

Statement of Dan Schwager
Washington, DC

Before the Senate Judiciary Subcommittee on the Constitution

Arctic Frost: Conspiracy and Coordination Against President Trump and the American Right

April 21, 2026

My name is Dan Schwager and I have been asked to testify regarding the role of predication and examination of evidence in judging 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:

- the principles and common tools of non-partisan investigations applicable to public corruption and any other complex matter;
- the roll of a non-partisan review of evidence in determining or overseeing the path of an investigation, including its witnesses and subpoena recipients.

While I have been asked to speak based on my past experience as a non-partisan corruption prosecutor, 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. I agree with the Committee that the Speech or Debate Clause deserves serious attention, debate, and maybe even additional legislation. From both perspectives, however, and from all of my training and experience, as well as what publicly available information I am aware of, I believe that reasonable and honest disagreements between the executive branch and the legislative branch over difficult areas of law are not necessarily evidence of partisanship, improper motives, or misconduct. I believe those are the kinds of reasonable and honest disagreements at issue here that should not easily be ascribed to such malign intent.

My views are rooted in the reasons I went to law school. My goal was not to be in a courtroom or a boardroom, but to explore a passion for ethics and integrity in government and, on the other side of the same coin, countering corruption and abuses of power. I have found those topics at their core to be an absolutely non-partisan concern and a non-partisan mission. I have worked in the executive and legislative branches for and with both Republicans and Democrats of great integrity and ethical compass, and 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.

In private practice, I have represented both Republican and Democratic members of Congress and their staff with equal conviction and commitment. In that role, I have seen mere allegations

exaggerated and facts misinterpreted or misunderstood on both sides of the aisle. I have also seen non-partisan investigators and attorneys treat subjects and investigations with respect and professionalism regardless of the subject's party. The debates I've had on both sides of a courtroom or in the center of a committee room have always been about evidence and the law, and party has never been relevant to the career professionals and many of the elected officials I've had the privilege to work with.

Where I believe I have seen apparent improper political or personal considerations infect investigations and prosecutions from afar, the difference seems to be whether one's primary allegiance is to evidence and honesty, or to someone's personal interests or grievances. No investigator, prosecutor, lawyer or human being is perfect, but commitment to evidence and honesty is the first principle of non-partisan investigation and prosecution and should matter greatly when judging an investigator's intent and conduct.

Throughout my career I have been trained on and taught these principles at every level. My corruption control, criminal law and procedure, and principles of prosecution classes were taught by amazing former prosecutors and defense attorneys, all of whom taught the same lessons about principles, evidence, and avoiding abuses of power. 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 and the abuse of power, 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 were scoured for patterns, timelines, and missing connections relevant to the investigation, and then additional subpoenas were sought for the records of those phone numbers within those patterns or around those times. By the time all subscriber information had been subpoenaed to understand the records, it was not unusual for the basic, non-content subscriber identification of hundreds of phone numbers and people to have been subpoenaed in order to understand the original records. The only thing that determined whose non-content records were subpoenaed was the fact that their number or connection had already come up in the investigation in some way, neither good nor bad, connected to the subject or alleged conduct. Of course, the mere fact that the identity of a phone subscriber was subpoenaed meant nothing nefarious or incriminating about the person identified, on its own. Because of wise grand jury secrecy laws, the fact that someone's non-content information was subpoenaed would rarely become public or cause them any impact or disturbance.

We employed these tools in police corruption investigations in New York, but they're the same tools likely to be used in any other complex investigations throughout any prosecuting organization. Obtaining non-content phone records is not, in any derogatory sense, fairly described as "spying." It is also not a "wiretap" and is handled very differently from a wiretap 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. To be clear, Congress has authorized this common investigative tool, with appropriate limits, as a proper balance between Americans' constitutional rights and the importance of robust law enforcement and accountability to the rule of law.

It was also almost always the case that these subpoenas were issued before the subjects of the investigation knew of either the existence, scope, or direction of the investigation, and the risk to the integrity of the investigation from the subject discovering any of those that had not yet been revealed was obvious. For that reason, where non-disclosure orders were necessary and appropriate, they were regularly sought.

After serving as an Assistant District Attorney in Manhattan, I returned to the Public Integrity Section 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.

One of my first cases at Public Integrity saw completely exculpatory evidence 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 foreign drug trafficker. The purported drug trafficker was caught on a recorded call with the government's informant talking in a detailed way about the FBI official being a friend of his and giving him details of the investigation. The FBI official was in fact the head of the field 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 foreign 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, the investigators were surprised to discover a script for the recorded phone call between the informant and the purported foreign drug trafficker. It turned out the entire narcotics and terrorism investigation was set up by the informant to steal FBI cash, and the FBI official had been framed to get him out of the way after he expressed brief skepticism. It was only through basic thorough investigative steps, the avoidance of

presumptions, 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 long standing and 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 many 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. These attacks on the prosecutor are similar to prosecuting police corruption, where the stereotype is that fellow police officers of the defendants will strongly criticize the prosecutors and witnesses, regardless of evidence, in blind support of their colleague.

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 here in Congress, when leadership and caucuses have, whether publicly or privately, encouraged resignations of their colleagues and allies accused of serious misconduct, after objectively looking at the available evidence.

Similarly, after the historic violent attack on the Capitol on January 6, 2021, some members of both parties courageously spoke out against both the violence, and the false and dangerous claims that they believed led to or fostered the attack and called for thorough investigations and accountability.

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 the difficult job of accountability.

Doing that job includes taking normal thorough investigative steps, even where elected officials are involved. Obtaining non-content toll records is one of the most common of such steps. They have been obtained by administrations of both parties in sensitive political matters regardless of party.

For example, in 2018, according to a DOJ OIG report, the Trump Justice Department issued subpoenas and sought and received non-disclosure orders for non-content records of two Democratic Members of Congress and over 40 staff, from both parties, in an investigation of allegations of leaked

classified information.¹ The Inspector General's review of those subpoenas included a discussion of the facts predicated the investigative step, and the context of the subpoenas and NDOs, including acknowledging common practices. That is what we should expect when reviewing or overseeing law enforcement investigations.

Coming back to the topic of this hearing, there is of course a vast amount of publicly available evidence concerning the events and conduct surrounding January 6th and the need for 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. All of this evidence constitutes predication for the investigation and its investigative steps.

The particular evidence at issue in this hearing, the telephone toll records, could have been one piece of the vast picture of those events. For that reason, a non-partisan investigation of the serious and well predicated allegations at issue in this matter should be expected to have included seeking the phone records and non-disclosure orders for people who were or appeared to have been contacted in the course of the alleged attempted fraud on the American public in an alleged effort to fraudulently, and even violently, overturn the results of an American election. Further, the fact that the people being reached out to by the alleged co-conspirators were people in the same party as the person trying to fraudulently overturn his election loss should not be surprising at all, and in no way means that the investigation itself was improperly motivated or partisan.

Finally, as mentioned briefly above, all searches for and seizures of information by the government implicate Constitutional rights of regular people. The Constitution and Congress authorize them anyway, with appropriate limits. Of course, when the legislative branch is involved in an investigation, common investigative steps can implicate additional important Constitutional concerns.

The Speech or Debate Clause is a wise insight of our founders explicitly included in the constitution to temper the risk of an authoritarian leaning president. However, the executive branch and legislative branch have argued in court and out of court for years about the scope of Speech or Debate. Those inter-branch debates have been both inter-party and intra-party. Speech or Debate was always, however, taken very seriously in my experience at the Public Integrity Section, even if they did not agree with the legislative branch's interpretations.

The reason for these arguments is that the scope of and law on Speech or Debate is not well developed and is even different across judicial circuits, with the Supreme Court not having settled significant splits to date. 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, in some cases regarding devices or accounts that were not

¹ "A review of the Department of Justice's Issuance of Compulsory Process to Obtain Records of Members of Congress, congressional Staffers, and Members of the News Media" Department of Justice Office of the Inspector General, Report # 25-010, December, 2024. See pp. 8-9.

official accounts. I consider it reasonable, then, to call the application of Speech or Debate to this specific set of facts uncertain and debatable.

I am glad, however, that the previous administration added an additional policy in 2024 requiring notification to the Court in situations like this. But that was not the policy at the time of these subpoenas, or the subpoenas issued in 2018. There were policies in place to address the heightened Constitutional concerns, and it appears they were followed. I do agree though that it is worth debating if the law needs to be developed even further, particularly as norms of non-political and non-retributive prosecution are eroded more and more in the last year. I would be happy to speak with your offices about efforts to improve the law's recognition of Speech or Debate.

Beyond Speech or Debate, with any interpretation of Constitutional rights, courts sometimes find that DOJ's interpretation is wrong, just as they sometimes find that Congress' legislation is wrong. It is one of the great features of our system of checks and balances. But such rulings are not, and cannot be, an automatic indication of misconduct or of improper partisanship.

In summary, the use of telephone toll records and non-disclosure orders appears to me to be consistent with a thorough, objective, and very well predicated criminal investigation such as Arctic Frost. Again, the need for a 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 claims of partisanship and weaponization over normal investigative tactics, even with reasonable disagreements on the application of Speech or Debate, appear to me to be unwarranted by the evidence, and likely to mistakenly exacerbate, instead of mitigate, partisan views of American law enforcement.

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