No. ____

In The
Supreme Court of the United States

ROBERT MENENDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Constitution's Speech or Debate Clause accords Members of Congress absolute immunity for all conduct falling within "the sphere of legitimate legislative activity." *Gravel v. United States*, 408 U.S. 606, 624 (1972). This immunity shields Members from having to explain or defend the motives underlying their official acts before the other branches. Therefore, in determining whether a Member's act is protected, "we do not look to the motives alleged to have prompted it." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508 (1975). Instead, this Court has made clear that the test is objective: whether conduct is protected legislative activity "turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998).

Notwithstanding this Court's clear guidance, the Third Circuit held that Members of Congress must prove the motives underlying their official actions were pure before courts will deem them "legislative acts" protected by the Clause. In other words, to determine whether a Clause designed to protect against inquiries into legislative motive applies to a legislator's acts, the Third Circuit inquires into the legislator's motive and purpose. That rule upends this Court's precedents, splits with at least three other circuits, and nullifies the core protection of the Speech or Debate Clause. The question presented is:

Whether a court may consider a legislator's motive for performing an act when deciding whether the act is protected by the Speech or Debate Clause.

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OTHER AUTHORITIES

United States Senator Robert Menendez respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit's opinion is reported at 831 F.3d 155. Pet.App.1a-37a. The district court's opinion is reported at 132 F. Supp. 3d 610. Pet.App.38a-75a.

JURISDICTION

The Third Circuit issued its decision on July 29, 2016, exercising jurisdiction under the collateral order doctrine as applied in *Helstoski v. Meanor*, 442 U.S. 500 (1979). Pet.App.12a. Petitioner filed a timely petition for rehearing *en banc*, which the court denied on September 13, 2016. Pet.App.88a-89a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Speech or 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.

STATEMENT

If this Court's Speech or Debate Clause precedents teach anything, it is that agents of the Executive Branch may not hale Members of Congress into court simply to impugn or even inquire into the motives underlying their official acts. Whether a Member's conduct was "improperly motivated" is

"precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *United States v. Johnson*, 383 U.S. 169, 180 (1966). That is so because "[i]n times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies." *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) (footnote omitted). Here as elsewhere, the Constitution ordains "a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). The Judiciary must not permit those walls to erode simply because someone else's independence is at stake.

It follows inevitably from this Court's teachings that the threshold test—to determine whether the Speech or Debate Clause applies to a given legislator's act—must be an objective one. Otherwise the Clause would be effectively useless, a shield more decorative than functional. In particular, it would be nonsensical to suggest that a Clause whose avowed purpose is to protect legislators from subjective motive inquiries *requires* them to undergo a subjective motive inquiry as its price of admission. Hence, this Court has unanimously instructed, the threshold question is "whether, *stripped of all considerations of intent and motive*, [an official's] actions were legislative." *Bogan*, 523 U.S. at 55 (emphasis added). And that question depends exclusively on whether the acts in question, viewed objectively, are by their nature "integral steps in the legislative process." *Id.*

Resisting that straightforward conclusion, the Third Circuit held that a legislator's ill-motivated acts will by and large fall outside the sphere of protected legislative activity; thus, it reasoned that it is appropriate to require nearly all legislators who claim immunity to submit their motives to judicial scrutiny at the threshold. But whatever difficulties there may be in separating protected "legislative acts" from other official acts of legislators, the Third Circuit's approach cannot draw the right line because it would destroy the very purpose of Speech or Debate protection. *See id.*; *Eastland*, 421 U.S. at 508. It amounts to a requirement that legislators forfeit their immunity in the process of trying to claim it.

In fact, the rule announced by the Third Circuit is an affront not only to the Speech or Debate Clause, but also to the wider body of this Court's official immunity jurisprudence. This Court's immunity doctrines have broadly and consistently forsworn inquiry into the alleged motives of officials accused of misconduct, and for good reason: it "is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial …. There are [also] special costs to 'subjective' inquiries of this kind," which "can be peculiarly disruptive of effective government." *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982). An immunity doctrine under which an "official is subject to damages [or imprisonment] unless he can prove he acted in good faith …. is no immunity at all: The 'immunity' disappears at the very moment when it is needed…. Only if the immunity inquiry is approached in [an objective] manner does it have any

meaning." *Butz v. Economou*, 438 U.S. 478, 520, 522 (1978) (Rehnquist, J., concurring in part and dissenting in part).

Those insights apply with full force to the scope of legislative immunity. As this Court has explained, "[t]he privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney*, 341 U.S. at 377. Yet that is exactly what the decision below requires. Ironically, by injecting a forbidden motive inquiry at the threshold of its Speech or Debate Clause analysis, the Third Circuit's decision leaves Members of Congress—whose offices and immunity are spelled out in the Constitution—with less protection than low-level Executive Branch officials whose immunity is merely qualified and is derived from the common law.

Unsurprisingly, the Third Circuit's decision is not only in conflict with this Court's precedents but also creates a clean circuit split, breaking decisively with decisions of at least the Fourth, Second, and D.C. Circuits, all of whom have faithfully followed this Court's teaching. The deep analytical error at the heart of the decision below guarantees that this split will not resolve itself. And the split is intolerable. Given that the Clause is designed to protect legislators from a potentially hostile executive, it makes no sense to allow the executive to pick and choose whether to prosecute a Member from the Third Circuit in the D.C. Circuit (where the protection against inquiries into legislative motive is

alive and well) or back in his home district (where motive inquiries are available at the threshold). This Court's intervention is needed to restore order to the law of legislative immunity, and to recalibrate the proper balance between the branches that the Speech or Debate Clause was intended to protect.

I. LEGAL BACKGROUND

The Speech or Debate Clause provides that Members of Congress "shall not be questioned in any other Place" for "any Speech or Debate in either House." U.S. Const. art. I, §6, cl. 1. "Behind these simple phrases 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." *Johnson*, 383 U.S. at 178; *see also Tenney*, 341 U.S. at 372-75. Cases like the present one, in which the Executive seeks to prosecute a sitting United States Senator known to be critical of the Administration's policies, thus lie at the heart of the Clause's protections. *See Johnson*, 383 U.S. at 182 (describing "the instigation of criminal charges against critical [and] disfavored legislators" as "the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, … the predominate thrust of the Speech or Debate Clause").

To prevent the threat of prosecution from influencing legislative decision-making, the Clause protects Members of Congress engaged in the "sphere of legitimate legislative activity" from being "made to answer—either in terms of questions or in terms of

defending [themselves] from prosecution"—for acts that occur as part of the legislative process. *Gravel*, 408 U.S. at 616, 624. The Clause prohibits the government from using evidence of a Member's legislative acts against him at trial, and precludes such acts "from being made the basis of a criminal charge." *Johnson*, 383 U.S. at 180. These immunities "were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972). When determining whether a particular prosecution runs afoul of the provision, this Court thus looks "to the prophylactic purposes of the Clause." *Johnson*, 383 U.S. at 182.

In recognition of the Clause's central place in our system of separated powers, "[r]ather than giving the clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Gravel*, 408 U.S. at 618. Thus, this Court has broadly construed it to prohibit inquiry into "things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880); *see also Gravel*, 408 U.S. at 625; *Johnson*, 383 U.S. at 173-77; *Doe v. McMillan*, 412 U.S. 306, 312 (1973); *Eastland*, 421 U.S. at 504-07; *United States v. Helstoski*, 442 U.S. 477, 486-89 (1979).

This Court has also made crystal clear that the Clause could not possibly serve its essential role

if Members of Congress could be subjected to the rigors of litigation based on mere allegations that their official acts were improperly motivated. Because the Clause is designed to prevent any "deterrent[] to the uninhibited discharge of [a Member's] legislative duty," the Clause's protections are not lost merely because the Executive alleges some improper, non-legislative purpose. *Tenney*, 341 U.S. at 377. Especially "[i]n times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Id.* at 378 (footnote omitted).

Given all that, it would be completely illogical to suggest that a Clause whose chief object is to protect Members from the harassment inevitably inflicted by invasive, wide-ranging, time-consuming motive interrogations, must nevertheless *require* Members to undergo *exactly those interrogations* in order to determine whether the Clause's protections apply. A shield is of no use to its owner if it can only be deployed *after* he is deeply wounded. Thus, sensibly enough, this Court has made clear that to determine whether an act is a "legislative act" protected by the Clause, the Court "*do[es] not look to the motives alleged to have prompted it*." *Eastland*, 421 U.S. at 508 (emphasis added). "The courts should not go beyond the narrow confines of determining that a [legislator's conduct] may fairly be deemed within [his] province." *Tenney*, 341 U.S. at 378. The proper inquiry is therefore objective in nature: whether, "*stripped of all considerations of*

intent and motive, [a legislator's] actions were legislative." *Bogan*, 523 U.S. at 55 (emphasis added).

There is no question that the ultimate classification of a given act as legislative or non-legislative will prove difficult in some cases. But that is no excuse for the Third Circuit's holding, which will render the Clause's promises illusory in nearly *every* case. By requiring Members affirmatively to *prove* their good motives before allowing them to invoke a privilege designed to *foreclose* motive inquiries, the decision below eviscerates the Clause and flaunts this Court's precedents. The Third Circuit's misguided approach simply is not the law; nor, in any rational system, would it be.

II. FACTUAL BACKGROUND

The Third Circuit's (mis)construction of the Speech or Debate Clause is hardly the only extraordinary aspect of this prosecution. This case does not involve cash or Rolexes from a stranger, but campaign contributions and hospitality from a long-time friend. At every turn, the prosecution threatens constitutionally protected conduct and blurs the line between what the executive perceives as criminal and what an objective observer would see as legitimate policy disagreements.

For over two decades, Senator Menendez has been close friends with Dr. Salomon Melgen, an ophthalmologist with whom he shares a common background and interests. Appellant's Br. at 6, *In re Grand Jury (Menendez)*, No. 14-4678 (3d Cir. Jan. 23, 2015). Since the mid-1990s, the Menendez and

Melgen families have travelled together, celebrated holidays together, exchanged gifts, and consoled each other during times of personal loss. *Id.* Senator Menendez's former chief of staff described Melgen as "one of [the Senator's] three closest friends," and, in his 2009 book, Senator Menendez praised Melgen as someone with the "'perseverance and internal fortitude' to succeed as an American citizen." *Id.*; Pet.App.197a n.10. Throughout their friendship, Melgen supported Senator Menendez's political career, donating to his campaigns and raising money for Democratic causes. Def.s' Mot. to Dismiss Counts 15-18 at 4 n.3, *United States v. Menendez*, No. 2:15-cr-00155-WHW (D.N.J. July 20, 2015), ECF No. 56-1.

Despite their long-standing friendship, the government alleges that Melgen's campaign contributions and hospitality (*e.g.*, stays at Melgen's house in the Dominican Republic, flights on Melgen's plane), were in reality nothing but bribes. Pet.App.95a-98a. In exchange for these campaign contributions and gifts, the indictment alleges Senator Menendez assisted Melgen with a Medicare reimbursement dispute, advocated on his behalf in a port security contract dispute in the Dominican Republic, and helped Melgen's friends obtain travel visas. Pet.App.97a-98a.

To support these charges, however, the government does not offer any direct evidence of an unlawful agreement between the Senator and Melgen; unlike the typical bribery case, there is no taped meeting or telephone call or cooperating witness ready to testify about a *quid pro quo*. Rather, the government asserts the timing of the gifts in relation to the acts allegedly performed for

Melgen will allow a jury to infer some sort of ongoing, unlawful agreement. And to make such a showing, the government intends to introduce evidence of Senator Menendez's protected legislative acts.

A. Senator Menendez's Legislative Responsibilities

While Senator Menendez disputes the allegations in the indictment and believes none of his conduct was inappropriate, let alone criminal, he has never argued that every act described in the indictment is a "legislative act" protected by the Speech or Debate Clause. He has never claimed, for example, that allegedly helping Melgen's friends obtain travel visas is a protected "legislative act." Rather, Senator Menendez has asserted that the Clause *does* protect five specific acts he allegedly took pursuant to his legislative responsibilities on health care policy and port security. The Senator's legislative responsibilities, and the specific acts taken pursuant to those responsibilities, are described briefly below. *See also* Pet.App.197a-221a.

1. Health Care Policy Oversight

As a Member of the Senate Committee on Finance, Senator Menendez was responsible for overseeing two federal agencies that administer federal health care programs: the Centers for Medicare and Medicaid Services ("CMS") and the Department of Health and Human Services ("HHS"). Pet.App.197a.

Senator Menendez employed a full-time health care policy advisor whose job was to raise policy

issues with CMS and HHS. *See* Pet.App.200a-201a. These issues included a controversial federal policy on "multi-dosing," a policy that required doctors to discard large portions of expensive pharmaceuticals, forcing them to purchase up to three times the amount of drugs they needed to treat their patients. Pet.App.197a-202a.

As a Finance Committee Member, Senator Menendez was also responsible for vetting the President's nomination of Marilyn Tavenner as Administrator of CMS, which was pending before the Senate. Pet.App.206a.

2. Port Security and Counter-Narcotics Policy

As a Member of the Senate Committee on Foreign Relations and as Chairman of the Subcommittee on Western Hemisphere, Peace Corps, and Narcotics Affairs ("WHA"), Senator Menendez was responsible for U.S. counter-narcotics policy and initiatives addressing port security and foreign investment in Latin America. Pet.App.212a-218a. The WHA Subcommittee exercised general oversight authority over William Brownfield, the Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs ("INL"). Pet.App.262a, 266a. New Jersey ports were some of the primary destinations for Dominican cargo.

B. The Five Challenged Acts

Without mentioning the health care policy and port security work that Senator Menendez and his staff regularly engaged in as part of their legislative

responsibilities, the indictment alleges that five specific acts taken pursuant to those responsibilities were part of the alleged bribery conspiracy with Melgen.

1. Tavenner Meeting

The first challenged act is a June 7, 2012 meeting between Senator Menendez and Tavenner, whose nomination was then pending before the Senate. During the meeting, the indictment alleges Senator Menendez "raised *the issue* at the core of Melgen's Medicare billing dispute,"[1] "pressed [Tavenner] *about multi-dosing and Medicare payments*," and "advocated on behalf of *the position* favorable to Melgen in his Medicare billing dispute." Pet.App.148a-149a (emphasis added).

2. Tavenner Follow-Up Call

The second challenged act is a July 2, 2012 follow-up call between Senator Menendez and Tavenner. During the call, the indictment alleges "[Tavenner] told Menendez that CMS would not alter its position" regarding multi-dosing and Medicare payments, and that "Menendez expressed dissatisfaction with [Tavenner's] answers and stated that he would speak directly with the Secretary of HHS about the matter." Pet.App.150a-151a.

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[1] Melgen's billing dispute involved reimbursement for "multi-dosing" Lucentis, a drug used to treat macular degeneration. Although multi-dosing of some ophthalmological drugs was permitted, a Medicare contractor alleged Melgen's multi-dosing of Lucentis was impermissible, and attempted to recover funds Medicare had paid to him.

3. Sebelius Meeting

The third challenged act is an August 2, 2012 meeting between Senator Menendez, Senator Harry Reid, and HHS Secretary Kathleen Sebelius. Unlike the earlier discussions with Tavenner, the indictment alleges that during the Sebelius meeting, Senator Menendez "focus[ed] on Melgen's specific case" and "assert[ed] that Melgen was being treated unfairly." Pet.App.153a. However, a CMS Director who attended the meeting told the FBI that the "focus of the conversation was on the policy," and that the Senators specifically said they "were not there to talk about a particular case; they were there to talk about policy." Pet.App.258a.

4. Brownfield Meeting

The fourth challenged act is a meeting between Senator Menendez and Brownfield on May 16, 2012, in between two WHA Subcommittee hearings chaired by Senator Menendez on US-Caribbean security. The indictment alleges the topic of the meeting was "cargo from [the Dominican Republic] coming into US ports," and that Senator Menendez "questioned [Brownfield] about the contract dispute between Melgen and the Dominican Republic."[2] Pet.App.129a-130a. As with the Sebelius meeting, however, the government's characterization

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[2] In 2011, Melgen acquired an interest in a company called "ICSSI," which held an exclusive contract to operate cargo screening equipment at all Dominican ports. The Dominican government had refused to honor the contract since it was signed in 2002.

does not square with the record evidence. Brownfield told the FBI that his conversation with Menendez "was a big picture conversation discussing INL projects and programs," that "[o]ne issue raised during that meeting was port security in the Dominican Republic," and that "the main point being pushed by Menendez" was "[a] more aggressive counter-narcotics posture in the Caribbean." Pet.App.264a-267a. Brownfield "did *not* see a highlighted focus on the [contract] dispute." Pet.App.267a (emphasis added).

5. CBP Email

The fifth challenged act is an email from Senator Menendez's Chief Counsel to Customs and Border Protection ("CBP") on January 11, 2013. The email requested information about a possible donation of cargo screening equipment by CBP to the Dominican government, and expressed concern that corrupt officials could use the equipment to undermine effective cargo screening by a private contractor. Pet.App.133a-134a. Like the Brownfield meeting, this email was entirely consistent with Senator Menendez's responsibilities to gather information and exercise oversight on US anti-narcotics and port security policy in Latin America.

III. THE PROCEEDINGS BELOW

A. The District Court Proceedings

On July 20, 2015, Senator Menendez moved to dismiss the indictment for violation of the Speech or Debate Clause. Pet.App.176a-251a. Senator Menendez argued the Clause prohibited the government from using evidence of the five

challenged acts against him at trial, that each count relied upon proof of the challenged acts, and that the grand jury had been hopelessly tainted by the government's wholesale use of Speech or Debate-privileged information to secure the indictment.[3]

The district court denied the Senator's motion, holding that none of the challenged acts were "legislative" acts. Pet.App.74a-75a. Relying on a series of "talking points" and notes prepared by someone *other* than Senator Menendez *before* the Tavenner and Sebelius meetings, the court concluded the Senator's discussions regarding multi-dosing and Medicare reimbursement policy were not protected because they were "attempt[s] to influence CMS rather than an attempt to gather legislative information." Pet.App.63a-65a. In the court's view, all attempts to "influence the Executive Branch" were categorically excluded from the Clause's protections. Pet.App.44a.; *see also* Pet.App.57a ("attempts to influence an agency do not become immunized merely because they concern policy").

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[3] During grand jury proceedings, several witnesses asserted the Speech or Debate privilege and refused to answer questions concerning the five challenged acts. The government moved to compel, the district court ordered compliance, *see* Pet.App.84a-87a, and, in a prior appeal, the Third Circuit vacated the order and remanded for a fact-finding hearing to determine whether the acts were protected "informal legislative fact-finding and informal oversight" or unprotected "political acts." Pet.App.76a-83a. Rather than allowing the district court to conduct this hearing, the government abandoned its motion and introduced the disputed evidence to the grand jury through the summary hearsay testimony of its case agent.

With respect to Senator Menendez's port security work, the district court recognized that, "[g]iven Senator Menendez's extensive involvement in Dominican port policy, he may indeed have had a policy reason to value Dr. Melgen's contract." Pet.App.55a. The district court nonetheless held the Brownfield meeting was not protected because the Senator failed to prove his *motives* were pure—he "fail[ed] to meet his burden to demonstrate that the *primary goal* of these communications was *not* to lobby the Executive Branch to enforce Dr. Melgen's specific contract." Pet.App.56a (emphases added). Similarly, the court held the CBP email was not protected because "Senator Menendez does not meet his burden to establish that the *predominant purpose* of these emails was to gather information for a legislative purpose rather than to lobby for the postponement of planned official action." Pet.App.57a (emphasis added).

B. The Decision Below

Senator Menendez appealed, arguing the district court improperly relied upon his purported "motive" and "purpose" in assessing the legislative nature of his acts, and that the court's interpretation of the Speech or Debate privilege was unduly narrow.

In contrast to the district court, the Third Circuit acknowledged that Senator Menendez's meetings with federal officials to discuss Medicare policy and Dominican port security *could be* protected legislative acts, holding that "informal attempts to influence the Executive Branch on policy, for actual legislative purposes, may qualify as 'true legislative oversight' and merit Speech or Debate

immunity." Pet.App.22a; *see also* Pet.App.23a (rejecting the argument that all efforts to influence the Executive are unprotected because "[t]he consequence of accepting the Government's position would be to place legitimate policy-based efforts under the specter of possible indictment").[4]

But the Third Circuit agreed with the district court that the five challenged acts were not entitled to immunity because Senator Menendez had not met "his burden" of showing his motives were pure. Pet.App.24a, 27a, 29a-30a. Despite acknowledging "evidence in the record showing that each of the challenged acts involved policy discussions," the Third Circuit was satisfied that "the content,

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[4] In this respect, the decision below accords with several decisions applying *Eastland* and *Gravel* to protect informal legislative fact-finding and information-gathering, plus scholarship on the importance of legislative oversight. *See, e.g.*, *McSurely v. McClellan*, ("*McSurely I*"), 553 F.2d 1277, 1286-87 (D.C. Cir. 1976) (*en banc*) (*per curiam*) ("field investigations by a Senator or his staff" to "acqui[re] knowledge through informal sources" are protected); *United States v. McDade*, 28 F.3d 283, 302-05 (3d Cir. 1994) (Scirica, J., concurring and dissenting in part) ("true legislative oversight" in which Members "evaluate[] legislation" and "monitor[] the operations of executive departments and agencies" on matters of policy is protected); *SEC v. Comm. on Ways & Means*, 161 F. Supp. 3d 199, 237 (S.D.N.Y. 2015) ("a legislator's gathering of information from federal agencies and from lobbyists" is protected); Cong. Research Serv., RL30240 Congressional Oversight Manual i, 1-2 (2014) (noting "Congress's oversight role" has become "even more significant" and explaining oversight activities "range from formal committee hearings to informal Member contacts with executive officials"); Joel D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* ix, 12 (1990) (same).

purpose, and *motive* of the communications at issue" supported the district court's conclusion that the "*predominant purpose* of the challenged acts was to pursue a political resolution to Dr. Melgen's disputes and not to discuss broader issues of policy, vet a presidential nominee, or engage in informal information gathering for legislation." Pet.App.24a-32a (emphases added).

Like the district court, the Third Circuit allowed the prosecution to impugn the motives underlying each of the Senator's official acts and put the onus on Senator Menendez to prove a negative – that his conduct was *not* improperly motivated. The Third Circuit reasoned that such inquiry into Senator Menendez's subjective "motive" and "purpose" was permissible because the acts at issue were "ambiguously legislative," meaning they were neither "manifestly legislative"[5] nor "clearly non-legislative." Pet.App.18a. When an act is "ambiguously legislative," the Third Circuit held, a court must proceed to "consider the content, purpose, and motive of the act to assess its legislative or non-legislative character." *Id.* In the Third Circuit's view, "*[o]nly after* we conclude that an act is in fact legislative must we refrain from inquiring into a legislator's purpose or motive." Pet.App.19a

[5] The decision below defines "manifestly legislative" acts to include "introducing and voting on proposed resolutions and legislation, introducing evidence and interrogating witnesses during committee hearings, subpoenaing records for committee hearings, inserting material into the Congressional Record, and delivering a speech in Congress." Pet.App.17a. The decision does not provide a standard for determining what other acts are "manifestly legislative."

(emphasis added). The Third Circuit stayed its mandate pending Senator Menendez's petition for certiorari. Pet.App.91a.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision requires Members of Congress to relinquish their Speech or Debate Clause immunity in order to vindicate it. That analytical framework effectively guts the core privilege the Clause is meant to confer. As this Court and many lower courts well understand, it would be utterly perverse to require Members of Congress to undergo a test of their good motives in order to claim the protection of a Clause whose primary purpose is to insulate those motives from executive and judicial scrutiny. Indeed, *even if Senator Menendez had succeeded in winning immunity*, it would have been a "successful" operation where the patient died. The Third Circuit would have already allowed a federal prosecutor to put him through the wringer of a motive inquiry, which is precisely what the Speech or Debate Clause is supposed to ensure never happens.

The Third Circuit's confused mode of analysis creates an immediate circuit split, defies this Court's directly on-point precedents, and impairs one of the Constitution's vital structural safeguards. This Court's intervention is badly needed and amply warranted.

I. The Decision Below Conflicts With Decisions Of Other Circuits

It should come as no surprise that the Third Circuit's upside-down interpretation of the Speech or

Debate Clause has been forcefully repudiated elsewhere. In holding that the Speech or Debate Clause prohibits inquiry into a legislator's subjective motive or purpose "*[o]nly after* [the court] conclude[s] that an act is in fact legislative," the Third Circuit acknowledged it was rejecting the view—adopted by several other circuits—that "Speech or Debate immunity protects not only legislative acts, but also acts which are *purportedly* or *apparently* legislative in nature." Pet.App.19a (first emphasis added). In contrast, the Second, Fourth, and D.C. Circuits have all held that when a legislator engages in conduct that appears—based upon its objective content—"arguably," "apparently," or "purportedly" legislative, the Speech or Debate Clause prohibits further inquiry into whether the legislator's motives were "pure." *United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973); *see also United States v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988); *McSurely v. McClellan* ("*McSurely II*"), 753 F.2d 88, 106 (D.C. Cir. 1985); *McSurely I*, 553 F.2d at 1295-98. This split in authority stems from a fundamental misinterpretation of this Court's precedents and the "prophylactic purposes" the Clause is meant to serve. *See Johnson*, 383 U.S. at 182.

1. In *Dowdy*, the Fourth Circuit refused to permit executive and judicial inquiry into a legislator's alleged "motive" or "purpose," holding that the Speech or Debate Clause "does not simply protect against inquiry into acts which are manifestly legislative" but also "*forbids inquiry into acts which are purportedly or apparently legislative, even to determine if they are legislative in fact*." 479 F.2d at 226 (emphasis added).

Congressman Dowdy was charged with accepting a $25,000 bribe from a federal contractor, in exchange for agreeing to meet with federal officials as a means of obtaining internal investigative files regarding the contractor. *Id.* at 218-19. At trial, the government offered proof of "the substance" of Dowdy's meetings with federal officials, as well as "a considerable amount of documentary evidence of reports of investigations which [Dowdy] obtained" from those officials. *Id.* at 219 n.8, 224. The government also introduced direct evidence of the illicit agreement between Dowdy and the contractor (something absent in Senator Menendez's case), who cooperated with the government's investigation and disclosed "the nature and details of his relationship with [Dowdy]." *Id.* at 220, 224. As part of this illicit agreement, the contractor revealed he agreed to file a complaint with Dowdy's congressional committee, which would provide Dowdy an excuse to meet with federal officials and request information regarding the contractor. *Id.* at 218-19.

Although Dowdy could be prosecuted based on direct evidence of his unlawful agreement with the contractor, *id.* at 226-27 (citing *Brewster*), the Fourth Circuit held the government went too far by introducing evidence of his meetings with federal officials. *Id.* at 224-25. Because Dowdy was Chairman of the Subcommittee investigating the contractor's complaint, the court explained, his meetings with federal officials "might be interpreted as preparation for a subcommittee hearing." *Id.* at 223. Questioning Dowdy about those meetings thus subjected him to an impermissible "examination of [his] actions as a Congressman," in violation of the Speech or Debate Clause. *Id.* at 224-25.

Crucially, in holding that Dowdy's meetings with federal officials were protected, the Fourth Circuit expressly rejected the government's requests to consider Dowdy's "actual motives" for arranging the meetings. *Id.* at 226. As the court explained:

> [A]n even more basic flaw in the government's argument is its implied assertion concerning the scope of protection afforded by the speech or debate clause; namely, that it is applicable only when a pure legislative motive is present. *The clause does not simply protect against inquiry into acts which are manifestly legislative. In our view, it also forbids inquiry into acts which are purportedly or apparently legislative, even to determine if they are legislative in fact.*

Id. (emphasis added).

Despite evidence indicating that Dowdy "creat[ed] a smokescreen of arguably legislative activity to camouflage illegal non-legislative acts," the Fourth Circuit refused to permit evidence of Dowdy's subjective "motive" or "purpose" to color its assessment of the legislative nature of his acts. *Id.* Once the court determined "that the legislative function was *apparently* being performed," the Fourth Circuit recognized that any further inquiry would frustrate the most basic purposes of the Clause. *Id.*

Dowdy expressly held the Clause "does *not* simply protect against inquiry into acts which are

manifestly legislative," but also "forbids inquiry into acts which are purportedly or apparently legislative, even to determine if they are legislative in fact." 479 F.2d at 226 (emphasis added). That holding is in direct conflict with the decision below, which expressly authorized inquiry into "Senator Menendez's *purportedly legislative* acts." Pet.App.3a (emphasis added).

2. The D.C. Circuit echoed *Dowdy* a few years later, holding that if an activity is "*arguably* within the 'legitimate legislative sphere,' the Speech or Debate Clause bars inquiry even in the face of a claim of 'unworthy motive.'" *McSurely I*, 553 F.2d at 1295 (emphasis added); *see also McSurely II*, 753 F.2d at 106 (relying on *Dowdy* to hold that "once a court determines … that a congressional committee was 'apparently' performing a legitimate investigative function, the court may not press on and inquire into 'the propriety and the motivation for the action taken'").

McSurely involved claims against Members and staff of a Senate subcommittee investigating a riot in Tennessee. 553 F.2d at 1280-82. As part of its investigation, the subcommittee obtained documents unlawfully seized by Kentucky authorities from the home of two civil rights organizers. *Id.* at 1281-83. Plaintiffs alleged the documents were seized not for any legitimate legislative purpose, but rather "to harass, stigmatize, and intimidate plaintiffs." *Id.* at 1281.

Relying on the general rule that "if the activity is *arguably* within the 'legitimate legislative sphere' the Speech or Debate Clause bars inquiry even in the

face of a claim of 'unworthy motive,'" the *en banc* court held the retention and use of the documents by Members and staff of the Senate subcommittee was protected. *Id.* at 1295-98 (emphasis added). Because they were "*at least arguably* relevant" to the subcommittee's investigation, defendants' use of the documents could not be subjected to further judicial inquiry.[6] *Id.* at 1298 (emphasis added).

Like the Fourth Circuit, the D.C. Circuit refused to look behind the objective nature of the challenged acts to examine the Members' purported "motive" or "purpose" because doing so would "embroil the courts in the kind of review of legislative performance that is prohibited by the Speech or Debate Clause." *Id.* When a legislator acts in an area that "is at least arguably within a proper legislative sphere" and "pertains to a subject 'on which legislation could be had,'" the "immunity shield" provided by the Clause "protects against lawsuits that are based on mere allegation or speculation" as to the legislator's motive. *Id.* at 1296 (quoting *Eastland*, 421 U.S. at 504 n.15). Such a rule is necessary to "give legislators and their aides a certain measure of elbow-room to pursue legislative activity without the inhibitions that necessarily flow

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[6] The panel permitted certain claims to proceed because the investigator *conceded* he seized some extraneous, personal material irrelevant to the subcommittee's inquiry. *Id.* at 1294-96. After trial of those claims, the D.C. Circuit reiterated that "[o]nce a court determines … that a congressional committee was 'apparently' performing a legitimate investigative function, the court may not press on and inquire into 'the propriety and the motivation for the action taken.'" *McSurely II*, 753 F.2d at 106 (quoting *Dowdy*, 479 F.2d at 226).

from exposure to suit because of the mere 'conclusion of a pleader' or 'a jury's speculation as to motives.'" *Id.* at 1295 (citing *Tenney*, 341 U.S. at 377).[7]

3. The Second Circuit joined the Fourth and D.C. Circuits in *Biaggi*. Congressman Biaggi was convicted of accepting unlawful gratuities, specifically Florida spa vacations, for his efforts on behalf of a Navy contractor. Biaggi argued that his trips to Florida were protected by the Speech or Debate Clause because he claimed to have conducted legislative "fact finding visit[s]" to "the agency on Aging in Broward County" and a "Health Maintenance Organization" during his vacation. 853 F.2d at 93, 102-03.

The Second Circuit ultimately rejected Biaggi's claims, holding "travel itself" does not constitute "legislative activity" because "the mere transport of oneself from one place to another is simply not 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings.'" *Id.* at 104 (quoting *Gravel*, 408 U.S. at 625). The fact that

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[7] The Third Circuit attempted to distinguish *Dowdy* and *McSurely* by claiming they involved "manifestly legislative activity." Pet.App.20a. But the conduct at issue in *Dowdy* (informal meetings with executive branch officials) and *McSurely* (field investigations by a staff member) does not satisfy the Third Circuit's *own* definition of "manifestly legislative" activity, *see* Pet.App.17a, and the Third Circuit's extensive inquiry into "Senator Menendez's *purportedly legislative* acts," Pet.App.3a (emphasis added), simply cannot be squared with those cases, which expressly prohibited any such inquiry.

Biaggi engaged in purportedly legislative "fact finding" meetings in Florida was insufficient to transform the entire trip into a "legislative act." *Id.*

In analyzing Biaggi's claims, however, the Second Circuit joined the Fourth and D.C. Circuits in holding that: (1) any "legislative factfinding activity conducted by Biaggi during his Florida trips was protected" by the Speech or Debate Clause, regardless of motive, *id.* at 103; and (2) "it is generally true that the Speech or Debate Clause forbids not only inquiry into acts that are manifestly legislative but also inquiry into acts that are purportedly legislative, 'even to determine if they are legislative in fact,'" *id.* (quoting *Dowdy*, 479 F.2d at 226). Like the Fourth and D.C. Circuits, the Second Circuit thus rejected the notion that the Speech or Debate Clause permits inquiry into a legislator's "motive" or "purpose" in order to determine whether an "apparently legislative" act is legislative in fact.

4. If anything, the circuit split is even more entrenched than *Dowdy*, *McSurely*, and *Biaggi* suggest. Most circuits have read this Court's precedents and concluded—correctly—that courts may never interrogate a legislator's motive to determine whether his acts are protected. *See, e.g.*, *Rangel v. Boehner*, 785 F.3d 19, 22 (D.C. Cir. 2015) ("Instead of looking into the defendants' 'motive or intent,' the standard for determining whether an act is legislative 'turns on the nature of the act' itself." (quoting *Bogan*, 523 U.S. at 54)); *Bagley v. Blagojevich*, 646 F.3d 378, 394 (7th Cir. 2011) ("motives do not matter in determining whether the action is legislative"); *Bryant v. Jones*, 575 F.3d 1281, 1307 (11th Cir. 2009) (the proper inquiry "is

simply 'whether, stripped of all considerations of intent and motive, [the] actions were legislative'" (quoting *Bogan*, 523 U.S. at 55)); *Almonte v. City of Long Beach*, 478 F.3d 100, 106 (2d Cir. 2007) ("whether immunity attaches turns not on the official's identity, or even on the official's motive or intent, but on the nature of the act in question"); *Torres-Rivera v. Calderon-Serra*, 412 F.3d 205, 213 (1st Cir. 2005) ("intent is not part of the analysis" when determining "whether the acts are legislative"); *Kamplain v. Curry Cty. Bd. of Comm'rs*, 159 F.3d 1248, 1252 n.4 (10th Cir. 1998) (citing *Tenney* and *Brewster* for "the long-held principle that a legislator's or legislature's motive is not a proper consideration for legislative immunity"). Even though some acts might be more difficult to classify than others, no faithful reading of those cases would permit the sort of doctrinal misadventure the Third Circuit embarked on here.

The foregoing authorities demonstrate that if Senator Menendez had been charged anywhere outside the Third Circuit, the court would have looked no further than the substance of his acts to assess their legislative nature objectively. Refusing to exercise the self-restraint the Speech or Debate Clause demands, however, the Third Circuit ran headlong into the Clause's "third rail" by inquiring extensively into the potential "motive" and "purpose" underlying his alleged conduct.[8] This Court should grant certiorari to resolve the obvious conflict.

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[8] By jettisoning the legal test followed by the other circuits, the Third Circuit also short-circuited any meaningful appellate

II. The Decision Below Violates This Court's Precedent By Permitting Inquiry Into A Legislator's "Motive" And "Purpose"

The decision below is in clear conflict with this Court's precedents, which have interpreted the Speech or Debate Clause to prohibit inquiry not only "into acts that occur in the regular course of the legislative process," but also "into *the motivation for those acts*." *Brewster*, 408 U.S. at 525 (emphasis added). In *Eastland* and *Bogan*, this Court emphasized that a court should not consider a legislator's purported "motive" or "purpose" when determining whether the legislator is entitled to immunity. The proper inquiry is whether, "*stripped of all considerations of intent and motive*, [the defendant's] actions were legislative." *Bogan*, 523 U.S. at 54-55 (emphasis added); *see also Eastland*, 421 U.S. at 508. The Third Circuit's failure to follow this Court's clear guidance was outcome determinative, as the decision below relied heavily upon Senator Menendez's "motive" and "purpose" in holding that his acts were not protected.

1. In *Eastland*, this Court rejected plaintiffs' claims that a House committee investigation fell outside the Speech or Debate Clause because its "sole purpose" was allegedly to "harass, chill, punish, and deter [plaintiffs] in their

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review. The other circuits do not consider motive at all, so there is no fact-finding on motive and the Speech or Debate inquiry remains *de novo*. The Third Circuit, by contrast, permitted extensive judicial inquiry into motive, and then reviewed that "fact-finding" (*i.e.*, deferring to what the prosecutor wrote in the indictment) only for clear error. Pet.App.14a.

exercise of their rights and duties under the First Amendment." 421 U.S. at 495.

Noting that the "central role" of the Clause was to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," this Court refused to permit allegations of an improper motive to color its assessment of the legislative nature of the acts. *Id.* at 502, 508-09. As this Court explained, "[i]f the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it." *Id.* at 508-09. For that reason, this Court held that "*in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it*." *Id.* at 508 (emphasis added).

2. This Court reached the same conclusion in *Bogan*, a case involving claims against city officials.[9] *See* 523 U.S. at 46-47. The plaintiff in *Bogan* alleged that an ordinance eliminating her position in the city health department was

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[9] Although the defendants in *Bogan* were municipal legislators asserting common law claims of legislative immunity, *Bogan*'s framework for classifying acts as legislative or non-legislative is fully applicable to cases involving federal legislators. This Court "generally ha[s] equated the legislative immunity to which state legislators are entitled under §1983 to that accorded Congressmen under the Constitution," and has explained that, if anything, "the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators." *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 733 (1980).

"motivated by racial animus and a desire to retaliate against her for exercising her First Amendment rights." *Id.* at 47. Both the district court and the First Circuit denied defendants' claims of legislative immunity, holding their conduct was non-legislative "because their actions were specifically targeted at [plaintiff]" and "[plaintiff's] constitutionally-protected speech was a substantial or motivating factor" behind their conduct. *Id.* at 47-48, 54.

This Court unanimously reversed, holding defendants were entitled to legislative immunity because their actions, "*stripped of all considerations of intent and motive*," were "integral steps in the legislative process." *Id.* at 55 (emphasis added). As Justice Thomas explained:

> Although the Court of Appeals did not suggest that intent or motive can overcome an immunity defense for activities that are, in fact, legislative, *the court erroneously relied on petitioners' subjective intent in resolving the logically prior question of whether their acts were legislative. Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it.* The privilege of absolute immunity "would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."

Id. at 54 (quoting *Tenney*, 341 U.S. at 377) (alteration in original) (emphasis added). Like *Eastland*, *Bogan* recognized that permitting inquiry into a legislator's subjective "motive" or "purpose" would undermine the prophylactic purposes of the Clause, as the mere allegation of an improper motive would be sufficient to circumvent the interests the Clause was designed to protect.

3. The error corrected in *Bogan* is the same error committed by the Third Circuit below. Rather than examining Senator Menendez's acts "stripped of all considerations of intent and motive," the Third Circuit required the Senator to *disprove* the prosecutor's allegations impugning his "motive" and "purpose" before resolving the "logically prior question" of whether his acts were legislative. *See* Pet.App.18a (stating the court would consider "the content, purpose, and motive" of Senator Menendez's acts "to assess [their] legislative or non-legislative character"); Pet.App.19a (holding inquiry into legislative motive was prohibited "*[o]nly after*" the court first concluded the act was legislative in fact (emphasis added)).

To take the most obvious example, the indictment alleges Senator Menendez met with Tavenner and discussed multi-dosing and Medicare reimbursement policy. Pet.App.148a-149a. But rather than evaluating the Tavenner meeting based solely upon the objective "nature of the act," *Bogan*, 523 U.S. at 54, the Third Circuit proceeded to examine a slew of third-party evidence related to the Senator's purported "motive" and "purpose" to conclude that even when Senator Menendez "framed" a meeting "using the language of policy," his acts

were non-legislative because these "[policy] concerns were instead attempts to help Dr. Melgen." Pet.App.27a.[10] The court's conclusion was not based on an objective assessment of what actually happened in the Tavenner meeting, but rather reflected the executive and judiciary's attempts at Senatorial mind reading.

4. The Third Circuit's failure to evaluate Senator Menendez's acts "stripped of all considerations of intent and motive," *Bogan*, 523 U.S. at 55, was outcome-determinative. Despite "evidence in the record" (and on the face of the indictment itself) "showing that each of the challenged acts involved policy discussions," the Third Circuit concluded that none of the Senator's acts were protected because his "*predominant purpose*" was "to pursue a political resolution to Dr. Melgen's disputes and not to discuss broader issues of policy."[11]

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[10] *See, e.g.*, Pet.App.27a (Senator Menendez met with Melgen's lobbyist while preparing for a meeting); 28a (Melgen and his lobbyist were "particularly interested in following up with Senator Menendez" after a meeting); 28a (memo prepared by a staffer *before* a meeting referred to Melgen's case); 26a (other meeting participants "were aware"—based upon correspondence with Senator Menendez's staff *three years earlier*, *see* Pet.App.5a—that he was "interested" in Melgen's case).

[11] At one point the decision below states, incorrectly, that "evidence exists that Dr. Melgen or his case was mentioned specifically during each of the challenged acts." Pet.App.26a. Nothing in the record demonstrates that Melgen or his case were mentioned during the Tavenner meeting or follow-up call and, as noted above, the record evidence refutes the indictment's bald characterizations of the Sebelius and Brownfield meetings. Moreover, neither the district court nor the Third Circuit held a hearing to resolve such factual

Pet.App.24a-25a, 32a (emphasis added). Under *Eastland* and *Bogan*, the Senator's "predominant purpose" never even should have factored into the analysis.

The fundamental flaw in the Third Circuit's analysis becomes all the more obvious when one considers what happens when the court concludes that its motive inquiry renders the privilege applicable. Under the Third Circuit's approach, courts are permitted to consider a legislator's "motive" and "purpose" any time the legislator performs an "ambiguously legislative" act. Pet.App.18a. But as the decision below acknowledges, "ambiguously legislative" acts can be either legislative or non-legislative; not all "ambiguously legislative" acts fall outside the Clause's protections. *Id.* And by the time a court employing the Third Circuit's framework determines an "ambiguously legislative" act is, in fact, a protected legislative act, the protections afforded by the Clause already have been lost—the legislator's protected act, as well as the motivation for that act, have been examined by the Judiciary, in a prosecution brought by the Executive.

As Justice Rehnquist noted in *McMillan*, "[a] supposed privilege against being held judicially accountable for an act is of virtually no use to the claimant of the privilege if it may only be sustained after elaborate judicial inquiry into the

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disputes. Rather, the government affirmatively avoided any such hearing on remand following the first appeal. *See supra* note 3.

circumstances under which the act was performed." 412 U.S. at 339 (Rehnquist, J., concurring and dissenting in part). The Speech or Debate privilege was designed to protect legislative independence by "prevent[ing] intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel*, 408 U.S. at 617. The Third Circuit's approach undermines the prophylactic purposes of the Clause by subjecting legislators engaged in legitimate, policy-based activities to extensive inquiry into whether their conduct was improperly motivated. The fact the court may ultimately conclude the legislator's motives were pure is no answer, as it is the *threat* of such prosecutions—the threat of being made to "answer" outside the halls of Congress—that endangers legislative independence. *Id.* at 615-16.[12]

The Third Circuit's illogic stands in even starker relief when viewed in light of this Court's official immunity jurisprudence more generally. This Court has long stated that courts adjudicating claims

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[12] One passage, in particular, demonstrates the Third Circuit's fundamental misunderstanding of the Clause's prophylactic purposes. The court tried to reassure Senator Menendez that "[t]he evidence in [his] favor … will no doubt channel forcefully his position at trial." Pet.App.27a. But as this Court explained in *Tenney*, the privilege "would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." 341 U.S. at 377. The "purpose and office" of the Clause is to protect legislators "not only from the consequences of litigation's results, but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967).

of official immunity must not be permitted to inquire into the alleged mindset or motives of officials charged with misconduct, precisely because "substantial costs attend the litigation of the subjective good faith of government officials," costs whose many harmful effects include "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816. And when legislative immunity is at issue, the costs of a crippled immunity regime include compromised "legislative independence" as well. *Consumers Union*, 446 U.S. at 731. Indeed, even Members of Congress who manage to successfully navigate the Third Circuit's threshold motive inquiry will see their "defense of official immunity … abolished in fact if not in form." *Butz*, 438 U.S. at 522 (Rehnquist, J., concurring in part and dissenting in part). That is simply not the law, nor should it be.

III. The Decision Below Presents An Important And Recurring Question That Threatens To Impair The Legislative Function

Certiorari is also warranted because this case presents a recurring issue of national importance that threatens to impair the legislative function.

Under the Third Circuit's approach, any legislator who accepts a campaign contribution and later engages in policy discussions with an executive branch official on a matter of importance to the contributor is subject to a bribery charge—even if those discussions are objectively consistent with the legislator's long-standing policy views and legislative responsibilities. The government is not required to

prove the act, stripped of all considerations of motive and purpose, was non-legislative in nature and thus outside the Clause's protections. To the contrary, under the Third Circuit's approach, the mere allegation that the legislator's "motive" or "purpose" was to assist a campaign contributor is sufficient to unleash an inquest into motive and force the legislator to defend himself at trial.

Indeed, just as much as an overly aggressive reading of the anti-bribery laws, the Third Circuit's substantial weakening of Speech or Debate Clause immunity effectively "cast[s] a pall of potential prosecution" every time "conscientious public officials arrange meetings for constituents, contact other officials on their behalf, [or] include them in events"—which is to say, "all the time." *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016). Such effect will be all the more potent in combination with the government's well-documented view—dramatized in this very case—that "nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*." *Id.* From now on, in the Third Circuit at least, legislators certainly will "wonder whether they could respond to even the most commonplace requests for assistance," a state of affairs that is particularly regrettable given that "[t]he basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns." *Id.*

Those unfortunate consequences flow directly from the Third Circuit's broad expansion of the

Executive's ability to "question" legislators about their acts, and the motivation for those acts, in a judicial forum. Yet none of this Court's cases countenance such judicial complicity in a power grab by the Executive. To the contrary, to preserve the prophylactic purposes served by the Clause, this Court's decisions in *Eastland* and *Bogan*, as well as decisions of the Second, Fourth, and D.C. Circuits, squarely forbid courts from inquiring into a legislator's alleged "motive."

This split in authority is particularly intolerable in light of the history underlying the Clause. The Executive—the precise party whose potential hostility prompted the Clause—should not be permitted to choose whether to prosecute a Congressman from the Third Circuit in his home district (where extensive inquiry into legislative motive is permitted) or the District of Columbia (where such inquiry is properly prohibited). A Member's immunity cannot turn on which State he represents, or where the Executive chooses to ask its questions.

Whatever difficulties might attend the ultimate classification of a legislator's acts as legislative or non-legislative, the Third Circuit's misguided approach to the Speech or Debate Clause is inexcusable and will not correct itself. This Court's intervention is needed to restore the vital role the Clause was designed to play in securing the separation of powers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 15-3459

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UNITED STATES OF AMERICA,

v.

ROBERT MENENDEZ,

Appellant.

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Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Action No. 2-15-cr-00155-001)
District Judge: Honorable William H. Walls

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Argued February 29, 2016

Before: AMBRO, JORDAN and SCIRICA,
Circuit Judges

(Opinion filed: July 29, 2016)

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OPINION OF THE COURT

AMBRO, *Circuit Judge*

A 22-count indictment (the "Indictment") charges that from 2006 to 2013 United States Senator Robert Menendez of New Jersey solicited and accepted numerous gifts from his friend Dr. Salomon Melgen, a Florida-based ophthalmologist. In exchange, Senator

Menendez allegedly used the power of his office to influence, among other things, an enforcement action against Dr. Melgen by the Centers for Medicare and Medicaid Services ("CMS") and to encourage the State Department and the U.S. Customs and Border Patrol ("Customs") to intervene on Dr. Melgen's behalf in a multimillion dollar contract dispute with the Dominican Republic.

Senator Menendez appeals from the denial of his motions to dismiss the Indictment. He argues that, as a United States Senator, he is protected from prosecution under the Speech or Debate Clause of our Constitution. U.S. Const. art. I, § 6, cl. 1. Though it states literally that Members of Congress "shall not be questioned in any other Place" for "any Speech or Debate in either House," its protections extend to "legislative acts" that Members perform. Senator Menendez contends that protected acts form the basis of the Indictment. He claims also that Count 22 of the Indictment—which charges him with knowingly or willfully falsifying, concealing, or covering up gifts from Dr. Melgen in violation of the Ethics in Government Act of 1978 (the "Ethics Act"), 5 U.S.C. app. 4 §§ 101-11, and 18 U.S.C. § 1001—must be dismissed because it allows other Branches of Government to intrude on Legislative Branch matters (a separation-of-powers claim) and was brought in the wrong venue (New Jersey) instead of where it belonged (the District of Columbia). We conclude that Senator Menendez's purportedly legislative acts are not protected by the Speech or Debate Clause and that the Indictment is not otherwise deficient. Thus we affirm.

I. Background

A. Senator Menendez, Multi-Dosing, and Dr. Melgen's Dispute with CMS

At the motion-to-dismiss stage, we generally accept as true the factual allegations in an indictment. *See United States v. Huet*, 665 F.3d 588, 595 (3d Cir. 2012). Our statement of facts is therefore drawn from the Indictment except where it is noted as drawn from evidence in the record.

In 2009 CMS suspected that Dr. Melgen had overbilled Medicare for $8.9 million from 2007 to 2008 by engaging in a prohibited practice known as "multi-dosing." Medicare policy required that each patient receiving the drug Lucentis be treated using a separate vial, but Dr. Melgen routinely used the extra solution from a single vial (so-called "overfill") to treat multiple patients. Because he was reimbursed as if he used a separate vial for each patient, CMS believed Dr. Melgen was paid for more vials of the drug than he actually used.

Before CMS began formal proceedings against Dr. Melgen, Senator Menendez instructed his Legislative Assistant to call the Doctor about "a Medicare problem we need to help him with." A-105 (Indict. ¶ 148). The Legislative Assistant replied that she and the Senator's Deputy Chief of Staff called Dr. Melgen twice and were "looking into how [they could] be helpful." *Id.* (Indict. ¶ 149) (alteration in original). After CMS formally notified Dr. Melgen that it may seek reimbursement for the suspected overbilling, the Senator's Deputy Chief of Staff emailed the Legislative Assistant, "I think we have to weigh in on [Dr. Melgen's] behalf . . . to say they can't make him pay retroactively." A-107 (Indict. ¶¶ 158-59).

Senator Menendez's staff continued to work with Dr. Melgen's lobbyist on the CMS dispute and eventually arranged for the Senator to speak with Jonathan Blum, the then-Acting Principal Deputy Administrator and Director of CMS. Before that conversation, an official from the United States Department of Health and Human Services ("HHS") wrote Mr. Blum, "We have a bit of a situation with Senator Menendez, who is advocating on behalf of a physician friend of his in Florida." A-108 (Indict. ¶ 166). Meanwhile, Senator Menendez's Legislative Assistant drafted "Talking Points" for the Senator that, along with statements about policy, included statements like "I was contacted by Dr. Melgen regarding an audit by First Coast, the Medicare administrative contractor in Florida," and "I am not weighing [in] on how you should administer Lucentis, nor on how his specific audit should be resolved but rather [am] asking you to consider the confusing and unclear policy on this issue and not punish him retroactively as a result." A-108-09 (Indict. ¶ 167). Ultimately, the conversation between Senator Menendez and Mr. Blum did not resolve Dr. Melgen's dispute with CMS. The following month, after more developments in the case, the Senator noted that Dr. Melgen was "still in the non[-] litigant stage" and directed his Chief of Staff to "determine who has the best juice at CMS and [HHS]." A-109 (Indict. ¶ 173).

Almost three years later, in June 2012, Senator Menendez discussed multi-dosing with Marilyn Tavenner, the then-Acting Administrator of CMS. There is some evidence in the record suggesting that Senator Menendez and Ms. Tavenner met to discuss her nomination to become the permanent Administrator of CMS. For example, the Senator's calendar noted that they were meeting about Ms. Tavenner's "nomination before the [Senate] Finance Committee." A-462.

However, there is no evidence suggesting that her nomination was actually discussed when they met. *See* A-1313 (Tavenner FD-302); A-1254-55 (Martino FD-302).

To prepare for the meeting, the Senator met with Dr. Melgen's lobbyist. A handwritten note for Senator Menendez mentioned Dr. Melgen and his lobbyist by name and reminded the Senator to "[m]ake the larger policy case" to Ms. Tavenner. A-1316. On the other side, Mr. Blum alerted Ms. Tavenner to Senator Menendez's interest in Dr. Melgen's case.

Once together, Senator Menendez pressed Ms. Tavenner about multi-dosing and advocated on behalf of the position favorable to Dr. Melgen in his Medicare billing dispute with CMS. Contemporaneous notes reported that Senator Menendez and Ms. Tavenner discussed CMS's multi-dosing policy but made no mention of Dr. Melgen or his case.

A follow-up call between Senator Menendez and Ms. Tavenner took place a few weeks later. Before the call, Dr. Melgen's lobbyist prepared a memorandum entitled "Talking Points: CMS Policy" and shared it with the Senator's staff, who incorporated it into a separate memorandum prepared for Senator Menendez. A-114 (Indict. ¶ 201). The latter memorandum noted that "[t]he subject of the call [wa]s to discuss the issue [of] Medicare reimbursement when a physician multi-doses from a single dose vial," but it also made several references to Dr. Melgen's case, such as "[w]e're talking about payments made in 2007-2008" and "[i]t's clear that CMS is taking steps to clarify both multi-dosing from single-dose vials and overfills going forward. This is, in effect, admitting that these policies didn't exist before and don't apply during the 2007-2008 period. Therefore they don't have any bearing on

the issue at hand." A-115 (Indict. ¶ 202). To the Government, the "issue at hand" was Dr. Melgen.

During the call, Ms. Tavenner said CMS would not alter its position on multi-dosing and Senator Menendez threatened to raise the issue of multi-dosing directly with Kathleen Sebelius, the then-Secretary of HHS who oversaw CMS. After the call, Dr. Melgen's lobbyist spoke with one of the Senator's staffers, and the staffer reported to the Senator that the lobbyist was "encouraged, but mainly because he's increasingly confident they won't have a leg to stand on should [Dr. Melgen] litigate. But we're all hopeful it won't come to that." A-116 (Indict. ¶ 207). The Indictment does not allege specifically that Senator Menendez mentioned Dr. Melgen by name to Ms. Tavenner.

A week later, the scheduler for the then-Majority Leader of the Senate, Harry Reid, arranged a meeting among Senator Reid, Senator Menendez, and Secretary Sebelius. Senator Menendez told his staff that he did not want to tell Dr. Melgen about the arrangement "so that I don't raise expectation[s] just in case it falls apart," A-117 (Indict. ¶ 210), though the Senator met with Dr. Melgen's lobbyist before the meeting and received a summary of the latest developments in Dr. Melgen's dispute with CMS. At the meeting with Secretary Sebelius and Senator Reid, Senator Menendez advocated on behalf of Dr. Melgen's position in the Medicare billing dispute, focusing on his specific case and asserting unfair treatment of it. Mr. Blum, who accompanied the Secretary to the meeting on behalf of CMS, later told the FBI he did not recall anyone mentioning Dr. Melgen by name, but said it was clear to him that the Senators were talking about Dr. Melgen and that the issue with his billing "was an

isolated issue as opposed to a general problem." A-1136 (Blum FD-302). Senator Reid told the FBI that Dr. Melgen's name probably came up during the meeting because his "individual situation was clearly the purpose of the meeting and they would have otherwise been speaking in a vacuum." A-1301 (Reid FD-302). Secretary Sebelius told Senator Menendez that because Dr. Melgen's case was in the administrative appeals process, she had no power to influence the matter.

B. Senator Menendez, Port Security, and Dr. Melgen's Dispute with the Dominican Republic

In February 2012, Dr. Melgen obtained exclusive ownership of a contract held by a company in the Dominican Republic named ICSSI. The contract gave ICSSI exclusive rights to install and operate X-ray imaging equipment in Dominican ports for up to 20 years and required all shipping containers to be X-rayed at a tariff of up to $90 per container. ICSSI and the Dominican Republic disputed the validity of the contract and had already begun litigating the issue.

The following month, a former Menendez staffer who worked for Dr. Melgen requested a phone call with Assistant Secretary of State William Brownfield to discuss ICSSI's contract. A State Department official reported to the Assistant Secretary that the former staffer "dropped the name of Sen. Menendez pretty squarely as having an interest in [the] case." A-98 (Indict. ¶ 119). That former staffer later met with the Assistant Secretary and represented that he (the staffer) spoke on behalf of "a United States entity involved in a contract dispute with the Government of the Dominican Republic concerning the screening of shipping containers at Dominican ports." *Id.* (Indict.

¶ 120). He referenced New Jersey connections to the dispute.

Senator Menendez's Senior Policy Advisor arranged a meeting in May 2012 between the Senator and Assistant Secretary Brownfield about U.S. policy relating to Dominican port security. At the meeting, Senator Menendez advocated for Dr. Melgen's interest in his foreign contract dispute, questioning the Assistant Secretary about the dispute and expressing dissatisfaction with the State Department's lack of initiative in the case. Assistant Secretary Brownfield later summarized the meeting in an email to his staff, noting that Senator Menendez "allud[ed] to" a particular company and that the Senator threatened to call a hearing if there was no solution. A-101 (Indict. ¶ 125).

In June 2012, Senator Menendez's Senior Policy Advisor emailed Assistant Secretary Brownfield's staff for an update on the Dominican port issue. A few days later, the Assistant Secretary told his staff that Dr. Melgen's case "is the case about which Sen. Menendez threatened to call me to testify at an open hearing. I suspect that was a bluff, but he is very much interested in its resolution. A reminder that I owe the Senator an answer to the question 'What can we do to resolve this matter?'" *Id.* (Indict. ¶ 129). Assistant Secretary Brownfield later forwarded to his staff another email from Dr. Melgen's representative and wrote, "More on [Senator] Menendez'[s] favorite DR port contract case." A-102 (Indict. ¶ 131).

Senator Menendez subsequently directed his Chief Counsel to ask Customs about its rumored donation to the Dominican Republic of equipment for the monitoring and surveillance of shipping containers. The equipment would have made it easier for the Dominican Republic to increase port security without honoring its

disputed contract with ICSSI. The Senator's Chief Counsel emailed a Customs employee the following:

> 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 [the Department of Homeland Security] to provide container shipment scanning/monitoring in the [Dominican Republic]. Apparently, there is some effort by individuals who do not want to increase security in the [Dominican Republic] to hold up that contract's fulfillment. These elements (possibly criminal) want [Customs] 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 [Customs] 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.

Id. (Indict. ¶ 133). The employee responded that Customs was not providing the Dominican Republic with any such equipment and confirmed with Senator Menendez's Chief Counsel that the "private company" referred to was ICSSI. A103 (Indict. ¶¶ 139-42).

C. Senator Menendez's Financial Disclosures

Under the Ethics Act, Senators are required to file with the Secretary of the United States Senate in Washington, D.C., an annual financial disclosure form reporting, among other things, income, gifts, and financial interests from the prior calendar year. While Senator Menendez was subject to that obligation, Dr.

Melgen and his companies allegedly gave the Senator reportable gifts, including "private, chartered, and first-class commercial flights," a car service, and hotel stays in Paris, France, and Punta Cana, Dominican Republic. A-135 (Indict. ¶ 272). Senator Menendez did not disclose any reportable gifts from Dr. Melgen in his filings during the relevant years. The Indictment claims that the Senator engaged in conduct "in the district of New Jersey and elsewhere" to falsify, conceal, and cover up those allegedly reportable gifts. *Id.* (Indict. ¶ 271).

D. Procedural History

In late 2014, two Menendez staffers (one current and one former) invoked the privilege conferred by the Speech or Debate Clause to withhold testimony before a federal grand jury investigating the Senator's dealings with Dr. Melgen. The parties disputed how protective the privilege was, and the District Court ultimately granted the Government's motion to compel the staffers' testimony. On appeal, we ruled that the privilege did not necessarily protect Senator Menendez's "informal communications with Executive Branch officials, one of whom [(Ms. Tavenner)] was at the time a presidential nominee whose nomination was pending before the United States Senate." *In re Grand Jury Investig. (Menendez)*, 608 F. App'x 99, 101 (3d Cir. 2015). However, we required additional fact-finding to determine if the privilege applied. Thus we remanded the matter to the District Court for "specific factual findings about the communications implicated by the grand jury questions" and with instructions to "separately analyze[]" the "contents and purposes of each disputed communication." *Id.* On remand, the Government presented the disputed evidence through

a summary witness and the District Court did not rule on the privilege issue again.

The grand jury decided to charge Senator Menendez and Dr. Melgen, and the Indictment issued in April 2015. The Senator moved to dismiss on several grounds, including the Speech or Debate privilege and, with respect to Count 22 alleging reporting violations under the Ethics Act, the separation of powers among the Branches of Government and faulty venue. The District Court denied the motions. It held that Senator Menendez failed to prove that the Indictment references any legislative acts covered by the Speech or Debate Clause. It also ruled that the Ethics Act charge was consistent with separation-of-powers constraints and that venue was proper in New Jersey.

Senator Menendez then took this appeal. The Government moved to dismiss parts of it for lack of jurisdiction, arguing that the District Court's denial of the motion to dismiss for lack of venue was not immediately appealable. *See, e.g.*, *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir. 2002). We agreed, but because the "appropriate mechanism" for reviewing an allegedly improper ruling regarding venue in the absence of an appealable final order is mandamus, *Sunbelt Corp. v. Noble, Denton & Assocs., Inc.*, 5 F.3d 28, 30 (3d Cir. 1993), we denied the Government's motion and restricted Senator Menendez to raising the venue issue only in the form of a "request for a petition for a writ of mandamus concerning venue," Order, Dec. 11, 2015.

The District Court exercised jurisdiction under 18 U.S.C. § 3231. We have jurisdiction over the Speech or Debate Clause issues under the collateral order doctrine. *United States v. McDade*, 28 F.3d 283, 288 (3d Cir. 1994). Under the specific circumstances here,

we have pendent appellate jurisdiction over Senator Menendez's separation-of-powers claims. *See CTF Hotel Holdings, Inc. v. Marriott Int'l, Inc.*, 381 F.3d 131, 136 (3d Cir. 2004). And we have jurisdiction over Senator Menendez's request for a petition for a writ of mandamus under 28 U.S.C. § 1651(a).

II. Standard of Review

"[O]ur standard of review is mixed" for motions to dismiss. *Huet*, 665 F.3d at 594. We review the District Court's legal conclusions *de novo* and its factual determinations, including its findings about the contents and purposes of the acts alleged in the Indictment, for clear error. *Id.* Senator Menendez argues that we should review the District Court's findings *de novo* as findings of constitutional fact, *i.e.*, "a fact whose 'determination is decisive of constitutional rights.'" *Zold v. Twp. of Mantua*, 935 F.2d 633, 636 (3d Cir. 1991) (quoting *N.J. Citizen Action v. Edison Twp.*, 797 F.2d 1250, 1259 (3d Cir. 1986)). But factual findings are not subject to plenary review simply because they are material to constitutional analyses. Outside the unique First Amendment context that requires "independent appellate review" of certain factual findings, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984), we review findings of historical fact for clear error even when they affect constitutional rights, *see Ornelas v. United States*, 517 U.S. 690, 699 (1996) (holding that findings of narrative or historical fact related to Fourth Amendment rights are reviewed for clear error); *see also United States v. Renzi*, 651 F.3d 1012, 1020-21 (9th Cir. 2011) (reviewing for clear error a district court's findings of fact in the context of a motion to dismiss an indictment on Speech or Debate Clause grounds). Here the District Court found historical facts, so we will review those

findings for clear error notwithstanding their relevance to the constitutional analysis.

Under the clear error standard, reversal of the District Court's factual findings is warranted only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Lowe*, 791 F.3d 424, 427 (3d Cir. 2015). "[I]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, we will not reverse it even if, as the trier of fact, we would have weighed the evidence differently." *United States v. Price*, 558 F.3d 270, 277 (3d Cir. 2009) (internal quotation marks omitted). Although our review at this stage of a prosecution is ordinarily limited to the allegations in the Indictment, *see United States v. DeLaurentis*, 230 F.3d 659, 660 (3d Cir. 2000), we can consider extrinsic evidence to determine whether the Speech or Debate Clause applies, *see Gov't of the Virgin Islands v. Lee*, 775 F.2d 514, 524 (3d Cir. 1985).

The mandamus petition pertaining to Count 22 is "subject to a stringent standard of review." *Delalla v. Hanover Ins.*, 660 F.3d 180, 183 n.2 (3d Cir. 2011). "[I]n order to grant mandamus relief, 'an appellate court must find a clear legal error calling for relief that can be obtained through no other means.'" *Id.* (emphasis omitted) (quoting *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1074 (3d Cir. 1983)). In other words, that relief is "appropriate only upon a showing of (1) a clear abuse of discretion or clear error of law; (2) a lack of an alternate avenue for adequate relief; and (3) a likelihood of irreparable injury." *United States v. Wright*, 776 F.3d 134, 146 (3d Cir. 2015).

III. Discussion

A. The Speech or Debate Clause

To repeat, the Speech or Debate Clause provides that "for any Speech or Debate in either House" Members of Congress "shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The "central role" of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *In re Grand Jury*, 821 F.2d 946, 952 (3d Cir. 1987) (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975)). It was "not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972); *see also Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (stating that legislators must be "immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good").

The Supreme Court has read the Clause "broadly" to guarantee Members of Congress immunity from criminal or civil liability based on their legislative acts, *Gravel v. United States*, 408 U.S. 606, 615 (1972), and to create a privilege against the use of "evidence of a legislative act" in a prosecution or before a grand jury, *United States v. Helstoski*, 442 U.S. 477, 487 (1979); *see Gravel*, 408 U.S. at 622. But because the privilege "was designed to preserve legislative independence, not supremacy," invocations of it that go "beyond what is needed to protect legislative independence" must be "closely scrutinized." *Hutchinson v. Proxmire*, 443 U.S. 111, 126-27 (1979). More specifically, "the Speech or Debate Clause must be read broadly to effect[] its purpose of protecting the independence of

the Legislative Branch, but no more than the statutes we apply . . . was its purpose to make Members of Congress super-citizens, immune from criminal responsibility." *Brewster*, 408 U.S. at 516. A Member seeking to invoke the Clause's protections bears "the burden of establishing the applicability of legislative immunity . . . by a preponderance of the evidence." *Lee*, 775 F.2d at 524 (citing *In re Grand Jury Investig. (Eilberg)*, 587 F.2d 589, 597 (3d Cir. 1978)).

In practice, the Speech or Debate privilege affords protection from indictment only for "legislative activity." *Gravel*, 408 U.S. at 625; *see also United States v. Johnson*, 383 U.S. 169, 184-85 (1966); *United States v. Helstoski*, 635 F.2d 200, 205-06 (3d Cir. 1980). Legislative acts have "consistently been defined as [those] generally done in Congress in relation to the business before it." *Brewster*, 408 U.S. at 512. They do not include "all things in any way related to the legislative process." *Id.* at 516; *see Gravel*, 408 U.S. at 625 ("That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature."). The takeaway is that "[t]he Speech or Debate Clause does not immunize every official act performed by a member of Congress." *McDade*, 28 F.3d at 295. Rather, it protects only acts 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*, 408 U.S. at 625.

This plays out in a two-step framework for identifying legislative acts protected by the Speech or Debate

Clause. First, we look to the form of the act to determine whether it is inherently legislative or non-legislative. Some acts are "so clearly legislative in nature that no further examination has to be made to determine their appropriate status." *Lee*, 775 F.2d at 522. Examples of "manifestly legislative acts" include introducing and voting on proposed resolutions and legislation, introducing evidence and interrogating witnesses during committee hearings, subpoenaing records for committee hearings, inserting material into the Congressional Record, and delivering a speech in Congress. *See id.* (listing cases). And even though "such manifestly legislative acts may have been pursued and accomplished for illegitimate purposes, such as personal gain, the acts themselves [are] obviously legislative in nature." *Id.* Thus "an unworthy purpose" does not eliminate Speech or Debate protection. *Johnson*, 383 U.S. at 180 (quoting *Tenney*, 341 U.S. at 377); *see also Eastland*, 421 U.S. at 508 ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."); *Youngblood v. DeWeese*, 352 F.3d 836, 840-41 (3d Cir. 2003) (concluding without any "consideration[] of intent and motive" that a legislator's appropriation of state funds was legislative activity).

On the other side of the spectrum, some acts are so clearly non-legislative that no inquiry into their content or underlying motivation or purpose is needed to classify them. Examples include legitimate constituent services such as "the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress," *Brewster*, 408 U.S. at 512, and, of course, illegitimate activities such as accepting bribes in exchange for taking official action, *id.* at 526.

Even if these non-legislative acts involve policy or relate to protected legislative activity, they are not protected. *See Hutchinson*, 443 U.S. at 130-33 (holding that newsletters and press releases are outside the scope of the Speech or Debate Clause even if they address matters of legislative importance); *see also Brewster*, 408 U.S. at 515 ("In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process.").

If an act is neither manifestly legislative nor clearly non-legislative, then it is ambiguously legislative, and we proceed to the second step of the Speech or Debate analysis. There we consider the content, purpose, and motive of the act to assess its legislative or non-legislative character. *See Lee*, 775 F.2d at 522-24. Ambiguously legislative acts—including trips by legislators and informal[1] contacts with the Executive Branch—will be protected or unprotected based on their particular circumstances. *See id.* at 524. In *Lee*, for example, a legislator from the Virgin Islands faced criminal charges for a trip he took supposedly on the Government's behalf. He argued that legislative immunity barred the prosecution because he engaged in legislative fact-finding during the trip. We first explained that there was nothing inherently legislative or non-legislative about the trip because it was only legislative to the extent it "involved legislative fact-finding." *Id.* at 522. Rather, "[i]t is the content of Lee's private conversations, and not the mere fact that the conversations took place, that determines whether Lee is entitled to legislative immunity." *Id.* We then

[1] We use the word "informal" to exclude manifestly legislative acts, such as communications with Executive Branch officials during committee hearings or the passage of legislation, that are protected even if they influence or coerce the Executive Branch.

determined that Lee's conversations were not "in fact . . . legislative in nature so as to trigger the immunity." *Id.* To reach that conclusion, we considered "the content of Lee's private conversations" and his "purpose or motive" for engaging in them. *Id.* at 522-24.

Senator Menendez proposes two alternative standards for distinguishing between legislative and non-legislative acts at step two. He first argues that an ambiguously legislative act should be "viewed objectively and, if it appears legislative, that should end the inquiry with the privilege upheld." Menendez Br. at 33. But *Lee* expressly rejected the view that Speech or Debate immunity "protects not only legislative acts, but also acts which are *purportedly* or *apparently* legislative in nature." 775 F.2d at 522 (emphasis in original). Rather, we consider a legislator's purpose and motive to the extent they bear on whether "certain legislative acts were in fact taken" or whether "non-legislative acts [are being] misrepresented as legislative" in order to invoke the Speech or Debate privilege improperly. *Id.* at 524. Only after we conclude that an act is in fact legislative must we refrain from inquiring into a legislator's purpose or motive. *Id. Lee*'s holding is not limited to after-the-fact characterizations of acts as legislative, as Senator Menendez contends, nor does it suggest that the privilege prevents us from considering evidence of a purportedly legislative act's true character.

The authority Senator Menendez cites to the contrary misses the mark. He cites a statement in *United States v. McDade* for the principle that it is inappropriate to consider a legislator's motives when determining the character of an ambiguously legislative act. *McDade* considered whether the Speech or Debate Clause

protected a Congressman's two ambiguously legislative letters, one that "openly lobbie[d]" the Executive Branch on behalf of a particular business in his district and one that discussed a "broader policy question" without "explicitly refer[ring] to any particular business." 28 F.3d at 300. Though the *McDade* Court suggested that the second letter "appear[ed] on its face" to be ambiguously legislative, it resolved the case without deciding whether the letters were legislative activity within the scope of the Clause. *Id.* The statement is thus a *dictum*, neither binding on us nor even a conclusive determination of the relevant legal issue.

Senator Menendez next cites three distinguishable cases from other circuits. Two involve manifestly legislative activity rather than ambiguously legislative activity that might appear legislative on its face. *See United States v. Dowdy*, 479 F.2d 213, 224-26 (4th Cir. 1973) (holding that actions pursuant to an investigation authorized by the Chairman of the House Subcommittee on Investigations were legislative notwithstanding evidence that the investigation was performed in exchange for a bribe); *McSurely v. McClellan*, 553 F.2d 1277, 1296 (D.C. Cir. 1976) (en banc) (per curiam) (holding that a Congressman's actions pursuant to an officially sanctioned Congressional investigation would be legislative notwithstanding evidence of impure motive, but noting that his inquiry into private matters beyond the scope of the investigation were not); *see also Lee*, 775 F.2d at 524 (treating *Dowdy* as limited to cases involving "admittedly" legislative activity). And the third case is consistent with *Lee* because it allows the Government to inquire into the reasons for apparently legislative activity. *See United States v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988) (ruling that the Government may

properly present arguments about the "non[-]legislative reasons" for the defendant's purportedly legislative act); *see also id.* at 104 ("The fact that one of the purposes of the travel may have been the conduct of legislative activity does not preclude a conviction."). We therefore reject Senator Menendez's first argument that the Speech or Debate Clause necessarily protects apparently legislative activity. Courts may dig down to discern if it should be deemed legislative or non-legislative.

Senator Menendez's second alternative posits that the Speech or Debate privilege protects any effort by a Member to oversee the Executive Branch, including informal efforts to influence it. *See* Menendez Br. at 14-18, 19 & n.5; *see also Hutchinson*, 443 U.S. at 136 (Stewart, J., concurring in part and dissenting in part). That blanket approach is much too broad, as it would immunize many illegal acts that have only dubious ties to the legislative process. Like all acts by Members, oversight activities exist along a spectrum: the Speech or Debate protection is obvious at the edges where they are manifestly legislative or clearly non-legislative, but it is not obvious in the middle ground where they are ambiguously legislative and consideration of their content, purpose, and motive is necessary. *See McDade*, 28 F.3d at 299-300. Senator Menendez's informal communications with Executive Branch officials are ambiguously legislative, so this case is fought on that middle ground, and claims of "oversight" do not automatically result in Speech or Debate protection.

The Government takes a much harder line: it argues that the Speech or Debate "protection does not extend to Legislative attempts to influence Executive actions, as those actions are the domain of the Executive."

Gov't Br. at 24. Though it concedes that the Clause protects formal efforts to encourage or command the Executive Branch to do something (*e.g.*, by "voting for a resolution," "preparing investigative reports," "addressing a congressional committee," or "speaking before the legislative body in session"), *id.* at 23 (quoting *Youngblood*, 352 F.3d at 840), it nonetheless contends that any other attempts to influence the Executive Branch are categorically outside the scope of the immunity, *see id.* at 25 ("[T]he Speech or Debate Clause does not apply to efforts by members of Congress to influence the Executive Branch." (quoting *McDade* 28 F.3d at 299)).

We disagree with the Government's all-encompassing position. Consistent with our two-step approach to Speech or Debate privilege determinations, informal efforts to influence the Executive Branch are ambiguously legislative in nature and therefore may (or may not) be protected legislative acts depending on their content, purpose, and motive. In general, efforts by legislators to "cajole" and "exhort" Executive Branch officials "with respect to the administration of a federal statute" are not protected. *Gravel*, 408 U.S. at 625. They include efforts to intervene in decisions pending before the Executive Branch that would mainly affect one particular party. *See McDade*, 28 F.3d at 300; *see also* Menendez Br. at 20 (distinguishing protected oversight from unprotected oversight based on "whether the Member was simply assisting a particular person or was addressing a broader policy question" (internal quotation marks omitted)). But informal attempts to influence the Executive Branch on policy, for actual legislative purposes, may qualify as "true legislative oversight" and merit Speech or Debate immunity. *McDade*, 28 F.3d at 304 (Scirica, J., concurring); *see In re Grand Jury Investig. (Menendez)*, 608 F. App'x at

100 (noting that "informal oversight" is not necessarily protected, but may be in some cases even though it is "not manifestly legislative"). Like all inquiries into ambiguously legislative acts, that distinction will turn on the content, purpose, and motive of the communications at issue. The consequence of accepting the Government's position would be to place legitimate policy-based efforts under the specter of possible indictment.

Senator Menendez does not prevail, however, because the acts alleged in this case were essentially lobbying on behalf of a particular party and thus, under the specific circumstances here, are outside the constitutional safe harbor. He claims that the Indictment improperly references five supposedly legislative acts: (1) his meeting with Ms. Tavenner; (2) his follow-up call with her; (3) his meeting with Secretary Sebelius; (4) his meeting with Assistant Secretary Brownfield; and (5) his staff's communications with Customs employees. Senator Menendez's opening brief suggests that the District Court erred in its treatment of several other acts alleged in the Indictment, but he specifies in his reply brief that he is challenging only these five acts on appeal.[2] The

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[2] For example, he argued that a meeting he attended between Dr. Melgen and Senator Tom Harkin, the then-Chair of the Senate Health, Education, Labor, and Pensions Committee, was protected legislative fact-finding. But even there, evidence suggests that Senator Menendez was not engaged in legislative fact-finding, but rather that he and Dr. Melgen sought Senator Harkin's assistance with Dr. Melgen's particular CMS dispute. *See, e.g.*, A-1152-53 (Harkin FD-302) ("[Senator] Harkin believes [Senator] Menendez asked him to meet with [Dr.] Melgen because [Dr.] Melgen had a problem that needed to be addressed."); A-112 (Indict. ¶ 186) (alleging that an email from a Menendez staffer to Senator Harkin's Chief of Staff mentioned Dr. Melgen's CMS

District Court found that these acts were informal attempts to influence the Executive Branch specifically on Dr. Melgen's behalf and not on broader issues of policy. *See, e.g.*, A-20 ("[Senator] Menendez fails to meet his burden to demonstrate that the primary goal of these communications was not to lobby the Executive Branch to enforce Dr. Melgen's specific contract, a non-legislative activity."); A-21 ("The Court finds that Senator Menendez does not meet his burden to establish that the predominant purpose of these emails was to gather information for a legislative purpose rather than to lobby for a postponement of planned official action."). Unless those findings were clearly erroneous, they require us to hold that the challenged acts are not legislative and that the Speech or Debate privilege does not apply to them. And for the reasons that follow, clear error is not evident.

Senator Menendez argues that the five challenged acts were legislative because they addressed questions of policy. He relies primarily on allegations from the Indictment and evidence in the record showing that each of the challenged acts involved policy discussions. *See, e.g.*, A-114 (Indict. ¶ 200) ("[Senator] Menendez pressed [Ms. Tavenner] *about multi-dosing and Medicare payments*, and advocated on behalf of *the position* favorable to [Dr.] Melgen." (emphases added)); A-116 (Indict. ¶ 204) (alleging that the follow-up call with Ms. Tavenner addressed CMS's "position regarding billing" and its decision to "follow[] the CDC guidelines"); A-99-100 (Indict. ¶ 123) (alleging that Senator Menendez requested a meeting with Assistant

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dispute). Hence the District Court's finding that the meeting was an attempt to assist Dr. Melgen specifically was not clearly erroneous, and the meeting was unprotected by the Speech or Debate privilege.

Secretary Brownfield "to talk about DR (cargo from [Dominican Republic] coming into US ports)"); A-1314 (Tavenner FD-302) (reporting that Ms. Tavenner's follow-up call with Senator Menendez addressed "the policy regarding billing for vials"); A-1135 (Blum FD-302) (reporting that the "focus of the conversation" at the Sebelius meeting was "the policy," and that Senator Menendez and Senator Reid told Secretary Sebelius they "were not there to talk about a particular case; they were there to talk about policy"); A-1306 (Sebelius FD-302) (reporting that Senator Menendez and Senator Reid spoke "broadly about . . . healthcare providers"). He also points to allegations and evidence suggesting that Dr. Melgen was not mentioned by name in the supposedly protected communications. *See, e.g.*, A-101 (Indict. ¶ 125) (alleging that the "issue of a US company" doing business in the Dominican Republic was only "allud[ed] to" at the Brownfield meeting); Menendez Br. at 41 ("No participant stated that [Dr.] Melgen or his case was mentioned."); *id.* at 45 ("[N]obody could recall Dr. Melgen's name being mentioned."); Menendez Reply Br. at 24 ("[T]he Indictment does *not* allege th[e] email [to Customs] identified [Dr.] Melgen or his company." (emphasis in original)). In light of these observations, Senator Menendez asserts that the District Court clearly erred when it found that the challenged acts were informal attempts to influence the Executive Branch specifically on Dr. Melgen's behalf and not on broader issues of policy.

But the existence of evidence to support an alternative finding—that Senator Menendez was concerned with broader issues of policy—does not mean that the District Court's findings are clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). For there is much to confirm that the District Court's

"account of the evidence is plausible in light of the record viewed in its entirety." *Id.* First, evidence exists that Dr. Melgen or his case was mentioned specifically during each of the challenged acts. *See, e.g.*, A1307 (Sebelius FD-302) (reporting that Secretary Sebelius told Senator Menendez "*the case at issue* [(*i.e.*, Dr. Melgen's case)] was no longer within [her] jurisdiction because it was in the appeals process" (emphasis added)); A-1301 (Reid FD-302) (reporting that Dr. Melgen's name probably came up during the Sebelius meeting "because [Dr.] Melgen's individual situation was clearly the purpose of the meeting and they would have otherwise been speaking in a vacuum"); A-1302 (Reid FD-302) ("[Senator] Reid considered his role in setting up the meeting with [Secretary] Sebelius to be offering assistance to [Senator] Menendez in order that [Senator] Menendez might be able to offer assistance to [Dr.] Melgen."); A-100-02 (Indict. ¶¶ 124-131) (alleging that Senator Menendez "questioned [Assistant Secretary Brownfield] about the contract dispute between [Dr. Melgen] and the Dominican Republic"). The unrebutted allegations of the Indictment and evidence in the record further suggest that participants in the challenged acts were aware that their policy discussions related specifically to Dr. Melgen. *See, e.g.*, A-1313 (Tavenner FD-302) (reporting that Mr. Blum told Ms. Tavenner before her meeting with Senator Menendez that the Senator was interested in Dr. Melgen's case); A-118 (Indict. ¶ 216) (alleging that Senator Menendez "focus[ed] on [Dr.] Melgen's specific case" during the Sebelius meeting and "assert[ed] that [Dr.] Melgen was being treated unfairly"); A1307 (Sebelius FD-302) (reporting that Secretary Sebelius told Senator Menendez at their meeting that she had no power to influence Dr. Melgen's case); A-98 (Indict. ¶ 119) (alleging that

Assistant Secretary Brownfield was told before his meeting with Senator Menendez that the latter "pretty squarely" had an "interest" in Dr. Melgen's case); A-100-02 (Indict. ¶¶ 124-131) (alleging that, after the Brownfield meeting, Assistant Secretary Brownfield referred to Dr. Melgen's case as the one "about which Sen. Menendez threatened to call me to testify" and "[Senator] Menendez'[s] favorite DR port contract case").

In sum, evidence is plentiful that to most of those involved the focal point of the meetings with Executive Branch officials was Dr. Melgen. That Senator Menendez framed those meetings using the language of policy does not entitle them unvaryingly to Speech or Debate protection. Rather, for every mention of policy concerns there is substantial record support for the District Court's findings that those concerns were instead attempts to help Dr. Melgen. The evidence in favor of Senator Menendez will no doubt channel forcefully his position at trial, where the burden will be on the Government to convince jurors to find in its favor beyond a reasonable doubt. But at this stage the burden is on Senator Menendez. It was not clear error for the District Court to find that the Senator acted primarily for Dr. Melgen.

Second, there is evidence about the preparations for the challenged acts suggesting that Dr. Melgen was the primary focus of the supposedly protected communications. Unrebutted allegations in the Indictment and materials in the record suggest that Senator Menendez prepared for the CMS-related acts with an eye toward Dr. Melgen's specific situation. *See, e.g.*, A-114 (Indict. ¶ 199) (alleging that Senator Menendez prepared for the Tavenner meeting by speaking with Dr. Melgen's lobbyist); A-115 (Indict. ¶ 202) (alleging

that a memo prepared for Senator Menendez in advance of the Tavenner call described the "issue at hand" as "payments made in 2007-2008," the same years as Dr. Melgen's purported overbilling); SA-5-8 (email from Dr. Melgen's lobbyist to a Menendez staffer explaining the scope of Dr. Melgen's dispute with CMS in advance of Senator Menendez's follow-up call with Ms. Tavenner); A-117 (Indict. ¶ 210) (alleging that Senator Menendez did not tell Dr. Melgen about the Sebelius meeting so as not to "raise [his] expectation[s] just in case it falls apart"). We do not accept Senator Menendez's suggestion that the Speech or Debate Clause somehow prevents consideration of relevant circumstantial evidence simply because it predated the purportedly legislative act. *See Lee*, 775 F.2d at 524-25.

Third, there are unrebutted allegations and materials in the record suggesting that Dr. Melgen and his lobbyist were particularly interested in following up with Senator Menendez on all of the challenged acts. *See, e.g.*, A-116 (Indict. ¶ 205) (alleging that Dr. Melgen's lobbyist wrote to a Menendez staffer after the Tavenner meeting that he (the lobbyist) was "eager to learn how the call went today"); *id.* (Indict. ¶ 207) (alleging that Dr. Melgen's lobbyist told a Menendez staffer that he (the lobbyist) was "hopeful it won't come to" litigation after the Tavenner meeting); A-116-17 (Indict. ¶ 208) (alleging that Dr. Melgen's lobbyist asked to be told when Ms. Tavenner responded to Senator Menendez because "at some point I have to make a decision whether to recommend to [Dr. Melgen] to go to court rather than wait any longer. I did not want to take any action until I knew that other avenues were shut down"); A-118-19 (Indict. ¶ 217) (alleging that Dr. Melgen's lobbyist asked for "further briefing" on the Sebelius meeting). While this could

be seen as evidence of Dr. Melgen's interest in the outcome of a genuine policy discussion, it could also be viewed as his interest in the outcome of casework performed on his behalf. Because the record supports both views, the District Court's findings were not clearly erroneous.

Fourth, Senator Menendez ignores unfavorable aspects of the evidence on which he relies. For example, he cites a note that urged him to "[m]ake the larger policy case" at his meeting with Ms. Tavenner, but that note also mentioned Dr. Melgen and his lobbyist by name. *See* A-1316. Far from showing that that Dr. Melgen was clearly not discussed at the meeting, the note suggests that any discussion of policy involved Dr. Melgen's particular case. Similarly, Senator Menendez points out that the Indictment alleges only that the "DR port issue" was discussed at the Brownfield meeting and that the "issue of a US company" doing business in the Dominican Republic was only "allud[ed] to." A-101 (Indict. ¶ 125). But the source of that quoted language also indicated that Assistant Secretary Brownfield promised he would try to "leverage a correct . . . decision on the port contract." A-101 (Indict. ¶ 125). By not referencing a promise relating specifically to "the port contract," especially when the Indictment alleges that Senator Menendez pressed Assistant Secretary Brownfield specifically on his inaction with respect to Dr. Melgen's contract dispute, the Senator asks us to ignore relevant and material evidence. We do not view the record through such a narrow lens.

Record evidence and unrebutted allegations in the Indictment cause us to conclude that the District Court did not clearly err when it found that the challenged acts were informal attempts to influence the

Executive Branch toward a political resolution of Dr. Melgen's disputes and not primarily concerned with broader issues of policy. Because there is substantial support for the District Court's findings, we lack "the definite and firm conviction that a mistake has been committed." *United States v. Bergrin*, 650 F.3d 257, 264 (3d Cir. 2011). Those findings support the Court's conclusion that the Senator's acts were not legislative. Thus the Speech or Debate privilege does not apply.

Senator Menendez also advances two alternative grounds for claiming that some of the challenged acts are protected by Speech or Debate immunity. First, he argues that he used the meeting and follow-up call with Ms. Tavenner to vet her as the President's nominee to become the permanent CMS Administrator. He points to some evidence suggesting that his interactions with Ms. Tavenner were related to her pending nomination, not her role as acting CMS Administrator. *See* A-462 (entry in Senator Menendez's calendar reflecting that the meeting with Ms. Tavenner was "re: her nomination before the Finance Committee"); A-323 (grand jury testimony of a Menendez staffer claiming that the purpose of the Tavenner meeting was "consideration of her nomination"); Menendez Reply Br. at 20 n.11 (arguing that the follow-up call, as a continuation of the meeting, was also part of the vetting process).

But the way that Senator Menendez chooses to characterize his actions does not resolve the Speech-or-Debate-Clause question. *See Lee*, 775 F.2d at 522. For there is evidence in the record suggesting that the meeting and follow-up call with Ms. Tavenner were not related to her nomination. *See, e.g.*, A-1312-13 (Tavenner FD-302) (reporting that Ms. Tavenner twice requested a meeting with Senator Menendez

about her confirmation but received no response, and she "did not expect her nomination to go forward" when she met with Senator Menendez); SA-14 (email from one Senator Reid staffer to another stating, in the same month as the meeting with Ms. Tavenner, that her nomination was "dead"); SA-2-4 (interoffice memorandum summarizing the Tavenner meeting so Senator Menendez could prepare for the follow-up call but never mentioning Ms. Tavenner's nomination); A-116-17 (Indict. ¶¶ 204, 209) (alleging that Senator Menendez threatened to take his complaints to Secretary Sebelius, implicitly suggesting that the complaints were unrelated to Ms. Tavenner's nomination). And, perhaps most telling, Ms. Tavenner told the FBI that her "nomination was not mentioned at the meeting." A-1313 (Tavenner FD-302). The District Court found that Senator Menendez's interactions with Ms. Tavenner were not related to her confirmation. On this record, that finding could hardly be considered clearly wrong; thus those interactions are not protected as part of Ms. Tavenner's confirmation process.

Second, Senator Menendez argues that his Chief Counsel's correspondence with a Customs employee was legislative because it was an attempt to gather information. "[F]act-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation," and thus they constitute protected legislative acts. *Lee*, 775 F.2d at 521. Here, the text of the initial communications with Customs appear to request some information from the agency. *See* A-102-03 (Indict. ¶¶ 132-38). But those communications also show that Senator Menendez was asking it to refrain from donating any equipment to the Dominican Republic arguably because this would affect Dr. Melgen's contract. *Id.* Later communications between

Senator Menendez's staff and Customs confirmed that both parties understood that ICSSI, Dr. Melgen's company, was the entity that would suffer from such a donation. *See* A-103 (Indict. ¶¶ 139-42). Because the request for information is so bound up with the advocacy on Dr. Melgen's behalf, it cannot be excised, and the privilege turns on the entire communication's predominant purpose. *See Lee*, 775 F.2d at 525; *Helstoski*, 442 U.S. at 488 n.7. The unrebutted allegations in the Indictment support the District Court's finding that it was not the primary purpose of the Customs communications to gather information in support of future legislation or to engage in policy-based oversight. Thus the District Court's finding falls well short of clear error, and the communications were not protected.

In sum, the materials before us provide a sufficient basis for the District Court's conclusion that the predominant purpose of the challenged acts was to pursue a political resolution to Dr. Melgen's disputes and not to discuss broader issues of policy, vet a presidential nominee, or engage in informal information gathering for legislation. It was not to engage in true legislative oversight or otherwise influence broad matters of policy. No clearly wrong findings exist at this stage, and we will affirm the Court's conclusion that the Speech or Debate Clause does not protect any of the challenged acts.

B. The Ethics Act

The Ethics Act is a wide-ranging statute that, among other things, requires Senators to submit certain financial disclosure reports each year to the Secretary of the Senate for review and public distribution by the Senate's Select Committee on Ethics. Count 22 of the Indictment charges Senator Menendez

with violating 18 U.S.C. §§ 1001(a)(1) and (c)(1) by knowingly or willfully falsifying, concealing, or covering up the reportable gifts he allegedly received from Dr. Melgen as part of a bribery scheme. Senator Menendez advances several arguments as to why Count 22 violates the separation of powers among our Branches of Government. We reject each.

First, Senator Menendez maintains that the Executive Branch may not punish any conduct regulated by the Ethics Act because the Senate has incorporated it into Senate Rule 34. Because the Act has been incorporated into the Senate Rules, he reasons that its filing requirements stem from the Constitution's Rulemaking Clause, U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."), and their violation is punishable *only* by the Senate as a transgression of a Senate Rule. *See* Menendez Br. at 48 ("Senators are compelled to complete these reports only because the Senate has exercised its constitutional authority to require them."). In other words, the Ethics Act is unconstitutional as applied to the Senate because "the Rulemaking Clause commits the power to set and enforce ethical standards for Senators to the Senate alone." Menendez Reply Br. at 28.

This contention confuses the relationship between the separation of powers, the Ethics Act, and Senate Rule 34. The Act, which was passed by the full Congress and signed into law by the President, is the source of a Senator's obligation to make financial disclosures. Rule 34 allows the Senate to punish Ethics Act violations; it does not undermine the Executive Branch's authority to prosecute a Senator for those violations. The separation-of-powers principle does not

mean that Rule 34 prevents the Executive Branch from enforcing the Act, and the Rulemaking Clause does not bar Congress from legislating ethics. To say otherwise would immunize from prosecution by the Executive Branch any conduct that is incorporated into the Senate Rules, however offensive to the laws of the United States. Separation of powers requires no such result. Moreover, to the extent the Ethics Act incorporates elements of the Senate Rules—such as permitting Senators to satisfy their Ethics Act obligations on forms created by the Senate, *see* 5 U.S.C. app. 4 § 106(b)(7), or creating a defense to the Act's liability for Senators who rely in good faith on advisory opinions issued by the Senate Select Committee on Ethics, *see United States v. Hansen*, 772 F.2d 940, 947 (D.C. Cir. 1985) (Scalia, J.)—that is how Congress and the President agreed the Act would operate. It is not a sign that the source of Senator Menendez's filing obligations is Senate Rule 34 or that the Ethics Act criminalizes violations of those Rules as such.

Second, Senator Menendez suggests that Count 22 is non-justiciable (legalese for incapable of being decided by a court) because it requires the Judicial Branch to resolve ambiguities in the Senate Rules. The Judicial Branch is generally capable of interpreting congressional rules. *See Yellin v. United States*, 374 U.S. 109, 114 (1963) ("It has been long settled, of course, that rules of Congress and its committees are judicially cognizable."); *United States v. Rostenkowski*, 59 F.3d 1291, 1305 (D.C. Cir. 1995) ("[I]t is perfectly clear that the Rulemaking Clause is not an absolute bar to judicial interpretation of the House Rules."). Although some Senate Rules may be non-justiciable because they are so vague that the Judicial Branch would essentially make rules for the Senate (and

thereby violate the Rulemaking Clause) if it tried to interpret them, *see Rostenkowski*, 59 F.3d at 1306; *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981), Senator Menendez has not identified any particular Senate Rule that would necessarily be interpreted in the course of his prosecution, let alone a Senate Rule that is so vague as to be non-justiciable.

Third, Senator Menendez argues that his Ethics Act disclosures are protected legislative acts under the Speech or Debate Clause. But the "[d]isclosure of income from sources other than employment by the United States" is not a legislative act because it is not "an integral part of the deliberative and communicative processes by which Members participate in committee and [Senate] proceedings." *United States v. Myers*, 692 F.2d 823, 849 (2d Cir. 1982). The cases from the D.C. Circuit on which the Senator relies neither compel us nor convince us to rule that Ethics Act filings are legislative acts. Those cases considered only whether the Clause gave safe harbor to a Member's speech in an official congressional disciplinary proceeding, not whether it protected a Member's Ethics Act filings. *See In re Grand Jury Subpoenas*, 571 F.3d 1200, 1202 (D.C. Cir. 2009); *United States v. Rose*, 28 F.3d 181, 188 (D.C. Cir. 1994); *Ray v. Proxmire*, 581 F.2d 998, 1000 (D.C. Cir. 1978). Indeed, the D.C. Circuit in another case upheld the conviction of a Member of Congress under 18 U.S.C. § 1001 for concealing material facts in an Ethics Act filing. *See Hansen*, 772 F.2d at 943 (Scalia, J.). Hence we rule that Ethics Act filings are not legislative acts protected by the Speech or Debate Clause.

C. Venue for Count 22

Senator Menendez asserts that venue for Count 22 is proper only in Washington, D.C., where he filed the Ethics Act disclosure forms, and New Jersey is thus the wrong place. Because the denial of a motion to dismiss for lack of venue is not immediately appealable, *see, e.g.*, *In re Federal-Mogul Global, Inc.*, 300 F.3d at 378, we allowed Senator Menendez to raise that issue only as a petition for a writ of mandamus ordering that Count 22 be tried in the District of Columbia. He chose not to address the issue of mandamus in his opening brief, stating only that our review of the venue issue is "plenary." Menendez Br. at 3. "When an issue is not pursued in the argument section of the brief, the appellant has abandoned and waived that issue on appeal." *Travitz v. Northeast Dep't ILGWU Health & Welfare Fund*, 13 F.3d 704, 711 (3d Cir. 1994). That is so here.

Even if the issue were not waived, we would deny Senator Menendez's petition. Mandamus is a "drastic remedy that a court should grant only in extraordinary circumstances in response to an act amounting to a judicial usurpation of power." *In re Diet Drugs Prods. Liab. Litig.*, 418 F.3d 372, 378 (3d Cir. 2005). Count 22 alleges that Senator Menendez violated 18 U.S.C. § 1001 when he concealed or covered up material facts *in New Jersey* before he filed his financial disclosures in Washington, D.C. A-135 (Indict. ¶ 271). "At the motion to dismiss stage, the District Court had to accept as true all allegations in the indictment, regardless of its uncertainty as to how the Government would prove those elements at trial." *Bergrin*, 650 F.3d at 270 n.8. The District Court thus did not abuse its discretion or commit a clear error of law when it ruled that the allegation was sufficient to support trial in

the District of New Jersey.[3] Additionally, Senator Menendez has not shown that facing trial in New Jersey as opposed to the District of Columbia would likely cause him irreparable injury or that a post-conviction appeal would be an inadequate remedy for the lack of venue.

V. Conclusion

We are sensitive that a privilege "is of virtually no use to the claimant of the privilege if it may only be sustained after elaborate judicial inquiry into the circumstances under which the act was performed." *Doe v. McMillan*, 412 U.S. 306, 339 (1973) (Rehnquist, J., concurring in part and dissenting in part). But we also "take seriously the sentiments and concerns of the Supreme Court that Members [of Congress] are not to be 'super-citizens' immune from criminal liability or process." *In re Search of Elec. Commc'ns*, 802 F.3d 516, 531 (3d Cir. 2015) (quoting *Brewster*, 408 U.S. at 516). Senator Menendez's selective reading of the materials in the record does not persuade us that the District Court clearly erred in its findings of fact or that it incorrectly applied any law. That reading may prevail at trial, but at this stage we affirm in all respects.

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[3] We shall not consider record evidence at this stage of the litigation to assess whether the District Court's venue ruling was an abuse of discretion or clear error. We recognize that "venue must be proper for each count of the indictment," *United States v. Root*, 585 F.3d 145, 155 (3d Cir. 2009), and the Government ultimately bears the burden of making that showing by a preponderance of the evidence, *United States v. Perez*, 280 F.3d 318, 330 (3d Cir. 2002). But "a pretrial motion to dismiss an indictment is not a permissible vehicle for addressing the sufficiency of the government's evidence." *DeLaurentis*, 230 F.3d at 660.

APPENDIX B

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed 09/28/15]

Cr. No. 15-155

UNITED STATES OF AMERICA,

v.

ROBERT MENENDEZ and SALOMON MELGEN,

Defendants.

OPINION

Walls, Senior District Judge

Defendants Robert Menendez and Salomon Melgen bring fifteen motions to dismiss the indictment in this criminal action on multiple grounds. Among these grounds, Senator Menendez moves, in several motions, for the Court to dismiss the indictment under the Speech or Debate Clause of the United States Constitution. After oral argument on September 17, 2015, the Court denies these motions. The Court's decision is subject to immediate appeal, *Helstoski v. Meanor,* 442 U.S. 500, 506-08 (1979).

PROCEDURAL AND FACTUAL BACKGROUND

Defendant Robert Menendez was indicted on April 1, 2015 on charges of bribery and related crimes.

Indictment, ECF No. 1.[1] He has represented New Jersey in the United States Senate since 2006. Dr. Salomon Melgen, an ophthalmologist, was named as his co-defendant in the same indictment. *Id.* The indictment's core allegation is bribery: that Dr.

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[1] This case has a relevant procedural history from its time in front of the grand jury. On September 15, 2014, the Government filed motions to compel four current and former staffers to Senator Menendez to provide testimony they withheld from the grand jury under assertions of the Speech or Debate Clause, attorney-client privilege, and/or attorney work-product doctrine. After hearing motions and oral argument from the Government and Menendez, the District Court, Thompson, J., ordered the parties to meet and confer and schedule new grand jury appearances in an effort to narrow and resolve the disputed issues. On November 12, 2014, three of the staffers reappeared before the grand jury and continued to withhold testimony. On November 25, the court held that the Speech or Debate Clause did not immunize the testimony of two staffers regarding Menendez's involvement in Melgen's Medicare billing dispute and the U.S. Customs and Border Protection's potential donation of surveillance equipment to the Dominican Republic, both discussed in detail later. The court ordered the staffers to reappear before the grand jury and answer questions on these topics. *In re Grand Jury Investigation*, No. 3-14-mc-00077 (D.N.J. Nov. 25, 2014). On appeal, the Third Circuit held that it could not determine whether this testimony was protected by the Speech or Debate Clause and remanded the case to the district court to make "specific factual findings about the communications implicated by the grand jury questions," namely whether they were "legislative acts" protected by the Speech or Debate Clause. *In re Grand Jury Investigation (Menendez)*, 608 F. App'x 99, 101 (3d Cir. 2015). On remand, the Government submitted a notice of intent announcing that it no longer sought to compel the disputed testimony. Opposition to Motions to Dismiss Predicated on Assertion of Speech or Debate Clause ("Opp. to Mot. to Dismiss") Ex. 2, ECF No. 85-2 at 2. The district court did not issue formal findings on the Speech or Debate issues, and the indictment was filed on April 1, 2015.

Melgen gave things of value to Senator Menendez in exchange for beneficial official acts. *Id.* ¶¶19-23.

The indictment includes a number of charges. Count One charges both Defendants with conspiracy to commit bribery and honest services wire fraud. *Id.* ¶¶ 1-227. Count Two charges Senator Menendez with violation of the Travel Act, and Dr. Melgen with aiding and abetting the violation. *Id.* ¶¶ 228-29. Counts Three through Eight charge Defendants with bribery, alleging that Senator Menendez sought and received flights from Dr. Melgen in return for being influenced in his performance of official acts. *Id.* ¶¶ 230-41. Counts Nine through Eighteen also charge Defendants with bribery, alleging that Senator Menendez sought and received financial contributions from Dr. Melgen, benefitting his personal and political interests, in return for being influenced in his performance of official acts. *Id.* ¶¶ 242-61. These counts relate to two alleged $20,000 contributions by Dr. Melgen to "a legal defense trust fund" benefitting Senator Menendez, *id.* ¶¶ 242-49, an alleged $40,000 contribution to the New Jersey Democratic State Committee Victory Federal Account, *id.* ¶¶ 250-53, two alleged $300,000 contributions to Majority PAC "earmarked for the New Jersey Senate race," *id.* ¶¶ 254-61, and an alleged $103,500 contribution to "various New Jersey county Democratic Party entities." *Id.* ¶¶ 258-61. Counts Nineteen through Twenty-One charge Defendants with honest services fraud. *Id.* ¶¶ 262-65. These counts allege that Senator Menendez and Dr. Melgen intentionally devised a scheme to defraud and deprive the United States and New Jersey citizens of Senator Menendez's honest services. Finally, Count Twenty-Two charges Senator Menendez with falsifying information in Senate financial disclosure forms. *Id.* ¶¶ 266-72.

Most relevant to the Court's consideration of these motions are the indictment's allegations regarding Senator Menendez's conduct. In alleged exchange for things of value, the indictment asserts that Senator Menendez took official actions to benefit Dr. Melgen. These actions fall into three categories. First, the indictment alleges that Senator Menendez "used his position as a United States Senator to influence the visa proceedings of [Dr. Melgen's] foreign girlfriends." *Id.* ¶ 70. Second, it alleges that Senator Menendez advocated for Dr. Melgen's financial interests regarding a contract dispute between a private company and the Dominican Republic. *Id.* ¶¶ 117-43. Third, it charges that Senator Menendez advocated for Dr. Melgen's financial interests regarding a Medicare billing dispute at the U.S. Department of Health and Human Services and the Centers for Medicare and Medicaid Services. *Id.* ¶¶ 144-227.

Senator Menendez now moves to dismiss the indictment's counts against him on the grounds that (a) its charges rely on evidence of his legislative acts which is inadmissible under the Constitution's Speech or Debate Clause, Motion to Dismiss No. 1, ECF No. 48-1 at 3-4, (b) the Government presented evidence protected by the Clause to the grand jury, Motion to Dismiss No. 2, ECF No. 49-1, (c) the Government incorrectly instructed the grand jury about the applicability of the Clause, Motion to Dismiss No. 4, ECF No. 51-1 at 5-13, and (d) the Speech or Debate Clause and Separation of Powers doctrine bar prosecution for the actions alleged in Count Twenty-Two. Motion to Dismiss No. 13, ECF No. 60-1 at 18-29. The Government responds in a consolidated opposition. Opp. to Mot. to Dismiss, ECF No. 85.

LEGAL STANDARD

Article 1, Section 6, Clause 1 of the Constitution reads, in part, that members of Congress:

> 'shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.*'

U.S. Const. art. I, § 6, cl. 1 (emphasis added).

The Supreme Court has "read the Speech or Debate Clause broadly" to grant members of Congress "absolute immunity from judicial interference" for all legislative acts. *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 501, 509 n.16 (1975). This immunity protects members of Congress from (1) "criminal or civil liability" for those acts, *Gravel v. United States*, 408 U.S. 606, 615 (1972), (2) the introduction of "evidence of a legislative act" in a prosecution, *United States v. Helstoski*, 442 U.S. 477, 487 (1979), (3) questioning in a grand jury proceeding about legislative acts, *Gravel*, 408 U.S. at 622, and (4) judicial orders, such as injunctions, that interfere with the legislative acts themselves, *Eastland*, 421 U.S. at 505-06. The Clause protects acts of both Senators and their aides, but it is the "privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf" and applies only to actions by aides that "would be immune legislative conduct if performed by the Senator himself." *Gravel v. United States*, 408 U.S. at 622.

The Clause protects not only "words spoken in debate," but anything "generally done in a session of the House by one of its members in relation to the

business before it." *United States v. Johnson*, 383 U.S. 169, 179 (1966) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)). The Clause "extends only to an act that has already been performed." *Helstoski*, 442 U.S. at 490. For instance, "a *promise* to introduce a bill is not a legislative act." *Id.* (emphasis in original).

Not all past acts performed by members of Congress or their staffers are protected legislative acts. A legislative act "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within jurisdiction of either House." *Gravel*, 408 U.S. at 625. Legislative acts include actual speech or debate in either House, voting on legislation, "authorizing an investigation" by a Congressional Committee, "holding hearings," "preparing a report," and "authorizing the publication and distribution of that report" at a committee hearing. *Doe v. McMillan*, 412 U.S. 306, 313 (1973). The Speech or Debate Clause protects both formal and informal investigations related to proposed legislation. *Gov't of the VI. v. Lee*, 775 F.2d 514, 521 (3d Cir. 1985).

But the Clause "has not been extended beyond the legislative sphere." *Gravel*, 408 U.S. at 624-25. Senators are not protected from liability for non-legislative acts, even if they perform them "in their official capacity as Senators," *id.* at 625, and even if these acts have "some nexus to legislative functions" or "casually or incidentally relate[ ] to legislative affairs." *United States v. Brewster,* 408 U.S. 501, 528 (1972). Non-legislative, "political acts" include "a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies,

assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." *Id.* at 512. Attempting to influence the Executive Branch is also a non-legislative activity. *McMillan*, 412 U.S. at 313; *see also Johnson*, 383 U.S. at 172 (In case where members of Congress received campaign contributions and legal fees from officers of loan company under indictment, "[n]o argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice" by contacting prosecutors and urging them to "review" the indictment).

Some official acts – particularly those related to "oversight" of the Executive Branch, such as "letters or other informal communications to Executive Branch officials from committee chairmen, ranking committee members, or other committee members" – fall into a "middle category" of activities that are not "clearly protected." *United States v. McDade*, 28 F.3d 283, 299-300 (3d Cir. 1994). As the Third Circuit held in a non-precedential decision regarding the grand jury proceedings in this case, where an act or communication is not "manifestly" legislative, but might be either legislative or merely political, "district courts must make factual findings regarding the content and purpose of the acts and communications in question to address their legislative or non-legislative character." *Menendez*, 608 F. App'x. at 101 (citing *Lee*, 775 F.2d at 522-24).

The court should analyze the record evidence already before it, including contemporaneous emails,

calendar entries, and notes related to each communication, as well as testimony or affidavits about the contents and purposes of the communication from the member of Congress asserting the privilege or her staff. *Id.* at 101-02 (citing *In re Grand Jury (Eilberg)*, 587 F.2d 589, 597 (3d Cir. 1978)).

Where an act has both legislative and non-legislative components, a court should attempt to separate the legislative components from the non-legislative components. *Id.* at 101 (citing *Helstoski*, 442 U.S. at 488 n. 7). "Where they are inseparable, the court must ascertain the nature of the act or communication by assessing its predominate purpose." *Id. See*, *e.g.*, *McDade*, 28 F.3d at 300 (in dicta, where two communications by Congressman with Executive Branch officials were purportedly legislative "oversight," letter to Secretary of the Navy warning not to stop work with specific company in Congressman's district was likely non-legislative because it lobbied on behalf of a particular company, while letter to Secretary of the Army regarding award of work contract in general was likely protected "oversight" because it did not lobby on behalf of a particular company).

On a motion to dismiss an indictment under the Speech or Debate Clause, the district court must examine the indictment to determine whether its charges are predicated upon evidence of legislative acts. *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 13 (D.C. Cir. 2006); *see also Brewster*, 408 U.S. at 525 (examining the face of the indictment to determine whether "inquiry into legislative acts or motivation for legislative acts is necessary . . . to make out a prima facie case"). If a charge cannot be proved without evidence of a legislative act, it must be dismissed. *Johnson*, 383 U.S. at 184-85. If, however, a

charge can be proved without evidence of a legislative act, the charge survives and trial must be "wholly purged of elements offensive to the Speech or Debate Clause." *Id.* at 185; *Brewster*, 408 U.S. at 512.

Under this approach, the Court first reviews the face of the indictment to determine if any of its allegations depend upon inadmissible evidence of legislative acts. If the Court determines that allegations within the indictment depend upon such evidence, the Court will evaluate whether barring the evidence from trial will preclude the Government from proving any charge in the indictment. If the Court determines that a charge is predicated upon evidence of a legislative act, such that it cannot be proved without it, the Court will dismiss the charge. A party asserting a legislative privilege, as Senator Menendez does here, bears the burden of establishing the applicability of legislative immunity by a preponderance of the evidence. *Lee*, 775 F.2d at 524.

DISCUSSION

Senator Menendez contends in several motions that the indictment must be dismissed because of violations of the Speech or Debate Clause. The Court will determine whether (a) the indictment must be dismissed because of violations of the Clause in the indictment, (b) violations of the Clause before the grand jury, (c) erroneous instructions about the Clause to the grand jury, and whether (d) Count Twenty-Two of the indictment must be dismissed because the alleged activity is protected by the Clause.

I. Motion to Dismiss 1 (Speech or Debate-Immunized Evidence in the Indictment)

A. Counts Two through Eighteen: the Bribery Counts do not rely on evidence immunized by the Speech or Debate Clause.

In Motion 1, Senator Menendez argues that the entire indictment must be dismissed because all counts require evidence that is protected by the Speech or Debate Clause. Though he calls for dismissal of the whole indictment the evidence he claims is protected is primarily important to the bribery charges.

And although the Speech or Debate Clause shields members of Congress from prosecution for legislative acts and from the introduction of evidence of legislative acts to establish other offenses, *Brewster*, 408 U.S. at 525-26, it does *not* bar prosecution for bribery. "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." *Id.* at 526. "The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. . . . [A]cceptance of the bribe is the violation of the statute." *Id.* "There is no need for the Government to show that [defendant] fulfilled the alleged illegal bargain." *Id.*

Bribery "requires intent 'to influence' an official act or 'to be influenced' in an official act." *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404 (1999). "[T]here must be a *quid pro quo* – a specific intent to give or receive something of value *in exchange* for an official act." *Id.* at 404-05 (emphasis in original). Generally, the government does not need to provide evidence of an explicit agreement between the parties to demonstrate a *quid pro quo;* it is enough to show a

"course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor," or a "stream of benefits" between the parties. *United States v. Bryant,* 655 F.3d 232, 241 (3d Cir. 2011) (internal quotations and emphasis omitted). The Supreme Court has held that, at least in the context of extortion prosecutions under the Hobbs Act, evidence of an "explicit promise or undertaking by the official to perform or not perform an official act" is required when the "thing of value" given is a campaign contribution, *McCormick v. United States*, 500 U.S. 257, 273-74 (1991).

Senator Menendez does not argue that he is immune from prosecution for allegedly accepting bribes, but he does claim that the Government does not allege any evidence of an explicit agreement in the indictment. Instead, the Government demonstrates a *quid pro quo* by alleging that Menendez took official acts for the benefit of Dr. Melgen. Senator Menendez claims these actions – his alleged communications with HHS and CMS regarding Dr. Melgen's Medicare billing dispute and his communications with the State Department regarding Dr. Melgen's Dominican Republic port security issues – are legislative in nature and protected by the Speech or Debate Clause. The Government responds that they are unprotected political attempts to influence the Executive Branch.

The Court addresses these particular acts as they are charged in the indictment. Evidence of these acts is necessary to support the charges. The question is whether the acts are legislative and protected by the Speech or Debate Clause.

1. State Department Visa Advocacy

Senator Menendez has conceded that his advocacy during the visa proceedings of Dr. Melgen's girlfriends was non-legislative. Mot. to Dismiss 1 at 8 (acknowledging "that his assistance to people applying for visas, for example, falls within this unprotected category, as it is pure case work."). Further discussion of these acts is not needed.

2. Communications Related to the Dominican Republic

Indictment Counts Thirteen and Fourteen allege that Senator Menendez and Dr. Melgen violated bribery statutes when Dr. Melgen donated $40,000 to the New Jersey Democratic State Committee Victory Federal Account "in return for Menendez's advocacy to the State Department on behalf of Melgen in his contract dispute with the Government of the Dominican Republic." Indict. ¶¶ 250-253. Counts Three through Twelve also incorporate allegations that Senator Menendez's chief counsel, Kerni Talbot, asked a U.S. Customs and Border Protection official not to donate cargo screening equipment to the Dominican Government, *id.* ¶¶ 132-143, into charges that Senator Menendez received something of value "in return for... being influenced in the performance of official acts, as opportunities arose." *Id.* ¶¶ 230-49. Senator Menendez is alleged to have advocated on behalf of a company known as Boarder Support Services, LLC ("Border"), a holding company established by Melgen to control another company known as ICSSI. *Id.* ¶¶ 114-17. During the period in which the alleged actions occurred, ICSSI was exclusively owned and controlled by Dr. Melgen and a party to a contract with the Dominican Republic for exclusive rights to install imaging equipment in Dominican ports. *Id.* ICSSI

and the Dominican Government were litigating the legality and legitimacy of this contract. *Id.* Senator Menendez asserts that his alleged communications with CBP and State Department officials were legislative acts and immunized by the Speech or Debate Clause.

a. State Department Advocacy Regarding the Contract Dispute

Are the allegations of Senator Menendez's advocacy in the Dominican contract dispute necessary to support these bribery charges? Though an indictment need not allege the actual performance of an official act to adequately plead bribery, *Brewster*, 408 U.S. at 526, Senator Menendez correctly argues that the Government does not allege an explicit *quid pro quo* agreement for the $40,000 contribution. Mot. to Dismiss 1 at 12-13. The Government instead alleges official acts to demonstrate a *quid pro quo* agreement. And so the challenged allegations are necessary to support the bribery charges.

Were Senator Menendez's acts on behalf of Dr. Melgen legislative or merely political in nature? Senator Menendez declares that his communications were "oversight over the Department of State and Department of Commerce" regarding "United States policy on Port Security," a legislative activity. Mot. to Dismiss 1 at 3, 29. The Government answers that, by asking the Assistant Secretary of State to intervene in a private contract dispute, Senator Menendez was simply attempting to influence members of the Executive Branch, a non-legislative activity. Opp. to Mot. to Dismiss at 20.

Senator Menendez says that his office's communications were really about a "broader issue involving

security and corruption," and that there would merely be an "incidental benefit to Dr. Melgen if the ICSSI contract were enforced," Mot. to Dismiss 1 at 31. In support, he offers evidence of his professional interest in port security and involvement in U.S. foreign relations policy with Caribbean nations, including the Dominican Republic. Senator Menendez explains his background as a member of the Foreign Affairs Committee and Select Committee on Homeland Security during his time as a U.S. Representative and his experience as Chairman of the Senate Committee on Foreign Relations and Subcommittee on Western Hemisphere, Peace Corps, and Narcotics Affairs ("WHA Subcommittee"). *Id.* at 26. He describes several bills he has supported regarding port security and cites the transcript of several WHA Subcommittee hearings where he addressed Dominican port security, including one where he explicitly discussed Dr. Melgen's contract dispute. *Id.* at 27-28. But Speech or Debate analysis does not turn on whether a particular act or communication was motivated by a genuine concern over policy. *See, e.g., Hutchinson v. Proxmire*, 443 U.S. 111, 114 (1979) (Senator's attempts to highlight what he believed were "egregious examples of wasteful governmental spending" through press releases and newsletters were not legislative acts); *cf Fields*, 459 F.3d at 12 ("The Speech or Debate Clause protects conduct that is integral to the legislative *process,* not a Member's legislative *goals.")* (emphasis in original). Nor does the Senator's position on relevant committees and subcommittees establish that any particular communication with the State Department was not an attempt to influence the Executive Branch on behalf of Dr. Melgen. *Cf. United States v. Biaggi*, 853 F.2d 89, 91-92, 98 (2d Cir. 1988) (Congressman who accepted illegal gratuities used his position on the House

Committee on Merchant Marine and Fisheries to advocate on behalf of a dry dock company.).

Because the Dominican Republic contract dispute acts contain both potentially legislative and non-legislative components, the Court seeks to separate these components. *Menendez*, 608 F. App'x at 101. Some allegations are clearly non-legislative. As example, paragraphs 118-121 of the indictment include communications that took place between two State Department officials and Pedro Permuy, "a friend of Melgen's who was a former Menendez staffer." Permuy allegedly "represented to the Assistant Secretary [of State for the Bureau of International Narcotics and Law Enforcement Affairs] that he was there to speak on behalf of a United States entity involved in a contract dispute with the Government of the Dominican Republic. . ." Indict. ¶¶ 120. According to an email quoted in the indictment, Permuy "dropped the name of Sen. Menendez pretty squarely as having an interest in this case." *Id.* ¶ 119.

The Speech or Debate Clause "applies 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 Member himself." *Gravel*, 408 U.S. at 618. In *Gravel*, the Supreme Court extended the protections of the Speech or Debate Clause to one of Senator Mike Gravel's assistants. *Id.* at 608, 628-29. In doing so, the Court explained that "the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos." *Id.* at 616-17.

Nothing, however, in *Gravel* or later cases suggests that the Speech or Debate Clause protects *a former* aide who has left the employment of a Member. Permuy cannot be considered an alter ego of Senator

Menendez for the purposes of communications made on behalf of a private entity after the end of his employment with the Senator. The communications in paragraphs 118-121 of the indictment are not protected by the Speech or Debate Clause.

Also clearly non-legislative is Paragraph 123, which includes a series of emails between Senator Menendez's Senior Policy Advisor, Jodi Herman, and a State Department official setting up a meeting between the Senator and an Assistant Secretary. Herman wrote that the Senator "would like to see [the Assistant Secretary] next week to talk about DR (cargo from DR coming into US ports)." Indict. ¶ 123. The State Department official asked for specificity about what the meeting would be about, and Herman replied that, while she "had to drag even this information out of him," Senator Menendez had "concerns about what is flowing through the ports either unobserved or with tacit permission." *Id.* Herman also suggested that the Assistant Secretary have "some talkers on any new DR initiatives, particularly at the ports" when he met with Senator Menendez. *Id.*

Although "fact-finding, information gathering, and investigative activities" are legislative acts, *Lee*, 775 F.2d at 521, there is a distinction between legislative acts themselves and routine preparations for legislative acts. The "making of appointments with Government agencies" is not a legislative act. *Brewster*, 408 U.S. at 512; *see also United States v. Jefferson*, 546 F.3d 300, 311 (4th Cir. 2008) (It is "apparent that non-legislative acts, *such as making appointments with agencies* . . . are within the scope of an appropriate inquiry.") (emphasis added).

The Court finds that the emails in paragraph 123 were non-legislative because they primarily involve

scheduling an appointment for the Senator rather than actual fact-finding. Although Herman suggests that the focus of the meeting would be the gathering of information about Dominican port issues, it is significant that she neither asked for nor received any information in these emails. Indeed, she expressed only a vague awareness of why the Senator wanted to meet with the Assistant Secretary at all. Indict. ¶ 123 ("I had to drag even this information out of him . . . [I] imagine he has some observations to share . . ."). The Defendant fails to demonstrate that these communications are protected by the Speech or Debate Clause.

The remaining acts alleged in the indictment relating to the Dominican Republic involve communications or references to communications between Senator Menendez and his staff and Executive Branch officials specifically discussing Dr. Melgen's contract dispute. For these acts, the potentially legislative and non-legislative components are "inseparable," so the Court must assess the "contents and purposes" of each communication to determine its "predominant purpose." *Menendez*, 608 F. App'x at 101. The text of the remaining communications demonstrate that Senator Menendez's primary focus was getting the Executive Branch to intervene in Dr. Melgen's contract dispute.

The Assistant Secretary's own understanding of the conversations is particularly instructive. The indictment alleges that, at the May 16, 2012 meeting between the Assistant Secretary and Senator Menendez, "Menendez questioned the Assistant Secretary about the contract dispute between [Dr. Melgen] and the Dominican Republic." Indict. ¶ 124. An email from the Assistant Secretary to his staff after the meeting characterized the "DR port issue" as "the issue of a

US company attempting to sell a tracking and security system to the DR port authority. . . . If I recall correctly, our investigation last time suggested that this was more a commercial dispute than a law enforcement issue." *Id.* ¶ 125. The Assistant Secretary alluded to policy but indicated that Senator Menendez was interested primarily in any policy's effect on Dr. Melgen's contract, writing "I told the Senator that we were working up some sort of port initiative, once we had a concrete initiative we would see if it could leverage a correct GODR decision on the port contract." *Id.* On June 18, 2012, the Assistant Secretary forwarded an email from Permuy regarding Dr. Melgen's contract dispute to his staff with the note "This is the case about which Sen. Menendez threatened to call me to testify at an open hearing." *Id* ¶ 129.[2] And on June 20, 2012, the Assistant Secretary forwarded another email from Permuy, this one with the subject "ICCSI [sic]-Border Security Solutions documents," to his staff with the message, "More on Menendez' favorite DR port contract case." *Id.* ¶ 131.

Given Senator Menendez's extensive involvement in Dominican port policy, he may indeed have had a policy reason to value Dr. Melgen's contract. But with Menendez's repeated discussions of this *specific* contract dispute, the Assistant Secretary's characterization of the dispute as the Senator's "favorite" case, and the Assistant Secretary's understanding that the

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[2] Senator Menendez claims that his threat to hold an open hearing makes this communication a legislative act, since Senate hearings are legislative acts. As already explained, though, the Speech or Debate Clause only protects acts that have already been performed. A promise – or in this case, a threat – to perform a legislative act is not itself a legislative act. *Helstoski*, 442 U.S. at 490.

conversations were primarily about Dr. Melgen's case, Menendez fails to meet his burden to demonstrate that the primary goal of these communications was not to lobby the Executive Branch to enforce Dr. Melgen's specific contract, a non-legislative activity. *See McDade*, 28 F.3d at 300 (distinguishing between letter to Secretary of Navy openly lobbying on behalf of specific company and letter to Secretary of Army discussing a "broader policy question" without reference to specific parties).

b. Customs and Border Protection Advocacy Regarding Equipment Donations

Paragraphs 132-143 allege communications in January 2013 between Menendez staffer Kern Talbot and Customs and Border Protection ("CBP") officials about a potential donation of equipment to the Dominican Government that might have conflicted with the financial interests of ICSSI. In Talbot's initial email to CBP, she asked "that [CBP] please consider holding off on the delivery of any such equipment until you can discuss this matter with us- [the Senator would] like a briefing. Could [CBP] please advise whether there is a shipment of customs surveillance equipment about to take place?" Indict. ¶¶ 132-143. Talbot's communications with CBP ceased once it was determined that no donation of equipment was actually planned. *Id.*

These communications involve both an attempt to influence an executive agency (the request to postpone the equipment delivery) and an attempt to gather information (the request to confirm Senator Menendez's information about the supposed upcoming shipment). *Id.* These requests were made simultaneously, as part of the same email, and both became moot when Senator Menendez's information was determined to

be incorrect. The legislative and non-legislative components are "inseparable, [and] the court must ascertain the nature of the act or communication by assessing its predominant purpose." *Menendez*, 608 F. App'x at 101.

The Court finds that Senator Menendez does not meet his burden to establish that the predominant purpose of these emails was to gather information for a legislative purpose rather than to lobby for a postponement of planned official action. The Senator directs the Court to various acts he took before 2013 that establish his longstanding involvement with port security policy. Mot. to Dismiss 1 at 25-29. This is insufficient to meet his required burden to establish that the 2013 emails are protected by the Speech or Debate Clause. As said, unprotected attempts to influence an agency do not become immunized merely because they concern policy. The Senator has the burden to demonstrate that these communications are privileged by a preponderance of evidence, and because these emails had two purposes, neither of which is found to be predominant, his burden is not met: the communications are not privileged by the Speech or Debate Clause.

2. Communications Related to the Medicare Billing Dispute

Senator Menendez is alleged to have advocated on Dr. Melgen's behalf in an $8.9 million Medicare billing dispute concerning the drug Lucentis. Indict. ¶ 144-227. Counts Fifteen and Sixteen allege that, in return for a donation from Melgen of approximately $300,000 to Majority PAC that was earmarked for the 2012 New Jersey Senate race, Menendez advocated "at the highest levels" of the Centers for Medicare and Medicaid Services (CMS) and Department of Health

and Human Services (HHS) "on behalf of Melgen in his Medicare billing dispute." Indict. ¶¶ 254-57. Counts Seventeen and Eighteen allege that, in return for a $103,500 contribution to "various New Jersey county Democratic Party entities" and another donation of approximately $300,000 to Majority PAC earmarked for the 2012 New Jersey Senate race, Menendez advocated "at the highest levels of HHS on behalf of Melgen in his Medicare billing dispute." Indict. ¶¶ 258-61. Menendez's communications with CMS and HHS officials are also incorporated by reference in the remaining Counts. Again, the indictment alleges official acts as evidence of a *quid pro quo,* so the allegations are necessary to support the bribery charges.

At the time of the dispute, Senator Menendez sat on the Committee on Finance, which oversees Medicare along with other programs and departments. Mot. to Dismiss 1 at 13. In his motion, Senator Menendez notes that he considered asking a possible question "on the broader issue surrounding Dr. Melgen's situation" during a hearing before the Senate Finance Committee. Mot. to Dismiss 1 at 19. Preparations for a committee hearing are clearly protected by the Speech or Debate Clause, *e.g. McDade*, 28 F.3d at 300, but no allegations in the indictment are related to the hearing. That Senator Menendez considered addressing Melgen's situation at a hearing does not immunize his other attempts to influence the resolution of Melgen's case. *See Johnson*, 383 U.S. at 171-72 (Congressman who took bribes from a savings and loan association was immune from charges relating to a speech he made on the House floor in favor of such associations but not immune as to attempts to lobby the Department of Justice on behalf of the association.). Those other attempts are each discussed later.

a. Paragraphs 148-161

The communications alleged in Paragraphs 148-156 are unprotected. Senator Menendez allegedly sent an email, with the subject "Dr melgen" [sic], describing the topic as "a Medicare problem we need to help [Dr. Melgen] with." Indict. ¶ 148. A staffer later replied that they were "looking into how [they could] be helpful." *Id.* ¶ 149. The other emails in this section similarly contain communications on the subject of an intervention on behalf of Dr. Melgen. These communications discuss pure casework, and the goal of the discussions alleged in these paragraphs was to influence the Executive Branch's resolution of Melgen's case. These are not legislative acts.

At first sight, Paragraphs 157 and 158 may appear to be within the scope of the Speech or Debate Clause, but reviewed in the context of the "contemporaneous email" in Paragraph 159, *Menendez*, 608 F. App'x. at 101, they are unprotected attempts to influence the Executive Branch. Paragraphs 157 and 158 discuss an email from Menendez staffer Emma Palmer to a CMS administrator along with the administrator's response:

> Beginning in or about July 2009, Menendez's staff reached out to CMS to advocate for Melgen. To address Melgen's pressing concern, [Emma Palmer] inquired as to whether a CMS administrative contractor would be issuing a new policy that would affect the future coverage of Lucentis in Florida.
>
> On or about July 10, 2009, [Elizabeth Engel], the then-Deputy Assistant Secretary for Legislation at HHS, emailed [Palmer] to notify her that "CMS has confirmed that

> [the contractor] has not issued, nor does it plan to issue, a revision to its local coverage determination for Lucentis."

Indict. ¶¶ 157-58. Palmer did not advocate for CMS to take any official action; instead, she requested information from the agency about a subject for which Senator Menendez's committee was responsible. But Palmer then forwarded this email to Menendez staffer Karissa Willhite, who indicated that the true focus of the communication was Dr. Melgen's specific dispute, responding, "Yeah, but what are they talking about being in the works . . . a decision on *Dr. Melgen specifically*? I think we have to weigh in on his behalf . . . . To say they can't make him pay retroactively." *Id.* ¶ 159 (emphasis added).

b. Paragraphs 162-184

None of the communications alleged in paragraphs 162-179 involve an attempt to gather facts or information related to oversight or legislation. HHS employees, describing these interactions with Menendez, wrote that the Senator was "advocating on behalf of a physician friend in Florida." *Id.* at ¶ 166. A talking points memorandum prepared by Menendez staff for a later call that took place between the Senator and HHS expressly disclaimed any interest beyond Dr. Melgen's case: "I am not weighing on how you should administer Lucentis, nor on how his specific audit should be resolved but rather asking you to consider the confusing and unclear policy on this issue and *not punish him retroactively* as a result." *Id.* ¶ 167 (emphasis added). The alleged call itself focused on "a doctor in Florida." *Id.* at ¶ 169. Further communications followed between Melgen's lobbyists and Menendez staffers. *Id.* ¶¶ 172-78. The Court finds that

these communications are concerned with the outcome of a specific case and are unprotected.

Paragraphs 180-184 involve the scheduling of a meeting between a Menendez staffer and a HHS staffer. As with paragraph 123, the scheduling of a meeting with HHS officials is not itself a legislative act. *See Brewster*, 408 U.S. at 512; *Jefferson*, 546 F.3d at 311.

c. Paragraphs 185-197

Paragraphs 185-189 of the indictment allege interactions Senator Menendez had with Senator Tom Harkin "so that Melgen could personally solicit [Harkin's] assistance with his Medicare billing dispute." Indict. ¶ 185. A Menendez staffer allegedly told a Harkin staffer that the "doctor Senator Menendez spoke to [Harkin] about is Dr. Sal Melgen" and that "CMS is pursuing Dr. Melgen for a matter around dosing procedures and relevant charges to Medicare." *Id.* ¶ 186. The indictment then alleges that Menendez set up a personal meeting between Melgen and Senator Harkin, and that Menendez "introduced Melgen to [Harkin] at the beginning of the meeting and remained while Melgen solicited [Harkin's] assistance." *Id.* ¶ 188.

The preliminary emails between Menendez and Harkin staffers did not involve legislative acts, they simply provided background about Dr. Melgen in preparation for a meeting. Senator Menendez now argues that this meeting itself was privileged "because it involved two Senators investigating issues raised by a citizen concerning matters of health care policy." Mot. to Dismiss 2 at 16. The Court disagrees. The indictment does not allege any substantive discussions between Menendez and Harkin; instead, it alleges

that Menendez remained at the meeting while Melgen "solicited [Harkin's] assistance." Indict. ¶ 188. In theory, communications between Melgen and Senator Harkin could be protected by Harkin's Speech or Debate privileges if Harkin had been engaging in legislative fact finding. But the indictment alleges only that Melgen solicited Harkin's assistance at the meeting.

Apart from the indictment, in another motion, Defendants have directed the Court to a summary from an FBI interview in which Harkin said that he did not recall Melgen specifically asking him for anything. Mot. to Dismiss No. 3 Ex. A, ECF No. 50-2, at 5. Significantly, the interview summary also notes that "Harkin just considered this to be a meeting in which he extended a professional courtesy to Menendez." *Id.* If anything, this evidence supports the conclusion that the meeting was *not* legislative in nature and was not a part of Congress's core deliberative processes that the Speech or Debate Clause exists to protect. In any event, any Speech or Debate privilege would be personal to Senator Harkin. Another Senator, such as Menendez, cannot shelter under Senator Harkin's privilege. *See In re Grand Jury (Eilberg)*, 587 F.2d at 593.

The communications in paragraphs 192-197 show Menendez staffers and Melgen lobbyists coordinating and developing a strategy to advocate to CMS administrators on behalf of Melgen. As example, in one email a staffer asked another staffer to "circle back with Dr. Melgan's [sic] attorney to find out specifically what they're asking for?" *Id.* ¶ 194. These communications are unprotected casework rather than legislative acts.

d. Paragraphs 198-208

Paragraphs 198-208 allege a meeting between Senator Menendez and the Acting Administrator of CMS, Marilyn Tavenner, who at the time had been nominated to be Administrator of CMS. See Indict. ¶¶ 198-208; Mot. to Dismiss 1 at 20; Opp. to Mot. to Dismiss at 12. The parties dispute the significance of the circumstance that Tavenner was awaiting confirmation by the Senate at the time of the meeting. *Id.* Senator Menendez's calendar reflected that this meeting was "re: her nomination before the Finance Committee," Mot. to Dismiss 1 at 20, but the government contends that no hearing on Tavenner's confirmation was scheduled during the 2012 legislative session. Opp. to Mot. to Dismiss at 18. At the meeting itself, the indictment alleges that "Menendez pressed [Tavenner] about multi-dosing and Medicare payments, and advocated on behalf of the position favorable to Melgen in his Medicare billing dispute." Indict. ¶ 200. The meeting was followed by a call between Menendez and Tavenner, for which a Melgen lobbyist and a Menendez staffer had prepared talking points, including the point that "we're talking about payments made in 2007-2008" and that CMS's current policies "don't have any bearing on the issue at hand." *Id.* ¶ 202. During the call, "Menendez expressed dissatisfaction with [Tavenner's] answers and stated that he would speak directly with the Secretary of HHS about the matter." *Id.* ¶ 204.

Although any effort to vet Tavenner as a nominee for confirmation would be a clearly protected act, the Speech or Debate Clause does not immunize all communications or requests made by a Senator to a current Executive Branch official while that official

awaits a confirmation hearing.[3] That the Senator's calendar noted that the meeting was "re: [Tavenner's] nomination" suggests that the nomination was discussed at the meeting, but it does not establish that other, non-legislative topics were not also discussed. In such a situation, "the correct approach is *not* to conclude that the [meeting was] entirely legislative and covered by the Clause or entirely non-legislative and unprotected by the Clause." *Menendez*, 608 F. App'x at 101. To the extent that any legislative communications took place at the meeting between Menendez and Tavenner, they are not alleged in the indictment and the "legislative components [have already been] separated from the non-legislative components." *Id.*

There are no requests for information about CMS policies or procedures alleged in the indictment. The talking points prepared before Menendez's call with Tavenner explicitly disclaimed the relevance of current CMS policies, noting that they "don't have any bearing on the issue at hand." Indict. ¶¶ 199, 201-03, 205-08. Significantly, during his phone conversation with Tavenner, Menendez threatened to go above Tavenner's head when he was unsatisfied with Tavenner's response. *Id.* ¶ 204.

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[3] Such an outcome would be especially unreasonable given the extended and ever-increasing time taken by the modern confirmation process. *See* Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform*? *An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 Duke L.J. 1645, 1669 (2015) (The average time for a successful nominee to be confirmed has increased in each of the last five administrations, reaching 127.2 days for successful Obama administration appointees through 2014.).

Again, the Senator has directed the Court's attention to FBI interviews with Tavenner and others concerning the call. Mot. to Dismiss 3 at 14; Mot. to Dismiss 3 Ex. A at 2-6. As with the initial meeting, these interviews, if anything, provide further support for the conclusion that the call was not about Tavenner's confirmation. Specifically, the summaries noted by the Senator explain that the call ended shortly after Tavenner told Menendez that CMS stood by its policy and would not change it. *Id.* In light of the evidence before the Court, the Senator has failed to meet his burden to show that the communications with Tavenner alleged in the indictment were protected.

e. Paragraphs 209-227

Paragraphs 209 through 220 concern a meeting between Senator Menendez and Secretary of Health and Human Services Kathleen Sebelius that was organized by Senator Reid. Indict. ¶ 210. Before the meeting, Senator Menendez wrote that he had not "told Dr. Melgen yet. Prefer to know when we [are] meeting her so that I don't raise expectation just in case it falls apart." *Id.* The planning for the meeting was focused on Medicare policy that was in place during the time in which Melgen's dispute arose. *Id.* at ¶ 211. During the meeting itself, Sebelius told Senator Menendez that she had no power to influence Melgen's case because it was in the administrative appeals process. *Id.* at ¶ 216. It is quite clear that this was an attempt to influence CMS rather than an attempt to gather legislative information. Likewise, the communications in paragraphs 221-227 were attempts to coordinate a strategy to achieve a favorable result for Melgen. The Court finds that these were not legislative acts.

B. Count One: The Conspiracy to Commit Bribery and Honest Services Wire Fraud Count does not rely on evidence immunized by the Speech or Debate Clause.

This Court also denies the motion to dismiss Count One, which Senator Menendez does not explicitly discuss. An indictment for conspiracy under 18 U.S.C. § 371 "need only allege one overt act." *McDade*, 28 F.3d at 300. Count One incorporates all of the overt acts already discussed, as well as Senator Menendez's advocacy to the State Department on behalf of Dr. Melgen's girlfriends. Indict. ¶¶ 1-227. Because the Court finds that none of the acts disputed by Senator Menendez are protected by the Speech or Debate Clause, the indictment alleges ample activity to support the conspiracy charge. But even if this Court were to accept Senator Menendez's argument that the Medicare reimbursement policy issues and Dominican Republic port security issues are immunized, the unchallenged visa advocacy would still provide an adequate basis for the conspiracy charge. The motion to dismiss Count One is denied.

C. Count Two: The Travel Act Count does not rely on evidence immunized by the Speech or Debate Clause.

Defendant Menendez fails in his burden to persuade the Court by a preponderance of the evidence to dismiss Count Two, which charges him with violating the Travel Act by traveling in interstate and foreign commerce with the intent to commit bribery. The Count incorporates the official actions and alleges that Senator Menendez agreed to perform official acts as opportunities arose in return for a stay at the Park Hyatt Paris Vendome provided by Dr. Melgen on or about April 8, 2010. Indict ¶¶ 228-229. Senator

Menendez does not challenge the admissibility of evidence of his trip to Paris, and the Court has already held that sufficient non-immunized evidence exists to support the bribery charges.

D. Counts Nineteen Through Twenty-One: The honest services fraud Counts do not rely on evidence immunized by the Speech or Debate Clause.

Defendant Menendez fails in his burden to persuade the Court to dismiss the honest services fraud counts. The Government adequately alleges that Dr. Melgen and Senator Menendez "devised and intended to devise a scheme and artifice to defraud and deprive the United States and the citizens of New Jersey of their right to [Menendez's] honest services" through bribery. Indict. ¶ 263. The unchallenged visa advocacy allegations support the bribery element of this charge, as do the Medicare and Dominican port security issues that the Court has found are not protected legislative acts.

Senator Menendez does not claim that any of the specific jurisdictional acts alleged in Counts Nineteen through Twenty-One – Dr. Melgen's private jet pilot's communication via interstate wire and radio while Senator Menendez rode in the jet on August 9 and September 6, 2010, and Dr. Melgen's delivery of a $300,000 check to Majority PAC by FedEx on June 5, 2012 – are immunized by the Speech or Debate Clause. And they are not.[4] The motion to dismiss Counts Nineteen through Twenty-One is denied.

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[4] Senator Menendez does not argue that the "scheme and artifice to defraud and deprive" alleged in Count Twenty-One requires evidence of his involvement in Dr. Melgen's Medicare billing dispute, even though the Government specifically alleges

II. Motion to Dismiss 13 (Speech or Debate-Immunized Evidence in Count Twenty-Two of the Indictment)

In a separate motion, Senator Menendez contends that his mandatory disclosures filed under the Ethics in Government Act are protected by the Speech or Debate Clause. Mot. to Dismiss 13 at 25-29. Senator Menendez argues that, because he was required by Senate Rules to file financial disclosure forms, the filing was a legislative act. Mot. to Dismiss 13 at 25-26. This argument fails because the filing of financial disclosures is not protected by the Clause. *United States v. Myers*, 692 F.2d 823, 849 (2d Cir. 1982).

The indictment does not charge Senator Menendez with violating a Senate rule; it charges him with violating federal law, a provision of the federal Ethics in Government Act ("EIGA"), which requires members of Congress to file financial disclosure forms with the Secretary of the Senate disclosing gifts they receive and makes it unlawful to include false information in these forms. Indict ¶ 266-272; *see also* 5 U.S.C. App. 4 §§ 101, 102(a)(2)(A), 104(a)(2); Senate Ethics Manual, S. Pub. 108-1, 108th Cont, 1st Sess., at 62 (2003), *available at* http://www.ethics.senate.gov/downloads/pdffiles/manual.pdf (noting that the Senate requires annual financial disclosures under the EIGA). As the Government points out, the first page of the forms Menendez filed provides the warning: "Any individual who knowingly and willfully falsifies, or who knowingly and willfully fails to file this report may be

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that Dr. Melgen made the $300,000 Super PAC donation in exchange for "Menendez's advocacy at the highest levels of CMS and HHS." Indict. ¶ 255. In any event, this Court has already held that Senator Menendez's communications with CMS and HHS are not protected by the Speech or Debate Clause.

subject to civil and criminal sanctions (See 5 U.S.C. App. 6, § 104 and 18 U.S.C. § 1001)." Opp. to Mot. to Dismiss at 37. The indictment charges Senator Menendez with violating one of the listed federal statutes by doing what he was warned against.

Senator Menendez urges the court to adopt the reasoning of Judge Kavanaugh's concurrence in *In re Grand Jury Subpoenas,* 571 F.3d 1200, 1203 (D.C. Cir. 2009). *In re Grand Jury Subpoenas,* a case involving a congressman's allegedly false testimony before the House Ethics Committee, *id.* at 1201, did not overturn the D.C. Circuit's earlier decision in *United States v. Rose*, when that Circuit determined that "testimony by a Member of Congress about the filing of a financial disclosure report under the Ethics [in Government] Act is not protected." 28 F.3d 181, 189 (D.C. Cir. 1994).[5] Regardless, the Court is persuaded by the Second Circuit's statement in *Myers* (where, as here, the status of the forms themselves rather than testimony about them was disputed) that "disclosure of income from sources other than employment by the United States . . . is no part of [the] 'deliberative and communicative processes'" that are protected by the Speech or Debate Clause. 692 F.2d at 849.

The Senator also makes a related argument that Count 22 violates the Separation of Powers doctrine. Mot. to Dismiss 13 at 18-25. Relying on Article I,

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[5] In *In re Grand Jury Subpoenas,* Judge Kavanaugh wrote that *Rose's* testimony about an EIGA form before the House Committee on Standards of Official Conduct "should have qualified as protected speech" because it was "Speech . . . in either House." 571 F.3d at 1205 (Kavanaugh, J. concurring). This reasoning is inapposite here. Menendez seeks to protect the act of filing a statutorily-required disclosure form itself, not testimony about the form before a Congressional committee.

section 5 of the Constitution, which empowers each house of Congress to regulate the conduct of its members, Senator Menendez argues that "it is the Senate alone that decides whether a Senator engaged in misconduct and, if so, what punishment is imposed." Mot. to Dismiss 13 at 25.

The suggestion that the Senate has exclusive power and jurisdiction to punish any act which, although being a crime under federal law, is also a violation of the Senate Rules is unsupported and has been rejected by the Supreme Court. Specifically, the Court explained in *Brewster* that, for many reasons,[6] "Congress is illequipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process." *Brewster*, 408 U.S. at 518; *cf. Johnson*, 383 U.S. at 185 (leaving open for consideration whether Congress's power to regulate its members' conduct could be used to authorize a criminal prosecution "entailing inquiry into legislative acts or motivations" that would normally be immunized by the Speech or Debate Clause).

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[6] Specifically, "Congress has shown little inclination to exert itself in this area. Moreover, if Congress did lay aside its normal activities and take on itself the responsibility to police and prosecute the myriad activities of its Members related to but not directly a part of the legislative function, the independence of individual Members might actually be impaired. . . . Strong arguments can be made that trials conducted in a Congress with an entrenched majority from one political party could result in far greater harassment than a conventional criminal trial with the wide range of procedural protections for the accused, including indictment by grand jury, trial by jury under strict standards of proof with fixed rules of evidence, and extensive appellate review. Finally, the jurisdiction of Congress to punish its Members is not all-embracing." *Brewster* 408 U.S. at 519-20.

The submission of Senator Menendez's financial disclosure forms under the Ethics in Government Act was not a legislative act under the Speech or Debate Clause. The Separation of Powers doctrine does not immunize the Senator from prosecution merely because the form was mandated by a Senate Rule as well as by federal law. The Court will address Defendant's other, unrelated arguments in Mot. to Dismiss 13 in a separate opinion.

III. Motion to Dismiss 2 (Speech or Debate Clause Violations Before the Grand Jury)

As discussed in footnote 1, Senator Menendez previously asserted Speech or Debate Clause immunity to challenge a motion to compel two of his staffers to testify before the grand jury. Senator Menendez argued that questions and answers about his involvement in Dr. Melgen's Medicare billing dispute and the CBP's donation of port surveillance equipment were immunized by the Speech or Debate Clause, *Menendez*, 608 F. App'x at 100. The District Court held that none of the questions or answers were immunized. On appeal, the Third Circuit held that it could not "adequately evaluate the District Court's decision because it did not fully explain the basis for its factual determination" and remanded the case to the District Court to make "specific factual findings about the communications implicated by the grand jury questions." *Id.* at 101-02.[7]

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[7] Senator Menendez mischaracterizes the Third Circuit's decision, claiming that the Government "lost[] its Speech or Debate Clause claim before the Third Circuit." Mot. to Dismiss 2 at 1. He argues that the Third Circuit "rejected the prosecution's broad claim that its labelling the actions of Senator Menendez and his staff 'advocacy'" would remove the "protections of the Speech or Debate Clause," and "provided the prosecution with a

In a separate motion to dismiss, Senator Menendez argues that the entire indictment must be dismissed because the District Court failed to make these "specific factual findings" and allowed the prosecution to present privileged Speech or Debate material, influencing the grand jury's decision to indict. Mot. to Dismiss 2 at 1.

A facially valid indictment can be dismissed based on "wholesale violation of the speech or debate clause before a grand jury" where "any attempt to cull out single counts of the indictment" are "unrealistic." *United States v. Helstoski*, 635 F.2d 200, 205 (3d Cir. 1980). Where there has been no wholesale or pervasive violation in front of the grand jury, it is generally true that an "indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for a trial on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956); *Jefferson*, 546 F.3d at 314, 314 n. 8 (applying *Costello* in the Speech or Debate context where defendant had made no allegation of a pervasive violation before the grand jury).

In this case any error in the grand jury was harmless and does not require dismissal of the indictment. The District Court did not make the "specific factual findings" ordered by the Third Circuit because the Government introduced evidence through Special

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roadmap on remand as to what it would need to prove to overcome the Speech or Debate privilege." *Id.* at 2. As stated already, the Government did not need to "prove" anything. A party asserting legislative immunity bears the burden of establishing the immunity by a preponderance of the evidence. *Lee,* 775 F.2d at 524. The burden was – and still is – on Senator Menendez to prove that his acts are protected by the Speech or Debate Privilege, not on the Government to prove that they are unprotected.

Agent Gregory Sheehy of the Federal Bureau of Investigation rather than re-examine the challenged staffers. Mot. to Dismiss 2 at 5. The parties dispute whether the Third Circuit remanded for findings on only the "specific questions" posed to the staffers, Opp. to Mot. to Dismiss at 27 – in which case interviewing Agent Sheehy rendered the Third Circuit's instructions moot – or on the potentially immunized communications themselves – in which case it did not. This Court finds that the Third Circuit directed the District Court to make findings about the "*communications* implicated by the grand jury questions," *Menendez*, 608 F. App'x at 101 (emphasis added). But the distinction is immaterial. Senator Menendez notes, correctly, that "the issue as to what is privileged under the Speech or Debate Clause is the same" under Motion 2 and Motion 1. Mot. to Dismiss 2 at 3. As the Court has already determined, the indictment's allegations about Senator Menendez's communications regarding Dr. Melgen's Medicare billing dispute and Dominican port security issues are not legislative acts protected by the Speech or Debate Clause. The evidence presented to the grand jury on all of these issues was materially the same as the allegations contained in the indictment. The Court reaches the same holding as in Motion 1.

IV. Motion to Dismiss 4 (Erroneous Speech or Debate Clause Instructions to the Grand Jury)

In a separate motion to dismiss, Senator Menendez and Dr. Melgen argue that the indictment must be dismissed because the grand jury was erroneously instructed on several issues, including the applicability of the Speech or Debate Clause. Mot. to Dismiss 4. The Court addresses the Defendants' Speech or

Debate argument here and will address the remaining arguments in a separate opinion.

Defendants do not identify any incorrect statements of law made by the prosecutors, who correctly described the privilege as belonging to the Senator, being "an important part of the constitution," and covering only legislative activity. Mot. to Dismiss 4 at 7-9. Defendants claim that the prosecutors should have specified that any conduct covered by the Speech or Debate Clause had to be disregarded by the grand jurors. *Id.* They also dispute the prosecutor's statement to the grand jury that the jurors "should not be deciding whether or not this is about an invalid assertion of the Speech or Debate Clause. That's an issue that if we need to raise, we'll bring it before a judge, and the judge will make a determination." *Id.* Defendants contend, without citation, that the validity of a Speech or Debate Clause assertion is a question for a grand jury. *Id.* at 9-10.

The government's instructions to the grand jury were correct, and Defendants' contentions about erroneous instructions are without merit. Accepting for the sake of argument Defendants' contention that the government failed to explain to the grand jurors that they should disregard material that was privileged by the Speech or Debate Clause, the Court has already determined that there was no protected material. The government was also correct that the validity of an assertion of the protection of the Speech or Debate Clause is a matter of law and not a question for a grand jury to decide.

CONCLUSION

Senator Menendez had the burden to demonstrate by a preponderance of the evidence that his acts

alleged in the indictment were legislative acts protected by the Speech or Debate Clause of the Constitution's Article I. He has failed for the reasons advanced in this opinion. It follows that Menendez's motion to dismiss the indictment for violations of the Speech or Debate Clause (Motion 1) is denied. Senator Menendez's motion to dismiss Count Twenty-Two of the indictment (Motion 13) is denied with respect to claims about violations of the Speech or Debate Clause and Separation of Powers doctrine. Senator Menendez's motion to dismiss the indictment for violations of the Speech or Debate Clause before the grand jury (Motion 2) is denied. Defendants' motion to dismiss the indictment for erroneous instructions to the grand jury (Motion 4) is denied with respect to the claim about erroneous instructions on the Speech or Debate Clause. An appropriate order follows.

DATE: 28 September 2015

/s/ William H. Walls
William H. Walls
Senior United States District Court Judge

APPENDIX C

NOT PRECEDENTIAL UNDER SEAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed 04/20/2015]

No. 14-4678

IN RE: GRAND JURY INVESTIGATION
JOHN DOE; ABC ENTITY,

Appellants.

On Appeal from United States District Court
for the District of New Jersey
(D. NJ No. 3-14-mc-00077)
District Judge: Anne E. Thompson

Argued February 19, 2015

Before: FISHER, JORDAN, and
KRAUSE, *Circuit Judges*.

(Filed: February 27, 2015)

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OPINION[*]

FISHER, *Circuit Judge*.

A federal grand jury is investigating Senator Robert Menendez for official actions he allegedly took on behalf of, and gifts he received from, his close personal friend, Dr. Salomon Melgen. This appeal concerns two general categories of official actions.[1] The first

[*] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] On appeal, the parties have agreed that Robert Kelly, Senator Menendez's Administrative Director, should have answered questions posed to him before the grand jury. Kelly

category 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; 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. The second category relates 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.

Michael Barnard, Senator Menendez's Legislative Assistant on health care issues, has been called before the grand jury twice, both times invoking the Speech or Debate Clause to withhold testimony. In his November 2014 testimony, he refused to answer fifty questions regarding the Senator's conversations with Tavenner and Secretary Sebelius as well as communications between the Senator's Office and Alan Reider, Dr. Melgen's lawyer and lobbyist, about the

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previously invoked the attorney work-product doctrine when asked about his knowledge of flights taken by Senator Menendez on Dr. Melgen's private jet. Accordingly, we do not address this issue.

Tavenner and Sebelius conversations. Talbot has also appeared twice before the grand jury. In her most recent testimony, she refused to answer questions about whether Senator Menendez intended to invoke the Speech or Debate Clause to challenge the use of the CBP email chain against him. On November 25, 2014, the District Court granted the Government's motion to compel Barnard and Talbot's testimony on the disputed issues. This appeal followed.[2]

Article I, section 6 of the United States Constitution provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other place." Put simply, the Speech or Debate Clause prohibits questioning a Member of Congress about "legislative acts or the motivation for legislative acts." *United States v. Brewster*, 408 U.S. 501, 512 (1972). "A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it." *Id.*

Some acts by Members of Congress, such as speaking on the House or Senate floor, are "manifestly legislative" such that the Speech or Debate Clause obviously applies to them. *Gov't of the V.I. v. Lee*, 775 F.2d 514, 522 (3d Cir. 1985). But other acts, such as informal legislative fact-finding and informal oversight, are not manifestly legislative, and indeed can look very much like unprotected political acts. *See id.*;

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[2] The District Court had jurisdiction over the matter pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and *Perlman v. United States*, 247 U.S. 7, 13 (1918). We exercise plenary review over the scope of protection provided by the Speech or Debate Clause as it is a pure question of law. *See MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988). We review the District Court's factual findings for clear error.

United States v. McDade, 28 F.3d 283, 300 (3d Cir. 1994). In these latter cases, district courts must make factual findings regarding the content and purpose of the acts and communications in question to assess their legislative or non-legislative character. *See Lee*, 775 F.2d at 522-24. Mere assertions that the Clause applies are insufficient, and the burden of proof resides with the Member of Congress as the proponent of the privilege. *Id.* at 524. Where an act or communication has some legislative and non-legislative components, the correct approach is not to conclude that the act or communication is entirely legislative and covered by the Clause or entirely non-legislative and unprotected by the Clause. Rather, the legislative components should be separated from the non-legislative components, if possible, and the latter may be the subject of questioning. *See United States v. Helstoski*, 442 U.S. 477, 488 n.7 (1979); *Lee*, 775 F.2d at 523. Where they are inseparable, the court must ascertain the nature of the act or communication by assessing its predominant purpose. *See Lee*, 775 F.2d at 525 (explaining that a trip consisting of both personal and legislative business could constitute a legislative act if it "contained a significant legislative component" and that a "meeting or trip may be deemed immune even though some personal exchanges transpired").

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. There-

fore, specific factual findings about the communications' legislative character are necessary to decide whether the Speech or Debate Clause applies. *See Lee*, 775 F.2d at 524. The District Court granted the Government's motion to compel the withheld testimony because it decided that these communications were unprotected "efforts by [M]embers of Congress to influence the Executive Branch." (App. 6 (internal quotation marks omitted).)

At this stage, we cannot adequately evaluate the District Court's decision because it did not fully explain the basis for its factual determination that the acts here are not legislative. Accordingly, we 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.

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. This inquiry must involve careful analysis of the record evidence already before the District Court, including the contemporaneous emails, calendar entries, and notes related to each communication.[3] It may also involve either testimony or

[3] There is evidence supporting both the Government's and the Senator's positions regarding the legislative nature of these communications. For example, Danny O'Brien, Senator Menendez's Chief of Staff, asked Senator Menendez before his meeting with Secretary Sebelius whether he had told Dr. Melgen about the meeting, supporting the inference that at least one purpose of the meeting was to assist Dr. Melgen. Senator Menendez counters that the discussions focused on policy, not Dr. Melgen's case, and in the meeting with Secretary Sebelius, "[n]ot

affidavits from the Senator or his staff about the contents and purposes of the communications. *See In re Grand Jury (Eilberg)*, 587 F.2d 589, 597 (3d Cir. 1978). We leave to the District Court's discretion whether to consider such testimony, affidavits, or any other new evidence about the contents and purposes of the purportedly protected communications in an *in camera* proceeding. *See, e.g., In re Grand Jury Subpoena*, 745 F.3d 681, 690 (3d Cir. 2014). Finally, given the sensitive constitutional interests at stake, the parties have a responsibility to clearly identify the areas that remain in dispute for the District Court. At oral argument, the parties clarified that the disputed issues are now limited to only some of the fifty questions that Barnard refused to answer and to the use of the CBP email chain against the Senator.[4] We

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one participant mentioned Dr. Melgen's name." (Appellant's Br. 45.) On remand, the District Court must consider these and other competing facts in making its findings.

[4] Of the fifty questions Barnard refused to answer, Senator Menendez's brief conceded that questions about whether Reider asked the Senator's Office to assist Dr. Melgen in his billing dispute are permissible. (Appellant's Br. 42 n.11.) Therefore, Questions 1-4 are permissible, and no further fact-finding is necessary. (Supplemental App. 536.) Additionally, in his brief and at oral argument, the Senator conceded that "logistical" questions, as opposed to questions about the contents of particular conversations, are permissible. (Appellant's Br. 42 n.11.) Therefore, Questions 5 (asking, generally, whom the Senator met with to assist Dr. Melgen); 6-7, 12 (asking about the first Tavenner conversation); 21-24, 27 (asking about the second Tavenner conversation); 38-41, and 50 (asking about the Sebelius meeting) are permissible. (Supplemental App. 536-39.) Finally, the Senator's brief conceded that questions about whether Barnard discussed the Tavenner call or the Sebelius meeting with Reider are permissible. (Appellant's Br. 42 n.11.) Thus, Questions 31 and 45 are permissible. No further fact-finding is necessary regarding any of these permissible questions.

trust they will do the same for the District Court on remand.

For the reasons set forth above, we will vacate the order of the District Court and remand the case for further proceedings consistent with this opinion.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed 12/10/2014]

Misc. No. 14-77

IN RE: GRAND JURY INVESTIGATION

UNDER SEAL

GRAND JURY NO. 13-177

MEMORANDUM ORDER

THOMPSON, U.S.D.J.

On September, 15, 2014, the United States filed motions to compel Michael Barnard, Robert Kelly, Emma Palmer, and Kerri Talbot, current and former staffers to Senator Robert Menendez, to provide testimony they withheld from the grand jury under assertions of the Speech or Debate Clause of the Constitution, attorney-client privilege, and/or attorney-work-product doctrine. The holder of the privileges at issue, Respondent Senator Robert Menendez, filed responses on October 13, 2014; the United States filed replies in support of its motions on October 20, 2014. The Court heard oral argument and conferred with the parties on October 23, 2014. On October 27, 2014, the Court ordered the parties to meet and confer, and schedule witness interviews or grand jury appearances in an effort to narrow or resolve the disputed issues.

On November 12, 2014, Michael Barnard, Robert Kelly, and Kerri Talbot reappeared before the grand jury. The Government contends that all three witnesses continued to withhold testimony from the grand jury under assertions of the Speech or Debate Clause and the attorney-work-product doctrine. Specifically, the Government contends Mr. Barnard refused to answer questions about meetings and communications that the Office of Senator Menendez—including Mr. Barnard, other staff, and Senator Menendez himself—had regarding Dr. Melgen's $8.9 million Medicare reimbursement dispute, arising during and in relation to: (1) a June 2012 meeting between Senator Menendez and Marilyn Tavenner, then-Acting Administrator of the Centers for Medicare and Medicaid Services (CMS); (2) a July 2012 follow-up telephone call between Senator Menendez and Ms. Tavenner; and (3) an August 2012 meeting between Senator Menendez and then-Secretary of Health and Human Services Kathleen Sebelius. The Government asserts that Senator Menendez refused to inform Ms. Talbot whether he was asserting the Speech or Debate Clause over a January 11, 2013, e-mail exchange. Also, the Government contends that Robert Kelly invoked the attorney-work-product doctrine to withhold testimony about when he learned that Senator Menendez had flown on Dr. Melgen's private plane on more than three occasions.

I.

The Supreme Court has instructed that "[i]n no case has this Court ever treated the [Speech or Debate] Clause as protecting all conduct *relating* to the legislative process." *United States v. Brewster*, 408 U.S. 501, 515 (1972) (emphasis in original); *see also id.* at 516. The Third Circuit has observed that "[t]he Supreme

Court has repeatedly stated that the Speech or Debate Clause does not apply to efforts by members of Congress to influence the Executive Branch." *United States v. McDade,* 28 F.3d 283, 299 (3d Cir. 1994). Accordingly, Senator Menendez's meetings and communications with Executive Branch officials to assist Dr. Salomon Melgen in resolving his Medicare billing dispute, and preparatory meetings with representatives of Dr. Melgen held in advance of those meetings and contacts with Executive Branch officials, are unprotected by the Speech or Debate Clause. Similarly, Senator Menendez's and his staffs efforts to persuade CBP not to take an act that would adversely affect Dr. Melgen's financial interests is unprotected by the Speech or Debate Clause.

The Court finds that the questions posed by the United States to Mr. Barnard and Ms. Talbot before the grand jury on November 12, 2014, the statements given by Ms. Talbot on October 31, 2014, which are summarized in Exhibit 2 to the United States' Report in Compliance with Court's Order, and the documents that are the subject of Ms. Talbot's proposed testimony, identified as Exhibit 3 to the United States' Report in Compliance with Court's Order and Exhibit 64 to the Motion to Compel Testimony Withheld From the Grand Jury Under an Assertion of the Speech or Debate Clause, fall outside the Speech or Debate Clause's protections.

II.

The Court recognizes that "[t]he work-product doctrine . . . protects from discovery materials prepared or collected by an attorney 'in the course of preparing for possible litigation.'" *In re Grand Jury Investigation,* 599 F.2d 1224, 1228 (3d Cir. 1979) (quoting *Hickman v. Taylor,* 329 U.S. 495, 505 (1947)); *see also In re*

Grand Jury (Impounded), 138 F.3d 978, 981 (3d Cir. 1998). However, the Court finds that the work-product doctrine should be narrowly construed consistent with its purpose. *See*, *e.g.*, *In re Chevron Corp.*, 633 F.3d 153, 164 (3d. Cir. 2011); *In re Grand Jury Proceedings,* 604 F.2d 798, 802 (3d Cir. 1979); *E.I. Dupont de Nemours & Co. v. Kolon Industries*, *Inc.*, 269 F.R.D. 600, 606-07. Accordingly, the Court finds that Robert Kelly's invocation of the attorney work-product doctrine when questioned as to when he learned that Senator Menendez had flown on Dr. Melgen's plane more than three times was misplaced.

III.

In light of the above, IT IS HEREBY ORDERED that Michael Barnard, Robert Kelly, and Kerri Talbot are to reappear before the grand jury to answer the questions posed by the United States on November 12, 2014, and provide the testimony they previously withheld.

/s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

Date: Nov. 25, 2014

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed: 09/13/2016]

No. 15-3459

UNITED STATES OF AMERICA,

v.

ROBERT MENENDEZ,

Appellant.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Action No. 2-15-cr-00155-001)
District Judge: Honorable William H. Walls

Before: MCKEE, *Chief Judge*, AMBRO, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, KRAUSE, RESTREPO, and SCIRICA*, *Circuit Judges*

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the

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* Senior Judge Scirica is limited to panel rehearing only.

circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court *en banc,* is denied.

By the Court,

s/ Thomas L. Ambro, Circuit Judge

Dated: September 13, 2016
PDB/cc: All Counsel of Record

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-3459

UNITED STATES OF AMERICA,

v.

ROBERT MENENDEZ,

Appellant.

(D.N.J. No. 2-15-cr-00155-001)

September 20, 2016

Present: AMBRO, JORDAN and SCIRICA,
Circuit Judges

1. Motion by Appellant to Stay Mandate Pending Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of the United States;

2. Response by Appellee In Opposition to Motion to Stay Mandate Pending Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of the United States.

Respectfully,

Clerk/pdb

ORDER

The foregoing Motion to stay the mandate pending the filing and disposition of a petition for a writ of certiorari is granted.

By the Court,

s/ Thomas L. Ambro
Circuit Judge

Dated: September 26, 2016

CJG/cc: Monique Abrishami, Esq.
Joseph P. Cooney, Esq.
Peter M. Koski, Esq.
Amanda R. Vaughn, Esq.
Raymond M. Brown, Esq.
Scott W. Coyle, Esq.
Jenny R. Kramer
Christopher D. Man, Esq.
Stephen M. Ryan, Esq.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed: 4/1/2015]

No. 15 CR 155

UNITED STATES OF AMERICA

v.

ROBERT MENENDEZ

(Counts 1, 2, 3, 5, 7, 9, 11, 13, 15, 17, 19, 20, 21, & 22)

and

SALOMON MELGEN

(Counts 1, 2, 4, 6, 8, 10, 12, 14, 16, 18, 19, 20, & 21),

Defendants.

Count 1: 18 U.S.C. § 371 (Conspiracy to Commit Bribery and Honest Services Wire Fraud)

Count 2: 18 U.S.C. §§ 1952, 2 (Travel Act)

Counts 3-18: 18 U.S.C. § 201(b) (Bribery)

Counts 19-21: 18 U.S.C. §§ 1341, 1343, 1346, 2 (Honest Services Fraud)

Count 22: 18 U.S.C. § 1001 (False Statements)

Forfeiture Notice

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

18 U.S.C. § 371
(Conspiracy to Commit Bribery and Honest Services Wire Fraud)

1. At all times material to this indictment:

2. Defendant ROBERT MENENDEZ was a United States Senator from the State of New Jersey. He was previously a member of the United States House of Representatives. MENENDEZ was sworn in as a United States Senator on or about January 17, 2006. As a United States Senator, MENENDEZ owed a fiduciary duty to the United States and the citizens of New Jersey to perform the duties and responsibilities of his office free from corrupt influence.

3. Defendant SALOMON MELGEN was an ophthalmologist who lived and practiced in the State of Florida.

RELEVANT INDIVIDUALS AND ENTITIES

4. Vitreo-Retinal Consultants of the Palm Beaches, P.A. (VRC) was the company through which MELGEN operated his ophthalmology practice. MELGEN was VRC's sole owner.

5. The Office of Senator Robert Menendez, based in Washington, D.C., and New Jersey, was MENENDEZ's official government office.

6. Menendez for Senate, based in New Jersey, was a MENENDEZ campaign entity.

7. Person A was MELGEN's personal assistant and son-in-law.

8. Staffer 1 was MENENDEZ's Chief of Staff from in or about June 2008 to in or about March 2014.

THE CONSPIRACY AND ITS OBJECTS

9. From at least in or about January 2006 through in or about January 2013, in the District of New Jersey and elsewhere, the defendants,

ROBERT MENENDEZ and
SALOMON MELGEN,

did knowingly combine, conspire, confederate, and agree with each other and others known and unknown to the Grand Jury to commit an offense against the United States; that is:

a. to, directly and indirectly, corruptly give, offer, and promise anything of value to a public official and to any other person and entity, with intent to influence an official act; that is, offering to give to MENENDEZ, a United States Senator, and to other persons and entities, things of value to influence official acts benefitting MELGEN's personal and business interests, in violation of 18 U.S.C. § 201(b)(1)(A);

b. to, being a public official, directly and indirectly, corruptly demand, seek, receive, accept, and agree to receive and accept anything of value personally and for any other person and entity, in return for being influenced in the performance of an official act; that is, MENENDEZ, a United States Senator, sought and received things of value from MELGEN in order to influence MENENDEZ's official acts, in violation of 18 U.S.C. § 201(b)(2)(A); and

c. to devise and intend to devise a scheme and artifice to defraud and deprive the United States and the citizens of New Jersey of the honest services of a public official; that is, to deprive the United

States and the citizens of New Jersey of the honest services of MENENDEZ, a United States Senator elected by the citizens of New Jersey, in violation of 18 U.S.C. §§ 1341, 1343, and 1346.

PURPOSE OF THE CONSPIRACY

10. The purpose of the conspiracy was for the defendants to use MENENDEZ's official position as a United States Senator to benefit and enrich themselves through bribery.

MANNER AND MEANS

11. The manner and means by which the defendants and others carried out the conspiracy included, but were not limited to, the following:

12. MELGEN offered and gave, and MENENDEZ solicited and accepted from MELGEN, things of value, including domestic and international flights on private jets, first-class domestic airfare, use of a Caribbean villa, access to an exclusive Dominican resort, a stay at a luxury hotel in Paris, expensive meals, golf outings, and tens of thousands of dollars in contributions to a legal defense fund.

13. MELGEN financed things of value he gave to MENENDEZ through corporate entities.

14. MELGEN, through his companies, gave MENENDEZ and his guests free flights on his private jets. MELGEN's company, Melissa Aviation, owned a ten-seat Hawker Siddeley, from in or about April 2003 to in or about December 2011. MELGEN used another company, DRM Med Assist, LLC, to purchase a twelve-seat Challenger in or about June 2009. These aircraft were flown by MELGEN's private flight staff and stocked with refreshments for passengers. MELGEN furnished MENENDEZ with many flights on these

private jets over the course of several years, which MENENDEZ accepted at no cost to himself. On more than one occasion, MENENDEZ brought a guest. On at least one occasion, MENENDEZ's guest flew on the plane without MENENDEZ in order to meet MENENDEZ for a weekend stay at MELGEN's villa in the Dominican Republic.

15. MELGEN offered and gave, and MENENDEZ solicited and accepted from MELGEN, vacations at MELGEN's villa in Casa de Campo, a luxury golf and sporting resort located in La Romana, on the Caribbean coast of the Dominican Republic. The ocean-side community has a marina, three golf courses, thirteen tennis courts, three polo playing fields, equestrian facilities, a 245-acre shooting facility, a spa, beaches, restaurants, and a hotel. MELGEN owns a Spanish-style vacation villa at Casa de Campo. Located on one of the three golf courses, MELGEN's villa opens to a courtyard, has its own pool, and is serviced by MELGEN's private staff, which cooks, cleans, provides transportation, and generally caters to the needs of MELGEN and his guests.

16. MELGEN offered and gave, and MENENDEZ solicited and accepted from MELGEN, hundreds of thousands of dollars of contributions to entities that benefitted MENENDEZ's 2012 Senate campaign, in exchange for specific requested exercises of MENENDEZ's official authority.

17. MENENDEZ concealed things of value he solicited and accepted from MELGEN by knowingly and willfully omitting them from the annual Financial Disclosure Reports he was statutorily required to complete under the Ethics in Government Act. Specifically, in reports MENENDEZ filed between 2007 and

2012, he never disclosed any of the reportable gifts that he received from MELGEN.

18. MENENDEZ withheld information from his Senate staff to conceal the extent of his official action on MELGEN's behalf.

19. MELGEN used his personal assistant and agent, Person A, to help manage his dealings with MENENDEZ, including agreeing to MENENDEZ's solicitations for things of value, offering and providing MENENDEZ with things of value, equipping MENENDEZ and MENENDEZ's Senate staff with information and resources to promote MELGEN's personal and business interests, and requesting official action from MENENDEZ and MENENDEZ's Senate staff as needed.

20. MENENDEZ used the Chief of Staff of his Senate Office, Staffer 1, to help manage his dealings with MELGEN, including soliciting and accepting things of value from MELGEN, accommodating MELGEN's requests for official action, monitoring the progress of MENENDEZ's Senate staff's advocacy on MELGEN's behalf, and updating MELGEN on the status and progress of MENENDEZ's official action on MELGEN's behalf.

21. MENENDEZ used his Senate staff to accommodate MELGEN's requests for official action, including collecting information from MELGEN and his agents about MELGEN's needs and interests, arranging for MELGEN to meet with a United States Senator, and advocating on MELGEN's behalf to Executive Branch officials.

22. MENENDEZ used the prestige, authority, and influence of his status as a United States Senator to promote MELGEN's personal and business interests

with a United States Ambassador, fellow United States Senators, and Executive Branch officials, including a member of the President's Cabinet.

23. MENENDEZ used the power of his Senate office to do the following:

a. influence the immigration visa proceedings of MELGEN's foreign girlfriends;

b. pressure the U.S. Department of State (State Department) to influence the Government of the Dominican Republic to abide by MELGEN's multi-million dollar foreign contract to provide exclusive cargo screening services in Dominican ports;

c. stop the U.S. Customs and Border Protection (CBP), a component of the U.S. Department of Homeland Security, from donating shipping container monitoring and surveillance equipment to the Dominican Republic—a donation that would threaten MELGEN's multi-million dollar foreign contract to provide exclusive cargo screening services in Dominican ports; and

d. influence the outcome of the Centers for Medicare and Medicaid Services's (CMS's) administrative action seeking millions of dollars in Medicare overbillings that MELGEN owed to the Federal Government.

OVERT ACTS

24. In furtherance of the conspiracy, and to accomplish its objects, MENENDEZ, MELGEN, and others committed the following overt acts in the District of New Jersey and elsewhere:

I. Things of Value

A. Private, Chartered, and First-Class Commercial Flights

25. MELGEN, directly and through his companies and personal assistant, Person A, gave MENENDEZ and his guests free private, chartered, and first-class commercial flights for personal trips, including the following:

a. On or about August 18, 2006, MENENDEZ and his guest, Guest 1, traveled on MELGEN's private jet from West Palm Beach, Florida, to the Dominican Republic for a vacation at MELGEN's villa in Casa de Campo.

b. On or about August 24, 2006, MELGEN sent his private jet from West Palm Beach, Florida, to the Dominican Republic in order to pick up MENENDEZ and his guest, Guest 1, to fly them to New Jersey after their vacation at MELGEN's villa in Casa de Campo.

c. On or about August 24, 2006, MENENDEZ and his guest, Guest 1, traveled on MELGEN's private jet from the Dominican Republic to Teterboro, New Jersey, with a stop in West Palm Beach, Florida.

d. On or about April 4, 2007, MENENDEZ traveled on MELGEN's private jet from West Palm Beach, Florida, to the Dominican Republic for a vacation at MELGEN's villa in Casa de Campo.

e. On or about April 8, 2007, after MENENDEZ's vacation at MELGEN's villa in Casa de Campo, MELGEN furnished MENENDEZ with a free flight from the Dominican Republic to Fort Lauderdale, Florida, on a private jet owned by MELGEN's business associate. MELGEN's own private jet had

suffered a mechanical problem and was unavailable to fly back to the United States.

f. On or about August 30, 2008, MELGEN sent his private jet from the Dominican Republic to Teterboro, New Jersey, in order to pick up MENENDEZ and his guest, Guest 2, to fly them to the Dominican Republic for a vacation at MELGEN's villa in Casa de Campo.

g. On or about August 30, 2008, MENENDEZ and his guest, Guest 2, traveled on MELGEN's private jet from Teterboro, New Jersey, to West Palm Beach, Florida, where they stayed overnight before traveling to the Dominican Republic the next day.

h. On or about August 31, 2008, MENENDEZ and his guest, Guest 2, traveled on MELGEN's private jet from West Palm Beach, Florida, to the Dominican Republic.

i. On or about September 4, 2008, MELGEN sent his private jet from West Palm Beach, Florida, to the Dominican Republic in order to pick up MENENDEZ and his guest, Guest 2, to fly them to New Jersey after their vacation at MELGEN's villa in Casa de Campo.

j. On or about September 4, 2008, MENENDEZ and his guest, Guest 2, traveled on MELGEN's private jet from the Dominican Republic to Teterboro, New Jersey, with a stop in West Palm Beach, Florida.

k. On or about May 28, 2010, MENENDEZ's guest, Guest 3, traveled on MELGEN's private jet from West Palm Beach, Florida, to the Dominican Republic, in order to meet MENENDEZ for a vacation at MELGEN's villa in Casa de Campo.

l. On or about June 1, 2010, MENENDEZ's guest, Guest 3, returned from the Dominican Republic to West Palm Beach, Florida, on MELGEN's private jet, after vacationing with MENENDEZ at MELGEN's villa in Casa de Campo.

m. On or about August 6, 2010, MELGEN sent his private jet from West Palm Beach, Florida, to the Washington Metropolitan Area, in order to pick up MENENDEZ to fly him to the Dominican Republic for a vacation at MELGEN's villa in Casa de Campo.

n. On or about August 6, 2010, MENENDEZ traveled on MELGEN's private jet from the Washington Metropolitan Area to the Dominican Republic, with a stop in West Palm Beach, Florida.

o. On or about August 9, 2010, after his vacation at MELGEN's villa in Casa de Campo, MENENDEZ traveled on MELGEN's private jet from the Dominican Republic to Teterboro, New Jersey, with a stop in West Palm Beach, Florida.

p. On or about September 3, 2010, MELGEN sent his private jet from the Dominican Republic to Teterboro, New Jersey, in order to pick up MENENDEZ and his guest, Guest 3, to fly them to the Dominican Republic for a vacation in Punta Cana.

q. On or about September 3, 2010, MENENDEZ and his guest, Guest 3, traveled on MELGEN's private jet from Teterboro, New Jersey, to the Dominican Republic, with a stop in West Palm Beach, Florida.

r. On or about September 6, 2010, after their vacation in Punta Cana, MENENDEZ and his guest, Guest 3, traveled on MELGEN's private jet from the

Dominican Republic to Teterboro, New Jersey, with a stop in West Palm Beach, Florida.

s. On or about October 8, 2010, MELGEN, through Person A, bought MENENDEZ a first-class airline ticket at a cost of approximately $890.70 for a flight from Newark, New Jersey, to West Palm Beach, Florida, departing the next day.

t. On or about October 11, 2010, MELGEN, through Person A, paid approximately $8,036.82 to charter a private jet to fly MENENDEZ that day from West Palm Beach, Florida, to the Washington Metropolitan Area. MENENDEZ was the only passenger on that chartered flight.

26. MENENDEZ did not pay for any of these flights at the time he took them.

B. Vacations at MELGEN's Caribbean Villa at Casa de Campo

27. Between in or about August 2006 and in or about January 2013, MENENDEZ stayed at MELGEN's vacation villa in Casa de Campo on numerous occasions, with and without MELGEN present. On more than one occasion, MENENDEZ was accompanied by a guest.

C. Three Nights at the Park Hyatt Paris-Vendôme

28. From on or about April 8, 2010, through on or about April 11, 2010, MENENDEZ stayed in an executive suite at the five-star Park Hyatt Paris-Vendôme valued at $4,934.10. MENENDEZ solicited and accepted from MELGEN 649,611 American Express Membership Rewards points (hereinafter "AmEx points") in order to pay for the suite.

29. MENENDEZ planned the personal trip to Paris to spend a weekend with a woman with whom he had a personal relationship. That woman was planning to travel to Paris with her sister, who was going on a business trip.

30. On or about March 8, 2010, MENENDEZ emailed the sister, asking her where she was planning to stay in Paris. The sister responded that day and informed him that she would be staying at the Park Hyatt. MENENDEZ confirmed that he would also book a room there.

31. Also on or about March 8, 2010, MENENDEZ emailed Staffer 2, his Office Manager, asking him to research the Park Hyatt rates, including whether they had a government rate available for the dates April 8, 9, and 10, 2010.

32. Later that day, Staffer 2 responded that the Park Hyatt did have a government rate, and that it would be $798.75 per night for a Park Deluxe King and $934.82 per night for a Park Suite King. The standard rates for these rooms were $870.87 and $1,006.94, respectively.

33. On or about March 18, 2010, MENENDEZ emailed the sister and asked her if her company (through which she would be making the reservation for her business trip) had "any special rates at the Park Hyatt."

34. On or about March 24, 2010, MENENDEZ sent MELGEN an email in which he asked MELGEN to book either the Park Suite King or the Park Deluxe King at the Park Hyatt on his behalf—both rooms featuring, according to MENENDEZ' s email, "king bed, work area with internet, limestone bath with soaking tub and enclosed rain shower, [and] views of

courtyard or streets." MENENDEZ explained, "You call American Express Rewards and they will book it for you. It would need to be in my name."

35. The next day, MELGEN redeemed an American Express Travel Credit for 649,611 points to cover the cost of a three-night stay in a Park Executive Suite for MENENDEZ. Person A emailed MENENDEZ the reservation confirmation, reflecting that the suite's value was $1,536.96 per night, plus $323.22 in fees and tax recovery charges, for a total value of $4,934.10 for the three nights.

D. Weekend in Punta Cana

36. On or about the weekend of September 3, 2010, through September 6, 2010, MENENDEZ and a guest, Guest 3, traveled to a wedding in Punta Cana in the Dominican Republic, traveling roundtrip free of charge on MELGEN's private jet, as described in paragraphs 25p through 25r above.

37. From on or about September 3, 2010, through on or about September 6, 2010, MENENDEZ and his guest, Guest 3, stayed free of charge in a two-bedroom suite with MELGEN and his wife at the Tortuga Bay Hotel Puntacana Resort and Club. MELGEN paid approximately $769.40 to the Tortuga Bay Hotel Puntacana Resort and Club for the accommodations.

E. $40,000 to MENENDEZ's Legal Defense Trust Fund

38. To pay for litigation arising from a recall effort, MENENDEZ created a legal defense trust fund called The Fund to Uphold the Constitution.

39. On or about September 21, 2011, Staffer 1, MENENDEZ's Chief of Staff, emailed Person A:

> The attached memo has the information on the legal defense trust fund that Senator Menendez discussed with the doctor. When I spoke with the doctor, he said he and Mrs. Melgen and his children also wanted to contribute. Obviously, that is a very, very generous offer. For the time being, I think the best approach is for the doctor and Mrs. Melgen to contribute. Should we need additional contributions next week, I will come back to you to discuss this matter further.
>
> I hope that works for you and the [sic] Dr. Melgen.

40. That same day, MELGEN and his wife wrote a $20,000 check to MENENDEZ's legal defense trust fund from their joint bank account.

41. On or about April 30, 2012, Staffer 1 sent an email to Person A with the subject line "Humbly Asking," in which he solicited, among other things, another $20,000 donation to MENENDEZ's legal defense trust fund. Staffer 1 explained:

> There is a second part to this ask and it is for Dr. Melgen to have two additional members of his family contribute to the Senator's legal defense fund. Dr. Melgen and Mrs. Melgen have already contributed $10,000 each. At the time they made their contributions Dr. Melgen mentioned to me that he would try to help out more if we needed it. The ask of Dr. Melgen is for him to consider having two other members of his family contribute $10,000 each. The name of this account is The Fund to Uphold the Constitution. It is not a

> federally-controlled FEC account and, as such, contributions into the account do not count to federal giving limits.
>
> This request is more than considerable. I truly hope Dr. Melgen will understand that we do not take it lightly nor the sacrifice it represents.

42. That same day, Person A responded:

> Regarding your request . . . don't worry. We will take care of it. Dr. Melgen will be calling you tomorrow to speak further.

43. On or about May 16, 2012, MELGEN and his wife wrote another $20,000 check to MENENDEZ's legal defense trust fund.

F. Other Things of Value

44. On or about October 4, 2008, MELGEN hired a car service company to drive MENENDEZ from Hoboken, New Jersey, to and around New York City, New York, at a cost of $875.12.

45. On or about January 10, 2013, MENENDEZ, MELGEN, and Person A golfed together at the private Banyan Golf Club in West Palm Beach, Florida. MELGEN paid for the greens fees. After the round of golf, Person A paid $356.80 for a meal at the Raindancer Steak House in West Palm Beach, Florida.

G. $751,500 in 2012 Campaign Contributions

46. MENENDEZ ran for and won reelection to the United States Senate in November 2012. From in or about May 2012 through in or about October 2012, MELGEN contributed over $750,000 to entities supporting MENENDEZ's reelection effort.

i. $143,500 to New Jersey State and County Democratic Party Entities

47. On or about April 30, 2012, in the same email to Person A described above in paragraph 41, Staffer 1 solicited MELGEN for contributions to the New Jersey Democratic State Committee to benefit MENENDEZ' s reelection efforts. In that email, Staffer 1 wrote that "the Senator and I humbly wanted to put a big ask before [MELGEN]," specifying that:

> I am trying to raise money into the New Jersey Democratic State Committee. The Committee is vital to the Senator's efforts as the state party will conduct voter contact and get out the vote activities on behalf of Senator Menendez and other congressional candidates in the state. The account is named New Jersey Democratic State Committee Victory Federal. The limit per individual is $10,000. Could Dr. Melgen and family members consider giving a total of $40,000?

Staffer 1 observed that MELGEN had "been as loyal and helpful as anyone out there" and noted that "there may be bigger opportunities out there for the doctor to join in later this summer that will be beneficial to the Senator's re-election effort."

48. As noted above in paragraph 42, that same day, Person A responded:

> Regarding your request . . . don't worry. We will take care of it. Dr. Melgen will be calling you tomorrow to speak further.

49. Just over ten days later, on or about May 10, 2012, Staffer 1 and MELGEN spoke on the phone. MELGEN told Staffer 1 that he would make the

contributions Staffer 1 had requested and that Person A would manage the process. The following day, Staffer 1 emailed Person A to memorialize his conversation with MELGEN and stated, "It would be great if the contributions could be sent via Fedex to my home address and I'll distribute them once I receive them."

50. On or about May 16, 2012, MELGEN and his wife wrote a $20,000 check to "New Jersey Democratic State Committee Victory Federal Account." On the check's memo line "MFS Contribution" was written and subsequently crossed out. Person A overnighted the checks to Staffer 1 via Federal Express to his home address.

51. That same day, on or about May 16, 2012, MELGEN's daughter and her husband, Person A, wrote a $20,000 check to "New Jersey Democratic State Committee Victory Federal Account." On the check's memo line "(MFS) Menendez Contribution" was written and subsequently crossed out.

52. Also that same day, on or about May 16, 2012, MELGEN issued a $20,000 check through VRC, his ophthalmology practice, to MELGEN's daughter.

53. In or about September and October 2012, MELGEN issued more than $100,000 in checks through VRC to several New Jersey county Democratic Party committees and organizations that supported MENENDEZ's reelection bid:

a. On or about September 30, 2012, MELGEN, through VRC, gave $16,500 to the Union County Democratic Organization;

b. On or about October 1, 2012, MELGEN, through VRC, gave $37,000 to the Passaic County Democratic Organization;

c. On or about October 12, 2012, MELGEN, through VRC, gave $25,000 to the Camden County Democratic Committee; and

d. On or about October 12, 2012, MELGEN, through VRC, gave $25,000 to the Essex County Democratic Committee.

ii. $8,000 Contribution to Satisfy MENENDEZ's Financial Obligation to Another Senator's Campaign

54. During the 2012 election cycle, Senator 1, a United States Senator, raised approximately $25,000 to support MENENDEZ's reelection efforts. MENENDEZ agreed to raise a commensurate amount of money for Senator 1, who was also running for reelection in 2012.

55. On or about July 17, 2012, a MENENDEZ fundraiser emailed Person A soliciting a contribution from MELGEN to Senator 1. Specifically, the fundraiser wrote the following:

> The Senator asked me to write you and ask for your help. We are raising money for Senator {1] because she helped us earlier this Spring. She raised $25k for our campaign and now we are returning the favor because she is facing a primary in August.
>
> Will you and [your wife] help us meet our obligations and contribute $5k each to Senator [1]'s campaign? We feel indebted to Senator [1] and we would really appreciate your help.

56. On or about July 20, 2012, a different MENENDEZ fundraiser emailed MENENDEZ stating that MELGEN would contribute the requested $10,000

to Senator 1, "but you [(MENENDEZ)] have to email him and ask? Will you?" MENENDEZ responded, "Do we need that much? I will but want to make sure we need that much, as I thought we were close on commitments." The fundraiser replied that they had obtained $17,000 in commitments to Senator 1, to which MENENDEZ replied, "Ok so I will ask for 8k."

57. Three days later, on or about July 23, 2012, Person A emailed the fundraiser referenced in paragraph 55, stating, "FYI. $8,000 will be sent tomorrow on Dr. and Mrs. Melgen's behalf."

58. That same day, on or about July 23, 2012, MELGEN and his wife gave $8,000 to the campaign of Senator 1. Prior to this contribution, MELGEN had never given any money to Senator 1's campaign.

iii. $600,000 to Majority PAC, Earmarked for the New Jersey Senate Race

59. Between on or about June 1, 2012, and on or about October 12, 2012, MELGEN gave $600,000 to Majority PAC, a Super PAC whose purpose was to protect and expand the Democratic majority in the U.S. Senate. The $600,000 was divided into two $300,000 payments, both of which MELGEN made through VRC. MELGEN earmarked both $300,000 payments for the New Jersey Senate race. MENENDEZ was the only Democrat running for the Senate in New Jersey that year.

60. On or about June 1, 2012, MELGEN issued a $300,000 check from VRC to Majority PAC. This occurred on the same day that MELGEN attended and served on the Host Committee for MENENDEZ's annual fundraising event in New Jersey.

61. MELGEN gave this first $300.000 payment to Person B, a close personal friend of MENENDEZ, who also attended and served on the Host Committee for MENENDEZ's annual fundraising event in New Jersey. Person B sent the check to Fundraiser 1, a fundraiser for Majority PAC, via FedEx from New Jersey to Washington, D.C. Upon receiving the check on June 7, 2012, Fundraiser I wrote an email to Fundraiser 2, another Majority PAC fundraiser, with the subject line "Majority PAC (not PM USA): $300.000 earmarked for New Jersey."

62. On or about October 12, 2012. MELGEN issued a second $300,000 check from VRC to Majority PAC.

63. On or about October 16, 2012, Fundraiser 1 wrote Fundraiser 2 an email with the subject line, "Vitreo-Retinal Consultants – Entire $300k to [Majority PAC] is earmarked for New Jersey."

II. Concealment

64. As a United States Senator, MENENDEZ was required by the Ethics in Government Act of 1978 to submit a yearly Financial Disclosure Report. In reports MENENDEZ filed from 2007 to 2012, he did not disclose any of the reportable gifts that he received from MELGEN.

65. On or about June 26, 2007, MENENDEZ filed a Financial Disclosure Report in which he certified that he did not receive any reportable gifts in calendar year 2006. He signed, "I CERTIFY that the statements I have made on this form and all attached schedules are true complete and correct to the best of my knowledge and belief."

66. On or about April 29, 2008, MENENDEZ filed a Financial Disclosure Report in which he certified that

he did not receive any reportable gifts in calendar year 2007. He signed, "I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief."

67. On or about May 6, 2009, MENENDEZ filed a Financial Disclosure Report in which he certified that he did not receive any reportable gifts in calendar year 2008. He signed, "I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief."

68. On or about May 16, 2011, MENENDEZ filed a Financial Disclosure Report in which he certified that he did not receive any reportable gifts in calendar year 2010. He signed, "I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief."

69. On or about May 9, 2012, MENENDEZ filed a Financial Disclosure Report in which he certified that he did not receive any reportable gifts in calendar year 2011. He signed, "I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief."

III. Official Acts

A. MENENDEZ's Advocacy on Behalf of the United States Visa Applications of MELGEN's Foreign Girlfriends

70. MENENDEZ used his position as a United States Senator to influence the visa proceedings of MELGEN's foreign girlfriends.

i. Melgen's Girlfriend from Brazil

71. MELGEN and Girlfriend 1, a Brazilian national who worked as an actress, model, and lawyer, began a romantic relationship in approximately 2007.

72. Sometime in 2007, MELGEN suggested that Girlfriend 1 pursue a graduate degree in the United States, specifically in South Florida, where MELGEN lived.

73. At MELGEN's urging, Girlfriend 1 applied to the LLM program at the University of Miami, which required her to obtain a student visa.

74. MELGEN contacted MENENDEZ regarding Girlfriend 1's student visa application. Specifically, on or about July 24, 2008, the day before Girlfriend 1's visa application appointment in Brasilia, Brazil, Staffer 3, MENENDEZ's Senior Policy Advisor, emailed the Deputy Assistant Secretary (DAS) at Visa Services, Bureau of Consular Affairs, Department of State, stating the following:

> The Senator asked me to get in touch with you about the following visa applicant. If it is helpful, I can send over a signed letter from the Senator with the details. Thank you for your help with anything you can do to facilitate the following application:
>
> [Girlfriend 1] (no relation to me) has her visa application appointment in Brasilia, Brazil, tomorrow. I understand she is an attorney in Brazil and is coming to the U.S. on a student visa with support from Dr. Solomon [sic] Melgen. Sen. Menendez would like to advocate unconditionally for Dr. Melgen and encourage

> careful consideration of [Girlfriend 1]'s visa application.
>
> [Girlfriend l's personal identifying information]
>
> Please don't hesitate to contact me if I can provide additional information and thank you for any help you can provide.

75. Within hours, the DAS responded to Staffer 3, saying, "Thanks much. I have reached out to our folks in Brasilia and will be back in touch tomorrow."

76. On or about July 25, 2008, the day of Girlfriend 1's appointment, the visa was approved, and the DAS sent an email to Staffer 3, saying, "The visa was approved today in Brasilia. She was a perfect student visa case—no problems." Staffer 3 replied, "Thanks a lot [DAS], the Senator very much appreciates your help."

77. Within minutes of receiving the approval email from the DAS, Staffer 3 emailed MENENDEZ and Staffer 1 to say, "Sir: Dr. Solomon [sic] visa applicant, [Girlfriend 1], was APPROVED for her student visa this morning in Brasilia. Should someone call Dr. Meigen?" Staffer 1 responded, "Good work! Thanks."

78. Girlfriend 1 completed her application to the University of Miami listing MELGEN as the guarantor that she would have sufficient funds for tuition as well as living and housing expenses. MELGEN partially funded Girlfriend l's tuition through The Sal Melgen Foundation, a non-profit organization with the self-described purpose of "help[ing] with the educational needs of disadvantaged persons" and "assist[ing] with the economic educational needs of children in develeoping [sic] countires [sic] and the U.S." In an email arranging payment, Person A sent

Girlfriend 1 an Application Information Form for funds from The Sal Melgen Foundation. In the email, Person A informed Girlfriend 1, "I also need you to fill the attached application and send it back to me, since we will make the check payable from the foundation and IRS is very strict."

79. Girlfriend 1 met MENENDEZ several times while with MELGEN in New York, New Jersey, Florida, Spain, and the Dominican Republic, including at MELGEN's villa in Casa de Campo. Before her July 25, 2008, visa interview, MELGEN introduced Girlfriend 1 to MENENDEZ as his, MELGEN's, girlfriend.

ii. Melgen's Girlfriend from the Dominican Republic, and Her Sister

80. MELGEN and Girlfriend 2, a Dominican national who worked as a model, began a romantic relationship in approximately 2005.

81. Girlfriend 2 and her younger sister sought to visit MELGEN in the United States on tourist visas in or about 2008.

82. On or about October 13, 2008, MELGEN sent a letter to the United States Embassy in the Dominican Republic, stating the following:

> Dear Consul,
>
> I hope this letter finds you well. I write in reference to [Girlfriend 2] (Passport# [REDACTED]) and [Girlfriend 2's sister] (Passport# [REDACTED]). To whom I have extended an invitation to visit me in West Palm Beach, Florida. During their visit here in the United States I will cover all their expenses and assure that they will return back to Dominican Republic.

> I appreciate your assistance in this matter. If you should need further information please contact me at any of the numbers listed below.
>
> Sincerely,
> Salomon Melgen, M.D.

83. On or about the same day he sent the letter to the Embassy, MELGEN called MENENDEZ and asked for MENENDEZ's assistance in securing visas for Girlfriend 2 and Girlfriend 2's sister.

84. MENENDEZ instructed MELGEN to speak with Staffer 3, the same Senior Policy Advisor for MENENDEZ who assisted with Girlfriend l's visa application in or about July 2008.

85. On or about October 14, 2008, Person A attempted to call Staffer 3, but could not reach him and instead spoke with Staffer 4, another MENENDEZ staffer. Following their conversation, Person A emailed to Staffer 4 a copy of the letter that MELGEN had written to the Embassy. Staffer 4 forwarded the letter to Staffer 3, explaining:

> [Person A] from Dr. Melgan's [sic] office called me. The doctor spoke with RM last night about this letter he sent to the DR embassy. He asked RM if he could "move the letter along." RM then said he needed to talk to you..and since you're out, they called me. Make sense? Anyhoo, the letter is attached, please let me know if you need me to do anything. See you manana!

86. Minutes later, Staffer 3 replied:

> THanks [sic], can you call [Person A] and find out all the detials [sic] — 1) why are they

coming, 2) have they come before, 3) what is the status of their visa application? 4) when did they submit their application? 5) what have they heard in response? 6) when do they plan to travel, 7) is there any reason to think they would not be approved? Any problems? History we should know about etc. . .

87. Staffer 4 then responded:

This is the info that [Person A] (Melgans [sic] assistant) gave me:

1) Sight see and tour around Palm Beach, very good friends with Melgan [sic] (I pressed for more info but he wouldn't go beyond that)

2) They have not been to the US before — this is their first visa they have applied for the US

3) Their status is that they have an appointment on Nov 6 with the embassy in the DR – where they will go over the paperwork and it will be decided if they get the visa or not

4) [Person A] doesn't know when they submitted their application

5) Only response is to come in for their appointment

6) They hopefully plan to travel around Christmas time

7) [Person A] said there is no reason why they would be denied and have no history problems

*He did mention that these people have traveled to Europe and around the world and

> have never had any problems with their paperwork in these countries.

88. The staffers drafted a letter from MENENDEZ supporting Girlfriend 2's and her sister's visa applications. The letter was addressed to the Consul General of the United States Embassy in the Dominican Republic and dated October 22, 2008. It read as follows:

> Dear [Consul General]:
>
> I wanted to bring your attention to the pending non-immigrant visa applications of two citizens of the Dominican Republic: [Girlfriend 2] (Passport no. [REDACTED]), and [Girlfriend 2's sister] (Passport no. [REDACTED]). I understand they are scheduled for interviews at the Embassy on November 6.
>
> While [Girlfriend 2 and Girlfriend 2's sister] have traveled before to Europe and other destinations outside the Dominican Republic, this would be their first trip to the U.S. They plan to visit someone I know well, Dr. Salomon Melgen, who is an eye doctor in Florida.
>
> I appreciate very much your giving these applications all due consideration within the requirements of the law.
>
> Sincerely,
> Robert Menendez
> United States Senator

89. On or about October 22, 2008, Staffer 3 asked MENENDEZ if he should send the "general letter of

support" that the staff had prepared. MENENDEZ replied, "Yes. As well as call if necessary."

90. On or about October 28, 2008, Girlfriend 2 emailed MELGEN to ask for a copy of MENENDEZ's letter of support. The email read as follows:

> [ENGLISH TRANSLATION]
>
> Hello my love,
>
> I write to remind you that you need to send me a copy of what Senator Bob Menendez's office sent you, which I need for the embassy.
>
> And also remember the bank thing please. Thank you. A kiss.
>
> [Girlfriend 2]

91. On or about November 3, 2008, Person A emailed Staffer 4 to inquire whether Staffer 3 had sent the letter of support to the United States Consulate in the Dominican Republic, and to ask for a scanned copy.

92. The next day, on or about November 4, 2008, Staffer 4 emailed the letter of support to Person A.

93. On or about November 6, 2008, the United States Embassy denied Girlfriend 2's and her sister's applications for tourist visas. In the memorandum describing the reasons for refusal, the Embassy employee explained, "Siblings, 18 and 22 yrs old. No children. No previous travel. To go visit a friend in Florida. Neither is working. No solvency of their own. Not fully convinced of motives for travel."

94. That same day, on or about November 6, 2008, Person A alerted MENENDEZ's staff of the Embassy's decision, emailing Staffer 4 the following update:

> Dr. Melgen just called me that there [sic] Visa was denied. I tried calling you at the office, but it went straight to voicemail. The Doctor tells me that the lady just took a quick look at the papers and told them "you are students" and denied there [sic] Visa. The lady was very rude to them. The doctor wanted to see if there is something he can do, since the lady obviously didn't read or checked [sic] any papers.

95. Additionally, MELGEN alerted MENENDEZ on or about November 6, 2008, forwarding him an email Girlfriend 2 had written describing details of the visa interview. MENENDEZ forwarded Girlfriend 2's email to Staffer 3, stating, "Theu [sic] were denied their visa. I would like to call Ambassador tomorrow and get a reconsideration or possibly our contact at State. Thanks."

96. Staffer 3 replied within minutes, informing MENENDEZ,

> Yes, we talked to his office today and are preparing a follow-up letter to send out in the morning to the consul general in the DR. We should get a response within a couple of days. Then, we could follow-up with a phone call if need be, since it's not yet clear why they were denied?
>
> Would you rather wait for the outcome of a follow-up letter or call the Ambo asap?

97. Minutes later, MENENDEZ responded, "Call Ambassador asap."

98. On or about November 9, 2008, MELGEN sent Staffer 3 and Staffer 4 scanned copies of all of the

documents that Girlfriend 2 and her sister gave to the Embassy.

99. On or about November 12, 2008, the Chief of the Nonimmigrant Visa Unit sent MENENDEZ a letter regarding the visa denial. The letter stated as follows:

> Dear Senator Menendez:
>
> Thank you for your recent inquiry regarding the nonimmigrant visa application of [Girlfriend 2] and [Girlfriend 2's sister].
>
> [Girlfriend 2] and [Girlfriend 2's sister] were denied visas on November 6, 2008, under Section 214(b) of the U.S. Immigration and Nationality Act. Under this law, all applicants for nonimmigrant visas are presumed to be intending immigrants. In order to be approved for a visa, applicants must satisfy the interviewing consular officer that they are entitled to the type of visa for which they are applying and that they will depart the United States at the end of their authorized temporary stay. This means that before a visa can be issued, applicants must demonstrate strong social, economic, and/or family ties outside the United States.
>
> Unfortunately during their interview, [Girlfriend 2] and [Girlfriend 2's sister] were unable to overcome the presumption of the law. I have reviewed the applications and the interviewing officer's notes, in addition to the information we received from you, and I must agree with the decision of the interviewing officer in the case.

> Any applicant found ineligible under Section 214(b) may schedule an appointment for a new interview. During the interview, the applicants will be given another opportunity to demonstrate their qualifications for visas.
>
> I hope this information has been helpful to you and to your constituent.
>
> Sincerely,
> [REDACTED]
> Chief, Nonimmigrant Visa Unit

100. On or about November 13, 2008, Staffer 3 emailed MELGEN, "Dr Melgen: I forwarded the information you send [sic] to the Embassy in the DR on Monday of this week. We haven't heard back but will let you know when we do. Let's stay in touch."

101. Person A followed up with MENENDEZ's staff, emailing Staffer 4 on or about November 21, 2008, to ask if they "had heard anything from the Embassy in Dominican Republic on why the visas were denied." Staffer 4 replied, "As of right now, we have not heard anything. We will let you know as soon as we get some news."

102. On or about November 24, 2008, Staffer 3 emailed MELGEN and Person A to say, "State notified me today that the visa applicants in the DR have been called back for a 2nd interview."

103. Person A responded, "Thanks for the email. Dr. Melgen asks if you want them to contact a certain person or if someone from the embassy will contact them, since they haven't done it yet. Please let me know so I can tell the Doctor. He also would like to thank you for all your help."

104. Staffer 3 replied, "The latter, if they don't hear from the Embassy in a week, let me know."

105. Girlfriend 2 and her sister were re-interviewed on or about December 1, 2008. At the conclusion of the interview, Girlfriend 2 and her sister were informed that their visa applications were approved.

106. On or about December 10, 2008, Staffer 3 sent an email from his personal account to Staffer l's personal account with the subject line "2 people from the DR who wanted visas to visit Dr. Melgem [sic] GOT THEM." Staffer 3 wrote, "In my view, this is ONLY DUE to the fact that RM intervened. I've told RM."

107. MENENDEZ first met Girlfriend 2 in the Dominican Republic prior to when she received her visa in or about 2008, when MELGEN, Girlfriend 2, and MENENDEZ stayed together at MELGEN's home in Casa de Campo.

iii. MELGEN's Girlfriend from Ukraine

108. Girlfriend 3, a Ukrainian national who worked as a model and actress, was another woman with whom MELGEN had a romantic relationship.

109. In or about 2006 or 2007, MELGEN invited Girlfriend 3, who was residing in Spain at the time, to visit him in Miami, Florida. Girlfriend 3 needed a tourist visa in order to do so.

110. Sometime in or about 2007, MELGEN sought MENENDEZ's assistance in obtaining Girlfriend 3's visa. On or about February 13, 2007, Staffer 5, MENENDEZ's Chief of Staff at the time, wrote an email to Staffer 6, a MENENDEZ staffer, asking her, "did we send dr. Melgen's letter?" Staffer 6 responded:

> I'm assuming your [sic] referring to an issue I discussed with RM?
>
> RM asked me to work on an issue of a Ukrainian visa for a woman in Spain related to Dr. Melgen. I passed all the information on to [Staffer 7, a MENENDEZ staffer] and she knew it was an RM personal request. She has followed up on it.

111. On or about February 15, 2007, Staffer 7 sent an email to Staffer 5 stating, "This will be the new version of the letter. However, I am still missing the new interview date. This is so you can have an idea of what the letter will say....." The draft of the letter read as follows:

> Dear Consul General:
>
> I am writing on behalf of Salomon Melgen, who has contacted my district office in reference to a non-immigrant visa for his friend, [Girlfriend 3] (DOB: [REDACTED]).
>
> According to Dr. Melgen, he has extended an invitation to his good friend [Girlfriend 3] to undergo medical evaluation for plastic surgery as well as to visit with him within the U.S. Upon receiving the invitation, [Girlfriend 3] had contacted the U.S. Embassy in Madrid (Spain) and subsequently, she was scheduled for a non-immigrant visa interview for February 12, 2007. Unfortunately, [Girlfriend 3] had to reschedule the interview. Dr., [sic] Melgen states that [Girlfriend 3] has no intentions of abandoning her residency abroad due to the fact that she has such strong ties to Spain. Furthermore, [Girlfriend 3] is enrolled at the University of Blanca ford

in Barcelona, Spain and she is also the broadcast image for channel Tele 5 Spana and thus, a famous person in Spain. Thus, Dr. Melgen assures that if [Girlfriend 3] is granted a non-immigrant visa, she will remain in the U.S. only for the time allotted by the visa and will return to her home abroad before the non-immigrant visa expires. Dr., [sic] Melgen will assume all financial responsibilities during her stay in the United States. Therefore, Dr. Melgen respectfully requests that his good friend, [Girlfriend 3], be granted a non-immigrant visa so that she may be able to travel to the U.S. to obtain a medical evaluation and visit with him.

Dr. Melgen is a person of the highest caliber. He is a fine citizen and held in high esteem by his peers. In this time of heightened security, I can appreciate the gravity of your task. Fastidious review of visa appointments is vital to the future of this great nation. Therefore, if there is anything my office or Dr. Melgen can do to assist you in making a prompt and fair decision to grant [Girlfriend 3] a visa petition, please inform my office at your earliest convenience.

In view of these circumstances, I respectfully request that your good office review this matter and kindly consider granting the non-immigrant visa with guidance from the Immigration and Nationality Act.

Thank you for your cooperation. Please feel free to contact my Newark office if I can be of assistance to you or contact my Director of Immigration Services, [Staffer 7], at

[REDACTED] should you have additional questions.

Sincerely,
Robert Menendez
United States Senator

112. Girlfriend 3 was granted a visa on or about February 22, 2007.

113. After receiving her visa, Girlfriend 3 traveled to Florida. While there, she stayed in an apartment that MELGEN owned in Palm Beach. She visited Miami, where she joined MELGEN and MENENDEZ for dinner at Azul, a restaurant in the Mandarin Hotel. MELGEN introduced MENENDEZ to Girlfriend 3 as the man who helped Girlfriend 3 with her visa.

B. MENENDEZ's Efforts to Advance MELGEN's Interests in a Foreign Contract Dispute

114. In or about 2006, MELGEN purchased an option to buy a 50-percent share of a company called ICSSI, SA, which he exercised in or about 2011. ICSSI was a company that had entered into a contract with the Dominican Republic on or about July 18, 2002. Under the contract, ICSSI acquired the exclusive rights to install and operate X-ray imaging equipment in Dominican ports for up to 20 years. The contract required all shipping containers entering Dominican ports to be X-rayed at a tariff of up to $90 per container, which made this contract worth potentially many millions of dollars. Soon after the contract was executed, ICSSI and the Dominican Republic began litigating its legitimacy and legality.

115. In or about 2011, MELGEN established an American company, Boarder Support Services, LLC

(also known as Border Support Services) as a holding company for the contract.

116. In or about February 2012, MELGEN acquired the remaining 50 percent of ICSSI, thereby obtaining exclusive ownership and control of any enforceable rights under the contract.

i. MENENDEZ's Meeting with the Assistant Secretary of State for INL to Advance MELGEN's Interests in his Contract Dispute with the Dominican Republic

117. On or about May 16, 2012, MENENDEZ advocated for MELGEN's interests in his Dominican contract dispute in a meeting with the Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs (INL).

118. Prior to this meeting, on or about March 12, 2012, Person C, a friend of MELGEN's who was a former MENENDEZ staffer, contacted the U.S. Department of State to request a phone call with the Assistant Secretary of State for INL.

119. On or about March 13, 2012, State 1, an aide to the Assistant Secretary, called Person C on the Assistant Secretary's behalf. That same day, State 1 emailed the Assistant Secretary the following note:

> Sir: I called back [Person C]. He said the current scanners are inadequate and the port security is deteriorating quickly. The customs director is highly corrupt. He proposes going after visas for corruption purposes, which would have a cultural impact and send a message to the president. I agreed to discuss it with him when he's back in town. However, he says he still wants to talk to you briefly

> about this. [Person C] doesn't currently represent anyone involved in this contract dispute over scanners but he will soon join the board of Border Security Services. And, he dropped the name of Sen. Menendez pretty squarely as having an interest in this case.

120. After State 1's call with Person C, in or about March or early April 2012, the Assistant Secretary met with Person C, who represented to the Assistant Secretary that he was there to speak on behalf of a United States entity involved in a contract dispute with the Government of the Dominican Republic concerning the screening of shipping containers at Dominican ports. Person C asked the Assistant Secretary to incorporate this contract into larger law enforcement conversations with the Dominican government, arguing that the contract would help INL meet drug interdiction and port security objectives in the region. Person C referenced New Jersey connections to the issue.

121. On or about April 6, 2012, Person C emailed the Assistant Secretary regarding the ICSSI issue. In that email, Person C stated, "Below, along with three brief attachments, I have tried to succinctly summarize the issues at hand in the matter of the DR port security contract and ask that you consider taking appropriate actions in this serious matter."

122. MENENDEZ was in the Dominican Republic from on or about April 5 to on or about April 11, 2012, and MELGEN was in the Dominican Republic from on or about April 2 to on or about April 10, 2012.

123. On or about May 10, 2012, Staffer 8, MENENDEZ's Senior Policy Advisor, reached out to State 2, a staffer to the Assistant Secretary, to arrange

a meeting between MENENDEZ and the Assistant Secretary. That same day, MELGEN promised Staffer 1 that he would send the $60,000 that Staffer 1 requested in the April 30, 2012, email, as set forth in paragraphs 41 to 42 and 47 to 49. Staffer 8 and State 2 exchanged the following emails:

> 12:22 p.m. (Staffer 8 to State 2)
>
> [State 2] —
>
> Just saw Menendez and he would like to see [the Assistant Secretary] next week to talk about DR (cargo from DR coming into US ports) and [REDACTED].
>
> I'll put in the request through H [the Office of Legislative Affairs in the State Department], but wanted to give you a heads up.
>
> [Staffer 8]
>
> 12:24 p.m. (State 2 to Staffer 8)
>
> Cool, thanks for the heads up — my long lost friend!! I've been waiting anxiously for you to pop up! The second piece I get — can you help me with the first. . . . Any more specificity?
>
> Hope to see you next week!
>
> [State 2]
>
> 12:27 p.m. (Staffer 8 to State 2)
>
> Hah! [REDACTED]. I had to drag even this information out of him. He was just in the DR for a personal visit and imagine he has some observations to share, but he continues to have concerns about what is flowing through the ports either unobserved or with tacit permission.

> 12:29 p.m. (State 2 to Staffer 8)
>
> Roger that. I know [the Assistant Secretary] will be happy to opine and be helpful however he can — that said, it might be the case that WHA [(the Bureau of Western Hemisphere Affairs at the Department of State)] is the true angle he will want to pursue on the DR point. But since [the Assistant Secretary] can chat [REDACTED], what the heck — he can always offer his two cents.
>
> If H is in the room — best if the good Senator from New Jersey doesn't mention the prior private meeting they had ☺
>
> [State 2]
>
> 12:32 p.m. (Staffer 8 to State 2)
>
> Understood. I think it would behoove [the Assistant Secretary] to have some talkers on any new DR initiatives, particularly at the ports.

124. The meeting between the Assistant Secretary and MENENDEZ occurred on or about May 16, 2012, the same day that MELGEN and his family gave $40,000 to the New Jersey Democratic State Committee Victory Federal Account and $20,000 to MENENDEZ's legal defense fund, as set forth in paragraphs 43 and 50 to 52. During the meeting, MENENDEZ questioned the Assistant Secretary about the contract dispute between MELGEN and the Dominican Republic. MENENDEZ expressed dissatisfaction with INL's lack of initiative in enforcement of the contract.

125. That same day, the Assistant Secretary sent the following email to his staffers describing the meeting:

> DR port issue. [State 1] will remember the Senator raised several months ago the issue of a US company attempting to sell a tracking and security system to the DR port authority, and suggesting they were being blocked by corrupt officials. This is what he was alluding to today. If I recall correctly, our investigation last time suggested this was more a commercial dispute than a law enforcement issue. I told the Senator we were working up some sort of port initiative, once we had a concrete initiative we would see if it could leverage a correct GODR decision on the port contract, and I would let him know how this developed. He said he wanted to hear of a solution by July 1. If not, he would call a hearing to discuss it.

126. On or about June 14, 2012, Staffer 8 emailed State 2, "Can we talk DR? Anything to share based on [MENENDEZ and the Assistant Secretary's] last conversation?"

127. Approximately two hours later, State 2 replied to Staffer 8, "We're working on getting an update on the specific issue he raised. I took it that the particular matter was most important to him, right? We are unfortunately not the lead so we've been working the phones hard to get info from the embassy."

128. On or about June 15, 2012, the Assistant Secretary received an email from Person C attaching a copy of a letter that MELGEN sent to Dominican

government officials urging that they enforce the contract.

129. Three days later, on or about June 18, 2012, the Assistant Secretary forwarded the email and attachment to his staff with the following message:

> FYI
>
> This is the case about which Sen. Menendez threatened to call me to testify at an open hearing. I suspect that was a bluff, but he is very much interested in its resolution. A reminder that I owe the Senator an answer to the question "What can we do to resolve this matter?"

130. That same day, State 2 responded to the Assistant Secretary's email:

> I chatted with the Senator's staff on Thursday in an effort to temper expectations and to indicate that we're working to gather any info that we can to pass along. This is most certainly still on their minds. The response will most appropriately come from a phone call from you to the Senator, ideally as soon as tomorrow. If not tomorrow, the last opportunity before the Senator's deadline will be directly after your return from Peru. Absent a real warm and fuzzy answer, it's better to reach out sooner than later.

131. On or about June 20, 2012, Person C sent the Assistant Secretary another email regarding the ICSSI situation, with the subject "ICCSI [sic]-Border Security Solutions documents." The Assistant Secretary forwarded it to his staff that same day with

the message, "More on Menendez' favorite DR port contract case."

ii. MENENDEZ's Attempt to Stop CBP from Donating Cargo Screening Equipment to the Dominican Republic

132. On or about January 11, 2013, MENENDEZ called Staffer 9, his Chief Counsel, and asked her to contact CBP to stop them from donating shipping container monitoring and surveillance equipment to the Dominican Republic—a donation that would hurt MELGEN's financial interests in the contract he had to provide exclusive cargo screening in Dominican ports.

133. Shortly after the call, at 1:56 p.m., Staffer 9 sent an email to CBP 1 at CBP entitled "Customs equipment– Dom Republic." The email said the following:

> Dear [CBP 1],
>
> 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?
>
> Thanks. My number is [REDACTED.]

134. At 2:41 p.m., CBP 1 responded, "We need to look into the matter. I'm adding [CBP 2], whose team can assist in running this down. We'll get back to you ASAP."

135. At 2:48 p.m., MENENDEZ sent an email to Staffer 9 with the subject, "Any info?"

136. At 3:01 p.m., Staffer 9 replied to CBP 1 and CBP 2, "Thanks, my boss considers it very urgent so would love any update by the end of the day. My cell is [REDACTED.] Thanks!"

137. At 4:04 p.m., CBP 2 replied to Staffer 9 with the following information:

> I just spoke with our Office of Field Operations. The contract that you are referring to for additional equipment is between the Government of the Dominican Republic and a private company. CBP has not been a part of this contract, as CBP is present at one port in the Dominican Republic, Port of Caucedo, and the equipment that is being used there was donated by CBP when the operations started in 2006. CBP has not agreed to any expanded operations in the Dominican Republic and has not provided any additional equipment.

138. At 4:13 p.m., Staffer 9 notified MENENDEZ,

> This is their response:
>
> The contract that you are referring to for additional equipment is between the Government of the Dominican Republic and a private company. CBP has not been a part of this contract, as CBP is present at one port in the Dominican Republic, Port of Caucedo, and the equipment that is being used there was donated by CBP when the operations started in 2006. CBP has not agreed to any expanded operations in the Dominican Republic and has not provided any additional equipment.

139. At 4:18 p.m., MENENDEZ replied to Staffer 9, "What is the name of the private company?"

140. At 4:39 p.m., Staffer 9 replied to CBP 2, "Thanks very much- sounds like our information was incorrect. What is the name of the private company to be sure we are discussing the same thing? Thanks[.]"

141. At 4:41 p.m., CBP 2 replied, "The company is called ICCSI [sic]."

142. At 9:46 p.m., Staffer 9 replied to MENENDEZ, "The company is called ICSSI."

143. This series of emails occurred one day after MENENDEZ, MELGEN, and Person A golfed together at the private Banyan Golf Club in West Palm Beach, Florida, where MELGEN paid for the greens fees, as referenced in paragraph 45. After the round of golf, Person A paid $356.80 for a meal at the Raindancer Steak House in West Palm Beach, also referenced in paragraph 45.

C. MENENDEZ's Advocacy on Behalf of MELGEN in a Medicare Billing Dispute Worth Approximately $8.9 Million

144. For several years, MENENDEZ, personally and through his aides, advocated for MELGEN's interests in a Medicare billing dispute MELGEN had with CMS and HHS involving millions of dollars.

145. MELGEN's health care dispute arose in or about July 2008, when the Zone Program Integrity Contractor (ZPIC) for CMS began to investigate MELGEN's billing practices for a drug called Lucentis. Lucentis is an injectable drug that is stored in single-use vials as a preservative-free solution. Although the Lucentis vials contain excess solution, called overfill, in case of spillage, the Food and Drug Administration (FDA) has only approved the use of one dose per vial, which means that each vial should only be used for a single eye of a single patient. The Centers for Disease Control and Prevention (CDC) has also issued guidelines warning that reusing a single-use vial, or harvesting the preservative-free solution to treat more than one patient, spreads the risk of infection. The manufacturing label for Lucentis also instructs that "each vial should be used for the treatment of a single eye." Although the FDA, CDC, and manufacturing label caution against harvesting Lucentis, MELGEN did so, using overfill from the single-dose vials to treat up to three patients. Then, through his company, VRC, MELGEN sought and obtained reimbursement from CMS for the full cost of a single vial of Lucentis for each dose he administered, even though he had not incurred the expense of purchasing a new vial for each dose. In other words, MELGEN billed CMS for multiple vials of Lucentis that he never actually used and for which he never incurred any cost.

146. In or about July 2008, the ZPIC requested patient records from MELGEN's practice in connection with the administration of Lucentis for patients treated from on or about February 1, 2007, through on or about December 21, 2007.

147. In or about January 2009, the ZPIC requested patient records from MELGEN's practice in connection with the administration of Lucentis for patients treated from on or about January 2, 2008, through on or about December 23, 2008.

i. MENENDEZ Directs His Staff to Assist MELGEN in His Medicare Billing Dispute

148. On or about June 12, 2009, after MELGEN learned that an audit of his Medicare billing was likely to result in a multi-million dollar overpayment finding, MENENDEZ emailed Staffer 10, his Legislative Assistant handling health care issues. The email's subject line was "Dr melgen." In the email, MENENDEZ instructed Staffer 10 to "[p]lease call him asap at [REDACTED] re a Medicare problem we need to help him with."

149. Staffer 10 replied that evening that she and Staffer 11, MENENDEZ' s Deputy Chief of Staff, had called MELGEN twice that day and were "looking into how [they could] be helpful."

150. On or about June 19, 2009, Staffer 11 emailed MENENDEZ to inform him that she and Staffer 10 had had a conference call with MELGEN "in which he asked [Staffer 11 and Staffer 10] to weigh in with CMS," but that MELGEN's attorneys had told them to wait for strategic reasons.

151. The next day, on or about June 20, 2009, Person A sent Staffer 10 an email entitled "Dr. Melgen." Person A copied Lobbyist 1, MELGEN's lobbyist and lawyer, on the email, sharing with Staffer 10 "some points that Dr. Melgen wanted [Person A] to provide" in support of MELGEN's position in his Medicare billing dispute with CMS. In the email, Person A also said that MELGEN "wants to see if [Staffer 10] and [Lobbyist 1] could meet early this week to speak. He wants everyone to know the facts and to be on the same page."

152. That same day, on or about June 20, 2009, Staffer 10 responded, "Thank you. Yes, setting up a call early next week would be great. What day and time works [sic] best?"

153. Approximately three minutes later, Person A forwarded Staffer 10's response to MELGEN.

154. On or about June 21, 2009, MELGEN emailed Staffer 10, copying MENENDEZ, with more information about MELGEN's specific case so that she would "better understand the facts."

155. Over the next few days, MELGEN requested more calls with Staffer 10, and Lobbyist 1 sent more information about the status of MELGEN's dispute to her.

156. On or about June 30, 2009, the ZPIC formally notified MELGEN that it had conducted a post-payment review of claims and concluded that Medicare had overpaid MELGEN on claims he submitted, through VRC, for Lucentis. The ZPIC informed MELGEN that it had preliminarily determined that his practice owed approximately $8,981,514.42.

157. Beginning in or about July 2009, MENENDEZ's staff reached out to CMS to advocate for MELGEN. To address MELGEN's pressing concern, Staffer 10 inquired as to whether a CMS administrative contractor would be issuing a new policy that would affect the future coverage of Lucentis in Florida.

158. On or about July 10, 2009, HHS 1, the then-Deputy Assistant Secretary for Legislation at HHS, emailed Staffer 10 to notify her that "CMS has confirmed that [the contractor] has not issued, nor does it plan to issue, a revision to its local coverage determination for Lucentis."

159. Staffer 10 forwarded that email to Staffer 11, who responded, "Yeah, but what are they talking about being in the works . . . . a decision on Melgen specifically? I think we have to weigh in on his behalf . . . . to say they can't make him pay retroactively."

160. That same day, Staffer 10 sent MENENDEZ the following email, with the subject line, "Update on Dr. Melgen and CMS":

> I understand that Dr. Melgen might be calling you this afternoon so I wanted to let you know where things stand. [Staffer 11] and I have spoken to Dr. Melgen every few days to update him on the situation. We have reached out to a good contact at HHS (who used to work at the DPC) to ask them to look into the situation and find out what is going on. They are hoping to get back to us by the end of the day with additional information so that we can best advise you about how to proceed for your involvement. Also, just fyi, we received an email from Dr. Melgen yesterday sharing a letter he sent to the lead

> investigator on his case that summarizes his situation well and we asked him if we could share that with HHS to further explain his situation.

161. While Staffer 10 was communicating with CMS officials, she continued to receive case-specific information from MELGEN's lobbyists/lawyers.

ii. MENENDEZ Advocates on Behalf of Melgen to the Director and Acting Principal Deputy of CMS

162. On or about July 22, 2009, Staffer 11 emailed MENENDEZ to inform him, "As you know we've been working on the Melgen case everyday and just this morning got an update from his lawyer that we expect a response to be made public this week." Staffer 11 requested a breakfast meeting with MENENDEZ to update him, which would precede "find[ing] a time for [MENENDEZ] to call the Sec" that day.

163. That same day, Lobbyist 1 emailed MELGEN, copying Staffer 10 and Staffer 11, to inform them that he had received a document regarding Lucentis that CMS proposed to publish that week. Lobbyist 1 complained that there was "no legal basis" for the contents of the document—which were adverse to MELGEN's interests—and wrote, "I am forwarding this to Senator Menendez's office. Clearly, if there is a way to stop publication, we need to do so immediately."

164. Later that day, Staffer 10 thanked him for the update and informed him that she was "working to schedule a time for the Senator to call the Secretary today, so thanks for the update."

165. In the meantime, Staffer 10 arranged a phone call with CMS officials that day in which she insisted

that the CMS regulations regarding Lucentis were unclear, and that there existed "conflicting information" that supported MELGEN's position in his financial dispute.

166. At this point, MENENDEZ sought to speak to a high-level official to advance MELGEN's position. HHS determined that the proper person to speak with MENENDEZ was HHS 2, the Director and Acting Principal Deputy of CMS. In arranging this conversation, HHS 1 sent HHS 2 the following email:

> Hi, [HHS 2]. Just tried to call you but understand you are in Baltimore today. We have a bit of a situation with Senator Menendez, who is advocating on behalf of a physician friend of his in Florida. The bottom line is that he wants to talk to someone <u>today</u> – I talked his office out of the Secretary, but therefore through [sic] you under the bus. Would you be able to speak with Senator Menendez some time today? Can I give you a call this a.m. to give you some background on discussions thus far? . .
>
> Many thanks and sorry!

167. The call between MENENDEZ and HHS 2 occurred on or about July 27, 2009. To prepare MENENDEZ for this call, Staffer 10 prepared a "Talking Points" memorandum, which began, "I was contacted by Dr. Melgen regarding an audit by First Coast, the Medicare administrative contractor in Florida." The opening section continued, "I understand that you are familiar with his situation and Lucentis but let me go through his concerns," and then outlined MELGEN's arguments for why he should not have to pay the approximately $8.9 million to CMS. The

opening section ended, "I am not weighing on how you should administer Lucentis, nor on how his specific audit should be resolved but rather asking you to consider the confusing and unclear policy on this issue and not punish him retroactively as a result."

168. While Staffer 10 was preparing the "Talking Points" memorandum for MENENDEZ, Lobbyist 2, another one of MELGEN's lobbyists/lawyers, emailed Staffer 11 arguments that MELGEN wanted to emphasize in support of his position. Staffer 11 forwarded the email to Staffer 10 and asked her to incorporate the arguments into the memorandum for MENENDEZ. Staffer 10 did so, including sections in the memorandum entitled "arguments we received from [Lobbyist 2]" and "Dr. Melgen also asked that you have these points."

169. During the call on or about July 27, 2009, between HHS 2 and MENENDEZ, MENENDEZ asserted that CMS's policy guidelines regarding single-use vials were vague and that a doctor in Florida was being treated unfairly as a result. HHS 2 responded that he had reviewed the bills and spoken to the contractors, and that they should allow the case to take its course. HHS 2 reminded MENENDEZ that the doctor had due process and appellate rights. MENENDEZ told HHS 2 not to tell him (MENENDEZ) about MELGEN's appellate rights and abruptly ended the call.

170. On or about July 31, 2009, Person A sent Staffer 10 an email entitled "Dr. Melgen Call." In it, Person A informed Staffer 10, "Dr. Melgen is available now. If you can call him again at [REDACTED.] He is waiting for your call."

171. Later that day, Staffer 10 sent Staffer 11 an email with the subject line, "talking to dr melgen," writing that "He is v upset."

iii. MENENDEZ Attempts to Speak to the Secretary of HHS to Advocate on MELGEN's Behalf After MELGEN Receives Unfavorable Rulings in His Medicare Billing Dispute

172. On or about August 5, 2009, the Medicare Administrative Contractor (MAC-1) adopted the ZPIC's finding and issued a revised Overpayment Demand to MELGEN in the amount of approximately $8,982,706.98.

173. One week later, on or about August 12, 2009, MENENDEZ emailed Staffer 1, "Dr. Melgen is still in the nonlitigant stage, so we should determine who has the best juice at CMS and Dept of Health."

174. On or about August 13, 2009, Lobbyist 1 emailed Staffer 10 and Staffer 11 to inform them that "Dr. Melgen received the overpayment demand letter from First Coast," which he stated was sent prematurely because MELGEN was preparing to appeal the underlying decision. Staffer 11 forwarded the email to MENENDEZ the next day, asking, "Do you want us to ask our CMS leg affairs contact to look into this?" MENENDEZ replied, "Yes I do want us to contact them on this issue."

175. On or about August 20, 2009, Staffer 10 emailed HHS 1 and copied Staffer 11, requesting a call regarding MELGEN's "issue regarding repayment demand letters from several Medicare supplemental insurers."

176. On or about August 21, 2009, MELGEN filed a Request for Redetermination with the MAC-1.

177. Between in or about September 2009 and January 2010, MELGEN's team continued to update MENENDEZ's staff regarding the status of MELGEN's dispute.

178. On or about October 13, 2009, the MAC-1 issued a denial of MELGEN's Request for Redetermination. After the MAC-1 issued this denial, on or about November 25, 2009, Person A sent an email to Staffer 1 with the subject, "Dr. Melgen," that included an attachment entitled, "Medicare Second Appeal." In the email, Person A said, in part, "Dr. Melgen asked me to forward the attached QIC Appeal."

179. On or about January 29, 2010, the Qualified Independent Contractor (QIC) affirmed the Overpayment Determination against MELGEN in the amount of approximately $8.9 million. After the QIC issued its decision, on or about March 30, 2010, MELGEN requested a hearing before an Administrative Law Judge.

180. On or about August 4, 2010, Staffer 10 emailed HHS 3, an HHS staffer, with the following request:

> My boss would like to try and set up a call with [the] Secretary [of HHS] (not clear on the topic at this point—will try and find out). Could you connect us to her scheduler or whomever you think is best so we can arrange a time?

181. That same day, HHS 3 put Staffer 10 in touch with HHS 4, the Deputy Director for Scheduling and Advance for the Secretary of HHS, but specified that HHS "do[es] need to know what's on [MENENDEZ's] agenda."

182. On or about August 5, 2010, HHS 4 entered the email exchange, again asking for "any background on the topic" for the call.

183. That same day, Staffer 12, MENENDEZ's scheduler, emailed HHS 4 that MENENDEZ wants "to try and speak with the Secretary as soon as possible," listing potential available times for that evening and the following day. In response to the HHS requests for the topic of the call, she wrote, "Unfortunately my boss didn't share with me the topic—just that he really wished to speak with the Secretary as soon as possible."

184. Also that same day, HHS 4 suggested that the call occur at 1:15 p.m. on August 6, 2010, but Staffer 12 stated that MENENDEZ would be on a flight at that time and therefore unable to take a call. In fact, the flight MENENDEZ took that day was on MELGEN's private jet from West Palm Beach, Florida, to MELGEN's villa in Casa de Campo.

iv. MENENDEZ Arranges for MELGEN to Lobby the Chair of the Senate HELP Committee Regarding His Medicare Billing Dispute

185. In or about May 2011, MENENDEZ arranged for MELGEN to meet with Senator 2, Chair of the Senate Health, Education, Labor, and Pensions (HELP) Committee, so that MELGEN could personally solicit Senator 2's assistance with his Medicare billing dispute.

186. MENENDEZ first spoke to Senator 2 about MELGEN directly, and then, on or about May 5, 2011, Staffer 1 emailed Senator 2's Chief of Staff, requesting a meeting between Senator 2 and MELGEN. The email noted that "[t]he doctor Senator Menendez

spoke to [Senator 2] about is Dr. Sal Melgen," and stated that "CMS is pursuing Dr. Melgen for a matter around dosing procedures and relevant charges to Medicare."

187. On or about May 16, 2011, the Health Policy Director for the Senate HELP Committee reached out to MENENDEZ's office for more information, and Staffer 10 and Staffer 11 arranged to speak to her about MELGEN's Medicare billing dispute.

188. The meeting that MENENDEZ arranged between MELGEN and Senator 2 took place on or about May 18, 2011. MENENDEZ introduced MELGEN to Senator 2 at the beginning of the meeting and remained while MELGEN solicited Senator 2's assistance.

189. On or about June 24, 2011, MELGEN forwarded to MENENDEZ a memorandum he had received from Lobbyist 1, his lobbyist/lawyer, which memorialized a conversation between a staffer for Senator 2 and CMS that was unfavorable to MELGEN. In the email, MELGEN said to MENENDEZ, "These people are unbelievable. Again, they continue to lie."

v. After MELGEN Receives More Unfavorable Rulings, MENENDEZ Enlists the Office of the Senate Majority Leader to Assist MELGEN in His Medicare Billing Dispute

190. On or about June 13, 2011, the Administrative Law Judge issued a decision affirming the decision of the QIC.

191. On or about August 14, 2011, MELGEN filed an appeal before the Medicare Appeals Council (MAC-2).

192. On or about September 19, 2011, MELGEN forwarded to MENENDEZ an email from Lobbyist 1 entitled "Secretary Authority." Among other things, the email said the following:

> [I]f the MAC[-2] were contacted by CMS and advised that CMS believed that the position of the provider were correct, it would eliminate the dispute and the MAC would dismiss the appeal. Naturally, in that case, First Coast would be directed by CMS to make payment to you. Since CMS is subject to the Secretary's oversight, my contact believed that the Secretary could direct CMS to drop its opposition and notify the MAC that it agreed with the position of the provider.
>
> Overall, this makes sense, because if you consider the fact that if the MAC ruled against us, and we went to court, we would be suing the Secretary as the head of HHS -- so that means that the Secretary would be making the decision in the litigation.
>
> Given these facts, it seems to me that the best approach to the Secretary is not to ask for the Secretary to direct the MAC to find in your favor, but to ask the Secretary to direct CMS to reverse its position and to notify the MAC that it agrees with you.

193. At least as early as in or about March 2012, Staffer 13, Staffer 10's replacement as MENENDEZ's Legislative Assistant in charge of health care matters, worked with MELGEN's lobbying/legal team to provide information to the Senior Health Counsel for Senator 3, the Senate Majority Leader, regarding MELGEN's Medicare billing dispute.

194. On or about April 6, 2012, Staffer 13 sent the following email, entitled "Melgan [sic]," to Staffer 1:

> Can you circle back with Dr. Melgan's [sic] attorney to find out specifically what they're asking for? I just heard from [the Senior Health Counsel for Senator 3], who needs to know because CMS is asking. I know they've changed from their original ask, so we need to know what they're seeking now.

195. That same day, Staffer 1 responded, "Will do. Thanks."

196. Staffer 13 arranged for MELGEN's lobbying/legal team to meet on or about May 8, 2012, with the Senior Health Counsel for Senator 3.

197. On or about May 22, 2012, Person A sent MENENDEZ an email entitled "Email — [Lobbyist 1]" that contained the email address for Lobbyist 1.

vi. MENENDEZ Advocates on MELGEN's Behalf to the Acting Administrator of CMS

198. Approximately six days after MELGEN issued a $300,000 check from VRC to Majority PAC, earmarked for New Jersey, MENENDEZ advocated on behalf of MELGEN's position in his Medicare billing dispute to the Acting Administrator of CMS.

199. On or about June 5, 2012, MENENDEZ and his staff met with Lobbyist 1 to prepare MENENDEZ to advocate on MELGEN's behalf to the Acting Administrator of CMS.

200. On or about June 7, 2012, MENENDEZ met with the Acting Administrator of CMS and raised the issue at the core of MELGEN's Medicare billing dispute. Specifically, MENENDEZ pressed the Acting

Administrator of CMS about multi-dosing and Medicare payments, and advocated on behalf of the position favorable to MELGEN in his Medicare billing dispute.

201. On or about June 12, 2012, Lobbyist 1 sent Staffer 1 a memorandum entitled "Talking Points: CMS Policy" for MENENDEZ to use during future advocacy with the Acting Administrator of CMS. Approximately two weeks later, after Lobbyist 1 asked Staffer 1 if there had been "any follow up with respect to the conversation with [the Acting Administrator of CMS]," Staffer 1 emailed Lobbyist 1 the following:

> [Lobbyist 1]:
>
> The Senator is scheduled to receive a call from [the Acting Administrator of CMS] mid-morning this coming Tuesday. I shared you're [sic] your memo with [Staffer 13] that contains arguments to use in response [sic] [the Acting Administrator of CMS] should she try to make the case that other agencies have policies in place that prohibit multi-dosing.
>
> [Staffer 13] is preparing a memo for the Senator that covers your points for the first meeting, a review of the conversation in the first meeting, and your most recent memo with proposed counter-arguments.
>
> I am out next week but the Senator may want to do a call to prep for his Tuesday call with [the Acting Administrator of CMS]. Should this be the case, will you be around Monday afternoon or Tuesday morning.
>
> Thanks.
>
> [Staffer 1]

202. On or about June 30, 2012, Staffer 13 prepared the memorandum to MENENDEZ described in Staffer l's email in the preceding paragraph, and sent it to Lobbyist 1 for his review. That memorandum notes that "[t]he subject of the call [with the Acting Administrator of CMS] is to discuss the issue [of] Medicare reimbursement when a physician multi-doses from a single-dose vial." The memorandum also includes as one of four "Talking Points for the Call" the following argument: "The CDC guidelines, while necessary to ensure patient safety and reduce the number of healthcare-associated infections, has no bearing on Medicare reimbursement policy[.]" Another talking point notes that "[w]e're talking about payments made in 2007-2008," the years in which MELGEN was found to have received approximately $8.9 million in Medicare overpayments. The final talking point argues the following: "It's clear that CMS is taking steps to clarify both multi-dosing from single-dose vials and overfills going forward. This is, in effect, admitting that these policies didn't exist before and don't apply during the 2007-2008 period. Therefore they don't have any bearing on the issue at hand."

203. Lobbyist 1 reviewed the memorandum and sent his edits to Staffer 13 on or about July 1, 2012.

204. The follow-up call between MENENDEZ and the Acting Administrator of CMS occurred on or about July 2, 2012. During the call, the Acting Administrator of CMS told MENENDEZ that CMS would not alter its position regarding billing for vials used for multiple patients. The Acting Administrator of CMS also explained that CMS's enforcement of Medicare billing followed the CDC guidelines, which warn that reusing a single-use vial, or harvesting the preservative-free solution to treat more than one patient, increases the

risk of infection. In response, MENENDEZ expressed dissatisfaction with the Acting Administrator of CMS's answers and stated that he would speak directly with the Secretary of HHS about the matter.

205. On or about July 2, 2012, Lobbyist 1 emailed Staffer 1 and Staffer 13, "I am eager to learn how the call went today – please advise."

206. On or about July 2, 2012, Staffer 13 responded to Lobbyist 1, "[G]ive me a call tomorrow afternoon and I'll fill you in."

207. On or about July 3, 2012, MENENDEZ emailed Staffer 13, "Followup [sic] yield anything of value?" Staffer 13 responded by summarizing a follow-up conversation he had with CMS regarding multi-dosing and whether overfill could be considered in Medicare payments, while noting that he, Staffer 13, spoke with Lobbyist 1 after the call. Specifically, Staffer 13 noted that Lobbyist 1 is "encouraged, but mainly because he's increasingly confident they won't have a leg to stand on should he litigate. But we're all hopeful it won't come to that."

208. On or about July 16, 2012, Lobbyist 1 responded to an email sent by Staffer 13 with a subject line that read, in part, "CDC report emphasizes importance of adhering to single-dose/single use vial protocols." Lobbyist 1 added Staffer 1 to the email, in which Lobbyist 1 said, "[L]et me know if you hear back from [the Acting Administrator of CMS's] office -- at some point I have to make a decision whether to recommend to the doctor to go to court rather than wait any longer. I did not want to take any action until I knew that other avenues were shut down."

vii. MENENDEZ Elevates His Advocacy on MELGEN's Behalf to the Secretary of HHS

209. On or about July 10, 2012, Senator 3's scheduler contacted HHS, stating that "[Senator 3] would like to have a meeting with [the Secretary of HHS] and Senator Menendez sometime in the next couple of weeks."

210. On or about July 13, 2012, Staffer 1 emailed MENENDEZ asking whether he, MENENDEZ, had informed MELGEN that Senator 3 was organizing a meeting with the Secretary of HHS. MENENDEZ responded, "Haven't told Dr Melgen yet. Prefer to know when we r meeting her so that I don't raise expectation just in case it falls apart."

211. On or about July 19, 2012, Person A forwarded to MENENDEZ an email MELGEN received from Lobbyist 1 entitled "CMS recent justification for denial of payment." The email from Lobbyist 1 contained a "summary of the latest information provided by CMS in connection with its denial of reimbursement and subsequent recoupment in connection with claims submitted that reflected the multi-dosing of Lucentis, for the years 2007 – 2008." In his email to MENENDEZ, Person A wrote, "Dr. Melgen had mistakenly sent you the draft version earlier that was not complete. Below please find the final version."

212. On or about July 20, 2012, Person A forwarded to Staffer 1 the same email from Lobbyist 1 described in the preceding paragraph. In his email to Staffer 1, Person A wrote, "Dr. Melgen had asked me to forward you the email below."

213. Also on that same date, HHS 5, the Secretary of HHS's scheduler, emailed Senator 3's scheduler to

suggest dates and times for the Secretary of HHS's meeting with MENENDEZ and Senator 3.

214. On or about July 24, 2012, Person A sent an email to MENENDEZ entitled "Dr. Melgen" with an attachment entitled "Letter to [the Acting Administrator of CMS] (7-23-12)." In the email to MENENDEZ, Person A wrote, "Attached please find the proposed letter that was sent to [Staffer 1] by [Lobbyist 1]. Dr. Melgen wanted me to send it to you as well." The draft letter submitted by MELGEN's lobbyist/lawyer does not mention MELGEN by name, but advocates on behalf of his position and twice references "the Medicare contractor in Florida."

215. MENENDEZ's meeting with the Secretary of HHS occurred on or about August 2, 2012. On or about August 1, MENENDEZ spoke to Lobbyist 1, MELGEN's lobbyist/lawyer, to prepare for the meeting.

216. During MENENDEZ's meeting with the Secretary of HHS, MENENDEZ advocated on behalf of MELGEN's position in his Medicare billing dispute, focusing on MELGEN's specific case and asserting that MELGEN was being treated unfairly. The Secretary of HHS disagreed with MENENDEZ's position, explaining that CMS was not going to pay for the same vial of medicine twice, and emphasizing that CDC guidelines expressly advised against multiple applications from the same vial to prevent potential contamination. The Secretary of HHS also informed MENENDEZ that because MELGEN's case was in the administrative appeals process, she had no power to influence it.

217. After MENENDEZ advocated on behalf of MELGEN directly to the Secretary of HHS, Lobbyist 1 emailed Staffer 1 and Staffer 13, saying, "I have

spoken with [the] doctor and understand that the meeting with the Secretary was quite 'lively.'" Lobbyist 1 then asked for "further briefing."

218. On or about September 12, 2012, Lobbyist 1 emailed Staffer 13 asking if he "had heard back from [the Secretary of HHS's] office following the meeting last month." Staffer 13 forwarded the email to Staffer 1, asking what he should tell Lobbyist 1.

219. On or about September 13, 2012, Staffer 1 replied to Staffer 13, "I think you should try to get some feedback without raising attention."

220. On or about September 19, 2012, Staffer 13 reached out by email to HHS 6, an Assistant Secretary at HHS, to see if "there might be any news from your end on the meeting our boss's [sic] had right before recess." HHS 6 did not respond.

viii. MELGEN Gives $375,000 to Entities Supporting MENENDEZ's Reelection Efforts to Renew MENENDEZ's Advocacy to the Secretary of HHS in Support of MELGEN's Medicare Billing Dispute

221. On or about October 19, 2012, one week after MELGEN, through his company, VRC, issued a $300,000 check to Majority PAC, earmarked for New Jersey, and three $25,000 checks to New Jersey Democratic County Committees, MELGEN sent MENENDEZ an email with the subject "MAC Appeal." The email stated, "Here is the latest memo with the most recent developments," and included an attachment entitled "MAC Appeal Update and Recent Developments 10-1-2012." The memorandum was authored by MELGEN's lobbyists/lawyers and addressed to MELGEN. The four-page memorandum is entitled "Status of Medicare Audit and Appeal,"

and opens with the following introduction: "You have asked for a brief summary of the current status of the pending Medicare Overpayment Determination appeal for Vitreo Retinal Consultants (the 'Practice'). You have also asked us to provide an update on recent developments in other litigation matters relating to drug product overfill." The memorandum concludes with a section entitled "The Secretary's Authority," asserting that "[i]t would be appropriate for the Secretary of the Department of Health and Human Services to intervene during the pendency of the Practice's appeal before the MAC to clarify that, as to the period prior to January 1, 2011, CMS policy permitted physicians and providers to bill for overfill." MELGEN sent this email to MENENDEZ at approximately 5:01 p.m.

222. On or about October 19, 2012, also at approximately 5:01 p.m., MELGEN emailed to Staffer 1 the same attachment described in the preceding paragraph.

223. On or about October 19, 2012, at approximately 5:03 p.m., MELGEN emailed the same attachment described in paragraph 221 to Fundraiser 2, a Majority PAC fundraiser and former staffer to and fundraiser for Senator 3.

224. On or about October 20, 2012, Fundraiser 2 responded to MELGEN's email, stating,

> Dr. Sal,
>
> I'm going to see him on Tuesday. I will give this to him directly. Is that ok?
>
> I am sure he will forward this to [the Senior Health Counsel for Senator 3] in his office. She was the staff person in the meeting before. I would suggest that someone come in and brief her on the updated information.

225. On or about October 22, 2012, MELGEN forwarded to MENENDEZ an email he received from Lobbyist 1 on or about October 20, 2012. The email from Lobbyist 1 to MELGEN read as follows:

> Sal - - the sleeping bear has awakened. I attach a letter received today from the Medicare Appeals Council. The letter denies our request for oral argument but gives us an additional 30 days to submit a supplemental brief. It would not surprise me if this was triggered by the meetings earlier this summer and someone looking into the status of the case. When they found that it was not moving, they pushed it, hoping that this would satisfy you.

226. On or about October 22, 2012, MELGEN separately forwarded to Staffer 1 the same email that he, MELGEN, received from Lobbyist 1 on or about October 20, 2012, described in the preceding paragraph.

227. On or about October 22, 2012, Staffer 1 responded to MELGEN, "Thanks. Will call you."

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

18 U.S.C. §§ 1952, 2
(Travel Act)

228. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

229. On or about April 8, 2010, in the District of New Jersey and elsewhere, the defendant,

aided, abetted, induced, and caused by the defendant, SALOMON MELGEN, traveled in interstate and foreign commerce from Newark, New Jersey, to Paris, France, with the intent to promote, manage, establish, and carry on, and facilitate the promotion, management, establishment, and carrying on, of an unlawful activity, to wit, bribery, in violation of Title 18, United States Code, Sections 201(b)(2)(A) and 201(b)(1)(A), and thereafter did perform and attempt to perform acts to promote, manage, establish, and carry on, and facilitate the promotion, management, establishment, and carrying on, of that unlawful activity; that is, MENENDEZ, a United States Senator, corruptly demanded, sought, received, accepted, and agreed to receive and accept, and MELGEN corruptly gave, offered, promised, and agreed to give MENENDEZ, a hotel stay in the Park Hyatt Paris Vendôme, necessitating that MENENDEZ fly from Newark, New Jersey, to Paris, France, with intent to influence MENENDEZ in the performance of official acts, as opportunities arose.

All in violation of Title 18, United States Code, Sections 1952 and 2.

COUNT THREE

18 U.S.C. § 201(b)(2)(A)
(Bribery)

230. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

231. Between on or about August 6, 2010, and on or about August 9, 2010, in the District of New Jersey and elsewhere, the defendant,

ROBERT MENENDEZ,

being a public official, directly and indirectly, corruptly did demand, seek, receive, accept, and agree to receive and accept anything of value personally in return for MENENDEZ being influenced in the performance of an official act; that is, MENENDEZ, a United States Senator, sought and received from SALOMON MELGEN a roundtrip flight on MELGEN's private jet to the Dominican Republic, starting in the Washington Metropolitan Area and ending in Teterboro, New Jersey, with stops in West Palm Beach, Florida, in return for MENENDEZ being influenced in the performance of official acts, as opportunities arose.

All in violation of Title 18, United States Code, Section 201(b)(2)(A).

COUNT FOUR

18 U.S.C. § 201(b)(1)(A)
(Bribery)

232. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

233. Between on or about August 6, 2010, and on or about August 9, 2010, in the District of New Jersey and elsewhere, the defendant,

SALOMON MELGEN,

directly and indirectly, corruptly did give, offer, and promise anything of value to a public official with intent to influence an official act; that is, MELGEN

offered and gave to ROBERT MENENDEZ, a United States Senator, a roundtrip flight on his, MELGEN's, private jet to the Dominican Republic, starting in the Washington Metropolitan Area and ending in Teterboro, New Jersey, with stops in West Palm Beach, Florida, in order to influence MENENDEZ' s official acts, as opportunities arose.

All in violation of Title 18, United States Code, Section 201(b)(1)(A).

COUNT FIVE

18 U.S.C. § 201(b)(2)(A)
(Bribery)

234. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

235. Between on or about September 3, 2010, and on or about September 6, 2010, in the District of New Jersey and elsewhere, the defendant,

ROBERT MENENDEZ,

being a public official, directly and indirectly, corruptly did demand, seek, receive, accept, and agree to receive and accept anything of value personally and for another person in return for MENENDEZ being influenced in the performance of an official act; that is, MENENDEZ, a United States Senator, sought and received from SALOMON MELGEN a roundtrip flight on MELGEN's private jet to the Dominican Republic for himself and a guest, starting and ending in Teterboro, New Jersey, with stops in West Palm Beach, Florida, in return for MENENDEZ being influenced in the performance of official acts, as opportunities arose.

All in violation of Title 18, United States Code, Section 201(b)(2)(A).

COUNT SIX

18 U.S.C. § 201(b)(1)(A)
(Bribery)

236. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

237. Between on or about September 3, 2010, and on or about September 6, 2010, in the District of New Jersey and elsewhere, the defendant,

SALOMON MELGEN,

directly and indirectly, corruptly did give, offer, and promise anything of value to a public official and another person with intent to influence an official act; that is, MELGEN offered and gave to ROBERT MENENDEZ, a United States Senator, and MENENDEZ's guest, a roundtrip flight on his, MELGEN's, private jet to the Dominican Republic, starting and ending in Teterboro, New Jersey, with stops in West Palm Beach, Florida, in order to influence MENENDEZ's official acts, as opportunities arose.

All in violation of Title 18, United States Code, Section 201(b)(1)(A).

COUNT SEVEN

18 U.S.C. § 201(b)(2)(A)
(Bribery)

238. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated,

realleged, and incorporated by reference as though fully set forth herein.

239. Between on or about October 8, 2010, and on or about October 11, 2010, in the District of New Jersey and elsewhere, the defendant,

ROBERT MENENDEZ,

being a public official, directly and indirectly, corruptly did demand, seek, receive, accept, and agree to receive and accept anything of value personally in return for MENENDEZ being influenced in the performance of an official act; that is, MENENDEZ, a United States Senator, sought and received from SALOMON MELGEN a roundtrip flight to West Palm Beach, Florida, starting with a first-class commercial flight from Newark, New Jersey, costing approximately $890.70, and ending with a private chartered flight to the Washington Metropolitan Area costing approximately $8,036.82, in return for MENENDEZ being influenced in the performance of official acts, as opportunities arose.

All in violation of Title 18, United States Code, Section 201(b)(2)(A).

COUNT EIGHT

18 U.S.C. § 201(b)(1)(A)
(Bribery)

240. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

241. Between on or about October 8, 2010, and on or about October 11, 2010, in the District of New Jersey and elsewhere, the defendant,

SALOMON MELGEN,

directly and indirectly, corruptly did give, offer, and promise anything of value to a public official with intent to influence an official act; that is, MELGEN offered and gave to ROBERT MENENDEZ, a United States Senator, a roundtrip flight to West Palm Beach, Florida, starting with a first-class commercial flight from Newark, New Jersey, costing approximately $890.70, and ending with a private chartered flight to the Washington Metropolitan Area costing approximately $8,036.82, in order to influence MENENDEZ' s official acts, as opportunities arose. All in violation of Title 18, United States Code, Section 201(b)(1)(A).

COUNT NINE

18 U.S.C. § 201(b)(2)(A)
(Bribery)

242. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

243. On or about September 21, 2011, in the District of New Jersey and elsewhere, the defendant,

ROBERT MENENDEZ,

being a public official, directly and indirectly, corruptly did demand, seek, receive, accept, and agree to receive and accept anything of value personally and for another entity in return for MENENDEZ being influenced in the performance of an official act; that is, MENENDEZ, a United States Senator, sought and received $20,000 from SALOMON MELGEN for The Fund to Uphold the Constitution, a legal defense trust fund that benefitted MENENDEZ, in return for MENENDEZ

being influenced in the performance of official acts, as opportunities arose.

All in violation of Title 18, United States Code, Section 201(b)(2)(A).

COUNT TEN

18 U.S.C. § 201(b)(1)(A)
(Bribery)

244. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

245. On or about September 21, 2011, in the District of New Jersey and elsewhere, the defendant,

SALOMON MELGEN,

directly and indirectly, corruptly did give, offer, and promise anything of value to a public official and another entity with intent to influence an official act; that is, MELGEN offered and gave $20,000 to The Fund to Uphold the Constitution, a legal defense trust fund that benefitted ROBERT MENENDEZ, a United States Senator, in order to influence MENENDEZ' s official acts, as opportunities arose.

All in violation of Title 18, United States Code, Section 201(b)(1)(A).

COUNT ELEVEN

18 U.S.C. § 201(b)(2)(A)
(Bribery)

246. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

247. On or about May 16, 2012, in the District of New Jersey and elsewhere, the defendant,

ROBERT MENENDEZ,

being a public official, directly and indirectly, corruptly did demand, seek, receive, accept, and agree to receive and accept anything of value personally and for another entity in return for MENENDEZ being influenced in the performance of an official act; that is, MENENDEZ, a United States Senator, sought and received $20,000 from SALOMON MELGEN for The Fund to Uphold the Constitution, a legal defense trust fund that benefitted MENENDEZ, in return for MENENDEZ being influenced in the performance of official acts, as opportunities arose.

All in violation of Title 18, United States Code, Section 201(b)(2)(A).

COUNT TWELVE

18 U.S.C. § 201(b)(1)(A)
(Bribery)

248. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

249. On or about May 16, 2012, in the District of New Jersey and elsewhere, the defendant,

SALOMON MELGEN,

directly and indirectly, corruptly did give, offer, and promise anything of value to a public official and another entity with intent to influence an official act; that is, MELGEN offered and gave $20,000 to The Fund to Uphold the Constitution, a legal defense trust fund that benefitted ROBERT MENENDEZ, a United

States Senator, in order to influence MENENDEZ' s official acts, as opportunities arose.

All in violation of Title 18, United States Code, Section 201(b)(1)(A).

COUNT THIRTEEN

18 U.S.C. § 201(b)(2)(A)
(Bribery)

250. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

251. On or about May 16, 2012, in the District of New Jersey and elsewhere, the defendant,

ROBERT MENENDEZ,

being a public official, directly and indirectly, corruptly did demand, seek, receive, accept, and agree to receive and accept anything of value personally and for another entity in return for MENENDEZ being influenced in the performance of an official act; that is, MENENDEZ, a United States Senator, sought and received $40,000 from SALOMON MELGEN for the New Jersey Democratic State Committee Victory Federal Account, which benefitted MENENDEZ, in return for MENENDEZ's advocacy to the State Department on behalf of MELGEN in his contract dispute with the Government of the Dominican Republic.

All in violation of Title 18, United States Code, Section 201(b)(2)(A).

COUNT FOURTEEN

18 U.S.C. § 201(b)(1)(A)
(Bribery)

252. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

253. On or about May 16, 2012, in the District of New Jersey and elsewhere, the defendant,

SALOMON MELGEN,

directly and indirectly, corruptly did give, offer, and promise anything of value to a public official and another entity with intent to influence an official act; that is, MELGEN offered and gave $40,000 to the New Jersey Democratic State Committee Victory Federal Account, which benefitted ROBERT MENENDEZ, a United States Senator, in return for MENENDEZ's advocacy to the State Department on behalf of MELGEN in his contract dispute with the Government of the Dominican Republic.

All in violation of Title 18, United States Code, Section 201(b)(1)(A).

COUNT FIFTEEN

18 U.S.C. § 201(b)(2)(A)
(Bribery)

254. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

255. On or about June 1, 2012, in the District of New Jersey and elsewhere, the defendant,

ROBERT MENENDEZ,

being a public official, directly and indirectly, corruptly did demand, seek, receive, accept, and agree to receive and accept anything of value personally and for another entity in return for MENENDEZ being influenced in the performance of an official act; that is, MENENDEZ, a United States Senator, sought and received from SALOMON MELGEN approximately $300,000 for Majority PAC that was earmarked for the New Jersey Senate race, which benefitted MENENDEZ, in return for MENENDEZ's advocacy at the highest levels of CMS and HHS on behalf of MELGEN in his Medicare billing dispute.

All in violation of Title 18, United States Code, Section 201(b)(2)(A).

COUNT SIXTEEN

18 U.S.C. § 201(b)(1)(A)
(Bribery)

256. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

257. On or about June 1, 2012, in the District of New Jersey and elsewhere, the defendant,

SALOMON MELGEN,

directly and indirectly, corruptly did give, offer, and promise anything of value to a public official and another entity with intent to influence an official act; that is, MELGEN offered and gave approximately $300,000 to Majority PAC that was earmarked for the New Jersey Senate race, which benefitted ROBERT MENENDEZ, a United States Senator, in return for MENENDEZ's advocacy at the highest levels of CMS

and HHS on behalf of MELGEN in his Medicare billing dispute.

All in violation of Title 18, United States Code, Section 201(b)(1)(A).

COUNT SEVENTEEN

18 U.S.C. § 201(b)(2)(A)
(Bribery)

258. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

259. From on or about September 30, 2012, to on or about October 12, 2012, in the District of New Jersey and elsewhere, the defendant,

ROBERT MENENDEZ,

being a public official, directly and indirectly, corruptly did demand, seek, receive, accept, and agree to receive and accept anything of value personally and for another entity in return for MENENDEZ being influenced in the performance of an official act; that is, MENENDEZ, a United States Senator, sought and received from SALOMON MELGEN approximately $103,500 for various New Jersey county Democratic Party entities, and approximately $300,000 for Majority PAC that was earmarked for the New Jersey Senate race, all of which benefitted MENENDEZ, in return for MENENDEZ's advocacy at the highest levels of HHS on behalf of MELGEN in his Medicare billing dispute.

All in violation of Title 18, United States Code, Section 201(b)(2)(A).

COUNT EIGHTEEN

18 U.S.C. § 201(b)(1)(A)
(Bribery)

260. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

261. From on or about September 30, 2012, to on or about October 12, 2012, in the District of New Jersey and elsewhere, the defendant,

SALOMON MELGEN,

directly and indirectly, corruptly did give, offer, and promise anything of value to a public official and another entity with intent to influence an official act; that is, MELGEN offered and gave approximately $103,500 to various New Jersey county Democratic Party entities, and approximately $300,000 to Majority PAC that was earmarked for the New Jersey Senate race, all of which benefitted ROBERT MENENDEZ, a United States Senator, in return for MENENDEZ's advocacy at the highest levels of HHS on behalf of MELGEN in his Medicare billing dispute.

All in violation of Title 18, United States Code, Section 201(b)(1)(A).

COUNTS NINETEEN THROUGH TWENTY-ONE

18 U.S.C. §§ 1341, 1343, 1346, 2
(Honest Services Fraud)

262. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

263. From at least in or about January 2006 through in or about January 2013, in the District of New Jersey and elsewhere, the defendants,

ROBERT MENENDEZ and
SALOMON MELGEN,

devised and intended to devise a scheme and artifice to defraud and deprive the United States and the citizens of New Jersey of their right to the honest services of ROBERT MENENDEZ, a United States Senator, through bribery.

USE OF INTERSTATE WIRES TO
EXECUTE THE SCHEME

264. On or about the dates listed below, in the District of New Jersey and elsewhere, MENENDEZ and MELGEN, for the purpose of executing the above-described scheme and artifice to defraud and deprive, transmitted and caused to be transmitted by means of wire and radio communication in interstate commerce, signals and sounds; that is, they caused pilots to communicate via interstate wire and radio the following signals and sounds:

Count	Date	Signal and Sound
19	August 9, 2010	Pilot of MELGEN's private jet, on which MENENDEZ was a passenger, in New Jersey air space to air traffic control in New York
20	September 6, 2010	Pilot of MELGEN's private jet, on which MENENDEZ was a passenger, in New Jersey air space to air traffic control in New York

All in violation of Title 18, United States Code, Sections 1343, 1346, and 2.

USE OF PRIVATE OR COMMERCIAL INTERSTATE CARRIER TO EXECUTE THE SCHEME

265. On or about the date listed below, in the District of New Jersey and elsewhere, MENENDEZ and MELGEN, for the purpose of executing the above-described scheme and artifice to defraud and deprive, and attempting to do so, deposited and caused to be deposited the following matter and thing to be sent and delivered by any private and commercial interstate carrier, and knowingly caused the matter and thing to be delivered by such carrier according to the direction thereon:

Count	Date	Mail
21	June 5, 2012	MELGEN's June 1, 2012, $300,000 check, through VRC, to Majority PAC, earmarked for New Jersey, sent from Person B in New Jersey to Fundraiser 1 in Washington, D.C., via FedEx

All in violation of Title 18, United States Code, Sections 1341, 1346, and 2.

COUNT TWENTY-TWO

18 U.S.C. §§ 1001(a)(1), (c)(1)
(False Statements)

266. The allegations contained in paragraphs 1 through 227 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein.

267. The Ethics in Government Act of 1978 required all United States Senators to file an annual financial disclosure form reporting, among other things, income, gifts, and financial interests from the prior calendar year. These financial disclosure forms were required to be submitted to and filed with the Secretary of the United States Senate, an office within the Legislative Branch, and were available to the public.

268. A purpose of the financial disclosure forms was to disclose, monitor, and deter conflicts of interest, thereby maintaining public confidence in the integrity of the United States Senate and its Members. The financial disclosure forms provided the public at large with the information necessary to evaluate and consider official conduct by United States Senators in light of their income, gifts, and financial interests, among other things.

269. As a United States Senator, MENENDEZ was statutorily mandated to file an annual financial disclosure form by the Ethics in Government Act of 1978.

270. The financial disclosure form required that MENENDEZ disclose, among other thins, "any reportable gift in the reporting period." In calendar year 2006, reportable gifts were those that aggregated more than $305 and were not otherwise exempt: in calendar years 2007. 2008. and 2010, the minimum reporting threshold was $335.

271. From in or about June 2007 through in or about May 2011, in the District of New Jersey and elsewhere, the defendant,

knowingly and willfully falsified, concealed, and covered up by a trick, scheme, and device, material facts in a matter within the jurisdiction of the Legislative Branch. Specifically, in reports he tiled from 2007 to 2011, MENENDEZ did not disclose any of the reportable gills that he received from MELGEN.

272. It was part of the scheme to conceal that MENENDEZ received things of value from MELGEN without reporting them as required on his annual financial disclosure forms, including, but not limited to, the following: MENENDEZ did not disclose the private, chartered, and first-class commercial flights he received from MELGEN and MELGEN's companies on his financial disclosure forms covering calendar years 2006, 2007, 2008, and 2010; nor did MENENDEZ report the car service he received from MELGEN on his financial disclosure form covering calendar year 2008; nor did MENENDEZ report the Paris and Punta Cana hotel stays lie received from MELGEN on his financial disclosure form covering calendar year 2010--all of which were reportable gifts over the minimum dollar value threshold.

All in violation of Title 18, United States Code, Sections 1001(a)(1) and (c)(1).

NOTICE AS TO CRIMINAL FORFEITURE

18 U.S.C. § 981(a)(1)(C); 28 U.S.C. § 2461
(Criminal Forfeiture)

273. The allegations contained in paragraphs 1 through 272 of this Indictment are hereby repeated, realleged, and incorporated by reference as though fully set forth herein for the purpose of alleging forfeitures pursuant to Title 18, United States Code,

Section 981(a)(1)(C) and Title 28, United States Code, Section 2461.

274. Pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461, the defendant, ROBERT MENENDEZ, upon conviction of the offense in violation of Title 18, United States Code, Section 371, set forth in Count 1; conviction of the offense in violation of Title 18, United States Code, Section 1952, set forth in Count 2; conviction of the offense(s) in violation of Title 18, United States Code, Section 201(b), set forth in Counts 3, 5, 7, 9, 11, 13, 15, and 17; and conviction of the offense(s) in violation of Title 18, United States Code, Sections 1341, 1343, and 1346, set forth in Counts 19, 20, and 21, the defendant,

ROBERT MENENDEZ,

shall forfeit to the United States of America pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461, any property, real or personal, which constitutes or is derived from proceeds traceable to said violations. The property to be forfeited includes, but is not limited to, the following:

a. A sum of money, the amount to be determined, in United States currency representing the total amount of proceeds traceable, directly or indirectly, to the offense(s) in violation of Title 18, United States Code, Sections 371, 1952, 201(b), and 1341, 1343 & 1346.

275. If any of the property described above, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c).

A TRUE BILL,

FOREPERSON

4/1/15
DATE

RAYMOND HULSER
Acting Chief, Public Integrity Section
Criminal Division
U.S. Department of Justice

By: /s/ Peter Koski
Peter Koski
Deputy Chief
J.P. Cooney
Deputy Chief
Monique Abrishami
Trial Attorney
Public Integrity Section
Criminal Division
U.S. Department of Justice

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed 07/20/15]

Crim. No. 2:15-cr-00155

UNITED STATES OF AMERICA,

v.

ROBERT MENENDEZ and SALOMON MELGEN,

Defendants.

Hon. William H. Walls

SENATOR MENENDEZ'S MOTION TO DISMISS THE INDICTMENT BECAUSE ALL CHARGES AGAINST HIM DEPEND ON PROVING ALLEGATIONS THROUGH EVIDENCE THAT IS INADMISSIBLE BY THE SPEECH OR DEBATE CLAUSE
(Motion to Dismiss No. 1)

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INTRODUCTION

In creating a system of separation of powers with checks and balances, the Founders placed in the first article of the Constitution a prohibition against the Executive Branch calling into question certain actions of legislators. The Speech or Debate Clause provides that Members of Congress:

> shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses, and in going to and from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. Const. art. I, § 6. Where an "activity is found to be within the legitimate legislative sphere, balancing plays no part. The speech or debate protection provides an absolute immunity from judicial interference." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 n.16 (1975).

From the time the Supreme Court first construed the Clause through today, it has emphasized that "the privilege should be read broadly, to include not only 'words spoken in debate,' but anything 'generally done in a session of the House by one of its members in relation to the business before it.'" *United States v. Johnson*, 383 U.S. 169, 179 (1966) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)). The reason the Speech or Debate Clause is construed both broadly and absolutely is that its protections do much more than protect any individual Member of Congress: "'The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to

protect the integrity of the legislative process by insuring the independence of individual legislators.'" *Eastland*, 421 U.S. at 502 (quoting *United States v. Brewster*, 408 U.S. 501, 507 (1972)); *see*, *e.g.*, *Powell v. McCormack*, 395 U.S. 486, 503 (1969) ("Our cases make it clear that the legislative immunity created by the Speech or Debate Clause performs an important function in representative government. It insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation.").

The Speech or Debate Clause is not a legal technicality; it is not a gift to Congress; and it is not a side door exit for misbehaving legislators. The absolute immunity provided to Members of Congress by the Speech or Debate Clause is very similar to the absolute immunity provided to members of the Judicial and Executive Branches. *Forrester v. White*, 484 U.S. 219, 224 (1988). By design, the Framers expected that there would be conflict between the branches, as each acted to check and balance the power of the other. Absolute immunity provides members of each branch with the necessary independence to do their jobs without fear that taking official acts that stoke the displeasure of those in rival branches could result in civil or criminal liability. Rather than allow members of one branch to sit in judgment of members of another branch,[1] the Framers intended such fights to be had in

[1] Only in the exceptional case of impeachment, where the burden is so high that it is rarely invoked successfully, do members of the Legislative Branch sit in judgment of members of the Executive or Judicial Branches. *Nixon v. Fitzgerald*, 457 U.S. 731, 771 n.6 (1982). Even then, and unlike our British predecessors who frequently imposed imprisonment and even the death penalty as a consequence of impeachment, the Constitution provides that a judgment of impeachment "shall not extend

the political process, with "we the people" serving as judge in deciding who will be elected or re-elected.

The investigation and prosecution of this case transgress the limits of the Speech or Debate Clause by questioning Senator Menendez's activities within the legislative sphere. Among other examples, the prosecution questions Senator Menendez's legislative oversight over the Department of Health and Human Services ("HHS") and Center for Medicaid and Medicare Services ("CMS"): he inquired about and sought a change in policy concerning a Medicare reimbursement issue. Similarly, the prosecution questions Senator Menendez's oversight over the Department of State and Department of Commerce: he wanted to ensure that these agencies did not undermine his signature legislation requiring 100% inspection at ports that send cargo ships to the United States. And, the prosecution questions Senator Menendez's vetting of a presidential nominee, notwithstanding his constitutional responsibility and therefore unfettered discretion to give his "Advice and Consent" to such nominations. U.S. Const., art. II, § 2, cl. 2. All these actions are squarely within the protective scope of the Speech or Debate Clause, and are subject to its absolute immunity.

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further than to removal from Office." U.S. Const., art. I, § 3, cl. 7. The Constitution does not provide for removal of members of the Legislative Branch by the other branches because, by holding regular elections, Members of Congress are regularly tried through the electoral process. Moreover, the Legislative Branch can remove one of its own, even for conduct the Speech or Debate Clause would prevent the other branches from considering. *Johnson*, 337 F.2d at 191; *see* U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

To give effect to the immunity afforded by the Speech or Debate Clause, the Court must strike all charges and allegations in the Indictment that fall within the scope of the Clause or that depend on evidence that would fall within the Clause. *See*, *e.g.*, *Johnson*, 383 U.S. at 185 (ordering all references to Speech or Debate materials stricken from the indictment and barring the use of such materials at trial); *McSureley v. McClellan*, 553 F.2d 1277, 1299 (D.C. Cir. 1976) (*en banc*) ("[T]he Speech or Debate Clause acts as an exclusionary rule and testimonial privilege, as well as substantive defense.").[2] No evidence privileged by the Speech or Debate Clause may be admitted at trial and, because all charges against Senator Menendez specifically rely upon alleged conduct that is immunized by the Speech or Debate Clause, those Counts must be dismissed. (Indict.

[2] This Motion provides a sufficient basis for the Court to resolve the Speech or Debate Clause issues in the Senator's favor. Additionally, the Court also may conduct a *Simmons*-like hearing to resolve these issues. *In re Grand Jury*, 587 F.2d 589, 597-98 (3d Cir. 1978) (authorizing hearing in the Speech or Debate context comparable to those permitted under *Simmons v. United States*, 390 U.S. 377 (1968)); *In re Possible Violations of 18 U.S.C. §§ 201, 371*, 491 F. Supp. 211, 214 n.2 (D.D.C. 1980) (Bryant, C.J.) (same). *Simmons* provides a hearing on a motion to suppress under the Fourth Amendment, where a defendant can testify to assert his constitutional right and that testimony cannot later be used against him. *Simmons*, 390 U.S. at 393-94. Likewise, the Court can hold an evidentiary hearing on the availability of Speech or Debate immunity and, if a defendant chooses to testify, "no testimony so elicited may be used against him in any subsequent prosecution." *In re Grand Jury*, 587 F.2d at 597; *see also United States v. Turkish*, 623 F.2d 769, 776 (2d Cir. 1980) (approving this procedure).

Counts 1 (conspiracy), Count 2 (Travel Act), Counts 3, 5, 7, 9, 11, 13, 15, 17, 19-21 (bribery).)[3]

ARGUMENT

I. SPEECH OR DEBATE CLAUSE IMMUNITY IS BROAD AND CONDUCT IT SHIELDS MUST BE STRUCK FROM THE INDICTMENT AND EXCLUDED AT TRIAL

The immunity afforded by the Speech or Debate Clause extends more broadly than to speeches and debates held on the floor of Congress; it extends to any act that is "an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972); *see, e.g., Eastland*, 421 U.S. at 510-11 ("Our consistently broad construction of the Speech or Debate Clause rests on the belief that it must be so construed to provide the independence which is its central purpose."). In addition to immunizing votes on legislation, the Speech or Debate Clause immunizes "authorizing an investigation," "holding hearings," "preparing a report," and "authorizing the publication and distribution of that report." *Doe v. McMillan*, 412 U.S. 306, 313 (1973). The Clause also immunizes "informal information gathering in connection with or in aid of a legislative act . . . . Such information gathering may take the form of communications with organizations, constituents, or officials of a coordinate branch." *Jewish War*

[3] Senator Menendez is separately moving to dismiss Count 22 (false statements) based on the Speech or Debate Clause and for other reasons. (MTD No. 13.)

Veterans v. Gates, 506 F. Supp. 2d 30, 54 (D.D.C. 2007).[4]

The "power to investigate" must be 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)). "[I]nformation gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation." *McSurley*, 553 F.2d at 1286. For example,

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[4] In this very case, the Third Circuit recognized that "informal legislative fact-finding and informal oversight" are protected. *In re Grand Jury Investig. (Menendez)*, 2015 WL 3875670 at *1 (3d Cir. Feb. 27, 2015) (citing *Lee*, 775 F.2d at 522, and *United States v. McDade*, 28 F.3d 283, 300 (3d Cir. 1994)); *see also McDade*, 28 F.3d at 300 (finding a protected "middle category of oversight activities"); *Lee*, 775 F.2d at 522 (finding legislative immunity applicable to "fact-finding, information gathering, and investigative activities[, which] are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation"). Other courts agree. *See*, *e.g.*, *Miller v. Transam. Press*, *Inc.*, 709 F.2d 524, 530 (9th Cir. 1983) ("Obtaining information pertinent to potential legislation or investigation is one of the 'things generally done in a session of the House,' concerning matters within the 'legitimate legislative sphere.' [For example, c]onstituents may provide data to document their views when urging the Congressman to initiate or support some legislative action." (citations omitted)); *Webster v. Sun Co.*, *Inc.*, 561 F. Supp. 1184, 1189-90 (D.D.C. 1983) (Congressional Research Service analyst's receipt of information from lobbyist protected), *vacated and remanded on other grounds*, 731 F.2d 1 (D.C. Cir. 1984); *Tavoulareas v. Piro*, 527 F. Supp. 676, 680 (D.D.C. 1981) ("[A]cquisition of information by congressional staff, whether formally or informally, is an activity within the protective ambit of the speech or debate clause.").

> [a] congressman cannot subpoena material unless he has enough threshold information to know where, to whom, or for what documents he should direct a subpoena. The acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly.

Id. at 1286-87 (internal citation omitted); *see Jewish War Veterans*, 506 F. Supp. at 55 (explaining all opinions in the *en banc McSurley* case agreed on this point).[5] Given that the prosecution previously argued Senator Menendez had no valid Speech or Debate claims for communications with members of the Executive Branch, it bears emphasizing: "These activities do not lose their legislative character simply because employees of the Executive Branch are involved." *Jewish War Veterans*, 506 F. Supp. at 59.

"The Supreme Court has consistently read the Speech or Debate Clause 'broadly' to achieve its purposes." *Rangel v. Boehner*, 785 F.3d 19, 23 (D.C. Cir. 2015) (quoting *Eastland*, 421 U.S. at 501).[6] Accordingly, "it is generally true that the Speech or Debate

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[5] Of course, "the legitimacy of a congressional inquiry [is not] to be defined by what it produces. The very nature of the investigative function – like any research – is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result." *Eastland*, 421 U.S. at 509.

[6] "[T]he 'central role' of the Clause is to 'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.'" *Eastland*, 421 U.S. at 502 (quoting *Johnson*, 383 U.S. at 181, and *Gravel*, 408 U.S. at 617); *see United States v. Rose*, 28 F.3d 181, 187 (D.C. Cir. 1994) (The purpose of

Clause forbids not only inquiry into acts that are manifestly legislative but also inquiry into acts that are *purportedly* legislative, '*even to determine if they are legislative in fact.*'" *United States v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988) (quoting *Dowdy*, 479 F.2d at 226 (emphasis added)). "In the usual case if the activity is *arguably* within the 'legislative sphere' the Speech or Debate Clause bars inquiry even in the face of a claim of 'unworthy motive.'" *McSurley*, 553 F.2d at 121295 (emphasis added). Because the Clause "forbids inquiry into acts which are purportedly or apparently legislative," immunity attaches once a court concludes legislative activity "was *apparently* being performed." *Dowdy*, 479 F.2d at 226 (emphasis in original); *cf. McSurley*, 553 F.2d at 1297-98 & n.74 (noting that "judicial inquiry must come to a halt" under the Speech or Debate Clause when it is apparent there was a seemingly valid legislative purpose for an act, and courts will not "embroil" themselves in questions

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the Clause is to ensure that "representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive. . . .") (quoting 8 *Works of Thomas Jefferson* 322-23 (1797)) "To effect this protection, the speech or debate clause not only provides a defense on the merits, but spares the legislator from having to devote his time and efforts to defending himself in court." *United States v. Dowdy*, 479 F.2d 213, 221 (4th Cir. 1973). Because this is a threshold issue related to the admissibility of evidence, the Court itself must address the issue before it goes to the jury. *Id.* at 226. Given that Speech or Debate Clause immunity prevents a Senator from being forced to endure the burdens of trial, a denied claim of immunity is subject to immediate appeal under the collateral order rule. *See*, *e.g.*, *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979); *Rose*, 28 F.3d at 185 ("Denials of claims of speech or debate immunity . . . are immediately appealable because the Speech or Debate Clause is designed to protect Members of Congress not only from liability but also from the cost and inconvenience of litigation.").

as to where the line separating valid from invalid legislative purposes is drawn).

Courts must tread carefully because the potential for liability "lessens the ability of Members of the Congress to 'represent the interests of their constituents,' and litigation itself 'creates a distraction and forces Members to divert their time, energy, and attention from legislative tasks.' Such litigation also undermines separation of powers." *Rangel*, 785 F.3d at 23 (quoting *Powell*, 395 U.S. at 503; *Eastland*, 421 U.S. at 503). These separation of powers concerns prevent courts from questioning the good faith of a claim by a Member of the Legislative Branch that he engaged in legislative activity, just as courts regularly refuse to second guess Legislative Branch characterizations of their internal acts in other contexts. *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892) (while courts decide whether enacted legislation is constitutional, the "respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed congress, all bills" the Legislative Branch represents as having passed); *Zivotsky v. Clinton*, 132 S. Ct. 1421, 1433 (2012) (Sotomayor, J., concurring) ("Because of the respect due to a coequal and independent department, for instance, courts properly resist calls to question the good faith with which another branch attests to the authenticity of its internal acts."); *United States v. Munoz-Flores*, 495 U.S. 385, 10 (1990) (Scalia, J., concurring) ("Mutual regard between the coordinate branches, and the interest of certainty, both demand that official representations regarding . . . matters of internal process be accepted at face value."). Such an "exemption from prosecution, for everything said or done by him, as a representative, in the exercise of that office" should be

made "'*without inquiring* whether the exercise was regular according to the rules of the house, or irregular and against their rules.'" *Tenney v. Brandhove*, 341 U.S. 367, 374 (1951) (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (Mass. 1808) (emphasis added)).

To be sure, not everything a Member does is a protected legislative activity. The Clause does not cover activities that "are political in nature rather than legislative." *Brewster*, 408 U.S. at 512. In *Johnson,* for example, the Supreme Court held that pure case work – there, attempts by two Congressmen to "exert influence on the Department of Justice to obtain the dismissal of pending indictments" – was not protected. 383 U.S. at 171. Within this category are "a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." *Brewster*, 408 U.S. at 512. Senator Menendez acknowledges that his assistance to people applying for visas, for example, falls within this unprotected category, as it is pure case work.

Because contacts between a Member and a person in the Executive Branch can be either unprotected case work on behalf of an individual or protected legislative oversight and fact gathering, courts must examine the substance of the communications themselves to determine whether the communications are *apparently* legislative activity and thus immunized by the Speech or Debate Clause. *In re Grand Jury Investig. (Menendez)*, 2015 WL 3875670 at *1 ("[D]istrict courts must make factual findings regarding the content and purpose of the acts and communications in question to assess their legislative or non-

legislative character."). In *McDade*, the Third Circuit provided some guidance on how courts should make this inquiry. There, the Court considered whether the Clause applied to letters to the Executive Branch that implicated government programs within the jurisdiction of committees on which then-Congressman McDade sat. 28 F.3d at 297-302. The first letter "openly lobbie[d] on behalf [of a particular company] in the defendant's district," but the second did not refer to "any particular business." *Id.* at 300. Instead, the second "discusse[d] *the broader policy question* whether the Army should award such a contract." *Id.* (emphasis added). As a result, "whatever the defendant's motivation in writing the [second] letter, the letter appear[ed] on its face to fall into the above-described middle category of oversight activities." *Id.* Thus, the line suggested by *McDade* is whether the Member was simply trying to assist a "particular" person or whether the Members was addressing a "broader policy question." *Id.* at 300.

Again, it should be emphasized that a communication or activity that *appears* to address a "broader policy question" should be found protected by the Speech or Debate Clause because "the Speech or Debate Clause forbids . . . inquiry into acts that are purportedly legislative, 'even to determine if they are legislative in fact.'" *Biaggi*, 853 F.2d at 103 (quoting *Dowdy*, 479 F.2d at 226). An errand on behalf of an individual that does not require a change in policy would be unprotected case work (e.g., filing a claim for government benefits, seeking an award of a government contract), but the appearance of a broader policy issue changes the Speech or Debate analysis entirely. As the Third Circuit explained in this very case, such protected legislative oversight or information gathering does not lose its immunity "'even though some

personal exchanges transpired;'" the activity remains protected so long as a legislative purpose appears to be its "predominant purpose" or the activity appears to contain "'a significant legislative component.'" *In re Grand Jury Investig. (Menendez)*, 2015 WL 3875670 at *1 (quoting *Lee*, 775 F.2d at 525).

Once it is apparent that an indictment charges conduct protected by the Speech or Debate Clause, the Court must strike those parts of the indictment, dismiss the charges that rest on protected conduct, and exclude any evidence of such legislative acts at trial: "The Court's holdings in *United States v. Johnson* and *United States v. Brewster* leave no doubt that evidence of a legislative act of a Member may not be introduced by the Government in a prosecution . . . ." *United States v. Helstoski*, 442 U.S. 477, 487 (1979).[7] The Supreme Court's decision in *Johnson* made clear that "all references" to Speech or Debate activities must be "eliminated" and "wholly purged" from an indictment, and the Clause also proscribes the use of "the evidence . . . during trial." 383 U.S. at 173, 185; *see Brewster*, 408 U.S. at 511 (noting *Johnson* "authorized a new trial on the conspiracy count, provided that all references to making the speech were eliminated");[8] *United States v. Murphy*,

[7] In *Johnson*, the government voluntarily dismissed several charges on remand because it could not prosecute those charges without Speech or Debate material. *United States v. Johnson*, 419 F.2d 56, 58 (4th Cir. 1969). The same was true in *Helstoski. United States v. Helstoski*, 635 F.2d 200, 202 (3d Cir. 1980).

[8] The Supreme Court noted in *Johnson* that "the defendant, not the prosecution, introduced the speech itself," but the Supreme Court still found a Speech or Debate Clause violation. 383 U.S. at 184. Consequently, a Member's use of Speech or Debate Clause material at the trial itself will not necessarily result in a waiver of a Speech of Debate Clause claim.

642 F.2d 699, 700 (2d Cir. 1980) (finding an overt act alleged in the indictment "is not on its face protected by the Speech or Debate Clause, but if an offer of proof at trial indicates that it is protected when assessed in light of other evidence, the appellants will be entitled to have that particular allegation stricken"); *Dowdy*, 479 F.2d at 224 (language in an indictment that offends the Speech or Debate Clause should be "stricken").[9] Consequently, for the Speech or Debate Clause "to be given meaning, the validity of an indictment must be determined in the context of the proof which is offered to sustain it, or in the context of facts adduced on a motion to dismiss," and "it may be necessary to go beyond the indictment to obtain the full meaning of what appear facially to be perfectly proper allegations." *Dowdy*, 479 F.2d at 223.

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[9] The Supreme Court has acknowledged the potential costs associated with this very broad constitutional protection. "The Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion." *Helstoski*, 442 U.S. at 491; *see Eastland*, 421 U.S. at 509-11 ("[T]he broad protection granted by the Clause creates a potential for abuse."); *Brewster*, 408 U.S. at 516 ("In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity[] . . . ."). Moreover, even where the Clause is most clearly applicable in insulating a Member's conduct from review by the Judiciary, the Member is not held unaccountable. Rather, "the duty falls on the House of Congress to punish its offending member." *Johnson*, 337 F.2d at 191; *see* U.S. Const., Art. I § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."). Nothing prevents the Executive Branch from asking the Legislative Branch to discipline its own Members, or to complain to "we the people" if it disagrees with the Legislative Branch's response. That is the nature of separation of powers.

In *Dowdy*, a former Congressman was indicted for conspiring to accept bribes from a contractor that was under investigation by law enforcement. The contractor asked the Congressman and the committee he chaired to conduct its own investigation of the contractor. *Id.* at 218-19. The former Congressman claimed several overt acts charged in the indictment were legislative oversight activities protected by the Speech or Debate Clause. The Fourth Circuit agreed and reversed the conviction.

The indictment alleged the Congressman requested a meeting and then met with an Assistant U.S. Attorney, met with representatives of the Federal Housing Authority and the Housing and Home Finance Agency, and received documents from those agencies. *Id.* at 223. The Fourth Circuit noted the bribery charges based on these actions appeared "plainly proper" on their face because the indictment failed to disclose that the contacts were actually made as part of a legislative investigation. *Id.* at 223. But when read in light of that evidence, "it is evident that these same overt acts might be interpreted as preparation for a subcommittee hearing on [the contractor]." *Id.* at 223-24. The Fourth Circuit held the defendant's contacts with the agencies were immunized by the Speech or Debate Clause. *Id.* at 223-24.

The conviction in *Dowdy* could not stand because conduct that constituted Speech or Debate activities was charged in the indictment itself and evidence of such protected activities was admitted at trial. The Fourth Circuit, however, permitted retrial with "the offending overt acts stricken," so that the government could attempt to prove the offenses "without reference to any legislative acts." *Id.* at 213. Prosecution would be permitted under a *Brewster* theory: "The illegal

conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that [the Member] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise." *Brewster*, 408 U.S. at 525; *see also United States v. Garmatz*, 445 F. Supp. 54, 64 (D. Md. 1977) (allowing bribery prosecution of a Congressman that properly charged an "illegal agreement" where the "indictment does not allege the performance by the defendant of any legislative acts").

Dowdy stands for the proposition that, while prosecutors cannot use protected legislative acts as evidence at trial, they may present direct evidence of the bribery agreement itself to prove a *Brewster* theory (without any reference to a legislative act having been performed). *Dowdy*, 479 F.2d at 219-20 (bribe payor testified to agreement with the Congressman, and recorded conversations with the Congressman regarding the bribery agreement). Significantly, that is not the prosecution's case here. The prosecution has no direct evidence (no witnesses, no recording, no letter, no email) that there ever was a *quid pro quo* agreement between Senator Menendez and Dr. Melgen (because no such agreement ever occurred). Instead, the prosecution wants to introduce Senator Menendez's legislative acts into evidence – something the Speech or Debate Clause flatly precludes. In the absence of any evidence of an agreement between Senator Menendez and Dr. Melgen, the prosecution's only hope is to attempt to infer the existence of an agreement by pointing to the Senator's legislative acts, alleging that they came after Dr. Melgen provided something of value, and inviting the jury to deduce that there must have been some agreement to connect the two events. Such an attenuated circumstantial

case provides no legitimate basis for inferring causation in any event, but in this case it is barred altogether by the Speech or Debate Clause, which prohibits the prosecution from charging or offering any evidence of a legislative act against Senator Menendez.

II. THE INDICTMENT RESTS ON SPEECH OR DEBATE IMMUNIZED MATERIALS

The Indictment itself depends upon allegations of conduct that are immunized by the Speech or Debate Clause, and the prosecution cannot prove any of its claims regarding Medicare reimbursement policy or port security policy without reference to immunized materials. Because every charge against Senator Menendez contains these tainted allegations, the Indictment as a whole must be dismissed.

A. The Medicare Reimbursement Policy Issues Are Immunized

Senator Menendez serves as a member of the Committee on Finance, which oversees HHS and CMS. In June 2009, Senator Menendez alerted his staff to a Medicare issue concerning the repackaging or multi-dosing of the drug Lucentis that involved his "close personal friend," Dr. Melgen,[10] and his staff then began investigating the issue. *In re Grand Jury*

[10] Daniel O'Brien, Senator Mendendez's former Chief of Staff and a mutual friend of both the Senator and Dr. Melgen, testified that Dr. Melgen is "probably either [the Senator's] closest friend or one of his three closest friends." (O'Brien 1/21/15 Tr. at 30.) O'Brien explained that Dr. Melgen "defines himself by national Hispanic issues, and sees Senator Menendez as the champion of national Hispanic issues," and that is why Dr. Melgen is such a strong political supporter of Senator Menendez. (*Id*. at 31.)

Investig. (Menendez), 2015 WL 3875670, at *1. [11] Throughout their entire investigation, the prosecutors

[11] The issue here was that the manufacturer of the drug Lucentis packaged it for sale in vials containing 400% of the recommended standard dose of 0.05 mL, *i.e.*, each vial was sold containing 0.2 mL. The manufacturer's labeling information even stated explicitly that physicians were purchasing a single-use vial containing 0.2 mL. *See* Genentech, Inc., *Lucentis - Highlights of Prescribing Information* § 16 (June 2010) ("Each LUCENTIS carton, NDC 50242-080-01, contains a 0.2 mL fill of 10 mg/mL ranibizumab in a 2-cc glass vial"), http://www.genentech-access.com/sites/default/files/LUCENTIS_prescribing.pdf; *see also* Genentech, Inc., *Lucentis - Highlights of Prescribing Information* § 16 (June 2006) (same), http://dailymed.nlm.nih.gov/dailymed/archives/fdaDrugInfo.cfm?archiveid=6235. But CMS wanted physicians to throw away 0.15 mL and buy a new vial for every administration of the drug. Consequently, in its ordinary use, approximately 75% of each vial of drug was wasted and certain pharmaceutical companies profited from selling any additional quantities of the drug that went unused. For other drugs (including one used to treat the same disease as Lucentis), CMS did not oppose multi-dosing or repackaging, thus creating Executive Branch decision-making that drove billions of dollars to certain manufacturers, including the biggest supporters of the Affordable Care Act ("ACA").

Doctors are paid by Medicare on the basis of each unit they administer, *see* 42 U.S.C. § 1395w-3a(b)(1), and they do not bill Medicare for the purchase of a vial of medicine. Some doctors, like Dr. Melgen, engaged in a practice of repackaging or multi-dosing, where they used the full amount of drug sold to them and listed on the FDA-approved labeling. According to physicians, this avoids waste and saves them the cost of buying unnecessary drugs. Pharmaceutical companies do not like this practice because they want to sell more drugs, whether or not the drugs are used. When Lucentis was initially approved, its manufacturer attempted to get doctors to use the more expensive Lucentis compared to the manufacturer's colorectal cancer treatment Avastin, which was being used off-label to treat the same eye disease as Lucentis. Interestingly, CMS advocates aggressively for doctors to multi-dose Avastin. Simply put, doctors who multi-

failed to grasp the policy issues at stake and wrongly concluded that because Dr. Melgen was using facts known personally to him in his administrative matter that he must have been asking for his friend to intervene in his case. Nothing could be further from the truth, and discovery bears out that Sen. Menendez made no effort to ever intervene in Dr. Melgen's pending matters. The issues from Dr. Melgen's case highlight a broader policy question of this Administration's actions that benefit pharmaceutical companies while discounting issues experienced by practicing physicians—a policy question that falls squarely within Senator Menendez's oversight responsibilities as a member of the Senate Finance Committee.

Daniel O'Brien, Senator Menendez's Chief of Staff, testified that it was not uncommon for Dr. Melgen to discuss issues, policy issues or otherwise, and, "[g]enerally, [he] would just listen to him talk about his issues, knowing there wasn't much we could do to help." (O'Brien 1/21/15 Tr. at 45.) When these issues would be raised by Dr. Melgen, the Office "on a policy level either decided to help or just facilitate in a communication onto an agency." (*Id.*) There were

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dose prefer to practice medicine by providing the medicine they deem best for the patient while avoiding the unnecessary expense of buying three times more medicine than they use (and being forced to throw away perfectly good medicine in the process). The cost to Medicare is the same either way because Medicare pays based solely on the number of units actually administered to the patients, whether those units come from one vial or three vials. The issue here is whether Medicare reimbursement policy should operate differently for Lucentis than it does for any other drug that can be repackaged or multi-dosed. It also is a question of whether this Administration has elected a policy that favors the financial interests of certain pharmaceutical companies over physicians.

"several" times the Office could not really further the issue, so it may just pass along information to the relevant agency. (*Id.* at 46.)[12] He testified that Dr. Melgen had a lot of ideas, but they were not "necessarily ones that [the Office] saw a public policy dimension to, so we would not engage them." (*Id.*) O'Brien explained, "our job is to filter requests and decide which ones have merit and which one's don't." (*Id.* at 86.) Michael Barnard, Senator Menendez's policy advisor on health issues testified similarly. He explained that individuals ask the Senator to advocate on their behalf before federal agencies, "[a]ll the time," and sometimes the Senator gets involved where it is a "one off issue . . . unique to that individual" and "[o]ther times it's sort of a broader policy based inquiry." (Barnard 8/13/14 Tr. at 9.)

The Medicare reimbursement policy on multi-dosing Lucentis (which departed from Medicare's reimbursement policies on repackaging or multi-dosing other drugs) was an issue where the Office decided "there was an overarching health policy issue" that should be examined. (Barnard 8/13/14 Tr. at 17.) The Office learned about the "policy elements" of Dr. Melgen's

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[12] The Indictment contains an example of this, where it states the Senator sent a letter to an Embassy noting only that two sisters had applied for a visa, that they would be visiting someone "I know well," and asking the Embassy to give "these applications all due consideration within the requirements of the law." (Indict. ¶ 88.) This is a typical case work, where the Senator was simply flagging an issue for an agency at an individual's request. Of course, it can hardly be argued that asking an agency to give an application "all due consideration within the requirements of the law" is corrupt or overreaching. (Talbot 8/13/14 Tr. at 14 (emphasizing the Senator's Office was careful that such letters were "worded correctly, that you're just asking for the agency's consideration, you're not telling them what to do.").)

practice from the doctor's lawyer. (O'Brien 1/21/15 Tr. at 63; *see id.* at 43 ("the underlying issue was one of policy").) Barnard testified that he understood there to be "[a]mbiguities and contradictions in the Medicare rules," and a "lack of clarity." (Barnard 8/13/14 Tr. at 18.) He understood Dr. Melgen's request to be policy-related: "Clarifying the rules of the road so it's understandable what it is that [doctors] can do in those instances." (*Id.* at 21.) Senator Menendez "was trying to clarify the rules that allowed for this confusion in the first place." (*Id*. at 39.) Even the Indictment itself alleges that Senator Menendez told CMS that he viewed the problem as a policy issue: Its "policy guidelines regarding single-use vials were vague." (Indict. ¶ 169.)

The Senator and his staff contacted federal agencies as part of their investigation and oversight on these policy issues, and the Senator discussed these issues with the Acting Administrator of CMS, Marilyn Tavenner; Secretary of HHS, Kathleen Sebelius; and John Blum, the Director and Acting Principal Deputy of CMS.[13] The prosecution wants to treat these contacts as simply advocacy on behalf of Dr. Melgen, so it can characterize the contacts as unprotected case work. But the mere fact that it was Dr. Melgen who called the Senator's attention to the issue, or the fact that Dr. Melgen could benefit from a prospective change in policy, does not render the activity case work. It is not uncommon for legislators to learn of problems from particular individuals, and seek

[13] To prepare, the Senator's staff created a list of "Talking Points." (A-140.) The document explained why there was "Confusion in Policy" in CMS' approach to Lucentis. (A-145.) [Citations to "A-number" are to the appellate appendix in this case.]

broader policy changes that would benefit that individual and others.[14] From day one, the prosecution has assumed in its questioning of witnesses that Senator Menendez was trying to help Dr. Melgen in his administrative case, yet none of the witnesses ever confirmed that Senator Menendez so much as mentioned Dr. Melgen's name when discussing the policy issue at the key meetings charged in the Indictment.

While the Medicare reimbursement policy issues came to the attention of Senator Menendez and his staff through Dr. Melgen, the legislative information-gathering and oversight activities the Senator and his staff undertook were grounded in broader policy issues. They were not merely trying to help a supporter with a personal errand; they were exploring a broader policy change that would affect all doctors who multi-dose or repackage injectable drugs or administer the drug Lucentis and, ultimately, all physicians generally given the wide-ranging consequences of Medicare's stated justification for its Lucentis multi-dosing policy. For example, the Indictment alleges that the Senator's staff reached out to "advocate for MELGEN" by asking CMS if it "would be issuing a new policy that would affect the future coverage of Lucentis in Florida." (Indict. ¶ 157; *see also*

[14] Often, even legislation itself is named after individuals who inspired it, such as the Lilly Ledbetter Fair Pay Act (equal pay for women), the Ryan White Care Act (AIDS research), the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act (hate crimes), among many others. While such legislation may have been inspired by what happened to particular individuals, Congressional action on these bills was directed to a broader policy. Not only is the legislation itself protected by the Speech or Debate Clause, the information-gathering and oversight underlying the legislation itself is protected as well.

id. ¶ 158 (noting CMS did not change its policy).) Plainly, this is "policy" directed information gathering and protected by the Speech or Debate Clause. Moreover, the fact that it addressed a "new policy" concerning "future coverage" also meant that it could not retroactively impact Dr. Melgen's then-existing billing dispute with Medicare. Because this was not case work on behalf of a particular individual, but rather addressed broader policy issues, Senator Menendez's contacts with federal officials regarding multi-dosing are protected as legislative information-gathering and oversight under the Speech or Debate Clause. Nevertheless, the Indictment relies extensively on these immunized acts.[15]

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[15] (Indict. ¶¶ 19 (claiming Person A was "equipping MENENDEZ and MENENDEZ's Senate staff with information and resources"); 21 (Menendez and his staff were "collecting information" and "advocating on MELGEN's behalf to Executive Branch officials"); 22 (promoting agenda with "Executive Branch officials, including a member of the President's cabinet" and with "fellow United States Senators"); 144 (alleging Senator Menendez and his staff addressed policy issues with CMS and HHS); 151-55 (explaining Senator Menendez's staff was addressing policy issues with Dr. Melgen's lawyer); 157-58 (Senator Menendez's staff asks CMS if they "would be issuing a new policy that would affect the future coverage of Lucentis in Florida"); 159-62 (addressing Senator Menendez's staff's investigation); 163 (noting Dr. Melgen's lawyer advised Senator Menendez's staff that CMS was proposing actions that have "no legal basis"); 164 (Senator Menendez's staff noting the Senator is trying to arrange a meeting with the Secretary); 165 (Senator Menendez's staff complains to CMS that its "regulations regarding Lucentis were unclear"); 166-67 (noting call between Senator Menendez and the Director and Acting Principal Deputy of CMS where Senator Menendez asked her "to consider the confusing and unclear policy on this"); 168 (Senator Menendez's staff's preparations for meetings with CMS); 169 (addressing Senator Menendez's call to CMS complaining "CMS' policy guidelines regarding single-use

After a call with Secretary Sebelius failed to address this administration's policy discrepancies in August 2010, the Senator considered raising broader issues involving multi-dosing at a hearing before the Senate Finance Committee. In November 2010, the Senator asked his staff to "brainstorm[] a possible question for Berwick . . . on the broader issue surrounding Dr. Melgen's situation." (A-857.) Dr. Donald Berwick,

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vials were vague"); 173-75, 177 (Senator Menendez's staff's investigation and preparation for meetings with HHS); 180-84 (Senator Menendez's staff trying to arrange a meeting for the Senator and Secretary); 185, 186 (noting the Senators had discussed the "dosing procedures" issues in Dr. Melgen's case), 188 (joint meeting between Dr. Melgen and both Senators); *see also* 187 (HELP Committee staff and Senator Menendez's staff discuss issue); 192 (Senator Menendez discussing the Secretary's authority with Dr. Melgen's lawyer); 194-97 (coordination between Senator Menendez's staff, Dr. Melgen's lawyers and CMS); 199 (Senator Menendez and his staff meet with Dr. Melgen's lawyer to prepare for meeting with Tavenner); 200 (Senator Menendez addresses "multi-dosing" issue with Tavenner); 201 (Senator Menendez's staff sends him a memorandum regarding "CMS Policy" to raise in a follow-up call with Tavenner); 202 (Senator Menendez's staff explains call with Tavenner is to address "Medicare reimbursement policy" and that while "CMS is taking steps to clarify both multi-dosing from single-dose vials and overfills going forward. . . . [T]hese policies didn't exist before"); 203 (Senator Menendez's staff consults with Dr. Melgen's lawyer before call with Tavenner); 204 (Tavenner advises Senator Menendez that "CMS would not alter its position regarding billing for vials used for multiple patients," and Menendez advises he will go over her head to the Secretary of HHS); 207 (noting Senator Menendez's staff had a follow-up call with CMS regarding "multi-dosing and whether overfill could be considered in Medicare payments"); 208 (information gathering by Senator Menendez's staff); 209-10, 213 (Senator's staff contacts HHS to schedule a meeting with Secretary, and discussed meeting internally); 211 214, 221-22, 225-27 (information gathering by Senator's staff).)

Administrator of CMS, appeared before the Senate Finance Committee on November 17, 2010, at a hearing titled, "Strengthening Medicare and Medicaid: Taking Steps to Modernize America's Health Care System." (A-859.) The day before, Senator Menendez's staff raised two "line[s] of questioning[,]" but ultimately the Senator chose not to raise the issue for unrelated political reasons associated with the debate over Obamacare. (A-857.) The staff advised that the "hearing [was] going to be very high profile" politically because it was "the all anticipated showdown hearing on healthcare reform." (*Id.*) Indeed, "[R]epublicans [were] expected to go after healthcare reform and Berwick in a big way." (*Id.*) Accordingly, the staff recommended the Senator raise the "broader issue surrounding Dr. Melgen's situation" in a "private, rather than public setting," rather than as part of the political theatrics associated with the Obamacare debate. (*Id.*)

Senator Menendez was not alone in raising these issues. First, Senator Tom Harkin, the Chairman of the Health, Education, Labor, and Pensions ("HELP") Committee, and the HELP Committee's "health policy team leader" met with Dr. Melgen on May 18, 2011. (A-246.) In preparation for the meeting, the HELP Committee's staff reached out to Senator Menendez's staff for more information so they could "prepare a memo." (A-244.) This meeting is specifically addressed in the Indictment in Paragraphs 185-89. Second, Senate Majority Leader Harry Reid's staff solicited information about the multi-dosing policy issues in Dr. Melgen's case and participated in a meeting with Dr. Melgen's representatives. (A-248, A-250.) Again, the Indictment specifically references these communications. (Indict. ¶¶ 193-196.)

Particularly troubling is that the Indictment makes much out of a meeting and calls that Senator Menendez had with Acting Administrator of CMS, Marilyn Tavenner, as part of her confirmation process. Aside from being Speech or Debate immunized as legislative information-gathering and oversight, these discussions are at the very core of the Speech or Debate Clause because the Senator was vetting her as a nominee of the President. Ms. Tavenner had been nominated to be the Administrator of CMS and was awaiting confirmation by the Senate. The Indictment references this June 7, 2012 meeting between Senator Menendez and Tavenner in which the multi-dosing issue was raised. (Indict. ¶¶ 198-208.)

The purpose of the meeting was for Senator Menendez to vet Tavenner's nomination, and, as part of this vetting, the Senator raised multi-dosing policy issues, among other policy issues, with her. The Senator was well within his rights and constitutional duty to consider her views on that issue, and any others he deemed relevant to his assessment of her nomination and confirmation. The Senator's calendar reflected that this meeting was "re: her nomination before the Finance Committee." (A-1033; *see* Gov't Br. at 20 n.5, *In re Grand Jury* (3d Cir. filed Feb. 6, 2015) (acknowledging this is true).) Two days earlier, Senator Menendez stressed that he wanted to "[m]ake the larger policy case" with respect to Lucentis. (A-1035.) During the meeting, Senator Menendez and Administrator Tavenner discussed a number of policy issues: "FQHC" (Federally Qualified Heath Centers); "1115 Waiver[s]" under the Social Security Act; "Lucentis"; and "Makena," a drug used to decrease the risk of premature birth. (A-1037-38.) With respect to Lucentis, Administrator Tavenner conveyed that she

"agree[d] w/you (RM) on policy of not wasting[.]" (*Id.*; *see also* A-1040-41.)[16]

The Indictment itself demonstrates that these discussions between the Senator and Tavenner were policy based, and therefore subject to Speech or Debate immunity. The Indictment notes that following the Senator's meeting with Tavenner, the Senator's staff prepared a memorandum, "Talking Points: CMS Policy," for the Senator to use in future calls with Tavenner – another powerful indicator that these communications were about "policy" and are immunized by the Speech or Debate Clause. (Indict. ¶ 201.)[17] The

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[16] Before the Third Circuit in this case, the government claimed the Court could segregate the communications between Senator Menendez and Tavenner, so that issues related to her nomination could be excluded, but the issues concerning Medicare policy could be admitted. There is no basis for such a distinction. Senator Menendez included these Medicare policy issues in his consideration of her as a nominee – and he has unbridled discretion to consider any factor he wants in deciding whether to confirm her. (Gov't Br. at 44.) For the Judicial Branch to weigh in on what factors a Senator may legitimately consider in exercising his or her authority to confirm a Presidential appointment would clearly violate separation of powers. (*Supra* at 9-13.)

[17] The memorandum to the Senator began by highlighting the policy issues: "The subject of the call is to discuss the issue Medicare reimbursement when a physician multi-doses from a single-dose vial." (A-1043.) Barnard recapped the two "larger public policy questions" Senator Menendez raised with Administrator Tavenner a month earlier:

> Since Medicare encourages the efficient use of medication, shouldn't it also allow for multi-dosing, as long as it's safe and clinically appropriate?
>
> If multi-dosing is not allowed, but feasible, the only benefactor is the pharmaceutical company who manufactures the drug, since this significantly increases the amount of product they would sell. Is this in the best

Indictment also references alleged communications between the Senator's staff and Dr. Melgen's counsel about one concern Tavenner might have had, "that other agencies have policies in place that prohibit multi-dosing" and the fact that the concern was baseless. (*Id*. ¶ 201). The Indictment goes on to explain that the discussion concerned policy issues, like why the "CDC guidelines" have "no bearing on Medicare reimbursement policy;" indeed, the fact that the discussion addressed how "CMS is taking steps to *clarify* both multi-dosing from single-dose vials and overfills going forward" confirms that the subject of the discussion was policy, and that a clear policy did not exist at the time. (*Id*. ¶ 202 (emphasis added).) Moreover, the Indictment reflects that in a follow-up call, Tavenner explained CMS would not allow multi-dosing on policy grounds. (Indict. ¶ 204.) Tavenner stated that CMS would take the same approach as the CDC guidelines, which were concerned that multi-dosing "increases the risk of infection." (*Id.*)[18]

> interest of the Medicare program and the best use of taxpayer money?

(*Id*.) Barnard noted, Administrator Tavenner "seemed to understand the confusion and ambiguity surrounding this policy" and reminded the Senator that she had previously "stated that when she worked as a nurse and hospital administrator, they multi-dosed 'all the time.'" (*Id.*)

[18] The prosecution is presenting only one side of the policy debate in the Indictment in an effort to suggest that Senator Menendez was wrong as a matter of policy. But neither questions of guilt nor immunity turn on how the Court judges that policy debate. Indeed, the Court has no reason to wade into that policy debate at all. The relevant point, confirmed by the prosecution highlighting one side of the policy debate in the Indictment, is that this was a policy debate between the Senator and the Executive Branch. The fact that the Senator was engaging the Executive Branch on a policy level, in an effort to be better

Obviously, the CDC guidelines apply to *reusing* single-use *syringes* (*i.e.*, "needle-sharing"), which was never a part of Dr. Melgen's practice, nor was it ever the topic of any policy discussion.

Aside from the policy-driven nature of these conversations between Tavenner and Senator Menendez, the fact that they took place as part of the nomination and confirmation process makes it even clearer that the communications are immunized under the Speech or Debate Clause. The Senate's advice and consent on presidential nominees is a fundamental part of the legislative process because it is explicit in the Constitution itself. U.S. Const. art. II, § 2, cl. 2; *see Gravel*, 408 U.S. at 625 (the Speech or Debate Clause applies to "matters which the Constitution places within the jurisdiction of either House"). Consequently, a Senator's investigation into whether to confirm an appointment is protected by the Speech or Debate Clause. *See Lee v. Biden*, 1989 U.S. App. LEXIS 22951, *3-4 (9th Cir. June 5, 1989) (affirming dismissal of complaint against Senate Judiciary Committee on Speech or Debate grounds that alleged a failure to investigate wrongdoing by then-Judge Anthony Kennedy during his confirmation hearings for the Supreme Court; stating "Determinations by congressional committee members as to what matters within their jurisdiction merit further investigation are an integral part of the legislative process"); *Dastmalchian v. DOJ*, 2014 U.S. Dist. LEXIS 148617, at *12 (D.D.C. Oct. 20, 2014) (dismissing *pro se* complaint against Senate Judiciary Committee because the "allegedly unconstitutional decision to approve" a federal judge during the confirmation

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informed and to exercise oversight on policy issues, makes this a legislative activity shielded by the Speech or Debate Clause.

process "clearly falls within the parameters of [legislative] immunity"). Given the potential for confrontation between the Executive Branch and the Senate in the confirmation context, the need to preserve the Legislative Branch's independence from the Executive Branch is at its zenith.

The Indictment also addresses a meeting between Senator Menendez and HHS Secretary Sebelius on August 2, 2012 concerning these Medicare policy issues. (Indict. ¶¶ 209-20.) On its face, the Indictment addresses policy issues. It alleges that Senator Menendez "advocated" Dr. Melgen's "position," which was Senator Menendez's own policy position, and goes into detail as to why the Secretary disagreed with that position. (Indict. ¶ 216 ("explaining that CMS was not going to pay for the same vial of medicine twice, and emphasizing that CDC guidelines expressly advised against multiple applications from the same vial to prevent contamination.").)[19]

The Indictment neglects to mention that this meeting included Senate Majority Leader Reid, Blum, and Jim Esquea, the Assistant Secretary of HHS for Legislation, and took place in the Senate Democratic

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[19] Again, the government presents only one side of the debate in an effort to make it appear Senator Menendez was wrong on the merits of the policy dispute. In reality, billing for repackaged or multi-dosed Lucentis did not cost the government *any* additional money because the government does not pay per vial. And, as noted above, the issue here is not which side was right on the substantive policy issue, but rather whether these conversations were policy-related, whether they involved legislative fact-finding and information-gathering, and whether they were a part of the Senate's oversight responsibilities. (*Supra* at 22 n.18.) By confirming the discussion was about policy, the Indictment makes clear this is a legislative inquiry protected by the Speech or Debate Clause.

Leader's Suite. (A-1047.) Both Senator Menendez and Senate Majority Leader Reid argued the policy CMS sought to implement concerning Lucentis was "wrong" as a matter of policy. (*Id.*) Senator Menendez indicated that to date, CMS' "[c]lear guidance" had focused on "efficiency" and to "leave [it] to [the] doc[tor]," such that CMS previously declined to interfere with the treatment protocols of practicing physicians. (A-1048.) Senator Menendez asked whether "as public policy," it was "wrong" for a doctor to treat a patient when medically appropriate with medication the doctor would otherwise discard. (*Id.*) At the end of the meeting, Senator Menendez told Secretary Sebelius it appeared that CMS would "[r]ather give PhRMA [money] whenever its app[ropriate]," intending to convey that CMS' position provides a substantial windfall to pharmaceutical companies. (*Id*.) To avoid this result and save taxpayer money, Senator Menendez stated he intended to "go before SFC" (Senate Finance Committee) and raise the issue there. (*Id.*)

Neither Senator Menendez nor Senate Majority Leader Reid raised Dr. Melgen's billing dispute (or any individual's case) in the meeting with Secretary Sebelius. Nor did they ask Secretary Sebelius to intervene in any case. Not one participant in the meeting even mentioned Dr. Melgen's name. (A-1047-48.) Secretary Sebelius – not the Senators – did reference "the case" and Blum noted an "[a]ppeals process," but Senate Majority Leader Reid (not Senator Menendez) called that excuse a "cop out," meaning CMS knew it was wrong at the policy level, but was pointing to the appeals process in a particular case rather than admit a mistake. (*Id*.) Of course, CMS policy would not only affect Dr. Melgen, but physicians nationwide. Thus, both Senator Menendez and Senate Majority Leader Reid argued that to the extent CMS

intended to take a firm stance against repackaging or multi-dosing, CMS should clarify its position "prospective[ly]." (A-1047.) Not only would a "retroactive" change in policy be "very unfair," it would establish the wrong precedent for other agencies. (*Id*.) Given their policy-driven nature, these communications must be found to have been on the immunized side of the Speech or Debate line.

As if the testimony generated during the investigation was not enough, Senators McCaskill and Collins sent a letter to HHS Secretary Burwell as recently as June 1, 2015 raising essentially the same policy issue related to the repackaging of Avastin and recent FDA Guidance making clear that the FDA will take no action against physicians who multi-dose drugs like Lucentis or Avastin. All told, this policy debate is alive and well and continues between the Legislative and Executive branches.

B. The Port Security Policy Issues Are Immunized

Prior to newly-elected Governor John Corzine appointing Senator Menendez to serve in the United States Senate in 2006, Senator Menendez had served in the United States House of Representatives since 1993. In the House, he served on the Foreign Affairs Committee and Select Committee on Homeland Security. In the Senate, he served as Chairman of the Subcommittee on Western Hemisphere, Peace Corps, and Narcotics Affairs ("WHA Subcommittee") from 2011 to 2013. In January 2013, he was the first Latino elected Chairman of the Committee on Foreign Relations, a position he held until January 2015, when he became Ranking Minority Member. In those capacities, improving port security has been among his highest priorities. In addition to his historic concerns

about national security, various highly used ports are in New Jersey.

On September 13, 2006, Senator Menendez advocated on the Senate floor for increased port security, and introduced the 100 Percent Scanning Amendment. (A-486.) Senator Menendez and his staff drafted several related bills (A-490), and obtained final passage of the provision, *see* 6 U.S.C. § 982. On December 8, 2010, the Senator and other members of the Subcommittee introduced the Western Hemisphere Drug Policy Commission Act. (A-453.)

On March 31, 2011, Senator Menendez chaired a WHA Subcommittee hearing titled "A Shared Responsibility: Counternarcotics and Citizen Security in the Americas," where the Subcommittee examined the pervasive narcotics problem in the Caribbean. (A-510.)

On December 15, 2011, Senator Menendez chaired a WHA Subcommittee hearing on "The U.S.-Caribbean Shared Security Partnership: Responding to the Growth of Trafficking and Narcotics in the Caribbean." (A-581.) In his opening statement, Senator Menendez explained why port security in the Dominican Republic mattered in his home state of New Jersey:

> SENATOR MENENDEZ. . . . I often think about this in a very significant way in my own home State because we know that some of those container ships ladened with cocaine-when they leave the Dominican Republic, where do they sail to? Well, they very often end up in the Port of Newark and Elizabeth, which is the mega-port of the east coast in my home state of New Jersey. From the port, the drugs go to the street corners and the schools

> of New Jersey and New York. All of us here today, whether sitting on the dais or sitting in the witness chair, owe it to our children and those who protect them to do everything in our power to stop the flow of drugs in our country.

(A-588.) In questioning Rodney Benson, Chief of Intelligence for the Drug Enforcement Administration, Senator Menendez elaborated on his concern:

> SENATOR MENENDEZ. Mr. Benson, let me ask you, using again the Dominican Republic by way of example. It is a major shipping, normal shipping, port. It has two major, significant ports. A lot of shipping goes to Europe. A lot of shipping comes to the United States to my home port in New Jersey. I have read a series of articles and concerns in which the basis of the cargo inspection, the basis of some of those ports being used where there is no inspection, or after an inspection takes place, the door is changed where the seal has been issued, which is sort of like our guarantee that in fact what has been inspected there is legitimate and able to come to the United States. And then the door is changed and moved to another container where ultimately what is in there is illicit drugs. There may be other items as well. Can you talk to the committee a little bit about that?
>
> MR. BENSON. Well, clearly the drug trafficking organizations have recognized that the ports are a place where they can move shipments of drugs to the United States and Europe. The major port there, the Dominican port, Casedo—and then there are 15 or so

> other smaller ports. We clearly have investigations tied to activity there. We work with our sensitive investigative units at targeting what is moving through those ports. There are issues, Senator, as you mentioned, with port security that needs to be looked at. But we continue to work with those trusted partners at targeting those organizations responsible for movement of drugs through the ports there.

(A-610.) Additionally, Senator Menendez asked Benson about government corruption in the Dominican Republic and the role it played in narcotics trafficking to the United States:

> SENATOR MENENDEZ. . . . Can you comment for the committee on the growth in the narcotics trade in the DR, how it is entering and leaving the country, what effect corruption has on our ability to address this growing problem and reform the police? So let us start with an oversight on the Dominican Republic.
>
> MR. BENSON. Senator, the Dominican Republic, as we look at it from a targeting point of view, plays a major role as a transshipment point for those drug trafficking organizations. We see loads of cocaine and heroin moving up into the Dominican Republic. We saw utilization of aircraft. We see go-fast boat activity bringing loads of cocaine. We see containerized cargo moving up into the DR. It is still probably the most significant transit point for criminal organizations to take those loads of cocaine and then we see it move from that point to the United States. We see also significant loads of

> cocaine leave the Dominican Republic and also then move to Europe as well. So it is a critical spot for us to work with our counterparts in the Dominican Republic from a targeting strategy point of view, and we do that every day. There are issues of corruption in the Dominican Republic, and then there is also great partnerships and counterparts that we work with every day to get the job done.

(A-608.) The Subcommittee heard from two additional witnesses, who provided expert advice on narcotic issues in the Caribbean. One focused his testimony on the Dominican Republic. (A613-19.) The day before the hearing, Dr. Melgen emailed the Senator's staff a summary of the status of the port security contract held by his company-on-paper, ICSSI. (A-691.)

Senator Menendez also raised the concern that Latin American governments had unfairly treated American companies who do business there. On July 31, 2012, Senator Menendez chaired a WHA Subcommittee hearing called "Doing Business in Latin America: Positive Trends But Serious Challenges." (A-637.) The hearing focused on issues American companies face in Latin America. Senator Menendez asked about the Dominican Republic, and other countries:

> SENATOR MENENDEZ. . . . We have another company with American investors that has a contract actually ratified by the Dominican Congress to do x-ray of all of the cargo that goes through the ports, which have been problematic and for which in the past narcotics have been included in those cargo, and they [the Dominican Republic] do not want to live by that contract either. You have

> some of the other countries that I have mentioned today with arbitration awards that have gone against them, and yet they do not want to live by that.

(A-660.)

As these hearings progressed, Senator Menendez and his staff communicated with agencies and third parties in preparation for traditional congressional oversight hearings and possible legislation. For example, on March 30, 2011, Jodi Herman, then-Senior Policy Advisor to the Senator, asked Todd Levett, Special Assistant to the Assistant Secretary and Senior Advisor for Congressional Affairs at the Department of State, about funding for the Caribbean Base Security Initiative ("CBSI") in the Dominican Republic. (A-849.) And on September 6, 2011, she arranged a meeting between Senator Menendez and Assistant Secretary of State Brownfield to discuss "[c]ounternarcotics legislation that would be amenable to the Department." (A-854.)

On December 12, 2012, Herman asked Levett about "EU threats to impose sanctions or take some type of action unless Latin Am. [c]ountries do a better job of port screening[.]" (A852.) Approximately a month later, Kerri Talbot, Chief Counsel to the Senator, emailed Customs and Border Patrol ("CBP") and asked about rumored plans to donate cargo scanning equipment to be used in Dominican ports. She relayed Senator Menendez's concern about corruption in the Dominican Republic government, asked for a briefing, and requested confirmation of whether CBP intended to supply the Dominican Republic with port security equipment.

The Indictment makes numerous allegations concerning Senator Menendez's efforts to improve port security in the Dominican Republic, all of which are immunized by the Speech or Debate Clause because they clearly involve United States policy on port security.[20] The Indictment alleges that the company Dr. Melgen purchased had a contract that "required

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[20] (Indict. ¶¶ 23(b) ("pressure the U.S. Department of State" on port security issues); 117 (raising the "Dominican contract dispute in a meeting with the Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs"); 123 (Senator Menendez's staff arranging meeting with State Department staff, noting the Senator's policy concerns – that the Senator has "concerns about what is flowing through the ports either unobserved or with tacit permission"); ¶ 119 (noting the State Department understood the issue to be policy related, that "current scanners are inadequate and the port security is deteriorating quickly," and the "customs director is highly corrupt"); 120 (noting the State Department was advised on policy, that "the contract would help INL meet drug interdiction and port security objectives in the region"); 124 (noting Senator Menendez "expressed dissatisfaction with INL's lack of initiative" in a meeting with the State Department's Assistant Secretary); 125 (State Department's Assistant Secretary noting Senator Menendez asserted a problem with "corrupt officials" in the Dominican Republic at their meeting and he told the Senator that State is developing a "port initiative" that may impact the contract); 126-27 (follow-up emails between State Department and Senator Menendez's staff); 129 (State Department's Assistant Secretary claims Senator Menendez "threatened to call me to testify at an open hearing" on Dominican port security issues); 132-33 (explaining Senator Menendez's staff asked CBP not to donate equipment to the Dominican Republic because of a concern there is an "ulterior purpose" at work by Dominicans "who do not want to increase security in the DR" by having the government screen cargo, when "the government use of the equipment will be less effective than the outside contractor"); 134-142 (emails exchanged between CBP and Senator Menendez's staff regarding port security).)

all shipping containers entering Dominican ports" to be screened by the company. (Indict. ¶ 114.) There were issues as to whether the Dominican Government would honor the contract. While The face of the Indictment reflects that the State Department understood the concern was that "current scanners are inadequate and port security is deteriorating quickly. The customs director is highly corrupt," and adhering to the contract "would help [the U.S. government] meet drug interdiction and port security objectives in the region." (Indict. ¶¶ 119-20.) The Indictment also relays that Senator Menendez's staff advised the State Department that the Senator "continues to have concerns about what is flowing through the ports either unobserved or with tacit permission," and the Senator personally "expressed dissatisfaction with [the U.S. government's] lack of initiative in enforcement of the contract." (*Id.* ¶¶ 123-24.) Following the Senator's meeting with the Assistant Secretary, the Indictment recalls that Senator Menendez had previously suggested the contract was "being blocked by corrupt officials" and he raised that concern again at the meeting. (*Id.* ¶125.) The Indictment also alleges that the Assistant Secretary told the Senator the State Department was working up a "port initiative," which it might be able to leverage to assist the port contract. (*Id.*) Significantly, according to the Indictment itself, Senator Menendez stated that if there was no solution soon, "he would call a hearing to discuss it." (*Id.*; *see also id.* ¶ 129 (again relaying "Sen. Menendez threatened to call me to testify at an open hearing.").) Calling a congressional hearing obviously lies at the heart of legislative—and therefore protected—activity.

While the prosecution may try to characterize the issue simply as "Dr. Melgen's contract dispute," Senator Menendez and the Executive Branch clearly

understood it as a broader issue involving security and corruption. The alleged incidental benefit to Dr. Melgen if the ICSSI contract were enforced does not change the legislative nature of the issue. The Indictment's explanation that Senator Menendez was conducting this investigation in preparation for a "hearing" places this conduct beyond any doubt within the Speech or Debate Clause's immunity, as this is the same type of information-gathering and oversight activity addressed in cases, like *Eastland*, *McSurley*, *McDade* and *Lee*. (*Supra* at 4-13; *see also United States v. Urciuoli*, 513 F.3d 290, 295-96 (1st Cir. 2008) (explaining a State Senator's "advocacy" to mayors was not an official act, but would have been if he "invoked any purported oversight authority or threatened to use official powers in support of his advocacy").[21]

Later, the Indictment alleges that an issue arose with CBP potentially donating screening equipment to the Dominican Republic and again frames the issue in policy terms. The Senator's staff wrote CBP that they were concerned "there is some effort by individuals who do not want to increase port security in the DR to hold up the contract's fulfillment," and "[t]hese elements (possibly criminal) want CBP to give the

[21] The Indictment notes that the Assistant Secretary suspected Senator Menendez's plan to hold a hearing was a "bluff" (Indict. ¶ 124), but courts and juries must not second-guess a Senator's claim that his apparent legislative activity in fact was legislative even though some may suspect it was just a "bluff." (*Supra* at 4-13.) In *McSurley*, for example, the D.C. Circuit would not second guess whether a Subcommittee subpoena that apparently had a legislative purpose in fact did have such a purpose, when it was alleged "that the real purpose" was not legislative but to "cover-up . . . improper conduct" by the staff. 553 F.2d at 1298.

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." (Indict. ¶ 133; *see* Talbot 3/16/15 Tr. at 17 (clarifying the email is just seeking "information," not asking them "never" to donate).) Again, the Indictment itself frames this as a policy-based inquiry, which is protected by the Speech or Debate Clause. A request for a "briefing" is precisely the type of legislative information-gathering that is immunized under the Clause.

CONCLUSION

Because every Count in the Indictment alleges conduct that is immunized by the Speech or Debate Clause or would require the introduction of evidence privileged by the Clause, the Indictment as a whole must be dismissed.

Respectfully submitted,

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APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Crim. No. 2:15-cr-00155

UNITED STATES OF AMERICA,

v.

ROBERT MENENDEZ and SALOMON MELGEN,

Defendants.

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)

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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]

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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.)

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.

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

[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

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.

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

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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.

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

[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

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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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]

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

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[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.)

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

[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.

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 (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

[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).

> 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

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

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society of an independent and informed grand jury." *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

actually charged in the Indictment itself. Accordingly, the Indictment must be dismissed.

Respectfully submitted,

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APPENDIX J

FEDERAL BUREAU OF INVESTIGATION

Date of entry 02/19/2013

Investigation on 02/13/2013 at Washington, District Of Columbia, United States (In Person)

File # [redacted]

Date drafted 02/19/2013

by Alan S. Mohl

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

JONATHAN BLUM, Director and Acting Principal Deputy, CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS), was interviewed at his place of employment, [redacted], Washington, DC. Also present for the interview was Peter Koski, Esq., Deputy Chief, Public Integrity, Department of Justice. After being advised of the identities of the interviewing agent and attorney and the nature of the interview, BLUM voluntarily provided the following information:

BLUM provided the following biographical information:

Date of Birth: [redacted]

Social Security Number: [redacted]

Home Address: [redacted]

Personal cell: [redacted]

Work telephone: [redacted]

BLUM graduated from the University of Pennsylvania, and then earned a Masters of Science in Public Policy from the Kennedy School. BLUM then worked for the Senate Finance Committee from 2001 to 2004, specifically, for Senator MAX BAUCUS. BLUM then worked for AVALERE HEALTH CONSULING for approximately four and one half years, where he (BLUM) worked on policy issues. BLUM's last title at AVALERE HEALTH CONSULTING was Vice-president.

BLUM started working at CMS in approximately March 2009. BLUM had a similar, but not identical title at the time. BLUM was given the additional title of Acting Principal Deputy in approximately the spring of 2012. BLUM has had different titles at CMS, but has essentially had the same job. CMS is part of The Department of Health and Human Service (HHS).

BLUM oversees payment policy for CMS. BLUM establishes and oversees payment policy strategies for medicare and navigates the decision processes. Issues of fraud and over-billing rarely come to BLUM's desk. There are contractors who process claims and other contractors who review the propriety of the claims. It is rare for an issue of fraud to be brought to BLUM's attention.

If there were an allegation of fraud in South Florida, a separate team or center would deal with the integrity of the claims. The field office and contractors in Florida would deal with the issue.

BLUM was not certain exactly when he (BLUM) first heard of SALOMON MELGEN. In the late spring or early summer of 2009, CMS' Department of Legislation asked BLUM to speak to Senator ROBERT

MENENDEZ. Someone from MENENDEZ' office contacted the HHS Assistant Secretary of Legislation, who deals with inquiries from Congress. It was through this process that a staffer asked BLUM to talk to MENENDEZ. This was BLUM's first call with a Senator. BLUM has since spoken to Senators between approximately twenty and one hundred times, approximately once every couple of weeks.

BLUM's office prepared him (BLUM) for the telephone call with MENENDEZ. BLUM knew that the call would relate to a doctor in Florida, but BLUM was not sure whether he (BLUM) knew MELGEN's name at that point. BLUM knew that there was an approximately $9 million overpayment involving this doctor and the drug Lucentis. BLUM tried to figure out why a New Jersey Senator was calling about a Florida doctor.

One of the members of the Department of Legislation found out that the purpose of MENENDEZ' call had to do with an issue with MENENDEZ' friend in Florida. BLUM wanted to know why he (BLUM) was taking this call. BLUM was confident that this was a billing problem on the doctor's end, and pushed back against having the telephone call. BLUM did not think it seemed right. ELIZABETH ENGEL, one of BLUM's staffers, told BLUM that MENENDEZ had a strong desire to speak with him (BLUM) and resolve the issue. ENGEL was one of BLUM's staff members from approximately 2009 through 2011. ENGEL currently works for the GLOVER PARK GROUP in Washington, DC. [redacted].

BLUM talked to the contractor/medical officer who said that if there were this many legitimate claims for

medication, people would be dying. BLUM asked for a claims analysis for the Florida doctor. BLUM saw that this doctor was a huge outlier in billing for this drug.

BLUM was in Baltimore when he (BLUM) had the telephone call with MENENDEZ. BLUM recalled the telephone call well because the call did not go well. BLUM thought the call with MENENDEZ was a conference call, although he (BLUM) could not recall specifically who set up the call. BLUM recalled that ENGEL was on the call.

MENENDEZ' issue on the call was that CMS' policy documents were vague. Drug manufacturers included more drugs in each vial than was necessary, which was known as overfill. The rules at the time allowed doctors to combine the overfills. The rules did not allow doctors to bill for the whole vial if the vial was split between patients. The contractors found that a doctor in Florida split the vials between patients, but billed for the whole vial for each patient. For example, if one vial were used in two patients, the doctor was only allowed to bill for one vial. The contractor found that the doctor in Florida billed for a full vial for each patient, even when the patients shared one vial.

MENENDEZ said that the rules permitted this kind of behavior and billing and that the doctor was being treated unfairly. BLUM responded that he (BLUM) talked to the contractors and looked at the bills and that they should let the process proceed. BLUM told MENENDEZ that the doctor had his due process and appeal. MENENDEZ told BLUM not to tell him (MENENDEZ) about the doctor's appeal rights and slammed down the telephone. BLUM estimated that the whole telephone call lasted approximately five to ten minutes.

MENENDEZ' position was that the policy was wrong and unclear and that BLUM could not defend the policy. BLUM could not recall whether anyone mentioned a specific doctor's name. BLUM could not recall if MENENDEZ wanted BLUM to intervene for the doctor or change the policy. MENENDEZ talked about the policy in general, but it focused on one doctor. It was clear to BLUM that MENENDEZ was talking about MELGEN, even if no one used MELGEN's name.

BLUM has spoken with members of Congress. Generally, BLUM talks about broad policy questions or hospitals in the member's district. BLUM thought the telephone call with MENENDEZ was strange because it did not involve broad policy questions or a hospital in MENENDEZ' district. BLUM was not sure why MENENDEZ was pressing the issue. BLUM's impression was that the doctor was MENENDEZ' friend and MENENDEZ was personally concerned about the issue.

BLUM described MENENDEZ' tone during the call as "prosecutal." MENENDEZ put BLUM on the defensive. MENENDEZ said that the policy was unclear and vague and that the policy allowed the practice of billing for a full vial per patient, even if the patients split the contents of the vial. MENENDEZ said that CMS was being too tough.

BLUM stated that telephone calls with members of Congress are usually more civil and involve BLUM explaining CMS' rationale. In this call, MENENDEZ told BLUM that BLUM was wrong instead of trying to understand BLUM's position. BLUM told MENENDEZ that he (BLUM) saw no reason to interfere. BLUM described MENENDEZ' tone as aggressive and angry. BLUM was not comfortable during this telephone call.

When BLUM defended CMS' policy, MENENDEZ' tone became angrier and more confrontational.

ENGEL was in Washington, DC during this call. Both BLUM and ENGEL were a little shaken after the call. After the call, BLUM wanted to make sure that CMS was on the right footing.

MENENDEZ was asking BLUM to clarify the policy, to make sure that this pattern of billing was permitted. MENENDEZ focused on the policy. BLUM did not think MENENDEZ was asking BLUM to interfere with the due process of CMS' procedures. A change or clarification of the policy to allow such billing processes would impact MELGEN's appeal. BLUM did not feel personally threatened during the call or think that his (BLUM's) job was at stake based on the telephone call.

After the telephone call with MENENDEZ, BLUM did not do anything to change CMS' policy. CMS clarified the policy to overemphasize its intent going forward and made sure that its intent was clear.

BLUM next interacted with MENENDEZ in approximately the last week in July or the first "week of August, 2012. MENENDEZ and Senator HARRY REID asked to speak with the Secretary of HHS, KATHLEEN SEBELIUS. The Department of Legislation asked BLUM and JIM ESQUEA, telephone number [redacted], to attend the meeting. SEBELIUS, ESQUEA, and BLUM met with REID and MENENDEZ in REID's office. REID was accompanied by one of his (REID's) staffers, KATE LEONE. BLUM did not know MENENDEZ' staffer's name, but he was a young man. The same issue (regarding billing for a whole vial, even if it was split between patients) came

up in this meeting as came up in BLUM's telephone call with MENDENDEZ.

REID said that he (REID) became aware of this issue through a close doctor friend in Florida. The focus of the conversation was on the policy, which REID and MENENDEZ said was vague. MENENDEZ and REID said that they (MENENDEZ and REID) were not there to talk about a particular case; they were there to talk about policy. MENENDEZ and REID advocated a change to CMS' policy to allow the pattern of billing. A change in the policy would have helped MELGEN.

MENENDEZ talked about why the policy was wrong and that CMS' interpretation of the policy was wrong. MENENDEZ put BLUM on the defensive. BLUM continued to defend the policy. SEBELIUS said that since the billing was done outside of the policy, she (SEBELIUS) could not intervene. MENENDEZ was angry with SEBELIUS' response. SEBELIUS said that they would look into it.

BLUM characterized the meeting as very hostile. BLUM estimated that the meeting lasted approximately thirty minutes. It was clear to BLUM that REID and MENENDEZ were talking about MELGEN at this meeting. There was no other doctor in South Florida who had the extent of billing and overpayments as MELGEN. BLUM did not know of any other doctors other than MELGEN about whom REID and MENENDEZ could have been talking. The issue with MELGEN's billing was an isolated issue as opposed to a general problem.

MENENDEZ and BLUM did most of the talking during the meeting. MENENDEZ directed the meeting and BLUM responded to MENENDEZ. MENENDEZ

showed BLUM documents. MENENDEZ did not want to debate the issue. MENENDEZ' tone was angry and aggressive.

There was a memorandum prepared in advance of the meeting. BLUM did not do any additional work prior to this meeting. BLUM checked the status of MELGEN's claims and reviewed the memorandum prior to the meeting. BLUM did not recall MELGEN being mentioned by name at the meeting. MENENDEZ said that he (MENENDEZ) would use his (MENENDEZ') position on the Finance Committee to make sure this issue stayed current and that he (MENENDEZ) would not give up on this issue. BLUM's interpretation of this statement was that the next time BLUM had to testify before the Finance Committee, he (BLUM) would have to answer questions about this policy. BLUM is scheduled to testify before the full Finance Committee on 02/27/2013.

The meeting seemed very odd to BLUM. At the time, it felt like the interactions were bad. BLUM thought that there was an odd degree of aggressiveness in the meeting. MENENDEZ was more hostile during the meeting than REID. MENENDEZ was more aggressive and hostile that CMS was not going to change the policy. BLUM characterized the meeting as probably the most hostile interaction with a member of Congress that he (BLUM) has had. REID said that this was why the public hates bureaucracy.

BLUM did not ask why MENENDEZ and REID were interested in this issue because he (BLUM) thought his head would be torn off if he (BLUM) asked. BLUM did not make the connection as to why MENENDEZ and REID were interested in this issue. BLUM thought ENGEL may have asked MENENDEZ' staff why MENENDEZ was interested in this issue.

SEBELIUS and BLUM stormed out of the meeting. SEBELIUS was angry at the way the meeting went. BLUM would not shake MENENDEZ' hand at the conclusion of the meeting. BLUM and SEBELIUS then got in SEBELIUS' car. BLUM was shaken by the meeting. SEBELIUS asked BLUM to follow up and make sure they had answers. SEBELIUS never told BLUM to change the policy. CMS did not change the policy or interfere with MELGEN's case based on the telephone call with MENENDEZ or the meeting with MENENDEZ and REID. SEBELIUS was not happy that she (SEBELIUS) was brought into the meeting. SEBELIUS did not want to go to this meeting. BLUM thought that the meeting would have been more civil because SEBELIUS was there. One of REID's staffers tried to apologize to SEBELIUS' staffer.

BLUM has never been to a meeting with SEBELIUS that was as detailed as this meeting. The meetings BLUM has attended with SEBELIUS are generally more broad.

Sometime after this meeting, in approximately late September or early October, 2012, BLUM attended a separate, unrelated meeting in REID's office regarding radiation therapy pay-outs. REID, MENENDEZ, and approximately four others were present for the meeting. MENENDEZ did not say anything at this meeting. This meeting was more typical of the type of meeting BLUM normally attends; the discussion involved general policy, concerns, and policy rationale.

BLUM helped MARILYN TAVENNER prepare for her (TEVENNER's) meeting with MENENDEZ. BLUM told TAVENNER what happened with his (BLUM's) interactions. BLUM was not certain when this interaction occurred.

BLUM did not know how many times MENENDEZ contacted HHS.

Within the last few weeks, BLUM spoke with CMS' General Counsel to determine if BLUM had a duty to disclose his (BLUM's) interactions with MENENDEZ. BLUM's interactions with MENENDEZ seem even more strange in light of the stories that have been coming out in the press.

BLUM spoke with HHS Inspector General Assistant Special Agent in Charge [redacted]. BLUM has not spoken to the press.

The overpayment and collection issue involving MELGEN began prior to BLUM coming to CMS.

MENENDEZ is now on the Senate Finance Committee, so he (MENENDEZ) has some influence over CMS.

APPENDIX K

FEDERAL BUREAU OF INVESTIGATION

Date of entry 03/03/2013

Investigation on 02/20/2013 at Washington, DC, District Of Columbia, United States (In Person)

File# [redacted]

Date drafted 03/03/2013

by Gregory J. Sheehy

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William BROWNFIELD, was interviewed in his office at the U.S. Department of State, [redacted]. Department of Justice Attorney Peter Koski and Assistant Legal Adviser for Law Enforcement and Intelligence Attorney Tom Heinemann were present during the interview. After being advised of the identity of the interviewing Agent and the nature of the interview, BROWNFIELD provided the following information:

BROWNFIELD has been employed by the Department of State (DOS) as a career Foreign Service Officer since 1979. BROWNFIELD has served in posts throughout Latin America, including serving as U.S. Ambassador to Chile, Venezuela and Colombia, where he served from August, 2007 through August, 2010. BROWNFIELD assumed his current position as Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs (INL) in

January, 2011. The Senate Foreign Relations Committee had jurisdiction over this Senate confirmed position and the Foreign Relations Subcommittee on Western Hemisphere Affairs has oversight.

The issue regarding ICSSI came to BROWNFIELD's attention in late 2011 or early 2012. BROWNFIELD's recollection is that he was reached out to by Pedro Pablo PERMUY. PERMUY was BROWNFIELD's former counterpart from Department of Defense (DOD) during the Clinton Administration, in or about 1999 through 2000. PERMUY served as Deputy Assistant Secretary (DAS) for DOD Western Hemisphere Affairs while BROWNFIELD was serving as DAS for DOS Western Hemisphere Affairs (WHA) during that same time period. They were in contact every one to two weeks during their crossover time in those positions.

PERMUY contacted BROWNFIELD's office telephonically asking to meet with BROWNFIELD. BROWNFIELD's staff determined who PERMUY was and informed BROWNFIELD that PERMUY was probably calling regarding an American company that was involved in a contract dispute in the Dominican Republic and would be seeking BROWNFIELD's assistance. BROWNFIELD called PERMUY back and followed up with a lunch meeting. PERMUY represented that he was involved with a U.S. entity involved in a contract dispute with the Dominican Republic government. PERMUY advised that the Dominican Republic was not complying with a contract that would help INL meet its objectives on drug interdiction, port security, and law enforcement matters. PERMUY was hopeful that INL could incorporate the contract into a larger conversation with the Dominican Republic government regarding port security during law enforcement engagement

discussions. PERMUY referenced New Jersey connections and BROWNFIELD responded he was aware of at least one Senator's interest and that the U.S. investor in the company had the interest of the Senator.

BROWNFIELD's staff had initially made him aware of Senator Robert MENENDEZ's interest in the ICSSI contract. BROWNFIELD and PERMUY had a phone conversation, lunch meeting and exchanged emails all right around the same time period of late 2011 or early 2012 before BROWNFIELD passed PERMUY on to DAS for INL Todd ROBINSON for further conversations.

Around the same time period that BROWNFIELD spoke with PERMUY, BROWNFIELD spoke directly with MENENDEZ on the ICSSI issue on two occasions. The first meeting between MENENDEZ and BROWNFIELD involved discussions on port security in the Dominican Republic as well as everything else INL was doing in the Western Hemisphere. It was a big picture conversation discussing INL projects and programs implemented throughout the Western Hemisphere. One issue raised during that meeting was port security in the Dominican Republic. MENENDEZ stated he was concerned about the Dominican Republic government not abiding by a contract between itself and an American company.

INL is responsible for law enforcement assistance programs and implementing them. There are a precise set of standards by which decisions are made. When dealing with INL programs, INL is very limited with regard to flexibility on how to approach program implementation. The ICSSI issue fell outside that role of INL because the ICSSI contract was not funded by the United States and was not an INL program. This

afforded INL the flexibility to get involved in the contract dispute more as an advocate, if INL determined that role was appropriate in the circumstances. INL could listen to the problem and respond with flexibility because INL had not funded or implemented the ICSSI contract.

MENENDEZ was hopeful that INL could produce or encourage the Dominican Republic government to abide by the terms of the contract which would allow the Dominican Republic to meet their security obligations and meet INL goals of port security and counter-narcotics interdiction and eradication. BROWNFIELD believes his conversation with PERMUY occurred prior to his conversation with MENENDEZ, but he is not certain. He did recognize at the time that both conversations were clearly tied together. PERMUY's name did not come up during the conversations with MENENDEZ. BROWNFIELD was accompanied by Congressional Adviser to the Bureau of INL Todd LEVETT and possibly someone from the Congressional Affairs Office when meeting with MENENDEZ.

BROWNFIELD advised that a Senator advocating on behalf of a constituent is not unusual and the initial contact by MENENDEZ did not stand out as out of the ordinary. BROWNFIELD thought there was a New Jersey connection with ICSSI, however he never heard that from MENENDEZ. BROWNFIELD later learned that ICSSI had no connection to New Jersey. BROWNFIELD advised it is very unusual to have a Senator advocate on behalf of a non-constituent. In BROWNFIELD's experience, he is not aware of another example of a Senator advocating for a non-constituent.

MENENDEZ was Chairman of the Foreign Relations Subcommittee on the Western Hemisphere at the time BROWNFIELD spoke with him. That position made MENENDEZ particularly important to INL as MENENDEZ had oversight authority over INL WHA. MENENDEZ's influence was second only to the Chairman of Appropriations Committee that passes INL's budget. INL needs to deal with Congress and to be responsive to Congress in general, but reality requires INL to be particularly responsive to the Chairman of the Foreign Relations Subcommittee on Western Hemisphere Affairs who is responsible for Senate confirmed posts and oversight of INL programs.

At the initial meeting between BROWNFIELD and MENENDEZ, BROWNFIELD agreed that INL would look to prepare programs to address general concerns with the Dominican Republic, to include preparing a National Program Plan to address Drug Trafficking from the Caribbean. This was a big picture approach to include port security as well as police training, equipment, legal process and other items. INL was looking to make the Caribbean effective at Drug Interdiction and Eradication. The INL Officer in the Dominican Republic was not effective during that time period and personnel changes needed to be made in order to make INL effective in the Dominican Republic.

MENENDEZ's office thereafter reached out to BROWNFIELD for a second meeting. BROWNFIELD was not given notice what the meeting was regarding, however MENENDEZ had been pushing hard for a more aggressive posture by INL regarding Caribbean Drug Trafficking during this time period. The general conversation with MENENDEZ during this second

meeting started with the Caribbean at large, but transitioned to the Dominican Republic. BROWNFIELD had to acknowledge that he had not yet proceeded with the plan regarding the Dominican Republic that he had promised at their meeting a couple of months earlier. MENENDEZ wanted quicker movement and suggested scheduling Senate Hearings requiring BROWNFIELD to testify on the matter of Caribbean Drug Trafficking in order to get more satisfactory answers. Testifying at Senate Hearings is a part of oversight and is not unusual, although it is unpleasant.

BROWNFIELD felt that MENENDEZ was increasing pressure to deliver on a strategy to develop a plan for the Caribbean as promised, however at the time BROWNFIELD did not see a highlighted focus on the ICSSI dispute. Similar to their first conversation, this second meeting started on large picture, general topics, but then got more specific to the Dominican Republic with MENENDEZ raising the issue of port security and the contract involving port security between the Dominican Republic and ICSSI. A more aggressive counter-narcotics posture in the Caribbean was the main point being pushed by MENENDEZ. It was an unpleasant conversation, as MENENDEZ voiced his dissatisfaction, but nothing BROWNFIELD has not otherwise experienced.

Eventually, the ICSSI issue developed into a more uncomfortable posture. INL reached out to the U.S. Embassy in Santo Domingo to find out what was going on with the ICSSI issue because the Embassy would usually be most familiar. INL received strong feelings of concern from the Embassy cautioning against getting too involved on behalf of ICSSI. The Commercial Section and Economic Section were both

concerned about advocacy. INL determined to address the issue carefully.

As INL dug deeper, BROWNFIELD determined that a U.S. Person purchased the company ICSSI for no reason other than to enforce the contract. The company had nothing to do with port security and was akin to a shell company. In BROWNFIELD's estimation, the outstanding claim to enforce a disputed contract against a foreign government was the purpose of the purchase of ICSSI. These factors made INL less inclined to aggressively advocate for ICSSI. BROWNFIELD did not voice this concern to MENENDEZ because he needed to retain a good relationship on the larger issues and did not want to "poison the well" over this single item. As a tactical matter, BROWNFIELD needed to get satisfaction on the contractual matter while trying to get support for larger issues without turning a powerful Senator into an adversary.

Subsequent to the second meeting with MENENDEZ, during the summer of 2012, BROWNFIELD traveled to the Dominican Republic. He planned to make this travel even without MENENDEZ's pressure because the Caribbean did require attention, so he suggested to MENENDEZ that they attend a common event in the Dominican Republic to show the United States Government was engaged with the Dominican Republic in their drug interdiction efforts. MENENDEZ however was not intending travel to the Dominican Republic. As an alternative, BROWNFIELD agreed to raise the ICSSI contract issue to the newly inaugurated Dominican Republic President MEDINA during his visit to the Dominican Republic. When introduced to MEDINA, BROWNFIELD advised him that he (MEDINA) had an issue with the U.S. Congress, right

or wrong, and the longer the contract was unresolved the longer it would be an issue. MEDINA responded that he had a team looking into the matter and he hoped to resolve it soon. After the Caribbean trip, someone from BROWNFIELD's staff notified someone from MENENDEZ's staff regarding the context of the trip and specifically that the ICSSI contract issue had been raised with President MEDINA. BROWNFIELD has had no additional contact with MENENDEZ or his office regarding the ICSSI issue.

During the timeframe that BROWNFIELD was dealing with MENENDEZ on this issue, BROWNFIELD viewed MENENDEZ's interest in the Dominican Republic as potential to develop a congressional ally who might be able to assist INL in procuring funds and implementing desired programs in the INL WHA region.