**Summary of Oral Arguments in Rep. Scott Perry Phone Seizure Case**

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On Feb. 23, the U.S. Court of Appeals for the District of Columbia Circuit heard oral arguments in *In re Sealed Case*, concerning the Department of Justice’s attempts to access the personal cell phone of Rep. Scott Perry (R-Pa.) as part of its investigation into Jan. 6 and former President Donald Trump’s attempt to subvert the 2020 election.

Perry played a critical role in advising the Trump White House about favorable individuals who could be appointed to senior positions within the Justice Department in the wake of the 2020 election in order to subvert the transition of power. Specifically, Perry likely [introduced](https://www.nytimes.com/2021/01/23/us/politics/scott-perry-trump-justice-department-election.html) then-President Trump to Jeffrey Clark, the acting head of the Justice Department’s Civil Division at the time. Clark and Trump then spoke multiple times without then-Acting Attorney General Jeffrey Rosen, and Trump came extremely close to replacing Rosen with Clark as head of the Justice Department in January 2021. It was only the [threat](https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html) of widespread resignations by the Justice Department leadership that halted this plan. Additionally, according to the Jan. 6 committee, Perry and Clark discussed a plan wherein Clark would send a letter from the Justice Department to Georgia informing the state of an investigation into possible voter fraud. Perry also personally investigated the viability of voting against the certification of the 2020 election results in Congress.

**Factual Background**

Although many of the details of the case have been sealed because they pertain to an ongoing grand jury investigation, [reporting](https://www.politico.com/news/2023/01/30/secret-hold-doj-phone-trump-scott-perry-00080233) from Politico has chronicled Rep. Perry’s legal battle with the Justice Department. In August 2022, the FBI seized Perry’s personal cell phone pursuant to a warrant [issued](https://www.justsecurity.org/85240/speech-or-debate-immunity-will-not-protect-scott-perrys-phone/) by U.S. Magistrate Judge Susan E. Schwab in the Middle District of Pennsylvania. The FBI made a forensic copy of the phone’s contents and then returned it to the representative later that day.

Shortly thereafter, Perry filed a lawsuit challenging the Justice Department’s authority to view the phone’s contents under the Speech or Debate Clause of the Constitution, which prohibits the “question[ing]” of senators and representatives “for any Speech or Debate in either House.” However, he withdrew the suit on Oct. 22, 2022. To what extent he continued to fight the FBI’s efforts to view the phone’s contents in private is unknown.

Although the FBI possessed the copy of the cell phone, it was unable to view the contents without a secondary warrant, which it sought and was granted by Chief Judge Beryl Howell of the U.S. District Court for the District of Columbia in a sealed ruling on Dec. 28, 2022. The day after oral arguments in the D.C. Circuit, Howell ordered the unsealing of this ruling and several others, which are described below.

Perry’s legal team appealed, and a three-judge panel for the U.S. Court of Appeals for the D.C. Circuit granted a stay of Howell’s ruling in a sealed order on Jan. 5 of this year, pending oral arguments and further filings. On Jan. 27, the House of Representatives itself [moved to intervene](https://www.cnn.com/2023/01/30/politics/house-intervene-scott-perry-phone-doj/index.html) in the case. Although its arguments remain sealed, the decision to intervene is not easily dismissed as partisan: The decision was authorized unanimously by the Bipartisan Legal Advisory Group, a body of senior House leadership including the House minority leader, Democrat Hakeem Jeffries.

In a per curiam [order](https://storage.courtlistener.com/recap/gov.uscourts.cadc.39352/gov.uscourts.cadc.39352.1218494327.0_1.pdf) on Feb. 16, the court of appeals requested that the parties be prepared to discuss three issues during the public portion of the upcoming oral arguments:

1. Whether this court has jurisdiction under 28 U.S.C. § 1291, the collateral order doctrine, mandamus, or some other theory.
2. Whether the Speech or Debate Clause of the Constitution protects informal legislative fact-finding by individual members of Congress in the absence of official authorization.
3. Whether the Speech or Debate Clause’s nondisclosure privilege extends to communications between members of Congress and either private parties or members of the executive branch.

Although neither side’s arguments about the court’s jurisdiction are public, the certified question is revealing: 28 U.S.C. § 1291 limits the jurisdiction of courts of appeals such as the D.C. Circuit to reviewing “final decisions of district courts.” The Justice Department may, therefore, be arguing that Howell did not issue a final decision in the matter and so the circuit court lacks statutory jurisdiction to review the action.

The Speech or Debate Clause, which is located in Article I, Section 6, of the Constitution, prohibits the “question[ing]” of senators and representatives “for any Speech or Debate in either House.” This clause has been interpreted by the Supreme Court to contain several protections for members of Congress. Primarily, the clause bestows on members of Congress immunity from civil and criminal liability for actions within a “[legislative sphere](https://casetext.com/case/doe-v-mcmillan-3).” Most relevant to the current dispute, the clause has also been [interpreted](https://casetext.com/case/gravel-v-united-states) to shield members of Congress from questioning about their legislative acts, including before grand juries.

The nondisclosure privilege derives from the second implication of the Speech or Debate Clause as interpreted by the U.S. Court of Appeals for the D.C. Circuit in [*United States v. Rayburn House Office Building*](https://casetext.com/case/us-v-rayburn-house-rm-2113-washington-dc). As Chief Judge Howell described it, “the Clause creates a non-disclosure privilege for documents and records—obtained either through a search warrant or a subpoena—that fall within the ambit of protected legislative activity.” Specifically, the nondisclosure privilege allows the senator or representative to protect specific records and documents from executive branch review even when seized pursuant to a warrant, subject to judicial review. The animating purpose behind the principle is to avoid chilling “the exchange of views with respect to legislative activity,” including “frank or embarrassing statements.” Notably, Howell wrote in her [December 2022 opinion](https://www.dcd.uscourts.gov/sites/dcd/files/Redacted%20December%2028%2C%202022%20Memorandum%20Opinion%2C%20ECF%20No%2043.pdf) on the records that the nondisclosure privilege has been recognized only in the D.C. Circuit and was rejected by the Third and Ninth Circuits “when applied to records or third-party testimony.” Perry invoked the nondisclosure privilege from the Speech or Debate Clause in this litigation because he sought to protect the communications on his cell phone from review by the Justice Department.

The appeals court held oral arguments on Feb. 23. The three-judge panel—consisting of Judges Karen LeCraft Henderson, Gregory Katsas, and Neomi Rao—heard from counsel for Perry, John Rowley, as well as Justice Department lawyer John Pellettieri. The House did not participate in arguments. Over half of the oral arguments occurred during a sealed session, and the last portion of the public arguments was not accessible to members of the public listening from outside the courtroom due to a [technical glitch](https://www.politico.com/news/2023/02/23/appeals-court-perry-speech-debate-jan-6-00084180). But the available portion of the arguments was nonetheless revealing. You can listen to the audio [here](https://www.youtube.com/watch?v=cvCYQSlwr1g&ab_channel=UnitedStatesCourtofAppealsfortheDCCircuit).

**Oral Arguments**

Henderson, with Rao’s and Katsas’s agreement, swiftly directed both attorneys to dispense with any discussion of the jurisdictional question and focus their oral arguments on the Speech or Debate Clause. This direction was the only time Henderson spoke during the public portion of the oral arguments—she asked no questions to either attorney.

Rowley, arguing on behalf of Perry, appeared first. He asked the court to reverse Howell’s order—which, he said, held that the Speech or Debate Clause does not protect “informal” fact-finding by members of Congress if not “specifically authorized by the House.” Alternatively, Rowley argued, the court should remand the case to the district court asking it to reconsider its review of the records of issue. On the second question set out in the per curiam order, concerning legislative fact-finding, Rowley argued for an expansive protection for informal legislative fact-finding based on “important separation of powers issues.”

The first question directed to Rowley came from Katsas. Acknowledging that the Speech or Debate Clause has been construed broadly, Katsas nevertheless asked Rowley why the clause should apply given that “what we’re talking about here seems far afield from speech or debate.” In response, Rowley put forward a broad test for communications protected by the Speech or Debate Clause. Any speech that is “within the legitimate legislative sphere,” he argued, is protected. He drew a throughline from previous cases protecting activity within congressional offices to activity conducted on members’ cell phones, which he characterized as essentially the medium through which members communicate about legislative matters and which therefore fall within the protection of the clause.

When pressed by Rao about the limits of his proposed test, and specifically whether disclosure to a third party would waive the privilege, Rowley defended an indefeasible version of the nondisclosure privilege. He distinguished the Speech or Debate Clause’s nondisclosure privilege from the nondisclosure executive privilege, which is assumed to be waived when information is not protected or is disclosed to a third party. The former privilege is not waivable, according to Rowley, because it is a “constitutional protection.” Under Rowley’s argument, the “linchpin” of the privilege is simply whether or not the communication “is being undertaken for legislative purposes.” If so, the judicial inquiry should end, and the communication is protected, the “legitimate interest” of law enforcement “to investigate potential criminality” notwithstanding.

Katsas seemed to share Rao’s concerns with the limits of Rowley’s proposed rule. He remarked that allowing the privilege holder to have protected communications with “anyone in the universe” would be “odd,” particularly considering that other communications privileges like the attorney-client privilege apply, by definition, only to communications with a specific category of person. In response, Rowley distinguished the speech or debate privilege from Katsas’s analogies, arguing that the privilege at issue is not communications based but rather “activities-based.” Returning to his proposed test, Rowley argued that courts merely have to determine that any communication “occurred within the legislative sphere.” If so, the privilege is “absolute,” regardless of with whom the legislator communicated.

Rowley expanded on what he had in mind as occurring within a “legislative sphere” by analogizing to a fictional member of Congress who sought out information about conditions in East Palestine, Ohio, in light of the recent rail accident there. Courts could determine that these inquiries were within the legislative sphere, he argued, because they “occur[ed] in an area where legislation could be had.” In response to Rao’s concern that there were no cases about the privilege applying to individual member fact-finding as compared to fact-finding authorized by a committee, Rowley admitted that the case law was “sparse” but “not nonexistent.” He pointed to U.S. District Judge Leigh Martin May’s ruling in September 2022, which [held](https://www.washingtonpost.com/national-security/2022/09/01/lindsey-graham-georgia-testify/) that Sen. Lindsey Graham (R-S.C.) could be compelled to testify before a grand jury in Fulton County, Georgia, about his conversations with Georgia election officials in the run-up to the certification of the 2020 presidential election results. Although May ultimately rejected Graham’s claim of absolute immunity, she ruled that “Senator Graham cannot be asked about the portions of the calls that were legislative fact-finding.” This ruling—which was apparently [affirmed](https://apnews.com/article/us-supreme-court-donald-trump-georgia-south-carolina-8b5ad9f096e0bd0551b70b4313d06435) by the Supreme Court in its decision to permit Graham’s grand jury testimony to proceed when it noted that it did not need to halt the testimony that Graham might give about investigative activities because lower courts already “have held that Senator Graham may not be questioned about such activities”—is likely what Rowley was referring to.

Finally, Rowley attempted to respond to a question by Rao about what his proposed test would call upon courts to do. Rao noted that the case law on Speech or Debate Clause privilege takes a “categorical approach” and directs judges not to interrogate the motives underlying actions or communications at issue. Surely, she said, any test that called upon courts to probe the intentions of an activity to determine whether there was a legislative purpose would run against this case law. Rowley stumbled and ultimately offered that courts have “an obligation to determine whether or not under a certain factual scenario it’s plausible that legislation could be had and that the reason for the communication was within the legislative sphere.”

Pellettieri, arguing for the Justice Department, was next to argue before the panel. He began by laying out a chain of logical inquiries that each had to be satisfied by Perry’s team in order to prevail. These inquiries included whether the panel had jurisdiction to hear the case, whether the nondisclosure privilege could apply to a cell phone, whether the panel should independently conduct a review of whether the contents of the cell phone at issue were protected by the nondisclosure privilege, and whether such a review should apply only to materials kept confidential.

Pellettieri then engaged with Rao and Katsas about the boundaries of his proposed version of the speech or debate privilege. Katsas in particular expressed a concern that the case law did not support the position that any communication with someone outside Congress would defeat the privilege. For example, he pointed out that in [*United States v. Rayburn House Office Building*](https://casetext.com/case/us-v-rayburn-house-rm-2113-washington-dc) and [*Brown & Williamson Tobacco Corp. v. Williams*](https://casetext.com/case/brown-williamson-tobacco-v-williams) the Speech or Debate Clause protected documents that contained communications with outside parties. Pellettieri attempted to distinguish these cases by arguing that those documents were protected because of their status as a sort of record of internal congressional deliberation, analogous to attorney work product, rather than because of any communications they contained.

His argument was not entirely satisfactory to Katsas, however. Katsas pressed Pellettieri about whether his version of the privilege would extend to notes written by a member of Congress while speaking with key stakeholders to obtain their advice about how to vote on an upcoming bill. Pellettieri argued that the nondisclosure privilege would not apply, but he attempted to assuage Katsas’s concern by assuring him that other derivative privileges of the Speech or Debate Clause, such as immunity from criminal prosecution, could still apply. As evidence, he cited the legally distinct speech or debate immunities in [*United States v. Helstoski*](https://casetext.com/case/united-states-v-helstoski), in which a district court found the grand jury testimony of a congressman to be inadmissible as evidence in a criminal trial because it was protected by the Speech or Debate Clause, even while the testimony itself was not protected from disclosure.

Pellettieri proceeded to focus on the attorney-client privilege analogy that Rowley had struggled with, arguing that protecting communications with members of the public would not fulfill the purpose of the Speech or Debate Clause’s nondisclosure privilege. Despite disagreeing with Katsas about whether the contents of Perry’s private cell phone were essentially available to the public or kept private, Pellettieri insisted that communicating with even specific members of the public who could themselves be subpoenaed renders such communications nonconfidential. Therefore, he argued, the nondisclosure privilege—which exists to protect the confidentiality of congressional deliberations—is not served by protecting nonconfidential communications just as the attorney-client privilege is not served by protecting communications made to third parties.

Katsas suggested that the better analogy to the privilege might be an exception to the Freedom of Information Act, which protects information based on the act that the information describes rather than the individuals to whom the information is communicated. Pellettieri admitted that the nondisclosure privilege necessarily turns on the nature of the act as a prerequisite, but he contended that it is additionally limited based on its purpose—which, in his view, is not satisfied by protecting communications that have already been shared outside of Congress.

Katsas offered a hypothetical concerning a bill on the floor of Congress: Imagine that a member of Congress who is not on the relevant subcommittee makes calls to outside experts trying to gauge their view of the bill, asking for their recommendation on how the member should vote. Would this be a legislative act?

Unfortunately, the audio livestream cut out before Pellettieri could answer.

**Further Context**

The day after oral arguments, Chief Judge Howell [ordered the unsealing](https://www.dcd.uscourts.gov/sites/dcd/files/Memorandum%20and%20Order%20February%2024%2C%202023.pdf) of four redacted opinions and orders concerning Perry’s phone “in light of the facts that the D.C. Circuit held oral argument open to the public.” The unsealed documents, [available on the public website](https://www.dcd.uscourts.gov/unsealed-orders-opinions-documents/Stored%20Communications%20Act/2023) of the U.S. District Court for the District of Columbia, include a [Nov. 4, 2022, opinion](https://www.dcd.uscourts.gov/sites/dcd/files/Redacted%20November%204%2C%202022%20Memorandum%20Opinion%20and%20Order.pdf) from Howell holding that the protections of the Speech or Debate Clause “require judicial review of Rep. Perry’s claims of privilege prior to the disclosure of those records and communications [available on Perry’s phone] to the government” and that Perry bears the burden of establishing that the legislative privilege obtains over the records; Howell’s [Dec. 28, 2022, opinion](https://www.dcd.uscourts.gov/sites/dcd/files/Redacted%20December%2028%2C%202022%20Memorandum%20Opinion%2C%20ECF%20No%2043.pdf) and [order](https://www.dcd.uscourts.gov/sites/dcd/files/Redacted%20December%2028%2C%202022%20Order%2C%20ECF%20No%2042.pdf) ruling that the Justice Department could access Perry’s phone; and a [Jan. 4, 2023, opinion](https://www.dcd.uscourts.gov/sites/dcd/files/Redacted%20January%204%2C%202023%20Memorandum%20Opinion%20and%20Order%2C%20ECF%20No%2044.pdf) denying Perry’s motion for a stay pending appeal of the December ruling.

The unsealed opinions speak to the sheer volume of records that Perry seeks to assert privilege over. Howell’s Nov. 4 opinion alluded to the “volume of records” on Perry’s phone and described repeated delays in the initial review process, likely caused by the volume of communications at issue. Although allowing Perry to continue reviewing the records, a seemingly frustrated Howell ruled on Nov. 4 that “Perry is now on notice to speed up his review ... or face the consequence of forfeiting protection.” The December opinion noted that Perry reviewed 9,462 records on his phone. Howell’s December order also clarified exactly how many records Perry actually asserted privilege over—2,219.

In her Jan. 4 opinion, Howell reported that Perry sought to stay the disclosure of the 2,055 records Howell ruled were not subject to protection in December. Last week’s oral arguments therefore likely pertained to those 2,055 records.

The exact content and purpose of the communications is unknown, but the Nov. 4 opinion noted that Perry asserted the records are privileged because “they involve communications with his staff, members of Congress, and others.” Perry apparently had argued that they were “‘information gathering’ efforts in preparation of his legislative role and vote on the certification of the 2020 presidential election on January 6, 2021.” The “others” with whom Perry communicated are further described in the December opinion as “private individuals and officials with no formal role or function in the United States Congress” and later as “private individuals touting an expertise in cybersecurity,” “attorneys from a presidential campaign,” and “state legislators” from Pennsylvania who would be conducting “hearings ... about possible election fraud.” For its part, the government evidently contended that the phone was used “to communicate with individuals allegedly engaged in [efforts to overturn the 2020 presidential election] over critical periods of time.”

In the December order, Howell permitted Perry to withhold 161 records in whole and three records in part from the government while requiring disclosure of 2,055 records. After conducting *in camera* review of the 2,219 records, Howell found that “few of these withheld records are protected by the Clause.” Howell rejected Perry’s “broad” version of the nondisclosure privilege that would “block access in a criminal investigation to any communications he had with any person in any capacity when ‘he was engaged in information gathering that is “part of, in connection with, or in aide of a legitimate legislative act” ... even where it is an informal effort undertaken by an individual Member of Congress or their staff.’” She called the theory “astonishing” and held instead that the clause does not protect “extra-legislative communications that are only tangential to matters coming before the Congress” but, rather, only acts “directly related to the due functioning of the legislative process ... acts or activities that are ‘integral’ to a Member’s participation in ‘the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of the House.’” Most of Perry’s communications were, in Howell’s estimation, “informal investigative efforts or fact-finding inquiries untethered to a formally sanctioned congressional inquiry” and, as such, fell outside the clause’s nondisclosure privilege. Howell criticized the nondisclosure privilege as a doctrine and called attention to other circuits’ rejection of it, but she wrote that “[n]o matter the critiques, however, *Rayburn* is binding on this Court.”

Applying *Rayburn* to the case, Howell agreed with Perry (and, according to the opinion, the Justice Department) that “activities integral to Rep. Perry’s [Electoral Count Act of 1887 (ECA)] vote are protected under the Clause.” She specifically ruled that “communications with fellow congressional Members and staff directly relating to internal House of Representatives committee assignments or membership, pending legislation or floor votes on such legislative matters, as well as voting and/or speaking order and strategy for the ECA vote on January 6, 2021, are protected under the Clause.” However, she rejected Perry’s contention that a significant tranche of the records, which were with “‘Other’ individuals” and part of “‘fact-finding’ efforts to ‘gather information about the security of the 2020 election and the validity of the electors required to certify the election,” were protected.

For Howell, fact-finding efforts must be “formally authorized by a Congressional body to constitute protected legislative activity.” This issue is one of the three questions the D.C. Circuit will rule on. Similarly, she denied protection to “purely political” communications, for example with congressional staff about media messaging, and to communications with executive branch officials. She noted that Perry’s assertion of privilege with respect to communications with the latter group was “ironic” given that Perry was trying to protect those communications from the executive branch now.

Although Howell noted that she was in “no position to assess the sources of information” Perry turned to, she did deride the “vigor with which Rep. Perry pursued his wide-ranging interest in bolstering his belief that the results of the 2020 election were somehow incorrect–even in the face of his own reelection.”