

NDO FAIRNESS ACT

JUNE 13, 2022.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

[To accompany H.R. 7072]

The Committee on the Judiciary, to whom was referred the bill (H.R. 7072) to amend title 18, United States Code, to modify delayed notice requirements, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all that follows after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “NDO Fairness Act”.

SEC. 2. DELAY OF NOTIFICATION.

Section 2705(a) of title 18, United States Code, is amended to read as follows:

“(a) DELAY OF NOTIFICATION.—

“(1) APPLICATION.—A governmental entity that is seeking a warrant, order, or subpoena under section 2703 may include in the application (or motion in the

case of an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena) a request to a court of competent jurisdiction for an order delaying the notification under section 2703 for a period of not more than 60 days.

“(2) DETERMINATION.—The court may not grant a request for delayed notification to a customer or subscriber made under paragraph (1), or an extension of such delayed notification requested by the governmental entity pursuant to paragraph (3), unless the court issues a written determination, based on specific and articulable facts, and including written findings of fact and conclusions of law, that it is substantially likely that the notification of the customer or subscriber of the existence of the warrant, order, or subpoena will 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) EXTENSION.—The governmental entity may request one or more extensions of the delay of notification granted under paragraph (2) for a period of not more than 60 days for each such extension. The court may only grant such an extension if the court makes a written determination required under paragraph (2) and the extension is in accordance with the requirements of such paragraph.

“(4) EXPIRATION OF DELAY OF NOTIFICATION.—Upon expiration of the period of delay of notification and all extensions thereof under paragraphs (2) and (3) of this subsection, the governmental entity shall deliver to the customer or subscriber by at least 2 methods, which shall be personal service, registered or first-class mail, electronic mail, or other means approved by the court, as reasonably calculated to reach the customer or subscriber within 72 hours of the expiration of the delay—

“(A) a copy of the warrant, order, or subpoena; and

“(B) notice that informs such customer or subscriber—

“(i) of the nature of the inquiry made by the governmental entity, with reasonable specificity;

“(ii) that information maintained for such customer or subscriber by the provider of electronic communications service or remote computing service to which the warrant, order, or subpoena under section 2703 was directed, was supplied to or requested by the governmental entity;

“(iii) that notification of such customer or subscriber was delayed by court order;

“(iv) the identity of the court that issued such order;

“(v) the provision of law under which the order delaying notification was authorized; and

“(vi) that the governmental entity will, upon request by the customer or subscriber, provide the customer or subscriber with a copy of the information that was disclosed in response to the warrant, order, or subpoena, or in the event that no information was disclosed, a written certification that no information was disclosed.

“(5) COPY OF INFORMATION DISCLOSED.—Upon expiration of the period of delay of notification under paragraph (2) or (3) of this subsection, and at the request of the customer or subscriber made within 180 days of receiving notification under paragraph (4), the governmental entity shall promptly provide the customer or subscriber—

“(A) with a description of the information disclosed and a copy of the information that was disclosed in response to the warrant, order, or subpoena; or

“(B) in the event that no information was disclosed, with a written certification that no information was disclosed.”.

SEC. 3. PRECLUSION OF NOTICE.

Section 2705(b) of title 18, United States Code, is amended to read as follows:

“(b) PRECLUSION OF NOTICE.—

“(1) APPLICATION.—A governmental entity that is seeking a warrant, order, or subpoena under section 2703, when it is not required to notify the customer or subscriber, or to the extent that it may delay such notice pursuant to subsection (a), may apply to a court for an order, subject to paragraph (6), directing a provider of electronic communications service or remote computing service to which a warrant, order, or subpoena under section 2703 is directed not to notify any other person of the existence of the warrant, order, or subpoena for a period of

not more than either 60 days or the period of delay of notice provided under subsection (a), if any.

“(2) DETERMINATION.—The court may not grant a request for an order made under paragraph (1), or an extension of such order requested by the governmental entity pursuant to paragraph (3), unless—

“(A) the court issues a written determination, based on specific and articulable facts, and including written findings of fact and conclusions of law, that it is substantially likely that not granting the request will 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; and

“(B) the order is narrowly tailored and there is no less restrictive alternative, including notification to an individual or organization within or providing legal representation to the customer or subscriber, to avoid an adverse result as described in clause (i) through (v) of subparagraph (A).

“(3) EXTENSION.—A governmental entity may request one or more extensions of an order granted under paragraph (2) of not more than 60 days for each such extension. The court may only grant such an extension if the court makes a written determination required under paragraph (2)(A) and the extension is in accordance with the requirements of (2)(B).

“(4) NOTIFICATION OF CHANGED CIRCUMSTANCES.—If the need for the order issued under paragraph (2) changes materially, the governmental entity that requested the order shall notify the court within 72 hours of the changed circumstances, and the court shall reassess the order and modify or vacate as appropriate.

“(5) OPPORTUNITY TO BE HEARD.—

“(A) IN GENERAL.—Upon an application, petition, or motion by a provider of electronic communications service or remote computing service or person acting on behalf of the provider to which an order under paragraph (2) (or an extension under paragraph (3)) has been issued, the court may modify or vacate the order if—

“(i) the order does not meet requirements provided in paragraph (2);

or

“(ii) compliance with the order is unreasonable or otherwise unlawful.

“(B) STAY OF DISCLOSURE OF CUSTOMER OR SUBSCRIBER COMMUNICATIONS OR RECORDS.—A provider’s obligation to disclose the information requested in the warrant, order, or subpoena to which the order in paragraph (1) applies is stayed upon the filing of the application, petition, or motion under this paragraph pending resolution of the application, petition, or motion, unless the court with jurisdiction over the challenge determines based on a showing by the governmental entity that the stay should be lifted in whole or in part prior to resolution.

“(C) FINALITY OF ORDER.—The decision of the court resolving an application, petition, or motion under this paragraph shall constitute a final, appealable order.

“(6) EXCEPTION.—A provider of electronic communications service or remote computing service to which an order under paragraph (2) applies, or an officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

“(A) those persons to whom disclosure is necessary in order to comply with the warrant, order, or subpoena;

“(B) an attorney in order to obtain legal advice or assistance regarding the warrant, order, or subpoena; and

“(C) any person the court determines can be notified of the warrant, order, or subpoena.

“(7) SCOPE OF NONDISCLOSURE.—Any person to whom disclosure is made under paragraph (6) (other than the governmental entity) shall be subject to the nondisclosure requirements applicable to the person to whom the order is issued. Any recipient authorized under this subsection to disclose to a person information otherwise subject to a nondisclosure requirement shall notify the person of the applicable nondisclosure requirement.

“(8) SUPPORTING DOCUMENTATION.—Upon serving a provider of electronic communications service or remote computing service with an order granted under paragraph (2), or an extension of such order granted under paragraph (3), the

governmental entity shall include a copy of the warrant, order, or subpoena to which the nondisclosure order applies.

“(9) EXPIRATION OF ORDER PRECLUDING NOTICE.—Upon expiration of an order issued under paragraph (2) or, if an extension has been granted under paragraph (3), expiration of the extension, the governmental entity shall deliver to the customer or subscriber, by at least 2 methods, which shall be personal service, registered or first-class mail, electronic mail, or other means approved by the court as reasonably calculated to reach the customer or subscriber within 72 hours of the expiration of the order—

“(A) a copy of the warrant, order, or subpoena; and

“(B) notice that informs the customer or subscriber—

“(i) of the nature of the law enforcement inquiry with reasonable specificity;

“(ii) that information maintained for such customer or subscriber by the provider of electronic communications service or remote computing service to which the warrant, order, or subpoena under section 2703, was directed was supplied to or requested by the government entity;

“(iii) that notification of such customer or subscriber was precluded by court order;

“(iv) of the identity of the court authorizing the preclusion of notice;

“(v) of the provision of this chapter under which the preclusion of notice was authorized; and

“(vi) that the government will, upon request by the customer or subscriber, provide the customer or subscriber with a copy of the information that was disclosed in response to the warrant, order or subpoena, or in the event that no information was disclosed, a written certification that no information was disclosed.

“(10) COPY OF INFORMATION DISCLOSED.—Upon expiration of the order precluding notice issued under paragraph (2) or (3) of this subsection, and at the request of the customer or subscriber made within 180 days of receiving notification under paragraph (9), the governmental entity shall promptly provide the customer or subscriber—

“(A) with a copy of the information that was disclosed in response to the warrant, order or subpoena; or

“(B) in the event that no information was disclosed, a written certification that no information was disclosed.”

SEC. 4. ADDITIONAL PROVISIONS REGARDING DELAYED NOTICE.

Section 2705 of title 18, United States Code, is amended by adding at the end the following:

“(c) ANNUAL REPORT.—On an annual basis, the Attorney General shall provide to the Committees on the Judiciary of the House of Representatives and the Senate, in a manner consistent with protection of national security, a report setting forth with respect to the preceding calendar year, for each Federal judicial district—

“(1) the number of customers or subscribers with respect to whom, in that calendar year, a warrant, subpoena, or court order was issued pursuant to section 2703;

“(2) the aggregate number of applications requesting delay of notification pursuant to section 2705;

“(3) the aggregate number of such orders either granted, extended, or denied;

“(4) the aggregate number of such orders targeting a member of the news media, including any conduct related to activities protected under the First Amendment; and

“(5) the aggregate number of arrests, trials, and convictions, resulting from investigations in which such orders were obtained, including the offenses for which individuals were arrested, tried, or convicted.

The Attorney General shall include in the report under this subsection a description of the process and the information used to determine the numbers for each of paragraphs (1) through (5).”

Purpose and Summary

H.R. 7072, the “NDO Fairness Act,” increases transparency of the government’s use of secrecy orders and ensures that non-disclosure orders (NDOs) are granted only when there is sufficient need for secrecy. It specifically amends 18 U.S.C. § 2705 to require that judges apply a strict scrutiny standard when they consider requests for delays of required government notification and when they con-

sider requests for the imposition of non-disclosure orders on electronics communications services and remote computing services. The bill would also require an annual report by the Attorney General on the Department of Justice’s (DOJ) use of searches under 18 U.S.C. § 2703, requests for preclusion of notice under 18 U.S.C. § 2705, and related data.

Background and Need for the Legislation

I. BACKGROUND

NDOs, also known as “gag orders” and “secrecy orders,” prohibit service providers from informing a customer that they were subject to a search by federal law enforcement under the Stored Communications Act.¹ Under this proposed legislation, courts considering a government entity’s NDO request must use a strict scrutiny standard, limit any order granted to 60 days, and narrowly tailor the order to prevent the adverse event contemplated by the government. The bill also: (1) amends 18 U.S.C. 2705(a), to ensure statutory uniformity and require that any application for delayed notice of a search under 18 U.S.C. 2703 is required to meet the same standard as an application for an NDO and (2) requires annual reporting by the Attorney General.

A. The Fourth Amendment and the Stored Communications Act

As a general rule, the Fourth Amendment protects people from unreasonable searches and seizures by the government, unless authorized by a warrant.² With a limited number of notable exceptions, searches and seizures inside a home without a warrant are presumptively unreasonable.³ A warrantless search of a home, and the contents, may be lawful if: (1) consent to search is granted;⁴ (2) the search is incident to a lawful arrest;⁵ (3) there is probable cause to search and exigent circumstances exist;⁶ or (4) if the items that are seized are in plain view.⁷ Where files are on a computer located in a suspect’s home, DOJ must present a particularized description of the items to be seized.⁸

For data that exists in the “cloud” rather than on a home computer, the Department has other authorities that authorize seizure in certain circumstances. In title II of the Electronic Communications Privacy Act of 1986, commonly known as the Stored Communications Act, Congress provided law enforcement agents the ability to compel a provider of electronic communication services to disclose the contents and records of electronic communications.⁹ A law enforcement agent may obtain records of stored electronic communications by either securing a warrant pursuant to the Federal Rules of Criminal Procedure or by a court order.¹⁰

A successful warrant application may be granted if DOJ “offers specific and articulable facts showing that there are reasonable

¹ 18 U.S.C. § 2703.

² U.S. Const. amend. IV.

³ *Payton v. New York*, 445 U.S. 573 (1980).

⁴ *Davis v. United States*, 328 U.S. 582 (1946).

⁵ *United States v. Robinson*, 414 U.S. 218 (1973).

⁶ *Payton v. New York*, 445 U.S. 573 (1980).

⁷ *Maryland v. Macon*, 472 U.S. 463 (1985).

⁸ *Marron v. United States*, 275 U.S. 192, 196 (1927).

⁹ 18 U.S.C. §§ 2701–2711.

¹⁰ 18 U.S.C. § 2703(d).

grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.”¹¹ Courts have interpreted this threshold to be equivalent to the reasonable suspicion standard.¹²

DOJ frequently uses court orders to prevent providers from alerting customers when the government seizes their personal email or records. These orders can be broad and can prevent companies from ever alerting customers that DOJ seized their information.¹³ Although the government has announced intentions to tighten guidelines for the use of secrecy orders, technology companies continue to report frequent use of such orders. For example, Microsoft has previously described, “that in an 18-month period, 2,576 of the legal demands we received from the U.S. government included an obligation of secrecy, and 68 percent of these appeared to be indefinite demands for secrecy. In short, we were prevented from ever telling a large number of customers that the government had sought to access their data.”¹⁴

1. *Non-disclosure Orders*

18 U.S.C. § 2705(b) allows for the government to request an NDO prohibiting the service provider of the subject of a search under 18 U.S.C. § 2703 from informing its user or customer that the search is taking place.¹⁵ When the government applies for an order under section 2703, it can apply for a court order forbidding the service provider from notifying anyone of the compelled disclosure of their customer’s electronic communications.¹⁶ The only guideline for the courts to follow in evaluating whether to grant a request under section 2705 is:

If it determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in—(1) endangering the life or physical safety of an individual; (2) flight from 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.¹⁷

Experts note that this application procedure has evolved into a “rubber stamp” process,¹⁸ where little consideration is given to the true necessity of the order.

2. *Delayed Notification*

Some searches permitted under the Stored Communications Act require the government to notify the subject prior to the search.¹⁹

¹¹ *Id.*

¹² *In re U.S. for an Ord. Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 287 (4th Cir. 2013).

¹³ DOJ acts to curb the overuse of secrecy orders. Now it’s Congress’ turn., MICROSOFT, Oct. 23, 2017, available at: <https://blogs.microsoft.com/on-the-issues/2017/10/23/doj-acts-curb-overuse-secrecy-orders-now-congress-turn/>.

¹⁴ DOJ acts to curb the overuse of secrecy orders. Now it’s Congress’ turn., MICROSOFT, Oct. 23, 2017, available at: <https://blogs.microsoft.com/on-the-issues/2017/10/23/doj-acts-curb-overuse-secrecy-orders-now-congress-turn/>.

¹⁵ 18 U.S.C. § 2705(b).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Tom Burt, Written Testimony Before the House Judiciary Committee, HOUSE CMTE. ON THE JUDICIARY, Jun. 30, 2021.

¹⁹ 18 U.S.C. § 2703(b).

18 U.S.C. § 2703(b) provides for searches with prior notice from the government in cases where it “uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or (ii) obtains a court order for such disclosure under subsection (d).”²⁰ In those cases, the government may ask the court to grant a delay of the notification²¹ under 18 U.S.C. § 2705(a).

Today, warrantless searches in which there is a presumption of notice are infrequently, if ever, used. The Sixth Circuit, in *United States v. Warshak*, found that email account holders in most cases had a reasonable expectation of privacy and thus, pursuant to the Supreme Court’s decision in *Katz v. United States*,²² the government must establish probable cause to search email contents or provide prior notice to allow the subject of the search to obtain judicial review.²³ While this decision has not been codified in legislation, the holding has chilled usage of section 2705(a) by the government.

II. NEED FOR THE LEGISLATION

A. Government Overuse of NDOs

Experts agree that the government liberally requests non-disclosure orders when it files for a warrant or order under 18 U.S.C. § 2703. While there is little data publicly available, and there is no requirement for the federal government to report on its use of sections 2703 and 2705, reports from service providers can provide some idea. Third party cloud and technology companies, such as Google, Apple, Microsoft, and Verizon, are the typical targets of gag orders under 18 U.S.C. § 2705(b).²⁴ When the government obtains one of these orders from a court, the company is unable to alert their customer or user that the government is accessing their emails. Microsoft, for example received 2,400 to 3,500 secrecy orders each year between 2016 and 2021—an average of 7–10 per day, “representing one-quarter to one-third of all the legal demands” it received.²⁵

Experts on the Department’s use of the Stored Communications Act also generally agree that the process to obtain an NDO has become a box-checking exercise. As communication over technology increased, so has the government’s reliance on searches under 18 U.S.C. § 2703, with “an increased aggressiveness by DOJ in more cases to pursue those records it believes will advance its investigations, notwithstanding the rights on the other side of the balance.”²⁶ With those searches have come a flood of NDO requests. During a June 30, 2021 hearing on “Secrecy Orders and Prosecuting Leaks: Potential Legislative Responses to Deter Prosecutorial Abuse of Power” before the House Judiciary Committee, Congresswoman Jayapal (D-WA) asked the four witnesses to rate the

²⁰ *Id.*

²¹ 18 U.S.C. § 2705(a).

²² *Katz v. United States*, 389 U.S. 347.

²³ *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010).

²⁴ Eve Burton, *Written Testimony Before the House Judiciary Committee*, HOUSE CMTE. ON THE JUDICIARY, Jun. 30, 2021.

²⁵ Tom Burt, *Written Testimony Before the House Judiciary Committee*, HOUSE CMTE. ON THE JUDICIARY, Jun. 30, 2021.

²⁶ Eve Burton, *Written Testimony Before the House Judiciary Committee*, HOUSE CMTE. ON THE JUDICIARY, Jun. 30, 2021.

process to obtain an NDO “on a scale of one to 10, of one being a rubber stamp and 10 being a real process that protects our civil liberties.”²⁷ Every witness responded two or below, including one witness who gave the process a zero.²⁸

On October 19, 2017, Deputy Attorney General Rod Rosenstein issued a memorandum regarding DOJ policy towards applications for orders under section 2705(b).²⁹ In the document, the Department outlined the requirements for DOJ prosecutors to follow beyond the stated premise that “each 2705 order should have an appropriate factual basis and each order should extend only as long as necessary to satisfy the government’s interest.”³⁰ These changes included: (1) that prosecutors “conduct an individual and meaningful assessment” to determine the need for a protective order; (2) that applications are tailored to the specific facts of the case with written analysis applying the law; and (3) a one year time limit to any order sought under section 2705(b), among others.³¹

The update was initially praised by service providers, such as Microsoft, which called the memorandum an “important step” that ensures “secrecy orders are used only when necessary and for defined periods of time.”³² Federal magistrate courts had maintained that further orders from the court were necessary to end a secrecy order,³³ so the change limiting prosecutorial NDO requests to one year was essential to time limiting these orders. Microsoft later dropped its lawsuit against the Department,³⁴ which had alleged that the U.S. government had requested secrecy orders for “2,576 legal demands” over 18 months, 68 percent of which “contained no fixed end date.”³⁵ However, during the Committee’s June 30, 2021 hearing, Microsoft Corporate Vice President Tom Burt alleged that in spite of the one-year limit, requests for secrecy orders have remained high since 2016, with use—and court approval—“even for routine investigations without any meaningful analysis of either the need for secrecy or the orders” compliance with fundamental constitutional rights.”³⁶

B. Use Against Journalists and Members of Congress

Presidential administrations have attempted to crack down on classified leaks to media outlets since the Nixon era. Both Presidents George W. Bush and Barack Obama sought journalists’ records through the Espionage Act to investigate leaks to the press. The Bush Administration, after the September 11, 2001 terrorist attacks, used the National Security Agency (NSA) to surveil Ameri-

²⁷ Hearing, “Secrecy Orders and Prosecuting Leaks: Potential Legislative Responses to Deter Prosecutorial Abuse of Power,” HOUSE CMTE. ON THE JUDICIARY, Jun. 30, 2021.

²⁸ *Id.*

²⁹ Rod Rosenstein, “Policy Regarding Applications for Protective Orders Pursuant to 18 U.S.C. 2705(b).” DEPT. OF JUSTICE, Oct. 19, 2017.

³⁰ *Id.*

³¹ *Id.*

³² Brad Smith, “DOJ acts to curb the overuse of secrecy orders. Now it’s Congress’ turn,” Microsoft, Oct. 23, 2017. <https://blogs.microsoft.com/on-the-issues/2017/10/23/doj-acts-curb-over-use-secrecy-orders-now-congress-turn/>.

³³ Hanley Chew, “Federal Gag Orders Likely to Change,” IP WATCHDOG, Feb. 18, 2017. <https://www.ipwatchdog.com/2017/02/18/federal-gag-orders-likely-change/id=78326/>.

³⁴ Lilianna Rembar, “DOJ Tightens Requirements for Obtaining SCA Non-Disclosure Orders,” Jolt Digest, Nov. 6, 2017. <https://jolt.law.harvard.edu/digest/doj-tightens-requirements-for-obtaining-sca-non-disclosure-orders>.

³⁵ Brad Smith, “Keeping secrecy the exception, not the rule: An issue for both consumers and businesses,” Microsoft, Apr. 14, 2016. <https://blogs.microsoft.com/on-the-issues/2016/04/14/keeping-secrecy-exception-not-rule-issue-consumers-businesses/>.

³⁶ Tom Burt, Written Testimony Before the House Judiciary Committee, HOUSE CMTE. ON THE JUDICIARY, Jun. 30, 2021.

cans without warrants. It is unclear to this day how far the Bush DOJ went to surveil journalists. The Obama Administration pursued more leaks through litigation than all of his predecessors combined.³⁷ During that time period, DOJ used subpoenas and the court system to pursue journalists' records. Because DOJ policy did not prohibit prosecutors from asking for secrecy orders without an end date until 2017, it is unknown how many other cases of journalists searched under 18 U.S.C § 2703 might exist.

The use of non-disclosure orders by the Trump Administration to prevent email service providers from alerting their clients of the government's search is the most recent example of NDO use against the press. On May 7, 2021, the *Washington Post* reported that the Justice Department seized three of its journalists' phone records during 2020 and attempted to obtain their emails.³⁸ On May 20, 2021, *CNN* disclosed that DOJ also sought journalist Barbara Starr's phone and non-content email records in 2020.³⁹ Attorneys for *CNN* challenged the subpoena before agreeing to a limited deal on January 26, 2021, which included a "limited set of e-mail logs."⁴⁰ The court also granted the gag order request on the *CNN* executives.⁴¹

On June 2, 2021, the *New York Times* reported that DOJ obtained a court order to seize four of its reporters' phone records.⁴² Google was placed under a gag order and unable to notify the *Times*.⁴³ On June 10, 2021, it was then reported that DOJ subpoenaed Apple for phone and email records from 2017 and early 2018.⁴⁴ This request swept up the information of Rep. Adam Schiff (D-CA), Rep. Eric Swalwell (D-CA), congressional aides, and their family members.⁴⁵ Apple's subpoena was issued on February 6, 2018 and requested information from 73 phone numbers and 36 email addresses.⁴⁶ Finally, on June 13, 2021, the *New York Times* reported that DOJ subpoenaed Apple for information on accounts belonging to White House Counsel Don McGahn and his wife.⁴⁷ The company was prevented from disclosing the subpoena to Mr. McGahn until May 2021.⁴⁸ The legal battle for emails continued throughout the early months of the Biden Administration. *CNN* settled with DOJ on January 26th, 2021.⁴⁹ DOJ, however, continued in its legal battle with Google and the *New York Times* well

³⁷ Calvin Woodward and Christopher Rugaber, AP FACT CHECK: Obama was harsh against leakers, AP, Sep. 11, 2018.

³⁸ Devlin Barrett, Trump Justice Department secretly obtained Post reporters' phone records, WASH. POST, May 7, 2021.

³⁹ Adam Goldman, Trump Justice Dept. Seized CNN Reporter's Email and Phone Records, N.Y. TIMES, May 20, 2021.

⁴⁰ Katelyn Polantz and Evan Perez, Trump administration pursued CNN reporter's records in months-long secret court battle, CNN, Jun. 9, 2021.

⁴¹ *Id.*

⁴² Charlie Savage and Katie Benner, Trump Administration Secretly Seized Phone Records of Times Reporters, N.Y. TIMES, June 2, 2021.

⁴³ Charlie Savage and Katie Benner, U.S. Waged Secret Legal Battle to Obtain Emails of 4 Times Reporters, N.Y. TIMES, Jun. 9, 2021.

⁴⁴ Katie Benner, et al., Hunting Leaks, Trump Officials Focused on Democrats in Congress, N.Y. TIMES, June 10, 2021; Manu Raju, et al., Trump Justice Department subpoenaed Apple for data from House Intelligence Committee Democrats, sources say, CNN, June 10, 2021.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Michael S. Schmidt & Charlie Savage, Apple Is Said to Have Turned Over Data on Trump's White House Counsel in 2018, N.Y. TIMES, June 13, 2021.

⁴⁸ *Id.*

⁴⁹ Katelyn Polantz and Evan Perez, Trump administration pursued CNN reporter's records in months-long secret court battle, CNN, Jun. 9, 2021.

into the first quarter of the year.⁵⁰ This included requested—and granted—renewals of the secrecy orders preventing the public and affected journalists from being made aware of the seizure of their records.

On June 5, 2021, the Biden Administration announced that it would not seek journalists’ records.⁵¹ On June 11, 2021, the DOJ Inspector General announced it was “initiating a review of DOJ’s use of subpoenas and other legal authorities to obtain communication records of Members of Congress and affiliated persons, and the news media . . . The review will examine the Department’s compliance with applicable DOJ policies and procedures, and whether any such uses, or the investigations, were based upon improper considerations.” Attorney General Merrick Garland has asked the Deputy Attorney General to “evaluate and strengthen the department’s existing policies and procedures for obtaining records of the Legislative branch.”⁵² Notably, this is not a commitment to evaluate the Department’s policies and procedures for obtaining records from the press or its use of secrecy orders. Furthermore, any changes made by DOJ can be reversed by later administrations.

Finally, Project Veritas—an organization run by CEO James O’Keefe and known for targeting journalists, politicians, and political organizations with undercover recordings and ambush interviews—revealed in a court filing on March 22, 2022 that it had been the subject of an electronic records search under 18 U.S.C. § 2703(d) between November 2020 and April 2021.⁵³ Project Veritas is under investigation by—and in a protracted legal battle with—DOJ into how it came into possession of the diary of the daughter of then-Presidential Candidate Joe Biden in October 2020.⁵⁴ In conjunction with its requests to compel disclosure of the electronic records of Project Veritas-related emails, the government also requested and obtained so-called gag orders on Project Veritas’ email service provider, Microsoft, under 18 U.S.C. 2705(b), preventing any disclosure of the search from Microsoft to Project Veritas.⁵⁵ These secrecy orders were extended by DOJ prosecutors, “after the government’s diary investigation had long been a matter of public record such that any purported grounds for the nondisclosure orders became non-existent.”⁵⁶

III. CONCLUSION

H.R. 7072 would restore constitutional protections into the non-disclosure order process. When the government obtains a search order under the Stored Communications Act, it often has no obligation to tell the subject that their email records will be searched, and the government can use 2705(b) to prohibit the subject’s service provider from informing their customer of the search—even

⁵⁰ Charlie Savage and Katie Benner, *U.S. Waged Secret Legal Battle to Obtain Emails of 4 Times Reporters*, N.Y. TIMES, Jun. 9, 2021.

⁵¹ Veronica Stracqualursi, Biden’s Justice Department says it will no longer seize reporters’ records for leak investigations, CNN, Jun. 5, 2021.

⁵² Statement from Attorney General Merrick B. Garland, DEPT. OF JUSTICE, June 14, 2021. <https://www.justice.gov/opa/pr/statements-attorney-general-merrick-b-garland>.

⁵³ Letter, *In re Search Warrant dated November 5, 2021, Case No. 21-MC-00813 (AT)*, Mar. 22, 2022.

⁵⁴ Michael S. Schmidt and Adam Goldman, “Project Veritas Says Justice Dept. Secretly Seized Its Emails,” N.Y. TIMES, Mar. 22, 2022.

⁵⁵ *Id.*

⁵⁶ Letter, *In re Search Warrant dated November 5, 2021, Case No. 21-MC-00813 (AT)*, Mar. 22, 2022.

when it's legally required under a user contract. The provisions of H.R. 7072 would ensure that the government can only obtain secrecy orders prohibiting service providers from speaking freely to their customers when it is truly necessary. By amending 18 U.S.C. 2705(b) to require that the courts issue a written decision as to why an NDO is necessary, time-limit secrecy orders to 60 days, and allow service providers standing to challenge non-disclosure orders, H.R. 7072 would ensure Americans' data is protected from government overreach.

Hearings

For the purposes of clause 3(c)(6)(A) of House rule XIII, the following hearing was used to consider H.R. 7072:

On June 30, 2021, the House Committee on the Judiciary held a hearing entitled, "Secrecy Orders and Prosecuting Leaks: Potential Legislative Responses to Deter Prosecutorial Abuse of Power." The witnesses at the hearing were: Tom Burt, Corporate Vice President, Customer Security & Trust, Microsoft Corporation; Eve Burton, Executive Vice President & Chief Legal Officer, Hearst Corporation; Lynn Oberlander, Of Counsel, Ballard Spahr LLP; and Jonathan Turley, J.B. and Maurice C. Shapiro Professor of Public Interest Law, The George Washington University Law School. The hearing examined the applicable law and DOJ policies and procedures to determine what, if any, action Congress can or should take to address concerns over potential abuse of DOJ's authority to conduct investigations of unauthorized disclosures of classified information and its overuse of secrecy orders. The witnesses discussed overuse of non-disclosure orders by DOJ, including the effects of such overuse on the freedoms of the press.

Committee Consideration

On April 6, 2022, the Committee met in open session and ordered the bill, H.R. 7072, favorably reported, as amended, by a voice vote, a quorum being present.

Committee Votes

No roll call votes occurred during the Committee's consideration of H.R. 7072.

Committee Oversight Findings

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

Committee Estimate of Budgetary Effects

Pursuant to clause 3(d)(1) of House rule XIII, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

New Budget Authority and Congressional Budget Office Cost Estimate

Pursuant to clause 3(c)(2) of House rule XIII and section 308(a) of the Congressional Budget Act of 1974, and pursuant to clause (3)(c)(3) of House rule XIII and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received from the Director of the Congressional Budget Office a budgetary analysis and a cost estimate of this bill.

Duplication of Federal Programs

Pursuant to clause 3(c)(5) of House rule XIII, no provision of H.R. 7072 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of House rule XIII, H.R. 7072 would amend section 2705 of United States Code title 18 to establish standards necessary for courts to: (1) grant a government request to delay their responsibility to notify the subject of an electronic communications search that their records were searched and (2) grant a government request for a non-disclosure order, prohibiting the search subject's service provider from informing the subject of the search. It would also add a third section, to require annual reports from the Attorney General to Congress on the use of searches under section 2703 of the United States Code title 18.

Advisory on Earmarks

In accordance with clause 9 of House rule XXI, H.R. 7072 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9, or 9(f) of rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short Title. This section sets forth the short title of the bill as the "NDO Fairness Act."

Sec. 2. Delay of Notification. This section revises 18 U.S.C. § 2705(a) to raise the standard for courts to grant a government request to delay notification to the subject of a search. It stipulates that requests should only be granted in cases where there are specific and articulable facts supported by written findings of fact and conclusions of law that the notification will, by a substantial likelihood, result in endangering the safety of an individual, flight from prosecution, destruction of evidence, intimidation of witnesses, or otherwise jeopardize an investigation or unduly delay a trial. Under this section, a governmental entity may still request a notification delay, but it cannot exceed 60 days, and extensions are similarly permitted but time-limited to not more than 60 days. It also stipulates the government's obligation to the subject of a search after the expiration of the delay, and requires the government to deliver a copy of the order to the customer by at least 2 methods

of communication within 72 hours of the expiration of a delay, including notice of the specific nature of the inquiry, the information that was supplied to or requested by the governmental entity, the existence of the delay, the identity of the court authorizing the delay, and the legal basis for the delay. During the following 180 days after expiration of the delay period, the subject of the order can also request a copy of the disclosed information or a written certification that no information was disclosed.

Sec. 3. Preclusion of Notice. Section 3 revises 18 U.S.C. § 2705(b). It governs delays of notification for governmental entities seeking a warrant under 18 U.S.C. § 2703. In cases where a governmental entity is not required to notify the customer or subscriber, it may apply for a court order directing a provider not to notify another person of the existence of an order under section 2703 for a maximum of 60 days. A court may only grant a request for a delay or extension in cases where there are specific and articulable facts supported by written findings of fact and conclusions of law, applying a strict scrutiny standard, that the notification will, by a substantial likelihood, result in endangering the safety of an individual, flight from prosecution, destruction of evidence, intimidation of witnesses, or otherwise jeopardize an investigation or unduly delay a trial. There must also be no less restrictive alternative, and the order must be narrowly tailored. Delays or extensions under section 3 must also meet the same standard and are time-limited to not more than 60 days. The government must notify the court within 72 hours of any change in the need for the order.

Under these changes, providers under section 3 have the capacity to challenge orders when they do not meet the requirements for a delay or where compliance would be unreasonable or unlawful. During appeal, any required disclosure is stayed pending the resolution of a filed challenge unless a court determines otherwise. A court's decision on a challenge is a final appealable order.

Service providers are permitted to disclose the existence of an order to individuals necessary for compliance, attorneys for legal advice, and any other person determined by the court. Any person who receives disclosure is bound by the same non-disclosure requirements as the entity that provided the information.

Service of a provider shall include a copy of the warrant, order, or subpoena to which the non-disclosure order applies. Within 72 hours of the expiration of a delay, the government must deliver a copy of the order to the customer by at least 2 methods of communication, including notice of the specific nature of the inquiry, the information that was supplied to or requested by the governmental entity, the existence of the delay, the identity of the court authorizing the delay, and the legal basis for the delay. The customer may also request, during the next 180 days, a copy of the disclosed information or a written certification that no information was disclosed.

Sec. 4. Additional Provisions Regarding Delayed Notice. Section 4 creates a new section at the end of section 2705 that requires the Attorney General to report to the House and Senate Judiciary Committees on a yearly basis the number of customers targeted for a 2703 order, the number of applications for a delay of notification, the number of granted, extended, or denied orders, the number of orders targeting a member of the news media or conduct related to

First Amendment protected activities, and the number of arrests, trials and convictions—including the offenses—resulting from the orders.

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 I—CRIMES

* * * * *

CHAPTER 121—STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

* * * * *

§ 2705. Delayed notice

[(a) DELAY OF NOTIFICATION.—(1) A governmental entity acting under section 2703(b) of this title may—

[(A) where a court order is sought, include in the application a request, which the court shall grant, for an order delaying the notification required under section 2703(b) of this title for a period not to exceed ninety days, if the court determines that there is reason to believe that notification of the existence of the court order may have an adverse result described in paragraph (2) of this subsection; or

[(B) where an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury subpoena is obtained, delay the notification required under section 2703(b) of this title for a period not to exceed ninety days upon the execution of a written certification of a supervisory official that there is reason to believe that notification of the existence of the subpoena may have an adverse result described in paragraph (2) of this subsection.

[(2) An adverse result for the purposes of paragraph (1) of this subsection is—

[(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) The governmental entity shall maintain a true copy of certification under paragraph (1)(B).

[(4) Extensions of the delay of notification provided in section 2703 of up to ninety days each may be granted by the court upon application, or by certification by a governmental entity, but only in accordance with subsection (b) of this section.

[(5) Upon expiration of the period of delay of notification under paragraph (1) or (4) of this subsection, the governmental entity shall serve upon, or deliver by registered or first-class mail to, the customer or subscriber a copy of the process or request together with notice that—

[(A) states with reasonable specificity the nature of the law enforcement inquiry; and

[(B) informs such customer or subscriber—

[(i) that information maintained for such customer or subscriber by the service provider named in such process or request was supplied to or requested by that governmental authority and the date on which the supplying or request took place;

[(ii) that notification of such customer or subscriber was delayed;

[(iii) what governmental entity or court made the certification or determination pursuant to which that delay was made; and

[(iv) which provision of this chapter allowed such delay.

[(6) As used in this subsection, the term “supervisory official” means the investigative agent in charge or assistant investigative agent in charge or an equivalent of an investigating agency’s headquarters or regional office, or the chief prosecuting attorney or the first assistant prosecuting attorney or an equivalent of a prosecuting attorney’s headquarters or regional office.

[(b) PRECLUSION OF NOTICE TO SUBJECT OF GOVERNMENTAL ACCESS.—A governmental entity acting under section 2703, when it is not required to notify the subscriber or customer under section 2703(b)(1), or to the extent that it may delay such notice pursuant to subsection (a) of this section, may apply to a court for an order commanding a provider of electronic communications service or remote computing service to whom a warrant, subpoena, or court order is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order. The court shall enter such an order if it determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in—

[(1) endangering the life or physical safety of an individual;

[(2) flight from 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.]

(a) *DELAY OF NOTIFICATION.*—

(1) *APPLICATION.*—A governmental entity that is seeking a warrant, order, or subpoena under section 2703 may include in the application (or motion in the case of an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena) a request to a court of competent jurisdiction for an order delaying the notification under section 2703 for a period of not more than 60 days.

(2) *DETERMINATION.*—The court may not grant a request for delayed notification to a customer or subscriber made under paragraph (1), or an extension of such delayed notification requested by the governmental entity pursuant to paragraph (3), unless the court issues a written determination, based on specific and articulable facts, and including written findings of fact and conclusions of law, that it is substantially likely that the notification of the customer or subscriber of the existence of the warrant, order, or subpoena will 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) *EXTENSION.*—The governmental entity may request one or more extensions of the delay of notification granted under paragraph (2) for a period of not more than 60 days for each such extension. The court may only grant such an extension if the court makes a written determination required under paragraph (2) and the extension is in accordance with the requirements of such paragraph.

(4) *EXPIRATION OF DELAY OF NOTIFICATION.*—Upon expiration of the period of delay of notification and all extensions thereof under paragraphs (2) and (3) of this subsection, the governmental entity shall deliver to the customer or subscriber by at least 2 methods, which shall be personal service, registered or first-class mail, electronic mail, or other means approved by the court, as reasonably calculated to reach the customer or subscriber within 72 hours of the expiration of the delay—

- (A) a copy of the warrant, order, or subpoena; and
- (B) notice that informs such customer or subscriber—
 - (i) of the nature of the inquiry made by the governmental entity, with reasonable specificity;
 - (ii) that information maintained for such customer or subscriber by the provider of electronic communications service or remote computing service to which the warrant, order, or subpoena under section 2703 was directed, was supplied to or requested by the governmental entity;
 - (iii) that notification of such customer or subscriber was delayed by court order;
 - (iv) the identity of the court that issued such order;
 - (v) the provision of law under which the order delaying notification was authorized; and
 - (vi) that the governmental entity will, upon request by the customer or subscriber, provide the customer or subscriber with a copy of the information that was disclosed in response to the warrant, order, or subpoena, or in the event that no information was disclosed, a written certification that no information was disclosed.

(5) *COPY OF INFORMATION DISCLOSED.*—Upon expiration of the period of delay of notification under paragraph (2) or (3) of this subsection, and at the request of the customer or subscriber

made within 180 days of receiving notification under paragraph (4), the governmental entity shall promptly provide the customer or subscriber—

(A) with a description of the information disclosed and a copy of the information that was disclosed in response to the warrant, order, or subpoena; or

(B) in the event that no information was disclosed, with a written certification that no information was disclosed.

(b) **PRECLUSION OF NOTICE.**—

(1) **APPLICATION.**—A governmental entity that is seeking a warrant, order, or subpoena under section 2703, when it is not required to notify the customer or subscriber, or to the extent that it may delay such notice pursuant to subsection (a), may apply to a court for an order, subject to paragraph (6), directing a provider of electronic communications service or remote computing service to which a warrant, order, or subpoena under section 2703 is directed not to notify any other person of the existence of the warrant, order, or subpoena for a period of not more than either 60 days or the period of delay of notice provided under subsection (a), if any.

(2) **DETERMINATION.**—The court may not grant a request for an order made under paragraph (1), or an extension of such order requested by the governmental entity pursuant to paragraph (3), unless—

(A) the court issues a written determination, based on specific and articulable facts, and including written findings of fact and conclusions of law, that it is substantially likely that not granting the request will 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; and

(B) the order is narrowly tailored and there is no less restrictive alternative, including notification to an individual or organization within or providing legal representation to the customer or subscriber, to avoid an adverse result as described in clause (i) through (v) of subparagraph (A).

(3) **EXTENSION.**—A governmental entity may request one or more extensions of an order granted under paragraph (2) of not more than 60 days for each such extension. The court may only grant such an extension if the court makes a written determination required under paragraph (2)(A) and the extension is in accordance with the requirements of (2)(B).

(4) **NOTIFICATION OF CHANGED CIRCUMSTANCES.**—If the need for the order issued under paragraph (2) changes materially, the governmental entity that requested the order shall notify the court within 72 hours of the changed circumstances, and the court shall reassess the order and modify or vacate as appropriate.

(5) **OPPORTUNITY TO BE HEARD.**—

(A) **IN GENERAL.**—Upon an application, petition, or motion by a provider of electronic communications service or

remote computing service or person acting on behalf of the provider to which an order under paragraph (2) (or an extension under paragraph (3)) has been issued, the court may modify or vacate the order if—

- (i) the order does not meet requirements provided in paragraph (2); or
- (ii) compliance with the order is unreasonable or otherwise unlawful.

(B) *STAY OF DISCLOSURE OF CUSTOMER OR SUBSCRIBER COMMUNICATIONS OR RECORDS.*—A provider's obligation to disclose the information requested in the warrant, order, or subpoena to which the order in paragraph (1) applies is stayed upon the filing of the application, petition, or motion under this paragraph pending resolution of the application, petition, or motion, unless the court with jurisdiction over the challenge determines based on a showing by the governmental entity that the stay should be lifted in whole or in part prior to resolution.

(C) *FINALITY OF ORDER.*—The decision of the court resolving an application, petition, or motion under this paragraph shall constitute a final, appealable order.

(6) *EXCEPTION.*—A provider of electronic communications service or remote computing service to which an order under paragraph (2) applies, or an officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

- (A) those persons to whom disclosure is necessary in order to comply with the warrant, order, or subpoena;
- (B) an attorney in order to obtain legal advice or assistance regarding the warrant, order, or subpoena; and
- (C) any person the court determines can be notified of the warrant, order, or subpoena.

(7) *SCOPE OF NONDISCLOSURE.*—Any person to whom disclosure is made under paragraph (6) (other than the governmental entity) shall be subject to the nondisclosure requirements applicable to the person to whom the order is issued. Any recipient authorized under this subsection to disclose to a person information otherwise subject to a nondisclosure requirement shall notify the person of the applicable nondisclosure requirement.

(8) *SUPPORTING DOCUMENTATION.*—Upon serving a provider of electronic communications service or remote computing service with an order granted under paragraph (2), or an extension of such order granted under paragraph (3), the governmental entity shall include a copy of the warrant, order, or subpoena to which the nondisclosure order applies.

(9) *EXPIRATION OF ORDER PRECLUDING NOTICE.*—Upon expiration of an order issued under paragraph (2) or, if an extension has been granted under paragraph (3), expiration of the extension, the governmental entity shall deliver to the customer or subscriber, by at least 2 methods, which shall be personal service, registered or first-class mail, electronic mail, or other means approved by the court as reasonably calculated to reach the customer or subscriber within 72 hours of the expiration of the order—

- (A) a copy of the warrant, order, or subpoena; and

(B) notice that informs the customer or subscriber—

(i) of the nature of the law enforcement inquiry with reasonable specificity;

(ii) that information maintained for such customer or subscriber by the provider of electronic communications service or remote computing service to which the warrant, order, or subpoena under section 2703, was directed was supplied to or requested by the government entity;

(iii) that notification of such customer or subscriber was precluded by court order;

(iv) of the identity of the court authorizing the preclusion of notice;

(v) of the provision of this chapter under which the preclusion of notice was authorized; and

(vi) that the government will, upon request by the customer or subscriber, provide the customer or subscriber with a copy of the information that was disclosed in response to the warrant, order or subpoena, or in the event that no information was disclosed, a written certification that no information was disclosed.

(10) COPY OF INFORMATION DISCLOSED.—Upon expiration of the order precluding notice issued under paragraph (2) or (3) of this subsection, and at the request of the customer or subscriber made within 180 days of receiving notification under paragraph (9), the governmental entity shall promptly provide the customer or subscriber—

(A) with a copy of the information that was disclosed in response to the warrant, order or subpoena; or

(B) in the event that no information was disclosed, a written certification that no information was disclosed.

(c) ANNUAL REPORT.—On an annual basis, the Attorney General shall provide to the Committees on the Judiciary of the House of Representatives and the Senate, in a manner consistent with protection of national security, a report setting forth with respect to the preceding calendar year, for each Federal judicial district—

(1) the number of customers or subscribers with respect to whom, in that calendar year, a warrant, subpoena, or court order was issued pursuant to section 2703;

(2) the aggregate number of applications requesting delay of notification pursuant to section 2705;

(3) the aggregate number of such orders either granted, extended, or denied;

(4) the aggregate number of such orders targeting a member of the news media, including any conduct related to activities protected under the First Amendment; and

(5) the aggregate number of arrests, trials, and convictions, resulting from investigations in which such orders were obtained, including the offenses for which individuals were arrested, tried, or convicted.

The Attorney General shall include in the report under this subsection a description of the process and the information used to determine the numbers for each of paragraphs (1) through (5).

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