UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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

DEFENDANT SENATOR ROBERT MENENDEZ'S MOTION TO ALTER THE TRIAL SCHEDULE TO PERMIT SENATOR MENENDEZ TO PARTICIPATE IN CRITICAL VOTES BEFORE THE UNITED STATES SENATE

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INTRODUCTION

At the start of jury selection on August 22, during discussions of preliminary issues, Senator Robert Menendez raised the dilemma that he and other Members of Congress charged with a crime face—taking full part in his trial, which will require many absences from Washington, D.C., while participating as much as possible in critical debates and votes in Congress. By this motion, Senator Menendez respectfully requests that the Court alter the trial schedule to allow for practical means to address this dilemma.

BACKGROUND

As to Members of Congress especially (and the same might be true of other elected officials in Washington if they are in trials elsewhere), they have a constitutional right to be an active part of every minute of their trial, but they also have constitutional obligations to serve the people who elected them. On August 22, the Court noted that any defendant has a right to attend or not attend his or her trial. But where a defendant is an elected official, whose job involves voting on a schedule not of his own making, it is a unique situation. If a non-public official chooses not to attend his or her trial, the jury may draw whatever inference it wants, including that the defendant did not care enough about his or her case. However, this is not a proper or accurate inference here, and the Court can and should take appropriate steps to prevent the prejudice that might come with such an incorrect inference.

The Senator did not and is not asking the Court to provide a non-prejudicial means for him to attend the daily activities of his office during the trial. He recognizes that is not possible, and many things to which he would attend and participate were there no trial will not be possible. Instead, this motion focuses on the Senator's need to be present on the Senate floor and vote only for certain critical votes, including those which must occur during September 2017. These

include raising the federal borrowing limit to avoid default and approving a spending deal to avoid a government shutdown. *See, e.g.*, *The Daily 202: Congress will have 12 working days to prevent a debt default and keep the government open*, Wash. Post, Aug. 11, 2017, *available at* https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/08/11/daily-202-congress-has-12-working-days-to-prevent-a-debt-default-and-prevent-a-government-shutdown/598d070630fb045fdaef1270 (explaining that when Congress returns in September the House will have just 12 legislative days to raise the federal borrowing limit to avoid default and the same amount of time to approve a spending deal to avert a government shutdown).

Similarly, the National Flood Insurance Program, which protects over 200,000 New Jersey policyholders will expire at the end of September if it is not reauthorized by Congress. *See, e.g.*, *New Jersey Needs Flood Insurance Reform*, USA Today, Aug. 20, 2017, *available at* https://www.usatoday.com/story/opinion/readers/2017/08/20/commentary-new-jersey-needs-flood-insurance-reform/581686001/.

Moreover, a comprehensive rewrite of the tax code and reforms to the health insurance market are also on Congress' agenda. *See, e.g.*, *Congress faces daunting agenda following August break*, CBS News, Aug. 5, 2017, *available at* http://www.cbsnews.com/news/congress-must-prove-its-mettle-this-fall-it-has-no-choice/. As the recent vote on whether to repeal the Affordable Care Act demonstrated, the Senate is divided by razor-thin margins on consequential legislation, making Senator Menendez's absence from any particular vote potentially determinative. *See 'Obamacare' repeal fails in Senate*, Associated Press, July 28, 2017, *available at* gttp://www.nj.com/politics/index.ssf/2017/07/obamacare_repeal_fails_in_senate.html.

In fact, as recently as today, August 24, the impact of Senator Menendez not being able to participate in a future vote to repeal the Affordable Care Act was raised by a reporter in the White House to suggest a repeal bill might be easier to pass if he were absent:

> Q [Reporter]: When the President meets with Senator McConnell at the beginning September, when congress is back that he will ask him to take another swing at repealing Obamacare. At the same time a judge in New Jersey, Judge Walls, has said that Senator Robert Menendez cannot come back to the Senate to cast votes. How does that, in combination with what the President might want the Senate Majority Leader to do on Obama care factor into the balance of power and the vote count you need to get a repeal bill through?
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> A [Sarah Huckabee Sanders]: Ahh, I'm not sure about the specifics of that case. I know there's still ongoing judicial process taking place so I'm not going to get into that. . . .

White House News Briefing, Aug. 24, 2017, at 4:30-5:40, *available at* https://www.youtube.com/watch?v=-AqoMvtoJj4.

The healthcare vote is not the only vote of major national or international importance that is likely to come up for debate and vote in the next six to eight weeks. It is likely that the following additional, important topics will also surface: sanctions on Iran, sanctions or other measures to address North Korea (including a possible War Powers Act resolution), and the Administration's raising economic or other actions concerning Venezuela.

ARGUMENT

The clash of values addressed in this motion accentuates the fact that Senator Menendez is situated differently from most other defendants. He has constitutional obligations, which can only be discharged several hours from the location of his trial.[1]

It requires little citation to establish the principal that an accused person has the right to be present during his trial. A defendant's right to be present at his own trial is protected by the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the U.S. Constitution. *See United States v. Gagnon*, 470 U.S. 522, 526 (1985). In order to effectuate the "bedrock procedural guarantee" that the accused shall enjoy the right to confront witnesses against him, *see Crawford v. Washington*, 541 U.S. 36, 42 (2004), a defendant must be present in the courtroom. Moreover, even in situations where a defendant is not actually confronting witnesses, the Supreme Court has recognized that a defendant's right to be present at his trial is protected by the Due Process Clause where fundamental fairness might be thwarted by his absence. *United States v. Alessandrello*, 637 F.2d 131, 137 (3d Cir. 1980) (citing *Faretta v. California*, 422 U.S. 806, 816 (1975)). This right to be present at trial is based upon the premise that the defense "may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether." *Faretta*, 422 U.S. at 816 (citing *Snyder v. Com. of Mass.*, 291 U.S. 97, 106 (1934)). In other words, a defendant's presence at trial permits him to meaningfully assist in his own defense. Moreover, as other courts have noted,

[1] This issue was forecast in May 2015 in Defendant's Motion to Transfer Venue (Dkt. 18), in which Defendants requested the case be transferred to Washington, D.C. because this issue of voting could be better resolved there. One reason the Court denied the motion was because it was unclear if the Senate would be in session when the case was tried. (*See* Dkt. 34 at 12.) That issue has been answered, and it is clear the Senate will be in session, so a solution is being requested short of a transfer.

there is a reasonable possibility that juries will make adverse inferences based on a defendant's absence from the courtroom. *See, e.g.*, *Wade v. United States*, 441 F.2d 1046, 1050 (D.C. Cir. 1971); *United States v. Alikpo*, 944 F.2d 206, 210 (5th Cir. 1991). This is of particular concern to Senator Menendez.

For these reasons, criminal defendants have strong—and constitutionally protected—interests in being present at their own trials. Federal Rule of Criminal Procedure 43, which codifies and broadens the constitutional protection, *see Alessandrello*, 637 F.2d at 137, requires the presence of a defendant at "the initial appearance, initial arraignment, [. . .] plea, [. . .] every trial stage, including jury empanelment and the return of the verdict[,] and [. . .] sentencing." Fed. R. Crim. P. 43(a). Only in very limited circumstances can a defendant who is initially present at trial waive the right to be present: either by his voluntary absence, *see* Fed. R. Crim. P. 43(c)(1)(A), (B), or as a result of his disruptive behavior, *see* Fed. R. Crim. P. 43(c)(1)(C). The Supreme Court has even held that Rule 43 absolutely prohibits a trial *in absentia* of a defendant who is not present at the beginning of trial. *Crosby v. United States*, 506 U.S. 255, 262 (1993). Because of the importance of these interests, appellate courts have often found that the violation of the defendant's right to be present constituted reversible error. *See United States v. Neal*, 320 F.2d 533, 536 (3d Cir. 1963); *United States v. Mackey*, 915 F.2d 69, 75 (2d Cir. 1990); *United States v. Camacho*, 955 F.2d 950, 957 (4th Cir. 1992); *Alikpo*, 944 F.2d at 210; *United States v. Watkins*, 983 F.2d 1413, 1422 (7th Cir. 1993).

Senator Menendez, like any criminal defendant whose individual liberty is at stake, has a clear and unqualified interest in being present at his own trial. However, a trial taking place during a session of Congress risks involuntarily denying Senator Menendez his rights to due

process and confrontation, unless he elects to forego his constitutional duty to cast his vote on critical issues pending before Congress so that he can be present in the courtroom.

A defendant's constitutionally-protected right to be present at his trial comes into direct and unavoidable conflict with other important constitutional values, where, as here, the defendant is a sitting United States Senator who can only perform certain constitutional responsibilities if he is physically present at certain dates and times on the floor of the United States Senate in Washington, D.C. Members of Congress can and do delegate many responsibilities to staff members, such as performing research and meeting with constituents and interest groups. In limited circumstances, Senators may vote by proxy in Senate Committees. *See* Senate R. XXVI(7). However, the Constitution assigns Senators certain responsibilities that can only be performed by members themselves: most importantly, the power to cast votes on legislation, treaties, and nominations on the floor of the Senate. *See* U.S. Const. art. I § 1; art. II § 2. These responsibilities cannot be exercised by proxy.

The duty of a member of Congress to participate as the voice of those who elected him on many issues, but especially on the types of issues this motion addresses, is paramount. This is a unique situation where the process of other defendants who decide to attend or not attend their trials for any other reason does not apply. There is no provision in the Constitution or applicable rule of Congress that permits remote or proxy voting on the floor of the Senate; a member must be physically present in the chamber in order to cast his or her vote. As a result, anything that prevents or impedes a member of Congress from attending a vote held on the floor risks

distorting legislative outcomes and directly deprives the citizens he or she represents from influencing decisions of extraordinary public importance.[2]

Both Senator Menendez and the citizens who elected him, have an unquestionable interest in the Senator's continued performance of the core legislative functions that the Constitution assigns to him alone. Here, a trial scheduled to take place during a session of Congress will invite the effect the Constitution seeks to avoid: it would distort the outcome of floor votes on legislation and deprive the citizens of New Jersey of representation in such decisions, unless Senator Menendez forgoes his own individual rights to due process and confrontation in order to attend to such duties.

A defendant's constitutionally-protected right to be present at his trial also comes into direct and unavoidable conflict with the central constitutional principle of separation of powers, where, as here, the action of a coordinate branch may impede a member of Congress from attending to his core legislative responsibilities. The Supreme Court's separation of powers jurisprudence makes clear that intrusion by one branch into the functions of another should be avoided when possible. For example, when considering legal challenges alleging a violation of the Constitution's separation of powers, the Supreme Court has not hesitated to strike down provisions of laws that "undermine the authority and independence of one or another coordinate Branch." *Mistretta v. United State*s, 488 U.S. 361, 382 (1989). Similarly, the Supreme Court

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[2] The Arrest Clause is one example of the framers' concern about potential harm caused by a member's absence from the chamber during the legislative session. The clause grants temporary immunity for members of Congress from civil arrest (rather than criminal arrest) while attending a session of Congress, or traveling to or from it. *See Long v. Ansell*, 293 U.S. 76, 83 (1934). While the practice of civil arrest was largely discontinued in the early Twentieth Century, the clause's overriding purpose of preserving legislative independence is clear. As early constitutional commentator Joseph Story noted, civil arrests while Congress is in session would skew votes and harm constituents by diluting their influence. *See* Akhil Reed Amar & Neal Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev. 701, 712 (1995).

has held that the purpose of the Speech or Debate Clause is to ensure that the legislative function of the Constitution allocated to Congress may be performed independently. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975).

For example, in the context of separation of powers challenges to the federal courts' power to exercise jurisdiction over the President, the Supreme Court has instructed that courts must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. *See Nixon v. Fitzgerald*, 457 U.S. 731, 753-54 (1982). Similarly, the Court has held that the Speech or Debate Clause's fundamental purpose is to free "the legislator from executive and judicial oversight that *realistically* threatens to control his conduct as a legislator." *Gravel v. United States*, 408 U.S. 606, 618 (1972) (emphasis added).

Senator Menendez, the citizens of New Jersey, and the constitutional system as a whole, have strong interests in preventing realistic threats to Senator Menendez's ability to carry out his core legislative duties. Here, a trial schedule without some non-prejudicial accommodation of this dilemma directly interferes with the independent operation of the legislative branch by putting Senator Menendez in the position of choosing between his individual rights to due process and confrontation on the one hand, and from discharging his core legislative duties on the other hand. Given this very real threat to legislative independence, the Supreme Court's separation of powers doctrine provides additional grounds for this Court to take narrowly tailored measures that avoid such interference without significantly delaying the adjudication of this trial.

PROPOSED SOLUTION

The Court rejected starting testimony in the case during a planned congressional recess in October through the end of the year, affording the same time in weeks for trial as is planned now. There is another solution that would not unduly interfere with the trial schedule.

The Court's current schedule of sitting until the afternoon may accommodate some debates and votes. In addition, days the Court is off for the observance of some religious holidays may also be on days that the Congress is in session beyond the most major of those holidays. However, the same concept can apply to other days. That is, when Senator Menendez can inform the Court in advance of a day in which a critical issue of the kind described above will be debated and voted, the Court could adjourn trial for that day to accommodate that participation. In such a week, the Court could perhaps substitute a day that was not scheduled for trial for a day that would otherwise be lost. Or as the trial progresses toward the recess, trial days could be longer as the Court indicated might happen later in the trial for other reasons.

The Court has broad discretion in managing its docket, and it should exercise that discretion to adjourn trial on those days when Senator Menendez's presence is needed in the Senate for the types of major actions described above. In *Clinton v. Jones*, 520 U.S. 681 (1997), for example, the Supreme Court "rejected the argument that the potential burdens [of litigating a civil case] on the President violate separation-of-powers principles," but the Supreme Court emphasized that "those burdens are appropriate matters for the District Court to evaluate in its management of the case." *Id.* at 707 (noting that the "high respect" owed to a co-equal branch fulfilling its duties "should inform the conduct of the entire proceeding, including the timing and scope of discovery"); *see also Cheney v. District Court*, 542 U.S. 367, 391-92 (2004) (advising courts to be "mindful of the burdens imposed on the Executive Branch in any future

proceedings" and to give "[s]pecial consideration" to requests from a co-equal branch). The same concerns are in play when a member of Congress is involved in litigation. The Second Circuit, for example, has noted that while criminal prosecution is burdensome on all criminal defendants, "the interests if Members of Congress in this regard are especially compelling" because "the pendency of criminal charges against a Member of Congress and a trial of those charges implicate aspects of our representative form of government. The Member's capacity to represent his constituents is inevitably impaired." *United States v. Myers*, 635 F.2d 932, 936 (2d Cir. 1980) (finding these interests override "traditional interests in judicial efficiency").

The Court should exercise its discretion by managing its docket in such a way that will minimize any impairment of Senator Menendez's ability to represent the citizens of New Jersey. Surely, this solution is a practical one to allow all the interests in the case as well as the unique obligations and dilemma of the Senator and the people of New Jersey who elected him to be addressed as well.

CONCLUSION

For the foregoing reasons, counsel for Senator Menendez respectfully requests the court grant the attached Order altering the trial schedule on select days to be identified in the future to allow Senator Menendez to vote on key pieces of legislation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2017, I electronically filed the foregoing response with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record for all parties.

/s/ Abbe David Lowell

Abbe David Lowell