

Statement of Dan Schwager  
Washington, DC

Before the Senate Judiciary Subcommittee on Privacy, Technology, and the Law

*Arctic Frost Accountability: Oversight of Telecommunications Carriers' Responses to  
Jack Smith's Witch Hunt*

February 10, 2026

My name is Dan Schwager and I have been asked to testify regarding the practice of using non-content toll records in criminal investigations, including politically sensitive investigations, based on my experience and perspectives as a former corruption prosecutor at the state and federal level. I am not speaking on behalf of my current or any former employer.

Today I hope to share my perspective regarding:

- how common it is to obtain such records and non-disclosure orders regarding them in thorough investigations of complex matters;
- how obtaining such records and orders does not indicate something nefarious about either the owner of the phone, or the investigators seeking the records; and
- how any investigation of a political figure is at risk of being called political, but that regular and thorough investigative steps are not political actions themselves.

All of that being said, I have also been a fierce non-partisan defender of the prerogatives of the legislative branch and the protection it needs from a potentially abusive and retributive executive branch. And while I agree with the Committee that the Speech or Debate Clause deserves serious attention, debate, and maybe even legislation, my training and experience have taught me that reasonable and honest disagreements between the executive branch and the legislative branch over difficult areas of law are not necessarily evidence of improper motives or misconduct.

I went to law school not to be in a courtroom or a boardroom, but because my passion was about ethics and integrity in government and, on the other side of the same coin, countering corruption. I have found that to be an absolutely non-partisan concern. I have worked in the executive and legislative branches for and with both Republicans and Democrats of great integrity and ethical compass, and I have investigated, prosecuted, and seen prosecuted public officials on both sides of the aisle who have breached the public trust. An investigation of corruption or fraud looks roughly the same no matter who the target or witnesses are. Unfortunately, political attacks on those non-partisan investigations often look and sound roughly the same as well.

During law school I studied corruption control, and in my second summer of law school, when most friends were at big law firms, I spent the summer interning at the Public Integrity Section of the Department of Justice. After law school I became an Assistant District Attorney in

New York County, New York. I had the privilege of working for one of the giants of ethical prosecution, Robert Morgenthau. Mr. Morgenthau was famous for buffering line prosecutors from politics. We were all thoroughly trained that considerations of political alliance, opposition, or speech, had absolutely no place in the work of a prosecutor. We were taught that ethical investigation and prosecution and the interest of justice required only an open view of the evidence, a rigorous review of the law, and persistence in pursuing the public's interest in justice. Those non-partisan principles have guided my career ever since and guide my testimony today.

At the Manhattan D.A.'s office, given my interest in corruption control, I quickly moved from general crime to the Official Corruption Unit, which investigated and prosecuted police corruption. It was in those investigations that I learned the value and use of what we called then "luds and tolls." Almost any investigation of police corruption began with subpoenas of the non-content phone records of not only officers suspected of corruption, but of known associates both within and without suspicion. Those records are scoured for patterns, timelines, and missing connections relevant to the investigation, and then additional subpoenas are sought for the records of those phone numbers within those patterns or around those times. I employed these tools in police corruption investigations in New York, but they're the same tools used in any other complex investigations throughout any prosecuting organization. Nothing is assumed about the data found, but the understanding and context grows. Non-content phone records are very different from wiretaps and handled very differently and much more frequently. This is because both the Supreme Court and Congress have recognized that seeking non-content data such as toll records from third party processors is simply a lower privacy intrusion than a wiretap, or other forms of seeking content of communications.

After serving as an Assistant District Attorney in Manhattan I returned to the Public Integrity Section at the Department of Justice and investigated public corruption of different types, including political corruption from the local to national level, contractor corruption, federal law enforcement corruption, campaign finance crimes, and even multiple investigations and criminal prosecutions of other federal prosecutors. Non-content toll records were used in many investigations of all kinds of cases. The records were used not only to find evidence of a crime, but also to see if there was exculpatory evidence.

One of my first cases at Public Integrity was one where complete exculpatory evidence was discovered by following leads from the non-content data of what we thought was a friendly phone. This case involved an allegation against a senior FBI official who had been accused of leaking information about a narcotics and terrorism investigation to a purported Nigerian drug trafficker. The purported drug trafficker was caught on a recorded call with the government's informant talking about the FBI official being a friend of his, giving specific details. The FBI official was in fact the head of the office where the drug and terrorism investigation was being run, and he had expressed skepticism about the case.

While the recorded call was powerful evidence and there were calls to lock up the FBI official immediately, the Public Integrity Section insisted on conducting a thorough investigation first, which included a thorough phone record analysis. Indeed, no one had identified the Nigerian drug trafficker yet, and all efforts were made to identify and locate him. But to be thorough, we also insisted that we obtain the non-content phone records of the FBI informant in the underlying investigation. Looking at calls made around the time of the interactions with the drug trafficker, we decided to visit some of the people called to see if there were any details missed. One was, if my memory is correct, a cousin of the informant. Again being thorough, the investigators visited the cousin and, in the process, took a quick look in the trash cans that were at the curb of the cousin's home. In that trash can, the investigators were surprised to discover a script for the recorded phone call between the informant and the purported Nigerian drug trafficker. It turned out the entire narcotics and terrorism investigation was actually a set up by the informant to steal FBI cash, and the FBI official had been framed to get him out of the way. It was only through basic thorough investigative steps and a willingness to look at all angles that the FBI official was saved from the meticulously planned, but absolutely false allegations. Instead, the informant went to prison for years.

The Public Integrity Section exists precisely to overcome presumptions, biases and improper considerations in investigations and prosecutions of the most sensitive cases. Only in an office with extensive institutional knowledge and memory, and a large enough staff to be sure to have colleagues from different political and other backgrounds, can the section as a whole promote the consistency across political administrations and winds that justice requires. While we didn't usually know the personal political leanings of our colleagues, I have friends and mentors from my time at PIN who have been nominated to the bench by Presidents Bush, Obama, Trump and Biden. I have friends from PIN in the Federalist Society and friends who aren't. In a robust and well-staffed Public Integrity Section, we are all a check on each other and ourselves to ensure that nothing but thorough investigations and carefully analyzed facts and law guide our actions.

Despite this reality and mission for the Public Integrity Section, there is no doubt that any investigation of a politician on either side is likely to draw criticism, sometimes free from evidence, by that politician's allies. I have personally and publicly been accused of being a tool of the right and a tool of the left. I was once even accused of both in the same case while prosecuting a high level political fundraiser but declining to make allegations against the candidate that were not supported by evidence. This is similar to prosecuting police corruption, where the stereotype is that fellow police officers of the defendants will strongly criticize the prosecutors and witnesses.

In my career, however, nothing has impressed me more than when good police officers acknowledged the importance of prosecuting corrupt ones. I have seen that as well on the Hill, when caucuses have, even if privately, encouraged resignations of their colleagues and allies accused of serious misconduct, after objectively looking at the available evidence. It has seemed to me then, the mark of integrity in responding to criminal allegations of one of your own, whether

for Police or Politicians, is dealing honestly with actual evidence and thorough investigations, and refusing to attack the career investigators and prosecutors for simply doing their jobs.

Doing that job includes taking normal thorough investigative steps, even where elected officials are involved. Telephone toll records are one of the most basic and least intrusive investigative tools to use in any complex investigation. They are not “wiretaps” and they are not “spying” in a derogatory or fearful sense.

Non-disclosure orders are also commonly warranted and sought. To be clear, the basis for seeking such an order is absolutely not that the person whose records you are seeking may intimidate potential witnesses themselves or attempt to destroy evidence themselves or otherwise seriously jeopardize an investigation themselves, but that such intimidation or destruction, or jeopardy may occur if the subpoena became public to others, including the target of the investigation and their co-conspirators. People brazen and dishonest enough to commit acts of significant corruption or fraud are often brazen and dishonest enough to try to hide the evidence of it or intimidate witnesses. It should not be surprising then that credible allegations of such serious misconduct might warrant a precaution such as a non-disclosure order.

There is of course a vast amount of publicly available evidence concerning the events and conduct surrounding January 6th and the need for a thorough investigation. A non-partisan and objective review of that evidence, including video, public statements and social media posts, and documentation available due to widespread and diverse media coverage, scores of court cases, investigations in states and in Congress, and testimony of police officers and civilians, show how serious, objective, and thorough the investigation needed to be for the sake of our country. The particular evidence at issue in this hearing, the telephone toll records, could have been one tiny fraction of the vast picture of those events, if they contributed at all. According to the publicly available evidence, however, a non-partisan approach to the serious allegations at issue in this matter should be expected to have included seeking phone records and non-disclosure orders for people who were or appeared to have been contacted in the course of the alleged conduct being investigated.

To be clear, and as discussed above, the search for and seizure of information by the government implicates the Constitutional rights of all people in the United States. Of course, when the legislative branch is involved in an investigation, these common investigative steps can implicate additional important Constitutional concerns and checks and balances that have long been addressed by the executive and legislative branches and often argued between them. But a reasonable disagreement about these issues does not amount to improper conduct.

The Speech or Debate Clause is a critical and wise insight of our founders explicitly included in the constitution to temper an authoritarian leaning president. But the scope of and law on Speech or Debate is not well developed and is even disputed across judicial circuits. The DC Circuit is indeed more protective of your privilege than some other circuits. However, even in DC, I am not aware of a case that dealt with these specific facts - subpoenas for non-content records of

a mere witness. I consider it reasonable then to call the application of Speech or Debate to this set of facts unclear and debatable.

In general, the executive branch and legislative branch have argued in court and out of court for years about Speech or Debate. Those inter-branch debates have been both inter-party and intra-party. Speech or Debate was always taken very seriously in my experience at the Public Integrity Section and the Department of Justice, even if they did not agree with the legislative branch's interpretations. Courts sometimes find that DOJ's interpretation was wrong. That happens now and then. It is one of the great features of our system of checks and balances. But it is not an indication of partisanship or prior misconduct.

I am glad, however, that the previous administration added a policy in 2024 requiring notification of the Court in situations like this. But that was not the policy at the time, and I am not aware of any policy or law that was violated. Indeed, there were policies in place to address the heightened Constitutional concerns, and it appears they were followed. I think it is also worth debating if the law needs to be developed even more, particularly if norms of non-political and non-retributive prosecution are eroded.

In summary, the use of telephone toll records and a non-disclosure order appear to me to be perfectly consistent with a thorough, objective, and very well predicated criminal investigation such as the one at issue here. Indeed, criminal investigation was referenced in this very body by Republicans as well as Democrats after the events of January 6th. This is what that investigation would be expected to look like. No person or investigation is perfect, but cries of partisanship and weaponization over normal investigative tactics, even with reasonable disagreements on the application of Speech or Debate, appear to me to be overstated and risk further and needlessly exacerbating instead of mitigating, partisan views of American law enforcement.

Thank you very much for allowing me to speak with you today. I look forward to your questions.