

Prior Restraints and Digital Surveillance: The Constitutionality of Gag Orders Issued Under the *Stored Communications Act*

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20 YALE J. L. & TECH. 74 (2018)

The First Amendment's prohibition on prior restraints on speech is generally understood to be near-absolute. The doctrine permits prior restraints in only a handful of circumstances, and tends to require compelling evidence of their necessity. The focus of this Article is the source of an unexpected but important challenge to this doctrine: government surveillance in the digital age. Recent litigation about the constitutionality of the Stored Communications Act (SCA) highlights that challenge. The SCA authorizes the government both to obtain a person's stored internet communications from a service provider and to seek a gag order preventing the provider from even notifying the person of that fact. Though the government did not ultimately prevail in the litigation, the case provides a renewed opportunity to consider the tension between prior restraint doctrine and the government's digital surveillance efforts.

This Article does that, offering three arguments. First, gag orders issued under the SCA ought to be treated like classic prior restraints that are valid in all but the rarest of cases. Second, the SCA cannot pass constitutional muster even under a more traditional strict scrutiny standard. Third, and independently, the procedure that the statute creates for obtaining a gag order is constitutionally deficient. In a concluding section, the Article considers the government's revised stance on SCA gag orders, and suggests an alternative construction of the statute that may avoid constitutional problems.

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INTRODUCTION

The First Amendment abhors no restriction on speech more than a prior restraint. A prior restraint on expression—a restriction that “forbid[s] certain communications when issued in advance of the time that such communications are to occur”¹—is “the most serious and the least tolerable infringement on First Amendment rights,”² and bears a “heavy presumption” of unconstitutionality.³ In a word, the prohibition on prior restraints under black-letter First Amendment law is “near-absolute.”⁴

The focus of this Article is the source of an unexpected but important challenge to classic prior restraint doctrine: government surveillance in the digital age. Recent litigation about the constitutionality of the Stored Communications Act (SCA)⁵ highlights that challenge. The SCA authorizes the government both to obtain a person’s stored internet communications from a service provider and to seek a gag order preventing the provider from even notifying the person of that fact. In April 2016, Microsoft brought a lawsuit against the Department of Justice in federal court, alleging that gag orders issued under the SCA constitute unconstitutional prior restraints and content-based restrictions on speech.⁶ In a February 2017 decision, the court denied the government’s motion to dismiss Microsoft’s First Amendment claims.⁷ Microsoft later agreed to drop the lawsuit after the Department of Justice issued guidance to prosecutors heightening requirements for obtaining gag orders.⁸

¹ *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03 (1984)). The Court in *Alexander* also noted that “[t]emporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints.” *Id.* As Professors Lemley and Volokh argue, however, “[a] permanent injunction, entered following a final determination that the speech is unprotected, is generally seen as constitutional.” Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 169-70 (1998).

² *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

³ *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

⁴ 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 15:2 (Supp. 2017).

⁵ 18 U.S.C. §§ 2701-2712 (2012).

⁶ See generally First Amended Complaint, *Microsoft Corp. v. U.S. Dep’t of Justice*, No. 2:16-cv-00538-JLR (W.D. Wash. 2017) (No. 28), 2016 WL 3381727 [hereinafter, “Microsoft Complaint”].

⁷ *Microsoft Corp. v. U.S. Dep’t of Justice*, 233 F. Supp. 3d 887, 894 (W.D. Wash. 2017).

⁸ Ellen Nakashima, *Justice Department Moves to End Routine Gag Orders on Tech Firms*, WASH. POST (Oct. 24, 2017), <http://www.washingtonpost.com/world/national-security/justice-department->

Although it did not provide a final ruling on Microsoft's First Amendment claims, the court was correct to reject the Justice Department's motion to dismiss these claims. SCA gag orders are prior restraints on speech, and they cannot withstand the heavy scrutiny that should apply to them. Recent decisions addressing the constitutionality of similar gag orders in National Security Letters (NSLs), however, suggest that courts may be sympathetic to the view that such orders should not be tested against the scrutiny that applies to traditional prior restraints. That premise is dubious. But even granting it, the SCA poses serious constitutional problems. If courts are to carve out an exception for prior restraints in the era of digital surveillance, that exception should be exceedingly narrow.

This Article proceeds in several parts. It opens with a discussion of prior restraint doctrine and how courts have applied it to gag orders in NSLs. It then turns to the SCA, summarizing its relevant provisions and assessing whether the gag orders it authorizes pass constitutional muster. The Article concludes that they do not, but suggests an interpretation of the statute that might remedy these issues.

I. PRIOR RESTRAINTS AND DIGITAL SURVEILLANCE

Prior restraints are, put simply, restrictions designed to suppress speech before it takes place. They typically take the form of an administrative scheme requiring a permit or license to engage in certain speech, or a court order enjoining the speech before it occurs.⁹

Classic First Amendment doctrine is uncompromising towards these restrictions. It permits prior restraints in a handful of circumstances, and requires the government to present compelling evidence of their necessity. In the realm of digital surveillance, however, that doctrine appears to be giving way to a more permissive set of rules.

A. *The Classic Doctrine*

The First Amendment has long held prior restraints in particular contempt. The Supreme Court's first notable decision addressing prior restraints came in 1931, in *Near v. Minnesota*.¹⁰ The Court held that a statute authorizing the government to enjoin a newspaper from publishing "malicious,

moves-to-end-routine-gag-orders-on-tech-firms/2017/10/23/df8300bc-b848-11e7-9e58-e6288544af98_story.html [http://perma.cc/PB53-TMY8].

⁹ SMOLLA, *supra* note 4, § 15:1.

¹⁰ 283 U.S. 697 (1931).

scandalous or defamatory” content was unconstitutional.¹¹ Drawing on the writings of William Blackstone and James Madison, the Court recognized protection against prior restraints to be a core purpose of the First Amendment; as it explained, “liberty of the press, historically considered and taken up the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.”¹² The Court acknowledged that this immunity “is not absolutely unlimited,” but confined it to “exceptional cases.”¹³

Subsequent cases have retained this posture toward prior restraints. In its 1971 decision in *New York Times Co. v. United States* (the Pentagon Papers case), the Court held that the First Amendment did not permit the government to enjoin the New York Times and Washington Post from publishing the contents of a classified government study about the history of the Vietnam War.¹⁴ The Court’s per curiam opinion repeated that “any system of prior restraints of expression” bears “a heavy presumption against its constitutional validity,”¹⁵ and the separate opinions of justices in the majority either rejected prior restraints per se or confined them to extenuating circumstances.¹⁶ Five years later, in *Nebraska Press Association v. Stuart*,¹⁷ the Court invalidated a gag order limiting news coverage in a high-profile murder trial. The Court explained that prior restraints were “in many ways more inhibiting” than subsequent punishments:

[A system of prior restraint] is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression

¹¹ *Id.* at 722-23.

¹² *Id.* at 716.

¹³ *Id.*

¹⁴ 403 U.S. 713, 719 (1971).

¹⁵ *Id.* at 714.

¹⁶ See SMOLLA, *supra* note 4, § 15:17 (“[The opinions of Justices Black and Douglas] may fairly be read as holding that under the First Amendment no prior restraints may ever be issued enjoining publications by the press.”); see also *N.Y. Times Co.*, 403 U.S. at 726-27 (Brennan, J., concurring) (“[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.”); *id.* at 730 (Stewart, J., concurring) (“I cannot say that disclosure . . . will surely result in direct, immediate, and irreparable damage to our Nation or its people.”); *id.* at 731 (White, J., concurring) (declining to issue an injunction despite acknowledging that publication would “do substantial damage to public interests”).

¹⁷ 427 U.S. 539 (1976).

through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.¹⁸

Thus, as the Court put it then and has reiterated since, “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”¹⁹

The Court has, understandably, been more permissive of prior restraints where the state’s target is speech unprotected by the First Amendment. In the 1965 case *Freedman v. Maryland*,²⁰ the Court sanctioned the use of state-administered licensing schemes for obscene films, provided they contain three “procedural safeguards”: (1) that “any restraint prior to judicial review . . . be imposed for a specified brief period”; (2) that “expeditious judicial review” be available for that decision; and (3) that the government “bear the burden of going to court to suppress the speech and . . . bear the burden of proof once in court.”²¹ The Court has extended *Freedman*’s applicability to other kinds of licensing schemes, including some in which protected speech is at issue.²² But even where a scheme targets unprotected speech, the concern is that it will *also* suppress *protected* speech in the interim period before review;²³ the safeguards seek to minimize that risk.

In short, where protected speech is involved, the law appears to create an almost impossibly high standard—one that goes further than the typical strict scrutiny standard—for justifying prior restraints.

B. Prior Restraints in the Age of Digital Surveillance

¹⁸ *Id.* at 589-90.

¹⁹ *Id.* at 559; *see also* *Tory v. Cochran*, 544 U.S. 734, 738 (2005) (quoting *Nebraska Press*, 427 U.S. at 559).

²⁰ 308 U.S. 51 (1965).

²¹ *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002) (summarizing the *Freedman* safeguards).

²² *See* *Lemley & Volokh*, *supra* note 1, at 180 (“[T]he Court has suggested that the *Freedman* standards may apply in at least some non-obscenity contexts, such as injunctions against offensive demonstrations.” (citing *Nat’l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977))); *see also* *In re Nat’l Sec. Letter*, 863 F.3d 1110, 1128 (9th Cir. 2017) (“In later years, the Supreme Court has extended the applicability of *Freedman*, holding that government schemes for licensing constitutionally permissible speech or communicative conduct also require procedural safeguards.”).

²³ *See* Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 57 (1984).

In cases involving digital surveillance, however, courts appear to have eschewed the strict constraints of classic prior restraint doctrine. The best illustration of this trend can be found in case law addressing the constitutionality of gag orders in National Security Letters, where courts have relaxed the applicable level of scrutiny to enable greater restraints on speech.

NSLs are a unique form of administrative subpoena issued principally by the Federal Bureau of Investigation (FBI) to obtain personal information from communications providers and others in connection with national security investigations.²⁴ The SCA authorizes the FBI to issue a gag order with the subpoena, prohibiting the recipient from disclosing the existence of the NSL.²⁵

The Second Circuit's 2008 decision in *John Doe, Inc. v. Mukasey*²⁶ is, to date, likely the most important statement on the constitutionality of NSL gag orders. The *Doe* court found that the statutory provisions governing these orders, which have since been amended,²⁷ violated the First Amendment.²⁸ The statute at issue permitted the FBI to issue a gag order upon a senior official's certification that disclosure would cause one of several enumerated harms: "danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person."²⁹ It also provided that the recipient of an NSL could petition a district court for an order modifying or setting aside the NSL.³⁰ A court could only do so, however, if it found "no reason to believe" that one of the enumerated harms would transpire.³¹ If the Attorney General or another senior official were to certify that disclosure would endanger national security or interfere with diplomatic

²⁴ See generally CHARLES DOYLE, CONG. RESEARCH SERV., RL33320, NATIONAL SECURITY LETTERS IN FOREIGN INTELLIGENCE INVESTIGATIONS: LEGAL BACKGROUND (2015), <http://fas.org/sgp/crs/intel/RL33320.pdf> [<http://perma.cc/VM9M-GHES>].

²⁵ 18 U.S.C. § 2709(c) (2012).

²⁶ 549 F.3d 861 (2d Cir. 2008).

²⁷ See USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 501, 129 Stat. 268, 282 (2015) (codified as amended at 18 U.S.C. § 2709(b)).

²⁸ *Doe*, 549 F.3d at 876.

²⁹ *Id.* at 866-67 ("Congress amended the nondisclosure prohibition of subsection 2709(c) to require nondisclosure only upon certification by senior FBI officials that 'otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person.'").

³⁰ *Id.* at 867.

³¹ *Id.* at 868.

relations, that certification would be “conclusive” unless made in “bad faith.”³²

Although the *Doe* court ultimately concluded that the statute did not comport with the First Amendment, it struggled in its analysis of NSLs under prior restraint doctrine. The court noted that an NSL gag order “is not a typical example” of a prior restraint because it is not “imposed on those who customarily wish to exercise rights of free expression, such as speakers in public fora, distributors of literature, or exhibitors of movies.”³³ Moreover, the “category of information” subject to the gag order—i.e., “the fact of receipt of an NSL and some related details”—is “far more limited than the broad categories of information that have been at issue with respect to typical content-based restrictions.”³⁴

For these reasons, the Second Circuit found that the gag order provision was not “a typical prior restraint or a typical content-based restriction warranting the most rigorous First Amendment scrutiny.”³⁵ The panel could not agree whether to apply “a standard of traditional strict scrutiny” or a standard of “not quite as ‘exacting’ a form of strict scrutiny.”³⁶ Finding that the issue would not affect the outcome of the case, and accepting the government’s concession that strict scrutiny applied, the court applied the higher standard and interpreted the statute fairly flexibly in order to avoid constitutional problems.³⁷

The *Doe* court identified issues of both substance and procedure. On the former, the court narrowed the circumstances in which the government could obtain a gag order consistent with the First Amendment. The court found the last of the statute’s enumerated harms, endangerment of “the life or physical safety of any person,” to be “particularly troublesome” because of the potential to “extend the Government’s power to impose secrecy to a broad range of information.”³⁸ The court avoided the constitutional issue “by construing the scope of the enumerated harms in light of the purposes for which an NSL is issued,” the result being that *all* enumerated harms under the statute must relate to “an

³² *Id.*

³³ *Id.* at 876 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984)) (addressing the prohibition on disclosure of information obtained in court-ordered discovery); *id.* at 876 n.12 (“We note that none of the decisions discussing the appropriateness or limits of grand jury secrecy has referred to a nondisclosure requirement in that context as a prior restraint.”).

³⁴ *Id.* at 876.

³⁵ *Id.* at 877.

³⁶ *Id.* at 878.

³⁷ *Id.*

³⁸ *Id.* at 874.

authorized investigation to protect against international terrorism or clandestine intelligence activities.”³⁹ The Second Circuit also read the statute to mean that the government had the burden of persuading a district court of “a *good* reason to believe” that one of the enumerated harms would transpire.⁴⁰ Finally, the court held that the provision making a senior official’s certification that disclosure would endanger national security or disrupt diplomatic relations “conclusive” upon the court was unconstitutional.⁴¹

On procedure, the court looked to the three-part test under *Freedman*. The court found that the statute as written did not comply with *Freedman*’s third prong—that the government “bear the burden of going to court to suppress the speech” and “the burden of proof in court”⁴²—because it did not require the government to initiate review.⁴³ Instead, the Second Circuit devised its own procedure—one concededly not created by statute, but that the government could follow of its own accord—that satisfied *Freedman*.⁴⁴ Under this “reciprocal notice procedure,” the government would be required to provide an NSL recipient with notice of a gag order and their right to challenge it in court.⁴⁵ If the NSL recipient then notified the government that it wished to contest the order, the government would have to initiate a judicial review proceeding to justify the order.⁴⁶

This reciprocal notice procedure, along with some generous statutory interpretation, permitted the *Doe* court to salvage most of the statute, giving the government a narrower but still attainable means for obtaining gag orders. In 2015, Congress amended the NSL gag order provisions, reflecting the changes that *Doe* identified as necessary.⁴⁷

In 2017, the constitutionality of the amended provisions came before the Ninth Circuit, in *National Security Letter v. Sessions* (“*Sessions*”).⁴⁸ The district court had upheld the provisions, relying on *Doe*’s reasoning that an NSL gag order is not a “typical example” of a prior restraint and holding that gag orders both met the *Freedman* requirements and withstood

³⁹ *Id.* at 875 n.6; *id.* at 876 (quoting 18 U.S.C. § 2709(b) (2012)).

⁴⁰ *Id.* at 875 (emphasis added).

⁴¹ *Id.* at 884.

⁴² *Id.* at 871.

⁴³ *Id.* at 880-81.

⁴⁴ *Id.* at 879.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 502, 129 Stat. 268, 288-289 (2015).

⁴⁸ *In re Nat’l Sec. Letter*, 863 F.3d 1110 (9th Cir. 2017).

strict scrutiny.⁴⁹ On appeal, the Ninth Circuit affirmed.⁵⁰ It agreed with the district court that the *Freedman* safeguards were satisfied and found that the provisions were content-based restrictions that survived strict scrutiny.⁵¹ It relegated to a footnote the appellants' argument that the NSL provisions, as "a content-based restriction imposed by a system of prior restraint," ought to be held to a standard "higher than strict scrutiny."⁵² The court deemed that argument "meritless."⁵³ For one thing, according to the court, the per curiam opinion in the Pentagon Papers case "did not specify a test that should be applied to prior restraints."⁵⁴ For another, the decision in *Nebraska Press* merely "considered the availability of less restrictive alternatives to a restraining order," which is entirely "consistent with the application of strict scrutiny."⁵⁵

Accordingly, the NSL provisions needed only to satisfy strict scrutiny—in other words, to be "narrowly tailored to serve compelling state interests"⁵⁶—and, in the court's view, they did so.⁵⁷

II. THE STORED COMMUNICATIONS ACT

Recent litigation about the constitutionality of the SCA again pitted classic prior restraint doctrine against the government's digital surveillance efforts. After summarizing the relevant provisions of the SCA and the *Microsoft* decision, this Article will turn to its own assessment of the statute's constitutionality.

A. *The Basics*

Congress enacted the SCA as part of the Electronic Communications Privacy Act of 1986 (ECPA).⁵⁸ The SCA grew out of concerns that the Fourth Amendment of the Constitution

⁴⁹ *In re Nat'l Sec. Letter v. Sessions*, Nos. 11-CV-02173-SI, 3:11-CV-2667 SI, 3:13-MC-80089 SI, 3:13-CV-1165 SI, slip op. at 20 (N.D. Cal. Mar. 29, 2016) (citing *Doe*, 549 F.3d at 876), <http://www.eff.org/document/redacted-order> [<http://perma.cc/VQS3-BZJS>].

⁵⁰ *Sessions*, 863 F.3d at 1114.

⁵¹ *Id.* at 1131.

⁵² *Id.* at 1127 n.21.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 1121.

⁵⁷ *Id.* at 1126.

⁵⁸ 18 U.S.C. §§ 2510 *et seq.* (2012).

provided little if any protection for internet communications.⁵⁹ Based on the law at the time of the SCA's conception,⁶⁰ internet users had no clear expectation of privacy in information, such as web history and e-mail, that was necessarily shared with network providers. The Constitution did not prohibit private parties like internet service providers from disclosing a person's internet communications to the government.⁶¹ The result, as policymakers saw it, was inadequate legal protection for a person's stored internet communications.

The SCA filled this gap by creating "a range of statutory privacy rights against access to stored account information held by network service providers."⁶² The SCA facilitates this in two ways: It limits the government's ability to compel network service providers to provide information about their customers and subscribers, and it limits the ability of service providers to voluntarily disclose that same information to the government.⁶³

The SCA applies to two kinds of service providers. First, it covers providers of an "electronic communications service" (ECS), which is "any service which provides to users thereof the ability to send or receive wire or electronic communications."⁶⁴ Second, the statute covers providers of a "remote computer service" (RCS), defined as "the provision of computer storage or processing services by means of an electronic communications system."⁶⁵ The distinction between an ECS and RCS can be somewhat esoteric.⁶⁶ What matters for our purposes is that the SCA covers various kinds of internet communications stored with service providers.

⁵⁹ Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1209-13 (2004).

⁶⁰ More recent jurisprudence has called into question the principle that individuals do not have a reasonable expectation of privacy in internet communications, such as e-mail messages. See, e.g., *In re Grand Jury Subpoena, JK-15-029*, 828 F.3d 1083, 1090 (9th Cir. 2016) ("[E]mail should be treated like physical mail for purposes of determining whether an individual has a reasonable expectation of privacy in its content.").

⁶¹ Kerr, *supra* note 59, at 1209-10.

⁶² *Id.* at 1212.

⁶³ *Id.* at 1212-13. The statute also criminalizes unauthorized access to stored communications. 18 U.S.C. § 2701 (2012).

⁶⁴ 18 U.S.C. § 2510(15) (2012).

⁶⁵ *Id.* § 2711(2).

⁶⁶ See Kerr, *supra* note 59, at 1215-18; *id.* at 1215-16 ("The classifications of ECS and RCS are context sensitive: the key is the provider's role with respect to a particular copy of a particular communication, rather than the provider's status in the abstract. A provider can act as an RCS with respect to some communications, an ECS with respect to other communications, and neither an RCS nor an ECS with respect to other communications.").

The SCA also draws a distinction between the “contents” of communications (e.g., the text of an e-mail message), on the one hand, and “non-content” information (e.g., the source and destination e-mail address) on the other.⁶⁷

18 U.S.C. § 2703 sets out the requirements that apply when the government seeks to compel a service provider to disclose a customer or subscriber’s information. These requirements vary based on the service provider and nature of the communication sought. Put simply, though, these rules operate as “an upside-down pyramid”: the more process the government observes, the more information it has access to.⁶⁸ At the very bottom, the government can obtain basic subscriber information with a simple subpoena, which requires no notice to the subscriber.⁶⁹ The more process the government satisfies—i.e., providing notice to the subscriber or obtaining a court order or warrant rather than a subpoena—the greater its access to information.⁷⁰ At the very top of the inverted pyramid, only by means of a search warrant, the government can compel a service provider to disclose all of the information in its possession.⁷¹

B. The Gag-Order Provision

The SCA’s gag-order provision is found at 18 U.S.C. § 2705(b):

(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

⁶⁷ *In re* Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2705(b), 131 F. Supp. 3d 1266, 1267-69 (D. Utah 2015).

⁶⁸ Kerr, *supra* note 59, at 1222.

⁶⁹ 18 U.S.C. § 2703(c)(2) (2012); *see* Kerr, *supra* note 59, at 1222.

⁷⁰ 18 U.S.C. §§ 2703(a)-(c) (2012).

⁷¹ *Id.* § 2703(a).

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.⁷²

The statute has a clearly broad sweep. A gag order lasts “for such period as the court deems appropriate.”⁷³ If the court has “reason to believe” that any one of the enumerated consequences in the statute would follow from disclosure, it “*shall* enter” the order.⁷⁴ In short, a court may issue a gag order “for *all* requests of information under § 2703,” regardless of the nature of the information sought and from whom it is sought.⁷⁵

C. Microsoft v. DOJ

In April 2016, Microsoft filed suit in district court in the state of Washington, seeking a declaration that §§ 2703 and 2705(b) violate the First and Fourth Amendments of the Constitution.⁷⁶ Microsoft, a provider of cloud computing services, contended that the government has increasingly sought to obtain private information not from cloud customers themselves, but from service providers like Microsoft.⁷⁷ Over a twenty-month period ending in May 2016, Microsoft itself was

⁷² 18 U.S.C. § 2705(b) (2012).

⁷³ *Id.*

⁷⁴ *Id.* (emphasis added).

⁷⁵ *See In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2705(b)*, 131 F. Supp. 3d 1266, 1275 (D. Utah 2015).

A source of some confusion has been the language at the beginning of § 2705(b): “A government entity acting under section 2703, *when it is not required to notify the subscriber or customer under section 2703(b)(1)* . . .” 18 U.S.C. § 2705(b) (2012) (emphasis added). This language suggests, sensibly, that the government cannot obtain a gag order in cases where the SCA requires the government to give notice to the subscriber or customer of a subpoena or court order. *See id.* § 2703(b)(1)(B); *In re Application of the U.S.*, 131 F. Supp. 3d at 1274-75. But the analysis does not end there. Even where notice to a customer or subscriber is required under § 2703(b)(1), the government can delay notice under § 2705(a). Section 2705(b), in turn, permits the government to seek a gag order “to the extent that it may delay [notice to the customer or subscriber] pursuant to subsection (a) of this section.” The upshot is that if the government can satisfy the requirements for delayed notice under § 2705(a) (which appear identical to those for a gag order), it may also obtain a gag order.

⁷⁶ *Microsoft Corp. v. U.S. Dep’t of Justice*, 233 F. Supp. 3d 887 (W.D. Wash. 2017).

⁷⁷ *Microsoft Complaint*, *supra* note 6, at ¶ 4.

subjected to 3,250 gag orders, two-thirds of which have no fixed end date.⁷⁸ Microsoft acknowledged that gag orders might be permissible in exceptional circumstances, but argued that the SCA's sweep, as effectuated by the government, had been obviously overbroad.⁷⁹

The district court sided with Microsoft in part. Judge Robart dismissed Microsoft's Fourth Amendment claim, on the ground that Microsoft lacked the standing to assert the privacy rights of its customers,⁸⁰ but held that Microsoft had stated a claim under the First Amendment.⁸¹ Judge Robart rejected the government's arguments that Microsoft was without standing to challenge § 2705(b); he found that gag orders "that indefinitely prevent Microsoft from speaking about government investigations implicate Microsoft's First Amendment rights," causing an injury that is sufficiently particularized, likely to reoccur, and redressable via declaratory relief.⁸²

Turning to the merits, Judge Robart concluded that Microsoft "adequately alleged a facially plausible First Amendment claim"⁸³ that § 2705(b) gag orders are impermissible prior restraints and content-based restrictions.⁸⁴ The government argued that even if the gag orders are prior restraints, § 2705(b) contained the requisite procedural protections set out in *Freedman*.⁸⁵ Judge Robart explained, however, that *Freedman* does not apply in this context because § 2705(b) gag orders are less like "administrative prior restraints imposed by a licensing scheme" and more akin to "permanent injunctions preventing speech from taking place before it occurs."⁸⁶

In an important footnote, Judge Robart rejected two arguments that the government offered for applying a lower standard of scrutiny to § 2705(b). First, he was not persuaded by the government's argument that the affected speech "does not address matters of public concern."⁸⁷ Matters of public concern, he noted, are "matters related to political, social, or other concerns to the community."⁸⁸ Second, he declined to find,

⁷⁸ *Id.* ¶ 5.

⁷⁹ *Id.* ¶ 6.

⁸⁰ *Microsoft Corp.*, 233 F. Supp. 3d at 912-16.

⁸¹ *Id.* at 904-12.

⁸² *Id.* at 900-04. Judge Robart also rejected the government's argument that the court should reject the suit on "comity grounds." *Id.* at 904.

⁸³ *Id.* at 908.

⁸⁴ *Id.* at 904-08.

⁸⁵ *Id.* at 906.

⁸⁶ *Id.*

⁸⁷ *Id.* at 906 n.7.

⁸⁸ *Id.* (citing *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)). He also relied on the Supreme Court's statement in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978), that "[t]he inherent worth of the speech in terms of its

as the Second Circuit did in *Doe*, that a § 2705(b) gag order “is not a typical prior restraint or a typical content-based restriction warranting the most rigorous First Amendment scrutiny.”⁸⁹ Judge Robart distinguished § 2705(b) gag orders on two grounds: (1) these orders, unlike NSL gag orders, can be deployed outside the national security context, and (2) § 2705(b), unlike the NSL statute, permits gag orders of potentially unlimited duration.⁹⁰

Taking Microsoft’s allegations as true, Judge Robart found that § 2705(b) orders could operate as prior restraints and content-based restrictions. He held that Microsoft’s stated facts—that the gag orders can be of prolonged duration, that the “reason to believe” standard is too permissive, and that the statute is otherwise deficient⁹¹—were sufficient to state a First Amendment claim.⁹² And even if a standard lower than strict scrutiny were to apply, Microsoft’s allegations gave rise to a reasonable inference that “indefinite nondisclosure orders impermissibly burden Microsoft’s First Amendment rights.”⁹³ Judge Robart accordingly denied the government’s motion to dismiss Microsoft’s complaint.⁹⁴

In October 2017, Microsoft announced that it planned to drop its lawsuit after the Department of Justice issued binding guidance limiting the availability of § 2705(b) gag orders.⁹⁵ The guidance memo states that every gag order “should have an appropriate factual basis” and “should extend only as long as necessary to satisfy the government’s interest.”⁹⁶ More

capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.” *Id.*

⁸⁹ *Id.* at 907 n.7 (quoting *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 877 (2d Cir. 2008)).

⁹⁰ *Id.*

⁹¹ *Id.* at 907-08.

⁹² *Id.* at 907-08. Specifically, the court accepted Microsoft’s allegation that § 2705(b) “allows an indefinite disclosure ‘in the absence of any case-specific compelling interest,’ is ‘substantially broader than necessary,’ and ‘provides no meaningful constraints.’” *Id.*

⁹³ *Id.* at 908. Here, Judge Robart cited Microsoft’s allegations that “indefinite nondisclosure orders continue to burden its First Amendment rights after the government’s interest in keeping investigations secret dissipates,” and that “courts do not have occasion to revisit the indefinite orders unless Microsoft challenges the individual orders in court.” *Id.*

⁹⁴ *Id.* Judge Robart also found that Microsoft had sufficiently stated claims that § 2705(b) is impermissibly overbroad and violated the First Amendment as applied to Microsoft. *Id.* at 908-12.

⁹⁵ See Memorandum from Rod J. Rosenstein, Deputy Att’y Gen., to Heads of Dep’t Law Enf’t Components, Dep’t Litigating Components, Dir. of Exec. Office for U.S. Att’ys, & All U.S. Att’ys (Oct. 19, 2017), <http://apps.washingtonpost.com/g/documents/world/read-dojs-new-policy-on-gag-orders/2610/> [<http://perma.cc/7NFE-YLRY>] [hereinafter Rosenstein Memorandum].

⁹⁶ *Id.* at 1.

concretely, the memo requires prosecutors to conduct “an individualized and meaningful assessment” about whether an order is necessary; obligates them to “tailor the application to include the available facts of the specific case and/or concerns”; limits delay of notice to one year or less, “barring exceptional circumstances”; and permits extensions for a period only of equal or shorter duration.⁹⁷

III. THE CONSTITUTIONALITY OF § 2705(B)

The *Microsoft* case again highlights the tension between classic prior restraint jurisprudence and government surveillance in the digital age. SCA gag orders are a form of what Professor Jack Balkin has dubbed “new school” speech regulation.⁹⁸ Government surveillance requires “access to the facilities through which most people are speaking,” which, in turn, requires “access to the infrastructure of free expression, which is largely held in private hands.”⁹⁹ The result is that governments must “coerce or co-opt the private owners of the infrastructure of free expression” in their surveillance efforts.¹⁰⁰ Put another way, government surveillance inevitably leads “to prior restraints on owners of private infrastructure or techniques that operate in much the same way as prior restraints.”¹⁰¹ This phenomenon itself is not new, but its extent in the digital age is.

The Article offers three arguments here. *First*, SCA gag orders ought to be treated like classic prior restraints that are valid in all but the rarest of cases. *Second*—and here the Article builds on the analysis in *Microsoft*—the SCA cannot pass constitutional muster even under a more traditional strict scrutiny standard. *Third*, and independently, the procedure that the statute creates for obtaining a gag order is constitutionally deficient. A final section considers the Justice Department’s revised stance on gag orders and an alternative construction of the SCA that may avoid constitutional problems.

A. SCA Gag Orders Are Prior Restraints—Period

There can be no real dispute that a § 2705(b) gag order meets the classic definition of a prior restraint, for it “forbid[s] certain communications when issued in advance of the time

⁹⁷ *Id.* at 2-3.

⁹⁸ See Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2324-25 (2014).

⁹⁹ *Id.* at 2329.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 2330.

that such communications are to occur.”¹⁰² Once a court issues a § 2705(b) order, the service provider to whom the request has been issued (in the form of a warrant, court order, or subpoena) cannot speak to anyone about that request. A § 2705(b) gag order is thus clearly a prior restraint. The Supreme Court’s jurisprudence, as discussed, makes it exceptionally difficult for the government to justify these restrictions on speech—the result being that SCA gag orders are invalid in all but the rarest of cases.

The NSL cases do not provide particularly compelling reasons for departing from this jurisprudence. *Doe* rested its holding on the fact that NSL gag orders are not “typical example[s]” of a prior restraint, because they are not “imposed on those who customarily wish to exercise rights of free expression, such as speakers in public fora, distributors of literature, or exhibitors of movies.”¹⁰³ The court also cited the Supreme Court’s decision in *Seattle Times v. Rhinehart*, which found protective orders in the context of pretrial civil discovery to be consistent with the First Amendment.¹⁰⁴ But this analysis is not fully persuasive. For one thing, the strength of First Amendment protections typically does not vary based on the *identity* of the speaker. If anything, the *content* of the speech at issue in *Doe* and similar cases—about whom the government surveils and what information it seeks—would be entitled to particularly vigorous protection as bearing on matters of indisputable public concern.¹⁰⁵ For another, the analogy to protective orders in pretrial discovery is inapt. In such cases, parties generally “opt in” to the protective order; they gain information “only by virtue of the trial court’s discovery processes,” which “are a matter of legislative grace.”¹⁰⁶ A recipient of a § 2705(b) or NSL gag order, in contrast, is an unwilling participant in the censorship the government imposes upon it.

At the same time, the reasons Judge Robart gave in *Microsoft* to differentiate *Doe* were also unpersuasive. He distinguished *Doe* on the basis of its “national security context”

¹⁰² *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03 (1984)).

¹⁰³ *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876 (2d Cir. 2008).

¹⁰⁴ 467 U.S. 20, 33-34 (1984) (“[I]t is significant to note that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny.”), *cited in Doe*, 549 F.3d at 876.

¹⁰⁵ *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (noting that speech on matters of public concern is “at the heart of the First Amendment’s protection”); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” (internal quotation marks omitted)).

¹⁰⁶ *Seattle Times*, 467 U.S. at 32.

and the fact that the NSL statute, unlike § 2705(b), “imposed temporal limits on the nondisclosure orders.”¹⁰⁷ But the mere fact that national security concerns are at play does not warrant a lower standard of scrutiny; indeed, the *Pentagon Papers* case suggests that the opposite is true. And the point that § 2705(b) orders are potentially indefinite in duration is probably best considered in determining whether the law satisfies the applicable standard of scrutiny, not what standard applies in the first place.

The Ninth Circuit’s reasoning in *Sessions* fares little better. The court, again, found that prior restraints do not merit more than strict scrutiny because (i) the per curiam opinion in the *Pentagon Papers* case did not announce a separate test for prior restraints, and (ii) the test *Nebraska Press* announced for gag orders in criminal trials is “consistent” with the application of strict scrutiny.¹⁰⁸ These statements are true, but incomplete. The absence of a legal standard in the *Pentagon Papers*’ per curiam decision does not end the analysis: the court ought to have looked to the individual opinions of the majority justices,¹⁰⁹ each of which set out a different legal standard. Justice Stewart’s formulation—requiring evidence of “direct, immediate, and irreparable damage” before a prior restraint will be granted—has been regularly applied by the lower courts.¹¹⁰ The Supreme Court, moreover, has frequently noted that the burden for justifying a prior restraint is heavier than that for a subsequent punishment.¹¹¹ The best reading of these cases is that prior restraints must endure something more than traditional strict scrutiny.

¹⁰⁷ *Microsoft Corp. v. U.S. Dep’t of Justice*, 233 F. Supp. 3d 887, 906 n.7 (W.D. Wash. 2017).

¹⁰⁸ *Nat’l Sec. Letter v. Sessions*, 863 F.3d 1110, 1127 n.21 (9th Cir. 2017).

¹⁰⁹ *See Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (“[W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” (citation omitted)). A group of amici curiae make this observation in the brief seeking rehearing of the Ninth Circuit’s decision. *See* Brief for The Reporters Comm. for Freedom of the Press et al. as Amici Curiae Supporting Petitioners at 14 n.5, *Nat’l Security Letter v. Sessions*, No. 16-16067 (9th Cir. 2017).

¹¹⁰ *See, e.g., Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 226 (6th Cir. 1996) (Martin, Jr., J., concurring); *Matter of Providence Journal Co.*, 820 F.2d 1342, 1350-1351 (1st Cir. 1986), *modified on reh’g*, 820 F.2d 1354 (1st Cir. 1987); *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 473 (5th Cir. 1980) (en banc), *aff’d*, 452 U.S. 89 (1981); *United States v. Progressive, Inc.*, 467 F. Supp. 990, 1000 (W.D. Wis. 1979); *see also* *Def. Distributed v. U.S. Dep’t of State*, 865 F.3d 211, 213 (5th Cir. 2017) (citing *Bernard*, 619 F.2d at 473).

¹¹¹ *See, e.g., Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975) (“The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties.”).

The Ninth Circuit's reliance on *Nebraska Press* is somewhat more convincing, but not entirely so. There, the Supreme Court held that the constitutionality of a gag order imposed to protect a criminal defendant's right to a fair trial turned on three factors: the nature and extent of pretrial news coverage, the availability of alternative measures, and the likely effectiveness of a restraining order.¹¹² This standard is, admittedly, reminiscent of strict scrutiny.¹¹³ But it does not follow that *Nebraska Press* necessarily has general applicability to other types of prior restraints; the countervailing constitutional interest in these cases, a defendant's Sixth Amendment right to a fair trial, affected where the Court drew this particular line. What's more, in practice the *Nebraska Press* standard is rarely satisfied, and lower courts tend to treat it "as tantamount to an absolute prohibition" on prior restraints in criminal trials.¹¹⁴

Whatever the precise legal reasoning of *Doe, Sessions*, and other cases, the concern driving them is a pragmatic one: permitting a service provider to notify a customer or subscriber of a search will, in some cases, undermine an investigation. Indeed, the law already reflects the government's interest in conducting covert searches during the course of a criminal investigation. For example, the government has established but limited authority to conduct covert searches of physical places. Such searches, pursuant to so-called "sneak and peek" warrants, have become more prevalent after the passage of the PATRIOT Act.¹¹⁵ But even before then, courts had permitted law enforcement authorities to conduct searches of physical places without prior notice to the search target, so long as certain strict conditions—for example, the government's provision of a good reason for delayed notice—were met.¹¹⁶

¹¹² *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976).

¹¹³ See Balkin, *supra* note 98, at 2335 (referring to the "potentially less stringent standard" for prior restraints in *Nebraska Press*).

¹¹⁴ See SMOLLA, *supra* note 4, § 15:30 (noting that, while *Nebraska Press* "did not go so far as to hold prior restraints of coverage of criminal trials absolutely impermissible in all circumstances," it is "a precedent that has come to be understood as something even more forceful than the test announced" in the case); see also Erwin Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 LOY. L.A. ENT. L.J. 311, 311-12 (1997) ("The Supreme Court's decision in *Nebraska Press Ass'n v. Stuart* has virtually precluded gag orders on the press as a way of preventing prejudicial pretrial publicity.").

¹¹⁵ See Jonathan Witmer-Rich, *The Fatal Flaws of the "Sneak and Peek" Statute and How To Fix It*, 65 CASE W. RES. L. REV. 121, 121 (2014).

¹¹⁶ See *United States v. Villegas*, 899 F.2d 1324, 1337 (2d Cir. 1990) (addressing searches for intangible evidence); *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986) (authorizing covert entries where notice is given within seven days, "except upon a strong showing of necessity").

Wiretaps are an even better example. As courts have noted, wiretaps “would likely produce little evidence of wrongdoing if the wrongdoers knew in advance that their conversations or actions would be monitored.”¹¹⁷ The law accordingly prohibits a service provider from disclosing the existence of a wiretap.¹¹⁸ The same is true for pen registers¹¹⁹ and Foreign Intelligence Surveillance Act subpoenas.¹²⁰ The constitutionality of these provisions does not appear to have been tested, and it does not follow from their existence that the SCA comports with the First Amendment. But these provisions do lend some weight to the government’s general policy justification for applying a lower level of scrutiny to gag orders.

At the same time, the policy concerns disfavoring gag orders are not insignificant. The numbers suggest that at least in the past, the government deployed § 2705(b) orders—as it did with NSL gag orders—overzealously. Recall that Microsoft itself received 3,250 § 2705(b) orders in 20 months; over 2,000 of these were for indefinite durations.¹²¹ Driving the government’s increasing reliance on these orders is a massive

¹¹⁷ *Villegas*, 899 F.2d at 1336; *see also* *Katz v. United States*, 389 U.S. 347, 355 n.16 (1967) (“[T]he fact that the petitioner in *Osborn* was unaware that his words were being electronically transcribed did not prevent this Court from sustaining his conviction, and did not prevent the Court in *Berger* from reaching the conclusion that the use of the recording device sanctioned in *Osborn* was entirely lawful.”).

¹¹⁸ 18 U.S.C. § 2511(2)(a)(ii) (2012) (“No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter.”); *see also* *Doe v. Gonzales*, 500 F. Supp. 2d 379, 392 (S.D.N.Y. 2007), *aff’d in part, rev’d in part and remanded sub nom. John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), *as modified* (Mar. 26, 2009).

¹¹⁹ 18 U.S.C. § 3123(d)(2) (2012) (“An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that . . . the person owning or leasing the line or other facility to which the pen register or a trap and trace device is attached or applied, or who is obligated by the order to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.”).

¹²⁰ 50 U.S.C. § 1861(d) (2012) (“No person shall disclose to any other person that the Federal Bureau of Investigation has sought or obtained tangible things pursuant to an order issued or an emergency production required under this section . . .”); *see also id.* § (d)(2).

¹²¹ For its part, Twitter received a similar number of orders in the 18 months spanning 2015 and 2016: 3,315 orders, nearly half of which were indefinite. Brief of Amicus Curiae Twitter, Inc. in Support of Microsoft Corporation’s Opposition to Defendant’s Motion to Dismiss, *Microsoft Corp. v. U.S. Dep’t of Justice*, No. 2:16-cv-00538-JLR, at *14 (W.D. Wash. Sept. 2, 2016) [hereinafter *Twitter Amicus Brief*].

expansion in the use of cloud computing services—by individuals and businesses alike—provided by companies like Microsoft and Apple.¹²² And as *Microsoft* illustrates, there may be no recourse for unconstitutional surveillance unless companies can speak about it: Companies likely lack standing to challenge the search itself,¹²³ and the gag order prevents the only persons who could have standing—the targets of the search—from ever knowing about it.¹²⁴ Moreover, governmental overreach on surveillance is well documented. In 2013, for example, it came to light that the Justice Department had obtained two months of phone telephone records for reporters and editors of the Associated Press in the course of a leak investigation, in violation of the Department’s own rules.¹²⁵ Those records were sought pursuant to a subpoena; as others have observed, the request may never have come to light had it been made via an NSL.¹²⁶ Endowing the government with broad authority to gag service providers unquestionably creates a potential for abuse.

In short, it is hard to dispute that applying strict scrutiny to SCA gag orders represents a departure from prior restraint doctrine. But other courts confronted with similar issues may be swayed by policy concerns and be inclined to follow the reasoning in *Doe* or *Sessions*. It is therefore worth asking: Do

¹²² See Tony Danova, *The Cloud Computing Report: How Different Cloud Services Are Competing for Users and Pushing Up Usage*, BUS. INSIDER (July 25, 2014), <http://www.businessinsider.com/cloud-report-competing-for-users-and-pushing-up-usage-2014-7> [<http://perma.cc/3ZGX-CZ9B>] (noting that “90% of global internet users are already on the cloud” and that “traffic to the cloud from mobile devices will grow at a compound annual rate of 63% between 2013 and 2018”).

¹²³ See *Microsoft Corp. v. U.S. Dep’t of Justice*, 233 F. Supp. 3d 887, 914 (W.D. Wash. 2017). (“[T]he Supreme Court and Ninth Circuit have also adhered to the principle that a third party may not sue to vindicate another person’s Fourth Amendment rights in cases that did not involve the exclusionary rule or Section 1983.” (citing *Cal. Bankers Ass’n v. Schultz*, 416 U.S. 21 (1974); *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243 (9th Cir. 1982)).

¹²⁴ In theory, if a criminal prosecution followed, the defendant could challenge the search on Fourth Amendment grounds in a motion to suppress. But that can only happen if the government ultimately told the defendant how it obtained the evidence—and the government has a track record of not doing so in cases of digital surveillance. See, e.g., Patrick Toomey, *Why Aren’t Criminal Defendants Getting Notice of Section 702 Surveillance—Again?*, JUST SEC. (December 11, 2015), <http://www.justsecurity.org/28256/arent-criminal-defendants-notice-section-702-surveillance-again> [<http://perma.cc/43KY-2BUC>].

¹²⁵ Mark Sherman, *Gov’t Obtains Wide AP Phone Records in Probe*, ASSOCIATED PRESS, May 14, 2013, <http://www.ap.org/ap-in-the-news/2013/govt-obtains-wide-ap-phone-records-in-probe> [<http://perma.cc/E2G4-JCNZ>].

¹²⁶ Balkin, *supra* note 98, at 2339.

§ 2705(b) gag orders, as content-based restrictions on speech,¹²⁷ satisfy strict scrutiny?

B. SCA Gag Orders Fall Short of Strict Scrutiny, Too

A restriction on speech satisfies strict scrutiny only if it is “narrowly tailored to promote a compelling Government interest,” and there are no “less restrictive alternatives that would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”¹²⁸ Based on the allegations in *Microsoft*, SCA gag orders cannot meet this standard.

Microsoft’s suit raised three issues with the substance of § 2705(b): (1) that gag orders can be of prolonged, and potentially unlimited, duration; (2) that a court need only have a “reason to believe” that one of the enumerated adverse consequences would follow from disclosure; and (3) that the last of these enumerated consequences—that disclosure would “otherwise seriously jeopardiz[e] an investigation or unduly delay[] a trial”—is an overbroad catch-all.¹²⁹ Each of these, as Judge Robart recognized, raises a serious First Amendment problem. That is to say, to the extent that each of the statute’s enumerated consequences is considered a compelling interest, the law is not narrowly tailored in advancing those interests.

The statute’s authorization of potentially indefinite gag orders is perhaps the least defensible of these consequences. The statute vests courts with the discretion to determine the duration of a gag order, which shall last “for such period as the court deems appropriate.”¹³⁰ However, the experience of companies like Microsoft and Twitter suggests that, prior to the Justice Department’s new guidance, judges routinely deferred to the government’s judgment that an indefinite order was warranted.¹³¹ As the government has now recognized, less restrictive alternatives to indefinite gag orders are available. The statute could, for example, require that the government periodically appear before a judge to justify maintaining the order. The statute could also provide that an order expires after

¹²⁷ This Article takes for granted that SCA gag orders are, in fact, restrictions on speech based on content.

¹²⁸ *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876 (2d Cir. 2008) (quoting *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997)).

¹²⁹ *Microsoft Complaint*, *supra* note 6, ¶¶ 23-33 (quoting 18 U.S.C. § 2705(b) (2012)).

¹³⁰ 18 U.S.C. § 2705(b) (2012)..

¹³¹ As noted, a substantial proportion of the information requests to these companies contained gag orders: two thirds for Microsoft and just over half for Twitter. *See supra* text accompanying note 121.

a criminal investigation is complete, or even after the target of an investigation has been prosecuted or sentenced. At least as it had been previously applied, § 2705(b) goes further than it needs to and accordingly fails the narrow tailoring requirement.

The same is true for the two other issues Microsoft identified. The “reason to believe” standard sets an unacceptably low threshold for granting a gag order. The standard means, ostensibly, that the government could restrain a service provider’s speech on the basis of speculation or pro forma rationales and has no obligation to produce actual, concrete evidence of potential harm. Heightening the standard for granting an order would be, to be sure, more burdensome on the government. And as the Department of Justice points out, the government will be less equipped to make a full factual showing at the outset of an investigation.¹³² But setting the “reason to believe” standard as the minimum showing for all cases sets the bar too low.

As for the catch-all, it is admittedly hard to say that the words “seriously jeopardiz[e] an investigation” and “unduly delay[] a trial”¹³³ are overbroad, without knowing how courts actually apply the provision. That makes this argument necessarily more tentative than the others. But Microsoft is at least right that the language is somewhat vague. And the fact that other companies affected by § 2705(b) orders have singled it out for criticism¹³⁴ suggests that, at least in the past, the government has tended to rely on it fairly frequently. It might be the case that, in practice, courts have interpreted the language loosely and deferred to the government even when the risk of compromising an investigation or a trial’s timeliness is small. If so, these are still state interests—but probably not compelling ones.

¹³² Rosenstein Memorandum, *supra* note 95, at 2 (“The factors justifying protection from disclosure may be similar in many cases, particularly at the outset of an investigation. As appropriate, prosecutors may state the extent to which the stage of the investigation limits the availability of specific facts justifying the § 2705(b) order.”).

¹³³ 18 U.S.C. § 2705(b) (2012).

¹³⁴ Twitter Amicus Brief, *supra* note 121, at 12. Twitter notes, for example, that the Department of Justice’s Guide to the SCA itself suggests that agents seeking a gag order under § 2705(b) include boilerplate language that “notification of the existence of [an order] would seriously jeopardize the ongoing investigation.” *Id.* at 13. (quoting U.S. DEPT’ OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 218-19 (2009), <http://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf> [<http://perma.cc/D3AR-PVC5>]).

C. Problems of Procedure

In addition to the above, the SCA suffers from at least one more flaw: The procedure it establishes for the government to obtain a gag order does not comport with the First Amendment.

The *Doe* and *Sessions* decisions applied the three-part test from *Freedman*, and *Doe* ultimately devised its own constitutionally compliant procedure for gag orders. But in this respect these decisions cannot be straightforwardly applied to § 2705(b), because the *Freedman* test was designed for administrative prior restraints.

To be clear, *Freedman* is a case about the *procedural* requirements that attach before a prior restraint can be imposed. Professor Balkin has criticized the *Doe* court for applying it, because “[i]nvoicing *Freedman* meant that the Second Circuit was deliberately lowering the bar for judicial scrutiny.”¹³⁵ But this objection somewhat misreads *Doe*. The *Doe* court, as noted, applied *Freedman* merely to the procedural dimension of the NSL statute, but applied strict scrutiny to the statute’s substance.¹³⁶ This makes sense; in cases where the speech subject to suppression is clearly protected by the First Amendment, the substance and procedure of a statute should both comport with the Constitution.¹³⁷

For SCA orders, however, *Freedman* should have no application. As Judge Robart observed, *Freedman* involved administrative prior restraints imposed by a licensing scheme, whereas § 2705(b) orders “are more analogous to permanent injunctions preventing speech from taking place before it occurs.”¹³⁸ It made sense to apply *Freedman* in *Doe*, because gag orders in NSLs are in the first instance directly issued by the FBI; it makes less sense with respect to the SCA, where prior restraint is sought by the government but issued by a court.

That conclusion does not end the inquiry, however, because even when a prior restraint comes in the form of a court order, the process must meet some procedural minimums. As Professor Redish has put it, “[a] speaker must be afforded an opportunity in a full and fair judicial hearing to contest any restraint before it is imposed.”¹³⁹ In *Carroll v. President and*

¹³⁵ See Balkin, *supra* note 98, at 2335.

¹³⁶ See text accompanying *supra* notes 42-46.

¹³⁷ See *Microsoft Corp. v. U.S. Dep’t of Justice*, 233 F. Supp. 3d 887, 906 (W.D. Wash. 2017) (“In any event, even if the procedural safeguards outlined in *Freedman* are met, the Government must show that the statute in question meets strict scrutiny.”).

¹³⁸ *Id.*

¹³⁹ Redish, *supra* note 23, at 89.

Commissioners of Princess Anne, for example, the Supreme Court set aside a state court's restraining order "because of a basic infirmity in the procedure by which it was obtained."¹⁴⁰ The order "was issued *ex parte*, without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings."¹⁴¹ The Court held that the First Amendment prohibits such orders absent a showing "that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate."¹⁴² Accordingly, a party subject to a § 2705(b) order must at a minimum have notice of a prior restraint and an opportunity to participate in the proceeding in order to challenge it.

Judge Robart did not make findings about the statute's procedural due process components (or lack thereof). But the problems here are serious. The process devised by § 2705(b) does not contemplate notice to, or the participation of, the service provider sought to be gagged;¹⁴³ the provider can seek to move or quash a gag order only *after* it has already been issued.¹⁴⁴ The proceeding is, as a result, effectively *ex parte*. And as Twitter observes, a provider will rarely have the knowledge necessary to assess whether a challenge to a particular gag order would be meritorious.¹⁴⁵ How can Microsoft know, for example, whether the government's investigation has reached the point where the justification for secrecy no longer applies?¹⁴⁶ Under these conditions, it is difficult to conceive of circumstances in which a service provider has a meaningful opportunity to participate in the proceedings.

D. A Judicial Fix

The law's faults are serious. And some of them are quite clearly commanded by the statutory text. Ideally, Congress would amend the statute to rectify the constitutional problems, crafting a regime that neither compromises legitimate law enforcement interests nor runs afoul of the First Amendment.

¹⁴⁰ 393 U.S. 175, 180 (1968).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See Matter of Application of United States of Am., 45 F. Supp. 3d 1, 6 (D.D.C. 2014) ("In addition, section 2705(b) includes no requirement that the service provider be afforded an opportunity to intervene to be heard on the merits of the government's application for a non-disclosure order *prior to* the court issuing the nondisclosure order.").

¹⁴⁴ *Id.*

¹⁴⁵ Twitter Amicus Brief, *supra* note 121, at 13.

¹⁴⁶ *Id.*

Legislative gridlock makes that unlikely, but *Microsoft* could provide impetus for reform.

The Department of Justice’s guidance—which, to be sure, is a document without the force of law—is a step in the right direction. It appears that prior to *Microsoft*, the government would routinely deploy indefinite gag orders based on little more than boilerplate justifications.¹⁴⁷ This guidance will likely curb those abuses of the statute. Still, the guidance does not go far enough, even if a strict scrutiny standard applies. The requirement that orders have an “appropriate factual basis”¹⁴⁸ is not obviously more stringent than the statute’s permissive “reason to believe” standard. Moreover, one year—the limit for gag orders, in the first instance—may still be longer than necessary for many orders, and extensions appear indefinitely available if “additional, specific facts” have been developed during the investigation. Orders longer than a year are permitted in “exceptional circumstances.”¹⁴⁹ Ultimately, much of the language in the guidance is vague, and time will tell how much the government alters its past practice.

To some degree, then, the statute’s constitutional problems remain. We might consider how a court following in the steps of the *Doe* decision would interpret the statute in a manner that avoids constitutional problems. *Doe* took that canon of construction close to its limit—perhaps too close. But it is nonetheless useful to consider how the statute might be read as constitutionally compliant.

The three substantive problems identified in *Microsoft* are not so challenging to solve. *First*, the court would have to narrowly construe the words “for such period as the court deems appropriate” in the statute.¹⁵⁰ A limit of one year, as the government’s guidance requires, is still quite long—a period of thirty or sixty days may come closer to meeting the narrow tailoring requirement.¹⁵¹ Sneak-and-peek warrants, for

¹⁴⁷ See Brad Smith, *DOJ Acts to Curb the Overuse of Secrecy Orders. Now It’s Congress’ Turn.*, MICROSOFT (Oct. 23, 2017), <http://blogs.microsoft.com/on-the-issues/?p=55096> [<http://perma.cc/9AZ2-TLPM>] (“Until today, vague legal standards have allowed the government to get indefinite secrecy orders routinely, regardless of whether they were even based on the specifics of the investigation at hand. That will no longer be true.”).

¹⁴⁸ See Rosenstein Memorandum, *supra* note 95, at 1.

¹⁴⁹ *Id.*

¹⁵⁰ 18 U.S.C. § 2705(b) (2012).

¹⁵¹ The SCA’s delayed-notice provision, found at § 2705(a), permits the government to obtain an order delaying notification “for a period not to exceed ninety days.” 18 U.S.C. § 2705(a)(1)(A), (B) (2012). But as Professor Kerr has observed, that period is already “simply too long” and “serves no legitimate purpose.” Kerr, *supra* note 59, at 1235. A thirty-day period is sufficient for police “to assess the evidence, pursue leads, and indict the target if necessary.” *Id.*

example, tend to have a more limited duration,¹⁵² with extensions permitted where the government provides a “fresh showing of the need for further delay.”¹⁵³ Creating a clear and reasonable temporal limit, and requiring the government to justify any extensions of that limit, ensures that speech is not restrained any longer than it needs to be. The government would surely protest such a requirement as overly burdensome, but it is not one that the government is unable to bear or that is disproportionate to the competing interests at stake.

Second, the court should construe “reason to believe” in § 2705(b) to mean “*good* reason to believe.” Recall that the Second Circuit in *Doe* confronted a similar issue: The statute commanded that a court must uphold an NSL gag order unless it found “no reason to believe” that an identified harm would occur. In *Doe*, the court construed this to mean “good reason to believe.”¹⁵⁴ So too, here: strict scrutiny requires that a service provider’s First Amendment rights not be limited absent concrete evidence showing it is necessary. Permitting gag orders to issue on the basis of speculative and generalized information inevitably results in an overbroad suppression of speech. But if a court has a *good* reason to believe some enumerated harm would follow from disclosure, that suggests proper grounding for a gag order.

Third, the court should take a narrow reading of the words “seriously jeopardize” and “unduly delay” in §2705(b)(5). There is an instructive comparison to *Doe* here, too: The court there narrowed the statute by holding that all of the enumerated harms must relate to the statute’s focus on terrorism and intelligence gathering.¹⁵⁵ The SCA merits a similarly strict construction. The interests here can be compelling, but only if the statute’s language is read sufficiently narrowly. For example, a court should not consider that disclosure will “seriously jeopardize” an investigation unless it would actually imperil the entire investigation. And a court should strictly interpret “unduly delay,” perhaps to mean that the delay would be substantial (that is, more than what is considered normal)

¹⁵² Even under the amended and more controversial version of the sneak-and-peek statute, notice of a search may be delayed only if “the warrant provides for the giving of such notice within a reasonable period not to exceed 30 days after the date of its execution, or on a later date certain if the facts of the case justify a longer period of delay.” 18 U.S.C. § 3103a(b)(3) (2012). The delay can be extended only if “an updated showing of the need for further delay” is made and “each additional delay [is] limited to periods of 90 days or less, unless the facts of the case justify a longer period of delay.” *Id.* § 3103a(c). These provisions appear to have been added in 2006. *See* Pub. L. No. 109-177, title I, § 114, 120 Stat. 177, 210 (2006).

¹⁵³ *United States v. Villegas*, 899 F.2d 1324, 1337 (2d Cir. 1990).

¹⁵⁴ *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876 (2d Cir. 2008).

¹⁵⁵ *Id.*

and likely prejudicial. These findings must, again, be case-specific and evidence-based.

Remediating the procedural problems in the gag-order framework is more difficult, but not impossibly so. As noted, the statute does not require “that the service provider be afforded an opportunity to intervene to be heard on the merits of the government’s application for a non-disclosure order prior to the court issuing” the order.¹⁵⁶ A court’s authority to devise a “statutory basis” for intervention where there is none might strike one as dubious.¹⁵⁷ But it is certainly not without precedent. The Federal Rules of Criminal Procedure, for example, make no reference to the right to intervene in a criminal case. But the Second Circuit has nonetheless held that such a motion is a proper vehicle for third parties to assert a First Amendment right of access to court proceedings.¹⁵⁸ It based that holding on federal courts’ “authority to ‘formulate procedural rules not specifically required by the Constitution or the Congress’ to ‘implement a remedy for violation of recognized rights.’”¹⁵⁹ Courts have taken a similar tack for third parties seeking to intervene in a civil case to challenge a confidentiality order. Although Federal Rule of Civil Procedure 24 is perhaps, on its face, “a questionable procedural basis” for such an intervention, courts have found that basis on a “broad-gauged” reading of Rule 24.¹⁶⁰

Here, too, a court could devise a method for service providers to intervene in gag-order proceedings. Like the “reciprocal notice procedure” in *Doe*, this process would give the government a path for obtaining a § 2705(b) order without running afoul of the First Amendment. Under this procedure, the government would be required to notify a service provider of its intention to seek a gag order, and the provider could participate in the proceeding by way of a simple motion to intervene. The government would also be required to give the provider sufficient information at every stage, including when the government seeks extensions of the original order. And the government would, of course, always bear the burden of proof. From a digital privacy perspective, this procedure is imperfect:

¹⁵⁶ *In re* Order of Nondisclosure, 45 F. Supp. 3d 1, 6 (D.D.C. 2014).

¹⁵⁷ *Id.*

¹⁵⁸ *United States v. Aref*, 533 F.3d 72, 81 (2d Cir. 2008); *see also In re* Associated Press, 162 F.3d 503, 507 (7th Cir. 1998) (allowing a party to intervene in a criminal case to assert First Amendment right to access to court proceedings).

¹⁵⁹ *Aref*, 533 F.3d at 81 (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983)).

¹⁶⁰ *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000) (“[E]very court of appeals to have considered the matter has come to the conclusion that Rule 24 is sufficiently broad-gauged to support a request of intervention for the purposes of challenging confidentiality orders.”).

Ultimately, a service provider has to be sufficiently motivated and well-resourced to challenge the government's gag order. But it provides a possible remedy to the First Amendment problems with the statute's procedural framework.

IV. CONCLUSION

The government's interest in effective surveillance is important. But so are the First Amendment interests at stake. The notion that prior restraints are to be regarded as particularly dangerous dates back to William Blackstone¹⁶¹ and has been part of the First Amendment's firmament since the early twentieth century.¹⁶² Courts inclined to carve out an exception for gag orders in the age of digital surveillance should be mindful of that history and proceed carefully.

¹⁶¹ SMOLLA & NIMMER, *supra* note 4, § 15:2.

¹⁶² *See Near v. Minnesota*, 283 U.S. 697 (1931).