
Note

Gagging on the First Amendment: Assessing Challenges to the Reauthorization Act's Nondisclosure Provision

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*"Safety from external danger is the most powerful director of national conduct."
Alexander Hamilton¹*

In 2004, the president of a small Internet access and consulting business received a national security letter (NSL) from the Federal Bureau of Investigation (FBI).² The letter ordered the president to divulge private information about one of the company's clients.³ A judge had not reviewed or approved the letter.⁴ Accompanying the letter was a gag order: the president was forbidden to disclose to anyone, including the client, that the FBI was seeking the requested information.⁵ The president's story is known only because of his anonymous editorial in *The Washington Post*.⁶ To this day, the identity of the presi-

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1. THE FEDERALIST NO. 8, at 35 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. Editorial, *My National Security Letter Gag Order*, WASH. POST, Mar. 23, 2007, at A17.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* On March 23, 2007, the company president submitted an editorial to *The Washington Post* describing his or her experiences. The newspaper's editorial board noted in a disclaimer that while it does not publish anonymous pieces as a matter of policy, it made an exception in this case "because the author—who would have preferred to be named—is legally prohibited from dis-

dent, including his (or her) gender and company, is not publicly known.

Rather than submitting the requested information to the FBI, the president enlisted the assistance of the American Civil Liberties Union (ACLU) and filed a lawsuit—*Doe v. Ashcroft*, known now as *Doe I*—challenging the constitutionality of the NSL power.⁷ This lawsuit presented the district court with a difficult question of balancing. The case pitted an individual's First Amendment rights against the government's need for secrecy in its terrorism investigations.⁸ To the district court, this was a simple case of prior restraint, legally indistinguishable from a local government film board prohibiting a movie's general release prior to its screening for indecency.⁹ Prior restraints on speech require strict scrutiny review, the court reasoned.¹⁰ The fact that the subject matter involved national security during the post-9/11 war on terror did not persuade the court to grant the FBI additional leeway.¹¹ Applying a strict scrutiny standard of review, the court found the relevant NSL nondisclosure provisions unconstitutional.¹² The president's First Amendment challenge succeeded over the government's objection that the statute imposed no prior restraint and merited only intermediate scrutiny.¹³

The story did not end there. *Doe I* was only the first skirmish in a protracted back-and-forth between Congress, Internet providers and the federal courts; *Doe v. Gonzales (Doe III)*

closing his or her identity." *Id.*

7. See *Doe v. Ashcroft (Doe I)*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), *vacated*, 449 F.3d 415 (2d Cir. 2006).

8. See *id.* at 474 ("The high stakes here . . . compel the Court to strike the most sensitive judicial balance, calibrating by delicate increments toward a result that adequately protects national security without unduly sacrificing individual freedoms, that endeavors to do what is just for one and right for all.").

9. See *Doe v. Gonzales (Doe III)*, 500 F. Supp. 2d 379, 399–400 (S.D.N.Y. 2007) (comparing the NSL nondisclosure order to the facts of *Freedman v. Maryland*, 380 U.S. 51 (1965), which involved film restrictions imposed by the Maryland State Board of Censors).

10. See *id.* at 401 (concluding that strict scrutiny should apply even though the case involves national security).

11. See *id.*

12. See *id.* at 425.

13. See Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of the Government's Cross-Motion to Dismiss the Complaint Or For Summary Judgment, at 50–54, *Doe I*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) (No. 04 Civ. 2614), *vacated*, 449 F.3d 415 (2d Cir. 2006).

is merely the latest episode.¹⁴ That tug-of-war continues today as Congress is considering amendments to the NSL nondisclosure provision in response to *Doe III*.¹⁵ Through the maze of repealed provisions and court decisions, however, there remains the fundamental question of whether the *Doe III* court was correct to apply strict scrutiny. This question remains alive today as the latest iteration of the NSL nondisclosure provision, introduced in the Senate in September 2007, does not prescribe a specific standard to courts reviewing a nondisclosure challenge.¹⁶ The question is open-ended, and, on future challenges, judges in other jurisdictions must decide whether to follow the *Doe III* rule or to adopt a different test.

This Note offers a critique of the *Doe* decisions, which all apply strict scrutiny, and suggests that intermediate scrutiny is the proper standard of review for NSL nondisclosure challenges. Based on a line of cases that grew from the Espionage Act of 1917,¹⁷ federal courts have previously indicated that matters of national security deserve different legal treatment than run-of-the-mill free speech cases.¹⁸ This Note suggests that such reasoning should apply to NSL nondisclosure challenges, and reviewing courts should use a lower standard. In that regard, this Note presents a new approach to an outcome that the government unsuccessfully sought in *Doe I*.¹⁹ The government's brief argued for intermediate scrutiny based on a line of grand jury secrecy cases.²⁰ Since that reasoning failed in the *Doe* cases and the courts applied strict scrutiny, the government needs a new argument to justify intermediate scruti-

14. See *Doe III*, 500 F. Supp. 2d at 387–89 (discussing the procedural history of the case including *Doe I*, *Doe v. Gonzales (Doe II)*, 386 F. Supp. 2d 66 (D. Conn. 2005), and congressional responses).

15. See NSL Reform Act of 2007, S. 2088, 110th Cong. (2007).

16. *Id.*

17. See 18 U.S.C. § 793 (2000).

18. See, e.g., *United States v. Morison*, 844 F.2d 1057, 1070 (4th Cir. 1988) (holding that First Amendment rights are not implicated in Espionage Act cases); *United States v. Rosen*, 445 F. Supp. 2d 602, 637 (E.D. Va. 2006) (denying First Amendment protection for a government employee who leaked classified information).

19. See Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of the Government's Cross-Motion to Dismiss the Complaint Or For Summary Judgment, at 50–54, *Doe I*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) (No. 04 Civ. 2614), *vacated*, 449 F.3d 415 (2d Cir. 2006) (arguing in support of intermediate scrutiny based on the *Butterworth v. Smith*, 494 U.S. 624 (1990) line of cases but not invoking Espionage Act jurisprudence).

20. See *infra* notes 122–45, 147–56.

ny. This Note devises that that new argument should be based on national-security jurisprudence. In order to understand the role NSLs play in promoting national security, Part I discusses the origins of NSLs, as well as their current statutory construction and ongoing uses. Part II then discusses relevant First Amendment and national security doctrine as it affects nondisclosure orders. Finally, Part III analyzes the government's interest in secrecy and explains why courts should apply intermediate scrutiny for challenges to NSL statutes.

I. THE HISTORICAL AND LEGAL BACKGROUND OF THE NSL PROCEDURE AS AN ANTITERRORISM TACTIC

Under the current statutory scheme, NSLs “require Americans to cough up loads of information on colleagues and clients—maybe you—and to never breathe a word to anyone of what they’ve done.”²¹ Although this Note focuses primarily on the statute at issue in *Doe III*,²² four statutes authorize the FBI to issue NSLs.²³ The earliest of these dates to 1986.²⁴ However, the events of September 11, 2001 and the enactment of the USA Patriot Act in late 2001²⁵ brought national attention²⁶ to NSLs due to the important role that they play in gathering ter-

21. Ronald J. Sievert, *Patriot 2005-2007: Truth, Controversy, and Consequences*, 11 TEX. REV. L. & POL. 319, 330 (2007) (quoting *On Point: National Security Letters: Use or Misuse?* (National Public Radio broadcast Nov. 10, 2005), available at http://archives.onpointradio.org/shows/2005/11/20051110_a_main.asp).

22. See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (codified in 18 U.S.C.A. § 3511 (West 2006)), *invalidated by Doe III*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007).

23. See, e.g., Right to Financial Privacy Act (RFPA), 12 U.S.C.A. §§ 3401–3422 (West 2001 & Supp. 2008); Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 (2000); Electronic Communications Privacy Act (ECPA), 18 U.S.C.A. § 2709 (West 2000 & Supp. 2008), *invalidated by Doe III*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007); National Security Act, 50 U.S.C. § 436 (West 2003 & Supp. 2008).

24. See 12 U.S.C.A. §§ 3401–22.

25. See USA PATRIOT ACT of 2001, Pub. L. No. 107-56 115 Stat. 272 (codified in scattered sections of U.S.C.). For a general discussion of the evolution of the Patriot Act, see DONALD J. MUSCH, CIVIL LIBERTIES AND THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 203–06 (2003).

26. See, e.g., Eric Lichtblau & James Risen, *Broad Domestic Role Asked for C.I.A. and the Pentagon*, N.Y. TIMES, May 2, 2003, at A21 (noting the Bush administration's efforts to grant the NSL power to the C.I.A. and the Pentagon); see also Barton Gellman, *The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, WASH. POST, Nov. 6, 2005, at A1 (reporting that the government issues over 30,000 NSLs each year).

rorism-related intelligence.²⁷ A recent report from the Office of the Inspector General (OIG Report) indicates that the NSLs enable FBI agents to generate “link analyses,” one of the “principal analytical intelligence products” generated by FBI Field Intelligence Groups.²⁸ According to that same report, the government may use information derived from NSLs to develop a variety of written products that are shared with Joint Terrorism Task Forces.²⁹ This Section outlines those important functions and illustrates the critical value of NSLs as an antiterrorism tool.

A. THE STATUTORY UNDERPINNINGS OF NSLS

As one scholar has observed: “[s]ecrecy has been part of national security operations for as long as there has been a nation to secure [and] it has been problematic ever since.”³⁰ The current NSL regime is emblematic of the problems of secrecy as it has evolved into a tug-of-war in which Congress attempts to balance the government’s secrecy interests with the rights of citizens.³¹ Congress passed the first NSL statute³² as a modification to the Right to Financial Privacy Act (RFPA) of 1978.³³ The original RFPA sought to prevent unjustified monitoring of a financial institution’s customers while still allowing law enforcement to conduct investigative work.³⁴ In 1986, Congress enacted the first NSL provision, which allowed the FBI to demand financial records in foreign-intelligence cases without no-

27. See, e.g., Press Release, Patrick Leahy, Chairman, Senate Judiciary Comm., Reaction of Sen. Patrick Leahy, On the Inspector General’s Report on the Use of National Security Letters (Mar. 9, 2007), available at <http://leahy.senate.gov/press/200703/030907.html> (describing NSLs as “a powerful tool”).

28. See OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF NATIONAL SECURITY LETTERS, xxv (2007) [hereinafter OIG REPORT]. Perhaps because of the secrecy surrounding NSLs, the OIG REPORT is the only comprehensive source on current NSL usage.

29. *Id.*

30. Nathan Alexander Sales, *Secrecy and National Security Investigations*, 58 ALA. L. REV. 811, 811 (2007).

31. For a discussion of the evolution of NSL statutes, see *id.* at 849–54 (discussing the legislative histories of the RFPA, FCRA, and ECPA NSL statutes). Sales notes that the various NSL secrecy requirements “are substantively indistinguishable.” *Id.* at 852.

32. See Pub. L. No. 99-569, 100 Stat. 3197 (1986) (codified as amended at 12 U.S.C.A. § 3414 (West 2001 & Supp. 2008)).

33. See *id.*

34. See H.R. REP. NO. 95-1383, at 33 (1978).

tifying the subject in advance.³⁵ Fifteen years later, the Patriot Act lowered that standard, and now financial institutions must comply with an NSL request if the FBI certifies in writing that the records it seeks support counterintelligence to fight international terrorism.³⁶

In 1986, Congress enacted the Electronic Communications Privacy Act's (ECPA) NSL provision—which lies at the heart of the *Doe* case.³⁷ As originally enacted, the ECPA required the government to show that investigations were relevant to an ongoing criminal investigation in order to obtain a court order before instigating pen registers or trap-and-trace devices.³⁸ The Patriot Act, however, amended the ECPA, allowing the FBI to obtain an individual's name, address, length of service, and local and long distance toll-billing records upon certification that they relate to international antiterrorism investigations.³⁹ The Patriot Act also eliminated the requirement that the subject be a foreign-power's agent.⁴⁰ The ECPA comes with a nondisclosure provision barring any recipient from disclosing that he has received an NSL.⁴¹ This nondisclosure order lies at the heart of the *Doe* disputes.⁴²

The two remaining NSL statutes are not discussed in the *Doe* cases. One came as an amendment to the National Security Act of 1947.⁴³ Prompted by Aldrich Ames's espionage investigation,⁴⁴ the National Security Act NSL statute authorized the FBI to request financial records or other consumer reports of government employees targeted in investigations.⁴⁵ According

35. See Pub. L. No. 99-569, 100 Stat. 3197 (1986) (codified as amended at 12 U.S.C.A. § 3414 (West 2001 & Supp. 2008)); see also OIG REPORT, *supra* note 28, at 11–12.

36. 12 U.S.C.A. § 3414(a)(5)(A).

37. See 18 U.S.C.A. § 2709 (West 2000 & Supp. 2008), *invalidated by Doe III*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007).

38. See OIG REPORT, *supra* note 28, at 12–13 (discussing the application of pre-Patriot Act ECPA provisions).

39. 18 U.S.C.A. § 2709(b)(2).

40. See Sievert, *supra* note 21, at 338 (discussing the Patriot Act's changes to the ECPA).

41. 18 U.S.C. § 2709(c)(1) (2000).

42. See, e.g., *Doe III*, 500 F. Supp. 2d at 379, 385 (S.D.N.Y. 2007) (noting the plaintiffs' challenge to the constitutionality of § 2709).

43. See 50 U.S.C.A. § 436 (West 2003 & Supp. 2008).

44. See OIG REPORT, *supra* note 28, at 15 ("In 1994, in the wake of the espionage investigation of former Central Intelligence Agency employee Aldrich Ames, Congress enacted an additional NSL authority by amending the National Security Act of 1947.").

45. See 50 U.S.C. § 436(a)(1)–(2)(A) (2000).

to available government information, these NSLs are used very rarely.⁴⁶

The final NSL authority comes from the Fair Credit Reporting Act (FCRA) of 1970.⁴⁷ Since the Patriot Act, the FBI can issue two types of NSLs under the FCRA to obtain credit reports on individuals pursuant to national-security investigations.⁴⁸

B. THE CURRENT ROLE OF NSLS IN FBI INVESTIGATIONS

NSLs might best be understood as the intelligence analogue to administrative subpoenas in the criminal context.⁴⁹ According to the OIG Report, prepared independently of the FBI, NSLs support a variety of key counterterrorism functions.⁵⁰ Primary among these is acquiring information to bolster FISA applications for other intelligence-gathering tools, such as electronic surveillance, pen registers, trap-and-trace devices, and physical searches.⁵¹ NSLs often provide the baseline evidence that justifies more intrusive investigations.⁵² NSLs also are key to linking various suspects' communications or finances, as well as obtaining grounds to open new investigations or expand existing ones.⁵³ In this way, NSLs appear to be a type of gateway tool preceding more elaborate procedures.⁵⁴ The FBI also stresses that NSLs are beneficial in corroborating information produced in other investigations.⁵⁵ The information obtained under NSLs may be distributed to U.S. Attorney's Offices to aid prosecutions.⁵⁶ Indeed, the OIG Report demonstrates that

46. See OIG REPORT, *supra* note 28, at xiv.

47. 15 U.S.C. § 1681 (2000 & Supp. 2005).

48. *Id.*

49. Sievert, *supra* note 21, at 338 ("In the criminal context [computer and telephone] information has long been obtained by administrative subpoenas, while in the intelligence context the FBI has utilized [NSLs]."); see also Sales, *supra* note 30, at 849 (referring to NSLs as "subpoenalike authorities").

50. See OIG REPORT, *supra* note 28, at xlvi.

51. *Id.*

52. *Id.*

53. *Id.* ("[NSLs] provid[e] evidence to initiate new investigations [and] expand national security investigations.").

54. See *id.*

55. *Id.* For more discussion on the general use of NSLs, see generally Michael J. Woods, *Counterintelligence and Access to Transactional Records: A Practical History of USA PATRIOT Act Section 215*, 1 J. NAT'L SECURITY L. & POL'Y 37, 43-50 (2005). Woods is the former chief of the FBI's National Security Law Unit. *Id.* at 37.

56. See OIG REPORT, *supra* note 28, at xlvi.

NSLs are noted more for their versatility than for any one particular function.⁵⁷

In practice, the use of NSLs is not “quite so sinister” as it may sound, according to one expert.⁵⁸ NSL use is “fairly limited and targeted” at information that the individual has already disclosed to third parties anyway.⁵⁹ Professor Daniel J. Solove has offered one illustration of how an NSL might be issued.⁶⁰ First, the FBI comes across an anonymous website proclaiming support for a terrorist organization and urging others to join the group.⁶¹ The FBI then obtains the IP address for that site and issues an NSL to the Internet service provider to learn the author’s identity.⁶² The nondisclosure requirement placed on the provider exists only to prevent a target from changing his behavior should he learn that he is being watched.⁶³

The OIG Report provides a second, real-life example of NSLs in action.⁶⁴ The FBI, based on intelligence indicating that a detainee had used an e-mail account, issued NSLs to obtain usage information, such as URL history, on that account.⁶⁵ That information in turn led to further NSLs to obtain phone records for both the detainee and his associates.⁶⁶ One of those sources linked the detainee to a different suspect, and as a result, that latter individual was later convicted for materially supporting terrorism.⁶⁷

From 2003 through 2005, the FBI issued 143,074 NSL requests.⁶⁸ In 2004, the number of requests issued jumped to 56,507, up from 39,346 in 2003.⁶⁹ However, 2005 (the most recent year for which data are available) saw a decline in NSL

57. *See id.*

58. *See* Sievert, *supra* note 21, at 339. *But see* Caroline Fredrickson, American Civil Liberties Union, Statement for the Record, <http://www.aclu.org/safefree/nationalsecurityletters/29200leg20070328.html> (arguing that the OIG Report “confirms our worst fears” that the NSL authority is more intrusive and unjustified than Sievert suggests).

59. Sievert, *supra* note 21, at 339.

60. *See* Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 167 (2007).

61. *Id.*

62. *Id.*

63. *See* Sales, *supra* note 30, at 852.

64. OIG REPORT, *supra* note 28, at 64.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 36.

69. *Id.* at 37 fig. 4.1.

use, down to 47,221.⁷⁰ These requests currently target U.S. persons at a higher rate than non-U.S. persons.⁷¹ That percentage grew from about 39 percent of 2003 NSL requests to about 53 percent of 2005 NSL requests.⁷² In other words, NSL use became more prevalent from 2003 to 2005 and increasingly targeted U.S. citizens and permanent residents.

On the whole, the vast majority of NSL requests—over seventy-three percent—arise through counterterrorism investigations.⁷³ The remaining fraction was issued in counterintelligence operations and in foreign-computer-intrusion cyber investigations.⁷⁴ In counterterrorism investigations, NSL use almost doubled from 2003 to 2005.⁷⁵ About 19 percent of all the counterterrorism investigations during this period involved NSLs.⁷⁶ However, there are no statistics available on how often NSLs produce information actually used in a criminal proceeding.⁷⁷

The FBI does not report specific success statistics for NSLs, and so the public does not know the extent to which they aid counterterrorist efforts. Nevertheless, the FBI asserts that NSLs are “indispensable investigative tools that serve as building blocks in many counterterrorism and counterintelligence investigations.”⁷⁸ The above statistics and examples at least confirm their frequent use. As the detainee example illustrates,

70. *See id.* at 37–38.

71. *Id.* The term “United States person” means:

[A] United States citizen, an alien known by the intelligence agency concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments.

Exec. Order No. 12,333 § 3.4(i), 3 C.F.R. 200 (1982), *reprinted as amended in* 50 U.S.C. § 401 (2000 & Supp. 2006); *see also* Exec. Order No. 13,355, 3 C.F.R. 218 (2005), *reprinted as amended in* 50 U.S.C. § 401 (2000 & Supp. 2006), *amending* Exec. Order No. 12,333, *supra*.

72. *See* OIG REPORT, *supra* note 28, at 38.

73. *Id.* at 39.

74. *Id.*

75. *Id.*

76. *Id.*

77. *See id.* at xlvi (“[B]ecause information derived from national security letters is not marked or tagged as such, it is impossible to determine when and how often the FBI provided information derived from national security letters to law enforcement authorities for use in criminal proceedings.”).

78. *Id.* at xlvi; *see also id.* at 65 (listing numerous uses for NSLs); *id.* at 64–65 (discussing real-life examples of how NSLs aided specific investigations).

NSLs play a role in what the Supreme Court has acknowledged as the key intelligence task of adding “bits and pieces of data” to paint a broader, more useful picture.⁷⁹

C. ABUSES OF THE NSL POWER

In addition to legitimate and lawful uses, the OIG reports that the FBI on numerous occasions misused NSLs.⁸⁰ The OIG report lists eight general categories of improper NSL use.⁸¹ These included issuing NSLs after the proper investigative authority had lapsed and investigating beyond the prescribed time limits in the NSL.⁸² Most of the violations were self-identified and properly reported to the relevant administrative body, although the OIG documented several instances when the government didn’t report violations.⁸³

The OIG Report also cautions the reader not to make too much of the abuses, because, in most cases, the FBI obtained information it had a right to receive, even if it had followed proper protocol.⁸⁴ Also, no misuse of the NSL power constituted criminal conduct.⁸⁵ As one observer noted, “there was no improper use of the letters against individuals who were not legitimate suspects.”⁸⁶ Indeed, the FBI rarely obtained information it had no right to receive.⁸⁷

79. *CIA v. Sims*, 471 U.S. 159, 178 (1985). One author has dubbed this piece-by-piece intelligence gathering as “mosaic theory,” and argues that it has been widely invoked by the Bush II administration to “justify numerous actions.” See Christina E. Wells, *CIA v. Sims: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 863 (2006).

80. See OIG REPORT, *supra* note 28, at 66–107 (documenting instances of illegal or improper use of the NSL authority). The OIG Report is the only current source that comprehensively documents NSL misuses.

81. *Id.* at 66–67.

82. *Id.*

83. *Id.* at 67 (noting misuses of NSLs that were properly reported to the FBI’s Office of General Counsel as well as incidents that should have been reported but were not and were instead identified by the Office of General Counsel during site visits).

84. *Id.* (“[I]n most cases the FBI was seeking to obtain information that it could have obtained properly if it had followed its applicable statutes, guidelines, and internal policies.”). *But see* Fredrickson, *supra* note 58 (“[T]he FBI uses its NSL authorities to systematically collect private information about people who are not reasonably suspected of being involved in terrorism, and it retains this information indefinitely.”).

85. OIG REPORT, *supra* note 28, at 67 (“We also did not find any indication that the FBI’s misuse of NSL authorities constituted criminal misconduct.”).

86. Sievert, *supra* note 21, at 339. *Compare id.* (arguing that the government had used NSLs against legitimate suspects), *with* Fredrickson, *supra*

D. CONSTITUTIONAL CHALLENGES TO THE NSL AUTHORITY

Of the four NSL statutes discussed above, the ECPA has generated the greatest legal controversy in recent times.⁸⁸ In *Doe I*, the district court found that the statute facially unconstitutional under the First, Fourth, and Fifth Amendments.⁸⁹ Shortly thereafter, in a case involving a different plaintiff, a second district court struck down ECPA's nondisclosure requirement as unconstitutional in *Doe v. Gonzales (Doe II)*.⁹⁰ It found that the statute failed strict scrutiny because it was not narrowly tailored to serve a compelling government interest.⁹¹ Before *Doe I* and *Doe II* were appealed, however, Congress passed the USA PATRIOT Improvement and Reauthorization Act of 2005 (Reauthorization Act).⁹² This new legislation substantially altered § 2709 and expanded judicial review of NSLs.⁹³ Because of these statutory changes, the Second Circuit remanded *Doe I* to the district court for consideration in light of the new procedures.⁹⁴

The case thus became *Doe III*, in which despite the statutory revisions, the anonymous company president won another victory. The district court rejected the nondisclosure portion of § 2709(a) and parts of § 3511 as unconstitutional on First Amendment grounds only.⁹⁵ After concluding that the plaintiffs did have appropriate standing to challenge the statutes at issue,⁹⁶ the court found that § 2709's nondisclosure provision constituted a prior restraint as well as a content-based restric-

note 58 ("The Inspector General reviewed just a tiny proportion of NSLs issued by the FBI from 2003 through 2005, yet he found an extraordinary level of mismanagement, incompetence, and willful misconduct . . .").

87. See Sievert, *supra* note, 21, at 339.

88. See, e.g., *Doe III*, 500 F. Supp. 2d 379, 385 (S.D.N.Y. 2007); *Doe II*, 386 F. Supp. 2d 66, 68–69 (D. Conn. 2005); *Doe I*, 334 F. Supp. 2d 471, 474 (S.D.N.Y. 2004), *vacated*, 449 F.3d 415 (2d Cir. 2006); see also Sievert, *supra* note 21, at 339 (noting that with *Doe I*, "for the first time in the long history of the utilization of NSLs, the government was repeatedly challenged by NSL recipients in court"); Andrew E. Nieland, Note, *National Security Letters and the Amended Patriot Act*, 92 CORNELL L. REV. 1201, 1202 (2007) (noting that until recently, NSL recipients "apparently never challenged their validity").

89. *Doe I*, 334 F. Supp. 2d at 475.

90. See *Doe II*, 386 F. Supp. 2d at 82.

91. *Id.*

92. Pub. L. No. 109-177, 120 Stat. 192 (codified in 18 U.S.C.A. § 3511 (West 2006)), *invalidated by Doe III*, 500 F. Supp. 2d at 379.

93. *Doe III*, 500 F. Supp. 2d at 386.

94. See *Doe v. Gonzales*, 449 F.3d 415, 419 (2d Cir. 2006).

95. See *Doe III*, 500 F. Supp. 2d at 386–87.

96. *Id.* at 396.

tion on speech.⁹⁷ The court, therefore, applied strict scrutiny⁹⁸ and would uphold the statute “only if it is narrowly tailored to promote a compelling government interest, and there are no less restrictive alternatives [that] would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”⁹⁹ The court then considered whether the Reauthorization Act provides requisite safeguards to survive a constitutional challenge.¹⁰⁰ First, the court found that the statute presents a licensing scheme,¹⁰¹ and went on to conclude that its validity is subject to all three prongs of the so-called *Freedman v. Maryland* test.¹⁰² Section 3511(b) could not satisfy the third *Freedman* prong, the court reasoned, because the government does not bear the burden of justifying the NSL request.¹⁰³ For this reason, the Reauthorization Act failed to survive the First Amendment challenge.¹⁰⁴

Next, the court held that § 3511(b) violated the long-standing principles of the separation of powers.¹⁰⁵ The problem

97. *Id.* at 397.

98. *Id.* at 398 (noting that prior restraints and content-based speech restrictions traditionally require strict scrutiny); *see, e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (“If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.”); *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.”).

99. *Doe III*, 500 F. Supp. 2d. at 398 (internal quotation marks and citations omitted).

100. *Id.* at 399–401 (discussing the requirements to satisfy *Freedman v. Maryland*, 380 U.S. 51 (1965) safeguards).

101. *Id.* at 400 (“As a preliminary matter, this Court finds that § 2709(c) does constitute a form of licensing.”).

102. *Id.* at 399–406 (noting that all three *Freedman* procedural safeguards apply); *see also* *Freedman v. Maryland*, 380 U.S. 51, 58–60 (1965). The *Freedman* case involved a film-censorship board that prohibited the screenings of films before the board approved them. *Id.* at 52. In this way, the film board imposed a prior restraint on film screenings, raising First Amendment issues. *Id.* The three *Freedman* prongs are, first, that the censor bear “the burden of proving that the film is unprotected expression.” *Id.* at 58. Second, mandatory advance submission of all films is permissible, but “the requirement cannot be administered in a manner which would lend an effect of finality to the censor’s determination whether a film constitutes protected expression.” *Id.* Third, the censor must, “within a specified brief period, either issue a license or go to court to restrain showing the film.” *Id.* at 59.

103. *Doe III*, 500 F. Supp. 2d at 405–06.

104. *Id.*

105. *See id.* at 411; *see also* *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (noting that congressional acts may not supersede the Supreme Court’s decisions interpreting the Constitution).

lies in § 3511(b)'s requirement that the courts "blindly credit" the FBI's determination that disclosure may result in harm.¹⁰⁶ In other words, the statute afforded the executive branch too much control over the nature of the oversight any particular request will receive, even going so far as to dictate a judicial standard of review. The lack of real judicial oversight, as well as the potentially unlimited duration of a nondisclosure order, indicated that § 2709(c) was not narrowly tailored,¹⁰⁷ providing further grounds for its defeat. As a final matter, the court found the unconstitutional portions of the statute to be non-severable from the broader NSL power, and therefore struck down § 2709 in its entirety.¹⁰⁸

Congress responded quickly to *Doe III*.¹⁰⁹ The proposed NSL Reform Act of 2007 allows the FBI Director (or other approved officials) to impose a thirty-day nondisclosure period subject to certain criteria.¹¹⁰ The proposal also orders the FBI to relinquish the nondisclosure requirement if the need for nondisclosure ceases prior to the thirty-day period.¹¹¹ If the FBI wishes to extend the thirty-day period, it would apply to the district court for an extension.¹¹² Even if the court grants an extension, the FBI must terminate the nondisclosure order if, at any point, the facts supporting the order cease to exist.¹¹³

The statute stops short of prescribing a strict scrutiny standard for a reviewing court. Proposed § 2709(c)(6) allows a court to issue an ex parte order for the NSL request if "there is reason to believe" that disclosure will bring about one of several enumerated harms and that "the nondisclosure requirement is narrowly tailored to address the specific harm identified by the Government."¹¹⁴ In other words, the proposed § 2709 requires narrow tailoring but not a "compelling government interest" as

106. *Doe III*, 500 F. Supp. 2d at 418.

107. *Id.* at 420–22 (concluding that the scope of the nondisclosure order could be narrower and noting that "it is hard to conceive of any circumstances that would justify a permanent bar on disclosure").

108. *See id.* at 424–25.

109. *See* NSL Reform Act of 2007, S. 2088, 110th Cong. (2007). As of publication this bill has not yet passed. This Note does not evaluate this specific bill, but instead asks how a court should properly review challenges to the NSL regime.

110. *See id.* § 2.

111. *See id.* § 9.

112. *See id.*

113. *See id.* § 2.

114. *See id.*

per typical strict scrutiny.¹¹⁵ Congress apparently leaves it to courts to determine the appropriate standard of review, raising a question about what courts should choose.

II. THE FIRST AMENDMENT AND NATIONAL SECURITY

The heart of the *Doe III* decision—and the fundamental question future challenges must face—is whether the Constitution requires NSL statutes to pass strict scrutiny.¹¹⁶ One set of cases—including *Seattle Times Company v. Rhinehart*,¹¹⁷ *Butterworth v. Smith*,¹¹⁸ and others cited by the *Doe III* court—indicates that strict scrutiny is appropriate.¹¹⁹ However, because NSLs advance national-security interests, the *Doe III* court should have considered a different line of cases beginning with *New York Times Company v. United States*¹²⁰ (“*Pentagon Papers*”), the “most famous case involving the publication of national security secrets.”¹²¹ This Section, then, analyzes those parallel sets of case law and the values that they each embody.

A. RHINEHART, BUTTERWORTH, AND STRICT SCRUTINY

The *Rhinehart* decision addressed the right to disclose, before trial, information gained in pretrial discovery.¹²² In considering the legality of the protective order that would prevent dissemination, the Supreme Court noted that First Amendment rights are not absolute, and that the First Amendment does not categorically allow individuals the right to disseminate pretrial discovery at any time.¹²³ The antidissemination statute would survive only if it were narrowly tailored to advance an “important or substantial” government interest.¹²⁴ The Court empha-

115. See *Doe III*, 500 F. Supp. 2d 379, 398 (S.D.N.Y. 2007) (noting that passing strict scrutiny requires a statute to be “narrowly tailored to promote a compelling government interest” (citing *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000))).

116. See *Doe III*, 500 F. Supp. 2d at 396–99.

117. See 467 U.S. 20 (1984).

118. See 494 U.S. 624 (1990).

119. See *Doe III*, 500 F. Supp. 2d at 403–05.

120. 403 U.S. 713 (1971).

121. See Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. Ill. L. Rev. 881, 897.

122. *Rhinehart*, 467 U.S. at 22.

123. *Id.* at 31.

124. *Id.* at 32 (“[I]t is necessary to consider whether the practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression and whether the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the

sized the public nature of the information in question¹²⁵ and noted that because pretrial discovery is not public, “restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.”¹²⁶ *Rhinehart*, therefore, represents the idea that some nondisclosure statutes deserve less First Amendment scrutiny “than would restraints on dissemination of information in a different context.”¹²⁷ The government may limit the dissemination of certain types of *acquired* information—in this case, information obtained through the non-public discovery process.¹²⁸

A similar issue appeared six years later in *Butterworth*, which addressed a Florida law prohibiting a grand jury witness from ever disclosing testimony he gave before a grand jury.¹²⁹ The Court’s review used the strict scrutiny language, calling for “a state interest of the highest order.”¹³⁰ Notably, however, whatever secrecy interest the government held dies when the grand jury investigation concludes.¹³¹ Therefore, the government’s interest in grand jury secrecy does not allow permanent nondisclosure,¹³² and for that reason, the Florida statute failed to pass constitutional muster.¹³³ Like *Rhinehart*, *Butterworth* suggests that nondisclosure statutes are acceptable so long as they are limited in duration.

In his *Butterworth* concurrence, Justice Scalia noted that “there is considerable doubt whether a witness can be prohibited, even while the grand jury is sitting, from making public what he knew before he entered the grand jury room.”¹³⁴ However, whether that witness can disclose the grand jury proceedings—knowledge gained “only by virtue of being made a witness”—is a different matter.¹³⁵ Justice Scalia suggests that the

particular governmental interest involved.” (internal quotation marks and citations omitted)).

125. *See id.* at 33.

126. *Id.*

127. *Id.* at 34.

128. *Id.*

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

130. *Id.* at 632 (citing *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) and *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).

131. *Id.*

132. *Id.*

133. *Id.* at 635–36.

134. *Id.* at 636 (Scalia, J., concurring).

135. *See id.*

state may have a sufficient interest in prohibiting a witness from disclosing that acquired knowledge.¹³⁶

Kamasinki v. Judicial Review Council also considered similar statutory confidentiality provisions.¹³⁷ At issue was a Connecticut statute that governed the Judicial Review Council (JRC), the body that investigates complaints against judges.¹³⁸ Using strict scrutiny,¹³⁹ the Second Circuit held that the statute's nondisclosure provision did not violate the First Amendment.¹⁴⁰ The First Amendment allows a state, with sufficient interest in doing so, to "prohibit a complainant's disclosure of the fact that he has filed a complaint, or a witness's disclosure of the fact that he has testified . . ." ¹⁴¹ The court also found that it would be constitutional to prohibit disclosure of information acquired through JRC interaction.¹⁴²

The *Doe III* court mentioned additional cases—including *United States v. Aguilar*,¹⁴³ *Hoffmann-Pugh v. Keenan*,¹⁴⁴ and *Freedman v. Maryland*¹⁴⁵—that illustrate the proper application of strict scrutiny.¹⁴⁶ In particular, *Freedman* involved the constitutionality of a Maryland statute that required movie theaters to submit films to a state censorship board prior to public screenings.¹⁴⁷ Finding the censorship system a prior restraint on speech, the Court noted that prior restraints bear a heavy presumption against their constitutionality.¹⁴⁸ To mitigate the dangers of censorship, the Court established three procedural safeguards.¹⁴⁹ First, the censor must show that the film falls outside protected expression.¹⁵⁰ Second, mandatory advance submission of all films is permissible, but the process

136. *See id.*

137. 44 F.3d 106, 108 (2d Cir. 1994).

138. *Id.*

139. *Id.* at 109 ("We agree that the restrictions here are content-based, and that strict scrutiny is the correct standard.")

140. *Id.* at 108.

141. *Id.* at 111.

142. *Id.*

143. 515 U.S. 593 (1995).

144. 338 F.3d 1136 (10th Cir. 2003).

145. 380 U.S. 51 (1965).

146. *See Doe III*, 500 F. Supp. 2d 379, 403 (S.D.N.Y. 2007) (discussing *Aguilar*); *id.* at 395 (referencing *Hoffmann-Pugh*); *id.* at 399–407 (discussing and applying *Freedman*).

147. *Freedman*, 380 U.S. at 52.

148. *Id.* at 57.

149. *Id.* at 58–59.

150. *Id.*

may not “lend an effect of finality” to the censor’s judgment.¹⁵¹ In other words, any valid final restraint requires a judicial determination.¹⁵² Third, the censor must, “within a specified brief period,” license the film or file for restraint in court.¹⁵³ The goal in such a requirement is to mitigate the dangers of an inappropriate license denial, and there is a clear emphasis on the government’s responsibility of bearing the burden.¹⁵⁴

A licensing scheme does not automatically fall within *Freedman*’s territory.¹⁵⁵ For example, the Supreme Court noted in *Thomas v. Chicago Park District* that *Freedman* does not apply to “[a] content-neutral time, place, and manner” regulation of the use of a public forum.¹⁵⁶ However, the *Doe III* court held that the NSL nondisclosure orders are content-based, and that there are no grounds for believing that *Freedman*’s safeguards would not apply.¹⁵⁷

B. THE *PENTAGON PAPERS*, THE ESPIONAGE ACT, AND JUDICIAL DEFERENCE

NSLs, as the name suggests, invoke issues of national security, and it is appropriate to examine whether a special standard should apply. Both the *Pentagon Papers* case¹⁵⁸ and subsequent prosecutions under the Espionage Act of 1917¹⁵⁹ suggest that the executive branch deserves more leeway in matters of national security than strict scrutiny allows.¹⁶⁰

151. *Id.*

152. *Id.*

153. *Id.* at 58–59.

154. *Id.* at 59.

155. *See Doe III*, 500 F. Supp. 2d 379, 400–01 (S.D.N.Y. 2007) (“Since *Freedman*, the Supreme Court has addressed a broad range of licensing systems, and it has decided, on a case-by-case basis, whether *Freedman*’s procedural protections are required to validate the licensing at issue.”).

156. *See Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002) (“We have never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman*.”). For a general discussion of content-based versus content-neutral restrictions on speech, see Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1286–93 (2005).

157. *See Doe III*, 500 F. Supp. 2d at 400–01 (“There is no basis justifying a conclusion that *Freedman* is limited to cases involving obscenity or sexually-oriented expression, as the Government suggests, or that it is somehow not applicable to cases that involve national security.”).

158. 403 U.S. 713, 713 (1971).

159. 18 U.S.C. § 793 (2000).

160. *See, e.g., id.*; *N.Y. Times Co.*, 403 U.S. at 741 (Marshall, J., concur-

The *Pentagon Papers* was not prosecuted under the Espionage Act; rather, the government was seeking a preliminary injunction against *The New York Times*.¹⁶¹ The government's purpose was to prevent *The New York Times* from revealing the decision-making process that led to the Vietnam War.¹⁶² The Supreme Court denied the injunction solely on First Amendment grounds.¹⁶³

In the concurrences and dissents, however, lies the notion that even though an injunction was improper in this particular case, there may nevertheless be circumstances in which "the First Amendment [would] permit an injunction against publishing information about government plans or operations."¹⁶⁴ Justice White even admitted that publishing the information at stake in *Pentagon Papers* "will do substantial damage to public interests"¹⁶⁵ and hinted that although an injunction was inappropriate here, that "does not mean that [the government] could not successfully proceed in another way."¹⁶⁶ The difficult task becomes guessing what alternative direction might have been successful.

Dissenting Justice Harlan took a stronger view.¹⁶⁷ He called upon the judiciary to review the President's initial determination and to ensure that the President had not exceeded the scope of his foreign-policy power.¹⁶⁸ This view concedes significant power to the Executive. The role of the Court is merely to review the Executive's determination and to guarantee that an individual of appropriate authority makes the necessary determination.¹⁶⁹ These two inquiries, according to Justice Harlan, formed the judiciary's limit because executive decisions on foreign policy are inherently political rather than judicial.¹⁷⁰ These "are decisions of a kind for which the Judiciary has nei-

ring); see also *United States v. Morison*, 844 F.2d 1057, 1057 (4th Cir. 1988); *United States v. Rosen*, 445 F. Supp. 2d 602, 602 (E.D. Va. 2000).

161. See Kitrosser, *supra* note 121, at 897. However, some Supreme Court Justices did invoke the Espionage Act in their concurrences. See *N.Y. Times Co.*, 403 U.S. at 720–21 (Douglas, J., concurring).

162. See *N.Y. Times Co.*, 403 U.S. at 714, 717.

163. See *id.*; Kitrosser, *supra* note 121, at 897.

164. *N.Y. Times Co.*, 403 U.S. at 731 (White, J., concurring).

165. *Id.*

166. *Id.* at 733.

167. See *id.* at 757 (Harlan, J., dissenting).

168. *Id.*

169. *Id.* at 756–57.

170. *Id.*

ther aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”¹⁷¹ Most importantly, Justice Harlan argued that, “the scope of review must be exceedingly narrow” with appropriate deference to the judgment of a co-equal branch “operating within the field of its constitutional prerogative.”¹⁷² He argued that executive branch officers must be given an opportunity to explain the relevance of the national security issue, and the ensuing judicial review “should be in accordance with the views expressed in this opinion.”¹⁷³ This reasoning seems to suggest that in cases in which the Executive has acted to advance his constitutional responsibilities of ensuring national security, the judiciary is not equipped to judge the effectiveness of the actions, and the Executive must be given a significant amount of leeway.

Justice Blackmun also dissented and emphasized the powers of Article II.¹⁷⁴ Noting that Article II vests the foreign affairs power in the Executive and charges that branch with maintaining national security, he argued against First Amendment absolutism at the expense of “downgrading other provisions.”¹⁷⁵ He asserted that “there are situations where restraint is in order and is constitutional,” and times of war may allow different restrictions than times of peace.¹⁷⁶ He did not provide specific examples, but he at least left open the possibility that legitimate Article II interests may trump the First Amendment.

Even Justice Stewart’s concurrence suggested great deference to Executive decisions.¹⁷⁷ He found it obvious that maintaining national security requires confidentiality and secrecy.¹⁷⁸ He argued that the Constitution’s grant of “unshared power” to the Executive bestows a constitutional “duty” to “protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national de-

171. *Id.* at 757–58 (citing *Chi. & Se. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

172. *Id.* at 758.

173. *Id.*

174. *Id.* at 759–63 (Blackmun, J., dissenting).

175. *Id.* at 761.

176. *Id.*

177. *Id.* at 727–28 (Stewart, J., concurring).

178. *Id.* at 728 (“In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.”).

fense.”¹⁷⁹ Stewart, then, at least argued for a highly deferential approach to the Executive on matters of national security, even advocating suppression of some of the documents at issue in *Pentagon Papers*.¹⁸⁰

Of course, these dissents did not carry the day and the majority held that the preliminary injunction was unwarranted and rejected special treatment for issues of national security.¹⁸¹ That does not mean, however, that a court today should disregard the dissenting views. First, *Pentagon Papers* came shortly after the end of the Warren Court, a time when the U.S. Supreme Court rapidly expanded civil rights and prioritized individual liberties above other interests.¹⁸² The rights-focused values of that era might not sway today’s more conservative Supreme Court. Second, the *Pentagon Papers* majority acknowledged that future courts need not duplicate its reasoning. Justice Brennan, for example, suggests that a similar future case could justifiably reach a different outcome.¹⁸³

These various *Pentagon Papers* opinions suggest that at least a large minority of the Court would grant the Executive a highly deferential review standard when deciding issues of national security. These opinions do not explicitly advocate intermediate scrutiny—as opposed to strict scrutiny—or some other named standard. Yet Justices Harlan, Blackmun, and Stewart’s views certainly suggest that the high burden of strict scrutiny may not always be appropriate.

179. *Id.* at 729–30.

180. *Id.* at 730. Justice Stewart filed a concurrence rather than a dissent because “no statutes or regulations authorized the punishment sought and because the very high threshold for imposing a prior restraint without such authorization was not clearly met. Notably, he lamented that the Court had been asked “to perform a function that the Constitution gave to the Executive, not the Judiciary.” Kitrosser, *supra* note 121, at 898–99 (quoting *N.Y. Times Co.*, 403 U.S. at 730 (Stewart, J., concurring)).

181. *N.Y. Times Co.*, 403 U.S. at 714.

182. See Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why it Matters)*, 69 OHIO ST. L.J. 255, 257 (“The many ‘activist’ rulings of the Warren Court expanding individual rights and the jurisdiction of federal courts are the paradigmatic example of courts protecting the rights of minorities. Indeed, in academia and in politics, the Warren Court is still synonymous with judicial activism.”).

183. See *N.Y. Times Co.*, 403 U.S. at 724–25 (Brennan, J., concurring) (“[O]ur judgments in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the Government.”).

Cases emerging from the Espionage Act of 1917 provide additional support for this view. According to the Bush administration, the Espionage Act “provides a statutory basis to prosecute both government employees who leak classified information, and journalists and members of the public who pass on or even willingly receive such information.”¹⁸⁴ Nevertheless, at present, only two prosecutions have been brought under the Act “outside of a classic espionage or spying context.”¹⁸⁵ The Court’s approach to these cases suggests a model for the NSL controversy.

United States v. Morison considered an Espionage Act conviction.¹⁸⁶ The defendant was convicted on four counts, the first of which involved illegally leaking secured satellite photographs to the press.¹⁸⁷ Affirming his conviction, the Fourth Circuit observed that it “[did] not perceive any First Amendment rights to be implicated here” because the defendant was a government employee who knowingly and willfully broke protocol in releasing the photographs.¹⁸⁸ The First Amendment does not provide license to violate valid criminal laws, and the mere fact that a news organization was involved did not bring about special First Amendment protections.¹⁸⁹

However, in his concurrence, Circuit Judge Wilkinson suggested that the First Amendment was implicated in this case.¹⁹⁰ He argued that while First Amendment issues are usually subject to an “aggressive balancing” of the interests involved, issues of national security should bring greater judicial deference to the “political branches” of government.¹⁹¹ For a First Amendment claim, he noted, “the Court has held that government restrictions that would otherwise be impermissible may be sustained where national security and foreign policy are implicated.”¹⁹² In the interest of separation of powers, the judiciary needs to recognize the compelling interest in preserv-

184. Kitrosser, *supra* note 121, at 883.

185. *Id.* at 882. The cases referenced are *Morison* and *Rosen. Id.* The *Morison* court acknowledged that this was not a case of “classic” spying. *See United States v. Morison*, 844 F.2d 1057, 1070 (4th Cir. 1988).

186. *Morison*, 844 F.2d at 1060.

187. *Id.*

188. *Id.* at 1068.

189. *Id.*

190. *Id.* at 1082.

191. *Id.*

192. *Id.*

ing secrecy in these situations.¹⁹³ “[A]ggressive balancing,” he argued, is not required.¹⁹⁴

The second relevant Espionage Act prosecution, *United States v. Rosen*, involved two pro-Israel lobbyists.¹⁹⁵ Responding to their lobbying efforts, the government alleged that the two defendants built relationships with government officials who had special access to sensitive government information. Additionally, the government claimed that the defendants obtained information through those relationships and transmitted it to unauthorized persons, including foreign government officials.¹⁹⁶ As in *Morison*, the facts implicated matters of national security.¹⁹⁷ As a preliminary matter, the court determined that the First Amendment applied.¹⁹⁸ Prosecutions under the Espionage Act “unquestionably” merit First Amendment scrutiny,¹⁹⁹ with the crucial caveat that “the rights protected by the First Amendment must at times yield to the need for national security.”²⁰⁰ Unfortunately, the *Rosen* court does not define those times explicitly.

The *Rosen* court left no doubt that a government employee who signed a secrecy agreement and leaked classified information in bad faith does not receive First Amendment protection.²⁰¹ The more difficult cases involve those who have not vi-

193. *Id.*

194. *Id.* The reference to “[a]ggressive balancing” appears to rule out the use of the strict scrutiny standard, or at least to provide justification for applying intermediate scrutiny. *Id.* As one author has noted, “the Supreme Court has never discussed whether intermediate scrutiny should apply in this context, [but] the Court has indicated that it may be willing to subject secrecy statutes, such as the NSL nondisclosure provisions, to greater regulation. This leeway should allow a court to apply intermediate scrutiny.” Brett A. Shumate, Comment, *Thou Shalt Not Speak: The Nondisclosure Provisions of the National Security Letter Statutes and the First Amendment Challenge*, 41 GONZ. L. REV. 151, 167 (2006) (rejecting the *Doe I* court’s decision to apply strict scrutiny on the *Butterworth* reasoning).

195. See *United States v. Rosen*, 445 F. Supp. 2d 602, 607 (E.D. Va. 2006); Kitrosser, *supra* note 121, at 900.

196. *Rosen*, 445 F. Supp. 2d at 608.

197. *Id.*

198. *Id.* at 630 (“In the broadest terms, the conduct at issue—collecting information about the United States’ foreign policy and discussing that information with government officials (both United States and foreign), journalists, and other participants in the foreign policy establishment—is at the core of the First Amendment’s guarantees.”).

199. *Id.*

200. *Id.* at 634.

201. *Id.* at 636.

olated any nondisclosure pact with the government²⁰²—such as, perhaps, the Internet company president in *Doe III*, who never voluntarily agreed to nondisclosure. These individuals, the *Rosen* court reasons, merit stronger First Amendment protections.²⁰³ Nevertheless, even with heightened protection, Congress still may constitutionally limit disclosure of secret information in “situations in which national security is genuinely at risk.”²⁰⁴ Both the *Rosen* defendants and the *Doe* plaintiffs should fall within that category. The theme from the *Pentagon Papers* dissents and *Morison* case continues: national security deserves special consideration in First Amendment cases. The *Doe III* court did not appear to give national security any special consideration in its decision to declare § 2709(c) unconstitutional.

III. COURTS SHOULD APPLY INTERMEDIATE SCRUTINY IN FUTURE NSL REVIEWS

Certainly, the Executive may not obtain license to do anything it wishes simply by invoking “national security.” That notion runs entirely contrary to First Amendment principles. As Judge Wilkinson noted, “[t]he First Amendment interest in informed popular debate does not simply vanish at the invocation of the words ‘national security.’”²⁰⁵ The *Rosen* court also stated that “the mere invocation of ‘national security’ or ‘government secrecy’ does not foreclose a First Amendment inquiry.”²⁰⁶ At the same time, the Supreme Court has also observed that “[i]t is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.”²⁰⁷ This Section seeks to strike a balance among those values and examines whether secrecy is equally compelling.

A. NSLS SUBSTANTIALLY ADVANCE NATIONAL-SECURITY INTERESTS AND SECRECY PLAYS AN INTEGRAL ROLE

As discussed above, Congress recognizes the high value of NSLs and made it easier for the FBI to issue NSLs under the ECPA.²⁰⁸ The nondisclosure orders preserve secrecy, which, ac-

202. *Id.*

203. *Id.* at 636–37.

204. *Id.* at 639.

205. *United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988).

206. *Rosen*, 445 F. Supp. 2d at 630.

207. *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citations omitted).

208. *See Sievert*, *supra* note 21, at 338.

ording to one scholar, advances the “heart of intelligence operations.”²⁰⁹ One might object, however, that NSLs simply do not analogize to the grand intelligence instruments in, for example, *Pentagon Papers*, in which *The New York Times* sought to publish an historical account of how the U.S. became involved in the Vietnam War.²¹⁰ NSLs also are admittedly much smaller in scope than even the intelligence at issue in *Rosen*, in which two lobbyists obtained classified information and shared it with a foreign government. NSL recipients, by contrast, merely want to notify their customers that the FBI is watching them. Nevertheless, NSLs’ smaller scale should not detract from their role in advancing crucial national security issues.

Furthermore, preserving secrecy in NSL investigations prevents enemies from obtaining compromising information. As one scholar has pointed out, seemingly small and trivial pieces of information—such as disclosure of an NSL recipient—can mean a great deal to espionage experts.²¹¹ There is a danger that foreign powers may “be able to discern from the individual tiles the larger intelligence mosaic.”²¹² Large-scale security leaks are obviously harmful, but even “innocuous disclosures” can compromise national objectives.²¹³

It is true, as some critics have noted, that needless nondisclosure can actually have a harmful effect.²¹⁴ Imposing unwarranted nondisclosure orders unfairly reduces public access to information about NSLs. The Senate appears to recognize this problem in Senate Bill 2088,²¹⁵ which requires the FBI to lift the nondisclosure order when the need for secrecy has elapsed or expired. The Senate should ensure that this type of safeguard attaches to any future NSL legislation in order to avoid the dangers of unnecessary gag orders.

209. Sales, *supra* note 30, at 818 (citing *CIA v. Sims*, 471 U.S. 159, 167 (1985)).

210. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714, 717 (1971); Kitrosser, *supra* note 121, at 897.

211. Sales, *supra* note 30, at 819–20.

212. *Id.* at 820 (citations omitted).

213. *Id.* at 819.

214. See Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 136 (2006) (describing classification as a “double-edged sword” and noting that unnecessary secrets impose “real costs” that undermine the legitimacy of government (citations omitted)).

215. See NSL Reform Act of 2007, S. 2088, 110th Cong. (2007).

There is no serious doubt that NSLs advance national-security interests, and that NSL secrecy is necessary in most cases. A single disclosure of an NSL may appear small-scale yet have much broader ripple effects, and so NSLs should be treated as any other serious national-security device and given the same type of judicial review.

B. DEVISING THE PROPER STANDARD OF REVIEW

1. The Justification for Strict Scrutiny is Unpersuasive

The *Doe III* court justifies its application of strict scrutiny based on the *Rhinehart-Butterworth-Freedman* line of cases, but its reasoning appears unsatisfying given the subject matter. The *Doe III* court summarizes First Amendment principles as follows: any nondisclosure order “on information acquired by way of a confidential government investigation” will likely satisfy strict scrutiny based on two key factors.²¹⁶ Those are “the compelling government interest in keeping ongoing investigations secret, and the safeguard that the restraint is necessarily narrowly tailored to curtail the minimum of speech.”²¹⁷ The sufficiency of those safeguards, the court notes, may be tested via *Freedman*.²¹⁸

Section 2709(c) provides that if the FBI Director (or other approved official) “certifies that otherwise there may result a danger to the national security of the United States” or other harm, “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.”²¹⁹ This language grants the FBI, the *Doe III* court notes, “broad discretion” on a case-by-case basis “to grant some NSL recipients permission to disclose certain information pertaining to their receipt of an NSL and to deny others that freedom.”²²⁰ The court’s primary objection is that the FBI has unfettered authority to decide who may and may not speak.²²¹ This power

216. *Doe III*, 500 F. Supp. 2d 379, 404 (S.D.N.Y. 2007).

217. *Id.*

218. *Id.*

219. 18 U.S.C.A. § 2709(c) (West 2000 & Supp. 2008).

220. *Doe III*, 500 F. Supp. 2d at 400.

221. *Id.* (“[T]he FBI, based on its own case-by-case assessment, now has broad discretion to grant some NSL recipients permission to disclose certain information pertaining to their receipt of an NSL and to deny others that freedom.”).

appears analogous to that of the censorship board in *Freedman*, which had broad authority to approve or deny films for content-based reasons according to its own discretion.²²² The *Doe III* court therefore mandated the application of the *Freedman* safeguards.²²³ Under the Reauthorization Act, the government does not bear the burden of going to court to enforce the non-disclosure order.²²⁴ Plainly, § 3511(b) achieves the opposite effect by requiring the NSL recipient to take his challenge to court.²²⁵ Finding this burden at least as onerous as that of the plaintiffs in *Freedman*, the *Doe III* court ruled that § 3511(b) fails *Freedman* requirements, and is therefore unconstitutional.²²⁶

However, this interpretation of *Freedman* fails to account for the vastly different subject matter at issue in NSL challenges.²²⁷ NSL nondisclosure orders do not analogize to film censorship: the latter relates to the appropriateness of entertainment, while the former concerns saving American lives and prosecuting terrorists. In the same way, NSLs are distinguishable from the secrecy required in grand jury proceedings for common crimes (as per *Butterworth*).²²⁸ NSLs have played a key role in fighting international terrorism; grand jury secrecy does not promote goals of such magnitude. The Supreme Court has declared that the Constitution “is not a suicide pact.”²²⁹ When national security is at stake, film screenings do not merit the same treatment as NSLs.

Furthermore, the Supreme Court indicated that strict scrutiny applies if the government has imposed speech restric-

222. *Freedman v. Maryland*, 380 U.S. 51, 52 (1965).

223. *Doe III*, 500 F. Supp. 2d at 401.

224. *Id.*

225. 18 U.S.C.A. § 3511(b) (West 2006); *see also Doe III*, 500 F. Supp. 2d at 401.

226. *Doe III*, 500 F. Supp. 2d at 406.

227. *See generally* JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 13 (2007) (arguing that national security issues invoke different legal concerns). The article notes that invoking national security “has obvious ramifications in a constitutional climate where presidents have long asserted authority to use force as commander in chief, without express congressional authorization, and to employ instruments of intelligence without legislative or judicial review.” *Id.*

228. *See Butterworth v. Smith*, 494 U.S. 624, 626 (1990) (“We hold that insofar as the Florida law prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment to the United States Constitution.”).

229. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

tions for agreeing or disagreeing with a particular message or viewpoint.²³⁰ The Supreme Court declared as much in *R.A.V. v. City of St. Paul*.²³¹ The important distinction in NSL nondisclosure cases is that the government does not object to the message that NSLs are a bad thing; the OIG Report and *Washington Post* editorial demonstrate the government's acceptance of an anti-NSL view.²³² This is not a case in which the government allows pro-NSL speech but suppresses dissent. An ISP who publicly applauds an NSL he received violates the law as much as another ISP who decries it. This situation appears to fall outside the primary purpose of strict scrutiny, making its application here further suspect.

2. Intermediate Scrutiny Offers a Better Solution

One means of arguing that the *Doe III* court erred is to suggest that under the *Butterworth-Kamasinski* reasoning, the nondisclosure order in § 2709(c) is in reality neither a prior restraint on speech nor a content-based restriction, but is instead a content-neutral order. Therefore, intermediate scrutiny applies. The government argued accordingly in its brief to the court,²³³ and NSL scholars have taken a similar approach.²³⁴ Because that argument has failed twice—in *Doe I* and *III*—future courts need a novel approach to justify intermediate scrutiny. In other words, *even if* NSL nondisclosure is a prior restraint or content-based restriction, it still merits only inter-

230. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (noting the reasons for strict scrutiny review).

231. 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed.” (citations omitted)).

232. See OIG REPORT, *supra* note 28; Editorial, *supra* note 2.

233. See Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of the Government's Cross-Motion to Dismiss the Complaint Or For Summary Judgment, *Doe I*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) (No. 04 Civ. 2614), *vacated*, 449 F.3d 415 (2d Cir. 2006) (“First, § 2709(c) does not impose a ‘prior restraint’ on speech” because the statute “does not create any licensing system Second, § 2709(c) is not the type of ‘content-based’ restriction that requires traditional strict scrutiny”).

234. See, e.g., Shumate, *supra* note 194, 166–67 (“[T]he *Doe [I]* court incorrectly selected and applied strict scrutiny in its analysis of the nondisclosure provision”). That Comment appeared prior to the *Doe III* decision and the passage of the Reauthorization Act and did not argue for intermediate scrutiny on national security grounds. Because the *Doe I* and *Doe III* courts have rejected this line of reasoning, this Note now propounds an alternative justification for intermediate scrutiny.

mediate scrutiny because important national security issues are at stake.

Intermediate scrutiny avoids the practical inconsistency that the *Rosen* court noted in its analysis of *Pentagon Papers*.²³⁵ The *Rosen* court drew a distinction between imposing a prior restraint on speech and punishing illegally leaked speech.²³⁶ The Supreme Court usually applies a “heavy presumption” that prior restraints on speech are unconstitutional.²³⁷ As the *Rosen* court suggests, however, the government might have prevailed in *Pentagon Papers* if it had prosecuted the newspapers via the Espionage Act *post-publication* rather than seeking an injunction *pre-publication*. The majority of the opinions in *Pentagon Papers* reflect a general abhorrence for prior restraints on speech.²³⁸ Yet later federal courts have willingly prosecuted individuals for espionage after they have already leaked information.²³⁹ Strict scrutiny, as seen in *Doe*, invalidated a so-called prior restraint on speech when that speech might be illegal anyway under the Espionage Act.

The Supreme Court has long recognized that the First Amendment does not bar prosecution for treasonous speech.²⁴⁰ But it is inconsistent to refuse to restrain speech only to prosecute the speaker once the words are said. A better solution would be to accept that certain information may or may not be released. If disclosure of particular materials would subject the leak to a valid criminal prosecution, then there is no reason for a court to deny issuing a preliminary injunction simply to preserve strict scrutiny review of prior restraints. The intermediate scrutiny requirements, as discussed below, allow nondisclosure orders to pass constitutional muster, thereby avoiding the problem of allowing speech to occur yet prosecuting it subsequent to its occurrence.

235. *United States v. Rosen*, 445 F. Supp. 2d 602, 638 (E.D. Va. 2006).

236. *Id.*

237. *Id.*

238. *See, e.g., N.Y. Times Co. v. United States*, 403 U.S. 701, 714–15 (1971) (Black, J., concurring) (“I believe that every moment’s continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.”).

239. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992).

240. *See, e.g., id.* at 389 (“[W]ords can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets). . .”).

3. Because of the Subject Matter, Case Law Supports Intermediate Scrutiny²⁴¹

The *Doe III* decision, in its application of strict scrutiny, overlooks the vast body of case law indicating that issues of national security deserve different treatment. Those cases, such as *Morison*, promote the importance of deference to the Executive without explicitly advocating intermediate scrutiny.²⁴² A major objection, then, to the use of intermediate scrutiny is that there are no major First Amendment cases of prior restraint and content-based restrictions in which a majority of the Court held that intermediate scrutiny was appropriate.²⁴³ One possible response to this objection is that courts have focused on achieving specific outcomes in individual cases rather than developing a coherent long-term jurisprudence. Therefore, if a court applies strict scrutiny but automatically gives the appropriate deference to an executive foreign policy decision, the result is no different from applying intermediate scrutiny.²⁴⁴ When courts deciding national security cases grant substantial leeway to an executive determination as the *Pentagon Papers* concurrences and dissents suggest they should, they are in fact applying intermediate scrutiny review.

Furthermore, true strict scrutiny calls for a level of inquiry that might force the executive branch to disclose information that should be kept secret. Secrecy is necessary to protect “the Executive’s intelligence sources and methods, or information about the manner in which the government collects intelligence.”²⁴⁵ Compromising those sources “can have devastating consequences” such as allowing enemies to evade detection, hindering strikes on foreign powers, and even opening the nation to “assaults against American interests.”²⁴⁶ Justice Har-

241. As noted earlier, other authors have made the argument that the very framework on which *Doe III* is built (such as *Butterworth*) already provides case law justification for intermediate scrutiny. This Section takes a different approach by examining national security cases instead. See *supra* note 234 and accompanying text.

242. See, e.g., *United States v. Morison*, 844 F.2d 1057, 1082 (1988).

243. See BAKER, *supra* note 227, at 16 (“Judicial treatments of ‘national security’ also vary, in part, because courts tend to be guided by the specific case or controversy presented rather than a desire to find central and lasting constitutional constructions.”).

244. See *Korematsu v. United States*, 323 U.S. 214 (1944) (purporting to apply strict scrutiny while deferring to President Roosevelt’s foreign policy decision).

245. Sales, *supra* note 30, at 818.

246. *Id.*

lan's *Pentagon Papers* dissent indicated a limited role for the judiciary in this type of situation. As described above, NSLs fall within the ambit of the Executive's "foreign power," and their disclosure could "irreparably impair the national security."²⁴⁷ When courts delve into these matters, the proper review standard should be as limited as intermediate scrutiny allows.²⁴⁸

Some observers rightfully counter that disclosure of classified information constitutes "very high value speech" because speech concerning government activities "is at the core of the First Amendment's value."²⁴⁹ Since the government-related speech is the First Amendment's focus, this argument goes, courts must "strongly protect classified information dissemination by the press and public."²⁵⁰ Free speech is weakened, moreover, if nondisclosure prevents the public from learning more information about NSLs.²⁵¹ The current First Amendment provisions in the NSL—which require FBI certification that the NSL is not conducted on the basis of First Amendment activities—do not sufficiently protect First Amendment rights,²⁵² and only strict scrutiny provides a real check on the Executive's power and prevents abuse.²⁵³

However, in the context of NSLs, these arguments are not persuasive. NSL disclosures are distinguishable from the type of disclosure at issue in *Pentagon Papers*. In that case, *The New York Times*, at the height of the Vietnam War, sought to pub-

247. *N.Y. Times Co. v. United States*, 403 U.S. 701, 757 (1971) (Harlan, J., dissenting).

248. Kitrosser, *supra* note 121, at 909 (noting that the judiciary already closely scrutinizes national security rationales for speech suppression). *But see* BAKER, *supra* note 227, at 27 ("[T]he inclusion of the legislative or judicial branches [does not] necessarily undermine the national security requirements for speed and secrecy. . . . [T]he government's most sensitive secrets can be subject to external judicial validation without disclosure.").

249. Kitrosser, *supra* note 121, at 906.

250. *Id.* at 923.

251. *See* Fuchs, *supra* note 214, at 141 ("Freedom of speech and the right to petition the government for redress of grievances are weak rights if government officials withhold information necessary to a complete understanding of the issue in controversy.").

252. *See* Solove, *supra* note 60, at 168.

253. *See* Susan M. Herman, *The USA Patriot Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67, 129 (2006) (arguing that because a simple balancing test "between liberty and security" tends to "stack the deck against claims of individual rights," the government's burden should not be reduced); *see also* BAKER, *supra* note 227, at 22 (noting that because matters of security are concrete and the preservation of "liberty" is abstract, policymakers tend to favor bolstering security).

lish secret documents that revealed how the United States became involved in the war.²⁵⁴ For the public, the documents constituted new information that shed light on the substantive decision making at the highest levels of government; it was the type of information that an informed citizenry would want to know. NSL disclosures are a different matter because they do not reveal any *new* information about the government's activities. Thanks to the recent and comprehensive OIG Report, which is freely available over the Internet, the general public already has ample information about the existence and use of NSLs. Thus, if the company president of *Doe III* were to disclose that he had received an NSL, he would not be providing any new information to the national debate except that his own particular customers may be under surveillance, which would defeat the NSL's purpose.

In any case, the company president was not prohibited from sharing his views on NSLs; the government did not prosecute him for his *Washington Post* editorial. Even in the national forum, he was free to express the NSL's impact on his life and why he felt it was inappropriate. The catch is that he had to do so anonymously, which only further indicates that the government supports public debate on NSLs so long as its specific individual targets are not alerted that they are under surveillance.

There are two serious reasons to allow the company president to reveal his name. First, personifying an NSL request allows the public to place a human face and name on the NSL regime. The public may not care about anonymous, ethereal NSL recipients, but if the public knew that the popular and respected John Doe had received an NSL request, it might feel differently about the value of NSLs. This argument has some weight, but it is ultimately less compelling than the strong needs for secrecy. The public already has information that telecommunications providers generally are subject to NSL requests, and that the FBI issued over 47,000 such requests in 2005.²⁵⁵ Furthermore, the public need not dig up obscure publications like the OIG Report; even *The Washington Post* in 2005 reported on widespread NSL usage.²⁵⁶ The most significant in-

254. See *supra* notes 159–63163 and accompanying text.

255. See OIG REPORT, *supra* note 28, at 36.

256. See Barton Gellman, *The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, WASH. POST, Nov. 6, 2005, at A1; see also Herman, *supra* note 253, at 87 (“The public learned from a 2005

formation about NSLs is already publicly available, and whatever value personification adds should not trump the government's undisputed need for secrecy.

The second reason not to allow the company president to reveal his name is that if the company president were allowed to speak openly about his NSL request, his customers would know that they are being watched, and they could temper their activities accordingly or, alternatively, decide to play a role in the national debate on NSLs. But notifying these individuals—law-abiding or otherwise—that they are being watched may defeat the purpose of the NSL regime. NSL secrecy preserves ongoing investigations. One expert notes that “[i]f a target discovers he is under surveillance, he might flee or go into hiding.”²⁵⁷ The company president's sense of personal duty to clients cannot trump the government's legitimate and necessary investigative methods that preserve national security.

Civil libertarians may also object to the use of intermediate scrutiny because it can lead to increased FBI investigation into private activity. The targets, this argument goes, deserve higher protection, and strict scrutiny will improve the chances of an ISP warning its customers that they are being watched.²⁵⁸ Furthermore, limiting some rights sends the nation down a slippery slope in which more and more important liberties are threatened.²⁵⁹ This argument fails to note, however, that the targets have already willingly given the information the government seeks—URLs, e-mail addresses, phone records, and the like—to the ISP, a third party. When Internet users type a URL into a browser, they do so knowing that their ISP can track that address the same way that a postal carrier can see the destination addresses of outgoing letters he or she picks up. NSLs do not let the FBI into specific e-mails to read their content, but they do allow the FBI to see an e-mail's recipient,

Washington Post article, rather than a government report or court order, that the FBI has issued more than 30,000 National Security Letters a year, an astronomical increase over ‘historic norms.’”).

257. Sales, *supra* note 30, at 821.

258. See, e.g., Solove, *supra* note 60, at 167–68 (“The blogger’s political expression may be substantially chilled by the government’s actions. . . . Given the blogger’s radical and unpopular beliefs, she might be speaking anonymously precisely in order to shield her identity from the government.”).

259. But see AMITAI ETZIONI, HOW PATRIOTIC IS THE PATRIOT ACT?: FREEDOM VERSUS SECURITY IN THE AGE OF TERRORISM 39 (2004) (“It is true that almost any of the new security measures may threaten our rights if used wantonly yet they could also be quite acceptable if used under very limited conditions, under the supervision of the courts, [and] Congress . . .”).

which is information the target has already relinquished. Intermediate scrutiny will not let the FBI read through American citizens' personal e-mails to friends and colleagues,²⁶⁰ but it will better allow the FBI to perform its crucial antiterrorism activities more effectively by ensuring secrecy.

Thus, NSL disclosures have some worth, but not value on par with other notable information leaks that scholars argue merit the highest First Amendment protection. While speech about government activities may lie at the heart of the First Amendment's protection, the need to keep NSLs secret is more compelling in this case.

C. JUDGING NSL REQUESTS UNDER A LOWER STANDARD

This Section has suggested that intermediate scrutiny is appropriate for NSL review, and *Doe III* already has illustrated how strict scrutiny application would invalidate at least some NSL provisions. Per intermediate scrutiny review, a statute "will be sustained under the First Amendment 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."²⁶¹ This Section analyzes competing interests to determine how reviewing courts should balance the competing values in an NSL dispute.

National security is an "important government interest," but is secrecy? Professor Nathan Alexander Sales has outlined the government's specific interests in secrecy.²⁶² First, secrecy protects the executive's sources as well as the process by which the government acquires information.²⁶³ In this area, secrecy protects identities of covert operatives.²⁶⁴ Compromising those sources and methods may produce "devastating conse-

260. See RONALD J. SIEVERT, DEFENSE, LIBERTY, AND THE CONSTITUTION: EXPLORING THE CRITICAL NATIONAL SECURITY ISSUES OF OUR TIME 81 (2005) (noting that claims that the Patriot Act allows the government to read through e-mails without a warrant are "inaccurate and misleading").

261. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997). *But see* Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397, 397-98 (1998) (arguing that the various levels of scrutiny are defined imprecisely and applied inconsistently, and noting at least four different kinds of "intermediate scrutiny"). The government advocates the *Turner Broadcasting* definition of intermediate scrutiny in its *Doe I* brief.

262. See Sales, *supra* note 30, at 818.

263. *Id.*

264. *Id.*

quences.”²⁶⁵ Second, secrecy prevents “diplomatic embarrassment”—the strained relationship that results when one country learns that another has spied on it.²⁶⁶ Diplomatic embarrassment also results when an entity is exposed for cooperating with the U.S.²⁶⁷ Third, and perhaps the most compelling interest, secrecy preserves ongoing investigations.²⁶⁸ If a target learns he is being watched, he may destroy evidence or alert others in ways that jeopardize the investigation and prosecution.²⁶⁹ He may fabricate evidence “to throw investigators off his trail.”²⁷⁰ Even Congress has acknowledged the compelling need for secrecy, and it recognized as much when it passed the § 2709 nondisclosure provision.²⁷¹

These interests, of course, must be balanced against the Internet provider’s interests in disclosure.²⁷² Professor Sales argues that the strength of an Internet provider’s speech interest hinges on the information’s origin.²⁷³ As Justice Scalia noted in *Butterworth*,²⁷⁴ a provider has a stronger interest in speech about information he possessed prior to any interaction with the government.²⁷⁵ The provider’s interests are weaker, however, when the provider wishes to disclose information obtained only through contact with the FBI.²⁷⁶ In the *Doe* cases, the information that Internet providers wish to reveal falls into this second category because, but for the NSL request, the provider would not know of the FBI’s actions. This suggests a reduced speech interest, according to Professor Sales.²⁷⁷

265. *Id.* at 820.

266. *Id.* (“America suffered severe embarrassment, and a summit between Khrushchev and Eisenhower was ruined, after a Soviet surface to air missile downed [a U.S.] spyplane over Sverdlovsk in 1960.”).

267. *See id.*

268. *See id.* (“If a target discovers he is under surveillance, he might flee or go into hiding.”).

269. *See id.*

270. *Id.*

271. *See* H.R. REP. NO. 95-1383, at 228 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9273, 9359 (“[The nondisclosure provision] assure[s] the absolute secrecy needed for the investigations covered by the exemptions.”).

272. *See* Sales, *supra* note 30, at 827 (“Secrecy requirements profoundly affect the speech interests of third parties who wish to publicly discuss their experiences.”).

273. *See id.* at 828.

274. *See supra* notes 134–36 and accompanying text.

275. *See* Sales, *supra* note 30, at 828.

276. *See id.* at 828–29.

277. *See id.*

Of course, the broader public may also have an interest in disclosure.²⁷⁸ One part of that interest is government accountability; the FBI may act differently if it knows that its actions are open to public scrutiny.²⁷⁹ On the other hand, secrecy can also serve the larger public interest—if, for example, the government suppresses information that could endanger American lives if revealed.²⁸⁰

Despite these objections to nondisclosure, the above governmental interests constitute an important interest unrelated to the suppression of free speech. The next question, then, is whether the nondisclosure order substantially burdens more speech than necessary to further those interests. NSL nondisclosure orders impose almost a complete ban on speech—almost, because, as the Internet company president has shown, an NSL recipient still has the ability to speak anonymously about receiving the NSL. The recipient cannot identify himself, however, and for good reason: even publicly identifying himself as an NSL recipient could alert his customers—who may be FBI targets—that they are being watched. This burden on speech is *exactly* what is necessary to preserve the investigative value of NSLs. In any case, courts are not in a good position to judge what level of speech burden is appropriate in NSL cases, and therefore they must give substantial deference to executive determinations.²⁸¹ In this case, the FBI has determined via certification that secrecy is necessary,²⁸² and the current nondis-

278. See *id.* at 816 (“Democracies die behind closed doors,” and “[s]unlight is said to be the best of disinfectants.” (citations omitted)).

279. See *id.* at 829–30 (“Government officials are less likely to misbehave if they know their actions are a matter of public record.”).

280. *Id.* at 830.

281. Compare *CIA v. Sims*, 471 U.S. 159, 178 (1985) (“Thus, [w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.” (quoting *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978))), and *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) (“Given this weight of authority counseling deference in national security matters, we owe deference to the government’s judgments contained in its affidavits.”), and *King v. U.S. Dep’t. of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987) (“[T]he court owes substantial weight to detailed agency explanations in the national security context.”), with Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 90 (1992) (“Judges dealing with these cases face a dilemma. Despite judicial deference to agency judgments, judges must continue to review [secrecy] cases and try to make that review thorough and meaningful.”).

282. See 18 U.S.C.A. § 2709(b) (West 2000 & Supp. 2008). The proposed Senate bill requires the same certification. See NSL Reform Act of 2007, S.

closure requirement bans only the speech necessary to advance the government's interest.

Critics might suggest that the government's interest in secrecy appears too vague or undefined in the NSL context. However, such imprecision is inevitable because intelligence operations are by nature shrouded in secrecy.²⁸³ Under the intermediate scrutiny standard, the government can show a sufficiently strong interest supporting NSL nondisclosure, as well as appropriate tailoring given the needs of secrecy. This outcome is different from that reached in *Doe III* and better reflects the importance of protecting key investigative techniques.

CONCLUSION

The company president of *The Washington Post* editorial has been successful so far, both in *Doe I* and *III*. His first challenge brought about a change in NSL policy codified in the Reauthorization Act. The second challenge has produced a new bill in the Senate. To be sure, the *Doe* courts noted several constitutional defects in the NSL regime; it is possible that even under intermediate scrutiny, various NSL statutes would fail. For example, NSL recipients must have easy access to speedy judicial review, which the post-Patriot Act NSL statutes did not provide. Such statutes were rightly declared unconstitutional. Indeed, this Note has readily adopted the position that judicial review is necessary,²⁸⁴ and asked *how* the review should occur when a dispute arises. Courts should give great deference to executive decisions, particularly in cases in which the executive has determined that secrecy is necessary. This Note also argues that strict scrutiny is inappropriate, and that this remains true regardless of whether Congress passes Senate Bill 2088.

The need for nondisclosure and preserving secrecy should not be understated. U.S. history presents countless examples of

2088, 110th Cong. (2007).

283. The U.S. Supreme Court noted as much in *United States v. United States District Court for the Eastern District of Michigan*. See 407 U.S. 297, 322 (1972) ("Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.").

284. This is justified because the latest Senate bill provides for prompt judicial review. See NSL Reform Act of 2007, S. 2088, 110th Cong. (2007); see also Deyling, *supra* note 281, at 90 ("[I]f courts cannot have full latitude to conduct that review, then no one can.").

secrecy breaches and the disasters that followed. In 1942, for example, the *Chicago Tribune* reported that American forces had cracked a key Japanese naval code that had contributed to victory in the Battle of Midway.²⁸⁵ The newspaper's disclosure prompted the Japanese to switch to a new, unbroken code.²⁸⁶ The double agent Aldrich Ames's disclosures to the U.S.S.R. resulted in the executions of at least ten American agents.²⁸⁷ Even more troubling is a case involving the hunt for Osama bin Laden. After the 1998 U.S. missile strikes on Afghanistan, "a newspaper revealed that American investigators were aware that al Qaeda leader Osama bin Laden used a satellite telephone to communicate with his associates. . . ."²⁸⁸ After the newspaper report, "bin Laden abruptly stopped using the phone and investigators lost the ability to eavesdrop on his conversations."²⁸⁹

The list of harms goes on, and the takeaway should be apparent: secrecy is highly valuable, and the Executive, as numerous courts have acknowledged, is in the best position to determine when secrecy is appropriate. In reviewing NSL statutes, intermediate scrutiny appropriately balances national interests against individual rights. Since "the energy of the Executive is the bulwark of the national security,"²⁹⁰ courts should defer accordingly.

285. Sales, *supra* note 30, at 818–19.

286. *Id.* at 819.

287. *Id.*

288. *Id.* at 834.

289. *Id.*

290. THE FEDERALIST NO. 70, at 395 (Alexander Hamilton) (Clinton Rossiter ed., 1961).