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 Chief Judge Beryl A. Howell **UNDER SEAL**

MEMORANDUM OPINION AND ORDER

Congressman Scott Perry ("Rep. Perry") has represented the Commonwealth of Pennsylvania's Tenth Congressional District since January 2013. *See* Rep. Perry's Resp. to the Gov't's Brief Regarding the Applicability of the Speech or Debate Clause ("Perry Resp.") at 4, ECF No. 15

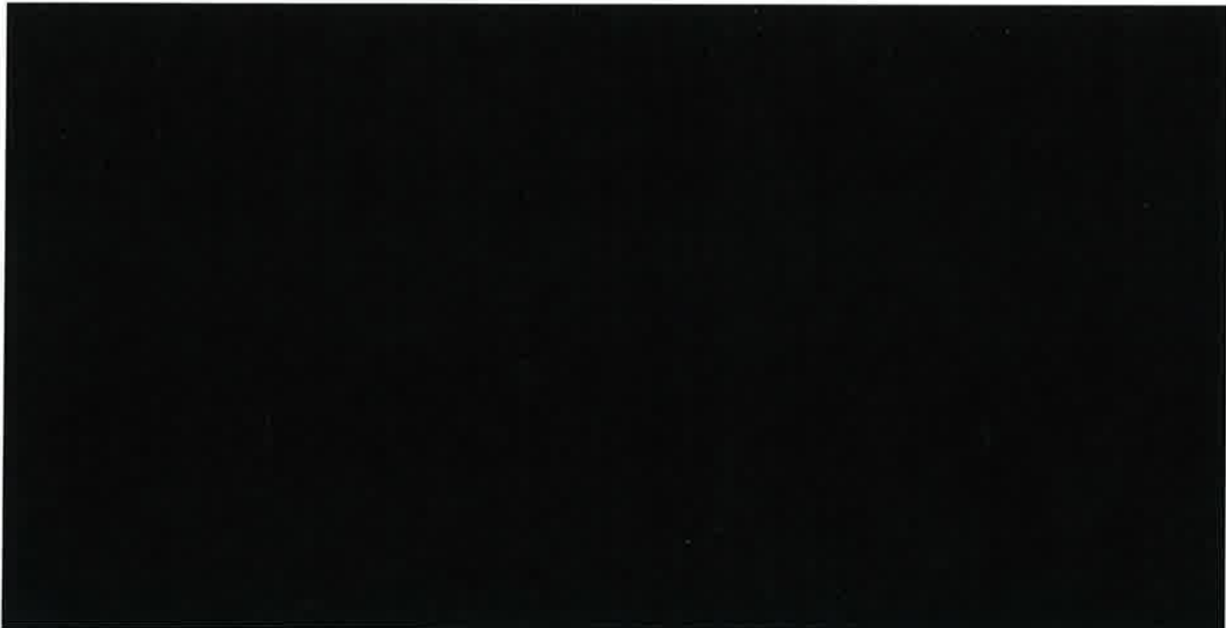
Now, the parties dispute whether the Speech or Debate Clause of the U.S. Constitution ("Clause"), U.S. Const. Art. I, § 6, Cl. 1., protects against the disclosure of potentially privileged records and communications on Rep. Perry's cell phone to the government, and if it does, which party bears the burden of proving the Clause's applicability. For the reasons set out below, under binding precedent in this Circuit, the Clause's protections require judicial review of Rep. Perry's claims of privilege prior to the disclosure of those records and communications to the government, and Rep. Perry bears the burden of proving the Clause applies.

I. BACKGROUND

A search and seizure warrant to seize Rep. Perry's personal cell phone was issued by a magistrate judge in the Middle District of Pennsylvania and executed on August 9, 2022, when the Federal Bureau of Investigation ("FBI") forensically extracted an image of the phone's contents. *See* Aff. of FBI Special Agent In Support of Appl. For Search Warrant (dated Aug. 18, 2022) ("D.D.C. Warrant Aff."), ¶ 7, ECF No. 1; *see also* Ex. A, Aff. Supp. Search Warrant ("M.D. Pa Aff.") at pg. 76, ECF No. 1-1. This seizure warrant did not permit a search of the contents, rather just a forensic copying of stored information. *See* M.D. Pa Aff. ¶ 141.

After promptly returning the cell phone to Rep. Perry, the government sought a separate search warrant in this Court to review the contents of the forensic extraction, in accordance with a court-authorized search protocol issued as Attachment C to the warrant. *See* D.D.C. Warrant Aff., Att. C. As provided in this search protocol, Rep. Perry was given thirty days to first assert his privilege under the Clause with respect to any records or communications on his cell phone. *See id.* at § 2.b–d. Attachment C provided that the government could then ask for judicial review of "the records over which Congressman Perry has asserted privilege for the Court to make a final determination whether they contain privileged information." *Id.* at § 2.d. This Court approved the government's search warrant on August 18, 2022, finding probable cause that a crime was committed. *See* Signed D.D.C. Search Warrant at 1, ECF No. 4. Through his counsel, the government provided Rep. Perry with a copy of the Attachment C search protocol, on August 18, 2022, followed shortly thereafter, on August 23, 2022, with a forensic extraction of the contents of his phone. Gov't's Opp'n to Rep. Perry's Mot. for Ext. of Time ("Gov't's Opp'n") at 2–3, ECF No. 8.

As the end of the review period approached—after the government had extended the initial thirty-day period by an additional fourteen days, Gov't's Opp'n at 1—Rep. Perry petitioned this Court, on October 6, 2022, for additional time to review the phone's contents and assert his privilege. *See* Rep. Perry's Mot. for Ext. of Time ("Perry Mot."), ECF No. 7. Rep. Perry explained that responsive records on his phone implicate the Clause's protections because they involve communications with his staff, members of Congress, and others, and he required additional time to review those records and create the requisite privilege log. *Id.* at 5, 9–10. He helpfully categorized the volume of records from his cell phone as follows:



Id. at 6.

Following the completion of briefing on Rep. Perry's motion for an extension and a hearing, held on October 18, 2022, the Court issued a scheduling order requiring Rep. Perry to provide a privilege log of the records already reviewed by 6:00 PM that day, "identifying each record by date, recipients, sender, and subject matter, as required under Attachment C to the [Signed D.D.C. Search Warrant], for the 1,041 records he has reviewed and the 33 records in the 'Notes' category of extracted information from his personal cell phone . . . that he believes are

subject to the Speech or Debate Clause privilege." Minute Order (October 18, 2022) ("Perry Privilege Log Order"). He was further instructed to provide to the government any records over which he did not claim privilege. *Id.* The government was instructed to submit briefing regarding (1) what records, if any, identified on Rep. Perry's October 18, 2022, privilege log it believes are not subject to the Clause's privilege; and (2) "whether (a) the Speech or Debate Clause privilege applies to communications found on the personal cell phone of a Member of Congress; (b) the presence of non-legislative third parties to communications otherwise subject to the Speech or Debate Clause privilege vitiates that privilege; (c) the crime-fraud exception is invoked here and, if so, applies to the Speech or Debate Clause privilege." *Id.* Rep. Perry was provided an opportunity to respond to the government's submission, and he was directed to "conduct review, at a rate of 800 records per business day, of the remaining 9,660 records to determine whether he asserts the Speech or Debate Clause privilege as to any record" and provide regular privilege logs to the government on every Friday beginning on October 28, 2022. *Id.*

While continuing review is underway, Rep. Perry has, so far, identified 1,120 documents that he is withholding from the government as subject to the Speech or Debate Clause privilege, notwithstanding that these documents are concededly responsive to the warrant. *See* Perry Resp. at 1.

II. DISCUSSION

At this stage, the parties have identified two key disputes, resolution of which is necessary to facilitate the process of fully executing the D.D.C. warrant while providing fulsome protection

for Rep. Perry's Speech or Debate privilege. First, the parties dispute whether the government can review the communications and records on Rep. Perry's phone prior to the Court evaluating each of his claims of privilege under the Clause. Second, the parties contest which one of them bears the burden of establishing whether the Clause's privilege applies.

First up is the dispute regarding the scope of the Clause's non-disclosure protections. Consistent with the Attachment C search protocol, Rep. Perry has recommended "principles" to apply in judicial "review of the information over which he has asserted Speech or Debate protection[,]" as well as made suggestions as "to the mechanics of that review." *Id.* at 11. The government, by contrast, argues that the Attachment C search protocol should be jettisoned, thereby allowing the government unfettered authority to conduct the search for responsive information on Rep. Perry's phone. *See* Gov't's Br. Regarding the Inapplicability of the Speech or Debate Cl. To Materials Seized from Rep. Perry ("Gov't's Br.") at 1, ECF No. 13. Alternatively, the government joins with Rep. Perry in requesting that judicial review of the withheld records be performed, in accordance with the Attachment C protocol, "out of an abundance of caution and to avoid litigation that would unduly delay the Government's investigation." *Id.* at 1.

Rep. Perry is right about Attachment C, insofar as he argues that the location of the targeted responsive communications and records on his personal cell phone does not mean they fall outside the protection of the Clause. The Speech or Debate Clause provides that, "in all Cases, except Treason, Felony and Breach of the Peace . . . for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. Art. I, § 6, Cl. 1. The D.C. Circuit has held that 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. *United States v. Rayburn House Office Building, Room 2113,*

Washington, D.C. 20515 ("*Rayburn*"), 497 F.3d 654, 656 (D.C. Cir. 2007).[1] Similar to this case, *Rayburn* involved a search warrant executed for non-legislative materials of a Member of a Congress, though it was executed in the Congressman's office. *Id.* at 655. The D.C. Circuit further held that the Executive could not review a legislator's documents and records to determine or verify which ones were privileged or not. *Id.* Thus, the legislator's rights under the Clause were violated because the search of the legislator's office "must have resulted in the disclosure of legislative materials to agents of the Executive." *Id.* at 661. The Court was critical of "[t]he special procedures outlined in the warrant affidavit" for failing to "avoid[] the violation of the Speech or Debate Clause because they denied the Congressman any opportunity to identify and assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents." *Id.* at 662; *see also id.* (explaining that "incidental review . . . does not deny that compelled review by the Executive occurred, nor that it occurred in a location where legislative materials were inevitably to be found, nor that some impairment of legislative deliberations occurred").

Although recognizing that *Rayburn* is binding in this Circuit, the government urges this Court to find that Attachment C's search protocol guidelines are not constitutionally required, for two reasons. First, it says that legislative materials were inevitably to be found in *Rayburn* because the search and seizure in that case occurred in the congressional office of a sitting Member of Congress, while the search of Rep. Perry's phone, by contrast, does not pose that same risk. Gov't's Br. at 8. Second, it claims that *Rayburn* rests its reasoning on the fact that a search and

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[1] Notably, the Third and Ninth Circuits disagree with *Rayburn*'s approach, holding that the Speech or Debate "privilege when applied to records or third-party testimony is one of nonevidentiary use, not of non-disclosure." *See In re Grand Jury Investigation*, 587 F.2d 589, 597 (3d Cir. 1978); *United States v. Renzi*, 651 F.3d 1012, 1032 (9th Cir. 2011) (rejecting the contention "that there exists some grandiose, yet apparently shy, privilege of non-disclosure that the Supreme Court has not thought fit to recognize").

seizure of files from a Congressman's office is highly likely to cause disruption, but the government's seizure of Rep. Perry's phone for a few hours, coupled with a forensic search of his phone, did not similarly impair the Congressman's ability to complete his legislative work. *Id.* at 9.

These are valid distinctions from the circumstances in *Rayburn*, but prudence dictates compliance with Attachment C. Certainly, the government's seizure and forensic imaging of Rep. Perry's phone was much less disruptive than the search at issue in a congressman's official office in *Rayburn*, but potentially some of a Member's communications on his personal cell phone—particularly with aides or other legislators—will be part of or integral to legislative acts or the motivations behind legislative acts. Even if the *Rayburn* search "must have resulted in the disclosure of legislative materials" because the government seized physical documents in the Congressman's office, 497 F.3d at 661, *Rayburn* is written sufficiently broadly to contemplate that a Member's text or email communications with his staff or other legislators on his cell phone regarding an upcoming vote, speech notes on an upcoming floor speech, or questions prepared for a witness at an upcoming committee meeting, enjoy the same nondisclosure protection. *Cf. Riley v. California*, 573 U.S. 373, 393 (2014) ("Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. . . . [T]hese devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."). [2] As the D.C. Circuit articulated the rationale for

[2] Indeed, Rep. Perry notes that a Member is permitted to connect her personal cell phone to the House infrastructure, Perry Resp. at 6, but the government points out that Rep. Perry has not done so. Reply at 3–4. Despite the target cell phone's lack of formal connection to the House infrastructure, *Rayburn*'s non-disclosure requirement still dictates that the Attachment C protocol be followed, considering the significant number of communications that Rep. Perry has with other Members, their staff, and his own staff. *See* Perry Mot. at 7. The special protection that *Rayburn*'s non-disclosure provision affords to Members—putting them in an automatically privileged position and

non-disclosure of information subject to the Clause's privilege, the ability for the Executive to review these documents and records "may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity. This chill runs counter to the Clause's purpose of protecting against disruption of the legislative process." *Rayburn*, 497 F.3d at 661.

Given that the government's search of Rep. Perry's cell phone could touch on those protected materials, the Clause's non-disclosure privilege applies under *Rayburn* and Attachment C must be followed to prevent the release of privileged communications to the government. *Id.* at 663 (citation omitted) ("[A] search that allows agents of the [government] to review privileged materials without the Member's consent violates the Clause . . . , but [the government's] copying of computer hard drives and other electronic media is constitutionally permissible because . . . the Congressman [then has] an opportunity to assert the privilege prior to disclosure of privileged materials to the Executive[.]").[3]

Finally, the parties disagree on which one of them bears the burden of establishing the applicability of the Clause's privilege to any given communication or record. The government says that burden lies with Rep. Perry as the holder of the privilege, Gov't's Br. at 10, while Rep. Perry believes that the government should carry the burden. Perry Resp. at 8.

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allowing them, like Rep. Perry has done here, unilaterally to delay criminal investigations—is indeed a troubling outcome of the D.C. Circuit's decision, but the decision is nonetheless binding on this Court.

[3] In reply, the government claims that *Rayburn* rests its decision on the fact that legislative materials would "inevitably to be found." Gov't's Reply in Support of Gov't's Br. ("Reply") at 2–3, ECF No. 17 (quoting *Rayburn*, 497 F.3d at 661). Even if the presence of legislative materials is less likely on a Member's personal cell phone—a dubious suggestion given the fact that modern-day cell phones are ubiquitous and particularly necessary for congresspeople required to travel to and from the U.S. Capitol and their home districts—the presence of such materials in such a mobile "location" is a concrete reality here, and thus the act of disclosure to the government would run counter to *Rayburn*'s command that records covered by the Clause's protections should not be revealed to the Executive in the first place.

Rep. Perry bears the burden of showing that the legislative privilege obtains over all records and communications. *See United States v. Rostenkowski*, 59 F.3d 1291, 1300 (D.C. Cir. 1995) (concluding that a Congressman seeking dismissal of an indictment on Speech or Debate grounds bears the "burden" of "show[ing] that the Government has relied upon privileged material"); *see also In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm'n*, 439 F.3d 740, 750 (D.C. Cir. 2006) ("It is well established that the proponent of a privilege bears the burden of demonstrating facts sufficient to establish the privilege's applicability."). Given that Rep. Perry is asserting a use privilege personal to him, and since only he has possession of the records and communications he claims are privileged, the burden of persuasion—by a preponderance of the evidence—falls on him. *See In re Grand Jury Investigation*, 587 F.2d at 597. Nowhere in *Rangel v. Boehner,* which is relied upon by Rep. Perry, *see* Perry Resp. at 8, does the D.C. Circuit address which party, the government or the privilege holder, bears the burden of proof as to the applicability of the privilege. *See* 785 F.3d 19 (D.C. Cir. 2015). *Rangel* instead stands for the principle that a party invoking a court's jurisdiction bears the burden of establishing the court's subject-matter jurisdiction, an entirely different inquiry. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).[4] Considering that the government cannot even access to the communications and records over which Rep. Perry claims privilege until a judicial determination that the privilege does not apply, the government plainly cannot bear the burden of establishing that result. *See* Reply at 5.

Finally, the pace of compliance with the Perry Privilege Log Order is concerning. The government notes that Rep. Perry has, "[n]ine business days after the Court's order, [reviewed]

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[4] Based on Rep. Perry's briefing, the Court assumes that Rep. Perry does not challenge this Court's subject matter jurisdiction. *See* Perry Resp. at 8 (arguing that, under *Rangel* and other cases, the government, "[a]s the party seeking to pierce a constitutional immunity, . . . bears the burden to show the activity is not protected").

less than 2,400 additional documents[,] . . . resulting in an average review pace of approximately 265 documents per day." *Id.* at 2, n.1. Considering the government's interests in obtaining Rep. Perry's non-privileged communications and records and records in an expedient manner, while balancing Rep. Perry's interests in preserving his privilege under the Clause, this Court ordered Rep. Perry to review documents at a pace of 800 documents per day, *see* Perry Privilege Log Order, as his counsel had confirmed at the October 18, 2022, hearing he was able to accomplish, *see* October 18, 2022 Hearing Tr. at 60:24 ("We will get 800 a day done, sure."). If Rep. Perry has indeed significantly deviated from the pace required under the Perry Privilege Log Order, and he continues to slow-walk producing privilege logs to the government—particularly considering that the government had previously granted him a fourteen-day extension, and even more time to complete his privilege review was provided in the Perry Privilege Log Order—he risks forfeiting his right to assert his privilege. *See Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1146–47 (9th Cir. 2005) (explaining that under Federal Rules of Civil Procedure 26(b)(5) and 34, failure to properly and timely provide privilege logs risks a party waiving the ability to assert her privilege); *Porter v. City & Cty. of San Francisco*, No. 16-cv-03771, 2018 WL 4215602, at *6 (N.D. Cal. Sept. 5, 2018) ("Although waiver is a harsh sanction, courts have not hesitated to find waiver where a party repeatedly engages in inexcusable or unjustifiable conduct."); *Mauna Kea Resort, LLC v. Affiliated FM Ins. Co.*, No. CV 07-00605, 2009 WL 10677201, at *4 (D. Haw. June 24, 2009) ("While a failure to meet this deadline will not automatically result in a waiver of privilege, repeated failures to abide by Court orders and/or fulfill discovery obligations may result in a finding of waiver of privilege in the future."); *Loop AI Labs Inc. v. Gatti*, No. 15-CV-00798-HSG, 2016 WL 2908415, at *3 (N.D. Cal. May 13, 2016) (finding waiver where a party repeatedly and unjustifiably failed to comply with the court's order

to provide an adequate privilege log). Rep. Perry is now on notice to speed up his review, in compliance with the Perry Privilege Log Order, or face the consequence of forfeiting protection.

In sum, although *Rayburn* requires the Court to follow Attachment C's procedures, Rep. Perry bears the burden of showing, by a preponderance of the evidence, that the Clause's protections apply to every record or communication over which he claims privilege. After Rep. Perry has been given the opportunity to supplement his claims of privilege under the Clause, he will submit, on a rolling basis, all the records and communications over which he claims privilege for *in camera* review to determine whether the Clause's protections apply.[5]

III. ORDER

For the foregoing reasons, it is hereby

ORDERED that the government, by **November 14, 2022**, advise the Court which documents and records in Rep. Perry's privilege logs, which were due by October 18, 28 and November 4, 2022, *see* Perry Privilege Log Order ¶¶ A(1) and C, that they dispute as privileged under the Clause; it is further

ORDERED that Rep. Perry, by **November 16, 2022**, furnish the Court with all disputed records and communications by:

1. assigning each such record and any communication in the same chain, together with any attachments, an exhibit number;
2. providing the Court with:
    a. a thumb drive with electronic versions of the exhibits, with each exhibit saved as a separate file and organized into folders reflecting the categories into which

[5] While helpful, the government and Rep. Perry's briefing on the scope and potential applicability of the Clause to Rep. Perry's cell phone records and communications is, at this stage, too hypothetical. Only after the Court has had the opportunity to evaluate Rep. Perry's claims of privilege with respect to each record or communication can a conclusion be reached as to whether that record or communication is protected.

Rep. Perry has already sorted the documents, namely

b. one set of binders with hard copies of each exhibit, also sorted by Rep. Perry's categories, and

c. an Excel spreadsheet detailing the following for each exhibit submitted for review:

   i. exhibit number

   ii. Bates number(s), if any

   iii. document type (i.e., text, email, Notes app file)

   iv. date

   v. recipient(s)

   vi. sender

   vii. proposed category, and

   viii. any additional information concerning the communication, if necessary; and

3. submitting a motion for withholding as subject to the Speech or Debate Clause privilege that explains Rep. Perry's claims of privilege as to each exhibit; it is further

ORDERED that, by **November 18, 2022,** the parties (1) propose a schedule for rolling productions of exhibits for *in camera* review of disputed privilege logs; and (2) provide a report on the status of Rep. Perry's compliance with the Perry Privilege Log Order.

SO ORDERED.

Date: November 4, 2022

BERYL A. HOWELL
Chief Judge