

April 10, 2019

**Kelly B. Kramer**

**BY COURIER**

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Re: United States v. Richard Renzi

Dear Messrs. Amundson and Horowitz:

I write on behalf of my client, Richard Renzi, to request that you investigate misconduct by, among others, Gary Restaino, Esq., an Assistant United States Attorney in the District of Arizona (“AUSA Restaino”); and Daniel Odom, a Special Agent of the Federal Bureau of Investigation (“SA Odom”) during the Department of Justice’s investigation and prosecution of Mr. Renzi.

I do not make this complaint lightly. In more than 20 years of practice as a white-collar criminal defense attorney in Washington, D.C., I have never had occasion to file a complaint about the conduct of federal law enforcement officials, for whom I have the utmost respect. I submit this letter because, in my view, the misconduct in Mr. Renzi’s case was repeated, concealed, and corrosive—occurring before, during, and after the trial. In my view, the government’s misconduct not only deprived Mr. Renzi of his constitutional right to a fair trial, but it allowed the jury to convict an innocent man.

**Summary of Government Misconduct**

This public-corruption case centered on whether Mr. Renzi, a Republican, abused his position as a Member of Congress in connection with two legislative land-exchange proposals. As the record establishes, the investigation and prosecution were marred by knowing and deliberate misconduct, including the following:

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- ***Improper Media Leaks:*** The investigation took place against the backdrop of the hotly-contested 2006 mid-term elections. Mr. Renzi’s seat was one of the Democrat’s top targets. In the weeks leading up to the election, news of the investigation broke in the Arizona and national media; some of the stories cited Department of Justice officials.<sup>1</sup> Acting as an “October surprise,” the leaks damaged Mr. Renzi’s reelection prospects. Although Mr. Renzi won re-election anyway, the leaks about him and other members of Congress—nearly all House Republicans—were so pervasive that the DOJ officials (including the FBI Director) issued a memorandum to all employees with a “stern message” about their obligations to preserve the confidentiality of their investigations.<sup>2</sup>
- ***Illegal Wiretap:*** During a Title III wiretap, the government recorded dozens of attorney-client privileged calls. When Mr. Renzi raised concern about these recordings, the government denied all wrongdoing. It fought bitterly (but unsuccessfully) against allowing any discovery. The ensuing evidentiary hearing revealed wide-spread misconduct. The district court found that the government had *deliberately* and *illegally* recorded dozens of privileged phone calls between Mr. Renzi and his counsel.<sup>3</sup> Moreover, the district court found that the government had lied to the supervising court about its misconduct.<sup>4</sup> Although the district court took the extraordinary step of suppressing the wiretap in its entirety, it refused to dismiss so much as a single count of the indictment.<sup>5</sup> Substantial evidence suggests that the government used privileged information to advance its investigation—indeed, one of the case agents kept a compact disc containing a sensitive privileged call at his desk for years.<sup>6</sup>
- ***Concealment of Exculpatory Evidence:*** In the early stages of the investigation, SA Odom interviewed Philip Aries, a key witness who would later sign on as a “Confidential Human Source.” Mr. Aries told SA Odom that he first learned about an alfalfa farm (the “Farm”) at the center of this case from Joanne Keene (then Mr. Renzi’s District Director)—*not* from Mr. Renzi. SA Odom and his partner concealed this exculpatory information, which he later conceded was “important,” by leaving it out of their FBI report of interview—even though this fact was clear from the face of their handwritten notes.<sup>7</sup> Critically, the report

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<sup>1</sup> See Jennifer Talhelm, *Officials Scrutinize Arizona Land Deal*, AP, Oct. 25, 2006; David Johnston, *Congressman From Arizona Is the Focus Of an Inquiry*, NY Times, Oct. 25, 2006; Dennis Wagner and Billy House, *Inquiry on Renzi: Real Deal or Campaign Trickery?*; *Justice Official Cautions not to Jump to Conclusions About Investigation*, Ariz. Republic, Oct. 26, 2006.

<sup>2</sup> See David Johnson, *Leaks About Lawmakers Prompt Warning*, N.Y. Times (Nov. 6, 2006).

<sup>3</sup> See *United States v. Renzi*, 722 F. Supp.2d 1100 (D. Az. 2010).

<sup>4</sup> See *id.* at 1108-09.

<sup>5</sup> See *id.* at 1118.

<sup>6</sup> See *id.* at 1109 & 1116.

<sup>7</sup> Transcript 75 (Oct. 26, 2015).

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of interview was provided to the defense, but the agents' notes were not revealed until after Mr. Renzi reported to prison.

- ***Concealment of Impeachment Evidence:*** During the investigation of this case, Mr. Aries balked at continuing to cooperate. To convince him to continue, SA Odom secretly told him that the FBI offered monetary awards to cooperators. The government not only concealed this classic impeachment evidence; it capitalized on it, by “misleading” the jury (in the district court’s words) that Mr. Aries’ testimony was untainted by financial motives.<sup>8</sup>
- ***Introduction of False Testimony:*** After learning that he stood to receive money for his cooperation, Mr. Aries’ changed his story about the origins of the land exchange. Whereas he originally told SA Odom that he learned about the alfalfa farm at the center of his proposed exchange from Mr. Renzi’s District Director—not from Mr. Renzi—he testified before the Grand Jury (and again at trial) that he only heard about the farm when Mr. Renzi sprung it upon him during their one and only face-to-face meeting. The government knew that Mr. Aries’ testimony was false—after all, Mr. Aries had told SA Odom as much during his initial interview. But the government sponsored this false claim, both at trial and in the grand jury, while concealing Mr. Aries’ initial statement.

In addition to these matters of record, Mr. Renzi has discovered additional facts calling into question the fairness and impartiality of the investigation. For one thing, Mr. Renzi has learned that the government opened its investigation based on a fabricated dossier provided by Democratic lobbyists working for the Resolution Copper Company (“Resolution”). Resolution dubbed this plan “Operation Eagle,” which appears to have been an effort by a foreign-owned corporation to “weaponize” the Department of Justice (“DOJ”) in order to defeat Mr. Renzi at the polls.

Mr. Renzi and his legal team also learned that AUSA Restaino was married to a senior advisor to Arizona’s Democratic Governor, Janet Napolitano.<sup>9</sup> Governor Napolitano was not only one of Mr. Renzi’s fiercest political rivals in Arizona, but she also played an active political role in Resolution’s land-exchange proposals. Furthermore, since 2008, AUSA Restaino and his wife have donated nearly \$10,000 to Hillary Clinton, Barack Obama, and other Democratic candidates for federal office.<sup>10</sup> AUSA Restaino’s partisan political leanings, along with his spouse’s close

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<sup>8</sup> Order at 8 (Dec. 30, 2015).

<sup>9</sup> Between 1996 and 2003, AUSA’s Restaino’s wife worked for a private law firm. In 2003, she became the Executive Director of the Governor’s Citizens Finance Review Commission. She then became the Treasurer of Governor Napolitano’s 2006 gubernatorial campaign and of the Governor’s Competitive Edge PAC. She next became Governor Napolitano’s General Counsel in February 2008. After Governor Napolitano was confirmed as Secretary of the Department of Homeland Security, she joined her in Washington as a Deputy General Counsel. She left the Department of Homeland Security in 2010 after the media reports alleging that she was involved in efforts to stifle responses to politically-sensitive Freedom of Information Act requests. *See* Ted Britis, *Playing Politics with Public Records Requests*, AP, July 21, 2010.

<sup>10</sup> *See* [www.opensecrets.org](http://www.opensecrets.org).

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personal relationship with Governor Napolitano, calls into question whether any prosecution decisions were influenced by “improper considerations, such as partisan or political or personal considerations...”<sup>11</sup>

The federal courts have reviewed some of the misconduct discussed herein, but because much of it was concealed until after Mr. Renzi’s direct appeal, they have never had the opportunity to consider the cumulative impact of the misconduct, which I believe to have been substantial. On behalf of Mr. Renzi, I respectfully request that you conduct a full and fair investigation.

### **Background Facts**

#### **I. RICK RENZI’S LONG-RUNNING AND CLOSE RELATIONSHIP WITH FORT HUACHUCA**

The son of an Army Major General, Rick Renzi came of age at Fort Huachuca in southern Arizona.

In November 2002, the people of the First Congressional District of Arizona elected Mr. Renzi to the United States House of Representatives. During his term in office, Mr. Renzi took pains to preserve and protect Fort Huachuca, which was and is the home of the U.S. Army’s Intelligence Center of Excellence. Military officials testified at his trial that his interest in the Fort was unique, heartfelt, and genuine. He not only participated in briefings and training exercises at Fort Huachuca, he also traveled to Iraq and Afghanistan, where he learned first-hand about many of the tactics employed in the War on Terrorism, including so-called enhanced interrogation techniques. Many of his overseas activities are classified. Suffice it to say that these experiences informed and reinforced Mr. Renzi’s view that Fort Huachuca was absolutely essential to our national security.

Mr. Renzi also knew that a regional water shortage threatened Fort Huachuca’s future viability. During his time in office, the U.S. Army, The Nature Conservancy, the Upper San Pedro River Partnership, Congressman James Kolbe, Senator John McCain and others lobbied Mr. Renzi about possible solutions. All of these stakeholders agreed that the best way to help resolve the situation would be to retire water usage on the Farm just outside the Fort’s boundaries. The Nature Conservancy knew that Mr. Renzi had associated with the Farm’s owners, Jim and Terry Sandlin.<sup>12</sup> Although these groups had tried to buy the Farm or to relocate its operations to another part of

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<sup>11</sup> American Bar Association, Standard 3.16 of the Criminal Justice Standards for the Criminal Justice Function (2015).

<sup>12</sup> Mr. Renzi knew Mr. Sandlin’s wife from high school. In addition, Mr. Renzi and the Sandlins had briefly co-owned a real-estate development project in northern Arizona (more than 300 miles away from the Farm) but the Sandlins bought out Mr. Renzi’s interest in early 2003. Thereafter, as a result of that transaction, Mr. Sandlin owed money to a corporation owned by Mr. Renzi. This was a legitimate debt which Mr. Renzi publicly disclosed on his Congressional Financial Disclosure Statement to the Committee of Standards and Conduct. At all times relevant to the land exchange proposals at issue here, Mr. Renzi and the Sandlins were not business partners and did not have any ongoing business relationship.

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Arizona, they had never come to terms with the Sandlins. They lobbied Mr. Renzi to try to convince Mr. Sandlin to stop using water on the Farm to help save the Fort.

Importantly, as the government eventually stipulated, what these groups were asking Mr. Renzi to do—namely, retire water usage on the Farm—would have been in the public interest. That's because the Farm was the last significant agricultural parcel in the watershed, and retiring water usage on the parcel would have materially benefitted the Fort and enhanced U.S. national security.<sup>13</sup>

## II. FIRST PROPOSED LAND EXCHANGE—RESOLUTION COPPER

In 2003, just after Mr. Renzi's election, Resolution, a joint venture controlled by foreign mining giants Rio Tinto and BHP Billiton, began lobbying Congress and state officials for land-exchange legislation that would grant it the right to mine federal park lands inside Mr. Renzi's district.

Resolution's proposal was both controversial and politically charged. In 2003 and 2004, Arizona's then-Governor, Janet Napolitano, was intent on helping her party to defeat Mr. Renzi. (At that time, Mr. Renzi was perceived to be a highly-vulnerable freshman member.) Concerned that Mr. Renzi could bolster his political standing by advancing Resolution's proposal, Governor Napolitano played hardball: she told Resolution and its Democratic lobbyists that she would oppose the exchange if Mr. Renzi sponsored it.<sup>14</sup> Acceding to Governor Napolitano's threat, Resolution sought to work with other legislators, such as Congressman Kolbe, but it was unable to convince anyone to introduce its bill.

In November 2004, Mr. Renzi resoundingly won re-election. In light of the result, Resolution concluded that it would be better served by asking Mr. Renzi to sponsor its legislation. Having been lobbied extensively by the U.S. Army, The Nature Conservancy, and the Upper San Pedro River Partnership about the environmental threats to Fort Huachuca, Mr. Renzi knew that water use on the Farm threatened the Fort's viability. So when Resolution asked for suggestions to improve its draft bill, he thus suggested that it work with The Nature Conservancy to acquire a conservation easement on the Farm. Notably, Resolution knew that Mr. Renzi had once had a business relationship with the Sandlins.

Resolution went through the motions of following up Mr. Renzi's suggestion, but it never seriously considered acquiring an easement on the Farm. Mr. Renzi eventually became frustrated by what he perceived to be Resolution's arrogance and its unwillingness to address the Fort's biggest threat. When Resolution claimed that it did not think that it would acquire the easement, Mr. Renzi told

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<sup>13</sup> At the time of these events, the Base Realignment and Closure Commission was undertaking a review of United States military installations. Fort Huachuca's viability was in question because of environmental litigation and a regional water shortage. *See, e.g.,* Center for Biological Diversity, *Pentagon Cover-up of Fort Huachuca's Water Problem* (June 21, 2005).

<sup>14</sup> Transcript at 91-92 (May 15, 2013).

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it that he would not support the bill unless it addressed the threat to Fort Huachuca—through the Farm or otherwise.

Notwithstanding all of this, Mr. Renzi continued to work on Resolution’s draft bill. Several interest groups, including the San Carlos Apache Indian tribe, environmentalists, and rock climbers came out in opposition to Resolution’s proposal. Seeking to broker these controversies, Mr. Renzi introduced Resolution’s bill in late 2005, but it did not advance in that Congress. (In fact, Congress did not pass Resolution’s proposal until 2014—some six years after Mr. Renzi left Congress.)

### **III. SECOND PROPOSED LAND EXCHANGE—PHILIP ARIES**

In early 2005, Phillip Aries approached Mr. Renzi’s District Director, Joanne Keene, about a new land-exchange proposal that he had developed with former Secretary of the Interior Bruce Babbitt. Mr. Aries had a close relationship with Ms. Keene, whom he had known for years. Ms. Keene, Mr. Aries, and Mr. Babbitt worked to refine and improve Mr. Aries’s proposal. They eventually devised a draft bill that would have allowed the federal government to obtain a conservation easement on the Farm. Mr. Renzi played no role in these discussions.

Once the bill was sufficiently advanced, Ms. Keene put Mr. Aries in touch with Mr. Sandlin to discuss a possible transaction. She also arranged for Mr. Aries to meet Mr. Renzi at a constituents’ event in April 2005. Shortly before that meeting, Ms. Keene submitted Mr. Aries’s draft bill to the Office of Legislative Counsel of the U.S. House of Representatives and put a copy of it in the briefing book that she provided to Mr. Renzi. The draft legislation contemplated that, as part of the exchange, the government would obtain a conservation easement on the Farm.

During this meeting, Mr. Aries and Ms. Keene explained the draft bill. They stressed that even former Secretary Babbitt endorsed the plan to retire water usage on the Farm. Knowing that reducing water use on the Farm was a top priority for both the U.S. Army and The Nature Conservancy, Mr. Renzi endorsed Mr. Aries’ proposal. He urged Mr. Aries to meet with the officials at Fort Huachuca and The Nature Conservancy to get their endorsements.<sup>15</sup>

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<sup>15</sup> According to Mr. Aries, Mr. Renzi also told him that he would be willing to use a “free pass” with the Chairman of the Natural Resources Committee to advance the legislation. Ms. Keene did not recall Mr. Renzi promising Mr. Aries a “free pass,” but she did recall that he said that he would speak with the Chairman about a “placeholder.” A “placeholder” is when a member reserves a timeslot on the Chairman’s calendar to debate the legislation on the merits. The insertion of a placeholder does not imply that a bill or amendment would bypass Committee consideration. *See* 152 Cong. Rec. H4689-03, 2006 WL 1789221 (2006) (supporting a placeholder so the specific issue could be revisited at the bill’s conference); 147 Cong. Rec. H4553-03, 2001 WL 837747 (2001) (proposing an amendment “with the express intent and purpose of being the placeholder that we need as we continue to work with the Senate and in conference . . . in fashioning the final bill”); 145 Cong. Rec. S6160-01, 1999 WL 341139 (1999) (Senator John McCain describing language in a bill as being “a placeholder” to ensure that a further proposal could be “appropriately considered in the normal legislative process”).

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After this meeting, Mr. Aries sought to line up support for his draft legislation. He met with officials at Fort Huachuca, who supported his effort to retire water use on the Farm. The Nature Conservancy took the view that a conservation easement would be inadequate; it told Mr. Aries that it would only support the legislation if he purchased the property outright—something Mr. Renzi had never suggested. Mr. Aries then decided, of his own accord and without consulting Mr. Renzi, that he would purchase the Farm. He negotiated a purchase price of \$4.5 million. Mr. Aries testified that this was a fair price; indeed, he admitted that he had turned down a \$5.2 million offer to sell the property only a few weeks after closing on the purchase.

Mr. Sandlin used a portion of the proceeds from the sale of the Farm to pay off the debt he owed to Mr. Renzi's company. Mr. Renzi did not know that Mr. Sandlin used these funds to pay off the debt. No one disputes that this pre-existing debt was entirely legal and appropriate. And no one disputes that Mr. Renzi did not receive even a penny more than he was due under the terms of that debt agreement.

## **THE INVESTIGATION**

### **I. RESOLUTION AND ITS CONSULTANTS LAUNCH “OPERATION EAGLE”**

After introducing Resolution's bill, Mr. Renzi sought to broker an agreement between Resolution and the bill's opponents, including especially the San Carlos Apache Tribe. Frustrated by Mr. Renzi's efforts to accommodate the Tribe's concerns, Resolution and its lobbyists arranged for *The Arizona Republic* to run an op-ed piece criticizing Mr. Renzi's approach.<sup>16</sup> Resolution's effort to use the media to influence public policy was legitimate.

More than a year earlier, Resolution and its lobbyists had launched “Operation Eagle”—which appears to have been an illegitimate effort to use the DOJ to defeat Mr. Renzi at the polls. The effort began as early as February 2005, when Resolution's lobbyists Tom Glass and Ron Ober made contact with former FBI agent Jim Elroy.<sup>17</sup> Mr. Ober is a long-time Democratic political operative with close ties to Governor Napolitano.<sup>18</sup> Mr. Glass is a former Colorado State Senator

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<sup>16</sup> *Firm Hand Needed to Guide Mining Deal*, *The Arizona Republic* (Aug. 24, 2006) (“Renzi is the logical representative to carry the bill in the House. But if he can't bring himself to act in Arizona's best interest, he should step aside and let another House member ... take the leadership role.”).

<sup>17</sup> After retiring from the FBI, Mr. Elroy worked as a private investigator. Among other things, he worked for well-heeled interests to “prepare ... criminal case[s] ... which could ultimately be handed to federal authorities.” Patrick Radden Keefe, *The Jefferson Bottles*, *The New Yorker* (Sept. 3, 2007). Despite Mr. Elroy's central role in launching this investigation, the government refused to provide Mr. Renzi's defense with access to his source file.

<sup>18</sup> At the time of Resolution's proposal, Ron Ober was a “longtime Democratic operative” who “boast[ed] on his Web site of ties to Napolitano.” Jerry Kammer, *Environmental Activist Aims to Alter Land Swap*, *The Arizona Republic* (Oct. 18, 2008). Mr. Ober also played a leading role in the Keating Five scandal by doing more than \$110 million worth of business with Charles Keating while his boss, Governor Dennis DeConcini, was

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and a Democratic campaign advisor. Together, they falsely told Mr. Elroy that Mr. Renzi and Mr. Sandlin were systemically “shaking-down” land-developers through a series of extortion schemes. Mr. Elroy compiled a dossier reflecting these false claims, which he provided to SA Odom. About one month later, Mr. Elroy re-submitted a slightly revised but anonymous letter, apparently to disguise his role in developing the extortion theory. The timing is striking: months before the telephone conversation in which Bruno Hegner claimed that Mr. Renzi told him “no Sandlin property, no bill,” Resolution’s Democratic lobbyists were secretly back-channeling false claims about Mr. Renzi to the FBI.

Although the entire premise was false, the dossier appears to have caught the attention of law enforcement. The partisan political overlay is apparent. AUSA Restaino must have recognized the threat that Mr. Renzi posed to Gov. Napolitano’s political dominance in Arizona.<sup>19</sup> Disregarding the conflict of interest arising out of his wife’s relationship with the Governor and his own partisan leanings, AUSA Restaino led the aggressive investigation that followed.

## **II. THE FBI CULTIVATED WITNESSES AND CONCEALED EXCULPATORY INFORMATION**

Seeking to prove the truth of Mr. Elroy’s furtive dossier, SA Odom began recruiting witnesses. One of his first targets was Mr. Renzi’s former district director, Ms. Keene. By then, she had resigned from Mr. Renzi’s office after being passed over for a promotion. In the weeks and months that followed, SA Odom met with Ms. Keene over 50 times; she testified that she was “personally invested” in the case and that she had come to view herself as “part of the investigation team.”<sup>20</sup> The true nature of SA Odom’s meetings with Ms. Keene is still uncertain. Although the government produced Form 302 reports of interviews regarding these meetings, it refused to produce copies of the agents’ handwritten notes.

The government’s refusal to produce these handwritten notes is especially troubling given what we now know about the notes from contemporaneous witness interviews. Soon after targeting Ms. Keene, SA Odom set his sights on Mr. Aries. When SA Odom first approached Mr. Aries, Mr. Aries told him that he first learned of the plan to retire water use on the Farm for the benefit of Fort Huachuca from Ms. Keene (*not* from Mr. Renzi). Even though SA Odom would later concede that this exculpatory evidence was “important,” and even though it was clear on the face of SA Odom’s handwritten interview notes that Mr. Aries had not learned of the Nature Conservancy plan and alfalfa farm water savings from Mr. Renzi, the FBI concealed this information by leaving it out of its Form 302—the only record of the interview that was accessible to the defense.

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intervening with thrift regulators on Mr. Keating’s behalf. See John Dougherty, *DeConcini and Keating*, The Phoenix New Times (July 14, 1993).

<sup>19</sup> In March 2005, multiple media reports suggested that Mr. Renzi might challenge Governor Napolitano in the upcoming gubernatorial election. See, e.g., United Press International, *Hayworth Will Not Run for Arizona Governor* (March 10, 2005) (“U.S. Rep. Rick Renzi ... may take a look at the race.”).

<sup>20</sup> Transcript at 206 (May 17, 2013).



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Concealing this information empowered the government to argue that Mr. Renzi had used the power of his office to force Mr. Aries to purchase the Farm.

### **III. THE DOJ AND THE FBI ILLEGALLY WIRETAPPED MR. RENZI**

Selectively using information provided by Ms. Keene and Mr. Aries, the government obtained a wiretap on Mr. Renzi's cell phone. The implementation of that wiretap was definitively illegal. The district court found that it violated Mr. Renzi's constitutional rights, in multiple respects.

First, the government made an affirmative decision to record Mr. Renzi's conversations with one of his defense attorneys for later review by a "taint team." The government's purported justification for recording these attorney-client privileged calls was that one of Mr. Renzi's attorneys was a "political operative"—not a member of the Arizona Bar. That was false. And the government knew it: the district court specifically found that, on the day that the wiretap began, an FBI agent "accessed the Arizona State Bar's public website and determined that [she] was a licensed attorney and printed a copy of her profile from the website."<sup>21</sup>

Second, during the course of the wiretap, the government provided periodic reports to the supervising judge about the implementation of the wiretap. In those reports, the government knowingly and falsely claimed that it had "minimized," *i.e.*, not recorded, any conversation involving Mr. Renzi's attorneys. In reality, the government recorded dozens of calls involving Mr. Renzi's counsel for later review by a taint team and their agents.<sup>22</sup>

Third, after recording these privileged calls, the government did not seal them. Moreover, the electronic records established that FBI agents had accessed and presumably listened to dozens of privileged phone calls. The government could not provide an innocent explanation for why they accessed any of these calls.<sup>23</sup>

Fourth, the government monitored, summarized, and even created a transcript of one especially sensitive call between Mr. Renzi and one of his campaign-finance lawyers. Remarkably, rather than seal and secure this evidence so that the defense would be able to know the true extent of the government's intrusion upon the privilege, SA Odom ordered the FBI to destroy the summary and the transcript of this privileged call. On cross examination, SA Odom justified his order by stating that he did it to "prevent agents from being tainted by exposure to the privileged calls." Yet another case agent kept a CD with a copy of this call in his desk throughout the investigation.<sup>24</sup>

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<sup>21</sup> *Renzi*, 720 F. Supp.2d at 1108. The government also chose to monitor and record dozens of calls regarding campaign issues and national politics, including substantial portions of the Republican Caucus' post-election teleconference in which the leadership analyzed the outcome and discussed its going-forward strategy.

<sup>22</sup> *See id.* at 1109.

<sup>23</sup> *See id.*; *see also id.* at 1115.

<sup>24</sup> *See id.*; *see also id.* at 1115.

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The district court found that the government's conduct violated Title III and breached Mr. Renzi's Fourth Amendment right against unreasonable searches and seizures.<sup>25</sup> The district court additionally found that the government "breached its duty of candor" to the supervising court by falsely claiming that it had minimized all attorney calls, when it was instead recording dozens of them.<sup>26</sup> As a sanction for this misconduct, the district court ordered the suppression of the entirety of the wiretap. However, even though the defense proved that multiple FBI agents had been exposed to privileged information, and that at least one agent involved in the prosecution maintained unsecured copies of privileged calls at his desk, the district court credited the government's bald claim that it had made no use of these calls. The court declined to dismiss any of the charges against Mr. Renzi.<sup>27</sup>

#### **IV. SA ODOM DANGLED MONEY TO INDUCE MR. ARIES' COOPERATION**

In the midst of the wiretap, having found nothing incriminating, SA Odom approached Mr. Aries about placing a call directly to Mr. Renzi. Mr. Aries balked. As he would later testify, he was in the middle of a family counseling session when SA Odom requested that he place the call to Mr. Renzi. Mr. Aries told SA Odom that he was uncomfortable with the request. SA Odom overcame Mr. Aries' reluctance by telling him that the government paid cooperators who made recorded calls.

SA Odom's comments undoubtedly influenced Mr. Aries. Mr. Aries would later testify that he not only believed that a reward was possible, but that he "deserved" to be paid for his cooperation. In terms of the amounts at issue, he testified that a \$10,000 reward would have been a "home run" and that a \$25,000 reward would have been like "hitting the lottery."<sup>28</sup>

SA Odom's comments also led Mr. Aries to change his story. After learning that he could be paid for his cooperation, the government called Mr. Aries to testify before the grand jury. Although he originally told the FBI that he had learned about the Farm from Ms. Keene (which was true), he lied to the grand jury by testifying that he only learned about the Farm when Mr. Renzi demanded that he acquire it during their meeting. SA Odom knew that testimony was false—after all, Mr. Aries had told him the opposite during their initial interview—but the government sponsored it anyway. (Mr. Aries's grand jury testimony—unlike his initial, concealed statement to SA Odom—lined up with Mr. Elroy's dossier's depiction of Mr. Renzi as the perpetrator of systemic extortion.)

Thereafter, Mr. Aries received an annual admonishment about his obligations as a Confidential Human Source. As part of the admonishments, the FBI reminded him that he would be liable for

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<sup>25</sup> See *id.* at 1111.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.* at 1118.

<sup>28</sup> Transcript at 18 (Oct. 26, 2015).

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paying taxes on any reward that he received from the government. Mr. Aries testified that these admonishments buttressed his believe that he could be—and deserved to be—paid for his help.<sup>29</sup>

### **THE TRIAL**

At trial, the government argued that Mr. Renzi acted corruptly, for his own personal benefit. The defense argued that Mr. Renzi acted in the public interest and to protect Fort Huachuca. The defense also attacked the credibility of the government’s witnesses and the quality of its investigation. Faced with these questions of Mr. Renzi’s intent, the jury eventually returned a split verdict. But the government misled the jury regarding key facts, such as Mr. Aries’ financial motives, and deprived it of critical exculpatory and impeachment evidence.

#### **I. MR. RENZI WAS PROHIBITED FROM EXPLAINING TO THE JURY THE REASONS WHY HE WAS SO ADAMANT ABOUT PROTECTING FORT HUACHUCA**

At trial, a threshold question was whether Mr. Renzi, who had served on the Permanent Select Committee on Intelligence, would be able to explain to the jury *why* he had responded to Resolution and Mr. Aries in the ways that he had. To do so, Mr. Renzi would have needed to reveal classified information about his experiences in Iraq and Afghanistan, the efforts of military intelligence to obtain information from detainees in the Middle East and elsewhere, and Fort Huachuca’s role in these activities.

As he was obligated to do under the Classified Information Protection Act, Mr. Renzi made a submission to the Court regarding the classified information that he would need to reveal in order to defend himself effectively. The district court would not hear of it; it categorically precluded Mr. Renzi from revealing any classified information as part of his defense. All the district court would do was require the DOJ to stipulate—as was obviously true—that Fort Huachuca was “essential” to national security and that Renzi’s efforts to preserve its viability by retiring the water usage at the alfalfa farm would therefore have been “in the public interest.”

Accordingly, instead of hearing evidence about the specific facts and circumstances that prompted Mr. Renzi’s efforts to protect Fort Huachuca, the jury learned only conclusory information about Mr. Renzi’s motives. The government exploited this by arguing to the jury that Mr. Renzi had sought to defend the case by “wrapping himself in the flag.” The jury did not know that Mr. Renzi had far more hands-on experience with the War on Terror than nearly any other member of Congress. By prohibiting Mr. Renzi from articulating the actual facts and experiences that compelled him to fight to protect Fort Huachuca, the district court ensured that the jury would not have access to evidence critical to assessing his intent.

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<sup>29</sup> *Id.* at 26.

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## **II. MR. RENZI'S ACTIONS INDISPUTABLY WERE IN THE PUBLIC INTEREST**

Although the district court blocked Mr. Renzi from introducing any classified evidence about Fort Huachuca's role in the War on Terrorism, the evidence showed that Renzi was the target of a sustained lobbying campaign by Army officials and Congressman Kolbe's staff to end water usage at the Farm. Between 2002 and 2006, Mr. Renzi advocated for Fort Huachuca in public hearings, repeatedly arguing that retiring water use on the alfalfa farm would be the single most important step that the community could take to resolve a regional water deficit that threatened Fort Huachuca's viability and possible base closure.

The evidence establishing the need to retire water usage at the Farm was overwhelming. Matt Walsh, who represented Fort Huachuca as a Congressional liaison, testified about Mr. Renzi's many efforts to assist the Fort, including his efforts to address the regional water shortage. Holly Richter of The Nature Conservancy testified about TNC's multi-year effort to purchase or to obtain a conservation easement over the property. She also testified to her personal efforts to enlist Mr. Renzi to help TNC in retiring water usage at the Farm, as well as briefing Joanne Keene and Mr. Renzi's staff on the specifics of the plan.<sup>30</sup> Other TNC executives confirmed its historic efforts to purchase the property, its inability to reach an agreement with Mr. Sandlin, and its requests to Mr. Renzi to intervene to convince Mr. Sandlin of the merits of its efforts.

All of the sustained lobbying efforts contributed to Mr. Renzi's interest in resolving the water crisis and to benefit the Fort where he had grown up. The Babbitt/Aries draft bill would have been a godsend to the Fort. Indeed, as former Representative James Kolbe's Chief of Staff wrote upon seeing the initial draft of the legislation: "This is a great bill."

## **III. THE GOVERNMENT INTENTIONALLY SUPPRESSED EXCULPATORY EVIDENCE AND KNOWINGLY PRESENTED FALSE TESTIMONY**

At trial, the government relied heavily on Mr. Aries' testimony. At the time of his testimony, Mr. Aries not only desperately hoped to be, but believed he deserved to be, paid for his cooperation. But the government was careful to conceal from the defense team any information about a possible payoff. In that regard, AUSA Restaino later admitted that he made an intentional decision not to provide the defense with FBI records showing that the government had told Mr. Aries repeatedly that he would need to pay taxes on whatever reward he might receive in exchange for his cooperation.

At trial, the government—as it had in the grand jury—knowingly elicited through Mr. Aries the false claim that Mr. Aries did not learn about the Farm until his meeting with Mr. Renzi. In actuality, Mr. Aries proposed the plan to acquire a conservation easement on the Farm to Mr. Renzi. On cross-examination, Mr. Renzi's counsel demonstrated that this narrative was false, but Mr. Aries' claimed—persuasively, at least in the jury's view—that he had made an innocent

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<sup>30</sup> See Transcript at 124-95 (May 30, 2015).

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mistake in recalling how he learned of the Farm. At the time, Mr. Renzi's counsel did not know, and the jury thus never learned, that Mr. Aries had only changed his account about his meeting with Mr. Renzi after learning from the FBI that he could be paid for his cooperation.

The government knew that Mr. Aries' credibility was critical to its case. Accordingly, the government dedicated significant time and attention to this issue in its closing argument. After the defense argued that Mr. Aries could not be believed, the government misled the jury about Mr. Aries' credibility in its rebuttal argument. In particular, the government emphatically told the jury that Mr. Aries had not received "one thin dime" for his cooperation, cunningly leading the jury to believe that Mr. Aries had no financial motive to lie and effectively concealing SA Odom's use of a reward to cinch Mr. Aries' cooperation.

When the government sponsored Mr. Aries' false testimony, it knew that Mr. Aries had changed his story from the time of his initial interview, but, having concealed the original story, it presumed that Mr. Renzi would be unable to demonstrate that it was false. The transcript of the post-trial hearing reveals Mr. Aries' contradictory testimony on these topics.

#### **IV. THE JURY'S VERDICT AND THE INITIAL APPEAL**

After a five-week trial, the jury returned a split verdict. It convicted Mr. Renzi on about half of the public corruption charges, but acquitted him on the other half. That jury did not know anything about the classified information that prompted Mr. Renzi's efforts. In addition, it had no idea that the government had concealed information about Mr. Aries' financial motives, that Mr. Aries believed that he deserved to be paid for his cooperation, that the FBI case agents were planning to pay him for his assistance, or that the government had unconstitutionally monitored privilege calls while misleading the supervising court as to its actions.

#### **APPEAL AND POST-TRIAL DISCLOSURES**

Unaware of most of the government's misconduct, Mr. Renzi appealed his convictions to the U.S. Court of Appeals for the Ninth Circuit. That court granted bail pending appeal, but ignorant of the suppressed evidence, it eventually affirmed the convictions.<sup>31</sup>

After the Ninth Circuit's decision, Mr. Aries began soliciting payment from the FBI.<sup>32</sup> In a March 18, 2015 email to AUSA Restaino, Mr. Aries wrote:

I was very glad to see that the Renzi matter seems to be finalized. Although, further appeal is mentioned in the press. The subject of a 'possible' reward for my help was mentioned to me on numerous occasions. Is this still a possibility?

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<sup>31</sup> See *United States v. Renzi*, 769 F.3d 731 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2889 (2015).

<sup>32</sup> See generally Transcript (Oct. 26, 2015).

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In a follow-up interview with the FBI, Aries explained that “he had casual conversations with [Agents Odom and Burris] about individuals potentially receiving money for cooperating with FBI investigations.” These conversations, which he said took place over the phone and in person, all occurred before Mr. Renzi’s and Mr. Sandlin’s trials, and were in addition to the annual CHS Admonishments. According to the FBI memorandum of interview, Mr. Aries stated that he felt that he was “entitled to some compensation if some is given.” *Id.*

In April 2015, with Mr. Renzi imprisoned, AUSA Restaino disclosed Mr. Aries’s request for payments to the defense. Mr. Renzi moved for a new trial. In response, the government produced additional discovery materials, including the agents’ notes of their initial conversation with Mr. Aries, which showed for the first time that *the government knew all along that Mr. Aries first heard about Mr. Sandlin’s property from Joanne Keene.*

In July, after the Supreme Court’s denial of Mr. Renzi’s petition for certiorari, Mr. Aries again e-mailed the AUSA seeking his reward, stating:

I was not promised anything, but was told it was a possibility that I would be rewarded. I feel that I truly extended myself during the taped phone call process, and tried always to be helpful in general. The whole experience took an emotional and financial toll on me. Money is extremely tight, and if there was a chance for a reward, I would like to be considered.

The district court held a hearing on Mr. Renzi’s motion for a new trial, where Mr. Renzi proved that the FBI had knowingly concealed “important” information about its initial meeting with Mr. Aries, that SA Odom had illegally induced Mr. Aries to continue cooperating by dangling a payoff, and that Mr. Aries believed that he deserved a reward for his cooperation. Indeed, Mr. Aries testified that a \$10,000 reward would be “a home run” for him and that a \$25,000 reward would be “like winning the lottery.”

The district court ruled that the government had wrongly deprived Mr. Renzi of evidence that would have undercut Mr. Aries’ credibility. It also ruled that the government’s claim in its rebuttal argument that Mr. Aries had not received “one thin dime” was “disingenuous” and “misleading.”<sup>33</sup> Despite condemning the government’s misconduct, both the district court and the Court of Appeals declined to grant Mr. Renzi a new trial, claiming that the suppressed evidence was “immaterial.”

However, because the government successfully concealed this evidence until after Mr. Renzi’s original appeal and until Mr. Renzi was already incarcerated in federal prison, no court has ever considered whether the cumulative misconduct in Mr. Renzi’s case deprived him of a fair trial. Indeed, evidence of prosecutorial misconduct discovered since Mr. Renzi’s appeal, along with

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<sup>33</sup> Order at 8 (Dec. 30, 2015).

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well-supported evidence of the government's misconduct during this case, are the crux of our complaint and the basis our request for an investigation.

**Request for Investigation**

Over the past thirteen years, Mr. Renzi has always maintained his innocence. He and his twelve children have paid a heavy price for his efforts; it would have been far easier for them had he simply pled guilty to a false-statement offense. But convinced of his own innocence, Mr. Renzi could not plead guilty to a crime he did not commit. As Mr. Renzi has come to learn, a man who has been unfairly and unjustly imprisoned experiences a unique form of brutality. He is forced to relive the nightmare with every attempt to prove his innocence, with every reminder of the injustices he and his family have suffered, and with every new piece of evidence he uncovers about government misconduct.

We submit that the prosecution and investigation of Mr. Renzi's case violated his basic constitutional right to a fair trial. Mr. Renzi respectfully requests that you conduct a full, fair, and thorough review.

Sincerely,

Kelly B. Kramer