

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 7072
OFFERED BY M . _____**

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

1 SECTION 1. SHORT TITLE.

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

3 SEC. 2. DELAY OF NOTIFICATION.

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

6 “(a) DELAY OF NOTIFICATION.—

7 “(1) APPLICATION.—A governmental entity
8 that is seeking a warrant, order, or subpoena under
9 section 2703 may include in the application (or mo-
10 tion in the case of an administrative subpoena au-
11 thorized by a Federal or State statute or a Federal
12 or State grand jury or trial subpoena) a request to
13 a court of competent jurisdiction for an order delay-
14 ing the notification under section 2703 for a period
15 of not more than 60 days.

16 “(2) DETERMINATION.—The court may not
17 grant a request for delayed notification to a cus-
18 tomer or subscriber made under paragraph (1), or

1 an extension of such delayed notification requested
2 by the governmental entity pursuant to paragraph
3 (3), unless the court issues a written determination,
4 based on specific and articulable facts, and including
5 written findings of fact and conclusions of law, that
6 it is substantially likely that the notification of the
7 customer or subscriber of the existence of the war-
8 rant, order, or subpoena will result in—

9 “(A) endangering the life or physical safety
10 of an individual;

11 “(B) flight from prosecution;

12 “(C) destruction of or tampering with evi-
13 dence;

14 “(D) intimidation of potential witnesses; or

15 “(E) otherwise seriously jeopardizing an
16 investigation or unduly delaying a trial.

17 “(3) EXTENSION.—The governmental entity
18 may request one or more extensions of the delay of
19 notification granted under paragraph (2) for a pe-
20 riod of not more than 60 days for each such exten-
21 sion. The court may only grant such an extension if
22 the court makes a written determination required
23 under paragraph (2) and the extension is in accord-
24 ance with the requirements of such paragraph.

1 “(4) EXPIRATION OF DELAY OF NOTIFICA-
2 TION.—Upon expiration of the period of delay of no-
3 tification and all extensions thereof under para-
4 graphs (2) and (3) of this subsection, the govern-
5 mental entity shall deliver to the customer or sub-
6 scriber by personal service, registered or first-class
7 mail, electronic mail, or other means approved by
8 the court, as reasonably calculated to reach the cus-
9 tomer or subscriber within 72 hours of the expira-
10 tion of the delay—

11 “(A) a copy of the warrant, order, or sub-
12 poena; and

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

15 “(i) of the nature of the inquiry made
16 by the governmental entity, with reason-
17 able specificity;

18 “(ii) that information maintained for
19 such customer or subscriber by the pro-
20 vider of electronic communications service
21 or remote computing service to which the
22 warrant, order, or subpoena under section
23 2703 was directed, was supplied to or re-
24 quested by the governmental entity;

1 “(iii) that notification of such cus-
2 tomer or subscriber was delayed by court
3 order;

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

6 “(v) the provision of law under which
7 the order delaying notification was author-
8 ized; and

9 “(vi) that the governmental entity
10 will, upon request by the customer or sub-
11 scriber, provide the customer or subscriber
12 with a copy of the information that was
13 disclosed in response to the warrant, order,
14 or subpoena, or in the event that no infor-
15 mation was disclosed, a written certifi-
16 cation that no information was disclosed.

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

24 “(A) with a description of the information
25 disclosed and a copy of the information that

1 was disclosed in response to the warrant, order,
2 or subpoena; or

3 “(B) in the event that no information was
4 disclosed, with a written certification that no in-
5 formation was disclosed.”.

6 **SEC. 3. PRECLUSION OF NOTICE.**

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

9 “(b) PRECLUSION OF NOTICE.—

10 “(1) APPLICATION.—A governmental entity
11 that is seeking a warrant, order, or subpoena under
12 section 2703, when it is not required to notify the
13 customer or subscriber, or to the extent that it may
14 delay such notice pursuant to subsection (a), may
15 apply to a court for an order, subject to paragraph
16 (6), directing a provider of electronic communica-
17 tions service or remote computing service to which a
18 warrant, order, or subpoena under section 2703 is
19 directed not to notify any other person of the exist-
20 ence of the warrant, order, or subpoena for a period
21 of not more than either 60 days or the period of
22 delay of notice provided under subsection (a), if any.

23 “(2) DETERMINATION.—The court may not
24 grant a request for an order made under paragraph
25 (1), or an extension of such order requested by the

1 governmental entity pursuant to paragraph (3), un-
2 less—

3 “(A) the court issues a written determina-
4 tion, based on specific and articulable facts, and
5 including written findings of fact and conclu-
6 sions of law, that it is substantially likely that
7 not granting the request will result in—

8 “(i) endangering the life or physical
9 safety of an individual;

10 “(ii) flight from prosecution;

11 “(iii) destruction of or tampering with
12 evidence;

13 “(iv) intimidation of potential wit-
14 nesses; or

15 “(v) otherwise seriously jeopardizing
16 an investigation or unduly delaying a trial;
17 and

18 “(B) the order is narrowly tailored and
19 there is no less restrictive alternative, including
20 notification to an individual or organization
21 within or providing legal representation to the
22 customer or subscriber, to avoid an adverse re-
23 sult as described in clause (i) through (v) of
24 subparagraph (A).

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

9 “(4) NOTIFICATION OF CHANGED CIR-
10 CUMSTANCES.—If the need for the order issued
11 under paragraph (2) changes materially, the govern-
12 mental entity that requested the order shall notify
13 the court within 72 hours of the changed cir-
14 cumstances, and the court shall reassess the order
15 and modify or vacate as appropriate.

16 “(5) OPPORTUNITY TO BE HEARD.—

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

1 “(i) the order does not meet require-
2 ments provided in paragraph (2); or

3 “(ii) compliance with the order is un-
4 reasonable or otherwise unlawful.

5 “(B) STAY OF DISCLOSURE OF CUSTOMER
6 OR SUBSCRIBER COMMUNICATIONS OR
7 RECORDS.—A provider’s obligation to disclose
8 the information requested in the warrant, order,
9 or subpoena to which the order in paragraph
10 (1) applies is stayed upon the filing of the ap-
11 plication, petition, or motion under this para-
12 graph pending resolution of the application, pe-
13 tition, or motion, unless the court with jurisdic-
14 tion over the challenge determines based on a
15 showing by the governmental entity that the
16 stay should be lifted in whole or in part prior
17 to resolution.

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

22 “(6) EXCEPTION.—A provider of electronic
23 communications service or remote computing service
24 to which an order under paragraph (2) applies, or
25 an officer, employee, or agent thereof, may disclose

1 information otherwise subject to any applicable non-
2 disclosure requirement to—

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

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

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

11 “(7) SCOPE OF NONDISCLOSURE.—Any person
12 to whom disclosure is made under paragraph (6)
13 (other than the governmental entity) shall be subject
14 to the nondisclosure requirements applicable to the
15 person to whom the order is issued. Any recipient
16 authorized under this subsection to disclose to a per-
17 son information otherwise subject to a nondisclosure
18 requirement shall notify the person of the applicable
19 nondisclosure requirement.

20 “(8) SUPPORTING DOCUMENTATION.—Upon
21 serving a provider of electronic communications serv-
22 ice or remote computing service with an order grant-
23 ed under paragraph (2), or an extension of such
24 order granted under paragraph (3), the govern-
25 mental entity shall include a copy of the warrant,

1 order, or subpoena to which the nondisclosure order
2 applies.

3 “(9) EXPIRATION OF ORDER PRECLUDING NO-
4 TICE.—Upon expiration of an order issued under
5 paragraph (2) or, if an extension has been granted
6 under paragraph (3), expiration of the extension, the
7 governmental entity shall deliver to the customer or
8 subscriber, by personal service, registered or first-
9 class mail, electronic mail, or other means approved
10 by the court as reasonably calculated to reach the
11 customer or subscriber within 72 hours of the expi-
12 ration of the order—

13 “(A) a copy of the warrant, order, or sub-
14 poena; and

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

17 “(i) of the nature of the law enforce-
18 ment inquiry with reasonable specificity;

19 “(ii) that information maintained for
20 such customer or subscriber by the pro-
21 vider of electronic communications service
22 or remote computing service to which the
23 warrant, order, or subpoena under section
24 2703, was directed was supplied to or re-
25 quested by the government entity;

1 “(iii) that notification of such cus-
2 tomer or subscriber was precluded by court
3 order;

4 “(iv) of the identity of the court au-
5 thorizing the preclusion of notice;

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

9 “(vi) that the government will, upon
10 request by the customer or subscriber, pro-
11 vide the customer or subscriber with a
12 copy of the information that was disclosed
13 in response to the warrant, order or sub-
14 poena, or in the event that no information
15 was disclosed, a written certification that
16 no information was disclosed.

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

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

4 “(B) in the event that no information was
5 disclosed, a written certification that no infor-
6 mation was disclosed.”.

7 **SEC. 4. ADDITIONAL PROVISIONS REGARDING DELAYED**
8 **NOTICE.**

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

11 “(c) ANNUAL REPORT.—On an annual basis, the At-
12 torney General shall provide to the Committees on the Ju-
13 diciary of the House of Representatives and the Senate,
14 in a manner consistent with protection of national secu-
15 rity, a report setting forth with respect to the preceding
16 calendar year, for each Federal judicial district—

17 “(1) the number of customers or subscribers
18 with respect to whom, in that calendar year, a war-
19 rant, subpoena, or court order was issued pursuant
20 to section 2703;

21 “(2) the aggregate number of applications re-
22 questing delay of notification pursuant to section
23 2705;

24 “(3) the aggregate number of such orders ei-
25 ther granted, extended, or denied;

1 “(4) the aggregate number of such orders tar-
2 geting a member of the news media, including any
3 conduct related to activities protected under the
4 First Amendment; and

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

10 The Attorney General shall include in the report under
11 this subsection a description of the process and the infor-
12 mation used to determine the numbers for each of para-
13 graphs (1) through (5).”.

