Thou Shalt Not Speak: The Nondisclosure Provisions of the National Security Letter Statutes and the First Amendment Challenge

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I. INTRODUCTION

National Security Letters ("NSLs") are controversial components of the government's post 9/11 counterterrorism powers that are cloaked in secrecy; however, the receipt of an NSL could look something like this:[1]

Special Agents Dean and Snipes arrived at Comcast Headquarters determined to gather information on suspected terrorist Abdul Rahman Yasin. Both agents knew that Yasin had recently made contact with an associate known only by his internet profile, CA76740. That internet profile had been traced by the FBI counterterrorism unit as one registered to a Comcast account. The agents hoped that they could obtain the name and address of the account holder, and begin surveillance on Yasin's unknown associate.

Agents Dean and Snipes found their company point of contact, Tyler Pearson, an in-house attorney responsible for compliance with subpoena requests, and provided him with their documents. The agents mentioned that he should open the documents in a private place and not share the contents with anyone.

Pearson carefully opened the manila envelope with "SECRET" plastered across the front. The document inside directed Pearson to provide the FBI with the "name, address, and length of service of subscriber identity name: 'CA76740,'" because the information was "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." Finally, the document ordered Pearson not to disclose the FBI's request.[2]

Pearson picked up the phone to call General Counsel Randall Boe for guidance because he had never before seen such a request. As he dialed Boe's extension, he was reminded of what the FBI agents had told him, and what the document had said about disclosure—if he told anyone, he could be prosecuted for a violation of federal law.

Without knowing it, Tyler Pearson had been the recipient of a little publicized, yet highly controversial tool used by the government in terrorism and counterintelligence investigations. The document Pearson received was called a National Security Letter ("NSL"). Although the actual number of NSLs issued by the FBI goes undocumented, it is known that an Internet Service Provider in New York received an NSL and refused to comply.[3] This was a recipient's first refusal to

1. This example is fictional and is to be used for illustrative purposes only. Although it is fictional, the procedure by which the agents issued the NSL is based upon the FBI's guidelines and a form NSL. *See* Memorandum from Gen. Counsel, Nat'l Sec. Law Unit, FBI, National Security Letter Matters (Nov. 28, 2001), http://www.aclu.org/patriot_foia/FOIA/NOV2001FBImemo.pdf [hereinafter FBI Memo].

2. *See* 18 U.S.C. § 2709 (2000).

3. Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004). Although the FBI does not

comply with an NSL request in their eighteen-year existence.[4] That refusal led to a lawsuit in which a district court held a nondisclosure provision unconstitutional.[5] Since that decision, the American Civil Liberties Union ("ACLU") and the American Library Association also challenged the FBI's issuance of an NSL to a Connecticut Library in 2005.[6]

Because so little is known about NSLs, this article is aimed at bringing to light the existence of these highly controversial investigative tools. Specifically, this article will focus on the dilemma that Tyler Pearson faced when he received an NSL—the nondisclosure provision.[7]

Part II of this article examines national security letters in closer detail by tracing their development from the Electronic Communications Privacy Act to the USA PATRIOT Act. This part will illustrate the essential aspects of NSLs, and argue that NSLs are part of a larger family of administrative subpoenas. Part III will discuss the *Doe v. Ashcroft*[8] case in which an ISP challenged the government's authority under an

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compile statistics on the number of violations of the nondisclosure provisions, it is believed that a number of individuals have failed to comply with the requirement. *See Hearing on H.R. 3179 Before the Subcomm. on Crime, Terrorism, and Homeland Security* 23-24 (2004) http://www.house.gov/judiciary_democrats/crimehr3179followupresp112404.pdf (responses of Daniel J. Bryant, Assistant Att'y Gen., to post-hearing questions) [hereinafter Bryant Answers]. There is also ongoing debate within the FBI and Justice Department regarding the overall effectiveness of the current NSLs. *Id.* at 24.

> FBI headquarters is generally aware of the fact that some institutions and entities give low priority to responding to NSL requests because the *legal* authorities under which a request is made provide for neither a self-executing enforcement authority nor payment of ordinary expenses. Thus, some NSL requests are either not responded to at all, or not responded to in a timely enough fashion to aid the related investigation.

Id. (emphasis added).

4. *See* ACLU Org., Challenge to the National Security Letter Authority, *at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15543&c=262 (last visited Sept. 4, 2005).

5. *Doe*, 334 F. Supp. 2d at 471. This decision is currently on appeal before the Second Circuit Court of Appeals. American Civil Liberties Union, National Security Letters Gag Patriot Act Debate (last visited Aug. 26, 2005), at http://www.aclu.org/nsl/.

6. *See* Dan Eggen, *Library Challenges FBI Request*, WASH. POST, Aug. 26, 2005, at A11 ("The suit, originally filed under seal in Connecticut on Aug. 9, focuses on the FBI's use of a document called a "national security letter" (NSL), which allows investigators to demand records without the approval of a judge and to prohibit companies or institutions from disclosing the request."); Eric Lichtblau, *F.B.I., Using Patriot Act, Demands Library's Records*, N.Y. TIMES, Aug. 26, 2005 ("Because of federal secrecy requirements, the A.C.L.U. said it was barred from disclosing the identity of the institution of other main details of the bureau's demand, but court papers indicate that the target is a library in the Bridgeport area."). The suit was filed under seal because of the nondisclosure provision of the particular national security letter statute pursuant to which the NSL was issued. For a discussion of the various national security letter statutes, see *infra* Part II.B.

7. *See* 28 U.S.C. § 2709(c) (2004).

8. *Doe*, 334 F. Supp. 2d 471.

NSL statute by refusing to comply with an NSL. Part IV will analyze the court's discussion of the First Amendment challenge to NSLs while arguing that the NSL nondisclosure provisions should be subject to intermediate rather than strict scrutiny.

The Supreme Court has signaled its approval of greater regulation of disclosures one gains solely by participating in a secret government investigation.[9] Thus, the nondisclosure provisions should survive a First Amendment challenge, despite the permanent ban on disclosure, since they are substantially related to the government's compelling interest in secrecy.

II. NATIONAL SECURITY LETTERS IN CONTEXT

This part illustrates the context in which NSLs operate and argues that NSLs are part of a larger family of administrative subpoenas. First, an overview of administrative subpoenas and their relationship to NSLs is presented. Second, this part outlines the various statutory authorities for NSLs. Third, a discussion of the scope of NSL statutes is intended to show that the USA PATRIOT Act reduced standards by which NSLs are issued. Fourth, the nondisclosure provisions of the NSL statutes are examined. And finally, the procedure by which the FBI issues NSLs is briefly summarized.

A. *The Administrative Subpoena Context*

National security letters are a category of administrative subpoena that the government may issue in order to obtain certain types of information.[10] They are described as "a unique form of administrative subpoena cloaked in secrecy and pertaining to national security issues."[11] As one commentator put it, NSLs are the "foreign intelligence corollary to administrative subpoenas for criminal investigations."[12]

Since NSLs are considered to be in the family of administrative subpoenas, it is useful to understand the extensive use of administrative subpoenas by the federal government. Not limited to criminal investigations, administrative subpoenas are common investigatory tools available to the government in both civil and criminal investigations.[13] The Department of Justice's Office of Legal Policy reported that

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9. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (Powell, J., concurring) (Brennan, J., concurring).

10. FBI Memo, *supra* note 1, at 2.

11. *Doe*, 334 F. Supp. 2d at 475.

12. Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1332 (2004).

13. *Tools to Fight Terrorism: Subpoena Authority and Pretrial Detention of Terrorists: Hearing Before the S. Judiciary Comm., Subcomm. on Terrorism, Technology and Homeland Security*, 108th Cong. (June 22, 2004) (statement of Rachel Brand, Principal Deputy Assistant Att'y

approximately 335 administrative subpoena authorities currently exist.[14] These range from Internal Revenue Service subpoenas to investigate violations of the tax code,[15] Secret Service subpoenas to investigate threats against the President,[16] Department of Justice subpoenas to investigate federal narcotics crimes[17] and crimes involving the exploitation of children,[18] to Department of Agriculture subpoenas to investigate violations of laws governing honey research.[19]

In the federal criminal context, the government already maintains extensive subpoena authority that may be quashed if unreasonable or oppressive.[20] Even without using NSLs, the government may obtain certain information, such as basic subscriber information, by using an administrative subpoena, trial subpoena, or grand jury subpoena, without notifying the subscriber of the request.[21] Administrative subpoenas are similar to subpoenas, search warrants, and court orders as another tool the government can use to obtain information.[22] National security letters should therefore be considered in this context.

B. *The National Security Letter Statutes*

Three different statutes authorize three types of NSLs.[23] Initially, however, it must be understood that NSL authority existed in all three statutes prior to the passage

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Gen., Office of Legal Policy, U.S. Dep't of Just.) [hereinafter Brand Testimony]. The Supreme Court addressed the constitutional requirements for the issuance of an administrative subpoena in *United States v. Powell*, 379 U.S. 48, 57-58 (1964) (Douglas, J., dissenting):

> [The agency] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed-in particular, that the "Secretary or his delegate," after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect.

Id.

14. Brand Testimony, *supra* note 13. *See, e.g.*, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUST., REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES 5, http://www.usdoj.gov/olp/intro.pdf (last visited Sept. 4, 2005).

15. 26 U.S.C. § 7602(a) (2004).

16. 18 U.S.C § 3486(a)(1)(A)(II) (2004).

17. 21 U.S.C. § 876(a) (2004).

18. 18 U.S.C. § 3486(a)(1)(A)(ii)(II) (2004).

19. Doe v. Ashcroft, 334 F. Supp. 2d 471, 484 (S.D.N.Y. 2004) (citing 7 U.S.C. § 4610a(b) (2004).

20. *See* FED. R. CRIM. P. 17 (c)(2).

21. *Doe*, 334 F. Supp. 2d 487. *See also* 18 U.S.C. § 2703(C)(2) (2004).

22. U.S. Internet Provider Association, *Electronic Evidence Compliance—A Guide for Internet Service Providers*, 18 BERKELEY TECH. L.J. 945, 974 (2003).

23. FBI Memo, *supra* note 1, at 2.

of the USA PATRIOT Act of 2001.[24] All three statutes contain similar characteristics and were amended by section 505 of the USA PATRIOT Act in order to allow their more expansive use.[25]

First, the Electronic Communications Privacy Act ("ECPA") authorized the initial use of NSLs in 1986 to obtain telephone subscriber information, telephone billing records, and electronic communication transactional records.[26] Second, the Right to Financial Privacy Act ("RFPA") permits the FBI to issue NSLs to obtain records from banks and other financial institutions.[27] Third, the Fair Credit Reporting Act ("FCRA") allows the FBI to obtain from credit bureaus consumer identifying information as well as "the names and addresses of all financial institutions . . . at which a consumer maintains or has maintained an account."[28]

The national security letter statutes thus permit the FBI to obtain seven classes of information: "1) subscriber information; 2) toll billing records; 3) electronic subscriber information; 4) electronic communication transactional records; 5) financial records; 6) identity of financial institutions; and 7) consumer identifying information."[29]

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24. Testimony of Matthew Berry 2 (May 26, 2005), http://judiciary.house.gov/media/pdfs/berry052605.pdf [hereinafter Berry Testimony].

25. *See, e.g.*, James X. Dempsey & Lara M. Flint, *Commercial Data and National Security*, 72 GEO. WASH. L. REV. 1459, 1477 (2004); *see also* Berry Testimony, *supra* note 24, at 2.

26. 18 U.S.C. § 2709(a) (2000). ("A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation."). Congress enacted the first national security letter statute with the ECPA in 1986. Dempsey, *supra* note 25, at 1483 n.117. NSL authority for financial records and credit cards were authorized in 1986 and 1996. *Id.* ("The first National Security Letter authority was not enacted until 1986."). *See also Preventing and Responding to Acts of Terrorism: A Review of Current Law: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (April 14, 2004) *at* http://judiciary.senate.gov/hearing.cfm?id=1151 [hereinafter Eyer Testimony] (statement of Dani Eyer) (stating that the SAFE Act "clarifies that libraries are not communications service providers subject to FBI national security letter records.").

27. 12 U.S.C. § 3414(a)(5)(A) (2000) ("Financial institutions, and officers, employees, and agents thereof, shall comply with a request for a customer's or entity's financial records made pursuant to this subsection by the Federal Bureau of Investigation.").

28. 15 U.S.C. § 1681u(a) (2000) ("[A] consumer reporting agency shall furnish to the Federal Bureau of Investigation the names and addresses of all financial institutions . . . at which a consumer maintains or has maintained an account.").

29. FBI Memo, *supra* note 1, at 4. *See also* 50 U.S.C. § 436(a) (1) (2000) ("Any authorized investigative agency may request from any financial agency, financial institution, or holding company, or from any consumer reporting agency, such financial records, other financial information, and consumer reports as may be necessary in order to conduct any authorized law enforcement investigation, counterintelligence inquiry, or security determination."); 15 U.S.C. § 1681(v)(a) (Supp. II 2000) ("[A] consumer reporting agency shall furnish a consumer report of a consumer and all other information in a consumer's file to a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to,

C. *The Scope of National Security Letters*

The current scope of the NSL statutes is best understood by examining the changes made to the NSL authorities by the USA PATRIOT Act, which amended the NSL statutes in two significant ways.[30] First, the Act extended the use of NSLs beyond foreign counter-intelligence cases to include international terrorism cases.[31] Second, the Act relaxed the standard by which an NSL may be issued.[32]

The NSL statutes all contain substantially similar language, strictly prohibiting the FBI from using NSLs outside of international terrorism and foreign counterintelligence investigations.[33] Pre-PATRIOT Act NSLs were restricted to "foreign counter-intelligence" operations.[34] However, today NSLs may be sought during investigations of "international terrorism or clandestine intelligence activities."[35] For example, the amended ECPA states that NSLs may only be requested if "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities."[36]

Prior to the PATRIOT Act, the issuance of an NSL required the FBI to certify "specific and articulable facts" which indicated that the information pertained to a foreign power or an agent of a foreign power.[37] This made NSLs substantially more demanding on the government than other criminal authorities, which only require a relevance certification, because they required specific documentation of facts to predicate the connection to an agent of a foreign power and required the signature of a high ranking official at FBI headquarters.[38] NSLs could take months to issue, whereas criminal subpoenas, which may be used to obtain the same information, are issued rapidly at the local level.[39] The PATRIOT Act harmonized NSLs with existing criminal laws because prior to the PATRIOT Act, NSLs created substantial delays in

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international terrorism.").

30. Doe v. Ashcroft, 334 F. Supp. 2d 471, 483 (S.D.N.Y. 2004).

31. Swire, *supra* note 12, at 1333.

32. *Id.* at 1331.

33. *See* FBI Memo, *supra* note 1, at 2. *See generally* The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (Oct. 31, 2003), http://www.4law.co.il/Lea391.pdf.

34. Swire, *supra* note 12, at 1333.

35. 18 U.S.C. § 2709(b)(1) (Supp. II 2000).

36. *Id.* The amended RFPA requires the FBI to certify that the information sought by the NSL is "for foreign counter intelligence purposes to protect against international terrorism or clandestine intelligence activities." 12 U.S.C. § 3414(a)(5)(A) (Supp. II 2000). The amended FCRA also contains a similar certifying provision that requires the FBI to attest that the information is sought for an "investigation to protect against international terrorism or clandestine intelligence activities." 15 U.S.C. § 1681u(b) (Supp. II 2000).

37. Swire, *supra* note 12, at 1333.

38. Doe v. Ashcroft, 334 F. Supp. 2d 471, 483 (S.D.N.Y. 2004).

39. *Id.*

counterintelligence and counterterrorism investigations.[40] The PATRIOT Act relaxed this strict standard by requiring that the FBI only certify the information sought be relevant to the counterintelligence or counterterrorism investigation.[41] Thus, the PATRIOT Act significantly relaxed the standard by which the FBI may seek information through an NSL.[42]

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40. *Id.* at 483-84. *See also Tools Against Terror: How the Administration is Implementing New Laws in the Fight to Protect Our Homeland: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (Oct. 9, 2002) (statement of Dennis Lormel) (discussing the causes for delays in issuing NSLs prior to the USA PATRIOT Act). One description of the difficulty for FBI field agents to obtain NSLs proceeds as follows:

> The NSLs yielded very useful information, but the process for their internal approval frustrated the Chicago agents, who said that the tremendous delays in getting NSLs authorized by FBI headquarters was the biggest obstacle they had to overcome in their pre 9/11 investigation of GRF. It routinely took six months to a year to get NSLs approved for routine documents, such as telephone or bank records. The Chicago agents believed their contact at the FBI headquarters in the Radical Fundamentalist Unit was very good at his job, but was overwhelmed with work, which caused a major bottleneck in getting the NSLs.

Victoria B. Bjorkland, Jennifer I. Reynoso & Abbey Hazlett, *Terrorism and Money Laundering: Illegal Purposes and Activities*, 25 PACE L. REV. 233, 272 (2005).

41. FBI Memo, *supra* note 1, at 7. *See also* The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, Pub. L. 107-56, 115 Stat. 272, § 505, 115 Stat. 272, 365 (2001). Current proposals exist in the SAFE Act to alter the standard by which the FBI may issue an NSL. *See* Eyer Testimony, *supra* note 26. *See also America after 9/11: Freedom Preserved or Freedom Lost: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (Nov. 18, 2003) (statement of Nadine Strossen).

> Before the PATRIOT Act, the government was required to show 'specific and articulable facts' that the records it sought in intelligence investigations (whether through a business records order or a national security letter) pertained to a spy, terrorist, or other agent of a foreign power. As a result of sections 215 and 505, that is no longer the case—now anyone's records may be obtained, regardless of whether he or she is a suspected foreign agent, as long as the government says the records are sought for an intelligence or terrorism investigation.

Id. See also Jamie Gorelick, John H. Harwood II & Heather Zachary, *Navigating Communications Regulation in the Wake of 9/11*, 57 FED. COMM. L.J. 351, 358 (2005) ("The newly amended statute requires the FBI to certify only that the requested information is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities and that no U.S. person has been targeted solely on the basis of activities protected by the First Amendment.").

42. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (2001). Another similar provision in the PATRIOT Act that allows the government to obtain business records is section 215, which amended the Foreign Intelligence Surveillance Act of 1978 (FISA) and contains many of the similar attributes of the NSL statutes. *Id.* Section 215 orders permit the FBI to obtain "any tangible things (including books, records, papers, documents, and other items)." *Id.* Like NSLs, section 215 orders are restricted only to non-U.S. persons in international terrorism or clandestine intelligence investigations. *Id.* Moreover, investigations may not be conducted "solely upon the basis of activities protected by the first amendment to the Constitution."

D. *The Non-Disclosure Provisions of the NSL Statutes and the Lack of Judicial Review*

Perhaps the most controversial feature of the NSL statutes is the nondisclosure provision. Both the ECPA and the RFPA state that no wire or electronic communication service, financial institution, or consumer reporting agency "shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records."[43] By contrast, the FCRA allows disclosure to "those officers, employees, or agents of a consumer reporting agency necessary to fulfill the requirement to disclose information to the Federal Bureau of Investigation."[44]

The nondisclosure provisions fail to address whether consulting an attorney constitutes disclosure and violation of the statute, even if consultation of an attorney might be necessary to fulfill the request.[45] Arguably, however, the FCRA would allow attorney consultation if necessary to comply with the NSL.[46] The nondisclosure provisions also do not provide any procedure for lifting the ban by a court at a later date.[47] Furthermore, there is no provision by which the government can seek judicial enforcement of NSLs against a recipient who refuses to comply or who willfully violates the nondisclosure provision.[48] To the contrary, the PATRIOT

Id. Recipients of section 215 orders are also prohibited from disclosing the FBI's request for tangible things. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (2001). The government must obtain permission from the Foreign Intelligence Surveillance Court before issuing an order pursuant to Section 215. Section 215 also reduced the standard by which the FBI may obtain business records. *Id.* Before, FISA required the FBI to prove "specific and articulable facts" that gave reason to believe that the target of the search was "a foreign power or agent of a foreign power" as well as provide proof that the information sought was for a "foreign surveillance or foreign terrorism investigation." Swire, *supra* note 12, at 1331. Section 215 now only requires a relevance standard similar to the NSL statutes. Berry Testimony, *supra* note 24, at 3. Investigators may only obtain records under section 215 by first obtaining a court order. USA PATRIOT Act § 215. In contrast, NSLs do not require a court order. Doe v. Ashcroft, 334 F. Supp. 2d 471, 481 (S.D.N.Y. 2004). NSLs are also narrower in scope because "they only apply to specified communications and financial records," whereas section 215 orders may be used to obtain any tangible thing. Swire, *supra* note 12, at 1358. For a discussion of the differences between NSLs and section 215 orders, and criticism of both, see Jeffrey Rosen, *The Naked Crowd: Balancing Privacy and Security in an Age of Terror*, 46 ARIZ. L. REV. 607, 613-14 (2004).

43. 18 U.S.C. § 2709(c) (2000); 12 U.S.C. § 3414(a)(3) (2000).

44. 15 U.S.C. § 1681u(d) (2000); *see generally* Doe v. Ashcroft, 334 F. Supp. 2d 471, 492 n.107 (S.D.N.Y. 2004).

45. *Doe*, 334 F. Supp. 2d at 492.

46. *Id.* at 492 n.107.

47. *Id.* at 492.

48. *Id.* (discussing plans to modify this provision). The statutes also lack any provision by which an individual can challenge the NSL request. *Id.*

Act only amended the scope of the NSL authorities by extending them to terrorism cases and adopting the reliance standard.[49]

E. *FBI Procedure for Issuing NSLs*

FBI guidelines require that two documents be prepared for the issuance of an NSL—the NSL itself and a "cover EC."[50] Accordingly, the national security letter must be prepared for one of the seven variations of the three NSL types.[51] The NSL must address whether the FBI is seeking "1) subscriber information; 2) toll billing records; 3) electronic subscriber information; 4) electronic communication transactional records; 5) financial records; 6) identity of financial institutions; or 7) consumer identifying information."[52]

The first paragraph of the NSL must identify the statutory authority for the NSL, whether it be the ECPA, the RFPA, or the FCRA.[53] Depending on the statutory authority, the NSL will have varying date and subject requirements.[54] The second paragraph must include the certification language that the records are sought pursuant to "foreign counterintelligence purposes."[55] The third paragraph of the NSL contains the nondisclosure warning.[56] The final paragraph directs the appropriate "company point of contact" to personally deliver the documents or information to the FBI field division.[57]

The NSL must also be accompanied by a "cover EC"[58] which serves four functions:

> (1) [I]t documents the predication for the NSL by recording why the information sought is relevant to an investigation; (2) it documents the approval of the NSL

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49. Swire, *supra* note 12, at 1333.

50. *See, e.g.,* FBI Memo, *supra* note 1, at 4. The FBI Memo, among other sources, fails to identify what exactly the term "EC" is. *Id.* at 6. However, by examining its general components, characterizing a "cover EC" as a form of "cover letter" with requirements specific to the NSL process seems a logical conclusion. *Id.*

51. *Id.* at 4.

52. *Id.*

53. FBI Memo, *supra* note 1, at 4; *see* 18 U.S.C. § 2709 (2004); 12 U.S.C. § 3414 (5)(A) (2004); 15 U.S.C. § 1681u(a) (2004).

54. FBI Memo, *supra* note 1, at 4-5.

55. *Id.* at 5.

56. *Id.*

57. *Id.* For an example of a form NSL, see http://www.aclu.org/nsl/legal/NSL_formletter_080404.pdf.

58. FBI Memo, *supra* note 1, at 6. The FBI Memo, among other sources, fails to identify what exactly the term "EC" is. *Id.* However, by examining its general components, characterizing a "cover EC" as a form of "cover letter" with requirements specific to the NSL process seems a logical conclusion. *Id.*

> by relevant supervisors and the legal review of the document; (3) it contains the information needed to fulfill the Congressional reporting requirements for each type of NSL; and (4) it transmits delivery to the appropriate telecommunications carrier, ISP, financial institution, or credit agency.[59]

Four varieties of cover ECs are based on whether the FBI is seeking subscriber information, toll communication transactional records, financial records, or credit information.[60]

The cover EC also requires the FBI to identify certain field descriptors, disclose the NSL's predication and relevance, obtain official approval, and comply with reporting requirements.[61] The field descriptors section identifies the date the NSL was approved, the general counsel's name, the requesting field office, supervisors, personnel working on the case, the name of the chief of the National Security Letter Unit at FBI headquarters, and the subject's name.[62] The predication and relevance section must identify the relevance of the NSL to the investigation. For example, the predication may state that, "A full foreign counterintelligence investigation of *subject*, a Non-U.S. person, was authorized in accordance with the Attorney General Guidelines because he may be a suspected intelligence officer for the Government of Iraq."[63] The relevance requirement connects the information sought to the investigation by stating, for example, that "The subject's financial records are being requested to determine his involvement in possible HAMAS fund raising activities."[64] The approval section must identify the level of official who approved the issuance of the NSL.[65] And finally, the cover EC must comply with FBI National Security Letter Unit reporting requirements.[66]

III. NATIONAL SECURITY LETTER CHALLENGE: *DOE V. ASHCROFT*

The ACLU and an unnamed Internet Service Provider ("John Doe") recently challenged the government's NSL authority in the Southern District of New York.[67] This was the first time an NSL had been judicially challenged since the passage of the first NSL statute in 1986.[68] Judge Marrero held that the government's NSL authority in the amended ECPA violated the Fourth Amendment and that the permanent ban on

59. FBI Memo, *supra* note 1, at 6.
60. *Id.*
61. *Id.* at 6-8.
62. *Id.* at 6-7.
63. FBI Memo, *supra* note 1, at 7 (emphasis added).
64. *Id.* at 8.
65. *Id.*
66. *Id.*
67. Doe v. Ashcroft, 334 F. Supp. 2d 471, 475 (S.D.N.Y. 2004).
68. *Id.* at 502.

nondisclosure violated the First Amendment because it acted as a prior restraint.[69] This part will not discuss the court's analysis of the Fourth Amendment challenge, but will closely examine the court's holding regarding the First Amendment.[70]

A. *The Factual Background of the Case*

Doe received a call from an FBI agent informing him that he would receive a document known as an NSL.[71] The NSL stated that "'pursuant to Title 18, United States Code (U.S.C.), Section 2709' Doe was 'directed' to provide certain information to the Government."[72] The FBI certified in the NSL that the information sought was relevant to an investigation to "protect against international terrorism or clandestine intelligence activities."[73] The NSL also informed Doe that the nondisclosure provision prohibited him from disclosing his receipt of the NSL to any person.[74] Doe refused to comply with the NSL request and consulted with ACLU attorneys who brought suit to challenge the government's NSL authority.[75]

B. *First Amendment Challenge: Subscribers' Right to Anonymous Speech*

Turning to the First Amendment challenge, the court began by considering whether § 2709 violated subscribers' First Amendment rights of anonymous speech and association.[76] The court emphasized that the lack of a provision for judicial

69. *Id.* at 475. The Department of Justice announced its decision to appeal the *Doe* court's decision. *See* Press Release, Mark Corallo, Director of Public Affairs, On the Department's Decision to Appeal the National Security Letter Ruling by the District Court in New York (Sept. 30, 2004), *at* http://www.usdoj.gov/opa/pr/2004/September/04_opa_664.htm.

70. *Doe*, 334 F. Supp. 2d at 526-27. Doe challenged the government's subpoena authority under the ECPA by arguing that such authority violated the Fourth Amendment's prohibition on unreasonable searches and seizures because there is no form of judicial review and that the non-disclosure provision violated the First Amendment. *Id.* at 475. The court declined to rule on Doe's facial challenge to the ECPA on Fourth Amendment grounds and refused to decide the appropriate Fourth Amendment protection when the government makes an NSL request. *Id.* at 475-76. The court's holding, with respect to the Fourth Amendment, recognized that certain Fourth Amendment rights are implicated by the receipt of an NSL, and that some form of access to the judicial system, which is precluded under the ECPA, is required to challenge the NSL. *Id.* at 476. Absent a judicial review provision, "in practice NSLs are essentially unreviewable because . . . given the language and tone of the statute as carried into the NSL by the FBI, the recipient would consider himself, in virtually every case, obliged to comply, with no other option but to immediately obey and stay quiet." *Id.* at 503.

71. *Doe*, 334 F. Supp. 2d at 478.

72. *Id.*

73. *Id.* at 478-79.

74. *Id.* at 479.

75. *Id.*

76. *Doe*, 334 F. Supp. 2d at 506. The court began its analysis by recognizing the

review could violate subscribers' rights upon the receipt of an NSL.[77] The court also discussed the danger of disclosing "vast amounts of anonymous speech and associational activity."[78] Expressly declining to define the scope of these First Amendment rights, the court merely noted that "such fundamental rights are certainly implicated in some cases. . . ."[79] The court then turned to its primary concern in the First Amendment context.[80]

C. *First Amendment Challenge: The Nondisclosure Provision*

The most critical part of the court's decision, for the purpose of this discussion, is its holding in regards to the nondisclosure provision in § 2709. The nondisclosure provision in the ECPA states that "No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section."[81]

1. The *Doe* Court's Choice of Scrutiny: Strict or Intermediate

The threshold question considered by the court in discussing the First Amendment challenge to the nondisclosure provision was which level of scrutiny should be applied.[82] The court first considered the government's position that the provision was subject to intermediate scrutiny, under which the provision may be upheld if "it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[83] The court also considered the plaintiff's position that the provision acted as a prior restraint or content-based restriction and was subject to

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intersection of the government's grave national security interests and civil liberties. *Id.* at 476. While national security is the supreme purpose of a sovereign, "the war power does not remove constitutional limitations safeguarding essential liberties." *Id.* at 477 (quoting Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934)). Although the court acknowledged the intense passions inflamed by the September 11th attacks, such tragedies often encourage the government to "move in secrecy to a given end with the most expedient dispatch and versatile means [and] often pose the gravest perils to personal liberties." *Id.* at 478. The temptation to ignore constitutional guarantees is ever present, and the judiciary must be especially vigilant. *Id.*

77. *Id.* at 507.
78. *Id.* at 509.
79. *Id.* at 511.
80. *Id.*
81. 18 U.S.C. § 2709(c) (2004).
82. *Doe*, 334 F. Supp. 2d at 511.
83. *Id.* (quoting Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 189 (1997)).

strict scrutiny, which requires the provision to be "narrowly tailored to promote a compelling Government interest."[84]

The court concluded that the provision was subject to strict scrutiny because it acted as both a prior restraint and content-based restriction on speech.[85] The provision acted as a prior restraint because it prohibited speech before it occurred.[86] The court noted:

> [A] blanket permanent prohibition on future disclosures is an even purer form of prior restraint than a licensing system in which the speaker may at least potentially obtain government approval and remain free to speak. In fact, a blanket proscription on future speech works identically to the most severe form of a licensing system—one in which no licenses are granted, and the speech at issue is maximally suppressed.[87]

The court also classified the provision as a content-based restriction by following the Second Circuit's reasoning in *Kamasinski v. Judicial Review Council*.[88] In *Kamasinski*, the court applied strict scrutiny to a Connecticut law that required judicial ethics proceedings to be confidential and prohibited witness disclosure.[89] The *Doe* court found the Second Circuit's ruling to be binding and rejected the government's argument that the nondisclosure provision was content-neutral because it prohibited all disclosures irrespective of the speaker's views on NSLs.[90] Like the nondisclosure provision, the Connecticut law in *Kamasinski* was content-neutral, but the Second Circuit applied strict scrutiny.[91]

The government argued that underlying the disfavor of content-based restrictions is a concern that the government should not silence "less favored" views while permitting those it deems acceptable.[92] The nondisclosure provision did not invoke such a concern because the purpose of the provision is not to pick the issues suitable for public discussion, but to "apply a neutral ban on disclosures that are potentially harmful to Government investigations."[93] The court again rejected the government's argument by concluding that even a viewpoint-neutral restriction could be content-

84. *Id.* (quoting United States v. Playboy Entertainment Group, Inc., 529 U.S. 802, 813 (2000)).

85. *Id.*

86. *Id.* at 511-12.

87. *Doe*, 334 F. Supp. 2d at 512.

88. *Id.* at 512 (interpreting Kamasinski v. Judicial Review Council, 44 F.3d 106 (2d Cir. 1994)).

89. Kamasinski v. Judicial Review Council, 44 F.3d 106, 109 (2d Cir. 1994).

90. *Doe*, 334 F. Supp. 2d at 512.

91. *Id.* at 513.

92. *Doe*, 334 F. Supp. 2d at 512 (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-49 (1986)).

93. *Id.* at 512-13.

based if it restricted an entire class of speech.[94] The *Doe* court noted in *Consolidated Edison Co. v. Public Service Commission*, that the Supreme Court held "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."[95] Since the nondisclosure provision forever prohibits discussion of the entire topic of NSLs by recipients, the court classified it as both a prior restraint and a content-based restriction subject to strict scrutiny.[96]

2. The *Doe* Court's Application of Strict Scrutiny

The *Doe* court classified the nondisclosure provision in the ECPA as a prior restraint and a content-based restriction; therefore, in order to pass constitutional muster it must be narrowly tailored to promote the government's compelling interest, and no alternatives may exist which would be at least as effective in achieving the government's purpose.[97]

The court first acknowledged the government's compelling interest in this case as "protecting the integrity and efficacy of international terrorism and counterintelligence investigations. . . ."[98] Disclosure of the issuance of an NSL creates the risk that the suspected terrorist or operative may destroy evidence or alert others, and reveals the government's intelligence gathering methods.[99]

Despite the government's weighty interests, the court held that the nondisclosure provision was not narrowly tailored because it continued long after the conclusion of the investigation to a time when the need for secrecy no longer exists.[100] The court expressed concerns about the extreme nature of the nondisclosure provision:

> The statute permanently prohibits not only the recipient, but its officers, employees or agents, from disclosing the NSL's existence 'to any person,' in every instance in which an NSL is issued and irrespective of the circumstances prevailing at any given point in time.[101]

The Court further reasoned that in other secret government investigations, the government must normally apply for a court order before it is issued temporary

94. *Id.* at 513 (construing Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980)).

95. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980).

96. *See Doe*, 334 F. Supp. 2d at 513.

97. *Id.* (citing United States v. Playboy Entertainment Group, Inc., 529 U.S. 802 (2000) and Reno v. ACLU, 521 U.S. 844 (1997)).

98. *Id.*

99. *Id.* at 514.

100. *Id.*

101. *Doe*, 334 F. Supp. 2d at 514.

restrictions, which also provide recipients with a forum to challenge the nondisclosure provision.[102] Additionally, the court cited *Butterworth v. Smith*,[103] a case in which the Supreme Court invalidated a grand jury secrecy law because it violated the First Amendment rights of a journalist who testified before a grand jury.[104]

The court also discussed cases that distinguished laws prohibiting persons from disclosing information gained by their participation in confidential government proceedings from those prohibiting disclosure where the person obtained the information independently.[105] Although the court acknowledged that lesser First Amendment protection is afforded to laws which prohibit persons from disclosing information they gain from participating in those proceedings, the fact that the nondisclosure provision is permanent, providing no provision for lifting the bar when the government's secrecy interests expire, renders it unjustifiable.[106] When the government's interest in secrecy no longer exists, the extension of the secrecy provision "may become the cover for spurious ends that government may then deem too inconvenient, inexpedient, merely embarrassing, or even illicit to ever expose to the light of day."[107]

Finally, a less restrictive alternative, such as allowing the recipient to petition for an end to the nondisclosure requirement, would still achieve the government's secrecy interest.[108] The court also acknowledged the unique and compelling government secrecy interests regarding national security cases. The Court recognized that the judiciary should respect the separation of powers and not intercede in national security matters, but held that this deference should only be granted in particular cases involving specific persons and timeframes—not permanent secrecy on future cases whose details are still unknown.[109] Thus, the court concluded that NSL nondisclosure requirements are remarkably unique and extensive compared to other provisions, and could not be considered narrowly tailored because they are "a blunt agent of secrecy applying in perpetuity to all persons affected in every case."[110]

IV. NONDISCLOSURE AND THE FIRST AMENDMENT

This article argues that the *Doe* court incorrectly selected and applied strict scrutiny in its analysis of the nondisclosure provision because the United States

102. *Id.* at 515.
103. Butterworth v. Smith, 494 U.S. 624 (1990).
104. *Id.*
105. *Doe*, 334 F. Supp. 2d at 518.
106. *Id.* at 519.
107. *Id.* at 520.
108. *Id.* at 521.
109. *Id.* at 524.
110. *Doe*, 334 F. Supp. 2d at 516.

Supreme Court has suggested that contexts in which the government provides secret information to individuals invoke lesser First Amendment protection.[111] Although the Supreme Court has never discussed whether intermediate scrutiny should apply in this context, the Court has indicated that it may be willing to subject secrecy statutes, such as the NSL nondisclosure provisions, to greater regulation.[112] This leeway should allow a court to apply intermediate scrutiny.

When applying intermediate scrutiny to the nondisclosure provision the provision will survive because it is substantially related to the government's compelling interest to maintain secrecy in terrorism and counterintelligence investigations.[113] The application of intermediate scrutiny must take into account the substantial deference given to the political branches when dealing with issues of national security.[114]

Alternatively, in the event a court is unwilling to apply intermediate scrutiny to the nondisclosure provision because it acts as a prior restraint and content restriction, the provision should nonetheless survive, even under strict scrutiny, because the government's compelling interests are narrowly tailored despite the permanent ban on disclosure.[115]

A. *The Nondisclosure Provision and Intermediate Scrutiny*

Although the nondisclosure provision may act as both a prior restraint on speech and a content restriction, intermediate scrutiny is appropriate because the Supreme Court has indicated that it will allow greater regulation in this context.[116] Individuals wishing to disclose the fact that an event occurred, such as the fact that testimony was given, are generally regarded as receiving less First Amendment protection than individuals wishing to disclose the substance of their testimonies, such as their observations.[117]

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111. Butterworth v. Smith, 494 U.S. 624, 636 (1990) (Scalia, J., concurring).

112. *Id.*

113. *Doe*, 334 F. Supp. 2d at 524.

114. *Id.* For a discussion of the deference to which the Executive is entitled, albeit in the context of enemy combatants, see Brett Shumate, *New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan*, 18 N.Y. INT'L L. REV. 1, 68-69 (2005) (quoting Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2674 (2003) (Thomas, J., dissenting)).

115. *Id.* at 524, 525.

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

117. Kamasinski v. Judicial Review Council, 44 F.3d 106, 110 (2d Cir. 1994). The federal circuits have embraced this distinction. *See Kamasinski*, 44 F.3d at 111 (rejecting a challenge to state secrecy laws regarding judicial misconduct hearings); First Amendment Coalition v. Judicial Inquiry Review Bd., 784 F.2d 467, 479 (3d Cir. 1986) (en banc) (holding that the First Amendment allows a witness in a judicial ethics proceeding to reveal his testimony, but state secrecy provision was constitutional "insofar as it would prevent a person . . . from disclosing the proceedings taking

In the national security context, the distinction between the two categories is generated by the fact that when an individual wishes to disclose the occurrence of an event it involves information provided to the individual by the government instead of that obtained by the individual independently.[118] Courts generally uphold secrecy statutes when the secrecy is limited to facts merely learned pursuant to a person's participation in the government's investigation.[119] Even according to the *Doe* Court, "[L]aws which prohibit persons from disclosing information they learn solely by means of participating in confidential government proceedings trigger less First Amendment concerns [than] laws which prohibit disclosing information a person obtains independently."[120] As the *Doe* court recognized, "the Government has at least some power to control information which is its 'own creation,' and to which there is otherwise 'no First Amendment right of access.'"[121] This distinction was initially embraced by the Supreme Court in *Seattle Times Co. v. Rhinehart*.[122]

B. *The* Rhinehart *Principle: The Distinction Between Information Gained Independently and Information of the State's Own Creation*

In *Rhinehart*, the Supreme Court acknowledged this distinction in the context of a pretrial protective order.[123] Rhinehart, the spiritual leader of a religious group, sued a newspaper for defamation and invasion of privacy.[124] After the group refused to produce financial information during discovery on the grounds of freedom of association and religion, the trial court issued a protective order preventing the Seattle Times from publishing the information.[125] The newspaper argued that because the protective order restricted freedom of expression, the order could only be issued if there were a compelling government interest, narrowly tailored with no less restrictive alternatives.[126] The Supreme Court rejected the paper's argument and held that the protective order was consistent with the First Amendment because the litigant

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place. . . ."); Hoffmann Pugh v. Keenan, 338 F.3d 1136, 1140 (10th Cir. 2003) ("Reading *Butterworth* in light of *Rhinehart*, we are convinced a line should be drawn between information the witness possessed prior to becoming a witness and information the witness gained through her actual participation in the grand jury process.").

118. *Doe*, 334 F. Supp. 2d at 518.

119. *Id. See also Kamasinski*, 44 F.3d at 110 (holding that the secrecy statute can be upheld as long as it is limited to information obtained through a judicial review council).

120. *Doe*, 334 F. Supp. 2d at 518.

121. *Id.* at 518 (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984)).

122. *Rhinehart*, 467 U.S. at 32.

123. *Id.* at 34.

124. *Id.* at 22-23.

125. *Id.* at 27.

126. *Id.* at 30-31.

gained access to the information only by virtue of the court's discovery process and that this did not represent a classic prior restraint.[127] The Court reasoned:

> [A] protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes.[128]

Hence, the First Amendment provides less protection to information gained only by virtue of the government's action than to information gained independently.[129]

The Supreme Court addressed the same issue involving a grand jury secrecy provision in *Butterworth* and reaffirmed the distinction.[130] The Court struck down a Florida statute that prohibited a grand jury witness from ever disclosing his testimony even after the grand jury term had ended.[131] After a reporter testified before a grand jury, he sought to publish what he learned from his own investigation, but was informed of a Florida statute that prohibited him from disclosing his testimony to anyone.[132] The Supreme Court held that the government's interest in permanent secrecy did not outweigh the reporter's First Amendment rights.[133] However, the Court also distinguished *Butterworth* from its recent decision in *Rhinehart*:

> Here, by contrast, we deal only with respondent's right to divulge 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. In such cases, where a person 'lawfully obtains truthful information about a matter of public significance," we have held that "state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[134]

In his concurrence, Justice Scalia embraced the majority's distinction between *Rhinehart* and *Butterworth* and expanded upon it by reasoning that although a witness may disclose information he received independently, the disclosure of the fact that he conveyed that information may be subject to greater regulation.[135] Hence, the

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127. *Rhinehart*, 467 U.S. at 33.

128. *Id.* at 34.

129. *Id.*

130. Butterworth v. Smith, 494 U.S. 624, 626 (1990).

131. *Id.*

132. *Id.*

133. *Id.* at 632.

134. *Id.* (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)); Florida Star v. B.J.F., 491 U.S. 524, 533 (1989).

135. *Butterworth*, 494 U.S. at 636-37. Justice Scalia continued:

I think there is considerable doubt whether a witness can be prohibited, even while the

Supreme Court, in *Rhinehart* and *Butterworth*, has shown a willingness to allow greater regulation of secrecy statutes in which an individual gains information solely from the state's own creation of that information.[136] This signal of approval toward greater regulation should allow the Court to apply intermediate scrutiny in the NSL context.

1. The *Rhinehart* Principle Applied to the Recipient of an NSL

Because of the Supreme Court's willingness to allow greater restrictions where the government creates or provides access to information, the *Rhinehart* principle seems to approve of an application of intermediate scrutiny.[137] When applied in the NSL context, the nondisclosure provision should survive.[138]

Unlike the reporter in *Butterworth* who testified before the grand jury about information he obtained independently, the recipient of an NSL gains his information from the government's own action through the issuance of the NSL.[139] The recipient of an NSL is similar to the newspaper in *Rhinehart* because both gain information solely from the government's involvement.[140] The reporter in *Butterworth* would be placed in the first category—an individual who sought to disclose the substance of his testimony.[141] According to the Supreme Court, the reporter is entitled to the greatest First Amendment protection because he gained his information independently.[142] By contrast, individuals in the second category, who receive their information solely from the government's action, such as the recipient of an NSL and the newspaper in *Rhinehart*, are entitled to less First Amendment protection.[143]

Accordingly, in situations in which the government has provided the information to the individual, the government is entitled to impose restrictions on speech that

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> grand jury is sitting, from making public what he knew before he entered the grand jury room. Quite a different question is presented, however, by a witness' disclosure of the grand jury proceedings, which is knowledge he acquires not "on his own" but only by virtue of being made a witness. And it discloses those proceedings for the witness to make public, not what he knew, but what it was he told the grand jury he knew. There may be quite good reasons why the State would want the latter information—which is in a way information of the State's own creation—to remain confidential even after the term of the grand jury has expired.

Id. (Scalia, J., concurring).

136. *See id.*; *Rhinehart*, 467 U.S. at 34.

137. *Rhinehart*, 467 U.S. at 34.

138. *Id.* This is applicable due to the fact that the NSL is given to the individual by the government. *Doe*, 344 F. Supp. 2d at 519.

139. *Butterworth*, 494 U.S. at 626; *Doe*, 334 F. Supp. 2d at 519.

140. *Rhinehart*, 467 U.S. at 32; *Doe*, 334 F. Supp. 2d at 519.

141. *Butterworth*, 494 U.S. at 626.

142. *Id.*

143. *Rhinehart*, 467 U.S. at 34.

would be impermissible if applied to the first category of individuals.[144] NSLs involve the second category of individuals because those individuals only learn about the investigation as a result of the government's own action.[145] In fact, the *Doe* court admitted as much:

> An NSL recipient . . . learns that an NSL has been issued only by virtue of his particular role in the underlying investigation, and...it presumptively does little violence to First Amendment values to condition the issuance of an NSL upon the recipient's return obligation of at least some secrecy.[146]

This would entitle recipients of NSLs to less First Amendment protection while allowing the government more leeway in crafting secrecy provisions, including the nondisclosure provisions of NSLs.[147] This greater latitude should be given by the courts in the form of the scrutiny that the provisions receive.[148] Thus, NSL statutes with nondisclosure provisions should be entitled to intermediate rather than strict scrutiny.

2. The Voluntary-Involuntary Distinction

An apparent distinction exists between *Rhinehart* and *Butterworth* and recipients of NSLs because the individuals in *Butterworth* and *Rhinehart* not only acquired the information independently, but also voluntarily, while recipients of NSLs acquire their information involuntarily.[149] For example, the newspaper in *Rhinehart* voluntarily sought the information that only the government could provide access to by virtue of the discovery process.[150] By contrast, recipients of NSLs serve as involuntary participants in the NSL process because the government forces them to accept information and then refuses to allow them to disclose it.[151] Thus, the application of the *Rhinehart* principle may be unworkable in the NSL context because the prior Supreme Court cases involved the individual's *voluntary* acquisition of information.[152]

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144. *See id.*

145. *Doe*, 334 F. Supp. 2d at 519.

146. *Id.*

147. *Id.* at 518.

148. *Rhinehart*, 467 U.S. at 33-34.

149. Butterworth v. Smith, 494 U.S. 624, 626 (1990) (information obtained as a result of reporter's involvement in investigation if improprieties committed by Charlotte County State Attorney's and Sheriff's Departments); *Rhinehart*, 467 U.S. at 24-25 (information voluntarily acquired through the use of an order compelling discovery); *Doe*, 334 F. Supp. 2d at 478 (NSL served by the FBI and ordered to provide information).

150. *Rhinehart*, 467 U.S. at 24.

151. *Doe*, 334 F. Supp. 2d at 478-79.

152. *Rhinehart*, 467 U.S. at 24.

Although the distinction is worthy of note, it failed to play an important part in the Court's decisions in *Rhinehart* or *Butterworth*.[153] Instead, both decisions relied solely on the distinction between information gained independently and information of the "state's own creation."[154] Therefore, the fact that NSL recipients are involuntarily pulled into a secret government investigation should not preclude the application of the *Rhinehart* principle in this context.[155]

Additionally, individuals who gain information voluntarily have a greater interest to disclose that information than individuals who gain their information involuntarily.[156] The newspaper in *Rhinehart* and the reporter in *Butterworth*, as voluntary participants in the grand jury process, both had a great interest in disclosure because they sought to publish their information.[157] By contrast, since recipients of NSLs are involuntary participants in secret government investigations, they are likely to have no interest in publication or, for that matter, disclosure.[158] The First Amendment interest in freedom of the press is not implicated when an individual receives an NSL.[159] Besides, the compelling government interest in secrecy is much greater in the NSL context than in the grand jury context.[160] Therefore, greater regulation of the disclosures made by recipients of NSLs would likely be permissible, even though they are involuntary participants in the investigation.

3. The Fact-Substance Distinction and the Frustration of the Nondisclosure Provision

Another apparent distinction that may frustrate the application of the *Rhinehart* principle is that the NSL recipient would be permitted to publicize the substance of the information he provided to the FBI (subscriber name and address) because that category of information would not be subject to the same regulation as would the fact of the information.[161] If the *Rhinehart* principle does not then extend to the substance of the information, then the recipient could publicize the information he provided to the FBI without explaining the reason for the publication of that information and

153. *Id.* at 34; *Butterworth*, 494 U.S. at 636.

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

155. *Doe*, 334 F. Supp. 2d at 519.

156. *See Rhinehart*, 467 U.S. at 32 (petitioners intended to distribute information they acquired in the discovery process).

157. *Doe*, 334 F. Supp. 2d at 516-17.

158. *Id.* at 519.

159. *Id.*

160. *Id.* at 523.

161. *Id.* at 514.

without disclosing the fact that he provided information to the FBI.[162] The recipient would then have successfully obviated the nondisclosure provision.[163]

Although the recipient may theoretically disclose the information he provided to the FBI, this concern is not one that would realistically occur. Such a disclosure would certainly violate the subscriber's privacy and other legal rights and, no doubt, run contrary to the ISP's interests. Indeed, the *Doe* court recognized the reluctance among ISPs to comply with voluntary NSL requests because of privacy laws.[164] Thus, this concern should not affect the constitutional analysis under *Rhinehart*.

Under intermediate scrutiny, the nondisclosure provision will be upheld if "it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[165] Since the *Doe* court analyzed the provision using strict scrutiny, the difference here should save the nondisclosure provision because the secrecy provision is substantially related to the government's compelling interest in national security.[166]

C. *NSLs and the Compelling Government Interest in National Security Investigations*

The next step in the constitutional analysis is to determine the government's compelling interests, which in the NSL context are consistently underestimated.[167] For example, in *Doe*, the court's concern with the perpetual secrecy of the nondisclosure requirement caused it to gloss over the crucial interest the government maintains in secrecy—even after the investigation of the subject is completed.[168] To the court's credit, it acknowledged the distinction between intelligence investigations and other criminal investigations:

> [T]errorism and counterintelligence investigations are generally different from investigations of past crimes in that the latter proceedings usually contemplate a logical endpoint (*i.e.*, trial or hearing) where the Government publicly presents the evidence it has gathered related to allegations of a discrete, past wrongdoing. By contrast, international terrorism and counterintelligence investigations seek to uncover and disrupt *future* activities of typically large, long-term and expansive conspiracies.[169]

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162. *Doe*, 334 F. Supp. 2d at 514.
163. *Id.*
164. *Id.* at 481.
165. Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'r, 520 U.S. 180, 189 (1997).
166. *Doe*, 334 F. Supp. 2d at 513.
167. *Id.*
168. *Id.* at 514.
169. *Doe*, 334 F. Supp. 2d at 522. *See also Preventing and Responding to Acts of Terrorism:*

Acknowledging the difference between terrorism and counterintelligence investigations on one hand, and ordinary criminal investigations on the other, only begins to expose the significance of the government's interests. Unlike investigations of ordinary crimes in which the government's tactics are subject to public scrutiny and disclosure, terrorism and counterintelligence investigations invoke the disclosure of sources and methods, the preservation of which are essential to the integrity of the investigation process and national security.[170] Unlike the disclosure of wiretaps and grand jury testimony following the conclusion of a criminal investigation, which likely has little effect on future investigations, the government's interest in secrecy continues even after the termination of a specific terrorism or counterintelligence investigation.[171]

The interests protected by the nondisclosure provision include maintaining the integrity of current and future terrorism investigations, and the protection of sources and methods used to disrupt terrorist plots. If the NSL's recipient discloses its existence, the terrorism suspect may be alerted to the investigation, allowing the suspect to destroy evidence, flee, or alert coconspirators.[172] Moreover, valuable sources and methods of tracking terrorist suspects could be seriously compromised.[173]

Beside the ongoing need for secrecy in terrorism investigations, NSLs are a key feature of the Justice Department's shift in focus toward the prevention of future terrorist crimes and away from merely serving as a reactionary law enforcement agency.[174] This prevention strategy requires law enforcement to detect and disrupt terrorist plots before they are executed, and requires the timely acquisition of information.[175] NSLs are critical to this prevention strategy because they provide the

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A Review of Current Law: Hearing Before the Senate Comm. on the Judiciary, 108th Cong. (Apr. 14, 2004) (statement of Dani Eyer, Executive Director).

170. *Doe*, 334 F. Supp. 2d at 522.

171. *Id.* at 523.

172. *Id.* at 514.

173. *Id.*

174. *"Anti-Terrorism Intelligence Tools Improvement Act of 2003": Hearing on H.R. 3179 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 108th Cong. (May 18, 2004) (statement of Daniel J. Bryant, Assistant Att'y Gen., Office of Legal Policy, U.S. Dep't of Just.) ("Rather than waiting for terrorists to strike and then prosecuting those terrorists for their crimes, the Department seeks to identify and apprehend terrorists before they are able to carry out their nefarious plans.").

175. Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 21 (2005). ("[S]ince 9/11 the Justice Department has prioritized the prevention of future terrorist attacks above other institutional objectives, giving prosecutors significant internal incentive to expand their capacity for prevention."); *see also id.* at 26-27 ("Whereas in the past priority with respect to terrorism was to prosecute suspected terrorists in a traditional manner, the overriding priority of the Department since 9/11 is to prevent the attacks before they occur using all available tools.") (footnote omitted).

government with information about terrorist suspects while safeguarding the integrity of classified investigations.[176]

Finally, NSLs invoke the traditional deference given by the judiciary to the political branches.[177] The Supreme Court has recognized that cases involving "terrorism or other special circumstances" require the courts to provide "heightened deference to the judgments of the political branches with respect to matters of national security."[178] Thus, the nondisclosure provisions of the NSL statutes invoke such deference from the courts so as to make the government's interest in secrecy incredibly compelling in the NSL context.

D. *Intermediate and Strict Scrutiny Applied: The Need for Permanent Secrecy*

The final step in the analysis is determining whether the nondisclosure provision will survive the applied level of scrutiny.[179] Despite the *Doe* court's concern about the permanency of the nondisclosure provision, the nondisclosure provisions should satisfy intermediate scrutiny because the need for permanent secrecy continues even after the conclusion of a terrorism investigation.[180] The disclosure that the FBI issued an NSL in a certain terrorism investigation could compromise sources and methods used to disrupt terrorist cells, thereby seriously impairing the government's compelling interests.[181]

Even though an investigation may have ended, the disclosure of the fact that an NSL was issued to an ISP during the FBI's investigation could alert a terrorist's associates that the government may be in hot pursuit. Any such red flags would likely prompt the suspect to flee or alert other terrorist cells in the United States.[182] For example, the FBI may have issued an NSL early in the Yasin investigation. Should the existence of the issuance of the NSL be made publicly known even after the investigation were completed, Yasin's associates would be alerted to the fact that the FBI knew of Yasin's internet address and would soon know the identities of those whom he contacted. Since the associates would be alerted to that fact, CA76740 would flee the United States and evade the FBI's grasp, thereby frustrating FBI

176. *Doe*, 334 F. Supp. 2d at 479.

177. *Id.* at 523-24.

178. Zadvydas v. Davis, 533 U.S. 678, 696 (2001).

179. *Doe*, 334 F. Supp. 2d at 511.

180. *Id.* One objection made to the permanent secrecy provision is that it prohibits a recipient from disclosing the existence of the NSL to a company lawyer. *Id.* at 496. The government argued that the NSL statute should be read to allow the recipient to consult with an attorney, thus eliminating such a concern because consulting with an attorney should be impliedly allowed under the statute because it may be necessary to comply with the request. *Id.* at 497.

181. *Id.* at 513-14.

182. *Id.* at 514.

efforts to disrupt terrorist plots within the United States. Sources and methods would have been revealed, requiring the government to alter its strategies.

Had the issuance of the NSL not been disclosed, CA76740 would not have known that the FBI was aware of his email contacts with Yasin or the extent of the FBI's knowledge of his contact with Yasin. Without such knowledge, CA76740 would have remained in place, unaware that the FBI would be searching Yasin's email contacts and closing in on his identity and location. While such a hypothetical may seem farfetched, it highlights the danger that the mere disclosure of an NSL may cause to current and future terrorism investigations.

Similarly, concerns over disclosure exist even after the passage of many years; however, the permanent secrecy requirement was a principle concern of the *Doe* court.[183] That court recognized a situation in which the government's interest in secrecy may no longer exist—a situation in which the nondisclosure provision would nonetheless continue to restrict the recipient from disclosing the NSL's existence.[184] For example, the existence of an NSL may become publicly known after the investigation is completed or after the passage of a significant amount of time, a situation in which the government may no longer have an interest in preventing the NSL recipient from disclosing its existence.[185] The court concluded that because such hypothetical situations may exist, there are less restrictive alternatives of accomplishing the government's secrecy interest. These alternatives include requiring the FBI to make a determination that the need for secrecy remains and provide a forum to define situations in which the NSL recipient may disclose the NSL's existence.[186]

Although the *Doe* court is correct that the government's interest in preventing disclosure to keep the existence of an NSL secret may diminish over time, justification for permanent secrecy nonetheless remains.[187] The government's interest in secrecy remains because the possibility of the NSL's recipient disclosing its existence could compound the threat to the protection of sources and methods used to disrupt terrorist cells in the future.[188] Moreover, the government continues to keep historical records and information from World War II secret despite the fact that a significant amount of time has passed.[189]

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183. *Id.*

184. *Id.* at 520.

185. *Doe*, 334 F. Supp. 2d at 520.

186. *Id.* at 520-21.

187. *Id.* at 523.

188. *Id.* at 514.

189. Douglas Jehl, *CIA Said to Rebuff Congress on Nazi Files*, N.Y. TIMES, Jan. 30, 2005, at 10 ("The Central Intelligence Agency is refusing to provide hundreds of thousands of pages of documents sought by a government working group under a 1998 law that requires full disclosure of classified records related to Nazi war criminals.").

Additionally, a provision allowing for a judicial challenge by requiring the government to go to court after-the-fact to defend against the disclosure would present additional dangers to national security and the integrity of terrorism and counterintelligence investigations.[190] Disclosure would also put the judiciary in the position of judging sensitive national security matters; this could lead to judicial intrusion on the traditional deference given to the political branches.[191] Compared to the threat posed to future investigations as well as national security, the restriction on the recipient of the NSL not to disclose its existence seems relatively minor. The individual interest in disclosing the existence of the NSL is so minimal that the government's interests surely overcome those of the individual.[192] Accordingly, the disclosure of the mere issuance of an NSL could disrupt and impede terrorism investigations, highlighting the persistent need for secrecy in terrorism and counterintelligence investigations.[193] Furthermore, this justification satisfies the government's burden to survive intermediate scrutiny.[194]

Finally, the permanence of the nondisclosure provision should survive a challenge under intermediate scrutiny because it is substantially related to the government's compelling interest to maintain secrecy when conducting national security investigations.[195] Additionally, the nondisclosure provision is not related to suppression of speech because the provision is viewpoint neutral and imposes a ban on all disclosures, regardless of the recipient's views.[196] The provision does not substantially burden more speech than necessary because the individual interests in disclosure are relatively minor compared to the government's compelling interest in secrecy.[197] Thus, the NSL nondisclosure provision should survive intermediate scrutiny.

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190. *See* Bryant Answers, *supra* note 3, at 11 ("[I]n the context of sensitive intelligence and espionage investigations, it would be difficult for the government to furnish evidence that the disclosure of an NSL actually harmed national security without risking further harm to national security.").

191. *Doe,* 334 F. Supp. 2d at 523-24.

192. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) ("[O]ur society . . . has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'") (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

193. *Doe,* 334 F. Supp. 2d at 514.

194. *Id.* at 511.

195. *Id.* at 513-14.

196. *Id.* at 512.

197. *Id.* at 524-25.

E. *The Nondisclosure Provision and Strict Scrutiny*

Even if a court is unwilling to apply intermediate scrutiny to the nondisclosure provision because it acts as both a prior restraint and content restriction, the provisions should also be able to survive strict scrutiny because they are narrowly tailored to meet the government's compelling interest.[198] In *Doe*, the court's main criticism of the provision was the permanent ban on secrecy and the inability of the recipient to either consult with an attorney or challenge the permanent ban.[199]

Despite these concerns, the government's interest should still be found narrowly tailored because, in addition to the government's weighty national security interests, the provisions could be read implicitly to allow the recipient to consult with an attorney in order to ensure compliance with the NSL order.[200] In fact, the FCRA nondisclosure provision explicitly allows consultation if necessary to comply with the request even though the ECPA does not.[201] Indeed, the government made such an argument, which the court rejected because the provision still "exerts an undue coercive effect on NSL recipients."[202] Allowing the recipient to consult with an attorney to fulfill the NSL order is implicitly allowed by the statute because it may be necessary to comply with the request.[203] For example, in the previous hypothetical, Tyler Pearson could not have complied with the NSL request had he not consulted with another attorney. With this concern effectively alleviated, courts should find that the permanency of the nondisclosure rule is narrowly tailored to satisfy the government's compelling national security interests. Thus, the nondisclosure provision should survive a challenge under intermediate or strict scrutiny.

V. CONCLUSIONS AND RECOMMENDATIONS

The nondisclosure provisions of the NSL statutes, which prohibit recipients from disclosing the existence of an NSL, require courts to balance delicate interests. On one hand, courts must consider the First Amendment rights of the NSL's recipient, and on the other hand, courts must also consider the government's weighty interest to maintain secrecy in national security investigations. The individual's minimal interests in disclosure must yield to the significant government interests because the individual interests in disclosure are relatively minor compared to the interests of the government.

The courts' first opportunity to evaluate the NSL statutes, in *Doe v. Ashcroft,* began by selecting and applying the incorrect level of scrutiny to the nondisclosure

198. *Doe,* 334 F. Supp. 2d at 514.
199. *Id.*
200. *Id.* at 505.
201. 15 U.S.C. § 1681u(d) (2000).
202. *Doe,* 334 F. Supp. 2d at 494.
203. *Id.* at 496.

provisions. Although at first blush strict scrutiny would appear to be appropriate because the provisions act as a prior restraint and content-based restriction, the Supreme Court has recognized the realities inherent to national security investigations and has provided the political branches with substantial deference. Not only this, but the Court has also signaled its approval of more stringent speech regulation in cases where the individual gains information solely by virtue of his participation in a secret government investigation. In those cases, compared to cases in which the individual obtains information independently, the Court has signaled its approval of intermediate scrutiny.

When intermediate scrutiny is applied to the permanent cloak of secrecy imposed by the nondisclosure provision, the provision should survive because the government's compelling interest in secrecy remains a reality long after the issuance of the NSL. Moreover, the statutes should also be able to survive strict scrutiny analysis. Given Congress' important task of deciding whether to extend the provisions of the USA PATRIOT Act affecting the national security letter statutes in the closing months of 2005, this article has hoped to remove the cloud of misunderstanding surrounding NSLs and to establish the appropriate framework under which challenges to the nondisclosure provisions of the NSL statutes should be analyzed.