

WATCHING THE WATCHDOGS:
ASSESSING A FIRST AMENDMENT CLAIM AGAINST THE
GOVERNMENT'S USE OF NATIONAL SECURITY LETTERS
TO TRACK JOURNALISTS' NEWSGATHERING ACTIVITIES

Lisa Hoppenjans

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Approved by:

Michael Hoefges, J.D., Ph.D.

Cathy Packer, Ph.D

Joseph Blocher, J.D., M.Phil.

ABSTRACT

LISA HOPPENJANS: Watching the Watchdogs: Assessing a First Amendment Claim Against the Government’s Use of National Security Letters to Track Journalists’ Newsgathering Activities
(Under the direction of Michael Hoefges)

The FBI’s use of National Security Letters (“NSLs”) to secretly demand customer records from communications providers in terrorism-related investigations has been criticized as an intrusion on privacy rights. The potential use of NSLs to collect the records of journalists, however, raises an additional set of concerns by threatening to expose and deter confidential sources.

While the Fourth Amendment does not protect communications records in the hands of third-party service providers from searches or seizures by the government, when NSLs are issued for journalists’ communications records, the First Amendment may separately provide a right to certain procedural protections in order to guard against NSL abuses that threaten protected newsgathering activities. Limits on this First Amendment right, however, are likely justified by the government’s countervailing interests in national security. Those seeking to protect journalists’ records from disclosure via NSLs would therefore be best advised to pursue legislative reform rather than constitutional remedies.

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CHAPTER I

INTRODUCTION

Since the terrorist attacks of September 11, 2001, advances in technology have combined with the grant of sweeping counterterrorism powers to the federal government to create what some privacy advocates have described as a “surveillance society.”¹ Although much of this surveillance is conducted in secret, and remains so, evidence has emerged that journalists, like many other Americans, have not been able to escape this new surveillance network. In August 2008, for example, FBI Director Robert Mueller apologized to the editors of *The Washington Post* and *The New York Times* for collecting four reporters’ phone records during the course of a national-security investigation without following U.S. Department of Justice policies designed to limit subpoenas of journalists’ records.² Later that same year, two former military intercept operators working at a National Security Agency monitoring center revealed that

¹ See, e.g., Adam L. Penenberg, *The Surveillance Society*, WIRED, Dec. 2001, available at <http://www.wired.com/wired/archive/9.12/surveillance.html>; American Civil Liberties Union, Surveillance Clock – More, Sept. 4, 2007, <http://www.aclu.org/technology-and-liberty/surveillance-society-clock-more> (last visited Dec. 18, 2009).

² Carrie Johnson, *FBI Apologizes to Post, Times*, THE WASHINGTON POST, Aug. 9, 2008, at A4, <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/08/AR2008080803603.html>.

they had electronically eavesdropped on the calls of American journalists in Baghdad's Green Zone.³

While the intrusiveness of such monitoring may be unwelcome to anyone, it is particularly problematic for journalists. Source confidentiality has long been considered an important professional responsibility of journalists, and journalists also depend on secrecy to avoid tipping off the subject of an investigative piece to the journalist's activities, especially when the subject matter is controversial. One reporter starkly warned that surveillance "compromises my ability to gather information and therefore compromises my ability to do my job."⁴ Moreover, government monitoring of journalists' activities threatens the press' traditional role as a government watchdog;⁵ investigative reporting to expose government abuses may be significantly hampered if the government is monitoring the investigation.

One of the counterterrorism tools that potentially exposes journalists to government monitoring of confidential newsgathering activities is the National Security Letter ("NSL"). The NSL is a "unique form of administrative subpoena"⁶ used in national security investigations. Authorized under five different statutes covering various types of information, NSLs allow certain

³ Brian Ross, Vic Walter & Anna Schechter, *Exclusive: Inside Account of U.S. Eavesdropping on Americans*, ABC NEWS: THE BLOTTER, Oct. 9, 2008, <http://abcnews.go.com/Blotter/Story?id=5987804&page=1>.

⁴ Samantha Fredrickson, *Tapping Into the Reporter's Notebook*, THE NEWS MEDIA & THE LAW, Fall 2008, at 10, available at http://www.rcfp.org/news/mag/32-4/tapping_into_the_reporters_notebook_10.html.

⁵ See *infra* Part II.

⁶ Doe v. Ashcroft, 334 F. Supp. 2d 471, 475 (S.D.N.Y. 2004) (vacated by 449 F.3d 415 (2d Cir. 2006)) [hereinafter "Doe I"].

government agencies—mainly the Federal Bureau of Investigation—to demand “customer and consumer transaction information in national security investigations from communications providers, financial institutions, and credit agencies” (hereinafter referred to collectively as “providers”).⁷ Although the information is collected from the provider, it is the customer who is the actual “target” of the investigation.

The power to issue NSLs existed before the Sept. 11th terrorist attacks, but it was greatly expanded with the passage of the USA PATRIOT Act (“Patriot Act”),⁸ which contained provisions relaxing the standards for issuing an NSL. Prior to the Patriot Act, all NSLs had to come from FBI headquarters and be signed by a high-ranking FBI official.⁹ With the Act’s passage, letters can be signed by the Special Agent in Charge of one of the FBI’s field offices.¹⁰ The Patriot Act also relaxed the evidentiary requirement for securing an NSL. Before the act, the FBI had to demonstrate specific facts that would allow the FBI official issuing the NSL to conclude that the target himself was a terrorist or spy;¹¹ under the amended statutes, the agency need only show that the records sought are

⁷ Charles Doyle, Cong. Research Serv., National Security Letters in Foreign Intelligence Investigations: Legal Background and Recent Amendments 1 (2009), *available at* <http://fas.org/sgp/crs/intel/RL33320.pdf>.

⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act].

⁹ Valerie Caproni, Symposium, *Crimes, War Crimes, and the War on Terror*, 11 LEWIS & CLARK L. REV. 1087, 1095 (2007).

¹⁰ USA PATRIOT Act, Pub. L. No. 107-56, § 505, 115 Stat. 272, 365 (2001).

¹¹ Caproni, *supra* note 9, at 1095.

relevant to a national security investigation.¹² These new provisions expanded the class of targets to whom an NSL could apply, and the use of NSLs soared as a result. Between 2003 and 2005, the FBI issued more than 143,000 NSL requests, and by 2005 it was using NSLs in 29 percent of its counterterrorism investigations.¹³

This expansion of NSL authority was particularly worrisome to some because, prior to amendments in 2006, the statutes authorizing NSLs barred providers from telling anyone that they had received such requests. The amended statutes allow the government to issue nondisclosure orders to providers only if executive officials certify that dissemination of information about the request could harm national security; interfere with diplomatic relations or with a criminal, counterterrorism, or counterintelligence investigation; or endanger the physical safety of an individual.¹⁴ However, it should be noted that even when providers are not bound by secrecy, nothing requires them to alert a customer who is the target of an NSL that his or her records have been requested. The target, therefore, often has no notice that his or her records have been turned over to the government.

The NSL statutes themselves do not address the potential use of NSLs against journalists. However, while expanding the NSL provisions in 2001, Congress amended most of the NSL statutes to require that records requests not

¹² USA PATRIOT Act § 505.

¹³ See Office of the Inspector Gen., U.S. Dep't of Justice, A Review of the Federal Bureau of Investigation's Use of National Security Letters 120 (2007) [hereinafter *OIG 2007 Report*], available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf>.

¹⁴ Doyle, *supra* note 7, at 9-10.

be made in investigations conducted “solely upon the basis of activities protected by the first amendment.”¹⁵ These amendments mirror a similar provision in the Foreign Intelligence Surveillance Act.¹⁶ The extent of protection that these amendments offer journalists, however, is likely quite limited. In discussing NSLs’ potential to chill political speech, privacy law scholar Daniel Solove noted: “Hardly any investigations are conducted ‘solely’ on the basis of First Amendment activities. Law enforcement officials will invariably argue that their investigation is based at least in some part on criminal activity.”¹⁷ This would likely be the case in the journalism context as well. For example, a law enforcement official investigating an illegal leak of classified information could seemingly issue an NSL for the phone records of the journalist who published this information without running afoul of the First Amendment limitation; the crime of the illegal leak would provide a basis for the investigation of activities beyond those protected by the First Amendment.

A second possible limitation on the use of NSLs to collect the records of journalists is a voluntarily adopted U.S. Department of Justice policy that lays out special requirements for subpoenas to members of the media or for telephone records of journalists.¹⁸ This policy, among other things, directs DOJ employees (including members of the FBI) to take “all reasonable investigative steps . . .

¹⁵ USA PATRIOT Act, Pub. L. No. 107-56, § 505, 115 Stat. 272, 365 (2001).

¹⁶ 50 U.S.C. § 1801, et. seq.

¹⁷ Daniel Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 168 (2007).

¹⁸ See 28 C.F.R. § 50.10(a) (2009).

before considering issuing a subpoena for telephone toll records of any member of the news media”¹⁹ and requires authorization of the Attorney General prior to issuing such a subpoena.²⁰ As with the First Amendment statutory limitations, however, the extent of protection offered by this policy is likely limited. As an initial matter, the policy applies only to telephone records and would thus provide no limitations on NSLs requesting other records, such as those from Internet service providers (“ISPs”). Second, the policy does not have the force of law: violations are punishable only by internal disciplinary action and the policy specifically states that it “is not intended to create or recognize any legally enforceable right in any person.”²¹ Third, even when the policy is appropriately followed, the ultimate decision to request the records rests with the Attorney General rather than a neutral decision maker such as a judge.²² Finally, evidence suggests that this policy is not being stringently followed. A January 2010 report by the Department of Justice Inspector General, for example, reveals that in three leak investigations since 2003, the FBI failed to follow these procedures when requesting media telephone records using exigent letters,²³ a since-abandoned form of records request that is similar to the NSL, but easier to obtain.²⁴ The limited protection offered to journalists by either the statutory First Amendment

¹⁹ *Id.* § 50.10(b).

²⁰ *Id.* § 50.10(e).

²¹ *Id.* § 50.10(n).

²² *See id.* § 50.10(e).

²³ *See* Office of the Inspector Gen., U.S. Dep’t of Justice, A Review of the Federal Bureau of Investigation’s Use of Exigent Letters and Other Informal Requests for Telephone Records 89 (2010) [hereinafter *OIG 2010 Report*], available at <http://www.justice.gov/oig/special/s1001r.pdf>.

²⁴ *OIG 2007 Report*, *supra* note 13, at xxxiv.

exemption or the DOJ guidelines thus suggests that journalists remain susceptible to having their records collected through NSLs in the absence of a recognized First Amendment right against such records requests or statutory protection.

The constitutionality of NSLs in general has been debated by scholars, but has not been heavily litigated.²⁵ The dearth of litigation can be attributed to the nature of the NSL statutes themselves:²⁶ because of the secrecy surrounding the issuance of NSLs, targets do not know that their records have been requested and, until recently, the custodians of the records were not permitted to notify anyone of the records request.²⁷ According to one commentator, this has left “few people who have both the necessary knowledge and the will to litigate.”²⁸ While the government has issued tens of thousands of NSLs,²⁹ only two custodians are known to have gone to court to challenge the requests.³⁰ These cases are discussed briefly in the paragraphs that follow in order to provide context and background and will be discussed in more detail in Chapter 2.

In the 2004 case of *Doe v. Ashcroft* (“*Doe I*”), an unnamed ISP and the ACLU brought suit in the U.S. District Court for the Southern District of New

²⁵ See Susan N. Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L.L. REV. 67, 71 (2006).

²⁶ See *id.*

²⁷ See 18 U.S.C. §3511(b) (2006).

²⁸ See Herman, *supra* note 25, at 71.

²⁹ See *supra* note 13 and accompanying text.

³⁰ See Herman, *supra* note 25, at 87-88. The first case, brought in the Southern District of New York, will be discussed below. The second, brought in the District of Connecticut was consolidated with the first case on appeal to the Second Circuit, but was dismissed as moot because the government accidentally released the identity of the target. *Doe v. Gonzales*, 449 F.3d 415, 419-21 (2d Cir. 2006) [hereinafter “*Doe III*”]. The *Doe* litigation will be discussed in greater detail in Chapter 2.

York, claiming that the document production provisions of one of the NSL statutes violated the First and Fourth Amendments and that the nondisclosure provisions violated the First Amendment.³¹ First, the plaintiffs claimed that the statute’s failure to provide a mechanism for judicial review of NSL requests violated the Fourth Amendment’s prohibition on “unreasonable searches and seizures,”³² which depends on the availability of a neutral tribunal to determine reasonableness.³³ Second, they claimed that the document production provisions could be used to infringe the First Amendment rights to anonymous speech and association of ISP subscribers who were targets of an investigation.³⁴ Finally, the plaintiffs claimed that the nondisclosure provisions—which essentially imposed gag orders barring recipients from disclosing receipt of the NSL request—operated as unconstitutional prior restraint on speech.³⁵ A prior restraint is an administrative or judicial order prohibiting in advance future speech or other communication³⁶ and may only be upheld “if it is ‘narrowly tailored to promote a compelling Government interest.’”³⁷

The federal district court largely agreed with the plaintiffs’ claims. As to the Fourth Amendment claim, the court held that the document production

³¹ Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) [hereinafter “*Doe I*”].

³² U.S. CONST. amend IV.

³³ *Doe I*, 334 F. Supp. 2d at 495-96.

³⁴ *Id.* at 506.

³⁵ *Id.* at 511.

³⁶ *Alexander v. United States*, 509 U.S. 544, 550 (1993).

³⁷ *Doe I*, 334 F. Supp. 2d at 511 (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000)).

provisions “authorize[ed] coercive searches effectively immune from any judicial process, in violation of the Fourth Amendment.”³⁸ The court also found this lack of judicial review relevant to the plaintiffs’ claim that the statute violated the First Amendment rights of subscribers, concluding that the statute’s document production provisions “may, in a given case, violate a subscriber’s First Amendment privacy rights . . . if judicial review is not readily available.”³⁹ Finally, the court agreed that the nondisclosure provisions “operate[d] as an unconstitutional prior restraint on speech in violation of the First Amendment.”⁴⁰

In 2005, in *Doe v. Gonzales* (“*Doe II*”), a member of the American Library Association filed a separate challenge to an NSL in a federal district court in Connecticut. The *Doe II* court similarly concluded that the nondisclosure provisions violated the First Amendment.⁴¹ The two cases—*Doe I* and *Doe II*—were consolidated on appeal to the United States Court of Appeals for the Second Circuit, in *Doe I v. Gonzales* (“*Doe III*”).⁴² In the meantime, however, Congress amended the statutes to provide for judicial review of the nondisclosure orders and to provide limited judicial review of NSL requests themselves.⁴³ The Second Circuit vacated and remanded *Doe I* to the federal district court for the Southern District of New York to reconsider the plaintiffs’ claims in light of the new

³⁸ *Id.* at 506.

³⁹ *Id.*

⁴⁰ *Id.* at 475.

⁴¹ *Doe v. Gonzales*, 386 F. Supp. 2d 66, 82 (D. Conn. 2005) [hereinafter “*Doe II*”].

⁴² *Doe III*, 449 F.3d 415, 417 (2d Cir. 2006).

⁴³ USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (Mar. 9, 2006).

amendments and dismissed *Doe II* as moot based on a concession by the government.⁴⁴ On remand, however, the government dropped its demand for the underlying records at issue in *Doe I*; the district court accordingly considered only the First Amendment challenge to the nondisclosure provision.⁴⁵

Because the *Doe* plaintiffs did not raise their First Amendment challenge to the statute's document production provisions upon remand of the case to the district court, the viability of a First Amendment claim by the target of an NSL remains an open legal question. The goal of this thesis is to examine the viability of a First Amendment claim against the use of NSLs by a specific class of potential targets—journalists. A close examination of the constitutionality of NSLs as an investigative tool to collect journalists' records is worthy of attention because the threat of NSLs to identify journalists' sources or expose their investigative work has the potential to chill important newsgathering activities, particularly on issues relating to national security.

Part II of this chapter provides the background for this discussion by briefly describing traditional views of a free press as a crucial component of an informed democracy and as a watchdog against government abuse. Part III describes the debate over whether the First Amendment provides the press with protection against government intrusion into the newsgathering process in order to

⁴⁴ *Doe III*, 449 F.3d at 419-21.

⁴⁵ *Doe v. Gonzales*, 500 F. Supp. 2d 379, 385 n.3 (S.D.N.Y. 2007) [hereinafter "*Doe IV*"]. As discussed in Chapter 2, the district court held the nondisclosure provisions unconstitutional. *Id.* at 385-86. On appeal, the Second Circuit agreed with much of the district court's reasoning, but upheld most of the nondisclosure provisions based on an alternate reading of the statute that remedied many of the constitutional problems. *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008) [hereinafter "*Doe V*"].

carry out this role. Part IV of this chapter reviews the scholarly debate on the conflict between First Amendment press rights and government interests in the context of national security. Part V will then examine scholarly literature that has specifically addressed the constitutional implications of National Security Letters in general. This review will demonstrate that the First Amendment implications of using NSLs to collect journalists' records is a topic that has not been addressed in the scholarly literature. Finally, Parts VI of this chapter explains the research questions and methodology for this study and provides a brief summary of the chapters that follow.

Part II: The Role of the Free Press

Because of the secrecy provisions of the NSL statutes, it is impossible to know the extent to which they are being used against reporters. News accounts, however, suggest that NSLs are at least being used to seek reporters' phone records in leak investigations,⁴⁶ and the FBI admitted to using a similar investigative tool, known as an exigent letter, to obtain the phone records of reporters in the Indonesia bureaus of *The Washington Post* and *The New York Times*.⁴⁷ While First Amendment legal scholarship has yet to directly address the constitutionality of the document production provisions of the NSLs, the potential use of NSLs to collect journalists' records implicates longstanding views about

⁴⁶ Brian Ross & Richard Esposito, *FBI Acknowledges: Journalists' Phone Records are Fair Game*, ABC NEWS: THE BLOTTER, May 16, 2006, http://blogs.abcnews.com/theblotter/2006/05/fbi_acknowledge.html (citing officials who explain that reporters' phone records "will be sought if government records are not sufficient").

⁴⁷ Johnson, *supra* note 2, at A4.

the role of the press under democratic theories of the First Amendment by limiting the press' ability to inform the public and to serve as a government watchdog.

The importance of the press in fostering the continued vitality of American democracy has been recognized by the judiciary⁴⁸ and by First Amendment scholars. Under the informed democracy view of the First Amendment, free speech is valued for its role in facilitating democratic decisionmaking. Thus, Professor Alexander Meiklejohn writes that the "primary purpose of the First Amendment is . . . that all citizens shall, so far as possible, understand the issues which bear upon our common life."⁴⁹ In the same vein, Professor Lillian BeVier explains: "[A] viable democracy requires a politically well-informed citizenry. . . . Information in the hands of citizens is indispensable to their being able to hold their government into account, which is in turn indispensable almost by definition to democracy."⁵⁰

Beyond merely disseminating information necessary for informed democratic governance, Professor C. Edwin Baker explains, the press plays its most important role when it exposes information about "government corruption or

⁴⁸ See, e.g., *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) ("The press plays a unique role as a check on government abuse . . ."); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("The First Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.").

⁴⁹ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (1960), *quoted in* Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of the Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. Rev. 1303, 1311 (2009).

⁵⁰ Lillian R. BeVier, *The Invisible Hand of the Marketplace of Ideas*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 233, 238 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

incompetence.”⁵¹ The watchdog theory of the press views journalists as playing a vital role in a democracy by scrutinizing government activities.⁵² Professor Vincent Blasi similarly conceives the role of the press in his “checking value” theory of the First Amendment, which posits that the exercise of First Amendment rights—both by the press and by the people—functions as a check on government power.⁵³ To the extent that NSL statutes limit journalists’ ability to effectively carry out their watchdog or checking functions, the question becomes whether NSLs constrain activity that is at the core of First Amendment protection.

Part III: The First Amendment and Government Intrusion into the Newsgathering Process

The debate over whether the press has constitutional protection against government intrusion into the newsgathering process often begins with a debate about the meaning of the Press Clause itself. In one camp are those, like Justice Potter Stewart, who argue that the Free Press Clause of the First Amendment is a

⁵¹ C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 324-25 (1998) (“Exposure of government corruption or incompetence . . . is probably the most important contribution the press can make to either democracy or to the public sphere.”); *see also* S. Reid & Laurence B. Alexander, *A Test Case for Newsgathering: The Effects of September 11, 2001 on the Changing Watchdog Role of the Press*, 25 LOY. L.A. ENT. L. REV. 357, 360 (2005) (“The press, by informing the public about the government, keeps the government accountable for its actions or inactions”); HERBERT J. GANS, *DEMOCRACY AND THE NEWS* 79 (2003) (explaining that the watchdog role represents “journalists’ finest opportunity to show that they are working to advance democracy”), *quoted in* Clay Calvert, *The First Amendment, Journalism & Credibility: A Trio of Reforms for a Meaningful Free Press More Than Three Decades After Tornillo*, 4 FIRST AMEND. L. REV. 9, 12 (2005).

⁵² Calvert, *supra* note 51, at 9.

⁵³ *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

“*structural* provision” extending protection to the press as an institution.⁵⁴ While such protection, Stewart notes, does not provide a constitutional right of access to particular government information, the press “may publish what it knows, and may seek to learn what it can.”⁵⁵ On the other hand, scholars like Professor David Lange argue that the framers did not contemplate a separate constitutional status for the mass media and, rather, understood the freedom of the press as an individual right against prior restraints.⁵⁶ Under such a view, constitutional recognition of an independent right to newsgathering for the press would not be warranted.

Scholars note that the Supreme Court has not made clear its own view of the Press Clause. Professor Erik Ugland describes the “law of newsgathering” as a “patchwork of conflicting case law, appended by an assortment of statutes that, in some cases, provide journalists with special dispensations.”⁵⁷ Such confusion stems from the Court’s ambiguous rulings in free press cases and the “lower courts’ willingness to supply their own doctrine” in the absence of clear guidance from the Supreme Court.⁵⁸ Professor Timothy Dyk notes that while the Supreme Court seems to have afforded the press greater protection than other speakers in the context of prior restraints and defamation, the Court “has not been as generous

⁵⁴ Potter Stewart, “*Of the Press*,” 26 HASTINGS L.J. 631, 633 (1975); *see also* Melville Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975).

⁵⁵ Stewart, *supra* note 54, at 636.

⁵⁶ David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 97-99 (1975)

⁵⁷ Erik Ugland, *Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom*, 11 U. PA. J. CONST. L. 375, 381 (2009).

⁵⁸ *Id.*

in the area of newsgathering” and “has yet to explicitly afford special protections to the newsgathering process.”⁵⁹ Dyk explains that while the Court’s 1980 decision in *Richmond Newspapers, Inc. v. Virginia* recognized a constitutional right of access for the press and public to criminal trials, it did not provide a special right of access for the press alone.⁶⁰ Similarly, Dyk notes that while the majority in the 1972 decision in *Branzburg v. Hayes* recognized that “news gathering is not without its First Amendment protections,” the Court held that the First Amendment did not give reporters subpoenaed by a grand jury the right to protect confidential sources.⁶¹ Constitutional law scholar Erwin Chemerinsky concludes that the Court’s language regarding newsgathering in *Branzburg* and similar pronouncements suggesting the need for newsgathering protection were merely “empty rhetoric from the Court.”⁶²

Professor Ugland’s comprehensive review of the briefs and opinions filed in eighty First Amendment media or press cases heard by the Supreme Court between the 1971-72 term and the 2006-07 term similarly found a lack of clarity in the Court’s treatment of the First Amendment rights of the press. Ugland concludes that while the Supreme Court has “routinely acknowledged the importance of the press and has distinguished it from freedom of speech . . . it has not directly addressed [Justice] Stewart’s thesis, nor has it declared that the Press

⁵⁹ Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 927 (1992).

⁶⁰ *Id.* at 929 & n.12 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

⁶¹ *Id.* at 928-29 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972)).

⁶² Erwin Chemerinsky, *Protecting the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1145 (2000).

Clause has any meaning apart from the Speech Clause.”⁶³ In assessing whether the Court’s jurisprudence has conferred special newsgathering rights upon members of the press, Ugland finds that the while the Court has rejected newsgathering claims for an affirmative right of access—such as, for example, a right to interview inmates in state prisons⁶⁴—it has not foreclosed the possibility that the First Amendment provides the press with a “shield” against government interference in the newsgathering process.⁶⁵

Separate from the question of whether the Court has recognized constitutional protection for newsgathering, a number of scholars have focused on whether the Court *should* recognize such protection. Professor Randall Bezanson, on one hand, argues that the freedom of the press protected by the First Amendment means only that the press enjoys “independence from government decisions about whether and what to publish.”⁶⁶ Since newsgathering has “little to do with independent judgment,” it is “only incidentally related to press freedom.”⁶⁷ In Bezanson’s view, generally applicable restrictions on newsgathering therefore do not threaten press independence and should be presumed constitutional.⁶⁸ Chemerinsky, on the other hand, argues that newsgathering does not exist in a vacuum, but rather “exists to provide the

⁶³ Ugland, *supra* note 57, at 392-93.

⁶⁴ *Id.* at 402 (citing *Pell v. Procunier*, 417 U.S. 817, 828 (1974)).

⁶⁵ *See id.* at 402-03.

⁶⁶ Randall P. Bezanson, *Means and Ends for Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895, 896 (1998).

⁶⁷ *Id.*

⁶⁸ *Id.* at 896-97.

information that the press . . . publishes.”⁶⁹ As such, it “directly serves core purposes of the First Amendment” by obtaining information about government and the political process that can then be shared with the public.⁷⁰

As the literature demonstrates, whether the Press Clause provides special protection to journalists beyond that afforded to other citizens, or whether the First Amendment’s Speech Clause provides general protection to the type of activities involved in newsgathering remains a subject of debate. However, to the extent that protection for newsgathering rights does exist, the literature suggests that it is far more likely to be recognized in those cases in which the government actively interferes with the newsgathering process—for example, by compelling a reporter to testify—rather than in cases in which the government merely refuses to provide the media with an affirmative right of access to government property or information. The recognition of a First Amendment right, however, does not end the inquiry in cases in which a newsgathering interest may be involved. The courts next have to assess the competing government interest that supports a restriction on newsgathering. In the case of NSLs, the claimed competing interest is national security. The next part of this chapter therefore examines the literature on balancing national security interests against the rights of a free press.

⁶⁹ Chemerinsky, *supra* note 62, at 1158.

⁷⁰ *Id.* at 1159.

Part IV: The Conflict between the Rights of a Free Press and National Security Interests

Scholars have noted that First Amendment rights are often most at risk when the nation is attempting to respond to a perceived threat to its security.⁷¹ As Blasi concludes, however, it is also during such times that adequate protection of First Amendment rights is most crucial.⁷² Law professor Paul Haridakis notes this tension, explaining that “it is exceedingly important to assess any attenuation of First Amendment rights during wartime, because finding the proper balance between homeland security and civil liberties is dependent on a robust exchange of ideas and debate fostered by the First Amendment, while at the same time it is hampered by restraints on such rights.”⁷³ During times of war, Haridakis explains, the focus is often on the need to unify behind the troops and the war effort, overshadowing the important question of whether there exists a free marketplace of ideas that can provide “the information necessary to reach prudent, informed decisions in support of or in opposition to a particular wartime action or policy.”⁷⁴

Journalism historian Jeffery A. Smith explains that the press plays a key role in providing this information.⁷⁵ While the executive branch has often

⁷¹ See, e.g., DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION* 1-2 (3d ed. 2006).

⁷² Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-50 (1985).

⁷³ Paul Haridakis, *The Tension Between National/Homeland Security and the First Amendment in the New Century*, 14 TEMP. POL. & CIV. RTS. REV. 433, 434 (2005).

⁷⁴ *Id.* at 436.

⁷⁵ See JEFFERY A. SMITH, *WAR & PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER* 222 (1999).

attempted to limit press access to information about military operations, Smith notes that, historically, extraordinary efforts to maintain secrecy have ended up jeopardizing the efficiency of missions.⁷⁶ Moreover, Smith argues, “[e]arly and careful media analysis of troubles not being addressed can help the military avoid costly mistakes.”⁷⁷ Smith noted that unrestricted news coverage helps ensure that armed conflict “conforms to international law” and also contributes to the “political and psychological dimensions of national defense.”⁷⁸

The terrorist attacks of September 11, 2001, have brought a renewed focus on the conflict between national security interests and First Amendment rights or other civil liberties. In a 2006 book, the influential jurist Richard Posner argues that “constitutional decision making in the era of modern terrorism” requires “restrik[ing] the balance between the interest in liberty from government restraint or interference and the interest in public safety, in recognition of the grave threat that terrorism poses to the nation’s security.”⁷⁹ The question, according to Posner, is not “whether liberty is more or less important than safety,” but “whether a particular safety measure harms liberty more or less than it promotes safety.”⁸⁰ In the context of free press rights, Posner argues that this evaluation should yield greater restrictions on the press than the Supreme Court has

⁷⁶ *Id.* at 221-22.

⁷⁷ *Id.* at 222.

⁷⁸ *Id.*

⁷⁹ RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 31 (2006).

⁸⁰ *Id.* at 31-32.

traditionally permitted.⁸¹ Posner is particularly critical of the Supreme Court's decision in 1971's *New York Times Co. v. United States*,⁸² also known as the "Pentagon Papers" case, in which the Court held that the *Times* could not be enjoined from publishing a classified history of U.S. involvement in Vietnam. In that case, Posner argues, the Court distorted the appropriate balancing analysis by placing too much emphasis on the taboo of "prior restraints" and further, that in doing so, the Court "placed a thumb on the balance, arbitrarily increasing the weight of free speech."⁸³ According to Posner, judges must be deferential to the government's claims regarding the nature of a terrorist threat, even when judges may have their own doubts. He argues, "The Bill of Rights should not be interpreted so broadly that any measure that does not strike the judiciary as a sound response to terrorism is deemed unconstitutional."⁸⁴

Constitutional law professor Keith Werhan argues that while freedom of speech has fared relatively well since the September 11, 2001, attacks, as compared to previous periods of heightened concern over national security, free press rights have been more vulnerable to attack.⁸⁵ Werhan attributes this difference to the relative strength of contemporary free speech doctrine, as compared to free press doctrine, and in particular, the Court's failure to recognize

⁸¹ See *id.* at 110.

⁸² *New York Times Co. v. United States*, 403 U.S. 713 (1971).

⁸³ POSNER, *supra* note 79, at 110.

⁸⁴ *Id.* at 125.

⁸⁵ Keith Werhan, *Rethinking Freedom of the Press After 9/11*, 82 TUL. L. REV. 1561, 1566 (2008).

a meaningful First Amendment right to newsgathering.⁸⁶ Werhan notes that “the lack of doctrinal clarity surrounding the press’s First Amendment right to receive, possess, and publish classified information,”⁸⁷ and federal prosecutors’ increased willingness to compel reporters to disclose their sources have exposed “weak points in the Press Clause doctrine” since the terrorist attacks.⁸⁸ Werhan argues that the Court must “shore up First Amendment doctrine to protect freedom of the press, and the democratic principles that a free press serves,”⁸⁹ among other ways, by recognizing a qualified reporter’s privilege against compelled testimony.⁹⁰

Other scholars have focused more narrowly on the war on terror’s implications for freedom of the press. Professor Kendra Stewart and attorney Christian Marlin noted that the relationship between the government and the media has changed in three important areas since the September 11th attacks: 1) “access to government information and the interpretation of the Freedom of Information Act (FOIA)”; 2) “the openness of administrative and judicial proceedings involving immigrants and suspected terrorists”; and 3) “the media’s access to American troops overseas and to military battles.”⁹¹ Of these, the government’s denial of press access to military tribunals and certain deportation

⁸⁶ *Id.* at 1567, 1571.

⁸⁷ *Id.* at 1583.

⁸⁸ *Id.* at 1591-92.

⁸⁹ *Id.* at 1605.

⁹⁰ *Id.* at 1604.

⁹¹ Kendra B. Stewart & L. Christian Marlin, *Terrorism, War, and Freedom of the Press: Suppression and Manipulation in Times of Crisis in AMERICAN NATIONAL SECURITY AND CIVIL LIBERTIES IN AN ERA OF TERRORISM* 167, 168 (David B. Cohen & John W. Wells eds., 2004). Stewart and Marlin argue that in these three areas, the media’s access has been more limited since the September 11 terrorist attacks. *See id.* at 168-75.

proceedings—and this denial’s potential threat to the limited newsgathering right established in the *Richmond Newspapers* case—has received particularly strong attention in the academic literature.⁹²

The legal scholarship reveals the deep tension between free press rights and national security interests—at those points when the need to protect national security by suppressing media activities is at its greatest, the need for a robust media that can inform citizens about government actions is at its greatest as well. The debate in the legal scholarship since the September 11th attacks demonstrates this tension, with scholars on one side of the debate calling for broad deference to national security interests and those on the other side calling for a renewed commitment to free press rights and other civil liberties. The conflict between civil liberties and national security has been highlighted specifically in the legal scholarship on NSLs as well. Part V addresses this body of literature.

Part V: The Debate over the Constitutionality of National Security Letters

Most legal scholarship on NSLs has focused on their constitutionality under the Fourth Amendment’s search-and-seizure requirements⁹³ or has evaluated First Amendment concerns raised by the nondisclosure provisions that

⁹² See, e.g., Howard W. Chu, *Is Richmond Newspapers in Peril After 9/11?*, 64 OHIO ST. L.J. 1655 (2003); Paul Haridakis, *The War on Terrorism: Military Tribunals and the First Amendment*, 9 COMM. L. & POL’Y 317 (2004); Kathleen K. Miller, Note, *Do Democracies Die Behind Closed Doors?: Finding a First Amendment Right of Access to Deportation Hearings by Reevaluating the Richmond Newspapers Test*, 72 GEO. WASH. L. REV. 646 (2004).

⁹³ See, e.g., Nickolas J. Bohl, Note, *Unsheathing a Sharp Sword: Why National Security Letters are Permissible Under the Fourth Amendment*, 86 B.U.L. REV. 443 (2006); Susan N. Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67 (2006); Lauren M. Weiner, Comment, *“Special” Delivery: Where Do National Security Letters Fit into the Fourth Amendment?*, 33 FORDHAM URB. L.J. 1453 (2006) (highlighting potential Fourth Amendment issues and suggesting reforms).

apply to NSL recipients.⁹⁴ Less attention has been paid to whether the *targets* of the investigation have any separate First Amendment claim against the use of NSLs to gather information,⁹⁵ and even those articles that have addressed the question have failed to consider whether targeted journalists may have a special claim to First Amendment protection from NSLs.

The legal literature addressing Fourth Amendment search and seizure concerns relating to NSLs examines whether NSLs may infringe the Fourth Amendment rights of two different groups—the rights of the targets of the investigation and the rights of the providers that maintain the records in question and actually receive the NSL. The rights of the latter were at issue in the *Doe* litigation,⁹⁶ while the rights of the former have received greater attention in the scholarly literature. The Fourth Amendment protects “against unreasonable searches and seizures” and provides that “no Warrants shall issue, but upon probable cause.”⁹⁷ Under the Supreme Court’s landmark decision in *Katz v. United States* in 1967, the amendment’s protections apply only when an individual has a reasonable expectation of privacy in the information or activity at

⁹⁴ See, e.g., Brian D. Eyink, Note, *Constitutional Secrecy: Aligning National Security Letter Nondisclosure Provisions with First Amendment Rights*, 58 DUKE L.J. 473 (2008); Andrew E. Nieland, Note, *National Security Letters and the Amended Patriot Act*, 92 CORNELL L. REV. 1201 (2007).

⁹⁵ See Patrick P. Garlinger, Note, *Privacy, Free Speech, and the PATRIOT Act: First and Fourth Amendment Limits on National Security Letters*, 84 N.Y.U. L. REV. 1105 (2009); Solove, *supra* note 17, at 167-68.

⁹⁶ See *supra* notes 31 to 45 and accompanying text.

⁹⁷ U.S. CONST. amend IV.

issue.⁹⁸ Meeting this threshold requires “first that a person have [sic] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”⁹⁹ These requirements are referred to as the subjective and objective prongs, respectively, of the reasonable expectation of privacy test. Because the test is an individualized assessment, the Fourth Amendment interests of the target and provider must be considered separately; it is possible that there may be a reasonable expectation of privacy in the information sought by the NSL for one of these parties, but not the other. If an individual can demonstrate a reasonable expectation of privacy, the court next considers whether the search or seizure was “reasonable.”

Most scholars conclude that NSLs do not violate targets’ Fourth Amendment rights because targets cannot have a reasonable expectation of privacy in the records at issue.¹⁰⁰ These analyses rest on a line of Supreme Court cases holding that an individual has no reasonable expectation of privacy in information that has been exposed to a third party,¹⁰¹ a rule that is known as the third-party doctrine. In its 1976 decision in *United States v. Miller*, for example,

⁹⁸ *Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).

⁹⁹ *Id.* at 361 (Harlan, J., concurring).

¹⁰⁰ See, e.g., Bohl, *supra* note 93, at 452; Herman, *supra* note 25, at 120. But see Dara Jebrock, Note & Comment, *Securing Liberty: Terrorizing Fourth Amendment Protections in a Post 9/11 World*, 30 NOVA L. REV. 279, 299-300 (2006) (stating that NSL provisions “clearly infringe[] on our Fourth Amendment rights”).

¹⁰¹ See *United States v. Miller*, 425 U.S. 435, 443 (1976) (“[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities”); *Smith v. Maryland*, 442 U.S. 735, 743 (1979) (“[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”).

the Court held that a defendant had no protectable Fourth Amendment interest in his bank records because they had already been exposed to a third party—the bank.¹⁰² The rationale behind these decisions is that an individual who voluntarily discloses information to a third party assumes the risk that that party could reveal the information to the government.¹⁰³ In the NSL context, commentators explain, the target of the investigation cannot have a reasonable expectation of privacy in phone or Internet records, for example, because such records have already been disclosed to the third-party provider.¹⁰⁴ As Nickolas Bohl explains in a student note in the *Boston University Law Review*, “One does not need an intimate knowledge of network circuitry to know that an ISP can track information about its customer’s habits.”¹⁰⁵

Bohl suggests, however, that the third-party doctrine might not bar *all* Fourth Amendment claims by individuals who have voluntarily disclosed information to a third party.¹⁰⁶ He points out that the *Miller* Court may have qualified its holding; the Court explained that it had not been confronted “with a situation in which the Government, through unreviewed executive discretion, has made a wide-ranging inquiry that unnecessarily touches upon intimate areas of an

¹⁰² *Miller*, 425 U.S. at 442. The specific holding in *Miller* relating to bank records was superseded by the Right to Financial Privacy Act, 12 U.S.C. 3401 et. seq., but the third-party doctrine remains good law.

¹⁰³ See Herman, *supra* note 25, at 112.

¹⁰⁴ Bohl, *supra* note 93, at 462; see also Herman, *supra* note 25, at 120 (suggesting that the Court’s current Fourth Amendment jurisprudence would not provide targets with constitutional protection against NSLs).

¹⁰⁵ Bohl, *supra* note 93, at 462.

¹⁰⁶ *Id.*

individual's personal affairs.”¹⁰⁷ Based on this language, Bohl proposes that if a target could show that the NSL “touched upon intimate areas of his or her life, then it might give rise to Fourth Amendment protection.”¹⁰⁸ As Bohl notes, however, it's unclear what type of “intimate” information would be required to distinguish a particular situation from those in which the Court has previously held that disclosure to third-party providers voided privacy expectations.¹⁰⁹

The question of the Fourth Amendment rights of the provider similarly begins with an assessment of the provider's expectation of privacy. Bohl suggests that a provider that took steps to protect the confidentiality of the records could demonstrate a subjective expectation of privacy, but that surviving the objective prong of the privacy expectation analysis would be a closer call that comes down to how society balances a provider's sense of security in its records against the government's need for the information sought in the NSL.¹¹⁰ While there are “societal concerns about the government having the power to rummage through a company's records unchecked,” Bohl notes, society may be “less concerned about the government's rummaging when it involves a suspected terrorist.”¹¹¹ A provider would also need to overcome the third-party disclosure exception; while the provider has not willingly exposed the records, the target has exposed them to

¹⁰⁷ *Miller*, 425 U.S. at 444 n.6 (internal quotation marks omitted), *quoted in* Bohl, *supra* note 93, at 463.

¹⁰⁸ Bohl, *supra* note 93, at 463.

¹⁰⁹ *Id.*

¹¹⁰ *See id.* at 463-64.

¹¹¹ *Id.* at 464.

the provider.¹¹² Bohl concludes, however, that because law enforcement could only have access to the records with the provider's permission, the provider likely has a reasonable expectation of privacy if it has not exposed the records itself.¹¹³ This would lead to the counterintuitive result that the provider has greater Fourth Amendment rights than the target of the NSL, whose personal information is at stake.¹¹⁴

Another line of legal scholarship on NSLs has examined the impact of NSL statutes on First Amendment rights. Two First Amendment issues seemingly are implicated by the NSL statutes: 1) whether the nondisclosure provisions of the NSL statutes unconstitutionally violate the First Amendment rights of NSL recipients and 2) whether the records production provisions of the statutes violate the First Amendment rights of the targets.

The decision in *Doe I* prompted several authors to examine the constitutionality of the nondisclosure provisions and other aspects of the court's decision.¹¹⁵ Brett Shumate's 2005 student comment in the *Gonzaga Law Review* criticizes the district court's original holding in *Doe I* that the nondisclosure provisions violated the First Amendment and argues that the court should have

¹¹² *Id.*

¹¹³ *Id.* at 464-65.

¹¹⁴ *Id.*

¹¹⁵ See Nieland, *supra* note 94, at 1127 (criticizing the NSL amendments as "problematic"); Zachary D. Shankman, Note, *Devising a Constitutional National Security Letter Process in Light of Doe v. Ashcroft*, 94 GEO. L.J. 247 (2005) (finding the *Doe I* decision correct and proposing reforms); 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 (2005) (arguing that the district court wrongly decided that the nondisclosure provisions violated the First Amendment); Jebrock, *supra* note 100, at 299-300 (agreeing with the district court's Fourth Amendment analysis).

applied intermediate scrutiny rather than strict scrutiny to the NSL nondisclosure provisions.¹¹⁶ To survive strict scrutiny, a law must be “narrowly tailored to promote a compelling Government interest”;¹¹⁷ in other words, it must be the least restrictive means of achieving the interest that it was enacted to serve.¹¹⁸ Intermediate scrutiny is a less demanding standard that requires that a law restricting speech “advance[] important governmental interests unrelated to the suppression of free speech” and that it “does not burden substantially more speech than necessary to further those interests.”¹¹⁹ Under the intermediate scrutiny standard, Shumate argues, the provisions would surely survive, especially in light of the substantial deference given to the political branches on issues of national security.¹²⁰

A 2008 student note by Brian Eyink published in the *Duke Law Journal*, on the other hand, concludes that even after Congress amended the nondisclosure provisions to try to remedy First Amendment deficiencies, the provisions remained “unconstitutional prior restraints and content-based restrictions on speech.”¹²¹ Eyink argues that the NSL nondisclosure provisions fail the minimum constitutional safeguards required by the Supreme Court for a system of prior

¹¹⁶ Shumate, *supra* note 115, 166-67.

¹¹⁷ *Doe I*, 334 F. Supp. 2d 471, 511 (S.D.N.Y. 2004) (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 802, 813 (2000)).

¹¹⁸ *Id.*

¹¹⁹ *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997)).

¹²⁰ Shumate, *supra* note 115, at 167.

¹²¹ Eyink, *supra* note 94, at 476.

restraints,¹²² provide the issuing authority with too much discretion in restraining speech, and are not narrowly tailored to the government's national security interests.¹²³

Finally, several authors have discussed whether the NSL records production provisions implicate the First Amendment free speech and association¹²⁴ rights of the targets, a question ultimately left open by the *Doe* cases. A recent student note by Chris Montgomery in the *Ohio State Law Journal* claimed that NSLs—along with other government information-gathering methods—are used by the government to circumvent First Amendment protection for inflammatory but constitutionally protected speech related to terrorism by pressuring ISPs to censor material that the government could not directly censor on its own.¹²⁵ Because private actors like ISPs may censor inflammatory rhetoric without running afoul of constitutional protections, Montgomery argues, the government has pressured ISPs to become “de facto Internet police,” “operating as proxy censors for the government.”¹²⁶ Montgomery identifies the “overuse of National Security Letters,” “‘good corporate citizen’ programs and provisions that request ISPs to voluntarily remove questionable content,” and “vague provisions

¹²² *Id.* at 485-96 (citing *Freedman v. Maryland*, 360 U.S. 51, 58 (1965)).

¹²³ *See id.*

¹²⁴ The Supreme Court has recognized that because “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,” the “freedom to engage in association for the advancement of beliefs and ideas” is within the scope of those freedoms protected by the First Amendment. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

¹²⁵ Chris Montgomery, Note, *Can Brandenburg v. Ohio Survive the Internet and the Age of Terrorism?: The Secret Weakening of a Venerable Doctrine*, 70 OHIO ST. L.J. 141, 144, 168 (2009).

¹²⁶ *Id.*

in the laws prohibiting material support of terrorists that create doubt about the scope of illegal speech” as the primary means of applying this pressure.¹²⁷ NSLs, Montgomery explains, not only allow the government to monitor Internet users, but they put “an ISP on notice that one of its subscribers is the subject of a federal investigation, increasing the probability that the ISP will drop the subscriber to avoid liability.”¹²⁸ He suggests this is particularly worrisome when, as reports demonstrate, the NSL process has been abused.¹²⁹

Other authors have focused in particular on whether NSLs may violate the right to speak or associate *anonymously*.¹³⁰ If NSLs are used “to obtain personal information about previously-anonymous users,” they may produce a chilling effect.¹³¹ Privacy scholar Daniel Solove argues that targets of NSLs and other information-gathering tools may in some instances have First Amendment speech and association rights against collection of their information from third-party providers.¹³² Solove explains that while the Supreme Court has suggested that a stricter application of Fourth Amendment requirements may be in order when a warrant implicates First Amendment interests, the Court has left open the question of what protections should be required when information gathering implicates

¹²⁷ *Id.* at 168-69.

¹²⁸ *Id.* at 190.

¹²⁹ *Id.* at 191.

¹³⁰ *See* Solove, *supra* note 17, at 116.

¹³⁰ *Id.* at 127 (for example, when the government conducts surveillance of a rally in public); Shankman, *supra* note 115, at 259.

¹³¹ Shankman, *supra* note 115, at 259.

¹³² Solove, *supra* note 17, at 116.

First Amendment activities, but the Fourth Amendment does not apply.¹³³ In such cases, Solove claims, the First Amendment should require the application of its own set of procedural safeguards, serving as an independent source of criminal procedure.¹³⁴ To determine whether First Amendment safeguards apply under this analysis, courts should determine “whether the activity at issue is within the scope of the First Amendment” and “whether the government information gathering has a cognizable chilling effect on First Amendment activity.”¹³⁵ If so, the First Amendment requires that the government demonstrate “a significant interest in gathering the information” and “that the manner of collection is narrowly tailored to achieving that interest.”¹³⁶ According to Solove, a warrant supported by probable cause will typically satisfy the narrow tailoring requirement.¹³⁷

Such safeguards could be invoked, according to Solove, when the disclosure of information to the government pursuant to an NSL implicates the target’s First Amendment speech and association rights.¹³⁸ This may be the case, for example, when an NSL is used to obtain the identity of an anonymous blogger who has espoused controversial views relating to a terrorist organization.¹³⁹

¹³³ *Id.* at 127. For example, the government may “send officers to record information about public demonstrations,” without implicating Fourth Amendment rights. *Id.*

¹³⁴ *Id.* at 132.

¹³⁵ *Id.* at 159.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 167.

¹³⁹ *Id.*

According to Solove, in such cases, even if the government does not bring criminal charges against the blogger, the “mere exposure of the blogger’s identity could have significant chilling effects.”¹⁴⁰ Although most NSL provisions provide that a records request may not be made in an investigation of a U.S. person “conducted solely on the basis of activities protected by the First Amendment,”¹⁴¹ Solove asserts that such protection is too narrow because few investigations are conducted “solely” on the basis of protected activities.¹⁴² Instead of focusing on whether the investigation is based on First Amendment activities, Solove proposes, the focus should be on whether the investigation has a chilling effect on such activities.¹⁴³ If it does, he argues, then the warrant requirement should apply.¹⁴⁴

Patrick Garlinger assesses targets’ First Amendment rights against NSLs in a 2009 student note published in the *New York University Law Review* and concludes that a First Amendment challenge to NSLs issued to telecommunications providers would likely be unsuccessful.¹⁴⁵ According to Garlinger, the “critical question . . . is the extent to which an NSL actually implicates free speech and association.”¹⁴⁶ As Garlinger explains, First Amendment protection is limited when the government is not attempting to

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 168 (quoting 18 U.S.C. § 2709(b)).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Garlinger, *supra* note 95, at 1108.

¹⁴⁶ *Id.* at 1128.

directly regulate speech or association but “is instead engaged in law enforcement activity.”¹⁴⁷ Furthermore, the First Amendment chilling effect doctrine can protect privacy only when necessary to safeguard speech; it thus “requires proof that the government’s action actually deters speech.”¹⁴⁸ Garlinger suggests that the type of Internet activity recorded by ISPs (or other activity recorded by telecommunications providers), however, might not sufficiently implicate First Amendment interests to trigger constitutional concerns about expression and association. Related records sought through NSLs would therefore lack a link to protected activity such that the NSL would “create a cognizable chilling effect.”¹⁴⁹ Moreover, a litigant must not only prove that protected First Amendment activities have been “concretely chilled,” she must also demonstrate that the interest in the privacy of her data outweighs a compelling government interest in national security.¹⁵⁰ Because NSLs likely fall within the content-neutral category of regulations and their impact on speech is incidental, Garlinger argues, they would likely be subject to a deferential standard of review.¹⁵¹ Garlinger’s analysis, however, fails to account for instances—as is the case with journalists—where an activity for which records may be collected through an NSL is conducted as a crucial part of an arguably protected First Amendment

¹⁴⁷ *Id.* at 1129.

¹⁴⁸ *Id.* at 1129-30.

¹⁴⁹ *Id.* at 1127.

¹⁵⁰ *Id.* at 1133.

¹⁵¹ *Id.* at 1134.

activity, such as newsgathering. In such instances, it at least seems more likely that a litigant could concretely demonstrate the required chilling effect of NSLs.

Part VI: Research Questions and Methodology

The literature on NSLs demonstrates that while providers may have a Fourth Amendment claim against turning over records, the target of the investigation would likely have no such claim under the third-party doctrine. The First Amendment, however, may provide the target with grounds to challenge an NSL, depending on how a court views the extent to which the collection of the target's records implicates First Amendment interests and the degree of protection the court is willing to afford such interests in light of national security concerns.

Overall, the scholarly literature demonstrates the need for concern about the use of NSLs against journalists in light of journalists' watchdog function to draw attention to government abuses. Furthermore, legal scholarship demonstrates that while the Supreme Court has acknowledged the need to protect at least some newsgathering rights, it has not defined the scope of these rights or specifically recognized newsgathering rights for members of the press that extend beyond free speech rights held by other citizens. To the extent that newsgathering rights do exist, however, the scholarship demonstrates that they do not appear to provide affirmative access to information held by the government, but rather act as a shield against government interference in newsgathering activities that journalists could otherwise conduct. The literature on the conflict between free press and national security interests demonstrates that a First Amendment

newsgathering right would be balanced against a competing claim of national security interests by the government and that the courts have traditionally been deferential to such government claims. Finally, the literature on NSLs shows that while many legal scholars have considered the effect of NSLs on Fourth Amendment rights of providers and targets and on First Amendment rights of providers, little attention has been paid to the effect of NSLs on the First Amendment rights of the targets. Those scholars who have addressed the issue—Solove and Garlinger—have come to opposite conclusions about whether the collection of documents like phone records and Internet search records through the use of NSLs would actually implicate First Amendment speech and association rights. However, neither Garlinger nor Solove has addressed the special case in which an NSL is used to collect such information about a journalist’s newsgathering activities, a situation in which there may be a stronger First Amendment claim at stake. This thesis attempts to fill that void in the literature by considering whether the First Amendment protects journalists against the use of NSLs to collect their information.

The analysis will focus on whether journalists have a cognizable First Amendment free speech or free press right against government collection of their records pursuant to NSLs and, if such a right exists, whether it outweighs countervailing national security interests. This analysis will build on and extend beyond the work of scholars like Ugland by assessing the recognition of newsgathering rights not just at the Supreme Court, but also in the U.S. Courts of Appeals. Further, this thesis will build on research on the conflict between free

press rights and national security interests by providing a comprehensive analysis of both Supreme Court and U.S. Courts of Appeals decisions involving such conflicts. In addition this thesis will examine cases in which the First Amendment speech or association claims of nonmedia litigants are balanced against national security interests and analyze what parallels may be drawn to cases involving press rights. In analyzing these issues, four specific sets of research questions will be addressed:

- 1) How do the National Security Letter statutes enable the government to collect records related to a journalist's newsgathering activities? To what extent do the statutes, their legislative history, and the Department of Justice policy regarding media subpoenas inform the First Amendment issues involved when the press is the target of NSLs?
- 2) To what extent have the federal courts recognized that journalists have protections, based on the First Amendment rights to free speech and free press, against government intrusion into the newsgathering process? How do these cases inform the question of whether journalists have free speech or free press rights against government intrusion through the use of NSLs?
- 3) How have the federal courts balanced First Amendment rights—including the right to free press, free speech, and the closely related right to freedom of association—against countervailing national security interests? How do these cases inform whether journalists' rights against government intrusion into the newsgathering process would be upheld against the government's national security interest in the information sought?

- 4) Does the First Amendment bar the government from collecting the records of journalists under the NSL statutes? If not, what statutory reforms might best limit the impact of NSLs on the newsgathering process?

This thesis is organized such that each subsequent chapter addresses one set of these research questions, in the order in which they appear. The research method, described in further detail below, is a critical analysis of the relevant statutes, legislative histories, and case law.

Chapter 2 describes the evolution of National Security Letters from a limited exception to privacy protection statutes to a wide ranging, warrantless investigative tool, and the resulting judicial and Congressional backlash. In explaining this evolution, this chapter describes the adoption of the first NSL statute and outlines amendments of NSL statutes to the present day. This chapter also describes certain developments—such as the *Doe v. Ashcroft*¹⁵² litigation and the release of U.S. Department of Justice Inspector General reports revealing NSL abuses—that spawned legislative changes or calls for reform. This chapter will also consider the extent to which existing Department of Justice policies governing media subpoenas may provide reporters with protection against the collection of their records through NSLs.

Chapter 3 describes U.S. Supreme Court and U.S. Courts of Appeals decisions that address the extent to which journalists have (or lack) First Amendment protection against government intrusion into the newsgathering process, in which journalists research and collect information for the purpose of

¹⁵² *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004)

reporting it as news. Among other areas, this chapter covers cases in which the government sought to subpoena a reporter or materials created in the newsgathering process, cases involving warrants for newsroom searches and surveillance of reporters, and cases in which judges have issued orders specifically barring the media from engaging in particular newsgathering activities.

Chapter Four describes U.S. Supreme Court and Courts of Appeals decisions that address a conflict between First Amendment press, speech, or associational rights and national security interests and assesses how the courts have balanced these opposing interests.

Chapter Five will analyze, in light of the case law discussed in Chapters Three and Four: 1) whether the press could claim a cognizable First Amendment right to protection against the collection of records of newsgathering activity through the use of NSLs and 2) whether the First Amendment interest in such protection would outweigh countervailing interests in national security. This chapter will also suggest—in the case that no such First Amendment protection seems available or is outweighed by countervailing security concerns—legislative reforms that might provide the media with protection against NSLs while also respecting the grave national security interest at stake.

The legislative materials discussed in Chapter Two, including statutes, bills, committee reports, and hearing transcripts, were compiled from the LexisNexis and WestLaw online legal research databases and databases available through the Library of Congress (Thomas.gov), and Government Printing Office

Access web sites. The materials examined include all statutes authorizing NSLs, as well as all amendments to those statutes. The research also involved an examination of all committee reports accompanying these statutes and amendments in search of any indication that Congress considered the First Amendment implications of the NSL provisions and, more specifically, considered implications for the press. In addition, research for this chapter included an examination of all House and Senate committee hearings since 2001 (when the Patriot Act greatly expanded the use of NSLs) that addressed renewal of the NSL provisions of the Patriot Act or NSL amendments. The hearings examined were limited to those for which full transcripts have been published in the Government Printing Office Access database. The decisions making up the *Doe v. Ashcroft* litigation¹⁵³ were accessed via the LexisNexis database. The Inspector General's reports were accessed through the U.S. Department of Justice web site.

The cases for Chapters Three and Four were compiled using various searches, described in detail below, of the LexisNexis and WestLaw legal databases. Several limitations apply to the cases examined in both these chapters. First, given the large number of cases that have assessed the types of claims at issue in these chapters and the existence of state statutory protections that may go beyond what the First Amendment requires, the case searches were limited to decisions by the U.S. Supreme Court and U.S. Courts of Appeals. Once these searches were performed, certain cases were eliminated from discussion based on

¹⁵³ See *supra* notes 31 to 45 and accompanying text.

the fact that: 1) the court failed to actually reach the merits of the First Amendment claim at issue—for example, by resolving the claim on procedural grounds; 2) the court’s decision lacked precedential value because it was vacated in its entirety, reversed by subsequent proceedings in the same case, or overturned by a later decision in a different case; or 3) the search terms were included as merely incidental mentions in cases focused on other issues.¹⁵⁴

The research for Chapter Three focused on cases that reveal the extent to which the U.S. Supreme Court and U.S. Courts of Appeals have recognized First Amendment free speech or free press rights against government intrusion into the newsgathering process. A preliminary list of cases was compiled by running three separate searches. First, a search of the Lexis Nexis Supreme Court and Court of Appeals combined database was run using the following search string: ("newsgathering" or "news gathering" or “gather news”) and (journalist! or reporter! or media or news!) and HEADNOTES("First Amendment" or “U.S. Const. amend. I”). In this list, there were two Supreme Court cases that satisfied all the limitations for this chapter – *Branzburg v. Hayes* and *Zurcher v. Stanford Daily*. A Westlaw¹⁵⁵ “Citing References” search, which provides a list of subsequent cases that have cited these decisions, was run on each of these two cases. For both cases, the search was limited to subsequent decisions by the Supreme Court or federal courts of appeals. The search on *Branzburg* was also

¹⁵⁴ An example of such an incidental mention would be when a case that does not actually involve a First Amendment claim draws an analogy to First Amendment case law in a short paragraph or footnote.

¹⁵⁵ The Westlaw database, rather than the Lexis Nexis database, was used for this purpose because a Westlaw “Citing References” search may more easily be restricted to federal appellate courts than a Lexis Nexis Shepard’s search.

limited, using WestLaw's "headnotes" function, to cases with headnotes relating to "enforcement of generally applicable laws," "disclosure of sources," "In general, obligation to testify," "privilege," and "journalists." Finally, the search was further narrowed using Westlaw's "locate" function to cases containing the term "subpoena" and any word that had "reporter," "journalist," or "news" as its root (such that the search would yield hits for plural versions of "reporter" or "journalist" and variations on "news," like "newsman"). The citing references search on *Zurcher* was limited to decisions containing the term "First Amendment" and the term "journalist, reporter, media, or news" (or any word with those terms as its root).

A final list of Chapter Three cases was compiled as follows. First, all duplicate results were eliminated from the lists. Second, in order to focus on those cases that most closely parallel the type of intrusion posed by NSLs and the interests supporting such intrusion, any case in which the intrusion on news gathering did not *originate* with the government itself was eliminated. This means that cases in which the intrusion merely resulted from a court enforcing the rights of private parties—for example, by enforcing a subpoena for the testimony of a reporter by a private party in a civil suit—are not included in the analysis in Chapter Three. Third, the cases included in the final list were limited to those in which the government action at issue could be understood to constitute active inference with the newsgathering process, rather than a simple refusal to provide affirmative access to government controlled information or spaces, including records, courts, prisons, executions, crime and accident scenes, and military

operations, among others. Finally, cases involving criminal laws of general applicability or court orders that barred individuals from sharing certain types of information with *anyone*—such as general gag orders banning litigants from speaking about a case, laws restricting the disclosure of classified information, or laws banning the sending or receiving of child pornography—were also eliminated from consideration. In total, these three searches produced a list of twenty-two decisions that fit the chapter’s limitations.¹⁵⁶

The research for Chapter Four was focused on those cases in which the federal courts have evaluated a conflict between First Amendment press, speech, or association rights and national security interests. Because only a handful of such cases involved media litigants, the analysis includes cases in which First Amendment claims were raised by media and non-media parties. An initial list of cases was compiled by running two separate searches in the LexisNexis online legal database. The first search used the database’s headnotes and core terms features to search the Supreme Court and federal courts of appeals databases. The search string was: HEADNOTES ("First Amendment" or "U.S. Const. amend. I")

¹⁵⁶ These decisions are: *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006); *Arkansas Chronicle v. Murphy*, 183 F. App’x 300 (4th Cir. 2006); *In re Grand Jury Subpoena (Wolf)*, 201 F. App’x 430 (9th Cir. 2006); *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964 (D.C. Cir. 2006); *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004); *Desyllas v. Bernstine*, 351 F.3d 934 (9th Cir. 2003); *United States v. Brown*, 250 F.3d 907 (5th Cir. 2001); *United States v. Ahn*, 231 F.3d 26 (D.C. Cir. 2000); *United States v. Cleveland*, 128 F.3d 267 (5th Cir. 1998); *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994); *In re Shain*, 978 F.2d 850 (4th Cir. 1992); *Storer Commc’ns, Inc. v. Giovan* (*In re Grand Jury Proceedings*), 810 F.2d 580 (6th Cir. 1987); *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1986); *United States v. Harrelson*, 713 F.2d 1114 (5th Cir. 1983); *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982); *Securities and Exchange Comm’n v. McGoff*, 647 F.2d 185 (D.C. Cir. 1981); *Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978); *Reporters Comm. for Freedom of Press v. AT&T Co.*, 593 F.2d 1030 (D.C. Cir. 1978); *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976).

and (HEADNOTES ("national security") or CORE-TERMS ("national security"))). Because a number of cases discussed national security-type concerns without actually invoking the term “national security,” it was necessary to include in this search cases in which either the headnotes *or* the core terms included “national security,” as the core terms function identifies key concepts at issue in a decision, even if the decision itself does not use the word or phrase at issue. A second search of the same databases focused on cases in which “First Amendment” and “national security” appeared in close proximity. This search string was: “First Amendment” /s “national security.”

A final list of cases was compiled as follows. First, duplicate cases were eliminated. Second, cases were individually evaluated for compliance with the general limitations for Chapters Three and Four described above. Third, in order to maintain a focus on how the courts have evaluated *conflicts* between First Amendment rights and national security interests, cases in which the court rejected the *existence* of a protectable First Amendment interest—for example, by determining that the activity at issue was not actually within the scope of First Amendment protection—were eliminated. Fourth, cases were excluded if the court refused to consider a balance of national security interests and First Amendment rights because it determined that the activity at issue—for example, decisions on security clearances or visa applications—had been uniquely delegated to the executive branch. Finally, the cases selected were limited to those in which the asserted First Amendment interest was based on the right to free speech, press, or association. In total, these two searches produced a list of

eighteen decisions within the limitations, including four Supreme Court decisions.¹⁵⁷

Chapter 5 is largely an analysis of the case law discussed in Chapters Three and Four and its applicability to the First Amendment rights of journalists targeted by NSLs. However, this chapter will also consider whether—in the absence of a viable constitutional claim—legislative reforms could provide journalists with protection against NSLs. For this purpose, the Library of Congress’ online legislative database, Thomas, was used to compile a list of bills in the 111th Congress (2009-10) that would provide, or that with minor amendments could provide, potential avenues for reform—specifically, bills proposing amendments to the NSL statutes and those that would create a federal media shield law. The final list for discussion was limited to those bills in the House and Senate that have been voted out of committee.

¹⁵⁷ These decisions are: *Holder v. Humanitarian Law Project*, No. 08-1498, 2010 U.S. LEXIS 5252 (June 21, 2010); *Snepp v. United States*, 444 U.S. 507 (1980); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. Robel*, 389 U.S. 258 (1967); *Barenblatt v. United States*, 360 U.S. 109 (1958); *United States v. Aref*, 533 F.3d 72 (2d Cir. 2008); *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212 (10th Cir. 2007); *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004); *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002); *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986); *White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984); *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983); *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972); *Wilkinson v. United States*, 272 F.2d 783 (5th Cir. 1959); *United States v. Josephson*, 165 F.2d 82 (2d Cir. 1947).

CHAPTER 2

THE HISTORY AND EVOLUTION OF NATIONAL SECURITY LETTERS

While National Security Letters (“NSLs”) have come under fire from privacy advocates in recent years, they initially developed as limited exceptions to federal statutes designed to protect privacy interests in areas where the Fourth Amendment was not available.¹ NSLs are currently authorized by five specific provisions contained in four federal statutes.² Under these statutes, the FBI can issue NSLs to obtain records from third parties, “including telephone companies, financial institutions, Internet service providers, and consumer credit agencies.”³ The type of information that may be collected varies by statute, but typically includes customer account information and transactional records, such as telephone toll billing records.⁴

This chapter first describes each NSL statute and outlines its history from the time of adoption through the Patriot Act amendments in 2001. It will then explain how post-Patriot Act concerns over NSL abuse and a challenge to the

¹ See *infra* notes 11-19 and accompanying text.

² Office of the Inspector Gen., U.S. Dep’t of Justice, A Review of the Federal Bureau of Investigation’s Use of National Security Letters viii (2007) [hereinafter *OIG 2007 Report*], available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf>.

³ *Id.*

⁴ *Id.*

NSL statutes in federal court, in the *Doe* litigation mentioned in the previous chapter, led to additional amendments to the NSL statutes in 2006.⁵ In explaining the NSL statutes' history, this chapter will in particular consider whether Congress considered the unique First Amendment concerns involved when journalists are the targets of NSLs. Finally, this chapter will examine the extent to which existing Department of Justice policies governing media subpoenas may limit the collection of reporters' records through NSLs.

Part I: The Development of the NSL Statutes

National Security Letters are authorized under five provisions in four different federal statutes:⁶ The Right to Financial Privacy Act,⁷ The Electronic Communications Privacy Act,⁸ The Fair Credit Reporting Act,⁹ and The National Security Act.¹⁰ This section describes each of these statutes and recounts their legislative history from the time of initial adoption through the 2001 Patriot Act amendments.

⁵ See *infra* notes 101-107 and accompanying text.

⁶ The USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 118(d), 120 Stat. 192, 218 (2006), defines a “national security letter” to mean a request for information issued under the statutes listed, *infra*, notes 7 to 10.

⁷ 12 U.S.C. § 3414(a)(5)(A).

⁸ 18 U.S.C. § 2709.

⁹ 15 U.S.C. § 1681u, 1681v.

¹⁰ 50 U.S.C. § 436.

The Right to Financial Privacy Act

The first statute authorizing a process similar to the modern NSL request was the Right to Financial Privacy Act (“RFPA”) of 1978.¹¹ NSLs issued under RFPA allow the FBI to collect information about “open and closed checking and savings accounts and safe deposit box records,” and “transactions with issuers of travelers checks, operators of credit card systems, pawnbrokers, loan or finance companies, travel agencies, real estate companies, casinos, and other entities.”¹²

The RFPA was passed in response to the Supreme Court’s decision in *United States v. Miller*, which held that individuals have no Fourth Amendment protection against government subpoenas of their bank records from banks where they have accounts.¹³ Congress responded by extending statutory protection “to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity.”¹⁴ RFPA struck this balance by requiring federal agencies to provide individuals with advance notice when the government is seeking disclosure of personal financial information and to provide these individuals with a chance to contest the requested disclosure.¹⁵ The 1978 Act, however, contained an exception for requests from agencies “authorized to conduct foreign counter- or

¹¹ Andrew E. Nieland, Note, *National Security Letters and the Amended Patriot Act*, 92 CORNELL L. REV. 1201, 1207 (2007).

¹² OIG 2007 Report, *supra* note 2, at xii.

¹³ *United States v. Miller*, 425 U.S. 435, 436-37 (1976); *see also* H.R. Rep. No. 95-1383, at 32, 1978 U.S.C.C.A.N. 9273, 9306 (1978) (noting that the statute “is a Congressional response to the Supreme Court decision” in *Miller*).

¹⁴ H.R. REP. NO. 95-1383, at 31 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9305.

¹⁵ 12 U.S.C. §§ 3401-3422 (2000).

foreign positive-intelligence activities for purposes of conducting such activities,” requests from “the Secret Service for the purpose of conducting its protective functions,” and for certain emergency situations.¹⁶ In such cases, the agency could request that the institution voluntarily disclose the records by providing a certified request from a supervisor.¹⁷ When these requests were issued, the financial institution was barred from disclosing to “any person” that the government had “sought or obtained access to a customer’s financial records.”¹⁸ Congress intended this exception to be a narrow one, explaining that it should be used “only for legitimate foreign intelligence investigations” and that “investigations proceeding only under the rubric of ‘national security’ do not qualify.”¹⁹

In 1986, however, Congress amended RFPA to make disclosure by financial institutions under this exception mandatory rather than voluntary when the FBI director or his designee certified that the records were “sought for foreign counterintelligence purposes and that there are specific and articulable facts giving reason to believe that the customer or entity whose records are sought is a

¹⁶ Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, § 1114, 92 Stat. 3641, 3707-08 (1978).

¹⁷ *Id.* § 1114(a)(2), 92 Stat. 3707.

¹⁸ *Id.* § 1114(a)(3), 92 Stat. 3708.

¹⁹ H.R. REP. NO. 95-1383, at 52 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9327.

foreign power or an agent of a foreign power.”²⁰ By this point, the FBI was referring to requests made under the RFPA exception as “national security letter[s].”²¹ The 1986 amendment was deemed necessary in order to preempt state privacy laws that prevented financial institutions in some states from voluntarily turning over records to the FBI.²² According to a 1986 U.S. Senate report, by making disclosure mandatory, the statute would provide the access “the FBI needs to perform its counterintelligence functions effectively.”²³ A House committee noted that the change was “justified and reasonable” given that the number of requests under the exception was likely to be “relatively small.”²⁴

The Patriot Act amended RFPA in two important ways. First, it amended the certification requirement to give more FBI officials the authority to certify NSL requests. Prior to the passage of the Patriot Act, RFPA required that an NSL request be certified by “the Director of the Federal Bureau of Investigation (or the

²⁰ Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, § 404, 100 Stat. 3190, 3197 (1986) (amending RFPA § 1114(a) to require that financial institutions “*shall* comply” with such requests) (emphasis added). “Foreign power” and “agent of a foreign power” were defined according to the Foreign Intelligence Surveillance Act of 1978. That act broadly defines “foreign power” to include “a foreign government or any component thereof,” “a faction of a foreign nation or nations, not substantially composed of United States persons,” “an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments,” “a group engaged in international terrorism or activities in preparation therefor,” “a foreign-based political organization not substantially composed of United States persons,” or “an entity that is directed and controlled by a foreign government or governments.” Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 101, 92 Stat. 1783, 1783 (1978) (codified at 50 U.S.C. § 1801).

²¹ S. REP. NO. 99-307, at 15 (1986) (“Currently, under Section 1114(a) of the RFPA, to gain access to financial records for counterintelligence investigations, the FBI issues a letter, called a ‘national security letter,’ signed by an appropriate supervisory official and certifying compliance with the applicable provisions of the RFPA, seeking financial records relevant to FBI counterterrorism activities.”).

²² *Id.*

²³ *Id.* at 14.

²⁴ H.R. REP. NO. 99-690, at 16 (1986).

Director's designee),"²⁵ and a congressional conference report made clear that such a designee must be "no further down the FBI chain-of-command than the level of Deputy Assistant Director."²⁶ The Patriot Act, however, amended the statute to also allow Special Agents in Charge in bureau field offices to provide the necessary certification.²⁷

Second, the Patriot Act substantially broadened the category of investigations in which the FBI could issue an NSL. Rather than requiring "specific and articulable facts" to show that the target of the NSL was a foreign power or agent of a foreign power, the Patriot Act amendments allow the FBI to issue an NSL when the information is "sought for foreign counterintelligence purposes to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States."²⁸ The new standard, importantly, does not require any showing that the target himself is actually involved in international terrorism or clandestine intelligence activities, and instead merely requires that the records be "sought for foreign counter intelligence purposes to protect against international terrorism or clandestine intelligence activities."²⁹

²⁵ 12 U.S.C. § 3414 (a)(5)(A).

²⁶ H.R. CONF. REP. NO. 99-952, at 23 (1986), *reprinted in* 1986 U.S.C.A.A.N. 5379, 5383.

²⁷ USA PATRIOT Act, Pub. L. No. 107-56, § 505 (b), 115 Stat. 272, 365 (2001).

²⁸ *Id.* at § 505, codified at 12 U.S.C. § 3414(1)(5)(A).

²⁹ *Id.*

The version of the Patriot Act that became law moved swiftly through Congress in the wake of the September 11th terrorist attacks; it was introduced in the House on Oct. 23, 2001,³⁰ and was signed into law just three days later on Oct. 26, 2001.³¹ The bill was not accompanied by a committee report, although portions of the bill's language were drawn from three other bills, two of which were accompanied by committee reports.³² The RFPA amendments, however, originated in a Senate bill that was not accompanied by a report, leaving little legislative history to examine.³³ Nonetheless, it should be noted that the language providing that a RFPA NSL may not be issued pursuant to an investigation "conducted solely on the basis of activities protected by the first amendment" is similar to a provision in the Foreign Intelligence Surveillance Act ("FISA") of 1978 requiring that a target could not be considered a foreign power or agent of a foreign power "solely upon the basis of activities protected by the first amendment to the Constitution of the United States."³⁴ A Senate report on FISA explained that activities consisting "solely of the lawful exercise of First Amendment rights of speech, petition, assembly, and association" should not

³⁰ See 147 Cong. Rec. H 7159 (2001).

³¹ See USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

³² See *id.* Each of these three bills had either passed or been introduced in one house earlier that month. These bills were the Uniting and Strengthening America Act, H.R. 2975, 107th Cong. (2001); the Uniting and Strengthening America Act, S. 1510, 107th Cong. (2001); and the Federal Anti-Terrorism Act, H.R. 3004, 107th Cong. (2001). While H.R. 2975 and H.R. 3004 were accompanied by committee reports, which will be discussed to the extent relevant below, the PATRIOT Act amendments expanding the use of NSLs under RFPA originated in S. 1510, which was not accompanied by a committee report.

³³ See *supra* note 32.

³⁴ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 105, 92 Stat. 1783, 1790 (1978), codified at 50 U.S.C. § 1805(a)(3).

provide a basis for electronic surveillance.³⁵ The committee report makes clear that legislators were concerned that certain types of protected political speech—for example, “pure advocacy of the commission of terrorist acts”—could alone provide a basis for approving electronic surveillance against a U.S. person under FISA.³⁶

The Electronic Communications Privacy Act

The Electronic Communications Privacy Act (“ECPA”)³⁷ of 1986 was modeled after the RFPA to protect privacy interests in electronic and wire communications maintained by third parties, such as telephone companies and ISPs, while also “protecting the Government’s legitimate law enforcement needs.”³⁸ The information the FBI may collect through an ECPA NSL includes historical (as opposed to real time) information on telephone calls made and received; local and long distance billing records; “electronic communication transactional records (e-mails), including e-mail addresses associated with the account[,], screen names[,], and billing records”; and “subscriber information associated with particular telephone numbers.”³⁹ The FBI cannot access the content of conversations or e-mails under ECPA NSL authority.⁴⁰

³⁵ See S. REP. NO. 95-701, at 29 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 3998.

³⁶ *Id.*

³⁷ Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986).

³⁸ S. REP. NO. 99-541, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557.

³⁹ OIG 2007 Report, *supra* note 2, at xiii.

⁴⁰ *Id.* at xiii n.11.

Under the 1986 statute, communication service providers were required to comply with requests by the FBI Director (or his designee) for subscriber information, toll billing records information, or electronic communication transactional records when the FBI certified that the records were “relevant to an authorized foreign counterintelligence investigation” and “there are specific and articulable facts giving reason to believe that the person or entity” whose information is sought “is a foreign power or an agent of a foreign power.”⁴¹ The statute also barred providers from disclosing to “any person” that the records had been requested by the FBI.⁴² The Senate Judiciary Committee explained that these provisions were designed to “remed[y] the defect in current law that the FBI cannot gain access” to telephone toll records in states where “public regulatory bodies have created obstacles to providing such access.”⁴³ The committee described these records as “highly important to the successful investigation of counterintelligence cases.”⁴⁴

Congress amended ECPA in 1993 in response to an FBI request that the statute be expanded to “require phone companies to identify not only suspected agents of foreign powers but also persons who have been in contact with foreign powers or suspected agents of foreign powers.”⁴⁵ The 1993 amendment added authority for the FBI to issue an NSL for subscriber information (but not long

⁴¹ Pub. L. No. 99-508, § 201, 100 Stat. 1848, 1867 (1986).

⁴² *Id.*

⁴³ S. REP. NO. 99-541, at 43 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3597.

⁴⁴ *Id.*

⁴⁵ H.R. REP. NO. 103-46, at 2 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1913, 1914.

distance or local toll records) when “the information sought is relevant to an authorized foreign counterintelligence investigation” and “there are specific and articulable facts giving reason to believe that the communication facilities registered in the name of the person or entity have been used . . . in communication with” an individual engaged in international terrorism or with a foreign power or agent of a foreign power “under circumstances giving reason to believe that the communication concerned international terrorism . . . or clandestine intelligence activities.”⁴⁶ A House of Representatives report explained that while “the national security letter is an extraordinary device” and “[n]ew applications are disfavored,” the expansion was justified.⁴⁷ The 1993 amendment also made a second change, specifying that the certification of the NSL may be made only by the FBI director or his designee “in a position not lower than Deputy Assistant Director.”⁴⁸

As was the case with RFPA, the Patriot Act broadened the class of officials authorized to issue NSLs under ECPA to include Special Agents in Charge of field offices.⁴⁹ The Patriot Act also replaced ECPA’s 1993 certification requirement, requiring instead that the FBI certify that “the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine activities, provided that such an investigation of a United States

⁴⁶ FBI Access to Telephone Subscriber Information Act, Pub. L. No. 103-142, §1, 107 Stat. 1491, 1492 (1993).

⁴⁷ H.R. REP. NO. 103-46, at 3 (1993), reprinted in 1993 U.S.C.C.A.N. 1913, 1914-15.

⁴⁸ Pub. L. No. 103-42, § 1, 107 Stat. 1491, 1491 (1993).

⁴⁹ USA PATRIOT Act, Pub. L. No. 107-56, § 505 (a), 115 Stat. 272, 365 (2001).

person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.”⁵⁰ A committee report for H.R. 2975, a predecessor to the bill that became the final Patriot Act, contained similar language easing the requirements for EPCA NSLs. The report explained that the change was necessary because the prior “specific and articulable facts” requirement caused “unacceptable” and “substantial delays in counterintelligence and counterterrorism.”⁵¹

The Fair Credit Reporting Act

The Fair Credit Reporting Act (“FCRA”)⁵² of 1970 was enacted “to protect personal information collected by credit reporting agencies.”⁵³ In 1996, the statute was amended to authorize the FBI to issue NSLs to obtain certain information about an individual’s credit history. Under the amended statute, the FBI could compel disclosure of the names and addresses of all financial institutions at which a consumer has had an account upon certification that such information is “necessary for the conduct of an authorized foreign counterintelligence investigation” and that “there are specific and articulable facts giving reason to believe that the consumer” is a foreign power or is “an agent of a foreign power and is engaging or has engaged in an act of international terrorism . . . or clandestine intelligence activities.”⁵⁴ The statute also authorized the use of

⁵⁰ *Id.*

⁵¹ H.R. REP. NO. 107-236, pt. 1, at 61-62 (2001).

⁵² Fair Credit Reporting Act, Pub. L. No. 91-508, §§ 601et seq., 84 Stat. 1114, 1127-36 (1970).

⁵³ OIG 2007 Report, *supra* note 2, at xiii (citing 15 U.S.C. § 1681 et. seq.).

⁵⁴ Intelligence Authorization Act for Fiscal Year 1996, Pub. L. No. 104-93, § 601(a), 109 Stat. 961, 975-76 (1996).

NSLs to obtain the consumer's current and former addresses, and the consumer's current and former places of employment upon certification that "such information is necessary to the conduct of an authorized counterintelligence investigation" and that "there is information giving reason to believe that the consumer has been, or is about to be, in contact with a foreign power or an agent of a foreign power."⁵⁵ The House Conference Report, noting that the FBI already had the authority to issue NSLs under RFPA and ECPA, explained that "[e]xpansion of this extraordinary authority is not taken lightly."⁵⁶ However, the report concluded that in "this instance the need is genuine, the threshold for use is sufficiently rigorous, and, given the safeguards built in to the legislation, the threat to privacy is minimized."⁵⁷

The Patriot Act amended the FCRA NSL authority in two ways. First, as with the other categories of NSLs it amended, the act expanded the class of officials who could certify issuance of a FCRA NSL and amended the certification standard to require that the information requested is "sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation is not conducted solely upon the basis of activities protected by the first amendment."⁵⁸ Second, the act added a new class of NSLs authorized under the FRCA, allowing the FBI to obtain from a consumer reporting agency an individual's full credit

⁵⁵ *Id.* at § 601(a), 109 Stat. 961, 976.

⁵⁶ H.R. CONF. REP. NO. 104-427, at 36 (1995).

⁵⁷ *Id.*

⁵⁸ Patriot Act, § 505(c), 115 Stat. 366.

report and “all other” consumer information in the agency’s files.⁵⁹ This type of NSL may be issued if “a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism” certifies that the information “is necessary for the agency’s conduct or such investigation, activity or analysis.”⁶⁰ A committee report for a predecessor bill to the Patriot Act containing similar language explained that the amendment would provide authorities with “prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding.”⁶¹

The National Security Act

In 1994, Congress amended the National Security Act of 1947 to provide the FBI with the authority to issue NSLs “in connection with investigations of improper disclosure of classified information by government employees.”⁶² Under this rarely used provision,⁶³ the FBI can request financial records, other financial information, and consumer reports from financial organizations and consumer reporting agencies “as may be necessary to conduct any authorized law enforcement investigation, counterintelligence inquiry, or security determination.”⁶⁴ Requests may only be made when the records “pertain to a

⁵⁹ Patriot Act, § 358(g), 115 Stat. 327-28, codified at 15 U.S.C. § 1681v.

⁶⁰ *Id.*

⁶¹ H.R. REP. 107-250, at 61, (2001).

⁶² OIG 2007 Report, *supra* note 2, at xiv (citing H.R. REP. NO. 103-541 (1994) and H.R. CONF. REP. NO. 103-753 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2703).

⁶³ *Id.* at xiv.

⁶⁴ 50 U.S.C. § 436 (a) (1).

person who is or was an employee in the executive branch of Government.”⁶⁵

This provision was not affected by the Patriot Act amendments.

Part II: Post-Patriot Act Changes to the Statutes Governing NSLs

Following the expansion of the NSL statutes under the Patriot Act, the number of NSL requests soared.⁶⁶ In 2000, the year before the passage of the Patriot Act, the FBI issued roughly 8,500 NSL requests. After the act’s passage, the annual number of NSL requests increased to approximately 39,000 in 2003, 56,000 in 2004, and 47,000 in 2005, according to the FBI Office of General Counsel National Security Letter database.⁶⁷ The vast majority of these requests sought telephone toll billing records, telephone or e-mail subscriber information, or electronic communication transactional records under ECPA.⁶⁸ These figures, however, may not account for the true number of NSL requests. A report by the DOJ Office of the Inspector General concluded that due to incomplete information in the FBI database, the FBI’s figures were “significantly understated.”⁶⁹ The Inspector General’s report estimated that about six percent of NSL requests issued between 2003 and 2005 were missing from the FBI database.⁷⁰

⁶⁵ *Id.* § 436 (a)(2)(A).

⁶⁶ The number of NSL requests is not the same as the total number of national security *letters*. One letter may include several requests. OIG 2007 Report, *supra* note 2, at xix.

⁶⁷ *Id.* at xvi.

⁶⁸ *Id.* at xviii.

⁶⁹ *Id.* at xvii.

⁷⁰ *Id.*

Serious calls for reform of the Patriot Act's NSL provisions began in Congress within two years of the act's passage. The push for NSL reform took on additional urgency when two federal district courts struck down various provisions of the NSL statutes as unconstitutional.⁷¹ In 2006, Congress responded to the courts' rulings and other concerns about NSL use by providing for judicial review of NSL requests and nondisclosure orders (which barred NSL recipients from sharing information about the NSL), increasing congressional oversight of NSL requests, and directing the Office of the Inspector General of the Department of Justice to undertake a review of NSL use, including any abuses of NSL authority.

Early Calls for NSL Reform

Although the Patriot Act passed Congress overwhelmingly in 2001,⁷² by 2003 calls to scale back some of its broad investigatory powers were gaining support in Congress. That year, legislators introduced a number of unsuccessful proposals to limit NSLs⁷³ and bring greater congressional oversight to their use.⁷⁴

⁷¹ See *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005) ; *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004).

⁷² The act passed the House 357-66, with nine members not voting. Office of the Clerk of the U.S. House of Representatives, Final Vote Results for Roll Call 398, <http://clerk.house.gov/evs/2001/roll398.xml> (last visited June 2, 2010). It passed the Senate 98-1, with one senator not voting. United States Senate, U.S. Senate Roll Call Votes 107th Congress – 1st Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00313 (last visited June 2, 2010).

⁷³ See, e.g., H.R. 3352, 108th Cong. § 5 (2003) (exempting libraries from the scope of 18 U.S.C. § 2709); S. 1507, 108th Cong. § 3 (2003) (imposing a heightened certification requirement for ECPA NSLs issued to libraries or booksellers).

⁷⁴ S. 436, 108th Cong. § 3 (2003).

The use of national security letters also was addressed in congressional hearings, with both legislators and witnesses raising concerns about their use.⁷⁵

By 2005, the push for NSL reform was even stronger. At a 2005 hearing, Rep. Bobby Scott (D-Va.) identified what he considered to be “numerous” problems with the NSL authority granted under Section 505 of the Patriot Act:

First, records sought under this provision don’t have to pertain to a foreign power or an agent of a foreign power, thus, the confidentiality of records of countless innocent Americans can routinely get caught up in such requests. Second, instead of requiring the approval of a senior official at FBI headquarters, section 505 authorizes the release of such letters at the whim of a special agent in charge who is located somewhere in a local FBI office. Third, national security letters are subject to the gag rule, which prevents the recipient from disclosing its receipt, and, therefore, questioning whether it’s appropriate. Finally, the issuance of such letters is accomplished without any judicial supervision or checks and balances whatsoever.⁷⁶

At the same hearing, U.S. Department of Justice attorney Matthew Berry laid out the administration’s case for maintaining the broadened Patriot Act NSL

⁷⁵ *Anti-Terrorism Investigations and the Fourth Amendment After September 11, 2001: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 14 (2003) (statement of James X. Dempsey, Executive Dir., The Center for Democracy and Technology) (“[T]he so-called national security letter authorities, at least to my reading, seem to allow the Government to get entire databases”); *Protecting Our National Security From Terrorist Attacks: A Review of Criminal Terrorism Investigations and Prosecutions: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 34 (2003) (statement of Sen. Leahy, Member, S. Comm. on the Judiciary) (“The FBI could seek production of certain library records using NSLs, national security letters; is that right?”).

⁷⁶ *Material Witness Provisions of the Criminal Code, and the Implementation of the USA PATRIOT Act: Section 505 that Addresses National Security Letters, and Section 804 that Addresses Jurisdiction Over Crimes Committed at U.S. Facilities Abroad: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 3 (2005) (statement of Rep. Bobby Scott, Member, Subcomm. on Crime, Terrorism, and Homeland Security).

authority, explaining that the pre-Patriot Act certification requirement “put the cart before the horse.”⁷⁷ On this point he stated:

Suppose, for example, investigators were tracking a known al-Qaeda operative and saw him having lunch with three individuals. A responsible agent would want to conduct a preliminary investigation of those individuals and find out, among other things, with whom they had recently communicated. Before the passage of the PATRIOT Act, however, the FBI could not have issued an NSL to obtain such information. While investigators could have demonstrated that this information was relevant to an ongoing terrorism investigation, they could not have demonstrated sufficient specific, and articulable facts that the individuals in question were agents of a foreign power. Thankfully, however, section 505 of the USA PATRIOT Act corrected this problem.⁷⁸

The Doe Litigation and Congress’ Response

In 2004, in *Doe v. Ashcroft* (“*Doe I*”), an anonymous ISP filed suit in federal district court in the Southern District of New York challenging an NSL request and an accompanying nondisclosure order that barred the recipient from disclosing to anyone that the FBI had sought information from it.⁷⁹ Joined by the ACLU, which also acted as the ISP’s counsel, the ISP claimed, inter alia, that the government’s broad power to order production of records under ECPA violated ISP subscribers’ First Amendment rights of anonymous speech and association⁸⁰ and violated the ISP’s procedural rights of protection against unreasonable searches under the Fourth Amendment.⁸¹ It also claimed that the nondisclosure

⁷⁷ *Id.* at 10 (statement of Matthew Berry, Counselor to the Asst. Attorney Gen., Office of Legal Policy, U.S. Dep’t of Justice).

⁷⁸ *Id.*

⁷⁹ *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 478-79 (S.D.N.Y. 2004) [hereinafter *Doe I*].

⁸⁰ *Id.* at 506.

⁸¹ *Id.* at 496.

provision was an unconstitutional prior restraint in violation of the First Amendment.⁸² According to the plaintiffs, the ECPA NSL statute, 18 U.S.C. § 2709, “gives the FBI extraordinary and unchecked power to obtain private information without any form of judicial process” and the “non-disclosure provision burdens speech categorically and perpetually, without any case-by-case judicial consideration of whether that speech burden is justified.”⁸³

In *Doe I*, the district court struck down the statute as unconstitutional. The court held that § 2709 violated the Fourth Amendment because “at least as currently applied, it effectively bars or substantially deters any challenge to the propriety of an NSL request.”⁸⁴ The court also concluded that the statute’s permanent ban on disclosure of an NSL request “operate[d] as an unconstitutional prior restraint on speech in violation of the First Amendment.”⁸⁵

In response to the ISP’s claim that § 2709 could be used to violate the First Amendment rights of anonymous speech and association of ISP customers (the targets, rather than the recipients, of the NSLs), the *Doe I* court concluded that the law “may, in a given case, violate a subscriber’s First Amendment privacy rights . . . if judicial review is not readily available to an ISP that receives an NSL.”⁸⁶ The government, drawing comparisons to the third-party doctrine in

⁸² *Id.* at 475.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 506.

Fourth Amendment law,⁸⁷ claimed that “an internet speaker relinquishes any interest in anonymity, and any protected claim to that information as soon as he releases his identity and other information to the ISP.”⁸⁸ The court, however, rejected this reasoning, noting that the right to engage in anonymous internet speech was well established and that “[n]o court had adopted the Government’s argument that . . . anonymous internet speech or associational activity ceases to be protected [just] because a third-party ISP is in possession of the [speaker’s] identifying information.”⁸⁹ Such a holding, the court concluded, would allow anonymous speakers to be “unmasked” by a mere civil or trial subpoena without requiring the government “to provide any heightened justification for revealing the speaker.”⁹⁰

The *Doe I* court focused in particular on the nature of Internet communication, noting that while a customer may have no First Amendment interest in the compelled disclosure of transactional information by his or her phone company or bank, Internet records “differ substantially” for First Amendment purposes.⁹¹ The court explained that the “electronic communication transactional records” that ISPs must provide in response to NSL requests would include logs of e-mail addresses with which the target had corresponded and web

⁸⁷ As discussed in Chapter 1, under the third-party doctrine, individuals are considered to have no reasonable expectation of privacy, and thus no Fourth Amendment claim, in information that they have exposed to a third party. See *United States v. Miller*, 425 U.S. 435, 442 (1976).

⁸⁸ *Doe I*, 334 F. Supp. 2d at 508.

⁸⁹ *Id.*

⁹⁰ *Id.* at 509.

⁹¹ *Id.*

pages the target had visited.⁹² The court stated further that transactional records could also reveal “the anonymous message boards to which a person logs on or posts, the electronic newsletters to which he subscribes, and the advocacy websites he visits.”⁹³

The *Doe I* court recognized that there could be situations in which an ISP customer’s First Amendment rights would be outweighed by the government’s compelling interests in obtaining records from ISPs, and the opinion emphasized that it was not attempting to define the scope of these rights in the NSL context. On this point, the opinion explained:

The Court holds only that such fundamental rights are certainly implicated in some cases in which the Government may employ § 2709 broadly to gather information, thus requiring that the process incorporate the safeguards of some judicial review to ensure that if an infringement of those rights is asserted, they are adequately protected through fair process in an independent neutral tribunal.⁹⁴

In striking down the statute, the *Doe I* court emphasized the weighty interests on both sides of the case. The court explained that “[n]ational security is a paramount value” and that the government, in order to properly perform its national security functions, “must be empowered to respond promptly and effectively to public exigencies as they arise.”⁹⁵ However, the *Doe I* opinion also cautioned that “cases engendering intense passions and urgencies to unencumber the Government . . . often pose the gravest perils to personal liberties” and that

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 511.

⁹⁵ *Id.* at 476.

times of crisis require “heightened vigilance, especially by the judiciary, to ensure that, as a people and as a nation, we steer a principled course faithful and true to our still-honored founding values.”⁹⁶

Nearly a year after the decision in *Doe I*, the federal district court for the District of Connecticut reached a similar conclusion on the constitutionality of § 2709’s non-disclosure provision in *Doe v. Gonzales* (“*Doe II*”).⁹⁷ In that case, an anonymous library received an NSL requesting “any and all subscriber information, billing information and access logs of any person or entity related to” a library computer.⁹⁸ The court granted the library’s request for a preliminary injunction barring enforcement of the non-disclosure provision to prevent it from revealing its identity as the recipient of an NSL, concluding that, as applied, the provision could not survive the strict scrutiny review required for prior restraints on speech.⁹⁹

The two *Doe* cases were consolidated on appeal to the U.S. Court of Appeals for the Second Circuit as *Doe I v. Gonzales* (“*Doe III*”).¹⁰⁰ In the meantime, however, Congress amended the NSL statutes to respond to the federal district courts’ rulings in *Doe I* and *Doe II* and other concerns about NSL use.

⁹⁶ *Id.* at 478.

⁹⁷ *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005) [hereinafter *Doe II*].

⁹⁸ *Id.* at 70.

⁹⁹ *Id.* at 82.

¹⁰⁰ *See Doe I v. Gonzales*, 449 F.3d 415 (2d Cir. 2006) [hereinafter *Doe III*].

Two separate bills amending the NSL statutes were enacted on March 9, 2006.¹⁰¹ The first, the USA PATRIOT Improvement and Reauthorization Act of 2005, created a judicial review procedure for NSL requests, allowing an NSL recipient to petition a federal district court “for an order modifying or setting aside the request” and providing that the court may provide such relief “if compliance [with the request] would be unreasonable, oppressive, or otherwise unlawful.”¹⁰² The act also created a judicial review procedure allowing an NSL recipient to contest NSL nondisclosure orders¹⁰³ and made various additional amendments to the nondisclosure provisions.¹⁰⁴ Finally, the act expanded congressional oversight of NSL use¹⁰⁵ and directed the Inspector General of the Department of Justice to “perform an audit of the effectiveness and use, including any improper or illegal use, of national security letters” issued by the Department from 2003 to 2006.¹⁰⁶ The second bill, the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, contained additional amendments to the NSL statutes, in particular, making clear that an NSL recipient could disclose receipt of an NSL request to an attorney to obtain legal advice or assistance.¹⁰⁷

¹⁰¹USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006); USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 278 (2006).

¹⁰² Pub. L. No. 109-177, § 115, 120 Stat. 192, 211 (2006), codified at 18 U.S.C. § 3511.

¹⁰³ *Id.*

¹⁰⁴ *See id.* §§ 116, 117, 120 Stat. 213-17.

¹⁰⁵ *Id.* § 118, 120 Stat. 217-18 (requiring semiannual reports to Congress on NSL requests and an annual report setting forth the number of NSL requests made under each of the NSL statutes).

¹⁰⁶ *Id.* § 119.

¹⁰⁷ Pub. L. No. 109-178, § 4, 120 Stat. 278, 280-81 (2006).

In light of these amendments, the Second Circuit vacated *Doe I* and remanded the case to the federal district court to reconsider the ISP's First Amendment challenge to the nondisclosure provision under the new statute.¹⁰⁸ The court noted that in light of the amendments allowing NSL recipients to challenge the issuance of NSLs in court, the ISP had dropped its Fourth Amendment claim to the document production provisions of the statute on appeal.¹⁰⁹ The court did not mention the ISP's claim that the document production provision violated the First Amendment, but because that claim also was predicated on the unavailability of judicial review, it may have been dropped on appeal. In any case, following the circuit court's decision, the government decided that it would not seek to enforce the underlying NSL, thus taking the First Amendment challenge to the document production provisions off the table on remand.¹¹⁰ The Second Circuit dismissed *Doe II* on procedural grounds, holding that the library's claims were moot because the government conceded that the plaintiff could reveal its identity as the recipient of an NSL.¹¹¹

On remand, the *Doe I* federal district court considered the ISP's First Amendment challenge to the non-disclosure provisions and held the modified provisions to be unconstitutional.¹¹² On appeal, the Second Circuit affirmed much of the district court's reasoning, but interpreted the statute in a way that

¹⁰⁸ *Doe III*, 449 F.3d 415, 419 (2d Cir. 2006).

¹⁰⁹ *Id.* at 419-20.

¹¹⁰ *Doe v. Gonzales*, 500 F. Supp. 2d 379, 385 n.3 (S.D.N.Y. 2007) [hereinafter *Doe IV*].

¹¹¹ *Doe III*, 449 F.3d at 421.

¹¹² *Doe IV*, 500 F. Supp. 2d at 385-86.

significantly narrowed the circumstances in which a nondisclosure order could be upheld in order to remedy the district court's concerns while avoiding striking down most of the statute.¹¹³ The circuit court did, however, agree that provisions requiring recipients, rather than the government, to initiate judicial review of nondisclosure orders and requiring that judges give extraordinary deference to certain determinations of executive officials in reviewing such orders were unconstitutional under the First Amendment.¹¹⁴

The *Doe* litigation is important because it resulted in significant amendments to the NSL statutes that alleviated some of the First Amendment concerns. It also suggested that in addition to the obvious First Amendment concerns stemming from the nondisclosure orders, the use of NSLs in certain circumstances implicated the First Amendment rights of speech and association of the NSL targets. Finally, the *Doe* litigation served to draw congressional attention to concerns about the use of NSLs.

Part III: The Inspector General's Reports

One of the results of this congressional focus on NSLs was a series of investigations into the use of NSLs by the Inspector General of the U.S. Department of Justice ("IG"). The 2006 amendments to the NSL statutes directed the IG to review the department's use of NSLs and document any abuses.¹¹⁵ In response to this directive, the IG issued two reports that documented widespread

¹¹³ *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008) [hereinafter "*Doe V*"].

¹¹⁴ *Id.* at 881-83.

¹¹⁵ *See supra* note 106 and accompanying text.

misuse of NSL authority and spawned a new round of calls for reform. The findings of the reports also led to a request for a third IG report, focused on the FBI's use of so-called "exigent letters" to circumvent certain requirements of the NSL statutes.

The first IG report, which was released in March 2007, covered NSL use from 2003 to 2005. The 2007 report outlined the dramatic increase in NSL use from 8,500 requests per year in 2000 to 47,000 in 2005.¹¹⁶ The IG's report also documented a rise in the use of NSLs to investigate Americans; the percentage of NSL requests generated from investigations of Americans rose from 39 percent in 2003 to 53 percent in 2005.¹¹⁷ The report found abuses of NSL authority in both the FBI field offices and at FBI Headquarters. A sample of 293 NSLs issued by four FBI field offices turned up twenty-two NSL-related violations of statutes or directives that were not reported to the appropriate authorities.¹¹⁸ The IG attributed the violations to "confusion about the authorities available under the various NSL statutes," rather than intentional misconduct.¹¹⁹ The IG also found widespread abuse of NSL authority by units of the FBI Headquarters Counterterrorism Division. Perhaps the most troubling discovery was that Counterterrorism Division personnel who were not authorized to sign NSLs under ECPA had been issuing so-called "exigent letters" to request toll billing records or subscriber information for approximately 3,000 phone numbers from three

¹¹⁶ OIG 2007 Report, *supra* note 2, at 120.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at xxix.

¹¹⁹ *Id.* at xxxiii.

companies.¹²⁰ These letters stated that the records were being requested due to “exigent circumstances” and claimed that subpoenas from the U.S. Attorney’s Office would follow as quickly as possible.¹²¹ In most cases, however, the IG’s report found that “there was no documentation associating the requests with pending national security investigations.”¹²²

The second IG report, released in March 2008, reviewed the FBI’s use of NSLs in 2006 and the corrective measures that the FBI had taken following the issuance of the first IG report.¹²³ The second IG report found that the annual number of NSL requests continued to increase, hitting 49,425 in 2006,¹²⁴ and that the percentage of requests generated from investigations of Americans also continued to rise, reaching 57 percent in 2006.¹²⁵ The report also concluded that the FBI had made “significant progress” in addressing the problems identified in the 2007 report, although it was “too early to definitively state whether the new systems and controls developed by the FBI and the Department [of Justice] will eliminate fully the problems” the IG identified.¹²⁶

¹²⁰ *Id.* at xxxiv-xxxvi.

¹²¹ *Id.* at xxxiv.

¹²² *Id.*

¹²³ Office of the Inspector Gen., U.S. Dep’t of Justice, A Review of the FBI’s Use of National Security Letters: An Assessment of Corrective Actions and Examination of NSL Usage in 2006 (2008) [hereinafter *OIG 2008 Report*], available at <http://www.justice.gov/oig/special/s0803b/final.pdf>.

¹²⁴ *Id.* at 8.

¹²⁵ *Id.* at 9.

¹²⁶ *Id.* at 8.

The IG's discovery in its first report that the FBI had circumvented the ECPA NSL statute to request information for approximately 3,000 phone numbers using so-called "exigent letters" led to a third report, released in January 2010, that reviewed these requests and other informal requests for telephone records.¹²⁷ The IG had previously concluded that these exigent letters contained factual misstatements and were sometimes used in non-exigent circumstances.¹²⁸ The heavily redacted unclassified version of the third report detailed numerous violations of the law and department policy. Notably, the report found that in the course of a leak investigation involving a potential violation of the Espionage Act, the FBI had used an exigent letter to collect telephone records of seven numbers assigned to reporters without complying with department policy governing subpoenas for the production of reporters' telephone toll billing records.¹²⁹

The section of the third IG report that discusses this exigent letter is heavily redacted, but the report describes a letter requesting telephone toll records for seven phone numbers belonging to *New York Times* and *Washington Post* reporters.¹³⁰ While all references to the dates of the requests, the names or locations of the reporters, or the subject matter of the investigation have been redacted, it appears, based on later media coverage, that the phone numbers were assigned to three reporters and a researcher covering Islamic terrorism in

¹²⁷ Office of the Inspector Gen., U.S. Dep't of Justice, A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records (2010) [hereinafter *OIG 2010 Report*], available at <http://www.justice.gov/oig/special/s1001r.pdf>.

¹²⁸ *Id.* at 2.

¹²⁹ *Id.* at 89.

¹³⁰ *Id.* at 92-94.

Southeast Asia while working from Jakarta, Indonesia.¹³¹ Just days after the exigent letter was issued, the FBI received records of 1,627 phone calls, only three of which actually fell within the period of interest relevant to the investigation.¹³²

The department policy referenced in the third report is a set of self-imposed guidelines created by the Department of Justice to govern subpoenas to members of the news media and subpoenas for telephone toll records of any member of the media.¹³³ The guidelines direct attorneys to make “all reasonable attempts . . . to obtain information from alternative sources before considering issuing” such a subpoena.¹³⁴ They also require that the department pursue negotiations with the affected member of the media prior to issuing a subpoena, except in those cases involving telephone toll records when an Assistant Attorney General determines that such negotiations would pose a “substantial threat to the integrity of the investigation.”¹³⁵ Reporters must be notified ahead of time that the government intends to issue a subpoena for their toll records, or, when such notice cannot be made ahead of time, it must be provided as soon as “it is determined that such notification will no longer pose a clear and substantial threat

¹³¹ The OIG 2010 Report states that the breaches were eventually disclosed to the newspapers’ editors on August 8, 2008. *Id.* at 101. The next day, an article in *The Washington Post* stated that the FBI had admitted to breaching the phone records of a *Post* writer based in Jakarta, a researcher in the paper’s Jakarta bureau, and two *New York Times* reporters who worked in Jakarta. Carrie Johnson, *FBI Apologizes to Post, Times*, WASH. POST, Aug. 9, 2008, at A4, <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/08/AR2008080803603.html>.

¹³² OIG 2010 Report, *supra* note 127, at 95-96.

¹³³ 28 C.F.R. § 50.10 (2009).

¹³⁴ *Id.* § 50.10(b).

¹³⁵ *Id.* § 50.10(c)-(d).

to the integrity of the investigation.”¹³⁶ In criminal cases, the guidelines require reasonable grounds to believe that a crime has occurred and that the information “sought is essential to the successful investigation of that crime.”¹³⁷ Subpoenas for telephone records of members of the media also require approval by the Attorney General.¹³⁸ The goal in each case is “to strike the proper balance between the public’s interest in the free dissemination of ideas and information and the public’s interest in effective law enforcement and the fair administration of justice.”¹³⁹

Although the guidelines predate the adoption of the NSL statutes and refer only to subpoenas, the IG’s third report makes clear that the department now interprets the guidelines to apply to NSLs. While the guidelines may offer some protection against the use of certain types of NSLs to collect reporters’ records, it should be noted that this protection is fairly limited. First, the guidelines apply only to subpoenas *issued to* reporters or subpoenas for reporters’ *telephone toll records*. Therefore, at best, the guidelines apply only to NSLs issued pursuant to the ECPA NSL statute, and even then, only to the subset of NSLs that deal with telephone toll records, as opposed to telephone subscriber information or records from ISPs. Second, even when the guidelines do apply, the decision to issue a subpoena for telephone toll records remains at the discretion of the Attorney General rather than a neutral magistrate, and the guidelines make clear that they

¹³⁶ *Id.* § 50.10(g)(2)-(3).

¹³⁷ *Id.* § 50.10(g)(1).

¹³⁸ *Id.* § 50.10(e).

¹³⁹ *Id.* § 50.10(a).

“are not intended to create or recognize any legally enforceable right in any person.”¹⁴⁰ Finally, as the IG’s report demonstrates, these guidelines are not always followed. In addition to the incident described above, the IG also identified two instances in which the department failed to follow the guidelines in issuing grand jury subpoenas for reporter’s telephone records.¹⁴¹

Despite ongoing concerns about the use and impact of NSLs, Congress has rejected the opportunity to further reform the NSL statutes. Although a number of bills proposed in 2009 would have further limited the use of NSLs while renewing certain expiring provisions of the Patriot Act,¹⁴² in February 2010 Congress passed a one-year extension of the expiring Patriot Act provisions without these or other reforms.¹⁴³ The use of NSLs, however, continues to receive scrutiny. In June 2010, the Inspector General notified Sen. Patrick Leahy, Chairman of the Senate Judiciary Committee, of his intention to conduct a fourth review of the use of NSLs. According to the IG, this review will examine the FBI’s progress in responding to the IG’s recommendations in prior reports and will also examine the number of NSLs issued from 2007 to 2009.¹⁴⁴

¹⁴⁰ *Id.* § 50.10(n).

¹⁴¹ OIG 2010 Report, *supra* note 127, at 104-22.

¹⁴² *See, e.g.*, Patriot Act Sunset Extension Act of 2009, S. 1692, 111th Cong. (2009); USA PATRIOT Amendments Act of 2009, H.R. 3845, 111th Cong. (2009). These bills will be discussed in detail in Chapter 5.

¹⁴³ *See* H.R. 3961, 111th Cong. (2010).

¹⁴⁴ Letter from Glenn A. Fine, Inspector Gen., U.S. Dep’t of Justice, to Sen. Patrick Leahy (June 15, 2010), *available at* <http://judiciary.senate.gov/resources/documents/111thCongress/upload/061510FineToLeahy.pdf>.

Conclusion

NSLs have evolved from a limited exception to laws designed to provide privacy protections to a popular investigative tool subject to widespread abuse. While this development is troubling to privacy advocates, it should also be troubling to journalists. The use of NSLs to secretly collect phone records and e-mail transactional information provides the government with the opportunity to discover reporters' confidential sources without notice to the reporter and, unless the provider chooses to contest the NSL, without any judicial oversight. While the Department of Justice Guidelines may provide some measure of protection against collection of journalists' records, this protection is limited to phone records only and occurs at the discretion of the executive branch. Moreover, as the third IG report demonstrates, these guidelines are sometimes simply ignored.

There is no evidence in the legislative history of the NSL statutes or their amendments that Congress considered the burden that NSLs may pose to First Amendment newsgathering rights. While the Patriot Act amendments did provide protection against the use of NSLs for investigations conducted solely on the basis of protected First Amendment activities, this protection would probably only apply to a narrow class of cases and would certainly not apply if the government was investigating an illegal leak to a reporter. Whether targets of an NSL may have a constitutional First Amendment right against the use of NSLs to collect their records remains an open question after the *Doe* litigation, although the district court's ruling suggests that the existence of such a right would depend on whether the underlying activities are of a type that is at the core of First

Amendment protection. In order to determine whether journalists may have a First Amendment right against being targeted by NSLs, the next chapter assesses the degree of First Amendment protection that has been extended to newsgathering activities.

CHAPTER 3

FIRST AMENDMENT PROTECTION AGAINST GOVERNMENT INTRUSION INTO THE NEWSGATHERING PROCESS

Although the Supreme Court has acknowledged that newsgathering is entitled to at least some level of First Amendment protection,¹ its decisions do not make clear the boundaries or robustness of this protection. There are two broad categories of First Amendment newsgathering claims that have been considered by the court: those involving claims of an affirmative right of access to information or areas controlled by the government and those involving claims that the government was actively intruding into the newsgathering process. As to the former category of cases, the Court has upheld a First Amendment right of access of the press and public to criminal trials and related proceedings,² but has generally rejected other access claims.³ The Court addressed the latter category of newsgathering claims in two cases—*Branzburg v. Hayes*⁴ and *Zurcher v.*

¹ See *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972) (noting that “news gathering is not without its First Amendment protections”).

² See *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

³ See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (rejecting a claim that the media has a special First Amendment right of access to jails); *Pell v. Procunier*, 417 U.S. 817 (1974) (rejecting a claim that the media have a special First Amendment right of access to prisons); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (holding that journalists do not have a First Amendment right to interview prisoners).

⁴ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Stanford Daily.⁵ In its 1972 decision in *Branzburg*, the Court held that the First Amendment did not protect journalists against having to reveal confidential sources pursuant to a grand jury subpoena.⁶ Six years later, the Court held in *Zurcher* that the First Amendment did not bar law enforcement searches of a newsroom pursuant to a warrant.⁷ However, while the Court ultimately ruled against the newsgathering claims at issue, language in both decisions supports the notion that interference with the newsgathering process implicates First Amendment interests. In both cases, the Court also noted that to the extent that First Amendment concerns do arise, existing procedural protections can sufficiently guard First Amendment interests.

The fact that the *Branzburg* and *Zurcher* majorities rejected the specific newsgathering claims at issue while still supporting at least some First Amendment protection for news gathering generally—along with an enigmatic concurrence by Justice Powell in *Branzburg*—left lower federal courts without clear guidance for assessing future newsgathering claims. The appellate courts have generally provided the most robust protection to newsgathering interests when the government directly interferes with newsgathering activities—for example, by barring the media from contacting jurors following the conclusion of high-profile trials.⁸ The courts have provided only minimal protection for

⁵ *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

⁶ *Branzburg*, 408 U.S. at 667.

⁷ *Zurcher*, 436 U.S. at 565.

⁸ *See, e.g.*, *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994); *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982).

newsgathering interests, however, when they view the link between the government action and the alleged harm to newsgathering as more attenuated—for instance, in assessing claims that requiring reporters to testify about confidential sources will impede reporters’ ability to gather confidential information in the future. Even in these cases, the circuits have varied in the protection afforded to newsgathering interests, with some circuits requiring the government to make a heightened showing of need before compelling a reporter’s testimony and others merely requiring that the subpoena have been issued in good faith.

Part I of this chapter provides a detailed discussion of the *Branzburg* and *Zurcher* decisions, the two cases in which the Supreme Court has considered challenges to government intrusion into the newsgathering process. Part II then describes federal courts of appeals decisions on claims involving government intrusion into the newsgathering process, focusing on five broad categories of cases involving: subpoenas of reporters, searches and seizures of reporters, subpoenas for journalists’ phone records from third-party providers, restrictions on trial coverage, and restrictions on exit polling.

Part I: Newsgathering Claims in the Supreme Court

The Supreme Court’s jurisprudence on First Amendment newsgathering claims has generally drawn a clear line between claims for an affirmative right of access to information or places in the control of the government for newsgathering purposes and claims for protection against government intrusion

into the newsgathering process. As to the former class of claims, while the Court has recognized a First Amendment right of the press and the public to attend criminal trials⁹ and related court proceedings,¹⁰ it has generally rejected First Amendment-based access claims in other contexts.¹¹ As to the latter class of claims, while the Court’s decisions in *Branzburg* and *Zurcher* ultimately rejected the journalists’ claims, the majority opinions in both cases contained language recognizing that intrusions on newsgathering invoke First Amendment concerns. The Court’s analysis in both cases also noted the availability of procedural protections—the ability to contest a subpoena by a motion to quash and the requirement of a neutral magistrate assessing a warrant—to adequately protect newsgathering rights on a case-by-case basis.

In *Branzburg v. Hayes*, the Court held that the First Amendment guarantees of freedom of speech and freedom of the press did not provide journalists with a right to refuse to testify in front of a grand jury.¹² At the same time, however, the Court recognized that newsgathering is entitled to at least

⁹ *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576-77 (1980) (“The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.”).

¹⁰ *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (recognizing a First Amendment right of access to jury selection proceedings in criminal trials); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (recognizing a right of access to preliminary hearings in criminal cases).

¹¹ *See Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (holding that the media have no special First Amendment right of access to jails); *Pell v. Procunier*, 417 U.S. 817, 850 (1974) (holding that “[n]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public”); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (holding that a Bureau of Prisons policy barring prisoner-press interviews did not violate the First Amendment).

¹² *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

some degree of First Amendment protection,¹³ and language in the majority opinion and Justice Powell's concurrence suggested that there may be circumstances in which First Amendment concerns would provide a basis for journalists to avoid compelled testimony.¹⁴

Branzburg involved the consolidated claims of three journalists, each of whom had been called to testify before a grand jury about potential criminal activity they had observed or learned about in the course of interactions with confidential sources.¹⁵ According to the *Branzburg* Court, the journalists objected to testifying on First Amendment grounds, explaining:

that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment.¹⁶

The journalists did not claim an absolute privilege against testifying. Instead, their argument, as summarized by the Court, was that a reporter should not be forced to testify before a grand jury or at a trial unless there are sufficient grounds

¹³ *Id.* at 681 (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”).

¹⁴ *Id.* at 707 (“[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.”); *Id.* at 709 (Powell, J., concurring) (“The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in the safeguarding of their sources. . . . The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”).

¹⁵ *Id.* at 667-76.

¹⁶ *Id.* at 679-80.

to believe: 1) that the reporter has information relevant to the crime at issue; 2) that this information is not available from other sources; and 3) that “the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interest occasioned by the disclosure.”¹⁷ As the Court explained, “The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.”¹⁸

While the *Branzburg* Court disavowed the suggestion that news gathering was without First Amendment protection and recognized that “without some protection for seeking out the news, freedom of the press could be eviscerated,”¹⁹ it nonetheless held that a journalist did not have a First Amendment-based privilege to refuse to provide testimony to a lawfully-convened grand jury conducting a good faith investigation of an alleged crime about which the reporter has relevant information.²⁰ The Court characterized the burden imposed by requiring a reporter to respond to grand jury subpoenas as relatively minimal, stating that the consolidated cases did not restrict speech, impose a prior restraint on publication, compel the press to publish information it wanted to withhold, or require the press to “indiscriminately” disclose the identity of sources on request.²¹ Instead, the Court explained, reporters were simply being asked to

¹⁷ *Id.* at 680.

¹⁸ *Id.*

¹⁹ *Id.* at 681.

²⁰ *Id.* at 690-91.

²¹ *Id.* at 681-82.

fulfill a duty expected of all citizens—to respond to grand jury subpoenas and answer questions relevant to a criminal investigation.²² The First Amendment, the Court concluded, “does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability”²³ Rather, prior cases demonstrated that “otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.”²⁴

At the same time, the *Branzburg* Court highlighted the “ancient role” of the grand jury and its importance in the American criminal justice system.²⁵ Not only are grand jury proceedings a constitutional mandate in many prosecutions, the Court explained, they also play a crucial role in protecting citizens against unfounded prosecutions.²⁶ The public’s strong interest in law enforcement and effective grand jury proceedings, the Court concluded, outweighed the “consequential, but uncertain, burden on news gathering that is said to result”

²² *Id.* at 682.

²³ *Id.*

²⁴ *Id.* The Court cited, *inter alia*, *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (holding that the Associated Press was not exempt from the requirements of the National Labor Relations Act), *Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186, 192-93 (1946) (rejecting a claim that applying the Fair Labor Standards Act to a newspaper publishing business violated the First Amendment), and *Associated Press v. United States*, 326 U.S. 1 (1945) (rejecting claims that the First Amendment barred application of the Sherman Act to a newsgathering organization).

²⁵ *Id.* at 686 (citing *Wood v. Georgia*, 370 U.S. 375, 390 (1962) (“Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.” (footnote omitted))).

²⁶ *Id.* at 686-87.

from compelling grand jury testimony by reporters.²⁷ The majority dismissed concerns that this holding would broadly threaten confidential relationships between reporters and their sources.²⁸ Using history as its guide, the Court explained that the common law did not recognize a reporter's privilege and that the press had operated without a constitutional privilege since the nation's founding, yet the lack of such protection had not been an obstacle to the press's use of anonymous sources.²⁹

While the Court categorically rejected a reporter's privilege to avoid testifying pursuant to a good faith grand jury subpoena, its opinion does not make clear whether this rejection extends to other contexts. While the Court explained that the "sole issue before [it] is the obligation of reporters to respond to grand jury subpoenas,"³⁰ its language elsewhere suggests a rejection of reporter's privilege generally.³¹ However, the Court also suggested that there is an exception to this rule even in the grand jury context, noting that grand jury investigations "instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment."³² The Court explained that in such situations, procedural protections are available to guard First Amendment rights: "Grand juries are subject to judicial control and

²⁷ *Id.* at 690.

²⁸ *Id.* at 691.

²⁹ *Id.* at 698-99.

³⁰ *Id.* at 682.

³¹ *See id.* at 703 ("The administration of a constitutional newsmen's privilege would present practical and conceptual difficulties of a high order.").

³² *Id.* at 707.

subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.”³³

Efforts to discern the scope of the *Branzburg* Court’s holding are further complicated by a two-page concurrence by Justice Powell. Powell, who joined the five-justice majority opinion, wrote a separate concurrence noting the “limited nature” of the Court’s holding.³⁴ The majority’s holding, Powell said, did not mean that reporters subpoenaed to testify before a grand jury “are without constitutional rights with respect to the gathering of news or in safeguarding their sources.”³⁵ Powell explained that if a reporter believed that an investigation was not being conducted in good faith, that the information sought had only a “remote and tenuous relationship to the subject of the investigation,” or that his or her testimony implicated relationships with confidential sources without a legitimate need by law enforcement, the reporter may move to quash the subpoena. He further explained that the claim to privilege “should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony.”³⁶ When Powell’s apparent support for a qualified privilege is added to the votes of the four dissenting justices, all of

³³ *Id.* 708.

³⁴ *Id.* at 709 (Powell, J., concurring).

³⁵ *Id.*

³⁶ *Id.* at 710.

whom supported at least a qualified reporter's privilege,³⁷ it appears that a five-justice majority recognized at least some type of privilege for a reporter subpoenaed by the grand jury. The significance of Powell's concurrence has thus become a point of debate in lower courts considering privilege claims.

Six years after the *Branzburg* decision, the Supreme Court again took up a claim of First Amendment protection against government intrusion into the newsgathering process in *Zurcher v. Stanford Daily*.³⁸ In that case, police officers executed a warrant to search the newsroom of Stanford University's student newspaper after the paper published articles and photographs relating to a protest in which two officers were injured.³⁹ The warrant did not allege that members of the newspaper staff were involved in any crime, but instead was based on the probable cause to believe that the newspaper had unpublished photographs relevant to the identities of the attackers.⁴⁰ The newspaper and several members of its staff sued in federal district court, alleging, *inter alia*, that the search violated the First and Fourth amendments.⁴¹ The newspaper claimed that searches of its premises would "seriously threaten the ability of the press to gather,

³⁷ Justice Douglas would have recognized an absolute reporter's privilege. *Id.* at 712 (Douglas, J., dissenting) ("[I]n my view a newsman has an absolute right not to appear before a grand jury . . ."). Justice Stewart, joined by Justices Brennan and Marshall, called for a qualified privilege. *Id.* at 743 (Stewart, J., dissenting) ("W]hen a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information." (footnotes omitted)).

³⁸ *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

³⁹ *Id.* at 550-51.

⁴⁰ *Id.* at 551.

⁴¹ *Id.* at 552.

analyze, and disseminate news”⁴² because: 1) searches physically disrupt the newsroom; 2) confidential sources will “dry up” due to fears that confidential press files would be “readily available to the authorities”; 3) reporters will be deterred from preserving their work product; 4) the dissemination of news will be “chilled by the prospects that searches will disclose internal editorial deliberations”; and 5) the press will engage in “self-censorship to conceal its possession of information of potential interest to the police.”⁴³

In a 5-3 opinion, the Supreme Court rejected the lower courts’ imposition of a special standard to govern newsroom searches under warrant and held instead that First Amendment interests can be adequately protected by a neutral magistrate applying with “particular exactitude” the Fourth Amendment requirements of probable cause, specificity with regard to the location to be searched and the items to be seized, and overall reasonableness.⁴⁴ The *Zurcher* Court acknowledged historic concerns that the “unrestricted power of search and seizure” could be used to stifle free expression,⁴⁵ but explained that the Framers had addressed these concerns by subjecting searches to a test of reasonableness, as determined by a neutral magistrate, rather than by subjecting searches involving the press to special rules.⁴⁶ In other words, any First Amendment

⁴² *Id.* at 563.

⁴³ *Id.* at 563-64.

⁴⁴ *Id.* at 565.

⁴⁵ *Id.* at 564 (quoting *Marcus v. Search Warrant*, 37 U.S. 717, 729 (1961)).

⁴⁶ *Id.* at 565.

concerns could be factored into the magistrate's analysis of the reasonableness of the search:

There is no reason to believe, for example, that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper. Nor, if the requirements of specificity and reasonableness are properly applied, policed, and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions.⁴⁷

The Court cautioned, however, that “[w]here presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field.”⁴⁸

Thus, even while recognizing that First Amendment rights are implicated when the government conducts searches of newsrooms, the Court concluded that existing procedural protections were sufficient to guard these rights against any abuses. As it did in *Branzburg*, the Court rejected arguments that its holding would cause confidential sources to dry up, noting that whatever “incremental effect” search warrants had in this area “does not make a constitutional difference.”⁴⁹

The *Zurcher* decision ultimately had only a limited impact on the searches of newsrooms. Just two years later, Congress responded to *Zurcher* by passing the Privacy Protection Act of 1980, which barred searches for or seizures of journalists’ work product or other documentary materials by law enforcement

⁴⁷ *Id.* at 566.

⁴⁸ *Id.* at 564.

⁴⁹ *Id.* at 566. The Court noted that there had been very few instances of warrants for newsroom searches and that, moreover, the press “is not easily intimidated.” *Id.*

officials at all levels of government, with only limited exceptions.⁵⁰ The law was based on Congress' conclusion that, contrary to the Court's holding, "the search warrant procedure in itself does not sufficiently protect the press."⁵¹ As the Senate Judiciary Committee explained, the new restrictions on searches would force law enforcement officials to first subpoena or otherwise request materials in the hands of the press, thereby reducing "the threat that [*Zurcher*] poses to the vigorous exercise of First Amendment rights."⁵² This statute, rather than *Zurcher*, now governs newsroom searches, although *Zurcher*'s constitutional analysis of the First Amendment issues remains good law.

Branzburg and *Zurcher* establish that the First Amendment extends at least some degree of protection to newsgathering, although the precise boundaries of that protection are not made clear in either decision. In both cases, the Court recognized that the government action at issue implicated news gathering but rejected arguments calling for a press-specific standard. Instead, the Court

⁵⁰ Privacy Protection Act of 1980, § 101, Pub. L. No. 99-440, 94 Stat. 1879 (codified as amended at 42 U.S.C. § 2000aa (2006)). The act does not refer to "journalists" specifically, but rather applies to persons "reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." *See id.* There are two exceptions to the general bar on searches for or seizures of journalists' work product materials: 1) if there is probable cause to believe that the person in possession of the protected materials "has committed or is committing the criminal offense to which the materials relate," except if the offense "consists of the receipt, possession, communication, or withholding of such materials or the information contained therein," and 2) if "there is reason to believe the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being." *Id.* at § 101(a). These exceptions also apply to the bar on searches for or seizures of documentary materials other than work product in the possession of journalists, along with additional exceptions when "there is reason to believe that the giving of notice pursuant a subpoena duces tecum would result in the destruction, alteration, or concealment of such materials" and when a subpoena has been unsuccessful and other remedies have been exhausted. *Id.* at § 101(b).

⁵¹ S. REP. NO. 96-874, at 4 (1980).

⁵² *Id.* at 4-5.

explained that the government's law enforcement interests outweighed the "incidental" burdens on newsgathering and noted that generally applicable procedural protections—like judicial supervision of grand juries or magistrate approval of search warrants—were sufficient to guard against potential government abuses.

Part II: Newsgathering Claims in the U.S. Courts of Appeals

The Supreme Court has not addressed a claim of First Amendment protection against government intrusion into the newsgathering process since its decision in *Zurcher*. The federal courts of appeals have thus been left to resolve the scope of *Branzburg* in ruling on privilege claims and to determine the protection afforded to newsgathering activities in the face of other alleged government intrusions, such as court orders limiting post-verdict interviews with jurors or wiretaps of a reporter's phone. As outlined in Chapter 1, the cases discussed in this chapter were gathered through a series of legal database searches, including a search for cases that contained key relevant terms⁵³ and separate searches for cases that had cited the *Branzburg* or *Zurcher* decisions and also contained certain key terms.⁵⁴ The results of these searches were further

⁵³ The search string was: ("newsgathering" or "news gathering" or "gather news") and (journalist! or reporter! or media or news!) and HEADNOTES ("First Amendment" or "U.S. Const. amend. I").

⁵⁴ These searches used the WestLaw citing references function. The citing references search for *Branzburg* was limited using WestLaw's "headnotes" function to cases with headnotes relating to "enforcement of generally applicable laws," "disclosure of sources," "In general, obligation to testify," "privilege," and "journalists." It was further narrowed using Westlaw's "locate" function to cases that also contained term "subpoena" and any word that had "reporter," "journalist," or "news" as its root. The citing references search for *Zurcher* was limited to decisions containing the term "First Amendment" and the term "journalist, reporter, media, or news" (or any word with those terms as its root).

limited by a case-by-case examination to focus on only those decisions involving an *affirmative* intrusion on newsgathering that *originated* with the government and that was not the result of a generally applicable criminal law or order banning individuals from sharing certain types of information in general (such as laws restricting the disclosure of classified information or general gag orders banning litigants from speaking about a case).

This research found that the federal appeals courts have considered a First Amendment right against government intrusion on newsgathering in five broad classes of cases involving: subpoenas of reporters, searches and seizures of newsrooms or reporters' materials, subpoenas for journalists' phone records from third-party providers, restrictions on trial coverage that directly limited journalists' newsgathering activities, and restrictions on exit polling. In the remainder of this chapter, each of these classes is discussed in turn, with an extended discussion of the phone records cases due to the factual similarities those cases share with the collection of records via NSLs. Study of these cases reveals that the courts have provided the most robust protection to newsgathering rights when the government directly restricts newsgathering activities, but that they have refused to extend First Amendment protection when the link between the government action and newsgathering interests is more attenuated.

Subpoenas of Reporters

The most common situation in which the courts of appeals have addressed claims of First Amendment newsgathering rights is when a reporter or media organization refuses to comply with a subpoena. *Branzburg* dealt specifically

with grand jury subpoenas, and some language in that opinion could be interpreted to limit its holding to the grand jury context.⁵⁵ At the same time, the majority's decision spoke more broadly of the difficulty courts would face in trying to administer a judicially created reporter's privilege, a concern that would arise for trial subpoenas as well as grand jury subpoenas.⁵⁶ The federal courts of appeals have thus been left to sort out the scope of *Branzburg*'s holding and how it applies to subpoenas in other contexts, including civil and criminal trials and proceedings conducted by agencies. The analysis below focuses on a subset of these cases⁵⁷—those in which the government itself has requested the subpoena seeking to compel the reporter's testimony—that provide the closest parallel to the NSL context, because it is in these cases that the government originates the intrusion on newsgathering rights rather than simply enforcing rights asserted by private parties.

In assessing grand jury subpoenas of reporters or media organizations, the circuit courts have often debated the significance of Justice Powell's *Branzburg* concurrence, which called for a balancing of First Amendment interests and the

⁵⁵ *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972) (“[T]he investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called ‘bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.’” (quoting *Bates v. Little Rock*, 361 U.S. 516, 525 (1960))).

⁵⁶ *Id.* at 703-04 (“We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order.”).

⁵⁷ *In re Grand Jury Subpoena*, 201 F. App'x 430 (9th Cir. 2006); *In re Grand Jury Subpoena*, 397 F.3d 964 (D.C. Cir. 2005); *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004); *In re Shain*, 978 F.2d 850 (4th Cir. 1992); *Storer Commc'ns, Inc. v. Giovan* (*In re Grand Jury Proceedings*), 801 F.2d 580 (6th Cir. 1987); *SEC v. McGoff*, 647 F.2d 185 (D.C. Cir. 1981); *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976).

“obligation of all citizens to give relevant testimony with respect to criminal conduct” when there is evidence that the investigation is not being conducted in good faith, the reporter’s testimony “bear[s] only a remote and tenuous relationship to the subject of the investigation,” or if there is reason to believe the testimony is not related to a “legitimate need of law enforcement.”⁵⁸ The Ninth Circuit tracked this language in its 2006 decision in *In re Grand Jury Subpoena*, which assessed a blogger’s claim that a subpoena to testify in front of a grand jury and produce a video footage he recorded violated his First Amendment rights.⁵⁹ The Ninth Circuit explained that “a limited balancing of First Amendment interests may be conducted only ‘where a grand jury inquiry is not conducted in good faith, or where the inquiry does not involve a legitimate need of law enforcement, or has only a remote and tenuous relationship to the subject of the investigation.’”⁶⁰ Where no one of these conditions applied, according to the court, no balancing was necessary.⁶¹

The D.C. Circuit, on the other hand, held in a 2005 decision that no weight should be placed on Justice Powell’s concurring opinion in *Branzburg*.⁶² In *In re Grand Jury Subpoena*, the court considered journalists Judith Miller and Matthew

⁵⁸ *Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring).

⁵⁹ *In re Grand Jury Subpoena*, 201 F. App’x 430, 431 (9th Cir. 2006).

⁶⁰ *Id.* at 432 (quoting *Scarce v. United States*, 5 F.3d 397, 401 (9th Cir. 1983)).

⁶¹ *Id.*

⁶² *In re Grand Jury Subpoena*, 397 F.3d 964, 970 (D.C. Cir. 2005) (“Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promoted by the reporter to any source. . . . Without doubt, that is the end of the matter.”).

Cooper's appeals to contempt citations for their refusal to testify before a grand jury investigating a leak outing CIA agent Valerie Plame. The court concluded that regardless of what Justice Powell intended to convey in his concurrence, he joined the majority's opinion,⁶³ and that opinion rejected the existence of a First Amendment reporter's privilege "in no uncertain terms."⁶⁴

Although the D.C. Circuit refused to recognize a First Amendment reporter's privilege against testifying before a grand jury, this does not mean the court viewed the underlying newsgathering activities as unworthy of any protection at all. In a concurring opinion, Judge David Tatel explained that while the D.C. Circuit had construed *Branzburg* broadly "with respect to criminal investigations," it had recognized a reporter's privilege in the face of a criminal defense subpoena and in the context of civil litigation.⁶⁵ The recognition of a privilege in these contexts suggests that the court does not view the right to protect confidential sources as wholly unworthy of First Amendment protection, but rather that it simply considers this right to be outweighed by law enforcement needs in the context of a criminal investigation.

A similar view of the meaning of *Branzburg* and the protection afforded to newsgathering activities is apparent in the Sixth Circuit's 1987 decision in *Storer*

⁶³ *Id.* at 972.

⁶⁴ *Id.* at 969.

⁶⁵ *Id.* at 988 (Tatel, J., concurring) (citing *United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000); *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974)). Judge Tatel would have recognized a common law privilege protecting against compelled disclosure of reporters' confidential sources. *Id.* at 995.

Communications, Inc. v. Giovan.⁶⁶ In that case, the court denied relief to a television news reporter challenging a state court order holding him in contempt for refusing to comply with a grand jury subpoena demanding he produce videotapes created during the course of reporting on youth gangs.⁶⁷ The court explained that upholding a claim of privilege in this context based on Powell's concurrence would require it to "restructure" the majority's holding in *Branzburg*.⁶⁸ The majority opinion in *Branzburg*, the Sixth Circuit stated, categorically rejected even a conditional or qualified privilege and "discussed at great length the difficulties of administering such a privilege and the policy reasons which argue against its recognition."⁶⁹ This does not mean, however, that there should not be a balancing of interests in some cases, according to the court. The court explained that judges must determine whether the subpoena is intended to harass the reporter, "whether the grand jury's investigation is being conducted in good faith, whether the information sought bears more than a remote and tenuous relationship to the subject of the investigation, and whether a legitimate law enforcement need will be served by forced disclosure of the confidential source relationship."⁷⁰ While this language mirrors that of Powell's concurrence,

⁶⁶ *Storer Comm'ns, Inc. v. Giovan* (In re Grand Jury Proceedings), 810 F.2d 580 (6th Cir. 1987).

⁶⁷ *Id.* at 581-82.

⁶⁸ *Id.* at 583.

⁶⁹ *Id.* at 584.

⁷⁰ *Id.* at 586.

the Sixth Circuit emphasized that “this balancing of interests should not then be elevated . . . to the status of a first amendment constitutional privilege.”⁷¹

Outside of the grand jury context, federal appeals courts have been more willing to provide protection to newsgathering rights in the face of government subpoenas. The First Circuit, in its 2004 decision in *In re Special Proceedings*, considered a reporter’s appeal of a civil contempt order for his refusal to comply with a special prosecutor’s subpoena demanding that he identify a confidential source who provided leaked materials. Although the First Circuit affirmed the order, it explained that testimony “may not be compelled unless directly relevant to a nonfrivolous claim or inquiry undertaken in good faith; and disclosure may be denied where the same information is readily available from a less sensitive source.”⁷²

The Fourth Circuit, however, interpreted the newsgathering interest protected by *Branzburg* narrowly, at least when the reporter invokes the privilege to protect non-confidential information. In its 1992 decision in *In re Shain*, the court affirmed a district court order holding reporters in contempt for refusing to comply with a prosecutor’s subpoena to testify about non-confidential statements.⁷³ The court held that the reporters could not assert a privilege absent evidence that the government intended to harass them or otherwise sought the

⁷¹ *Id.*

⁷² *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (internal citations omitted). The court, however, noted that the extent to which these requirements were constitutional rather than prudential was “unsettled.” *Id.*

⁷³ *In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992).

testimony in bad faith.⁷⁴ As Judge Wilkinson pointed out in his concurrence, however, because a subpoena can only rarely be successfully challenged on the basis of state harassment, the “reportorial interest, as defined by the majority, is not much of an interest at all.”⁷⁵ The majority’s reasoning in *Shain* runs counter to the Fourth Circuit’s 1976 decision in *United States v. Steelhammer*, in which the court held that reporters were not obligated to testify at a civil contempt trial about their observations at a union rally they had been invited to cover.⁷⁶ That decision, which the court emphasized was limited to the facts of that case, held that where the “information could have been adduced for the Court through the testimony of any of many others,” the reporters should not be held in contempt for refusing to testify.⁷⁷ The court explained that its holding did not recognize a reporter’s privilege, but was instead aimed at protecting a privilege of the public by balancing “protection of the public by exacting truth versus protection of the public through maintenance of a free press.”⁷⁸

Finally, the D.C. Circuit, in a 1981 decision considering a newspaper publisher’s challenge to subpoenas issued by the Securities and Exchange Commission in a fraud investigation of the publisher and his companies, upheld a district court judge’s order excluding from the reach of the subpoenas documents related “solely to editorial policy or solely relate[d] to information obtained as

⁷⁴ *Id.*

⁷⁵ *Id.* at 854 (Wilkinson, J., concurring).

⁷⁶ *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976).

⁷⁷ *Id.* at 375.

⁷⁸ *Id.*

part of the process of gathering news for publication.”⁷⁹ Here, the newspaper companies were actually the target of the investigation rather than third parties who merely possessed relevant information. While the D.C. Circuit held that the publisher and his companies had no “special privilege” to withhold information, it also explained that there was a need for “special sensitivity” when it comes to such subpoenas due to the “vital function the press serves in a self-governing society.”⁸⁰ The court thus agreed with the district judge that the subpoenas must be limited in order to avoid “unnecessary encroachment” on activities related to newsgathering and editorial decisions.”⁸¹

Searches and Seizures Involving Reporters

The appellate courts have also considered the impact of First Amendment newsgathering rights in assessing Fourth Amendment-related claims.⁸² The courts have split on whether and in what circumstances the First Amendment imposes special requirements for searches involving journalists. In 1979—after *Zurcher*, but before the passage of the Privacy Protection Act—the D.C. Circuit in *Smith v. Nixon* considered the claims of a *New York Times* reporter and his family for civil damages from federal officials for alleged violations of the First and Fourth Amendments in placing a wiretap on the family’s home phone line.⁸³ The

⁷⁹ SEC v. McGoff, 647 F.2d 185, 187 (D.C. Cir. 1981).

⁸⁰ *Id.* at 191.

⁸¹ *Id.*

⁸² See *Arkansas Chronicle v. Murphy*, 183 F. App’x 300 (4th Cir. 2006); *Desyllas v. Bernstine*, 351 F.3d 934 (9th Cir. 2003); *Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979).

⁸³ *Smith*, 606 F.2d at 1186-87 (D.C. Cir. 1979) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972)).

court relied in part on *Branzburg*'s statement that "newsgathering is not without its First Amendment protections"⁸⁴ in concluding that a wiretap target's employment as a journalist must be taken into account when determining whether surveillance satisfies the Fourth Amendment's "reasonableness" requirement.⁸⁵ The court found further support for this holding in Justice Powell's concurrence in *Zurcher*, which stated that magistrates "'can and should take cognizance of the independent values protected by the First Amendment'" when issuing a warrant.⁸⁶ The court cautioned, however, that its focus on the issues raised by surveillance of a journalist "does not suggest any lesser value of the First Amendment interest" of any target in "not having their private conversations overheard by the government, but simply highlights one feature of this case."⁸⁷

Two other circuits, however, have rebuffed claims that searches or seizures involving journalists involved special constitutional considerations under the First Amendment. In 2006, in *Arkansas Chronicle v. Murphy*, the Fourth Circuit rejected the claim of a part-time newspaper employee that a warrant for a search of his home and the seizure of computers and files belonging to the newspaper had to meet a "heightened standard of particularity."⁸⁸ While the court did not dispute that heightened specificity was required for *some* searches involving items protected by the First Amendment, it held that this requirement

⁸⁴ *Id.* at 1189 (quoting *Branzburg*, 408 U.S. at 707).

⁸⁵ *Id.*

⁸⁶ *Id.* (citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 570 (1978) (Powell, J., concurring)).

⁸⁷ *Id.* at 1190.

⁸⁸ *Arkansas Chronicle v. Murphy*, 183 F. App'x 300, 301-303 (4th Cir. 2006).

did not apply where the seizure “was an attempt to shed evidentiary light” on a crime, rather than to “suppress the ideas contained in the documents.”⁸⁹ The Ninth Circuit, in its 2003 decision in *Desyllas v. Bernstine*, emphasized that “generally the First Amendment imposes no requirements beyond those in the Fourth Amendment” when officers engage in otherwise lawful investigative activities.⁹⁰ The Court held that where officers complied with the Fourth Amendment in temporarily locking down the office of a campus newspaper office and did not otherwise attempt to interfere with publication, the student editor of the paper had no First Amendment claim.⁹¹

Newsgathering Claims in Other Contexts

Collection of Journalists’ Phone Records via Third-Party Providers.

In two decisions that have particular relevance to discerning the potential First Amendment rights of journalists whose records were subject to NSLs, the Second Circuit and the D.C. Circuit addressed journalists’ claims of First Amendment protection for phone records maintained by third-party service providers. In the first of these cases, *Reporters Committee for Freedom of the Press v. AT&T Co.*, the D.C. Circuit in 1978 rejected journalists’ claims that the First Amendment requires prior notice of subpoenas issued for their telephone toll records in the

⁸⁹ *Id.* at 305. The court further explained, “The search warrant here was incidental to any alleged First Amendment activity and was not used as ‘an instrument for stifling liberty of expression, which is the evil that the heightened particularity standard is designed to combat.’” *Id.* (quoting *Zurcher*, 436 U.S. at 564 (internal citation omitted)).

⁹⁰ *Desyllas v. Bernstine*, 351 F.3d 934, 941-42 (9th Cir. 2003).

⁹¹ *Id.* at 942-43.

course of felony investigations.⁹² In 2006, the Second Circuit considered a similar claim, holding in *New York Times Co. v. Gonzales* that while the First Amendment protected phone records in the hands of third parties to the same extent they would be protected in the hands of the reporters themselves, this protection was not enough to avoid a good faith grand jury subpoena in the specific circumstances of that case.⁹³ Due to the factual similarities between the actions at issue in these cases and the collection of phone records through NSLs, these two cases are discussed in greater detail than the other appeals court cases discussed in this chapter.

In *Reporters Committee*, journalists sued two phone companies for declaratory and injunctive relief, claiming that the First Amendment required that they be provided with prior notice before the companies provided their long distance billing records to the Government.⁹⁴ The United States intervened as a defendant.⁹⁵ The billing records at issue documented all long distance calls charged to a customer's telephone number, including the number dialed and the "date, time, and duration of the call."⁹⁶ At least five times in a 38-month period,

⁹² *Reporters Comm. for Freedom of the Press v. AT&T Co.*, 593 F.2d 1030, 1053 (D.C. Cir. 1978) ("[J]ournalists in this context have no 'First Amendment interest' in third-party records which disclose the identity of a secret source and, consequently, have no First Amendment right to notice of subpoenas directed at such records.").

⁹³ *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006).

⁹⁴ *Reporters Comm.*, 593 F.2d at 1036.

⁹⁵ *Id.* The reporters also brought a Fourth Amendment claim. This claim, however, was swiftly rejected under the third-party doctrine, with the Court noting "the well-settled rule that a person has no expectation of privacy in the business records of a third party and, therefore, has no interest protected by the Fourth Amendment in such records." *Id.* at 1043-44.

⁹⁶ *Id.* at 1036.

phone companies had turned over such records in response to subpoenas issued in felony investigations.⁹⁷

In a 2-1 decision, the D.C. Circuit affirmed the district court's grant of summary judgment to defendants on most of the plaintiff's claims.⁹⁸ The court agreed that "the First Amendment extends some protection to news-gathering,"⁹⁹ but held that this protection neither created a right to maintain the secrecy of confidential sources in the face of good faith felony investigations nor was it abridged by government access to third-party records. The majority opinion characterized the reporters' claims of a right to prior notice as relying on two separate theories, both based on a First Amendment right to gather information from anonymous sources. Under the first theory, this right is threatened by *any* toll-record subpoena that could reveal anonymous sources, even one issued in good faith, and judicial balancing is necessary to determine whether the government's intrusion is justified in a particular case.¹⁰⁰ Under the second theory, journalists' First Amendment rights are infringed by bad faith subpoenas issued "as part of politically-motivated efforts to interfere with their news-

⁹⁷ *Id.* at 1037-39. Four of the subpoenas were issued by grand juries. Of these, three were issued in connection with possible violations of federal espionage laws—two involving the investigation of Daniel Ellsberg for the unauthorized disclosure of classified documents that came to be known as the "Pentagon Papers." The fourth grand jury subpoena was issued during an investigation into the suspected theft of government documents and the receipt of the stolen documents. The fifth instance in which phone companies provided journalists' records was in response to an IRS summons issued in an investigation of the unauthorized leak of income tax return information to a reporter. *Id.* at 1039-40.

⁹⁸ *Id.* at 1036.

⁹⁹ *Id.* at 1053 n.75.

¹⁰⁰ *Id.* at 1046-47.

gathering activities.”¹⁰¹ In these cases, the journalists argued, prior notice is necessary to ensure that journalists can challenge the subpoena in court, where a judge would screen out subpoenas issued in bad faith.¹⁰²

In addressing the first theory, the court held the right of journalists to gather information did not encompass the right to “maintain the secrecy of sources in the face of good faith felony investigations.”¹⁰³ The majority considered *Branzburg* to be dispositive on this point: if journalists have no First Amendment right to resist subpoenas issued to the journalists *themselves* in good faith felony investigations, “then they certainly have no right to resist good faith subpoenas” for a third-party’s business records.¹⁰⁴ Furthermore, the court noted, although government access to journalists’ telephone toll records may inhibit newsgathering activities, it does not follow that this limitation “abridges” First Amendment rights.¹⁰⁵ Here, as in *Branzburg*, the government’s action did not subject reporters to “regulation, proscription or compulsion,” as such, the court explained, it did not constitute the type of “abridgement” contemplated by the First Amendment.¹⁰⁶ Finally, the majority noted that even if the reporters could establish abridgment of a First Amendment right, they could not establish that this

¹⁰¹ *Id.* at 1047.

¹⁰² *Id.*

¹⁰³ *Id.* at 1050. The majority noted that while the First Amendment extends “some protection to news-gathering,” this protection does not mean that the plaintiffs have a “First Amendment ‘right’ or ‘interest’ in using their telephones immune from the prospect of good faith toll records subpoenas.” *Id.* at 1053 n.75.

¹⁰⁴ *Id.* at 1049-50.

¹⁰⁵ *Id.* at 1052.

¹⁰⁶ *Id.* at 1052-53.

created a serious burden to newsgathering that outweighed the government's interest in carrying out good faith felony investigations.¹⁰⁷

As to the plaintiffs' second theory—that the First Amendment required judicial review to screen out subpoenas issued in bad faith—the majority held that the First Amendment does protect newsgathering activities from official harassment and that a bad faith toll-record subpoena could abridge journalists' First Amendment rights.¹⁰⁸ However, in assessing the plaintiffs' demand for case-by-case judicial screening of toll-records subpoenas, the court concluded that ten of the fifteen plaintiffs had failed to make the requisite showing of an imminent threat that the government would in fact subpoena their toll records in bad faith.¹⁰⁹ As to the five remaining plaintiffs, the court concluded that they had “adduced just enough evidence” that they faced a threat of bad faith subpoenas to withstand the defendant's motion for summary judgment.¹¹⁰

The majority seemed skeptical, however, that these plaintiffs would be able to demonstrate their entitlement to an injunction on remand. In particular, the court explained, the plaintiffs would have difficulty making the required

¹⁰⁷ *Id.* at 1062-63 (“Journalists’ records have been subject to [toll-record] subpoenas for 50 years, and during this time, ‘the press has flourished’ and so has its use of confidential sources.” (quoting *Branzburg v. Hayes*, 408 U.S. 665, 698-99 (1972))).

¹⁰⁸ *Id.* at 1064 (“Unlike good faith investigation to which all citizens are subject, official harassment places a special burden on information-gathering, for in such cases the ultimate, though tacit, design is to obstruct rather than to investigate, and the official action is proscriptive rather than observatory in character.”).

¹⁰⁹ *Id.* at 1066. Such a showing is necessary under the traditional test for injunctive relief, which requires that an injunction may issue only upon a showing that the plaintiff is threatened with imminent harm, that such harm will cause substantial and irreparable damage, and that other remedies are inadequate. *See id.* at 1065.

¹¹⁰ *Id.* at 1066. The court made this determination viewing the evidence in the light most favorable to the plaintiffs, as is required at the summary judgment stage. *Id.*

showing that their remedy at law is inadequate.¹¹¹ The plaintiffs’ phone company had adopted a new policy providing that customers would receive same-day notice of subpoenas for their records or, in cases in which the government certified that such notice would impede a felony investigation, that notice would be provided at the end of 90 days.¹¹² The court explained that this “guarantees that plaintiffs will have the opportunity to bring . . . damage suits in any case in which they believe the Government was acting in bad faith” and that the “inevitability of damage suits would pose a significant deterrent to future Government misconduct.”¹¹³ Thus, in the court’s view, any First Amendment violations arising from a toll-records subpoena could be adequately addressed by existing legal remedies.

Judge J. Skelly Wright in dissent in *Reporters Committee* argued that toll-record subpoenas placed a clear burden on journalists’ First Amendment newsgathering rights, explaining that to restrain journalists from “making use of their telephones for long distance calls is, in effect, to foreclose them from engaging in newsgathering activity.”¹¹⁴ Wright argued the majority had misinterpreted *Branzburg* and *Zurcher*. Rather than “holding that the First Amendment rights involved were deserving of no procedural protections,” Wright explained, these decisions “turned explicitly on the determination that the prior

¹¹¹ *Id.* at 1069.

¹¹² *Id.* at 1038, 1069. The policy also allowed the government to extend the 90-day waiting period by providing a new certification that notice would impede a felony investigation. In these cases, notification would take place after the expiration of the extension.

¹¹³ *Id.* at 1069.

¹¹⁴ *Id.* at 1090 (Wright, J., dissenting).

judicial scrutiny on a case-by-case basis which was afforded was sufficient to protect the First Amendment rights at stake.”¹¹⁵ Wright explained:

Any lingering doubt as to the importance of judicial scrutiny to protection of First Amendment rights and, in particular, to newsgathering rights such as those at issue here must be laid to rest by the Supreme Court’s decisions in *Branzburg v. Hayes* and *Zurcher v. Stanford Daily*. The determinative vote in both those decisions was cast by Justice Powell on the basis of his view that the majority opinions did indeed provide for prior judicial scrutiny and thus afforded sufficient protection to the First Amendment rights at stake. . . .

In *Branzburg*, as Justice Powell pointed out, the reporter could seek judicial review of the grand jury subpoena through a motion to quash; at that point the court was charged with “(balancing) (the) vital constitutional and societal interests on a case-by-case basis.” Similarly, the warrant procedure, as upheld in *Stanford Daily*, ensures that First Amendment rights of the press will not be jeopardized by searches unless and until a judicial officer has first concluded that the search is reasonable in light of the First Amendment values at stake.¹¹⁶

An opportunity for such judicial scrutiny should similarly be available to the plaintiffs here, Wright argued, in order to adequately protect the journalists’ First Amendment rights.¹¹⁷

Twenty-eight years after the D.C. Circuit’s decision, the Second Circuit considered a similar claim of First Amendment protection for reporters’ phone records in *New York Times Co. v. Gonzales*.¹¹⁸ The claim arose out of a federal grand jury investigation of an unauthorized leak to two *New York Times* reporters revealing the government’s plans to search the offices of two foundations

¹¹⁵ *Id.* at 1080.

¹¹⁶ *Id.* at 1088-89 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972)) (internal citation omitted) (alterations in original).

¹¹⁷ *Id.* at 1080.

¹¹⁸ *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006).

suspected of funding terrorist activities.¹¹⁹ The reporters called the foundations for comment, thus tipping them off to the planned searches and, according to the government, compromising the investigations.¹²⁰ After the *Times* refused to cooperate with the federal prosecutor working on the case, the government, pursuant to Department of Justice guidelines, warned that it would subpoena the reporters' phone records from the newspaper's third-party telephone service provider.¹²¹ The *Times* sued, seeking a declaratory judgment that the records were protected from grand jury subpoena by a First Amendment privilege protecting against the compelled disclosure of confidential sources.¹²² The district court granted the *Times*' motion for summary judgment.

In a 2-1 decision, the Second Circuit reversed.¹²³ The court first rejected the government's claim that any privilege held by the reporters could not extend to telephone records held by third parties. Applying existing Second Circuit precedent governing privileges and third-party records, the court held that "so long as the third party plays an 'integral role' in reporters' work, the records of

¹¹⁹ *Id.* at 163.

¹²⁰ *Id.*

¹²¹ *Id.* at 164-65.

¹²² *Id.* at 165. The *Times* also claimed that the records were protected by a common law privilege. The court said that it was unnecessary to decide whether a common law privilege applied, since any such privilege would be qualified and would be overcome by the government on the facts of this case. *Id.* at 169-71.

¹²³ Judge Sack, dissenting, agreed with much of the majority's analysis, but would have found the records to be protected by a qualified common law privilege requiring that the government demonstrate: 1) that the information sought is necessary; 2) that it is not available from other sources; and 3) that the public interest in compelling disclosure outweighs the public interest in newsgathering and maintaining a free flow of information. *See id.* at 174, 186-87 (Sack, J., dissenting). Because Sack did not dispute the majority's holding on the First Amendment newsgathering claim—the primary subject of interest for purposes of this thesis—this chapter has omitted separate discussion of Sack's dissent.

third parties detailing that work are . . . covered by the same privileges afforded to the reporters themselves and their personal records.”¹²⁴ Because the telephone is an “essential tool of modern journalism and plays an integral role in the collection of information by reporters,” the court concluded, any First Amendment protection available to the reporters also extends to reporters’ telephone records sought from third parties.¹²⁵

The court, however, rejected the *Times*’ claim that a First Amendment privilege applied to records sought by a grand jury subpoena. The court explained that this claim was governed by *Branzburg*¹²⁶ and that nothing in the majority opinion nor in Justice Powell’s concurrence “calls for preventing the present grand jury from accessing information concerning the identity of the reporters’ sources(s).”¹²⁷ The court noted that the subject of the grand jury investigation—disclosures that tipped off the targets of a criminal investigation to impending searches—was a serious law enforcement concern and that moreover there was “no suggestion of bad faith in the investigation or conduct of the investigation.”¹²⁸ The court stated that even the qualified privilege outlined by Justice Stewart’s dissenting opinion in *Branzburg* would be overcome in this case, as the “serious

¹²⁴ *Id.* at 168. The case that the court considered governing precedent, *Local 1814, Int’l Longshoremen’s Ass’n, AFL-CIO v. Waterfront Comm’n*, 667 F.2d 267 (2d Cir. 1981), had held that the First Amendment rights of union workers were implicated by subpoenas for third-party records of activities that played an “integral role” in the union’s membership and fundraising activities and that these records were therefore entitled to the same protection as records of the union itself.

¹²⁵ *New York Times Co.*, 459 F.3d at 168.

¹²⁶ *Id.* at 172.

¹²⁷ *Id.* at 174.

¹²⁸ *Id.*

law enforcement concerns raised by targets learning of impending searches because of unauthorized disclosures” could easily satisfy Stewart’s demand for a showing of “relevance and need.”¹²⁹ Importantly, the court’s opinion does not rule out the possibility that the First Amendment may protect reporters’ phone records from disclosure to grand juries in other contexts.

Restrictions on Newsgathering Activities Related to Trial Coverage.

The federal appeals courts have extended the greatest protection to First Amendment newsgathering rights when the government’s action directly intrudes on the newsgathering process. The case law’s clearest examples of such direct restrictions are judicial orders that by their express terms directly limit reporters’ ability to gather news about a trial, for example, by barring reporters from conducting post-verdict interviews with jurors.¹³⁰ These orders are often based on concern for protecting the jurors from harassment by the press or protecting the secrecy of jury deliberations. The circuit courts that have addressed such restrictions have uniformly held them to be unconstitutional, although their precise reasoning has varied.¹³¹

¹²⁹ *Id.*

¹³⁰ Trial judges may also indirectly limit reporters’ ability to gather news about a trial by placing gag orders barring attorneys and parties from making public comment to anyone. Cases involving such gag orders, however, are not within the scope of this chapter. *See supra* Chapter 1, Part IV.

¹³¹ *See* United States v. Brown, 250 F.3d 907 (5th Cir. 2001); United States v. Cleveland, 128 F.3d 267 (5th Cir. 1998); United States v. Antar, 38 F.3d 1348, 1355 (3d Cir. 1994); United States v. Harrelson, 713 F.2d 1114 (5th Cir. 1983); *In re Express-News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982); United States v. Sherman, 581 F.2d 1358, 1360 (9th Cir. 1978). Although the Supreme Court has addressed claims of access to trials and of restrictions on publication of certain information related to trial proceedings, it has not addressed orders involving restrictions on underlying newsgathering activities that reporters could perform freely absent the restriction.

The Ninth Circuit, in its 1972 decision in *United States v. Sherman*, vacated a district court judge's post-verdict order prohibiting news media from contacting jurors. The court explained that *Branzburg* had "recognized that newsgathering is an activity protected by the First Amendment" and that the trial judge's order "clearly restrained the media in their attempts to gather news."¹³² Rather than analyzing this violation of newsgathering rights on its own terms, however, the court analyzed the restriction under the broader First Amendment doctrine of prior restraint, in which there is a heavy presumption against constitutionality of laws that prevent a statement from being made or published.¹³³ Here, the court treated the order as a prior restraint "depriving the media of the opportunity to ask the jurors if they wished to be interviewed," and found that it had failed to meet the stringent standards required for such laws.¹³⁴

The Fifth Circuit also invoked a prior restraint analysis in its 2001 decision in *United States v. Brown*, which considered a trial judge's orders barring the media from attempting to "interfere with" or "circumvent" a court order preserving the jury's anonymity.¹³⁵ While the non-circumvention orders could have been interpreted as merely barring journalists from attempting to obtain confidential court data, journalists challenging the orders argued that they also threatened "to proscribe independent newsgathering, e.g. any story not derived

¹³² *Sherman*, 581 F.2d at 1361 (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

¹³³ *Id.* (citing *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

¹³⁴ *Id.* at 1361-62. A prior restraint is a restriction prohibiting in advance future speech or communication. The courts have applied a heavy presumption against the constitutionality of prior restraints, which must be "narrowly tailored to promote a compelling government interest." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

¹³⁵ *Brown*, 250 F.3d at 917-18.

from confidential court records, that might deal with jurors.”¹³⁶ To the extent the trial judge intended this latter interpretation, the circuit court held that the orders were unconstitutional prior restraints “insofar as they interdicted the press from independent investigation and reporting about the jury based on acts obtained from sources other than confidential court records, court personnel or trial participants.”¹³⁷

In the 1982 case of *In re Express-News Corp.*, however, the Fifth Circuit relied solely on a standalone newsgathering right—rather than trying to place newsgathering activities within a prior restraint analysis—to strike down a district court rule that restricted post-verdict interviews with jurors.¹³⁸ Noting *Branzburg*’s warning that “without some protection for seeking out the news, freedom of the press could be eviscerated,”¹³⁹ the court explained that freedom of speech and freedom of the press would be limited if “those who wish to disseminate information [were] denied access to it, for freedom to speak is of little value if there is nothing to say.”¹⁴⁰ While journalists do not have the right to access information not available to the general public, the court explained that a court order cannot restrict the right to gather news unless the government can show that “it is narrowly tailored to prevent a substantial threat to the

¹³⁶ *Id.* at 914.

¹³⁷ *Id.* at 917-18.

¹³⁸ *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982).

¹³⁹ *Id.* at 808 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). The court also found that the order implicated a second First Amendment right—that of the public to receive information. *Id.* at 809.

¹⁴⁰ *Id.* at 808.

administration of justice.”¹⁴¹ In two later cases, the Fifth Circuit deemed this standard to be satisfied: in a 1983 case the court upheld post-verdict restrictions barring repeated requests for interviews after a juror has refused to talk and forbidding questions about the specific votes of other jurors,¹⁴² and in a 1998 case it approved a judge’s instruction that jurors could not be interviewed about their “deliberations” without the judge’s permission.¹⁴³

In 1994 in *United States v. Antar*, the Third Circuit assessed post-verdict restrictions on how reporters could approach and interview jurors, defining the right at stake as the “right of the press and public to have access to court proceedings.”¹⁴⁴ The court held that a judge could not limit the “press’s ability to have post-trial access to jurors” absent a “finding by the court that harassing or intrusive interviews are occurring or are intended” and that no less restrictive alternatives are available.¹⁴⁵

Restrictions on Exit Polling. A final situation in which a federal court of appeals has addressed a First Amendment newsgathering claim is in assessing challenges to restrictions on exit polling. While a number of states have passed laws restricting exit polling or interaction with voters near polling sites more generally, these claims have often been resolved in federal district courts or in a

¹⁴¹ *Id.* at 810.

¹⁴² *United States v. Harrelson*, 713 F.2d 1114, 1115 (5th Cir. 1983). The order, on its face, did not apply specifically to journalists as such, but to any “person” or “interviewer” who attempted to engage in the forbidden activities. *Id.* at 1116-17.

¹⁴³ *United States v. Cleveland*, 128 F.3d 267, 269 (5th Cir. 1998).

¹⁴⁴ *United States v. Antar*, 38 F.3d 1348, 1350 (3d Cir. 1994).

¹⁴⁵ *Id.* at 1363-64.

state courts, and thus only one such challenge involving a First Amendment newsgathering claim has been considered by the federal appeals courts.¹⁴⁶ In 1986 in *Daily Herald Co. v. Munro*, the Ninth Circuit considered the claim that a Washington statute barring exit polling within 300 feet of a polling place violated the First Amendment newsgathering rights of a group of news organizations that challenged the law.¹⁴⁷ The court concluded that the statute was a content-based restriction of speech¹⁴⁸ in a public forum and thus could only be upheld if it was narrowly tailored to accomplish a compelling government interest.¹⁴⁹ The court held that while the state had an interest in maintaining peace and order at the polls, the statute was not narrowly tailored because it barred all exit polling, including exit polling that was non-disruptive.¹⁵⁰ The Court, however, did not rely solely on the newspapers' newsgathering rights. It considered exit polling to involve speech that is protected "on several levels, by the First Amendment," including the protection afforded to speech about governmental affairs.¹⁵¹

¹⁴⁶ The Ninth Circuit, however, considered whether media plaintiffs who had successfully challenged exit polling restrictions in the district court should be awarded attorneys' fees. *See ABC v. Miller*, 550 F.3d 786 (9th Cir. 2008). As stated above, most other cases involving exit polling restrictions have been resolved by federal district courts or by state courts. *See, e.g., National Broad. Co. v. Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988); *Firestone v. News-Press Publ'g Co.*, 538 So. 2d 457 (Fla. 1989). In addition, a number of laws that restrict campaign activity or approaching voters within a certain distance from a polling site have been challenged by campaigns or activists as unconstitutional restrictions on political speech. The Supreme Court considered such a claim in *Burson v. Freeman*, 504 U.S. 191 (1992).

¹⁴⁷ *Daily Herald Co. v. Munro*, 838 F.2d 380, 382 (9th Cir. 1986).

¹⁴⁸ Content-based restrictions on speech are those based upon the subject matter or type of speech. Such a restraint is presumptively invalid, but may survive a First Amendment challenge if narrowly drawn to serve a compelling state interest. BLACK'S LAW DICTIONARY 141 (3d pocket ed. 2006).

¹⁴⁹ *Daily Herald Co.*, 838 F.2d at 385.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 384.

Conclusion

While the Supreme Court and federal appeals courts have been adverse to granting journalists “special rights,” they have often noted the special concerns involved when otherwise seemingly neutral laws threaten newsgathering interests and have recognized the need to adequately protect journalists’ First Amendment rights. In the case of laws that specifically burden reporters or that directly restrict newsgathering rights—such as those barring reporters from conducting interviews with jurors—the courts have more readily upheld First Amendment claims. The nature of the burden therefore appears to be a significant factor in how courts approach First Amendment newsgathering claims.

A second factor that appears to be influential in the courts’ case law on newsgathering claims is the availability of procedural protections. Even when the courts have refused to provide blanket remedies—such as the recognition of a constitutional reporter’s privilege in *Branzburg* or a prohibition on newsroom searches in *Zurcher*—they have nonetheless noted the importance of protecting against abuses of First Amendment rights and have highlighted the availability of procedural remedies to guard against abuse. The availability of procedural protections on a case-by-case basis to prevent First Amendment abuses thus seems to weigh in favor of a finding of constitutionality if the court has concerns about burdens to First Amendment rights but finds the government’s interest to be strong.

A final theme that emerges from the case law analyzed in this study is that the courts weigh heavily the interests of law enforcement, even in those cases in

which First Amendment interests may be threatened. In particular, in their decisions on government subpoenas for reporters' testimony or work products, law enforcement searches of journalists' work places, and subpoenas for reporters' phone records demonstrate a strong deference to law enforcement needs.

CHAPTER 4

BALANCING FIRST AMENDMENT RIGHTS AGAINST NATIONAL SECURITY INTERESTS

The judiciary has traditionally given “special deference” to the other branches of government on issues of national security, even when claims of constitutional rights are involved.¹ At the same time, however, the federal courts have recognized that the government must not be allowed to invoke vague claims of national security to justify invasions of First Amendment rights.² In several cases, in fact, the courts have cited the executive’s broad authority in the realm of national security as a reason to be particularly protective of First Amendment activities; the ability to monitor policies and actions related to national security and to bring information about them to the attention of the public, according to

¹ *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1221 (10th Cir. 2007).

² *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring) (“The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”); *United States v. Robel*, 389 U.S. 258, 263 (1967) (“[T]he phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.”); *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 13 (1st Cir. 2004) (“Security is not a talisman that the government may invoke to justify *any* burden on speech (no matter how oppressive.)”).

these decisions, can serve as the most effective means of checking executive power in this realm.³

The federal courts have considered the conflict between First Amendment rights and national security interests in a number of contexts. The Supreme Court has provided the most robust protection to First Amendment rights, and thus required the strongest showing of a national security interest to limit them, when the government attempts to impose a prior restraint upon speech.⁴ On the other end of the spectrum, the federal courts have considered national security to be a particularly compelling interest, and thus have more readily limited First Amendment rights, in the context of claims involving reasonable time, place, and manner restrictions on speech.

This chapter looks at cases in which the Supreme Court and federal courts of appeals have assessed conflicts between the First Amendment rights of free press, speech, or association and the government's alleged national security interests. As described in detail in Chapter 1, the cases for this chapter were compiled by running two searches in the Lexis Nexis database for cases containing relevant terms.⁵ From these lists, cases were screened individually to

³ See, e.g., *New York Times Co.*, 403 U.S. at 728 (Stewart, J., concurring) ("In the absence of the governmental checks and balances in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government."); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 703-04 (6th Cir. 2002) (explaining that "public access acts as a check on the actions of the Executive" in deportation proceedings in terrorism related cases).

⁴ See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

⁵ The first search string was: HEADNOTES ("First Amendment" or "U.S. Const. amend. I") and (HEADNOTES ("national security") or CORE-TERMS ("national security")). The second search was: "First Amendment" /s "national security."

limit the cases discussed in this chapter to those in which the courts had actually considered on the merits a conflict between First Amendment rights and national security interests. This means that cases in which the First Amendment or national security was mentioned only incidentally, cases in which the court held that the activity at issue was simply outside the scope of First Amendment protection, and cases in which the court refused to consider the balance of national security interests and First Amendment rights because it determined that the activity at issue—for example, approving security clearances—was uniquely within the power of the executive branch were excluded. After applying these limitations, eighteen cases remained, each of which is discussed below.⁶

The first part of this chapter examines cases in which the courts considered a conflict between national security interests and journalists' First Amendment rights. The second part examines cases in which the court assessed a conflict between national security interests and the First Amendment speech or association rights of a non-media litigant.

⁶ These decisions are: *Holder v. Humanitarian Law Project*, No. 08-1498, 2010 U.S. LEXIS 5252 (June 21, 2010); *Snepp v. United States*, 444 U.S. 507 (1980); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. Robel*, 389 U.S. 258 (1967); *Barenblatt v. United States*, 360 U.S. 109 (1958); *United States v. Aref*, 533 F.3d 72 (2d Cir. 2008); *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212 (10th Cir. 2007); *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004); *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002); *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986); *White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984); *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983); *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972); *Wilkinson v. United States*, 272 F.2d 783 (5th Cir. 1959); *United States v. Josephson*, 165 F.2d 82 (2d Cir. 1947).

Part I: Balancing Journalists' First Amendment Claims Against National Security Interests

While many cases balancing First Amendment rights and national security interests involve freedom of speech or association more generally, the courts have addressed claims that are specifically relevant to journalists' First Amendment rights in two types of cases—those involving prior restraints and those concerned with public access to judicial proceedings.⁷ In the most famous case pitting journalists' First Amendment rights against the government's claims that speech would damage national security interests—*New York Times Co. v. United States* (also known as the “Pentagon Papers” case)—the Supreme Court held in 1971 that the United States had not satisfied the “heavy burden” to uphold prior restraints enjoining *The New York Times* and *The Washington Post* from publishing the contents of a classified study of U.S. involvement in Vietnam.⁸ According to the government, the disclosure of certain documents in the study would pose a “grave and immediate danger to national security.”⁹ At oral argument, the Solicitor General told the justices that release of the documents would impact ongoing “delicate negotiations” to end the war in Vietnam and to recover prisoners of war, thus impacting the security of the United States.¹⁰ The government claimed that the president's constitutional power over foreign affairs

⁷ See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. Aref*, 533 F.3d 72, 76 (2d Cir. 2008); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986).

⁸ *New York Times Co.*, 403 U.S. at 714.

⁹ Brief for the United States at 13, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (No. 1885), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/usbrief.pdf>.

¹⁰ Transcript of Oral Argument at 26-27, 403 U.S. 713 (1971) (No. 1885), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/argument.pdf>.

as well as his authority as Commander-in-Chief entitled him to protect the nation against publication of such materials.¹¹ The district court that considered the government's claims against the *Times*, however, had found that the government offered "no cogent reasons" as to why the documents would damage the nation's security except for the general harm of "embarrassment."¹²

The Supreme Court held 6-3 that the government had not satisfied the burden necessary to justify a prior restraint. To justify a prior restraint—a restriction that prohibits in advance future communication¹³—the government must demonstrate that the restraint is "narrowly tailored to promote a compelling Government interest."¹⁴ The six justices' brief per curiam opinion rejecting the injunctions demonstrates this strong presumption against prior restraints on speech, even in the face of claims of harm to national security. However, these justices' concurring opinions represent a range of views on how the government may otherwise restrict free speech to protect national security.

¹¹ Brief of United States, *supra* note 9, at 13-14.

¹² *United States v. New York Times Co.*, 328 F. Supp. 324, 330 (S.D.N.Y. 1971). The Second Circuit ordered that the case "be remanded to the District Court for further in camera proceedings to determine . . . whether disclosure of" certain items highlighted by the government would "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined." *United States v. New York Times Co.*, 444 F.2d 544 (2d Cir. 1971) (en banc), *rev'd* 403 U.S. 713 (1971). Due to the fast-moving nature of events in this litigation, the D.C. federal district court that considered the request for an injunction against the *Post* did not issue a published decision. That court, however, also found that disclosure of the documents at issue "would not be harmful or that any harm resulting from disclosure would be insufficient to override First Amendment interests." See *United States v. Washington Post Co.*, 446 F.2d 1327, 1328 (D.C. Cir. 1971) (explaining the district court's ruling). The D.C. Circuit affirmed. *Id.* at 1329.

¹³ *Alexander v. United States*, 509 U.S. 544, 550 (1993).

¹⁴ *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

The views of Justices Black and Douglas in *New York Times*, each of whom joined in the other's opinion, provide the strongest protection for free speech; these justices maintained an absolutist interpretation of the First Amendment that would countenance no restraint on the press.¹⁵ While the government argued that restraints on speech were necessary to protect the nation's security, Black and Douglas took the view that the way to truly protect a democracy was to allow for a full and robust debate of public issues. Douglas' opinion contended that "[s]ecrecy in government is fundamentally anti-democratic," and that the health of American democracy is better protected by open discussion of public issues.¹⁶ Black echoed this view, writing, "The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."¹⁷ Black and Douglas also warned that "security" was "a broad, vague generality" that should not be used to justify restrictions on First Amendment rights.¹⁸

The other four justices in the *New York Times* majority agreed that the government had failed to meet the heavy burden necessary to justify a prior restraint in this case, but they refused to rule out the possibility of a constitutional

¹⁵ *New York Times Co. v. United States*, 403 U.S. 713, 720 (1971) (Douglas, J., concurring). In an opinion joined by Justice Black, Justice Douglas stated that the categorical command of the First Amendment "leaves . . . no room for governmental restraint on the press." *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 719 (Black, J., concurring).

¹⁸ *Id.* at 717.

prior restraint under other circumstances.¹⁹ Moreover, three of the concurring justices—Stewart, White, and Marshall—suggested that the government would not violate the First Amendment if it chose to prosecute newspapers after publication under laws that punish dissemination of sensitive national security information.²⁰ Thus, the newspapers’ First Amendment victory in *New York Times* may in fact be more limited than the result alone would suggest. Nonetheless, several of the concurring justices echoed Black and Douglas’ view that the free press played an important role in protecting the values of a democratic government. Justices Stewart and White noted that this role may be particularly important in the realm of national security, where public opinion operates as a crucial check on broad executive power over defense and foreign affairs.²¹

¹⁹ See *id.* at 726-27 (Brennan, J., concurring) (“[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.”); *id.* at 730 (Stewart, J., concurring, joined by White, J.) (“I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people.”); *id.* at 741-42 (Marshall, J., concurring) (explaining that the Court cannot allow the executive to invoke the courts’ equity power to enjoin behavior that Congress had specifically declined to prohibit).

²⁰ See *id.* at 730 (Stewart, J., concurring) (“Undoubtedly Congress has power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases.”); *id.* at 738 n.9 (White, J., concurring) (“[I]t seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under [the Espionage Act] if they communicate or withhold the materials covered by that section.”); *id.* at 745 (Marshall, J., concurring) (noting the potential relevance of the Espionage Act to the facts at issue).

²¹ *Id.* at 728 (Stewart, J., concurring, joined by White, J.) (“In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon national policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.”).

A second area in which the federal courts of appeals have considered the balance of First Amendment rights and national security interests is in ruling on claims by the media and other organizations of a right of access to court hearings that have been closed or documents that have been sealed based on an alleged need to avoid disclosure of sensitive security information. These cases follow a line of decisions that began with the Supreme Court's 1980 decision in *Richmond Newspapers v. Virginia*, in which the Court recognized a broad First Amendment right of the press and public to attend criminal trials.²² According to the plurality opinion in that case, "[W]ithout the freedom to attend [criminal] trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated."²³ In its 1982 decision in *Globe Newspaper Co. v. Superior Court*, the Court made clear that criminal trials may only be closed if the closure was "necessitated by a compelling governmental interest, and [was] narrowly tailored to serve that interest."²⁴ In a series of subsequent decisions, the Court expanded this right of access to criminal trials to include access to jury selection²⁵ and to preliminary hearings.²⁶ The Court has not, however, extended the right of access beyond the context of criminal trials and related proceedings.²⁷

²² *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

²³ *Id.* at 580.

²⁴ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1992).

²⁵ *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) [hereinafter *Press-Enterprise I*].

²⁶ *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986) [hereinafter *Press-Enterprise II*].

²⁷ In *Richmond Newspapers*, the Court explained, "Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open." 448 U.S. at 580 n.17.

Generally, courts evaluate claims of a First Amendment right of access in two stages. First, the party seeking access must demonstrate that the underlying proceeding is one for which there is a First Amendment right of access. The existence of a right of access depends on whether the proceeding is of a type that has traditionally been open to the public and whether “public access plays a significant positive role in the functioning of the particular process in question.”²⁸ If the court determines that the proceeding is subject to a First Amendment right of access, the court then moves to the second stage, in which it considers whether the party seeking closure can overcome that right by demonstrating that “closure is essential to preserve higher values and is narrowly tailored to serve that interest.”²⁹ When the government has claimed national security interests to justify closure, the courts have recognized the high value of this purpose, but have also emphasized that the judiciary cannot abdicate its duty to protect constitutional rights by allowing the government to invoke broad or vague security interests.

In *In re Washington Post Co.*, decided in 1986, the Fourth Circuit highlighted the important role of open court proceedings in preventing government abuses.³⁰ The circuit court vacated a district court order closing the courtroom for a Ghanaian national’s plea to espionage charges and sealing related documents.³¹ The government argued that disclosure of the plea proceedings, which were part of a larger prisoner exchange between the U.S. and Ghana, could

²⁸ *Press-Enterprise II*, 478 U.S. at 8-9.

²⁹ *Press-Enterprise I*, 464 U.S. at 510.

³⁰ *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986).

³¹ *Id.* at 393.

jeopardize the prisoner exchange and risk the lives of Americans who were being held for spying in Ghana.³² Although the Fourth Circuit acknowledged the dangers of public disclosure of classified information, it held that in order to justify closure, the district court must comply with standard procedural requirements mandating advance notice and specific findings supporting closure, even when national security interests are involved.³³ The Fourth Circuit explained that a trial court could follow standard procedures without divulging the substance of the information that the government sought to protect.³⁴ Furthermore, the court made clear that while it was “troubled . . . by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants,” it was “equally troubled by the notion that the judiciary should abdicate its decisionmaking to the executive branch whenever national security concerns are present.”³⁵ “Blind acceptance” of the government’s claimed need for secrecy, according to the court, would “open the door to possible abuse.”³⁶

In *Detroit Free Press v. Ashcroft*, decided in 2002, the Sixth Circuit similarly rejected an attempt by the government to carve out less rigorous closure rules for judicial proceedings related to national security issues. Pursuant to a challenge by the *Detroit Free Press*, the court affirmed a preliminary injunction

³² *Id.* at 386.

³³ *Id.* at 391.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 392.

against a post-September 11th executive branch policy that imposed blanket closures upon deportation hearings in “special interest” cases. Under the policy, the executive branch had unilateral power to designate a case as “special interest” based on suspicion that the alien was connected to or had information about terrorism.³⁷ While the court recognized the risk that dangerous information could be disclosed in certain deportation hearings, it concluded that “the ordinary process of determining whether closure is warranted on a case-by-case basis sufficiently addresses [these] concerns.”³⁸ The court explained the importance of maintaining openness in judicial proceedings and the role the press can serve in protecting against abuses:

The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. . . . The Framers of the First Amendment “did not trust any government to separate the true from the false for us.” They protected the people against secret government.³⁹

In deciding the case, the *Detroit Free Press* court first addressed whether there was a First Amendment right of access to such hearings. The court held that both prongs of the test for a First Amendment right of access had been satisfied,

³⁷ *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). The Third Circuit also considered a challenge to the “special interest” closure policy, but reached an opposite result. *See New Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003). The court held 2-1 that the First Amendment did not confer a right of access to deportation hearings, finding that deportation proceedings lacked the tradition of openness necessary to create a First Amendment right of access and that access to such proceedings did not play a positive role. *Id.* at 201. The court concluded, “Since the primary national policy must be self-preservation, it seems elementary that, to the extent open deportation hearings might impair national security, that security is implicated in [the second prong of the test].” *Id.* at 202.

³⁸ *Detroit Free Press*, 303 F.3d at 692-93.

³⁹ *Id.* at 683 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 773 (1972)).

emphasizing in particular the “positive role” that access would play by ensuring that proceedings were conducted fairly and properly, particularly in an area—immigration—in which the government has “nearly unlimited authority.”⁴⁰ In considering whether the government could overcome this right, the court held that while the government had a compelling interest in protecting national security by safeguarding its ongoing terrorism investigations, the blanket closure of “special interest” hearings was not a narrowly tailored means of serving this interest.⁴¹ The court concluded that the government had failed to show that its security concerns could not be “addressed on a case-by-case basis.”⁴² While the government argued that sensitive information would inevitably leak out if the judge had to conduct a hearing on the issue of closure and that these small pieces of isolated information could aid terrorists in “creating a bigger picture of the Government’s anti-terrorism investigation,” the court explained that such “speculation” should not “form the basis for such a drastic restriction of the public’s First Amendment rights.”⁴³ Furthermore, the court warned that the government could ostensibly use this theory—known as “mosaic intelligence”—to justify complete closure of any public hearing with even a remote connection to national security.⁴⁴ The court explained: “This, we simply may not countenance.

⁴⁰ *Id.* at 700, 703-04.

⁴¹ *Id.* at 705.

⁴² *Id.* at 707.

⁴³ *Id.* at 708-09.

⁴⁴ *Id.* at 709-10.

A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution.”⁴⁵

In another terrorism-related case, *United States v. Aref*, decided in 2008, the Second Circuit held that the government had satisfied the burden to sustain closure of court documents related to a defendant’s motion to discover any evidence against him resulting from a warrantless surveillance program that had been reported in *The New York Times*.⁴⁶ Assuming, without deciding, that there was a public right of access to the government’s sealed response to the discovery motion and related court order, both of which contained classified information, the court held based on an independent review of the documents that the closure was narrowly tailored to protect a national security interest.⁴⁷ While the court cautioned that district courts should be reluctant to seal documents in their entirety and that public scrutiny of judicial decisions should be limited “only in the rarest of circumstances,” the court also concluded that “transparency must at times yield to more compelling interests” and that no such interest was more compelling than national security.⁴⁸

The cases discussed above demonstrate that while the Supreme Court and courts of appeals place a high value on national security interests, they are unwilling to defer to the government’s broad or vague claims of a national

⁴⁵ *Id.* at 710.

⁴⁶ *United States v. Aref*, 533 F.3d 72, 76 (2d Cir. 2008). The party challenging the closure order in this case was the New York Civil Liberties Union, rather than a media outlet, as in the other two cases. It is included in this discussion, however, because it raises the same issue of public access.

⁴⁷ *Id.* at 82.

⁴⁸ *Id.* at 83.

security risk to justify a restriction on the media's First Amendment rights. The courts have also emphasized the value of upholding the media's First Amendment right to gather news and report on issues involving national security as a means of providing a check on the executive branch's broad power in this area.

Part II: Balancing Other First Amendment Speech and Association Claims Against National Security Interests

In addition to evaluating the rights of media parties in the face of restrictions aimed at protecting national security, the federal courts also have weighed the First Amendment speech and association rights of non-media litigants in the face of a wide range of government actions justified as essential to security, such as laws aimed at restricting the spread of Communism, laws targeting those who assist terrorists, or regulations on protests in security sensitive areas. These cases further demonstrate the tension between the courts' desire to avoid interfering with legitimate government activities that ensure the nation's safety and the courts' need to avoid providing the executive with carte blanche to limit First Amendment rights in the name of "security." The outcomes in these cases seem to be a function of the nature of the restriction at issue and, to some extent, the surrounding historical circumstances, with the courts generally demonstrating a greater deference to the government during periods of national security peril.

Several of the earliest federal cases addressing First Amendment challenges to restrictions based on national security concerns dealt with laws

aimed at limiting the spread of Communism.⁴⁹ In these cases, the courts treated Communism as posing a unique threat that justified First Amendment restrictions that would not be upheld in other circumstances.⁵⁰ For instance, in its 1947 decision in *United States v. Josephson*, the Second Circuit credited government assertions that Communism was the most immediate threat to freedom of expression in rejecting a defendant's First Amendment challenge to his conviction for refusing to answer questions about political beliefs or affiliations from the House Committee on Un-American Activities.⁵¹ The court doubted that the First Amendment could serve as a bar to Congress investigating Communist beliefs; if it could, the court said, "the Constitution itself provides immunity from discovery and lawful restraint for those who would destroy it."⁵² More than a decade later, in 1958, in *Barenblatt v. United States*, the Supreme Court rejected a First Amendment challenge to the right of the House Committee on Un-American Activities to inquire into a witness' past or present membership in the Communist Party.⁵³ While the Court recognized that the First Amendment would in some circumstances protect an individual from compelled disclosure of his or her associational relationships, it concluded that this right is outweighed by Congress'

⁴⁹ *United States v. Robel*, 389 U.S. 258 (1967); *Barenblatt v. United States*, 360 U.S. 109 (1958); *Wilkinson v. United States*, 272 F.2d 783 (5th Cir. 1959); *United States v. Josephson*, 165 F.2d 82 (2d Cir. 1947).

⁵⁰ See *Barenblatt*, 360 U.S. at 128 ("[T]his Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character.").

⁵¹ *Josephson*, 165 F.2d at 91.

⁵² *Id.* at 90.

⁵³ *Barenblatt*, 360 U.S. at 109.

need to investigate the “advocacy of or preparation for” the overthrow of the government by violence.⁵⁴ The following year, in *Wilkinson v. United States*, the Fifth Circuit similarly upheld the committee’s power to investigate political affiliations, noting that the First Amendment did not prevent Congress from “exercising measures of self-protection.”⁵⁵

By 1967, however, the courts were retreating from the broad deference given to the other branches in fighting the Communist threat. In *United States v. Robel*, decided that year, the Supreme Court limited the government’s ability to interfere with First Amendment associational rights in fighting Communism by striking down a law that made it a criminal offense for members of certain Communist organizations to be employed at defense facilities.⁵⁶ Although “association” is not among the freedoms identified by the First Amendment, the Supreme Court had previously held that “freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect” of freedom of speech.⁵⁷ In evaluating the restrictions on associational rights at issue in *Robel*, the Court held that the statute violated the First Amendment because it swept “indiscriminately across all types of association with Communist-action groups,

⁵⁴ *Id.* at 130, 134.

⁵⁵ *Wilkinson v. United States*, 272 F.2d 783 (5th Cir. 1959).

⁵⁶ *United States v. Robel*, 389 U.S. 258, 261(1967).

⁵⁷ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1154-55 (3d ed. 2006) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)). In *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984), the Supreme Court explained that an individual’s ability to exercise his or her enumerated First Amendment rights “could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”

without regard to the quality and degree of membership.”⁵⁸ According to the Court, the statute was not narrowly drawn to punish only those employees whose association with the Communist Party posed an actual threat, but instead punished any member of a Communist organization, regardless of whether he was inactive, unaware of the organization’s illegal aims, or disagreed with its unlawful goals.⁵⁹ While the government sought to defend the statute on the basis that it was passed under Congress’ war power and therefore entitled to broad deference, the Court warned that “the phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit”⁶⁰ and that “national defense” could not be invoked to “justify[] any exercise of legislative power designed to promote such a goal.”⁶¹ According to the Court, defending the nation included defending the “values and ideals which set this Nation apart,” among the most cherished of which is the First Amendment.⁶² Contrary to the Second Circuit’s conclusion 20 years earlier that the Constitution could not protect those who would destroy it, the *Robel* Court concluded, “It would be indeed ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.”⁶³

⁵⁸ *Robel*, 389 U.S. at 262.

⁵⁹ *Id.* at 266.

⁶⁰ *Id.* at 262-63.

⁶¹ *Id.* at 264.

⁶² *Id.*

⁶³ *Id.*

The *Robel* Court’s unwillingness to defer to broad claims of “national security” is echoed in the en banc D.C. Circuit’s plurality opinion in *Zweibon v. Mitchell*.⁶⁴ The plurality rejected the executive branch’s attempt to justify warrantless surveillance of a domestic advocacy organization on the basis of the executive’s determination that such surveillance “was deemed essential to protect this nation and its citizens against hostile acts.”⁶⁵ The opinion—issued in 1975, the year after President Richard Nixon’s resignation—highlighted growing unease with the increasing range of activities that the government was conducting for “national security” reasons.⁶⁶ The court acknowledged the executive’s “vast and indispensable powers” in this realm, but warned that the judiciary must be particularly vigilant because the “existence of such tremendous power . . . renders it susceptible to abuse and endangers those fundamental personal liberties which the Government was instituted to secure for its citizens.”⁶⁷ Although the court was primarily concerned with the Fourth Amendment violations entailed by warrantless surveillance, the opinion also emphasized that prior judicial review of surveillance was important “to protect free and robust exercise of the First Amendment rights of speech and association by those who might otherwise be chilled by the fear of unsupervised and unlimited Executive power to institute electronic surveillances.”⁶⁸

⁶⁴ *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc).

⁶⁵ *Id.* at 607.

⁶⁶ *Id.* at 604.

⁶⁷ *Id.*

⁶⁸ *Id.* at 633.

While the *Zweibon* opinion demonstrated a consciousness of surrounding historical circumstances that suggested a need for greater suspicion of executive power, several opinions since the terrorist attacks of September 11, 2001 have suggested that the surrounding circumstances necessitate greater deference to the executive's national security claims in the face of First Amendment challenges by non-media litigants. In 2005, in *United States v. Ickes*, the Fourth Circuit rejected a claim that the border search doctrine⁶⁹ was subject to a First Amendment exception, stating: "Particularly in today's world, national security interests may require uncovering terrorist communications, which are inherently expressive."⁷⁰ Judge Kermit Lipez of the First Circuit candidly acknowledged that since the 2001 attacks, the balancing of First Amendment rights and national security interests had become "even more difficult" because the "risks of violence and the dire consequences of that violence . . . may weigh more heavily than they once did."⁷¹ In *Boim v. Quranic Literacy Institute*, decided in 2002, the Seventh Circuit similarly described the government's "paramount" interest in preventing terrorism as having "been made all the more imperative by the events of September 11, 2001."⁷² The court in that case concluded that a civil suit founded on conduct that would violate a federal criminal statute barring the provision of "material support," including money, to foreign terrorist groups did not violate

⁶⁹ The border search doctrine is an exception to the Fourth Amendment's warrant requirement. It dictates that, based on the Government's strong interest in preventing the entry of unwanted persons or items, searches at the border "without probable cause and without a warrant are nonetheless 'reasonable.'" *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

⁷⁰ *United States v. Ickes*, 393 F.3d 501, 506 (4th Cir. 2005).

⁷¹ *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 19 (1st Cir. 2004) (Lipez, J., concurring).

⁷² *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1027 (7th Cir. 2002).

the First Amendment.⁷³ The court explained that the availability of the civil suit remedy was not aimed at suppressing speech and was “closely drawn to avoid unnecessary abridgment of associational freedoms” by premising liability on the basis of funding rather than mere membership.⁷⁴

In 2010, in *Holder v. Humanitarian Law Project*, the Supreme Court upheld the constitutionality of the criminal statute underlying the civil suit in *Boim* in an opinion emphasizing the importance of deferring to judgment of the political branches on issues of national security.⁷⁵ The Court held that the statute—which barred the knowing provision of “‘material support or resources’” to groups designated as “foreign terrorist organizations”—did not violate the First Amendment rights of speech and association of individuals and groups who sought to assist in only the “lawful, nonviolent purposes of those groups.”⁷⁶ The challenged statute defined “material support or resources” to include: “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . , and transportation, except medicine or religious materials.”⁷⁷ The plaintiffs claimed that they wanted to support the humanitarian and political

⁷³ *Id.* (quoting 18 U.S.C. § 2339B).

⁷⁴ *Id.*

⁷⁵ *Holder v. Humanitarian Law Project*, No. 08-1498, 2010 U.S. LEXIS 5252 (June 21, 2010).

⁷⁶ *Id.* at *13-16 (quoting 18 U.S.C. § 2339B(a)(1)).

⁷⁷ 18 U.S.C. 2339A(b)(1).

activities of two groups that had been designated as terrorist organizations by providing support in the form of money, legal training, and political advocacy—such as training members of these groups how to use international law to peacefully resolve disputes and how to seek aid from international bodies—but that they could not do so for fear of prosecution.⁷⁸ The plaintiffs claimed, *inter alia*, that the material-support statute unconstitutionally infringed on their First Amendment rights to free speech and association by criminalizing their provision of support to these organizations without requiring proof that the plaintiffs had specific intent to further the organization’s unlawful goals.⁷⁹

The Court, in a 6-3 decision, first found that the statute did not prevent the plaintiffs from engaging in independent advocacy, but instead was “carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.”⁸⁰ As to this category of speech, the Court noted that the “[g]overnment’s interest in combating terrorism is an urgent objective of the highest order” and rejected the plaintiffs’ argument that the application of the material support ban to activities aimed at serving a terrorist organization’s lawful

⁷⁸ *Id.* at *18, *26.

⁷⁹ *Id.* at *19. The plaintiffs also claimed that the statute was unconstitutionally vague under the Fifth Amendment’s Due Process Clause. *Id.*

⁸⁰ *Id.* at *45. While the court concluded that the statute was thus a content-based regulation of speech and therefore subject to a “more demanding standard” of scrutiny than the intermediate scrutiny that applies to content-neutral regulations of conduct that incidentally burden expression, it did not make clear exactly what standard of scrutiny it was applying. *Id.* at *48-*49.

goals was not necessary to serve that interest.⁸¹ The Court explained that “[w]hether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question” and that Congress, which had based its determination on specific findings, was justified in rejecting the view that “ostensibly peaceful aid would have no harmful effects.”⁸² Material support, the Court explained, could further terrorism by “free[ing] up other resources within the organization that may be put to violent ends,” by helping to “lend legitimacy to foreign terrorist groups,” and by straining the United States’ relationship with allies who have been attacked by these groups.⁸³

The majority further explained that while “concerns of national security and foreign relations do not warrant abdication of the judicial role” or deference to the “Government’s reading of the First Amendment,” “when it comes to collecting evidence and drawing factual inferences” in the area of national security and foreign relations, “respect for the Government’s conclusions is appropriate.”⁸⁴ The Court explained that national security concerns arise in a context of constantly evolving threats in which hard evidence can be difficult to obtain; in this context, the Court suggested, the government cannot reasonably be expected to make the same kind of specific showings that might be expected in other contexts.⁸⁵ In taking preventive measures to prevent terrorist attacks—such

⁸¹ *Id.* at *49-*50.

⁸² *Id.* at *50-*51.

⁸³ *Id.* at *52-*56.

⁸⁴ *Id.* at *59.

⁸⁵ *Id.* at *59-*60.

as by criminalizing aid that makes such attacks “more likely to occur”—the government is therefore “not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.”⁸⁶ According to the Court, “given the sensitive interests in national security and foreign affairs at stake, the political branches ha[d] adequately” justified their determination that prohibiting all support—even that “meant to promote only the groups’ nonviolent ends”—was necessary.⁸⁷

In addition to reflecting the influence of surrounding historical circumstances, the Supreme Court and courts of appeals’ balancing of First Amendment rights and national security interests also appears to be a function of the nature of the restriction at issue. In two areas—restraints on the speech of government employees⁸⁸ and time, place, and manner restrictions⁸⁹—the federal courts have been more willing to tolerate restrictions based on national security concerns. Cases in the first category have most often arisen in the context of restrictions on one particular group of government employees—CIA agents.

The federal courts have on several occasions upheld limits on the writings of former CIA employees based on information gained during the course of their employment. These cases make clear that while the former employees have a

⁸⁶ *Id.* at *60.

⁸⁷ *Id.* at *63.

⁸⁸ *Snepp v. United States*, 444 U.S. 507 (1980); *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972).

⁸⁹ *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212 (10th Cir. 2007); *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004); *White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984).

First Amendment interest in publication, the government has considerable leeway in limiting this right through employment agreements or other means. In a 1972 case, *United States v. Marchetti*, the Fourth Circuit held that the First Amendment limited the extent to which the federal government could impose secrecy requirements upon former employees and enforce them through a system of prepublication review of their writings.⁹⁰ At the same time, however, the court recognized that the government's need to maintain the secrecy of highly sensitive national security information justified a system of prior restraints limiting disclosure of classified information by employees and former employees.⁹¹

Eight years later, in *Snepp v. United States*, the Supreme Court approved additional limitations on disclosures by former CIA employees. In that case, the Court considered a former agent's challenge to an employment agreement that barred him from publishing *any* information related to the CIA without approval from the agency.⁹² The agent claimed that the agreement constituted an unconstitutional prior restraint,⁹³ but the Court upheld the agreement, explaining

⁹⁰ *Marchetti*, 466 F.2d at 1313. The Fourth Circuit concluded that the First Amendment did not bar a secrecy agreement requiring employees not to divulge any classified information unless specifically authorized to do so. *Id.* at 1317. However, the court also concluded that limitations on a former employee's ability to disclose unclassified information violated the First Amendment, even when such disclosures were barred by an employment agreement. *Id.* ("We would decline enforcement of the secrecy oath signed when [Marchetti] left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights."). This portion of the court's opinion appears to be limited by *Snepp v. United States*, 444 U.S. 507 (1980). In that case, the Court upheld enforcement of an agreement barring Snepp from publishing *any* information related to his employment with the CIA (classified or not) without prepublication clearance from the agency. *Id.* at 509 n.3, 513. The Court distinguished *Marchetti* on the basis that the underlying agreement in *Marchetti* involved a promise not to publish only *classified* information. *Id.* at 509 n.3, 513.

⁹¹ *Marchetti*, 466 F.2d at 1316.

⁹² *Snepp*, 444 U.S. at 508.

⁹³ *Id.* at 509 n.3.

that “a former intelligence agent’s publication of unreviewed material relating to intelligence activities can be detrimental to vital national interests even if the published information is unclassified.”⁹⁴ The government had a compelling interest in protecting secrecy, and the agreement was a “reasonable means” of protecting this interest, even though it infringed on employee activities that might otherwise be protected by the First Amendment.⁹⁵

Three years after *Snepp* was decided, in *McGehee v. Casey*, the D.C. Circuit similarly rejected a former CIA agent’s challenge to the classification of certain material in his manuscript as “secret,” and therefore unpublishable, during a CIA review of his writing pursuant to an employment agreement that barred him from publishing classified information.⁹⁶ The agent sought a declaratory judgment that the “CIA classification and censorship scheme violates the First Amendment,” or, in the alternative, a judgment that the CIA had improperly classified the information in his manuscript.⁹⁷ The court upheld the classification scheme, finding that it served the government’s “substantial interest in assuring secrecy in the conduct of foreign intelligence operations.”⁹⁸ Moreover, the court explained that when the government acts as an employer, it has an interest in regulating the speech of its employees and may do so as long as the restriction serves a substantial government interest not related to the suppression of free

⁹⁴ *Id.* at 511-12.

⁹⁵ *Id.* at 509 n.3.

⁹⁶ *McGehee v. Casey*, 718 F.2d 1137, 1139 (D.C. Cir. 1983).

⁹⁷ *Id.*

⁹⁸ *Id.* at 1140.

speech and is narrowly drawn to restrict no more speech than necessary to protect that interest.⁹⁹ On the issue of classification, however, while the court held the CIA's classification of the information at issue was appropriate here, it emphasized that when reviewing such decisions in the context of secrecy agreements, the courts "should require that CIA explanations justify censorship with reasonable specificity."¹⁰⁰ The court noted that although the judiciary lacks the CIA's expertise in matters of intelligence gathering, it must uphold its role in preserving individual rights. The court further explained that because "the line between information threatening to foreign policy and matters of legitimate public concern is often very fine, courts must assure themselves that the reasons for classification are rational and plausible ones."¹⁰¹

First Amendment challenges to time, place, and manner restrictions on protests in security-sensitive areas represent another area of litigation in which the courts have generally deferred to the government's judgment that a limitation on speech is necessary to protect security. Under the Supreme Court's case law, "the government may impose reasonable restrictions on the time, place, or manner of speech," if such restrictions are content-neutral, "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."¹⁰² Courts have considered a claimed

⁹⁹ *Id.* at 1141.

¹⁰⁰ *Id.* at 1148.

¹⁰¹ *Id.* at 1149.

¹⁰² *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

interest in national security as a particularly strong means of satisfying the significant-government-interest prong of this test. For instance, in evaluating restrictions on protests outside the site of a NATO conference, the Tenth Circuit, in its 2007 decision in *Citizens for Peace in Space v. City of Colorado Springs*, emphasized that the government’s security interest was of the “highest order.”¹⁰³ The First Circuit, in its 2004 decision in *Bl(a)ck Tea Society v. City of Boston*, likewise concluded that there could be “no doubting the substantial government interest in the maintenance of security at political conventions.”¹⁰⁴ In a case 20 years earlier, *White House Vigil for ERA Committee v. Clark*, the D.C. Circuit, considered restrictions on protests outside the White House and explained that the government’s interest in the president’s security implicated “the capacity of the United States to respond to threats and crises affecting the entire free world.”¹⁰⁵

The weight accorded to national security in these cases may be relevant not only for determining whether the restriction served a “significant” government interest, but also in conducting the narrow-tailoring analysis. In *Citizens for Peace*, the Tenth Circuit explained: “While an extremely important government interest does not dictate the result in time, place, and manner cases, the significance of the government interest bears an inverse relationship to the rigor of the narrowly tailored analysis.”¹⁰⁶ The court further noted the historic deference that courts have given the other branches “in matters relating to foreign

¹⁰³ *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1220 (10th Cir. 2007).

¹⁰⁴ *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 13 (1st Cir. 2004).

¹⁰⁵ *White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518, 1528 (D.C. Cir. 1984).

¹⁰⁶ *Citizens for Peace*, 477 F.3d at 1221.

affairs, international relations, and national security; even when constitutional rights are invoked by a plaintiff.”¹⁰⁷

While in each of these cases the courts ultimately determined that the government had satisfied the requirements for imposing reasonable time, place, and manner restrictions, these courts also stressed that the government must demonstrate the existence of specific security risks. For instance, in *Citizens for Peace*, the court explained that the claim of a broadly stated need for “security” would not suffice.¹⁰⁸ In *Bl(a)ck Tea Society*, the First Circuit, assessing restrictions on protests outside the Democratic National Convention, warned that “[s]ecurity is not a talisman that the government may invoke to justify *any* burden on speech” and that the narrow-tailoring analysis must consider the specific security harms that a particular set of restrictions are designed to combat.¹⁰⁹

In examining the Supreme Court and courts of appeals decisions identified in this study that weigh the First Amendment speech and association claims of non-media litigants against national security interests, two themes emerge. The first is that the courts appear to be at least conscious of—and perhaps influenced by—the unique political or historical context in which their decisions are taking place. Whether responding to dire fears about Communism, a recent record of abuses of executive power, or a massive attack on American soil, the courts appeared to take the broader surrounding circumstances into account in their balancing analysis. A second theme from these cases is that in certain areas, the

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 13 (1st Cir. 2004).

courts are generally deferential to claims of national security interests. In particular, the courts have usually deferred to the executive's judgment regarding restrictions on the speech of employees or time, place, and manner restrictions on speech activities in security-sensitive areas.

Conclusion

The Supreme Court and federal courts of appeals' decisions discussed in this chapter demonstrate that the judiciary has typically given the other branches of government significant deference in evaluating national security-based restrictions on First Amendment speech, press, and associational rights. This deference, however, has not been unlimited. In particular, when the government has attempted to justify restrictions of First Amendment rights based on broad or vague claims of a need to protect "national security," the courts have been less willing to defer to the judgment of the other branches. The appeals court cases involving security-based closures of court proceedings provide a good example of this tendency; the courts in *Detroit Free Press*¹¹⁰ and *In re Washington Post Co.*¹¹¹ rejected the government's attempts to replace case-by-case consideration of closed proceedings with rules requiring security-based closures in broad categories of cases. In addition, in claims involving restrictions on the First Amendment rights of the media, the courts have emphasized the important role that the media play in ensuring transparency in the conduct of national defense

¹¹⁰ *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

¹¹¹ *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986).

activities and in providing a check on the government's exercise of national security powers. Finally, and of particular relevance to claims relating to the government's expanded NSL authority under the Patriot Act amendments, the federal courts' decisions balancing First Amendment rights and national security concerns analyzed for this study appear to be influenced at least in part by the broader circumstances surrounding the restrictions at issue. In particularly perilous times, the cases suggest that courts are likely to be more receptive to First Amendment restrictions in the interest of national security.

CHAPTER 5

DISCUSSION AND CONCLUSIONS

The availability of NSLs to subpoena media records from third-party providers has important implications for both First Amendment rights and for national security interests. On one hand, the use of NSLs to demand journalists' records from third-party providers poses a threat to newsgathering rights by allowing the government to secretly collect information about the parties with whom a journalist has been communicating, including confidential sources. As the media petitioners argued in *Branzburg*, this exposure of confidential sources threatens the "free flow of information protected by the First Amendment."¹ Because gathering news often requires that reporters agree not to reveal the identity of certain sources of information, if the government is able to nonetheless identify confidential sources through the use of NSLs, sources identified this way and "other confidential sources of other reporters will be measurably deterred from furnishing publishable information."² On the other hand, the government interest in national security is "paramount" and has been made even stronger given the real threat of terrorist attacks since September 2001.³ The government

¹ *Branzburg v. Hayes*, 408 U.S. 665, 680 (1972).

² *See id.* at 679-80 (summarizing the media petitioners' argument against compelled grand jury testimony).

³ *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1027 (7th Cir. 2002).

therefore has a strong interest in being able to use all investigative tools at its disposal to monitor terrorist activities and to track down and deter leaks of national security information.

This chapter assesses whether the First Amendment protects journalists against the use of NSLs to subpoena their records. Part I discusses whether and how each of the various NSL statutes could be used to collect records relating to newsgathering activities. This analysis builds on the research discussed in Chapter 2, which addressed the first set of research questions identified in Chapter 1. Those questions asked how the NSL statutes may enable the government to collect records related to a journalist's newsgathering activities and the extent to which the statutes, their legislative history, and the Department of Justice media subpoena guidelines inform the First Amendment issues involved when NSLs are directed at the press as a target. Chapter 2 explained that the NSL statutes could be used to collect various records of journalists—including financial records, telephone toll records, and e-mail transactional records—based on only a showing of relevance to an investigation to protect against terrorism. That chapter also concluded that neither the statutes themselves nor the Department of Justice guidelines governing media subpoenas provide an effective limit to the potential use of NSLs to target journalists' records.

Part II assesses whether journalists have a protectable First Amendment interest in shielding these records from discovery by the government via NSLs. This part builds on the discussion in Chapter 3, which addressed this study's second set of research questions by examining the extent to which the federal

courts have recognized First Amendment-based protections against government intrusion into the newsgathering process. It also considered what principles drawn from these cases may be relevant to the question of whether journalists can claim First Amendment protection against government intrusion into the newsgathering process through the use of NSLs. Chapter 3 concluded that while the Supreme Court and federal courts of appeals have been adverse to granting journalists “special rights,” particularly when the restriction at issue only indirectly burdens newsgathering activities, they have also recognized the need to protect journalists’ First Amendment rights when otherwise neutral laws intrude on newsgathering activities. In particular, several of the decisions discussed in Chapter 3 suggest that the courts view the availability of procedural protections as an important means of protecting these rights. Part II of this chapter will explicitly apply these principles to the NSL context.

Assuming that journalists do have a First Amendment right to protect their records from discovery via NSLs, Part III considers whether NSLs could nonetheless be justified as a means of serving the government’s interest in national security. This part builds on Chapter 4, which addressed this study’s third set of research questions by examining how the Supreme Court and federal appeals courts’ have balanced First Amendment rights against countervailing national security interests and by considering what principles from these cases may be relevant to the NSL context. Chapter 4 concluded that while the Supreme Court and federal appeals courts have recognized the media’s important role as a check on the government’s exercise of its national security powers, the courts

have also given the government significant deference in evaluating national-security-based restrictions on First Amendment rights, particularly during periods of heightened national security concerns. Part III of this chapter builds on that analysis to specifically apply the cases located in this study and discussed in Chapter 4 to the NSL context. Together, Parts II and III address the first question in the fourth set of research questions for this study, whether the First Amendment bars the government from collecting the records of journalists through the use of NSLs.

Finally, Part IV considers whether, in the absence of a strong constitutional claim for protection against NSLs, there are legislative reforms that could effectively limit the use of NSLs to target journalists' records. This part thus addresses the second question in this study's fourth set of research questions. In particular, this part looks at legislation proposed in the 2009-10 Congressional session and considers how legislative reform could provide effective protection to reporters' records.

Part I: The Potential Impact of NSLs on Newsgathering Activities

As discussed in Chapter 2, there are four separate statutes providing the government with the authority to issue NSLs, each allowing for the collection of a different type of information about the target from third-party providers. Chapter 2 concluded that journalists could be susceptible to the collection of their records through the use of NSLs. However, one of the NSL statutes—the National Security Act—applies only to third-party records relating to a current or former

executive branch employee, and thus could not be used to obtain a reporter's records.⁴ Of the three NSL statutes that could be used to collect reporters' records, two of them—the Right to Financial Privacy Act (“RFPA”) and the Fair Credit Reporting Act (“FCRA”)—are unlikely in most circumstances to allow collection of records that would constitute interference in the newsgathering process. However, the issuance of NSLs pursuant to the remaining statute—the Electronic Communications Privacy Act (“ECPA”)—arguably poses a significant threat to reporters' newsgathering activities because it can be used to collect phone records and e-mail transactional information that would reveal reporters' sources. Each of the three statutes that could be applied to reporters' records is discussed further below.

As explained in Chapter 2, under the NSL authority granted by the Right to Financial Privacy Act (“RFPA”),⁵ the FBI may collect various financial records from third-party providers, including information about checking and savings accounts and transactions with loan companies, travel agencies, or operators of credit card systems.⁶ While the use of an RFPA NSL to collect a journalist's records might expose some information related to newsgathering activities—for example, a record of credit card purchases may reveal that a journalist had traveled to a particular city or country—it seems unlikely that in the typical case the government's knowledge of such information would threaten confidential

⁴ See 50 U.S.C. § 436(a).

⁵ See 12 U.S.C. § 3414(a)(5)(A).

⁶ Office of the Inspector Gen., U.S. Dep't of Justice, A Review of the Federal Bureau of Investigation's Use of National Security Letters xii (2007) [hereinafter OIG 2007 Report], available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf>.

newsgathering activities. Financial records alone would not necessarily reveal the nature of a story a journalist was working on or expose the identity of confidential sources, although in a rare case a record of travel to an out-of-the-way location where the suspected source of a leak resides could provide confirmation for the government's suspicions. Similarly, the NSL authority granted under the Fair Credit Reporting Act, which allows the FBI to obtain information about an individual's credit history and other consumer information maintained by credit reporting agencies,⁷ is unlikely to expose the type of information that may threaten a reporter's newsgathering activities.

The type of NSL most likely to reveal information about a journalist's newsgathering activities is an NSL issued under the authority of the Electronic Communications Privacy Act ("ECPA").⁸ These NSLs will accordingly be the focus of the remainder of this chapter. Under the NSL authority provided by the amended ECPA, the FBI may collect historical (as opposed to real time) information on telephone calls dialed and received; local and long distance billing records; subscriber information; and e-mail "transactional records,"⁹ which include the routing and addressing information for e-mails.¹⁰ These NSLs may be used to collect transactional information only—indicating when a communication occurred and who was involved—and cannot be used to gather information about

⁷ See 15 U.S.C. § 1681u, 1681 v.

⁸ 18 U.S.C. § 2709.

⁹ 2007 OIG Report, *supra* note 6, at 14.

¹⁰ Nathan Alexander Sales, *Secrecy and National Security*, 58 ALA. L. REV. 811, 852 n.198 (2007).

the actual content of the communications.¹¹ Nonetheless, the ability to collect transactional information alone arguably burdens newsgathering activities because such information is sufficient to reveal reporters' confidential sources. In a leak investigation, for example, information revealing whom the reporter spoke with by phone or communicated with by e-mail during a relevant time period can be used to identify the source of the leak. In fact, as the Inspector General's 2010 report detailing NSL abuses revealed, the government has already used exigent letters to collect reporters' telephone records in a leak investigation.¹² Moreover, the collection of phone or e-mail records may expose sources other than those who are the subject of the leak investigation. For example, when the FBI requested the toll billing records for various reporters in connection with the leak investigation mentioned above, they received from one company records of more than 1,600 phone calls, only three of which fell within the period relevant to the investigation.¹³

Such access to reporters' phone records could have a major impact on reporters' ability to do their job. As the Second Circuit explained in *New York Times Co. v. Gonzales*, "the telephone is an essential tool of modern journalism and plays an integral role in the collection of information by reporters."¹⁴ As

¹¹ OIG 2007 Report, *supra* note 6, at 14 n.33.

¹² Office of the Inspector Gen., U.S. Dep't of Justice, A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Information Requests for Telephone Records 89 (2010) [hereinafter OIG 2010 Report], available at <http://www.justice.gov/oig/special/s1001r.pdf>.

¹³ *Id.* at 96.

¹⁴ *New York Times Co. v. Gonzales*, 459 F.3d 160, 168 (2d Cir. 2006).

such, that court held that any First Amendment protection for reporters also extends to telephone records in the possession of third parties.¹⁵

Part II: NSLs as an Intrusion on Protected Newsgathering Activities

Assessing the degree of First Amendment protection afforded to newsgathering activities in the face of an NSL seeking a journalist's records involves applying two major themes of the Supreme Court and federal appeals courts decisions on newsgathering claims identified in Chapter 3. Chapter 3 addressed this study's second set of research questions, which considered the extent to which the federal courts have recognized First Amendment protections for newsgathering activities and how these decisions may inform the question of whether journalists have First Amendment rights against government intrusion though the use of NSLs. That chapter concluded that the courts have extended greater First Amendment protection against restrictions that directly limit newsgathering activities, while providing less protection against indirect restrictions on newsgathering activities. It also concluded, however, that even in the case of indirect restrictions, the courts have recognized the importance of procedural protections to guard against First Amendment abuses.

Applying these principles to the NSL context, on one hand, the link between the use of NSLs targeting journalists' records and the alleged harm to newsgathering—that current or potential confidential sources would be deterred from providing information—is the type of attenuated link that has typically led

¹⁵ *Id.*

the federal courts to extend only minimal substantive protection to the newsgathering interests at stake. In cases like *Branzburg* and *Zurcher*, for example, the Supreme Court was unwilling to create broad substantive rules to protect the underlying First Amendment newsgathering rights against intrusion by the government activities at issue. On the other hand, part of the justification for refusing to extend broad substantive First Amendment protections in these cases was the fact that procedural protections—such as a motion to quash a bad faith subpoena or the requirement that a neutral magistrate approve a newsroom search—were available to guard against abuses of First Amendment rights.

The NSL context is unique in this regard because the discretion to issue an NSL lies wholly within the executive branch and the target will rarely ever know of its existence,¹⁶ much less have an opportunity to challenge it. This part of Chapter 5 will first assess the scope and degree of First Amendment protection that the case law suggests would be afforded to journalists' interests in protecting their communications records from discovery by the government. It will then consider whether the use of NSLs to request these records intrudes upon protected First Amendment activities, with a particular focus on how the lack of procedural protections to guard against bad faith NSLs affects this analysis.

¹⁶ As discussed in Chapter 2, under the non-disclosure provisions of the NSL statutes the third-party recipient of the NSL is forbidden from notifying the target of the request for his or her documents. Under the law as amended in response to the *Doe* litigation, a recipient may contest the nondisclosure order in court. See 18 U.S.C. § 3511. Such challenges, however, will likely be rare, since providers will have few incentives to litigate these requests.

Assessing Journalists' First Amendment Rights to Protect their Communications Records from Discovery by NSLs

The Supreme Court and courts of appeals cases identified and discussed in Chapter 3 make clear that newsgathering is entitled to at least some degree of constitutional protection.¹⁷ In particular, when the government has attempted to directly prevent reporters from engaging in specific newsgathering activities—for example, by barring them from contacting jurors after the conclusion of a high-profile trial¹⁸ or restricting their ability to interview voters¹⁹—the courts have provided robust protection to First Amendment newsgathering rights. At the same time, however, the federal courts have concluded that the First Amendment “does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.”²⁰ In cases involving generally applicable laws aimed at serving important government interests, the burden on newsgathering is typically the incidental result of, rather than the intent of, the restriction at issue, and the link between the law and the harm to newsgathering is more “uncertain.”²¹ Therefore, in assessing journalists’ First Amendment claims against compelled testimony, searches and seizures, or subpoenas of their records from third-party providers, the courts have extended

¹⁷ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”); *id.* at 709 (Powell, J., concurring) (noting that reporters subpoenaed to testify before a grand jury are not “without constitutional rights with respect to the gathering of news or in safeguarding their sources”).

¹⁸ See, e.g., *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982); *United States v. Sherman*, 581 F.2d 1358, 1360 (9th Cir. 1978).

¹⁹ See *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1986).

²⁰ *Branzburg*, 408 U.S. at 682.

²¹ *Id.* at 690.

more limited protection to First Amendment rights.²² As the *Branzburg* Court explained, “otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.”²³

The NSL statutes fall within this category of neutral, generally applicable laws that may, when applied to reporters, have an incidental effect on newsgathering. They are not aimed specifically at restricting newsgathering activities, but, like subpoenas or searches, the use of NSLs to obtain reporters’ records may burden newsgathering activities by exposing journalists’ confidential sources and discouraging future sources from coming forward.²⁴ To the extent that the federal courts have recognized protection for newsgathering activities in challenges to such laws, they have not held that the First Amendment generally provides reporters with a right to be shielded from such intrusions into the newsgathering process. Instead, the First Amendment protection offered by most of these decisions could perhaps best be described, in the words of the D.C. Circuit, as a requirement that these laws be applied to journalists with “special sensitivity” in light of “the vital function the press serves in a self-governing society.”²⁵ At the least, this requirement has been viewed as providing journalists with First Amendment protection against abusive government practices in

²² See, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006); *Reporters Comm. for Freedom of Press v. AT&T Co.*, 593 F.2d 1030 (D.C. Cir. 1978).

²³ *Branzburg*, 408 U.S. at 682.

²⁴ See *supra* notes 10-12 and accompanying text.

²⁵ *SEC v. McGoff*, 647 F.2d 185, 191 (D.C. Cir. 1981).

applying these laws,²⁶ although some courts have also construed this special sensitivity to impose extra protections, such as the exhaustion of alternative sources before the government issues a subpoena to a reporter.²⁷

A narrow interpretation of this special-sensitivity standard is evident in the majority opinion in *Branzburg*, which suggests that reporters would have First Amendment protection against grand jury investigations “conducted other than in good faith.”²⁸ Justice Powell’s concurrence incorporates a more protective special-sensitivity standard, explaining that a reporter could move to quash a subpoena if the information sought had only a “remote and tenuous relationship to the subject of the investigation” or the testimony would implicate relationships with confidential sources without a legitimate need by law enforcement.²⁹ Similarly, the courts of appeals that have considered government subpoenas of reporters have imposed certain protections—such as the requirement that the reporter’s testimony have more than a remote relationship to the subject of the

²⁶ As explained in Chapter 1, the availability of a First Amendment claim would be particularly important to journalists attempting a challenge to NSLs demanding their communications records, since the third-party doctrine would prevent a Fourth Amendment claim.

²⁷ See *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (explaining that a court could deny a special prosecutor’s request to compel a reporter’s testimony if the information was readily available from another source).

²⁸ *Branzburg*, 408 U.S. at 707.

²⁹ *Id.* at 710 (Powell, J., concurring).

investigation or that the information not be readily available from another source—to ensure that reporters are not subpoenaed in bad faith.³⁰

The federal court decisions studied in Chapter 3 involving journalists’ First Amendment claims against searches or seizures also reveal an emphasis on applying the relevant laws to journalists with special sensitivity. In *Zurcher*, while the Supreme Court rejected a broad rule protecting journalists against searches pursuant to warrants, it explained that the warrant requirements should be applied with “particular exactitude” in the case of newsroom searches.³¹ Similarly, the D.C. Circuit in *Smith v. Nixon* held that a wiretap target’s employment as a journalist must be taken into account in assessing whether surveillance satisfies the Fourth Amendment’s “reasonableness” requirement.³²

While the notion of protection in the form of “special sensitivity” is less readily apparent in the D.C. Circuit and Second Circuit decisions on challenges to

³⁰ See, e.g., *In re Grand Jury Subpoena*, 201 F. App’x 430, 432 (9th Cir. 2006) (explaining that a “limited balancing” of journalists’ First Amendment rights and the government’s law enforcement interests may be conducted where a grand jury investigation is not conducted in good faith or the journalist’s testimony is only remotely related to the investigation); *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (stating that a reporter could not be compelled to testify pursuant to a special prosecutor’s subpoena unless such testimony is “directly relevant to a nonfrivolous claim or inquiry undertaken in good faith” and that “disclosure may be denied where the same information is readily available from a less sensitive source”); *Storer Commc’ns, Inc. v. Giovan* (*In re Grand Jury Proceedings*), 810 F.2d 580, 586 (6th Cir. 1987) (explaining that judges evaluating a grand jury subpoena of a reporter must determine “whether the grand jury’s investigation is being conducted in good faith, whether the information sought bears more than a remote and tenuous relationship to the subject of the investigation, and whether a legitimate law enforcement need will be served by forced disclosure of the confidential source relationship”).

³¹ *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978).

³² *Smith v. Nixon*, 606 F.2d 1183, 1889 (D.C. Cir. 1979). But see *Arkansas Chronicle v. Murphy*, 183 F. App’x 300, 305 (4th Cir. 2006) (holding that the heightened Fourth Amendment standard for protecting First Amendment interests applied only when a seizure was aimed at “suppress[ing] the ideas contained in the documents,” not when it “was an attempt to shed evidentiary light” on a crime); *Desyllas v. Bernstine*, 351 F.3d 934, 941-42 (9th Cir. 2003) (explaining that the First Amendment generally “imposes no requirements beyond those in the Fourth Amendment” when officers engage in otherwise lawful investigative activities).

subpoenas seeking journalists' phone records from telephone companies, these courts both recognized that abusive subpoenas for reporters' records would violate the First Amendment. In *Reporters Committee for Freedom of the Press v. AT&T Co.*, the D.C. Circuit, citing *Branzburg*, held that reporters have no general right to protect their phone records from good-faith inspection by the government.³³ According to the court, the "freedom to gather information" that is protected by the First Amendment is "[s]ubject to the general and incidental burdens that arise from good faith enforcement of otherwise valid criminal and civil laws that are not themselves solely directed at curtailing the free flow of information."³⁴ The *Reporters Committee* court acknowledged, however, that the use of subpoenas or other investigative tools to collect journalists' records in bad faith could abridge First Amendment rights.³⁵ According to the court, "while the First Amendment does not immunize the information-gathering activities of a journalist or any other citizen from good faith law enforcement investigation, it does protect such activities from official harassment."³⁶ In *New York Times Co. v. Gonzales*, the Second Circuit considered a newspaper's challenge to the government's planned grand jury subpoenas demanding that telephone companies turn over *Times* reporters' phone records in connection with investigation of a major leak in a terrorism case.³⁷ The court concluded that *Branzburg* squarely

³³ *Reporters Comm. for Freedom of the Press v. AT&T Co.*, 593 F.2d 1030, 1052 (D.C. Cir. 1978).

³⁴ *Id.* at 1051.

³⁵ *Id.* at 1064.

³⁶ *Id.*

³⁷ *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006).

governed the First Amendment claim.³⁸ While the opinion noted *Branzburg*'s suggestion, particularly in Justice Powell's concurrence, that bad faith subpoenas could violate First Amendment rights, it did not engage this analysis or discuss any need for special sensitivity to First Amendment rights because there was "no suggestion of bad faith in the investigation."³⁹

Based on the Supreme Court and courts of appeals cases found in this study and discussed in Chapter 3, it seems unlikely that journalists would be able to claim a broad First Amendment right against the use of NSLs to request their communications records from third-party providers in good-faith investigations. Like subpoenas or searches, NSLs are an otherwise valid investigative tool that imposes merely an incidental burden on newsgathering activities. Therefore, to the extent that journalists may claim a First Amendment right against the use of NSLs to collect their records, it is at least a right to be free from misuse of NSLs and may also encompass the right to have the NSL requirements applied with special sensitivity (for example, by ensuring requests are narrow and specific) when the target is a journalist. Unlike these other investigative tools, however, NSLs do not provide the target with an opportunity to protect his or her First Amendment rights through ex ante judicial review. The question then becomes whether the lack of such procedural protections undermines the constitutionality of the overall scheme.

³⁸ *Id.* at 172.

³⁹ *Id.* at 174 & n.8.

Assessing NSLs as an Intrusion on Protected First Amendment Rights

To the extent that the federal courts have recognized that otherwise valid criminal laws or investigatory tools may under some circumstances infringe First Amendment rights, they have often rejected broad substantive protections and instead relied on the availability of existing ex ante procedural protections to ensure that First Amendment rights are upheld. Judge J. Skelly Wright argued in his dissent in *Reporters Committee* that the *Branzburg* and *Zurcher* decisions “turned explicitly on the determination that the prior judicial scrutiny on a case-by-case basis which was afforded was sufficient to protect the First Amendment rights at stake.”⁴⁰ In *Branzburg*, for example, the Supreme Court explained that subpoenas issued in bad faith or for purposes of harassment remained subject to judicial control and could be challenged via a motion to quash.⁴¹

The courts of appeals decisions assessing reporter subpoenas found in this study, discussed in Chapter 3, likewise rely on the availability of a judge to determine whether the subpoenas satisfy the various requirements they have outlined for avoiding violations of reporters’ First Amendment rights. In *Zurcher*, the Court rejected a claim that the First Amendment required a broad rule barring newsroom searches pursuant to a warrant, but explained that the First Amendment interests at stake could be adequately protected by a neutral magistrate applying the warrant requirements with “particular exactitude.”⁴² As the court explained,

⁴⁰ *Reporters Comm.*, 593 F.2d at 1080 (Wright, J., dissenting).

⁴¹ *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972) (“Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.”).

⁴² *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978).

“There is no reason to believe . . . that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper.”⁴³ Similarly, the D.C. Circuit in *Smith v. Nixon* relied on procedural protections in concluding that a magistrate’s consideration of a wiretap target’s employment as a journalist provided adequate protection for First Amendment rights threatened by wiretaps of journalists’ phone lines.⁴⁴

The question of constitutionality of the NSL statutes thus becomes a question of whether the government may constitutionally use generally applicable criminal investigative tools to monitor journalists in the absence of ex ante procedural protections, such as those that would guard against bad faith subpoenas or unreasonable searches. The D.C. Circuit considered this issue in *Reporters Committee* and concluded that the media plaintiffs had not established their entitlement to an equitable remedy requiring that they be notified of subpoenas for their telephone toll records issued to third parties and provided the opportunity for case-by-case judicial review of such subpoenas to ensure that they had not been issued in bad faith.⁴⁵ While the court acknowledged that subpoenas issued in bad faith could violate reporters’ First Amendment rights, it concluded that the judiciary could not “assume superintendence of criminal investigations merely on the suspicion that Executive officers may act in bad faith in the future.”⁴⁶ Such a remedy would only be available, according to the court, if a

⁴³ *Id.* at 566.

⁴⁴ *Smith v. Nixon*, 606 F.2d 1183, 1189 (D.C. Cir. 1979).

⁴⁵ *Reporters Comm. for Freedom of Press v. AT&T Co.*, 593 F.2d 1030, 1070-71 (D.C. Cir. 1978).

⁴⁶ *Id.* at 1071.

plaintiff could establish a “clear and imminent threat of . . . future misconduct.”⁴⁷ Furthermore, the court noted that the plaintiffs were not without other remedies. The plaintiffs’ phone company had adopted a policy that would provide plaintiffs with after-the-fact notice that the government had issued a subpoena for their records. This notice, according to the D.C. Circuit, would guarantee that the plaintiffs could bring post hoc lawsuits for damages if they believed that the government had issued a particular subpoena in bad faith. The court concluded that the “inevitability” of such lawsuits “would pose a significant deterrent to future Government misconduct, making totally unnecessary any type of equitable relief.”⁴⁸

Judge J. Skelly Wright argued in dissent that the Supreme Court decisions in *Branzburg* and *Zurcher* “turned explicitly” on the ground that the availability of prior case-by-case judicial scrutiny was sufficient to protect journalists’ First Amendment rights and that therefore “some opportunity for judicial scrutiny such as that afforded in *Branzburg* and *Stanford Daily* must be provided here as well.”⁴⁹ In Wright’s view, the request for case-by-case review was not a demand for an equitable remedy, but a mandate of the First Amendment. According to Wright, a system requiring notice and an opportunity to be heard before the government could subpoena reporters’ records would provide an opportunity for journalists to raise genuine First Amendment challenges while also minimizing

⁴⁷ *Id.*

⁴⁸ *Id.* at 1069.

⁴⁹ *Id.* at 1080 (Wright, J., dissenting).

the burdens imposed on the government by leaving it up to the reporters to invoke judicial process.⁵⁰

In *New York Times Co. v. Gonzales*, the Second Circuit, over objection of the government, held that a newspaper that was notified of the government's intent to subpoena its reporters' phone records from the telephone company could bring an action for a declaratory judgment⁵¹ that the subpoena would violate the reporters' common law and First Amendment privileges against compelled disclosure of sources.⁵² The court further held that because the services provided by telephone companies play an "integral role" in reporters' work, telephone toll records, "when sought by the government [are] covered by the same privileges afforded to the reporters themselves and their personal records."⁵³ The court explained that because the facts before it involved a potential grand jury subpoena for reporters' phone records, *Branzburg* determined the scope of the First Amendment protection that was available.⁵⁴ The court did not assess what exactly these protections—procedural or otherwise—might be, however, because it determined that none of the interpretations of *Branzburg*'s holding would

⁵⁰ *Id.* at 1092.

⁵¹ Under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), a district court has discretion to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought," when there is "a case of actual controversy within [the court's] jurisdiction."

⁵² *New York Times Co. v. Gonzales*, 459 F.3d 160, 167 (2d Cir. 2006).

⁵³ *Id.* at 168.

⁵⁴ *Id.* at 174. As to the claim of a common law privilege, the court held that such a privilege would be overcome on the facts of this case. *Id.* at 169.

provide protection in the case before it, which involved serious law enforcement concerns and in which there was “no suggestion of bad faith.”⁵⁵

Judge Robert Sack, who dissented from the majority’s result but agreed with much of its opinion, took a larger view of the issues at stake. Sack explained that the “question at the heart of this appeal is not so much whether there is protection for the identity of reporters’ sources, or even what that protection is, but which branch of government decides whether, when, and how such protection is overcome.”⁵⁶ In Sack’s view, the majority opinion “reaffirme[ed] the role of the federal courts in mediating between the interest of law enforcement” and the press’s interest in maintaining the confidentiality of its sources.⁵⁷

The secrecy surrounding NSLs makes them unique among these investigative tools. Not only do the targets of NSLs lack notice and an opportunity to be heard before the requested documents are turned over, preventing *ex ante* enforcement of First Amendment rights, the nondisclosure provisions of the NSL statutes make it unlikely that the target will *ever* discover that his or her records were shared with the government, preventing *post hoc* enforcement as well.⁵⁸ Although the FBI’s request for toll billing or e-mail transactional information may not be made “solely upon the basis of activities protected by the first amendment,” the FBI is otherwise free to request reporters’

⁵⁵ *Id.* at 173-74.

⁵⁶ *Id.* at 175 (Sack, J., dissenting).

⁵⁷ *Id.*

⁵⁸ Even in the unlikely event that a communications service provider successfully contested the nondisclosure provisions, nothing mandates that the provider share the fact of the NSL with the target. Conceivably, a target could be alerted that his or her records were the subject of an NSL if the documents became evidence at a later criminal proceeding, but this also seems unlikely.

records without any special sensitivity to the potential burdens on First Amendment rights as long as the information is “relevant to an authorized investigation to protect against international terrorism or clandestine activities.”⁵⁹ Moreover, judicial review to ensure that NSLs are not issued in bad faith is unavailable to the target. While strict adherence to the voluntary DOJ guidelines governing subpoenas for reporters’ phone records may allow for some balancing of First Amendment interests in seeking phone records, even in the absence of judicial review, as discussed in Chapter 2, the IG’s reports suggest these guidelines have not been strictly followed and, in any case, discretion remains wholly with the executive branch.

Although the Supreme Court’s newsgathering case law has not specifically addressed whether the First Amendment requires the availability of ex ante procedural protections when valid criminal investigative tools are employed against journalists, language in the *Branzburg* and *Zurcher* decisions strongly suggest that this is the case. In both decisions, the Court explicitly relied upon the availability of procedural protections to ensure that investigative tools are not

⁵⁹ 18 U.S.C. § 2709(b).

used in bad faith to intrude upon protected newsgathering activities.⁶⁰ However, based on the cases located in this study, the circuit courts that have considered subpoenas of journalists' records from third-party providers—the closest analogy to the investigative use of an NSL—seem to be split on whether reporters have a right to challenge such subpoenas *ex ante*.⁶¹ But even the *Reporters Committee* decision, which rejected a requirement that subpoenas be reviewed *ex ante* for compliance with the First Amendment, seemed to require that at least some opportunity for judicial review be available. The court specifically noted that potential First Amendment violations could be deterred, and any actual violations vindicated, by post hoc damages suits upon notice of the subpoenas from the phone companies.⁶² Because the NSL statutes fail to provide for either the *ex ante* procedural protections or opportunities for post hoc relief that could protect against First Amendment violations, it appears that under existing precedent, there is a strong argument that the use of these statutes to target reporters' records constitutes a burden on protected First Amendment rights.

⁶⁰ See *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972) (“[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. . . . Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.”); *id.* at 710 (Powell, J., concurring) (“If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. . . . [H]e will have access to the court on a motion to quash and an appropriate protective order may be entered.”); *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978) (“There is no reason to believe, for example, that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper. Nor, if the requirements of specificity and reasonableness are properly applied, policed, and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions.”).

⁶¹ Compare *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006) with *Reporters Comm. for Freedom of Press v. AT&T Co.*, 593 F.2d 1030 (D.C. Cir. 1978).

⁶² See *Reporters Comm.*, 593 F.2d at 1069.

Part III: National Security Interests as a Justification for the Burdens to First Amendment Rights Imposed By NSLs

The finding that the use of NSLs to collect reporters' records is an intrusion on reporters' First Amendment rights, however, is merely the first step in an analysis of the ultimately constitutionality of the use of NSLs targeting reporters' records. Assessing the availability of First Amendment protection also requires examining whether the law may nonetheless be upheld because it serves important government interests that outweigh the burden to First Amendment rights. The use of NSLs to request reporters' records brings into conflict two important values of the American democratic system—protection of First Amendment rights, including vigorous protection for the rights of the free press, and the state's undeniable interest in national security and the safety of its citizens. Chapter 4 considered this conflict in addressing the third set of research questions posed by this study, which asked how the federal courts have balanced the rights of free press, free speech, and freedom of association against countervailing national security interests and how the decisions identified in that chapter inform the question of whether journalists' rights against government intrusion into the newsgathering process would be upheld against the government's national security interest in the information sought. Chapter 4 concluded that when First Amendment and national security values conflict, the courts have provided the most robust protection to First Amendment rights in the face of a government attempt to impose a prior restraint. On the other hand, the courts have generally been accommodating to the executive's claims that neutral

restrictions on the time, place, and manner of speech are necessary to protect national security interests. In addition, the cases identified in Chapter 4 demonstrated that while the courts have traditionally deferred to the other branches of government on issues of national security, particularly during periods of heightened national security concerns, they have also emphasized the need to protect the free press' role as an important check on the exercise of executive authority in this realm.

As discussed in Part II above, the application of NSLs to reporters' records is not aimed at restricting the content of speech and imposes only incidental burdens on the exercise of newsgathering rights. As such, it would likely be subject to intermediate scrutiny under the First Amendment.⁶³ Under this standard, a restriction on speech may be upheld if it "furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than" necessary to further that interest.⁶⁴ The regulation "need not be the least speech-restrictive means of advancing the Government's interest," rather the requirement is that the "means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests."⁶⁵

⁶³ Under Supreme Court precedent, laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content" and laws that "compel speakers to utter or distribute speech bearing a particular message" are subject to strict scrutiny. On the other hand, laws that are "unrelated to the content to speech are subject to an intermediate level of scrutiny . . . because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys. v. FEC*, 512 U.S. 622, 624 (1994).

⁶⁴ *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

⁶⁵ *Turner Broad.*, 512 U.S. at 662 (quotation omitted).

The federal cases located in this study and discussed in Chapter 4 make clear that the government's interest in national security is of the "highest order,"⁶⁶ suggesting that the NSL statutes would easily satisfy the "substantial government interest" prong of the intermediate scrutiny test. However, based on a review of those cases, the courts have also made clear that broad or vague claims of a national security interest will not suffice to justify restrictions on speech and that a naked claim of "national security" cannot alone justify a restriction on speech.⁶⁷ Whether a court would find the necessary fit between the government's claimed interest in national security and the contouring of the NSL provisions to serve this interest is a close call and could arguably come out either way. Given the courts' deference to the executive on national security claims, however, as well as the current climate of heightened concern for national security protections, it seems more likely that the balance would tip in favor of a finding of constitutionality.

The best argument to be made that the EPCA NSL statute may burden substantially more speech than necessary to serve the government's national security interests is that it allows the government to collect records of reporters' newsgathering activities on the basis of mere relevance to a national security investigation. There is no requirement that the information be necessary to the investigation, that the government first attempt to secure the information from alternate sources, or that the FBI take any other precautions to attempt to minimize intrusions on speech. The statute allows for broad records requests that

⁶⁶ *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1220 (10th Cir. 2007).

⁶⁷ *See, e.g., United States v. Robel*, 389 U.S. 258, 264 (1967); *In re Washington Post Co.*, 807 F.2d 383, 391-92 (4th Cir. 1986).

could (and do) result in the production of substantially more documents than necessary to discover the desired information, allowing for further potential invasions of newsgathering rights. In a leak investigation, for example, the government may request a reporter's phone records for the month leading up to the publication of a story containing classified information. These records, however, could be used to identify not just the source of the leak at issue, but to identify any number of confidential sources with whom the reporter had spoken over the course of the month.

On the other hand, however, the burdens on First Amendment rights imposed by NSLs could also be considered quite narrow. The NSL statutes do not bar the publication of any information or otherwise act as a prior restraint. Nor do they directly restrict journalists from engaging in newsgathering activities, for example, by limiting access to records or restricting the ability to interview certain parties. While the federal courts have recognized the particular value of reporting on national security issues, at most, the NSL statutes constitute an indirect interference with reporters' newsgathering efforts by deterring confidential sources from providing information about counterterrorism efforts or national security policies. The ultimate impact on speech may be negligible; as the *Branzburg* majority pointed out, "[f]rom the beginning of our country, the press has operated without constitutional protection for press informants, and the press has flourished."⁶⁸ For these reasons, it is likely that use of NSLs to collect reporters' records would survive intermediate scrutiny.

⁶⁸ *Branzburg v. Hayes*, 408 U.S. 665, 699-700 (1972).

Part IV: Potential Avenues for Reform and Recommendations

Because the First Amendment protection available to reporters subject to NSLs is doubtful, the most effective means of protecting journalists against the burdens to newsgathering imposed by NSLs is legislative reform. Regardless of whether reporters have constitutional protection against the use of NSLs to collect their records, Congress could choose to protect reporters' records by statute. While Parts II and III of this chapter together addressed the first question of fourth set of research questions for this study—whether the First Amendment bars the government from collecting the records of journalists under the NSL statutes—this part addresses the second question, which asks what statutory reforms might best limit the impact of NSLs on the newsgathering process. One way to provide such protection would be to amend the NSL statutes themselves, for example by excluding reporters' records from their reach or by requiring that requests for reporters' records receive judicial pre-approval. A second, and likely more difficult, means of protecting reporters' records in the hands of third-party communications providers would be the passage of a federal shield law that would encompass NSL requests to third parties for information about media customers.

This part reviews proposed legislation in the 111th Congress (2009-10) that could serve as a vehicle for providing journalists with protection against NSLs by either amending the NSL statutes or creating a media shield law. As mentioned in Chapter 1, because of the large number of proposed bills in a given Congress, the bills discussed here are limited to those that have been successfully

voted out of committee, which indicates that the bill could at least be viable in one of the Houses of Congress. This part discusses four such bills, describing the relevant provisions of each and discerning their potential effect on the use of NSLs to request journalists' records. It then recommends what type of legislative reform might best protect journalists' newsgathering interests while also providing sufficient protection for genuine national security interests.

Assessing Proposed Legislation

Prior to the renewal of expiring Patriot Act provisions in February 2010,⁶⁹ several legislators had proposed bills tying the renewal of these provisions to revisions of other portions of the Patriot Act, including the NSL amendments. Two such bills—one in the House and one in the Senate—were voted out of committee. The Senate Bill, the USA PATRIOT Act Sunset Extension Act of 2009,⁷⁰ would have returned the NSL statutes to their pre-Patriot Act form by the end of 2013 by revising each of the statutes to read as it read on the day before the Patriot Act's passage and repealing the second class of FCRA NSLs created by the Patriot Act.⁷¹ The bill would, however, have maintained provisions for judicial review of nondisclosure requests.⁷² These revisions, while failing to provide a blanket exemption for NSLs seeking reporters' records, would significantly reduce the threat that NSLs pose to newsgathering activities. By returning the ECPA NSL statute to its pre-Patriot Act form, the bill would have

⁶⁹ H.R. 3961, 111th Cong. (2010).

⁷⁰ See Patriot Act Sunset Extension Act of 2009, S. 1692, 111th Cong. (2009).

⁷¹ *Id.* at § 2(c)(1).

⁷² *Id.* at § 5.

ensured that an NSL could only be issued for a reporter's telephone toll records when the FBI had specific facts to conclude that the reporter *himself* was a terrorist or spy.⁷³ The government would also be able to collect subscriber information (but not toll records) if there was specific evidence that "communication facilities registered in the name of a" reporter or newspaper had been used in communication with a terrorist or spy or with "an agent of a foreign power under circumstances giving reason to believe that the communication concerned international terrorism."⁷⁴ While this authority would seemingly allow discovery of the fact that a number belonging to a reporter had dialed or received calls from a number belonging to a spy or terrorist, such a revelation would be based on the examination of the terrorist's telephone toll records, not the reporter's. It therefore seems that under either provision, the government would not be able to issue an NSL for a reporter's records simply to track down leaks or otherwise monitor communications related to a terrorism investigation.

The House Bill, the USA PATRIOT Amendments Act of 2009,⁷⁵ would similarly have returned the NSL statutes to their pre-Patriot Act text by the end of 2013⁷⁶ and maintained judicial review of nondisclosure orders.⁷⁷ Unlike the Senate bill, however, the House bill proposed a new standard for issuance of an NSL, requiring:

⁷³ See 18 U.S.C. § 2709 (b)(1) (2000).

⁷⁴ *Id.* at § 2709 (b)(2).

⁷⁵ H.R. 3845, 111th Cong. (2009).

⁷⁶ *Id.* § 202.

⁷⁷ *Id.* § 207.

specific and articulable facts showing that there are reasonable grounds to believe that the information sought: 1) pertains to a foreign power or an agent of a foreign power; 2) is relevant to the activities of a suspected agent of a foreign power that is the subject of such authorized investigation; or 3) pertains to an individual in contact with, or personally known to, a suspected agent of a foreign power that is the subject of such authorized investigation.⁷⁸

This standard would likewise seem to eliminate the applicability of NSLs to leak investigations, except in the rare case in which a leaking government employee is deemed to be acting as an agent of a foreign power. While this standard would not provide journalists with protections when their records are subject to NSLs, the House bill, like the Senate bill, would likely substantially reduce the number of situations in which an NSL could potentially be used to collect a reporter's records.

A second means of providing journalists with protection against NSLs' threat to newsgathering activities would be the passage of a media shield law. In the 111th Congress, one shield law bill passed the House,⁷⁹ and another was reported out of the Senate Judiciary Committee.⁸⁰ Each of these two bills would provide limited protection against the use of NSLs when reporters are the targets, with the end result being the availability of procedural protections, similar to those available for media subpoenas or searches, to allow reporters to challenge NSLs for their records.

⁷⁸ *Id.* at 204(a).

⁷⁹ Free Flow of Information Act, H.R. 985, 111th Cong. (2009) (as passed by House, Apr. 1, 2009).

⁸⁰ Free Flow of Information Act of 2009, S. 448, 111th Cong. (2009).

The House of Representatives passed a shield law bill in April 2009 that would provide journalists with a qualified privilege against compelled testimony and the production of certain materials.⁸¹ In all cases, the bill prevents a federal entity from compelling a “covered person” to provide testimony or produce documents related to information obtained while that person was engaging in journalism unless a judge finds by preponderance of the evidence, after providing the covered person with notice and the opportunity to be heard, that the government has “exhausted all reasonable alternative sources” of the information at issue and that the public interest in compelling disclosure outweighs “the public interest in gathering or disseminating news or information.”⁸² In determining the balance of the public interest, the court would be specifically authorized to consider “the extent of any harm to national security.”⁸³ In addition to these requirements, in a criminal investigation or prosecution the bill tracks the DOJ guidelines by requiring that the party seeking disclosure prove “there are reasonable grounds to believe that a crime has occurred” and that “the testimony or document sought is critical to the investigation or prosecution or to the defense against that prosecution.”

Heightened protections apply under the bill if the testimony or document would reveal the identity of a source or could reasonably be expected to allow discovery of the identity of a source. In these cases, the privilege is absolute

⁸¹ H.R. 985. The bill is identical to an amended version of an earlier effort, H.R. 2102, 110th Cong. (2007), which passed the house in October 2007. H.R. REP. NO. 111-61, at 2 (2009).

⁸² *Id.* at § 2(a).

⁸³ *Id.* at § 2(b).

unless the party seeking disclosure can show that the need for disclosure fits one of the bill's enumerated exceptions. Three of these exceptions have relevance to national security issues, allowing a party to compel disclosure of a source when it is: 1) "necessary to prevent, or to identify any perpetrator of, an act of terrorism against the United States or its allies or other significant and specified harm to national security with the objective to prevent such harm"; 2) "necessary to prevent imminent death or significant bodily harm"; or 3) "essential" in a criminal investigation to identify "a person who without authorization disclosed properly classified information and who . . . had authorized access to such information," where such disclosure "has caused or will cause significant and articulable harm" to national security.⁸⁴ Even if the demand fits within one of these exceptions, however, the exhaustion and public interest balancing requirements must be satisfied as well.⁸⁵

The same standards apply to requests for "compelled disclosure from communications service providers" for reporters' records.⁸⁶ In such cases, a court may compel disclosure of the document only after the party seeking the document provides the reporter whose records are being sought with notice of the request and an opportunity to challenge it in court, although notice may be delayed if the court determines "by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation."⁸⁷

⁸⁴ *Id.* at § 2(a)(3).

⁸⁵ *Id.* at § 2(a)(4).

⁸⁶ *See id.* § 3(a); H.R. REP. NO. 111-61, at 10 (2009).

⁸⁷ H.R. 985, § 3(c).

The House shield law bill would provide reporters with limited protection against the use of NSLs to demand their records from third-party communications providers. While the bill's requirements that the government must exhaust alternative sources of the information and that a judge evaluate the demand under a public interest balancing test in cases that do not involve information about the identity of a source would provide reporters with some protection against the use of NSLs, the bill's special treatment of demands related to national security diminishes these protections. In particular, the bill's exception to the absolute privilege for confidential sources in cases of leaks of classified information reduces protection against the most likely use of NSLs for reporters' records, although the requirement that the leak must "ha[ve] caused or will cause significant and articulable harm" to national security is a higher standard than the NSL statute's requirement of mere relevance to a terrorism investigation. Moreover, the notice and hearing requirements of the House bill will provide journalists with procedural protections, ensuring that the decision to demand their records is not left wholly to the discretion of the executive branch. Even when the government is able to invoke the exception to notice, thus depriving the target journalist of the chance to challenge the demand, the decision to apply this exception will rest with a court rather than the executive.

The Senate's shield law bill—reported out of the Senate Judiciary Committee in December 2009—provides a far more limited reporter's privilege than its counterpart in the House.⁸⁸ Perhaps most significantly, the Senate shield

⁸⁸ Free Flow of Information Act of 2009, S. 448, 111th Cong. (2009).

law bill applies only to a narrow category of “protected information,”⁸⁹ limited to information identifying confidential sources or materials that a reporter created or obtained upon a promise that the materials would remain confidential.⁹⁰

Like the House bill, the Senate bill provides that a party may compel disclosure of protected information only after exhausting “all reasonable alternative sources.”⁹¹ The Senate bill also requires that in criminal investigations there must be reasonable grounds to believe that a crime has occurred and that the information sought is essential. In most other ways, however, the Senate’s version of the privilege is much more limited. Importantly, the Senate bill replaces the House’s public interest balancing test with a standard allowing disclosure if the Attorney General has certified that the request is “consistent with” the DOJ guidelines governing media subpoenas⁹² and the covered person has failed to establish “by *clear and convincing* evidence that disclosure of the protected information would be contrary to the public interest.” As with the House bill, the judge is to take into account “the extent of any harm to national security” in assessing the public interest.⁹³

The Senate bill also makes it relatively easy to compel disclosure when certain safety or national security risks are present. When protected information

⁸⁹ *Id.* § 2.

⁹⁰ *Id.* § 10.

⁹¹ S. 448, 111th Cong., § 2 (2009).

⁹² *Id.* (emphasis added). These guidelines require, among other things, that DOJ employees take “all reasonable investigative steps . . . before considering issuing a subpoena for telephone toll records of any member of the news media.” 28 C.F.R. 50.10(b) (2009).

⁹³ S. 448, § 2.

is “reasonably necessary to stop, prevent, or mitigate a specific case of: 1) death; 2) kidnapping; or 3) substantial bodily harm,” the privilege simply does not apply at all.⁹⁴ The bill also creates an exception allowing compelled disclosure in a criminal matter or leak investigation if the court finds that the protected information would “*materially assist*” the government in “preventing, mitigating, or identifying the perpetrator of an act of terrorism or other acts that have caused or are reasonably likely to cause significant and articulable harm to national security.”⁹⁵ Investigations or prosecutions of leaks of classified information that do not involve an attempt by the government to prevent or mitigate terrorism or significant harm to national security are treated under the bill’s provisions covering criminal investigations generally.⁹⁶

The standards above also apply when the government attempts to compel a communications service provider to disclose information from a reporter’s account, *except* when the information is sought under 18 U.S.C. § 2709, the ECPA NSL statute.⁹⁷ When an ECPA NSL is issued in connection with a criminal investigation or prosecution, all the provisions above apply except the requirements that government have reasonable grounds to believe that a crime has

⁹⁴ *Id.* §4.

⁹⁵ *Id.* § 5(a) (emphasis added) (punctuation altered and numbered subheading designations eliminated from text as it appears in the bill). The bill further requires that when assessing the existence of harm to national security, the court “shall give appropriate deference to a specific factual showing submitted to the court by the head of any executive branch agency or department concerned.” *Id.* at § 5(b). The potential for subsequent unlawful leaks by the source sought to be identified is not, in of itself, sufficient to establish that disclosure would materially assist in preventing terrorism or national security harm. *Id.* § 5(d).

⁹⁶ *Id.* § 5(c).

⁹⁷ *Id.* § 6(a)(2).

occurred and that the Attorney General certify that the request is consistent with the media subpoena guidelines.⁹⁸ The bill thus provides fewer procedural protections when the government invokes its NSL authority to demand records. Nonetheless, the bill would still require that reporters whose records are subject to NSLs or other subpoenas to third parties receive notice of the request and an opportunity to be heard, except that notice may be delayed if the court determines that it would “pose a substantial threat to the integrity of a criminal investigation, a national security investigation, or intelligence gathering, or that exigent circumstances exist.”⁹⁹

While the Senate bill would not provide substantive protections as rigorous as those offered by the House bill, particularly given the broad exceptions for national security-related requests, it could still significantly limit the potential burdens to newsgathering imposed by NSLs. In particular, the requirement that reporters be provided with notice and an opportunity to be heard when their records are requested via NSLs would provide the type of procedural protections that the federal courts have recognized as sufficient to protect reporters’ First Amendment rights in other contexts.

Recommendations

In their current form, nothing in the NSL statutes provides journalists with any protection against the government’s ability to secretly collect their toll billing and e-mail transactional records to track down the confidential sources of leaks

⁹⁸ *Id.* § 6.

⁹⁹ *Id.* § 6(b)-(c).

upon a mere showing that “the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine activities.”¹⁰⁰

As discussed in Chapter 2, neither the statute’s provision that NSLs may not be issued “solely upon the basis of activities protected by the first amendment,”¹⁰¹ nor the DOJ’s voluntarily adopted and selectively enforced guidelines governing reporter subpoenas¹⁰² provide an effective check on the FBI’s NSL power.

The most effective means of protecting journalists’ newsgathering activities against the threat of NSLs would be to return the ECPA NSL to its pre-1993 scope. Prior to the 1993 amendments, a mere showing of relevance to a terrorism investigation was not sufficient to justify the use of NSL authority. Instead, NSLs could be issued only in foreign counterintelligence investigations and only for the records of those individuals or entities who were believed to be “a foreign power or an agent of a foreign power.”¹⁰³ Under this standard, the records of journalists would seemingly rarely—if ever—be subject to review. However, the 2010 failure of the House and Senate bills proposing to return the NSL statutes to their pre-Patriot Act scope suggests that proposals to scale back NSL authorities in general may not be politically viable.

The best, politically viable approach to ensuring an adequate balance of First Amendment rights and national security interests when NSLs are issued for journalists’ records may be to bring the use of NSLs in line with the use of other

¹⁰⁰ 18 U.S.C. § 2709(b).

¹⁰¹ *Id.*

¹⁰² 28 C.F.R. § 50.10(a) (2009).

¹⁰³ Pub. L. No. 99-508, § 201, 100 Stat. 1848, 1867 (1986).

investigative tools—such as searches and subpoenas—as applied to journalists. Providing procedural protections such as those available in *Branzburg* and other media subpoena cases would ensure that national security interests could not be invoked broadly to justify intrusions on journalists’ First Amendment newsgathering activities. Case-by-case scrutiny of NSL requests for reporters’ records by a neutral judge would ensure against abuses and would also provide an opportunity to account for the public interest in maintaining a free flow of information from confidential sources. At the same time, such a scheme would not prevent the government from invoking its national security interest in a case in which an intrusion is truly justified based on a specific national security need.

The essential ingredients to such a scheme would be notice to the media party of the intent to collect his or her records through the use of an NSL and the opportunity to contest the NSL before a court prior to its issuance. In light of the valid concern that disclosure of an NSL request could, in certain cases, tip off the target of a terrorism investigation and thus compromise law enforcement efforts, such a scheme would likely need to afford the government with the opportunity to seek a non-disclosure order against the media party to the same extent it may currently seek a non-disclosure order against the third-party provider in possession of the records. Such a compromise, while limiting the media’s First Amendment right to disclose information about the NSL request, may be necessary to ensure the greater First Amendment benefits that stem from an opportunity for judicial review of NSL requests for media records. A limitation in this context, which might be considered analogous to a court order preventing a

party in litigation from disclosing the contents of confidential materials received through discovery, is also less troubling than the type of prior restraint at issue in the Pentagon Papers case. Furthermore, the Second Circuit's interpretation of the scope of the non-disclosure provisions in the *Doe* litigation suggests that the government would have to make a significant and specific showing of need before non-disclosure could be ordered.¹⁰⁴

The statute should also adopt safeguards similar to those proposed in the House shield law bill discussed above, which requires in all cases that the government has exhausted all alternative sources of the information and that the public interest in compelling disclosure outweighs the public interest in gathering and disseminating news.¹⁰⁵

Conclusion

The attacks of September 11, 2001, and the war on terror have created “a greater sense of urgency to the issue of unauthorized disclosure of sensitive national security secrets.”¹⁰⁶ Both the Obama and Bush administrations ramped up efforts to root out leakers in the face of media reports about sensitive national security issues. Under the Bush administration, for example, leaks about secret CIA prisons and the NSA's warrantless surveillance program led to the launch

¹⁰⁴ *Doe v. Mukasey*, 549 F.3d 861, 881-83 (2d Cir. 2008).

¹⁰⁵ Free Flow of Information Act, H.R. 985, § 2, 111th Cong. (2009).

¹⁰⁶ Jack Nelson, *U.S. Government Secrecy and the Current Crackdown on Leaks* 27 (The Joan Shorenstein Ctr. on the Press, Politics & Pub. Pol'y Working Paper Series, Paper #2003-1), available at http://www.hks.harvard.edu/presspol/publications/papers/working_papers/2003_01_nelson.pdf.

several FBI probes, a polygraph investigation within the CIA, and a threat to prosecute reporters under federal espionage laws.¹⁰⁷ President Obama's Justice Department has similarly "taken a hard line against leakers."¹⁰⁸ In May 2010, an FBI linguist was sentenced to 20 months in prison after pleading guilty to providing classified information to a blogger in only the third known conviction of a U.S. government official or contractor for leaking information to the press.¹⁰⁹ The previous month, the Justice Department reissued a grand jury subpoena against a *New York Times* reporter demanding disclosure of his sources for book chapter describing a CIA operation to disrupt nuclear weapons research in Iran and indicted a former National Security Agency official in connection with leaks to the *Baltimore Sun*.¹¹⁰

As the government increasingly cracks down on leaks of national security information to the press, NSLs may provide an attractive means of quietly obtaining reporters' phone or e-mail records in order to ferret out the identities of leakers. From a First Amendment perspective, such a development would be troubling, as the use of NSLs occurs without the procedural protections that guard against violations of newsgathering rights in other contexts. While reporters would likely not have a viable First Amendment claim against the use of NSLs to obtain their records in good faith investigations under current precedent, they

¹⁰⁷ Dan Eggen, *White House Trains Efforts on Media Leaks: Sources, Reporters Could Be Prosecuted*, WASH. POST., Mar. 5, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/04/AR2006030400867.html>.

¹⁰⁸ Josh Gerstein, *Justice Dept. Cracks Down on Leaks*, POLITICO, May 25, 2010, <http://www.politico.com/news/stories/0510/37721.html>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

likely do have a First Amendment right to protect their newsgathering activities against NSLs that are overly broad, only tangentially related to the investigation at issue, or otherwise abusive. The lack of judicial oversight of NSLs, however, leaves journalists without the ex ante ability to challenge NSLs for their records. Moreover, the nondisclosure provisions of the NSL statutes mean that journalists will rarely, if ever, discover that their records were subject to NSL requests, essentially depriving them of the ability to sue for damages post hoc as well. However, even if a journalist was able to bring a claim against the use of NSLs to obtain his or her records, the government may be able to justify any First Amendment infringement based on the important national security interests served by the issuance of NSLs.

Given the uncertain success of a constitutional challenge, it appears that the best option for those concerned about the newsgathering intrusions imposed by NSLs is to seek legislative reforms. While a wholesale scaling back of the NSL provisions to their pre-Patriot Act scope would not provide journalists with specific protections against the use of NSLs to obtain their records, it would severely limit the applicability of NSLs to situations involving information available in reporters' records. Such revisions may also be more politically viable than providing protection through the passage of a shield law. Although a shield law would provide journalists with procedural protections to limit the use of NSLs, the odds of its passage may be slim. Legislators have long tried to pass a

successful shield law without success; for example, in just the first six years after the *Branzburg* decision, nearly 100 shield law bills failed.¹¹¹

No matter how they occur, NSL reforms may be necessary to ensure that the government does not obtain records of journalists' communications unchecked and in secrecy. Although the consequences of leaking can be particularly devastating during times of war or other national security threats, and the government's heightened concern about leaks therefore appropriate, the federal courts have suggested that the need for a robust and free flow of information may also be at its greatest during such times. As Justice Stewart explained in his concurrence in the *Pentagon Papers* case, "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government."¹¹²

¹¹¹ H.R. REP. 111-61, 111th Cong., at 4 (2009).

¹¹² *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

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