Nos. 10-10088, 10-10122

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross-Appellant,

v.

RICHARD G. RENZI,

Appellant/Cross-Appellee.

On Appeal from Orders of the U.S. District Court
for the District of Arizona

BRIEF OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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July 18, 2011

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INTRODUCTION

Pursuant to Circuit Rule 29-2, the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") respectfully urges this Court to grant the Petition for Rehearing *En Banc* by Appellant . . . Renzi (July 7, 2011) (ECF No. 45-1) ("Petition").[1] The Panel's June 23, 2011 Opinion ("Slip. Op.") plainly merits *en banc* review because it "directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity." 9th Cir. R. 35-1.

The Panel's Opinion concerns the scope and application of 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") – which is a fundamental pillar of Congress' independence and critically important to its relationship with the other branches of the federal government.

The House has no institutional interest in shielding former Congressman Richard Renzi from prosecution – and it does not file this brief for that purpose.

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[1] The Bipartisan Legal Advisory Group articulates the institutional position of the House of Representatives in litigation matters. It is currently comprised of the Honorable John A. Boehner, Speaker of the House, 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. The House is entitled to file as *amicus curiae* here, both because it is part of the "United States" government, 9th Cir. R. 29-2(a), and because counsel for both parties have consented to this filing. *Id*.

The House, however, has a very great interest in seeing that the Speech or Debate Clause, when reconciled with the Executive Branch's legitimate interest in investigating and prosecuting legislators who may have engaged in criminal activities, is construed in a manner that protects Congress and its Members in the conduct of their legislative duties, and thereby safeguards the independence of the Legislative Branch that is essential to our system of Separation of Powers. This the Panel conspicuously failed to do.

The Panel ruled on three distinct Speech or Debate issues. In general, we concur with Mr. Renzi that "[t]wo of the panel's rulings warrant *en banc* review because of . . . conflicts [with rulings of the Supreme Court, the Ninth Circuit and the D.C. Circuit] and their exceptional importance." Petition at 2. We write separately, however, to express our particular concern with the Panel's extraordinary (and unnecessary) ruling that legislative documents are not constitutionally protected, notwithstanding

- the Supreme Court's very clear holdings that the Speech or Debate Clause protects absolutely *all* activities by Members of Congress "within the 'legislative sphere,'" *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973) (quoting *Gravel v. U.S.*, 408 U.S. 606, 624-25 (1972)), which sphere 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."
>
> *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (quoting *Gravel*, 408 U.S. at 625); and,

- the self-evident proposition that documents may constitute or reflect activities "within the legislative sphere."

CONSTITUTIONAL OVERVIEW

The Separation of Powers Principle. "[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). "[N]one 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." The Federalist No. 48 (James Madison).

The Founders 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, that is, mechanisms that would "provide some practical security for each [branch], against the invasion of the others." *Id*. *See also* The Federalist No. 51 (James Madison) ("[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 encroachments of the others."). One such concrete, practical mechanism is the Speech or Debate Clause.

The History, Purpose and Scope of the Speech or Debate Clause. The Clause – which applies "even though the[] conduct [in question], if performed in *other* than legislative contexts, would . . . be unconstitutional or otherwise contrary to criminal or civil statutes," *McMillan*, 412 U.S. at 312-13 – is rooted historically in the suppression and intimidation, by criminal prosecution, of Members of Parliament by English monarchs in the 16th and 17th centuries. *See U.S. v. Johnson*, 383 U.S. 169, 178 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

"The purpose of the Clause is to [e]nsure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland*, 421 U.S. at 502. Its "'central role'" is to "'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.'" *Id.* (quoting *Gravel*, 408 U.S. at 617). The Clause thus "reinforc[es] the separation of powers so deliberately established by the Founders." *Johnson*, 383 U.S. at 178; *see also U.S. v. Brewster*, 408 U.S. 501, 507 (1972).

Because the guarantees of the Clause are so "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 has insisted, "[w]ithout exception . . . [that the Clause be] read . . . broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501; *see also McMillan*, 412 U.S. at 311; *Gravel*, 408 U.S. at 618, 624.

In keeping with these mandates, the courts have construed broadly the concept of legislative activity by "not tak[ing] a literalistic approach in applying the privilege. . . . Committee reports, resolutions, and the act of voting are equally covered," *Gravel*, 408 U.S. at 617; as are committee investigations and hearings, *Eastland*, 421 U.S. at 505-06; as is information gathering in furtherance of legislative responsibilities 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.'" *Id*. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)); *see also Miller v. Transam. Press, Inc*., 709 F.2d 524, 528-29 (9th Cir. 1983) (informal information gathering by individual Member protected).

Beyond legislative acts themselves, the Clause also broadly protects "'against inquiry into . . . the motivation for those [legislative] acts.'" *U.S. v. Helstoski*, 442 U.S. 477, 489 (1979) (quoting *Brewster*, 408 U.S. at 525); *see also*

Brewster, 408 U.S. at 538; *Johnson*, 383 U.S. at 180, 184-85; *Miller*, 709 F.2d at 530.[2]

The Speech or Debate Clause encompasses three broad protections: (i) an immunity from prosecutions and lawsuits for all "actions within the 'legislative sphere,'" *McMillan*, 412 U.S. at 312; (ii) a non-evidentiary use privilege that bars prosecutors – and parties in civil suits – from advancing their cases or claims against Members by "[r]evealing information as to a legislative act," *Helstoski*, 442 U.S. at 490; *see also Johnson*, 383 U.S. at 173; and (iii) a discovery privilege, both against being *compelled* to testify about legislative matters, *see, e,g*., *Gravel*, 408 U.S. at 615-16; *Miller*, 709 F.2d at 528-29; *and* against being *compelled* to produce legislative documents, *see, e.g*., *U.S. v. Rayburn House Office Bldg*., 497 F.3d 654, 655-56, 660-62 (D.C. Cir. 2007).

The *Rayburn* Decision and Legislative Documents. While *Rayburn* referred to the discovery privilege as a "non-disclosure" privilege, *id*. at 662, it is

[2] The broad reading mandated by the Supreme Court also has resulted in the application of the Clause (1) beyond the criminal context where it originated to the private civil context because a "private civil action . . . creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks . . . ." *Eastland*, 421 U.S. at 503; *see also Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) ("Speech or Debate Clause applies in civil cases. . . . The Clause states, after all, that Members shall not be called to account 'in any other Place' – not just a criminal court."); and (2) "to [a Member's] aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel*, 408 U.S. at 618.

important that this Court understand – because it is not clear the Panel did – that in using the word "non-disclosure," the D.C. Circuit was describing a privilege that applies only to *compelled* disclosure (*e.g.*, by subpoena or judicial warrant) of legislative documents.[3] *Rayburn* did not hold or suggest – and it is a mistake to read it as holding or suggesting – that the Clause "precludes the Government from reviewing documentary evidence referencing 'legislative acts,'" Slip. Op. at 8541, where that evidence is obtained legally and not in violation of the Clause. Insofar as the Speech or Debate Clause is concerned, prosecutors are free to review legislative materials they obtain, for example, from publicly-available sources or voluntarily from individuals who possess such materials (although, as noted above, such legislative materials may not then be used *as evidence* against the Member).

Accordingly, Judge Henderson, in her concurrence in *Rayburn* – upon which the Panel relied heavily, *see, e.g.*, Slip Op. at 8544 – was wrong when she characterized the *Rayburn* majority's holding as meaning that "the Clause's shield protects against *any* Executive Branch exposure to records of legislative acts." 497 F.3d at 671-72.

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[3] *Rayburn* concerned *compelled* disclosure inasmuch as the FBI, pursuant to a judicially authorized search warrant, raided then-Congressman William Jefferson's congressional office and forcibly seized virtually all of the documents in his office, including substantial quantities of the Congressman's legislative records. *See* 497 F.3d at 656-57.

The constitutional protection for legislative documents is firmly rooted in *Gravel*, did not originate with *Rayburn*, and has been an essential part of our constitutional fabric for decades. *See, e.g.*, *Brown & Williamson*, 62 F.3d at 419-21; *Pentagen Techs. Int'l, Ltd. v. Comm. on Appropriations*, 20 F. Supp. 2d 41, 43-44 (D.D.C. 1998), *aff'd*, 194 F.3d 174 (D.C. Cir. 1999) (per curiam); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859-61 (D.C. Cir. 1988); *U.S. v. Peoples Temple of the Disciples of Christ*, 515 F. Supp. 246, 248-49 (D.D.C. 1981).

Much of the case law, of course, was developed by federal courts in the District of Columbia, not surprisingly given that Capitol Hill is located in Washington, Members perform most of their legislative work in Washington and, therefore, the vast majority of Congress' legislative records are in Washington. However, the case law in this area is not limited to D.C. federal courts. This Court in *Miller* stated that committee reports and materials inserted into the Congressional Record are privileged. 709 F.2d at 529-30; *see also* Order at 1, *U.S. v. McDade*, No. 96-1508 (3d Cir. July 12, 1996) (reversing lower court order which had directed House committee to produce to Justice Department committee documents the lower court concluded were Speech or Debate-protected), attached as Exhibit A; *United Transp. Union v. Springfield Terminal Ry. Co.*, 132 F.R.D. 4, 6-8 (D. Me. 1990); Order at 3-7, *Stupak v. Hoffman-La Roche, Inc.*, No. 8:05-cv-

926-T-30TBM (M.D. Fla. Apr. 28, 2006) (ECF No. 30); Order, *U.S. v. Moussaoui*, No. 01-cr-455 (E.D. Va. Mar. 2, 2006), attached as Exhibit B; Order, *U.S. v. Arthur Andersen, LLP*, No. 02-cr-121 (S.D. Tex. May 14, 2002), attached as Exhibit C.[4]

Accordingly, it is the Panel's Opinion that radically departs from existing law, and not, as the Panel implies, the *Rayburn* decision; *Rayburn* is entirely consistent with Supreme Court jurisprudence. The Clause exists to safeguard Congress' institutional role in our federal government, *Brewster*, 408 U.S at 507, and whenever "power is . . . brought to bear on Members of Congress" by another branch of our government, legislative independence is "imperiled," *Eastland*, 421 U.S. at 503. That is just as true when a Member is compelled to disclose legislative *documents* as it is when (i) a Member is compelled to testify about legislative matters; (ii) a Member's legislative activities are used as evidence against him, or (iii) a Member is prosecuted or made to answer civilly for his legislative activities. All equally violate the Constitution.

[4] Aside from *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978) ("*Eilberg*"), we are unaware of any other decision, aside from the Panel Opinion, which suggests that legislative documents are not constitutionally protected. And *Eilberg* has been discredited and is no longer followed, even in the Third Circuit. *See* Brief *Amicus Curiae* of the [House] in Support of Reversal at 32-34 (June 24, 2010) (ECF No. 12-2) ("House Brief").

ARGUMENT

The third section of the Panel's Opinion – that the Speech or Debate Clause does not apply to legislative documents – manifestly "directly conflicts," 9th Cir. R. 35-1, with *Rayburn*, *MINPECO*, *McDade* and other cases. Moreover, because the Clause is a fundamental and critical provision of Article I of the Constitution and applies to every Member of the House and Senate, the Panel's ruling also "substantially affects a rule of national application in which there is an overriding need for national uniformity." *Id*.

For example, if the Panel Opinion stands, the legislative records of Members who represent congressional districts in the Ninth Circuit will be constitutionally protected in Washington, but not in their congressional districts, whereas the legislative records of Members who represent congressional districts outside the Ninth Circuit will be constitutionally protected both in Washington and in their districts. That is an exceedingly non-uniform and unsatisfactory state of affairs.

En banc review also is appropriate because of numerous substantial and critical flaws in the Panel's reasoning including, but not limited to, the following:

1. The Panel did not need to decide whether legislative documents are Speech or Debate-protected and, therefore, did not need to create a conflict with the D.C. Circuit. This is so because the issue Mr. Renzi raised was *not* whether his legislative documents were constitutionally privileged, but whether "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." Slip Op. at 8541. Having indicated at the outset that a *Kastigar*-like hearing is *not* an available remedy in the Speech or Debate context, *id*. at 8541-42 n.21, the Panel could and should simply have stopped at answering the question actually presented.

2. The Panel ignored the fact that Mr. Renzi's *Kastigar* argument turned also on *testimonial* evidence the prosecutors obtained in arguable violation of the Clause. *See* Brief for Appellant . . . Renzi at 50 (June 17, 2010) (ECF No. 7-1); Slip Op. at 8515 n.6 (prosecutors, pursuant to judicial warrant, wiretapped Renzi's cell phone).[5] While the Panel correctly may have refrained from considering whether the wiretap, *standing by itself*, violated the Speech or Debate Clause – because "the evidence obtained from the wiretap was later suppressed because of violations of Renzi's attorney-client privilege [and] [t]he Government [did] not challenge that ruling," Slip Op. at 8515 n.6 – the wiretap evidence obtained clearly remained relevant to Mr. Renzi's *Kastigar* argument.

[5] There was substantial evidence in the record below that the wiretap resulted in the recording of numerous Renzi conversations – with congressional aides and other Members of Congress – that concerned legislative matters and, therefore, were Speech or Debate-protected. *See* House Brief at 7-10, 39-48.

Thus, if the Panel were going to insist on determining whether the evidence the prosecutors obtained violated Mr. Renzi's Speech or Debate privilege, *before* considering whether a *Kastigar*-like remedy was even available, then surely the Panel was obligated to consider *all*, not just some, of the evidence Mr. Renzi contended had been obtained in violation of his constitutional rights.[6]

3. The Panel misread the case law in certain critical respects. For example, the Panel wrongfully concluded that the Supreme Court has countenanced the "compelled . . . disclos[ure of] documentary 'legislative act' evidence," Slip Op. at 8549 (citing *Helstoski*, *Johnson* and *Gravel*). *See* Petition at 8 (correctly noting that *Helstoski* did not involve *any* compelled disclosure). Indeed, the fact that Helstoski *voluntarily* produced legislative materials to the Executive Branch is precisely why the question before the Supreme Court was whether, in so doing, he had *waived* his Speech or Debate rights. *See* 442 U.S. at 480-81.

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[6] Ironically, in considering *only* the documentary evidence Mr. Renzi contended had been obtained in violation of the Clause, the Panel focused on the one class of evidence that appears *not* to have been obtained unconstitutionally. As noted above, *supra* at 8-9, if the assertedly legislative documents the Department possessed were not obtained from Mr. Renzi illegally or by legal compulsion – and there is no indication in the record that they were – then the Department's possession and review of those documents in the course of its investigation did not violate the Clause. Had the Panel made this determination, then it would not have needed to resolve the *Kastigar* question at all, much less would it have needed to precipitate a circuit split.

As for *Johnson* – which predates *Gravel* – the pages in that opinion cited by the Panel, 383 U.S. at 173-77, do not in fact "describ[e] the Government's investigation into actual legislation and other clear legislative acts." Slip Op. at 8549-50. Rather, those pages describe *testimonial evidence elicited at Congressman Johnson's trial*, which evidence resulted *in the reversal* of the Congressman's conviction:

> We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch . . . violates the express language of the Constitution, and the policies which underlie it.

Johnson, 383 U.S. at 177. If anything, this undercuts, rather than supports, the Panel's conclusion that legislative records are not constitutionally protected.[7]

The Panel also distorted the case law in asserting that the courts have "reviewed 'legislative act' evidence on countless occasions . . . with nary an eyebrow raised as to the disclosure . . . [which] demonstrates that the Clause does not incorporate a non-disclosure privilege as to any branch," Slip Op. at 8553. The cases the Panel cites involved instances in which (i) testimony about legislative

[7] The same thing is true of *Gravel*. Nothing in footnote 18 of that decision, to which the Panel cites, supports the conclusion that legislative records are not Speech or Debate-protected. If anything, footnote 18 suggests the opposite by making clear that Senator Gravel and his aide could *not* be questioned about legislative matters. *See Gravel*, 408 U.S. at 629 n.18.

acts was introduced at trial by the prosecution, resulting in the *reversal* on Speech or Debate grounds of the Member's conviction, *Johnson*, 383 U.S. at 177; (ii) legislative documents were produced *voluntarily* by the Member, *Helstoski*, 442 U.S. at 481-82; and (iii) no legislative documents were produced at all, *Gravel*, 408 U.S. at 628. None of these cases come close to supporting the Panel's conclusion.[8]

4. In fixating on the word "distraction," Slip Op. at 8545-51, the Panel mistook the rationale of the Clause for a test for its application. The courts have described at various times, and in various ways, the ills the Speech or Debate Clause was designed to avert in service of the ultimate goal of congressional independence. *See, e.g.*, *Eastland*, 421 U.S. at 503 ("burden of defen[se];" "distraction . . . and diver[sion of] their time, energy, and attention from their legislative tasks;" "delay and disrupt[ion of] the legislative function"); *Miller*, 709

[8] In fact, courts *rarely* review documents which are asserted to be legislative to determine whether they are privileged, precisely because such review would be inconsistent with the purposes that underlie the Speech or Debate Clause, one of which is to "prevent . . . accountability before a possibly hostile judiciary. . . ." *Eastland*, 421 U.S. at 502. Except in very rare instances, courts have avoided asserting an authority to review specific documents and instead have confined themselves to determining whether specific categories of documents reflect "legislative activities," as defined by the Supreme Court, on the basis of the language in subpoenas themselves or Members' representations about the categories of documents they contend are privileged, representations to which the courts have appropriately seen fit to defer. *See, e.g.*, *Pentagen*, 20 F. Supp. 2d at 44 (accepting legislators' representations regarding documents sought).

F.2d at 528 ("distraction from legislative duties, obstruction of ongoing legislative activity, [and] the burden of defense;" "chilling effect on Congressional freedom of speech"); *Brown & Williamson*, 62 F.3d at 419 ("prevent intrusions into the legislative process").

Whatever the particular formulation, concepts like burden, distraction and chill are not tests to be applied in individual cases, which is essentially what the Panel did here.[9] Rather, the ultimate touchstone of the Clause is the "protect[ion of] the integrity of the legislative process itself." *MINPECO*, 844 F.2d at 859 (citing *Miller*). And it is hard to conceive of a holding that would do more to undercut the integrity of the legislative process – as well as burdening and distracting legislators, and chilling congressional freedom of speech – then the Panel's throwing open the doors to compelled disclosure of legislative documents.

5. The Panel also ignored the basic realities of the federal legislative process. The legislative work of the House (and the Senate) is a document intensive process, with oceans of written legislative work product – *e.g.*, drafts of

[9] If it were otherwise, *Miller*, which held that a *former* Member could not be interrogated about his legislative affairs when he was a Member, would make no sense. 709 F.2d at 529 ("courts have disregarded the absence of liability or of current legislative tasks when applying the privilege"); *see also Brown & Williamson*, 62 F.3d at 419 ("[D]egree of disruption is immaterial. . . . [A]ny probing of legislative acts is sufficient to trigger" the protections of the Clause); *MINPECO*, 844 F.2d at 859.

legislation, reports, floor statements; analyses of legislative proposals; email, memoranda and correspondence concerning legislative and oversight matters; materials gathered in response to congressional subpoenas – being generated and collected every single day. And it is indisputably the case that "[d]ocumentary evidence can certainly be as revealing as oral communications," and "indications as to what Congress is looking at provide clues as to what Congress is doing, or might be about to do." *Brown & Williamson*, 62 F.3d at 420.

6. In suggesting that legislative documents may be protected "*only* when the underlying action is itself [protected]," Slip Op. at 8546, the Panel has created out of whole cloth a new constitutional test that has no grounding in Supreme Court jurisprudence. This new test – which treats very differently testimonial discovery and document discovery, even though there is but one constitutional privilege – makes no logical sense because, if the underlying action is constitutionally protected as to the Member, then it will be subject to dismissal and the issue of the discoverability of legislative documents generally will not arise.

Moreover, the Panel's new test is conceptually incompatible with *Miller*, which held that a former Congressman was protected by the Clause from being questioned by a litigant in a case to which the former Member was not a party, and in which "the underlying action" – a defamation suit by a union pension fund trustee against a magazine publisher – could not possibly be described as being

Speech or Debate-protected. There is no reason in law or logic why the former Member in *Miller* should be constitutionally protected from having to answer deposition questions about his legislative activities (as he certainly was), but constitutionally defenseless were he to be subpoenaed to produce documents which memorialized, reflected, or analyzed those same legislative activities.

CONCLUSION

If the Panel Opinion stands, a majestic constitutional provision that is "vitally important to our system of government," *Meanor*, 442 U.S. at 506, and about which "the Supreme Court has rarely spoken with greater clarity," *Peoples Temple*, 515 F. Supp. at 249, will be badly weakened; the balance of constitutional power between the Legislative and Executive branches, in particular, will be significantly altered, *cf*. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring) (warning against dangers of accretions of power in executive); and Congress' legislative, oversight and investigative functions will be chilled, disrupted and burdened to the detriment of the American people. Accordingly, this Court should grant rehearing *en banc*.

Respectfully submitted,

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July 18, 2011

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Ninth Circuit Rule 40-1, that the foregoing Brief of the Bipartisan Legal Advisory Group of the U.S. House of Representatives as *Amicus Curiae* in Support of Petition for Rehearing *En Banc*, is proportionately spaced, has a typeface of 14 points, and contains 4,136 words.

/s/ Kerry W. Kircher
Kerry W. Kircher

CERTIFICATE OF SERVICE

I certify that on July 18, 2011, I served one copy of the foregoing Brief of the Bipartisan Legal Advisory Group of the U.S. House of Representatives as *Amicus Curiae* in Support of Petition for Rehearing *En Banc* via the Ninth Circuit's ECF system on all parties in this case.

/s/ Kerry W. Kircher
Kerry W. Kircher

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL ACTION
JOSEPH M. McDADE, Defendant	:	NO. 92-249

FILED
AUG 1995
MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

ORDER

AND NOW, this 4th day of August, 1995, it is ORDERED that the Motion of the Custodian of Records of the House of Representatives to Quash the Subpoena issued to the Committee on Standards and Official Conduct (Subpoena 1) is GRANTED IN PART.* It is further ORDERED that the Custodian of Records shall produce all other documents requested by the government.

It is further ORDERED that Defendant's Motion to Quash the Subpoena issued to his office (Subpoena 2) is GRANTED IN PART.**

1995

BY THE COURT:

Robert S. Gawthrop, III J.

*The subpoena requests various documents from the House Ethics Committee, including letters of transmittal which the Ethics Committee sent along with copies of its rules to Mr. McDade, and any memoranda or correspondence concerning contact which Mr. McDade's office made to staff of the Committee on Standards and Official Conduct ("the Committee") to obtain informal advisory opinions on travel or the acceptance of gifts.

The House argues that any evidence of contact between Mr. McDade's staff and the Committee is privileged by the Speech or Debate Clause of the Constitution, Art. I, § 6, because the Committee acts pursuant to the House's constitutional power to "determine the Rules of its Proceedings" and "punish its Members for disorderly Behaviour." Art. I, § 5.

The Speech or Debate Clause protects activities which Congress undertakes pursuant to subjects within its constitutional jurisdiction, in addition to activities related to the process of drafting and proposing legislation. See Gravel v. United States, 408 U.S. 606, 625 (1972). When Congressional committees carry out protected activities, they are protected by the Speech or Debate Clause. Id.

The House's claim that because the Committee carries out the House's constitutional rulemaking powers, all of its communications are protected, is too broad. The privilege extends beyond actual speech or debate "only when necessary to prevent indirect impairment of deliberations." Id. Thus, an act which is not actual speech or debate is protected only if it is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings." Id.

Filing a financial disclosure statement with the House Clerk is not protected, for example, because even though the act relates to the House's right to provide rules and discipline for its members, it is not part of the deliberative and communicative process by which House members participate in the rulemaking function. United States v. Myers, 692 F.2d 823, 849 (2d Cir.), cert. denied, 491 U.S. 961 (1982). On the other hand, when the Ethics committee conducts a disciplinary proceeding, its deliberations, and the report which it issues, are protected. See Federal Elec. Comm'n v. Wright, 777 F. Supp. 525, 530 (N.D. Tex. 1991).

Applying this standard, I conclude that the transmittal letters attached to copies of Rules or forms which the Committee sent to Mr. McDade are not privileged. This correspondence is not integral to the deliberative and communicative process of promulgating House rules or disciplining members. In sending out these letters, Congress is merely providing its members with the finished product. It is not engaging them in debate over the content of the Rules or the punishment of a member.

The advisory opinions issued to Mr. McDade are, however, privileged. When a committee exercises its investigatory powers, the process by which it gathers and uses information is generally protected. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Tavoulareas v. Piro, 527 F. Supp. 676, 682 (D.D.C. 1981). By the same token, when a committee staffperson provides a member with an opinion of how the House rules apply to his conduct, she is carrying out an integral part of the deliberative and communicative process by which the House determines its rules. Were the courts to expose such communications, that exposure might impair the House's ability to regulate its members' conduct. Members might be more reluctant to seek the Committee's advice, for example, were there

a possibility that the Committee's interpretations might be used against them in a judicial proceeding.

The requests which Mr. McDade made to the committee for the committee's opinions fall somewhere in between these two categories, but I conclude that they are not protected. The Speech or Debate Clause "prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." United States v. Brewster, 408 U.S. 501, 508 (1972).

When a congressman testifies in response to an Ethics Committee inquiry about his personal or campaign finances, he acts in a personal, not legislative, capacity, and his testimony is not protected. United States v. Rose, 28 F.3d 181, 189 (D.C. Cir. 1994); Federal Elec. Comm'n v. Wright, 777 F. Supp. 525, 529-30 (N.D. Tex. 1991); but see United States v. Durenberger, 1993 WL 556454 (D. Neb. Dec. 6, 1993); United States v. Eilberg, 465 F. Supp. 1080, 1082-83 (E.D. Pa. 1979). In Rose, the D.C. Circuit criticized Durenberger and Eilberg. 28 F.3d at 189. I find its reasoning to be compelling. Although the defendant urges Eilberg upon the court as binding authority, I note, with all due respect to my colleagues, whom I do indeed respect, that the opinions of fellow district court judges do not control my decision. They are often persuasive, but those of co-equal judicial stature do not bind each other.

Rose also cites cases which hold that providing financial disclosure information to the House Clerk is not protected activity because it is "no part of [the] deliberative and communicative process [by which Members participate in committee and House proceedings.]". Id., citing Myers, supra, & United States v. Hansen, 566 F. Supp. 162 (D.D.C.), aff'd, No. 83-1689 (D.C. Cir. Aug. 1, 1983) (unpublished order).

In requesting a Rules interpretation from the Committee, Mr. McDade was acting in his personal, not his legislative capacity. He did not participate in the deliberative or communicative process in which the Committee formed its opinion. Cf. Rose ("[Rose] was neither a member of the Ethics Committee nor one of its agents.").

Given that the government requests a number of documents which appear not to be privileged, the House and Mr. McDade shall submit an index of all material which they consider to be privileged. See In re Grand Jury Investigations, 587 F.2d 589, 595 (3d Cir. 1978). The government shall be given the opportunity to contest claims of privilege, and the burden shall be upon the House and upon Mr. McDade to prove that the documents are privileged. Id. at 597. This exercise must be undertaken not with a broad brush, but with item-by-item particularity. See id.

The government may request production of any document which is not sufficiently described in the index to allow it to contest the invocation of the privilege. The Speech and Debate privilege is "not one of nondisclosure but of nonevidentiary use." In re Grand Jury Proceedings, 563 F.2d 577, 584 (3d Cir. 1977). To the extent that courts in other circuits have

permitted the House to assert a blanket speech or debate privilege, they conflict with the law in this circuit.

**The subpoena issued to Mr. McDade's office calls for many of the same materials requested in Subpoena Number 1 from the Ethics Committee. Mr. McDade contends that the government use of a Fed. R. Crim. Proc. 17(c) subpoena to request these documents is inappropriate. See United States v. Nixon, 418 U.S. 683, 700 (1974).

The subpoenas as drafted request narrow categories of documents. In the subpoena issued to Mr. McDade's office, there is a detailed list of specific requested documents. The subpoenas are not a mere "fishing expedition," nor are they a set of general requests more suited for discovery requests. See id. They seek information not by flinging forth a seine to surround the defendant and his office, thereby netting the works. Rather, to the extent that they fish for information, they consist of certain precise casts to specific potentially fruitful sites.

Further, the documents are relevant. One of Mr. McDade's defenses is that he was not aware that his conduct was unlawful, or that it violated the House Rules. Thus, evidence that Mr. McDade was aware of the legal standards which governed him as a congressman is relevant.

Mr. McDade argues that some of the evidence requested is too old to be relevant. For example, he claims that evidence of his awareness of the rules during the 1970's is not relevant because he is accused of acts which occurred in 1983-88. I prefer, however, to make these admissibility determinations within the context of the trial. It may well be, for example, that although the rules may have been subject to some tinkering, some fine-tuning, over the years, the core of their meaning has remained essentially the same.

Certain documents may be inadmissible because they are protected by the Speech or Debate Clause. As for any documents which Mr. McDade considers to be privileged, he shall follow the catalog procedure described above. He will have ample time to have their admissibility adjudicated before they are brought to light before the jury.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Criminal No. 01-455-A
v.	)	
	)	
ZACARIAS MOUSSAOUI,	)	
	)	
Defendant.	)	

ORDER

Before the Court is the Motion of U.S. Representative Curt Weldon to Quash Subpoena (Docket #1584), in which Representative Weldon objects to being called to give testimony about or provide documents collected during his investigation of the government's "Able Danger" program. The government has filed a related Motion In Limine to Exclude the Testimony of Proposed Defense Witnesses Related to the Able Danger Program (Docket #1619) ("Motion to Exclude"), in which it seeks a ruling preventing the defense from calling three witnesses with personal knowledge of the "Able Danger" program.[1]

On January 23, 2006, a trial subpoena was issued to

[1]The government's Motion to Exclude was filed under seal, because it reveals the names of potential defense witnesses. Because the Motion to Quash was not filed under seal, without objection from the defense, it is clearly a matter of public knowledge that the defense may wish to call witnesses knowledgeable about the "Able Danger" program. Therefore, the Court will address both motions in this unsealed Order.

Representative Weldon commanding him to appear at this court on March 6, and to bring any documents in his possession referring or relating to the "Able Danger" program, or to any of the September 11 hijackers. Representative Weldon objects to the subpoena on the grounds that as a member of Congress, his privilege under the Speech and Debate Clause of the United States Constitution immunizes him from being compelled to give testimony or provide documents in this case.[2] Representative Weldon also states that he is no longer in possession of the chart that the defense seeks.[3] The defendant objects to the Motion to Quash arguing that by discussing his knowledge of the "Able Danger" program in public, non-legislative fora such as The Oprah Winfrey Show, Representative Weldon has waived any privilege he may have had.

The Speech and Debate Clause provides a very strong protection to members of Congress against being questioned about activities that are "within the sphere of legitimate legislative activity." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501 (1975). If the court finds that the activities at issue are

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

[3]Although the subpoena is more broadly written, the defense has expressed a particular interest in a chart referenced by Representative Weldon in his book, Countdown to Terror, and described in various newspaper articles.

within the sphere of legitimate legislative activity, then "the prohibitions of the Speech or Debate Clause are absolute" and the representative may not be questioned about them, other than by the Congress itself. Id. Legitimate legislative activity has been defined by the Supreme Court as matters that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, 408 U.S. 606, 625 (1972). Much, if not all, of the information responsive to the subpoena can be expected to have come from Representative Weldon's legitimate legislative activity of investigating a project that is clearly a proper subject for Congressional legislation.

It is also clear that Representative Weldon's public discussion of his "Able Danger" investigation is not sufficient to waive the privilege of the Speech and Debate Clause in the context of this subpoena. The Supreme Court has held that any such waiver "can be found only after explicit and unequivocal renunciation of the protection." United States v. Helstoski, 442 U.S. 477, 491 (1979). Representative Weldon's public statements about the "Able Danger" program never referenced, let alone renounced, the Representative's privilege under the Speech and

Debate Clause. Based on these considerations, the Court does not find that the privilege has been waived. Accordingly, the subpoena will be quashed.

This decision will not prejudice the defendant because clearly Representative Weldon possesses no first hand knowledge of the government's "Able Danger" program. Anything he knows about the program either came from witnesses with more direct knowledge or the document which he no longer possesses. That document can certainly be subpoenaed from Stephen Hadley, the person to whom Representative Weldon says he gave the document. Moreover, as demonstrated by the government's Motion to Exclude, the defense has also subpoenaed three witnesses with first-hand knowledge of the "Able Danger" program. These persons can provide much, if not all, of the information that the defense could expect to obtain from Representative Weldon.

In its Motion to Exclude, the government argues that the entire "Able Danger" issue is not relevant to this case, and, even if relevant, allowing the defense to raise this issue will cause substantial delay and confuse the jury. The government also forcefully argues that no chart linking Mohammed Atta to Al Qaeda ever emerged from the "Able Danger" program, a contention disputed by the potential witnesses.[4] What knowledge the

[4]This contention is also disputed by Representative Weldon, who has stated in press reports that he viewed such a chart. See Deft's Opp. To Rep. Curt Weldon's Mot. to Quash Subpoena.

government possessed before September 11 regarding members of Al Qaeda, and specifically links between Al Qaeda and the eventual hijackers, is a key issue in dispute in this death penalty trial. Accordingly, the Court finds that the information to be elicited from the three "Able Danger" witnesses is sufficiently relevant to the case, and that its relevance is not outweighed by considerations of confusion and waste of time. Therefore, the government's Motion to Exclude is DENIED. Accordingly, it is hereby

ORDERED that the Motion of U.S. Representative Curt Weldon to Quash Subpoena be and is GRANTED, and the subpoena is hereby QUASHED, and it is further

ORDERED that the government's Motion to Exclude be and is DENIED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 2nd day of March, 2006.

/s/

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA, Plaintiff, v. ARTHUR ANDERSEN, L.L.P., Defendant.	Crim. No. H-02-121 (MH)

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
5/15/02
MICHAEL N. MILBY, CLERK

ORDER

UPON CONSIDERATION of the Motion to Quash Subpoena of the Committee on Energy and Commerce of the U.S. House of Representatives ("Motion"), the Opposition, ~~if any,~~ and the entire record herein, it is by the Court this 14th day of May, 2002

ORDERED

That the Motion is granted for all the reasons stated in the Memorandum of Points and Authorities filed in support of the Motion. It is further ORDERED

That the subpoena duces tecum directed to the Committee on Energy and Commerce, issued on April 25, 2002, by Defendant, be and hereby is quashed.

Melinda Harmon

Hon. Melinda Harmon
United States District Judge

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