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## Process Without Procedure: National Security Letters and First Amendment Rights

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### I. INTRODUCTION

When does the Constitution require procedural safeguards for infringements on First Amendment rights? Surprisingly, this general question has never been answered.<sup>1</sup> The absence of procedural protections for First Amendment rights can yield enormous and substantive implications.<sup>2</sup> One particular investigative tool, the National Security Letter (NSL), is illustrative.<sup>3</sup> Each year, the FBI uses tens of thousands of NSLs to obtain customer “toll billing” information, or transactional records—such as records related to telephone calls, emails, text messages, online forums, tweets, or Facebook messages—from service providers.<sup>4</sup> FBI nondisclosure orders, which usually accompany NSLs, prevent the recipient from speaking about the requests.<sup>5</sup> Since 2001, there have been

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1. See *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (highlighting Supreme Court has never developed a general test to determine whether First Amendment procedural safeguards apply).

2. See 18 U.S.C. § 2709 (2012) (permitting Federal Bureau of Investigation (FBI) to seek subscriber records from providers without court order).

3. See *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1065 (N.D. Cal. 2013) (demonstrating FBI's NSL use pursuant to statutory authority).

4. See 18 U.S.C. § 2709(a) (2012) (describing service providers' compulsory production of electronic records to FBI upon request); 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: ASSESSMENT OF PROGRESS IN IMPLEMENTING RECOMMENDATIONS AND EXAMINATION OF USE IN 2007 THROUGH 2009 60 (2014), <https://oig.justice.gov/reports/2014/s1408.pdf> [hereinafter NSL REPORT III] [<https://perma.cc/H2TP-PL38>] (noting NSL requests primarily for telephone and electronic communications); 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 36 (2007), <https://oig.justice.gov/special/s0703b/final.pdf> [hereinafter NSL REPORT I] [<https://perma.cc/G7U9-RFL8>] (reporting information obtained by NSL from 2003 through 2005).

5. See 18 U.S.C. § 2709(c) (2012) (prohibiting providers from disclosing information related to FBI request); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006 124 (2008), <https://oig.justice.gov/special/s0803b/final.pdf> [hereinafter NSL REPORT II] [<https://perma.cc/4ADZ-LE4Z>] (noting NSL nondisclosure obligations). “Of the 375 NSLs we examined in our random sample, 365, or ninety-seven percent imposed the nondisclosure and confidentiality obligation established in the Patriot Reauthorization Act. Based on that result, we projected that of the 15,187 NSLs the FBI issued from March 10, 2006, through December 31, 2006, 14,782 NSLs imposed the nondisclosure and confidentiality obligations.” NSL REPORT II, *supra*, at 5.

only a handful of known challenges to NSLs.<sup>6</sup>

Although, as a matter of principle, First Amendment jurisprudence accepts that adequate procedures are essential to protecting civil liberties, those procedures nevertheless vary greatly depending on context. The Supreme Court recognizes the essential nature of certain procedures in contexts such as licensing schemes, prior restraints, and speech regulations, which each apply different First Amendment analyses and implicate different procedural outcomes.<sup>7</sup>

While the importance of adequate procedures to protect First Amendment rights is keenly felt in the criminal trial context, First Amendment doctrine plays a relatively minor role in prescribing procedural safeguards for investigative activity.<sup>8</sup> The Supreme Court has repeatedly recognized the “danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.”<sup>9</sup> Courts look askance at criminal sanctions for First Amendment activity.<sup>10</sup> Yet “[t]he rules that regulate government investigations have typically emerged from the Fourth and Fifth Amendments, not the First. Lawyers and judges generally do not think of the First Amendment as having much relevance to criminal procedure, let alone as providing its own criminal procedure rules.”<sup>11</sup>

This Article argues that the near total absence of procedural safeguards for NSL issuance violates the First Amendment rights of subscribers whose records the FBI obtains. In Part II, this Article describes the statutory framework authorizing NSL issuance for communication records.<sup>12</sup> Several examples illustrate that the NSL process has created a *de facto* regime in which recipients automatically comply with requests in the absence of any judicial review.<sup>13</sup> While litigation remains the only avenue for securing judicial review of either an NSL or an accompanying nondisclosure order, a number of factors make challenges to NSLs exceedingly rare. The result is that the FBI commonly obtains communication metadata entirely in secret and without judicial

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6. See *infra* Part II.A.2 (discussing challenges to NSLs).

7. See generally *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (articulating requirements for content-based speech regulation); *Freedman v. Maryland*, 380 U.S. 51 (1965) (stating requirements for licensing scheme); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (noting requirements for prior restraint).

8. See Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 116 (2007) (discussing First Amendment protections in criminal investigations).

9. *NAACP v. Button*, 371 U.S. 415, 433 (1963) (explaining First Amendment freedoms as delicate and vulnerable).

10. See *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (striking down federal criminal statute prohibiting false representations about armed forces medals); see also *Bridges v. California*, 314 U.S. 252, 263 (1941) (striking down conviction for publishing comment on pending litigation); *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940) (striking down picketing conviction on First Amendment grounds).

11. Solove, *supra* note 8, at 114.

12. See *infra* Part II.

13. See *infra* Part II.

review.<sup>14</sup> As a threshold matter, judicial review is a prerequisite to actualizing meaningful and robust First Amendment safeguards. Whether the First Amendment protects an NSL target's communications is a constitutional question for the judicial branch to resolve. In Part III, this Article describes how NSLs are explicitly directed at uncovering specific subscribers' networks and associations, even though such subscribers are frequently not the target of the investigation.<sup>15</sup> This type of inquiry also detrimentally impacts the First Amendment rights of journalists and the press.<sup>16</sup>

Finally, this Article situates the NSL compelled disclosure regime within the broader scope of national security law.<sup>17</sup> Although nondisclosure orders and communications surveillance are commonplace within the national security framework, NSLs present distinctive constitutional problems because of the conjunction between secrecy, absence of judicial review, and compelled disclosure of information about communication. While, practically speaking, secrecy is endemic to other similar surveillance practices, NSLs lack many of the procedural safeguards used in other national security information-gathering tools. Additionally, although secrecy undoubtedly is an important feature of the state's national security surveillance tools, traditional safeguards in other constitutional contexts—including notice, the opportunity for a hearing, ex ante judicial oversight, and the exclusionary rule—foster transparency by facilitating scrutiny of the investigative process. As a result, NSLs are a unique case study for assessing the adequacy of procedural safeguards for First Amendment rights in the national security framework.

## II. NSLS: THE STATUS QUO

Four statutes authorize NSL use to obtain subscriber information from third parties such as telephone companies, Internet service providers, financial service providers, and credit institutions.<sup>18</sup> This Article is primarily concerned with one of those four statutes: the Electronic Communications Privacy Act (ECPA).<sup>19</sup> A primary purpose of ECPA NSLs, like other forms of metadata surveillance, is to connect subjects of investigations with their networks in order to gather information justifying a warrant and court order under the

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14. See *supra* note 5 and accompanying text (noting NSL data request's secret nature).

15. See *infra* Part III.

16. See Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 747 (2008) (exploring ways relational surveillance harms First Amendment).

17. See *infra* Part IV.

18. See generally Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (2012); Fair Credit and Reporting Act, 15 U.S.C. §§ 1671-1693r (2012); Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522 (2012); National Security Act, 50 U.S.C. §§ 3001-3234 (2012 & Supp. 2013).

19. Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522 (2012).

Foreign Intelligence Surveillance Act (FISA).<sup>20</sup> The information gleaned through NSLs can “connect terrorism subjects and terrorism groups with each other,” and “can assist in the identification of the investigative subject’s family members, associates, living arrangements, and contacts.”<sup>21</sup>

ECPA NSLs are issued to communications providers in order to obtain data related to communications.<sup>22</sup> Investigative activity that targets communication presents special First Amendment problems. Like other statutory authorities regulating surveillance, the ECPA provides that an investigation of a United States citizen may not be based *solely* on activity protected by the First Amendment, such as religious or political activity.<sup>23</sup>

### A. Statutory Background

As the Office of Legal Counsel recognized, an NSL is essentially an administrative subpoena requiring production of specified information in connection with an investigation.<sup>24</sup> Administrative subpoenas generally allow an administrative agency to compel a party to produce documents or testimony without judicial approval.<sup>25</sup> As an example, the Internal Revenue Service (IRS) commonly issues subpoenas, also referred to as summonses, in civil tax proceedings.<sup>26</sup> Additionally, the government frequently uses administrative subpoenas in criminal prosecutions.<sup>27</sup> ECPA NSLs permit the FBI to request the “local and long distance toll billing records” of any person from a “wire or electronic communication service provider.”<sup>28</sup> “Toll billing records” are metadata, not communications content; using NSLs, the FBI may only request “the name, address, length of service, and local and long distance toll billing

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20. See NSL REPORT I, *supra* note 4, at xxiv (categorizing supporting FISA applications via ECPA NSLs as “most important” use for such letters).

21. *Id.*

22. See *id.* (outlining ECPA NSLs’ major FBI investigative function).

23. See 18 U.S.C. § 2709 (2012) (authorizing electronic communication disclosure pertaining to telephone tolls and transactional records); 50 U.S.C. § 1842(a)(1) (2012) (prohibiting investigation based solely on First Amendment activity in pen register trap and trace requests); 50 U.S.C. § 1861(a)(1) (2012) (prohibiting First Amendment activity-based requests for business records).

24. See Memorandum from Office of Legal Counsel to Gen. Counsel of FBI 11 (Nov. 5, 2008) (on file at <http://1.usa.gov/1GZSj0a>) [hereinafter Office of Legal Counsel] [<http://perma.cc/8DNR-56UW>] (explaining NSL purpose).

25. See CHARLES DOYLE, CONG. RESEARCH SERV., RL32880, ADMINISTRATIVE SUBPOENAS AND NATIONAL SECURITY LETTERS IN CRIMINAL AND FOREIGN INTELLIGENCE INVESTIGATIONS: BACKGROUND AND PROPOSED ADJUSTMENTS 2 (2005), <https://www.fas.org/sgp/crs/natsec/RL32880.pdf> [<https://perma.cc/33LP-X52C>] (articulating NSL use in administrative subpoenas).

26. See 26 U.S.C. § 7602(a) (2012) (authorizing Secretary of Treasury to summon taxpayer and require production of books and records). The Secretary of the Treasury has the power to subpoena for purposes of, *inter alia*, “ascertaining the correctness of any return.” *Id.*

27. See DOYLE, *supra* note 25, at 1-2 (generally describing administrative subpoena use in criminal contexts). The Controlled Substances Act, the Inspector General Act, and 18 U.S.C. § 3486 all provide for issuing administrative subpoenas for use in criminal prosecutions. See *id.* at 13-15.

28. 18 U.S.C. § 2709 (2012).

records of a person or entity.”<sup>29</sup>

In many ways, NSLs are akin to other forms of administrative subpoenas. First, NSLs are issued by a member of the Executive branch, such as the Director of the FBI, Deputy Assistant Director, or Special Agents in Charge at certain field offices, and are not issued by prosecutors or grand juries.<sup>30</sup> Like other administrative subpoenas, a NSL permits the issuing agency to obtain records on a showing of relevance to an investigation, which has been described as a lax standard.<sup>31</sup> The core requirement of the NSL statute is that the FBI must certify in writing that the information sought is “relevant to an authorized investigation 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.”<sup>32</sup> As the Supreme Court held in analyzing an administrative subpoena issued to a newspaper company in 1946, an administrative subpoena need not be issued in connection with a “specific charge or complaint;” rather, “[i]t is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command.”<sup>33</sup>

As a corollary, when an agency issues an investigative subpoena, the agency itself determines whether the investigation is authorized. Courts are fairly deferential to this determination, finding a subpoena “sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.”<sup>34</sup> Likewise, an NSL may only be used in limited circumstances, but as with other forms of administrative subpoenas, the FBI itself decides whether those circumstances have been met.<sup>35</sup>

Yet NSLs are unique. First, NSLs emerge from an unusual statutory context. Four out of the five statutes that include NSL provisions are designed to protect individual privacy and balance privacy interests against the needs of

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29. *Id.*; see also Office of Legal Counsel, *supra* note 24, at 1. “The term ‘local and long distance toll billing records’ in § 2709(b)(1) extends to records that could be used to assess a charge for outgoing or incoming calls, whether or not the records are used for that purpose, and whether they are linked to a particular account or kept in aggregate form.” Office of Legal Counsel, *supra* note 24, at 1.

30. 18 U.S.C. § 2709(b) (2012) (defining class enabled to issue NSLs).

31. Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 826 (2005) (suggesting administrative subpoenas are reviewed under minimal relevance standard).

32. 18 U.S.C. § 2709(b)(1) (2012) (governing scope of relevance inquiry).

33. *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208-09 (1946) (enforcing subpoenas issued under Fair Labor Standards Act).

34. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (enforcing Federal Trade Commission orders issued under Federal Trade Commission Act).

35. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES § II(A)(I) (2002) [https://www.justice.gov/archive/olp/rpt\\_to\\_congress.htm](https://www.justice.gov/archive/olp/rpt_to_congress.htm) [hereinafter OLP REPORT] [<https://perma.cc/4P3K-LJKF>]. “Administrative subpoena authorities allow executive branch agencies to issue a compulsory request for documents or testimony without prior approval from a grand jury, court, or other judicial entity.” *Id.*

law enforcement; in these contexts, NSLs are national security *exceptions* to carefully drawn rules.<sup>36</sup> In contrast, many of the federal statutes authorizing administrative subpoenas are closely tied to the conferral of specific investigative authority within the same statute. For example, the Clean Air Act contains subpoena authority related to determinations and investigations of the various requirements and prohibitions contained in the Act.<sup>37</sup> The Inspector General Act of 1978 is the “single most significant source of administrative subpoena power,” but the authority contained therein is limited to the functions of the Inspector General.<sup>38</sup> The Internal Revenue Service is authorized to “examine any books, papers, records, or other data which may be relevant or material” to “the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.”<sup>39</sup> The Treasury Department’s broad subpoena authority is located in the Internal Revenue Code and clearly tied to violations of those provisions.<sup>40</sup>

Unlike these other administrative subpoena provisions, each NSL provision exists as an exception to the procedures put in place within its respective statute.<sup>41</sup> The ECPA, the Fair Credit Reporting Act, and the Right to Financial Privacy Act are not investigative statutes, but rather impose general bars on government access to protected records.<sup>42</sup> The ECPA was intended to extend privacy protections to new technologies.<sup>43</sup> Indeed, during the initial congressional hearings on civil liberties and national security that would grow into the ECPA framework, members of Congress repeatedly raised difficult questions involving balancing First Amendment rights and the need to protect military secrets.<sup>44</sup> In general, the ECPA embraces the requirement that law

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36. See H.R. REP. NO. 99-647, at 19 (1986) (characterizing ECPA as balancing interests). “The Committee believes [ECPA] represents a fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement.” *Id.*; see also 15 U.S.C. 1681(a)(4) (2012) (advocating for preservation of consumer privacy); *United States v. First Nat’l Bank of Md.*, 866 F. Supp. 884, 886 (D. Md. 1994) (describing Right to Financial Privacy Act as balancing privacy and law enforcement concerns).

37. 42 U.S.C. § 7607 (2012) (codifying administrative procedure and availability of judicial review under Clean Air Act).

38. OLP REPORT, *supra* note 35, § I(A) (summarizing administrative subpoena use by various government agencies).

39. 26 U.S.C. § 7602 (2012) (explaining authority to summon any person to determine tax return accuracy).

40. See *id.*

41. See OLP REPORT, *supra* note 35, at § IV, tbl. 1 (charting administrative subpoena authorities and showing many issuing authorities linked to investigative purpose in statutes).

42. See Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (2012); Fair Credit and Reporting Act, 15 U.S.C. §§ 1671-1693r (2012); Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522 (2012); National Security Act, 50 U.S.C. §§ 3001-3234 (2012 & Supp. 2013).

43. See 18 U.S.C. § 2510 (2012) (including electronic devices, storage, and communications in classification of protected information).

44. See *Civil Liberties and the National Security State, 1984: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 98th Cong. 20-21 (1984), <https://www.justice.gov/sites/default/files/jmd/legacy/2014/06/21/hear-103-1983.pdf> [<https://perma.cc/K6XB-F9FC>] (demonstrating Congressional concerns surrounding appropriate balancing of privacy and security under

enforcement seek a court order before obtaining customer information. As the Office of Legal Counsel has observed, “Section 2709 is an exception to the background rule of privacy established by 18 U.S.C. § 2702(a), which generally bars a provider from giving the Government a record or other information pertaining to a subscriber or customer”; the provision, however, is not a stand-alone grant of new administrative power.<sup>45</sup> Additionally, unlike most administrative subpoena forms, NSLs significantly limit the types of information that the FBI may seek, barring the FBI from obtaining certain content. This distinction reflects the ECPA drafters’ conviction that the content of communication records deserves stricter Fourth Amendment safeguards than mere subscriber records held by a third party.<sup>46</sup> In contrast, many other forms of administrative subpoenas allow the issuing agency to request all relevant records, regardless of whether they contain content or metadata.<sup>47</sup>

Finally, the loose standard of NSLs—requiring only relevance to an authorized investigation—is a relatively recent innovation. Historically, NSLs required a more stringent relevance showing than did administrative subpoenas in other contexts. Originally, NSLs were permitted only when the FBI certified that “there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power.”<sup>48</sup> Although the “reason to believe” standard was drafted to be less strict than probable cause, the foreign power requirement often made it impractical and difficult to use the NSL authority in conjunction with an investigation of a person in the United States.<sup>49</sup> In 1993, the “foreign power” requirement was loosened to allow investigation of an individual who communicated with a foreign power regarding terrorism or foreign intelligence.<sup>50</sup> In 2001, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act) amended the NSL authority once again, eliminating the foreign power requirement altogether.<sup>51</sup> As a result, it is no longer uncommon

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ECPA).

45. Office of Legal Counsel, *supra* note 24, at 3; *see also* 18 U.S.C. § 2702(a)(3) (2012) (noting general confidentiality requirement). “[A] provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service . . . to any governmental entity.” 18 U.S.C. § 2702(a)(3) (2012); H.R. REP. NO. 103-46, at 2 (1993) (characterizing NSL provision as “limited exception” to rule prohibiting divulgence of customer records).

46. *See* H.R. REP. NO. 99-647, at 22-23 (1986) (drawing various protective distinctions).

47. *See* 26 U.S.C. § 7602 (2012) (authorizing Treasury Department to subpoena all “relevant” records in tax investigations).

48. S. REP. NO. 99-541, at 44 (1986)

49. *See id.*; *see also* *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) (holding judicial warrant not “condition precedent” to administrative subpoena).

50. *See* 18 U.S.C. § 709(b)(2)(B)(ii) (1994) (allowing disclosure of information when specific facts indicate individual communicated with foreign agent).

51. 18 U.S.C. § 2709 (2012) (omitting mention of foreign power). The Patriot Act also broadened

for NSLs to target United States persons.<sup>52</sup> The relevance requirements for NSLs have loosened over time; however, they remain on par with the relevance requirements in the average administrative subpoena statute.<sup>53</sup>

### 1. Gag Orders

NSLs are also unique in that the statute authorizes the FBI to issue a gag order restricting the speech of the recipient without judicial approval or oversight. Many commentators have recognized that the gag orders presented by most NSLs are a prior restraint on speech that violate the First Amendment because they prevent the *recipient* from speaking.<sup>54</sup> The constitutional validity of this provision and subsequent amendments thereto, have long been the subject of controversy.<sup>55</sup>

Originally, the ECPA prohibited any NSL recipient, or “officer, employee, or agent thereof,” from disclosing “to any person” that the FBI had “sought or obtained access to information or records” under the NSL provision.<sup>56</sup> In 2004, an anonymous NSL recipient in the Southern District of New York challenged both the NSL provision’s substance and the gag order.<sup>57</sup> The district court concluded that the nondisclosure provision was an unconstitutional prior restraint; the government appealed.<sup>58</sup>

Subsequently, Congress amended the NSL provision to forbid disclosure to any person “other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request.”<sup>59</sup> Congress also provided new procedures for post-

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the number of FBI officials empowered to issue NSLs. 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 10 (2010), <https://oig.justice.gov/special/s1001r.pdf> [hereinafter EXIGENT LETTERS REPORT] [<https://perma.cc/SZJ8-6PF4>] (detailing list of FBI officials able to issue NSLs).

52. NSL REPORT I, *supra* note 4, at 62 (showing percentages of NSL requests related to investigations of United States persons).

53. See 26 U.S.C. § 7602(a)(1) (2012) (authorizing inspection of materials “which may be relevant or material” to tax inquiry).

54. 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, 1105 (2009) (analyzing argument NSLs chill exercise of free speech); Brian D. Eyink, Note, *Constitutional Secrecy: Aligning National Security Letter Nondisclosure Provisions With First Amendment Rights*, 58 DUKE L.J. 473, 473 (2008) (arguing NSL nondisclosure provision restrains protected speech).

55. See Garlinger, *supra* note 54, at 1107-08 (arguing PATRIOT Act violates Fourth and First Amendments).

56. 18 U.S.C. § 2709 (2012).

57. See *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 475 (S.D.N.Y. 2004), *vacated by Doe I v. Gonzales*, 449 F.3d 415 (2d Cir. 2006).

58. See *id.* (noting procedural history).

59. 18 U.S.C. § 2709 (2012) (amended 2015) (amending statute to include language regarding to whom disclosure remains entitled).



issuance judicial review and challenge of NSLs.<sup>60</sup> The nondisclosure provision, however, continued to draw attention. In 2006, the Second Circuit remanded the government's appeal to the district court to consider the revised statutory framework's First Amendment unanswered questions.<sup>61</sup> Once again, the district court held the nondisclosure provision unconstitutional because the provision, as written:

[G]rants broad discretion to the FBI to completely restrict constitutionally protected speech on the basis of its content, and it places the burden of challenging this restriction in court solely on the NSL recipient—a party that, in the overwhelming majority of cases, lacks any real incentive to do so.<sup>62</sup>

The government appealed.<sup>63</sup> On appeal, the Second Circuit construed the nondisclosure provision, “to place on the Government the burden to persuade a district court that there is a good reason to believe that disclosure may risk one of the enumerated harms” and to mean that “a district court, in order to modify or set aside a nondisclosure order” has to “find that such a good reason exists.”<sup>64</sup> Nevertheless, the Second Circuit declined to place the burden on the government to file a lawsuit enforcing the nondisclosure agreements in the more than 40,000 NSLs issued in 2005.<sup>65</sup> Instead, the court construed the statute to include a “reciprocal notice procedure” by which recipients could notify the FBI that they wished to contest the nondisclosure order, and in response, the FBI could initiate judicial review.<sup>66</sup> Under the Second Circuit's formulation, a court may sustain an FBI nondisclosure order only if the FBI had “good reason” to believe that disclosure of the order “may result” in harm to an authorized investigation.<sup>67</sup>

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60. See USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 115, 120 Stat. 192 (2006) (codified as amended at 18 U.S.C. § 2709 (2012)) (inserting 18 U.S.C. § 3511); see also 18 U.S.C. § 3511 (2012) (describing subject of subpoena's ability to petition judiciary to set aside nondisclosure).

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

62. *Doe v. Gonzales*, 500 F. Supp. 2d 379, 406 (S.D.N.Y. 2007), *aff'd in part, rev'd in part by Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008).

63. See *Doe, Inc. v. Mukasey*, 549 F.3d 861, 876 (2d Cir. 2008) (noting procedural history).

64. See *id.* at 875-76.

65. See *id.* at 879.

66. See *id.* (justifying statutory construction minimizing government litigation burden).

67. See *Mukasey*, 549 F.3d at 881. The Second Circuit also held that the standard for judicial review in 18 U.S.C. § 3511 was deferential, but permissible. See *id.* The NSL recipient in another case, Nicholas Merrill, eventually reached a settlement with the FBI that permitted him to identify himself as the recipient and to discuss “most aspects of the NSL.” See *Merrill v. Lynch*, No. 14-CV-9763, 2015 WL 9450650, at \*3 (S.D.N.Y. Aug. 28, 2015). Nevertheless, the nondisclosure order continued to bar Merrill from disclosing the categories of records the FBI sought in its 2004 NSL. See *id.* In 2014 Merrill brought another suit seeking to disclose further types of information covered by the NSL. See *id.* The District Court for the Southern District of New York granted summary judgment to Merrill, finding that the government failed to make an adequate showing that disclosure of the types of information sought in the 2004 NSL would risk a sufficiently grave harm. See *id.*

In 2013, a district court again considered the constitutionality of the nondisclosure provision when an NSL recipient brought a First Amendment challenge to the statute in California.<sup>68</sup> The FBI asserted that it was complying with the Second Circuit's reciprocal notice process nationwide, despite the fact that Congress never amended the statute to conform to the Second Circuit's holding.<sup>69</sup> The Northern District of California found that "the fact that the statute is facially deficient . . . presents too great a risk of potential infringement of First Amendment rights to allow the FBI to side-step constitutional review by relying on its voluntary, nationwide compliance with the Second Circuit's limitations;" the government appealed the decision to the Ninth Circuit.<sup>70</sup>

While the case was pending in 2014, the Department of Justice (DOJ) reached an agreement with five U.S. communications providers allowing them to make additional information available to customers about the aggregate number of NSLs received.<sup>71</sup> Under this agreement, companies may publish that they have received "0-999" NSLs.<sup>72</sup> Then, in June 2015, Congress passed the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act), which amended Section 3511 to incorporate the reciprocal notice process set out in *Mukasey*, and permitted the recipient of an NSL to file a petition for judicial review of a nondisclosure order.<sup>73</sup> Under the amended provision, if an NSL recipient wishes to challenge an FBI nondisclosure order, it may notify the FBI, which must then apply for an order prohibiting "disclosure of the existence or contents" of the relevant NSL.<sup>74</sup> The USA FREEDOM Act also directed the Attorney General to adopt new procedures to require a review of each nondisclosure to determine if the facts supporting each continue to exist.<sup>75</sup> The procedures, which were adopted on November 24, 2015, provide for the termination of a nondisclosure obligation upon the closing of the underlying

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68. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1066 (N.D. Cal. 2013) (explaining petitioner's complaint regarding restricted speech).

69. *See id.* at 1070 (outlining government's argument asserting NSL constitutionality).

70. *Id.* at 1067, 1074.

71. *See* Letter from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to Gen. Counsels of Facebook, Google, LinkedIn, Microsoft, and Yahoo (Jan. 27, 2014), <https://www.justice.gov/iso/opa/resources/366201412716018407143.pdf> [<https://perma.cc/KT39-VNY3>] (memorializing two ways providers may report data to the government).

72. *See id.* Twitter challenged the agreement, arguing not only that it cannot bind companies that have not agreed, but also that it violates the First Amendment by unconstitutionally restraining companies from disclosing that they have *not* received an NSL. *See* Complaint for Declaratory Judgment at 1, *Twitter, Inc. v. Holder*, 2015 U.S. Dist. LEXIS 121580 (N.D. Cal. Sept. 11, 2015).

73. 18 U.S.C. § 3511(b) (2012 & Supp. III 2015). As amended, the provision also makes explicit the deferential standard of review that courts ought to apply to nondisclosure orders. *See id.* § 3511(b)(3).

74. *Id.* § 3511(b)(1)(B).

75. *See* USA FREEDOM Act, Pub. L. No. 114-23, § 205(f), 129 Stat. 268, 288 (2015) (codified as amended in scattered sections of 18 U.S.C.; 15 U.S.C.; 12 U.S.C.; 50 U.S.C.).

investigation unless the FBI finds the statutory standards for a nondisclosure to be sufficient.<sup>76</sup> Under the new procedures, the FBI will also review nondisclosure obligations after the underlying investigation reaches its third anniversary.<sup>77</sup>

In light of the statutory changes, the Ninth Circuit remanded the case to the district court for further consideration.<sup>78</sup> On remand, the district court rejected the government's argument that the USA FREEDOM Act's codification of the Second Circuit's reciprocal notice procedures warranted no additional safeguards because those procedures were no longer merely "governmental promises of voluntary, nationwide compliance."<sup>79</sup> Instead, the court held that the *Freedman* standards should continue to apply to NSL nondisclosure orders.<sup>80</sup> The court concluded, however, that the amended provision for review of nondisclosure orders complies with the First Amendment.<sup>81</sup>

Even after the USA FREEDOM Act amendments and most recent judicial opinions, lingering questions remain about the constitutionality of the ECPA NSL provisions. Certainly, leaving aside the question of whether Congress may constitutionally prescribe a deferential standard of review in First Amendment cases,<sup>82</sup> the amended ECPA NSL statute continues to permit the FBI to investigate targets' First Amendment activity without any judicial oversight.<sup>83</sup>

## 2. Infrequent Judicial Review

Although compelling disclosure of membership lists, affiliations, and identities of speakers has obvious implications for First Amendment rights, the vast majority of NSL recipients do not challenge these demands for subscriber information.<sup>84</sup> The result is not only that judicial oversight is severely lacking within the NSL regime, but also that public understanding regarding NSLs has

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76. See TERMINATION PROCEDURES FOR NATIONAL SECURITY LETTER NONDISCLOSURE REQUIREMENT, FBI 1, 2 (Nov. 24, 2015), <https://www.fbi.gov/about-us/nsb/termination-procedures-for-national-security-letter-nondisclosure-requirement> [<http://perma.cc/k8sz-jaft>].

77. See *id.*

78. See *In re Nat'l Sec. Letter*, No. 13-15957 (9th Cir. Aug. 24, 2015), [https://www.eff.org/files/2015/08/28/in\\_re\\_nsl\\_remand\\_order.pdf](https://www.eff.org/files/2015/08/28/in_re_nsl_remand_order.pdf) [<http://perma.cc/9fy6-vtxl>] (reporting Ninth Circuit's remand rationale).

79. *In re Nat'l Sec. Letter*, No. 11-cv-02173-SI, at \*22 (N.D. Cal. Mar. 29, 2016), <https://www.eff.org/document/redacted-order> [<https://perma.cc/LSE7-5YGR>].

80. See *id.* at \*23.

81. See *id.* at \*27. The court, however, also found that as to one of the four certifications in support of nondisclosure at issue, the government had failed to make an adequate showing to justify maintaining the gag order. *Id.* at \*2.

82. *Doe, Inc. v. Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008) (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

83. See 18 U.S.C. §§ 2510-22 (2012) (describing changes to NSL provisions).

84. See DEP'T OF JUSTICE, ANNUAL FOREIGN INTELLIGENCE SURVEILLANCE ACT REPORT 3 (Apr. 28, 2016), <https://www.justice.gov/nsd/nsd-foia-library/2015fisa/download> (explaining FBI made 41,281 NSL requests for information in 2015, excluding subscriber-only requests).

been limited. The lack of transparency around NSLs means that there is little information on how the FBI determines whether an investigation is based entirely on protected activity, or only partially.<sup>85</sup> Because ECPA NSLs so frequently target speech, this inquiry is especially important, but the FBI's position remains unclear.<sup>86</sup>

Reviewing the available data on the issuance of NSLs makes it immediately clear that the vast majority of NSLs go uncontested. The FBI issued 111,144 requests for NSLs during the 2007-2009 period, averaging 37,048 annual requests.<sup>87</sup> In 2013, the FBI issued 19,212 NSLs containing 38,832 total requests.<sup>88</sup> The most recent data shows that in 2015, the FBI issued 12,870 NSLs containing over 48,000 requests.<sup>89</sup> Historically, the average annual figure is close to 50,000 requests.<sup>90</sup> A majority of the requests relate to investigations of United States persons.<sup>91</sup>

Despite the large numbers of requests, only a handful of challenges by NSL recipients have come to light. For example, the 2004 *Doe v. Ashcroft*<sup>92</sup> challenge in the Southern District of New York raised First, Fourth, and Fifth Amendment claims.<sup>93</sup> Soon after, a Connecticut library consortium received an NSL and challenged it on First Amendment grounds.<sup>94</sup> The FBI eventually withdrew the NSL after a district judge ruled that the gag order accompanying the NSL was unconstitutional.<sup>95</sup> When the Internet Archive received an NSL in 2008 and filed a complaint challenging the request, the FBI withdrew the

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85. See Katherine Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 783 (2008) (discussing the First Amendment limitation for investigations in the context of the USA PATRIOT Act). “[W]ithout meaningful judicial oversight, this provision is essentially toothless and unlikely to deter any law enforcement official bent on reproducing the excesses of the Hoover era.” See *id.* “Would you want to rely on the Government’s determination that you were ‘solely’ engaged in a protected activity and not in anything else? The statute plainly suggests that the FBI can investigate United States persons based in part on their exercise of First Amendment rights, without any safe harbor for such exercise.” Michael Traynor, *Citizenship in a Time of Repression*, 35 STETSON L. REV. 775, 783 (2006).

86. See *id.*

87. See NSL REPORT III, *supra* note 4, at 64 (discussing NSL issued by the FBI).

88. See *Statistical Transparency Report Regarding Use of National Security Authorities – Annual Statistics for Calendar Year 2013*, OFF. DIRECTOR NAT’L INTELLIGENCE (June 26, 2014), <http://bit.ly/TE8H3W> [<http://perma.cc/DHE8-ZRNX>].

89. *Statistical Transparency Report Regarding Use of National Security Authorities – Annual Statistics for Calendar Year 2015*, OFF. DIRECTOR NAT’L INTELLIGENCE (Apr. 30, 2016), <http://1.usa.gov/1TmRuV0> [<https://perma.cc/7T8W-5FKL>].

90. See NSL REPORT III, *supra* note 4, at 65.

91. See *id.* at 62 (providing graphic of NSL request relating to investigation of U.S. citizens).

92. 334 F. Supp. 2d 471 (S.D.N.Y. 2004), *vacated by* *Doe I v. Gonzales*, 449 F.3d 415 (2d Cir. 2006).

93. See *id.* at 475.

94. See *Doe v. Gonzales*, 386 F. Supp. 2d 66, 68-69 (D. Conn. 2005) (citing case with NSL amendment violations).

95. See Press Release, Am. Civil Liberties Union, Government Drops Demand for Library Records (June 26, 2006), <https://www.aclu.org/national-security/government-drops-demand-library-records> [<http://perma.cc/65AY-DHEN>] (arguing to unseal all documents involved in case).

NSL.<sup>96</sup> In 2013, the FBI withdrew another NSL it sent to Microsoft after Microsoft challenged the demand.<sup>97</sup> Three NSL recipients have challenged the constitutionality of the NSL statute in the Northern District of California.<sup>98</sup> The sum total of known judicial challenges to NSLs is fewer than ten.

Communications service providers' failures to challenge NSLs reflect a widespread regime of automatic compliance. Automatic compliance results from a confluence of factors. First, endemic secrecy prevents users and the public from scrutinizing individual firms' compliance with government requests. As Jack Balkin has put it, "Gag rules not only prevent owners of private infrastructure from tipping off targets of surveillance; they also help ensure that the public is not aware of the scope and extent of government surveillance."<sup>99</sup> The secrecy surrounding NSLs creates limited incentives for recipients to challenge a request.<sup>100</sup>

Elsewhere, Internet Service Providers (ISPs) have argued that disclosure of user information, such as the text of search queries, would cause serious harm to relations with their customer base.<sup>101</sup> Since the public never learns of most of the disclosures that companies make pursuant to NSLs, it is easy for users to ignore the risk that information could be disclosed. The risk of losing customers because of a failure to challenge an NSL is low when the NSL request itself will likely never come to light. Furthermore, litigating a constitutional challenge to an NSL can take years. For example, the Northern District of California only recently issued an order resolving a petition to set aside an NSL issued in 2011, five years after the petition was filed.<sup>102</sup>

Private firms provide the infrastructure for rights of free expression, association, and the press in modern society; indeed, private firms often raise individual users' rights as a defense to compliance with government demands for information.<sup>103</sup> Yet these firms are not well situated to understand individual users' rights. An ISP has no way of knowing whether toll billing records or subscriber information requested in a subpoena or NSL is protected

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96. See *Internet Archives et al v. Mukasey et al*, ELECTRONIC FRONTIER FOUND. (Apr. 5, 2016), <https://www EFF.org/cases/archive-v-mukasey> [<http://perma.cc/TB7Q-5HSE>] (reporting on Internet Archives' NSL case).

97. See *In re Nat'l Sec. Letter*, No. 2:13-cv-1048 WL 11034005, at \*1 (W.D. Wash. May 21, 2014) (effectuating stipulation to unseal certain documents).

98. See No. 12-1165, *In re Nat'l Sec. Letter* (Aug. 12, 2013), [https://www EFF.org/files/2014/01/16/008\\_-redacted\\_order\\_enforcing\\_nsls\\_1165.pdf](https://www EFF.org/files/2014/01/16/008_-redacted_order_enforcing_nsls_1165.pdf) [<http://perma.cc/KR5R-7AFJ>].

99. Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2332 (2014).

100. See *id.* at 2333.

101. See *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 683 (N.D. Cal. 2006).

102. See *In re Nat'l Sec. Letter*, No. 11-cv-02173-SI, at \*22 (N.D. Cal. Mar. 29, 2016).

103. See Ellen Nakashima & Julie Tate, *Google Says It Fought Gag Orders in WikiLeaks Investigation*, WASH. POST (Jan. 28, 2015), [http://www.washingtonpost.com/world/national-security/google-says-it-fought-gag-orders-in-wikileaks-investigation/2015/01/28/e62bfd04-a5c9-11e4-a06b-9df2002b86a0\\_story.html](http://www.washingtonpost.com/world/national-security/google-says-it-fought-gag-orders-in-wikileaks-investigation/2015/01/28/e62bfd04-a5c9-11e4-a06b-9df2002b86a0_story.html) [<http://perma.cc/N7V3-R9VH>] (discussing Google's effort to inform users of battle to stand up for user rights).

by the First Amendment.<sup>104</sup> Nor is an ISP in a position to understand whether an investigation is impermissibly predicated on First Amendment activity, including whether a suspect is targeted for his or her speech, religion, or political affiliation. The only person who really has the ability to understand these issues—and to make the most powerful argument in preservation of his or her own First Amendment rights—is the target.<sup>105</sup> For obvious reasons, the nondisclosure prohibition makes it impossible for recipients to notify targets that the recipients have received an NSL. Some services have experimented with so-called canaries as a form of automated notification that a service has not received an NSL.<sup>106</sup> Nevertheless, this remedy is limited in utility.<sup>107</sup> In March 2016, the online forum “Reddit” removed a canary from its transparency report that indicated it had not received an NSL or “any other classified request for user information.”<sup>108</sup> Because of the way the canary was phrased, it was impossible to tell whether the removal signaled that Reddit had received an NSL, a FISA Court order, or some other classified request.<sup>109</sup> The canary remedy is also legally questionable; in a discussion on the site, the Reddit CEO

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104. See DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS § 20:10 (updated Aug. 2014). “NSL recipients nearly always will be third-party commercial entities, and not the subject of the investigation in which the NSL was issued. The recipient therefore will have little incentive to assert that the NSL seeks irrelevant information.” *Id.*

105. See *id.* Michael Ratner, Wikileaks’ lawyer, made this point after Google notified Wikileaks that it had challenged requests under ECPA, calling this “an amazing Catch-22.” *Id.*; see also Brett Weinstein, Note, *Legal Responses and Countermeasures to National Security Letters*, 47 WASH. U. J.L. & POL’Y 217, 248 (2015) (explaining NSLs directed to overall ISP while only targeting one user). Due to the nature of the NSL, the only available challengers are the ISP and the target themselves. See Weinstein, *supra*, at 248. “However, the gag order prevents the ISP from communicating to the targeted user that he or she has been targeted, making the ISP almost always the only entity capable of challenging an NSL.” *Id.* Because large corporations are usually the “ISP,” they often do not challenge the NSL on their user’s behalf and fail to implement practices, like limited data retention, to protect their user’s privacy. See *id.*

106. See *National Security Demands (2014)*, MEDIUM CORP. (Jan. 5, 2015), <https://medium.com/transparency-report/national-security-requests-fa66dc8f76fc> [<http://perma.cc/2YMV-8Q72>] (discussing warrant canary). More common is the presence of a canary in a transparency report, which allows a service to show that it has not received an NSL. See *id.*; *Warrant Canary*, RSYNC.NET (Jan. 26, 2015), <http://www.rsync.net/resources/notices/canary.txt> [<http://perma.cc/7VVS-UPDJ>] (making available a weekly “warrant canary”). A canary’s utility is limited because it allows disclosure that an entity has received an NSL, but the gag order would continue to apply in any specific case. See *id.*

107. See Rebecca Wexler, Note, *Warrant Canaries and Disclosure by Design: The Real Threat to National Security Letter Gag Orders*, 124 YALE L.J. F. 158, 171 (2014) (examining First Amendment issues involved with NSLs and canaries).

108. Dustin Volz, *Reddit Deletes Surveillance ‘Warrant Canary’ in Transparency Report*, REUTERS (Mar. 31, 2016), [www.reuters.com/article/us-usa-cyber-reddit-idUSKCN0WX2YF](http://www.reuters.com/article/us-usa-cyber-reddit-idUSKCN0WX2YF) [<https://perma.cc/XYV4-KSYW>]; see also *Transparency Report*, REDDIT (Jan. 29, 2015), <https://www.reddit.com/wiki/transparency/2014> [<http://perma.cc/H22Y-C7DQ>] (“As of January 29, 2015, reddit has never received a National Security Letter, an order under the Foreign Intelligence Surveillance Act, or any other classified request for user information.”). If Reddit were to receive an NSL, the canary would disappear, thus alerting users. See *Transparency Report, supra*.

109. See Kim Zetter, *Reddit Hints—Without Saying Anything—That It Got a National Security Letter*, WIRED (Mar. 31, 2016), [www.wired.com/2016/03/reddit-warrant-canary-hints-it-got-a-national-security-letter/](http://www.wired.com/2016/03/reddit-warrant-canary-hints-it-got-a-national-security-letter/) [<https://perma.cc/X2YV-X5V6>].

commented, “Even with the canaries, we’re treading a fine line . . . I’ve been advised not to say anything one way or the other.”<sup>110</sup>

As a result of the ecosystem of secrecy that surrounds NSLs, most NSLs never face judicial scrutiny, and most targets are never notified that their records have been requested or obtained. In an unknown quantity of NSL cases, First Amendment claims are neither pursued nor vindicated, despite the fact that First Amendment harms are being perpetrated.<sup>111</sup>

### III. NSLS AND FIRST AMENDMENT RIGHTS

NSLs implicate First Amendment rights in a myriad of ways. As a general matter, there is no question that the collection of toll billing records and subscriber information using NSLs can seriously chill expressive and associational activity. As Justice Sotomayor recognized in relation to GPS surveillance, “[a]wareness that the Government may be watching chills associational and expressive freedoms.”<sup>112</sup> In a world where smartphones are all but actually physically attached to our person, toll-billing records can reveal friendships and intimate relationships as well as religious beliefs, political associations, or reporter-source relationships.<sup>113</sup>

The ECPA NSL provision explicitly requires that investigations supporting NSL issuance are not based solely on First Amendment activity.<sup>114</sup> Yet NSLs are explicitly designed to facilitate investigations on the basis of communications and associations. NSLs can help investigators answer questions such as: are the targets members of a religious group? A political advocacy group? Reporters or journalists? A family?

Two individual strands of First Amendment doctrine—emanating from associational rights and the Press Clause—tend to show that metadata connects individuals to each other, and that adequate safeguards are therefore essential to ensuring that these rights are protected. Under the ECPA, there is no acknowledgment that communications metadata may be protected from compelled disclosure by the First Amendment.<sup>115</sup> As a result, the NSL provision’s lack of procedural safeguards has led to widespread abuses of the process.

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110. *Id.*

111. See *In re Nat’l Sec. Letter*, 930 F. Supp. 2d 1064, 1074 (N.D. Cal. 2013) (explaining nondisclosure accompanies ninety-seven percent of NSLs); Weinstein, *supra* note 105, at 260. Weinstein notes, “Because most ISP recipients see no benefit to challenging NSLs on behalf of customers who will never know an NSL was issued, challenges are extremely rare.” Weinstein, *supra* note 105, at 260.

112. *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

113. See *Riley v. California*, 134 S. Ct. 2473, 2484 (2014); see also Office of Legal Counsel, *supra* note 24, at 5 (finding any records “suitable for billing” constitute toll-billing records under ECPA NSL statute).

114. See 18 U.S.C. § 2709(b)(2) (2012).

115. See 18 U.S.C. §§ 2510-2522 (2012).

*A. First Amendment Protections for Group Associations*

The First Amendment does not protect all forms of association. For example, associations within terrorist cells are undoubtedly not protected. A long line of cases, however, unequivocally find that associational liberties—including the right to associational privacy—are a core aspect of the First Amendment.<sup>116</sup> The link between associational liberties and associational privacy rights was first articulated in 1958, when an Alabama state court fined the NAACP \$100,000 in contempt charges for failing to disclose its membership lists to state officials pursuant to a production order.<sup>117</sup> The case arose from efforts to ban the NAACP outright because of its work backing an “illegal boycott” in opposition to segregated transportation in Montgomery.<sup>118</sup> John Patterson, the Attorney General who argued the case for Alabama, ran for governor later that year, reputedly with the backing of the Ku Klux Klan, and won.<sup>119</sup> In the racially charged climate of Southern politics, the NAACP’s refusal to disclose the names of its members was understandable. At trial, the NAACP proved that “on past occasions revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”<sup>120</sup> The trial court nevertheless held the NAACP in contempt.<sup>121</sup>

In its unanimous decision reversing the Alabama Supreme Court’s contempt adjudication, the United States Supreme Court held that the NAACP had standing to protect its members from “compelled disclosure by the state of their affiliation with the Association.”<sup>122</sup> Determining that First Amendment freedoms could not be severed from the guarantee of liberty in the Due Process Clause of the Fourteenth Amendment, Justice Harlan wrote that Alabama had not shown a compelling governmental interest in requiring the NAACP to disclose membership lists.<sup>123</sup> Although the disclosure requirement did not amount to a direct ban on membership in the NAACP, the Court decided that it

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116. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (recognizing rights of association as protected by U.S. Constitution). The court has established the right to “associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.” See *id.*; see also *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (explaining court recognizes rights pertaining to freedom of associations).

117. See *NAACP*, 357 U.S. at 454 (tracing historical link between associational liberties and privacy rights).

118. See *id.* at 1166-67.

119. *Crusader Son Wins Alabama Governor Bid*, CHI. DAILY TRIB. (June 4, 1958), <http://archives.chicagotribune.com/1958/06/04/page/10/article/crusader-son-wins-alabama-governor-bid> [<https://perma.cc/S98L-KFT3>] (discussing ties to KKK). “Patterson admitted acquaintance with the Klan grand dragon in Alabama . . . but insisted that he did not know Shelton was a K.K.K. leader.” See *id.*

120. *NAACP*, 357 U.S. at 462 (discussing NAACP’s claims).

121. See *id.* at 449 (addressing NAACP contempt issue).

122. *Id.* at 458.

123. See *NAACP v. Alabama*, 357 U.S. 449, 460, 466 (1958).



would indirectly constitute an unacceptable “restraint on freedom of association.”<sup>124</sup> Calling First Amendment liberties of speech, press, and association “indispensable,” the Court recognized that many government actions may unintentionally abridge those rights.<sup>125</sup> Comparing the disclosure requirement to “a requirement that adherents of particular religious faiths or political parties wear identifying arm-bands,” Justice Harlan recognized that compelled disclosure of an organization’s membership list, particularly one with dissident beliefs, would seriously undermine the ability of individuals to exercise their freedom to associate with those organizations.<sup>126</sup>

Two years later, in *Bates v. City of Little Rock*,<sup>127</sup> the Court again unanimously repudiated compelled disclosure requirements.<sup>128</sup> The cities of Little Rock and North Little Rock had imposed an “occupational license tax” on commercial enterprises within their city limits.<sup>129</sup> Later, both cities amended these tax ordinances, requiring organizations to disclose the identities of due-paying, contributing members.<sup>130</sup> The presidents of the NAACP branches in each city refused to do so, although they largely complied with the nonidentifying aspects of the disclosure requirements.<sup>131</sup> As a result, each was convicted of a misdemeanor violation of the ordinance.<sup>132</sup> The U.S. Supreme Court again struck down the requirement on substantive due process grounds, holding that although the cities had a legitimate interest in taxing commercial enterprises, they had “[f]ailed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause.”<sup>133</sup> In a concurring opinion joined by Justice Douglas, Justice Black wrote that freedom of association is entitled to the same protections as other First Amendment rights.<sup>134</sup> In Justice Black’s formulation, Little Rock not only had not, but also *could* not possibly come up with a state interest that would justify impinging on First Amendment liberties.<sup>135</sup>

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124. *Id.* at 462 (comparing compelled disclosure of group affiliation with other government action blocking rights).

125. *See id.* at 461 (recognizing unintended consequences of government action).

126. *Id.* at 462, 463 (discussing NAACP’s claims).

127. 361 U.S. 516 (1960).

128. *See id.* at 527 (holding municipalities cannot constitutionally require compulsory disclosure of organizations membership lists).

129. *Id.* at 517.

130. *See id.* at 517-18.

131. *See Bates*, 361 U.S. at 519 (discussing organizations refusal to reveal names of organization members).

132. *See id.* at 521.

133. *Bates v. City of Little Rock*, 361 U.S. 516, 527 (1960).

134. *See id.* at 528.

135. *See id.*; *see also* *Smith v. California*, 361 U.S. 147, 157-59 (1959) (Black, J., concurring) (discussing First Amendment implications). The language of the First Amendment does not give way to infringements of speech or press, no matter how slight. Justice Black did not believe the federal government had the power to undermine speech or press due simply to what may be thought to be a more important interest. *See id.*

In the same year, the Court dismissed a challenge to the imprisonment of the Director of World Fellowship, Inc. on jurisdictional grounds.<sup>136</sup> The Director was held on civil contempt charges for failing to produce membership lists to a New Hampshire committee investigating subversive activities.<sup>137</sup> Dissenting to the dismissal, Justice Douglas argued that *Bates* stood for an *individual*, as opposed to an *organizational*, right not to disclose membership lists, and argued that the right to free association applied equally to suspected Communists as it did to the NAACP.<sup>138</sup>

Yet this latter point was not always clear. In *Scales v. United States*,<sup>139</sup> decided the following year, the Court rejected a challenge to the so-called membership clause of the Smith Act, which made it a crime to be a member of a group that advocated the violent overthrow of the government.<sup>140</sup> *Scales*, a member of the Communist Party, argued that the statute unconstitutionally “impute[d] guilt to an individual merely on the basis of his associations and sympathies, rather than because of some concrete personal involvement in criminal activity.”<sup>141</sup> Writing for a 5-4 majority, Justice Harlan rejected *Scales*’ argument, reading into the statute implied requirements that a defendant has engaged in “active membership” and has “specific intent.”<sup>142</sup> Over three vigorous dissents by Justices Black, Douglas, and Brennan, Justice Harlan argued that *Scales*’s membership in the Communist Party was not protected by the First Amendment, holding there was “no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection” than advocacy for violent overthrow of the government.<sup>143</sup>

*Scales* raised important questions about the nexus between association and advocacy that the Court next addressed in *NAACP v. Button*.<sup>144</sup> In *Button*, Justice Brennan struck down a Virginia statute aimed at curtailing the NAACP’s desegregation litigation on the basis that it was inconsistent with the First Amendment.<sup>145</sup> The statute forbade an agent of an organization “which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability” from soliciting legal business within the state.<sup>146</sup> Virginia argued that the First Amendment did not protect

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136. See *Uphaus v. Wyman*, 364 U.S. 388, 388 (1960).

137. See *id.*

138. See *id.* at 406, 408 (Douglas, J., dissenting).

139. 367 U.S. 203 (1961).

140. See *id.* at 225.

141. See *id.* at 220.

142. *Id.* at 224 (upholding lower court’s recognition of these two implied requirements).

143. *Scales*, 367 U.S. at 229.

144. 371 U.S. 415 (1963).

145. See *id.* at 444-45.

146. *Id.* at 423 (holding statute unconstitutional).

solicitation and litigation.<sup>147</sup> Justice Brennan, writing for the Court, rejected that argument, holding that not only was the statute's distinction between criminal solicitation and First Amendment-protected activity unconstitutionally vague, but the First Amendment protected advocacy of litigation itself.<sup>148</sup>

The Court's free association jurisprudence, however, generally suggests that suspected Communists enjoyed less substantive protection than did members of the NAACP. Thus, in *Gibson v. Florida Legislative Investigation Committee*,<sup>149</sup> the Court rejected Florida's efforts to compel the NAACP to disclose membership information during an investigation of "Communists and Communist activities."<sup>150</sup> Justice Goldberg argued that compelling disclosure by the NAACP to get information about a third party "presents, under our cases, a question wholly different from compelling the Communist Party to disclose its own membership."<sup>151</sup> Because the state demonstrated no connection between the NAACP and subversive activity, the Court refused to recognize a compelling state interest in disclosure of the NAACP membership lists.<sup>152</sup> In his dissent, Justice Harlan found that given the history of congressional inquiry into "Communist infiltration . . . it is indeed strange to find the strength of state interest in the same type of investigation now impugned."<sup>153</sup> Justice White, also dissenting, protested that "the net effect of the Court's decision is . . . to insulate from effective legislative inquiry and preventive legislation the time-proven skills of the Communist Party in subverting and eventually controlling legitimate organizations."<sup>154</sup>

Three years later, in *DeGregory v. New Hampshire*,<sup>155</sup> the Court overturned a contempt charge against a suspected Communist who had refused to answer questions about his earlier participation in subversive activities, finding New Hampshire's interest too far removed and speculative to get around First Amendment protections.<sup>156</sup> Justice Harlan again dissented, objecting to the notion that New Hampshire would first have to demonstrate a link to current Communist activities before commencing its investigation.<sup>157</sup>

Yet despite some Justices' suspicion that the application of strict scrutiny review to compelled disclosure of Communist affiliations would hamstring

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147. *See id.* at 429.

148. *See Button*, 371 U.S. at 437 (noting Chapter 33 as construed limits First Amendment freedoms").

149. 372 U.S. 539 (1963).

150. *See id.* at 542-43.

151. *See id.* at 549.

152. *See id.* at 555. "Without any indication of present subversive infiltration in, or influence on, the Miami branch of the N.A.A.C.P. . . . we are asked to find the compelling and subordinating state interest which must exist if essential freedoms are to be curtailed or inhibited. This we cannot do." *Id.*

153. *See Gibson*, 372 U.S. at 580.

154. *Id.* at 585.

155. 383 U.S. 825 (1966).

156. *See id.* at 830.

157. *See id.* (Harlan, J., dissenting).

efforts to combat the Communist threat, the Court has continued to impose searching review where associational privacy is at stake. This obviously does not mean that all associations are entitled to First Amendment protection. In *Roberts v. Jaycees*,<sup>158</sup> the Court distinguished between associations that are intimate and those that are expressive to hold that the Jaycees' exclusion of women was unconstitutional.<sup>159</sup> While intimate associations—such as sexual relationships, marriage, and family—are protected “as a fundamental element of personal liberty,” the First Amendment protects expressive associations “as an indispensable means of preserving other individual liberties.”<sup>160</sup> In practice, it is difficult to draw a line between expressive and non-expressive associations and some have argued that, partly as a result, expressive associational rights are given short shrift in comparison to antidiscrimination norms.<sup>161</sup>

### B. Press Rights

Warrantless acquisition of communications metadata also implicates First Amendment harms for journalists and the press. Numerous cases emphasize the importance of procedural safeguards to protect the free press from overzealous investigative activity, including the unwarranted identification of confidential sources. Despite the technological novelty of the NSL mechanism, the strongest articulation of how compelled disclosure can damage the press as an institution hearkens back to a precedent from *Branzburg v. Hayes*.<sup>162</sup>

In *Branzburg*, the Court considered whether reporters have the same obligation “to respond to grand jury subpoenas as other citizens do . . . .”<sup>163</sup> Dismissing concerns that refusing to shield reporters from grand jury subpoenas would result in a widespread chilling effect, the Court wrote, “[r]eliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsman before a grand jury.”<sup>164</sup>

In his *Branzburg* concurrence, however, Justice Powell stressed that if a source fears that an investigation is baseless, he has potential remedies.<sup>165</sup> While Justice Powell rejected the reporter's position that he possessed “a constitutional privilege not even to appear before the grand jury” unless a court

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158. 468 U.S. 609, 618 (1984).

159. *See id.* at 618 (noting two types of associations exist and concluding Jaycees not entitled to constitutional protection).

160. *See id.* (distinguishing standards applied to intimate and expressive associations).

161. John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 *CONN. L. REV.* 149, 154 (2010) (finding untenable distinction between intimate and expressive association leaves nation with “anti-discrimination norms unchecked by principles of group autonomy”).

162. *See* 408 U.S. 665, 682 (1972) (noting groundbreaking case in compelled disclosure).

163. *See id.*

164. *See id.* at 694.

165. *See id.* at 710 (Powell, J., concurring).

issued an appropriately tailored order, his concurrence noted that available procedures were adequate to address situations in which the grand jury abused its subpoena power.<sup>166</sup> For example, a reporter who believed that a grand jury subpoena was unnecessary or overbroad could ask the court to quash it and enter a protective order on his or her behalf.<sup>167</sup> The availability of adequate protections was key to ensuring that the grand jury subpoena did not become a tool of “harassment.”<sup>168</sup>

Six years later, in *Zurcher v. Stanford Daily*,<sup>169</sup> a student newspaper sued for declaratory and injunctive relief after the police obtained a warrant to search the newsroom for evidence related to a skirmish between protesters and police at the Stanford University Hospital.<sup>170</sup> The district court granted relief, holding that “where the innocent object of the search is a newspaper, First Amendment interests are also involved and that such a search is constitutionally permissible” only under very limited circumstances.<sup>171</sup>

The Ninth Circuit affirmed the decision, but the Supreme Court reversed, rejecting the newspaper’s contention that additional First Amendment factors justified a rule forbidding the search warrant and permitting the supposedly less intrusive means of a subpoena to obtain documents and evidence.<sup>172</sup> Rather, “[p]roperly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are threatened by warrants for searching newspaper offices.”<sup>173</sup> Because unfettered searches and seizures also may silence speech, it is essential that Fourth Amendment protections possess real teeth.<sup>174</sup> The Court highlighted that requiring a warrant prevents abuse of discretion by the officers that will use them.<sup>175</sup> The Court determined that the relative rarity of warrants for searching newsrooms actually suggests a lack of abuse, and that any individual incident of abuse would be easily corrected.<sup>176</sup>

Likewise, another 1978 case regarding the use of subpoenas to obtain toll records of journalists suggests that practical limitations on communications surveillance capabilities provided safeguards against overzealous

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166. *Branzburg*, 498 U.S. at 724 (Powell, J., concurring).

167. *See id.*

168. *See Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972) (majority opinion) (stating grand jury investigation should be held to good faith standard).

169. 436 U.S. 547 (1978).

170. *See id.* at 550-51 (reviewing facts on appeal).

171. *See id.* at 552.

172. *See id.* at 563, 568 (rejecting newspaper’s argument and reversing appellate decision).

173. *Stanford Daily*, 436 U.S. at 565.

174. *See id.* at 564.

175. *See id.*

176. *See id.* at 566.

investigation.<sup>177</sup> In *Reporters Committee for Freedom of Press v. American Telephone & Telegraph Co.*,<sup>178</sup> (RCFP), a group of journalists demanded assurances from AT&T that their toll billing records would not be handed over to a governmental investigation without first consulting those affected.<sup>179</sup> AT&T refused, and the government intervened.<sup>180</sup> In a split panel decision, the D.C. Circuit rejected the journalists' assertion of a First Amendment privilege, thereby protecting them from subpoenas without notice.<sup>181</sup>

The opinion relied heavily on the fact that subpoenas for toll billing records were of limited utility.<sup>182</sup> Judge Wilkey wrote that, based on personal experience, "prosecutors in this Office are extremely cautious in subpoenaing toll records."<sup>183</sup> Moreover, the toll records available were less revelatory than today. The records only contained long distance calls by individual subscriber numbers, and therefore could not be used to see a record of a call placed or received by that subscriber, but that was charged to the other number.<sup>184</sup> The court also found that toll records were not available for extensions from business phones or pay phones.<sup>185</sup> Finally, the court noted that the records were only kept for sixth months, and were no longer available after that time.<sup>186</sup> None of these safeguards are present in the NSL context. Indeed, *RCFP* specifically acknowledged that "the propriety of any such practice" of large-scale subpoenas, "if it does exist, is simply not raised in the case at bar."<sup>187</sup>

Thirteen months after *Stanford Daily* was decided, the Court issued its ruling in *Smith v. Maryland*,<sup>188</sup> putting in place the "third party doctrine" that permits the government to obtain records from a third party without a warrant.<sup>189</sup> Stewart dissented again, unpersuaded that the Constitution did not protect information that "easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life."<sup>190</sup> This

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177. See *Reporters Comm. for Freedom of Press v. Am. Tel. & Tel. Co.*, 593 F.2d 1030, 1070-71 (D.C. Cir. 1978).

178. 593 F.2d 1030 (D.C. Cir. 1978).

179. See *id.* at 1038.

180. See *id.*

181. See *id.* at 1070-71 (holding plaintiffs not entitled to First Amendment protection under either theory).

182. See *Reporters Comm. for Freedom of Press*, 593 F.2d at 1036 (listing shortcomings of subpoenas for toll records).

183. *Id.* at 1037 n.7.

184. See *Reporters Comm. for Freedom of Press*, 593 F.2d at 1036 (describing accessible toll information).

185. See *id.* at 1037 (detailing further scope of accessible toll information).

186. See *id.*

187. See *id.* at 1040. The portion of *RCFP* that concludes, "the First Amendment offers no procedural or substantive protections against good faith criminal investigative activity beyond that afforded by the Fourth and Fifth Amendments," did not have a majority of the panel. See *id.* at 1053 n.76, 1055.

188. 442 U.S. 735 (1979).

189. See *id.* at 744-45 (analyzing Fourth Amendment warrant requirement in context of records held by third parties).

190. *Id.* at 748 (Stewart, J., dissenting) (inferring people have reasonable expectation of privacy in

time, though, it was Justice Marshall who, in dissent, looked to potential infringements of the First and Fourth Amendments by this unregulated surveillance.<sup>191</sup> “Permitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society.”<sup>192</sup>

### C. The FBI’s First Amendment Problem

Public reports by the Office of the Inspector General for the Department of Justice (OIG) detail problems with the ECPA NSL statute that are emblematic of the First Amendment concerns. In a 2010 report, the OIG detailed problems with the FBI’s practice of gathering “community of interest” or “calling circle” data from NSL recipients.<sup>193</sup> The OIG noted that calling circle requests appeared in hundreds of boilerplate attachments to NSLs and that the officials who signed these requests were sometimes unaware that they contained requests for calling circle information.<sup>194</sup> The OIG concluded that community of interest requests were improper because the FBI did not “consistently assess” all the telephone numbers listed and their relevance to the underlying investigation.<sup>195</sup> While the OIG made no mention of the First Amendment concerns associated with the wholesale collection of telephone records not linked to any investigation, it nonetheless concluded, “[t]he FBI’s community of interest . . . practices were inappropriate and likely resulted in the FBI obtaining and uploading into a . . . database thousands of telephone records for . . . telephone numbers without the required certifications of relevance to an authorized international terrorism investigation by an authorized FBI official.”<sup>196</sup>

OIG has also identified more specific instances of abuse related to associational rights. In one instance, the FBI requested records from North Carolina State University (NCSU) about a former student at the university that included that student’s emergency contact information, campus affiliations, like clubs or organizations, and information on other students contained in such records, all in violation of the Family Educational Rights and Privacy Act (FERPA).<sup>197</sup> NCSU refused to comply with the NSL and stated that the FBI

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numbers dialed).

191. *See id.* at 751 (Marshall, J., dissenting).

192. *Smith*, 442 U.S. at 751.

193. EXIGENT LETTERS REPORT, *supra* note 51, at 54. Community of interest or calling circle data consists of an analysis of who calls whom, when, how many times they call, how long those calls last, and various other data. *See* Christopher Soghoian, *An End to Privacy Theater: Exposing and Discouraging Corporate Disclosure of User Data to the Government*, 12 MINN. J.L. SCI. & TECH. 191, 201 (2011).

194. *See* EXIGENT LETTERS REPORT, *supra* note 51, at 56-57 (describing requests for “community of interest” data).

195. *See id.* at 75.

196. *Id.* at 78.

197. *See* NSL REPORT I, *supra* note 4, at 83-84 (describing information sought in violation of FERPA).

overstepped its authority.<sup>198</sup> Separately, the OIG identified repeated instances in which on-site analysts from communications service providers retrieved toll billing records for journalists and reporters in connection with leak investigations, despite lacking legal authority to do so.<sup>199</sup> In one instance, the FBI received over twenty-two months of toll billing records for reporters with the *Washington Post* and *The New York Times*.<sup>200</sup> In another case, the FBI used an NSL to seek over ten years of financial records for an investigation based on the target's extracurricular college activities.<sup>201</sup> When activity the First Amendment presumably protects is at the core of government requests, even if not the sole basis, it raises concerns that the FBI continues to use NSLs to seek information related to an individual's political, religious, or expressive activity.

Recently, the OIG raised questions about the FBI's practice of requesting toll billing records associated with an investigative subject, even if the records are not relevant to an authorized investigation.<sup>202</sup> The OIG found that telephone companies sometimes provide toll billing records and subscriber information for all telephone numbers on a given account, such as a family plan.<sup>203</sup> In one specific case, the FBI received toll billing records for all the phone numbers associated with the target's mother's account.<sup>204</sup> The OIG concluded that the FBI should monitor this type of overarching request, and not obtain such an overbroad amount of records without the specific association of said records to a valid investigation for national security purposes.<sup>205</sup>

The FBI also takes the position that special statutory and regulatory requirements that limit the use of subpoenas and warrants to obtain information from the news media do not apply to NSLs. DOJ regulations on obtaining information from or records of members of the news media require the DOJ to pursue negotiations and notice "unless the Attorney General determines that, for compelling reasons, such negotiations or notice *would* pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an *imminent* risk of death or serious bodily harm."<sup>206</sup> Although the negotiation and notice requirements apply to administrative subpoenas and to other orders and warrants issued under the ECPA, the DOJ Guidelines appear not to constrain the FBI's use of NSLs to

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198. See *id.* at 84 (reporting school's assertion that FBI demanded information beyond permissible scope of law).

199. See EXIGENT LETTERS REPORT, *supra* note 51, at 95-96 (explaining retrieved records only partially fell into period of interest).

200. See *id.* (noting Company A provided FBI with billing records for 1,627 telephone calls).

201. See NSL REPORT III, *supra* note 4, at 126 (disclosing potential NSL violations).

202. See *id.* at 157 (reviewing potential NSL violations).

203. See NSL REPORT III, *supra* note 4, at 158 (noting problems involved in issuance of NSLs).

204. See *id.* at 157 (offering examples of problems in specific cases).

205. See *id.* at 160 (recommending further steps to ensure third-party privacy).

206. 28 C.F.R. § 50.10(a)(3) (2016) (emphasis added).



obtain communication records belonging to the media.<sup>207</sup>

Even when the FBI has been notified that an investigation implicates First Amendment rights, the agency has sometimes ignored this fact. In 2006, the Foreign Intelligence Surveillance Court (FISC) twice denied the FBI's application for a FISA order compelling the disclosure of business records on the basis that the request infringed on the target's First Amendment protections.<sup>208</sup> The FBI did not review the underlying investigation to make sure it was not being conducted solely on the basis of First Amendment-protected activity.<sup>209</sup> Instead, after the FBI's application was denied, the FBI used the same factual predicate to issue NSLs for financial information in the same investigation.

The FBI's position that the underlying investigation was legitimate, despite the apparent First Amendment issues, rests on the troubling assertion that the FISA Court has no power to end an FBI investigation.<sup>210</sup> The FBI General Counsel asserted that the FISC ruling that the investigation implicated the First Amendment did not require the agency to revisit the predicate for the investigation.<sup>211</sup> Yet the prohibition against investigations based solely upon First Amendment activity in § 215 is identical to the prohibition in § 2709.<sup>212</sup> The logic that an investigation may be impermissibly based on First Amendment activity for the purposes of obtaining metadata under FISA, but not for purposes of obtaining metadata under ECPA, is tortuous at best.

The unique features of online communication render ECPA NSLs particularly vulnerable to abuse.<sup>213</sup> As Judge Marrero observed, the compulsion to turn over records from electronic communications is ill-defined, but one can reasonably interpret it to include a record of email addresses both used and emailed, as well as a website browsing history.<sup>214</sup> Indeed, a troublesome but little-noted ECPA feature is that the statute is written to apply to phone records, so the scope of records collection from electronic communication service providers is far from clear.<sup>215</sup> Most recently, the FBI

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207. See Trevor Timm, *When Can the FBI Use National Security Letters To Spy on Journalists? That's Classified.*, COLUM. JOURNALISM REV. (Jan. 11, 2016), [www.cjr.org/criticism/national\\_security\\_letters.php](http://www.cjr.org/criticism/national_security_letters.php) [<http://perma.cc/VK8X-A4E8>] (criticizing absence of NSL guidelines governing requests for journalists' toll billing records).

208. See U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GEN., A REVIEW OF THE FBI'S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS IN 2006 73 (March 2008), <https://oig.justice.gov/special/s0803a/final.pdf> [<https://perma.cc/B47P-ATAQ>] [hereinafter 215 REPORT].

209. See *id.* at 72.

210. See *id.*

211. See *id.* at 72-73.

212. Compare 50 U.S.C. § 1861 (2012) (amended 2015), with 18 U.S.C. § 2709(b)(1)-(2) (2012) (amended 2015) (noting investigations of U.S. person not to be conducted "solely on the basis of activities protected by the First Amendment").

213. See *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 509 (S.D.N.Y. 2004).

214. See *id.*

215. See Ellen Nakashima, *White House Proposal Would Ease FBI Access to Records of Internet Activity*,

received some form of information that the OIG recognized to be the substance of electronic communications.<sup>216</sup> In this case, one email service provider routinely responded to NSL requests with a specific type of information that was outside the scope of the statute.<sup>217</sup>

In 2008, the Office of Legal Counsel offered guidance for the types of information in § 2709(b)(1) by creating an exhaustive list of information that the FBI may request using an NSL, including the subscriber's "name, address, length of service, and local and long distance toll billing records."<sup>218</sup> Oddly, although the "toll billing records" language in the ECPA NSL provision has been in the statute since 1986, confusion continues to plague NSL recipients regarding what exactly toll billing records are.<sup>219</sup> The OIG repeatedly notes that NSL recipients disclose information that the FBI is either not authorized to collect or which the statute does not clearly address.<sup>220</sup> In a heavily redacted portion of its most recent report, the OIG questions whether the statute, in fact, authorizes the information the FBI receives in response to NSLs for telephone subscriber records.<sup>221</sup>

Even in instances where the FBI complies with the statute, it is clear NSLs can be used to figure out associations that the First Amendment may or may not protect. For example, NSL Report I documents the use of telephone billing records to identify "a group of individuals residing in the same vicinity as the subject" in order "to determine if there was a terrorist cell operating in the city."<sup>222</sup> The Report notes, "[a]nalysis of subscriber information obtained from national security letters for particular telephone numbers and e-mail addresses also can assist in the identification of the investigative subject's family members, associates, living arrangements, and contacts."<sup>223</sup> The Report is silent on the First Amendment implications of investigating a person's associations in this manner.

#### IV. RIGHTS WITHOUT SAFEGUARDS

The associational and expressive harms NSLs cause illustrate the need for adequate safeguards to protect First Amendment rights. Some suggest bulk

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WASH. POST (July 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072806141.html> [<http://perma.cc/U44M-KE35>] (discussing lack of clarity surrounding electronic communications transactional records).

216. See NSL REPORT III, *supra* note 4, at 131.

217. See *id.* at 132 (discussing unrequested disclosure).

218. Office of Legal Counsel, *supra* note 24, at 1 (describing types of information sought in NSL orders).

219. See *id.*

220. See *id.* (analyzing issues related to overproduction and confusion of NSL requirements and disclosures).

221. See NSL REPORT III, *supra* note 4, at 147-52.

222. NSL REPORT I, *supra* note 4, at 49 (identifying instance in which FBI located individuals from records).

223. *Id.* at 48 (noting other uses of information obtained from NSL).

surveillance programs could be challenged on First Amendment overbreadth grounds, or injunctive relief could be an adequate remedy for First Amendment harms.<sup>224</sup> These post hoc remedies, however, may not adequately protect against the chilling effects that widespread investigative activity causes.<sup>225</sup>

There are currently First Amendment safeguards present in other national security processes that, if applied in the NSL context, could protect citizens before violations take place. Constitutional and statutory requirements including notice, judicial oversight, and rigorous standards of relevance afford First Amendment rights an appropriate level of protection.<sup>226</sup> These hard mechanisms reflect strong preferences for courts to resolve First Amendment questions, rather than the Executive branch.<sup>227</sup> Nevertheless, soft protections within the Executive branch, such as non-binding regulations and chain of command approval for national security processes, should not be discounted, and can also help protect associational, expressive, religious, and press rights.<sup>228</sup>

The total absence, in practice, of the types of procedural safeguards present in analogous contexts sets NSLs apart. NSLs thus illustrate both the necessity of appropriate safeguards for First Amendment rights and the risks of national security process without adequate procedures.

#### A. Hard Safeguards

In the investigative context, hard safeguards are formally binding requirements that tend to limit the government's authority to conduct investigations.<sup>229</sup> As Dan Solove makes clear in his seminal article on the First Amendment as criminal procedure, the First Amendment is seldom invoked as a procedural safeguard in criminal investigations.<sup>230</sup> Nonetheless, constitutional protections against overly intrusive investigative activity have First Amendment roots. Other scholars also recognize that First Amendment interests can trigger heightened safeguards under other constitutional amendments.<sup>231</sup> In the context of search and seizure, for example, Akhil Amar

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224. See Solove, *supra* note 8, at 165 (describing First Amendment implications of bulk surveillance).

225. See *id.*

226. See *infra* note 304 and accompanying text.

227. See *infra* note 261 and accompanying text (discussing judicial decisionmaking).

228. See *infra* note 345 and accompanying text (illustrating one example of soft procedural safeguards); see also Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 579 (2008). Gersen and Posner define "soft law" as "a rule issued by a lawmaking authority that does not comply with constitutional and other formalities or understandings that are necessary for the rule to be legally binding." *Id.*

229. See Gersen & Posner, *supra* note 228, at 579. Gersen and Posner define "hard law" as "a rule issued by a lawmaking authority that does comply with constitutional and other formalities or understandings that are necessary for the rule to be legally binding." *Id.*

230. See Solove, *supra* note 8, at 116.

231. See Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 806 (1994)

suggests that:

First Amendment concerns could well trigger special Fourth Amendment safeguards—heightened standards of justification prior to searching, immediate (pre-search) appealability of any proposed search (with the premises sealed to prevent interim destruction of evidence), specially trained nonpartisan marshals or magistrates or masters to carry out the search, and so on.<sup>232</sup>

Indeed, First Amendment doctrine repeatedly emphasizes the importance of proper procedures to safeguard protected speech.<sup>233</sup> Prior restraint doctrine, for example, requires such protections to minimize the risk of censorship.<sup>234</sup> When a Fourth Amendment search implicates the First Amendment, the requirement of specificity in what things are to be seized is accorded the most “scrupulous exactitude.”<sup>235</sup> In First Amendment cases, appellate courts have an obligation to conduct a *de novo* review in order to ensure that the lower court did not impermissibly infringe upon free expression.<sup>236</sup>

All of these safeguards rely on one baseline assumption: the courts—not the Executive branch—determine whether protection should extend to the association in question. Indeed, the underlying norm that courts will resolve First Amendment problems is so strong that none of the above cases even considered a structure in which the courts were not involved in discerning and applying the correct standard of review.<sup>237</sup> This underlying norm is strong for good reason: Had the question of the NAACP’s First Amendment rights been left to the Alabama government to resolve, the outcome would be predetermined.

### 1. *The Fourth Amendment*

The Fourth Amendment’s warrant requirement, which imposes explicit, constitutionally based limitations on police capabilities, is a classic hard safeguard against overzealous law enforcement activity. A neutral magistrate assesses whether law enforcement has satisfied constitutional requirements of

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(discussing heightened constitutional safeguards when First Amendment concerns are at play).

232. *See id.*

233. *See Waters v. Churchill*, 511 U.S. 661, 669 (1994) (“[I]t is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures.”).

234. *See Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (holding procedural safeguards necessary where process requires film submitted to censor).

235. *See Marron v. United States*, 275 U.S. 192, 196 (1927).

236. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)).

237. *See generally Waters v. Churchill*, 511 U.S. 661 (1994); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Stanford v. Texas*, 379 U.S. 476 (1965); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

probable cause, specificity, and reasonableness.<sup>238</sup> The Fourth Amendment, however, does not apply to the collection of metadata. Therefore, none of the warrant requirement's safeguards apply to NSLs.<sup>239</sup>

A Fourth Amendment search takes place, implicating constitutional protections, only when government activities intrude on a person's reasonable expectation of privacy.<sup>240</sup> As a rule (albeit a contested one), "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."<sup>241</sup> Courts have applied this rule to hold that acquiring business records from an ISP reflecting subscriber activity is not a search under the Fourth Amendment.<sup>242</sup> As a result, because much First Amendment activity occurs through online intermediaries like ISPs, email service providers, social media platforms, mapping programs, and myriad other mechanisms not controlled by the user or speaker, Fourth Amendment coverage for records reflecting this type of activity is virtually nonexistent.<sup>243</sup>

The lack of Fourth Amendment coverage for NSLs has particularly harmful implications for the press because it renders inapplicable certain statutory protections. In the wake of *Stanford Daily*, Congress passed the Privacy Protection Act of 1980 (PPA). The PPA bars law enforcement from searching or seizing work product and documentary materials "possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."<sup>244</sup> Because the PPA's protections are coextensive with the Fourth Amendment's coverage of searches and seizures, the statute does not apply to investigative methods, like the acquisition of business records or communications metadata, which are not searches.<sup>245</sup>

Statutes also create hard safeguards in the form of standards of relevance upon which process may be issued. The standard in the NSL statute—"relevant to an authorized investigation"—is not unique.<sup>246</sup> Indeed, the FBI can acquire many of the same types of records on the same showing of relevance using §

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238. See U.S. CONST. amend. IV.

239. See, e.g., Elizabeth Atkins, *Spying on Americans: At What Point Does the NSA's Collection and Searching of Metadata Violate the Fourth Amendment?*, 10 WASH. J. L. TECH. & ARTS 51, 77 (2014) (highlighting Fourth Amendment protections for metadata); Laura K. Donohoe, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL'Y 757, 765 (2014) (discussing Fourth Amendment implications); David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. NAT'L SECURITY L. & POL'Y 209, 279-80 (2014) (discussing governmental collection of metadata).

240. See *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

241. *Id.* at 351 (majority opinion).

242. See *Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. 2001) (holding no Fourth Amendment privacy interest where information given to third party).

243. See Solove, *supra* note 8, at 126-27. Modern technology places information once confined to private places out into the social sphere, no longer covered by Fourth Amendment protections. See *id.*

244. 42 U.S.C. § 2000aa (2012).

245. See *id.* (isolating law's impact).

246. 18 U.S.C. § 2709(b).

215 orders, pen registers, or grand jury subpoenas.<sup>247</sup> In contrast, when the government seeks electronic communications transactional records through the Stored Communications Act (SCA), it may obtain subscriber records using either an administrative subpoena or a court order based on “specific and articulable facts” showing that the records are relevant to a criminal investigation.<sup>248</sup>

The fact that communications metadata may commonly be obtained on a showing of mere relevance, however, does not end the inquiry. When the government seeks a § 215 order, pen register, or grand jury subpoena for toll records, other safeguards—both hard and soft—are in place that mitigate the effect of the relaxed standard of relevance. For example, § 215 orders and pen registers require a court order.<sup>249</sup> In addition, grand jury subpoenas require the involvement and oversight of a United States Attorney.<sup>250</sup> The presence of multiple, overlapping safeguards is a key feature for preventing abuse of law enforcement process.

## 2. *Judicial Decision-Making*

ECPA’s NSL provision is also troubling because it invites the FBI to decide a key, substantive First Amendment issue: whether to impose a nondisclosure order on NSL recipients. The tradition of judicial decision-making on First Amendment questions demonstrates that this constitutional issue is fundamentally inappropriate for the Executive branch to resolve.

Nondisclosure orders themselves are nothing unique. For example, a government entity seeking customer records using a warrant or subpoena, under the SCA, may apply for an order barring the recipient from disclosing the existence of the request.<sup>251</sup> Likewise, an order authorizing a pen register or trap and trace device is required to include a nondisclosure order provision sealing the order and preventing the person who provides the monitored service from disclosing the existence of the pen or trap.<sup>252</sup> The FISA contains a provision that bars the recipient of an order, in a foreign intelligence investigation, from disclosing such an order.<sup>253</sup> Nor are administrative subpoenas rare birds. A 2001 DOJ report identified hundreds of sources of administrative subpoena

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247. See USA PATRIOT Act, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287-88 (codified at 50 U.S.C. §§ 1861-1863 (2012)).

248. 18 U.S.C. §§ 2703(d), 2703(b)(8)(i), 2703(a) (2012) (describing requirements for court order under SCA).

249. See 50 U.S.C. § 1861 (2012) (setting out requirements for FISA Court order for production of tangible things); 18 U.S.C. § 3123 (2012) (setting out requirements for pen register or trap and trace order).

250. See FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 18.5.9.3 (2011) (explaining U.S. Attorney issues grand jury subpoena).

251. See 18 U.S.C. § 2705(b) (2012).

252. See 18 U.S.C. § 3123(d) (2012).

253. See 50 U.S.C. § 1861(d) (2012).

authority.<sup>254</sup> In federal criminal child abuse and healthcare fraud investigations, the district court may render an order, *ex parte*, which requires that anyone associated with the event not disclose the summons to anyone, except an attorney, for up to 90 days.<sup>255</sup>

The confluence of administrative subpoena authority and administrative gag authority is found only in the NSL context. When the government obtains customer records using an administrative subpoena under the SCA, a federal court issues the nondisclosure order, not the government by itself.<sup>256</sup> When the government seeks a nondisclosure order under the SCA, the government is not empowered to determine itself whether it also met the requisite standard justifying nondisclosure; that inquiry resides with the court.<sup>257</sup> By contrast, the NSL provision only permits a court to conduct such an inquiry under the limited circumstances in which a recipient has filed a petition for review.<sup>258</sup> Even in the context of FISA applications, in which the FISC enters an *ex parte* order approving an application with a nondisclosure order as a matter of law, judicial order compels nondisclosure, not executive fiat.<sup>259</sup>

First Amendment jurisprudence has long recognized that whether something falls under First Amendment “speech” is a question best resolved by a court.<sup>260</sup> For example, in 1981, Professor Schauer remarked that “obscenity doctrine is undoubtedly the most prominent example” of judicial delineations of expressions outside constitutional speech protections.<sup>261</sup> Obscenity doctrine remains instructive regarding the capacity of the Executive branch to make unilateral determinations regarding whether the First Amendment covers or protects obscene materials.<sup>262</sup>

In 1957, the Supreme Court held that the First Amendment does not protect obscenity.<sup>263</sup> The Court recognized, however, that the court must protect First

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254. See OLP REPORT, *supra* note 35, at 2.

255. See 18 U.S.C. § 3486(a)(6)(A) (2012).

256. See 18 U.S.C. § 2705(b) (2012); see also *In re* Application of U.S. for an Order of Nondisclosure Pursuant to 18 U.S.C. § 2705(B) for Grand Jury Subpoena # GJ2014031422765, 41 F. Supp. 3d 1, 8 (D.D.C. 2014) (finding nondisclosure order warranted where government made statutory showing and court believed harm would result).

257. See 18 U.S.C. § 2705(b) (requiring court considering request for nondisclosure order “shall enter such an order if it determines that there is reason to believe that notification” of existence of SCA order would result in an enumerated harm).

258. *In re* Nat’l Sec. Letter, No. 11-cv-02173-SI, at \*14 (N.D. Cal. Mar. 29, 2016), <https://www.eff.org/document/redacted-order> [<https://perma.cc/92VL-G4FU>].

259. Cf. *In re* Nat’l Sec. Letter, 930 F. Supp. 2d 1064, 1073 (N.D. Cal. 2013) (finding nondisclosure provision of § 2709 is licensing scheme lacking appropriate safeguards).

260. See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 268 (1981).

261. *Id.*

262. See Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518, 520 (1970) (discussing reasons why due process ideals require judicial characterization of speech).

263. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (delineating scope of First Amendment coverage).

Amendment freedom by only prosecuting speech that is actually obscene.<sup>264</sup> In *Roth v. United States*, the Court found that the trial courts had applied the correct standard for First Amendment coverage.<sup>265</sup> Separately, Justice Harlan took issue with “easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment” required.<sup>266</sup> Justice Harlan argued that whether the First Amendment protects a given expression is not just a factual determination, but a constitutional one best left to a court.<sup>267</sup>

While Justice Harlan did not comment on later obscenity decisions, these decisions do strongly suggest that whether the First Amendment covers an expression is essentially a judicial question. In *Kingsley Books, Inc. v. Brown*,<sup>268</sup> the Court upheld a New York statute permitting a limited injunction preventing the distribution of materials after they were deemed obscene at trial.<sup>269</sup> In contrast, in *Marcus v. Search Warrants*,<sup>270</sup> the Court struck down a Missouri statute permitting police to obtain a warrant to seize materials:

(1) [w]ithout notice or any hearing afforded to the movants prior to seizure for the purpose of determining whether or not these . . . publications are obscene, and (2) because they ‘allowed police officers and deputy sheriffs to decide and make a judicial determination after the warrant was issued as to which . . . magazines were . . . obscene.’<sup>271</sup>

The *Marcus* Court contrasted the Missouri statute at issue to the New York law it upheld four years before.<sup>272</sup> The Court noted the New York law had procedural protections not present in the Missouri statute, requiring a court to render a decision, on the merits, regarding whether speech was protected.<sup>273</sup>

In *Manual Enterprises v. Day*,<sup>274</sup> the Court overturned a Post Office ruling that prevented publishers from mailing publications with allegedly obscene

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264. See *id.* at 488 (advocating for careful review to safeguard speech).

265. See *id.* at 490 (concluding trial court applied correct obscenity standard).

266. *Id.* at 498 (Harlan, J., concurring and dissenting) (discussing fear for future cases based on cavalier labeling).

267. See *Roth*, 354 U.S. at 497 (noting value of individual communication). “The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards.” *Id.* (emphasis added).

268. 354 U.S. 436 (1957).

269. See *id.* at 437, 445 (1957) (noting statute “studiously withholds restraint upon matters not already published and *not yet found to be offensive*”) (emphasis added).

270. 367 U.S. 717 (1961).

271. *Id.* at 723-24.

272. See *id.* (analyzing court difference in opinion years later).

273. See *id.*

274. 370 U.S. 478 (1962).



material.<sup>275</sup> The General Counsel of the Post Office informed petitioners that the post office was not mailing the magazines because they were “nonmailable,” and a hearing would not be held due to insignificant monetary value at stake.<sup>276</sup> Ultimately, petitioners had a hearing before a Post Office Judicial Officer, who affirmed that the magazines were nonmailable.<sup>277</sup> In a concurring opinion, Justice Brennan found that the Post Office administrative hearing system raised serious concerns about procedural safeguards, including whether Congress can create regulations that allow speech to be categorized as obscene without judicial oversight.<sup>278</sup> Justice Brennan found that “the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts” as to whether such a regime would satisfy the First Amendment.<sup>279</sup>

The reason not to trust the government as fact-finders regarding whether expression is outside the scope of the First Amendment is plain: “[b]ecause the censor’s business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression.”<sup>280</sup> Under *Freedman v. Maryland*, prior restraints must satisfy stringent procedural requirements, geared toward enhancing judicial review and oversight of administrative censorship schemes:

‘[A]ny restraint imposed prior to judicial review must be limited to a specified brief period;’ any further restraint prior to a final judicial determination must be limited to ‘the shortest fixed period compatible with sound judicial resolution;’ and the burden of going to court to suppress speech and the burden of proof in court must be placed on the government.<sup>281</sup>

As *Freedman* itself recognizes, however, prior restraint doctrine is not applicable to all situations in which a court seeks to balance First Amendment rights against some other interest. First, *Freedman* addresses only the need to counteract problems with the censorship system.<sup>282</sup> While various situations have applied *Freedman*, courts have not consistently demanded that the government seek a judicial determination before taking action regarding

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275. See *id.* at 496; see also Monaghan, *supra* note 262, at 520 (explaining holding of *Manual Enters. v. Day*).

276. See *Manual Enters.*, 370 U.S. at 496 (Brennan, J., concurring).

277. See *id.* at 480-81 (majority opinion) (describing nature of magazine at issue).

278. See *id.* at 497-98 (Brennan, J., concurring) (discussing threat toward First Amendment).

279. *Id.* at 519 (Brennan, J., concurring) (exploring adequacy of procedural safeguards).

280. *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965).

281. *Doe v. Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008) (summarizing *Freedman v. Maryland* requirements).

282. See *Doe v. Gonzales*, 500 F. Supp. 2d 379, 381 (S.D.N.Y. 2007) (noting *Freedman* holding).

potentially protected speech.<sup>283</sup> Yet, Henry Monaghan summarizes, a “major teaching of the obscenity cases is that in the [F]irst [A]mendment area judicial review must either precede final governmental action or expeditiously follow it.”<sup>284</sup>

### 3. *Procedural Due Process*

In 1970, Professor Monaghan argued that *Freedman* compelled an Article III court to apply extensive procedural measures any time protected speech was at risk.<sup>285</sup> But the Supreme Court has never reached this conclusion. In *Waters v. Churchill*,<sup>286</sup> the plaintiff, a public employee, challenged her termination, which was based on negative comments she made about her workplace.<sup>287</sup> A plurality of the Court upheld her termination.<sup>288</sup> The Court explained that it had never proffered a test for assessing when the First Amendment requires a procedural safeguard, nor did it plan to do so in *Waters*.<sup>289</sup> Rather, in *Waters* the Court considered what procedures are required before terminating a public employee, and embraced a flexible, due-process-like approach to First Amendment procedure.<sup>290</sup> Writing for the plurality, Justice O’Connor explained that a procedure should depend on the context of the question, the cost of implementing a procedure, and the possible constitutional risks that may develop or be cured.<sup>291</sup>

The *Waters* Court’s flexible approach to First Amendment procedural requirements is reminiscent of the balancing test used to resolve procedural due process disputes.<sup>292</sup> Closely resembling the *Freedman* procedural framework, a procedural due process framework “imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”<sup>293</sup> The *Mathews v. Eldridge*<sup>294</sup> test balances three factors to determine whether an administrative procedure that deprives an individual of a liberty or property interest satisfies constitutional due process requirements:

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283. See *id.* at 401 (illustrating cases applying *Freedman*).

284. Monaghan, *supra* note 262, at 532.

285. See *id.* at 524-25 (extending *Freedman* procedural safeguards to all forms of protected speech).

286. 511 U.S. 661 (1994).

287. See *id.* at 667.

288. See *id.* at 681 (agreeing with reversal of summary judgment for petitioner).

289. See *id.* at 671.

290. See *Waters*, 511 U.S. at 675 (analyzing public employment decisions in light of First Amendment considerations).

291. See *id.*

292. See *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (weighing procedure costs and level of significance of risks); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (describing due process inquiry as “judicious balancing” of private against Government’s interests).

293. See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

294. 424 U.S. 319, 332 (1976).

the “private interest” affected; the “risk of an erroneous deprivation” of that interest and the extent to which “additional or substitute safeguards” could minimize that risk; and the government’s interest in maintaining current procedures and avoiding “fiscal and administrative burdens” imposed by additional requirements.<sup>295</sup> This balancing test is flexible. The “substitute” safeguards mentioned in *Mathews* need not be full-fledged hearings with the rights to counsel, to present evidence and to confront and cross-examine adverse witnesses.<sup>296</sup> A “factfinding process that is both prudent and incremental” may be sufficient.<sup>297</sup>

Public employee termination clearly raises different issues than prior restraint, and the procedural safeguards necessary in the public employment context reflect that.<sup>298</sup> As such, *Waters* reflects a commitment, if not to applying the specific procedural requirements of *Freedman*, to the application of the types of general principles of procedural due process articulated in *Mathews*.<sup>299</sup> Thus, a more deferential procedure is adequate to protect First Amendment rights in the employment context because the underlying principles that necessitate safeguards in the first place are materially different.<sup>300</sup> At the same time, the plurality rejected Justice Scalia’s proposed approach that would have limited procedural safeguards where deprivation of First Amendment rights occurred “through the judicial process.”<sup>301</sup> Writing for the plurality, Justice O’Connor noted that “administrative action” can have as harsh an effect on speech as judicial sanctions, pointing out that in *Speiser v. Randall*, the Court had previously struck down administrative procedures that deprived individuals of First Amendment rights.<sup>302</sup>

Of core importance in determining whether procedures are constitutionally adequate under the Due Process Clause is access to a neutral decision maker.<sup>303</sup>

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295. *See id.* at 335.

296. *See id.*

297. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (describing “proper heed” courts should pay to sensitive matters).

298. *See Waters v. Churchill*, 511 U.S. 661, 672 (1994) (distinguishing between government employment and sovereign government procedural requirements).

299. *See id.* at 675. In *Waters*, Justice O’Connor obliquely referred to the third *Mathews* factor, the government interest, by differentiating between the government as employer and the government as sovereign. *See id.* A government may dismiss an employee, she argued, not because the dismissal would be narrowly tailored to achieve a compelling government interest, but because “the government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.” *Id.* at 675.

300. *See id.* (differentiating between speech restraint on general public and public employees).

301. *Id.* at 687 (Scalia, J., dissenting).

302. *See Waters*, 511 U.S. at 669.

303. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (citing *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993)) (stating “due process requires a ‘neutral and detached judge in the first instance’”); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (requiring that “deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case”).

An inkling that a decisionmaker may not “hold the balance nice, clear and true” undermines trust in the integrity of an adjudicative process.<sup>304</sup> As the case law governing the right to a neutral decision maker makes clear, due process demands will not tolerate a hearing by a person who has a financial stake in the outcome of a given case.<sup>305</sup> Institutional biases, however, are less problematic. In *Schweiker v. McClure*,<sup>306</sup> the Supreme Court rejected a challenge to the hearings afforded to Medicare claimants, which hearing officers appointed by insurance carriers oversaw.<sup>307</sup> The *Schweiker* Court embraced the presumption that the hearing officers were sufficiently unbiased and placed the burden to prove otherwise on plaintiffs.<sup>308</sup> Similarly, in *Marshall v. Jericco*,<sup>309</sup> the Court rejected a challenge to the Fair Labor and Standards Act procedures for collecting fines, under which the office that assessed the fines also collected a share after payment.<sup>310</sup> In rejecting the contention that such reimbursement rendered the assessing officers biased, the Court held that those officers were more akin to prosecutors than to judges.<sup>311</sup>

Beyond the direct role of due process in protecting civil liberties, the due process approach also plays a structural role in safeguarding the separation of powers.<sup>312</sup> According to Michael McConnell and Nathan Chapman, “due process has from the beginning been bound up with the division of the authority to deprive subjects of life, liberty, or property between independent political institutions.”<sup>313</sup> Legislative acts that impinged upon individual property or liberty rights were always questionable under the Due Process Clause, because the basis of the due process concept, from the very beginning, required that individual branches of the government operated “in a distinctive manner,” especially in situations affecting a citizen’s liberty or property.<sup>314</sup>

The due process framework is useful in understanding the NSL’s procedural flaws because NSLs do not include many of the minimal safeguards anticipated by *Schweiker*, *Jericco*, and *Waters*. For example, unlike the claimants in *Schweiker* and *Jericco*, an NSL target has no opportunity to confront a decision maker—whether neutral or biased—regarding NSL issuance or use. While

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304. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (examining importance of due process in procedural matters).

305. *See id.* at 523 (describing judges’ “substantial pecuniary interest” in finding against the defendant).

306. 456 U.S. 188 (1982).

307. *See id.* at 200 (holding current procedures sufficient to protect claimant’s interests).

308. *See id.* at 195 (placing officers in quasi-judicial position and requiring proof to warrant disqualification).

309. 446 U.S. 238 (1980).

310. *See id.* at 251-52 (holding current reimbursement procedure sufficiently fair according to Due Process Clause).

311. *See id.* at 248.

312. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672, 1729 (2012).

313. *Id.* at 1681.

314. *See id.* at 1781.

*Speiser* counsels that administrative First Amendment deprivations are cognizable harms, in the NSL context, targets lack any administrative or judicial forum in which to raise those rights. Rather, only NSL recipients may raise those arguments and then only in secretive, nonpublic judicial proceedings that rarely occur. In the majority of NSL cases, the Executive branch operates alone, unchecked by either the Judiciary or individual claimants.

#### 4. Heightened Scrutiny

A final potential First Amendment safeguard is the application of heightened scrutiny. Courts consider deprivations of associational rights under a strict scrutiny framework.<sup>315</sup> Unlike in the associational rights context, however, courts tend not to apply heightened scrutiny when considering the constitutionality of investigative methods under the First Amendment. Under ECPA's NSL provision, the FBI is required to certify that an investigation is not based solely on First Amendment activity.<sup>316</sup> Although this provision appears explicit, courts have been far less demanding and typically do not apply heightened scrutiny to this inquiry.

In *Alliance to End Repression v. City of Chicago*,<sup>317</sup> the Seventh Circuit refused to enjoin the application of FBI guidelines that allowed investigation on the basis of statements that “advocate[d] criminal activity or indicate[d] an apparent intent to engage in crime.”<sup>318</sup> The Seventh Circuit concluded that because investigations are less intrusive and “repressive” than prosecutions, investigations need not be subjected to the same strict standard.<sup>319</sup> Likewise, in litigation challenging surveillance and investigative practices in the New York City Police Department, the District Court for the Southern District of New York concluded that the complaint raised a question of whether police practices “are justified by the legitimate needs of law enforcement.”<sup>320</sup> Likewise, the Ninth Circuit has required only that investigations impacting First Amendment

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315. See *NAACP v. Button*, 371 U.S. 415, 438 (1963) (holding First and Fourteenth Amendments protected NAACP activities). “The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate can justify limiting First Amendment freedoms.” *Id.*

316. See Office of Legal Counsel, *supra* note 24, at 1; see also Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167, 172 (2004) (describing Justice guidelines, including “prior approvals” requirements for certain actions); see also Hannah Bloch-Wehba, *FBI Failed To Follow Its Own Rules When It Impersonated the Associated Press in a 2007 Investigation*, REPORTERS COMM. FOR FREEDOM PRESS (Apr. 28, 2016), <https://rcfp.org/browse-media-law-resources/news/fbi-failed-follow-its-own-rules-when-it-impersonated-associated-press> (discussing approval requirements for undercover operations involving “sensitive circumstances”).

317. 742 F.2d 1007 (7th Cir. 1984).

318. *Id.* at 1010.

319. See *id.* at 1016.

320. See *Handschu v. Special Servs. Div.*, 349 F. Supp. 766, 771 (S.D.N.Y. 1972) (describing analysis of justified police action).

rights serve a “legitimate law enforcement interest.”<sup>321</sup>

Rightly, the FBI is not required to go before a court whenever it opens an investigation that may be predicated on First Amendment activity. For example, if the FBI were to open an investigation based on statements made on Twitter, it need not first seek a judicial answer to the question of whether the First Amendment protects or covers the information. Nevertheless, even legitimate investigative activity can certainly infringe First Amendment rights.<sup>322</sup>

Of course, enforcing a statute of general applicability does not invariably create First Amendment problems.<sup>323</sup> For example, the Supreme Court decided not to apply strict scrutiny to general laws governing investigative activity that implicated press rights.<sup>324</sup> Yet determining that surveillance of communications does not implicate First Amendment rights because the surveillance is generalized only creates more questions than it does answers. Analysis of burdens on speech often rests on a distinction between “government actions aimed at communicative impact” and actions “aimed at noncommunicative impact but nonetheless having adverse effects on communicative opportunity.”<sup>325</sup> While content-based regulations focus on the impact of the activity, content-neutral laws are not aimed at communicative impact, but still have an adverse effect on that activity.<sup>326</sup>

One way to explain the imbalance between stricter review for government regulations that incidentally burden speech and rational basis review for content-based investigations is that heightened scrutiny applies to incidental restrictions on speech only when the conduct encompasses a “significant expressive element” that in fact necessitated the legal action.<sup>327</sup> When law enforcement construes the impetus for an investigation as conduct rather than speech, the applicable test is whether the investigation is “justified by the legitimate needs of law enforcement.”<sup>328</sup> Investigations motivated by an “unambiguous” intention to violate the First Amendment are subject to strict

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321. *United States v. Mayer*, 503 F.3d 740, 751 (9th Cir. 2007).

322. *See* 28 C.F.R. § 50.10 (2015) (differentiating extraordinary measures from standard practice). “[U]se of certain law enforcement tools . . . to seek information from, or records of, non-consenting members of the news media [are] extraordinary measures, not standard investigatory practices.” *Id.*

323. *See Branzburg v. Hayes*, 408 U.S. 665, 682 (1972).

324. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (holding reporter who disclosed confidential source had no special protection from general laws). Specifically, the Supreme Court held that, because the press has no “special” rights or privileges beyond those of the First Amendment more generally, “enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.” *Id.*

325. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 790 (2d ed. 1988).

326. Michael Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1176, 1201 (1996).

327. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986); *see also* Dorf, *supra* note 326, at 1204-05 (noting limit on application of heightened scrutiny to certain conduct).

328. *Handschu v. Special Servs. Div.*, 349 F. Supp. 766, 771 (S.D.N.Y. 1972); *see also United States v. Mayer*, 503 F.3d 740, 751 (9th Cir. 2007).

scrutiny; in contrast, “investigations motivated by some (perhaps dimly discernible) law enforcement purpose are in all instances constitutional.”<sup>329</sup> By framing investigations as “motivated” by conduct rather than expression or other First Amendment activity, law enforcement avoids the heightened scrutiny that the Constitution requires.<sup>330</sup>

Even accepting the doubtful application of the legitimate interest test, the secrecy surrounding NSLs makes it impossible to tell whether investigations are properly motivated, or (put another way) whether facially content-neutral authorities are applied in a content-based manner. For example, penalizing members of specific political or religious groups, or identifying certain journalists who publish stories that rely on unauthorized disclosures of classified information, would appear to be content-based even if the decisions are properly “motivated.”<sup>331</sup> Even assuming NSLs are truly content-neutral, it is not clear that the legitimate interest test is appropriate if, indeed, the statute incidentally burdens speech.<sup>332</sup>

### B. *Soft Safeguards*

NSL authority also lacks key procedural safeguards present in other information-gathering mechanisms through internal review and judicial supervision.<sup>333</sup> These safeguards are not ordinarily legally binding, and do not give rise to a private right of action on the part of a target. Yet these safeguards can help set norms regarding the appropriateness of FBI action.<sup>334</sup>

#### 1. *Chain of Command*

One typical soft safeguard requires involving other stakeholders in internal review processes for legal orders.<sup>335</sup> For example, when the FBI seeks a grand

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329. *Alliance To End Repression v. City of Chicago*, 742 F.2d 1007, 1020 (7th Cir. 1984) (Cudahy, J., dissenting).

330. *See id.* at 1024 n.9 (Cudahy, J., dissenting) (explaining First Amendment “does not limit” investigations if “properly motivated”).

331. *See* Eugene Volokh, *Laws of General Applicability, Content-Based as Applied and Content-Neutral as Applied*, VOLOKH CONSPIRACY (July 3, 2007), [www.volokh.com/posts/1183481341.shtml](http://www.volokh.com/posts/1183481341.shtml) [http://perma.cc/DK2-YHTH].

332. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *O'Brien* holds that a regulation incidentally burdening First Amendment rights is “sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.*

333. *See infra* note 346 and accompanying text (illustrating one example of soft-procedural safeguards).

334. *Cf. Gersen & Posner, supra* note 228, at 575 (“Soft law in international relations, like small-c constitutional law, consists of norms that affect the behavior of agents, even though the norms do not have the status of formal law.”).

335. *See* FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 18.5.9 (2011) (listing process required for FBI to request grand jury subpoena). In fact, subpoenas or court orders for records of the news media may be issued only “after negotiations with the affected member of the news media

jury subpoena, the FBI must request the subpoena through a United States Attorney.<sup>336</sup> When the FBI seeks a § 215 order, the process usually is broken into five parts: “FBI field office initiation and review, FBI Headquarters review, OIPR [Office of Intelligence Policy and Review] review, FISA Court review, and FBI service of the order.”<sup>337</sup> By contrast, the NSL statute requires no such internal review. In part because of this divergence, the President’s Review Group on Intelligence and Communications Technologies recommended in 2013 that NSLs be issued with judicial approval, noting that the “more demanding” requirements for § 215 orders would tend to drive agents to use the less onerous NSL process to seek the same records.<sup>338</sup>

The FBI’s internal review procedures for NSLs do mirror the procedures for issuing administrative subpoenas under the Controlled Substances Act.<sup>339</sup> In the context of the Controlled Substances Act, the Attorney General delegated her authority to issue subpoenas to a select group of DEA and FBI officials.<sup>340</sup> The Controlled Substances Act, however, unlike ECPA, does not include any authority for a nondisclosure order barring the recipient from discussing a subpoena.<sup>341</sup> In the only case involving a nondisclosure requirement in connection with a subpoena under the Controlled Substances Act, the recipient did not raise, and the court did not consider, any First Amendment arguments.<sup>342</sup>

## 2. Internal Guidelines

A more robust application of internal safeguards offers another path forward. The FBI and DOJ guidelines, as well as § 215 and the NSL statutes, already bar investigation based solely on First Amendment activity. Nevertheless, federal case law appears to permit these forbidden investigations whenever there is a legitimate law enforcement need. As a result of this precedent, the existing First Amendment protections are weaker than the text suggests. Stronger internal guidelines geared toward helping law enforcement officers evaluate

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have been pursued and appropriate notice to the affected member of the news media has been provided,” unless the Attorney General determines that negotiations or notice would risk an enumerated harm. *See Gersen & Posner, supra* note 228.

336. *See id.*

337. 215 REPORT, *supra* note 208, at 10.

338. *See* PRESIDENT’S REVIEW GRP. ON INTELLIGENCE AND COMM’NS TECHNOLOGIES, LIBERTY AND SECURITY IN A CHANGING WORLD 93 n.83 (2013).

339. *See* 21 U.S.C. § 876 (2012) (comparing process of service).

340. *See* 28 C.F.R. Pt. 0, subpart R, app., § 4(a) (2010) (delegating subpoena authority). The “FBI Assistant Special Agents-in-Charge; . . . FBI Supervisory Senior Resident Agents; . . . [and] those FBI Special Agent Squad Supervisors who have management responsibility over Organized Crime/Drug Program Investigations” are authorized to sign and issue subpoenas. *See id.*

341. *See id.* (failing to mention nondisclosure power).

342. *See* *United States v. Mountain States Tel. & Tel. Co.*, 516 F. Supp. 225, 233 (D. Wyo. 1981) (determining disclosing subpoena would be detrimental to investigation).



First Amendment harms may help address this problem.

Recent changes to the DOJ's internal guidelines for subpoenas and warrants targeting the news media offer some guidance.<sup>343</sup> In the wake of the subpoena targeting the Associated Press' phone lines and the warrant targeting James Rosen's personal Gmail account, the DOJ revised its guidelines for the use of warrants and subpoenas to obtain records of, or information from, members of the news media.<sup>344</sup> The guidelines emphasize the need to "strike the proper balance" of interests including national security, law enforcement needs, and the independent role of the free press.<sup>345</sup>

The guidelines make clear that the use of subpoenas or search warrants to gather information or records from a member of the news media is an extraordinary event and not customary.<sup>346</sup> As a result, investigators may use search warrants and subpoenas to obtain information from the news media only after "reasonable" alternatives have been exhausted, and the member of the news media is notified and has an opportunity to negotiate.<sup>347</sup> Only the Attorney General may waive these requirements if he or she decides that, for "compelling reasons," negotiations would "would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm."<sup>348</sup>

Nonetheless, the guidelines have very serious shortcomings. First, as DOJ guidelines, they do not constrain any of the intelligence agencies except for the FBI.<sup>349</sup> The DOJ guidelines also do not apply to any of the national security information-gathering statutes, including NSLs, which closely resemble subpoenas.<sup>350</sup> The guidelines require investigators to use any reasonable, different avenues to obtain information from other sources.<sup>351</sup> To a skeptical reader, this appears to be a virtual invitation to obtain information from national security surveillance in leaks investigations.

Despite these limitations, the guidelines do offer structural guidance for effective internal safeguards. First, they offer a presumption that when information-gathering tools target records of or information from reporters and journalists, those targets are entitled to notice and an opportunity to negotiate in all but the most exceptional cases.<sup>352</sup> Second, they offer workable boundaries

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343. See 28 C.F.R. § 50.10 (2015) (detailing policy to obtain information from news media sources).

344. See *id.*; see also Ann E. Marimow, *Justice Department's Scrutiny of Fox News Reporter James Rosen in Leak Case Draws Fire*, WASH. POST (May 20, 2013), <http://wapo.st/18ZTg9P> [<http://perma.cc/489N-MX8H>] (reporting widespread outrage due to investigation of news reporter).

345. See 28 C.F.R. § 50.10(a)(2) (2015).

346. See *id.*

347. See *id.* § (a)(3).

348. See *id.* (describing when Attorney General may waive notification requirements).

349. See 28 C.F.R. § 50.10(a)(3) (2015).

350. See *id.*

351. See *id.*

352. See *id.*

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for determining whether the enhanced protections apply: the guidelines are in place to protect “newsgathering activities,” not individual journalists and reporters.<sup>353</sup> Third, they realistically account for emergencies and exceptional situations that do not permit for notice and negotiation before information is sought.<sup>354</sup> These characteristics make the guidelines a useful model for other agencies to follow in developing and implementing internal procedures that would effectively safeguard press rights.

#### V. CONCLUSION

Procedural safeguards for First Amendment rights are not absolute. Their presence depends on the application of the flexible framework from both *Mathews* and *Waters*, and their content can take many different shapes: soft and hard, secret and public. But NSLs, which lack *any* familiar form of safeguard for the First Amendment rights of subscribers, exemplify the risks of a flexible approach without clear procedural requirements. Without a rule to guide agencies or courts, it is unclear which, if any, particular procedures might be required for issuing legal process that targets activity protected by the First Amendment. It is equally evident that taken together, a system in which the FBI can—without judicial oversight—simultaneously issue both a subpoena for communications records and a nondisclosure order gagging the recipient lacks adequate procedural safeguards to protect expressive, associational, religious, and press rights. Efforts to reform NSL process should focus on bringing the tool into procedural conformity with other, analogous processes within the national security space to ensure that First Amendment rights consistently receive appropriate protections.

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353. See 28 C.F.R. § 50.10(a)(3) (2015).

354. See *id.*