

DC Circ. Gag Order Rulings Reveal A Digital Privacy Paradox

By **Gregory Rosen and Lauren Kramer Sujeeth** (February 23, 2026)

Last July, in *In re: Sealed Case*, the U.S. Court of Appeals for the D.C. Circuit sent a pointed message to federal prosecutors: Secrecy of filings and the use of nondisclosure orders require a careful basis and accompanying findings.

On Feb. 3, the same court clarified what this means after the fact when litigants seek exposure of such sealed filings. Even when courts demand greater rigor before approving nondisclosure orders, the records explaining how and why those orders were issued may never see the light of day.

The ruling highlights a paradox at the heart of modern digital surveillance. Courts may insist on a stronger process at the front end, but the public may never learn whether that process was actually followed. The implications extend well beyond abstract debates over transparency, affecting investigative targets, technology companies and watchdog organizations alike.

A Win – With Limits

In *In re: Sealed Case*, the D.C. Circuit had rejected the government's attempt to obtain a yearlong, forward-looking nondisclosure order under Title 18 of the U.S. Code, Section 2705(b), part of the Stored Communications Act.[1]

Under the Stored Communications Act, the government may apply for a court order preventing a service provider from disclosing that it received legal process from the government. In the 2025 case, the court held that judges must make specific, individualized findings before gagging service providers from disclosing the existence of subpoenas. Convenience and investigative efficiency were not enough, and the court's duty to determine whether disclosure would result in statutorily enumerated harm could not be outsourced to a prosecutor.

That decision was seen as a victory for companies and individuals pushing back against overbroad secrecy demands. The court made clear that it had the statutory obligation to determine whether secrecy was warranted and that such findings could only be based on fact-specific and particularized justifications.

But the court's most recent decision answers a different question: Once nondisclosure orders have been issued, how much of the supporting record can the public later examine?

The Outsized Role of Rule 6(e)

In the latest case, *In re: Application of the United States for an Order Pursuant to 18 U.S.C. § 2705(b)*, nonprofit watchdog organization Empower Oversight Whistleblowers and Research sought to unseal filings made by the U.S. Department of Justice.[2]

The DOJ's filings had been used to obtain a series of Section 2705(b) orders connected to a



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2017 grand jury investigation into Jason Foster, who was at the time chief investigative counsel of the U.S. Senate Committee on the Judiciary. The original nondisclosure order was directed at Google, which later notified Foster of the existence of the subpoena.[3]

Although the U.S. District Court for the District of Columbia partially unsealed portions of the record, it concluded that most of the applications for those nondisclosure orders were "ancillary grand jury records" protected by Federal Rule of Criminal Procedure 6(e).[4] The D.C. Circuit affirmed.[5]

Even assuming the filings qualified as judicial records for which the right of access is presumed, the court held that Rule 6(e) displaced any common-law or First Amendment right to obtain records. The court's reasoning rested on the breadth of Rule 6(e), which requires records relating to grand jury proceedings to remain sealed "to the extent and as long as necessary to prevent unauthorized disclosure." [6]

According to the D.C. Circuit, even ancillary filings — such as Section 2705(b) applications — that would reveal the substance, scope or targets of a grand jury investigation must be kept secret under Rule 6(e).[7] That the investigation was long closed was of no matter, nor was the compelling public interest in the subject matter; the court held that Rule 6(e) did not permit the disclosure of grand jury materials.[8]

The panel underscored the long-standing rationale for grand jury secrecy: protecting individuals who are investigated but never charged from public stigma and ensuring that witnesses are not dissuaded from testifying fully and candidly.[9] A grand jury investigation that yields no charges, the court noted, may still warrant secrecy to protect "reputations from unwarranted aspersions." [10]

The takeaway: When nondisclosure orders are intertwined with grand jury proceedings, the presumption of secrecy is extraordinarily difficult to overcome.

Notably, the court rejected the argument that public reporting or official acknowledgments of an investigation necessarily extinguish Rule 6(e) protections. Press coverage, leaks, witness statements or even government statements confirming the existence of an investigation do not automatically mean that the cat is out of the bag and secrecy terminated.[11]

Here, the court decided that what had been publicly reported still did not justify wholesale disclosure of the government's sealed filings.[12] The court declined to assess whether an inspector general's public December 2024 report about the grand jury proceedings was sufficient to upend the original justification for secrecy, on the grounds that the report was not published at the time of the lower court's fact finding.[13]

For access advocates, this aspect of the ruling is particularly significant. Even where an investigation has become widely known, and even where subpoena recipients or witnesses are aware of grand jury activity, the supporting applications may remain sealed indefinitely. Once Rule 6(e) applies, the path to transparency becomes steep indeed.

The Developing Doctrine

Taken together, the two D.C. Circuit decisions reveal a growing tension in digital privacy jurisprudence.

Courts are increasingly unwilling to rubber-stamp broad or prospective gag orders.

Prosecutors must provide detailed justifications, and judges must make specific findings before imposing secrecy. That shift strengthens judicial oversight of executive power.

At the same time, the public may never see the very materials that demonstrate whether those statutory requirements were met. When nondisclosure orders are tied to grand jury investigations, the filings proving compliance are likely to remain sealed. Courts may demand better process, but the process itself remains hidden from public view.

For companies and individuals subject to nondisclosure orders, this distinction is critical. The most meaningful opportunity to challenge secrecy will almost always arise at the moment the order is issued, if the recipient or provider is even aware of it. Later efforts to unseal the record — by recipients, journalists or watchdog groups — face formidable barriers.

Practical Implications

For technology companies and other subpoena recipients, the message is clear: Vigilance must be contemporaneous.

The D.C. Circuit's earlier ruling empowers recipients to resist omnibus or poorly justified gag orders. But the latest decision makes equally clear that missed opportunities may not be recoverable. Even successful challenges may occur entirely behind closed doors.

From the government's perspective, the decision offers reassurance. Although prosecutors now face greater judicial scrutiny when seeking sweeping nondisclosure orders, their applications will often remain confidential and not subject to public inspection. Judges, too, are asked to strike a delicate balance, playing a more active role in policing secrecy, yet doing so largely outside public view.

The Limits of Litigation — and the Role of Congress

For transparency advocates, the new case illustrates the sobering limits of litigation. Efforts to unseal historical Section 2705(b) applications will frequently collide with Rule 6(e)'s formidable protections.

In exceptional cases — where investigations are saturated with public disclosures — courts may allow disclosure. But in most cases, the filings will remain locked away.

Meaningful reform, if it comes, would have to originate with Congress, rather than the courts. Legislators could mandate reporting requirements, require eventual unsealing after investigations conclude or establish independent oversight mechanisms. But the DOJ would almost certainly resist such measures, arguing that secrecy — when carefully and appropriately applied — protects investigative integrity and is a necessary limitation on public review of the justice system.

Conclusion

The D.C. Circuit's recent decision does not undermine the progress made in curbing overbroad nondisclosure orders. In the expanding realm of digital investigations, secrecy must still be supported by the record. But whether the public will ever see that process is, at least for now, unlikely.

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[1] In re: Sealed Case, No. 24-5089 (D.C. Cir. July 18, 2025).

[2] In re: Application of the United States for an Order Pursuant to 18 U.S.C. § 2705(b), No. 24-5239 (D.C. Cir. Feb. 3, 2026).

[3] Id.

[4] Id. at *2.

[5] Id.

[6] Id. at *7.

[7] Id. at *10.

[8] Id.

[9] Id. at *10-11.

[10] Id. at *11.

[11] Id. at *12-13.

[12] Id. at *15-16.

[13] Id.