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**UNITED STATES DISTRICT COURT**
**DISTRICT OF ARIZONA**

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| UNITED STATES OF AMERICA<br><br>v.<br><br>RICHARD G. RENZI<br><br>Defendant. | No. 4:08-cr-00212-TUC-DCB (BPV)<br><br>**MEMORANDUM OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* REGARDING GOVERNMENT'S CONTINGENT MOTION TO ADMIT EVIDENCE** |

Amicus curiae the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") respectfully submits this Memorandum to aid the Court in resolving issues raised in the Government's Contingent Motion to Admit Evidence (April 29, 2013) (ECF No. 1149) ("DOJ Motion"), and Defendant Richard G. Renzi's Opposition to the Government's Contingent Motion to Admit Evidence (May 3, 2013) (ECF No. 1159) ("Renzi Response").[1]

[1] The Bipartisan Legal Advisory Group – currently comprised of the Honorable John A. Boehner, Speaker; the Honorable Eric Cantor, Majority Leader; the Honorable Kevin McCarthy, Majority Whip; the Honorable Nancy Pelosi, Democratic Leader; and (*Continued . . .*)

The Court advised us earlier today that the House's Unopposed Motion . . . for Leave to File Memorandum as *Amicus Curiae* Regarding the Government's Contingent Motion to Admit Evidence (May 6, 2013) (ECF No. 1162) had been or would be granted, although we have not yet seen the Court's Order. On that understanding, we are filing this Memorandum now so that the Court will have it at the earliest possible time.

The House has no institutional interest in Mr. Renzi's ultimate guilt or innocence, and it does not file this Memorandum for the purpose of trying to protect or to harm him.

## BACKGROUND

The pertinent facts, as we understand them, are as follows. First, Mr. Renzi may choose to introduce in his own defense evidence of some of his legislative activities, in particular, evidence that one bill (referred to in the pleadings as the Resolution Copper Company bill) was introduced in the U.S. House of Representatives, and/or evidence that another bill (referred to in the pleadings as the Preserve Petrified Forest Land Investors bill or the legislation promoted by Philip Aries) was not introduced in the House. *See* DOJ Motion at 1-2; Renzi Response at 2.

Second, to date, Mr. Renzi – as he is entitled to do – has declined to waive (or to relinquish in any other manner) any of the protections afforded him by the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1 ("for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place").[2]

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the Honorable Steny H. Hoyer, Democratic Whip – presents the institutional position of the House in all litigation matters in which it appears.

[2] As this Court is aware, the Speech or Debate Clause provides three broad protections to Members, including former Members such as Mr. Renzi: (i) an immunity from lawsuits or prosecutions for all actions "within the 'legislative sphere,'" *Doe v. McMillan*, 412 U.S. 306, 312 (1973) (quoting *Gravel v. U.S.*, 408 U.S. 606, 624-25 (1972)); (ii) a non-evidentiary-use protection which bars prosecutors in a criminal case – and parties in civil suits – from advancing their cases or claims against Members by "[r]evealing information as to a legislative act," *U.S. v. Helstoski*, 442 U.S. 477, 490 (1979); *see also U.S. v. Johnson*, 383 U.S. 169, 173 (1966); and (iii) a testimonial privilege which operates to protect Members, among other things, from being compelled

(*Continued* . . .)

Third, Mr. Renzi may continue to decline to waive (or to relinquish in any other manner) any of his Speech or Debate protections, even if he elects to introduce in his own defense evidence of some of his legislative activities. As a result, DOJ asserts that, if Mr. Renzi is permitted to introduce evidence of his legislative activities – and, at the same time, to block DOJ's introduction of evidence of other of Mr. Renzi's legislative activities by assertion of the non-evidentiary-use protection of the Clause as a bar to the introduction of such rebuttal evidence – DOJ will be unfairly disadvantaged by not being permitted to introduce such rebuttal evidence, *see* DOJ Motion at 3, 8, although DOJ does not specify what this rebuttal evidence might be.

These facts raise important issues concerning (i) whether Mr. Renzi has waived the protections of the Speech or Debate Clause, and (ii) if Renzi has not waived (and does not otherwise relinquish) the protections of the Clause, what tools are available to the Court to prevent prejudice to DOJ. This Court has not previously addressed these issues, nor did the Ninth Circuit address these issues in its earlier ruling in this case. *See U.S. v. Renzi*, 651 F.3d 1012, 1015 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

In brief, the House contends that Mr. Renzi has not waived the protections of the Speech or Debate Clause, contrary to DOJ's arguments otherwise (Part II, infra), and that DOJ's prejudice concerns should be addressed as an evidentiary matter under Rule 403 of the Federal Rules of Evidence, rather than as a constitutional issue (Part III, infra).

## ARGUMENT

### I. Brief Constitutional Overview.

"[T]he whole American fabric has been erected" on the principle of separation of powers. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). As the Framers wisely insisted, "none of [the three branches of the federal government] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied that power is of an encroaching nature, and

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to testify as to privileged matters. *See, e.g., Gravel*, 408 U.S. at 615-16; *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528-29 (9th Cir. 1983).

that it ought to be effectually restrained from passing the limits assigned to it." The Federalist No. 48, at 316 (James Madison).

The Framers were acutely aware that simply dividing the federal government into three separate branches would not be sufficient to guarantee American liberty. Accordingly, they incorporated into the Constitution concrete mechanisms to ensure the separation of powers, mechanisms that would "provide some practical security for each [branch], against the invasion of the others." The Federalist No. 48, at 316 (James Madison); *see also* The Federalist No. 51, at 331 (Alexander Hamilton or James Madison) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."). One such concrete mechanism is the Speech or Debate Clause.

**A. Speech or Debate Clause Guarantees Legislative Branch Independence.**

**1. History and Purpose of the Clause.**

The Speech or Debate Clause is rooted in the epic struggle between the Parliament and the Crown in sixteenth- and seventeenth-century England. "Behind [the Clause] lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators." *Johnson*, 383 U.S. at 178.

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

*Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (citations omitted). As a result of the English experience, "[f]reedom of speech and action in the legislature was taken as a

matter of course" by the Founders, and reflected in the Speech or Debate Clause of our Constitution. *Id.*[3]

"The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed *independently*." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975) (emphasis added). "[T]he 'central role' of the Clause is to 'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.'" *Id.* (quoting *Gravel*, 408 U.S. at 617). Thus, "[i]n the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *Johnson*, 383 U.S. at 178.[4]

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

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[3] The historical record confirms the privilege's roots in the criminal context. *See, e.g.*, Harold Hulme, *The Winning of Freedom of Speech by the House of Commons*, 61 Am. Hist. Rev. 825, 836 (1956); John Reeve, *The Arguments in King's Bench in 1629 concerning the Imprisonment of John Selden and Other Members of the House of Commons*, 25 J. Brit. Stud. 264, 265 (1986).

[4] *See also Helstoski*, 442 U.S. at 491 ("[The] purpose [of the Speech or Debate Clause] was to preserve the constitutional structure of separate, coequal, and independent branches of government."); *Youngblood v. DeWeese*, 352 F.3d 836, 839 (3d Cir. 2004) ("Ensuring a strong and independent legislative branch was essential to the framers' notion of separation of powers . . . . The Speech or Debate Clause is one manifestation of this practical security for protecting the independence of the legislative branch . . . ."); *U.S. v. Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980) ("Like the Speech or Debate Clause, the doctrine of separation of powers serves as a vital check upon the Executive and Judicial Branches to respect the independence of the Legislative Branch, not merely for the benefit of the Members of Congress, but, more importantly, for the right of the people to be fully and fearlessly represented by their elected Senators and Congressmen.").

**2. Scope of the Clause.**

The protections afforded to Members of Congress by the Speech or Debate Clause apply to all activities "within the 'legislative sphere.'" *McMillan*, 412 U.S. at 312 (quoting *Gravel*, 408 U.S. at 624-25). The "'sphere of legitimate legislative activity'" includes all activities that are

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

*Gravel*, 408 U.S. at 624, 625; *see also Eastland*, 421 U.S. at 504.

The courts, broadly construing the concept of legislative activity, "have plainly not taken a literalistic approach in applying the privilege." *Gravel*, 408 U.S. at 617. Thus, the privilege covers all facets of the legislative process, including "[c]ommittee reports, resolutions, and the act of voting," *id.* at 617; investigations and hearings, *Eastland*, 421 U.S. at 504-05; *McMillan*, 412 U.S. at 313; information gathering in furtherance of legislative activities, 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));[5] and, importantly here, the drafting and introduction of legislation, *see, e.g., Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 10-11 (D.C. Cir. 2006); *Jewish War Veterans of the U.S.A., Inc. v. Gates*, 506 F. Supp. 2d 30, 53 (D.D.C. 2007).

Consistent with a broad construction of "legislative activity," the privilege also extends to preparations for specific legislative activities. *See, e.g., Gravel*, 408 U.S. at 629 (Speech or Debate Clause precluded questioning "concerning any act . . . performed by the Senator, or by his aides in course of their employment, in preparation for the

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[5] *See also Miller*, 709 F.2d at 530; *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421-23 (D.C. Cir. 1995); *Gov't of the Virgin Islands v. Lee*, 775 F.2d 514, 520-21 (3d Cir. 1985).

subcommittee hearing"); *Johnson*, 383 U.S. at 173-76 (Speech or Debate privilege precluded inquiring into the motivations for, preparation of, and ingredients of speech delivered by Member on House floor); *MINPECO, S.A. v. Conticommodity Serv., Inc.*, 844 F.2d 856, 861 (D.C. Cir. 1988) ("preparation of the statement for publication in the subcommittee report was part of the legislative process").

Beyond legislative activities themselves, the Speech or Debate Clause also protects "'against inquiry into . . . the motivation for those [legislative] acts.'" *Helstoski*, 442 U.S. at 489 (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972)); *see also Johnson*, 383 U.S. at 184-85 (inquiry into Member's motives for engaging in legislative activities "necessarily contravenes the Speech or Debate Clause"). Indeed, the Supreme Court – and numerous circuit courts – have held unequivocally that the question of whether a Member of Congress's conduct was improperly motivated "is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *Id.* at 180; *see also Miller*, 709 F.2d at 530 (Clause bars "questions about [Member's] motive or legislative purpose"); *Gov't of the Virgin Islands*, 775 F.2d at 522 (same); *U.S. v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973) (same).[6]

**3. Protections of the Clause.**

As discussed above, *see supra* n.2, the Speech or Debate Clause provides three broad protections to Members including two that are of particular importance here: the Clause bars DOJ from advancing its case against Mr. Renzi by introducing as evidence "information as to a legislative act," *Helstoski*, 442 U.S. at 490, and it bars Mr. Renzi – as well as congressional aides with respect to whom he holds the privilege – from being

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[6] The privilege, of course, does not cover everything Members do. For example, the Clause does not cover activities the courts have said are merely "related," but not integral, to the legislative process. Those "merely related" activities include such things as constituent casework and "assistance in securing Government contracts," *Brewster*, 408 U.S. at 512 (dicta); private republication of legislative papers, *Gravel*, 408 U.S. at 626; press statements and constituent newsletters, *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979); and congressional restaurant administration, *Walker v. Jones*, 733 F.2d 923, 931 (D.C. Cir. 1984).

compelled to testify about his legislative activities. *See, e.g.*, *Gravel*, 408 U.S. at 615-16; *Miller*, 709 F.2d at 529.

The Supreme Court draws no distinctions between these three components. Rather it has stated unequivocally that when the Speech or Debate privilege applies, it is "absolute." *Eastland*, 421 U.S. at 501, 503, 509-10, 510 n.16; *Gravel*, 408 U.S. at 623 n.14; *Barr v. Matteo*, 360 U.S. 564, 569 (1959).

**II. The Question of Waiver.**

The Supreme Court twice has addressed the issue of waiver in the Speech or Debate context, once implicitly, *see Johnson*, 383 U.S. 169, and once explicitly, *see Helstoski*, 442 U.S. 477.

*Johnson* involved, as does this case, a criminal prosecution of a Member of the House. Congressman Johnson was convicted of violating federal conflict of interest statutes and conspiracy to defraud; the Fourth Circuit reversed on Speech or Debate grounds, and the Supreme Court affirmed. *See Johnson*, 383 U.S. at 170-72. In his defense at trial, Congressman Johnson had introduced evidence of certain of his legislative activities. *Id.* at 177. Notwithstanding the Congressman's affirmative introduction of those legislative matters in his own defense, the Supreme Court specifically faulted, as violative of the Speech or Debate Clause, the prosecution's cross examination of the Congressman on those topics and its introduction, via the testimony of certain third-party witnesses, of evidence about the Congressman's legislative activities. *Id.* at 173-77, 173 n.4. DOJ, in this case, proposes to do exactly what the Supreme Court said in *Johnson* it may not do.

*Helstoski* involved a criminal indictment of a Member of the House who voluntarily testified about his legislative activities before the grand jury on ten occasions, and voluntarily produced records of his legislative activities to the grand jury. *See Helstoski*, 442 U.S. at 480-83. The Congressman moved to dismiss the indictment on Speech or Debate grounds. The district court denied that motion, but held that the prosecution could not introduce evidence of the Congressman's legislative activities. *Id.*

at 484. The Third Circuit affirmed that evidentiary ruling, specifically rejecting the prosecution's "attempt to analogize the [Speech or Debate] Clause to other privileges where only a voluntariness standard is required misses the significance of the Clause." *U.S. v. Helstoski*, 576 F.2d 511, 523 (3d Cir. 1978), *aff'd* 442 U.S. 477 (1979). In affirming the Court of Appeals, the Supreme Court expressly rejected the prosecution's argument that Congressman Helstoski had waived his Speech or Debate protections by testifying before, and producing records to, the grand jury. "[A]ssuming such a waiver can be made," the Congressman's "words and conduct cannot be seen as an explicit and unequivocal waiver of this immunity from prosecution." 442 U.S. at 492.

Two lower courts also have addressed the waiver issue in the context of civil proceedings. In *Brown & Williamson*, the plaintiffs sought to enforce document subpoenas as against, among others, Congressman Henry Waxman. *Brown & Williamson*, 62 F.3d at 411-12. The D.C. Circuit specifically rejected the plaintiff's argument that Congressman Waxman had waived the protections of the Speech or Debate Clause by "statements made [voluntarily] during a radio interview." *Id.* at 421 n.11.

Similarly, in *Pittston Coal Group, Inc. v. Int'l Union, UMWA*, 894 F. Supp. 275 (W.D. Va. 1995), the district court rejected the plaintiff's assertion that Senator John D. Rockefeller waived the privilege by voluntarily disclosing certain records to the defendant in the litigation. The court, in quashing a subpoena to the Senator's aide, characterized the waiver argument as "meritless." *Id.* at 278 n.5. According to the Court, "Pittston [has] produced no evidence that Senator Rockefeller renounced his privilege, let alone made the 'explicit and unequivocal expression' required to waive it." *Id.*

We are not aware of any case that holds that a Member of Congress, or any other individual to whom the protections of the Speech or Debate Clause apply, had waived those protections, nor has DOJ cited any such case. And if the actions of Congressmen Johnson, Helstoski, and Waxman, and Senator Rockefeller, were insufficient to constitute a waiver of their Speech or Debate protections – as the Supreme Court, D.C. Circuit and U.S. District Court for the Western District of Virginia held – then certainly Mr. Renzi's

mere non-assertion of his constitutional protections, which apparently is the most that can said at this time, cannot possibly constitute an "explicit and unequivocal renunciation" of those protections, particularly when coupled with his express refusal to waive. *See* Renzi Response at 2 n.1 ("To be clear, Congressman Renzi has waived nothing at this point.").

The same thing would be true were Mr. Renzi to introduce evidence of his legislative activities in his defense; that is, the introduction of such evidence would not constitute an "explicit and unequivocal renunciation," *Helstoski*, 442 U.S. at 491, of his Speech or Debate Clause protections. *See Johnson*, 383 U.S. at 173-77.

Accordingly, short of Mr. Renzi "explicit[ly] and unequivocal[ly] ren[ouncing]" his Speech or Debate Clause protections – such as, for example, by executing a document to that effect – the House does not believe the Court may conclude that Mr. Renzi has waived his Speech or Debate Clause protections in this case.[7]

**III. Federal Rule of Evidence 403.**

In the event Mr. Renzi elects to:

- not waive his Speech or Debate Clause protections;
- not consent to cross-examination about evidence of legislative activities he has introduced – or proposes to introduce – in his own defense; and/or
- not consent to DOJ's introduction of evidence of other of Mr. Renzi's legislative activities to rebut evidence of legislative activities Mr. Renzi has introduced – or proposes to introduce – in his own defense,

DOJ might respond to Mr. Renzi's evidence by introducing rebuttal evidence that does not run afoul of Mr. Renzi's Speech or Debate Clause protections, as DOJ itself

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[7] DOJ's attempts to analogize the protections of the Speech or Debate Clause to qualified privileges such as the attorney-client privilege and the Fifth Amendment privilege against self-incrimination, DOJ Motion at 5, certainly fail, not only because the protections of the Clause are absolute, *see supra* p. 8, but also because the underlying purpose of the Clause concerns the very structure of the federal government rather than the rights of any particular individual. *See, e.g.*, *Helstoski*, 442 U.S. at 492; *Helstoski*, 576 F.2d at 523.

acknowledges. *See* DOJ Motion at 3 ("Testimony about the legislative process in general, i.e., the steps via which any bill progresses through Congress, would not violate Renzi's [S]peech or [D]ebate protections.").

Alternatively, Rule 403 of the Federal Rules of Evidence – "the [C]ourt may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury . . . ." – provides the Court with ample discretion to address, as an evidentiary matter, DOJ's concerns that Mr. Renzi's introduction of evidence of his legislative activities in his own defense will present "an unfair, one-sided, or distorted picture for the jury." DOJ Motion at 8.

The House takes no position on how the Court should rule in the event it is presented with such a Rule 403 motion. The House, however, does bring to the Court's attention the following points:

First, Rule 403 provides the Court with broad discretion to preclude Mr. Renzi from introducing evidence of his legislative activities, or to strike such evidence from the record after it has been introduced. *See, e.g., U.S. v. Hooton*, 662 F.2d 628, 636 (9th Cir. 1981); *U.S. v. Hearst*, 563 F.2d 1331, 1349 (9th Cir. 1977).

Second, the mere fact that Mr. Renzi introduces evidence of his legislative activities in his own defense, and that DOJ is unable to cross-examine the witness(es) through which that evidence is introduced, or to introduce other of Mr. Renzi's legislative activities as rebuttal testimony, should not automatically result in the Court's concluding that the "probative value [of such evidence] is substantially outweighed by a danger of . . . unfair prejudice, confusing of the issues, [or] misleading the jury." Fed.R.Evid. 403. The Supreme Court expressly has recognized that the Speech or Debate Clause is not designed to assure fair trials. *See Helstoski*, 442 U.S. at 488 ("Without doubt the exclusion of [legislative act] evidence will make Prosecutions more difficult.").

Third, in another recent criminal case, the House Ethics Committee agreed not to assert Speech or Debate with respect to specified testimony DOJ sought to introduce in

its prosecution of a former congressional aide. In that case, where DOJ was benefiting from the introduction of testimony about legislative matters, DOJ moved in limine to preclude the defendant from cross-examining the Ethics Committee witness about matters beyond the scope of DOJ's direct examination of that witness. (The Ethics Committee also had agreed that it would not assert Speech or Debate as to cross-examination that was within the scope of the direct.) *See* [DOJ's] Motion in Limine at 1-2, 6, 10-12, *U.S. v. Verrusio*, No. 1:09-cr-00064 (D.D.C. Nov. 17, 2010) (ECF No. 87), attached as Ex. A. DOJ's *Verrusio* motion is relevant here, both because it reflects the appropriate use of the rules of evidence to resolve issues that concerns legislative matters, and because DOJ's position here, where it effectively seeks to introduce evidence well beyond the scope of what Mr. Renzi proposes to introduce, *see* DOJ Motion at 3-4, is wholly inconsistent with the position it took in *Verrusio*.

Fourth, if the Court rejects DOJ's contention that Mr. Renzi has waived his Speech or Debate protections, as the House believes it should, *see supra* pp. 8-10, and if the Court addresses any remaining "sword" and "shield" issue that may be presented as a Rule 403 evidentiary matter, rather than as a constitutional issue – again as the House believes it should – then the possibility that Mr. Renzi could appeal mid-trial from an adverse Speech or Debate ruling on this issue should be eliminated. *Cf. Renzi*, 651 F.3d at 1018-19; *U.S. v. Jefferson*, 546 F.3d 300 (4th Cir. 2008); *U.S. v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995); *U.S. v. McDade*, 28 F.3d 283 (3d Cir. 1994).

## CONCLUSION

The House thanks the Court for permitting it to participate as an *amicus*.

Respectfully submitted,

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May 6, 2013

**CERTIFICATE OF SERVICE**

I certify that on May 6, 2013, I served one copy of the foregoing Memorandum of the Bipartisan Legal Advisory Group of the U.S. House of Representatives as *Amicus Curiae* Regarding Government's Contingent Motion to Admit Evidence on all parties by CM/ECF.

*/s/ Todd B. Tatelman*
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