

TARGETING CHILD PREDATORS ACT OF 2017

MAY 22, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 883]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 883) to amend title 18, United States Code, to provide a certification process for the issuance of nondisclosure requirements accompanying certain administrative subpoenas, to provide for judicial review of such nondisclosure requirements, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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Purpose and Summary

H.R. 883, the “Targeting Child Predators Act,” provides a mechanism for the government to prohibit the recipient of an administrative subpoena under 18 U.S.C. § 3486 from disclosing its existence to the target of an investigation in child exploitation cases when the law enforcement agency certifies that disclosure may result in: (1) endangerment to the life or physical safety of any person; (2) flight to avoid prosecution; (3) destruction of or tampering with evidence; (4) intimidation of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial. The bill also provides judicial review so a company may challenge a non-disclosure order.

Background and Need for the Legislation

Federal law authorizes federal agencies to use administrative subpoenas in child exploitation cases.¹ This provision was originally enacted in 1998 as part of the Protection of Children from Sexual Predators Act.² The use of administrative subpoenas, in lieu of grand jury subpoenas, has enhanced the FBI’s ability to investigate online child exploitation offenses in an expeditious manner, which is highly desirable given that those crimes involve the ongoing abuse of children. Section 3486 created a speedy mechanism to identify users of electronic communication services or remote computing services. A timely method was needed because the information is extremely perishable. Many private and commercial online service providers maintain records on Internet usage by periods of time, sometimes two days or less. Although an investigative agency can obtain grand jury subpoenas from a U.S. Attorney’s Office in exigent circumstances on an expedited basis, more commonly, the agency’s acquisition of grand jury subpoenas takes several weeks. As a result, the Internet service provider is often no longer able to provide the needed information. Giving authority to the United States Attorneys, the Assistant Attorney General for the Criminal Division, and the FBI has facilitated the investigative process necessary to obtain information that identifies subjects and victimized children. In addition, investigative information can be particularly important in cases involving the abuse and exploitation of children.

1. Source and scope of subpoena authority under 18 U.S.C. § 3486(a)

The Attorney General or the Attorney General’s designee is authorized to issue administrative subpoenas for a limited category of information in criminal investigations of pornography, sex abuse, and transportation for illegal sexual activity offenses, where the victim was under eighteen.³ The underlying investigation must relate to an act or activity involving a violation of certain sexual abuse crimes,⁴ when the victim was a minor who had not attained the age of eighteen years. Section 3486(a)(1)(C) limits information that a governmental entity may request from a provider of electronic communications service or remote computing provider receiv-

¹ See 18 U.S.C. § 3486.

² Pub. L. No. 105–314, 112 Stat. 2984–985 (1998).

³ 18 U.S.C. § 3486(a).

⁴ 18 U.S.C. §§ 1201, 2241(c), 2242, 2243, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423.

ing a subpoena under section 3486. The service or provider can be required to disclose only the subscriber or customer's: (1) name; (2) address; (3) long distance telephone toll billing records; (4) telephone number or other subscriber identity; (5) length of service customer or subscriber utilized, which may be relevant to an authorized law enforcement inquiry.⁵ Using administrative subpoenas to obtain testimony is limited to requiring a custodian of records to give testimony concerning the production and authentication of such records.⁶ Administrative subpoenas issued under section 3486 may require production as soon as possible after service of the subpoena, but not less than twenty-four hours after such issuance.⁷

2. Applicable subpoena enforcement mechanisms

The Attorney General has no authority to enforce an administrative subpoena issued under 18 U.S.C. § 3486(a). The Attorney General is permitted to invoke the aid of any court of the United States within the jurisdiction in which the investigation is carried out or of which the subpoenaed person is an inhabitant, or in which he carries on business.⁸ Failure to comply with a court order may be punished by the court as contempt.⁹

3. Notification provisions and other provisions related to safeguarding privacy interests

Federal law provides that a governmental entity receiving records from a provider of electronic communication service or remote computing service pursuant to an administrative subpoena (requesting the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity, and length and type of service) does not have to provide notice to the subscriber.¹⁰ In addition, 18 U.S.C. § 3486(a)(6) allows an entity issuing a subpoena under 3486 authority to obtain an ex parte order preventing the disclosure of the existence of the subpoena for 90 days if the court finds that there is reason to believe disclosure may result in: (1) endangerment to the life or physical safety of any person; (2) flight to avoid prosecution; (3) destruction of or tampering with evidence; or (4) intimidation of potential witnesses. This ex parte order is renewable for an additional 90-day period based on a finding that the reasons listed above continue to exist.¹¹

4. Usefulness of administrative subpoena authority pursuant to § 3486(a)(1)(A)(i)(I)

The use of an administrative subpoena is an important tool for the investigation of child pornography and child sexual exploitation investigations. In cases in which children are at "high risk" and/or may be in imminent danger, the execution of an administrative subpoena allows immediate requests to be made to the appropriate entity. Furthermore, unlike grand jury material, which is pro-

⁵ 18 U.S.C. § 3486(a)(1)(C)(i).

⁶ 18 U.S.C. § 3486(a)(1)(C)(ii).

⁷ 18 U.S.C. § 3486(a)(9).

⁸ 18 U.S.C. § 3486(c).

⁹ 18 U.S.C. § 3486(c).

¹⁰ 18 U.S.C. § 2703(c)(2).

¹¹ 18 U.S.C. § 3486(a)(6)(B) and (C).

tected,¹² information gleaned from the service of an administrative subpoena can be shared with other law enforcement entities without delay. Delay could literally mean the difference between life and death for a child. In contrast, the disclosure limitations placed on investigators using grand jury subpoenas may not allow investigators to share information necessary to the location and apprehension of violent child sexual predators.

The purpose of the administrative subpoena in this sphere is to obtain information as expeditiously as possible. Indeed, Congress authorized these subpoenas so agents could gather information without the delay of applying for a court order. Currently, there is no mechanism to prevent an electronic communications service or remote computing provider from notifying the investigation target that the government has sought their subscriber information and toll records without going through the courts. As of now, the only option is to seek a court order under 18 U.S.C. §§ 2705(b) or 3486, both of which require court approval, which of course defeats the purpose of allowing that limited, non-content 2703(c)(2) information to be provided to the government efficiently with an administrative subpoena.

Hearings

The Committee on the Judiciary held no hearings on H.R. 883, but did hold a hearing on the subject of combating crimes against children on March 16, 2017.

Committee Consideration

On April 27, 2017, the Committee met in open session and ordered the bill, H.R. 883, favorably reported, without amendment, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that no roll call votes occurred during the Committee's consideration of H.R. 883.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

¹²See Fed. R. Crim. P. 6(e).

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 115, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 26, 2017.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 883, the Targeting Child Predators Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Robert Reese, who can be reached at 226–2860.

Sincerely,

KEITH HALL.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 883—Targeting Child Predators Act of 2017

As ordered reported by the House Committee on the Judiciary on
March 22, 2017

H.R. 883 would amend the current process for issuing nondisclosure requirements for subpoenas in certain cases of child exploitation. Under current law, a formal court order is needed for such nondisclosure requirements. Under the bill, a nondisclosure requirement could be placed on a subpoena if the subpoena is issued concurrently with a certification that disclosure of the summons could have certain adverse consequences on the defendant or the trial; a formal court order would no longer be necessary.

Based on an analysis of information provided by the Administrative Office of the U.S. Courts on the number of cases that would be affected by the bill, CBO estimates that implementing H.R. 883 would have no significant effect on the federal budget.

Enacting H.R. 883 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 883 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 883 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Robert Reese. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 883 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 883 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 883, the “Targeting Child Predators Act,” prohibits the recipient of an administrative subpoena under 18 U.S.C. § 3486 from disclosing its existence to the target of an investigation when the government certifies that disclosure may result in: (1) endangerment to the life or physical safety of any person; (2) flight to avoid prosecution; (3) destruction of or tampering with evidence; (4) intimidation of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial. The bill also provides judicial review so a company may challenge a non-disclosure order.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 883 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Section 1. Short Title. This section cites the short title of the bill as the “Targeting Child Predators Act of 2017.”

Section 2. Nondisclosure of Administrative Subpoenas. This section provides that if federal officials with administrative subpoena power make a certification that disclosure may result in: (1) endangerment to the life or physical safety of any person; (2) flight to avoid prosecution; (3) destruction of or tampering with evidence; (4) intimidation of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial, then providers of electronic communication services or remote computer services may not disclose the existence of the subpoena for 180 days.

Section 3. Judicial Review of Nondisclosure Requirements. This section provides a mechanism for judicial review for the provider to demand the government to begin judicial review proceedings or to challenge the subpoena’s non-disclosure requirement itself.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * *

PART II—CRIMINAL PROCEDURE

* * * * *

CHAPTER 223—WITNESSES AND EVIDENCE

Sec.

3481. Competency of accused.

* * * * *

3486A. *Judicial review of nondisclosure requirements.*

* * * * *

§ 3486. Administrative subpoenas

(a) AUTHORIZATION.—(1)(A) In any investigation of—

(i)(I) a Federal health care offense; or (II) a Federal offense involving the sexual exploitation or abuse of children, the Attorney General;

(ii) an unregistered sex offender conducted by the United States Marshals Service, the Director of the United States Marshals Service; or

(iii) an offense under section 871 or 879, or a threat against a person protected by the United States Secret Service under paragraph (5) or (6) of section 3056, if the Director of the Secret Service determines that the threat constituting the offense or the threat against the person protected is imminent, [the Secretary of the Treasury] *the Secretary of Homeland Security*, may issue in writing and cause to be served a subpoena requiring the production and testimony described in subparagraph (B).

(B) Except as provided in subparagraph (C), a subpoena issued under subparagraph (A) may require—

(i) the production of any records or other things relevant to the investigation; and

(ii) testimony by the custodian of the things required to be produced concerning the production and authenticity of those things.

(C) A subpoena issued under subparagraph (A) with respect to a provider of electronic communication service or remote computing service, in an investigation of a Federal offense involving the sexual exploitation or abuse of children shall not extend beyond—

(i) requiring that provider to disclose the information specified in section 2703(c)(2), which may be relevant to an authorized law enforcement inquiry; or

(ii) requiring a custodian of the records of that provider to give testimony concerning the production and authentication of such records or information.

(D) As used in this paragraph—

(i) the term “Federal offense involving the sexual exploitation or abuse of children” means an offense under section 1201, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423, in which the victim is an individual who has not attained the age of 18 years; and

(ii) the term “sex offender” means an individual required to register under the Sex Offender Registration and Notification Act (42 U.S.C. 16901 et seq.).

(2) A subpoena under this subsection shall describe the objects required to be produced and prescribe a return date within a reasonable period of time within which the objects can be assembled and made available.

(3) The production of records relating to a Federal health care offense shall not be required under this section at any place more than 500 miles distant from the place where the subpoena for the production of such records is served. The production of things in any other case may be required from any place within the United States or subject to the laws or jurisdiction of the United States.

(4) Witnesses subpoenaed under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(5) At any time before the return date specified in the summons, the person or entity summoned may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the summons, or a prohibition of disclosure [ordered by a court] under paragraph (6).

[(6)(A) A United States district court for the district in which the summons is or will be served, upon application of the United States, may issue an ex parte order that no person or entity disclose to any other person or entity (other than to an attorney in order to obtain legal advice) the existence of such summons for a period of up to 90 days.

[(B) Such order may be issued on a showing that the things being sought may be relevant to the investigation and there is reason to believe that such disclosure may result in—

- [(i) endangerment to the life or physical safety of any person;
- [(ii) flight to avoid prosecution;
- [(iii) destruction of or tampering with evidence; or
- [(iv) intimidation of potential witnesses.

[(C) An order under this paragraph may be renewed for additional periods of up to 90 days upon a showing that the circumstances described in subparagraph (B) continue to exist.]

(6)(A)(i) If a subpoena issued under this section is accompanied by a certification under clause (ii) and notice of the right to judicial review under subparagraph (C), no recipient of a subpoena under this section shall disclose to any person that the Federal official who issued the subpoena has sought or obtained access to information or records under this section, for a period of 180 days.

(ii) The requirements of clause (i) shall apply if the Federal official who issued the subpoena certifies that the absence of a prohibition of disclosure under this subsection may result in—

- (I) endangering the life or physical safety of an individual;
- (II) flight from prosecution;
- (III) destruction of or tampering with evidence;
- (IV) intimidation of potential witnesses; or
- (V) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(B)(i) A recipient of a subpoena under this section may disclose information otherwise subject to any applicable nondisclosure requirement to—

- (I) those persons to whom disclosure is necessary in order to comply with the request;
- (II) an attorney in order to obtain legal advice or assistance regarding the request; or
- (III) other persons as permitted by the Federal official who issued the subpoena.

(ii) A person to whom disclosure is made under clause (i) shall be subject to the nondisclosure requirements applicable to a person to whom a subpoena is issued under this section in the same manner as the person to whom the subpoena was issued.

(iii) Any recipient that discloses to a person described in clause (i) information otherwise subject to a nondisclosure requirement shall notify the person of the applicable nondisclosure requirement.

(iv) At the request of the Federal official who issued the subpoena, any person making or intending to make a disclosure under subclause (I) or (III) of clause (i) shall identify to the individual making the request under this clause the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(C)(i) A nondisclosure requirement imposed under subparagraph (A) shall be subject to judicial review under section 3486A.

(ii) A subpoena issued under this section, in connection with which a nondisclosure requirement under subparagraph (A) is imposed, shall include notice of the availability of judicial review described in clause (i).

(D) A nondisclosure requirement imposed under subparagraph (A) may be extended in accordance with section 3486A(a)(4).

(7) A summons issued under this section shall not require the production of anything that would be protected from production under the standards applicable to a subpoena duces tecum issued by a court of the United States.

(8) If no case or proceeding arises from the production of records or other things pursuant to this section within a reasonable time after those records or things are produced, the agency to which those records or things were delivered shall, upon written demand made by the person producing those records or things, return them to that person, except where the production required was only of copies rather than originals.

(9) A subpoena issued under paragraph (1)(A)(i)(II) or (1)(A)(iii) may require production as soon as possible, but in no event less than 24 hours after service of the subpoena.

(10) As soon as practicable following the issuance of a subpoena under paragraph (1)(A)(iii), ~~the Secretary of the Treasury~~ *the Secretary of Homeland Security* shall notify the Attorney General of its issuance.

(b) SERVICE.—A subpoena issued under this section may be served by any person who is at least 18 years of age and is designated in the subpoena to serve it. Service upon a natural person may be made by personal delivery of the subpoena to him. Service may be made upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpoena to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. The affidavit of the person serving the subpoena entered on a true copy thereof by the person serving it shall be proof of service.

(c) ENFORCEMENT.—In the case of contumacy by or refusal to obey a subpoena issued to any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on or of which the subpoenaed person is an inhabitant, or in which he carries on business or may be found, to compel compliance with the subpoena. The court may issue an order requiring the subpoenaed person to appear before the Attorney General to produce records, if so ordered, or to give testimony concerning the production and authentication of such records. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in any judicial district in which such person may be found.

(d) IMMUNITY FROM CIVIL LIABILITY.—Notwithstanding any Federal, State, or local law, any person, including officers, agents, and employees, receiving a subpoena under this section, who complies in good faith with the subpoena and thus produces the materials sought, shall not be liable in any court of any State or the United States to any customer or other person for such production or for nondisclosure of that production to the customer.

(e) LIMITATION ON USE.—(1) Health information about an individual that is disclosed under this section may not be used in, or disclosed to any person for use in, any administrative, civil, or criminal action or investigation directed against the individual who is the subject of the information unless the action or investigation arises out of and is directly related to receipt of health care or payment for health care or action involving a fraudulent claim related to health; or if authorized by an appropriate order of a court of competent jurisdiction, granted after application showing good cause therefor.

(2) In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services.

(3) Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

§3486A. Judicial review of nondisclosure requirements

(a) **NONDISCLOSURE.**—

(1) **IN GENERAL.**—

(A) **NOTICE.**—If a recipient of a subpoena under section 3486 wishes to have a court review a nondisclosure requirement imposed in connection with the subpoena, the recipient may notify the Government or file a petition for judicial review in any court described in subsection (a)(5) of section 3486.

(B) **APPLICATION.**—Not later than 30 days after the date of receipt of a notification under subparagraph (A), the Government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant subpoena. An application under this subparagraph may be filed in the district court of the United States for the judicial district in which the recipient of the subpoena is doing business or in the district court of the United States for any judicial district within which the authorized investigation that is the basis for the subpoena is being conducted. The applicable nondisclosure requirement shall remain in effect during the pendency of proceedings relating to the requirement.

(C) **CONSIDERATION.**—A district court of the United States that receives a petition under subparagraph (A) or an application under subparagraph (B) should rule expeditiously, and shall, subject to paragraph (3), issue a nondisclosure order that includes conditions appropriate to the circumstances.

(2) **APPLICATION CONTENTS.**—An application for a nondisclosure order or extension thereof or a response to a petition filed under paragraph (1) shall include a certification from the Federal official who issued the subpoena indicating that the absence of a prohibition of disclosure under this subsection may result in—

- (A) endangering the life or physical safety of an individual;
- (B) flight from prosecution;
- (C) destruction of or tampering with evidence;
- (D) intimidation of potential witnesses; or
- (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(3) **STANDARD.**—A district court of the United States shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in—

- (A) endangering the life or physical safety of an individual;
- (B) flight from prosecution;
- (C) destruction of or tampering with evidence;
- (D) intimidation of potential witnesses; or
- (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(4) **EXTENSION.**—Upon a showing that the circumstances described in subparagraphs (A) through (E) of paragraph (3) con-

tinue to exist, a district court of the United States may issue an ex parte order extending a nondisclosure order imposed under this subsection or under section 3486(a)(6)(A) for additional periods of 180 days, or, if the court determines that the circumstances necessitate a longer period of nondisclosure, for additional periods which are longer than 180 days.

(b) *CLOSED HEARINGS.—In all proceedings under this section, subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent an unauthorized disclosure of a request for records, a report, or other information made to any person or entity under section 3486. Petitions, filings, records, orders, certifications, and subpoenas must also be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a subpoena under section 3486.*

* * * * *

Dissenting Views

H.R. 883, the “Targeting Child Predators Act of 2017,” would modify the process by which the U.S. Attorney General, the Director of the U.S. States Marshals Service, and the Secretary of Homeland Security issue administrative subpoenas by eliminating the need to obtain a court order, requiring nondisclosure of the existence of a subpoena, and extending the initial period of nondisclosure from 90 days to 180 days. We believe that the requirement that a judge approve such nondisclosure orders prior to their issuance is an important check on the potential abuse of these orders. As H.R. 883 fails to provide for this critical check, we respectfully dissent and accordingly urge our colleagues to oppose this legislation when it comes to the floor.

DESCRIPTION AND BACKGROUND

DESCRIPTION

Section 2 of the bill amends section 3486(a) of title 18 of the United States Code, which sets out the process by which the U.S. Attorney General, the Director of the U.S. Marshals Service, and the Secretary of Homeland Security issue administrative subpoenas. As amended, section 3486(a) would: (1) eliminate the portion of the statute requiring a federal official requesting the subpoena to apply to a United States district court for an ex parte order of nondisclosure; (2) make the nondisclosure requirement subject to judicial review; and (3) increase the current nondisclosure period from 90 days to 180 days. A subpoena issued under this provision would impose a nondisclosure requirement on the recipient, without application to a judge, if the subpoena is accompanied by a notice of the right to judicial review and a certification that disclosure may result in endangering the life or safety of a person, flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, or otherwise seriously jeopardize an investigation or unduly delay a trial. Recipients of subpoenas may disclose information to persons necessary to comply with the subpoena, such as an attorney in order to obtain advice or assistance, or other persons allowed by the issuer of the subpoena.

Section 3 of the bill establishes the procedure for obtaining judicial review of nondisclosure requirements imposed in administrative subpoenas under section 3486. A recipient of a subpoena may notify the government or file a petition for judicial review of a non-disclosure order in a district court where the person resides or business is conducted. No later than 30 days after the notice is received, the government must apply for an order prohibiting disclosure of the existence or contents of the subpoena. The application must include a certification alleging that disclosure may result in: endangering the life or physical safety of an individual; flight from prosecution; destruction of or tampering with evidence; and intimidation of potential witnesses; or otherwise seriously jeopardizing an investigation or unduly delaying a trial. A U.S. district court judge must issue a nondisclosure order or extension if he or she determines that there is reason to believe that disclosure will result in the occurrence of any of the aforementioned circumstances. Extensions may be granted for 180 days or longer if the circumstances require a longer period of nondisclosure. The proceedings must be closed to the extent necessary to prevent disclosure of information under section 3486 and all filings, records, orders, certifications, and the like must be kept under seal. A clerical amendment is made to the table of sections to correspond with the addition of section 3486A.

BACKGROUND

As provided in section 3486, administrative subpoena authority is the power granted to certain federal agencies to compel, without judicial approval, the production of records (and testimony of the custodian of such records about their authenticity) relevant to an investigation. With the required showing of relevance, an administrative subpoena, which is more limited in scope of what may be compelled to be produced, is not subject to the Fourth Amendment's probable cause requirement.¹ Such subpoenas give the government agencies authorized to use them as an investigative tool, similar to that used by grand juries, to investigate alleged violations of the law.² Although agencies do not need probable cause to issue a subpoena, judicial review is intended to prevent agencies from abusing their subpoena power.³ In fact, an administrative subpoena begins an adversarial process that permits judicial review of the subpoena's reasonableness.⁴

The Attorney General is given this authority with respect to the investigations of health care offenses and offenses involving the sexual exploitation or abuse of children. A subpoena issued by the Attorney General pursuant to section 3486, to a provider of electronic communication service or remote computing service, in an investigation of a federal offense involving the sexual exploitation or abuse of children is limited by section 2703 of title 18, and the contents of the subpoena must not extend beyond requiring the

¹ *U.S. v. Powell*, 379 U.S. 48, 57 (1964); see *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 741–42 (1984) (holding that the standards set in *Powell* govern all administrative subpoenas).

² Office of Legal Policy, U.S. Dep't of Justice, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities 35 (2002) [hereinafter DOJ Report].

³ *Id.* at 9.

⁴ 18 U.S.C. § 3486(a)(5) (2017).

provider to disclose information specified in section 2703(c)(2).⁵ The U.S. Marshals Service is authorized to issue administrative subpoenas in tracking unregistered sex offenders and the Secret Service is given this authority with respect to investigating imminent threats against those whom they protect.

Upon application of the United States (Attorney General, U.S. Marshals Service, or Secret Service), a U.S. district court may issue an order of nondisclosure of the existence of the subpoena for a period of up to 90 days if disclosure may result in endangerment to a person's life or safety; flight to avoid prosecution; destruction of or tampering with evidence; or intimidation of potential witnesses. The order may be extended for additional 90-day periods if such circumstances persist.⁶

In the context of protecting children from predators, H.R. 883 seeks to strengthen the ability of law enforcement to seek out, locate, and prosecute online sex offenders. Law enforcement investigators may obtain the Internet Protocol (IP) address of individuals suspected of exchanging or distributing child pornography, enticing children, or otherwise committing child sexual exploitation crimes online. Law enforcement investigators may also subpoena Internet Service Providers (ISPs) for the user information attached to the IP address. Unless notice to customers is delayed by a nondisclosure order, ISPs might inform the user of the law enforcement inquiry, allowing the user to wipe their accounts and delete potentially incriminating evidence. H.R. 883 would eliminate judicial review prior to the issue of nondisclosure orders and require that recipients wait 180 days before disclosing to a user that their information was requested by law enforcement. This change would apply to all agencies authorized to issue such subpoenas pursuant to section 3486, i.e., the Attorney General, the U.S. Marshals Service, and the U.S. Secret Service.

CONCERN WITH H.R. 883

H.R. 883 eliminates the requirement that officials requesting the subpoenas apply to a judge for a nondisclosure order. The requirement that a judge issue a nondisclosure order helps ensure that the government pursues such orders only when they are truly necessary. Although a recipient of such a subpoena may challenge the nondisclosure order in court, the absence of judicial oversight or review at the front end may lead to governmental abuse of this authority. Particularly in the online context, companies are doing more to give notice to customers as to the government's investigative requests for their information, so eliminating judicial oversight or prior judicial review harms a benefit that companies believe customers desire.

CONCLUSION

Federal law grants certain agencies the authority to issue administrative subpoenas only under certain circumstances because of

⁵ A provider of electronic communication service or remote computing service shall disclose to a governmental entity: name, address, telephone records, length and type of service used, telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address, and means and source of payment, of a subscriber or customer when the entity uses an administrative subpoena authorized by a Federal statute.

⁶ 18 U.S.C. § 3486(a)(6)(A) (2017).

the extraordinary nature of allowing these agencies to compel the production of records pursuant to a standard less demanding than probable cause. Although well-intended, H.R. 883 unwisely eliminates an important protection that helps prevent abuse of administrative subpoenas. We believe current law strikes the right balance by requiring a judge to approve the inclusion of a nondisclosure order with administrative subpoenas.

Accordingly, we oppose H.R. 1039 and we urge our colleagues to join us in opposition.

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