IN THE NAME OF SECRECY: REVISITING GRAND JURY SECRECY AS APPLIED TO WITNESSES

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INTRODUCTION

Special Counsel Robert S. Mueller III's investigation into Russian interference in the 2016 U.S. presidential election renewed the public's interest in grand jury proceedings.[1] Between the Special Counsel's probe and additional investigations involving President Donald J. Trump, his personal accounting firm Mazars USA, LLP, and Deutsche Bank, grand jury subpoenas in particular have entered the national spotlight.[2] While the grand jury subpoenas and witnesses in those investigations have garnered national attention and generated a steady stream of running media commentary, an unknown—but by all estimates, significant—number of grand jury subpoenas remain hidden from public scrutiny by virtue of court-issued gag orders that preclude subpoena recipients from speaking out about them.[3]

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1. *See, e.g.*, Matt Apuzzo, *Mueller Issuing Subpoenas Through Washington Grand Jury*, N.Y. TIMES (Aug. 3, 2017), https://www.nytimes.com/2017/08/03/us/politics/robert-mueller-russia-investigation-grand-jury.html?; Sharon LaFraniere, *Judge Extends Term for Grand Jury Hearing Evidence From Mueller*, N.Y. TIMES (Jan. 4, 2019), https://www.nytimes.com/2019/01/04/us/politics/mueller-grand-jury.html?.

2. *See* Trump v. Vance, 140 S. Ct. 2412 (2020); Adam Liptak, *Supreme Court Rules Trump Cannot Block Release of Financial Records*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/07/09/us/trump-taxes-supreme-court.html; William K. Rashbaum & Benjamin Weiser, *Trump Raises New Objections to Subpoena Seeking His Tax Returns*, N.Y. TIMES (July 15, 2020), https://www.nytimes.com/2020/07/15/nyregion/donald-trump-taxes-cyrus-vance.html?; William K. Rashbaum & Benjamin Weiser, *D.A. Is Investigating Trump and His Company Over Fraud, Filing Suggests*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/08/03/nyregion/donald-trump-taxes-cyrus-vance.html?; David Enrich, Ben Protess, William K. Rashbaum, and Benjamin Weiser, *Trump's Bank Was Subpoenaed by N.Y. Prosecutors in Criminal Inquiry*, N.Y. TIMES, August 5, 2020, https://www.nytimes.com/2020/08/05/nyregion/trump-taxes-vance-deutsche-bank.html?.

3. For example, Microsoft alleged that between October 2014 and May 2016, federal courts issued more than 3,250 secrecy orders. *See* Microsoft Corp. v. U.S. Dep't of Just., 233 F. Supp. 3d 887, 897 (W.D. Wash. 2017).

The Stored Communications Act[4] ("SCA" or "the Act") allows the government to subpoena an internet service provider for certain information about or communications belonging to that provider's customers.[5] Section 2705(b) of the SCA further provides that, upon the government's request, a court *must* issue a non-disclosure order preventing the provider from disclosing the existence of the subpoena if there is "reason to believe" that one of five enumerated consequences will occur were the subpoena to become known to any person.[6] These gag orders raise significant concerns, not only obscuring the magnitude of the government's surveillance efforts, but also potentially conflicting with grand jury witnesses' First Amendment rights.

Courts have recognized the tension between § 2705(b) and the First Amendment; unfortunately, much of the attention has focused on the indeterminate, and potentially permanent, length of the gag orders, without much scrutiny as to whether grand jury secrecy justifies the imposition of a gag order in the first place. For instance, the U.S. Court of Appeals for the Third Circuit became the first federal appellate court to consider whether a § 2705(b) non-disclosure order violates a grand jury witness's First Amendment rights, and concluded that the one-year orders in that case furthered the government's compelling interest in preserving the secrecy of grand jury proceedings.[7]

Although the preservation of grand jury secrecy can excuse curbing a grand jury witness's free speech rights in certain circumstances, this Essay argues that the persistent exclusion of witnesses from the list of parties covered by the grand jury secrecy provisions of Federal Rule of Criminal Procedure 6(e) diminishes the government's general interest in grand jury secrecy as applied to those witnesses. Because Rule 6(e) does not contemplate gagging grand jury witnesses to protect the general cloak of secrecy long-considered integral to grand jury proceedings,[8] courts too should avoid falling back on that same generic principle when evaluating the constitutionality of speech restrictions on grand jury witnesses. Rather, courts should conduct an individualized assessment of both the investigation and the specific witness at issue for particularized facts or circumstances not contemplated by Rule 6(e), which may give the

4. 18 U.S.C. §§ 2701–2713.

5. *Id.* § 2703(c)(2).

6. *Id.* § 2705(b). Other statutes authorize similar gag orders. *See, e.g.*, 12 U.S.C. § 3409(b) (providing for a court-issued non-disclosure order, in renewable 90-day increments, where an authorized government agency subpoenas financial records); 15 U.S.C. § 78u(h)(4)(A) (providing for a court-issued non-disclosure order, in renewable 90-day increments, in SEC investigations); 18 U.S.C. § 3486(a)(6)(A) (providing for a court-issued non-disclosure order, in renewable 90-day increments, in investigations of healthcare fraud or crimes involving sexual exploitation or abuse of children).

7. *In re* Subpoena 2018R00776, 947 F.3d 148 (3d Cir. 2020).

8. *See* Fed. R. Crim. P. Rule 6(e); *see also The West Wing*: *In This White House* (NBC television broadcast Oct. 25, 2000) ("Attorneys and jurors are under a gag order. Witnesses are free to say whatever they want, and anyone is free to repeat what they've said.").

government a compelling interest in preserving the secrecy of that particular grand jury proceeding.

This Essay proceeds in four Parts. Part I first provides a brief overview of the First Amendment's protections and limitations over governmental regulation of speech. Part II then sets forth the pertinent provisions of the SCA that restrict service providers' speech, before Part III turns to the origins of grand jury secrecy in the United States and its later codification in Rule 6(e). Finally, Part IV reviews the intersection of each of these areas of law to conclude that a more rigorous, individualized compelling-interest analysis is required.

I. THE FIRST AMENDMENT AND GOVERNMENTAL REGULATION OF SPEECH

The First Amendment to the U.S. Constitution, which prohibits the government from enacting laws "abridging the freedom of speech,"[9] preserves the fundamental principles that people should decide for themselves "the ideas and beliefs deserving of expression, consideration, and adherence,"[10] and that "debate on public issues should be uninhibited, robust, and wide-open."[11] To prevent laws and regulations from impermissibly infringing upon these essential rights, the government generally cannot "restrict expression because of its message, its ideas, its subject matter, or its content."[12]

To be sure, an individual's freedom of speech is not absolute.[13] The government may constitutionally regulate certain classes of speech that fall outside of the First Amendment's broad protections, including obscenity; defamation; child pornography; fraud; speech integral to criminal conduct; advocacy intended, and likely, to incite imminent lawless action; and so-called "fighting words."[14] Outside of these traditional categories of expression, however, whether the government may constitutionally regulate

9. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). As is relevant for purposes of this Essay, First Amendment protections apply to corporations, particularly in the context of political speech. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342 (2010).

10. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

11. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); *see also* Roth v. United States, 354 U.S. 476, 484 (1957) (noting that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

12. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (quotation marks omitted) (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).

13. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976).

14. United States v. Alvarez, 567 U.S. 709, 717–18 (2012) (collecting cases); *see also* United States v. Stevens, 559 U.S. 460, 468 (2010) ("'From 1791 to the present,' however, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'" (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) and collecting cases)).

speech generally depends on the type of speech at issue, the severity of the restriction, and the corresponding level of scrutiny.

To begin, the level of protection afforded to speech varies with whether the particular speech at issue is of public or private concern. Speech on public issues lies "at the heart of the First Amendment's protection"[15] and "is more than self-expression; it is the essence of self-government."[16] Accordingly, it "occupies the highest rung of hierarchy of First Amendment values, and is entitled to special protection."[17] On the other hand, "First Amendment protections are often less rigorous" for speech related to purely private matters, because limiting such speech "does not implicate the same constitutional concerns as limiting speech on matters of public interest."[18] Namely, "[t]here is no threat to the free and robust debate of public issues," there is no possible disruption to the "meaningful dialogue of ideas," and the potential for liability does not risk the same "reaction of self-censorship" regarding matters of public interest.[19]

To determine whether speech addresses a matter of public or private concern, courts must examine "the content, form, and context of that speech, as revealed by the whole record."[20] To assist courts, the Supreme Court has articulated various "guiding principles . . . that accord broad protection to speech."[21] In general, speech dealing with matters of public concern includes speech that fairly relates "to any matter of political, social, or other concern to the community," or is "a subject of general interest and of value and concern to the public."[22] This is true even if the character of the statement is inappropriate or controversial,[23] and without regard to the private nature of the statement.[24] Examples of speech involving matters of only private concern include information about a particular person's credit

15. Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (quotation marks omitted) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985)).

16. *Id.* at 452 (quotation marks omitted) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

17. *Id*. (quotation marks omitted) (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

18. *Id.* (citations and quotation marks omitted).

19. *Id.* (citations and quotation marks omitted).

20. *Id.* at 453 (citation and quotation marks omitted); *see id.* at 454 ("In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.").

21. *Id*. at 452. For instance, *Snyder* involved abhorrent speech by members of the Westboro Baptist Church directed at homosexuality during a military funeral. *Id.* at 448–49. Although the content of the speech on a matter of public concern—namely, homosexuality in the military—was "insulting" and "outrageous," the Supreme Court held that we must tolerate such speech in public debate "in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Id.* at 458.

22. *Id.* at 453 (citations and quotations marks omitted).

23. *Id.*

24. Rankin v. McPherson, 483 U.S. 378, 386 n.11 (1987) ("The private nature of the statement does not . . . vitiate the status of the statement as addressing a matter of public concern." (citing Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414–16 (1979))).

report[25] and videos of a government employee engaging in sexually explicit acts.[26]

In addition to the public-private speech distinction, the Supreme Court's First Amendment jurisprudence also distinguishes between "content-based" and "content-neutral" regulations.[27] Determining whether a particular restriction is content-based or content-neutral can also be a difficult task, and requires courts to "look to the purpose behind the regulation."[28]

When a government regulation targets the communicative content of speech, it is a content-based restriction and is presumptively unconstitutional.[29] Content-based restrictions include laws that apply "to particular speech because of the topic discussed or the idea or message expressed,"[30] and such restrictions are subject to strict scrutiny—justified only if they are narrowly tailored to advance a compelling government interest through the least restrictive means.[31] Conversely, government regulation of expressive activity is typically content neutral if "it is justified without reference to the content of the regulated speech."[32] A content-neutral restriction on speech need pass only intermediate scrutiny, meaning it will be upheld if it "furthers an important or substantial governmental interest," that "is unrelated to the suppression of free expression," and "the

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25. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985) (holding that the petitioner's credit report, which was only made available to five subscribers who could not disseminate it further, "was speech solely in the individual interest of the speaker and its specific business audience," lacked any "strong interest in the free flow of commercial information," and, therefore, "concern[ed] no public issue").

26. City of San Diego v. Roe, 543 U.S. 77, 83–84 (2011) (per curiam) (holding that the respondent's sale of home-made, sexually explicit videotapes on eBay did "not qualify as a matter of public concern under any view of the public concern test" because it "did nothing to inform the public about any aspect of the [public employer's] functioning or operation" or comment "on an item of political news").

27. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

28. Bartnicki v. Vopper, 532 U.S. 514, 526 (2001).

29. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015); *see also* United States v. Alvarez, 567 U.S. 709, 716–17 (2012) (quoting Ashcroft v. Am. C.L. Union, 542 U.S. 656, 660 (2004)) ("[T]he Constitution 'demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.'").

30. *Reed*, 576 U.S. at 163–64 (holding that the town's sign code, which restricted the size, number, duration, and location of outdoor "temporary directional signs," violated the First Amendment because those restrictions were more stringent than other categories of outdoor signs based on the code's definitions of "political signs" and "ideological signs").

31. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000); *see also* Thompson v. W. States Med. Ctr., 535 U.S. 357, 371 (2002) ("[I]f the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.").

32. *Bartnicki*, 532 U.S. at 526 (citation, quotation marks, and emphasis omitted). An example of a content-neutral restriction of speech that did not violate free speech rights involved a municipal noise regulation that required performers at a bandshell to use sound-amplification equipment and a sound technician provided by the city to regulate the volume of music and prevent disturbing surrounding residents; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 792, 803 (1989) (upholding city sound-amplification guideline as reasonable regulation of place and manner of protected speech).

incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest."[33]

Another type of restriction on speech—and perhaps the most repugnant to the First Amendment—is a "prior restraint."[34] This term "is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur."[35] In other words, a prior restraint is a "governmental restriction on speech . . . before its actual expression."[36] Classic examples are "court orders that actually forbid speech activities," including temporary restraining orders and permanent injunctions.[37] While not unconstitutional per se,[38] prior restraints are "the most serious and the least tolerable infringement on First Amendment rights."[39] The government, therefore, must overcome a heavy presumption of unconstitutionality.[40] Like content-based restrictions, courts generally have applied strict scrutiny to prior restraints.[41]

II. THE SCA AND § 2705(B) GAG ORDERS

33. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 622 (1994) (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

34. *See* Al-Amyn Sumar, *Prior Restraints and Digital Surveillance: The Constitutionality of Gag Orders Issued Under the* Stored Communications Act, 20 YALE J. L. & TECH. 74, 76–77 (2018) ("The First Amendment abhors no restriction on speech more than a prior restraint."). Fans of the Coen brothers, or at least the character Walter Sobchak, are also familiar with the concept of prior restraint. *See* THE BIG LEBOWSKI (PolyGram Filmed Entertainment & Working Title Films 1998) ("For your information, the Supreme Court has roundly rejected prior restraint.").

35. Alexander v. United States, 509 U.S. 544, 550 (1993) (quotation marks and emphasis omitted).

36. *Prior Restraint*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 589 (1976) (noting that prior restraint "shuts off communication before it takes place").

37. *Alexander*, 509 U.S. at 550. Prior restraints also come in the form of administrative licensing schemes that require speakers to obtain approval before engaging in certain forms of speech. *See, e.g.*, Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992).

38. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975).

39. *Neb. Press*, 427 U.S. at 559.

40. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225 (1990); Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1305 (1983); *see also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.") (collecting cases).

41. *See, e.g.*, Harbourside Place, LLC v. Town of Jupiter, 958 F.3d 1308, 1322 (11th Cir. 2020) (citation and quotation marks omitted) (stating that prior restraints are presumably constitutional and face strict scrutiny); In re Subpoena 2018R00776, 947 F.3d 148, 155 (3d Cir. 2020) (same); In re Murphy-Brown, LLC, 907 F.3d 788, 797 (4th Cir. 2018) (same); Sindi v. El-Moslimany, 896 F.3d 1, 35 (1st Cir. 2018) (same); In re Dan Farr Prods., 874 F.3d 590, 593 n.2 (9th Cir. 2017) (same).

The SCA not only permits the government to compel information from third-party internet service providers as part of a grand jury investigation, but it also allows the government to restrict the speech rights of those witness-providers. The SCA sought to reconcile the tension between traditional Fourth Amendment doctrine, which prizes protection of the home and other private physical spaces, with the emerging reality that some of our most private information or communications are increasingly being stored away from our homes in remote environments belonging to third parties.[42] The remote, network nature of the Internet raised uncertainty as to whether then-existing Fourth Amendment doctrine would protect private information transmitted or maintained by commercial internet service providers.[43]

To remedy any potential gap, Congress implemented a series of statutory protections that imposed limits on qualifying service providers' ability to share certain customer or subscriber information with both government and non-governmental actors.[44] Congress further delineated the circumstances in which government actors could, through formal process, compel customer information or communications from those service providers.[45] Among the modes of formal process available to the government is a federal or state grand jury subpoena.[46]

By issuing such a subpoena to a service provider and calling for communications or information relevant to the government's investigation and within the provider's possession, the government has made the service provider a witness to that grand jury proceeding. The SCA further permits the government to request a court to issue a non-disclosure order that effectively gags the provider-witness from speaking about its receipt of the subpoena or its participation in the government's investigation. The information that government actors may obtain through a grand jury subpoena and the circumstances in which the government can preclude the provider-witness from speaking about the subpoena are detailed in turn below.

A. Information that the Government Obtains Under the SCA

Any entity that provides the public with an "electronic communication service" ("ECS") or a "remote computing service" ("RCS") is subject to the SCA's privacy framework.[47] Many providers serve both ECS and RCS

42. 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, 1210 (2004).

43. *Id*. at 1209–13.

44. *See* 18 U.S.C. § 2702.

45. *See id.* § 2703. Kerr, *supra* note 42, at 1212–13.

46. The government may also compel information through federal or state search warrants, administrative subpoenas, and court orders. 18 U.S.C. § 2703.

47. 18 U.S.C. § 2702(a). ECS providers are those who offer "users thereof the ability to send or receive wire or electronic communications," 18 U.S.C. § 2510(15), whereas RCS

functions, and how a provider is behaving with respect to any particular communication is critical because it determines the level of protection afforded to the communication, particularly as against government-compelled disclosure.[48] For instance, if the provider is not acting as an ECS or RCS provider with respect to certain customer or subscriber information, the customer or subscriber must rely on the Fourth Amendment protection against unlawful searches and seizures,[49] including all of the uncertainty that entails.[50] Assuming the SCA applies, however, the Act authorizes

providers offer "computer storage or processing services by means of an electronic communications system." 18 U.S.C. § 2711(2). Google is an example of an ECS or RCS provider.

48. Kerr, *supra* note 42, at 1215–16. For instance, the SCA regulates an ECS provider's ability to disclose "the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1). "Electronic storage" refers to "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof" and "any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. § 2510(17). Notably, some courts have differed as to when (or for how long) an email is held for "backup purposes," which may affect whether the email falls within the scope of the SCA and, if so, how much protection it is afforded. Those differing interpretations, however, are beyond the scope of this Essay. As to RCS providers, the SCA regulates communications that are "carried or maintained" "on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service," "solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing." 18 U.S.C. § 2702(a)(2). The SCA further regulates an ECS or RCS provider's disclosure of "record[s] or other information pertaining to a subscriber or customer," albeit with less restrictions. 18 U.S.C. § 2702(a)(3).

49. Kerr, *supra* note 42, at 1213.

50. While at least one appeals court has squarely held that individuals enjoy a reasonable expectation of privacy "in the contents of emails 'that are stored with, or sent or received through, a commercial ISP,'" United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010), this appears to be a potentially growing, but still minority view. *See* United States v. Hasbajrami, 945 F. 3d 641, 666 (2d Cir. 2019) (assuming "a United States person ordinarily has a reasonable expectation in the privacy of his e-mails sufficient to trigger a Fourth Amendment reasonableness inquiry when the government undertakes to monitor even foreign communications in a way that can be expected to, and . . . does, lead to the interception of communications with United States persons"); Johnson v. Duxbury, 931 F.3d 102, 108 n.5 (1st Cir. 2019) (contrasting a lack of reasonable expectation of privacy in "addressing information" necessary for third parties to route private communications with the protections generally afforded to the contents of private communications, including emails); In re Application of the U.S. for Historical Cell Site Data, 724 F.3d 600, 611 (5th Cir. 2013) ("Communications content, such as the contents of letters, phone calls, and emails, which are not directed to a business, but simply sent via that business, are generally protected. However, addressing information, which the business needs to route those communications appropriately and efficiently are not."), *abrogated on other grounds by* United States v. Carpenter, 138 S. Ct. 2206 (2018). *But see* Walker v. Coffey, 905 F.3d 138, 148 (3d Cir. 2018) ("[A]t present *Warshak* remains closer to a lonely outlier than to a representation of consensus.").

increasingly greater access to subscriber information and communications based on greater degrees of process in a type of "upside-down pyramid."[51]

With a grand jury subpoena, the government is entitled to a more limited set of material than would otherwise be available through greater process (i.e., a search warrant). First, if the government provides prior notice to the customer or subscriber, a subpoena authorizes it to obtain the contents of communications held in electronic storage for more than 180 days as well as all eligible communications held by RCS providers.[52] Second, even without advanced notice, a grand jury subpoena entitles authorities to a limited set of non-content information about the customer or subscriber, including its name, address, telephone connection records or records of session times and durations, length and type of service, subscriber number or identity, and means and payment for service.[53]

B. Governmental Restrictions on the Provider-Witness's Speech

The SCA not only requires service providers to supply certain information the government has compelled by means of a grand jury subpoena; it also regulates when and to whom service providers can disclose the fact that they even received a subpoena in the first place. For instance, when prior notice is required to obtain the contents of communications, the government can seek to delay that notification, initially up to ninety days, if a supervisory official certifies that notice of the subpoena may result in any of the following adverse effects: the endangerment of an individual's life or physical safety, flight from prosecution, destruction or tampering of evidence, intimidation of potential witnesses, or serious jeopardization of an investigation or undue delay of trial.[54]

Moreover, for situations under § 2703 where the government is not required to give notice, or when it can delay the required notice, the government may apply for a court order prohibiting the grand jury subpoena recipient from notifying any other person of the subpoena's existence.[55] The SCA requires the court to grant the requested non-disclosure order "if it determines that there is reason to believe that notification of the existence of the" subpoena will result in one or more of the same enumerated adverse effects that entitle the government to delay notice to the customer or subscriber.[56] Thus, a § 2705(b) non-disclosure order allows government authorities to effectively gag grand jury witnesses as to the existence of the subpoena "for such period as the court deems appropriate."[57] And unlike

51. Kerr, *supra* note 42, at 1222–23.
52. 18 U.S.C. § 2703(a), (b)(1)(B).
53. Kerr, *supra* note 42, at 1222–23; 18 U.S.C. § 2703(c)(2).
54. 18 U.S.C. § 2705(a)(2).
55. 18 U.S.C. § 2705(b).
56. *Id.*
57. Moreover, at least one court has concluded that the SCA "includes no requirement that the service provider be afforded an opportunity to intervene to be heard on the

the delayed notice provision, which requires reassessment and recertification that delayed notice remains appropriate every ninety days,[58] the § 2705(b) order gagging the witness contains no similar renewal period or evaluation, resulting in orders of potentially indefinite (or infinite) duration.[59]

In 2017, then-Deputy Attorney General Rod Rosenstein provided additional direction to Department of Justice attorneys seeking § 2705(b) non-disclosure orders to ensure "each order [ ] have an appropriate factual basis and . . . extend only as long as necessary to satisfy the government's interest." Deputy Attorney General Rosenstein's memorandum advised Department attorneys, among other things, to: "conduct an individualized and meaningful assessment regarding the need for protection from disclosure"; "only seek an order when circumstances require"; "tailor the application to include the available facts of the specific cases and/or concerns attendant to the particular type of investigation," including "identify[ing] which of the factors . . . apply and explain why"; and "only seek to delay notice for one year or less," barring "exceptional circumstances."[60] The memorandum further suggested that a sliding scale as to the level of factual detail required may be appropriate.[61] For instance, "[w]hen applying for a § 2705(b) order to accompany seeking basic subscriber information in an ongoing investigation that is not public or known to the subject(s) of the investigation," the Rosenstein memorandum advised that "stating the reasons for protection from disclosure under § 2705(b) . . . usually will suffice"; "[a]t a later stage of the investigation . . . when a search warrant is being sought," however, the memorandum instructed that "the prosecutor should include more specific facts, as available, in support of the protective order."[62]

While the Rosenstein memorandum emphasizes the need for Department attorneys to conduct individualized assessments of the specific facts particular to any given case, it expressly contemplates that for many situations, including at early stages of the investigation, the generalized harms articulated in § 2705(b) are likely sufficient to justify gagging a

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merits . . . *prior* to the court issuing the non-disclosure order," but, rather, "a service provider may move to quash or modify the nondisclosure order *after* the court issues the non-disclosure order." Matter of Application of United States of Am. for an Order of Nondisclosure Pursuant to 18 U.S.C. § 2705(B) for Grand Jury Subpoena No. GJ2014031422765, 41 F. Supp. 3d 1, 6 (D.D.C. 2014).

58. 18 U.S.C. § 2705(a)(4).

59. Some courts have differed as to whether the SCA permits non-disclosure orders of indefinite duration. See *In re* Search Warrant Issued to Google, Inc., 269 F. Supp. 3d 1205, 1208–12 (N.D. Ala. 2017) (describing the conflict among certain courts and concluding that "§ 2705(b) does not generally permit nondisclosure orders of indefinite duration.").

60. Rod J. Rosenstein Memorandum, U.S. Dep't of Justice (Oct. 19, 2017), at 2–3, *available at* https://cdn.geekwire.com/wp-content/uploads/2017/10/Policy-Regarding-Applications-for-Protective-Orders-Pursuant-to-18-U.S.C...-1.pdf.

61. *Id.* at 2, n.2.

62. *Id.*

subpoena recipient.[63] However, as demonstrated below, at least some of the adverse effects set forth in § 2705(b) were not sufficiently compelling to warrant the inclusion of witnesses within Rule 6(e)'s secrecy provisions in the first instance, calling into question whether those same considerations are sufficiently compelling to survive a First Amendment strict scrutiny analysis.

III. SECRECY, RULE 6(E), AND GRAND JURY WITNESSES

This Part explains the origins of, and the justifications for, grand jury secrecy in the United States and its later incorporation into Federal Rule of Criminal Procedure 6(e). It then examines the seminal case of *Butterworth v. Smith*,[64] in which the Supreme Court addressed the competing interests between preserving grand jury secrecy and witnesses exercising their First Amendment rights.

A. The History and Development of Standard Grand Jury Secrecy Rules

Like many American legal traditions, the grand jury migrated from England with some of the earliest American colonists before memorialization in the Fifth Amendment to the U.S. Constitution in its own right.[65] Often described as both a "sword and a shield," the grand jury has historically served dueling purposes. The grand jury wielded significant investigative authority to root out potential criminal wrongdoing as it saw fit, free of procedural constraints or evidentiary rules.[66] At the same time, an increasing "veil of secrecy" under which the grand jury operated served to insulate it from influence or control by the Crown.[67] It thus came to be perceived as an independent body that ensured criminal processes were not deployed for improper political purposes.[68] From the Fifth Amendment's adoption through present day, the grand jury has continued to serve these two primary functions,[69] and the body's standard operating procedures reflect its twin purposes.

In serving as a sword, the grand jury has broad investigative powers to require persons to appear or produce documents.[70] The testimony owed by grand jury witnesses is "a basic obligation that every citizen owes his [or

63. *Id.*

64. 494 U.S. 624 (1990).

65. United States v. Costello, 350 U.S. 359, 362 (1956). The Fifth Amendment reads in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." U.S. CONST. amend. V.

66. *Costello*, 350 U.S. at 362; United States v. Calandra, 414 U.S. 338, 343 (1974).

67. J. Robert Brown, *The Witness and Grand Jury Secrecy*, 11 AM. J. CRIM. L. 169, 170 (1983).

68. *Id.* at 170–71; *see also Costello*, 350 U.S. at 362.

69. *See Calandra*, 414 U.S. at 343.

70. *Id.* at 344–45.

her] government."[71] And unlike certain protections afforded to witnesses by modern civil discovery rules,[72] a grand jury witness is not immune from testimony when the testimony is "burdensome and even embarrassing," or could potentially "cause injury to a witness' social and economic status."[73] Rather, "the duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure."[74] And when called to testify, the witness is prohibited from interfering with the grand jury's investigation, for example by advancing objections of her own.[75] Nor may she attempt to limit the scope of the grand jury's inquiry or challenge its authority.[76]

The grand jury also has significant latitude in conducting its investigation; it requires no authorization from a court to initiate an investigation, and it can "investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not."[77] The resulting indictments are further immune from challenge due to insufficient or incompetent evidence.[78] A grand jury may indict based solely on hearsay.[79] And although the grand jury itself cannot compel evidence in violation of a defendant's own constitutional, statutory, or common-law rights against self-incrimination or unreasonable searches and seizures, for example,[80] it can consider, and indict based on, information that results from a violation of those rights.[81]

In serving as a shield, state and federal courts have traditionally imposed oaths of secrecy upon grand jurors.[82] Even before enactment of the Federal Rules of Criminal Procedure, courts considered grand jury secrecy "indispensable" and essential to its functions.[83] This secrecy obligation was then codified by the Federal Rules of Criminal Procedure, first adopted in 1944.[84] Early versions of Rule 6(e) prohibited grand jurors, interpreters or

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71. *Id.* at 345.

72. *See, e.g.*, Fed. R. Civ. P. 26(c) (allowing protective orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"); Fed. R. Civ. P. 45(d).

73. *Calandra*, 350 U.S. at 345, 353.

74. *Id.* at 345.

75. *Id.*

76. *Id.*

77. United States v. Williams, 504 U.S. 36, 48 (1992).

78. *Calandra*, 350 U.S. at 344–45.

79. *Costello*, 350 U.S. at 363.

80. *Williams*, 504 U.S. at 48–49 ("[W]e have insisted that the grand jury remain 'free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.").

81. *Calandra*, 350 U.S. at 345–46, 354–55; *In re* Grand Jury Investigation of Hugle, 754 F.2d 863, 865 (9th Cir. 1985) (upholding the applicability of the marital privilege in grand jury proceedings).

82. Brown, *supra* note 67, at 171–72.

83. United States v. Johnson, 319 U.S. 503, 513 (1943).

84. The Rules took effect in 1946. *See* Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 218 n.9 (1979); Brown, *supra* note 67, at 175.

stenographers, and attorneys from disclosing matters before the grand jury, with limited exceptions for government attorneys performing official duties or for disclosures made with court authorization.[85]

The grand jury's broad investigative powers and secret deliberations underscore that "the whole theory of [the grand jury's] function is that it belongs to no branch of the institutional Government, serving as kind of buffer or referee between the Government and its people."[86] The Fifth Amendment's guarantee that a defendant will be charged only with those charges brought before a grand jury "presupposes an investigative body acting independently of either prosecuting attorney or judge."[87] Although the judicial branch calls the jurors together, administers oaths of office, and can assist the grand jury by compelling testimony or documents, the grand jury otherwise operates without judicial interference or involvement, in what has been described as an "arm's length" relationship.[88] In light of the grand jury's independence—from both courts and the prosecution—the Supreme Court, in particular, has "been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure."[89] That is, the power of the courts over "grand jury procedures is a very limited one, not remotely comparable to the power [courts] maintain over their own proceedings."[90]

The Supreme Court has articulated several additional considerations underlying the secrecy requirement, including: encouraging prospective witnesses to appear voluntarily and testify fully; preventing putative targets of an investigation from fleeing, tampering with witnesses, or improperly influencing the vote of grand jurors; and protecting the reputation of an accused who is later exonerated by the grand jury.[91]

Notwithstanding the long tradition of grand jury secrecy, and the many, compelling reasons underlying that history, the authors of Rule 6(e) set important limits to the secrecy requirement. The earliest adopted version of the Rule provided that "[n]o obligation of secrecy shall be imposed on any person except in accordance with this rule."[92] Critically, not included within the enumerated list of persons subject to the Rule's secrecy obligation were grand jury witnesses, despite contemporaneous calls by some organizations and commentators for their inclusion.[93] This exclusion, together with the prohibition against imposing additional secrecy obligations, "constituted a

85. Fed. R. Crim. P. 6(e) (1946).

86. *Williams*, 504 U.S. at 47.

87. *Id.* at 49.

88. *Id.* at 47–48.

89. *Id.* at 49–50.

90. *Id.* at 50. Rather, the Court made clear that courts' supervisory authority may be invoked to dismiss an indictment due to "misconduct [that] amounts to a violation of one of those 'few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's function." *Id.* at 46 (referring to Rule 6 and other portions of the U.S. Code).

91. *Butterworth*, 494 U.S. at 630 (quoting *Douglas Oil Co.*, 441 U.S. at 218–19).

92. Brown, *supra* note 67, at 175–76.

93. *Id.* at 175.

deliberate attempt to eradicate a widespread practice of imposing obligations of secrecy on witnesses."[94] Since its first adoption, Rule 6(e) has undergone a series of amendments, but, in present form, the Rule continues to exclude witnesses from those persons subject to grand jury secrecy while retaining the instruction that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)."[95]

Despite the plain, unwavering language of Rule 6(e), federal courts have differed as to whether they maintain inherent authority to issue protective or secrecy orders on grand jury witnesses; some courts permit the orders upon a sufficient government showing, while others have concluded they lack such authority in light of the express prohibition.[96] And certain federal statutes enacted subsequent to the Rules—such as the SCA described above[97]—have allowed the government to obtain protective or non-disclosure orders to gag certain grand jury subpoena recipients.[98] Outside of the federal system, most states either expressly exempt witnesses from grand jury secrecy oaths or do not list them among those persons bound by grand jury secrecy, although a small minority of states do impose affirmative secrecy obligations on grand jury witnesses.[99]

B. Grand Jury Secrecy and the First Amendment

Grand jury secrecy requirements necessarily impinge on a witness's First Amendment rights, effectively constituting a prior restraint on his or her freedom of speech.[100] The Supreme Court has previously considered the competing interests of preserving grand jury secrecy and witnesses exercising their First Amendment rights.

In *Butterworth v. Smith*,[101] the Court held that the governmental interest was not sufficiently compelling to justify a Florida grand jury secrecy law under the First Amendment, albeit in the specific context of a grand jury

94. *Id.* at 175–76.

95. Fed. R. Crim. P. Rule 6(e).

96. 3 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 8.5(d) (4th ed.) (collecting cases). Prior to 2002, Rule 6(e) prohibited secrecy obligations imposed on persons "except in accordance with this rule," which some courts may have understood to permit extra-textual secrecy obligations that served the purpose and interests of some other aspect of Rule 6 or Rule 6 more generally. 1 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 106 (4th ed.). In 2002, the Rule was amended to prohibit imposing secrecy obligations on any person "except in accordance with Rule 6(e)(2)(B)," which remains to this day. *Id.*; *see also* Fed. R. Crim. P. Rule 6(e)(2)(A).

97. *See supra* Part II.

98. Another example is the Right to Financial Privacy Act, which generally prohibits financial institutions from notifying their customers of grand jury subpoenas issued for their financial records. 12 U.S.C. § 3420(b).

99. WRIGHT & MILLER, *supra* note 96.

100. *See supra* Part I.

101. 494 U.S. 624 (1990).

that was no longer serving any investigatory function. *Butterworth* concerned a Florida law that prohibited a grand jury witness from ever disclosing his or her own testimony.[102] Michael Smith, a newspaper reporter, had obtained information concerning alleged improprieties of government officials.[103] A special prosecutor was appointed to investigate the allegations, and Smith was called to testify before the grand jury.[104] Smith was warned that revealing his testimony could result in his criminal prosecution.[105] After the grand jury had terminated its investigation, Smith sought to publish a piece about his grand jury experience, including his testimony.[106] Florida law prohibited any person from disclosing the "testimony of a witness examined before the grand jury."[107] Smith filed suit seeking, among other things, a declaration that the statute violated the First Amendment.

Two relevant cases preceded *Butterworth*. In *Landmark Communications, Inc. v. Virginia*,[108] the Supreme Court had struck down a Virginia statute that criminalized divulging information regarding the confidential proceedings of a judicial review commission. There, the *Landmark* Court assumed that the confidentiality of such proceedings served legitimate state interests, although it noted that Virginia's interests were supported by little more than assertion and conjecture. The Court nonetheless found the imposition of criminal sanctions "insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom."[109]

By contrast, in *Seattle Times Company v. Rhinehart*,[110] the Court held that a protective order that prohibited a newspaper (which was also a party to the case) from publishing information it had obtained during pretrial discovery did not violate the First Amendment.[111] In rejecting the argument that the protective order constituted a "classic prior restraint" subject to strict scrutiny, the *Rhinehart* Court emphasized that the order covered only information the newspaper had gained as a participant in the civil discovery processes authorized by the state's legislature.[112] In other words, because the newspaper could still disseminate the same information if it was "gained through means independent of the court's processes," the newspaper's First

102. *Id.* at 626.
103. *Id*. at 626.
104. *Id.*
105. *Id.*
106. *Id.* at 628.
107. *Id.* at 627 (citing Fla. Stat. § 905.27 (1989)).
108. 435 U.S. 829 (1978).
109. *Id.* at 838.
110. 467 U.S. 20 (1984).
111. *Id.* at 35–37.
112. *Id.* at 32–33.

Amendment rights were limited "to a far lesser extent than would restraints on dissemination of information in a different context."[113]

The *Butterworth* Court found that *Landmark Communications* controlled Smith's case. Smith was prohibited from divulging "information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury."[114] Accordingly, "absent a need to further a state interest of the *highest order*," the Court held Florida could not constitutionally punish Smith for publishing information of public concern related to alleged governmental misconduct—i.e., "speech which has traditionally been recognized as lying at the core of the First Amendment."[115]

To support the permanent ban against a grand jury witness disclosing his or her own testimony after the grand jury had been discharged, Florida relied on the interests for maintaining grand jury secrecy previously articulated by the Court.[116] The *Butterworth* Court agreed that secrecy in grand jury proceedings was important for safeguarding those interests, but because these interests do not "dissolve[ ] all constitutional protections,"[117] the Court also recognized that grand juries are "expected to operate within the limits of the First Amendment."[118]

The *Butterworth* Court, however, was not convinced that the *Douglas Oil Co.* factors justified the speech restriction at issue.[119] First, the Court reasoned that once an investigation has come to its conclusion, there is no longer a need to encourage witness testimony or prevent flight or the importuning of grand jurors' votes—the grand jury has already deliberated, voted, and the target has been either exonerated or arrested (or otherwise informed of the charges).[120] Second, although Florida has an interest in preventing the tampering of those grand jury witnesses who will testify at trial, the Court held that this interest did not outweigh a witness's own First Amendment interest; not only does modern criminal procedure require the disclosure of state witnesses before trial, but there are criminal penalties for

113. *Id.* at 34. Although both *Landmark* and *Rhinehart* involved newspapers, these cases are still generally applicable to the issues present in this Essay, especially because the Court's reasoning in those cases was not based upon a right-of-access claim for the press under the First Amendment. *See Landmark Commc'ns, Inc.*, 435 U.S. at 837 ("Nor does Landmark argue for any constitutionally compelled right of access for the press to those proceedings."); *Rhinehart*, 467 U.S. at 32 ("A litigant has no First Amendment right of access to information made available only for purposes of trying his suit." (citing Zemel v. Rusk, 381 U.S. 1, 16–17 (1965))).

114. *Butterworth*, 494 U.S. at 631–32.

115. *Id.* at 632 (emphasis added) (quotation marks omitted) (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

116. *Id.* at 632–634.

117. *Id.* at 630 (quoting United States v. Dionisio, 410 U.S. 1, 11 (1973)).

118. *Id.* (quoting Branzburg v. Hayes, 408 U.S. 665, 708 (1972)).

119. *Id.* at 632 ("Some of these interests are not served at all by the Florida ban on disclosure, and those that are served are not sufficient to sustain the statute.").

120. *Id.* at 632–33.

both perjury and witness tampering, and a court has subpoena and contempt powers to order recalcitrant witnesses to the stand.[121] Third, while the Court agreed that Florida had "a substantial interest in seeing that persons who are accused but exonerated by the grand jury will not be held up to public ridicule,"[122] it nevertheless emphasized that, "absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech."[123] Finally, the Court noted approvingly that Federal Rule of Criminal Procedure 6(e)(2) and similar rules in the majority of the states do not "impose an obligation of secrecy on grand jury witnesses with respect to their own testimony to protect reputational interests or any of the other interests asserted by Florida."[124] Based on the foregoing, the Court held that Florida's interests in grand jury secrecy were insufficient to overcome Smith's First Amendment rights.[125]

IV. IS MAINTAINING THE SECRECY OF GRAND JURY PROCEEDINGS A COMPELLING GOVERNMENTAL INTEREST IN THE CONTEXT OF GRAND JURY WITNESSES?

Courts have recognized that § 2705(b) non-disclosure orders infringe upon witness-providers' First Amendment rights. Indeed, while the government has, on occasion, argued that § 2705(b) non-disclosure orders are unlike traditional prior restraints or content-based restrictions and, therefore, should not be subjected to strict scrutiny,[126] numerous courts have

121. *Id.* at 633–34.

122. *Id.* at 634 (citation and quotation marks omitted).

123. *Id.*

124. *Id.* at 634–35; *see also id.* at 635 ("While these practices are not conclusive as to the constitutionality of Florida's rule, they are probative of the weight to be assigned Florida's asserted interests and the extent to which the prohibition in question is necessary to further them.").

125. Although *Butterworth* dealt specifically with the First Amendment right of a grand jury witness to disclose his own testimony *after* the grand jury term had expired, several courts have considered this issue in the context of an *ongoing* criminal investigation. *See, e.g.*, Google LLC v. United States, 443 F. Supp. 3d 447 (S.D.N.Y. 2020); *In re* Grand Jury Subpoena for: [Redacted]@yahoo.com, 79 F. Supp. 3d 1091 (N.D. Cal. 2015); *In re* Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders, 562 F. Supp. 2d 876 (S.D. Tex. 2008).

126. *See, e.g.*, *In re* Subpoena 2018R00776, 947 F.3d 148, 155 (3d Cir. 2020); *see also* Brief of Appellee at 12–14, United States v. Google LLC, No. 19-1891 (2d Cir. Jan. 13, 2020), 2020 WL 292268 (citing John Doe, Inc. v. Mukasey, 549 F.3d 861, 876–78 (2d Cir. 2008)) (arguing that non-disclosure orders are not typical prior restraints or content-based restrictions). For support, the government has relied on *Seattle Times Co. v. Rhinehart*, in which the Supreme Court declined to apply strict scrutiny to a protective order that prohibited a civil litigant from disclosing information obtained during pretrial discovery. 467 U.S. 20, 33–34 (1984). It is worth noting that, in reaching its conclusion, the *Rhinehart*

rejected this argument and properly concluded that such orders constitute content-based, prior restraints on speech.[127] In assessing the constitutionality of the § 2705(b) non-disclosure orders under strict scrutiny, however, courts have too often accepted the proposition that protecting the secrecy of grand jury proceedings is a compelling government interest, focusing their attention instead on the *duration* of the non-disclosure order, and whether the length can be justified as narrowly tailored under the First Amendment.[128]

This Essay argues that courts and commentators should not assume that grand jury secrecy (and attendant concerns akin to the harms set forth in § 2705(b)), at least in the abstract, constitute compelling interests against the rights of grand jury witnesses in the first instance. A more individualized assessment for determining whether the government has a compelling interest in preserving secrecy in a specific case is not only preferable, but

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Court relied on Justice Powell's concurrence in *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979), a case involving the public's right of access to courtroom proceedings. There Justice Powell recognized that a gag order is "a classic prior restraint" and "one of the most extraordinary remedies known to our jurisprudence." *Id.* at 399 (Powell, J., concurring) (citing *Neb. Press*, 427 U.S. at 562).

127. *E.g.*, *In re Subpoena 2018R00776*, 947 F.3d at 155–56; *In re* Search Warrant for [redacted].com, 248 F. Supp. 3d 970, 980 (C.D. Cal. 2017) ("Courts considering this issue have almost uniformly found that Section 2705(b) [notice preclusion orders ('NPOs')], or NPOs issued under analogous statutes, are prior restraints and/or content-based restrictions.") (collecting cases); Microsoft Corp. v. U.S. Dep't of Justice, 233 F. Supp. 3d 887, 907 (W.D. Wash. 2017).

128. *E.g.*, *In re* Grand Jury Subpoena Issued to Twitter, Inc., No. 3:17-mc-40-M-BN, 2017 WL 9287146, at *7 (N.D. Tex. Sept. 22, 2017) (finding that although grand jury secrecy may be a compelling interest pre-indictment, it no longer serves as compelling once the defendant is publicly indicted, and an "indefinite Gag Order is not the least restrictive means of achieving [the government's] interest"), report and recommendation adopted, 2017 WL 9287147 (N.D. Tex. Oct. 19, 2017); *In re* Search Warrant Issued to Google, Inc., 269 F. Supp. 3d 1205, 1212–17 (N.D. Ala. 2017) (accepting that the adverse consequences of § 2705(b) satisfy the compelling interest standard but concluding that orders of indefinite duration risk running afoul of the First Amendment); *In re Search Warrant for [redacted].com*, 248 F. Supp. 3d at 983 (holding that an order of indefinite duration would not be narrowly tailored or the least restricted means available and setting an expiration date at 180 days); *Microsoft Corp.*, 233 F. Supp. 3d at 907–08 (concluding Microsoft stated a claim for relief when it alleged that secrecy orders of indefinite duration are not narrowly tailored or otherwise fail strict scrutiny); *In re* Grand Jury Subpoena for: [redacted]@yahoo.com, 79 F. Supp. 3d 1091, 1094–95 (N.D. Cal. 2015) (raising concern that "were the court to grant the government's request, Yahoo! would be prohibited from ever sharing the existence of the subpoena with anyone—even years after the grand jury moved on to other things."); *In re* Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders, 562 F. Supp. 2d 876, 886–87 (S.D. Tex. 2008) (holding that § 2705(b) non-disclosure orders of indefinite duration were not narrowly tailored to further the government's interests—integrity of an ongoing criminal investigation, reputational interests of targets, and sensitivity of investigative techniques); *see generally* Alexandra Burke, *When Silence is Not Golden: The Stored Communications Act, Gag Orders, and the First Amendment*, 69 BAYLOR L. REV. 596 (2017) (arguing that § 2705(b) non-disclosure orders of indefinite duration violate the First Amendment rights of cloud computing service companies).

required—particularly given the persistent exclusion of grand jury witnesses from the list of parties covered by Rule 6(e)'s secrecy provisions.

Unfortunately, the few courts that have acknowledged Rule 6(e) in considering the constitutionality of § 2705(b) non-disclosure orders did not consider whether and how the exclusion of grand jury witnesses from Rule 6(e) shaped the government's interest in avoiding the harms laid out in § 2705.[129] To be sure, the overarching interest in grand jury secrecy covers a range of considerations that are intended to preserve and protect the integrity of the grand jury proceeding. For instance, several of the harms set forth in § 2705—including flight from prosecution, the destruction of evidence, or intimidation of witnesses—concern the potential consequences of disclosure of the investigation to the targets of that investigation, which could jeopardize an investigation or unduly delay a trial.[130] The Third Circuit has also recognized that "[t]he government's interest in grand jury secrecy is not limited to avoiding notification to the target," and highlighted additional considerations set forth by the Supreme Court's *Douglas Oil Co.* decision, including "the grand jury's ability to freely deliberate, the desire for unfettered testimony by witnesses, and the protection of the target from the assumption of guilt."[131] These broader considerations, the Third Circuit concluded, justified the SCA's prohibition against disclosure to "'any other person' and not just the target of the investigation."[132]

Notwithstanding the breadth of interests that can be catalogued under grand jury secrecy, each interest finds roots in the historical sword and shield functions of the grand jury and were equally available to the drafters of Rule 6(e).[133] Nonetheless, the drafters did not find those concerns

129. *In re Subpoena 2018R00776*, 947 F.3d at 152 & n.9, 156–57; *In re* Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2705(b), 131 F. Supp. 3d 1266, 1276 (D. Utah 2015) (concluding that the SCA expressly "recognizes that the statute may impose secrecy obligations in addition to those stated in Rule 6(e)(2)" and granting the non-disclosure order); In re Grand Jury Subpoena to Facebook, No. 16-mc-1300, 2016 WL 9274455, at *6 (E.D.N.Y. May 12, 2016) (recognizing the tension between Rule 6(e) and the SCA but declining to resolve it as "[t]he government's failure to establish the factual assertion necessary for an order under the SCA obviates the need for such decision now"); *In re* Grand Jury Subpoena to Google Inc., No. 17-mc-2875, 2017 WL 4862780, at *3 (E.D.N.Y. Oct. 26, 2017) (same). *See also In re* Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2705(b), 866 F. Supp. 2d 1172 (C.D. Cal. 2011) (concluding that Rule 6(e) prohibited the issuance of secrecy orders on grand jury subpoena recipients under the SCA without discussing any First Amendment implications).

130. 18 U.S.C. § 2705(b). *See also In re Subpoena 2018R00776*, 947 F.3d at 156–57 (recounting the district court's conclusion that, pursuant to § 2705(b), there was reason to believe that notification of the subpoena would seriously jeopardize the investigation because targets would have an opportunity to flee, destroy evidence, notify confederates, or alter patterns of behavior).

131. *In re Subpoena 2018R00776*, 947 F.3d at 157.

132. *Id.*

133. *E.g.*, United States v. Providence Tribune Co., 241 F. 524, 526 (D.R.I. 1917) (explaining grand jury secrecy protects against "warning offenders to escape, to destroy evidence, or to tamper with witnesses" and ensures that "the reputations of innocent persons may not suffer from the fact that their conduct is under investigation, or has been investigated, by a grand jury").

sufficiently weighty to justify holding witnesses to the same secrecy obligation imposed on other participants to the grand jury proceeding. Nor was the drafters' omission of witnesses passive or inadvertent. In fact, early, confidential drafts of the Rule expressly included witnesses within the veil of secrecy, thereby precluding witnesses from disclosing their testimony, before subsequent, publicly released drafts removed all references to grand jury witnesses. This omission then prompted public debate as to their exclusion.[134] The version of the Rule that was ultimately adopted went a step further and not only excluded witnesses from the secrecy requirement, but also prohibited the imposition of secrecy oaths on persons not in accordance with the Rule.[135]

The Rule's history demonstrates that the authors fully considered whether witnesses ought to be obliged to silence in order to preserve grand jury secrecy before then making the deliberate decision to leave witnesses free to speak about their participation in the proceeding.[136] In *Butterworth*, the Supreme Court found it "probative of the weight to be assigned [the state's] asserted interests" that "neither the drafters of the Federal Rules of Criminal Procedure, nor the drafters of similar rules in the majority of the States, found it necessary to impose an obligation of secrecy on grand jury witnesses."[137] Accordingly, when it comes to grand jury witnesses in particular, courts should articulate a justification for imposing a gag order that is based on an individualized assessment of the specific investigation and the witness at issue; simply reciting the above age-old concerns should not suffice.

Furthermore, at least some of those concerns purport to protect witnesses themselves by guarding against threats and tampering, or encouraging individuals to come forward with relevant information, which logically would seem to come second to the witness's desire to exercise his or her First Amendment rights. And, as the Court in *Butterworth* observed, modern federal criminal procedure requires the disclosure of witnesses in advance of trial, and there are criminal penalties in place to punish those who would seek to threaten or tamper with a witness.[138] Ultimately, in relying generally and generically on the importance of secrecy in grand jury proceedings, courts like the Third Circuit risk casting the grand jury as "some talisman that dissolves all constitutional protections."[139] But the Supreme Court has emphatically said that it is not, explaining that "grand juries are expected to 'operate within the limits of the First Amendment,' as well as the other provisions of the Constitution."[140]

In holding that a § 2705(b) non-disclosure order does not violate a provider's First Amendment rights, some courts have sought to balance a

134. Brown, *supra* note 67, at 173–75 nn.24, 26–28.
135. *Id.* at 175–76.
136. *See id.* at 176.
137. *Butterworth*, 494 U.S. at 634–35.
138. *Id.* at 633–34.
139. *Id.* at 630.
140. *Id.*

witness's "First Amendment rights and the government's 'interests in preserving the confidentiality of its grand jury proceedings" by drawing a distinction between "disclosure of information that a witness has independent of his participation in grand jury proceedings and information the witness learns as a result of his participation" in those proceedings.[141] For example, in *In re Subpoena 2018R00776*,[142] an electronic service provider wished to notify a specific third party about the existence of a subpoena and search warrant it received from the government for information regarding one of the provider's subscribers, but because both were accompanied by a § 2705(b) non-disclosure order, the provider was prohibited from notifying anyone (except its own lawyers) about the government's data requests for one year.[143] The Third Circuit found that the non-disclosure orders prohibited the service provider from speaking about only the existence of those specific requests—information it learned by virtue of its participation in the proceedings—while leaving the provider free to "discuss[ ] the government's requests abstractly . . . by disclosing the number of data requests and NDOs they receive in public docket civil complaints." [144] As a result, the Third Circuit found the one-year restraint against disclosure to all third parties was narrowly tailored to accomplish the government's interests in preserving grand jury secrecy.[145]

This distinction, however, presupposes that the government has a compelling interest in precluding the witness from discussing his or her witness-status in the first instance. But no such distinction was contemplated by the authors or language of Rule 6(e). Rule 6(e) prohibits disclosure only of a "matter occurring before the grand jury"; by excluding witnesses from such an obligation, the inference is that witnesses are free to speak about exactly that. Although the Rule does not define "a matter occurring before the grand jury," it is generally thought to include information that would directly or indirectly reveal what transpired within the jury room, presumably including the fact of an ongoing investigation, one's status as a witness, and the experience of testifying before the jury itself.[146] Contemporaneous with the Rule's discussion and adoption, commentators recounted the restriction against witnesses as "impractical and unfair," with one going so far to observe, "a partner, an employee, a relative, a friend called on to testify will come back and tell the person concerning whom he testified, and it should be so."[147]

Thus, while the Third Circuit (and others) afford more weight to the government's interest in preventing witnesses from speaking about matters learned by virtue of their participation as a witness, as opposed to

141. *In re Subpoena 2018R00776*, 947 F.3d at 157–58.
142. 947 F.3d 148 (3d Cir. 2020).
143. *Id.* at 153–54.
144. *Id.* at 158.
145. *Id.*
146. WRIGHT & Miller, *supra* note 96.
147. George H. Desson, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L.J. 197, 204 & n.100 (1947); *see also* Brown, *supra* note 67, at 175 n.29.

knowledge obtained independent of the grand jury's investigation,[148] there appears to be no basis in the language or history of the Rule for doing so. The Third Circuit relied, in part, on *Butterworth* to support the distinction. But, as Justice Scalia noted in his concurrence, the question of whether a state could constitutionally preclude a witness's disclosure of the grand jury proceeding itself was not before the Court.[149] Justice Scalia recognized that the government may have "quite good reasons" for requiring witnesses to keep such information confidential, but expressly declined to say whether the interests underlying those reasons were necessarily sufficient.[150]

Although maintaining grand jury secrecy may be compelling in the abstract, whether it is necessary to impose secrecy obligations on a specific grand jury witness still needs to be "shown with particularity."[151] As the Supreme Court exemplified in *Butterworth*, it is not sufficient for the government to merely rely on the general justifications for grand jury secrecy without providing anything more than speculation and conjecture in support. Indeed, in balancing the grand jury witness's First Amendment rights with Florida's alleged need for grand jury secrecy, the Court considered whether each of the justifications was compelling based on the specific facts in that particular case.[152]

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148. *In re Subpoena 2018R00776*, 947 F.3d at 158–159; *In re* Grand Jury Proceedings Relative to Perl, 838 F.2d 304, 305–06 (8th Cir. 1988); Alexander v. F.B.I., 186 F.R.D. 102, 108 (D.D.C. 1998).

149. *Butterworth*, 494 U.S. at 636 (Scalia, J., concurring)

150. *Id.* at 632. The Third Circuit also relied on the circuit's prior decision in *First Amendment Coalition v. Judicial Inquiry & Review Board,* 784 F.2d 467 (3d Cir. 1986) (en banc), to support the distinction between information learned from a confidential proceeding and knowledge acquired independently of the confidential proceeding. However, although *First Amendment Coalition* did distinguish between the contents of a witness's testimony and other information learned during the confidential proceeding to hold the Commonwealth could not prohibit the witness from disclosing the former while upholding a disclosure ban on the latter, it explained the witness may not "reveal [the testimony] of another witness whom they hear testify" nor "the comments of Board members or staff that are overhead during their appearance." *Id.* at 479. The *First Amendment Coalition* court did not appear to try and preclude the witness from disclosing his or her status as a witness, however, or the existence of the proceeding itself. A subsequent Third Circuit case, *Stilp v. Contino*, 613 F.3d 405 (3d Cir. 2010), reviewed a confidentiality provision that precluded disclosure of the fact that an ethics complaint was filed—and thus that an open ethics investigation may exist—and concluded that, "because the disclosure of the filing of the complaint would divulge neither confidential testimony of other witnesses nor confidential statements by members of the Ethics Commission," it was protected under the logic of *First Amendment Coalition*. *Id.* at 414. *Stilp* further suggests, therefore, that *First Amendment Coalition* did not preclude disclosure of the existence of the board inquiry or, as here, the grand jury subpoena itself. *Id.*

151. *In re* Grand Jury Subpoena Duces Tecum, 797 F.2d 676, 680–81 (8th Cir. 1986) (holding that a district court has the inherent authority to issue a protective order prohibiting a financial institution from notifying a customer about a subpoena for an appropriate period of time, notwithstanding Rule 6(e)(2), but "there must be a 'compelling necessity . . . shown with particularity'" (quoting United States v. Procter & Gamble, 356 U.S. 677, 682 (1958))).

152. *See Butterworth*, 494 U.S. at 632–34.

When it comes to First Amendment challenges to non-disclosure orders issued under § 2705(b) of the SCA, courts should refrain from relying on the government's general interest in maintaining grand jury secrecy to justify suppressing a witness's speech rights. In light of the language and history of Rule 6(e), courts instead should conduct an individualized factual analysis or case assessment of why the risk of disclosure of that particular subpoena in the context of the specific investigation at issue poses a greater threat to the integrity of the grand jury proceeding than those previously considered and rejected by the drafters of Rule 6(e). Otherwise, effectively *every* § 2705(b) non-disclosure order of a reasonable duration—likely a year or less—would satisfy the First Amendment, because the government will always have the same generic interest in preserving grand jury secrecy and gag orders will, by definition, maintain that secrecy. Such sweeping logic is at odds with the heavy presumption of unconstitutionality borne by the orders. Rather, by articulating the particular facts for why preserving grand jury secrecy is a compelling interest for a specific case, and how a non-disclosure order furthers that particularized interest, courts will be able to effectively balance the government's legitimate interest in preserving the integrity of grand jury proceedings with the equally legitimate First Amendment rights of grand jury witnesses.

CONCLUSION

It is understandable why courts, in certain cases, are inclined to impose secrecy obligations on grand jury witnesses; failing to do so could blunt the sword of the grand jury and seriously jeopardize its investigatory function. But strictly focusing on the investigatory function fails to account for the grand jury's other function—to serve as a shield against government abuse. Non-disclosure orders, like those issued under § 2705(b) of the SCA, can significantly impede that function "by isolating and insulating the grand jury from potentially exculpatory information that might be forthcoming if grand jury witnesses were allowed more freedom to share their stories with others."[153] To properly balance these competing roles, it is critical to understand the rights that have traditionally been afforded to grand jury witnesses and to safeguard those rights going forward.

153. R. Michael Cassidy, *Silencing Grand Jury Witnesses*, 91 IND. L. J. 823, 827 (2016).