UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-10588

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD G. RENZI,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Arizona
No. 08-cr-0212
Hon. David C. Bury, District Judge, Presiding

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INTRODUCTION

Almost a decade ago, the government launched a wide-ranging investigation into Richard "Rick" Renzi's work in Congress, his campaign and personal finances, his taxes, and his insurance agency. Eventually securing an indictment on public-corruption, money-laundering, insurance-embezzlement, tax, and racketeering charges, the government at one point claimed that Renzi "could give Bernie Madoff a run for his money." Dkt-354, at 123. Its case then fell apart, both legally and factually.

Two legal rulings substantially undermined the prosecution. The government's public-corruption theory was that Renzi pushed two groups of land-exchange proponents to retire irrigation on a 640-acre alfalfa farm near Fort Huachuca without disclosing that the farm's owner, James Sandlin, owed him money. That conflict-of-interest theory evaporated when the Supreme Court decided *Skilling v. United States*, 130 S.Ct. 2896 (2010). Then, in a co-defendant's appeal, this Court held that the government's insurance-embezzlement theory—that Renzi misappropriated funds his agency held in trust—was legally invalid. *See United States v. Lequire*, 672 F.3d 724 (9th Cir. 2012).

The case also failed on the facts. After *Skilling*, the public-corruption counts required the government to prove that Renzi solicited or received a "thing of value." But the facts that emerged at trial preclude such a finding. As all agree,

retiring irrigation on the farm was in the public interest; the alleged extortion victim paid a fair-market price for the property; and Renzi received only the repayment of a legitimate, pre-existing, and unrelated debt. No court has ever found bribery or extortion in these circumstances.

Apart from this failure of proof, there was one fundamental error at trial after another. Philip Aries, whose investment group purchased the alfalfa farm, testified falsely about Renzi's one and only meeting with him. Aries claimed that he had never spoken with Sandlin and had no interest in the alfalfa farm until Renzi suddenly pushed the idea on him at that meeting. But Aries recanted on cross-examination when confronted with phone records—which the government had subpoenaed and analyzed at the outset of the investigation—conclusively disproving his story. Then, despite knowing that Joanne Keene, Renzi's former district director, would offer the same false account of the meeting, the government called her and elicited the same false story.

The government also used Keene to violate Renzi's Speech or Debate Clause privilege. Keene testified about Renzi's legislative acts, including his reasons for not introducing a land-exchange bill, even though the government had stipulated, pre-trial, that this evidence was protected by the Speech or Debate Clause. The testimony was not only improper but highly damaging, as the government stressed during summation.

The district court also improperly limited Renzi's defense. It excluded exculpatory testimony from an aide to another member of Congress under a more expansive reading of the Speech or Debate Clause than it had applied to Renzi. And the court barred Renzi from offering or testifying about classified information in his defense, even though that information would have helped to explain why he tried to shape the land-exchange proposals to protect Fort Huachuca.

After a five-week trial and several days of deliberation, the jury returned a split verdict: it found Renzi guilty on 17 counts, including portions of the public-corruption charges, but acquitted him on the remaining 15. None of these convictions is supported by sufficient evidence. And the public-corruption convictions are predicated on serial violations of Renzi's constitutional rights. These errors, and still others, require reversal.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. §3231. This Court has jurisdiction under 28 U.S.C. §1291 and 18 U.S.C. §3742(a). The district court entered final judgment on October 28, 2013. 1ER4. Renzi filed a timely notice of appeal on November 8, 2013. 1ER1; *see* Fed. R. App. P. 4(b)(1)(A).

STATEMENT OF ISSUES

1. Whether Renzi is entitled to judgment of acquittal on the public-corruption counts because there was insufficient evidence that he (or anyone else) obtained a "thing of value" from the sale of property at a fair-market price.

2. Whether, if there was sufficient evidence to support conviction on the public-corruption counts, Renzi is entitled to a new trial on those counts because (a) the district court failed to identify the "thing of value" when instructing the jury; (b) the district court admitted evidence in violation of the Speech or Debate Clause; (c) the district court denied Renzi his right to present a defense through its blanket exclusion of evidence under the Classified Information Procedures Act ("CIPA") and its inconsistent interpretation and application of the Speech or Debate Clause; and (d) the government violated Renzi's due process rights by knowingly presenting false testimony.

3. Whether Renzi is entitled to judgment of acquittal on the insurance counts because there was insufficient evidence that (a) Renzi was engaged in the "business of insurance" and (b) the documents submitted to regulators were "financial" documents.

4. Whether, if there was sufficient evidence to support conviction on the insurance counts, Renzi is entitled to a new trial on those counts because the district court erroneously instructed the jury on "financial reports or documents."

5. Whether Renzi is entitled to judgment of acquittal on the RICO count because there was insufficient evidence that Renzi misappropriated insurance-premium funds.

6. Whether, if there was sufficient evidence to support conviction on the RICO count, Renzi is entitled to a new trial on that count because the district court constructively amended the indictment.

7. Whether, if the convictions stand, Renzi is entitled to be resentenced because the district court employed an erroneous methodology in calculating the loss amount.

STATEMENT OF ADDENDUM

Relevant provisions of the United States Constitution, United States Code, and United States Sentencing Guidelines are set forth in an addendum.

BAIL/DETENTION STATUS

On February 18, 2014, this Court granted Renzi's motion to continue bail during his appeal.

STATEMENT OF THE CASE

A. Background

1. The campaign and coverage dispute

Rick Renzi grew up on Fort Huachuca, a military base near Sierra Vista, Arizona, where his father served. 2ER194. Renzi eventually established a

successful insurance agency, Renzi & Company ("R&C") or Patriot Insurance Agency ("Patriot"), as it was known after 2002, with offices in Sonoita, Arizona. The agency's clients included not-for-profit, religiously-oriented organizations called crisis pregnancy centers ("CPCs"). 2ER283-87.

In 2001, Renzi decided to run for Congress in Arizona's first district. 2ER160-61. To raise money for the campaign, he mortgaged his house and sold a 50% share in a real-estate venture to Sandlin. 2ER187; 2ER169. Renzi's father also agreed to stand behind him financially. 2ER162.

While Renzi campaigned, a coverage dispute arose with Safeco, the CPCs' insurer, after it denied a claim in part because the CPCs offered religious counseling. Because religious counseling was central to the CPCs' mission, which was to educate women about alternatives to abortion, Safeco's position gutted the policies. 2ER275-80. R&C then refused to remit premiums to Safeco's agent, North Island Facilities ("NIF"), which led Safeco to issue notices of cancellation to the CPCs and file complaints with insurance regulators around the country. 2ER265; 2ER253.

R&C then began the process of transferring clients to another insurer. 2ER281. Certificates of insurance were sent to some clients indicating that coverage was in place with Jimcor Insurance Company ("Jimcor"). 2ER288-90.

Jimcor was the broker with which R&C was working to move the policies, but it was not an insurance company, so the certificates were incorrect.

Shortly thereafter, Safeco and R&C resolved their dispute. R&C remitted the past-due premiums. 2ER263. Safeco retroactively reinstated the policies and repudiated its coverage position. 2ER254. No claim was ever denied for lack of payment. *Id.*

Although the dispute was resolved, insurance regulators in Virginia and Florida asked R&C to explain why clients had received certificates of insurance showing Jimcor as an insurer. 2ER266-68. Andrew Beardall, R&C's president and general counsel, responded with letters explaining that the reference to Jimcor had been a mistake. 2ER269-70. The letters said nothing about R&C's profits, losses, assets or financial condition.

2. Renzi's actions in Congress

By this time, Renzi had won election to Congress. Through the Committee on Natural Resources, he learned more about Fort Huachuca. 2ER184-85. Blaming the fort for the region's unsustainable water usage, environmental groups had secured court orders requiring the fort to reduce water use across the region. 2ER183. Working with House Leadership, Renzi then championed legislation, popularly known as the "Renzi Rider," that exempted Fort Huachuca from responsibility for off-base water usage. 2ER163. Nevertheless, facing ongoing

water-use litigation and review by the Base Realignment and Closure Commission ("BRAC"), Fort Huachuca faced a perilous future. 2ER164-65.

After being reelected, Renzi earned a seat on the Permanent Select Committee on Intelligence. 2ER180-81. Learning more about Fort Huachuca's essential role in protecting national security, he redoubled his efforts to protect it. 5ER807. His view of the fort's importance, and continued lobbying from Fort Huachuca's advocates, animated many of his actions in Congress. *E.g.*, *id*.

3. The land-exchange proposals

In 2005, two proposed federal land exchanges came to Renzi's attention. Land-exchange bills authorize swaps of private and federal land. 2ER256. To secure passage of such bills, land-exchange proponents attempt to assemble packages of land with environmental or strategic value to the government. 2ER251. In the first proposal, the Resolution Copper Company ("RCC") sought federal land on which to build a copper mine. 2ER255-56. In the second, an investment group led by Aries (the "Aries Group") sought federal land for development. 2ER208.

Both parties solicited Renzi's input. Citing its importance to Fort Huachuca and the BRAC process, Renzi discussed with both parties the idea of retiring water use on Sandlin's alfalfa farm (the "Sandlin property") in connection with their exchange efforts. 2ER228, 2ER257. Renzi explained what is now undisputed: that

retiring the water usage was in the public interest, because it would help not only to preserve the threatened San Pedro River, but also to ensure Fort Huachuca's viability. 2ER127.

4. Spirit Mountain Risk Retention Group

In 2005, Renzi helped to establish the Spirit Mountain Risk Retention Group ("Spirit Mountain"), which allowed the CPCs to self-insure. 2ER272-73. Patriot, including its CFO, Dwayne Lequire, handled marketing, sales, and premium collection for Spirit Mountain. 2ER274. Spirit Mountain is a stable, successful risk-retention group. 2ER188.

B. The Indictments

The initial indictment was returned in February 2008. It charged Renzi and Sandlin with extortion and honest-services fraud based on Renzi's failure to disclose that Sandlin owed him approximately $800,000. It charged Renzi and Beardall with embezzling insurance premiums and making false statements to insurance regulators between 2001 and 2003.

Finding the counts misjoined, a magistrate judge recommended severance. The government then obtained a superseding indictment that used a racketeering count to bridge the two groups of counts. It also added new insurance-embezzlement and -fraud counts against Renzi and Lequire based on Patriot's work for Spirit Mountain. After Renzi attacked the racketeering count, the

government obtained a second superseding indictment (the "indictment") that bolstered that count.

The indictment charged Renzi with four groups of offenses:

- *Public corruption.* Counts 1-27 charged Renzi with conspiracy, honest-services wire fraud, extortion and attempted extortion, and money laundering based on his dealings with RCC and the Aries Group and the derivative banking transactions. Racketeering Act Two in the RICO count (Count 47) alleged identical conduct.
- *Insurance embezzlement and false statements (2001-03).* Counts 28-35 charged Renzi with conspiracy, embezzling insurance premiums, and making false statements to insurance regulators between 2001 and 2003. This same conduct, recharacterized as mail and wire fraud, was alleged as Racketeering Act One.
- *Insurance embezzlement (2005-08).* Counts 36-46 charged Renzi with conspiracy and embezzling insurance premiums from Spirit Mountain between 2005 and 2008. This same conduct, labeled as wire fraud, was alleged as Racketeering Act Three.
- *False statements on tax returns.* Count 48 charged Renzi with making false statements on his 2005 income-tax return.

C. Pre-Trial Proceedings

Prior to trial, the district court suppressed all evidence from an unlawful wiretap and dismissed multiple counts of the indictment.

1. Wiretap

During its investigation, the government wiretapped Renzi's phone and recorded and reviewed dozens of calls between Renzi and his attorneys. 2ER389. The government also falsely reported to the supervising court that these privileged calls had been "minimized." 2ER389. Finding that the government had violated both Title III and the Fourth Amendment, and that it had "breach[ed] its duty of candor to the court," the district court sanctioned the government by suppressing all the wiretap evidence. 2ER393.

2. Skilling

In 2010, the Supreme Court held that 18 U.S.C. §1346 did not reach conflicts of interests, but rather "criminalize[d] only the bribe-and-kickback core of the *** law" on honest-services fraud. *Skilling*, 130 S.Ct. at 2931 (emphasis omitted). Prior to *Skilling*, the government had pursued a conflict-of-interest theory. Indeed, it represented to the district court that the "victims here were not bribe payers" and that a "bribery theory was not one which seemed to fit." 3ER470.

The government reversed course post-*Skilling*, arguing that the charges were elastic enough to encompass bribes or kickbacks. Dkt-935. The magistrate judge

recommended the counts be dismissed, Dkt-913, but the district court allowed them to go forward on a bribery theory, 1ER69.

3. Speech or Debate Clause

Many of the pre-trial proceedings involved the Speech or Debate Clause. Renzi challenged both the manner in which the government conducted its investigation and the validity of its theory of prosecution. Despite recognizing that the government had violated the Clause by presenting evidence of Renzi's legislative acts to the grand jury, the district court declined to grant any meaningful remedy. Instead, it found that Renzi's rights could be vindicated by ensuring that the government made no use of protected materials during trial. 2ER421.

On appeal, this Court affirmed. *See United States v. Renzi*, 651 F.3d 1012, 1039 (9th Cir. 2011). The Court explained that the government's theory of prosecution was not dependent on proof of legislative acts: it "need[ed] only [to] introduce evidence of Renzi's promise to support legislation and the circumstances surrounding that promise." *Id.* at 1031. With such evidence, the Court said, it would be theoretically possible for the government to prove Renzi's alleged "act to offer RCC, and later Aries, a *quid pro quo* deal: Sandlin property for future legislation," *id.*, without violating the Speech or Debate Clause.

Stressing that it did not have jurisdiction to consider evidentiary issues, the Court did not address whether any particular evidence was admissible under the

Clause. *Renzi*, 651 F.3d at 1018. The Court noted, instead, that the district court would "address the propriety of each piece of evidence 'as the government moves to introduce it' at trial." *Id.* at 1018.

4. *Lequire*

While Renzi's interlocutory appeal was proceeding, the government tried two of his co-defendants. The jury acquitted Beardall. This Court then acquitted Lequire upon finding that he had not violated 18 U.S.C. §1033(b), which prohibits persons in the business of insurance from embezzling, abstracting, or misappropriating funds, because, as a matter of law, one cannot embezzle or misappropriate funds that are not held in trust for another. *Lequire*, 672 F.3d 724.

After *Lequire*, the district court dismissed the insurance-embezzlement charges against Renzi, but not mail- and wire-fraud charges premised on identical conduct. The court denied Renzi's motion to dismiss these counts even though the indictment alleged a scheme to defraud by "misappropriating insurance premium funds held in trust" by R&C. 4ER456. The court reasoned that the "held in trust" language was surplusage, and that the term "misappropriating," as used in the indictment, meant something different from this Court's understanding of "misappropriation," as used in §1033(b). 4ER790.

5. CIPA

In October 2012, more than six months before the trial was to begin, Renzi alerted the government that his defense might reveal classified information. *See* 4ER798. After his counsel secured clearances allowing them to discuss the issues with him, Renzi timely filed a CIPA §5 notice describing the information he intended to present. 5ER804.

The district court then held a hearing under CIPA §6(a) to assess the information's relevance and admissibility. 5ER822. The court acknowledged that the evidence Renzi described was relevant to his state of mind, but found that it was not sufficiently relevant to trump the United States' national-security interests. It ordered the government to stipulate that Fort Huachuca was essential to national security, but barred Renzi from presenting *any* classified information at trial. 5ER858.

The district court also voiced concern about ensuring that no classified information was inadvertently disclosed at trial. 5ER832. It directed Renzi to submit a proffer of his testimony for classification review. 5ER832. It said that the proffer would not be provided to the prosecutors, unless it included classified information, in which case it would be turned over to them immediately. 5ER856. Knowing that testifying in his own defense would reveal classified information,

Renzi elected not to risk the disclosure of his defense before trial under this novel preclearance procedure.

6. Tax charge

Shortly before trial, after re-interviewing the accountant who prepared Renzi's tax returns, the government dismissed the tax count. 2ER293.

D. The Trial

1. Public-corruption charges

At trial, the evidence regarding the public-corruption charges focused on Renzi's intent. The government claimed that he had acted corruptly by telling RCC and the Aries Group that he would support their land-exchange legislation only if they purchased the alfalfa farm from Sandlin. Renzi did not dispute that he discussed retiring the irrigation at the farm, but argued that he acted with an innocent, good-faith intent to protect Fort Huachuca.

a. *Resolution Copper Company*

Bruno Hegner, RCC's general manager, and Keene testified about RCC's controversial effort to build a copper mine outside Superior, Arizona. Many groups have opposed the mine and, despite RCC's efforts, Congress has refused to pass its land-exchange legislation. 2ER166. To inoculate its case on this point, the government elicited testimony from Keene suggesting that the RCC project was good public policy. She testified that Renzi was not as "excited" about the

legislation as he "should have been" given that, in her opinion, it would have benefitted his district. 2ER216.

Hegner testified about his interactions with Renzi. He said that RCC had asked Renzi in January 2005 to suggest properties of interest to the federal government. 2ER257. Renzi suggested that RCC acquire the water rights to Sandlin's alfalfa farm near Fort Huachuca. 2ER258. RCC made preliminary inquiries, but struck no deal. According to Hegner, Renzi grew increasingly insistent about the farm. 2ER245. Hegner claimed that, during an April 12, 2005 telephone conversation, Renzi said that he would not support RCC's bill unless it included the Sandlin property. *Id*. Renzi added, when asked by Hegner, that he would discuss the matter further if RCC was unable to reach agreement. *Id*. RCC elected not to proceed with acquiring the water rights, 2ER246, but, as Hegner admitted on cross-examination, Renzi introduced RCC's land-exchange legislation anyway, 2ER250.

b. *The Aries Group*

Aries and Keene testified about Aries' land-exchange proposal, in which the Aries Group sought to acquire federal lands near Phoenix for residential development. Aries had initially pitched his proposal to Keene, whom he knew from other deals. 2ER227. Keene then invited him to meet with Renzi on April 15, 2005—the only time Aries ever met Renzi. *Id*.

Before that meeting, according to Aries, he had never spoken with Sandlin and had neither knowledge of nor interest in the alfalfa farm. 2ER230. Aries claimed, instead, that Renzi introduced the property to him, pushed him to buy it, and promised that the legislation he sought would get a "free pass" through the Natural Resources Committee. *Id*.

This depiction of the meeting was false. On cross-examination, Aries admitted that he had spoken with Sandlin for 28 minutes before meeting Renzi. 2ER236-37. Aries admitted that it was he, not Renzi, who had first raised the prospect of acquiring the Sandlin property during the meeting. 2ER239-40. And Aries admitted telling a business partner that he wanted to "screw Renzi seven ways to Sunday" because he was angry that the land exchange was not completed. 2ER241.

The government then elicited the same false account of the April 15 meeting from Keene. 2ER213-14. On cross-examination, Keene admitted that the draft bill from Aries that she had submitted to the Office of Legislative Counsel before the meeting already included the Sandlin property. 2ER193. And she acknowledged that a briefing book prepared for Renzi's use at the meeting contained a draft bill that included the Sandlin property. 2ER191-92.

In addition, despite its previous concession that the testimony was protected by the Speech or Debate Clause, the government elicited testimony from Keene

that Renzi had delayed introduction of the Aries legislation because of the public-corruption prosecution of Congressman Randall "Duke" Cunningham, in an effort to impugn Renzi's motives. 2ER222.

c. *Monetary transactions*

The evidence regarding the transactions between Aries and Sandlin, and between Sandlin and Renzi, was generally undisputed. In May 2005, Sandlin agreed to sell the alfalfa farm to Aries for $4.5 million, which all agreed was a fair-market price. 2ER232. Aries then paid Sandlin $1 million in earnest money. 2ER231. In July, the parties agreed to extend the closing date in exchange for an additional deposit. 2ER233-34. When the transaction closed in October, Aries made an additional payment to Sandlin. 2ER234-35.

During this time, Sandlin continued making payments to Renzi on a pre-existing debt from Sandlin's earlier purchase of Renzi's interest in an unrelated development in Kingman, Arizona. 2ER202. In May 2005, Sandlin paid Renzi $200,000, 2ER201, and, in September, he paid the remainder of the debt, including the accrued interest, $533,000. 2ER206. (Sandlin had repaid Renzi $100,000 in November 2004. 2ER203-07.)

d. *Defense case*

In his defense, Renzi sought to present evidence of his innocent intent. Although the district court's CIPA ruling precluded much of this evidence

(including Renzi's own testimony), he introduced non-classified testimony from Fort Huachuca officials and supporters about his abiding interest in the fort and his long-term efforts to address the regional water deficit. *E.g.*, 2ER175-78. Scientists from the Nature Conservancy also testified about requesting that Renzi work to retire water usage at the Sandlin property. *See, e.g.*, 2ER171-72.

Renzi also sought to offer testimony from Kevin Messner, who had been chief of staff to both Renzi and Congressman James Kolbe. But reading the Speech or Debate Clause far more broadly than it had with respect to Renzi's own privilege, the district court barred any testimony relating to Messner's time in Kolbe's office. 2ER158-59. Messner thus was not permitted to testify about his interactions with Renzi, his support for the Aries Group's legislation, or his efforts to promote the legislation within the Sierra Vista community. 2ER167-68.

2. Insurance charges

The government presented evidence regarding alleged mishandling of insurance premiums by R&C (from 2001 to 2003) and Patriot (from 2005 to 2008). For example, the government offered evidence that R&C did not have enough cash on hand to pay what it owed NIF during 2002 (even though Arizona law does not require agencies to maintain such balances). *See, e.g.*, 2ER286.

In addition, the government called two insurance regulators—from Florida and Virginia—to testify about the circumstances surrounding two letters that R&C

had submitted in response to their inquires. 2ER260-61 . And the government elicited testimony from Aly Gamble, an R&C employee, suggesting that the letters to the two regulators contained a false statement. Gamble admitted that she did not know if Renzi had ever read these letters, although she speculated that one of the phrases seemed like something that Renzi would have said. 2ER271.

E. The Verdict

The jury returned a split verdict. 2ER130-33. It acquitted Renzi on all honest-services-fraud and money-laundering counts relating to the payments Sandlin made or received in September and October 2005 (Counts 6-10 and 16-25), as well as the money-laundering count relating to Sandlin's purchase of a boat (Count 13). But the jury found Renzi guilty on counts relating to the payments Sandlin made or received in May and July 2005 (Counts 2-5, 12, and 14-15). It also found him guilty of conspiracy (Counts 1, 11, and 28), and on the extortion, insurance-false-statement, and RICO counts (26-27, 29-30, and 32, respectively). The jury acquitted Renzi on the Spirit Mountain conspiracy count (31) and related RICO acts.[1]

F. Sentencing

At sentencing, the parties disputed the loss amount for Guidelines purposes, including the value of the payment involved in the public-corruption counts. Renzi

[1] The counts are referred to here as they were renumbered for trial.

argued that the payment had zero net value, because the money he received from Sandlin paid a debt of the exact amount. Dkt-1300, at 2-5. The district court concluded the value of the payment was $200,000, and increased Renzi's office level by 10 levels. 2ER125. This resulted in a total offense level of 30 and a Guidelines range of 97 to 120 months. The court imposed a sentence of 36 months. 2ER126.

SUMMARY OF ARGUMENT

I. Renzi is entitled to judgment of acquittal or a new trial on the public-corruption counts.

A. An essential element of extortion and honest-services fraud is that an official solicit or receive a "thing of value" in exchange for official action. The government failed to establish that element.

The transactions on which the jury might have relied are insufficient either individually or in combination. The money the Aries Group paid to Sandlin was not a thing of value because it involved an equal-value exchange; neither the Aries Group nor Sandlin lost or gained anything in that exchange. Sandlin's payment to Renzi was likewise not a thing of value, because it was simply the repayment of a lawful debt.

Absent a contrary congressional directive, equal-value exchanges are not "things of value" under the public-corruption statutes. And even assuming that one

of the transactions could constitute a "thing of value," the district court erred by refusing to identify in its jury instructions the "thing of value" at issue.

B. Even if the evidence were sufficient, Renzi would be entitled to a new trial on the public-corruption counts because of multiple constitutional errors.

First, the government violated the Speech or Debate Clause by offering testimony about Renzi's motivations for his legislative acts, including his level of enthusiasm for RCC's bill and his reasons for not introducing the Aries Group's bill. That testimony was not admissible under a waiver theory, as the government argued and the district court believed, because Renzi never waived the privilege (assuming that waiver is even possible in this context). And testimony about these legislative acts was highly prejudicial to Renzi, as confirmed by the government's reliance on it during its closing arguments.

Second, Renzi was deprived of his right to present a defense. The district court prohibited Renzi from introducing *any* classified information as part of his defense, in violation of both CIPA and the Constitution, despite acknowledging that such evidence was relevant to his state of mind. The court also prohibited Renzi from eliciting *any* testimony from Messner about his work for Representative Kolbe, including evidence about pre-legislative conduct that the district court had previously found to be outside the scope of the Speech or Debate

Clause. These rulings prevented Renzi from presenting the jury with a full picture of what motivated his dealings with the land-exchange proponents.

Third, Renzi's due-process rights were violated when the government elicited testimony it knew or should have known was false. Both Aries and Keene, who were cooperating witnesses, testified falsely when they claimed that Aries had known nothing about the Sandlin property before meeting Renzi and that Renzi had pressured Aries to purchase the land. Phone records obtained from the government show that the government knew or should have known that this testimony was false. And even after Renzi impeached Aries with the records, the government elicited the same false testimony from Keene. Nor can there be any question that this testimony was material. The government told the jury in summation that it should continue to believe Keene's testimony, even claiming—falsely—that the prosecutors had always known about the phone records.

II. The insurance convictions also must be reversed. The relevant statute criminalizes false statements to regulators when they (a) are made by "insurers"—*i.e.*, entities that write or reinsure risks, as well as their officers, directors, agents or employees (18 U.S.C. §1033(f)); and (b) are made in connection with "financial reports or documents" (*id.* §1033(a)(1)(A)). Renzi was not an "insurer," because it is undisputed that neither he nor R&C ever wrote insurance or reinsured risk. There was also no evidence that the short, narrative letters sent to regulators were

"financial" documents. Accordingly, Renzi is entitled to judgment of acquittal on the insurance counts. In the alternative, he is entitled to a new trial on those counts because, in instructing the jury, the district court provided an unbounded and improper definition of "financial reports or documents."

III. RICO requires a "pattern" of racketeering—*i.e.*, two or more predicate racketeering acts. Renzi's RICO conviction must be reversed if the public-corruption convictions are reversed, because the public-corruption charges are one of the two predicate acts of racketeering. But even if the public-corruption convictions are *not* reversed, Renzi's RICO conviction still must be reversed, because the government did not prove that he misappropriated insurance premiums and thus did not prove the other predicate act. Because the premiums belonged to R&C, and were not held in trust, the government did not and could not prove the scheme alleged in the indictment. Alternatively, Renzi is entitled to a new trial, because the district court constructively amended the indictment by failing to instruct the jury on what the indictment alleged, which is that the premium funds *were* held in trust and were *not* R&C's property.

IV. Even if the Court upholds the verdict, it must vacate Renzi's sentence. By valuing a payment to satisfy an equal amount of debt based on its face value ($200,000) rather than its net value to Renzi (zero), and thereby increasing Renzi's Guidelines offense level by 10 levels, the district court committed an error of law.

STANDARDS OF REVIEW

This Court "review[s] de novo whether sufficient evidence exists to support a guilty verdict." *United States v. Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2010) (internal quotation marks omitted). The evidence is sufficient to sustain a conviction only if "a[] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotation marks omitted). *De novo* review also applies to the "[c]onstruction and interpretation of statutes." *United States v. Dahl*, 314 F.3d 976, 977 (9th Cir. 2002).

The Court reviews *de novo* "whether the district court's jury instructions adequately presented the defendant's theory of the case and whether the district court presented the jury with every element of the crime." *United States v. Jinian*, 725 F.3d 954, 960 (9th Cir. 2013).

The Court "review[s] *** constitutional questions, including alleged due process violations, de novo." *Vilchez v. Holder*, 682 F.3d 1195, 1198 (9th Cir. 2012).

A "district court's method of calculating loss" under the Sentencing Guidelines is reviewed "de novo." *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1153-54 (9th Cir. 2012).

ARGUMENT

I. RENZI IS ENTITLED TO JUDGMENT OF ACQUITTAL OR A NEW TRIAL ON THE PUBLIC-CORRUPTION COUNTS

Renzi is entitled to judgment of acquittal or, alternatively, a new trial on the public-corruption counts because none of them was supported by sufficient evidence and a multiplicity of trial errors violated his constitutional rights.

A. Renzi Did Not Obtain Any Specified "Thing Of Value"

The honest-services fraud and extortion counts required the government to prove that Renzi solicited or received a specific "thing of value" in exchange for his promise to take official action. The government failed to prove that Renzi solicited or received any such thing. *See* 2ER174; Dkt-1243, at 2-5 (raising issue); 2ER174a; 1ER27-28 (ruling on issue). Even if the evidence were sufficient, his convictions would still have to be reversed, because the district court's instructions failed to identify the specific "thing of value" at issue. *See* 2ER151; Dkt-1119, at 54-55 (requesting instruction); 2ER152 (denying instruction).

1. The evidence was insufficient

Extortion and bribery are in some respects opposite sides of the same coin. Extortion "requires that the victim part with his property, and that the extortionist gain possession of it." *Sekhar v. United States*, 133 S.Ct. 2720, 2725 (2013) (citation omitted). That is because, "[a]t common law, extortion was a property offense committed by a public official who took 'any money or thing of value' that

was not due to him under the pretense that he was entitled to such property by virtue of his office." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402 (2003); *accord Sekhar*, 133 S.Ct. at 2724 ("Extortion required the obtaining of items of value, typically cash, from the victim."). Thus, the "'gravamen' of the offense is loss to the victim." *United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995); *accord United States v. Carlock*, 806 F.2d 535, 555 (5th Cir. 1986); *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986); *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977). For its part, honest-services bribery "requires a showing that something of value was *** corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official." *United States v. Sun–Diamond Growers*, 526 U.S. 398, 404-05 (1999) (addressing 18 U.S.C. §201); *see United States v. McDonough*, 727 F.3d 143, 152 (1st Cir. 2013) (honest-services fraud requires proof of "the receipt of something of value"); *United States v. Ring*, 706 F.3d 460, 466-67 (D.C. Cir. 2013) (similar).

In this case, the government failed to prove that Renzi or Sandlin received anything of value or caused any loss to any victim. The government's case involved two transactions: the sale of the Sandlin property and Sandlin's use of some of the proceeds from the sale to repay a portion of his debt to Renzi. Neither transaction, either alone or together, establishes the "thing of value" element.

The evidence established that the Aries Group paid the fair-market price for the Sandlin property; indeed, it rejected a contemporaneous offer to resell the property at a profit of more than $700,000. 2ER142, 2ER242-43. In other words, the undisputed evidence shows that the parties engaged in an equal-value exchange.

The evidence also showed that Sandlin used some of these proceeds to pay a portion of a debt owed to Renzi. But that debt was legitimate and undisputed. 2ER140. Sandlin's payments reduced his indebtedness to Renzi on a dollar-for-dollar basis. This, too, was an equal-value exchange.

No court has ever held that an equal-value exchange could satisfy the "thing of value" element.[2] And for good reason, such a holding would lead to nonsensical results: a public official could commit bribery or extortion by demanding that a constituent exchange $10 bills with him as a condition for supporting legislation. This would conflate extortion and coercion. *See Sekhar*, 133 S.Ct. at 2725

[2] Although we know of no case directly on point, a few suggest that equal-value exchanges are not a "thing of value." *See, e.g.*, *United States v. Tillem*, 906 F.2d 814, 822 (2d Cir. 1990) ("Extortion under color of official right occurs when an official uses the authority of his office to obtain *unearned* money." (emphasis added)); *People v. Squillante*, 185 N.Y.S.2d 357, 360 (N.Y. Sup. Ct. 1959) ("Where, as here, nothing is paid except for services, there would appear to be a substantial question whether the Court should not have charged as requested that *** if the payments were for services rendered defendants were not guilty." (emphasis omitted)).

(distinguishing the two). Someone required to engage in an equal-value transaction might have his freedom of action restricted (and therefore may be coerced), but he would not suffer any loss (and therefore would not be paying a bribe or having money extorted from him). The former is at most what happened here, as the Aries Group indisputably suffered no loss and there was no evidence that Renzi attempted to cause RCC any loss.[3]

Even if the Hobbs Act or honest-services-fraud statute—neither of which is a model of clarity—could be stretched to encompass equal-value exchanges, the rule of lenity would require that Renzi's convictions be reversed. *See Skilling*, 130 S.Ct. at 2932 (applying rule of lenity to honest-services-fraud statute); *Scheidler*, 537 U.S. at 409 (applying rule of lenity to Hobbs Act). "[N]o citizen should be held accountable for a violation of a statute whose commands are uncertain." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.). Affirming Renzi's convictions would lead precisely to that result.

Renzi is thus entitled to judgment of acquittal on the public-corruption counts. If those convictions are reversed, the money-laundering convictions must

[3] The Model Penal Code, on which the Supreme Court has relied in interpreting the Hobbs Act, *see Scheidler*, 537 U.S. at 407-08 & n.13, provides an affirmative defense to extortion when the property received was "honestly claimed *** as compensation for property or lawful services." Model Penal Code §223.4(4) (1980). The Code thus would not impose liability on a public official, like Renzi, who engaged in an equal-value exchange.

be as well, because they are wholly derivative. *See, e.g.*, *United States v. Garrido*, 713 F.3d 985, 998 (9th Cir. 2013); *United States v. Shipsey*, 190 F.3d 1081, 1088 (9th Cir. 1999).

2. The jury was misinstructed

Throughout the case, the government refused to identify the "thing of value" that Renzi allegedly obtained. Dkt-136, at 3. Nor did the jury instructions do so. That failure entitles Renzi to a new trial even if the public-corruption convictions are supported by sufficient evidence.

In *United States v. Choy*, 309 F.3d 602, 605-07 (9th Cir. 2002), the defendant was charged with paying a $5,000 bribe to a public official. At trial, the government proved that the defendant had provided $5,000 to a private actor with the intent of facilitating later bribes. The instructions allowed the jury to convict on the basis of the trial proof. Despite the lack of a defense objection, the Ninth Circuit found reversible plain error because the instructions failed to specify the thing of value.

While *Choy* involved bribery under 18 U.S.C. §201, a "thing of value" is also an element of Hobbs Act extortion and honest-services bribery. Thus, the district court's failure to instruct the jury on the "thing of value" that Renzi allegedly received requires a new trial. Indeed, the case for reversal is even stronger here than in *Choy*, because Renzi did not fail to object, but instead

requested the district court to identify the "thing of value." Dkt-1119, at 54-55. When, as in this case, the jury receives no guidance on what "thing of value" is at issue, it is impossible to know whether the verdict rests upon proper grounds or even whether the jurors unanimously agreed on the "thing of value."

B. Renzi's Constitutional Rights Were Repeatedly Violated

"The prosecutor's job isn't just to win, but to win fairly, staying well within the rules." *United States v. Maloney*, 2014 WL 801450, at *1 (9th Cir. 2014) (internal quotation marks omitted). That did not happen here. In addition to violating Renzi's rights in the ways that the district court identified *before* trial, the government repeatedly crossed the line *during* trial. Renzi's rights under the Speech or Debate Clause were violated; he was denied his right to present a defense; and he was denied his due-process rights by virtue of the government's presentation of false testimony. Renzi is therefore entitled to a new trial on the public-corruption counts even if he is not entitled to judgment of acquittal. *See* 2ER215; Dkt-1241 (raising Speech or Debate Clause issue); 2ER215; 2ER221; 1ER44-45 (ruling on issue); 5ER856; Dkt-1241 (raising right-to-present-a-defense issue); 2ER158-59; 1ER45-46 (ruling on issue); 2ER135; Dkt-1238 (raising due-process issue); 2ER137; 1ER25-26 (ruling on issue).

1. The government introduced evidence in violation of the Speech or Debate Clause

a. Article 1, §6, Clause 1 of the Constitution provides that, "for any Speech or Debate in either House," members of Congress "shall not be questioned in any other Place." "Without exception," the Supreme Court's decisions "have read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975). These include the protection of legislative independence by prohibiting inquiry into acts "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).

A prosecution thus may not "draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *United States v. Brewster*, 408 U.S. 501, 526 (1972) (internal quotation marks omitted). And evidence of legislative acts cannot be "introduced to any jury." *Renzi*, 651 F.3d at 1020; *see also United States v. Helstoski*, 442 U.S. 477, 490 (1979) (prosecutors may not "[r]eveal[] information as to a legislative act" to advance their case).

On interlocutory appeal, this Court concluded that the charges against Renzi did not necessarily draw legislative acts into question. The indictment, this Court said, alleged that Renzi "offer[ed] RCC, and later Aries, a *quid pro quo* deal: Sandlin property for future legislation—nothing more, nothing less." *Renzi*, 651 F.3d at 1031. Renzi respectfully disagrees with this Court's decision not to dismiss

the indictment and reserves all his rights as to the issues presented in that appeal. He focuses here on the district court's evidentiary rulings that were not covered by this Court's decision.

At trial, the government had little evidence to suggest that the alleged *quid pro quo* deal was corrupt. It relied primarily on Hegner's testimony that Renzi told him "No Sandlin property, no bill," 2ER245, and Aries' testimony that Renzi said he would use his "free pass" through Committee if the property were included, 2ER228-29. Although the government casts them as nefarious, both comments are equally consistent with an innocent effort to protect Fort Huachuca. They are in line with the sort of horse-trading that legislators *legally* engage in every day.

Recognizing this, the government tried to use circumstantial evidence to prove that Renzi acted corruptly, rather than to benefit Fort Huachuca. In particular, it elicited two pieces of testimony by Renzi's former district director, Keene, regarding the motivations for his legislative acts. The admission of this testimony violated the Speech or Debate Clause and requires a new trial.

b. Before trial, the parties agreed that the Clause prohibited testimony by Keene about a phone conversation in which Renzi allegedly told Keene that he wanted to delay introduction of the Aries bill because of the public-corruption prosecution of Duke Cunningham. 4ER555. The government's concession was well-founded: the testimony related to Renzi's decision whether to introduce

legislation, which "is one of the most purely legislative acts that there is." *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1063 (11th Cir. 1992); *see also Brewster*, 408 U.S. at 527 (Clause precludes any showing of how legislator "decided"). By suggesting concern about the possible consequences of introduction, this testimony would improperly call into question the motivations for Renzi's decision.

But the government changed course during trial. It claimed that Renzi had waived the Clause's protections through the unrelated cross-examination of Hegner. 2ER218-19. The district court admitted the testimony over Renzi's objection, reasoning that the testimony was not protected by the Clause. 2ER221. Post-trial, the court further concluded that Renzi had waived the Clause's protections as to this testimony through cross-examination of Keene. 1ER45. The district court erred in both respects.[4]

First, as to whether the testimony was protected, the district court admitted it on the theory that it related to Renzi's "intent," "motive," and "state of mind" in committing an extortionate act. 2ER221. But the Speech or Debate Clause protects the motivations for a legislative act even if the government alleges that they are

[4] The court also suggested that this testimony reflected the performance of an extortionate act, 2ER220, but that suggestion was incorrect, since neither Hegner nor Aries was privy to the conversation.

improper. "The claim of an unworthy purpose does not destroy the privilege." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). If it did, "[t]he privilege would be of little value." *Id.* Moreover, the privilege, which covers conversations with staff about legislative acts, *see Gravel v. United States*, 408 U.S. 606, 629 (1972), is absolute when it applies, *Eastland*, 421 U.S. at 501, 509. Indeed, legislative-act evidence may not be offered even for a purpose *other* than inquiry into a legislative act, such as to prove motives for non-legislative conduct. *See Helstoski*, 442 U.S. at 489-90.

Second, as to waiver, the theories that Renzi waived his Speech or Debate Clause rights through cross-examination of Keene (the court's), or of Hegner (the government's), fail even on their own terms. Keene's testimony about Cunningham was elicited on *direct* examination, 2ER221-22, so the subsequent cross-examination could not have worked a waiver. And Hegner's testimony about the development of the *RCC* legislation was unrelated to Keene's testimony about her confidential conversation with Renzi concerning the *Aries* legislation. Moreover, despite raising issues relating to waiver at other stages of Renzi's cross-examination of Hegner, *see* 2ER247 (e-mail between Hegner and his supervisor); 2ER248-49 (attendance at Committee meeting), the government did not raise waiver concerns during the portion of the cross-examination that it later said worked a waiver.

More fundamentally, even assuming that the protections of the Speech or Debate Clause could ever be waived (and the Supreme Court has never so held), such a waiver would require an "explicit and unequivocal renunciation of the protection." *Helstoski*, 442 U.S. at 490-91. This standard reflects the Clause's role in our system of separated powers: "any lesser standard would risk intrusion by the Executive and the Judiciary into the sphere of protected legislative activities." *Id.* at 491. In part because the Supreme Court has set the waiver bar so high, no court has ever found a waiver. *See, e.g.*, *id.* at 492 (assuming possibility of waiver, but finding none despite congressman's repeated testimony about legislative acts before grand jury); *see also Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 n.11 (D.C. Cir. 1995); *Pittston Coal Grp., Inc. v. UMWA*, 894 F. Supp. 275, 278 n.5 (W.D. Va. 1995).

Certainly there was no "explicit and unequivocal" waiver here (or, for that matter, any waiver under *any* plausible standard). In concluding otherwise, the district court erroneously relied on waiver principles from other contexts, including the attorney-client privilege, 1ER45, and thus ignored the Supreme Court's teaching that "[t]he ordinary rules for determining the appropriate standard of waiver do not apply in this setting," *Helstoski*, 442 U.S. at 491.

c. Keene also testified, over Renzi's objection, that Renzi "did not seem very excited and interested" in the RCC bill even though, in her opinion, he "should

have been" because the legislation would have benefitted his district. 2ER215-16. The implication of this testimony was clear: Renzi did not support the RCC land-exchange legislation because of the legitimate public-policy benefits it would provide, but rather because he had some illegitimate, ulterior motive. It is equally clear that the admission of this testimony violated the Speech or Debate Clause, because it called into question the motivations for Renzi's legislative acts. *See, e.g.*, *Brewster*, 408 U.S. at 525-26.

The district court erred in concluding that Renzi had waived the privilege by cross-examining Keene. 1ER45. The testimony was elicited on *direct* examination, *before* any cross-examination began. 2ER215, 2ER218-21. Renzi thus made *no* waiver, let alone an "explicit and unequivocal" one.

d. A conviction cannot stand when a jury may have relied on protected legislative-act evidence. *See United States v. Dowdy*, 479 F.2d 213, 227 (4th Cir. 1973) (ordering new trial when it was not clear that jury did not rely on evidence of legislative acts). That standard—indeed, *any* standard—is easily met here. Each piece of Keene's testimony spoke to the key issue in the case: whether Renzi acted to protect Fort Huachuca or instead corruptly traded official acts for payment. The "Duke Cunningham" testimony suggested that Renzi had concerns about the legality of his actions relating to the Aries bill. And the RCC testimony suggested ulterior motives for his approach to the RCC bill.

The importance of Keene's testimony and its prejudice to Renzi are demonstrated by the government's heavy reliance on the testimony in both its principal and its rebuttal summation. For example:

- "If you're wondering why the Aries exchange *** doesn't get through, it's that Duke conversation, it's not pygmy owls, it's not other endangered species, it's not Metadata, it's Duke." 2ER143.
- "[D]on't forget that Mr. Renzi told her that he wanted to put the brakes on the Aries land exchange because of what was going on with Duke Cunningham, which just happened to be a very public federal corruption prosecution. They have no answer for her." 2ER145.
- "Why are they trying so hard to discredit [Keene]? It's because she hurts them." *Id.*

The government relied so heavily on Keene's testimony because the outcome of the trial was unclear. *Cf. Dowdy*, 479 F.2d at 227-28 (upholding conviction on three counts where other evidence of guilt was "overwhelming"). Indeed, it was precisely the lack of overwhelming evidence of Renzi's guilt that led to the Speech or Debate Clause violations in the first place, and it is that lack of evidence that defeats any suggestion that the jury could not have relied on the protected legislative-act evidence that the government found so important at trial. If this Court does not order judgment of acquittal on the public-corruption counts,

therefore, it should order a new trial on those counts, "wholly purged of elements offensive to the Speech or Debate Clause." *United States v. Johnson*, 383 U.S. 169, 185 (1966).

2. Renzi was prevented from offering a full defense

"Whether grounded in the Sixth Amendment's guarantee of compulsory process or in the more general Fifth Amendment guarantee of due process, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *United States v. Stever*, 603 F.3d 747, 755 (9th Cir. 2010) (internal quotation marks omitted). This guarantee includes "at a minimum *** the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). Yet in this case Renzi was prevented from eliciting material evidence of his innocent intent through the district court's misapplication of CIPA and the Speech or Debate Clause. Because the government cannot establish that these errors were harmless beyond a reasonable doubt, reversal is required.

a. *CIPA*

[Filed separately with the Court Information Security Officer.]

b. *Speech or Debate Clause*

Over Renzi's objection, the district court allowed Keene to testify extensively about her work on Renzi's congressional staff. It did so upon finding, on several occasions, that her testimony involved "pre-legislative" discussions

outside the scope of the Speech or Debate Clause. The court admitted, for example, Keene's testimony about her conversation with Renzi regarding their concern that Representative Kolbe would introduce the RCC legislation. 2ER211-12. Renzi then elicited testimony from Keene concerning an e-mail exchange she had had with Messner, Kolbe's chief of staff, about whether Kolbe would support the draft Aries bill. 2ER195-200. Renzi had the e-mail exchange admitted into evidence without objection by the government. 2ER195.

But the district court took a fundamentally different approach when Renzi sought to elicit testimony from Messner—a defense witness—about Renzi's legitimate motivations in the development of the same bill. Before Renzi began his direct examination, the court ruled that, because of Kolbe's invocation of the Speech or Debate Clause, Renzi could not elicit any testimony by Messner regarding his time in Kolbe's office. 2ER159. In so doing, the court ignored the distinctions it had previously drawn between protected legislative acts and pre-legislative conduct. The court thus reached the strange result of prohibiting Messner from testifying about matters as to which Keene had testified, including the e-mail exchange between Messner and Keene that had been found unobjectionable under the court's rulings during the government's case.

The prohibition against questioning Messner about *any* matter during his time in Kolbe's office violated Renzi's right to present a defense. Although there

appears to be no direct precedent on the interaction between the Sixth Amendment and the Speech or Debate Clause, the guarantee of a "meaningful opportunity to present a complete defense," *Stever*, 603 F.3d at 755 (internal quotation marks omitted), surely includes the right to offer evidence admissible under the rules that governed the prosecution's case.

Separately, the district court erred in failing to ensure that the protections of the Speech or Debate Clause, as asserted by Kolbe, were not construed in a manner that unnecessarily restricted Renzi's right to present a defense. In the Fifth Amendment context, this Court has explained that, when balancing the defendant's Sixth Amendment right against a witness's asserted right against self-incrimination, a district court must determine whether "a narrower privilege would adequately protect the witness." *United States v. Vavages*, 151 F.3d 1185, 1192 (9th Cir. 1998). The district court made no similar determination here; it issued a blanket ruling and then instructed Renzi, in no uncertain terms, not to press the point. If unwilling to take *that* step, the court should at least have balanced the Speech or Debate Clause protections against Renzi's right to present a defense, *cf. United States v. Nixon*, 418 U.S. 683, 707 (1974) (Executive Privilege must yield to rights of criminal defendant), or dismissed the affected counts, *see, e.g., United States v. Moussaoui*, 382 F.3d 453, 474 (4th Cir. 2004) (in context of compelled testimony, "[i]f the government refuses to produce the information at issue—as it

may properly do—the result is ordinarily dismissal"). By failing to do any of these things, the district court violated the Constitution.

This violation of Renzi's right to present a defense was not harmless beyond a reasonable doubt. *See, e.g.*, *Stever*, 603 F.3d at 757. Messner worked closely with Renzi, including as his chief of staff, for many years, and worked with Renzi and his staff on the Aries land exchange. A Renzi confidant, Messner was uniquely well-positioned to testify about Renzi's reasons for supporting that bill, not just whether the bill's objectives were in the public interest. Messner thus would have presented a starkly different picture to the jury than that offered by the government's witnesses. A new trial is therefore required.

3. The government presented false testimony

A conviction secured through the government's use of false testimony "must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Such a violation occurs when "(1) the testimony (or evidence) [presented by the prosecution] was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material." *Sivak v. Hardison*, 658 F.3d 898, 909 (9th Cir. 2011) (internal quotation marks omitted). Each requirement is satisfied here.

a. *Falsity*

Aries and Keene each testified falsely in portraying the April 15, 2005 meeting where Renzi allegedly extorted money from Aries. Both cooperating witnesses denied that Aries had any knowledge of Sandlin or the Sandlin property before that meeting. In fact, however, Keene and Aries had previously discussed the property, 2ER237, Keene had given Aries the contact information for Sandlin, 2ER238, Aries had spoken to Sandlin for nearly half an hour about the property, 2ER237, and Keene had prepared a binder for Renzi containing a draft of the land-exchange legislation that included the property, 2ER192. As the district court found, this testimony was plainly false. 1ER16.

It does not matter whether Keene or Aries believed the testimony. As this Court has repeatedly held, "that a witness may have been unaware of [the falsity of the statement] may mean that his testimony *** is not knowingly false or perjured, but it does not mean it is not false nevertheless." *Phillips v. Ornoski*, 673 F.3d 1168, 1184 (9th Cir. 2012); *accord Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005) (en banc). The refusal to limit *Napue* to perjured testimony makes perfect sense, as the point of the decision is to deter government misconduct.

Furthermore, even assuming that Keene believed her false testimony, that was only because the government elected not to confront her with contradictory evidence. *Cf.* 2ER136. Having seen Aries impeached on the same point days

earlier, the government did nothing to disabuse Keene of her false belief. Instead, it effectively kept Keene "in the dark, so that [s]he could testify *** without perjuring [her]self." *Hayes*, 399 F.3d at 979. [5]

b. *Knowledge*

The government knew or should have known that the testimony of Aries and Keene was false. With respect to Keene, it is clear that the prosecutors themselves knew her testimony was false, as they had already seen Aries impeached on these points. 2ER237-38. With respect to Aries, the government had a wealth of information that should have apprised it that his testimony was false. Most obviously, the government had already obtained and analyzed the very phone records that reflected Aries' prior, lengthy call with Sandlin. Dkt-1238, Ex. A. Because "*Napue* *** make[s] perfectly clear that the constitutional prohibition on the 'knowing' use of perjured testimony applies when *any* of the [government's] representatives would know the testimony was false," *Jackson v. Brown*, 513 F.3d 1057, 1075 (9th Cir. 2008), this satisfies the second requirement.

[5] This inaction alone requires reversal. Where, as here, "[t]he prosecution saw fit without prophylaxis to call to the stand witnesses whom it had clear reason to believe might have conspired to lie under oath," a new trial is required. *N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1123 (9th Cir. 2001).

c. *Materiality*

Although "*Napue* does not create a per se rule of reversal," reversal is "virtually automatic" if "it is established that the government knowingly permitted the introduction of false testimony." *Sivak*, 658 F.3d at 912 (internal quotation marks omitted). That is because the materiality standard for *Napue* violations is exceedingly low: "a conviction *** is set aside whenever there is *any* reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *Id.* (internal quotation marks omitted). That standard is lower than that for ordinary harmless-error review, *Dow v. Virga*, 729 F.3d 1041, 1048 (9th Cir. 2013), and even for *Brady* violations, *Jackson*, 513 F.3d at 1076. It is easily met here.

The false testimony here was not a mere mistake about the order of events; it was critical to proving the government's claim that it was Renzi who pushed Aries to purchase the Sandlin property. *See* 3ER431. Renzi's conduct at this meeting—when and how he addressed the Sandlin property—was precisely the conduct from which the jury was asked to infer Renzi's criminal intent. Given its pivotal role, the repeated false assertion that Renzi introduced the idea of the Sandlin property to Aries certainly could have affected—and very likely did affect—the judgment of the jury.

As the government correctly conceded below, Dkt-1281, at 21, the fact that Renzi cross-examined Aries and Keene about the meeting has no bearing on the

materiality analysis. "It is 'irrelevant' whether the defense knew about the false testimony," because a defendant "cannot waive the freestanding ethical and constitutional obligations of the *** government to protect the integrity of the court and the criminal justice system." *Sivak*, 658 F.3d at 909 (internal quotation marks and alteration omitted).

Furthermore, the false testimony remained material even after cross-examination, especially because of the government's efforts to confuse the jury about the April 15 meeting. It claimed during summation that it had known about the phone records all along. 2ER146.[6] It vouched for Keene's credibility, even though she falsely claimed not to have provided Aries with Sandlin's contact information until *after* the meeting. *See* 2ER144 ("nobody is trying to walk away from her on the government's side"); 2ER145 ("[s]he corroborates Mr. Aries"). And it told the jury not to credit the authenticity of the draft bill submitted to legislative counsel prior to the April 15 meeting that already included the alfalfa farm. 2ER141. The government's effort to salvage the prosecution by twisting the facts ensured that the false testimony remained material.

[6] The prosecutors later claimed that they had *not* known about the records before Aries' testimony, at which point Renzi moved for a mistrial based on those comments. 2ER137. The district court denied the motion, but vaguely instructed the jury not to consider the prosecutors' argument. 2ER138.

***

Each of these errors alone entitles Renzi to a new trial. But even if "no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors" requires a new trial. *United States v. Anekwu*, 695 F.3d 967, 988 (9th Cir. 2012) (internal quotation marks omitted).

"Where, as here, there are a number of errors at trial, a balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (internal quotation marks omitted). "In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors." *Id.*The trial errors here related to the primary "issue before the jury—[the defendant's] state of mind at the time of the crime—and all of the improperly admitted evidence bolstered the [government's] case, while all of the erroneously excluded evidence rendered [the] defense far less persuasive than it might have been." *Parle v. Runnels*, 505 F.3d 922, 934 (9th Cir. 2007). Thus, even if each of the trial errors were harmless individually, their cumulative impact would require reversal. *Id.*

II. RENZI IS ENTITLED TO JUDGMENT OF ACQUITTAL OR A NEW TRIAL ON THE INSURANCE COUNTS

Renzi was convicted of conspiring to violate, and violating, 18 U.S.C. §1033(a)(1), which criminalizes knowing, material false statements in connection with "financial reports or documents" presented to an insurance official or agency by someone engaged in the "business of insurance." Renzi is entitled to judgment of acquittal on the insurance counts because the government failed to prove either that Renzi was engaged in the "business of insurance" or that the statements at issue were made in connection with "financial" documents. Alternatively, Renzi is entitled to a new trial, because the district court misinstructed the jury on "financial reports or documents." *See* 2ER174; 2ER201; Dkt-1239, at 5-8 (raising issues); Dkt-1204; 2ER201; 1ER34-39 (ruling on issues).

A. The Evidence Was Insufficient

1. "Business of insurance"

Section 1033(a) applies only to those "engaged in the business of insurance." That term is defined to mean the "writing of insurance" or "reinsuring of risks *by an insurer*." 18 U.S.C. §1033(f)(1) (emphasis added). An "insurer," in turn, is an entity whose business is "the writing of insurance or the reinsurance of risks," or an officer, director, agent, or employee of such a business. *Id.* §1033(f)(2).

Neither R&C nor Renzi was an "insurer." R&C never wrote insurance or reinsurance and it was not an "agent" of Safeco, which actually wrote insurance for the CPCs. Indeed, R&C had no relationship, agency or otherwise, with Safeco. And R&C's relationship with NIF, Safeco's agent, was defined by contract to exclude an agency relationship. 2ER291. R&C was an insurance producer: it collected premiums from clients and purchased insurance for them. R&C represented its clients, not any insurer.

In the district court, the government argued that §1033 applies to R&C because the statute, after specifying that it reaches only the acts of insurers, goes on to state that it includes "all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons." 18 U.S.C. §1033(f)(1). But even if R&C's acts were "necessary or incidental" to Safeco's writing of insurance, the statute would not apply. The "necessary or incidental" language describes only the types of acts *of insurers* (or their agents) that are covered. It does not reach entities or people other than insurers and their agents, regardless of the activities they are engaged in.

Consistent with this view, the Second Circuit affirmed a conviction in *United States v. Peterson*, 288 F. App'x 727, 729 (2d Cir. 2008), only after observing that it was "uncontested that Peterson held himself out as an agent of an

insurer." Likewise, in *United States v. Segal*, 495 F.3d 826, 836 (7th Cir. 2007), the Seventh Circuit addressed a similar challenge by inquiring "[w]hether the broker is an agent of the insured or the insurer." These decisions are correct, not only because their holdings are compelled by the statutory text, but also because Section 1033 was targeted at "fraudulent behaviors that drove [insurance] companies into insolvency." H.R. Rep. No. 104-468 (1994); *see also* 140 Cong. Rec. E283 (daily ed. Mar. 1, 1994) (Rep. Pomeroy) (calling for "legislation to criminalize the looting and plundering of an insurance company from within"); 139 Cong. Rec. E209, E210 (daily ed. Jan. 27, 1993) (Rep. Dingell) (requesting "a specific Federal criminal statute to deal with fraudulent behavior at insurance companies"). Even if §1033(f) were somehow ambiguous on this point, the rule of lenity would demand the narrower construction. *E.g.*, *United States v. Cabaccang*, 332 F.3d 622, 635 (9th Cir. 2003) (en banc).

The government therefore failed to prove that Renzi was engaged in the "business of insurance."

2. "Financial reports or documents"

Section 1033 does not define "financial reports or documents," but the ordinary meaning of a "financial report" is a "report summarizing the financial condition or financial results" of a company," including a "balance sheet" and "income statement." Black's Law Dictionary 631 (6th ed. 1990). The statute's

legislative history confirms this narrow reading, as one of its sponsors emphasized that the term "financial" excludes, among other things, "applications for licenses; filings on holding company transactions; filings on parent-subsidiary transactions; and filings on mergers, consolidations, and acquisitions." 140 Cong. Rec. E748-01 (daily ed. Apr. 21, 1994) (Rep. Pomeroy). Here too, "to the extent that any doubt remains, the scope of the statute is sufficiently ambiguous to invoke the rule of lenity." *Cabaccang*, 332 F.3d at 635.

The letters to regulators here were not "financial reports or documents." They contained no financial information whatsoever, but were merely short narratives responding to regulators' questions about entries on certificates of insurance. Like the insurance agent's license-renewal application held not to be a financial document in *United States v. Segal*, 2004 WL 2931331, at *3-*4 (N.D. Ill. 2004), the letters say nothing about R&C's financial status.

Furthermore, a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotation marks omitted). To hold that the letters to regulators were "financial documents" would violate that rule of construction by rendering the "financial" modifier surplusage.

For the same reason, it is not enough that the letters were allegedly part of a broader scheme involving R&C's use of premium funds. Every statement a

company makes, if traced far enough, ultimately has some financial implication. To avoid this result, and consistent with the statute's text and history, "financial documents" must be interpreted to mean documents that directly address financial conditions.

B. The Jury Was Misinstructed

Even if §1033's "financial reports or documents" element could be read to encompass the charged letters, there is no guarantee that the jury made this finding. Instead, over Renzi's objection, 2ER153, the district court instructed the jury that "[t]he terms 'financial reports' or 'financial documents' *include* any documents concerning the management of money or the potential financial health and viability of a business, or that relate to the financial position of a business." 1ER90-91 (emphasis added).

This definition is unbounded. The jury was never told what documents were outside the statute's scope, or whether the statute had any limits. The use of the sweeping terms "concerning" and "relate" compounded the error, leaving the jury free to find that virtually any document satisfied this element.

Where, as here, an incorrect jury instruction is given over a defendant's objection, a new trial is required unless the error is harmless beyond a reasonable doubt. *See United States v. Berry*, 683 F.3d 1015, 1021 (9th Cir. 2012). Given the paucity of evidence that the letters were "financial reports or documents," and the

virtually limitless definition provided, this instructional error cannot be considered harmless. If Renzi is not entitled to judgment of acquittal on the insurance counts, therefore, he is entitled to a new trial.

III. RENZI IS ENTITLED TO JUDGMENT OF ACQUITTAL OR A NEW TRIAL ON THE RACKETEERING COUNT

The jury found that Renzi violated RICO by engaging in two acts of racketeering: (1) a "scheme and artifice to defraud by misappropriating insurance premium funds held in trust by [R&C]," 3ER456; and (2) a scheme to defraud the United States of Renzi's honest services, 3ER458. Because Racketeering Act Two is derivative of the public-corruption offenses, reversal on those counts would leave only one RICO predicate—Racketeering Act One—and thus no pattern of racketeering activity. *See* 18 U.S.C. §1961(5) (pattern "requires at least two acts of racketeering activity"). If this Court orders a judgment of acquittal or new trial on the public-corruption counts, therefore, it must do the same for the RICO count.

But this Court should order a judgment of acquittal on the RICO count even if it affirms the public-corruption convictions, because the scheme to defraud alleged in Racketeering Act One is legally invalid. Alternatively, the Court should order a new trial on the RICO count, because the district court's instructions constructively amended Racketeering Act One. *See* 2ER148-49; 2ER174; Dkt-994, at 7; Dkt-1236, at 1-11 (raising issues); 1ER41; 2ER149; Dkt-1204; 4ER771-72 (ruling on issues).

A. The Evidence Was Insufficient

Racketeering Act One alleged that Renzi devised a scheme "to defraud by misappropriating insurance premium funds held in trust by [R&C]." 3ER456. The indictment further alleged that these funds "were not the property of RENZI or [R&C]" and that Renzi had the purpose of "conceal[ing] [his] misappropriation of the *** funds." 3ER457. The government did not—and could not—prove this scheme, because the allegations are legally impossible.

In *Lequire*, this Court held that an Arizona insurance agency does *not* hold premium funds in trust absent a contractual obligation to the contrary. 672 F.3d at 731. The Court explained that Patriot (Renzi's agency) did not hold the premium funds in trust, but instead was subject to a debtor-creditor relationship with the insurer (Spirit Mountain). *Id.* at 728-29. The Court thus held that Lequire had neither "embezzle[d]" nor "misappropriate[d]" an insurer's funds. 18 U.S.C. §1033(b)(1).[7]

As in *Lequire*, R&C did not hold premium funds in trust for NIF (Safeco's agent). 4ER785. Rather, the funds belonged to R&C, subject to a debtor-creditor

[7] The indictment's characterization of the offense as misappropriation rather than embezzlement is immaterial, because *Lequire* makes clear that misappropriation also requires that funds be held in trust. *See* 672 F.3d at 728 (embezzlement is "*the fraudulent appropriation* of property by a person to whom such property has been *entrusted*, or into whose hands it has lawfully come" (internal quotation marks omitted; first emphasis added)).

relationship, and thus could be neither embezzled nor misappropriated. That precludes Renzi's conviction on the charge that he "misappropriate[ed] insurance premium funds held in trust." *See United States v. Marolda*, 615 F.2d 867, 870-71 (9th Cir. 1980) (finding that government was obligated to prove that union official used funds "without proper authorization" because that is how offense was charged (internal quotation marks omitted)); *see also United States v. Leichtnam*, 948 F.2d 370, 379 (7th Cir. 1991).

B. The Indictment Was Constructively Amended

Even if Renzi is not entitled to judgment of acquittal, he is entitled to a new trial, because the district court constructively amended Racketeering Act One. The grand jury alleged that the insurance-premium funds were "held in trust" and "not the property" of R&C. 3ER456-57. *See generally* 3ER456 ("Use of Insurance Premiums Held in Trust to Fund First Congressional Campaign"). But the district court refused to instruct the jury on this aspect of the charge. The court's instruction thus omitted any requirement that the funds be held in trust. 1ER94, 106. This allowed the jury to convict on a different—and far more expansive—theory than the indictment charged.

The Fifth Amendment guarantees a criminal defendant the "right to stand trial only on charges made by a grand jury in its indictment." *United States v. Garcia-Paz*, 282 F.3d 1212, 1215 (9th Cir. 2002). "An indictment must include a

statement of facts and circumstances that will inform the accused of the specific offense with which he is charged." *United States v. Shipsey*, 190 F.3d 1081, 1087 (9th Cir. 1999) (internal quotation marks omitted). Where "there is a complex of facts [presented at trial] distinctly different from those set forth in the charging instrument," or "the crime charged [in the indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved," the indictment has been constructively amended. *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002) (internal quotation marks omitted); *see, e.g.*, *Shipsey*, 190 F.3d at 1085-88 (reversing where jury instruction allowed conviction for theft by any wrongful taking of funds, whereas indictment charged only theft by false pretenses).

Here, the "statement of facts and circumstances" made clear that Renzi was charged with misappropriating others' premium funds. This charge was substantially broadened through the court's instructions, and it is impossible to say that the grand jury would have indicted if it had known that R&C owned the funds at issue. Reversal is required.

IV. RENZI IS ENTITLED TO BE RESENTENCED EVEN IF HIS CONVICTIONS STAND

At sentencing, the district court determined that Renzi's offense level was 30, his criminal history category I, and his Sentencing Guidelines range accordingly 97-120 months. 2ER125. The court committed legal error in

calculating this range. *See* Dkt-1300, at 2-5 (raising issue); 2ER124-25 (ruling on issue).

The offense level included a 10-level enhancement under Guidelines §2C1.1(b)(2), which cross-references §2B1.1(b)(1), based on the court's mistaken conclusion that the "value of the payment" at issue in the public-corruption conduct was $200,000 (the amount of the debt to Renzi that Sandlin initially paid off) rather than zero (the net value to Renzi). 2ER122. But for the 10-level enhancement, Renzi's Guidelines range would have been 33-41 months, the low end of which is lower than the (below-Guidelines) 36-month sentence the court imposed.

Section 2C1.1(b)(2) requires a sentencing court to increase the offense level "by the number of levels from the table in §2B1.1" if

> the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $5,000.

Under the Guidelines, "[t]he value of 'the benefit received or to be received'"—the second item listed in §2C1.1(b)(2)—"means the net value of such benefit." U.S.S.G. §2C1.1, app. n.3. This Court has also employed a "net value" analysis in determining "the value of anything obtained or to be obtained"—the third item in §2C1.1(b)(2). In that case, *United States v. White Eagle*, 721 F.3d 1108 (9th Cir.

2013), an official received a bribe in the form of a loan on favorable terms, although with an expectation of repayment, and this Court explained that the value to the recipient, not the face value of the loan, was the appropriate measure of loss. *Id.* at 1122. As another court has recognized, "[t]he value of a transaction is often quite different than the face amount of that transaction." *United States v. Fitzhugh*, 78 F.3d 1326, 1331 (8th Cir. 1996). For example, a $1,000 loan is less valuable than a $1,000 gift.

The "value of the payment"—the first item in §2C1.1(b)(2), and the one at issue here—must likewise be understood to incorporate the basic principle of *net* value. There is no basis for treating it differently. And any other interpretation would produce anomalous results—with, for example, exchanges of real estate or other property of equal value suddenly being counted as a "payment."

Sandlin and Renzi exchanged items of equal value: a cash payment of $200,000 and the extinction of $200,000 of interest-bearing debt. The value of the cash payment to Renzi was zero and the 10-level enhancement should not have been applied. Because the record does not establish that the district court would have imposed the same sentence under the correct Guidelines range, Renzi is entitled to be resentenced even if his convictions stand. *See, e.g., United States v. Munoz-Camarena*, 631 F.3d 1028, 1030-31 & n.5 (9th Cir. 2011) (per curiam).

CONCLUSION

Renzi is entitled to judgment of acquittal or a new trial on the public-corruption counts (1-5, 11-12, 14-15, and 26-27), insurance counts (28-30), and RICO count (32), or, in the alternative, to resentencing.

Dated: April 8, 2014

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STATEMENT OF RELATED CASES

The Court has consolidated this appeal with *United States v. Sandlin*, No. 13-10597. Sandlin was Renzi's co-defendant below, and No. 13-10597 is Sandlin's appeal of his conviction and sentence. There are no other related cases pending before this Court.

REQUEST FOR ORAL ARGUMENT

It appears that the Court has already set the case for oral argument. Pursuant to Federal Rule of Appellate Procedure 34(a)(1), Renzi respectfully requests such oral argument, which will assist the Court in reviewing the judgment below in this factually and legally complex case.

CERTIFICATE OF COMPLIANCE

Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Signature s/Dan Himmelfarb

Attorney for Richard G. Renzi, Defendant-Appellant

Date April 8, 2014

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 8, 2014.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: April 8, 2014

By: /s/ *Dan Himmelfarb*
Dan Himmelfarb

ADDENDUM

Page

U.S. Const. Art. 1, §6, cl. 1

Compensation of Members; Privilege from Arrest

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They 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.

18 U.S.C. §1033(a), (f)

Crimes by or affecting persons engaged in the business of insurance whose activities affect interstate commerce

(a)(1) Whoever is engaged in the business of insurance whose activities affect interstate commerce and knowingly, with the intent to deceive, makes any false material statement or report or willfully and materially overvalues any land, property or security--

> (A) in connection with any financial reports or documents presented to any insurance regulatory official or agency or an agent or examiner appointed by such official or agency to examine the affairs of such person, and
>
> (B) for the purpose of influencing the actions of such official or agency or such an appointed agent or examiner,

shall be punished as provided in paragraph (2).

***

(f) As used in this section--

> (1) the term "business of insurance" means--
>
> > (A) the writing of insurance, or
> >
> > (B) the reinsuring of risks,
>
> by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons;
>
> (2) the term "insurer" means any entity the business activity of which is the writing of insurance or the reinsuring of risks, and includes any person who acts as, or is, an officer, director, agent, or employee of that business;
>
> (3) the term "interstate commerce" means--

(A) commerce within the District of Columbia, or any territory or possession of the United States;

(B) all commerce between any point in the State, territory, possession, or the District of Columbia and any point outside thereof;

(C) all commerce between points within the same State through any place outside such State; or

(D) all other commerce over which the United States has jurisdiction; and

(4) the term "State" includes any State, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands.

18 U.S.C. §1346

Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. §1951

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. app. 3, §5

Notice of defendant's intention to disclose classified information

(a) Notice by defendant

If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act, and until the time for the United States to appeal such determination under section 7 has expired or any appeal under section 7 by the United States is decided.

(b) Failure to comply

If the defendant fails to comply with the requirements of subsection (a) the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defendant of any witness with respect to any such information.

18 U.S.C. app. 3, §6

Procedure for cases involving classified information

(a) Motion for hearing

Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(b) Notice

(1) Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such form as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a), the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

(c) Alternative procedure for disclosure of classified information

(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this

section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order--

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

(d) Sealing of records of in camera hearings

If at the close of an in camera hearing under this Act (or any portion of a hearing under this Act that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing shall be sealed and preserved by the court for use in the event of an appeal. The defendant may seek reconsideration of the court's determination prior to or during trial.

(e) Prohibition on disclosure of classified information by defendant, relief for defendant when United States opposes disclosure

(1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to--

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded classified information relates; or

(C) striking or precluding all or part of the testimony of a witness.

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue.

(f) Reciprocity

Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. If the United States fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

U.S.S.G. §2C1.1(b)

Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

(a) Base Offense Level:

(1) 14, if the defendant was a public official; or

(2) 12, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by 2 levels.

(2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.

(c) Cross References

(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense, if the resulting offense level is greater than that determined above.

(2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense, if the resulting offense level is greater than that determined above.

(3) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), if the resulting offense level is greater than that determined above.

(d) Special Instruction for Fines—Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment.