

NDO FAIRNESS ACT

Mr. FITZGERALD. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 3089) to amend title 18, United States Code, to modify delayed notice requirements, and for other purposes.

The Clerk read the title of the bill.

The text of the bill is as follows:

H.R. 3089

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

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

SEC. 2. 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) IN GENERAL.—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.

“(B) LENGTH.—An order granted under subparagraph (A) shall be in effect for a period of not more than 90 days.

“(C) OTHER REQUIREMENTS.—

“(i) IN GENERAL.—A application for an order under subparagraph (A) shall state, to the best of the applicant’s knowledge, whether the named customer or subscriber whose information is sought by the warrant, order, or subpoena under section 2703—

“(I) is aware of the warrant, order, subpoena, or underlying investigation; and

“(II) is suspected of involvement in the commission of the crime under investigation.

“(ii) ORDERS.—An order granted under this paragraph may not direct, or otherwise require, a provider of electronic communications service or remote computing service to provide notification of the expiration of order to the court or government entity that sought the order.

“(2) DETERMINATION.—

“(A) IN GENERAL.—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—

“(i) 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 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

“(ii) 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 named customer or subscriber, that is not likely to result in an adverse result as described in clauses (i) through (v) of subparagraph (A); and

“(iii) the court has reviewed the individual warrant, order, or subpoena under section

2703 to which the order issued under this paragraph applies.

“(B) NATURE OF THE OFFENSE.—The court may consider the nature of the offense in issuing a determination under subparagraph (A).

“(3) EXTENSION.—A governmental entity may request one or more extensions of an order granted under paragraph (2) of not more than 90 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 a reasonable period of time (not to exceed 14 days) 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 (3); or

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

“(B) STAY OF DISCLOSURE OF NAMED 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 order issued under paragraph (2) or the warrant, order, or subpoena to which the order applies; 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 named 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 named customer or subscriber within 5 business days of the expiration of the order—

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

“(B) notice that informs the named 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 made within 180 days after receiving notification under this paragraph, provide the named 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 named customer or subscriber made within 180 days of receiving notification under paragraph (9), the governmental entity shall promptly provide the named customer or subscriber—

“(A) with a copy of the information that was disclosed in response to the warrant, order or subpoena (except illicit records, child sexual abuse material, and other illegal material); or

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

“(11) REDACTIONS.—Any information disclosed pursuant to paragraphs (9) and (10) may be redacted only if a court finds such redactions necessary to preserve the secrecy or integrity of an investigation.”.

SEC. 3. 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 Committee on the Judiciary of the House of Representatives, the Committee on the Judiciary of the Senate, and the Director of the Administrative Office of the United States Courts, which the Director shall publish on the website of the Administrative Office of the United States Courts, 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 named 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 subsection (a)(1), preclusion of notice pursuant to subsection (b)(1), and extensions pursuant to subsection (b)(3);

“(3) the aggregate number of orders under this section either granting, extending, or denying a request for delay of notification or preclusion of notice;

“(4) the aggregate number of orders under this section affecting 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 orders under this section 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).”.

The SPEAKER pro tempore. Pursuant to the rule, the gentleman from Wisconsin (Mr. FITZGERALD) and the gentlewoman from Texas (Ms. JACKSON LEE) each will control 20 minutes.

The Chair recognizes the gentleman from Wisconsin.

GENERAL LEAVE

Mr. FITZGERALD. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks and to include extraneous material on H.R. 3089, the bill now under consideration.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

Mr. FITZGERALD. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in strong support of this legislation, H.R. 3089, the NDO Fairness Act. This bill makes much-needed changes to the way law enforcement obtains and utilizes nondisclosure orders, also known as secrecy orders.

Before modern advancements in cloud computing, when a law enforcement officer wanted to search someone's office, they would be required to obtain a search warrant based on probable cause, as we are all well aware of. When the officer executed the search, they would notify the individual, who would then have an opportunity to challenge the search in court. However, the era of cloud computing has ushered in a new method of storing sensitive information, whereby, as we know, individuals are replacing file cabinets with digital file folders.

Unbeknownst to them, by surrendering this physical office in favor of a digital office, individuals are also surrendering their expectation of privacy. That is because a provision within the Electronic Communications Privacy Act allows law enforcement to access an individual's data by subpoenaing the third-party service provider, such as Microsoft, Google, or Apple, rather than the individual.

The law enforcement officer then imposes a secrecy order on the company, preventing them from notifying the individual of the search. The secrecy order is often boilerplate in nature and without a time limit, leading to abuse and overuse.

According to Microsoft, between January to June 2022, Federal authorities requested U.S. citizen data from more than 5,500 accounts, an average of 15 requests per day. Over the same time period, Google received more than 21,000 subpoenas for nearly 50,000 accounts. Apple, whose public data is only available through calendar year 2021, received more than 6,600 requests between July and December of that year.

In nearly all the cases, a secrecy order was imposed on the company to prevent the disclosure of the search. The NDO Fairness Act would stop this abuse, which has allowed the circumvention of Fourth Amendment protections in favor of simple convenience.

This legislation ends indefinite secrecy orders, instead requiring the court to certify that disclosing the search is likely to jeopardize an investigation, result in the destruction of evidence, or endanger the life of an individual.

This legislation also imposes a 90-day limit on secrecy orders, with an extension available if and only if the need for secrecy is justified based on the facts and approval by a judge.

Finally, this legislation gives the individual subject to searches a chance to be heard and a chance to request a copy of the information that was disclosed.

Today's legislation, while not a major overhaul of ECPA, provides us with an opportunity to address the threat to our constitutional freedoms. These changes, I believe, will bring searches of the cloud more closely in line with Fourth Amendment searches.

Mr. Speaker, I thank my colleague from New York (Mr. NADLER), the ranking member of the House Judiciary Committee, for co-leading this bill, and I thank the chairman of the committee, Chairman JORDAN, for his leadership on this issue.

Mr. Speaker, I urge swift passage of the bill, and I reserve the balance of my time.

Ms. JACKSON LEE. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, let me, first of all, indicate that today is the National Fraternal Order of Police 42nd Annual National Peace Officers' Memorial Service, which I will make comments on throughout my discussion and debate of other bills. It is important to note the hundreds and hundreds of police officers that are here to honor those who have fallen in the line of duty and the many families who are here, as well, mourning and receiving recognition today.

At the same time, I render my sympathy and concern for Congressman

GERRY CONNOLLY and two staff members who have been violently attacked in his congressional office in Virginia and indicate our prayers and best wishes for these particular staff persons' speedy recovery. I know that we all are stunned, but we also offer our concern to our colleague and wish him safety, along with his staff.

Mr. Speaker, I now rise to offer strong support for H.R. 3089, the NDO Fairness Act, the crucial bipartisan surveillance reform legislation that passed out of the Judiciary Committee last week on a voice vote.

I thank Mr. FITZGERALD. I thank Mr. NADLER, the ranking member, for his leadership in working together with Mr. FITZGERALD and, of course, all of us on the committee that saw the rightness and reason for this legislation.

The NDO Fairness Act is a simple, straightforward bill that addresses a narrow problem by establishing essential guardrails for when the government seeks to assess someone's electronic communications without that person's knowledge.

This legislation would insert balance into a system that, for too long, has been a free-for-all for government prosecutors.

Let me be very clear: Nothing that we are doing is intending to undermine the fair prosecution of those who have done wrong, those who are criminals and otherwise who warrant the prosecution of the Federal Government.

It is, as we debated right after 9/11, an attempt to uphold the values of this Nation. I remember the intense discussions we had on the PATRIOT Act when the inclination after the heinous, devastating murder of 3,000-plus Americans on 9/11 was that we needed to do everything to insist that no one had even an inch of freedom.

I am glad that, in the Judiciary Committee, of which I was a member at that time, we saw the rhyme and reason, and we worked in a bipartisan way to establish a PATRIOT Act that could, in fact, fight terrorism, as it has done, but also protect the constitutional rights of Americans.

I see this in this NDO Fairness Act today. Under current law, after the government obtains a court's permission to search the contents of a person's electronic communications, a wish they would not know, prosecutors must then compel the email service provider to produce the relevant data. To avoid having the service provider turn around and tell its customer about the search, the government can also ask the court to grant a nondisclosure order, or NDO, colloquially referred to as a secrecy or gag order. You are gagging the American citizen.

There is no time limit for these orders. There is no standard to meet. Today, all the government needs to do is cite one of five potential adverse results, without showing that it is necessary, and the court may grant the request.

Prosecutors frequently seek these secrecy orders in cases where there is clearly sometimes no need and in situations where the government alone benefits. In many instances, there is no need.

Unlike when a physical search order occurs and a person has the right to go to court to dispute the warrant, NDOs can keep the subject of the search in the dark until the court reverses the order.

The NDO Fairness Act would do away with the rubberstamped process that governs gag order requests by ensuring that courts apply a strict scrutiny standard to government requests with a written determination explaining their reasoning.

By time-limiting nondisclosure orders, raising the standard of review, and ensuring that service providers have standing when they object, H.R. 3089 inserts transparency, reason, and balance into a system and fairness and justice on both sides that far too long has been a free-for-all for government prosecutors simply by virtue of it being just too easy to overuse.

In the 21st century, Federal prosecutors no longer need to show up to your office. They just need to raid your virtual office. Unlike physical searches, they can search an email in secret. The House surveillance laws have not kept pace with rapidly changing technology.

Mr. Speaker, just wait on the march of AI. I think this bill is extremely timely because we have to be engaged with our constitutional values no matter what the level of technology is. It is imperative that the House of Representatives act to ensure that Americans are still protected as everyday life moves increasingly online.

Mr. Speaker, I thank Congressman FITZGERALD for introducing this bill and Ranking Member NADLER, again, for his leadership on this issue. I also thank Chairman JORDAN for moving this bill swiftly through the Judiciary Committee and Senator LEE for his leadership in the Senate. I was glad to serve as the ranking member of the subcommittee dealing with this bill, as well.

Mr. Speaker, I encourage my colleagues to vote "yes" and to pass this important legislation today, and I reserve the balance of my time.

Mr. FITZGERALD. Mr. Speaker, I have no further speakers, and I am prepared to close.

Mr. Speaker, I reserve the balance of my time.

Ms. JACKSON LEE. Mr. Speaker, I yield myself the balance of my time.

Mr. Speaker, let me cite an example that I think is worthy of my colleagues hearing. Between 2016 and 2021, Microsoft received between 7 and 10 NDOs every day. That is, on average, from 2,400 to 3,500 secrecy orders a year.

Apple has received roughly 13,200 requests with secrecy orders from Federal agencies over the past 5 years, which is approximately 2,600 requests annually or the equivalent of 7 to 8 re-

quests per day that are accompanied by a gag order.

Just think of how many Americans that impacts. They are not the only service providers to feel the legal burden. Google has about 130,000 secrecy orders right now. Meta averages more than 100,000 requests per year.

For example, in the first half of 2021, 70 percent of the 63,657 search requests Meta received included gag orders. That is an enormous tally. That is a lot of Americans.

To be very clear, as I conclude my remarks, this is in no way attempting to thwart the important prosecution of individuals who are intending to do harm in any way to the United States by way of criminal acts. Certainly, we believe in justice for any person who is accused. They have a right to due process, a trial by their peers and otherwise, but we do believe that it is important to protect the vast number of Americans who would not know what is happening to their online searches or their online privacy.

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Mr. Speaker, the NDO Fairness Act would insert process and deliberation into gag order requests and make it more likely that Americans whose electronic communications are searched can assert their rights in court.

Mr. Speaker, I rise in strong support of H.R. 3089, the "NDO Fairness Act," crucial bipartisan surveillance reform legislation that passed out of the Judiciary Committee last week on a voice vote.

The NDO Fairness Act is a simple, straightforward bill that addresses a narrow problem. By establishing essential guardrails for when the government seeks to access someone's electronic communications without that person's knowledge, this legislation would insert balance into a system that for too long has been a free-for-all for government prosecutors. Under current law, after the government obtains a court's permission to search the contents of a person's electronic communications, prosecutors must then compel the email service provider to produce the relevant data.

To avoid having the service provider turn around and tell its customer about the search, the government can also ask the court to grant a nondisclosure order, or NDO, colloquially referred to as a "secrecy" or "gag" order.

There is no time limit to these orders. There is no standard to meet. Today, all the government needs to do is cite one of five potential adverse results—without showing that it is necessary—and the court may grant the request.

Prosecutors frequently seek these secrecy orders in cases where there is clearly no need, and in situations where the government alone benefits. Unlike when a physical search occurs, and a person has the right to go to court to dispute the warrant, NDOs can keep the subject of the search in the dark until a court reverses the order.

The NDO Fairness Act would do away with the rubber stamp process that governs gag order requests by ensuring that courts apply a strict scrutiny standard to government re-

quests, with a written determination explaining their reasoning.

By time-limiting nondisclosure orders, raising the standard of review, and ensuring that service providers have standing when they object, H.R. 3089 inserts transparency, reason, and balance into a system that for too long has been a free-for-all for government prosecutors, simply by virtue of it being too easy to overuse.

In the 21st century, federal prosecutors no longer need to show up to your office. They just need to raid your virtual office, but unlike physical searches, they can search an email in secret. Our surveillance laws have not kept pace with rapidly changing technology.

It is imperative that the House of Representatives act to ensure that Americans are still protected as everyday life moves increasingly online.

I thank Congressman FITZGERALD for introducing this bill, and Ranking Member NADLER for his leadership on this issue. I also want to thank Chairman JORDAN for moving this bill swiftly through the Judiciary Committee and Senator LEE for his leadership in the Senate.

I encourage my colleagues to vote "yes" and to pass this important legislation today.

Mr. Speaker, the NDO Fairness Act would insert process and deliberation into gag order requests and make it more likely that Americans whose electronic communications are searched can assert their rights in court. This is good bipartisan legislation, I urge all Members to support it.

Mr. Speaker, this is good bipartisan legislation, and I urge all of the Members to support it.

Mr. Speaker, I yield back the balance of my time.

Mr. FITZGERALD. Mr. Speaker, I reiterate my strong support for this bipartisan bill, H.R. 3089, which will provide much-needed safeguards on the secrecy order process.

Mr. Speaker, I hope that all my colleagues will support this bill, I urge its passage, and I yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Wisconsin (Mr. FITZGERALD) that the House suspend the rules and pass the bill (H.R. 3089).

The question was taken.

The SPEAKER pro tempore. In the opinion of the Chair, two-thirds being in the affirmative, the ayes have it.

Mr. FITZGERALD. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The SPEAKER pro tempore. Pursuant to clause 8 of rule XX, further proceedings on this motion will be postponed.

MESSAGE FROM THE SENATE

A message from the Senate by Ms. Byrd, one of its clerks, announced that the Senate has agreed to without amendment a concurrent resolution of the House of the following title:

H. Con. Res. 35. Concurrent Resolution authorizing the use of Emancipation Hall in the Capitol Visitor Center for an event to celebrate a King Kamehameha Day Lei Draping Ceremony.