insurance regulators. *See* 139 Cong. Rec. E209–04 (Statement of Rep. Dingell) ("States appar-

ently are not collecting adequate information, investigating wrongdoing, or taking legal action against the perpetrators of insurance insolvency.").

We conclude that the evidence was sufficient for a reasonable juror to find that the letters R&C sent to Virginia and Florida insurance regulators were "financial . . . documents."

C

Renzi argues that, over his objection, the district court misinstructed the jury by stating that "[t]he terms 'financial reports' or 'financial documents' include any documents concerning the management of money or the potential financial health and viability of a business or that relate to the financial position of a business."[32] Renzi contends that this "unbounded" definition left the jury free to conclude that virtually any document satisfied this element and that, therefore, he is entitled to a new trial.

District courts have wide discretion in crafting jury instructions. *United States v. Humphries*, 728 F.3d 1028, 1032 (9th Cir. 2013). We review de novo whether a jury instruction correctly states the law. *United States v. Berry*, 683 F.3d 1015, 1020 (9th Cir. 2012). Renzi is entitled to a new trial if the instruction actually given was misleading or inadequate to guide the jury's deliberation. *United States v. Garcia-Rivera*, 353 F.3d 788, 792 (9th Cir. 2003).

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[32] The district court's instruction on the definition of "financial reports or documents" was guided by its reading of *United States v. Goff*, 598 F. Supp. 2d 1237, 1238 (M.D. Ala. 2009) ("When false statements in a document are so connected to the potential financial health and viability of a business, they surely fall within the scope of § 1033(a)[.]").

The district court's definition of "financial documents" was a correct statement of the law. Financial documents do, in fact, "include" the documents mentioned by the court. *Humphries*, 728 F.3d at 1032. The district court was not required to explicitly state which documents were included or excluded from the statute's scope. Because the term "financial . . . documents" is undefined in the statute, the district court was permitted to rely on the plain language of the terms along with supporting case law. Thus, the district court did not err in instructing the jury that the definition of "financial reports or documents" included "documents concerning the management of money or the potential financial health and viability of a business or that relate to the financial position of a business."

VI

Next, Renzi challenges his conviction for engaging in a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) ("RICO"). This count was predicated on three alleged acts of racketeering: (1) Racketeering Act One: "Use of Insurance Premiums Held in Trust to Fund First Congressional Campaign;" (2) Racketeering Act Two: "Scheme to Deprive the United States of Honest Services, and to Extort Constituents;" and (3) Racketeering Act Three: "Misappropriations from Spirit Mountain Insurance Company." The jury acquitted Renzi of Racketeering Act Three, but found that Renzi committed many of the predicate acts alleged in Racketeering Acts One and Two.

Racketeering Act One charged Renzi with executing a "scheme and artifice to defraud" through the use of interstate wires, in violation of 18 U.S.C. § 1343 (wire fraud), and through the use of interstate mailings, in violation of 18 U.S.C. § 1341 (mail

fraud). In describing the scheme, the indictment stated that Renzi "misappropriat[ed] insurance premium funds held in trust by [R&C] and divert[ed] those funds to his own benefit." This charge was based on Renzi's transfer of over $400,000 from R&C, some of which came from client insurance premiums, to Renzi's personal accounts to fund his congressional campaign.

Renzi contends that the evidence was insufficient to convict him because the government did not, and could not, prove that Renzi "misappropriated" funds held "in trust" by another. Renzi relies on *United States v. Lequire*, where we held that Dwayne Lequire, R&C's accountant, was not guilty of "embezzlement" under 18 U.S.C. § 1033(b)(1) because Patriot Insurance did not hold funds "in trust" for the insurer, but instead was subject to a debtor-creditor relationship. 672 F.3d at 728–29. Referencing *Lequire*, Renzi contends that R&C did not hold funds "in trust" for North Island; instead, the funds belonged to R&C, subject to a debtor-creditor relationship. Renzi also argues that *Lequire* "makes clear" that misappropriation, like embezzlement, requires that funds be held "in trust."

Renzi overstates the holding of *Lequire*. While *Lequire* specifically dealt with embezzlement under § 1033(b)(1), it did not discuss misappropriation. And here, Renzi was not charged with misappropriation or embezzlement. He was charged with mail and wire fraud. Neither mail nor wire fraud requires any express relationship, either fiduciary or trust, between the victim and the defendant. See 18 U.S.C. §§ 1341, 1343. Instead, the fraud statutes require proof of a scheme to obtain money by means of false representations. Id. Renzi does not dispute that a ra-

tional juror could have found the evidence adduced at trial satisfied those elements.

"We have repeatedly held that language that describes elements beyond what is required under statute is surplusage and need not be proved at trial." *See Bargas v. Burns*, 179 F.3d 1207, 1216 n.6 (9th Cir. 1999). Here, we conclude that the indictment's use of the phrases "misappropriation" and "in trust" were surplusage. Those terms were used only in describing the overall scheme to defraud, and were not mentioned in the description of any of the predicate acts. Because the government was not required to show that R&C "misappropriated" funds held "in trust" for another in order to prove mail or wire fraud, this additional language in the indictment was surplusage and could be disregarded. *Id*.

We also conclude that the district court did not constructively amend the indictment by omitting the "in trust" language from the jury instructions. Because the "in trust" language was surplusage, removal of this language from the jury instructions was not error. *See United States v. Garcia-Paz*, 282 F.3d 1212, 1215–16 (9th Cir. 2002).

VII

In bribery, extortion, and honest-services fraud cases, § 2C1.1 of the United States Sentencing Guidelines instructs a sentencing court to enhance a defendant's offense level based on the "greatest" of "[1] the value of the payment, [2] the benefit received or to be received in return for the payment, [3] the value of anything obtained or to be obtained by a public official or others acting with a public official, or [4] the loss to the government from the offense[.]" U.S.S.G. § 2C1.1(b)(2). The district court found the ten-level enhancement "applicable under prong one;

that is, the value of the $200,000 payment on the counts of conviction that Renzi received in exchange for the influence exerted to the sale of the property."

Renzi and Sandlin challenge the district court's calculation of value under § 2C1.1(b)(2). They contend that the district court erred by concluding that the "value of the payment" was $200,000 (the amount of the debt to Renzi that Sandlin paid off), rather than zero (the net value to Renzi). We review a district court's method of calculating loss under the Sentencing Guidelines *de novo*. *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1153–54 (9th Cir. 2012). We review the district court's determination of the amount of loss for clear error. *Id*.

Renzi and Sandlin base their argument on the Application Notes to § 2C1.1(b), which state that "[t]he value of 'the benefit received or to be received' means the *net value* of such benefit." U.S.S.G. § 2C1.1, app. n.3 (emphasis added). They also rely on *United States v. White Eagle*, where we found that the district court erred in equating the value of a loan modification to a cash payment of the same size. 721 F.3d 1108, 1121 (9th Cir. 2013). In *White Eagle*, we concluded that the district court should have considered the "value of the benefit" received by the defendant, not just the face amount of the transaction. *Id*. at 1122.

Renzi and Sandlin's arguments ignore both the plain language of the Guideline itself and the district court's colloquy. The Guideline instructs the district court to consider the "greatest" of four calculation methods. And here, the district court stated that it was basing its conclusion on "prong one," "the value of the $200,000 payment." According to the jury, the value of the payment from Aries to Sandlin to Renzi

was $200,000. Application Note Three does not aid the court in interpreting prong one, since the Note only discusses the proper interpretation of the phrase "the benefit received," which appears in prong two of the Guideline. *White Eagle* does not compel a contrary decision because it focuses exclusively on prong two.

Renzi and Sandlin argue that the "value of the payment" prong must also be understood to incorporate the net value principle since "[t]here is no basis for treating it differently" and "any other interpretation would produce anomalous results." But the Application Note is clear in its scope: by its terms, it applies only to the "benefit received" prong. Thus, we hold that the district court did not err in imposing a ten-level enhancement under § 2C1.1(b)(2) to both Renzi and Sandlin.

VIII

James Sandlin, Renzi's codefendant, challenges the sufficiency of the evidence to support his convictions for conspiracy to engage in wire fraud, Hobbs Act extortion, and engaging in monetary transactions with criminally derived funds. Primarily, he asserts that there is no evidence that he agreed with Renzi to conceal their prior business relationship. Sandlin contends that the evidence shows that he was an innocent businessman engaging in financial transactions. We review *de novo* whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Nevils*, 925 F.2d at 1231; *Jackson*, 443 U.S. at 319.

Sandlin claims that he was always forthright in his dealings with Hegner and Aries. He points to the

fact that he explicitly told Hegner that he and Renzi continued to have "business dealings." And when he and Aries began discussing the land exchange, he volunteered that he and Renzi had a "very, very close working relationship and personal relationship" because his wife had attended high school with Renzi. According to Sandlin, this free sharing of information was consistent with his role as an innocent businessman.

Based on our own *de novo* review of the evidence before the jury, it is impossible to conclude that *no* reasonable juror would have voted to convict Sandlin. Most importantly, the government was not required to prove the existence of an explicit agreement to prove conspiracy. *Iannelli v. United States*, 420 U.S. 770, 777 (1975). Instead, the existence of an agreement to commit an unlawful act can "be inferred from the facts and circumstances of the case." *Id*. at 777 n.10.

Here, while the jury was presented with evidence that Sandlin volunteered information about his relationship with Renzi, the jury also heard that: (1) Sandlin never told RCC or Aries that he owed Renzi $700,000 plus interest on a personal note or that he planned to repay his debt to Renzi with some of the proceeds; (2) Sandlin repaid Renzi with a $200,000 check made payable to Renzi Vino, even though the debt was payable to Renzi personally; (3) Sandlin paid Renzi immediately upon receiving the earnest money from Aries; (4) Sandlin spoke to Renzi seven times on the day of the first payment; (5) Sandlin made a second repayment to Renzi with a $533,000 check made payable to Patriot Insurance with the notation "insurance payment," even though the debt was payable to Renzi personally; and

(6) Sandlin insisted in a phone call with Aries that "Rick was involved in that land in no way, shape, or fashion." Finally, when Sandlin began receiving phone calls from investigative reporters looking into the sale of his property, he immediately called Aries to provide instructions on how to respond to media inquiries. The attempt to lay off the deal on The Nature Conservancy could easily be viewed by a reasonable jury as proof of consciousness of guilt over how the transaction had been structured.

That conduct was powerful proof of criminal intent. The jury rejected Sandlin's defense that the money he received from The Aries Group was the result of a legitimate, innocent property sale. We conclude that the evidence was sufficient to support Sandlin's convictions.

IX

The Constitution and our citizenry entrust Congressmen with immense power. Former Congressman Renzi abused the trust of this Nation, and for doing so, he was convicted by a jury of his peers. After careful consideration of the evidence and legal arguments, we affirm the convictions and sentences of both Renzi and his friend and business partner, Sandlin.

AFFIRMED.

IKUTA, Circuit Judge, specially concurring:

"If it looks like an insurance agency and acts like an insurance agency," Maj. Op. at 43, it might be a brokerage company whose activities are not covered by 18 U.S.C. § 1033.

Section 1033 is drafted narrowly. It criminalizes conduct by persons who are "engaged in the business of insurance." 18 U.S.C. § 1033(a)(1). The definition of "business of insurance" is, on its face, limited to activities by insurers. The statute defines the term to mean either "the writing of insurance," or "the reinsuring of risks," in both cases, "by an insurer." 18 U.S.C. § 1033(f)(1). It defines "insurer" to mean "any entity the business activity of which is the writing of insurance or the reinsuring of risks." *Id.* § 1033(f)(2). The "business of insurance" includes activities by employees and agents of an insurer, as well as activities "incidental to" writing insurance or reinsuring risks that may be undertaken by an insurer. *Id.* § 1033(f)(1). Nothing in the statute suggests that someone who is not an insurer or authorized to act on an insurer's behalf is in the "business of insurance."

While a broker is involved in the insurance industry, its business does not generally meet the definition of "business of insurance" for purposes of § 1033(f). In general, "the legal distinction between an 'agent' and a 'broker' is that an 'agent' transacts insurance as *the agent of the insurer* and a 'broker' transacts insurance as *the agent of the insured* with regard to a particular insurance transaction." 2 Jeffrey E. Thomas *New Appleman on Insurance Law Library Edition* § 1502[1][a] (LexisNexis 2009) (emphasis in original); *Black's Law Dictionary* 220 (9th ed. 2009) ("insurance broker" defined as "a person who, for compensation, brings about or negotiates contracts of insurance as an agent for someone else, but not as an officer, salaried employee, or licensed agent of an insurance company.").

To be sure, a broker could also be an agent for an insurance company. Whether an entity is a broker or an insurance agent (or both) depends on "the particular facts of the case." *Curran v. Indus. Comm'n of Ariz.*, 752 P.2d 523, 526 (Ariz. Ct. App. 1988); *see also Sparks v. Republic Nat. Life Ins. Co.*, 647 P.2d 1127, 1140 (Ariz. 1982). Courts apply agency principles of the applicable state to determine whether a broker is also serving as an agent of an insurance company. *See United States v. Segal*, 495 F.3d 826, 836 (7th Cir. 2007) (rejecting defendants' claim that they were brokers and therefore not "engaged in the business of insurance" under § 1033(b), in light of Illinois law that a broker could become an agent of the insured under some factual circumstances) (citing *Capitol Indem. Corp. v. Stewart Smith Intermediaries, Inc.*, 593 N.E. 2d 872 (Ill. 1992)); *see also United States v. Lequire*, 672 F.3d 724, 728 (9th Cir. 2012) (looking to Arizona law to determine that an insurance broker did not hold property in trust for an insurer for purposes of § 1033). Under the Arizona law applicable here, *see id.*, a broker does not become the agent of an insurer simply because "the insurer contemplates receiving insurance business from brokers." *Curran*, 752 P.2d at 527. Nor does a broker become an insurance agent if the broker merely solicits applications for the insurer and secures "from the insurer's agent the policy which was issued." *Id.*

But the majority here does not determine whether R&C is writing insurance or reinsuring risks, or whether R&C is an agent of Safeco or Royal Surplus under principles of Arizona agency law. Instead, the majority relies on an expansive reading of § 1033 that could impose criminal liability not just on an insurer but also on any third party who interacts with insurers. Specifically, the majority focuses on the

language defining the "business of insurance" as writing or reinsuring risks by an insurer "including all acts necessary or incidental to such writing or reinsuring." 18 U.S.C. § 1033(f)(1). According to the majority, this means that any action by a third party that is "necessary or incidental to" an insurer's business is part of the "business of insurance." Maj. Op. at 42–43. Because a broker's business is to help customers obtain insurance, and such activities are incidental to writing insurance, the majority's interpretation appears to make brokerage businesses per se subject to liability under § 1033, regardless of whether a particular broker is acting as an agent of an insurer. Indeed, the majority's interpretation may make even a policy holder who writes a regulator and falsely accuses an insurance company of stealing his money liable under § 1033. The policy holder's letter is likely a "financial document" under our opinion, and receiving an insurance policy is "incidental to" the insurance company's business of insuring and reinsuring.

There is no indication Congress intended the statute to be read this broadly. The most natural reading of the "*including* all acts" language in § 1033(f)(1) (emphasis added) is that it refers to other acts "by an insurer."[1] This could include activities

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[1] The full definition states:

> (1) the term "business of insurance" means–
>
> (A) the writing of insurance, or
>
> (B) the reinsuring of risks,
>
> by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons.

typically undertaken as part of an insurer's business, such as drafting financial reports or communicating with regulators, because such acts are "incidental to" the insurance company's business of insuring and reinsuring. By contrast, when Congress wanted the statute to cover third parties such as brokers, it said so directly. In another subsection of the same statute, 18 U.S.C. § 1033(b)(1), Congress expressly imposed liability on third parties who are not insurers. In that section, the statute provides that a person who is either "engaged in the business of insurance" or "involved (other than as an insured or beneficiary under a policy of insurance) in a transaction relating to the conduct of affairs of such a business" can be held liable. This latter category would include brokers, and expressly excludes a policy holder.

Although I disagree with the majority's overly broad reading of the statute, I agree with the result. A broker can become an insurance agent based "upon the particular facts of the case" if the insurer's actions "create actual or apparent authority for a broker to act on its behalf." *Curran*, 752 P.2d at 526. Here, R&C engaged in a range of activities as an insurance broker, some (but not all) of which may be evidence that R&C acted as an agent of the insurer.[2]

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18 U.S.C. § 1033(f)(1).

[2] The majority's claim that R&C "even went so far as to issue fake insurance certificates to clients, which listed Renzi as Jimcor Insurance Company's 'authorized representative,'" Maj. Op. at 43, erroneously confuses a broker's work with an insurer's work. The fake Certificate of Liability Insurance shows that R&C was the "producer" which is consistent with being a broker, see Curran, 752 P.2d at 524, 527, and Renzi signed the certificate as the authorized representative of R&C, (not Jimcor) certifying only that if Jimcor canceled the policy, R&C would not be liable.

Maj. Op. at 42–43. At a minimum, there was evidence at trial indicating that R&C could bind Royal Surplus, i.e., issue a contract of insurance, and a person who has the power "to obligate the insurer upon any risk" is an agent of the insurer. *Curran*, 752 P.2d at 526. Accordingly, viewing the evidence in the light most favorable to the government, a reasonable juror could conclude that R&C was an agent of Royal Surplus, and thus falls under the definition of person involved in the "business of insurance." I therefore concur with this portion of the majority's opinion on these limited grounds.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RICHARD G. RENZI,
Defendant-Appellant.

No. 10-10088
D.C. No.
4:08-cr-00212-DCB-
BPV-1

OPINION

Appeal from the United States District Court for the District of Arizona
David C. Bury, District Judge, Presiding

Argued and Submitted
February 17, 2011—San Francisco, California
Filed June 23, 2011

Before: Richard C. Tallman and Consuelo M. Callahan, Circuit Judges, and Suzanne B. Conlon, District Judge.*

Opinion by Judge Tallman

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* The Honorable Suzanne B. Conlon, United States District Judge for the Northern District of Illinois, sitting by designation.

COUNSEL

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Irvin B. Nathan, General Counsel, Office of General Counsel, United States House of Representatives, Washington, D.C.; Kerry W. Kircher, Deputy General Counsel (argued); Christine M. Davenport, John D. Filamor, Katherine E. McCarron, Ariel B. Waldman, Assistant Counsels; for Amicus Curiae Bipartisan Legal Advisory Group of the United States House of Representatives in Support of Reversal.

Melanie Sloan, Washington, D.C., for Amicus Curiae Citizens for Responsibility and Ethics in Washington in Support of Affirmance.

OPINION

TALLMAN, Circuit Judge:

Former Arizona Congressman Richard G. Renzi seeks to invoke the Speech or Debate Clause[1] to pre-

[1] "[A]nd for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

clude his prosecution for allegedly using his public office to benefit himself rather than his constituents. The indictment against him alleges that Renzi offered two private parties a *quid pro quo* deal. If they would buy private land owned by a former business partner—a sale that would generate enough cash to repay a debt owed to Renzi—the Congressman promised to support future public land exchange legislation favorable to each.

Renzi denies the charges against him, but argues on interlocutory appeal that he is protected by the Clause from even the burden of defending himself. Specifically, he claims that the public corruption charges against him amount to prosecution on account of his privileged "legislative acts"; that "legislative act" evidence was improperly presented to the grand jury; that the United States must show that its investigation did not benefit from its review of "legislative act" evidence; and that the district court erred by declining to wholly suppress all of the evidence against him relating to his illicit "negotiations."

We cannot agree. We recognize, as we must, that the Speech or Debate Clause is a privilege that "has enabled reckless men to slander and even destroy others with impunity." *United States v. Brewster*, 408 U.S. 501, 516 (1972). But the Supreme Court has made equally clear that the Speech or Debate Clause does not "make Members of Congress supercitizens, immune from criminal responsibility." *Id.* Because we cling to "the precise words" of the Court's own Speech or Debate jurisprudence and "the sense of those cases, fairly read," *id.*, we conclude that Renzi's

actions fall beyond the Clause's protections. We therefore deny Renzi the relief he seeks.[2]

I

Renzi was elected to the United States House of Representatives in November 2002 as the representative for Arizona's First Congressional District.[3] He was sworn in the following January and, as a freshman congressman ("Member"), obtained a seat on the House Natural Resources Committee ("NRC")—the committee responsible for, among other things, approving of any land exchange legislation[4] before it can reach the floor of the House.

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[2] In a separate memorandum disposition filed concurrently with this opinion, we also grant the Government's cross-appeal, No. 10-10122, and order reinstated the racketeering act dismissed by the district court.

[3] Because this matter arises on interlocutory appeal, the facts are largely derived from the allegations contained in the second superceding indictment against Renzi. We accept these allegations as true only for the purpose of resolving the important constitutional questions before us. *United States v. Fiander*, 547 F.3d 1036, 1041 n.3 (9th Cir. 2008) ("We presume the allegations of an indictment to be true for purposes of reviewing a district court's ruling on a motion to dismiss." (internal quotation marks and citation omitted)).

[4] Federal land exchanges involve the exchange of privately held land for federal land. Typically, land exchanges are facilitated by government agencies and must comply with three general requirements: the federal parcel and the private land must be appraised to ensure equal value, the exchange must comply with the National Environmental Protection Act, and the exchange must serve the public interest. *E.g.*, Bill Paul, Article, *Statutory Land Exchanges that Reflect "Appropriate" Value and "Well Serve" the Public Interest*, 27 Pub. Land & Resources L. Rev. 107, 115-16 (2006). Legislative land exchanges are separate vehicles that avoid all of these requirements. *Id.* at 122

In 2004 and 2005, Resolution Copper Mining LLC ("RCC") owned the mineral rights to a large copper deposit located near Superior, Arizona, an area east of Phoenix. RCC was planning to extract the copper, but wanted first to secure ownership of the surface rights from the United States Government. To obtain these rights, RCC hired Western Land Group, a consulting firm, to assist it in acquiring private property that it could offer to the Government in exchange for the desired surface rights.

In 2005, Western Land Group approached Renzi about developing and sponsoring the necessary land exchange legislation. According to the allegations, Congressman Renzi met with RCC representatives in his congressional office in February 2005 and instructed them to purchase property owned by James Sandlin ("the Sandlin property") if RCC desired Renzi's support. Renzi never disclosed to RCC that Sandlin was a former business partner who, at that time, owed Renzi some $700,000 plus accruing interest.

RCC's negotiations with Sandlin were not fruitful. In March 2005, an RCC representative called Renzi to tell him that RCC had been unable to reach an agreement with Sandlin because Sandlin was insisting on unreasonable terms. Renzi reassured the representative that Sandlin would be more cooperative in the future. Later that day, RCC received a fax from Sandlin stating, "I just received a phone call from Congressman Renzi's office. They have the impression that I haven't been cooperating concerning

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(citing Robert B. Keiter, *Biodiversity Conservation and the Intermixed Ownership Problem: From Nature Reserves to Collaborative Processes*, 38 Idaho L. Rev. 301, 316 (2002)).

this water issue. I feel I have been very cooperative.... I still want to cooperate." Nevertheless, no deal could be struck. In April, RCC informed Renzi that it would not acquire the Sandlin property. Renzi responded simply, "[N]o Sandlin property, no bill."

Within the week following the collapse of "negotiations" with RCC, Renzi began meeting with an investment group led by Philip Aries ("Aries"), which desired the same surface rights. According to the Government, Renzi again insisted that the Sandlin property be purchased and included as part of any land exchange that took place. Again, he failed to disclose his creditor relationship with Sandlin. Upping the ante, Renzi told Aries that if the property was purchased and included, he would ensure that the legislation received a "free pass" through the NRC. Within a week, Aries agreed to purchase the property for a sum of $4.6 million and wired a $1 million deposit to Sandlin shortly thereafter.

Upon receiving that $1 million deposit, Sandlin wrote a $200,000 check payable to Renzi Vino, Inc., an Arizona company owned by Renzi. Renzi deposited the check into a bank account of Patriot Insurance—an insurance company he also owned—and used $164,590.68 to pay an outstanding Patriot Insurance debt. Later, when Aries appeared to grow nervous about the deal prior to closing on the Sandlin property, Renzi personally assured the group that he would introduce its land exchange proposal once the sale was complete. The day Aries closed, Sandlin paid into a Patriot Insurance account the remaining $533,000 he owed Renzi.[5] Ultimately,

[5] This sum accounted for both the principal and the accrued interest.

Renzi never introduced any land exchange bill involving Aries and the Sandlin property.

After an investigation,[6] two separate grand juries returned indictments against Renzi. On September 22, 2009, the second grand jury returned a second superseding indictment ("SSI") against Renzi and some of his cohorts. That indictment underlies the appeal we decide today and charges Renzi with 48 criminal counts related to his land exchange "negotiations," including public corruption charges of extortion, mail fraud, wire fraud, money laundering, and conspiracy.[7]

Prior to this appeal, the district court issued three orders, each adopting the Report and Recommendation of Magistrate Judge Bernardo P. Velasco. First, the court denied Renzi's motion for a *Kastigar*-

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[6] During the course of the Government's investigation, it interviewed Congressman Renzi's aides, reviewed documents provided by those aides, wiretapped Congressman Renzi's personal cell phone in accordance with a Title III Order, and searched, pursuant to a warrant, the office of Patriot Insurance. The evidence obtained from the wiretap was later suppressed because of violations of Renzi's attorney-client privilege. The Government does not challenge that ruling.

[7] Counts 1 through 27 of the SSI charge Renzi and Sandlin with various public corruption offenses related to the land exchange negotiations, including Hobbs Act extortion, mail fraud, honest services wire fraud, and money laundering. Counts 28 through 35 charge Renzi and another indi- vidual with various insurance fraud offenses. Counts 36 through 46 charge Renzi with additional insurance fraud offenses. Count 47 charges Renzi with a RICO violation. Count 48 charges Renzi with a tax offense, and Count 49 charges Sandlin with a campaign finance offense.

like hearing,[8] after determining that the Clause's privilege "is one of use, not non-disclosure." Second, the district court denied Renzi's motion to dismiss the indictment in its entirety because it agreed that Renzi's "negotiations" with RCC and Aries did not fall within the Clause's protections and because the limited legislative act evidence presented to the SSI grand jury did not warrant dismissal.

Finally, in its third order, the district court declined to suppress evidence related to Renzi's "negotiations" with RCC and Aries. We take special note of the fact that the district court did not rule, as Renzi implies, that all such evidence would be admissible. It simply concluded that blanket suppression of all the Government's evidence was inappropriate and that it would address the propriety of each piece of evidence "as the Government moves to introduce it" at trial.

Renzi timely filed this interlocutory appeal.

II

Because Renzi raises his claims on interlocutory appeal, our jurisdiction—to the extent it exists—must be founded upon the collateral order doctrine. *Helstoski v. Meanor*, 442 U.S. 500, 506-07 (1979); *cf.* 28 U.S.C. § 1291. As the Supreme Court explained in *Meanor*, this doctrine affords us jurisdiction to review a Member's interlocutory claim that an indict-

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[8] In *Kastigar*, the Court held that, when prosecuting an individual who has been granted immunity in exchange for his or her testimony, the Government bears an affirmative burden of demonstrating that it has not used that testimony, or any evidence derivative of that testimony, to further the prosecution. *Kastigar v. United States*, 406 U.S. 441, 460-61 (1972).

ment against him should be dismissed as violative of the Speech or Debate Clause. 442 U.S. at 507-08 ("[I]f a Member 'is to avoid exposure to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his...challenge to the indictment must be reviewable before...exposure [to trial] occurs.' " (first alteration added) (quoting *Abney v. United States*, 431 U.S. 651, 662 (1977))). We therefore address the first three of Renzi's claims to the extent each pertains to the viability of the indictment itself. *See United States v. Jefferson*, 546 F.3d 300, 309 (4th Cir. 2008); *United States v. McDade*, 28 F.3d 283, 288-89 (3d Cir. 1994) (Alito, J.).

Renzi's remaining claim—that the district court erred by denying his motion to suppress—does not appear to fall under that same jurisdictional grant, however. *McDade*, 28 F.3d at 301-02. In *Meanor*, the Court relied on its Double Jeopardy jurisprudence, specifically *Abney*, to guide its inquiry into the application of the collateral order doctrine to Speech or Debate claims. *Meanor*, 442 U.S. at 506-08 (observing that its "characterization [in *Abney*] of the purpose of the Double Jeopardy Clause echoed th[e] Court's statement in *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam), that the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves' " (internal citation amended to comport with modern citation style)). In *Abney*, the Court explicitly distinguished challenges to indictments—to which the collateral order doctrine applied—from challenges to district court rulings on motions to suppress—to which it did not:

> [T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. *Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him*.

Id. at 507 (first emphasis added) (quoting *Abney*, 431 U.S. at 659). As *Abney* guided the Court in *Meanor*, so it guides us today. We lack jurisdiction under the collateral order doctrine to consider Renzi's suppression claim and thus dismiss that part of his appeal.

III

Having disposed of one of Renzi's four claims, we turn to the merits of those that remain. To reiterate, Renzi argues first that the district court erred by not dismissing the Government's public corruption charges against him because, as he contends, those charges are based on his "legislative acts" or his motivation for his "legislative acts" and would require the introduction of "legislative act" evidence. Renzi also claims that the district court erred by not dismissing the SSI in its entirety because, as he contends, "legislative act" evidence permeated the Government's presentation to the grand jury. Finally, Renzi asserts that the district court erred by refusing to hold a *Kastigar*-like hearing to determine whether

the Government used evidence protected by the Speech or Debate Clause to obtain non-privileged evidence and whether the government can prove its case without allegedly tainted evidence.

After careful consideration, we reject each of these claims.

A

We address first whether Renzi's "negotiations" with RCC and Aries are protected "legislative acts."

If they are, we recognize that Renzi would obtain the benefit of three distinct protections. First, the Government would be barred by the Clause's privilege against liability from prosecuting Renzi for those acts, *e.g.*, *Gravel v. United States*, 408 U.S. 606, 616 (1972), regardless of his motivation, *United States v. Johnson*, 383 U.S. 169, 180 (1966) ("The claim of an unworthy purpose does not destroy the privilege." (internal quotation marks and citation omitted)). Second, the Government would be precluded from compelling Renzi, or his aides, to "testify[ ] at trials or grand jury proceedings" about that conduct. *E.g.*, *Gravel*, 408 U.S. at 622 (explaining that neither Member nor aide is immunized from testifying at trials or grand jury proceedings if the testimony does not concern or impugn a legislative act). And, third, evidence of those acts could not be introduced to any jury, grand or petit. *E.g.*, *United States v. Helstoski*, 442 U.S. 477, 489 (1979) ("The Clause...'precludes any showing of how [a legislator] acted, voted, or decided.' " (second alteration in original) (quoting *Brewster*, 408 U.S. at 527)); *id.* at 490 ("Revealing information as to a legislative act—speaking or debating—to a jury would subject a Member to being 'questioned' in a place other than

the House or the Senate, thereby violating the explicit prohibition of the Speech or Debate Clause."); *cf. Gravel*, 408 U.S. at 629 n.18.

However, if Renzi's "negotiations" are not "legislative acts," then the Clause's protections would not shield them. The Government could prosecute Renzi for his allegedly corrupt conduct, and neither the testimonial nor evidentiary privileges would apply. *Brewster*, 408 U.S. at 510, 525-27 ("[T]he Court in *Johnson* emphasized that its decision did not affect a prosecution that, though founded on a criminal statute of general application, 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.' " (quoting *Johnson*, 383 U.S. at 185)).

To resolve our inquiry, we first review Supreme Court precedent describing the character of a protected "legislative act," paying particular care to that conduct the Court considered beyond the reach of the Clause. We then apply that precedent to determine whether Renzi's conduct falls within the sweep of the Clause's protection. We conclude that it does not and therefore see no reason to bar Renzi's prosecution for the charges alleged.

1

Before wading too deeply into the merits of this claim, we resolve a threshold issue: the standard of review by which to assess Renzi's claim. This is an issue of first impression in this Circuit, but it is not a difficult one. Whether the Clause precludes Renzi's prosecution is a question of law, *see United States v. Ziskin*, 360 F.3d 934, 942-43 (9th Cir. 2003) ("The factor determining the standard of review is not whether the facts are disputed nor whether the ap-

peal is from a final judgment; rather, it turns on whether the district court has answered a legal question or made a factual determination."), and we already review de novo identical claims founded on Double Jeopardy concerns, *id*. Like our sister circuits, we see no reason to treat motions founded on the Speech or Debate Clause any differently. *Cf*. *Meanor*, 442 U.S. at 506-08; *United States v. Swindall*, 971 F.2d 1531, 1543 (11th Cir. 1992) (de novo); *MINPECO S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988) (same). "We review the district court's denial of the motion to dismiss...de novo" and "accept the district court's factual findings unless they are clearly erroneous." Ziskin, 360 F.3d at 942.

2

Because the protections of the Clause apply absolutely when they apply, the limits of what may constitute a protected "legislative act" is of fundamental importance. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). In first passing on the issue in *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (citing *Coffin v. Coffin*, 4 Mass. 1 (1808) (Parsons, C.J.), with approval), the Court struck a delicate balance between the interests of the three co-equal branches of Government when it declined to limit the Clause's reach to "words spoken in debate," holding instead that the Clause applies "to things generally done *in a session of the House* by one of its members in relation to the business before it." *Id*. (emphasis added); *accord Gravel*, 408 U.S. at 617.

Since *Kilbourn*, the Court has declined to alter that balance. *See*, *e.g.*, *Brewster*, 408 U.S. at 512-14 (relying on *Kilbourn* and rejecting Congressman Brewster's assertion that the Court had "expressed a

broader test for the coverage of the Speech or Debate Clause" in *Johnson*, 383 U.S. 169). As a result, a broad range of activities other than literal speech or debate continue to fall within the contours of a "legislative act":

> Prior cases have read the Speech or Debate Clause 'broadly to effectuate its purposes,' *Johnson*, 383 U.S. at 180, and have included within its reach anything 'generally done in a session of the House by one of its members in relation to the business before it.' *Kilbourn*, 103 U.S. at 204; *Johnson*, 383 U.S. at 179. Thus, voting by Members and committee reports are protected; and we recognize today—as the Court has recognized before, Kilbourn, 103 U.S. at 204; *Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1951)—that a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the 'sphere of legitimate legislative activity.' *Tenney*, 341 U.S. at 376.

Gravel, 408 U.S. at 624 (some citations amended to comport with modern citation style); see also *Eastland*, 421 U.S. at 504 (conducting official congressional inquiries); *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973) (compiling committee reports); *Brewster*, 408 U.S. at 526 ("The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute.").

This broad sweep of protection is not without limits, however. Reacting to an increasingly broad invocation of the Clause, the Court clarified that it had never indicated that "everything that 'related' to the office of a Member was shielded by the Clause." *Brewster*, 408 U.S. at 513-14. Rather, the Court explained that, "[i]n every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process," *id.* at 515-16, and, as such, many activities that a Member might be *expected to perform* would not fall within the Clause's protections:

> It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have

> the protection afforded by the Speech or Debate Clause.

Id. at 512; McMillan, 412 U.S. at 313 ("Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause."); *see also Eastland*, 421 U.S. at 504 (querying whether an activity was " 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings' " (quoting *Gravel*, 408 U.S. at 625)).

In addition, the Court has recognized a marked distinction between completed "legislative acts" and mere promises to perform future "legislative acts." *Helstoski*, 442 U.S. at 489-490. Completed "legislative acts" are protected; promises of future acts are not. *Id*. ("But it is clear from the language of the Clause that protection extends only to an act that has already been performed. A promise to deliver a speech, to vote, or to solicit other votes at some future date is not 'speech or debate.' Likewise, a promise to introduce a bill is not a legislative act."); *Brewster*, 408 U.S. at 525-29 (permitting the prosecution of *Brewster* for his promise to perform specific future "legislative acts" in exchange for a bribe).

With this guiding framework in mind, we turn to the case before us.

3

The district court determined that Congressman Renzi's "negotiations" with RCC and Aries were not privileged because Renzi had only promised to support *future* legislation through future acts. It found the Supreme Court's example in *Brewster* particularly compelling and declined to deviate from its result.

On appeal, Renzi argues that the district court drew too fine a line between present and future conduct. He asserts that the very act of "negotiating" with private entities over future legislation is analogous to discourse between legislators over the content of a bill and must be considered a protected "legislative act" under a broad construction of the Clause. He also contends that his prosecution must be barred to avoid impugning later "legislative acts." Finally, he argues that even if his promise of future action would not be protected under Supreme Court precedent, it would be protected under our decision in *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983) ("Obtaining information pertinent to potential legislation or investigation is one of the 'things generally done in the session of the House' concerning matters within the 'legitimate legislative sphere.' Constituents may provide data to document their views when urging the Congressman to initiate or support some legislative action." (internal citations omitted)).

We disagree with each of Renzi's contentions. In *Brewster*, the Court rejected Renzi's first argument—the contention that a Member's pre-legislative act negotiations with private parties are themselves "legislative acts." 408 U.S. at 516, 529. There, it considered whether the Clause precluded the Government from prosecuting Congressman Daniel B. Brewster *for negotiating with and ultimately promising private individuals that he would perform future legislative acts in exchange for private gain*—in that case, a cash bribe.[9] *Id.* at 502. Like Renzi, *Brewster*

[9] Brewster was alleged to have "corruptly asked, solicited, sought, accepted, received and agreed to receive money in re-

argued that his pre-legislative "negotiations" were a regular and necessary part of the legislative process that the Court should recognize as protected by the Clause. *See id.* at 502, 516. The Court was unconvinced:

> Appellee's contention for a broader interpretation of the privilege draws essentially on the flavor of the rhetoric and the sweep of the language used by courts, not on the precise words used in any prior case, and surely not on the sense of those cases, fairly read.
>
> (c) *We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process*. Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility.

Id. at 516 (emphasis added); *see also id.* at 526.

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turn for being influenced in his performance of his official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity." 408 U.S. at 502, 525 (internal quotation marks omitted).

The Court then focused on the specific nature of Brewster's "negotiations," his solicitation and acceptance of a bribe, to determine whether the Congressman's *specific* conduct might fall within the Clause's protections. Not surprisingly, it found Brewster's acts to be uniquely un-legislative and squarely dismissed Brewster's second argument, also echoed by Renzi today, that the prosecution was simply a veiled attempt to inquire as to the motivation for those later "legislative acts" actually performed:

> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an 'act resulting from the nature, and in the execution, of the office.' Nor is it a 'thing said or done by him, as a representative, in the exercise of the functions of that office,' *Coffin*, 4 Mass. at 27. Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.' *Johnson*, 383 U.S. at 185.

Id. at 526 (citations amended to comport with modern citation style).

One might think that this would be the end of the matter—that Renzi would concede that *Brewster* forecloses his claim. Instead, Renzi contends that *his* prelegislative "negotiations" are not doomed to the same fate as Brewster's because he was charged with extortion, not bribery. He reasons that *Brewster* was premised on the idea that there was no legitimate explanation for Brewster's acceptance of a bribe, and that, unlike Brewster, he has a legitimate explanation for his deeds. In short, Renzi relies on the fact that, as charged, his deceit was more refined, more sophisticated, than Brewster's. Rather than selling his office for cash, he was wise enough to at least attempt to conceal his crime by using more indirect means of payment. We think Renzi relies on a distinction without a difference. *See McDade*, 28 F.3d at 296 n.16 (refusing to distinguish between bribery and extortion charges against a Member and reasoning that *Brewster* applied to both).

First, the Court has already considered and rejected the contention that the Clause should be extended to preclude inquiry into any legislative activity with some degree of facial validity:

> Mr. Justice WHITE suggests that permitting the Executive to initiate the prosecution of a Member of Congress for the specific crime of bribery is subject to serious potential abuse that might endanger the independence of the legislature—for example, a campaign contribution might be twisted by a ruthless prosecutor into a bribery indictment. But, as we have just noted, the Executive is not alone in

> possessing power potentially subject to abuse; such possibilities are inherent in a system of government that delegates to each of the three branches separate and independent powers.
>
> * * *
>
> We therefore see no substantial increase in the power of the Executive and Judicial Branches over the Legislative Branch resulting from our holding today. If we underestimate the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of federal bribery laws, but it has deliberately allowed the instant statute to remain on the books for over a century.

Brewster, 408 U.S. at 521-22, 524; see also *United States v. Rostenkowski*, 59 F.3d 1291, 1303 (D.C. Cir. 1995) ("[T]o the extent that [Congressman] Rostenkowski himself chooses to present evidence of his status or activities as a legislator, we agree with the Second and Third Circuits that the constitutional protection against his being 'questioned' for his legislative acts 'does not prevent [a Member of Congress] from offering such acts in his own defense, even though he thereby subjects himself to cross-examination.' "); *McDade*, 28 F.3d at 294-95.

In addition, Renzi fails to consider that the Court's pointed condemnation of Brewster's specific crime, solicitation of a bribe, came only after the Court had already expressed, in general terms, its refusal to expand the Clause to protect the type of private negotiations between Members and constituents at issue here:

> The sweeping claims of appellee would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their holding office. *Such claims are inconsistent with the reading this Court has given, not only to the Speech or Debate Clause, but also to the other legislative privileges embodied in Art. I, § 6.*

Brewster, 408 U.S. at 520 (emphasis added); *see also id.* at 516; *Johnson*, 383 U.S. at 185 (permitting the Government to re-prosecute a former Member for conspiring to defraud the United States by accepting cash payments in exchange for, among other things, delivering a speech on the floor of the House, so long as that prosecution did not require evidence of the completed legislative act—the speech).

This point is evidenced not only by the Court's words in *Brewster*, but also by its example. *Cf.* 408 U.S. at 526. As discussed, when the Clause applies, it applies absolutely. *Eastland*, 421 U.S. at 503. If the Clause protects particular legislative activity, the fact that the activity was undertaken for an illicit purpose is of no consequence; the Clause applies in equal force to protect "legislative acts" regardless of a Member's alleged motivation. *E.g.*, *id.* at 508-09 ("If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it." (discussing *Brewster*)). *Brewster* did not except itself from this foundational principle. Thus, the fact that the Court permitted Brewster's prosecution for his alleged purpose in negotiating with private parties, solicitation of a bribe, demonstrates

that private negotiations between Members and private parties are not protected "legislative acts" in any case:

> *The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee* in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Brewster, 408 U.S. at 526 (emphasis added); *Johnson*, 383 U.S. at 185; *see also Brewster*, 408 U.S. at 528.

Having concluded that the Court's precedent is of no aid to Renzi's cause, we move to his final argument—that our own precedent has moved the bounds of Clause protection beyond the line drawn by the Court in *Brewster* and *Johnson* to protect a Member's pre-legislation investigation and fact-finding. *Cf. Miller*, 709 F.2d at 530. The argument is a clever one. If Renzi's unprotected negotiations are sufficiently cloaked under a broader category of protected legislative activity, i.e., an investigation, then the Clause would fall like an iron curtain to preclude prosecution for the otherwise unprotected activity as well. *See Helstoski*, 442 U.S. at 489-90.

The flaw in Renzi's reasoning is small, but it makes all the difference. Even assuming *Miller* appropriately applied Supreme Court precedent when

it concluded that unofficial investigations by a single Member are protected from civil discovery to the same extent as official investigations by Congress as a body,[10] *Miller* expressly limited its holding to circumstances in which no part of the investigation or fact-finding itself constituted a crime.[11] 709 F.2d at 530 ("Only one other court has directly confronted our situation, where a *civil litigant* seeks information about a nonparty Congressman's source of information *and the source's revelation of the information did not constitute a crime*." (emphasis added)). This careful caveat was no mere afterthought. Rather, it reflects the Court's own admonishments that the Clause does not protect unlawful investigations by Members—even if performed by Congress *as a body*:

> [N]o prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, *in order to secure information for a hearing*, themselves seized

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[10] We think it significant that the Supreme Court has never recognized investigations by an individual Member to be protected. *See, e.g., Brewster*, 408 U.S. at 525-26; *Johnson*, 383 U.S. at 171-72, 185. It has held only that when Congress, acting as a body, employs its constitutional power to investigate, such official investigations are quintessential "legislative acts." *Eastland*, 421 U.S. at 503-04; *McMillan*, 412 U.S. at 312-13.

[11] We are not alone in making this distinction. *E.g.*, *McSurely v. McClellan*, 553 F.2d 1277, 1288 (D.C. Cir. 1976) (en banc) ("The employment of unlawful means to implement an otherwise proper legislative objective is simply not 'essential to legislating.' As with taking a bribe, resort to criminal or unconstitutional methods of investigative inquiry is 'no part of the legislative process or function; it is not a legislative act.' " (quoting *Brewster*, 408 U.S. at 526)).

> the property or invaded the privacy of a citizen .... Such acts are no more essential to legislating than the conduct held unprotected in *United States v. Johnson* ....
>
> * * *
>
> Article I, § 6, cl. 1, as we have emphasized, does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true. While the Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, *it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts.*

Gravel, 408 U.S. at 621-22, 626 (emphasis added); *cf. Eastland*, 421 U.S. at 508 (protected if "essential to legislating"). Because Renzi is alleged to have done just that—"violate[d] an otherwise valid criminal law in preparing for or implementing [his] legislative acts," *id.*—*Miller* cannot support his claim.[12]

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[12] Renzi asserts that this reasoning is improper because it equates to an inquiry into his motivation—a proposition the Court, as described, has refuted. Were the Court to have extended Clause protection to prelegislative investigations and fact-finding by individual Members, we would agree. However, it has not. *Supra* note 10. Instead, the Court has stated that illegal investigatory or preparatory acts are not protected "legislative acts." *Gravel*, 408 U.S. at 621-22; *see also Brewster*, 408 U.S. at 526; *accord McSurely*, 553 F.2d at 1288. To the extent these specific edicts contradict more sweeping language, we adhere to them.

Thus, we find ourselves, at base, with a claim no different than that raised by Brewster. Like the district court, we see no reason to deviate from the example of the Court. *Brewster*, 408 U.S. at 526, 528-29. The district court properly denied Renzi's motion to dismiss the public corruption charges against him.

B

We next address whether the district court erred by declining to dismiss the indictment in its entirety for, as Renzi alleges, the pervasive presentment of "legislative act" evidence to the grand jury.

To resolve this issue, we first consider whether Renzi's allegation of Speech or Debate violations permits us to go behind the face of the indictment to inquire as to the evidence considered by the SSI grand jury. *Compare Jefferson*, 546 F.3d at 313-14 (concluding that a court need not look behind the face of an indictment to see if Speech or Debate materials were presented to a grand jury provided that none are presented at trial), *with Swindall*, 971 F.2d at 1546-50 (concluding that a court should look behind the face of an indictment), *Rostenkowski*, 59 F.3d at 1300 (same), and *United States v. Helstoski (Helstoski II)*, 635 F.2d 200, 205 (3d Cir. 1980) (same). We further consider whether any protected material was disclosed to that grand jury and, if so, whether that material "caused the jury to indict." *Swindall*, 971 F.2d at 1546-50 ("[W]hen improper evidence is considered by a grand jury, a Speech or Debate violation occurs only if the evidence causes the jury to indict."); *see also Brewster*, 408 U.S. at 511-12, 526-27; Johnson, 383 U.S. at 185. Because the indictment against Renzi does not depend on "legislative act" evidence, we hold that dismissal is not warranted.

1

Generally speaking, "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *United States v. Calandra*, 414 U.S. 338, 345 (1974) (citing *Costello v. United States*, 350 U.S. 359, 363 (1956) (concluding that an indictment premised on hearsay was not subject to challenge under the Fifth Amendment "on the ground that there was inadequate or incompetent evidence before the grand jury"); *Holt v. United States*, 218 U.S. 245, 247-48 (1910) (refusing to dismiss an indictment because "there was very little evidence against the accused" besides "admissions...obtained under circumstances that made them incompetent")).

As the Court explained in *Calandra*, this is because a grand jury's use of inadequate or incompetent evidence "involve[s] no independent governmental invasion of one's person, house, papers, or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning." *Id.* at 354 (discussing in the Fourth Amendment context). It thus "presents a question, not of rights, but of remedies," and the Court has determined that the regular operation of generally applicable rules of procedure and evidence at trial is the appropriate remedy. *Id.* (refusing to extend the exclusionary rule to the "context of a grand jury proceeding" because "the damage to that institution from the unprecedented extension of the exclusionary rule urged by respondent outweighs the benefit of any possible incremental deterrent effect"). Because that remedy bears no relation to a grand jury's deliberations, there is no cause to go behind the face of the indictment in ordinary cases. *Id.* at 345-46.

Renzi's case is no ordinary one, however. Even in *Calandra*, the Court noted that a grand jury cannot itself "violate a valid privilege, whether established by the Constitution, statutes, or the common law," in order to effectuate its duties. *Id.* at 346. Were it to do so, the jury's actions would work a new wrong, a new independent invasion, and thus present, presumably, a question of both rights and remedies. *See id.* at 354; *Kastigar v. United States*, 406 U.S. 441, 443-45, 449 (1972) (immunity privilege); *cf. Calandra*, 414 U.S. at 346 (not describing a remedy for an independent violation by a grand jury).

Because the Clause precludes any jury from "question[ing]" a Member about his "legislative acts," *e.g., Helstoski*, 442 U.S. at 489-90, Renzi's claim implicates this latter concern for an independent violation. If the SSI grand jury "questioned" Renzi about his "legislative acts," then it committed a new, independent violation of the privilege provided by the Clause. *Compare id., with Calandra*, 414 U.S. at 346. Still, assuming Renzi's claim involves a question of a right, the issue of the appropriate remedy remains. We must decide whether Renzi's claim, if proven, would permit him the relief he seeks, dismissal of the indictment, which would provide us with the predicate justification to go behind the face of the SSI.

Despite the fact that "[t]he Court...has never held that a speech or debate violation before the grand jury necessitates the quashing of the indictment," *Helstoski II*, 635 F.2d at 204, the bulk of our sister circuits have held that it would. *E.g., Swindall*, 971 F.2d at 1544 ("Protection from criminal liability includes protection from prosecution, not merely from conviction."); *Helstoski II*, 635 F.2d at 204 (reasoning that the "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"). They have therefore found it necessary in cases like Renzi's to go behind the face of the indictment:

> In order fully to secure th[e] purposes [of the Speech or Debate Clause], it seems that a court may find it necessary, at least under some circumstances, to look beyond the face of an indictment and to examine the evidence presented to the grand jury. Otherwise, a prosecutor could with impunity procure an indictment by inflaming the grand jury against a Member upon the basis of his Speech or Debate, subject only to the necessity of avoiding any reference to the privileged material on the face of the indictment.

Rostenkowski, 59 F.3d at 1298 (internal citation omitted); *Swindall*, 971 F.2d at 1547; *Helstoski II*, 635 F.2d at 204-05. *But see Jefferson*, 546 F.3d at 313 ("[W]hen an indictment is facially valid and the grand jury was 'legally constituted and unbiased,' the competency and adequacy of the evidence presented to it is not subject to challenge.").

We agree. A court cannot permit an indictment that depends on privileged material to stand—and burden a Member with litigation that ultimately cannot succeed—or else the Clause loses much of its teeth. *Eastland*, 421 U.S. at 503 ("[L]egislators acting within the sphere of legitimate legislative activity 'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.' " (*quoting Dombrowski*, 387 U.S. at 85)); *Helstoski II*, 635 F.2d at 205 ("A hostile

executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring or threatening to ignore the privilege in a presentation to a grand jury. Invocation of the constitutional protection at a later stage cannot undo the damage. If it is to serve its purpose, the shield must be raised at the beginning."). Moreover, in other analogous contexts, the Court has ordered the dismissal of an indictment to remedy independent violations by a grand jury. *United States v. Hubbell*, 530 U.S. 27, 45-46 (2000). We see no reason to treat differently new, independent Speech or Debate violations by a grand jury. *Cf. id.*

Still, the mere fact that some "legislative act" evidence was presented to the grand jury cannot entitle Renzi to dismissal. That would contravene the Court's example in *Brewster* and *Johnson*—two cases in which the Court decided that dismissal of the indictment was not warranted even though each Member was indicted by grand juries to whom the Government had presented "legislative act" evidence. *Johnson*, 383 U.S. at 185 ("The Court of Appeals' opinion can be read as dismissing the conspiracy count in its entirety .... [W]e think the Government should not be precluded from a new trial on this count ... wholly purged of elements offensive to the Speech or Debate Clause."); see *Brewster*, 408 U.S. at 511-12, 526-27 (reversing the district court's dismissal of the indictment even though "the indictment charges the offense as being in part linked to Brewster's 'action, vote and decision on postage rate legislation' ").

The solution to this problem of words and deeds is the middle ground upon which the Eleventh Cir-

cuit plants its flag in *Swindall*: an indictment need not be dismissed unless the "evidence [presented to the grand jury] causes the jury to indict." 971 F.2d at 1549 ("an essential element of proof") (*citing Brewster*, 408 U.S. at 511-12, 526-27, and *Johnson*, 383 U.S. at 185). As the court explained:

> A member's Speech or Debate privilege is violated if the Speech or Debate material exposes the member to liability, but a member is not necessarily exposed to liability just because the grand jury considers improper Speech or Debate material. "A member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts." *Brewster*, 408 U.S. at 512. *If reference to a legislative act is irrelevant to the decision to indict, the improper reference has not subjected the member to criminal liability. The case can proceed to trial with the improper references expunged.*

Id. at 1548 (citation style amended and footnote omitted) (emphasis added).

We think *Swindall* represents an elegant solution to an awkward problem—how to provide a remedy sufficiently measured that it protects a Member's privilege without transforming the shield of the Clause into a sword that unscrupulous Members might wield to avoid prosecution for even unprotected acts. We therefore adopt that standard and look behind the face of the indictment to evaluate whether Clause materials *caused* the grand jury to indict. *Id.*; *see Johnson*, 383 U.S. at 185; *Helstoski II*, 635 F.2d at 205 (dismissing the entire indictment be-

cause of "wholesale violation of the speech or debate clause before a grand jury").

2

Before the district court, Renzi challenged the presentment of specific excerpts of grand jury testimony by RCC and Aries representatives, as well as the introduction of nineteen documentary exhibits,[13] on the general ground that they either (1) "reference, describe and directly involve the development of legislation," (2) "discuss meetings about legislation," or (3) "involve the introduction of legislation." After reviewing the testimony and the exhibits, the district court found no fault in the testimony but upheld Magistrate Judge Velasco's order striking nine exhibits for referencing protected acts.[14] It then applied the *Swindall* standard and, finding that the struck exhibits did not cause the jury to indict, declined to dismiss the indictment.

On appeal, Renzi reiterates his complaints regarding the testimony and the Government's presentment of "numerous documents" that "describe or reference Congressman Renzi's negotiations, discussions and correspondence with RCC and Aries." Looking first to the propriety of the testimony, we find no error. As explained by Renzi, the representatives' testimony concerned their meetings and negotiations with Renzi, in which he insisted that they acquire the Sandlin property if they desired his sup-

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[13] Renzi challenged SSI Grand Jury Exhibits 7, 10, 13, 15-17, 28, 29, 36-39, 41, 43, 48, 49, 58, 91, and 95.

[14] Magistrate Judge Velasco struck Exhibits 13, 15, 16, 29, 37, and 43 per Renzi's request and *sua sponte* struck Exhibits 44, 45, and 60.

port. As previously discussed, these negotiations are not "legislative acts." *Brewster*, 408 U.S. at 526; *Johnson*, 383 U.S. at 185; *cf. Miller*, 709 F.2d at 530. The Clause thus did not bar their disclosure to the grand jury.

Turning to the issue of the "numerous documents," we think it incumbent on Renzi to bring to our attention those specific exhibits that cause him concern. *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1007 n.1 (9th Cir. 2000) ("[I]t behooves parties to treat appellate panels not as if we were pigs sniffing for truffles, but instead to fill our troughs to the brim with the relevant, let alone necessary, information." (internal citation omitted)). We thus confine our focus to those particular exhibits we were able to glean from his briefs.[15] After paring away those never presented to the SSI grand jury,[16] we are left with fifteen: the nine struck below, as well as Exhibits 21, 33, 41, 58, 95, and 96. Because the Government does not contest the court's findings regarding the nine already struck, we presume each violative and concern ourselves with the other six—three of which appear to be "newly offensive."[17]

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[15] One might logically assume that no "other" violative materials *caused* the jury to indict if Renzi himself feels it unnecessary to bring them to our—or the district court's—attention.

[16] Renzi did not contest the Government's assertion that he complained of documents in his briefs that were never presented to the SSI grand jury.

[17] Exhibits 21, 33, and 96 are challenged with specificity for the first time on appeal. Because we ultimately find each of these exhibits to be irrelevant to the grand jury's decision to indict, we do not engage in a protracted "plain error" analysis. Given the interests at issue, we simply assume, without deciding, that

Turning first to those documents the district court found unprotected, we think the district court and Magistrate Judge Velasco "drew the line precisely where it should have been drawn." Exhibit 41 describes Renzi's demand to RCC that it purchase the Sandlin property if it desired his future support, including his statement, "no Sandlin property, no bill." That demand is not a "legislative act." *Helstoski*, 442 U.S. at 490 ("[A] promise to introduce a bill is not a legislative act."); *Brewster*, 408 U.S. at 525-26. Exhibit 58, an RCC document describing RCC's efforts to acquire the Sandlin property, is no different. Neither is Exhibit 95, another RCC document describing Renzi's promise to request a hearing if RCC performed certain specified acts. *Helstoski*, 442 U.S. at 490.

The same cannot be said for the "newly offensive" exhibits, however. Exhibit 21 is a map of property included in the "Petrified Forest—San Pedro River Land Exchange Act," and Exhibits 33 and 96 are internal RCC emails that discuss, at least in some part, the status of actual legislation. To the extent each references actual "legislative acts," it should not have been presented to the grand jury. *Id.* ("As to what restrictions the Clause places on the admission of evidence, our concern is not with the 'specificity' of the reference. Instead, our concern is whether there is mention of a legislative act.").[18]

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were the *Swindall* test to be met, so too would the substantial rights requirement of Federal Rule of Criminal Procedure 52."

[18] Though the documents should not have been presented to the grand jury in their current form, we note that the Clause would not bar their introduction at trial if properly redacted. *Helstoski*, 442 U.S. at 489 n.7 ("Nothing in our opinion, by any conceivable reading, prohibits excising references to legislative

Of course, identifying the violative exhibits only puts the ball on the tee. We must still decide the dispositive question: whether the twelve documents[19] the Government impermissibly presented to the SSI grand jury *caused* the grand jury to indict. Comparing those documents to the charges against Renzi—e.g., conspiracy to commit extortion and wire fraud, honest services wire fraud, conspiracy to commit money laundering, and Hobbs Act extortion under color of official right—we see no basis for such a conclusion.

The charges against Renzi concern, as the Government alleges, his act to offer RCC, and later Aries, a *quid pro quo* deal: Sandlin property for future legislation—nothing more, nothing less. To prove these charges, the Government need only introduce evidence of Renzi's promise to support legislation and the circumstances surrounding that promise—the "meetings" and "negotiations" with RCC and Aries in which he pitched his offer. *Brewster*, 408 U.S. at 526 ("To make a prima facie case under this indictment, the Government need not show any act of appellee subsequent to the corrupt promise for payment, for it is taking the bribe, not performance of the illicit compact, that is a criminal act.").

The now-struck evidence—all of which concerned "the legislative performance itself"—is superfluous to these showings because the indictment could have been returned even absent these exhibits. *Id*. at 525-

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acts, so that the remainder of the evidence would be admissible. This is a familiar process in the admission of documentary evidence.").

[19] We must consider the three exhibits discussed herein and the nine documents previously struck.

27 ("An examination of the indictment brought against appellee and the statutes on which it is founded reveals that no inquiry into legislative acts or motivation for legislative acts *is necessary* for the Government to make out a prima facie case." (emphasis added)). Thus, while these exhibits should not have been presented, we cannot conclude that they were "essential elements of proof" that *caused* the jury to indict. *Swindall*, 971 F.2d at 1548; *see also Brewster*, 408 U.S. at 526-27; *Johnson*, 383 U.S. at 185. We therefore have no cause to grant Renzi the relief he seeks.[20]

We affirm the district court's refusal to grant his dismissal motion.

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[20] We reject Renzi's claim that this renders the Clause a right without a remedy. The Court dismissed a similar vindication argument in *Calandra*:

> It should be noted that, even absent the exclusionary rule, a grand jury witness may have other remedies to redress the injury to his privacy and to prevent a further invasion in the future. He may be entitled to maintain a cause of action for damages against the officers who conducted the unlawful search. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). He may also seek return of the illegally seized property, and exclusion of the property and its fruits from being used as evidence against him in a criminal trial. *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931). In these circumstances, we cannot say that such a witness is necessarily left remediless in the face of an unlawful search and seizure.

414 U.S. at 354 n.10 (citations amended to comport with modern citation style).

C

Finally, we consider Renzi's claim that the district court erred by refusing to hold a *Kastigar*-like hearing to determine whether the Government used evidence protected by the Speech or Debate Clause to obtain non-privileged evidence and whether the Government can prove its case with evidence derived from legitimate independent sources.

What Renzi asks is no small request. Rather, to do as he suggests would require us to agree that there exists some grandiose, yet apparently shy, privilege of non-disclosure that the Supreme Court has not thought fit to recognize. It would require us to ignore the care with which the Court has described the bounds of the Clause and to agree that legislative convenience precludes the Government from reviewing documentary evidence referencing "legislative acts" even as part of an investigation into unprotected activity. *See United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 655-56, 666 (D.C. Cir. 2007). Moreover, it would require us to conclude that this privilege of non-disclosure precludes even the use of derivative evidence.[21] Because we do not

[21] Renzi seems to assume that the Government would be required to prove that the indictment was not obtained through the use of derivative evidence were we to adopt the *Rayburn* formulation. We do not agree. Invoking the term "*Kastigar*-like hearing" does not serve to suspend the general rule that facially valid indictments are not subject to challenge. *Calandra*, 414 U.S. at 345. Rather, *Kastigar* hearings occur only because the immunity privilege implicated therein itself precludes derivative use. *Kastigar*, 406 U.S. at 453 ("We hold that such immunity from use *and derivative* use is coextensive with the scope of the privilege against selfincrimination, and therefore is sufficient to compel testimony over a claim of the privilege." (emphasis added)).

think it wise to expand the Clause "beyond its intended scope, its literal language, and its history" to "make Members of Congress super-citizens," *Brewster*, 408 U.S. at 516, we decline Renzi's request.[22]

Renzi's claim has its genesis—as it must—in the only case that has ever held that the Clause goes so far as to preclude the Executive from obtaining and reviewing "legislative act" evidence: the decision of the D.C. Circuit Court of Appeals in *Rayburn*. 497 F.3d at 659-60 ("Although in Gravel the Court held that the Clause embraces a testimonial privilege, [408 U.S.] at 616, to date the Court has not spoken on whether the privilege conferred by the Clause includes a non-disclosure privilege. However, this court has."). *Rayburn* itself concerned a novel problem: the first execution of a search warrant on the congressional office of a sitting Member of Congress.[23] Not

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Even the *Rayburn* privilege does not go that far. 497 F.3d at 664-67 ("Although the search of Congressman Jefferson's paper files violated the Speech or Debate Clause, his argument does not support granting the relief that he seeks, namely the return of all seized documents, including copies, whether privileged or not."); *see Rostenkowski*, 59 F.3d at 1300 (rejecting the suggestion that *Kastigar*-like hearings are appropriate in the Speech or Debate context). As a result, even under *Rayburn*, Renzi would need to rely on the exclusionary rule to preclude a jury's consideration of "fruit" evidence, and, as discussed, that rule has no place in the grand jury context. *Calandra*, 414 U.S. at 354-55.

[22] Renzi argued to the district court that this same privilege also required the disqualification of the prosecution team based on its exposure to protected material. *Cf. Rayburn*, 497 F.3d at 666. In light of our disposition here, we think that argument was properly rejected.

[23] As noted by Judge Karen Henderson, "this unique moment in our nation's history [wa]s largely of the Representative's own making." *Rayburn*, 497 F.3d at 668 n.7 (Henderson, J., concur-

surprisingly, Representative William J. Jefferson, the target of the search, eschewed his new position in the footnotes of history and brought a motion pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure[24] seeking the return of all materials seized by the Executive.

The district court denied Jefferson's motion but a panel of the D.C. Circuit Court of Appeals reversed. *Rayburn*, 497 F.3d at 656-57. Two of the three members of that panel reasoned that circuit precedent had already established that the testimonial privilege of the Clause precluded *civil discovery* of documentary "legislative act" evidence and saw no reason not to extend that rationale to the context of a criminal investigation. *Id.* at 660 ("[O]ur opinion in *Brown & Williamson* makes clear that a key purpose of the privilege is to prevent intrusions in the legislative process and that the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put." (citing *Brown & Williamson Tobacco Corp. v. Wil-*

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ring). Though it had "probable cause to believe that Congressman Jefferson, acting with other targets of the investigation, had sought and in some cases already accepted financial backing and or concealed payments of cash or equity interests in business ventures located in the United States, Nigeria, and Ghana in exchange for his undertaking official acts as a Congressman while promoting the business interests of himself and the targets," *id.* at 656, the Government first sought for months to obtain Representative Jefferson's cooperation in their investigation, *id*. at 668 n.7 (Henderson, J., concurring). Only after its efforts were rebuffed did the Government obtain the warrant. *Id.*

[24] "A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return."

liams, 62 F.3d 408, 419 (D.C. Cir. 1995))). *But see Brown*, 62 F.3d at 419-20 ("*Gravel*'s sensitivities to the existence of criminal proceedings against persons other than Members of Congress at least suggest that the testimonial privilege might be less stringently applied when inconsistent with a sovereign interest, but is 'absolute in all other contexts."). The majority concluded "that a search that allows agents of the Executive to review privileged materials without the Member's consent violates the Clause" because it serves *to distract* Members and their staffs from their legislative work. *Rayburn*, 497 F.3d at 660, 663. It ordered the return of all privileged materials to Congressman Jefferson, but declined to order the return of non-privileged materials as well. *Id.* at 665 ("[A]bsent any claim of disruption of the congressional office by reason of lack of original versions, it is unnecessary to order the return of non-privileged materials as a further remedy for the violation of the Clause.").[25]

Responding to the critique of their concurring colleague, the court dismissed the contention that its construction of the Clause effectively eviscerated the ability of the Executive to investigate Members of Congress. *Compare id.* at 661, *with id.* at 671-72 (Henderson, J., concurring) ("[A]s the government points out, to conclude that the Clause's shield protects against any Executive Branch exposure to records of legislative acts would jeopardize law enforcement tools 'that have never been considered problematic.' If Executive Branch exposure alone vio-

[25] The court also declined to consider "whether the seized evidence must be suppressed under the Fourth Amendment." *Rayburn*, 497 F.3d at 655.

lated the privilege, 'agents...could not conduct a voluntary interview with a congressional staffer who wished to report criminal conduct by a Member or staffer, because of the possibility ... that the staffer would discuss legislative acts in...describing the unprivileged, criminal conduct.' " (internal citations omitted) (alterations in original)). Rather, the majority concluded that nothing barred the Executive from seeking judicial review of a Member's claim that particular documents were privileged from disclosure by the Clause. *Id.* at 662. Specifically, the court referenced with approval its prior order that the district court review all of the seized materials and make findings as to which documents referenced privileged activity. *Compare id.* at 661-62, with id. at 657-58.

Simply stated, we cannot agree with our esteemed colleagues on the D.C. Circuit. We disagree with both *Rayburn*'s premise and its effect and thus decline to adopt its rationale.

Rayburn rests on the notion that "distraction" of Members and their staffs from their legislative tasks is a principal concern of the Clause, and that distraction *alone* can therefore serve as a touchstone for application of the Clause's testimonial privilege. 497 F.3d at 660 (reasoning that "the touchstone [of the Clause] is interference with legislative activities" (quoting *Brown*, 62 F.3d at 418, 421 (decided in the context of civil discovery))). This formulation of the Clause is specific to the D.C. Circuit, id. at 659-60, and was first derived by that court in *MINPECO*, a case concerning civil discovery, 844 F.2d at 859. There, the court relied on a fragment of a single passage of *Eastland* to support its conclusion that the Clause precludes not only civil actions, but also civil

discovery of documentary "legislative act" evidence, because both could be equally distracting:

> One of [the Clause's] purposes is to shield legislators from private civil actions that "create[ ] a distraction and force[ ] Members to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland*, 421 U.S. at 503. A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive.

MINPECO, 844 F.2d at 859 (internal citation amended to comport with modern citation style) (first alteration added). We do not interpret *Eastland* so broadly.[26]

To be clear, we have no quarrel with *MINPECO's* observation that a civil action cannot be maintained against a member of Congress once it is determined that the action is based on a Member's "legislative act." *Id.* That was the primary point of *Eastland;* that the Clause's privilege against liability[27] applies

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[26] We also think *MINPECO*'s reliance on *Miller* is misplaced. 844 F.2d at 860. *Miller* dealt with a civil litigant's attempt to compel former Congressman Sam Steiger *to testify* about acts we considered protected by the Clause. 709 F.2d at 526, 531. We affirmed the district court's denial of the litigant's motion to compel, *id.* at 532, because the Clause unequivocally precludes compelling Members to testify about their "legislative acts." *E.g., Gravel*, 408 U.S. at 622. We went no further.

[27] To reiterate, the Court has identified three distinct privileges in the Clause: a testimonial privilege, an evidentiary privilege, and a privilege against liability. *MINPECO* relied on the testimonial privilege of the Clause. 844 F.2d at 859. *Eastland* dealt with the Clause's privilege against liability. 421 U.S. at 503.

in equal measure to preclude both criminal and civil actions against a Member and his staff that are premised on "legislative acts." 421 U.S. at 503, 512-13. Where we differ with *MINPECO* is in our belief that legislative distraction is not the primary ill the Clause seeks to cure. Rather, we think the entirety of the passage of *Eastland* on which *MINPECO* relies demonstrates that concern for distraction *alone* precludes inquiry only when the underlying action is itself precluded:

> Thus we have long held that, when it applies, the Clause provides protection against civil as well as criminal *actions*, and against *actions* brought by private individuals as well as those initiated by the Executive Branch.
>
> The applicability of the Clause to private civil *actions* is supported by the absoluteness of the term 'shall not be questioned,' and the sweep of the term 'in any other Place.' In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity 'should be protected not only from *the consequences of litigation's results but also from the burden of defending themselves*.' *Dombrowski*, 387 U.S. at 85. Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil *action*, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the *litigation*. Private civil *actions* also may be used to delay and disrupt the legislative function. Moreover, whether a criminal *action* is insti-

> tuted by the Executive Branch, or a civil *action* is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled.

Id. at 503 (emphasis added); *Dombrowski*, 387 U.S. at 85 (upholding "summary dismissal of *the action* [against the Member] on the ground that 'the record before the District Court contained unchallenged facts of a nature and scope sufficient to give [him] an immunity against answerability in damages' " (emphasis added)).

Anchoring distraction to a precluded action not only satisfies the flair of the language used by the Court in *Eastland*, but also the precise words used in prior cases and "the sense of those cases, fairly read." *Cf. Brewster*, 408 U.S. at 516 (counseling against relying on "rhetoric and the sweep of the language used by courts"). In *Gravel*, for example, the Court explained that neither Senator Gravel nor his aide could be questioned about their "legislative acts" because the Clause precluded the very action against them. 408 U.S. at 629 n.18. The Court went on to explain, though, that the Clause would not apply with the same tenacity were the underlying action not barred:

> Having established that neither the Senator nor Rodberg is subject to liability for what occurred at the subcommittee hearing, we perceive no basis for inquiry of either Rodberg or third parties on this subject .... We do not intend to imply, however, that in no grand jury investigations or criminal trials of third parties may third-party witnesses

> be interrogated about legislative acts of Members of Congress. As for inquiry of Rodberg about third-party crimes, we are quite sure that the District Court has ample power to keep the grand jury proceedings within proper bounds and to foreclose improvident harassment and fishing expeditions into the affairs of a Member of Congress that are no proper concern of the grand jury or the Executive Branch.

Id. If distraction alone serves as the touchstone for the absolute protection of the Clause, the distinction drawn by the Court would be quite arbitrary. The quoted passage makes perfect sense, though, if one accepts that an underlying action must be precluded before concern for distraction alone is sufficient to foreclose inquiry.

Anchoring the two concerns also makes practical sense. When the Clause bars the underlying action, any investigation and litigation serve only as wasted exercises that *unnecessarily* distract Members from their legislative tasks. *Eastland*, 421 U.S. at 503, 512-13; *cf. Helstoski*, 442 U.S. at 480-81, 488 n.7; *Gravel*, 408 U.S. at 629 n.18; *Johnson*, 383 U.S. at 173-77. They work only as tools by which the Executive and Judiciary might harass their Legislative brother.

When the underlying action is not precluded by the Clause, however, the calculus is much different. *E.g., Gravel*, 408 U.S. at 629 n.18; *see Brewster*, 408 U.S. at 524-25. In that circumstance, the Court has demonstrated that other legitimate interests exist, most notably the ability of the Executive to adequately investigate and prosecute corrupt legislators

for non-protected activity. *Helstoski*, 442 U.S. at 488 n.7; *Brewster*, 408 U.S. at 524-25. As explained by the Court, this interest is of paramount importance to the Legislative branch itself:

> As we noted at the outset, the purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. But financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation. *Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence.* Given the disinclination and limitations of each House to police these matters, it is understandable that both Houses deliberately delegated this function to the courts, as they did with the power to punish persons committing contempts of Congress.

Brewster, 408 U.S. at 524-25 (emphasis added) (citation omitted). Were we to join the D.C. Circuit in precluding review of any documentary "legislative act" evidence, even as part of an investigation into unprotected activity, for fear of distracting Members, we would thus only harm legislative independence. *Id.*

Moreover, in resolving any lingering uncertainty as to whether distraction alone can preclude disclosure of documentary "legislative act" evidence, we

cannot ignore the example of the Court. The Court's own jurisprudence demonstrates that Members have been distracted by investigations and litigation—and have even been compelled to disclose documentary "legislative act" evidence—in cases in which the underlying action was *not* precluded by the Clause. *E.g., Helstoski*, 442 U.S. at 480-81, 488 n.7; *Johnson*, 383 U.S. at 173-77 (describing the Government's investigation into actual legislation and other clear legislative acts); *see Gravel*, 408 U.S. at 629 n.18. *Helstoski* is particularly insightful. There, the Court described how Congressman Helstoski was compelled to turn over "files on numerous private bills" and "correspondence with a former legislative aide and with individuals for whom bills were introduced." 442 U.S. at 481. Nevertheless, the Court never said a word about the compelled disclosure or the Government's review of that evidence. Id. at 488-90. Rather, the Court made clear that the Executive could use that documentary evidence against Helstoski at trial so long as it was appropriately redacted:

> Mr. Justice STEVENS suggests that our holding is broader than the Speech or Debate Clause requires. In his view, "it is illogical to adopt rules of evidence that will allow a Member of Congress effectively to immunize himself from conviction simply by inserting references to past legislative acts in all communications, thus rendering all such evidence inadmissible." *Post*, at 2444. Nothing in our opinion, by any conceivable reading, prohibits excising references to legislative acts, so that the remainder of the evidence would be admissible. This is a familiar pro-

> cess in the admission of documentary evidence. Of course, a Member can use the Speech or Debate Clause as a shield against prosecution by the Executive Branch, but only for utterances within the scope of legislative acts as defined in our holdings. That is the clear purpose of the Clause.

Id. at 488 n.7. Because the Executive would be hard pressed to redact a document it was constitutionally precluded from obtaining or reviewing, we see no tenable explanation for this caveat except that the Clause does not blindly preclude disclosure and review by the Executive of documentary "legislative act" evidence. Concern for distraction alone cannot bar disclosure and review when it takes place as part of an investigation into otherwise unprotected activity.[28]

Having discussed our disagreement with Rayburn's premise, we further explain why we are ill at ease with its effect. For one, it stands in direct contradiction to the Court's directive and example in *Helstoski*. 442 U.S. at 481-82, 488-90. Furthermore,

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[28] Of course, it is entirely true that sometimes the very disclosure of documentary evidence in response to a subpoena duces tecum may have some testimonial import. *Rayburn*, 497 F.3d at 669 (Henderson, J., concurring). This was the point raised by Judge Henderson in her concurrence. Id. She noted, however, that service of a warrant does not require a property owner "to respond either orally or by physically producing the property, including records." *Id.*; *see Andresen v. Maryland*, 427 U.S. 463, 473 (1976) (" 'A party is privileged from producing the evidence but not from its production.' " (quoting *Johnson v. United States*, 228 U.S. 457, 458 (1913) (Holmes, J.))). As a result, it "falls far short of the 'question[ing]' " required to trigger the Clause. *Rayburn*, 497 F.3d at 669.

we must bear in mind the Speech or Debate Clause is a creature born of separation of powers concerns. *E.g., Johnson*, 383 U.S. at 178-79,[29] 181-82. As a result, it applies in equal scope and with equal strength to both the Executive and the Judiciary:

> It was not only fear of the executive that caused concern in Parliament *but of the judiciary as well, for the judges were often lackeys of the Stuart monarchs, levying punishment more 'to the wishes of the crown than to the gravity of the offence*.' There is little doubt

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[29] As Justice Harlan explained in *Johnson*:

> In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders. As Madison noted in Federalist No. 48:
>
> 'It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and comple[te]ly administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next and most difficult task, is to provide some practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved.' (Cooke ed.)
>
> The legislative privilege, *protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary*, is one manifestation of the 'practical security' for ensuring the independence of the legislature.

383 U.S. at 178-79 (emphasis added).

> that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause.

Id. at 181-82 (emphasis added); id. at 178-79.

Despite acknowledging that fact, 497 F.3d at 660, the *Rayburn* court treated the two branches in a remarkably different fashion—concluding that "any Executive Branch exposure to records of legislative acts" was prohibited by the Clause, *id.* at 671 (Henderson, J., concurring), while noting that the Judiciary could review evidence claimed to be privileged, *id.* at 658, 661. Given the Clause's rationale, such a distinction cannot exist. If the Clause applies, it applies absolutely—there is no balancing of interests nor any lessening of the protection afforded depending on the branch that perpetrates the intrusion. *Eastland*, 421 U.S. at 509-10 ("Finally, respondents argue that the purpose of the subpoena was to 'harass, chill, punish and deter' them in the exercise of their First Amendment rights, App. 16, and thus that the subpoena cannot be protected by the Clause .... *That approach, however, ignores the absolute nature of the speech or debate protection* and our cases which have broadly construed that protection." (emphasis added) (footnote omitted); *id.* at 509 n.16 ("Where we are presented with an attempt to interfere with an ongoing activity by Congress, and that activity is found to be within the legitimate legislative sphere, *balancing plays no part. The speech or debate protection provides an absolute immunity*

from judicial interference." (emphasis added)). If disclosure to the Executive violates the privilege, then disclosure to the Judiciary does no different; the Clause does not distinguish between judge, jury, and prosecutor. *E.g.*, *Johnson*, 383 U.S. at 178-79, 181-82.

As such, the example of the Court again demonstrates that the Clause cannot incorporate the privilege *Rayburn* contends. Many times, the Court has itself reviewed evidence to ascertain whether it was protected or not. *E.g.*, *Helstoski*, 442 U.S. at 487-90; *Johnson*, 383 U.S. at 185-86; *cf. Gravel*, 408 U.S. at 627-29. Were the Clause truly to incorporate a nondisclosure privilege, each of these disclosures would serve as an independent violation of the Clause. We decline to adopt a rationale that would require such a conclusion.

In sum, the very fact that the Court has reviewed "legislative act" evidence on countless occasions—and considered cases in which such evidence had been disclosed to the Executive with nary an eyebrow raised as to the disclosure—demonstrates that the Clause does not incorporate a nondisclosure privilege as to any branch. *See*, *e.g.*, *Helstoski*, 442 U.S. at 480-81, 487-90; *Johnson*, 383 U.S. at 173-77, 185-86. Quite simply, the Court has not left unrecognized a privilege far broader than those narrowly drawn limits it has taken care to articulate. We decline to adopt the D.C. Circuit's *Rayburn* formulation and thus see no cause for a *Kastigar*-like hearing. We again affirm the district court.

IV

In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege" that "has enabled

reckless men to slander and even destroy others with impunity ...." *Brewster*, 408 U.S. at 516. Nevertheless, it has its limits. *McMillan*, 412 U.S. at 313 ("Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause."). Despite Renzi's best efforts to convince us otherwise, we agree with the district court that the alleged choices and actions for which he is being prosecuted lie beyond those limits. We affirm the district court's denial of relief on each of the issues properly raised on appeal.

AFFIRMED in part; DISMISSED in part.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

United States of America,
Plaintiff,
v.
Richard Renzi; James W. Sandlin,
Defendants.
CR 08-212-TUC-DCB

October 25, 2013

AMENDED ORDER

The Court denies the Motions for Judgment of Acquittal or in the Alternative Motions for New Trial. (Docs. 1235, 1236, 1237, 1238, 1239, 1243, and 1245.)

On June 11, 2013, after a 24 day trial, a jury returned guilty verdicts as to Defendants Renzi and Sandlin on counts 1-5, counts 9-12, counts 14 and 15, counts 26-30, and count 32. They were found not guilty on counts 6-8, count 13, counts 16-25, and count 31.[1]

The case had three components: the land exchange counts; the insurance fraud counts; and a racketeering count.

The land exchange counts were comprised of counts 2-10, honest services wire fraud; counts 26

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[1] Counts referenced here are as renumbered for trial, which differ from the counts as charged in the second superseding indictment (SSI) (Doc. 466) to accommodate for pretrial dismissals of counts 29-33, counts 37-46, and counts 48 and 49 as follows: trial count 29 was SSI count 34, trial count 30 was SSI count 35, trial count 31 was SSI count 36, and trial count 32 was SSI count 47.

and 27, extortion, and count 1, a conspiracy to commit both offenses. In addition, Defendants were charged with count 12, concealing illegal proceeds (obtained as charged in counts 2-10 and counts 26 and 27); counts 13-25, transactions in criminally derived funds, and count 11, a conspiracy to commit money laundering (as charged in count 12) or engaging in transactions in criminally derived funds (as charged in counts 13-25).

The jury found the Defendants guilty on these counts except as follows: counts 6-8, for two wire transfers to Pioneer Title of $445,000 and $551,000 on September 26, 2005, from New York and Texas, and payout instructions for $533,000 to be paid out to Patriot Insurance in Sierra Vista, Arizona, allegedly sent the next day; count 13 for the purchase of a cashier's check by Defendant Sandlin for $77,357.42, on May 12, 2005 to The Slalom Shop to allegedly purchase a boat for Defendant Renzi, and counts 16 through 25, which were interbank transfers within Bank One from September 30, 2005, to February 10, 2006, involving the $533,000 originally transferred from a Patriot Insurance account to a Renzi Rain Whisper Account and then to Renzi's personal account.

The insurance fraud counts were comprised of count 28, conspiracy to make a false statement to Virginia regulators as charged in count 29 and to Florida regulators as charged in count 30. Count 31 charged Defendant Renzi and others with conspiring to defraud Spirit Mountain members of premium money by means of false and fraudulent pretenses. The jury found the Defendants guilty of conspiring to make, and making false statements to insurance

regulators, but acquitted them on the conspiracy to defraud Spirit Mountain.

Count 32, racketeering, was charged only against Defendant Renzi. While the jury found him guilty of the overall charge, they found him not guilty of some of the subpredicate racketeering acts. Count 32 charged Renzi with engaging in a pattern of racketeering activity involving several subpredicate acts: wire and mail fraud (subpredicate act 1A-1H); Hobbs Act extortion (subpredicate acts 2A and 2B[2]); honest services wire fraud (subpredicate act 2C); money laundering (subpredicate acts 2D-2I); and misappropriations from Spirit Mountain (subpredicate acts 3A-3D). Renzi was found not guilty of subpredicate act 1A: using FEC Form 3 on January 24, 2002; subpredicate act 2C: wire fraud payout instructions for $533,000; subpredicate 2F: money laundering $533,000 on September 30, 2005; subpredicate act 2G: money laundering $324,287.05 on January 10, 2006; subpredicate act 2H: money laundering $325,000 on February 10, 2006; subpredicate act 2I: money laundering $325,000 on February 10, 2006[3]; and all of the subpredicate acts alleged in Racketeering Act Three related to Spirit Mountain.[4]

The Defendants have filed several post-trial motions. With the exception of the motion asserting violations of the Speech or Debate Clause, all the mo-

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[2] The allegations in subpredicate acts 2A and 2B were identical, respectively, to the allegations in Counts 26 and 27.

[3] Allegations in subpredicate acts 2C, 2F, 2G, 2H, 2I, were identical, respectively, to the allegations the jury acquitted both Defendants of in counts 8, 16, 23, 24, and 25.

[4] Renzi was acquitted of the related conspiracy to defraud Spirit Mountain charged in count 31.

tions assert insufficient evidence to sustain the convictions and alternatively argue errors of law requiring a new trial.

Motions for Acquittal and Motions for New Trial

Defendants move for a judgment of acquittal under Federal Rule Criminal Procedure, Rule 29. The Defendants must show that no rational trier of fact could find beyond a reasonable doubt that they committed the crimes charged in the Second Superseding Indictment (SSI), which are the subject of their convictions. The Court may enter a judgment of acquittal if the evidence is insufficient to sustain a conviction on the offense. Fed. R. Crim. P. 29(a). The Court reviews the trial evidence in the light most favorable to the Government. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Alternatively, the Defendants ask the Court to grant new trials in the interest of justice under Fed.R.Crim.P. 33(a). "A district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal." *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992). The Court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and evaluate for itself the credibility of witnesses. *Id.* at 1211. A motion for a new trial should be granted only in "exceptional cases." *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981). If despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict so that a serious miscarriage of justice may have occurred, the Court may set aside the verdict and grant a new trial. *Alston*, 974 F.2d at 1211-12.

1. Renzi's motion asserting the Government elicited false testimony during trial and misrepresented facts during opening and closing arguments in violation of the Due Process Clause[5]

Defendant Renzi challenges his public corruption convictions, counts 1-5, 9-12, 14-15, 26-27, and 32. He asserts the Government introduced false testimony in violation of his due process right to a fair trial and compounded this problem by misrepresenting facts during its opening and closing arguments. (Motion (Doc. 1238).)

The public corruption charges against Renzi and Sandlin arose out of their dealings with two sets of land exchange proponents. One group of charges involved Defendants' dealings with Philip Aries and Defendant's motion raises concerns regarding Aries' testimony about an April 2005 meeting in Flagstaff between Renzi, Aries, and Renzi's Congressional District Director, Joanne Keene. The second set of charges relates to Defendants' dealings with the Resolution Copper Company (RCC), and this motion raises concerns regarding (1) a February 2005 meeting in Renzi's congressional offices in Washington, D.C. between Renzi, Bruno Hegner, and Tom Glass, in which Keene participated by telephone; and (2) a conversation between Renzi and Hegner that Keene overhead while traveling in a car with Renzi in late March or early April 2005.

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[5] Doc. 1238: Defendant Richard G. Renzi's Motion for a Judgment of Acquittal or a New Trial as to Counts 1-5, 9-12, 14, 15, 26, 27 and 32. Defendant Sandlin joins in this motion. (Doc. 1248.) As to Sandlin's joinder in Renzi's motions, this motion fails as to Sandlin for the same reasons it fails as to Renzi.

A. Aries: April 2005 Meeting

Defendant Renzi takes exception to the testimony elicited by the Government from two witnesses, Aries and Keene, regarding an April 15, 2005 meeting between Renzi and Aries. "On direct examination, both testified, in sum and substance, that Mr. Aries had neither any knowledge of nor interest in the Sandlin property at the time of the meeting, that it was Mr. Renzi who first suggested that Mr. Aries contact Mr. Sandlin to discuss the Sandlin property, and that Mr. Aries had had no contact with Mr. Sandlin prior to the meeting with Mr. Renzi." (Motion (Doc. 1238) at 2 (citing *see* Transcript of Record (TR) May 15, 2013 (Doc. 1257) 26:7-15 (Aries); TR May 17, 2013 (Doc. 1258) 87:1-5 & 16-19 (Keene).) The relevance of the testimony was to suggest that it was Renzi who first introduced the idea of including the Sandlin property in the Aries' land exchange proposal "in order to obtain Renzi's support for their proposal in Congress," *id*. (citing SSI (Doc. 466) ¶ 20)), and at the "'April 16,[6] 2005, meeting between Renzi and [Mr. Aries]'" Renzi "insisted that [the Aries Group][7] purchase the Sandlin Property as part of its land exchange proposal," *id*. (citing SSI (Doc. 466) ¶ 25(k)).

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[6] The Court notes that the SSI mistakenly alleged the meeting between Renzi and Aries occurred on April 16, 2005, but the trial testimony established that the meeting occurred on April 15, 2005.

[7] Because of Aries' association with the investors known as Preserve Petrified Forest Land Investors (PPFLI), PPFLI has often been referred to throughout these proceedings as the "Aries Group" and the Court makes no distinction between these two references.

In fact, cross examination of Aries revealed that Keene had introduced the idea of the Sandlin property to Aries on April 14, 2005, the day before Aries met with Renzi, and that Sandlin called Aries that same day and the two spoke for 28 minutes about the property.

Renzi argues that the Government knew or should have known the Aries and Keene testimony was false because it had Sandlin's telephone records which reflected the April 14, 2005, 28 minute telephone conversation between Aries and Sandlin. The Government also had a wiretap conversation between Aries and Renzi, wherein Aries "admitted" that Keene told him about the Sandlin property and that he drove to Flagstaff for the meeting and "started talking to [Renzi] about the property." (Motion (Doc. 1238) at 3 and n. 3 (citing Ex. B: call # T-III-2239 at 3), *but see* same Exhibit (reflecting Renzi, not Aries, saying "you [Aries] talked to Sandlin . . .".) Also, the Government interviewed John Bullington, who told them and gave them his notes which reflected Aries first heard about the Sandlin property from a Renzi staff person, "presumably, Ms. Keene – and not from Mr. Renzi himself as Mr. Aries claimed during trial." *Id.* at 4; Ex. D: Bullington notes; Ex. E: FBI Report), *but see* (TR May 16, 2013 (Doc. 1257) at 101-02, 115 (Aries explaining that he perceived Keene and Renzi as the same, as being from the same office). Finally, Renzi argues that the Government knew, as a result of the cross examination of Aries, the falsity of the assertion that Renzi "pitched" the Sandlin property at the April 15, 2005, meeting, but nevertheless elicited similarly false testimony from Keene by asking her what Renzi said about the Sandlin property during the April 15, 2005, meeting.

B. Resolution Copper Company: February 2005; Late March, Early April 2005 Meetings

The Government's case against Renzi in respect to the RCC was alleged as follows: "'[i]n February 2005, RENZI met in his congressional office with representatives of [RCC] and its consulting firm and insisted that the Sandlin Property must be included in the land exchange proposal if he was to be a sponsor." (Motion (Doc. 1238) at 5 (citing SSI (Doc. 466) ¶ 25(c)). It further alleged that Renzi, when told by Hegner on April 12, 2005 that RCC was unlikely to conclude a deal with Sandlin, replied "no Sandlin Property, no bill." *Id*. at 5 (citing SSI (Doc. 466) ¶ 25(i)).

The Government called Hegner to testify about what transpired between Renzi and RCC representatives and used Keene's testimony to corroborate Hegner's testimony regarding the February meeting and April telephone call. Keene testified that she was present during the meeting in February 2005 at which Glass questioned Renzi about whether he had any prior business relationship with Sandlin. Keene testified that in response to the question Renzi looked angry, was irritated, stood up, pushed his chair in, and then the meeting was over. In addition, she testified that she overheard a telephone conversation between Renzi and Hegner sometime in April that upset Renzi during the call, and afterwards, Renzi dropped discussions about RCC and the Sandlin property. (Motion (Doc. 1238) at 5(citing TR May17, 2013 (Doc. 1258) 76:21-77:21; 79:6-9; 82:13-17 and 83:11-20).)

According to Renzi, this testimony was in fact false. Keene was not physically present at the February meeting between RCC and Renzi. Instead, she

appeared telephonically. The Government knew this because grand jury testimony from Hegner and Glass reflected she appeared telephonically. And, the Government also had telephone records for Renzi which reflected she could not have overheard a conversation on April 12, 2005. *Id*.

C. Opening and Closing Arguments

Defendant Renzi argues that the false testimony played a "crucial" role in the Government's case because "these conversations were where the extortion and honest services fraud took place." *Id*. at 6. Renzi argues that the Government adopted Aries description of the April 15, 2005 meeting in its opening statement and closing argument by telling the jury that Renzi "pitched" and "pushed" the Sandlin property to Aries and ignoring that it was not Renzi who first identified the Sandlin property to Aries. *Id*. at 7.

Renzi also contends that the Government admitted in its rebuttal argument that it knew about the April 14, 2005, telephone call from Sandlin to Aries, but then, in response to defense arguments to the Court on this mater, assured the Court that it had overlooked the April 14 phone call. *Id*. at 7 (citing TR June 5, 2013 (Doc. 1297) at 220:1-6). The Court rejected Renzi's request to strike Aries' testimony. Instead, the Court instructed the jury that the Government's arguments regarding the use of Sandlin's phone records, and "whether the government knew or did not know about the records, that argument was improper and [the jury] should disregard it." (TR June 6, 2013 (Doc. 1262) at 21:22-25, 22:1-2.)

D. Discussion

To prevail on a **d**ue process claim for the government's knowing presentation of false testimony to

a jury, a defendant must show that "(1) the testimony … was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material." *United States v. Houston*, 648 F.3d 806, 814 (9th Cir. 2011) (citing *United States v. Zuno–Arce*, 339 F.3d 886, 889 (9th Cir. 2003)).

The fact that witnesses gave inconsistent or conflicting testimony does not establish that such testimony was false. *United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997). Rather, "[d]iscrepancies in testimony … could as easily flow from errors in recollection as from lies." *United States v. Zuno–Arce*, 44 F.3d 1420, 1423 (9th Cir. 1995).

Under *Napue v. Illinois*, 360 U.S. 264, 269 (1959), "the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared." *United States v. Bagley*, 473 U.S. 667, 679 n. 8 (1985). "Mere speculation," is insufficient to establish a claim under *Napue*. *United States v. Aichele*, 941 F.2d 761, 766 (9th Cir. 1991). There must be something in the prosecutor's questioning, or the answers given, that may be construed to reflect an intention by the prosecutor to mislead the jury. *United States v. Etsitty*, 130 F.3d 420, 424 (9th Cir. 1997).While *Napue* does not create a *per se* reversal if it is established that the Government knowingly permitted the introduction of false testimony, in the Ninth Circuit reversal is virtually automatic. *Sivak v. Hardison*, 658 F.3d 898, 912 (9th Cir. 2011).

A conviction is set aside whenever there is *any* reasonable likelihood that the false testimony *could* have affected the judgment of the jury because the

use of false testimony is so clearly incompatible with due process. (Motion (Doc. 1238) at 8 (citing *Sivak v. Hardison*, 658 F.3d at 912)).

a. Aries' Testimony

Renzi first argues that the verdict must be set aside because the Government knowingly sponsored the false testimony of Aries. Renzi asserts that the Government knew, or should have known, that the testimony was false, and that the false testimony was material. Renzi also argues that the Government failed in its duty to investigate once it had reason to believe the testimony was false. Finally, Renzi contends that the Government independently violated the Due Process Clause by arguing false testimony during closing arguments.

The Court previously considered Renzi's assertion that his due process right to a fair trial was violated when he moved for a mistrial after the Government's rebuttal closing argument. *See* (Minute Entry June 6, 2013 (Doc. 1210)). In rebuttal to Defendant's repeated assertions that the Government witnesses were coached to say what the Government wanted them to say, the Government argued to the jury that there were numerous examples demonstrating that it was not coaching the witnesses regarding testimony. *See* (TR June 5, 2013 (Doc. 1297)[8] at 200:9-13; 201:12-16; 207:5-208:1; 208:9-12; 218:11-17; 218:21-23). Consistent with this line of argument,

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[8] The Government's Response cites to the docket number of the closing arguments on June 5, 2013 that was comprised of only the Government's closing and rebuttal arguments: Docket 1246. For clarification, all citations in this Order are to the complete version of the transcript (Doc. 1297), and where necessary, the Government's citations have been transposed to this version.

in rebuttal the Government conceded it was aware of the April 14 telephone call by Sandlin to Aries, but submitted to the jury that Aries had not been shown the phone records, demonstrating that the Government was not coaching Aries as a witness, rather, allowing Aries to testify to the facts as he recalled them, even though this opened Aries up to being impeached for his mistaken testimony. *Id*. at 220:1-16.

This Court conducted a thorough inquiry into Defendant's motion for a mistrial. All parties agreed that the Government went too far in asserting it knew about the April 14, telephone call from Sandlin to Aries. *See* (TR. June 6, 2013 (Doc. 1262)).

The Government did not admit to knowingly sponsoring false testimony. *Id*. at 13:9-12. It explained that Aries was examined by the Government's attorney, Mr. Restaino, who had not been responsible for focusing on telephone records, and it was an oversight by him to ask Aries, *id*. at 4:8-9: "Did you know about the Sandlin property going into that meeting?" The Court found that instructing the jury in a way that would lead them to believe that the lawyer who called the witness knew about the telephone records would be an improper remedy because there was no evidence of outright misconduct, but only a "peccadillo" which must be considered in the context of the complexity of the case and teams of lawyers on both sides, and the vast amount of work involved in the preparation of the case. *Id*. at 16:13-21. This Court found no due process violation in the record. (TR June 6, 2013 (Doc. 1262) at 15, ln. 2.)

The Court did not strike Aries' testimony from the case because it found that by cross examination the Defendant successfully impeached him and presented the truth of the matter to the jury. *Id*. at 15:1-

2; 16:25-17:1. *See United States v. Houston*, 648 F.3d 806, 814 (9th Cir. 2011)(no due process violation where inconsistencies in testimony are fully explored and argued to the jury, defense counsel effectively attacks witnesses credibility, and no evidence of knowingly using perjured testimony). The Court found a remedy was appropriate by way of an admonition to the jury to disregard the Government's rebuttal closing argument about whether it knew or did not know about the phone records. *Id*. at 15:2-3, 17:20-21, 18:1-3. Nothing in the pending motion changes the Court's conclusion regarding Aries' testimony. The Court finds there was no reasonable likelihood that the judgment of jury was affected by the challenged Aries' testimony, which was fully explored by Defendant on cross examination, or the Government's comments, which were not evidence and which the Court directed the jury to ignore. *See Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005)(*en banc*).

b. Keene's Testimony

Keene's testimony is even less problematic. There is no evidence that the prosecution knew or should have known that the testimony was actually false before she testified. Although her testimony that she was physically present at the February 3, 2005 meeting between Renzi and the RCC representatives (Hegner and Glass) conflicted with grand jury testimony from them that she appeared telephonically, (*see* Motion (Doc. 1238), Exs. F and G), Defendant did not disclose to the Government the evidence that most clearly established she, rather than Glass or Hegner, was mistaken in recalling the meeting. On cross examination, Defendant Renzi presented an email between Keene and Renzi's Washington, D.C. staff reflecting she planned to appear at the

meeting by teleconference. (TR May 17, 2013 (Doc. 1258) 143:20-21; Renzi Trial Ex. 2781.) The Defendant presented persuasive impeachment evidence to the jury that Keene appeared telephonically and could not have observed him getting angry or pushing his chair underneath the table. (TR May 17, 2013 (Doc. 1258) 144-150; 152.) Defendant also argued in closing that the jury should disregard her testimony about how he acted at the meeting. (TR June 5, 2013 (Doc. 1297) at 96:3-25; 97:1-8.) Importantly, the email was not disclosed to the Government as a trial exhibit, *see* sidebar discussion, (TR May 17, 2013 (Doc. 1258) at 141:20-142:10),[9] and the Defendant cannot now assert that the Government knew about it or should have known that Keene's recollection of her attendance at the meeting compared to Hegner and Glass's recall was wrong.

Regarding the April 12, 2005 meeting, Keene testified that she recalled overhearing Renzi's side of a conversation with Hegner, which upset Renzi, but she did not recall the substance of the conversation. *Id*. 83:1-2, 8-9, 13-14. She testified that she was traveling in a car with Renzi in Arizona sometime after March 18, 2005, when she heard Renzi's side of a

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[9] *See also* (Response (Doc. 1281) at 2-4); *see also* (TR May 20, 2013 (Doc. 1259) at 38-46) (sidebar: Government objection on cross examination of Keene to introduction of voluminous binder certified by the defense team to be the binder used by Renzi to prepare for April 15-meeting with Aries, with Court questioning the defense team: "Why do you guys keep giving the Government 10 seconds before the questions are asked?" *Id*. at 44:14-15. And, Court threatening to preclude evidence as untimely disclosed, questioning whether it is appropriate impeachment, but ultimately allowing it with cautionary instruction to the defense team to stop hiding the pea, *id* at 46.).

conversation. *Id*. at 81:14-19; 82:1-3. When asked for a more specific time frame, she answered, "Possibly April, I would say." *Id*. at 82:13-15.

On cross examination Keene was asked to confirm she overheard a heated conversation sometime in April. She said: "Yes late March, April; around that time period, yes." *Id*. at 153:25-154:1-4. Again, Keene was asked to confirm that she believed the conversation occurred in April. She said: "That is my recollection, yes." (TR May 17, 2013 (Doc. 1258) at 153:15-16.) Keene was then shown Renzi's appointment schedules which reflected he was in Washington from April 8 through approximately April 14, 2005. *Id*. at 154:5-14; (Renzi Trial Ex. 3575). The schedule demonstrated that Renzi had hearings he was scheduled to attend in Washington, D.C. on April 12, 2005. *Id*. at 155:16-156:15. The significance of the cross examination was to point out that Keene could not have overheard the conversation on April 12 between Renzi and Hegner when Renzi told Hegner "no Sandlin property, no bill." Keene, however, did not testify she overhead a conversation on April 12. This cross examination was not even proper impeachment because Keene did not give inconsistent, conflicting, contrary, or false testimony. She testified she overheard a conversation between Hegner and Renzi in late March or early April. On re-direct, the Government established, by admission and reference to Keene's handwritten notes, (Gov't Trial Ex. 185), telephone records (Gov't Trail Ex. 197), Renzi's weekly schedules (Gov't Trial Ex. 195), and Keene's testimony (TR May 20, 2013 108:22-109:23; 111:3-24), that she was traveling with Renzi throughout Arizona on March 22, 2005, the same day telephone records reflected three telephone calls between Hegner and Renzi. Therefore, the record does

not support Defendant's assertion that Keene's testimony was false; she was not even mistaken.

E. Conclusion

There is no assertion of perjury on the part of either Aries or Keene. Aries' recollection that Renzi first proposed the Sandlin property at the Flagstaff meeting was consistent with his recollections before the grand jury, where he testified approximately two years after the event, that he was first told about the Sandlin property by Renzi when he met with Renzi in Flagstaff, which was on April 15, 2005. (Response (Doc. 1281) Ex. H: Grand Jury Excerpts at 17.) In light of Renzi's Washington schedule, Keene's testimony that she was physically present at the February 3, 2005, meeting between Renzi and RCC appears to be a mistake in her recollection, and she truthfully testified that she overheard a conversation between Renzi and Hegner sometime in late March or early April. While Aries and Keene may have been mistaken in their recall, neither intentionally lied regarding these details.

Therefore, any due process violation turns on whether the Government knew or should have known the facts as Aries and Keene recalled them were false, and nevertheless intentionally asked questions to elicit the false testimony and then sat quietly by while the witnesses unintentionally gave false testimony on the stand. *See e.g.*, *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (*en banc*); *Northern Mariana Islands v. Bowie*, 243 F.3d 109 (9th Cir. 2009). As the Court found when assessing the merits of Defendant's motion for a mistrial, there was no such intent on the part of the Government in relation to Aries testimony that he first heard about the Sandlin property from Renzi at the April 15,

2005, meeting. (TR June 6, 2013 16:13-21.) As for Keene's testimony that she was physically present at the February 3, 2005, meeting, at most the Government knew only that this conflicted with Hegner and Glass's grand jury testimony, but did not know conflicting documentary evidence existed until the Defendant produced it during Keene's cross examination. Keene's testimony was true and accurate regarding the telephone conversation she overheard in late March.

The final factor the Court must consider is materiality. In both circumstances, the mistakes or errors in these witnesses' testimony was exposed to the jury through impeachment during cross examination. "Although the principle that the prosecution may not knowingly use perjured testimony 'does not cease to apply merely because the false testimony goes only to the credibility of the witness," (Response (Doc. 1281) at 20 (quoting *Napue*, 360 U.S. at 269)), "the degree to which the witness's credibility was already called into question can affect the materiality inquiry, *id.* (citing *e.g.*, *Gentry v. Sinclair*, 705 F.3d 884, 903 (9th Cir. 2013) (finding false testimony not material to question of credibility where credibility had been substantially called into question during course of testimony at trial).

The Court rejects Renzi's argument that Aries and Keene's false testimony regarding the April 15, 2005, meeting was crucial because it caused the jury to wrongly conclude that it was Renzi who pitched the Sandlin property. As Aries explained in his testimony, he said that Renzi had told him about the property because he considered Keene, as Renzi's chief of staff, to be an extension of Renzi. (TR May 16, 2013 (Doc. 1257) at 101-02, 115.) Either way, the

Sandlin property was proposed by Renzi or on behalf of Renzi by Keene, not by Aries. The telephone records reflect that on April 14, 2005 Renzi called Sandlin at 3:45 p.m. and talked for 5 minutes and called him again at 5:27 p.m. and talked for 1 minute. Sandlin called Aries at 5:33 p.m. and talked for 28 minutes. The Court finds that Sandlin's telephone call to Aries on April 14, 2005, was of limited relevance to the material question of whether Renzi "pitched" or "pushed" the property when he met with Aries on April 15, 2013, by highlighting the undisputed attributes of the Sandlin property and promising that he, Renzi, would ensure the PPFLI a free pass through the Natural Resource Committee if Aries included the Sandlin property in their land exchange proposal and purchased it. (TR May 16, 2013 (Doc. 1257) at 23-26.) Aries testified "[Renzi] said that every congressional term, he had the ability to prioritize a single land exchange to get it out of the resources committee and he called it a free pass. And he said, 'If you include the Sandlin piece in your exchange, I will give you my free pass.'" *id.* at 24:12-16. This was the testimony that was material to the jury's finding the Defendants guilty of extortion.

2. Renzi's motion challenging the sufficiency of the evidence to support the guilty verdict for honest service wire fraud and extortion and improper jury instruction for a good faith defense to both[10]

Defendant asserts the evidence reflects that Renzi and Sandlin both received property they were entitled to receive: Sandlin received a fair price for his land, and Renzi received money from Sandlin to pay off a debt. Thus, Defendant argues the extortion conviction must be set aside because the Government failed to show that Renzi obtained money that he "knew he was not entitled to receive." (Motion (Doc. 1243) at 2-3.) Defendant also argues that the indictment was flawed with respect to the fraud charges because it did not distinguish between the $733,000 that Sandlin paid to Renzi, or the money that the PPFLI paid to Sandlin, resulting in an improper variance. Additionally, the Defendant argues that the Government failed to prove the existence of a *quid pro quo*. Finally, the Defendant argues that the Court erred when it followed *Evans v. United States*, 504 U.S. 255, 277 (1992)(Kennedy, J., concurring) by giving the jury instruction: "It is a complete defense if a public official labors under the good faith but erroneous belief that he is entitled to payment for an official act." (Jury Instructions 8.123 (2-10) (Doc. 1225) at 23.)

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[10] Doc. 1243: Defendant Richard G. Renzi's Motion for a Judgment of Acquittal or for a New Trial as to Counts 1-5, 9-12, 14, 15, 26, 27 and 32. Defendant Sandlin joins in this motion. (Response (Doc. 1276) at 2 n.1.) As to Sandlin's joinder in Renzi's motions, this motion fails as to Sandlin for the same reasons it fails as to Renzi.

The Court has addressed Renzi's substantive challenges to the honest service wire fraud (counts 2-10) and extortion counts (counts 26 and 27) and rejected both. (Order (Doc. 965); R&R (Doc. 841); Order (Doc. 966); R&R (Doc. 913)). The Court does not repeat its reasoning, here, for rejecting these arguments. Renzi or Sandlin's alleged entitlements do not defeat their convictions on these counts, which depend on the jury finding that Renzi and Sandlin conspired in a scheme whereby Renzi promised Aries and the RCC that he would use his official powers in exchange for something of value: the purchase of the Sandlin property. In this context, the good faith defense precludes the jury from finding a *quid pro quo* agreement: to use official powers in exchange for receiving money you know are not entitled to receive for the performance of the official act.

The new case law, *Sekhar v. United States*, 133 S. Ct. 2720 (2013), does not assist Defendant. In *Sekhar*, the Court illuminates the distinction between extortion and coercion, explaining that extortion requires a transfer of property, *i.e.*, something of value that can be exercised, transferred, or sold. There is no question that the transfer of property, specifically the money from the sale of the Sandlin property, was the subject of the *quid pro quo* agreement in this case. The jury rejected Renzi's entitlement theories.

Renzi argues next that the jury instruction on good faith was too narrow, making it appear that good faith was a "complete defense" only if the jury believed that Renzi was laboring under the belief that he was entitled to payment for his official act, but suggesting incorrectly that any other "good faith defense," including Renzi's actual argument, that he

believed that his official acts were unconnected to his receipt of money to which he was entitled, was not a complete defense. (Motion (Doc. 1243) at 6.)

The jury instruction on the good faith defense was not too narrow, it accurately stated the law. *See Evans*, 504 U.S. at 277. Renzi asserts an overly broad complete defense: that he was acting in "good faith" because he believed passionately in aiding Ft. Huachuca and retiring water usage on the Sandlin property. *See* (TR June 5, 2013, 123:21-124:12). This Court previously addressed Renzi's arguments regarding the relevancy of his personal motivations in promoting the Sandlin property. *See* (Order March 21, 2013 (Doc. 965) at 3-4, adopting R&R 10/19/10 (Doc. 841) at 9) ("The relevant consideration is that he is alleged to have obtained, or attempted to obtain, a personal benefit not due him in the form of property."). Renzi's argument at trial amounted to nothing more than mere negation of the elements of the offense, *i.e.*, a lack of proof of a *quid pro quo*. Under *United States v. Inzunza*, 638 F.3d 1006, 1020 (9th Cir. 2011), the good faith instruction articulated by Kennedy in *Evans* is not required where adequate specific intent instructions are given because it only further defines the *mens rea* required for a Hobbs Act conviction, "it does not countermand the principle that adequate instructions on specific intent eliminate the need for an additional defense instruction on good faith."

Additionally, the Court does not believe the good faith defense instruction given in respect to the insurance fraud counts confused the jury. As to the insurance fraud counts, the jury was instructed that it must find Defendant made a false statement, intending to deceive, insurance regulators, and: "You may

determine whether a defendant had an honest, good faith belief in the truth of the specific misrepresentations alleged in the indictment in determining whether or not the defendant acted with intent to defraud. The good faith of defendant Renzi is a complete defense to Counts 28, 29, 30 and 31 charged in the indictment because good faith on the part of a defendant is simply inconsistent with the intent to defraud." (Jury Instruction 3.16 C - P.(Doc. 1225) at 48.) Both good faith instructions were given within the context of the substantive offense instructions to which they pertained, minimizing the possibility that the jury would apply them outside their context.

The Court finds sufficient evidence to support the extortion and honest service wire fraud counts and that it gave proper good faith instructions for these counts.

3. Renzi's motion on the money laundering counts because they are derivative to extortion and honest services claims and challenging convictions for insufficient evidence[11]

Defendant Renzi challenges his money laundering convictions on four grounds: (1) the money laundering charges are derivative of the extortion and honest service counts, which he argues must fail; (2) the evidence was insufficient to support the concealment money laundering convictions; (3) the evidence was insufficient to establish that the charged transactions were distinct from the underlying charged

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[11] Doc. 1237: Defendant Richard G. Renzi's Motion for a Judgment of Acquittal or for a New Trial as to the Money Laundering Counts. Defendant Sandlin joins in this motion. (Doc. 1248.) As to Sandlin's joinder in Renzi's motions, this motion fails as to Sandlin for the same reasons it fails as to Renzi.

crimes, and (4) the Court erred as a matter of law when it refused to instruct the jury that "proceeds," which are the subject of the money laundering charges means profits, not gross receipts from the extortion and honest service wire fraud.

The jury found Defendants guilty of count 11, conspiring to engage in concealment money laundering as charged in count 12 and in transactions involving criminally derived proceeds as charged in counts 14 and 15, and racketeering acts 2D and 2E. The jury found Defendants not guilty of the remaining transactional charges. The money laundering convictions are based on three transactions: 1) the receipt and deposit of a $200,000 check from Sandlin to Renzi Vino on May 5, 2005; 2) a $164,590 money transfer by Renzi on June 1, 2005 to pay a Patriot debt, with money derived from proceeds obtained from Sandlin; and 3) a $100,000 money transfer, on July 7, 2005, from funds held in escrow to a bank account controlled by Sandlin.

The Court finds that the evidence was sufficient to support the convictions for concealment money laundering and transactional money laundering. The extortion/honest service wire fraud offense ended with PPFLI's deposit of $1,000,000 into an escrow account for the purchase of the Sandlin property. The concealment count (count 12) began when Sandlin used these proceeds to write a $200,000 check on May 5, 2005 to Renzi Vino, a Renzi subchapter S corporation; the transactional money laundering (count 14) resulted from the deposit of the $200,000 check into a Patriot Insurance bank account. The additional transactional money laundering (count 15) resulted from a subsequent transfer by Sandlin of an additional $100,000 from the escrow

account, which was paid by PPFLI on July 7, 2005, as consideration to extend the closing date. Racketeering subpredicate act 2D was the same transaction ($200,000) charged in count 12, and subpredicate act 2E was the June 1, 2005, wire transfer by Renzi of $164,590 from the Patriot account to pay a Patriot debt (promissory note) to Lighthouse Underwriters. The Court finds no merit to Defendant's arguments that judgment of acquittal on these counts must be entered or that these counts must be vacated.

First, the Defendant's derivative argument fails because the Court does not vacate the honest service wire fraud and extortion convictions. *See* Section 2, *supra.*

Second, the evidence is sufficient to conclude that Defendant sought to conceal or disguise the nature, source, or ownership of the funds in question. Defendant argues there was insufficient evidence of concealment money laundering because the $200,000 was easily traced and not designed to hide the provenance of the funds involved. (Motion (Doc. 1237) at 3.) The concealment money laundering statute, 18 U.S.C. § 1956(a)(1)(B)(i), "criminalizes behavior that masks the relationship between an individual and his illegally obtained proceeds," *United States v. Wilkes,* 662 F.3d 524, 545 (9th Cir. 2011), but does not apply to transactions that amount "to no more than divvying up the joint venture's gains, albeit illegally obtained." *Id.* at 547 (citing *United States v. Adefehinti*, 510 F.3d 319, 322 (D.C. Cir. 2007)).

The Court finds that the money had nothing to do with the business activities of Renzi Vino or Patriot Insurance, rather, it represented the prohibited "fold[ing] of ill-gotten funds into the receipts of a legitimate business." (Response (Doc. 1279) at 4) (cit-

ing *Wilkes*, 662 F.3d at 545). For instance, Sandlin included on the check a printed notation of "Desert Fountain," the name of the second phase of the Kingman real estate development which Sandlin had purchased from Renzi. This evidence, and more which tracked the chain of transactions, (Response (Doc. 1279) at 3-9), was presented to the jury, which carefully considered it and found Defendants guilty only in respect to the $1,000,000 extorted from PPFLI which was the source of the $200,000 paid by Sandlin to Renzi, but found him not guilty in respect to other alleged honest service wire fraud transfers.

Viewing the evidence in the light most favorable to the Government, the Court finds it sufficient to support the money laundering convictions. Any rational trier of fact could have found concealment because Defendants transferred a portion of the proceeds, which they extorted from PPFLI, to "Renzi Vino" and deposited them in an account of another entity, "Patriot Insurance." Neither entity having any relationship to the Fountain Hills debt, there was sufficient evidence for the jury to conclude Defendant intended to conceal the transactions showing that Sandlin was paying Renzi money from the proceeds of the sale of the Sandlin property to PPFLI.

Third, as reflected above, the evidence sufficiently established a distinction between the charged money laundering transactions and the underlying extortion/honest service offenses. The evidence and the Government's theory of the case presented to the jury tracked the SSI, which this Court previously examined under *United States v Webster*, 623 F.3d 901, 906 (9th Cir. 2010), pursuant to the directives provided in *United States v. Wilkes*, 662 F.3d 524, 549 (9th Cir. 2011) and found did not pose any overlap or

"merger" concerns. (Order (Doc. 967) at 6-8), *see also* (Response (Doc. 1279) at 9-12)

Fourth, the Court properly refused to instruct the jury that it needed to find the charged transactions involved criminal profits because no merger problem existed. The Court applied *United States v Santos*, 553 U.S. 507, 516 (2008), as interpreted in *Webster* and *Wilkes*. *Id*.

4. Sandlin's motion challenging the sufficiency of the evidence to support a finding that he and Renzi conspired to commit extortion or fraudulent schemes[12]

Defendant Sandlin challenges the sufficiency of the evidence to support his convictions on all counts because he asserts there is no evidence that he agreed with Renzi to conceal their prior business relationship and there being no scheme to defraud, he engaged in nothing more than common wire and financial transactions necessarily resulting from the sale of property, and he received money he was entitled to receive from the sale of the property.

The honest service wire fraud and Hobbs Act extortion counts do not allege a scheme to conceal a conflict of interest. Defendants were charged with agreeing to commit a scheme or plan to trade an official act for a thing of value, here, money derived from the sale of the Sandlin property in exchange for Renzi's "free pass" for one land exchange proposal through the Natural Resource Committee. Defendants were charged with concealing and engaging in monetary transactions with these criminally derived

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[12] Doc. 1235: Defendant James W. Sandlin's Motion for Judgment of Acquittal and for a New Trial.

funds. The jury was presented with Defendant Sandlin's arguments and rejected them.

For the reasons noted above in respect to Renzi's motions, the evidence is sufficient to support his convictions for honest service wire fraud and extortion. The evidence was also sufficient to establish that Sandlin conspired with Renzi to extort the land exchange proponents and to deprive the public of its right to honest services. The evidence reflected that Sandlin "actively coordinated with Renzi about the RCC negotiations, as illustrated by his phone calls to and from Renzi contemporaneous with Sandlin's March 18, 2005, threat to RCC that he would 'resume the irrigation,' (Gov't Trial Exs. 239, 245A [at 1]); that the two men were in communication on April 11, 2005, shortly before Renzi's call to Hegner announcing 'no Sandlin property, no bill,' (Gov't Trial Ex. 245A, at 2); and that the two men were in frequent communication around the time a newspaper reporter started asking questions about the land exchange details (Gov't Trial Ex. 246A; *see also* TR May 16, 2013 (Doc. 1257), at 64-66 [referencing Tapes 18 and 22, admitted as Gov't Trial Exs. 212-13])." (Response (Doc. 1276) at 2-3.)

There was of course the evidence of the 28 minute telephone call initiated by Sandlin to Aries on April 14, 2005, the day prior to Aries meeting with Renzi. "Moreover, the jury could infer that once Philip Aries became involved back in the spring of 2005, Sandlin raised his prior negotiations with Resolution Copper as a bargaining chip with Aries." *Id*. at 3; *see* (TR May 16, 2013 (Doc. 1257) at 32) (Aries testifying that Sandlin expressed anger with RCC because it only wanted to tie up his land, not buy it) and 34

(testimony by Aries that it was important to get in line ahead of the RCC for a BLM land exchange).

The jury rejected Sandlin's defense that he was not guilty of honest service wire fraud and extortion because the money he received from PPFLI was as a result of a legitimate property sale. The Court finds there was sufficient evidence to support the convictions for money laundering and transactional counts. *See* (Motion (Doc. 1235) at 2-4) (noting these counts to be premised on allegations of unlawful activity as charged in conspiracy in count 1).

5. Renzi's motion challenging the sufficiency of the evidence to support the false statement convictions and because the Court gave improper jury instruction and excluded relevant evidence[13]

Defendant Renzi challenges the sufficiency of the evidence to support the convictions for violating 18 U.S.C. § 1033(a) by making false statements in connection with financial reports or documents presented to insurance regulators (counts 28-30). He also asserts the Court erred in instructing the jury as to the definition of a financial document and compounded its error by excluding testimony from a Government expert, Eric Nordman, who testified in the prior trial of Co-defendants Lequire and Beardall, that letters sent to insurance regulators were not financial documents. (Motion (Doc. 1239)).

The jury convicted Defendant Renzi of conspiracy to commit, and commission of, insurance fraud by making false statements to Virginia and Florida in-

[13] Doc. 1239: Defendant Richard G. Renzi's Motion for a Judgment of Acquittal or for a New Trial as to Counts 28-30

surance regulators in violation of 18 U.S.C. § 1033(a). Defendant challenges the sufficiency of the evidence to establish two elements necessary to support the conviction: 1) that Renzi's company was engaged in the business of insurance and 2) that two letters sent to state regulators were financial documents.

The Government presented evidence that Renzi was engaged in the business of insurance, which was described in the jury instruction pursuant to its statutory definition, 18 U.S.C. 1033(f)(1).[14] *See* (Jury Instruction 18-1033 (29-30) A (Doc. 1225) at 42). The Government presented evidence that Renzi engaged in the business of insurance because witnesses described Renzi's role in owning and operating Renzi & Company, an agency that marketed and sold insurance policies, approved applicants for insurance, issued certificates of insurance, and collected insurance premiums on behalf of insurance carriers. *See* (Response (Doc. 1277) at 4-5) (citing to TR May 9, 2013 (Doc. 1253) at 14-16 (marketing), 21-22 (premiums), 100 (certificates); TR May 10, 2013 (Doc. 1254) at 86-89 (policy pricing, coverage decisions), 92-93 (annual rate increases, annual list of insureds); Gov't

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[14] "(1) [T]he term 'business of insurance' means - - (A) the writing of insurance, or (B) the reinsuring of risks, by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons. (2) [T]he term 'insurer' means any entity the business activity of which is the writing of insurance or the reinsuring of risks, and includes any person who acts as, or is, an officer, director, agent, or employee of that business[.]"

Trial Ex. 5B (March 3 letter), 130B (March 24 letter)).

The Government also presented evidence to support the jury's conclusion that two letters sent to the regulatory agencies were financial documents, defined by the Court as: "financial reports or financial documents include any documents concerning the management of money or the potential financial health and viability of a business, or that relate to the financial position of a business." (Jury Instruction 18-1033 (29-30) A (Doc. 1225) at 42-43.) Insurance regulators testified that it would have been a problem if Renzi was collecting premiums but not paying the policies because coverage would lapse. *See* (Response (Doc. 1277) at 7) (citing TR May 13, 2013 (Doc. 1261) at 9, 17-18, 41, 57-58 (Virginia)). Also, the Government presented testimony that it was important the Renzi & Company represented a solvent, authorized insurance carrier, which Jimcor was not, to make sure that the policy insurer had the money to pay any claims. *Id*. (citing same at 13-14, 16, 32 (Florida); 48-49, 53 (Virginia.)).

The evidence included testimony from Aly Gamble that she drafted the "Jimcor letters" sent to Renzi & Company's insured clients at the direction of Defendant Renzi. She told Co-defendant Beardall that his "Jimcor letter" response to regulators that the Jimcor letter to insureds was a clerical error was wrong. Additionally, the record included testimony that Renzi staff did not take any actions without prior approval and authorization from Defendant Renzi. (Order (Doc. 1204) at 1 (denying Rule 29a motion); *see also* (Response (Doc. 1277) at 9-10).) Consequently, the jury could have reasonably concluded that the statements in the letters sent to Virginia and Florida

insurance regulators describing the "Jimcor letters" as a clerical mistake were false, and the statements were authorized or approved by Renzi.

The Court instructed the jury on the definition for financial documents as found in *United States v. Goff*, 400 Fed. Appx. 507, 512 (11th Cir. 2010); *see also* (Report & Recommendation (Doc. 626) at 10) (on pretrial motion, applying this same definition and finding the question was one for the jury to decide); (Amended Order (Doc. 646)) (adopting without any objection[15] the R&R). The Court finds that there was sufficient evidence in the record to support the jury's finding that the letters to investigators were financial documents, pursuant to this definition. The Court rejects the notion that it should have instructed the jury regarding the types of documents referenced by Rep. Pomeroy during congressional debate regarding 18 U.S.C. 1033 because the letters were not licencing applications nor related to any licencing application, and were specifically not filings on mergers, consolidations, or acquisitions.

The Court rejects the Defendant's challenge to the Court's instruction for "failing to make it clear that the charged letters themselves were the 'financial documents' at issue in this case. . .." (Motion (Doc. 1239) at 12.) The Defendant argues that the risk of confusion was "palpable" because insurance regulators testified that they were given copies of premium checks by insured entities, which triggered their investigations, and that therefore, the jury may have convicted upon concluding that false statements

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[15] Failure to object to Magistrate's report waives right to do so on appeal. *McCall v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980).

were made in connection with the checks or some unknown financial document.[16] *Id*.

First, the jury instruction in the second element specified: "the Defendant made a false statement in the March 3, 2003 letter to the Virginia Bureau of Insurance as charged in Count 29, and/or a false statement in the March 24, 2003 letter to the Florida Department of Insurance as charged in Count 30." (Jury Instruction (Doc. 1225) at 41.) In closings, the Government explicitly focused the jury's attention on two letters, which it described as "the Beaver's letter," which was dated March 3, 2003, and sent to Virginia insurance regulators, and "the Spencer letter," which was dated March 25, 2003, and sent to Florida regulators.[17] (TR June 5, 2013 (Doc. 1297) at 70); (Response (Doc. 1277) at Gov't Exs. 5B and 130B.) This focus was in keeping with the Court's pre-trial ruling to preclude the Government from "asserting that the checks were financial documents." (Minute Entry (Doc. 1146) at 2 (granting in part and denying in part Renzi's motion *in limine*).

Finally, the Court believes it properly precluded the Defendant from admitting into evidence testimony by the Government's expert, Eric Nordman, presented in the Beardall and Lequire trial, that the two letters were not financial documents. (TR June 13, 2010 (Doc. 811) at 28-37.) The Court notes that in the Beardall/Lequire trial, it admitted the testimony, over the objection of the Government, that defense counsel was eliciting testimony that called for an im-

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[16] The evidence also reflected that NIF complained to state investigators about Renzi & Company's nonpayment of premiums.

[17] (Response (Doc. 1277) at Gov't Ex. 5B and 130B.)

proper legal opinion. *Id*. at 22, 30. The defense attorneys had asked a series of questions regarding the types of routine annual financial reporting documents required by regulatory agencies, concluding with: "Is it fair to say the thing that makes these filings financial documents is the fact that as you say, they contain a lot of numerical data?" *Id*. at 33, lns. 14-16. When Nordman agreed, counsel asked him if the letters contained the type of numerical data that he would consider to be hallmarks of financial documents?" *Id*. at 36, lns. 15-19. He answered no and that the letters were more about coverage. *Id*. at 37, ln 6. In hindsight, the question did call for an improper legal opinion regarding an ultimate question of law: whether the letters were financial documents. And, that is how defense counsel sought to use the Nordman testimony in the Renzi trial. Therefore, the Court precluded it, instructed the jury regarding the law defining a financial document, and left the jury to make the findings of fact as to whether the two letters met that definition.

Defendant presented no case law directly on point requiring the introduction of the Nordman testimony from the Beardall/Lequire trial as a party-admission. (Motion (Doc. 1197).) The case relied on by Defendant, *In re Hanford Nuclear Reservation Litigation*, 534 F.3d 986, 1016 (9th Cir. 2008), relied on *Glendale Fed. Bank, FSB v. United States*, 39 Fed. Cl. 422, 424-25 (Fed. Cl. 1997), explained that offering an expert as a trial witness is a logical distinction, compared to expert testimony offered at deposition, to treat testimony given at trial by an expert as a party admission under Fed.R.Evid. 801(d)(2)(C).

The court in *Glendale* concluded, therefore, the prior deposition testimony of an expert becomes "authorized" upon the expert being tendered as a trial witness. "This, of course only applies to those made in the context of the instant proceeding. All other such statements may only be used to cross-examine that expert or others connected with the statement." *Id*. at 425.

Rule 801(d)(2)(C) exempts from hearsay "a statement made by a person whom the party authorized to make a statement on the subject." Assuming Rule 801 applies, it only serves to lift the hearsay bar, it does not require admission of the testimony. Here, the Court precluded the Nordman testimony because an expert may not offer an opinion as to his legal conclusion, i.e., an opinion on an ultimate issue of law. *Elsayed Mukhtar v. California State University of Hayward*, 299 F.3d 1053, 1065 n. 10 (9th Cir. 2002). The testimony was also properly precluded under Rule 403 as it would tend to confuse the jury "given that the defense in the earlier trial sought the admission of the testimony all while proclaiming that it was not in fact seeking the witness to opine on the meaning of federal law. Completeness under Rule 106 may also likely [have] been required, and the resulting mishmash of cross and re-direct testimony [by transcript, without the benefit of having the expert present before this jury for rebuttal], would likely [have] further confused the fact finder." (Gov't Response to Motion in Limine (Doc. 1199) at 2-3 n.1.)

The Court finds sufficient evidence to support the jury's verdicts in counts 28-30; there was no error in excluding the prior testimony from Eric Nordman that the letters were not financial documents, and instead the Court properly instructed the jury as to

the statutory definition for financial documents, pursuant to 18 U.S.C. § 1033(a).

6. Renzi's motion challenging conviction for racketeering: count 32[18]

A. No Misappropriation Where Premiums ***Not*** *Held in Trust*

Defendant challenges his conviction for devising a scheme and artifice to defraud "by misappropriating insurance premium funds held in trust by Renzi and Company" and diverting those funds to his own benefit because there can be no misappropriation where premiums are *not* held in trust, and the jury instruction constructively amended racketeering act 1 from an embezzlement scheme to a mail and wire fraud scheme. (Motion (Doc. 1236) at 1-10.)

As both parties recognize, these are not new arguments. Subsequent to the Ninth Circuit Court of Appeals reversal of the jury verdict against Co-defendant Lequire for embezzlement, the Government voluntarily dismissed the corresponding embezzlement counts against Defendant Renzi. Not satisfied, Defendant Renzi moved to dismiss the Renzi/Lequire conspiracy count, the insurance fraud counts, and predicate acts 1 and 3 of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c), count. Defendant argued "that all these counts were predicated on the embezzlement allegations and must be dismissed as a matter of law under *United States v. Lequire*, 672 F.3d 724 (9th Cir. 2012)." (Sealed Order (Doc. 1057) at 2.) The Court agreed and dismissed insurance fraud counts

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[18] Doc. 1236: Defendant Renzi's Motion for a Judgment of Acquittal or for a New Trial as to Count 32.

29-32 and the corresponding conspiracy count 28(2). *Id.* at 8. Only count 28(1) proceeded to trial, alleging Defendant, Beardall, and others, did knowingly and unlawfully conspire and agree to make false statements to insurance regulators. *Id.* The Court did not dismiss charges against Defendant Renzi that he and others knowingly and unlawfully conspired and agreed to devise a scheme and artifice to defraud and obtain money and property by means of false and fraudulent pretenses, representations and promises and used interstate wires and mailings: count 36(B) (Spirit Mountain), *id.* at 9-14, and the RICO charge, predicate act 1 (Renzi and Company), *id.* at 14-16.

The Defendant asked for, and the Court denied, reconsideration of its refusal to dismiss the wire and mail fraud counts. (Sealed Order (Doc. 1099.) At trial, Defendant Renzi was acquitted of the Spirit Mountain fraud scheme and found guilty on the RICO count, predicate act 1, Renzi and Company scheme to defraud.

For the reasons explained in the Order denying the Defendant's Motion to Dismiss (Doc. 1057) and the Order denying the Motion for Reconsideration (Doc. 1099), the Court denied a jury instruction proposed by Defendant Renzi "that would have required the jury to find, as alleged in Racketeering Act One, that Mr. Renzi 'devised . . . a scheme or plan to defraud by misappropriating insurance premium funds *held in trust* by Renzi and Company and diverting those funds to his own benefit and that of his congressional campaign.'" (Motion (Doc. 1236) at 3) (quoting Renzi Proposed Instr. 61 (Doc. 1124) (emphasis added). And, the Court also refused to define the term "misappropriation" as "'the fraudulent appropriation of property by a person to whom such

property has been *entrusted*, or into whose hands it has lawfully come.'" *Id.* For the reasons explained in the Order denying the Defendant's Motion to Dismiss (Doc. 1057) and the Order denying the Motion for Reconsideration (Doc. 1099) (emphasis added), the Court denies the Defendant's post-trial motion.

B. No Pattern of Racketeering

Defendant Renzi challenges the sufficiency of the evidence to establish a pattern of racketeering within the meaning of RICO. The Defendant argues there was no evidence of any relationship between racketeering act 1, the Renzi and Company wire fraud charges, and act 2, the public corruption charges. The two occurred almost two years apart and differed in almost every relevant manner, such as having: same or similar purposes, results, participants, victims, or methods of commission, or being otherwise interrelated by distinguishing characteristics and were not isolated events. (Motion (Doc. 1236) at 10 (citations omitted)).

The Court finds that the record, as accurately reflected by the Government, (Response (Doc. 1278) at 11-13), was sufficient to support the jury's finding of a pattern of racketeering. The evidence reflected that Defendant used his insurance business, first Renzi and Company and then Patriot Insurance, to further his political pursuits, including funding his campaign; funneling money received from Sandlin as a result of the extortion scheme through Patriot Insurance accounts to his own personal accounts; using some of the money from the extortion scheme to pay a debt owed by Patriot Insurance to Lighthouse Underwriters and to pay to amend his 2001 tax returns to correct them from their under-representation of

income resulting from the underlying misappropriation of Safeco premiums in 2001.

7. Renzi's motion asserting Speech or Debate Clause violations[19]

Defendant complains: 1) the Court protected a third party's Speech or Debate Clause privilege and, thereby, prevented him from presenting a complete defense in violation of his Fifth and Sixth Amendment rights, and 2) the Court allowed testimony in violation of his Speech or Debate Clause rights because it allowed references to the introduction of legislation and acts undertaken after the legislative process was underway. (Doc. 1245.)

A. References to Introduction or Potential Introduction of Legislation was Testimony Regarding Legislative Acts.

Renzi argues the Court violated the Speech or Debate Clause by admitting testimony regarding deliberations about whether to sponsor and introduce RCC land exchange legislation. Additionally, he asserts a blanket protection regarding all his negotiations with land exchange proponents subsequent to initiation of the legislative process, which is marked by bill submission to the House Office of Legislative Counsel for legislative drafting on March 4, 2005, for the RCC and on April 15, 2005, for PPFLI. The Court considered these arguments previously.

First, Defendant sought dismissal of the SSI based on assertions of Speech or Debate Clause violations, which the Court denied. This denial and the

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[19] Doc. 1245: Defendant Richard G. Renzi's Motion for a Judgment of Acquittal or for a New Trial for Violations of the Speech or Debate Clause.

Court's decision to consider questions of suppression at the time of trial were affirmed on appeal. (Motions to Dismiss (Docs. 86 and 264) Order (Doc. 573)), *aff'd United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011). Subsequently, the Defendant moved to suppress evidence based on broad assertions of privilege and law of the case arguments. The Court denied the Speech or Debate Clause motion without prejudice to further motion being made with sufficient specificity for the Court to make evidentiary rulings at the time of trial. (Motion to Suppress (Doc. 1048) Order (Doc. 1100).)

As for Renzi's blanket assertion that the Speech or Debate Clause was violated because the Court admitted evidence reflecting activities and acts taken by Renzi after he submitted bills for drafting to the House Office of Legislative Counsel, at trial, the Court was sensitive to the time frames being discussed by the witnesses. The Court considered each specific assertion of privilege at trial on a case by case basis. By and large the evidence reflected that land exchange packages are put together by members of the public, who for various reasons seek to obtain title to public lands; these constituents seek advice and assistance from members of Congress regarding private lands which the Government might be interested in acquiring so that there will be political support for the land swaps desired by these constituent groups in the event a land exchange proposal actually gets to Committee or Congress for consideration. The advice and support sought by the constituents and their lobbyists is a form of constituent services and is not protected by the Speech or Debate Clause. During this back and forth process between constituents and congressmen there are many options discussed regarding various pieces of

property, including possible political support and sponsorship options for the various land exchange packages. While the first step towards becoming an actual piece of legislation is drafting by the Office of Legislative Counsel, this by no means ensures any future actual legislative act.

For the reasons explained in these earlier rulings, the Court rejects Renzi's post-trial motion for a new trial based on assertions that the Speech or Debate Clause was violated by the evidentiary rulings of this Court. The Court finds no inconsistency between its earlier orders and its evidentiary rulings at the time of trial. Again, the Court rejects the Defendant's blanket assertion of privilege post-submission of the land exchange proposal to the House Office of Legislative Counsel.

Renzi argues that the Court admitted evidence of land exchange legislation by allowing the following evidence: 1) Hegner testified about the RCC's failed attempt to get Defendant Renzi to "change his mind" about sponsoring the bill and allow Congressman Kolbe to sponsor the bill, (TR May 14, 2013 (Doc.1255) at 15-16); 2) the Court denied Defendant's motion *in limine* to preclude evidence describing Defendant Renzi's decision to sponsor RCC's legislation (TR May 15, 2013 (Doc. 1256) at 4-6); 3) Keene testified regarding a conversation with Defendant Renzi about RCC pursuing Kolbe as a sponsor of its bill (TR May 17, 2013 (Doc.1258) at 52); and 4) the Court denied Defendant's motion *in limine* and allowed testimony referencing exhibits A9 and B9 (Motion *in Limine* (Doc.1041).

While the Defendant objects to the Court's rulings *in limine* to allow testimony about pre-legislative acts, constituent services and political

considerations, he fails to identify any specific objectionable testimony actually admitted at trial other than the Hegner testimony related to sponsorship. As noted by the Court when it ruled on the Defendant's motion *in limine*, he was anticipating that there might be objectionable evidence based on Hegner's grand jury testimony. (Motion (Doc. 1245) at 3 (citing TR May 15, 2013, (Doc. 1256) at 4-6). At trial, Hegner testified about bill sponsorship considerations on the part of the RCC in 2004. The Court affirms its finding at trial that this testimony did not reflect any protected legislative act or activities.

The Defendant also objects to the admission of testimony that he asserts reflected constituent negotiations related to draft legislation: 1) Hegner testified about efforts to obtain the Sandlin property, (TR May 15, 2013 at 23-33); 2) Hegner testified that Renzi would not support the bill without the Sandlin property, *id*. at 33-34; 3) Aries testified that Renzi stated that the head of the Natural Resource Committee, Congressman Pombo, would give him a "free pass" for one land exchange, (TR May 16, 2013 (Doc. 1257) at 9, 22-25); and 4) Keene testified about Renzi discussing a "placeholder," (TR May 17, 2013 (Doc. 1258) at 94).

This testimony reflects extortionate conduct, not privileged legislative acts. "When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act . . .." *United States v. Brewster*, 408 U.S. 501, 526 (1972). As alleged in the SSI, Defendant Renzi solicited a bribe by telling the RCC "No Sandlin property, no bill," (SSI at ¶¶ 19, 25(i)), and telling Aries that he would get a "free pass" through the Committee if he purchased the Sandlin property,

(SSI at ¶ 25(k)). For the reasons explained in its earlier rulings, extortionate acts and promises to take future legislative acts are not protected under the Speech or Debate Clause. *See* (Orders (Docs. 573 and 1100)).

Renzi complains that the Government elicited testimony about conversations he had with his legislative director concerning his support for draft legislation because Keene testified that Renzi was not very interested in the RCC land exchange, (TR May 17, 2013 (Doc. 1258) at 90), and Renzi suggested he should back-off from the Aries land exchange after corruption charges were brought against Randall "Duke" Cunningham, *id*. at 102-107. The Keene testimony was given on redirect, after Renzi elicited extensive testimony from her on cross examination about Renzi's legislative acts and introduced the actual draft legislation for the Aries land exchange. On cross examination, Renzi attempted to show that he continued to support the RCC land exchange even after Hegner refused to purchase the Sandlin property, and that his enthusiasm for the Aries land exchange cooled because of allegations made by the RCC. For purposes of trial, Renzi introduced evidence of his own legislative acts, but doing so opened the door to a challenge or response on redirect, especially if, as in this case, the legislative act evidence would create an inaccurate picture for the jury. *Renzi*, 651 F.3d at 1024 (relying on *United States v. Rostenkowski*, 59 F.3d 1291, 1303 (D.C. Cir. 1995); *see also United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999); *United States v. Beltran-Rios*, 878 F.2d 1208, 1212 (9th Cir. 1989); *United States v. Giese*, 597 F.2d 1170, 1190-91 (9th Cir. 1979); *United States v. Sturgis,* 578 F.2d 1296, 1300 (9th Cir. 1978). To the ex-

tent Keene's testimony reflected legislative acts, it was proper rebuttal to her cross examination.

B. Exclusion of Messner's Testimony Prevented Defendant Renzi from Presenting a Complete Defense.

While Renzi could waive his own privilege under the Speech or Debate Clause, he could not waive it for Congressman Kolbe. *United States v. Football League v. National Football League*, 842 F.2d 1335, 1374-75 (2nd Cir. 1988). At trial, Congressman Kolbe and Kevin Messner, who worked for Congressman Kolbe both before and after working for Renzi, asserted their testimonial privilege. Renzi argues that the Court's improper protection of a third party's Speech or Debate Clause privilege prevented him from presenting a complete defense in violation of his Fifth and Sixth Amendment rights. Renzi complains he was precluded from presenting testimony regarding Renzi's history of working with other members of the Arizona delegation as far back as 1993 to save Fort Huachuca by decreasing water use on the San Pedro River; Messner believed that there was nothing wrong with Defendant Renzi helping to convince Sandlin to sell the property, and Congressman Kolbe acted similarly with other owners of the Babocamari land; and Mr. Messner would have testified about working with Renzi's legislative director, Keene, on the Aries bill after he left Renzi's staff and returned to work for Congressman Kolbe. (Motion (Doc. 1245) at 6-8.)

The Court precluded the Messner testimony based on the third-party assertions of privilege. Furthermore, it was cumulative and of limited relevance. The parties stipulated that Fort Huachuca served the national interest and that the inclusion of

the Sandlin property in a land exchange would benefit the public interest. (Doc. 1214: Stipulation); *see also* (Response at 13-15 (citing to transcripts of record reflecting substantial testimony on the subject of Fort Huachuca and the value of the Sandlin property)). Even Messner's opinion about the value and/or propriety of the legislation or legislative activity, if relevant, would have been cumulative. Given the limited relevance of this cumulative evidence, the Court finds that the exclusion of this evidence did not affect Renzi's ability to present a complete defense.

Conclusion

The Court finds that this is not an exceptional case under Rule 33 in which evidence predominates heavily against the verdict. *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981). The facts the Defendants rely on as casting doubt on their guilt were identified, presented to the jury as reasonable doubt, considered, and rejected by the jury when it found Defendants guilty. The Defendants' attorneys zealously cross examined each witness, especially Hegner, Keene, and Aries, and there was an abundance of evidence presented in respect to the public's interest, including national security interests, in the Sandlin property being included in a land exchange package. As for Defendants' assertions of insufficient evidence under Rule 29, the Court reviews the trial evidence in the light most favorable to the Government. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and denies the Rule 29 motion.

Accordingly,

IT IS ORDERED that Sandlin's "Motion for Leave to Adopt Defendant Renzi's Motion[s] for

Judgment of Acquittal or for New Trial"(Doc. 1248) is GRANTED.

IT IS ORDERED that the "Motion for Judgment of Acquittal or for New Trial as to Counts 1-5, 9-12, 14, 15, 26, 27, and 32 (Doc. 1238); Motion for Judgment of Acquittal or for New Trial as to Counts 1-5, 9-12, 14, 15, 26, 27, and 32 (Doc. 1243); Motion for Leave to Adopt Defendant Renzi's Motion for Judgment of Acquittal or for New Trial as to the Money Laundering counts (Doc. 1237); Motion for Judgment of Acquittal and for a New Trial (Doc. 1235); Motion for a Judgment of Acquittal or for a New Trial as to Counts 28-30 (Doc. 1239); Motion for a Judgment of Acquittal and for a New Trial as to Count 32 (Doc. 1236) and Motion for a New Trial for Violations of the Speech or Debate Clause (Doc. 1245)" are DENIED.

DATED this 25th day of October, 2013.

/s/
David C. Bury
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Richard G. Renzi, James W. Sandlin, Andrew Beardall, Dwayne Lequire,

Defendant,

CR 08-212 TUC DCB (BPV)

February 17, 2010

ORDER

This matter having been referred to Magistrate Judge Bernardo P. Velasco, he issued a Report and Recommendation (R&R) on June 16, 2009, pursuant to 28 U.S.C. § 636(b)(1)(A). (R&R: doc. 387). Magistrate Judge Velasco recommends that the Court deny Defendant Renzi's motions[1] to dismiss the Indictment[2] for Speech or Debate Clause violations.

Defendant Renzi made two arguments for dismissal of the Indictment, as follows: 1) The Government's charges against Renzi are based on legislative acts, and the Government must necessarily introduce

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[1] Pending motions are: Motion to Dismiss the Indictment (doc. 86), Motion to Dismiss the Superseding Indictment for violations in the grand jury (doc. 264), and Motion to Dismiss the Superseding Indictment for violations in the grand jury (doc. 327). Defendant Sandlin filed a Motion to Join in Renzi's Motion to Dismiss the Superseding Indictment (doc. 327), but failed to file a supporting memorandum and has not entered any objection to the R&R.

[2] Now, the Second Superseding Indictment.

evidence of legislative acts to prove its case at trial, and 2) Speech or Debate Clause violations were made before the Grand Jury.

Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1) provides that the district court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1). If the parties object to a R&R, "[a] judge of the [district] court shall make a *de novo* determination of those portions of the [R&R] to which objection is made." 28 U.S.C. § 636(b)(1); *see Thomas v. Arn,* 474 U.S. 140, 149-50 (1985). When no objections are made, the district court need not review the R&R *de novo*. *Wang v. Masaitis,* 416 F.3d 992, 1000 n. 13 (9th Cir. 2005); *United States v. Reyna-Tapia,* 328 F.3d 1114, 1121-22 (9th Cir. 2003) (en banc).

After a full and independent review of the record and the Defendant's objections, the Magistrate Judge's R&R is accepted and adopted as the findings of fact and conclusions of law of this Court.[3] The Defendant's motions to dismiss the Indictment are denied. The Court rejects Defendant's objections, which are as follows.

Defendant Renzi charges that Magistrate Judge Velasco "creat[ed] a novel Speech or Debate Clause test, which conflicts with controlling Ninth Circuit precedent. He argues the Magistrate Judge erred in finding his dealings with land exchange proponents

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[3] Unless different from the Magistrate Judge's findings of fact, the Court relies on the citation of the record contained in the R & R. The Court equally relies on the law as properly stated by the Magistrate Judge.

were not legislative fact-finding, protected by the Speech or Debate Clause. He further argues that Judge Velasco erred as follows: he wrongly concluded that charges Congressman Renzi acted illegally or with criminal intent did not strip him of his Speech or Debate protections; he erred in finding the Speech or Debate Clause was not violated by allegations that Congressman Renzi's motive to ask land proponents to include the Sandlin property in their land exchange legislation was to enrich Sandlin and benefit himself, and he erred in holding that Speech or Debate material before the Grand Jury did not violate the Speech or Debate Clause because the Indictment did not rely or depend on it.

The Court rejects Defendant Renzi's notion that Judge Velasco created a "novel" Speech or Debate Clause test. Judge Velasco provided a detailed and thorough assessment of the history and construction of the Speech or Debate Clause privilege, which this Court relies on and finds no need to repeat here. It is undisputed the express language of the Speech or Debate Clause protects "any Speech or Debate in either House." (R&R at 6 (citing U.S. Const. Art. I, § 6, cl. 1.)). It is undisputed that the challenged allegations did not involve speech or debate in either House. The question before Judge Velasco and this Court is the breadth of protection afforded by the Speech or Debate Clause to acts that are not taken in either House. Within this context, Magistrate Judge Velasco relied on the same law relied on by Defendant Renzi, *United States v. Gravel*, 408 U.S. 606 (1972).

"[I]n addressing the scope of the Clause, the Court in *Gravel* explained [within the context of] '[m]embers of Congress [being] constantly in touch

with the Executive Branch of the Government and with administrative agencies - - they may cajole, and exhort with respect to the administration of a federal statute - - but such conduct, though generally done, is not *protected* legislative activity.'" (R&R at 10 (citing *Gravel*, 408 U.S. at 625)) (emphasis added).

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond *pure* speech or debate in either House, but 'only when necessary to prevent indirect impairment of such deliberation.

Id. (emphasis added). Neither does the Clause provide a privilege to "'violate an otherwise valid criminal law in preparing for or implementing legislative acts.'" *Id.*

Judge Velasco used the two-part test formulated in *Miller v. Transamerican Press*, 709 F.2d 524, 529 (9th Cir. 1983), for assessing whether activity other than that made in either House, i.e., "pure" speech or debate, qualifies for the privilege. (R&R at 12.) "First, it must be 'an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings.'" *Id.* "Second, 'the activity must address proposed legisla-

tion or some other subject within Congress' constitutional jurisdiction.'" *Id.*

There is no novelty in the law nor the test applied by Magistrate Judge Velasco to assess whether or not the Speech or Debate Clause privilege applies to Defendant Renzi's negotiations with land exchange proponents, which even if characterized as investigative fact-finding, were admittedly not done in either House or before any Congressional committee, and not done pursuant to any directive from Congress or a congressional committee. Judge Velasco described the former as "pure speech" and the latter as "formal" investigations. Defendant Renzi takes exception to both adjectives, but Judge Velasco necessarily used these terms to describe what is not at issue in this case.

With that said, the Court turns its attention to what is at issue in this case: whether Renzi's alleged legislative acts are the type protected by the Speech or Debate Clause. Like Magistrate Judge Velasco, the Court applies the two part test suggested in *Miller*: 1) were the land exchange negotiations an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings, and 2) did the negotiations address proposed legislation or some other subject within Congress' jurisdiction? This case involves congressional jurisdiction over land exchange legislation. Accordingly the Court looks to legislative acts that are taken within the context of Congress' jurisdiction to act on proposed legislation, involving the deliberative and communicative process by which Members participate in committee and House proceedings.

The Court has carefully considered Renzi's argument that in the land exchange context, "'directing a private land holder to include property in an exchange in return for a congressman's support for the legislation is a routine, manifestly legislative act akin to negotiating an amendment to draft legislation.'" (R&R at 19 (citing Motion to Dismiss Indictment (doc. 86) at 36)).

Here, Defendant Renzi asserts that every communication he had regarding the land exchange proposals qualifies for protection under the Speech or Debate Clause because they were all investigatory fact-finding legislative acts. In this case, private citizens contacted Defendant Renzi with land exchange proposals that were necessary components to their private ventures. "A federal public land exchange is a real estate transaction in which a property owner exchanges its privately owned land for federal public land. Before an exchange occurs, the federal parcel and the non-federal land must be appraised to ensure that they are of equal value, the exchange must comply with the national Environmental Protection Act, and must serve the public interest." (R&R at 3.) Alternatively, private land owners may pursue a legislated land exchange, which is not subject to these three requirements, and they are therefore less cumbersome than administrative exchanges. *Id.* at n. 3 (citing *Amicus Curiae* of Bipartisan . . . of the U.S. House of Representatives (doc. 198) at 10)).

Even if the land exchange negotiations are described as fact-finding investigative acts generally performed by Congressmen in their official capacities, this "does not necessarily make all such acts legislative in nature" for purposes of applying the Speech or Debate Clause. (R&R at 27 (citing Gravel,

408 U.S. at 625)). The Magistrate Judge correctly drew the line. The Speech or Debate Clause does not protect negotiations between Renzi and the private citizens proposing the land exchange deals that were not an integral part of any deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed land exchange legislation. Conversely, after the introduction of the land exchange legislation, negotiations with land exchange proponents, investigations and fact finding conducted for the purposes of preparing for hearings or amending the legislation or preparing speeches, or preparing to vote, etc., will clearly be protected. (R&R at 22.) Like the Magistrate Judge, this Court wants to make clear that it does not find that "the Speech or Debate Clause does not apply until legislation is introduced in Congress." *Id.*

It does not matter how the communications are characterized, whether formal or informal legislative investigation and fact-finding, the Speech or Debate Clause applies only to communications between Congressmen and land exchange proponents if they can be said to be *an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings addressing the land exchange legislation at issue here.*

I. Renzi moves to dismiss the Indictment because it contains three types of allegations that violate the Speech or Debate Clause: 1) what Renzi said to proponents of land exchange legislation; 2) references to and descriptions of meetings he had with land exchange proponents, and 3) quotes from his correspondence referring to land exchange legislation.

Like the Magistrate Judge, this Court limits its review to only the issue of whether or not the government based the charges in the Indictment on Congressman Renzi's protected legislative acts and whether the government must necessarily introduce evidence of protected legislative acts to prove its case at trial. Specifically, in the context of this discussion, the phrase "legislative acts" is used to describe *only legislative acts protected by the Speech or Debate Clause*. The Court finds that the Government may establish its allegations with proof involving promises by Renzi to support and vote for the proposed land swap legislation. The Court also finds that the Government may establish the allegations in the Indictment, including those of improper motive, with proof of promises to solicit other votes for the respective land swap proposals in return for the purchase of the Sandlin property. Such promises are promises to perform future legislative acts, and as such are not protected. (R&R at 18, 27 (citing *United States v. Helstoski*, 442 U.S. 477, 489, 490 (1979)) (explaining "[l]ikewise, a promise to introduce [and/or sponsor] a bill is not a legislative act."); *United States v. Brewster*, 408 U.S. 501, 526, 27 (distinguishing prosecution of a Member of Congress under a criminal statue as long as the case does not rely on legislative acts or the motivation for legislative acts); *United States v.*

Myers, 635 F.2d 932, 941-42 (2nd Cir. 1980 (finding "[s]ince the indictment alleges a promise to perform a legislative act and not the performance of the act, there is no reason to assume that at trial the Government will be unable to abide by the constitutional restriction upon its evidence."); *see also United States v. McDade*, 28 F.3d 283, 293 (3rd 1994) (Alito, J. (explaining "the Clause prohibits only proof that a member actually performed a legislative act" in the past)).

"'In no case has [the Supreme] Court ever treated the Clause as protecting all conduct relating to the legislative process.'" (R&R at 15 (citing *Brewster*, 408 U.S. at 515-16)). This is what the Defendant urges this Court to do, and which this Court cannot do in light of clear Supreme Court precedent to the contrary. Nor, may this Court apply the privilege to conduct that violates an otherwise valid criminal law in preparing for or implementing protected legislative acts. *Id.* at 9 (citing *Brewster*, 408 U.S. at 526-27)).

In the District of Columbia Circuit's recent decision *In re Grand Jury Subpoenas*, 571 F.3d 1200 (D.C. Cir. 2009), a member of Congress objected to the government's subpoena of his responses to a House Ethics Committee investigation into whether he was engaged in legislative fact-finding during a privately funded overseas trip. The court rejected the government's argument that the responses were not protected because the investigation involved the member's personal financial transactions and private conduct as opposed to the business of the House. The court found the investigation before the Ethics Committee was whether the member abused his official powers, specifically, his power to conduct legislative fact-finding. Consequently, the member's re-

sponses before the Congressional Ethics Committee were covered by the Speech or Debate Clause. Defendant Renzi argues that this Court should follow the D.C. Circuit in recognizing legislative fact-finding as protected by the Speech or Debate Clause.

This Court, however, does not find Renzi's position supported by *In re Grand Jury Subpoenas*. Instead, the D.C. Circuit distinguished between investigations before the Ethics Committee into private conduct such as a failure to make financial disclosures and investigations into the exercise of official powers. The D.C. Circuit found that even in the setting of a formal investigation by a Senate committee, the former is not protected, *see United States v. Rose*, 28 F.3d 181 (1994), but the latter is protected, *see Ray v. Proxmire*, 581 F.2d 998 (1978). The concurring opinion in *In re Grand Jury Subpoenas*, criticized the majority decision because under *Gravel*, "[a] Member's statement to a congressional ethics committee is speech in an official congressional proceeding and thus falls within the protection of the Clause." *Id.* at 1204, Kavanaugh (concurring, but for different reasons). Even in this most protected forum, the majority would withhold the privilege, where the inquiry involved only the private conduct of the congressman. *In re Grand Jury Subpoenas* does not help Defendant Renzi. As argued by the dissent, "the *Rose/Ray* test does not accord with the text of the Speech or Debate Clause and Supreme Court precedents." *Id.* Arguably, *In re Grand Jury Subpoenas* suggests an erosion of the privilege.

This Court has no intention in straying from Supreme Court precedent in respect to the Speech or Debate Clause, which has closely tracked the delicate balance struck by the Clause. The purpose of the

Clause is "to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process." (R&R at 6-7 (citing *Brewster*, 408 U.S. at 525)).

Unlike many of our constitutional privileges which safeguard our individual rights and personal liberties, the "'Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion.'" (R&R at 6 (citing *Helstoski*, 442 U.S. at 490). The Clause provides a delicate balance to preserve an independent legislature, free from possible prosecution by an unfriendly executive and conviction by a hostile judiciary, without creating a super-citizen, immune from criminal liability and free to take bribes and act criminally with impunity. Tipping the scale either way will undermine legislative integrity and defeat the right of the public to honest representation. *Id.* (citing *Brewster*, 408 U.S. at 508). So while the legislative privilege must be read broadly to effectuate its purpose, it must not be read so as to strip the executive branch of its power to investigate and prosecute the judiciary for taking bribes or conducting other criminal affairs. *Id.* at 7 (citing *United States v. Johnson*, 383 U.S. 169, 180 (1966); *Brewster*, 408 U.S. at 525)). Defendant Renzi's proposed definition of a legislative act protected by the Speech or Debate Clause does precisely what *Brewster* prohibits and ignores the Supreme Court precedent for application of the Clause.

In keeping with Supreme Court precedent, this Court finds that unless fact-finding occurs in the House or congressional committee, it must be an integral part of the deliberative and communicative process by which Members participate in committee

and House proceedings addressing legislation put before it or some other similar subject. The Court agrees with Magistrate Judge Velasco, Defendant Renzi cannot make this showing for the three types of allegations in the Indictment that he charges violate the Speech or Debate Clause: 1) what he said to land proponents; 2) references to and descriptions of meetings he had with land exchange proponents, and 3) quotes from his correspondence referring to land exchange legislation proposed by these proponents.

In summary, it is not enough that a private constituent comes to a member of congress with proposed legislation or to discuss proposed legislation, or to ask the congressman or woman for support of certain legislation. This would sweep *Brewster* and other Supreme Court precedent away, and there would be no need to distinguish between a promise of a future legislative act and a legislative act. Only the latter being privileged under the Speech or Debate Clause. If Supreme Court precedent means anything, it must mean that legislative acts protected by the Speech or Debate Clause occur subsequent to such meetings and discussions. The privilege arises when in fact the congressman acts to promote, support and pass the land exchange legislation in either House or undertakes an act that is an integral part of such an endeavor. Furthermore, there is a distinction between a legislative act and a criminal act or an act taken solely for personal aggrandizement. Only the former is privileged, not the latter. The motive behind a legislative act is also privileged, but evidence of motive, strategy, and purpose of conduct not protected by the Speech or Debate Clause is not privileged. If evidence requires an inference of a protected legislative act, it is privileged. If an inference may be drawn that will not violate the Speech or Debate

Clause, evidence is not privileged for this permissible purpose, but is otherwise privileged. These were the conclusions of law recommended by Magistrate Judge Velasco,[4] which this Court affirms and applies to these motions and all the Speech or Debate Clause motions presented by Defendant Renzi. *See i.e.,* (R&R on Motion to Suppress Wiretap and Warrant and Evidence (doc. 458) and this Court's corresponding Order.)

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[4] Defendant misconstrues the R&R when he argues that all his acts in respect to the land exchange proposals were privileged legislative acts under the Speech or Debate Clause because eventually a "'foundational' legislative act occurred because the land exchange legislation was introduced in Congress. (Renzi's Objection to R&R at 20-21.) The act of introducing the legislation and subsequent conduct related to its passage is clearly privileged, but the conduct Renzi seeks to protect under the Speech or Debate Clause qualifies only if it can be said to have been an "integral part of the deliberative and communicative process by which Members participate in committee and House proceedings addressing proposed land exchange legislation." *Supra* at 4-5. This definition of a legislative act does not reach activities such as political wrangling over which congressional member should sponsor the land exchange legislation, Renzi's insistence that land exchange proponents offer to build a detox center as part of their project, or that they obtain a letter of commendation to him from the Nature Conservatory. These activities were aimed at getting political milage out of the legislation and were not an integral part of the deliberative and communicative process by which Members participate in committee or House proceedings to pass land exchange legislation.

II. Renzi asked the Court to look behind the face of the Indictment and find that what transpired before the Grand Jury violated his constitutional rights under the Speech or Debate Clause.

The Magistrate Judge applied the following test: 1) did the Government present evidence to the Grand Jury in violation of the Speech or Debate Clause; 2) if yes, was this evidence an essential element of proof with respect to the affected counts, which here are limited to the land exchange/extortion counts (counts 1-27, 42), and 3) if yes, can the allegations and/or counts be excised, if not the SSI must be dismissed. (R&R at 28 (citing *United States v. Swindall*, 971 F.2d 1531, 1549 (11th Cir. 1992)).

Swindall offers directives for assessing Speech or Debate Clause violations before a grand jury, as follows: "A member's Speech or Debate privilege is violated if the Speech or Debate material exposes the member to liability, but a member is not necessarily exposed to liability just because the grand jury considers improper Speech or Debate material. 'A member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts.' *Brewster,* 408 U.S. at 512, 92 S.Ct. at 2537. If reference to a legislative act is irrelevant to the decision to indict, the improper reference has not subjected the member to criminal liability." *Id.* at 1548. "In the absence of liability, the grand jury's consideration of improper evidence is not a Speech or Debate violation at all." *Id.* n. 21. The case can proceed to trial with the improper references expunged." *Id.* at 1548.

The court distinguished the *Swindall* case from other cases involving improper inquiries into legislative activities, where the Supreme Court provided only the remedy of a new trial, and did not dismiss the indictment. "In *Johnson,* Speech or Debate material was improperly presented to the grand jury, and the Court ordered a new trial, reasoning that 'the Government should not be precluded from a new trial on [a] count ... wholly purged of elements offensive to the Speech or Debate Clause.'" *Id.* (citing *Johnson,* 383 U.S. at 185)). The Court determined that the government's conspiracy case could be proved without evidence of a speech the member made on the floor of the House, therefore, the evidence of the speech was not essential to the indictment and thus did not subject the member to liability at the grand jury stage. *Id.* "Similarly, in *Brewster,* the Supreme Court held that an indictment referring to legislative acts could stand because '[t]o make a prima facie case under this indictment, the Government need not show any act of [Brewster] subsequent to the corrupt promise for payment,' and a conviction could be sustained without 'inquir[y] into the [legislative] act or its motivation.'" *Id.* (citing *Brewster,* 408 U.S. at 526-27). "Likewise, in *United States v. Myers,* 635 F.2d 932, 941 (2d Cir.), . . . (1980), an indictment was allowed to stand because it charged an illegal promise to perform a legislative act, and there was no reason to assume that at trial the government would have to introduce evidence of the actual performance of the act." *Id.* at 1548 n. 22.

In comparison, the Third Circuit, in *United States v. Helstoski (Helstoski II),* 635 F.2d 200 (3rd Cir. 1980), dismissed an indictment because the improper use of Speech or Debate material was so widespread, it was determined to be inseparable

from the indictment. "In other words, it exposed the member to criminal liability." *Id.* at 1549. As explained by the court in *Helstoski II*, it was implicit in the Supreme Court's holdings in *Brewster* and *Johnson "that the cases could be tried without reference to protected matters was the conclusion that the grand juries' considerations of the privileged material were not fatal to the indictments.*" *Id.* at 1548 (citing *Helstoski II*, 635 F.2d at 205) (emphasis in original). But in *Helstoski II,* the *infection could not be excised,* and the indictment was dismissed.

The same remedy applied in *Swindall* because "[t]he government itself argued that it could not have proved Swindall's *knowledge of criminality* without showing the grand jury that he was on the committees that considered the money-laundering statutes." *Id.* at 1549 (emphasis added).

Because this Court, like Magistrate Judge Velasco, rejects Renzi's blanket assertion that any and all his negotiations, discussions, and correspondence with land exchange proponents to develop and investigate their land exchange proposals are privileged under the Speech or Debate Clause, this Court also rejects Renzi's contention that the "sheer volume" of Speech or Debate Clause violations before the Grand Jury require dismissal of the SSI. Likewise, the Court rejects Renzi's argument that the Grand Jury was improperly instructed. It was told to "not consider in its deliberations any communications solely between Renzi and his legislative staff that pertained to official legislative business, nor to consider any 'legislative acts' in its deliberations. The Grand Jury was expressly told that the focus of its deliberations should be on statements and communications made to and involving the Aries Group and Resolution

Copper, as well as financial transactions involving Sandlin and Renzi. The Grand Jury was warned not to consider the introduction of legislation or failure to introduce legislation." (R&R at 36.) This corresponds to this Court's understanding of the Clause.

Magistrate Judge Velasco considered specific excerpts of grand jury testimony, which Defendant Renzi argues violated his rights under the Speech or Debate Clause. The testimony involved conversations and negotiations between Defendant Renzi and Bruno Hegner, a RCC executive, and Tom Glass, a consultant with Western Land Group. The conversations pertained to their land exchange proposal and changes that could be made to garner Renzi's support. The testimony reflects conversations related to promised future legislative acts.

Renzi also objects to Magistrate Judge Velasco's conclusion that only 9 exhibits (13, 15, 16, 37, 43-45, and 60) were protected by the Speech or Debate Clause. Renzi raises no specific objections to the specific findings made by Magistrate Judge Velasco, but generally objects that both the grand jury testimony and grand jury exhibits included "detailed descriptions of Congressman Renzi's negotiation, development and investigation of legislative land exchanges, the drafting and introduction of the legislation, and Congressman Renzi's motivation for performing these legislative acts." He reasserts that all the material is protected by the Speech or Debate Clause." (Renzi Objection at 29.)

Because Defendant Renzi has not objected with specificity regarding Judge Velasco's rulings as to expungement in respect to specific challenged testimony and exhibits, this Court does not address the Magistrate Judge's rulings with such specificity. In-

stead, the Court reviewed the Magistrate Judge's rulings and approves of his approach and findings, and offers the following examples to explain the correctness of the R&R.

Defendant Renzi categorized his allegations of privileged exhibits similar to his challenge to the grand jury testimony into three types, as follows: 1) documents alleged to reference, describe and directly involve the development of legislation; 2) documents alleged to discuss meetings about legislation, and 3) documents alleged to involve the introduction of legislation. Specifically, Defendant challenged 19 documents: GJ Exs. 7, 10, 13, 15-17, 28-29, 36-39, 41, 43, 48-49, 58, 91, and 95.

The Government avers that document 7 was removed from the SSI grand jury proceeding and document 95 was included in the material but no testimony was given related to it.

As an example, the Court considers Renzi's claim that the Speech or Debate Clause was violated by the admission before the Grand Jury of documents that referenced, described and directly involved the development of legislation. Renzi challenged 18 documents. The Magistrate Judge found that six should be stricken, as follows: 1) Exhibit 13 (Keene informed Aries that she had sent a bill to staff for Senators McCain and Kyle and received positive feedback and Aries responded he would be comforted to know Renzi was dropping companion legislation); 2) Exhibit 15 (email between Keene and Aries regarding change in legislation, and request from Renzi for a letter from the Nature Conservancy recognizing his work on the San Pedro); 3) Exhibit 16 (Keene and Aries discuss submission to legislative counsel, and Aries' inquiry regarding whether the bill will be intro-

duced that week and Renzi's insistence that he have a letter from the Nature Conservancy); 4) Exhibit 29 (memo from Hegner explaining how political maneuvering was delaying introduction of land exchange legislation); 5) Exhibit 37 (minutes from RCC meeting that land exchange bill was sent to Senate), and 6) Exhibit 43 (Hegner memo explaining he hoped to have bill introduced that day, but Renzi was dragging his feet).

The documents Judge Velasco did not strike were related to information about Sandlin and the Sandlin property and efforts taken by Defendant Renzi to get political milage from any land exchange legislation passed by Congress. *See e.i.,* R&R at 30-32 (discussing admissibility of Exhibit 10 (Aries informs Keene that he has funds available for purchase of Sandlin property); Exhibit 17 (email between Aries and Keene discussing Sandlin's gossiping); Exhibit 38 (email from Keene to Hegner, with AP article attached per Renzi's request showing an environment group planning to sue the military and US Fish and Wildlife over threatened San Pedro River); Exhibit 28 (email from Metzger to Hegner with Sandlin's phone per Renzi); Exhibit 36 (email between Hegner and Englehorn discussing appraisal of Sandlin property); Exhibit 58 (memo from Hegner to Western Land Group regarding range of options related to Renzi's interest in securing a conservation easement on Sandlin property); Exhibit 95 (email from Glass to Western Land Group that Renzi would like RCC to send a letter to San Carlos Tribe offering to convert their hospital to a detox center and in return Renzi would request a hearing); Exhibit 39 (correspondence from Sandlin to Hegner that he had received call from Renzi saying Hegner had impression Sandlin was not cooperating on the water issue); Exhibit 41

(Hegner's note to self commemorating discussions with Renzi in April 2005, where Renzi said "no Sandlin property, no bill.); Exhibit 48 (notes by Glass during meetings with Renzi referencing Sandlin's property); Exhibit 49 (same); Exhibit 91 (notes from a meeting reflecting a detailed discussion of the Sandlin property)).

Again the Court finds that Magistrate Judge Velasco drew the line appropriately between activities that were an integral part of the deliberative and communicative process by which Members of the House participated in proceedings with respect to the consideration and passage or rejection of the land exchange legislation. In addition to the six documents above, which Judge Velasco found referenced, described and directly involved the development of legislation, he found three more documents were Speech or Debate Clause material (45, 44, and 60), as follows: Exhibit 45 (email from Hegner stating the Act was introduced in the House and Senate, noting the primary sponsors as Kyl and Renzi); Exhibit 60 (email from Glass to Penry with Western Land Group regarding Renzi acting to delay Bill's introduction), and Exhibit 44 (informing Rickus that Bill introduction will take place on Thursday).

Without some specific objection made by Defendant Renzi in respect to the specific findings of expungement made by Judge Velasco, it appears to this Court that he drew the line precisely where it should have been drawn in respect to the Speech or Debate Clause privilege. This Court affirms the Magistrate Judge's conclusion that the grand jury testimony did not violate the Speech or Debate Clause and that even if the few offending overt references to legislative acts in the exhibits are stricken, it does

not result in any insufficiency of the Indictment. (R&R at 35.) The case shall proceed to trial with these allegations expunged.

The Court denies Defendant Renzi's motions to dismiss the Indictment because it is not based on acts that must necessarily be proven by the introduction of evidence of legislative acts of the type protected by the Speech or Debate Clause.

IT IS ORDERED that after a full and independent, *de novo*, review of the record related to the objections from Defendant Renzi, the Magistrate Judge's R&R (doc. 387) is accepted and adopted as the findings of fact and conclusions of law of this Court.

IT IS FURTHER ORDERED that Defendant's motion to dismiss the Indictment because the Government based the charges in the Indictment on Renzi's legislative acts and must necessarily introduce evidence of legislative acts to prove its case at trial (doc. 86) is DENIED.

IT IS FURTHER ORDERED that Defendant's motions to dismiss the Indictment for Speech or Debate Clause violations in the grand jury proceeding (doc. 264, 327) is DENIED.

IT IS FURTHER ORDERED that this matter remains referred to Magistrate Judge Bernardo P. Velasco for all pretrial proceedings and Report and Recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) and LR Civ. 72.1(a), Rules of Practice for the United States District Court, District of Arizona (Local Rules).

IT IS FURTHER ORDERED denying Renzi's Request for Oral Argument.

IT IS FURTHER ORDERED denying Defendant Sandlin's Motion to Join in Renzi's motions to dismiss (doc. 328).

DATED this 17th day of February, 2010.

/s/ David C. Bury
David C. Bury
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD G. RENZI,

Defendant - Appellant.

No. 13-10588

D.C. No. 4:08-cr-00212-DCB-BPV-1

District of Arizona,

Tucson

ORDER

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES W. SANDLIN,

Defendant - Appellant.

No. 13-10597

D.C. No. 4:08-cr-00212-DCB-BPV-2

District of Arizona,

Tucson

ORDER

Filed December 1, 2014

Before: TALLMAN, CALLAHAN, and IKUTA, Circuit Judges.

The panel has voted to deny Appellants' petitions for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested

a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing en banc are DENIED.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD G. RENZI,

Defendant - Appellant.

Nos. 10-10088
10-10122

D.C. No. 4:08-cr-00212-DCB-BPV-1

District of Arizona,
Tucson

ORDER

Filed August 1, 2011

Before: TALLMAN and CALLAHAN, Circuit Judges, and CONLON, Senior District Judge.*

Judges Tallman and Callahan have voted to deny the petition for rehearing en banc, and Judge Conlon so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

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* The Honorable Suzanne B. Conlon, Senior District Judge for the U.S. District Court for Northern Illinois, Chicago, sitting by designation.