UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH OF THE FORENSIC COPY OF THE CELL PHONE OF REPRESENTATIVE SCOTT PERRY	**Case No. 22-sc-2144 (JEB)**

MEMORANDUM OPINION

In the summer of 2022 in connection with its investigation into illegal efforts to overturn the 2020 presidential election, the Federal Bureau of Investigation seized Congressman Scott Perry's personal cell phone and created a forensic copy of its contents pursuant to a search warrant. Perry subsequently filed a Motion for Nondisclosure, arguing that over 2,000 of the seized communications were privileged under the Constitution's Speech or Debate Clause. After this Court's predecessor ordered him to disclose the vast majority of those records, Perry appealed. The D.C. Circuit thereafter determined that the district court had failed to apply the fact-specific privilege inquiry required by Gravel v. United States, 408 U.S. 606 (1972), to many of Perry's communications. The Circuit, accordingly, remanded for this Court to apply Gravel on a document-by-document basis. Having now analyzed each of the 2,055 documents still at issue, the Court will order Perry to disclose 1,659 of them, but not the 396 others.

I. Background

An account of the relevant factual background appears in the D.C. Circuit's opinion in this case. In re Sealed Case, 80 F.4th 355, 359–61 (D.C. Cir. 2023). To recap briefly, following the 2020 presidential election, Perry — who represents Pennsylvania's Tenth Congressional District in the House of Representatives — used his personal cell phone to send and receive communications that the government believes may be relevant to its investigation into events

leading to the January 6 attempted insurrection. Id. at 359. Pursuant to a search warrant issued by a magistrate judge in the Middle District of Pennsylvania, the FBI seized the phone and created a forensic copy of its contents. Id. at 360.

The FBI then sought a separate search warrant from this Court's predecessor to review the contents of the extraction. Id. Former Chief Judge Beryl Howell issued the warrant, "with the proviso that Representative Perry would have an opportunity to assert any claims of privilege under the Speech or Debate Clause before the government could review the phone's contents." Id. (citing United States v. Rayburn House Off. Bldg., Room 2113, Washington, D.C. 20515, 497 F.3d 654, 662 (D.C. Cir. 2007) (Member of Congress must have an "opportunity to identify and assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents")).

Perry thus filed a Motion for Nondisclosure, asserting that 2,219 records were protected by the Speech or Debate Clause. Id. Judge Howell conducted a careful *in camera* review of each of the contested records and sorted them into three categories: (1) Perry's communications with individuals outside the federal government, (2) his communications with other Members of Congress and with congressional staff, and (3) his communications with members of the Executive Branch. Id. at 360–61. Reasoning that "informal factfinding" — *i.e.*, a Member's attempts to gather information, absent official House authorization — is categorically not protected by the Speech or Debate Clause, Judge Howell held that the records in categories 1 and 3 were not privileged. Id. As to category 2, she concluded that "some of these communications were privileged legislative acts, while others were too far removed from the legislative process." Id. at 360. She ordered Perry, accordingly, to disclose all but 164 of the disputed records; of

those, she permitted him to withhold 161 in full and three in part. Id.; see ECF No. 42 (Redacted Order) at 1.

The D.C. Circuit affirmed in part, vacated in part, and remanded. In re Sealed Case, 80 F.4th at 373. It reiterated that the "proper inquiry" when assessing whether something is covered by the Speech or Debate Clause is "fact-specific and considers whether the act is 'legislative,' i.e., 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.'" Id. at 359 (quoting Gravel, 408 U.S. at 625).

The Circuit thus remanded the district court's privilege determinations over categories 1 and 3. Id. at 371. Rejecting Judge Howell's conclusion that informal factfinding is categorically not privileged, the Court of Appeals explained that "[t]he labels 'formal' and 'informal' factfinding gloss over the appropriate analysis under the Speech or Debate Clause." Id. Under that analysis, a Member's "communications with individuals outside of Congress may qualify for the privilege" — even absent formal authorization for the Member to undertake an investigation — as long as they are legislative acts under Gravel. Id. The Circuit thus instructed this Court to "apply Gravel on a communication-by-communication basis" to categories 1 and 3. Id.

As to category 2, the Circuit agreed with some of Judge Howell's determinations but disagreed with her conclusion that "discussions with other Members about alleged fraud in the 2020 presidential election were non-legislative." Id. at 372. In light of "the context of these conversations, which involved Member deliberations about upcoming votes," among other things, the Court of Appeals held that "Representative Perry's conversations with other Members concern[ing] the passage of proposed legislation as well as the exercise of the constitutional duty

to certify the electoral votes from the 2020 election" were privileged. Id. at 372–73. It, accordingly, left it to this Court "to implement this holding on a communication-by-communication basis." Id. at 373. Although this Court has no doubt that Judge Howell reviewed all of the communications individually, it must now, armed with the guidance provided by the Circuit, repeat that exercise.

II. Analysis

The Court begins with a brief overview of the Speech or Debate Clause's legal framework and then explains how that framework applies to the contested records.

A. Legal Framework

The Speech or Debate Clause of the United States Constitution provides:

> 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.

U.S. Const. art. I, § 6, cl. 1 (emphasis added).

The Clause serves dual linked purposes. First, it "reinforc[es] the separation of powers so deliberately established by the Founders." United States v. Johnson, 383 U.S. 169, 178 (1966). Second and more specifically, it preserves legislative independence. That is, it ensures that Congress may "independently" perform the "legislative function the Constitution allocates to" it. Eastland v. U. S. Servicemen's Fund, 421 U.S. 491, 502 (1975) (collecting cases). The Supreme Court has "[w]ithout exception . . . read the Speech or Debate Clause broadly to effectuate [these] purposes." Id. at 501.

To serve those aims, the high court has long construed the Clause to protect more than just a Member's speech in legislative session. See, e.g., Kilbourn v. Thompson, 103 U.S. 168, 204 (1880) (recognizing Clause applies beyond "words spoken in debate" to things like "written reports," "resolutions," "voting," and other "things generally done in a session of the House by one of its members in relation to the business before it"). It has read the Clause broadly to protect all "legislative acts" that a Member might perform. Gravel, 408 U.S. at 625; see also United States v. Brewster, 408 U.S. 501, 512–13 (1972). As discussed above, the Court clarified in Gravel:

> The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings [1] with respect to the consideration and passage or rejection of proposed legislation or [2] with respect to other matters which the Constitution places within the jurisdiction of either House.

408 U.S. at 625.

Where it applies, the Clause provides "three distinct protections." Howard v. Off. of Chief Admin. Officer of U.S. House of Representatives, 720 F.3d 939, 946 (D.C. Cir. 2013). First, it grants Members civil and criminal immunity for their legislative acts. Eastland, 421 U.S. at 503, 510–11. Second, it provides an evidentiary privilege barring use of legislative-act evidence against a Member. United States v. Helstoski, 442 U.S. 477, 487 (1979). Third, it creates a testimonial privilege guaranteeing that Members "may not be made to answer" questions about their legislative acts. Gravel, 408 U.S. at 616. In this Circuit, and most relevant here, this testimonial privilege also includes a broader non-disclosure privilege that prevents the Executive from reviewing privileged materials — here, communications via cell phone —

without the Member's consent. Rayburn, 497 F.3d at 663; see In re Sealed Case, 80 F.4th at 365–66 (explaining the privilege).

B. Application to Contested Records

The Court now turns to the task at hand: applying Gravel on a communication-by-communication basis to the 2,055 records still at issue — *i.e.*, all of the records in categories 1 and 3, as well as those records in category 2 that Judge Howell ordered to be disclosed. Consistent with the Circuit's instructions, this Court has conducted an *in camera* review of each communication and has analyzed whether it constitutes a "legislative act" under Gravel. To facilitate its analysis, the Court has sorted the records into 31 subcategories that it has identified within the three larger categories that Judge Howell and the Circuit utilized. The analysis that follows proceeds by category and explains which subcategories are privileged.

1. *Perry's Communications with Individuals Outside the Federal Government*

The records in category 1 can be divided into nine subcategories, all of which cover communications with individuals outside the federal government: (a) communications seeking and/or acquiring information regarding alleged election fraud during the period before Congress's vote certifying the electoral votes and before its vote on H.R. 1, which was proposed legislation to alter election procedures; (b) communications seeking and/or acquiring information regarding non-election-related policy issues in advance of impending congressional action; (c) communications seeking to influence the conduct of individuals outside the federal government or otherwise providing information to such individuals regarding alleged election fraud; (d) discussions about non-legislative efforts to combat alleged election fraud; (e) discussions about non-legislative efforts regarding non-election-related policy issues; (f) communications regarding the procedures that Vice President Pence must follow under the Electoral Count Act;

(g) communications regarding what had occurred during the insurrection at the Capitol on January 6, 2021; (h) communications seeking and/or acquiring information regarding the spread of COVID-19, COVID-19 policy, and potential treatments; and (i) non-substantive communications.

Of those groups of records, only subcategories (a) and (b) are protected by the Speech or Debate Clause. Communications in those two subcategories were "integral" or "essential" to Perry's deliberations regarding "the consideration and passage or rejection of proposed legislation" or "other matters which the Constitution places within the jurisdiction of either House." Gravel, 408 U.S. at 625; see In re Sealed Case, 80 F.4th at 372 n.13 (noting that Congress's vote certifying the electoral votes was a "matter[] which the Constitution places within the jurisdiction of [the] House," and discussion regarding H.R. 1 constituted "consideration . . . of proposed legislation") (quoting Gravel, 408 U.S. at 625). They are, accordingly, squarely "legislative acts" within the meaning of Gravel.

Subcategories (c)–(i), however, comprise records that are "too far removed from legislative proceedings" to qualify for the Speech or Debate privilege. In re Sealed Case, 80 F.4th at 372. Records in subcategories (c), (d), and (e) have no "relationship to the legislative and deliberative process," let alone an "integral" or "essential" one. Hutchinson v. Proxmire, 443 U.S. 111, 130–31 (1979) (holding privilege inapplicable to communications that "have a relationship to the legislative and deliberative process" but were not "essential to the deliberations of [Congress]" nor "part of the deliberative process") (emphasis added). While records in subcategory (f) may bear a relationship to legislative proceedings insofar as they touch on the certification vote, they are neither "integral" nor "essential" to Perry's participation in those proceedings because they pertain only to Vice President Pence's role. Gravel, 408 U.S. at

625; see Brewster, 408 U.S. at 515 (the Clause does not "protect[] all conduct relating to the legislative process"). (While some documents in these subcategories — as well as in various subcategories of categories 2 and 3 — relate to efforts in the Pennsylvania state legislature, the Court nonetheless titles them "non-legislative" because they do not concern efforts in the U.S. Congress.) As to subcategories (g) and (h), the mere possibility that Congress could one day enact legislation related to the insurrection or COVID-19, respectively, is insufficient to render Perry's communications with individuals outside the federal government about those topics — which were "not legislative in nature" — privileged under Gravel. See In re Sealed Case, 80 F.4th at 365 (citation omitted). Subcategory (i), lastly, covers non-substantive communications that have no relationship to the legislative process and thus are similarly not protected.

2. *Perry's Communications with Other Members of Congress and with Congressional Staff*

That brings us to category 2. Because Perry's communications with other Members of Congress and with congressional staff run the gamut in terms of topics, the Court is constrained to sort them into no fewer than fourteen subcategories: (a) substantive electronic newsletters and press releases concerning legislative proceedings or matters integral to those proceedings; (b) discussions about alleged election fraud, whether to certify the electoral votes, and how to assess information relevant to legislation about federal election procedures during the period before Congress's vote certifying the electoral votes and before its vote on H.R. 1; (c) communications about non-election-related legislation, votes, and committee assignments; (d) substantive communications about House Freedom Caucus affairs; (e) communications about happenings on the House floor, House policies, and other House business; (f) non-substantive electronic newsletters and press releases concerning topics outside the legislative sphere; (g) discussions about efforts to work with members of the Executive Branch and state legislators to combat

alleged election fraud; (h) communications related to efforts to influence the conduct of members of the Executive Branch and state legislators; (i) preparatory discussions regarding election-fraud-related press releases and letters; (j) discussions regarding election-related litigation efforts and amicus briefs and other non-legislative efforts to combat alleged election fraud; (k) discussions about congressional campaigns and results; (l) discussions about Perry's press coverage and media strategy; (m) discussions regarding the spread of COVID-19, COVID-19 policy, and potential treatments; and (n) non-substantive communications.

Subcategories (a)–(e) are privileged. While not all electronic newsletters or press releases sent by or to Members warrant the Speech or Debate privilege, subcategory (a) consists of only those that "concern[ed] legislative proceedings or matters integral to those proceedings" and thus do. Id. at 372. As to subcategories (b), (c), and (d), the Circuit's opinion made clear that "a Member's deliberation about whether to certify a presidential election or how to assess information relevant to legislation about federal election procedures" and "communications with Members and staff about legislation, votes, committee assignments, and caucus affairs" are legislative acts protected by Gravel. Id. at 371–72. Subcategory (e) comprises Member and staff discussions that "occur in the regular course of the legislative process" and are therefore also protected as "integral" to legislative proceedings. Helstoski, 442 U.S. at 489.

The remaining subcategories consist of entirely non-privileged records. Subcategory (f) covers only those electronic newsletters and press releases that — unlike those in subcategory (a) — "focused on topics outside the 'legislative sphere'" and are thus "too far removed from legislative proceedings to warrant privilege under the Clause." In re Sealed Case, 80 F.4th at 372. Subcategories (g) and (h) consist of communications about non-legislative efforts to work with or influence members of the Executive Branch or state legislators, which — just like

"attempts to influence the conduct of executive agencies," Hutchinson, 443 U.S. at 121 n.10, or to "cajole[] and exhort" members of the Executive Branch "with respect to the administration of a federal statute," Gravel, 408 U.S. at 625 — are not privileged legislative acts. Neither are the records in subcategories (i), (j), or (k), which pertain to press releases and letters to be sent to audiences outside of Congress, briefs to be filed in courts, and congressional campaigns and results, respectively. Even if discussing those topics is a "legitimate action[] within the duties of [Members'] office[s]," such discussions do not "trigger[] the privilege" of the Speech or Debate Clause. In re Sealed Case, 80 F.4th at 364; cf. Hutchinson, 443 U.S. at 130–33. The same is true for the records in subcategory (l), which the Circuit held are "not privileged." In re Sealed Case, 80 F.4th at 372. And it is quite clearly true for subcategories (m) and (n), both of which contain records bearing no relationship to legislative proceedings. See id. (discussions of "non-legislative events occurring in and around Congress" are not privileged) (cleaned up).

3. *Perry's Communications Involving Members of the Executive Branch*

The records in Category 3, which consist of communications involving members of the Executive Branch, can be organized into eight subcategories: (a) communications seeking and/or acquiring information regarding alleged election fraud during the period before Congress's vote certifying the electoral votes and before its vote on H.R. 1; (b) communications seeking and/or acquiring information regarding non-election-related policy issues in advance of impending congressional action; (c) communications seeking to influence the conduct of members of the Executive Branch or otherwise providing information to such individuals regarding alleged election fraud; (d) discussions about non-legislative efforts to combat alleged election fraud; (e) communications seeking to influence the conduct of members of the Executive Branch or otherwise providing information to such individuals regarding non-election-related policy issues;

(f) discussions about non-legislative efforts regarding non-election-related policy issues; (g) communications regarding the procedures that Vice President Pence must follow under the Electoral Count Act; and (h) non-substantive communications.

The Speech or Debate Clause covers subcategories (a) and (b). Those are analogous to subcategories (a) and (b) within category 1, and the analysis is the same even though the source of information is different. In other words, communications in subcategories (a) and (b) were "integral" or "essential" to Perry's deliberations regarding "the consideration and passage or rejection of proposed legislation" or "other matters which the Constitution places within the jurisdiction of either House." Gravel, 408 U.S. at 625. That makes them textbook "legislative acts" under Gravel. See Section II.B.1, supra.

By contrast, the records in subcategories (c)–(h) must be disclosed. Subcategories (c), (d), (e), and (f) comprise communications about non-legislative efforts to work with or influence members of the Executive Branch. Even if such activities are "in a day's work for a Member of Congress," the Speech or Debate Clause "does not protect acts that are not legislative in nature." In re Sealed Case, 80 F.4th at 364–65; see Section II.B.2, supra. The records in subcategory (g), much like those in subcategory (f) within category 1, are neither "integral" nor "essential" to Perry's participation in legislative proceedings because they concern only Vice President Pence's role. Gravel, 408 U.S. at 625; see Section II.B.1, supra. Finally, the same is true for subcategory (h), which is analogous to subcategory (i) within category 1 and subcategory (n) within category 2. See Section II.B.1–II.B.2, supra.

III. Conclusion

For the foregoing reasons, the Court will grant in part and deny in part Representative Perry's Motion for Nondisclosure. Perry must disclose to the government 1,659 of the 2,055

records still at issue. He may withhold the other 396 under the Speech or Debate Clause. A separate Order so stating will issue this day.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
Chief Judge

Date: December 19, 2023