

United States Senate

WASHINGTON, DC 20510

VIA EMAIL

September 30, 2026

R. Culver Schmid
Chairman
Board of Professional Responsibility of the Supreme Court of Tennessee
10 Cadillac Dr., Ste. 220
Brentwood, TN 37027

Dear Chairman Schmid:

I am submitting a formal complaint of serious misconduct by John “Jack” Luman Smith, Tennessee BPR No. 034063. Mr. Smith violated the Rules of Professional Conduct by seeking and obtaining a nondisclosure order from a federal district court without advising the court of critical facts and law. The impact of his lack of candor was a violation of federal law, and an invasion of the very constitutional privileges that ensure a fully free legislative process.

1. The Constitution affords broad protection for communications involving members of Congress.

A senator’s communications with other members of Congress “and staff about legislation, votes, committee assignments, and caucus affairs” are “squarely ‘legislative acts’” that the Speech or Debate Clause absolutely protects from compelled disclosure.¹ “Just as the other branches may not compel verbal testimony concerning legislative acts, they may not force Members to hand over documentary evidence of those acts.”² “The caselaw is clear that a legislator asserting the invasion of the Speech or Debate Clause privilege by use of a grand jury subpoena to a third party may intervene and oppose such use,” and that protection extends to non-content phone records.³ Thus, records of phone calls by and amongst members of Congress “on whether to certify the electoral results from each state,” the facts relevant to that decision, and related legislation “are within the heartland of” the Speech or Debate Clause.⁴ To avoid violating the Constitution, discovery procedures must afford an opportunity for members of Congress to assert legislative privilege.⁵

Even without those constitutional protections, no court can lawfully keep the Senate in the dark of attempts to obtain its data. Under 2 U.S.C. § 6628(c), “any provider for a Senate office that is providing services to or used by a Senate office shall not be barred, through operation of any

¹ *In re Sealed Case*, 80 F.4th 355, 371 (D.C. Cir. 2023) (citation omitted).

² *Id.* at 365.

³ *In re Grand Jury Investigation*, 587 F.2d 589, 594-95 (3d Cir. 1978).

⁴ *In re Sealed Case*, 80 F.4th at 372-73 (rejecting arguments presented by the Smith’s office in an appeal argued before issuance of the subpoena at issue here).

⁵ *See United States v. Rayburn House Off. Bldg.*, 497 F.3d 654, 665 (D.C. Cir. 2007).

court order or any statutory provision, from notifying the Senate office of any legal process seeking disclosure of Senate data.”

2. Jack Smith failed to disclose critical facts and law to a federal court.

During the Biden administration, Jack Smith served as Special Counsel in the U.S. Department of Justice. In that role, he sent a subpoena to Verizon, my cell phone provider. He sought non-content records of my telephone calls and those of other sitting United States Senators which pertained to our duties as legislators. I never had an opportunity to intervene and quash the subpoena, however, because accompanying the subpoena to Verizon was a nondisclosure order forbidding Verizon from telling anyone—myself included—and a letter from Smith threatening Verizon with obstruction of justice should it disobey.⁶

The nondisclosure order was issued by District of D.C. Chief Judge James Boasberg. Nowhere did the order mention the Speech or Debate Clause, 2 U.S.C. § 6628, or that the records sought pertained to members of Congress. How could that be, given the body of case law substantiating an argument that these very records were subject to legislative privilege? Because Smith’s motion omitted the facts and law that would lead the judge to realize what he was ruling on.⁷ The defects in Smith’s motion are only heightened by the fact that the order was apparently *also* written by Smith, and rubber-stamped by the judge.⁸

Smith has admitted that a nondisclosure order prevents someone who would have an argument to quash the subpoena from being able to do so.⁹ That was certainly true in this case, for unquestionably I (and my colleagues) would have aggressively contested his subpoena had we only known about it. The invasion of Congress’s legislative privileges was complete when Verizon refused to contest the subpoena and handed over my records. This event has broad implications. While the people of the United States should expect that their legislators have the ability to investigate the facts, consult privately, and deliberate freely before exercising their ultimate constitutional responsibility—the casting of a vote—Smith’s actions have set a precedent that a legislator should think twice before answering the phone.

⁶ See Letter from Robert S. Fisher to Sen. Charles E. Grassley (Oct. 24, 2025), https://www.judiciary.senate.gov/imo/media/doc/2025_10_30_verizon_cover_letter_subpoena_ndo_provided_to_chairman_grassley.pdf (including the letter, nondisclosure order, and subpoena).

⁷ First Application for Nondisclosure Order Under 18 U.S.C. § 2705(b) and to Seal Filings, *In re Application of USA for 2705(b) Nondisclosure Order for Grand Jury Subpoena*, S.C. No. 22-SC-1073 (D.D.C.), available at <https://static01.nyt.com/newsgraphics/documenttools/bee8400ddd4115d4/05c633c5-full.pdf>; see also Charlie Savage, *Judge Unseals Filings From Jack Smith Subpoena for Lawmaker’s Phone Data*, N.Y. Times (July 16, 2026), <https://www.nytimes.com/2026/07/16/us/politics/judge-unseals-jack-smith-subpoena-filings.html> (explaining that the filing, though pertaining to AT&T, was representative of other motions in the matter); Deposition of Jack Smith 42:14-17 (Dec. 17, 2025), available at https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/2025-12/Smith-Depo-Transcript_Redacted-w-Errata.pdf (“Smith Depo.”). Smith again confirmed these facts, under oath, in response to questioning by Senators Cruz, Lee, Kennedy, and Hawley on September 29, 2026, before the U.S. Senate Judiciary Committee.

⁸ See Smith Depo. at 40:5-6. The dangers in adopting a proposed order are especially heightened when the injured party is excluded. *Cf. In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1269 (11th Cir. 2021) (discussing factors relevant to adopting proposed orders).

⁹ See Smith Depo. at 40:23-25.

3. Smith violated the Rules of Professional Conduct.

Unsurprisingly, withholding critical information from a tribunal is unethical. Tennessee Supreme Court Rule 8, Rule of Professional Conduct 3.3(a)(3) addresses an attorney's duty of candor when appearing *ex parte* before a tribunal. An attorney may not knowingly, "in an *ex parte* proceeding, fail to inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."¹⁰ Further, an attorney may not "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."¹¹

As discussed above, the law in the D.C. Circuit requires an opportunity to afford members of Congress an opportunity to assert legislative privilege. Furthermore, 2 U.S.C. § 6628(c) forbids the exact relief that Smith sought, and obtained, from the district court. The fact that the subpoena to Verizon sought the phone records of members of Congress likely to involve communications concerning legislative acts was undoubtedly material—yet Smith did not disclose it. The case law cited above and 2 U.S.C. § 6628 were directly contrary to the relief sought—yet Smith did not disclose it either. Jack Smith violated, at minimum, Rules of Professional Conduct 3.3(a) and 8.4(c)-(d).

Smith has given this explanation for why he withheld from the court the centrally important fact that his subpoenas targeting members of Congress: "I don't think that was Department policy at the time."¹² This is no excuse. Bureaucratic policy cannot supersede the Constitution or a federal statute. Regardless, the policy in question¹³ simply does not address whether a motion for a nondisclosure order must alert a court that it pertains to members of Congress. It does, however, state this:

[A] protective order should be sought only after a prosecutor engages in a case- and fact-specific analysis....

A prosecutor must provide a court with sufficient facts to permit the court to conduct the same case- and fact-specific analysis. In particular, as the 2017 Policy stated, prosecutors applying for a § 2705(b) order must tailor the application to include the available facts that permit "an individualized and meaningful

¹⁰ R.P.C. 3.3(a)(3); *see also* R.P.C. 8.4(c)-(d). To the extent that the professional conduct rules of the District of Columbia apply, *see* R.P.C. 8.5(b); D.D.C. LCvR 56.26(a) (adopting D.C. rules), they do not appear to be meaningfully different. *See* D.C. R.P.C. 3.3, 8.4(c)-(d); D.C. R.P.C. 3.3 cmt. 2 ("There may be circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."). Note also that D.C. R.P.C. 3.8(g) forbids a prosecutor from "abus[ing] the processes of the grand jury."

¹¹ R.P.C. 3.3(a)(2).

¹² Smith Depo. 42:13-18. In response to questioning yesterday by Senator Cruz, Smith again stated: "We submitted these nondisclosure orders consistent with the law and department policy."

¹³ At the time, it appears that the applicable DOJ policy was embodied in two memoranda. *See* Rod J. Rosenstein, DOJ Deputy Att'y Gen., Policy Regarding Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b) (Oct. 19, 2017), <https://s3.documentcloud.org/documents/4116081/Policy-Regarding-Applications-for-Protective.pdf>; Lisa Monaco, DOJ Deputy Att'y Gen., Supplemental Policy Regarding Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b) (May 27, 2022), <https://www.justice.gov/archives/dag/file/1221126-0/dl?inline>.

assessment regarding the need for protection from disclosure.” Applications should identify which of the pertinent factors apply and explain why.¹⁴

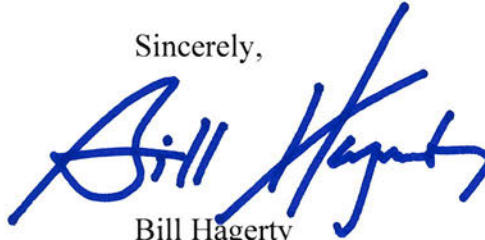
Rather than inoculating Smith, this policy reaffirms that an attorney in an ex parte proceeding “must” be cautious to provide the court with “sufficient facts.” Smith did not.

4. Conclusion.

Jack Smith’s lack of candor before a federal tribunal directly resulted in injury to the United States Congress. The Board should investigate and pursue the most serious remedy possible—disbarment—in light of the gravity of Smith’s intentional conduct; the effect of totally depriving members of Congress of legal recourse and appeal; the broader harm to our constitutional order, including the chilling effect on legislative communications; and his lack of remorse.¹⁵

If you have any further questions, please contact my General Counsel, Nate Kinard, at 202-224-4944.

Sincerely,

A handwritten signature in blue ink, appearing to read "Bill Hagerty", with a stylized flourish extending from the end.

Bill Hagerty
United States Senator

¹⁴ See Monaco, Supplemental Policy at 2.

¹⁵ See ABA Standards for Imposing Lawyer Sanctions 5.11(b), 6.11, 6.21; Tenn. Sup. Ct. R. 9, § 15.4.