UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, v. ROBERT MENENDEZ and SALOMON MELGEN, Defendants.	Crim. No. 2:15-cr-00155 Hon. William H. Walls

SENATOR MENENDEZ'S MOTION TO DISMISS THE INDICTMENT BASED ON VIOLATIONS OF THE SPEECH OR DEBATE CLAUSE BEFORE THE GRAND JURY
(Motion to Dismiss No. 2)

Abbe David Lowell
Jenny R. Kramer
Christopher D. Man
Scott W. Coyle
CHADBOURNE & PARKE LLP
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 974-5600

Raymond M. Brown
GREENBAUM ROWE SMITH & DAVIS LLP
Metro Corporate Campus One
P.O. Box 5600
Woodbridge, NJ 07095
(732) 476-3280

Stephen M. Ryan
Thomas J. Tynan
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 756-8000

Counsel for Defendant Senator Robert Menendez

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INTRODUCTION

The Indictment must be dismissed because the grand jury that returned it was inundated with material that is privileged by the Speech or Debate Clause, and those privileged materials unquestionably influenced the grand jury's decision to indict. (U.S. Const. art. I, § 6; see MTD No. 1 (Speech or Debate Clause issues in the Indictment).). The significance the grand jury improperly placed on these privileged materials is reflected in the Indictment itself, which alleges conduct immunized by the Speech or Debate Clause as the basis for the charges in the Indictment. Because the presentation of Speech or Debate Clause material to the grand jury was pervasive and drove the grand jury's decision to indict, the Indictment must be dismissed. See, e.g., United States v. Helstoski, 635 F.2d 200, 205-206 (3d Cir. 1980) (dismissing indictment for excessive presentation of Speech or Debate Clause materials to grand jury).

ARGUMENT

I. RATHER THAN ADHERING TO THE THIRD CIRCUIT'S REMAND FOR THE DISTRICT COURT TO RESOLVE THE SPEECH OR DEBATE CLAUSE ISSUES, THE PROSECUTION PRESENTED THE SPEECH OR DEBATE MATERIAL TO THE GRAND JURY WITHOUT THE HEARING SUGGESTED BY THE COURT

A. The Third Circuit Remanded For The District Court To Determine Whether The Evidence The Prosecution Wanted To Present To The Grand Jury Is Privileged Under The Speech Or Debate Clause

What may have begun as an unwitting error in presenting Speech or Debate Clause privileged material to the grand jury became a knowing decision to submit this forbidden evidence after the prosecution raised, and lost, its Speech or Debate Clause claim before the Third Circuit in this case. The prosecution litigated a motion to compel testimony from current and former members of Senator Menendez's staff concerning events that the witnesses and the Senator maintained were privileged under the Speech or Debate Clause. Those events concerned

communications between Senator Menendez and his staff with the Executive Branch concerning Medicare reimbursement policy and port security issues. (Gov't Br. at 10-11, In re Grand Jury Investig. (Menendez), No. 14-4678 (3d Cir. filed Feb. 6, 2015) ("Gov't CTA3 Br.").) The District Court had granted the prosecution's motion to compel, but the Third Circuit reversed and remanded. In re Grand Jury Investig. (Menendez), 2015 WL 3875670 (3d Cir. Feb. 27, 2015) ("Gov't CTA3 Br.").

The Third Circuit's decision vacating the district court's order to compel provided the prosecution with a roadmap on remand as to what it would need to prove to overcome the Speech or Debate privilege. The prosecutors had argued that "Senator Menendez and his staff advocated on Dr. Melgen's behalf" in their discussions with the Executive Branch concerning Medicare policy and port security issues, and that such advocacy was beyond the protective scope of the Speech or Debate Clause. In re Grand Jury Investig. (Menendez), 2015 WL 3875670, at *1. Senator Menendez challenged this characterization. What prosecutors called advocacy on behalf of Dr. Melgen, Senator Menendez calls immunized Speech or Debate activity – legislative investigation and oversight on matters of policy. The Third Circuit noted that even protected acts "such as legislative fact-finding and informal oversight. . . can look very much like unprotected political acts." Id. The Third Circuit observed that both sides seemed to have some evidence supporting their side, including evidence raised by Senator Menendez suggesting "the discussions focused on policy, not Dr. Melgen's case." Id. at *2 n.3. But because the district court did not make the necessary factual findings concerning the record before it, the Third Circuit chose to "remand the case to the District Court to make specific factual findings about the communications implicated by the grand jury questions. . . . On remand, the contents and purposes of each disputed communication must be separately analyzed

to decide whether the evidence shows that it was a legislative act. " Id. at *2. In doing so, the Third Circuit provided guidance that an activity "consisting of both personal and legislative business could constitute a legislative act if it 'contained a significant legislative component' and . . . 'be deemed immune even though some personal exchanges transpired.'" Id. at *1 (quoting Gov't of the V.I. v. Lee, 775 F.2d 514, 525 (3d Cir. 1985)).[1]

The Third Circuit rejected the prosecution's broad claim that its labelling the actions of Senator Menendez and his staff "advocacy" would lift the protections of the Speech or Debate Clause, but the Third Circuit did not leave the prosecution without a possible remedy. The Third Circuit made clear that prosecutors would have to do more to show that the actions were not legislative, and ordered the District Court to engage in the sort of fact-finding that would be required if the motion to compel were to be granted. Yet, having litigated the issue all the way to the Third Circuit, the prosecutors did not take the Third Circuit up on its offer. Following the Third Circuit's ruling, they made no effort to persuade the District Court that they could do so. The prosecutors recalled some grand jury witnesses, but were careful to avoid asking questions that would trigger the invocation of the Speech or Debate Clause privilege. Instead, prosecutors unilaterally presented the evidence directly to the grand jury through hearsay by its case agent – the very evidence Senator Menendez and his staff had objected to as privileged on Speech or Debate grounds.

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[1] The bulk of the law governing the Speech or Debate Clause is in Senator Menendez's separate motion to dismiss on Speech or Debate Clause grounds based on what is charged in the Indictment itself. (MTD No. 1.) Given that the evidence presented to the grand jury (addressed in this motion) is the basis for what is charged in the Indictment (MTD No.1), the issue as to what is privileged under the Speech or Debate Clause is the same under both motions. Consequently, it appeared prudent not to repeat that argument twice. Additional factual evidence, which was not presented to the grand jury, establishing that the conduct at issue in this Motion is protected by the Speech or Debate Clause is described in a separate motion to dismiss the Indictment based on other conduct before the grand jury. (MTD No.3.)

Given the Third Circuit's ruling, the prosecutors' decision to proceed in this fashion was, at best, curious. The prosecutors knew Senator Menendez objected to the use of this evidence under the Speech or Debate Clause, and it knew the Third Circuit had rejected the argument that prosecutors could circumvent the Speech or Debate Clause by simply labelling the conduct "advocacy." It also is apparent that the Third Circuit envisioned that its "remand" would lead to the District Court resolving the Speech or Debate Clause issue before the challenged evidence was presented to the grand jury. Perhaps to avoid another appeal, the prosecutors chose a path around the one left by the Third Circuit, which would have allowed the District Court to act as a filter to exclude improper evidence from the grand jury. Instead, the prosecutors called their own case agent to introduce the same evidence through hearsay, knowing that he would not raise any objection on behalf of Senator Menendez on Speech or Debate Clause grounds. Senator Menendez had no opportunity to object (although the prosecution knew of his objection), and the District Court was not given the opportunity intended by the Third Circuit on remand to evaluate the privilege claims for itself and determine what could properly be presented to the grand jury.

This strategy ensured the prosecution could present the grand jury with the evidence it wanted the grand jury to see, but it did not follow the careful process ordered by the Third Circuit to protect the Senator's Speech or Debate privilege. By throwing potentially immunized evidence into the grand jury, without first determining whether that evidence was privileged by the Speech or Debate Clause, the prosecution unnecessarily put the entire grand jury process at risk. Now, this Court must rule on this motion, addressing the issues post-Indictment that the Third Circuit envisioned would occur pre-Indictment. That evidence shows (as the prosecution may have feared, and as the Third Circuit warned) that the Speech or Debate Clause was violated.

B. The Prosecution Presented Speech Or Debate Clause Privileged Material To The Grand Jury On Port Security Issues

Following the Third Circuit's February 27, 2015 remand, prosecutors called case agent Gregory Sheehy before the grand jury on March 11, 2015 and April 15, 2015. Through his testimony, the prosecution presented the grand jury with the very evidence that had raised a Speech or Debate objection and was litigated in the Third Circuit, without following the Third Circuit's directions on remand.

1. CBP Email Chain

As the Third Circuit noted, one category of questions before it related

> to Dr. Melgen's interest in a contract with the Dominican Republic government giving him the exclusive right to provide screening equipment for Dominican ports. Specifically, Kerri Talbot, Senator Menendez's former Chief Counsel, exchanged emails with a staffer from U.S. Customs and Border Protection ("CBP") in which Talbot asked CBP not to donate screening equipment to the Dominican Republic and instead to allow the private contractor—controlled by Dr. Melgen—to provide the equipment.

(In re Grand Jury Investig. (Menendez), 2015 WL 3875670, at *1; see Gov't CTA3 Br. at 17 (arguing this "category consisted of Senator Menendez's advocacy to the U.S. Department of State and U.S. Customs and Border Protection (CBP) to enhance Dr. Melgen's leverage in the enforcement of a contract he had with the Government of the Dominican Republic").) The Court noted that "among the disputed issues" left to be addressed on remand was "the use of the CBP email chain against the Senator." Id. at *2. Although the Third Circuit remanded to allow the District Court to decide whether this category was protected by the Speech or Debate Clause, prosecutors chose to simply ignore the remand and present this email chain to the grand jury without asking the District Court for permission. In Senator Menendez's view, this email chain is protected by the Speech or Debate Clause because it is legislative oversight on policy issues related to port security.

The prosecution called Agent Sheehy as a witness to do a read-back of a deposition with Kerri Talbot, Senator Menendez's former counsel. (See MTD No. 3 at 25 (noting excessive hearsay presented through read-backs).) In doing so, they also put "this e-mail" chain "up on the projector so that everyone can read it and follow along with her testimony." (Sheehy 3/11/15 Tr. at 76 (projecting KT-9).) The first email has Talbot emailing CBP and asking:

> My boss asked me to call you about this. Dominican officials called him stating that there is a private company that has a contract with DHS to provide container shipment scanning/monitoring in the DR. Apparently, there is some effort by individuals who do not want to increase security in the DR to hold up that contract's fulfillment. These elements (possibly criminal) want CBP to give the government equipment because they believe the government use of the equipment will be less effective than the outside contractor. My boss is concerned that the CBP equipment will be used for this ulterior purpose and asked that you please consider holding off on the delivery of any such equipment until you can discuss this matter with us- he'd like a briefing. Could you please advise whether there is a shipment of customs surveillance equipment about to take place?

(KT-9.) Emails in that chain confirm that the private company contract referenced in the email is ICSSI, a company that Dr. Melgen eventually purchased. Subsequent emails showed that CBP had not donated equipment since 2006 and had no plans to donate more. (Id.) The prosecution then showed an email chain between Talbot and Senator Menendez in which she conveys the same information she had learned from CBP. (Sheehy 3/11/15 Tr. at 82 (putting "KT-11 up on the projector").)

Senator Menendez has repeatedly objected to the prosecution's use of this email chain on Speech or Debate Clause grounds. (Reply Br. at 7 n. 8 and 8 n.10, In re Grand Jury Investig., No. 14-4678 (3d Cir. filed Feb. 13, 2015) ("Menendez CTA3 Reply Br."); Rep. in Compliance of 11/15/14 at 9-10, In re Grand Jury, Misc. No. 14-177 (D.N.J. filed Oct. 27, 2014) ("Menendez Rep. in Compl."); Resp. Mot. to Compel at 10, In re Grand Jury, Misc. No. 14-177 (D.N.J. filed Oct. 14, 2014).) Prosecutors knew this email was subject to objection. They informally

interviewed Talbot on October 31, 2014, and she answered questions about these documents without objection, but "at the end of the meeting counsel for Senator Menendez stated that the documents and statements elicited from Talbot could implicate the Speech or Debate Clause." (Gov't CTA3 Br. at 4-5.) This was only an interview, involving documents already in prosecutors' possession, so there was no "use" of the email before the grand jury. As the Senator's counsel explained, the Senator did not object to Talbot answering questions in that setting because she did not know much about it, but he did object to the use of the emails themselves. (Menendez CTA3 Reply Br. at 8 n.10 ("The reason was that Talbot does not know anything of substance about what is discussed in those emails, so her answers were unlikely to disclose anything that is privileged. Nevertheless, as to the documents, the Senator's counsel made clear to the Department there could be a use privilege objection under the Clause concerning that email chain down the road."); Menendez Rep. in Compl. at 9 ("With respect to the physical document (the email chain), the Senator's attorneys stated that their position remains the same as it has been since the beginning of the investigation – documents related to port security fall under the Speech or Debate Clause, and the Senator does not intend to waive the privilege."); id. at 11 ("Ms. Talbot has very little substantive knowledge about the events at issue."); Resp. to Mot. Compel at 9-10, ("The Clause applies to fact-gathering related to Senator Menendez's legislative activity on port security, such as Ms. Talbot's email to CBP," and "while the Clause would apply to *some* questions about the CBP email chain, it does not apply to every inquiry") (emphasis in original). Going into the deposition, Senator Menendez's counsel again reminded the prosecutors they could ask Talbot whatever they liked, but "[a]s to what 'use' can be made of any of those answers 'against the Senator,' that is a different subject" and the

prosecution was reminded that its "use of the email chain" is still a disputed issue following the Third Circuit's remand. (Ltr. of 3/2/15 from A. Lowell to P. Koski at 2.)

Despite all this, the prosecutors used the privileged CBP email chain before the grand jury, both by providing the emails directly to the grand jury and through its read-back of the Talbot deposition, where the prosecution had read the emails into its questions of her. Senator Menendez did not consent to the use of these emails before the grand jury.[2] Moreover, the only purpose served by the Talbot read-back appears to have been to have the case agent read the CBP email chain to the grand jury. Talbot only knew what was in the email, and could not answer questions seeking additional information. (Sheehy 3/11/15 Tr. at 85-91.)

The prosecutors used the emails before the grand jury in an effort to show that the Senator received something of value from Dr. Melgen, close in time to doing something that allegedly benefited Dr. Melgen (sending e-mail). The prosecutors apparently hoped the grand jury would infer there must be some sort of corrupt connection between the two. For example, the prosecutors presented evidence that Dr. Melgen took Senator Menendez to play golf, and then had the case agent confirm that was "[t]he day before the two e-mail chains that we just reviewed in KT-9 and KT-11." (Sheehy 3/11/15 Tr. at 92.) That timing point is repeated over and over. (Id. at 93, 94.) Ultimately, the Indictment charges this conduct as criminal. (Indict. ¶¶ 23(c), 132-143.) The prosecution cannot establish a *quid pro quo* in this manner because the alleged "*quo*" (the CBP email exchange) is immunized by the Speech or Debate Clause.

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[2] In the event there is a trial, Senator Menendez will object to any use of the email chain or questions about those emails or their substance on Speech or Debate Clause grounds. The Supreme Court has not held the Speech or Debate Clause privilege even can be waived, but has held that, if it could, such a waiver would have to be explicit and that disclosure before a grand jury by a Senator would not prevent his claim of privilege at trial. United States v. Helstoski, 442 U.S. 477, 490-91 (1979). Here, Senator Menendez did not even consent to grand jury use.

2. Senator Menendez's Meeting With Assistant Secretary Brownfield

Agent Sheehy also was questioned extensively before the grand jury about the Dominican port security issue on March 11, 2015. (Sheehy 3/11/15 Tr. at 41-47, 51-55, 58, 60-67.) His testimony introduced numerous documents, and based on these documents he testified that Senator Menendez's interest in the port screening contract was brought to the attention of the State Department and that the Senator wanted a meeting with William Brownfield, the Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs, to discuss it. (Id. at 45, 47; 45-67 (addressing GS-104 through GS-109).) Agent Sheehy relayed e-mails addressing the policy purpose of the meeting – "Senator Menendez wants to speak [to] Brownfield next week and talk about DR [Dominican Republic], cargo from DR coming into U.S. ports," and Senator Menendez's staff conveyed that "he continues to have concerns about what is flowing through the ports either unobserved or with tacit permission." (Id. at 51-52.)

Agent Sheehy then testified about the substance of Senator Menendez's discussions with Brownfield. Reading from emails, Sheehy testified that Senator Menendez was "displeased" by the State Department's actions in the "Dominican Republic, specifically in regard to port maritime issues and cargo screening for drug and other contraband." (Id. at 60.) He explained that the Senator wanted a prompt report on what the State Department was doing and "threatened to hold a hearing on the matter if we don't meet his deadline." (Id. (emphasis added).) Agent Sheehy described a State Department e-mail reflecting that "the Senator raised several months ago the issue of a U.S. company attempting to sell a tracking and security system to the DR Port Authority, and suggesting they were being blocked by corrupt officials," and he again raised that issue at the meeting. (Id. at 61.) That email also conveyed that Senator Menendez was told that State was "working up some sort of port initiative" and would see if they could use that to

"leverage a correct GO DR decision on the port contact." The State Department would update the Senator, who said "he would call a hearing" if he did not hear back in a timely manner. (Id. at 62 (emphasis added).) In a subsequent email from Brownfield to others at the State Department, Agent Sheehy relayed again that this was "the case about which Senator Menendez threatened to call [Brownfield] to testify at an open hearing." (Id. at 65 (emphasis added).) On April 1, 2015, Agent Sheehy again testified about Senator Menendez's meeting with Brownfield, explaining he learned that the Senator "expressed dissatisfaction with INL's lack of initiative in enforcement of the contract." (Sheehy 4/1/15 Tr. at 13-14.)

On its face, all this evidence is privileged under the Speech or Debate Clause. Senator Menendez is clearly engaged in legislative oversight on an important matter of policy – port security. The discussions repeatedly concern drugs and other contraband, and efforts by corrupt persons in the Dominican Republic to undermine appropriate cargo screening. Placing the issue even more squarely in the legislative sphere, it is repeatedly noted that Senator Menendez said he would "call a hearing" in the Senate to get answers to his questions if he did not receive answers promptly. Nevertheless, this privileged evidence not only was presented to the grand jury, it is specifically charged in the Indictment. (Indict. ¶¶ 117-131.)

Again, prosecutors used this evidence in support of its bribery theory, arguing this action by Senator Menendez was close in time to Senator Menendez receiving a benefit. (Sheehy 3/11/15 Tr. at 47-59.) Without evidence of this purported *quo*, however, the grand jury could not have found probable cause to believe that bribery, an unlawful *quid pro quo*, had taken place.

C. The Prosecution Presented Speech Or Debate Clause Privileged Material To The Grand Jury On Medicare Reimbursement Policy

The Third Circuit explained that one category of issues on appeal:

> relates to a billing dispute between Dr. Melgen and the Center for Medicare and Medicaid Services ("CMS"). The Government alleges that Senator Menendez and his staff advocated on Dr. Melgen's behalf in a June 7, 2012, meeting between Senator Menendez and Marilyn Tavenner, then the Acting Administrator of CMS [and] in a July 2, 2012, follow-up call between Senator Menendez and Tavenner; and in an August 2, 2012, meeting among Senator Menendez, Senator Harry Reid, and Secretary of Health and Human Services Kathleen Sebelius.

In re Grand Jury Investig. (Menendez), 2015 WL 3875670, at *1. Also at issues were "communications between the Senator's Office and Alan Reider, Dr. Melgen's lawyer and lobbyist, about the Tavenner and Sebelius conversations." Id. at 3. In addressing those issues, the Third Circuit explained:

> Here, the parties primarily dispute the legislative character of Senator Menendez's two conversations with Tavenner and his meeting with Secretary Sebelius. These communications are not manifestly legislative acts because they are informal communications with Executive Branch officials, one of whom was at the time a presidential nominee whose nomination was pending before the United States Senate. Therefore, specific factual findings about the communications' legislative character are necessary to decide whether the Speech or Debate Clause applies. . . . [W]e will remand the case to the District Court to make specific factual findings about the communications implicated by the grand jury questions, especially the two Tavenner conversations, the Sebelius meeting, and discussions with Reider before and after these conversations.

Id. at 5-6.

Rather than allowing the District Court to address whether the Tavenner and Sebelius conversations (as well as the related discussions with Reider) were privileged on remand, the prosecution simply put evidence concerning each of these subjects before the grand jury—once again through the hearsay testimony of a case agent.

1. Medicare Reimbursement – Tavenner Communications

Agent Sheehy was called before the grand jury to confirm the prosecutor's statements that Senator Menendez and his staff met with Reider in advance of the Senator's meeting with

Tavenner, that the meeting between the Senator and Tavenner took place, and that the Senator and Tavenner had a follow-up call afterward. (Sheehy 3/11/15 at 126-27.)[3] Agent Sheehy testified about emails exchanged between Reider and the Senator's staff in preparation for those communications with Tavenner, including responses to a potential "policy issue" that Tavenner may raise. Agent Sheehy also testified about a memo that Reider sent to the Senator's staff regarding "talking points CMS policy for the follow-up call with Marilyn Tavenner." (Id. at 128-29; see id. at 130 (noting emails about "policies in place" regarding multi-dosing).)[4] In addition, Agent Sheehy testified about a memo the Senator's staff sent to the Senator to prepare him for the Tavenner meeting, including how "FDA policy may affect Medicare's current policy." (Id. at 133.) Later, prosecutors again asked if part of the Senator's alleged "advocacy" for Dr. Melgen included the meeting with Tavenner, and Agent Sheehy answered in the affirmative. (Sheehy 4/1/15 at 17-18.) The prosecutor then had Agent Sheehy agree that the Senator and Tavenner had a follow-up call, in which Tavenner conveyed policy objections to multi-dosing. (Id. at 19-20.) Agent Sheehy then testified about an email exchange between Senator Menendez and his staff (GS-149) in which the staff reassured the Senator that he was right as a matter of policy on the multi-dosing issue. (Id. at 21-22.) The prosecutors introduced all this testimony from Agent Sheehy without allowing the District Court to determine on remand whether these various email exchanges and communications with Tavenner were privileged under the Speech or Debate Clause.

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[3] Another reason this meeting was privileged was that Senator Menendez was meeting with Tavenner as part of the process of confirming her for a presidential appointment, but that purpose of the meeting was not disclosed the grand jury. (MTD No. 1 at 20-23.)

[4] The prosecutor discussed the following Speech or Debate Clause privileged documents in his exchange with Agent Sheehy: GS-130 through GS-141. (Sheehy 3/11/15 Tr. at 128-47.)

One reason the prosecutors may have purposefully avoided the remand ordered by the Third Circuit was that the prosecutors already had introduced a tremendous amount of potentially-privileged material to the grand jury even prior to the Third Circuit's remand. On May 7, 2014 – almost a year before the Third Circuit's remand – Agent Sheehy testified about Senator Menendez's calls and meetings with Blum, Tavenner and Sebelius, as well as Senator Harkin. (Sheehy 5/7/14 Tr. at 20-23.) Agent Sheehy recounted in detail his hearsay understanding of those communications (id. at 57-60), and testified at length about communications Dr. Melgen and his legal team allegedly had with Senator Menendez to educate him about the Medicare issue in advance of those meetings (id. at 26-34 (referencing privileged documents GS-51 through GS-56), 37-41 (GS-57 through GS-59)). In addition, Agent Sheehy testified about internal CMS emails that referenced the "reimbursement policy" issues that had been raised by Senator Menendez and his staff. (Id. at 56-57.) If the District Court found on remand that these types of communications regarding Medicare reimbursement policy were privileged, such a finding would obviously jeopardize the entire grand jury proceeding in this case, as the prosecutors had in fact already introduced the same type of testimony as early as May 2014 (without authorization from either the Senator or the District Court).

As Defendants explain in Motion to Dismiss 1, these communications are all privileged under the Speech or Debate Clause case law, as they concern legislative oversight on matters of policy. (MTD No. 1 at 4-7.) In addition, all the Senator's communications with Tavenner were part of his vetting process in confirming a presidential nominee – a core legislative role vested in him directly by the Constitution. U.S. Const. art. II, § 2, cl. 2. Yet, the Indictment seeks to criminalize this immunized conduct, and in fact relied on these communications as the alleged *quo* in a *quid pro quo*. (Indict. ¶¶ 198-208.)

2. Medicare Reimbursement – Sebelius Meeting

Agent Sheehy testified that following Senator Menendez's meeting with Tavenner, Senators Reid and Menendez arranged a meeting with HHS Secretary Sebelius. (Sheehy 3/11/15 Tr. at 136-38.) Agent Sheehy testified that this meeting was held on August 2, 2012 at the Capitol, and Senator Menendez had met with Reider in preparation for that meeting. (Id. at 140.) Agent Sheehy would later answer "yes" to the prosecutor's questions that this meeting with Secretary Sebelius and Senator Reid was "about Dr. Melgen's Medicare billing dispute" and that Senator Menendez "advocated" for Dr. Melgen by "focusing on Dr. Melgen's specific case and asserting that Dr. Melgen was treated unfairly." (Sheehy 4/1/15 Tr. at 23-24.) Agent Sheehy's hearsay characterization of that discussion was inaccurate, and it disclosed privileged information. (See MTD No. 3 (addressing inaccuracies in Agent Sheehy's testimony).)

As noted above, Agent Sheehy disclosed Speech or Debate privileged information to the grand jury even prior to the Third Circuit's ruling. On May 7, 2014, Agent Sheehy testified to and characterized efforts to set up the Sebelius meeting, and stated that it had occurred. (Sheehy 5/7/14 Tr. at 42-47, 54-55.) Relying on multiple levels of hearsay, Agent Sheehy testified about what Secretary Sebelius allegedly told a different agent had transpired at that meeting. (Id. at 54.) Agent Sheehy also testified as to what he claimed Senator Reid told him about that meeting. (Id. at 60-62.) Although he was not present at the Sebelius meeting, Agent Sheehy also testified as to what Senator Menendez allegedly did at that meeting. (Id. at 55, 65-67.)

The face of the Indictment makes clear that these communications with Sebelius were privileged, as the Sebelius meeting concerned legislative oversight on matters of Medicare policy. The Indictment alleges that Secretary Sebelius rejected Senator Menendez's view as to the appropriate policy, citing "CDC guidelines" concerning safety to support her misguided

notion that the policy favored by Senator Menendez would require "CMS [to] pay for the same vial of medicine twice." (Indict. ¶ 216; see also MTD No. 3 (providing additional evidence, not presented to the grand jury, that this meeting was about policy).) The merits of this policy discussion – who was right or wrong on the policy issues, whether multi-dosing was safe or economical, etc. – are irrelevant to the Speech or Debate Clause. Rather, the fact that the information sought by Senator Menendez related to Medicare policy on multi-dosing is all that matters for purposes of the Speech or Debate Clause. Nevertheless, this conduct is charged in the Indictment (Indict. ¶¶ 209-20), and the prosecutors improperly argued to the grand jury that the proximity in time between the Sebelius meeting and trips to the Dominican Republic is evidence of bribery (Sheehy 5/7/14 Tr. at 40-41, 43).

3. Medicare Reimbursement – Senator Harkin Meeting

Agent Sheehy testified about a meeting between Senator Menendez, Dr. Melgen and Senator Harkin. (Sheehy 5/7/14 Tr. at 22, 46-52.) Based on his hearsay understanding, Agent Sheehy testified that at the meeting "Dr. Melgen explained his problems with CMS," and argued that CMS's policy against multi-dosing was wasteful. (Id. at 48-49.) Agent Sheehy told the grand jury that Senator Harkin had a staff member reach out to CMS to get more information, but "his office did not advocate on behalf of Dr. Melgen." (Id. at 49.) Agent Sheehy explained that Senator Harkin's staffer, Nick Bath, looked into these policy issues and agreed with CMS, not with Dr. Melgen (Id. at 49-52.)[5]

[5] Agent Sheehy's testimony may have misled the grand jury into believing that Senator Harkin had refused a request from Dr. Melgen to assist him. Agent Sheehy's interview notes with Senator Harkin reflect that "HARKIN does not recall MELGEN ever specifically asking him to do anything and HARKIN never did do anything on MELGEN's behalf," but that information was not shared with the grand jury. (Harkin 5/1/14 FBI 302 at 2.)

This meeting is privileged by the Speech or Debate Clause because it involved two Senators investigating issues raised by a citizen concerning matters of health care policy. (MTD No. 1.) Nevertheless, the Indictment charges this conduct as criminal, alleging that the meeting itself was some sort of *quo* in a bribery scheme because the meeting was arranged by Senator Menendez. (Indict. ¶¶ 185-89.) Such an allegation ignores the fact that Dr. Melgen did not ask for anything at this meeting – he simply sought to educate two Senators on a misguided Medicare policy that needed to be changed. More importantly, however, this allegation uses privileged communications against the Senator in violation of the Speech or Debate Clause and therefore must be dismissed.

II. THE INDICTMENT MUST BE DISMISSED

The disclosure of an extraordinary amount of immunized material to the grand jury resulted in a wholesale violation of the Speech or Debate Clause in this case Moreover, the presentation of this immunized testimony caused the grand jury to indict. Not only did immunized testimony infect the majority of charges considered by the grand jury, this testimony involved the most serious charges, the bribery allegations. Given the pervasive use of this immunized testimony as well as the prosecutors' end-run around the Third Circuit's remand order, Senator Menendez's right to an independent and properly informed grand jury was compromised, and the Indictment as a whole must be dismissed.

The same result was required in Helstoski, following a remand from the Supreme Court to the Third Circuit. Helstoski, 635 F.2d at 205. In that case, as in the present case, the presentation of substantial immunized material to the grand jury resulted in a "wholesale

violation of the speech or debate clause," an "infection cannot be excised." Id. at 205.[6] It is a fair inference that this "improper testimony before the grand jury was a substantial factor underlying the indictment," and dismissal is therefore appropriate. Id. Numerous decisions from other Circuits recognize dismissal as a remedy under these circumstances. See, e.g., United States v. Renzi, 651 F.3d 1012, 1028 (9th Cir. 2011); United States v. Rostenkowski, 59 F.3d 1291, 1298 (D.C. Cir. 1995); United States v. Rose, 28 F.3d 181, 186-187 (D.C. Cir. 1994); United States v. Swindall, 971 F.2d 1531, 1549 (11th Cir. 1992); United States v. Garrett, 797 F.2d 656, 662 (8th Cir. 1986); United States v. Pino, 708 F.2d 523, 530 (10th Cir. 1983); United States v. Fusaro, 708 F.2d 17, 25 n.3 (1st Cir. 1983) (Breyer, J., on panel); United States v. Durenberger, 1993 WL 738477, at 2-5 (D. Minn. Dec. 3, 1999) (dismissing indictment); see also Rose, 28 F.3d at 186 (acknowledging that use of Speech or Debate privileged material "as background material for a complaint would clearly violate the Speech or Debate Clause" and warrant dismissal). cf. United States v. Williams, 504 U.S. 36, 48 (1992) (citing Gravel v. United States, 408 U.S. 606 (1972), in noting that courts must act to prevent grand juries from violating the Speech or Debate Clause).[7]

This outcome is warranted because the grand jury serves a critical role as a buffer between prosecutors and a citizen being investigated in these kinds of cases. (MTD No. 4

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[6] The Third Circuit distinguished Johnson and United States v. Brewster, 408 U.S. 501 (1972), where dismissal of the indictment for presentation of immunized material to the grand jury was not sought and where it does not appear such a challenge could be made because transcripts of those grand jury proceedings do not appear to have been recorded. Helstoski, 635 F.2d at 205. The Third Circuit also noted that the remaining charges in Brewster and Johnson were tried without reference to Speech or Debate immunized evidence. Id. at 204-05.

[7] Similarly, the Supreme Court and many circuits have held that an indictment can be quashed when immunized testimony (as opposed to merely improper evidence) is presented to the grand jury in other contexts. See, e.g., United States v. Hubbell, 530 U.S. 27, 46 (2000); United States v. Tantalo, 680 F.2d 903, 909 (2d Cir. 1982); United States v. Paz, 2003 WL 22299239, at *2 (E.D. Pa. Oct. 3, 2003).

(addressing important role served by the grand jury).) As Justice White presciently observed with respect to cases raising Speech or Debate Clause issues, the opportunities for the Executive "to claim that legislative conduct has been sold are obvious and undeniable." Brewster, 408 U.S. at 558 (dissenting). That there is a

> mutuality of support between legislator and constituent is inevitable. Constituent contributions to a Congressman and his support of constituent interests will repeatedly coincide in time or closely follow one another. It will be the rare Congressman who never accepts campaign contributions from persons or interests whose view he has supported or will support, by making a speech. . . . These opportunities, inherent in the political process as it now exists, create an enormous potential for executive control of legislative behavior by threats or suggestions of criminal prosecution – precisely the evil the Speech or Debate Clause was designed to prevent.

Id. at 558. The majority in Brewster acknowledged that a "strategically timed indictment could indeed cause serious harm to a Congressman," and noted that Congressman Johnson's indictment as he was campaigning arguably contributed to his defeat. 408 U.S. at 522 n.16. Similarly, the Third Circuit has acknowledged that even where a Member has been charged and vindicated at trial before an election, "the stigma lingers and may very well spell the end to a political career." Helstoski, 635 F.2d at 205; see also United States v. Johnson, 337 F.2d 180, 191 (4th Cir. 1965) ("It is no answer, therefore, to say that if the accused member is innocent of accepting a bribe he has nothing to fear. A groundless charge may be sufficient to destroy him at the polls. Moreover, the process of indictment by a grand jury and inquiry in a court may itself be so devastating that an innocent congressman may well fear it.").[8]

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[8] The Supreme Court has emphasized that, "[p]articularly in matters of local political corruption and investigations is it important . . . that the real issues not become obscured to the grand jury," and that such a context highlights the "necessity to society of an independent and informed grand jury." Wood v. Georgia, 370 U.S. 375, 390 (1962).

This Court can effectively mitigate that abuse by enabling an independent and unbiased grand jury to serve as a buffer. Brewster, 408 U.S. at 522 & n.16 (acknowledging Justice White's concern that the "specific crime of bribery is subject to serious potential abuse that might endanger the independence of the legislature – for example, a campaign contribution might be twisted by a ruthless prosecutor into a bribery indictment," but noting as a "barrier" to a prosecutor bringing such a case is that "he must persuade a grand jury to indict"); cf. United States v. Myers, 635 F.2d 932, 936 (2d Cir. 1980) ("The opportunity for intimidation by the prosecutors of the Executive Branch would be reduced by the knowledge that prosecutions encountering valid legal defenses will be promptly terminated by appellate courts before trial has occurred."). As the Third Circuit noted in Helstoski, this does not place any great burden on the government, "[a]ll that is required is that in presenting material to the grand jury the prosecutor uphold the Constitution and refrain from introducing evidence of past legislative acts or the motivation for performing them. In that way the clause will meet its expectations of preserving constitutional structure of separate, coequal, and independent branches of government." 635 F.2d at 206.

CONCLUSION

The grand jury was presented with an enormous amount of material immunized under the Speech or Debate Clause, and the fact that this immunized activity influenced the grand jury's decision to indict is made clear by the fact the immunized activities are actually charged in the Indictment itself. Accordingly, the Indictment must be dismissed.

Respectfully submitted,

/s/ Abbe David Lowell
Abbe David Lowell
Jenny R. Kramer
Christopher D. Man
Scott W. Coyle
CHADBOURNE & PARKE LLP
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
adlowell@chadbourne.com
(202) 974-5600

Raymond M. Brown
GREENBAUM ROWE SMITH & DAVIS LLP
Metro Corporate Campus One
P.O. Box 5600
Woodbridge, NJ 07095
rbrown@greenbaumlaw.com
(732) 476-3280

Stephen M. Ryan
Thomas J. Tynan
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street, N.W.
Washington, D.C. 20001
sryan@mwe.com
(202) 756-8000

Counsel for Defendant Senator Robert Menendez