

No. 13-10588

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD G. RENZI,

Appellant.

**On Appeal from a Final Judgment of the United States
District Court for the District of Arizona**

**BRIEF OF THE BIPARTISAN LEGAL ADVISORY GROUP OF
THE U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE***

Kerry W. Kircher, General Counsel
William Pittard, Deputy General Counsel
Todd B. Tatelman, Assistant Counsel
Mary Beth Walker, Assistant Counsel
Eleni M. Roumel, Assistant Counsel
Isaac B. Rosenberg, Assistant Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
202/225-9700

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

April 15, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION.....	2
LAND EXCHANGE LEGISLATION	3
FACTUAL BACKGROUND	5
I. Trial Evidence Regarding Land Exchange Bills.....	5
A. Testimony of Frank Hegner and Philip Aries.	6
B. Testimony of Joanne Keene.	7
C. Testimony and Proposed Testimony of Kevin Messner.....	10
II. New Trial Motion.	10
III. First Bail Motion.....	12
IV. Second Bail Motion.	13
ARGUMENT	15
I. Constitutional Overview – The Speech or Debate Clause Safeguards Legislative Branch Independence.....	15
A. History and Purpose of the Clause.	16
B. Scope of the Clause.	18
C. Protections of the Clause.....	21
II. Admission of the Challenged Keene Testimony Violated the Speech or Debate Clause	23
A. The Challenged Keene Testimony Concerned Legislative Matters.....	23

B.	None of the District Court or DOJ Rationales Justify Admission of the Challenged Keene Testimony.....	26
1.	Intent/Motive/State of Mind	26
2.	Illegal Act/Corrupt Conduct	27
3.	Pre-Legislative Investigations/Promises of Future Legislative Acts	30
4.	Waiver.....	31
III.	The District Court Properly Declined to Balance Kolbe’s Speech or Debate Rights Against Renzi’s Right to Present a Defense.....	35
	CONCLUSION	38
	CERTIFICATE OF COMPLIANCE	
	CERTIFICATE OF SERVICE	
	ADDENDUM	

TABLE OF AUTHORITIES

Cases

<i>Baraka v. McGreevey</i> , 481 F.3d 187 (3d Cir. 2007)	20, 25
<i>Brown & Williamson Tobacco Corp. v. Williams</i> , 62 F.3d 408 (D.C. Cir. 1995).....	34, 37
<i>Doe v. McMillan</i> , 412 U.S. 306 (1973).....	18, 19, 21, 28, 30
<i>Eastland v. U.S. Servicemen’s Fund</i> , 421 U.S. 491 (1975).....	2, 17, 18, 19, 22, 31, 36
<i>Gov’t of the Virgin Islands v. Lee</i> , 775 F.2d 514 (3d Cir. 1985)	19
<i>Gravel v. U.S.</i> , 408 U.S. 606 (1972).....	17, 18, 19, 20, 21, 22, 24, 28, 30
<i>Helstoski v. Meanor</i> , 442 U.S. 500 (1979).....	18
<i>Hill v. Colorado</i> , 530 U.S. 703 (2000).....	23
<i>Hutchinson v. Proxmire</i> , 443 U.S. 111 (1979).....	21
<i>In re Winship</i> , 397 U.S. 358 (1970).....	23
<i>Jewish War Veterans of the U.S. of Am., Inc. v. Gates</i> , 506 F. Supp. 2d 30 (D.D.C. 2007).....	20, 26
<i>Johnson v. Louisiana</i> , 406 U.S. 380 (1972).....	23
<i>Kleppe v. New Mexico</i> , 426 U.S. 529 (1976).....	3

Marbury v. Madison,
 5 U.S. (1 Cranch) 137 (1803)15

McGrain v. Daugherty,
 273 U.S. 135 (1927).....19, 31

McSurely v. McClellan,
 553 F.2d 1277 (D.C. Cir. 1976).....19

Miller v. Transam. Press, Inc.,
 709 F.2d 524 (9th Cir. 1983)19, 20, 22, 27, 31

MINPECO, S.A. v. Conticommodity Servs., Inc.,
 844 F.2d 856 (D.C. Cir. 1988).....37

Pittston Coal Grp., Inc. v. Int’l Union, UMWA,
 894 F. Supp. 275 (W.D. Va. 1995)34

Porteous v. Baron,
 729 F. Supp. 2d 158 (D.D.C. 2010).....29

Tenney v. Brandhove,
 341 U.S. 367 (1951).....17, 21, 28

U.S. v. Brewster,
 408 U.S. 501 (1972).....20, 21, 23, 29

U.S. v. City of S.F.,
 310 U.S. 16 (1940).....3

U.S. v. Dowdy,
 479 F.2d 213 (4th Cir. 1973)20

U.S. v. Helstoski,
 576 F.2d 511 (3d Cir. 1978)34

U.S. v. Helstoski,
 442 U.S. 477 (1979).....20, 21, 23, 27, 33, 34, 35

U.S. v. Johnson,
 383 U.S. 169 (1966).....16, 18, 20, 21, 22, 26, 27, 28, 33, 35

U.S. v. McDade,
28 F.3d 294 (3d Cir. 1994)34, 35

U.S. v. Myers,
635 F.2d 932 (2d Cir. 1980)18, 34, 35

U.S. v. Nixon,
418 U.S. 683 (1974).....38

U.S. v. Rayburn House Office Bldg.,
497 F.3d 654 (D.C. Cir. 2007)37

U.S. v. Renzi,
651 F.3d 1012 (9th Cir. 2011)4, 6, 13, 21, 22, 24, 36, 38

U.S. v. Rostenkowski,
59 F.3d 1291 (D.C. Cir. 1995)34, 35

Walker v. Jones,
733 F.2d 923 (D.C. Cir. 1984)21

Williams v. Johnson,
597 F. Supp. 2d 107 (D.D.C. 2009)37

Yeldell v. Cooper Green Hosp.,
956 F.2d 1056 (11th Cir. 1992)20, 26

Youngblood v. DeWeese,
352 F.3d 836 (3d Cir. 2004)17

Constitutional Provisions

U.S. Const. art. I, § 6, cl. 11

U.S. Const. art. IV, § 3, cl. 23

Legislative Authorities

H. Res. 5, 113th Cong. § 4(a)(1)(B) (2013) (enacted)1

Washington County Growth and Conservation Act of 2006 and White Pine County Conservation, Recreation and Development Act of 2006: Hr’g on S.3636 and S.3772 before the Subcomm. on Pub. Lands and Forests of the S. Comm. on Energy and Natural Res., 109th Cong. 8 (2007).....5

Other Authorities

Carol Hardy Vincent, et al., *Federal Land Ownership: Current Acquisition and Disposal Authorities*, Cong. Research Serv., RL34273 (Dec. 13, 2012)4

Christopher Thompson, *The Reaction of the House of Commons in November and December 1621 to the Confinement of Sir Edwin Sandys*, 40 Hist. J. 779 (1997).....17

Conrad Russell, *Parliaments and English Politics, 1621-1629* (1979)17

Daniel Dansie, *The Washington County Growth and Conservation Act of 2006: Evaluating a New Paradigm in Legislated Land Exchanges*, 28 J. Land Resources & Envtl. L. 185 (2008)4

Fed. R. Evid. 403.....35

Federalist No. 48 (James Madison).....15

Federalist No. 51 (James Madison or Alexander Hamilton).....16

Harold Hulme, *The Winning of Freedom of Speech by the House of Commons*, 61 Am. Hist. Rev. 825 (1956).....17

John Reeve, *The Arguments in King’s Bench in 1629 Concerning the Imprisonment of John Selden & Other Members of the House of Commons*, 25 J. Brit. Stud. 264 (1986).....17

Press Release, Senator Bob Bennett, *Bennett Introduces Washington County Land Bill* (Apr. 11, 2008).....5

Univ. of Mont., Ctr. for Natural Res. & Envtl. Policy, *Federal Land Exchanges: A Primer for Local Citizens and Planners* (2010)4

INTEREST OF *AMICUS CURIAE*¹

The Bipartisan Legal Advisory Group of the U.S. House of Representatives – the Honorable John A. Boehner, Speaker; the Honorable Eric Cantor, Majority Leader; the Honorable Kevin McCarthy, Majority Whip; the Honorable Nancy Pelosi, Democratic Leader; and the Honorable Steny H. Hoyer, Democratic Whip – “speak[s] for, and articulate[s] the institutional position of, the House in all litigation matters in which it appears.” H. Res. 5, 113th Cong. § 4(a)(1)(B) (2013) (enacted), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-113hres5eh/pdf/BILLS-113hres5eh.pdf>.

The House does not file here to defend appellant (and former Arizona Congressman) Richard Renzi, or to suggest that he or any Member of Congress is above the law. Rather, the House files here because this case raises issues under the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1 (“for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place”), that are of *substantial* institutional concern to the House. The manner in which the Court resolves those issues has significant long-term ramifications for the House in a broad range of contexts, separate and apart from this particular case.

¹ Both parties have consented to the House’s participation here as *amicus*.

Accordingly, the House strongly urges the Court to “read the Speech or Debate Clause,” as the Supreme Court repeatedly has directed, “broadly to effectuate its purposes,” *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 501 (1975), and, in so doing, in a manner that protects Congress in the conduct of its legislative responsibilities and thereby preserves the independence of the Legislative Branch essential to our system of government.

INTRODUCTION

Renzi challenges the district court’s Speech or Debate rulings in connection with two trial witnesses: Joanne Keene (a former Renzi congressional aide), and Kevin Messner (also a former Renzi congressional aide but, at times pertinent to the issue raised here, a congressional aide to then-Arizona-Congressman Jim Kolbe).²

1. Renzi challenges the district court’s ruling permitting the Department of Justice (“DOJ”) to elicit from Keene testimony regarding two Renzi-Keene conversations. The first concerned their respective views about a draft land exchange bill Renzi introduced in the House shortly thereafter; the second concerned Renzi’s reasons for not introducing, at a particular time, another draft

² See Mot. of Non-Party Kevin Messner for Protective Order . . . at 3 (D. Ariz. May 13, 2013) (ECF 1179) (“Messner Protective Order Motion”) (Messner worked for Kolbe from 1997-April 2003, and December 2004-June 2006; worked for Renzi from May 2003-November 2004).

land exchange bill. *See* Br. for Appellant at 31-39 (9th Cir. Apr. 8, 2014) (ECF 21) (“Renzi Brief”). The House maintains that the district court erred in not excluding the challenged Keene testimony because it concerned Renzi’s legislative activities and, therefore, was constitutionally inadmissible over his Speech or Debate objection. *See infra* Argument, Part II.

2. Renzi also challenges the district court’s ruling barring him from questioning Messner about legislative land exchange work Messner did for Kolbe. *See* Renzi Br. at 39-42. The House maintains that Renzi’s argument that “the court should . . . have balanced [Kolbe’s] Speech or Debate Clause protections against Renzi’s right to present a defense,” *id.* at 41, is constitutionally untenable. *See infra* Argument, Part III.

LAND EXCHANGE LEGISLATION

Congress has plenary power “to 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; *see also Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (“[T]he power over the public land thus entrusted to Congress is without limitations.” (quoting *U.S. v. City of S.F.*, 310 U.S. 16, 29 (1940))). This is a constitutional responsibility of substantial practical importance inasmuch as the federal government owns more than 600 million acres of land. *See* Carol Hardy

Vincent, et al., *Federal Land Ownership: Current Acquisition and Disposal Authorities*, Cong. Research Serv., RL34273, at 1 (Dec. 13, 2012) (“CRS Report”), available at <https://www.fas.org/sgp/crs/misc/RL34273.pdf>.

Congress exercises its Article IV authority both through *legislative* land exchanges – the trading, via particularized legislation, of federal lands for lands owned by corporations, individuals, or state or local governments – and by delegating authority to executive branch agencies to effect land exchanges through administrative processes. *See id.* at 1-2.³

While designated House and Senate committees have primary jurisdiction over the consideration of legislative land exchange bills, *see U.S. v. Renzi*, 651 F.3d 1012, 1016 (9th Cir. 2011), the actual bills often are drafted and/or sponsored by a Member(s) who represents the state in which some or all of the land is located. As with all legislation, negotiations between stakeholders and Members are a normal

³ *See generally* Daniel Dansie, *The Washington County Growth and Conservation Act of 2006: Evaluating a New Paradigm in Legislated Land Exchanges*, 28 J. Land Res. & Envtl. L. 185, 187 (2008) (discussing particular importance of legislative land exchanges in addressing land management issues in western states); Univ. of Mont., Ctr. for Natural Res. & Envtl. Policy, *Federal Land Exchanges: A Primer for Local Citizens and Planners* 9 (2010) (discussing increase in legislative vs. administrative land exchanges), available at [http://www.cnrep.org/documents/filestorage/Federal Land Exchange policy brief.pdf](http://www.cnrep.org/documents/filestorage/Federal_Land_Exchange_policy_brief.pdf).

and routine part of this process (including negotiations regarding parcels to be included in the exchange proposal).⁴

FACTUAL BACKGROUND

I. Trial Evidence Regarding Land Exchange Bills.

At trial, testimony was elicited regarding two proposed legislative land exchanges: one sought by Resolution Copper Company (“RCC Bill”), and a second pressed by developer Philip Aries (“Aries Bill”). Both involved consideration of inclusion of the so-called “Sandlin property.” *See* Renzi Br. at 8-9.

The RCC Bill, which did not include the Sandlin property, was in draft form by March 2005, and introduced by Renzi in May 2005. *See, e.g.*, Day 7 Tr. at 202-

⁴ *See, e.g., Washington County Growth and Conservation Act of 2006 and White Pine County Conservation, Recreation and Development Act of 2006: Hr’g on S.3636 and S.3772 before the Subcomm. on Pub. Lands and Forests of the S. Comm. on Energy and Natural Res., 109th Cong. 8 (2007) (Sen. Ensign) (“Senator Reid and I . . . s[at] down with all of the stakeholders . . . the environmental groups, the local governments, developers, power companies, water companies, Federal, State and local governments . . .”), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg33094/pdf/CHRG-109shrg33094.pdf>; *id.* at 14 (Sen. Reid) (explaining his role in increasing amount of privately held land included in particular exchange); Press Release, Senator Bob Bennett, *Bennett Introduces Washington County Land Bill* (Apr. 11, 2008) (“After five years at the table with all interested stakeholders, Congressman Matheson and I have produced a bill that successfully strikes the balance between conservation and growth.”), available at http://www.npca.org/news/media-center/press-releases/2008/041108_swrowashcountybill.html.*

06;⁵ Day 10 Tr. at 13, 27; Def.’s Trial Ex. 3568; Def.’s . . . Mot. for a New Trial . . . at 4 (D. Ariz. July 10, 2013) (ECF 1245) (“New Trial Motion”).⁶ The Aries Bill, which did include the Sandlin property, was drafted by April 2005, but not introduced. *See, e.g.*, Day 8 Tr. at 73-74, 80-82. Neither bill was enacted into law. *See* Day 7 Tr. at 205.

A. Testimony of Frank Hegner and Philip Aries.

Hegner, a Resolution Copper executive, testified on direct for DOJ, over Renzi’s objection, about Hegner’s interactions with Renzi and his staff regarding the RCC Bill. *See, e.g.*, Day 6 Tr. at 15-19, 28-31; Day 7 Tr. at 33-34. Aries testified on direct for DOJ, also over Renzi’s objection, about Aries’ interactions with Renzi and his staff regarding the Aries Bill. *See, e.g.*, Day 8 Tr. at 22-27.⁷ Renzi cross-examined Hegner and Aries on these same topics. *See* Day 7 Tr. at

⁵ All trial transcript pages cited in this brief are reproduced in the Addendum at the back of this brief.

⁶ The New Trial Motion originally was filed under seal; however, the seal has been lifted. *See* Order (D. Ariz. Apr. 14, 2014) (ECF 1396).

⁷ Admission of the Hegner and Aries testimony about their interactions with Renzi and his staff regarding the two bills violated the Speech or Debate Clause because “evidence of [such legislative] acts [may] not be introduced to any jury, grand or petit.” *Renzi*, 651 F.3d at 1020. However, because Renzi has not challenged on appeal the admission of this evidence, we do not consider it further.

106-11, 128-36, 153-55 (Hegner); Day 8 Tr. at 71-74, 80-82, 100-06, 125-27, 138-43, 147-55 (Aries).

During Renzi's cross-examination of Aries (and on redirect), the district court suggested that Renzi's cross-examination had opened the door for DOJ to question Aries "or any other witness" about the Aries Bill. Day 8 Tr. at 91, 223-25.

B. Testimony of Joanne Keene.

Keene – Renzi's District Director when the RCC and Aries Bills were under consideration – also testified on direct for DOJ about both bills, once again over Renzi's objection. *See* Day 9 Tr. at 138-43, 157, 160-70, 177-78 (RCC Bill); *id.* at 170-82, 193-94 (Aries Bill).

On appeal, Renzi challenges the following two discrete pieces of Keene direct examination testimony. *See* Renzi Br. at 36-37, 33-36. The first concerns the RCC Bill, and the second concerns the Aries Bill:

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.*

Day 9 Tr. at 177-78 (emphases added).

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.

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.

Id. at 194 (emphasis added). (Renzi apparently was on the House floor during this conversation. *See id.* at 192-93.)

We understand that DOJ, prior to trial, conceded that the Speech or Debate Clause barred admission of this Keene testimony. *See Renzi Br.* at 33. However, during trial, DOJ changed course. When Renzi objected to DOJ's questioning of Keene, DOJ argued that Renzi, in cross-examining *Hegner*, had waived his Speech or Debate privilege as to the *Keene* testimony:

[PROSECUTOR]: Obviously, I need a reason I think I can ask these questions, and the reason that I think I can is because there was protracted questioning yesterday by the defense of Mr. Hegner about the aftermath of the introduction over Resolution Copper bill.

Day 9 Tr. at 190-91.

The district court declined to adopt DOJ's waiver argument. However, the court did rule – notwithstanding its earlier acknowledgement that events relating to draft legislation were Speech or Debate protected, *see Day 8 Tr.* at 91, 223-25 – that the Keene testimony was admissible because “it's performance and extortion, illegal act,” Day 9 Tr. at 192, and “pertains to [Renzi's] intent, his motive, his state of mind in the commission of the extortionist act,” *id.* at 193.

C. Testimony and Proposed Testimony of Kevin Messner.

Messner testified for Renzi about events that occurred while Messner served as Renzi's aide from May 2003-November 2004. *See* Day 17 Tr. at 61-121.

However, Renzi also sought testimony from Messner about his work for Kolbe. *See* Renzi Br. at 19 (Renzi wanted Messner to testify about his "time in Kolbe's office," in particular, about "his interactions with Renzi, his support for the Aries [Bill], [and] his efforts to promote the legislation within the . . . community").

The district court, in response to Kolbe's assertion of his Speech or Debate privilege as to any questioning of Messner regarding Kolbe's legislative activities, *see* Messner Protective Order Mot. at 3-8, held that the "parties are barred from questioning Kevin Messner at trial concerning the legislative activities of . . . Kolbe." Order (D. Ariz. May 14, 2013) (ECF 1183); *see also* Day 17 Tr. at 9-10 (court indicated it "would sustain any objection to any actions or statements . . . Messner might testify about while he was staffing . . . Kolbe"; "I will not balance").

On appeal, Renzi also challenges these rulings. *See* Renzi Br. at 39-42.

II. New Trial Motion.

Following his conviction, Renzi moved for a new trial on the grounds, among others, that (i) admission of the two pieces of Keene testimony discussed above violated the Speech or Debate Clause, and (ii) his inability to question Messner

about Kolbe's legislative activities violated Renzi's right to present a defense. *See* New Trial Mot. at 3-11.

In response, DOJ argued – for the first time and contrary to its apparent pretrial position – that the Keene testimony was admissible because it concerned Renzi's state of mind. *See* [DOJ]'s Opp'n to . . . Mot. for a New Trial . . . at 8-11 (D. Ariz. Aug. 9, 2013) (ECF 1287) (“DOJ New Trial Opposition”).⁸ DOJ also argued (again) that Renzi had waived his Speech or Debate rights by cross-examining Hegner, *id.* at 7, and – in another new argument – by cross-examining Aries, *id.* at 10. With respect to Renzi's Messner argument, DOJ said the district court “had no authority to override the testimonial privilege of . . . Kolbe and compel Messner's testimony.” *Id.* at 11.

The district court denied the New Trial Motion. With respect to the Keene testimony, the district court now said – incorrectly as a matter of fact – that DOJ had elicited the pertinent Keene testimony during its re-direct, and it held that Renzi effectively waived his Speech or Debate rights as to such re-direct testimony by virtue of his *cross-examination of Keene*. *See* Am. Order at 34 (D. Ariz. Oct. 25, 2013) (ECF 1314) (“New Trial Order”). (Given that DOJ actually elicited the

⁸ DOJ's New Trial Opposition originally was filed under seal; however, the seal has been lifted. *See* Order (D. Ariz. Apr. 14, 2014) (ECF 1396).

pertinent Keene testimony on direct, *see* Day 9 Tr. at 177-78, 194, it is logically impossible for Renzi to have waived anything as to that testimony as a result of a cross-examination his lawyers had not yet conducted.)

With respect to the Messner argument, the district court said the excluded evidence was “cumulative and of limited relevance.” New Trial Order at 35.

III. First Bail Motion.

Renzi advanced the same two Speech or Debate arguments in his first motion for bail pending appeal. *See* Def. . . . Mot. for Bail Pending Appeal at 4-7, 10-12 (D. Ariz. Nov. 12, 2013) (ECF 1326).

In response, DOJ again argued that the Keene testimony concerned Renzi’s “state of mind,” but it abandoned its waiver argument. [DOJ] Resp. to Def. Renzi’s Mot. for Bail Pending Appeal at 3-5 (D. Ariz. Nov. 26, 2013) (ECF 1334) (“DOJ First Bail Response”). With respect to the Messner issue, DOJ asserted again that the district court “had no authority to override the testimonial privilege of . . . Kolbe and compel Messner’s testimony.” DOJ First Bail Resp. at 9.

The district court denied the bail motion. As to the Keene testimony, the court abandoned its earlier waiver justification. Instead, it now said that Speech or Debate “does not protect pre-legislative investigations or other fact-finding by [M]embers conducted outside the congressional venue, promises to take some

future legislative act, or corrupt conduct.” Order at 4 (D. Ariz. Jan. 7, 2014) (ECF 1380) (“District Court Bail Order”). However, the court did not say into which of these three boxes, if any, the challenged Keene testimony fell.

As to Renzi’s Messner argument, the district court said that “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.” *Id.* (quoting *Renzi*, 651 F.3d at 1038).

IV. Second Bail Motion.

Renzi then sought similar relief in this Court. *See* Mot. to Continue Bail Pending Appeal (9th Cir. Jan. 13, 2014) (ECF 9-1) (raising same arguments as to Keene testimony and Messner proposed testimony). In opposing, DOJ stayed with its state of mind argument as to the Keene testimony, but now reprised its theory that Renzi, by cross-examining Hegner and Aries, had waived his Speech or Debate rights as to Keene’s testimony. *See* Opp’n of the U.S. to Renzi’s Mot. for Release Pending Appeal at 5-16 (9th Cir. Jan. 27, 2014) (ECF 12-1) (“DOJ Second Bail Response”). This Court granted Renzi’s bail motion, noting that “th[is] appeal raises a substantial question of law or fact that is fairly debatable, and that if that substantial question is determined favorably to [Renzi] on appeal, that decision is

likely to result in reversal or an order for a new trial.” Order at 1-2 (9th Cir. Feb. 18, 2014) (ECF 20) (quotations omitted).

* * *

The district court – and DOJ – plainly had great difficulty fixing on a justification for the admission of the challenged Keene testimony, as the summary table below reflects:

DOJ and District Court Positions on Challenged Keene Testimony

	DOJ	District Court
Pre-Trial	Conceded Speech or Debate	
Trial Day 8		Waiver – Renzi cross-examination of Aries
Trial Day 9	Waiver –Renzi cross-examination of Hegner	(i) Illegal act; (ii) intent, motive, state of mind
Motion for New Trial	(i) State of mind; (ii) waiver – Renzi cross-examination of Hegner; (iii) waiver – Renzi cross-examination of Aries	Waiver – Renzi cross-examination of Keene
First Bail Motion	Renzi state of mind	Speech or Debate “does not protect pre-legislative investigations or other fact-finding by [M]embers conducted outside the congressional venue, promises to take some future legislative act, or corrupt conduct” – no indication of how or whether Keene testimony fit into any of these boxes
Second Bail Motion	(i) State of mind; (ii) waiver – Renzi cross-examination of Hegner; (iii) waiver – Renzi cross-examination of Aries	

As we now explain, the reason the district court – and DOJ – struggled so much is that the matters about which Keene testified – Renzi’s position on, and

reasons for supporting, or not supporting, the RCC and Aries Bills – self-evidently were legislative matters. As such, the challenged testimony was constitutionally infirm and never should have been admitted.

ARGUMENT

We first provide an overview of the relevant constitutional landscape (Part I).

We then explain why the challenged Keene testimony was Speech or Debate protected, and why none of the district court’s (or DOJ’s) shifting rationales justified its admission (Part II). Finally, with respect to the Messner issue, we explain why Renzi’s argument that the district court should “have balanced [Kolbe’s] Speech or Debate Clause protections against Renzi’s right to present a defense,” Renzi Br. at 41, is untenable (Part III).

I. Constitutional Overview – The Speech or Debate Clause Safeguards Legislative Branch Independence.

“[T]he whole American fabric has been erected” on the principle of Separation of Powers. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). As the founders wisely insisted, “none of [the three branches of the federal government] 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.” Federalist No. 48 (James Madison).

The Framers were acutely aware that simply dividing the government into three separate branches would not suffice to guarantee American liberty. Accordingly, they also included in the Constitution concrete mechanisms to make the Separation of Powers principle work, mechanisms that “provide some practical security for each [branch], against invasion of the others.” *Id.*; *see also* Federalist No. 51 (James Madison or Alexander Hamilton) (“[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others.”). One such concrete practical mechanism is the Speech or Debate Clause.

A. History and Purpose of the Clause.

The Clause is rooted in the epic struggle for parliamentary independence in 16th- and 17th-century England. “Behind [the Clause] lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators.” *U.S. v. Johnson*, 383 U.S. 169, 178 (1966).

As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. . . . In 1689, the Bill of Rights declared in unequivocal language: “That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.”

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

“The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently. . . . [Its] ‘central role’ . . . is to ‘prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary’” *Eastland*, 421 U.S. at 502 (quoting *Gravel v. U.S.*, 408 U.S. 606, 617 (1972)). “In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.” *Johnson*, 383 U.S. at 178.¹⁰

⁹ The historical record confirms the Clause’s roots in the criminal context. See, e.g., Harold Hulme, *The Winning of Freedom of Speech by the House of Commons*, 61 *Am. Hist. Rev.* 825 (1956); John Reeve, *The Arguments in King’s Bench in 1629 Concerning the Imprisonment of John Selden & Other Members of the House of Commons*, 25 *J. Brit. Stud.* 264 (1986); Christopher Thompson, *The Reaction of the House of Commons in November and December 1621 to the Confinement of Sir Edwin Sandys*, 40 *Hist. J.* 779 (1997); Conrad Russell, *Parliaments and English Politics, 1621-1629* (1979).

¹⁰ See also *Youngblood v. DeWeese*, 352 F.3d 836, 839 (3d Cir. 2004) (“Ensuring a strong and independent legislative branch was essential to the framers’ notion of separation of powers The Speech or Debate Clause is one manifestation of
(Continued . . .)

Because “the guarantees of th[e Speech or Debate] Clause are vitally important to our system of government,” they “are entitled to be treated by the courts with the sensitivity that such important values require.” *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979). Accordingly, the Supreme Court repeatedly has insisted, “[w]ithout exception, . . . [that the courts] read the Speech or Debate Clause broadly to effectuate its purposes.” *Eastland*, 421 U.S. at 501; *see also Doe v. McMillan*, 412 U.S. 306, 311 (1973); *Gravel*, 408 U.S. at 624; *Johnson*, 383 U.S. at 180.

B. Scope of the Clause.

The protections afforded by the Speech or Debate Clause apply to all activities “within the ‘legislative sphere.’” *McMillan*, 412 U.S. at 312 (quoting *Gravel*, 408 U.S. at 624-25), which includes all activities that are

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

this practical security for protecting the independence of the legislative branch”); *U.S. v. Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980) (“Like the Speech or Debate Clause, the doctrine of separation of powers serves as a vital check upon the Executive and Judicial Branches to respect the independence of the Legislative Branch, not merely for the benefit of the Members of Congress, but, more importantly, for the right of the people to be fully and fearlessly represented by their elected Senators and Congressmen.”).

Eastland, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625).

The federal courts, responding to the Supreme Court’s direction, have broadly construed the concept of “legislative activity” to cover all facets of the legislative process. For example:

- “Committee reports, resolutions, and the act of voting are equally covered,” *Gravel*, 408 U.S. at 617, as are investigations and hearings, *see Eastland*, 421 U.S. at 504-05; *McMillan*, 412 U.S. at 313.
- Information gathering (both formal and informal) is protected because “[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.” *Eastland*, 421 U.S. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)); *see also Miller v. Transam. Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983) (“Obtaining information pertinent to potential legislation . . . is one of the things generally done in a session of the House, concerning matters within the legitimate legislative sphere.” (quotation marks omitted)).¹¹

¹¹ *See also, e.g., Gov’t of the Virgin Islands v. Lee*, 775 F.2d 514, 520-21 (3d Cir. 1985) (legislative fact-finding by individual legislator protected); *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976) (en banc) (“[A]cquisition of
(Continued . . .)

- Drafting, introducing (or deciding against introducing), and securing support for legislation also are legislative activities. *See, e.g., Baraka v. McGreevey*, 481 F.3d 187, 196 (3d Cir. 2007); *Yeldell v. Cooper Green Hosp.*, 956 F.2d 1056, 1063 (11th Cir. 1992); *Jewish War Veterans of the U.S. of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 59 (D.D.C. 2007).

Importantly, the Speech or Debate Clause protects “‘against inquiry into . . . the motivation for . . . [legislative] acts.’” *U.S. v. Helstoski*, 442 U.S. 477, 489 (1979) (quoting *U.S. v. Brewster*, 408 U.S. 501, 525 (1972)); *see also Johnson*, 383 U.S. at 184-85 (inquiry into Member’s motives for engaging in legislative activities “necessarily contravenes the Speech or Debate Clause”); *Miller*, 709 F.2d at 530 (Clause bars “questions about [Member’s] motive or legislative purpose”); *Gov’t of the Virgin Islands*, 775 F.2d at 522 (same); *U.S. v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973) (same).

Finally, and also critically important here, the Clause covers all activities “within the ‘legislative sphere’ even though the[] conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to

knowledge through informal sources is a necessary concomitant of legislative conduct and thus . . . within the ambit of the [Speech or Debate] privilege . . .”).

criminal or civil statutes.” *McMillan*, 412 U.S. at 312-13 (quoting *Gravel*, 408 U.S. at 624-25); *Johnson*, 383 U.S. at 180 (question of whether Member conduct was *improperly* motivated “is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry”); *Tenney*, 341 U.S. at 377 (“claim of an *unworthy* purpose does not destroy the privilege” (emphasis added)). That is, the Clause is not abrogated and the privilege is not defeated merely because DOJ (or some other litigant) alleges that a Member committed a crime or otherwise acted unlawfully.¹²

C. Protections of the Clause.

The Speech or Debate Clause provides Members (and their aides) with “three distinct protections.” *Renzi*, 651 F.3d at 1020.¹³ Only two of those protections are relevant here. The first is an evidentiary privilege that barred DOJ from advancing its case against Renzi by “[r]evealing information as to a legislative act.” *Helstoski*,

¹² Of course, not everything a Member does as a Member is “legislative.” See *Brewster*, 408 U.S. at 515. Non-legislative Member activities include matters such as constituent casework (e.g., interfacing between constituents and Executive Branch agencies respecting previously-legislated benefits or programs), *id.* at 512 (dicta); private republication of legislative papers, see *Gravel*, 408 U.S. at 626; press statements and constituent newsletters, see *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979); and congressional restaurant administration, see *Walker v. Jones*, 733 F.2d 923, 931 (D.C. Cir. 1984).

¹³ These protections apply “not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the
(Continued . . .)

442 U.S. at 490; *see also Johnson*, 383 U.S. at 177 (reversing Member conviction on basis of, among other reasons, prosecution’s introduction of evidence about Member’s legislative activities via third-party witness: “[Introduction of such testimony] violates the express language of the [Speech or Debate Clause] and the policies which underlie it”); *Renzi*, 651 F.3d at 1020 (evidence of legislative acts may “not be introduced to any jury, grand or petit”). The second is a testimonial privilege that barred any “compelling [of] Renzi [and Kolbe], or [their] aides, to ‘testify[] at trial[] . . .’ about [their legislative] conduct.” *Id.* (quoting *Gravel*, 408 U.S. at 622); *see also Miller*, 709 F.2d at 528-29.¹⁴

The Supreme Court draws no distinctions between the Clause’s protections, nor has it drawn any distinctions between the application of the Clause in the criminal and civil contexts. Rather, it has stated unequivocally that when the Speech or Debate Clause applies – that is, when a Member is acting within the “legislative sphere” – the protections are “absolute.” *Eastland*, 421 U.S. at 501, 503, 507, 509-10 & n.16; *Gravel*, 408 U.S. at 623 n.14.

Member himself.” *Gravel*, 408 U.S. at 618; *see also Eastland*, 421 U.S. at 507.

¹⁴ Earlier, this Court said that the Clause’s testimonial component does not encompass legislative records. *See Renzi*, 651 F.3d at 1032-39. While the House disagrees, *see Br. of the [House] as Amicus Curiae* in Supp. of Pet. for Reh’g *En Banc*, *United States v. Renzi*, Nos. 10-10088, -10122 (9th Cir. July 18, 2011), that
(Continued . . .)

* * *

There are, of course, potential costs associated with this broad constitutional protection. “[W]ithout doubt the exclusion of [legislative acts] will make prosecutions more difficult.” *Helstoski*, 442 U.S. at 488; *see also id.* at 491 (“Clause was [not] designed . . . to assure fair trials”). Nevertheless, the Supreme Court repeatedly has held that the Clause must be broadly construed and applied because that was “the conscious choice of the Framers.” *Id.* at 488 n.7 (quoting *Brewster*, 408 U.S. at 516).¹⁵

II. Admission of the Challenged Keene Testimony Violated the Speech or Debate Clause.

A. The Challenged Keene Testimony Concerned Legislative Matters.

Insofar as the challenged Keene testimony is concerned, the only pertinent question now is whether the information DOJ elicited reflects Renzi legislative

earlier ruling in no way is dispositive of the testimonial privilege issues presented here because they do not concern legislative records.

¹⁵ Speech or Debate is hardly the only constitutional principle we as Americans value and protect, notwithstanding potential costs. For example, “we . . . have always held that in criminal cases we would err on the side of letting the guilty go free rather than sending the innocent to jail. We have required proof beyond a reasonable doubt as ‘concrete substance for the presumption of innocence.’” *Johnson v. Louisiana*, 406 U.S. 380, 393 (1972) (quoting *In re Winship*, 397 U.S. 358, 363 (1970)). And we tolerate offensive speech because we value free speech more. The “suppression of uncongenial ideas is the worst offense against the First Amendment.” *Hill v. Colorado*, 530 U.S. 703, 746 (2000).

activities. If yes, then as a constitutional matter, Keene could not be “compell[ed],” over Renzi’s objection, ““to testify[] at trial[] . . .’ about [those activities],” *Renzi*, 651 F.3d at 1020 (quoting *Gravel*, 408 U.S. at 622),¹⁶ and that information “could not be introduced to [the] jury,” *id.* For the reasons that follow, the challenged Keene testimony plainly did reflect Renzi legislative activities and, therefore, the district court erred in not excluding it.

Keene was a senior congressional aide to Renzi. *See* Day 9 Tr. at 134-36. One of her responsibilities was to assist Renzi in navigating the “complexities of the modern legislative process,” *Gravel*, 408 U.S. at 616, including, in particular, to work with him and advise him regarding legislation – such as the RCC and Aries Bills – that directly affected the congressional district Renzi represented. *See* Day 9 Tr. at 134-35, 138-43, 170-72, 177-78. Keene’s testimony makes clear that that is what she did and how she viewed her role. *Id.* Not surprisingly, therefore, in light of Keene’s role as Renzi’s legislative “alter ego,” *Gravel*, 408 U.S. at 616, her

¹⁶ While a Member’s aide can invoke the privilege, the privilege ultimately belongs to the Member under the plain language of the Constitution. Accordingly, the Member has the ultimate authority to decide whether the privilege should be asserted or not, notwithstanding any contrary wish on the part of the aide, *see Gravel*, 408 U.S. at 622 n.13, as here, where Keene was a DOJ cooperating witness and testified over Renzi’s objection.

challenged testimony concerned Renzi activities that cannot reasonably be described as anything other than legislative in nature.

Keene's testimony about Renzi's interest in and enthusiasm for the RCC Bill is simply another way of describing his legislative motivations: Was he sufficiently interested in and enthused about the RCC Bill – that is, was he motivated – to introduce the RCC Bill (he did) and push for its passage? Similarly, her testimony about her views of the RCC Bill reflects conflicting pressures at play in Renzi's congressional office as he grappled with the decision – the quintessentially legislative decision – of how to handle the RCC Bill.

Keene's discussions with Renzi about the Aries Bill are, if anything, even more pointedly reflective of Renzi's legislative motivations: “[H]e [Renzi] said at that time that he wanted to put the brakes on . . . Mr. Aries' land exchange because of what was happening with Duke [Cunningham].” Day 9 Tr. at 194. And ultimately, of course, Renzi decided against introducing the Aries Bill.

Renzi's decisions to introduce or not introduce, and to support or not support, the RCC and Aries Bills (necessarily including the internal processes by which those decisions were made) are core legislative functions. *See supra* Argument, Part I.B; *Baraka*, 481 F.3d at 196 (interpreting state law analog to Speech or Debate Clause: “[A]ctivities by legislators that directly affect drafting [and] introduc[tion]”

of legislation “are properly characterized as legislative”); *Yeldell*, 956 F.2d at 1063 (interpreting state law analog to Speech or Debate Clause: “[T]he decision whether or not to introduce legislation is one of the most purely legislative acts that there is.”); *Jewish War Veterans*, 506 F. Supp. 2d at 59 (“drafting, proposing, and securing support for a bill are core legislative activities”).

And just as legislative – and, therefore, just as “foreclose[d] from executive and judicial inquiry,” *Johnson*, 383 U.S. at 180 – are Renzi’s motivations for his decisions to introduce or not introduce, and to support or not support, the RCC and Aries Bills. *See supra* Argument, Part I.B (citing cases).

In short, the challenged Keene testimony clearly reflects Renzi legislative activities. Accordingly, DOJ’s questioning of her about those activities, and the district court’s admission of her testimony, over Renzi’s objections violated the Speech or Debate Clause.

B. None of the District Court or DOJ Rationales Justify Admission of the Challenged Keene Testimony.

1. Intent/Motive/State of Mind.

On trial day nine, the district court justified admission of the challenged Keene testimony on the ground that “it pertain[ed] to [Renzi’s] intent, his motive, his state of mind.” Day 9 Tr. at 193. DOJ later adopted this notion in responding to

Renzi's New Trial Motion and both bail motions. *See* DOJ New Trial Opp'n at 7, 9-10; DOJ First Bail Resp. at 3-5; DOJ Second Bail Resp. at 5-16.

The district court – and DOJ – have it exactly backwards, as we explained immediately above. The fact that the challenged Keene testimony reflects Renzi's motivations regarding the RCC and Aries Bill – as the district court (and DOJ) effectively and correctly acknowledged – is precisely why that testimony should not have been admitted. Renzi's motivations for his decisions regarding the RCC and Aries Bills – good, bad, or otherwise – are off limits. And the district court, by permitting DOJ to question Keene about those matters, and by failing to exclude her testimony, “necessarily contravene[d] the Speech or Debate Clause.” *Johnson*, 383 U.S. at 184-85; *see also Helstoski*, 442 U.S. at 489; *Miller*, 709 F.2d at 530; *supra* Argument, Parts I.B, I.C. This is so regardless of the noun – intent, motive, state of mind – used to describe the evidentiary purpose of the challenged Keene testimony.

2. Illegal Act/Corrupt Conduct.

On trial day nine, the district court also justified its decision to admit the challenged Keene testimony on the ground that it concerned an “illegal act.” Day 9 Tr. at 192; *see also* Dist. Ct. Bail Order at 4 (suggesting as general matter that “corrupt conduct” not Speech or Debate protected). The district court did not support this conclusion with any analysis, and DOJ never advanced this argument.

The district court’s apparent suggestion that the Clause did not apply because Renzi was accused of criminal conduct – or that conduct otherwise legislative ceases to be so if the prosecution asserts that it has some connection to an alleged crime – is wrong. The Supreme Court repeatedly has made clear that a “claim of an unworthy purpose does not destroy the privilege.” *Tenney*, 341 U.S. at 377; *see also McMillan*, 412 U.S. at 312-13 (Clause applies to activities “within the ‘legislative sphere’ *even though the[] conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes*” (quoting *Gravel*, 408 U.S. at 624-25; emphasis added and citation omitted)); *Johnson*, 383 U.S. at 180 (question of whether Member conduct was *improperly motivated* “is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry”).

The only issue with respect to the challenged Keene testimony is whether the matters about which she testified reflect Renzi legislative activities or his motivations for legislative activities. If yes, then it was error for the district court to have admitted the testimony. And in determining whether the testimony concerned Renzi’s legislative activities or motivations, the underlying criminal charges simply were not relevant. As one lower court put it, with admirable clarity:

[T]he proper focus of this Court’s inquiry under the Speech or Debate Clause is not . . . on what the defendants did in

particular and whether it was unlawful. The focus is on the nature of the defendants' conduct more generally. So long as th[at] type of conduct . . . falls legitimately within the scope of legislative activity, it matters not whether the specific conduct is unlawful.

Porteous v. Baron, 729 F. Supp. 2d 158, 166 (D.D.C. 2010).¹⁷

¹⁷ Any confusion in this area stems principally from a misunderstanding of *Brewster* and, in particular, its statement in dicta that “[t]aking a bribe is . . . no part of the legislative process or function; it is not a legislative act.” 408 U.S. at 526.

The issue *Brewster* actually addressed was whether a Member could be prosecuted under the federal bribery statute for allegedly accepting money in exchange for a promise relating to an official act. *Id.* at 502. The lower court found the Member immune from prosecution, *id.* at 503-04, and the Supreme Court reversed. In so holding, the Court went to great lengths to distinguish conduct that is merely “related to” the legislative process (*e.g.*, casework, newsletters) from protected legislative activities. *Id.* at 512-14, 524. The latter (including the motivation for the latter), the Court made clear, could not be inquired into or used against the Member. *Id.* at 525. The heart of the Court’s analysis, and the reason it held that the Member was not immune from prosecution, was its conclusion that a Member’s acceptance of money, or his agreement to accept money, “is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator.” *Id.* at 526. (The Court did not say how the prosecution would prove its case – *i.e.*, what specific evidence it could use and not use – since that issue was not before it. However, it did make clear that “no inquiry into legislative acts or motivation” was permissible, *id.* at 525.)

Once *Brewster*’s actual holding is understood, it is easier to understand why the Court’s statement that “[t]aking a bribe is . . . no part of the legislative process” is confusing. “Bribery” is a legal conclusion; whether a “bribe” has been taken is determined only as a result of a trial (or a plea). Accordingly, while the Court’s statement is true in a general, abstract sense, it sheds no light whatsoever on how the courts are to determine whether particular Member conduct is legislative (and, therefore, Speech or Debate protected) in advance of a trial.

(Continued . . .)

3. Pre-Legislative Investigations/Promises of Future Legislative Acts.

In denying Renzi's First Bail Motion, the district court asserted generally that the Speech or Debate Clause "does not protect pre-legislative investigations or other fact-finding by [M]embers conducted outside the congressional venue, [or] promises to take some future legislative act." Dist. Ct. Bail Order at 4. The court did not say it viewed the challenged Keene testimony as falling into either box, and DOJ never has advanced either rationale.

In any event, it is clear the challenged Keene testimony did not concern any promise on Renzi's part of a future legislative act or some early stage investigative

The critical constitutional question for Speech or Debate purposes is and must be: What is the nature of the actual Member activity alleged to be protected – considered *in a value-neutral manner and stripped of any attendant allegations of improper purpose* – i.e., is that conduct part of the legislative process or not? This is so for at least two reasons. First, otherwise, the language in *Gravel* (decided the same day as *Brewster*) and *McMillan* (decided the following year) quoted above – the Clause applies to all activities “within the ‘legislative sphere’ *even though the[] conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes*” – makes no sense. Second, if allegations of bad purpose or unlawful conduct were sufficient to permit the executive or judiciary to sidestep the Clause, its protections would mean absolutely nothing.

activity. As noted above, both the RCC and Aries Bills already were in draft format at the time of the conversations about which Keene testified. *See supra* pp. 5-6.¹⁸

4. Waiver.

Finally, during trial, and in ruling on the New Trial Motion – but not thereafter – the district court justified admission of the challenged Keene testimony on the basis of a waiver it derived from Renzi’s cross-examination of Aries (the court suggested this on day eight, before Keene testified on direct on day nine, and then never mentioned it again). *See* Day 8 Tr. at 91, 223-25. After trial, the court

¹⁸ Leaving aside the circularity of determining whether conduct is “legislative” by ascertaining whether it is “pre-legislative” (the functional equivalent of saying it is not legislative if it is non-legislative), the district court’s apparent suggestion that the question of whether an activity is “legislative” turns on whether draft legislation exists, *see also* Day 8 Tr. at 90-91, 223-25, is not only wholly artificial, it is also analytically wrong. In the real-world legislative process, investigation, oversight, and information-gathering play a critical role in enabling legislators to determine – *before they put pen to paper* – whether legislation is needed or advisable (and, if so, what it should look like). *See, e.g., McGrain*, 273 U.S. at 175 (“[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”). And the courts, not surprisingly, have treated such critical pre-drafting activities as integral to the legislative process for Speech or Debate purposes. *See, e.g., Eastland*, 421 U.S. at 509 (dismissing on Speech or Debate grounds suit against Senate subcommittee Members and staff, based on subcommittee investigation; no legislation pending: “The very nature of the investigative function – like any research – is that it takes the searchers up some ‘blind alleys’ and into nonproductive enterprises.”); *Miller*, 709 F.2d at 529-31 (holding that Member’s insertion of material into Congressional Record, and Member’s receipt of information “pertinent to *potential* legislation”
(*Continued . . .*)

found a waiver on the basis of Renzi's cross-examination of Keene (a cross-examination that had not yet occurred at the time she testified on direct). *See* New Trial Order at 34. And the last time the court addressed the admissibility question, in ruling on Renzi's first bail motion, it did not mention waiver at all. *See* Dist. Ct. Bail Order at 4.

DOJ, with good reason, has never pressed the idea that Renzi waived his Speech or Debate rights with respect to Keene's direct testimony by virtue of his *subsequent* cross-examination of Keene. However, DOJ has attached itself, at various times, to the notion that Renzi waived by cross-examining Hegner and/or Aries. *See* Day 9 Tr. at 190-91; DOJ New Trial Opp'n at 7, 9-10; DOJ Second Bail Resp. at 5-16.

At the end of the day, it does not matter whose cross examination is used to support the waiver theory because there was no waiver here. The Supreme Court, while expressing doubt that such a waiver is even possible, has stated clearly that:

Assuming that [it] is possible [for an individual Member to waive], we hold that waiver can be found only after explicit and unequivocal renunciation of the protection. The ordinary rules for determining the appropriate standard of waiver do not apply in this setting.

protected – no suggestion that either connected to pending legislation (emphasis added)).

Helstoski, 442 U.S. at 490-91. Not surprisingly, therefore, no court ever has held that a Member waived his or her Speech or Debate rights.

The Supreme Court has addressed the issue of waiver in the Speech or Debate context twice, once implicitly in *Johnson*, and once explicitly in *Helstoski*. In *Johnson*, the defendant Member introduced legislative matters in his own defense at trial. *See* 383 U.S. at 173 n.4, 184. Notwithstanding, the Supreme Court reversed his conviction on the basis of, among other reasons, the prosecution's cross examination of the Member on those topics, *see id.* at 176-77, 184-85, thereby implicitly holding that the Member had effected no waiver by his affirmative use of legislative activities in his own defense.

Helstoski involved a criminal indictment of a Member who voluntarily (i) testified before a grand jury on ten occasions about his legislative activities, and (ii) produced to the grand jury records of his legislative activities. *See* 442 U.S. at 480-83. The district court denied the Member's motion to dismiss the indictment on Speech or Debate Clause grounds, but in so doing barred the prosecution from introducing at trial evidence of the Member's legislative activities. *Id.* at 484. The Third Circuit affirmed, specifically rejecting the prosecution's "attempt to analogize the [Speech or Debate] Clause to other privileges where only a voluntariness

standard is required [for a finding of waiver].” *U.S. v. Helstoski*, 576 F.2d 511, 523 (3d Cir. 1978), *aff’d*, 442 U.S. 477 (1979).

The Supreme Court, in affirming, expressly rejected the prosecution’s argument that the Member waived his Speech or Debate protections by testifying before, and producing records to, the grand jury. As noted above, the Court stated with remarkable clarity that a Speech or Debate waiver, if possible at all, “can be found only after explicit and unequivocal renunciation of the protection.” 442 U.S. at 491.¹⁹

In light of this case law, Renzi’s cross examination of Hegner and Aries, even if they dealt with legislative matters, cannot possibly constitute an “explicit and unequivocal renunciation” of those protections, particularly when coupled with Renzi’s express refusal to waive. *See* Day 7 Tr. at 143; Day 8 Tr. at 223.²⁰

¹⁹ Two lower courts also have explicitly addressed the waiver issue. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 n.11 (D.C. Cir. 1995) (rejecting, in subpoena enforcement action against Member, argument that Member had waived protections of Clause by “statements made [voluntarily] during a radio broadcast interview”); *Pittston Coal Grp., Inc. v. Int’l Union, UMWA*, 894 F. Supp. 275, 278 n.5 (W.D. Va. 1995) (describing as “meritless” plaintiffs’ argument that non-party Senator waived protections of Clause by voluntarily disclosing certain records to defendant in litigation).

²⁰ DOJ may try, as it did below, to buttress its waiver theory by citing *U.S. v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), *U.S. v. McDade*, 28 F.3d 294 (3d Cir. 1994), and/or *Myers*, 635 F.2d 932. However, these cases are not on point. They stand, at most, for the proposition that an *indictment* need not to be dismissed even
(Continued . . .)

III. The District Court Properly Declined to Balance Kolbe's Speech or Debate Rights Against Renzi's Right to Present a Defense.

With respect to the proposed Messner testimony, Renzi argues that the district court should “have balanced [Kolbe's] Speech or Debate Clause protections against Renzi's right to present a defense.” Renzi Br. at 41. That is incorrect.²¹

The testimony Renzi sought from Messner concerned Kolbe's legislative activities. *See* Renzi Br. at 19 (desired Messner testimony concerned Messner's “interactions with Renzi, his support for the Aries [Bill], [and] his efforts to

if it forces the Member to consider introducing legislative matters in his or her defense at trial. *See, e.g., Rostenkowski*, 59 F.3d at 1303; *McDade*, 28 F.3d at 291, 295; *Myers*, 635 F.2d at 942. This is not a pre-indictment case, and none of these decisions addressed, or even discussed, the waiver question at issue here.

DOJ also may argue, as it suggested below, that a waiver finding is justified here because the alternative – admitting the testimony Renzi elicited from Hegner and/or Aries on cross examination, but excluding Keene's direct testimony about the same or similar matters – would be unfair to DOJ. The Court also should reject this argument if made, both because *Helstoski* and *Johnson* are dispositive on the waiver issue, and because DOJ could have made an Federal Rule of Evidence 403 objection at trial and apparently chose not to. *See* Mem. of [the House] as *Amicus Curiae* . . . at 11 (D. Ariz. May 6, 2013) (ECF 1168) (explaining, in response to [DOJ's] Contingent Motion to Admit Evidence (D. Ariz. Apr. 29, 2013) (ECF 1149), that Renzi's introduction of legislative matters in his own defense could not effect a waiver, but that court could address any unfair prejudice problems, as an evidentiary matter, through Rule 403).

²¹ The House takes no position on what we understand to be Renzi's alternative arguments that his Fifth and/or Sixth Amendment rights were violated, and/or that the district court otherwise erred, as a result of the dissimilar manner in which that court applied the Speech or Debate Clause to DOJ's and Renzi's witnesses. *See* Renzi Br. at 40-42.

promote the legislation within the . . . community”). That proposed testimony, therefore, clearly was Speech or Debate protected as to Kolbe, and Renzi does not suggest otherwise. Given this, Renzi has no argument because this Court properly already has rejected the notion that the Speech or Debate Clause is subject to any kind of balancing: “If the Clause applies, it applies absolutely – there is no balancing of interests nor lessening of the protection afforded . . .” *Renzi*, 651 F.3d at 1038.

The Supreme Court already has addressed the balancing notion in the civil context (and, as noted above, the Court never has distinguished between the application of the Clause in the civil and criminal contexts). In *Eastland*, a nonprofit corporation and two members alleged that a congressional subpoena violated their First Amendment rights. *See* 421 U.S. at 493-96, 509-10. The D.C. Circuit “concluded that if the subpoena were obeyed [plaintiffs]’ First Amendment rights would be violated,” *id.* at 498, with one member of the panel specifically endorsing a balancing of “the congressional interests against private rights,” *id.* at 500.

The Supreme Court reversed. In so holding, it did not inquire whether the constitutional rights of the nonprofit and its members were violated, nor did it engage in any balancing. Those inquiries, it effectively held, were beside the point:

Their [the plaintiffs'] theory seems to be that once it is alleged that First Amendment rights may be infringed by congressional action the Judiciary may intervene to protect those rights; the Court of Appeals seems to have subscribed to that theory. That approach, however, ignores the absolute nature of the speech or debate protection and our cases which have broadly construed that protection.

Id. at 509-10 (footnote omitted).

The question to be resolved is whether the actions of the petitioners [the congressional parties] fall within the sphere of legitimate legislative activity. If they do, the petitioners 'shall not be questioned in any other Place' about those activities since the prohibitions of the Speech or Debate Clause are absolute.

Id. at 501 (quoting Speech or Debate Clause; other quotation marks and footnote omitted); *see also id.* at 503 ("We reaffirm that once it is determined that the Members are acting within the legitimate legislative sphere, the Speech or Debate Clause is an absolute bar to interference." (quotation marks omitted)).²²

²² Other courts also have rejected, in both the civil and the criminal contexts, balancing arguments similar to that advanced here by Renzi. *See, e.g., U.S. v. Rayburn House Office Bldg.*, 497 F.3d 654, 662-63 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008); *Brown & Williamson*, 62 F.3d at 417-19; *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 860, 862 (D.C. Cir. 1988); *Williams v. Johnson*, 597 F. Supp. 2d 107, 117-18 (D.D.C. 2009) (finding "wholly without merit" suggestion that court should engage in any balancing).

Eastland is dispositive of Renzi's claim. While Renzi cites *U.S. v. Nixon*, 418 U.S. 683 (1974), in support of his balancing idea, *Nixon* concerned executive privilege which is qualified and, therefore, necessarily subject to balancing. See 418 U.S. at 706-07. The Speech or Debate Clause is different; it is absolute when it applies and, therefore, "there is no balancing of interests." *Renzi*, 651 F.3d at 1038.

CONCLUSION

This Court should hold that admission of the challenged Keene testimony violated the Speech or Debate Clause, and that the district court properly declined to balance Kolbe's Speech or Debate rights against Renzi's right to present a defense.

Respectfully submitted,

/s/ Kerry W. Kircher

KERRY W. KIRCHER, General Counsel
WILLIAM PITTARD, Deputy General Counsel
TODD B. TATELMAN, Assistant Counsel
MARY BETH WALKER, Assistant Counsel
ELENI M. ROUMEL, Assistant Counsel
ISAAC B. ROSENBERG, Assistant Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
202/225-9700

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

CERTIFICATE OF COMPLIANCE

1. This brief is accompanied by a motion for leave to file an oversize brief pursuant to Fed. R. App. P. 29(d) and Circuit Rule 32-2; it contains 9,099 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

/s/ Kerry W. Kircher
Kerry W. Kircher

CERTIFICATE OF SERVICE

I certify that on April 15, 2014, I filed via the Court's CM/ECF system the foregoing Brief of the Bipartisan Legal Advisory Group of the U.S. House of Representatives as *Amicus Curiae* and served via the CM/ECF system all parties for whom counsel has entered an appearance by operation of the Court's CM/ECF system.

/s/ Kerry W. Kircher
Kerry W. Kircher