

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: NATIONAL SECURITY LETTERS,

Case No. 11-cv-02173-SI ; Case No. 3:11-cv-2667 SI; Case No. 3:13-mc-80089 SI;
Case No. 3:13-cv-1165 SI
SEALED

**ORDER RE: RENEWED PETITIONS
TO SET ASIDE NATIONAL SECURITY
LETTERS AND MOTIONS FOR
PRELIMINARY INJUNCTION AND
CROSS-PETITIONS FOR
ENFORCEMENT OF NATIONAL
SECURITY LETTERS**

These related cases involve two electronic communication service providers who received National Security Letters ("NSLs"), a type of administrative subpoena, issued by the Federal Bureau of Investigation. The NSLs sought subscriber information, and were issued by an FBI Special Agent in Charge who certified that the information sought was relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. *See* 18 U.S.C. § 2709(b) (2014). The NSLs also informed the providers that they were prohibited from disclosing the contents of the subpoenas or the fact that they had received the subpoenas, based upon a certification from the FBI that such disclosure may result in "a danger to the national security of the United States; interference with a criminal, counterterrorism, or counterintelligence investigation; interference with diplomatic relations; or danger to the life or physical safety of any person." 18 U.S.C. § 2709(c)(1) (2014).

In 2011 and 2013, the electronic communication service providers filed these lawsuits seeking to set aside the NSLs as unconstitutional. In 2013, this Court reviewed the 2013 versions

1 of the NSL statutes and held that the nondisclosure requirements and related provisions regarding
2 judicial review of those requirements suffered from significant constitutional infirmities that could
3 not be cured absent legislative action. While these cases were on appeal to the Ninth Circuit Court
4 of Appeals, Congress amended the NSL statutes through the passage of the USA Freedom Act of
5 2015 ("USAFA"), Pub. L. No. 114-23, 129 Stat. 268 (2015). The Ninth Circuit remanded these
6 cases to this Court to reexamine the providers' challenges to the NSL statutes in light of the
7 amendments.

8 Now before the Court are petitioners' motions for a preliminary injunction and renewed
9 petitions to set aside the NSLs, and the government's cross-petitions to enforce the NSLs. The
10 Court held a hearing on these matters on December 18, 2015. After careful consideration of the
11 parties' papers and arguments, the Court concludes that the 2015 amendments to the NSL statutes
12 cure the deficiencies previously identified by this Court, and that as amended, the NSL statutes
13 satisfy constitutional requirements. This Court has also considered the appropriateness of
14 continued nondisclosure of the four specific NSL applications which gave rise to these cases. As
15 to three of the certifications (two in case 3:13-cv-1165 SI and one in case 3:11-cv-2173 SI), the
16 Court finds that the declarant has shown that there is a reasonable likelihood that disclosure of
17 the information subject to the nondisclosure requirement would result in a danger to the national
18 security of the United States, interference with a criminal, counterterrorism or counterintelligence
19 investigation, interference with diplomatic relations or danger to a person's life or physical safety.
20 As to the fourth (in case 3:13-mc-80089 SI), the Court finds that the declarant has not made such a
21 showing.

22 23 24 **BACKGROUND**

25 **I. 2013 Decisions of this Court and Prior Cases Testing Constitutionality of the NSL** 26 **Provisions**

27 On [REDACTED] 2011, pursuant to the National Security Letter Statute, 18 U.S.C. § 2709, the
28 FBI issued an NSL to petitioner A, an electronic communication service provider ("ECSP"),

1 seeking "all subscriber information, limited to name, address, and length of service, for all services
2 provided to or accounts held by the named subscriber and/or subscriber of the named account."
3 Dkt. No. 7, Ex. A in 3:11-cv-2173 SI. By certifying, under section 2709(c)(1), that disclosure of
4 the existence of the NSL may result in "(i) a danger to the national security of the United States;
5 (ii) interference with a criminal, counterterrorism, or counterintelligence investigation; (iii)
6 interference with diplomatic relations; or (iv) danger to the life or physical safety of any person,"
7 the FBI was able to prohibit petitioner from disclosing the existence of the NSL. 18 U.S.C.
8 § 3511(b)(2)-(3) (2014). On May 2, 2011, petitioner filed a Petition to Set Aside the National
9 Security Letter and Nondisclosure Requirement, pursuant to 18 U.S.C. § 3511(a) and (b). *In re*
10 *National Security Letter*, 3:11-cv-2173 SI. The government opposed the petition, filed a separate
11 lawsuit seeking a declaration that petitioner was required to comply with the NSL, *United States*
12 *Department of Justice v. Under Seal*, 3:11-cv-2667 SI, and filed a motion to compel compliance
13 with the NSL.

14 Petitioner challenged the constitutionality – both facially and as applied – of the
15 nondisclosure provision of 18 U.S.C. § 2709(c) and the judicial review provisions of 18 U.S.C.
16 § 3511(b) (collectively "NSL nondisclosure provisions").¹ Petitioner argued that the

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18 ¹ The version of the NSL statutes in effect at the time these lawsuits were filed in 2011
19 provided as follows. 18 U.S.C. §§ 2709(a) and (b) stated that a wire or electronic communication
20 service provider was required to comply with a request for specified categories of subscriber
21 information if the Director of the FBI or his designee certified that the records sought were
22 relevant to an authorized investigation to protect against international terrorism or clandestine
23 intelligence activities, provided that such an investigation of a United States person was not
24 conducted solely on the basis of activities protected by the First Amendment to the Constitution of
25 the United States. 18 U.S.C. §§ 2709(a)-(b) (2011). Section 2709(c)(1) provided that if the
26 Director of the FBI or his designee certified that "there may result a danger to the national security
27 of the United States, interference with a criminal, counterterrorism, or counterintelligence
28 investigation, interference with diplomatic relations, or danger to the life or physical safety of any
person," the recipient of the NSL was prohibited from disclosing to anyone (other than to an
attorney to obtain legal advice or legal assistance with respect to the request) that the FBI sought
or obtained access to information or records sought in the NSL. 18 U.S.C. § 2709(c)(1) (2011).
Section (c)(2) required the FBI to inform the recipient of the NSL of the nondisclosure
requirement. 18 U.S.C. § 2709(c)(2) (2011).

Section 3511 governed judicial review of NSLs and nondisclosure orders issued under
section 2709 and other NSL statutes. Under 3511(a), the recipient of an NSL could petition a
district court for an order modifying or setting aside the NSL. The court could modify the NSL, or
set it aside, only "if compliance would be unreasonable, oppressive, or otherwise unlawful." 18
U.S.C. § 3511(a) (2011). Under 3511(b)(2), an NSL recipient subject to a nondisclosure order
could petition a district court to modify or set aside the nondisclosure order. If the NSL was

1 nondisclosure provision of the statute was an unconstitutional prior restraint and content-based
2 restriction on speech. More specifically, petitioner contended that the NSL provisions lacked the
3 necessary procedural safeguards required under the First Amendment because the government did
4 not bear the burden to seek judicial review of the nondisclosure order, and the government did not
5 bear the burden of demonstrating that the nondisclosure order was necessary to protect specific,
6 identified interests. Petitioner also argued that the NSL nondisclosure provisions violated the First
7 Amendment because they acted as a licensing scheme providing unfettered discretion to the FBI,
8 and that the judicial review provisions violated separation of powers principles because the statute
9 dictated an impermissibly restrictive standard of review for courts adjudicating challenges to
10 nondisclosure orders. Petitioner also attacked the substantive provisions of the NSL statute itself,
11 both separately and in conjunction with the nondisclosure provisions, arguing that the statute was
12 a content-based restriction on speech that failed strict scrutiny.

13 In its opposition to the petition, the government argued that the NSL statute satisfied strict
14 scrutiny and did not impinge on the anonymous speech or associational rights of the subscriber
15 whose information was sought in the NSL. The government also asserted that the nondisclosure
16 provisions were appropriately applied to petitioner because the nondisclosure order was not a

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18 issued within a year of the time a challenge to the nondisclosure order was made, a court could
19 "modify or set aside such a nondisclosure requirement if it finds that there is no reason to believe
20 that disclosure may endanger the national security of the United States, interfere with a criminal,
21 counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or
22 endanger the life or physical safety of any person." 18 U.S.C. § 3511(b) (2011). However, if a
23 specified high ranking government official (i.e., the Attorney General, Deputy or Assistant
24 Attorney Generals, the Director of the Federal Bureau of Investigation, or agency heads) certified
25 that disclosure "may endanger the national security of the United States or interfere with
26 diplomatic relations, such certification shall be treated as conclusive unless the court finds that the
27 certification was made in bad faith." 18 U.S.C. § 3511 (b)(2) (2011).

28 Under 3511(b)(3), if the petition to modify or set aside the nondisclosure order was filed
more than one year after the NSL issued, a specified government official, within ninety days of the
filing of the petition, was required to either terminate the nondisclosure requirement or re-certify
that disclosure may result in an enumerated harm. 18 U.S.C. § 3511(b)(3) (2011). If the
government provided that re-certification, the Court could again only alter or modify the NSL if
there was "no reason to believe that disclosure may" result in an enumerated harm, and the court
was required to treat the certification as "conclusive unless the court f[ound] that the
recertification was made in bad faith." 18 U.S.C. § 3511(b)(3) (2011). Finally, if the court denied
a petition for an order modifying or setting aside a nondisclosure order, "the recipient shall be
precluded for a period of one year from filing another petition to modify or set aside such
nondisclosure requirement." 18 U.S.C. § 3511(b)(3) (2011).

"classic prior restraint" warranting the most rigorous scrutiny and because it was issued after an adequate certification from the FBI. Finally, the government argued that the statutory standard of judicial review of NSLs and nondisclosure orders was constitutional.

In a decision filed on March 14, 2013, this Court found that the NSL nondisclosure and judicial review provisions suffered from significant constitutional infirmities. *In re National Security Letter*, 930 F. Supp. 2d 1064 (N.D. Cal. 2013). The Court first reviewed prior cases testing the constitutionality of the NSL provisions at issue. In *John Doe, Inc. v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007), affirmed in part and reversed in part and remanded by *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), the district court found that the nondisclosure provision was a prior restraint and a content-based restriction on speech that violated the First Amendment because the government did not bear the burden to seek prompt judicial review of the nondisclosure order. *John Doe, Inc.*, 500 F. Supp. 2d at 406 (relying on *Freedman v. Maryland*, 380 U.S. 51 (1965)).² The district court approved allowing the FBI to determine whether disclosure would jeopardize national security, finding that the FBI's discretion in certifying a need for nondisclosure of an NSL "is broad but not inappropriately so under the circumstances" of protecting national security. *Id.* at 408-09. However, the district court determined that section 3511(b)'s restriction on when a court may alter or set aside an NSL – only if there was "no reason to believe" that disclosure would result in one of the enumerated harms – in combination with the statute's direction that a court must accept the FBI's certification of harm as "conclusive unless the court finds that the certification was made in bad faith," were impermissible attempts to restrict judicial review in violation of separation of powers principles. *Id.* at 411-13. The district court

² In *Freedman*, the Supreme Court evaluated a motion picture censorship statute that required an owner or lessee of a film to submit the film to the Maryland State Board of Censors and obtain its approval prior to showing the film. 380 U.S. at 52. The Court held that such a review process "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58. "*Freedman* identified three procedural requirements: (1) any restraint imposed prior to judicial review must be limited to 'a specified brief period'; (2) any further restraint prior to a final judicial determination must be limited to 'the shortest fixed period compatible with sound judicial resolution'; and (3) the burden of going to court to suppress speech and the burden of proof in court must be placed on the government." *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008) (quoting *Freedman*, 380 U.S. at 58-59) (numbering and ordering follows Supreme Court's discussion of *Freedman* in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990)).

1 found that the unconstitutional nondisclosure provisions were not severable from the substantive
2 provisions of the NSL statute, and declined to address whether the unconstitutional judicial review
3 provision – which implicated review of other NSLs, not just NSLs to electronic communication
4 service providers at issue – was severable.

5 The district court's decision was affirmed in part, reversed in part, and remanded by the
6 Second Circuit Court of Appeals in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). In
7 that case, the Second Circuit found that while not a "classic prior restraint" or a "broad" content-
8 based prohibition on speech necessitating the "most rigorous First Amendment scrutiny," the
9 nondisclosure requirement was sufficiently analogous to them to justify the application of the
10 procedural safeguards announced in *Freedman v. Maryland*, 380 U.S. 51, particularly the third
11 *Freedman* prong requiring the government to initiate judicial review. *Id.* at 881. However, in
12 order to avoid the constitutional deficiencies, the Second Circuit read into the statute a "reciprocal
13 notice" requirement that the government inform each NSL recipient that the recipient could object
14 to the nondisclosure requirements, and if contested, the government would initiate judicial review
15 within 30 days, and that such review would conclude within 60 days. The Second Circuit held
16 that by "conforming" section 2709(c) in this manner, the *Freedman* concerns were met.

17 The Second Circuit also found problematic the statutory restrictions on the district court's
18 review of the adequacy of the FBI's justification for nondisclosure orders. In order to avoid some
19 of the problems, the Second Circuit accepted three concessions by the government that narrowed
20 the operation of sections 2709(c) and 3511(b) in significant respects. First, the Second Circuit
21 accepted the government's position – offered in litigation – that the section 2709(c) nondisclosure
22 requirement applied only if the FBI certified that an enumerated harm related to an authorized
23 investigation to protect against international terrorism or clandestine intelligence activity may
24 occur. *Id.* at 875. Second, the Second Circuit accepted the government's litigation position that
25 section 3511(b)(2)'s requirement that a court may alter or modify the nondisclosure agreement
26 only if there "is no reason to believe that disclosure may" risk one of the enumerated harms,
27 should be read to mean that a court may alter or modify the nondisclosure agreement unless there
28 is "some reasonable likelihood" that the enumerated harm will occur. Third, the Second Circuit

1 accepted the government's agreement that it would bear the burden of proof to persuade a district
2 court – through evidence submitted in camera as necessary – that there was a good reason to
3 believe that disclosure may risk one of the enumerated harms, and that the district court must find
4 that such a good reason exists. *Id.* at 875-76.

5 In interpreting section 3511(b) to require the government to show a "good" reason that an
6 enumerated harm related to international terrorism or clandestine intelligence activity may result,
7 and requiring the government to submit proof to the district court to support its certification, the
8 Second Circuit found that a court would have – consistent with its duty independently to assess
9 First Amendment restraints in light of national security concerns – "a basis to assure itself (based
10 on in camera presentations where appropriate) that the link between the disclosure and risk of
11 harm is substantial." *Id.* at 881. After implying these limitations – based on the government's
12 litigation concessions – the Second Circuit found that most of the significant constitutional
13 deficiencies found by the district court could be avoided. However, the Second Circuit affirmed
14 the lower court's holding that section 3511(b)(2) and (b)(3)'s provision that government
15 certifications must be treated as "conclusive" is not "meaningful judicial review" as required by
16 the First Amendment. *Id.* at 882. In conclusion, the Second Circuit severed the conclusive
17 presumption provision of section 3511(b), but left intact the remainder of section 3511(b) and the
18 entirety of section 2709, with the added imposed limitations and "with government-initiated
19 review as required." *Id.* at 885.

20 In this Court's March 13, 2013 decision, the Court largely agreed with the analysis of the
21 Second Circuit in *John Doe, Inc. v. Mukasey*, and held that although section 2709(c) did not need
22 to satisfy the "extraordinarily rigorous" *Pentagon Papers* test,³ section 2709(c) must still meet the
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24 ³ In *New York Times v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per
25 curiam), the Supreme Court denied the United States' request for an injunction enjoining the *New*
26 *York Times* and the *Washington Post* from publishing a classified government study. Citing
27 Justice Stewart's concurrence, petitioners have contended throughout this litigation that the
28 nondisclosure provisions are constitutional only if the government can show that disclosure of the
information will "surely result in direct, immediate, and irreparable harm to our Nation or its
people." *Id.* at 730 (Stewart, J., joined by White, J., concurring). As explained in the Court's 2013
decision and this decision, the Court concludes that the *Pentagon Papers* test does not apply to the
NSL nondisclosure requirements.

1 heightened justifications for sustaining prior-restraints announced in *Freedman v. Maryland*, and
2 must be narrowly tailored to serve a compelling government interest.

3 This Court found that section 2709 did not satisfy the *Freedman* procedural safeguards
4 because the NSL provisions did not require the government to initiate judicial review of NSL
5 disclosure orders. This Court also found that the NSL nondisclosure provisions were not narrowly
6 tailored on their face, since they applied without distinction to prohibiting disclosures regarding
7 the content of the NSLs as well as to the very fact of having received an NSL. This Court also
8 held that section 3511(b) violated the First Amendment and separation of powers principles
9 because the statute impermissibly attempted to circumscribe a court's ability to review the
10 necessity of nondisclosure orders. This Court found that it was not within its power to "conform"
11 the NSL nondisclosure provisions as the Second Circuit had. This Court therefore held the NSL
12 statutes unconstitutional, denied the government's request to enforce the NSL at issue in 3:11-cv-
13 2173 SI, and enjoined the government from issuing NSLs. This Court stayed enforcement of its
14 decision pending appeal to the Ninth Circuit.

15 In 2013, petitioner A received two additional NSLs and on April 23, 2013, petitioner A
16 filed another petition to set aside those NSLs on same constitutional grounds raised in the 2011
17 petition. *In re NSLs*, 3:13-mc-80089 SI. In addition, two other recipients of NSLs filed lawsuits
18 in this Court seeking to set aside the NSLs on the basis of the First Amendment and separation of
19 powers. See *In re NSLs*, 3:13-cv-1165 SI (petition challenging 2 NSLs) and *In re NSLs*, 3:13-mc-
20 80063 SI (petition challenging 19 NSLs).⁴

21 In three separate orders filed on May 21, 2013, August 12, 2013, and August 13, 2013, this
22 Court found that in light of the pending appeal and stay of the judgment in *In re NSLs*, 3:11-cv-
23 2173 SI, it was appropriate to review the arguments and evidence on an NSL-by-NSL basis. In
24 determining whether to enforce the challenged NSLs, the Court reviewed classified and
25 unclassified evidence submitted by the government. The Court found that the government
26 demonstrated that the NSLs were issued in full compliance with the procedural and substantive
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28 ⁴ The Court will refer to the petitioner in *In re NSLs*, 3:13-cv-1165 SI as petitioner B and
the petitioner in *In re NSLs*, 3:13-mc-80063 SI as petitioner C.

1 requirements imposed by the Second Circuit in *John Doe, Inc. v. Mukasey*. Specifically, the Court
2 found that the government had: (1) notified the NSL recipients that the government would initiate
3 judicial review of the nondisclosure order and the underlying NSL if the recipient objected to
4 compliance; (2) certified that the nondisclosure orders were necessary to prevent interference with
5 an authorized investigation to protect against international terrorism or clandestine intelligence
6 agencies; and (3) submitted evidence to showing there was a "good reason" to believe that absent
7 nondisclosure, some reasonable likelihood of harm to an authorized investigation to protect
8 against international terrorism or clandestine intelligence agencies would result. The Court also
9 found that the Court was not expected to treat the FBI's certification as to the necessity of the
10 nondisclosure as conclusive, but to conduct a searching review of the evidence submitted. *See*
11 Dkt. No. 27 in 3:13-mc-80063 SI (May 21, 2013 Order); Dkt. No. 13 in 3:13-cv-1165 SI (August
12 12, 2013 Order); Dkt. No. 20 in 3:13-mc-80089 SI (August 13, 2013 Order). The Court denied
13 the petitioners' petitions to set aside the NSLs challenged in 3:13-mc-80089 SI, 3:13-mc-80063 SI,
14 and 3:13-cv-1165 SI, and granted the government's motions to enforce those NSLs. The
15 petitioners in those cases unsuccessfully sought stays of the enforcement orders, and thereafter
16 complied with the information requests and the nondisclosure requirements of all of the NSLs.⁵
17 The petitioner in 3:13-mc-80063 SI did not file an appeal. The parties in 3:11-cv-2173 SI, 3:13-
18 mc-80089 SI and 3:13-cv-1165 SI filed appeals, and those appeals were consolidated before the
19 Ninth Circuit.

20 The consolidated appeals were submitted for decision following oral argument on October
21 8, 2014. On June 2, 2015, while the consolidated appeals were pending before the Ninth Circuit,
22 Congress amended 18 U.S.C. §§ 2709 and 3511 through the passage of the USA Freedom Act of
23 2015 ("USAFA"), Pub. L. No. 114-23, 129 Stat. 268 (2015). In June 2015, the Ninth Circuit
24 ordered the parties to file supplemental briefing regarding the impact of the amendments on the
25 appeals. On August 24, 2015, the Ninth Circuit issued an order stating "[i]n light of the significant
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27 ⁵ In a few instances, the government withdrew the information requests for particular
28 NSLs, but the government did not withdraw any of the nondisclosure requirements for any of the
NSLs.

changes to the statutes, we conclude that a remand to the district court is appropriate since the district court may address the recipients' challenges to the revised statutes." The Ninth Circuit vacated the judgments in the consolidated appeals and remanded to this Court for further proceedings.

II. 2015 Amendments to NSL Statutes

The legislative history of the USAFA states that section 502, titled "Limitations on Disclosure of National Security Letters," "corrects the constitutional defects in the issuance of NSL nondisclosure orders found by the Second Circuit Court of Appeals in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), and adopts the concepts suggested by that court for a constitutionally sound process." H.R. Rep. No. 114-109, at 24 (2015).

A. Section 2709

The USAFA amended sections 2709(b) and (c), and added new subsection (d). As amended, section 2709(b)(1) provides that an NSL is authorized only when a specified FBI official provides a certification that "us[es] a term that specifically identifies a person, entity, telephone number, or account as the basis for [the NSL]," 18 U.S.C. § 2709(b) (2016).⁶ Section 2709(c) now requires the government to provide the NSL recipient with notice of the right to judicial review as a condition of prohibiting disclosure of the receipt of the NSL. *See* 18 U.S.C. § 2709(c)(1)(A) (2016). Similarly, new subsection (d) requires that an NSL notify the recipient that judicial review is available pursuant to 18 U.S.C. § 3511. *See* 18 U.S.C. § 2709(d) (2016). Second, the amended statute now permits the government to modify or rescind a nondisclosure requirement after an NSL is issued. *See* 18 U.S.C. § 2709(c)(2)(A)(iii) (2016). Finally, under the

⁶ The legislative history regarding this amendment states, "This section prohibits the use of various national security letter (NSL) authorities (contained in the Electronic Communications Privacy Act, Right to Financial Privacy Act, and Fair Credit Reporting Act) without the use of a specific selection term as the basis for the NSL request. It specifies that for each NSL authority, the government must specifically identify the target or account." H.R. Rep. No. 114-109, at 24 (discussing § 501 of USAFA).

1 amended section 2709(c), the recipient of an NSL containing a nondisclosure requirement "may
2 disclose information . . . to . . . other persons as permitted by the Director of the [FBI] or the
3 designee of the Director." 18 U.S.C. §§ 2709(c)(2)(A)(iii); 2709(c)(2)(D) (2016).

4 As amended by the USAFA, section 2709, titled "Counterintelligence access to telephone
5 toll and transactional records," now states in full:

6 (a) Duty to provide.--A wire or electronic communication service provider shall
7 comply with a request for subscriber information and toll billing records
8 information, or electronic communication transactional records in its custody or
9 possession made by the Director of the Federal Bureau of Investigation under
10 subsection (b) of this section.

11 (b) Required certification.--The Director of the Federal Bureau of Investigation, or
12 his designee in a position not lower than Deputy Assistant Director at Bureau
13 headquarters or a Special Agent in Charge in a Bureau field office designated by
14 the Director, may, using a term that specifically identifies a person, entity,
15 telephone number, or account as the basis for a request--

16 (1) request the name, address, length of service, and local and long distance
17 toll billing records of a person or entity if the Director (or his designee) certifies in
18 writing to the wire or electronic communication service provider to which the
19 request is made that the name, address, length of service, and toll billing records
20 sought are relevant to an authorized investigation to protect against international
21 terrorism or clandestine intelligence activities, provided that such an investigation
22 of a United States person is not conducted solely on the basis of activities protected
23 by the first amendment to the Constitution of the United States; and

24 (2) request the name, address, and length of service of a person or entity if
25 the Director (or his designee) certifies in writing to the wire or electronic
26 communication service provider to which the request is made that the information
27 sought is relevant to an authorized investigation to protect against international
28 terrorism or clandestine intelligence activities, provided that such an investigation
of a United States person is not conducted solely upon the basis of activities
protected by the first amendment to the Constitution of the United States.

(c) Prohibition of certain disclosure.--

(1) Prohibition.--

(A) In general.--If a certification is issued under
subparagraph (B) and notice of the right to judicial review under
subsection (d) is provided, no wire or electronic communication
service provider that receives a request under subsection (b), or
officer, employee, or agent thereof, shall disclose to any person that
the Federal Bureau of Investigation has sought or obtained access to
information or records under this section.

(B) Certification.--The requirements of subparagraph (A)
shall apply if the Director of the Federal Bureau of Investigation, or
a designee of the Director whose rank shall be no lower than Deputy
Assistant Director at Bureau headquarters or a Special Agent in

Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in--

(i) a danger to the national security of the United States;

(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

(iii) interference with diplomatic relations; or

(iv) danger to the life or physical safety of any person.

(2) Exception.--

(A) In general.--A wire or electronic communication service provider that receives a request under subsection (b), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to--

(i) those persons to whom disclosure is necessary in order to comply with the request;

(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

(iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

(B) Application.--A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request is issued under subsection (b) in the same manner as the person to whom the request is issued.

(C) Notice.--Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall notify the person of the applicable nondisclosure requirement.

(D) Identification of disclosure recipients.--At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(d) Judicial review.--

(1) In general.--A request under subsection (b) or a nondisclosure requirement imposed in connection with such request under subsection (c) shall be subject to judicial review under section 3511.

(2) Notice.--A request under subsection (b) shall include notice of the availability of judicial review described in paragraph (1).

18 U.S.C. § 2709 (2016).

B. Section 3511

Section 502(g) of the USAFA amends section 3511(d) to codify a version of the reciprocal notice procedure for NSL disclosure requirements that the Second Circuit held in *John Doe, Inc. v. Mukasey* would be constitutional. As amended, section 3511(b) provides that "[i]f a recipient of [an NSL] wishes to have a court review a nondisclosure requirement imposed in connection with the request or order, the recipient may notify the Government or file a petition for judicial review in any court" 18 U.S.C. § 3511(b)(1)(A) (2016). If the recipient notifies the government that it objects to or wishes to have a court review the nondisclosure requirement, the government must apply for a nondisclosure order within 30 days. *Id.* § 3511(b)(1)(B) (2016). The amended statute requires the district court to "rule expeditiously," and if the court determines that the requirements for nondisclosure are met, it shall "issue a nondisclosure order that includes conditions appropriate to the circumstances." *Id.* § 3511(b)(1)(C) (2016).⁷ The amended statute also provides that a recipient of an NSL "may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the request[.]" and that "[t]he court may modify or set aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful." *Id.* at § 3511(a) (2016).

In addition, amended section 3511(b) requires that in the event of judicial review, the government's application for a nondisclosure order must be accompanied by a certification from a specified government official "containing a statement of specific facts indicating that the absence of a prohibition of disclosure under this subsection may result in-- (A) a danger to the national

⁷ As discussed *infra*, the statutory requirement of "expeditious" judicial review differs from the reciprocal notice procedure discussed in *John Doe, Inc. v. Mukasey*, in that in *Doe*, the Second Circuit stated its view that if the government used a reciprocal notice procedure as a means of initiating judicial review and judicial review was sought, a court would have 60 days to adjudicate the merits, unless special circumstances warranted additional time. *See John Doe, Inc.*, 549 F.3d at 883. Petitioners contend that the amended statute is deficient because it does not mandate a specific time period for the conclusion of judicial review.

1 security of the United States; (B) interference with a criminal, counterterrorism, or
2 counterintelligence investigation; (C) interference with diplomatic relations; or (D) danger to the
3 life or physical safety of any person." 18 U.S.C. § 3511(b)(2) (2016). The statute provides that
4 the district court "shall issue a nondisclosure order or extension thereof under this subsection if the
5 court determines that there is reason to believe that disclosure of the information subject to the
6 nondisclosure requirement during the applicable time period may result in" one of the enumerated
7 harms. *Id.* § 3511(b)(3) (2016). The USAFA repealed the provision formerly contained in section
8 3511(b)(2)-(3) that gave conclusive effect to good faith certifications by specified government
9 officials. *See* H.R. Rep. No. 114-109, at 24 ("This section repeals a provision stating that a
10 conclusive presumption in favor of the government shall apply where a high-level official certifies
11 that disclosure of the NSL would endanger national security or interfere with diplomatic
12 relations."). The USAFA also repealed the provision formerly set forth in section 3511(b)(3)
13 under which an NSL recipient who unsuccessfully challenged a nondisclosure requirement a year
14 or more after the issuance of the NSL was required to wait one year before seeking further judicial
15 relief.

16 As amended by the USAFA, 18 U.S.C. § 3511, titled "Judicial review of requests for
17 information," now provides,

18 (a) The recipient of a request for records, a report, or other information under
19 section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit
20 Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or
21 section 802(a) of the National Security Act of 1947 may, in the United States
22 district court for the district in which that person or entity does business or resides,
petition for an order modifying or setting aside the request. The court may modify
or set aside the request if compliance would be unreasonable, oppressive, or
otherwise unlawful.

23 (b) Nondisclosure.--

24 (1) In general.--

25 (A) Notice.--If a recipient of a request or order for a report,
26 records, or other information under section 2709 of this title, section
27 626 or 627 of the Fair Credit Reporting Act (15 U.S.C. 1681u and
28 1681v), section 1114 of the Right to Financial Privacy Act of 1978
(12 U.S.C. 3414), or section 802 of the National Security Act of
1947 (50 U.S.C. 3162), wishes to have a court review a
nondisclosure requirement imposed in connection with the request

1 or order, the recipient may notify the Government or file a petition
2 for judicial review in any court described in subsection (a).

3 (B) Application.--Not later than 30 days after the date of
4 receipt of a notification under subparagraph (A), the Government
5 shall apply for an order prohibiting the disclosure of the existence or
6 contents of the relevant request or order. An application under this
7 subparagraph may be filed in the district court of the United States
8 for the judicial district in which the recipient of the order is doing
9 business or in the district court of the United States for any judicial
10 district within which the authorized investigation that is the basis for
11 the request is being conducted. The applicable nondisclosure
12 requirement shall remain in effect during the pendency of
13 proceedings relating to the requirement.

14 (C) Consideration.--A district court of the United States that
15 receives a petition under subparagraph (A) or an application under
16 subparagraph (B) should rule expeditiously, and shall, subject to
17 paragraph (3), issue a nondisclosure order that includes conditions
18 appropriate to the circumstances.

19 (2) Application contents.--An application for a nondisclosure order or
20 extension thereof or a response to a petition filed under paragraph (1) shall include
21 a certification from the Attorney General, Deputy Attorney General, an Assistant
22 Attorney General, or the Director of the Federal Bureau of Investigation, or a
23 designee in a position not lower than Deputy Assistant Director at Bureau
24 headquarters or a Special Agent in Charge in a Bureau field office designated by
25 the Director, or in the case of a request by a department, agency, or instrumentality
26 of the Federal Government other than the Department of Justice, the head or deputy
27 head of the department, agency, or instrumentality, containing a statement of
28 specific facts indicating that the absence of a prohibition of disclosure under this
subsection may result in--

(A) a danger to the national security of the United States;

(B) interference with a criminal, counterterrorism, or
counterintelligence investigation;

(C) interference with diplomatic relations; or

(D) danger to the life or physical safety of any person.

(3) Standard.--A district court of the United States shall issue a
nondisclosure order or extension thereof under this subsection if the court
determines that there is reason to believe that disclosure of the information subject
to the nondisclosure requirement during the applicable time period may result in--

(A) a danger to the national security of the United States;

(B) interference with a criminal, counterterrorism, or
counterintelligence investigation;

(C) interference with diplomatic relations; or

(D) danger to the life or physical safety of any person.

1 18 U.S.C. 3511(a)-(b) (2016).

2
3 **C. Other Provisions of USAFA**

4 The USAFA includes two other provisions that are relevant to this litigation. First, section
5 502(f) requires the Attorney General to adopt procedures to require "the review at appropriate
6 intervals" of nondisclosure requirements issued pursuant to amended section 2709 "to assess
7 whether the facts supporting nondisclosure continue to exist." USAFA § 502(f)(1)(A), Pub. L.
8 No. 114-23, 129 Stat 268, at 288 (2015). On November 24, 2015, the Attorney General adopted
9 "Termination Procedures for National Security Letter Nondisclosure Requirement."⁸ Those
10 procedures provide:

11 **III. Review Procedures**

12 **A. Timeframe for Review**

13 Under these NSL Procedures, the nondisclosure requirement of an NSL shall
14 terminate upon the closing of any investigation in which an NSL containing a
15 nondisclosure provision was issued except where the FBI makes a determination
16 that one of the existing statutory standards for nondisclosure is satisfied. The FBI
17 also will review all NSL nondisclosure determinations on the three-year
18 anniversary of the initiation of the full investigation and terminate nondisclosure at
19 that time, unless the FBI determines that one of the statutory standards for
20 nondisclosure is satisfied. When, after the effective date of these procedures, an
21 investigation closes and/or reaches the three-year anniversary of the initiation of the
22 full investigation, the agent assigned to the investigation will receive notification,
23 automatically generated by FBI's case management system, indicating that a review
24 is required of the continued need for nondisclosure for all NSLs issued in the case
25 that included a nondisclosure requirement. Thus, for cases that close after the
26 three-year anniversary of the full investigation, the NSLs that continue to have
27 nondisclosure requirements will be reviewed on two separate occasions; cases that
28 close before the three-year anniversary of the full investigation will be reviewed on
one occasion. Moreover, NSL nondisclosure requirements will be reviewed only if
they are associated with investigations that close and/or reach their three-year
anniversary date on or after the effective date of these procedures.

24 **B. Review Requirements**

25 The assessment of the need for continued nondisclosure of an NSL is an
26 individualized one; that is, each NSL issued in an investigation will need to be
individually reviewed to determine if the facts no longer support nondisclosure

27 ⁸ The procedures are available at [https://www.fbi.gov/about-us/nsb/termination-](https://www.fbi.gov/about-us/nsb/termination-procedures-for-national-security-letter-nondisclosure-requirement-1)
28 [procedures-for-national-security-letter-nondisclosure-requirement-1](https://www.fbi.gov/about-us/nsb/termination-procedures-for-national-security-letter-nondisclosure-requirement-1). The procedures became
effective 90 days after they were adopted by the Attorney General, or February 22, 2016.

1 under the statutory standard for imposing a nondisclosure requirement when an
2 NSL is issued—i.e., where there is good reason to believe disclosure may endanger
3 the national security of the United States; interfere with a criminal,
4 counterterrorism, or counterintelligence investigation; interfere with diplomatic
5 relations; or endanger the life or physical safety of any person. *See, e.g.*, 18 U.S.C.
6 § 2709(c). This assessment must be based on current facts and circumstances,
7 although agents may rely on the same reasons used to impose a nondisclosure
8 requirement at the time of the NSL's issuance where the current facts continue to
9 support those reasons. If the facts no longer support the need for nondisclosure of
10 an NSL, the nondisclosure requirement must be terminated.

11 Every determination to continue or terminate the nondisclosure requirement will be
12 subject to the same review and approval process that NSLs containing a
13 nondisclosure requirement are subject to at the time of their issuance. Thus, (i) the
14 case agent will review the NSL, the original written justification for nondisclosure,
15 and any investigative developments to determine whether nondisclosure should
16 continue; (ii) the case agent will document the reason for continuing or terminating
17 the nondisclosure requirement; (iii) the case agent's immediate supervisor will
18 review and approve the case agent's written justification for continuing or
19 terminating nondisclosure; (iv) an attorney—either the Chief Division Counsel or
20 Associate Division Counsel in the relevant field office or an attorney with the
21 National Security Law Branch at FBIHQ—will review and approve the case
22 agent's written justification for continuing or terminating nondisclosure; (v) higher-
23 level supervisors—either the Assistant Special Agent in Charge in the field or the
24 Unit Chief or Section Chief at FBIHQ—will review and approve the case agent's
25 written justification for continuing or terminating nondisclosure; and (vi) a Special
26 Agent in Charge or a Deputy Assistant Director at FBIHQ will review and make
27 the final determination regarding the case agent's written justification for
28 continuing or terminating nondisclosure. In addition, those NSLs for which the
nondisclosure requirement is being terminated will undergo an additional review at
FBIHQ for consistency across field offices and programs. This review process
must be completed within 30 days from the date of the review notice given by the
FBI's case management system.

18 C. Notification of Termination

19 Upon a decision that nondisclosure of an NSL is no longer necessary, written
20 notice will be given to the recipient of the NSL, or officer, employee, or agent
21 thereof, as well as to any applicable court, as appropriate, that the nondisclosure
22 requirement has been terminated and the information contained in the NSL may be
23 disclosed. Any continuing restrictions on disclosure will be noted in the written
24 notice. If such a termination notice is to be provided to a court, the FBI field office
25 or FBIHQ Division that issued the NSL, in conjunction with FBI's Office of
26 General Counsel, shall coordinate with the Department of Justice to ensure that
27 notice concerning termination of the NSL nondisclosure requirement is provided to
28 the court and any other appropriate parties.

25 ...

26 Second, section 604 of the USAFA, titled "Public Reporting by Persons Subject to
27 Orders," sets forth a structure by which persons subject to nondisclosure orders or requirements
28 accompanying an NSL may make public disclosures regarding the national security process. A

recipient may publicly report, semi-annually, the number of national security letters received in bands of 100 starting with 0-99, in bands of 250 starting with 0-249, in bands of 500 starting with 0-499, or in bands of 1000, starting with 0-999. *See* USAFA § 604(a), Pub. L. No. 114-23, 129 Stat. 268 (2015); 50 U.S.C. § 1874(a) (2016).

DISCUSSION

I. Level of Scrutiny

The parties dispute what level of scrutiny the Court should apply when analyzing the NSL statutes.⁹ The Court notes that the parties largely repeat the same arguments that they advanced to this Court in prior briefing on this issue. Petitioners again contend that the nondisclosure orders amount to a classic prior restraint on speech because they prohibit recipients of an NSL from speaking not just about the NSL's contents and target, but even about the existence or receipt of the NSL. *See, e.g., Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term 'prior restraint' is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.03, p. 4-14 (1984))). Petitioners argue that, as a "classic" prior restraint, the statute can only be saved if disclosure of the information from NSLs will "surely result in direct, immediate, and irreparable damage to our Nation or its people." *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 730 (1971) (Stewart, J., joined by White, J.

⁹ The parties also dispute whether the Court should engage in a facial analysis of the amended statutes, or limit its review to an as-applied challenge. At the hearing on this matter, the Court asked the parties to articulate the practical difference between these two approaches in light of the Ninth Circuit's instruction to this Court to address petitioners' "challenges to the revised statutes." The principal difference the parties identified was whether the Court would review the Attorney General's recently promulgated "Termination Procedures for National Security Letter Nondisclosure Requirement," because it was unclear (until the hearing) whether those procedures applied to petitioners' NSLs, since those NSLs were issued in 2011 and 2013. The government stated that because the investigations associated with petitioners' NSLs are still ongoing, the procedures would apply upon the termination of the investigations. Based upon that representation, the Court will review the Termination Procedures as applied to petitioners. At the hearing, petitioners asserted that there may be NSLs with current nondisclosure requirements that were issued under the prior NSL statutes and that may not be subject to the Termination Procedures. The Court declines to speculate about the existence of any such NSLs, and limits its consideration to the NSLs issued in these cases.

1 concurring).

2 Petitioners also contend that the NSL nondisclosure orders are a content-based restriction
3 on speech because they target a specific category of speech – speech regarding the NSL. As a
4 content-based restriction, the nondisclosure provision is "presumptively invalid," *R.A.V. v. St.*
5 *Paul*, 505 U.S. 377, 382 (1992), and can only be sustained if it is "narrowly tailored to promote a
6 compelling Government interest. . . . If a less restrictive alternative would serve the Government's
7 purpose, the legislature must use that alternative." *United States v. Playboy Entm't Group*, 529
8 U.S. 803, 813 (2000) (citation omitted).

9 The government contends that the amended nondisclosure provisions are akin to grand jury
10 secrecy requirements and therefore do not warrant the most rigorous First Amendment scrutiny.
11 The government also contends that the *Freedman* procedural safeguards do not apply to the
12 amended NSL statutes because "the USAFA . . . has transformed the procedural and substantive
13 protections for NSL recipients from governmental promises of voluntary, nationwide compliance,
14 to statutory protections." Dkt. No. 92 in 3:11-cv-2173 SI at 19 n.15 (internal citation and
15 quotation marks omitted).¹⁰ The government argues that the NSL statutory system is similar to the
16 statute challenged in *Landmark Comm. v. Virginia*, 435 U.S. 829 (1978), which prohibited the
17 disclosure of information about the proceedings of a judicial investigative body and imposed
18 criminal penalties for violation. *See Landmark Comm.*, 435 U.S. at 830. The government asserts
19 that, as in *Landmark*, the NSL statutes do not constitute a prior restraint or attempt to censor the
20 news media or public debate.

21 The Court finds no reason to deviate from its prior analysis regarding the standard of
22 review. As the Court held in 2013, the Court finds that given the text and function of the NSL

23
24 ¹⁰ Petitioners A and B are represented by the same counsel, and filed virtually identical
25 briefs in the briefing on remand. The main difference in the briefing is that the petitioner's motion
26 in 3:11-cv-2173 SI additionally challenged the "compelled production" provision of section
27 2709(b) as unconstitutional. (In the Court's 2013 decision, the Court denied the government's
28 motion to enforce the 2011 NSL, and thus on remand, petitioner A challenged both the
nondisclosure provisions as well as the statutory authority to request information pursuant to an
NSL.) [REDACTED] the FBI withdrew the information demand accompanying
the 2011 NSL, thus mooted those arguments. In the Court's August 12, 2013 order in 3:13-cv-
1165 SI, the Court granted the government's motion to enforce the NSLs at issue, and after this
Court and the Ninth Circuit denied a stay of that order, petitioner B complied with the NSLs.

1 statute, petitioners' proposed standards are too exacting. Rather, this Court agrees with the Second
2 Circuit's analysis in *John Doe, Inc. v. Mukasey*:

3 Although the nondisclosure requirement is in some sense a prior restraint, . . . it is
4 not a typical example of such a restriction for it is not a restraint imposed on those
5 who customarily wish to exercise rights of free expression, such as speakers in
6 public fora, distributors of literature, or exhibitors of movies. And although the
7 nondisclosure requirement is triggered by the content of a category of information,
8 that category, consisting of the fact of the receipt of an NSL and some related
9 details, is far more limited than the broad categories of information that have been
10 at issue with respect to typical content-based restrictions.

11 *John Doe, Inc.*, 549 F.3d at 876 (internal citations omitted). The Court also agrees with the
12 Second Circuit's statement that "[t]he national security context in which NSLs are authorized
13 imposes on courts a significant obligation to defer to judgments of Executive Branch officials."
14 *Id.* at 871; *see also Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally
15 have been reluctant to intrude upon the authority of the Executive in . . . national security affairs.")

16 However, the nondisclosure provision clearly restrains speech of a particular content –
17 significantly, speech about government conduct. *John Doe, Inc.*, 549 F.3d at 876, 878. Under
18 section 2709(c), the FBI has been given the power to determine, on a case-by-case basis, whether
19 to allow NSL recipients to speak about the NSLs. As a result, the recipients are prevented from
20 speaking about their receipt of NSLs and from disclosing, as part of the public debate on the
21 appropriate use of NSLs or other intelligence devices, their own experiences. *See* Dkt. No. 91-2 in
22 3:11-cv-2173 SI (declaration of [REDACTED]); Dkt. No. 73 in 3:13-cv-1165 SI (corrected
23 declaration of [REDACTED]). In these circumstances, the Court finds that while section
24 2709(c) does not need to satisfy the extraordinarily rigorous *Pentagon Papers* test, section 2709(c)
25 must still meet the heightened justifications for sustaining prior-restraints announced in *Freedman*
26 *v. Maryland* and must be narrowly tailored to serve a compelling governmental interest. *See John*
27 *Doe, Inc.*, 549 F.3d at 878 (noting government conceded strict scrutiny applied in that case).

28 The Court is not persuaded by the government's attempt to avoid application of the
29 *Freedman* procedural safeguards by analogizing to cases which have upheld restrictions on
30 disclosures of information by individuals involved in civil litigation, grand jury proceedings and
31 judicial misconduct investigations. The concerns that justified restrictions on a civil litigant's pre-

1 trial right to disseminate confidential business information obtained in discovery – a restriction
2 that was upheld by the Supreme Court in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) – are
3 manifestly not the same as the concerns raised in this case. Here, the concern is the government's
4 ability to prevent individuals from speaking out about the government's use of NSLs, a subject
5 that has engendered extensive public and academic debate.

6 The government's reliance on cases upholding restrictions on witnesses in grand jury or
7 judicial misconduct proceedings from disclosing information regarding those proceedings is
8 similarly misplaced. With respect to grand jury proceedings, the Court notes that the basic
9 presumption in federal court is that grand jury witnesses are not bound by secrecy with respect to
10 the content of their testimony. *See, e.g., In re Grand Jury*, 490 F.3d 978, 985 (D.C. Cir. 2007)
11 ("The witnesses themselves are not under an obligation of secrecy."). While courts have upheld
12 state law restrictions on grand jury witnesses' disclosure of information learned only through
13 participation in grand jury proceedings, those restrictions were either limited in duration or
14 allowed for broad judicial review. *See, e.g., Hoffmann-Pugh v. Keenan*, 338 F.3d 1136, 1140
15 (10th Cir. 2003) (agreeing state court grand jury witness could be precluded from disclosing
16 information learned through giving testimony, but noting state law provides a mechanism for
17 judicial determination of whether secrecy still required); *cf. Butterworth v. Smith*, 494 U.S. 624,
18 632 (1990) (interests in grand jury secrecy do not "warrant a permanent ban on the disclosure by a
19 witness of his own testimony once a grand jury has been discharged.").

20 Importantly, as the Second Circuit recognized, the interests of secrecy inherent in grand
21 jury proceedings arise from the nature of the proceedings themselves, including "enhancing the
22 willingness of witnesses to come forward, promoting truthful testimony, lessening the risk of
23 flight or attempts to influence grand jurors by those about to be indicted, and avoiding public
24 ridicule of those whom the grand jury declines to indict." *John Doe, Inc.*, 549 F.3d at 876. In the
25 context of NSLs, however, the nondisclosure requirements are imposed at the demand of the
26 Executive Branch "under circumstances where the secrecy might or might not be warranted." *Id.*
27 at 877. Similarly, the secrecy concerns which inhere in the nature of judicial misconduct
28 proceedings, as well as the temporal limitations on a witness's disclosure regarding those

1 proceedings, distinguish those proceedings from section 2709(c). *Id.*

2 The Court is also not persuaded by the government's contention that *Freedman* should not
3 apply to the revised NSL statutes because the USAFA "has transformed the procedural and
4 substantive protections for NSL recipients from 'governmental promises' of 'voluntary, nationwide
5 compliance,' [quoting *In re NSL*, 930 F. Supp. 2d at 1073-74], to statutory protections." Dkt. No.
6 92 in 3:11-cv-2173 SI at 19 n.15 (internal citation and quotation marks omitted). *Freedman* holds
7 that where expression is conditioned on governmental permission, the First Amendment generally
8 requires procedural safeguards to protect against censorship. While the USAFA changed the
9 procedures for judicial review and the circumstances under which nondisclosure requirements
10 could be lifted or amended, expression nevertheless remains conditioned on governmental
11 permission.¹¹ Under the amended statutes, the government is still permitted to impose a
12 nondisclosure requirement on an NSL recipient to prevent the recipient from disclosing the fact
13 that it has received an NSL, as well as from disclosing anything about the information sought by
14 the NSL.

15 The government also asserts that the amended NSL statutory scheme is akin to the criminal
16 statute challenged in *Landmark Communications v. Virginia*, 435 U.S. 829 (1978). *Landmark*
17 *Communications* is inapposite. In that case, the question was "whether the First Amendment
18 permits the criminal punishment of third persons who are strangers to the inquiry, including the
19 news media, for divulging or publishing truthful information regarding confidential proceedings of
20 the Judicial Inquiry and Review Commission." *Id.* at 837. Here, rather than imposing criminal
21 sanctions based on disclosure of information, the statute permits the government to impose a
22 nondisclosure requirement prohibiting speech.

23
24
25
26 ¹¹ The Court does, however, recognize the differences between licensing schemes such as
27 those at issue in *Freedman*, which always act as a restraint because such systems are applied to all
28 prospective speakers at the time the speaker wishes to speak, and the NSL nondisclosure
requirements, which apply at the time the government requests information as part of an
investigation and at a time when there is no certainty that a NSL recipient wishes to engage in
speech.

II. Procedural Safeguards

Having concluded that the procedural safeguards mandated by *Freedman* should apply to the amended NSL statutes, the question becomes whether those standards are satisfied. *Freedman* requires that "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990) (O'Connor, J., joined by Stevens, and Kennedy, JJ.)).

A. Time Prior to Judicial Review

Under *Freedman*'s first prong, any restraint prior to judicial review can be imposed only for "a specified brief period." *Freedman*, 380 U.S. at 59. Previously, the NSL provisions did not provide any limit to the period of time the nondisclosure order can be in place prior to judicial review. The Second Circuit held that this *Freedman* factor would be satisfied if the government were to notify NSL recipients that if they objected to the nondisclosure order within ten days, the government would seek judicial review of the nondisclosure restriction within thirty days. *John Doe, Inc.*, 549 F.3d at 883.

The amended statute largely incorporates the Second Circuit's suggestions on this point. Section 2709(d)(2) requires that an NSL "include notice of the availability of judicial review," and section 3511(b)(2) provides that if a recipient notifies the government that it wishes to have a court review a nondisclosure requirement, within 30 days "the Government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant request or order." 18 U.S.C. § 2709(d)(2) (2016); 18 U.S.C. § 3511(b)(2) (2016).

Petitioners contend that the amended statute violates the first prong of the *Freedman* test because the statute authorizes gags of indefinite duration unless the recipient takes action by initiating judicial review or by notifying the government of its desire for judicial review. Petitioners argue that the amended statute violates *Freedman*'s admonition that a potential speaker

1 must be "assured" by the statute that a censor "will, within a specified brief period, either issue a
2 license or go to a court to restrain" the speech at issue. *Freedman*, 380 U.S. at 58-59. As
3 discussed *supra*, because the NSL nondisclosure requirements are not a typical prior restraint, the
4 Court concludes the Constitution does not require automatic judicial review in every instance,
5 provided that NSL recipients are notified that judicial review is available and the *Freedman*
6 procedural safeguards are otherwise met. See *John Doe, Inc.*, 549 F.3d at 879-80 (discussing
7 reciprocal notice procedure and how use of that procedure obviates need for automatic judicial
8 review of every NSL).

9 The Court further finds that although the amended statute does not include the initial ten
10 day period discussed by the Second Circuit, the amended statute satisfies *Freedman's* first
11 requirement that any restraint prior to judicial review can be imposed only for "a specified brief
12 period." Under the amended statute, a recipient of an NSL is notified of the availability of judicial
13 review at the same time the recipient receives the NSL. If a recipient wishes to seek prompt
14 review of a nondisclosure order, the recipient can either file a petition or promptly notify the
15 government of its objection, thereby triggering the thirty day period for the government to initiate
16 judicial review. As such, the Court finds that the amended statute complies with *Freedman's* first
17 requirement.

18
19 **B. "Expeditious" Judicial Review**

20 *Freedman* next requires "a prompt final judicial decision" regarding the nondisclosure
21 requirement. *Freedman*, 380 U.S. at 59. Amended section 3511(B)(1)(C) states that a court
22 reviewing nondisclosure requirements "should rule expeditiously." 18 U.S.C. § 3511(b)(1)(C)
23 (2016).

24 Petitioners contend that the amended statute does not meet the second *Freedman*
25 requirement because there is no specified time period in which a final determination must be
26 made. Petitioners rely on the Second Circuit's holding in *John Doe, Inc.*, that if the government
27 used the Second Circuit's suggested reciprocal notice procedure as a means of initiating judicial
28 review, "time limits on the nondisclosure requirement pending judicial review, as reflected in

1 *Freedman*, would have to be applied to make the review procedure constitutional." *John Doe*,
2 *Inc.*, 549 F.3d at 883. The Second Circuit held, "[w]e would deem it to be within our judicial
3 authority to conform subsection 2709(c) to First Amendment requirements, by limiting the
4 duration of the nondisclosure requirement . . . and a further period of 60 days in which a court
5 must adjudicate the merits, unless special circumstances warrant additional time." *Id.*

6 Petitioners' arguments about prescribing time limits for the completion of judicial review
7 are not without force. However, although the Second Circuit held that a 60 day time limit for
8 judicial review would meet constitutional standards, the *John Doe, Inc.* court was reviewing the
9 prior version of section 3511 which did not contain the directive that "courts should rule
10 expeditiously." As the government notes, *Freedman* and other Supreme Court cases applying or
11 discussing *Freedman* have held the Constitution requires "prompt" or "expeditious" judicial
12 review. *Freedman*, 380 U.S. at 59; see also *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227
13 (1990) (stating *Freedman's* second prong as requiring "expeditious judicial review of [prior
14 restraint] decision"); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975) (stating
15 under *Freedman* "a prompt final judicial determination must be assured."). In *Freedman*, the
16 Supreme Court held that the Maryland censorship scheme did not satisfy this requirement because
17 the statute only stated that a person could seek judicial review of an adverse decision, without "any
18 assurance of prompt judicial review." 380 U.S. at 54, 59. Here, in contrast, the amended statute
19 directs that courts "should rule expeditiously." 18 U.S.C. § 3511(b)(1)(C) (2016). The Court
20 concludes that the amended statute satisfies the second *Freedman* procedural prong.

21 22 **C. Government Must Initiate Judicial Review and Bear Burden of Proof**

23 The third *Freedman* safeguard requires the government to bear the burden of seeking
24 judicial review and to bear the burden of proof once in court. *Freedman*, 380 U.S. at 59-60. The
25 Second Circuit found that the absence of a reciprocal notice procedure in the prior version of the
26 NSL statutes rendered them unconstitutional, but suggested that if the government were to inform
27 recipients that they could object to the nondisclosure order, and that if they objected, the
28 government would seek judicial review, then the constitutional problem could be avoided. *John*

Doe, Inc., 549 F.3d at 879-80. The amended statutes now incorporate this reciprocal notice procedure. *See* 18 U.S.C. §§ 2709(c)(1)(A); 2709(d)(2) (2016) (requiring notice of the availability of judicial review); 18 U.S.C. § 3511(b)(1)(A)-(C) (2016) (initiating judicial review through reciprocal notice and imposing 30-day requirement on government).

Petitioners argue that the amended statute places an impermissible burden on invoking judicial review because recipients need to notify the FBI of an objection in order to trigger judicial review. Petitioners' principal complaint is that the amended statute does not require automatic judicial review of every NSL, a contention that the Court has already addressed. *See also John Doe, Inc.*, 549 F.3d at 879-80. The Court also finds that notifying the government of an objection is not a substantial burden, and that the relevant burden is "the burden of instituting judicial proceedings," which is placed on the government. *See Freedman*, 380 U.S. at 59; *see also Southeastern Promotions, Ltd.*, 420 U.S. at 560; *see also id.* at 561 (holding municipal board's rejection of application to use public theater for showing of rock musical "Hair" did not meet *Freedman*'s procedural requirements because, *inter alia*, "[t]hroughout [the process], it was petitioner, not the board, that bore the burden of obtaining judicial review."). Here, if a recipient notifies the government of an objection, the burden of seeking judicial review is upon the government. Petitioners also assert that the amended statute is deficient because the government can choose to ignore its obligation to initiate judicial review. However, petitioners' assertion is speculative, and the record before the Court shows that the government promptly sought judicial review with respect to the NSLs at issue.¹²

III. Judicial Review

The prior version of section 3511(b) provided that a court could modify or set aside a nondisclosure requirement only if the court found there was "no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or

¹² The question of which party bears the burden of proof is related to the issue of judicial review, and thus the Court discusses the two issues together *infra*.

1 endanger the life or physical safety of any person." 18 U.S.C. § 3511(b)(2)-(3) (2014). If the FBI
2 certified that such a harm "may" occur, the district court was required to accept that certification
3 as "conclusive." *Id.*

4 This Court found that the prior version of section 3511(b) impermissibly restricted the
5 scope of judicial review. The Court held that "[t]he statute's intent – to circumscribe a court's
6 ability to modify or set aside nondisclosure NSLs unless the essentially insurmountable 'no reason
7 to believe' that a harm 'may' result is satisfied – is incompatible with the court's duty to searchingly
8 test restrictions on speech." *In re National Sec. Letter*, 930 F. Supp. 2d at 1077-78. The Court
9 agreed with the government that "in light of the national security context in which NSLs are
10 issued, a highly deferential standard of review is not only appropriate but necessary." *Id.* at 1078.
11 However, the Court found that deference to the government's national security determinations
12 "must be based on a reasoned explanation from an official that directly supports the assertion of
13 national security interests." *Id.* The Court also agreed with the Second Circuit that the statute's
14 direction that courts treat the government's certification as "conclusive" was also unconstitutional.

15 The amended statute now states, "A district court of the United States shall issue a
16 nondisclosure order or extension thereof under this subsection if the court determines that there is
17 reason to believe that disclosure of the information subject to the nondisclosure requirement
18 during the applicable time period may result in-- (A) a danger to the national security of the
19 United States; (B) interference with a criminal, counterterrorism, or counterintelligence
20 investigation; (C) interference with diplomatic relations; or (D) danger to the life or physical
21 safety of any person." 18 U.S.C. § 3511(b)(3) (2016). Section 3511(b)(2) now requires the
22 government's application for nondisclosure order to include a certification from a specified
23 government official that contains "a statement of specific facts indicating that the absence of a
24 prohibition on disclosure may result in" an enumerated harm. In addition, through the USAFA
25 Congress eliminated the "conclusive" nature of certain certifications by certain senior officials.

26 The Court concludes that as amended, section 3511 complies with constitutional
27 requirements and cures the deficiencies previously identified by this Court. Section 3511 no
28 longer contains the "essentially insurmountable" standard providing that a court could modify or

1 set aside a nondisclosure requirement only if the court found there was "no reason to believe" that
2 disclosure may result in an enumerated harm. The government argues, and the Court agrees, that
3 in the USAFA, Congress implicitly ratified the Second Circuit's interpretation of section 3511 as
4 "plac[ing] on the Government the burden to persuade a district court that there is a good reason to
5 believe that disclosure may risk one of the enumerated harms, and that a district court, in order to
6 maintain a nondisclosure order, must find that such a good reason exists." *John Doe, Inc.*, 549
7 F.3d at 875-76.¹³ This conclusion is supported by the legislative history of the USAFA, which
8 states that section 502 of the USAFA (which amended section 3511 as well as section 2709),
9 "corrects the constitutional defects in the issuance of NSL nondisclosure orders found by the
10 Second Circuit Court of Appeals in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), and adopts the
11 concepts suggested by that court for a constitutionally sound process." H.R. Rep. No. 114-109, at
12 24 (2015); *see also Midatlantic Nat'l Bank v. N.J. Dep't of Env't'l Prot.*, 474 U.S. 494, 501 (1986)
13 (citing the "normal rule of statutory construction" that "if Congress intends for legislation to
14 change the interpretation of a judicially created concept, it makes that intent specific."); *Lorillard*
15 *v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or
16 judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute
17 without change . . ."); *United States v. Lincoln*, 277 F.3d 1112, 1114 (9th Cir. 2002) (where Ninth
18 Circuit had previously interpreted statutory definition of "victim" to include the United States and
19 Congress amended that definition without excluding the United States, the court "inferred that
20 Congress adopted the judiciary's interpretation.").¹⁴

21
22 ¹³ In so interpreting the pre-USAFA version of section 3511, the Second Circuit accepted
23 the government's concessions that (1) "reason" in the quoted phrase means "good reason"; and (2)
24 "the statutory requirement of a finding that an enumerated harm 'may result' to mean more than a
conceivable possibility. The upholding of nondisclosure does not require the certainty, or even the
imminence of, an enumerated harm, but some reasonable likelihood must be shown." *Id.* at 875.

25 ¹⁴ The Court notes that the "good reason" standard is also discussed in the Attorney
26 General's recently promulgated "Termination Procedures for National Security Letter
27 Nondisclosure Requirement." Those procedures state, *inter alia*, "The FBI may impose a
28 nondisclosure requirement on the recipient of an NSL only after certification by the head of an
authorized investigative agency, or an appropriate designee, that one of the statutory standards for
nondisclosure is satisfied; that is, *where there is good reason to believe* disclosure may endanger
the national security of the United States; interfere with a criminal, counterterrorism, or
counterintelligence investigation; interfere with diplomatic relations; or endanger the life or

Petitioners contend that even if the amended statute could be interpreted as requiring the government to demonstrate that there is a "good reason" to believe that disclosure of the information may result in an enumerated harm, the standard of review is "excessively deferential" because the "may result" standard in section 3511(b)(3) is incompatible with the First Amendment's requirement that restrictions on speech be "necessary." However, as the Second Circuit held, "[t]he upholding of nondisclosure does not require the certainty, or even the imminence of, an enumerated harm, but some reasonable likelihood must be shown." *John Doe, Inc.*, 549 F.3d at 875. This reasonable likelihood standard is incorporated by the USAFA, *see* H.R. Rep. No. 114-109, at 24 (2015), and the Court concludes that this standard is sufficient. Further, a court will be able to engage in meaningful review of a nondisclosure requirement because under the amended statute, the government is required to provide "a statement of specific facts indicating that the absence of a prohibition on disclosure may result in" an enumerated harm, and courts are no longer required to treat the government's certification as "conclusive." 18 U.S.C. § 3511(b)(2) (2016).

V. Narrowly Tailored to Serve a Compelling Governmental Interest

As content-based restrictions on speech, the NSL nondisclosure provisions must be narrowly tailored to serve a compelling governmental interest. It is undisputed that "no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). The question is whether the NSL nondisclosure provisions are sufficiently narrowly tailored to serve that compelling interest without unduly burdening speech.

The Court previously found that the NSL nondisclosure provisions were not narrowly tailored on their face, since they applied, without distinction, to both the content of the NSLs and to the very fact of having received one. The Court found it problematic that the statute did not distinguish – or allow the FBI to distinguish – between a prohibition on disclosing mere receipt of an NSL and disclosing the underlying contents. The Court was also concerned about the fact that

physical safety of any person." <https://www.fbi.gov/about-us/nsb/termination-procedures-for-national-security-letter-nondisclosure-requirement-1>.

1 nothing in the prior statute required or even allowed the government to rescind the non-disclosure
2 order once the impetus for it had passed. Instead, the review provisions required the recipient to
3 file a petition asking the Court to modify or set aside the nondisclosure order. *See* 18 U.S.C.
4 § 3511(b) (2014). The Court also found problematic the fact that if a recipient sought review, and
5 the court declined to modify or set aside the nondisclosure order, a recipient was precluded from
6 filing another petition to modify or set aside for a year, even if the need for nondisclosure would
7 cease within that year. 18 U.S.C. § 3511(b)(3) (2014).

8 The Court concludes that the amendments to section 3511 addressed the Court's concerns.
9 18 U.S.C. § 3511(b)(1)(C) now provides that upon review, a district court may "issue a
10 nondisclosure order that includes conditions appropriate to the circumstances." 18 U.S.C.
11 § 3511(b)(1)(C) (2016). At the hearing, the government stated that "conditions appropriate to the
12 circumstances" could include a temporal limitation on nondisclosure, as well as substantive
13 conditions regarding what information, such as the identity of the recipient or the contents of the
14 subpoena, is subject to the nondisclosure order. The amended statutes also now authorize the
15 Director of the FBI to permit additional disclosures concerning NSLs. *See* 18 U.S.C. §§
16 2709(c)(2)(A)(iii) (2016) (recipient of NSL "may disclose information otherwise subject to any
17 applicable nondisclosure requirement to . . . other persons as permitted by the Director of the
18 Federal Bureau of Investigation or the designee of the Director.")¹⁵; 18 U.S.C. § 2709(c)(2)(D)
19 ("At the request of the Director of the Federal Bureau of Investigation or the designee of the
20 Director, any person making or intending to make a disclosure under clause (i) or (iii) of
21 subparagraph (A) shall identify to the Director or such designee the person to whom such
22 disclosure will be made or to whom such disclosure was made prior to the request."). In addition,
23 Congress eliminated the provision that precluded certain NSL recipients from challenging a
24 nondisclosure requirement more than once per year. USAFA § 502(f)(1), Pub. L. No. 114-23, 129
25 Stat. 268 (2015).

26
27 ¹⁵ The prior version of section 2709(c) permitted NSL recipients to disclose that they had
28 received an information request to (1) parties necessary to comply with the request and (2) an
attorney to obtain legal advice or legal assistance regarding the request. 18 U.S.C. § 2709(c)
(2014).

1 In addition, on November 24, 2015, pursuant to section 502(f) of the USAFA, the Attorney
2 General adopted "Termination Procedures for National Security Letter Nondisclosure
3 Requirement." [https://www.fbi.gov/about-us/nsb/termination-procedures-for-national-security-](https://www.fbi.gov/about-us/nsb/termination-procedures-for-national-security-letter-nondisclosure-requirement-1)
4 [letter-nondisclosure-requirement-1](https://www.fbi.gov/about-us/nsb/termination-procedures-for-national-security-letter-nondisclosure-requirement-1). The procedures require the FBI to re-review the need for the
5 nondisclosure requirement of an NSL three years after the initiation of a full investigation and at
6 the closure of the investigation, and to terminate the nondisclosure requirement when the facts no
7 longer support nondisclosure. These procedures apply to investigations that close or reach their
8 three year anniversary on or after the effective date of the procedures. At the hearing in this case,
9 the government stated that the investigations related to the NSLs issued to petitioners all remain
10 open, and thus the procedures would apply when (and if) the investigations are closed.¹⁶ The
11 procedures state, *inter alia*,

12 The assessment of the need for continued nondisclosure of an NSL is an
13 individualized one; that is, each NSL issued in an investigation will need to be
14 individually reviewed to determine if the facts no longer support nondisclosure
15 under the statutory standard for imposing a nondisclosure requirement when an
16 NSL is issued—i.e., where there is good reason to believe disclosure may endanger
17 the national security of the United States; interfere with a criminal,
18 counterterrorism, or counterintelligence investigation; interfere with diplomatic
19 relations; or endanger the life or physical safety of any person. *See, e.g.*, 18 U.S.C.
20 § 2709(c). This assessment must be based on current facts and circumstances,
21 although agents may rely on the same reasons used to impose a nondisclosure
22 requirement at the time of the NSL's issuance where the current facts continue to
23 support those reasons. If the facts no longer support the need for nondisclosure of
24 an NSL, the nondisclosure requirement must be terminated.

19 *Id.*

20 Petitioners do not raise any specific challenge to these procedures (and they were adopted
21 during the course of briefing the instant motions), other than to assert that there may be some
22 NSLs that were issued prior to 2015 that will not be subject to the new procedures based on when
23 the underlying investigations began and ended. However, the government stated that the
24 investigations related to the NSLs in these cases are all open, and thus the procedures will apply to
25 these NSLs if and when those investigations close. Further, the Court finds that these procedures

26
27 ¹⁶ The FBI has also re-reviewed the need for the nondisclosure requirements for these
28 particulars NSLs in connection with the current briefing, and has submitted the classified
declarations in support of the government's position that the nondisclosure requirements remain
necessary.

1 provide a further mechanism for review of nondisclosure requirements.

2 Finally, the Court finds that section 604 of the USAFA, which permits recipients of NSLs
3 to make semi-annual public disclosures of aggregated data in "bands" about the number of NSLs
4 they have received, supports a conclusion that the NSL statutes are narrowly tailored because this
5 section permits recipients to engage in some speech about NSLs, even when the nondisclosure
6 requirements are still in place.

7
8 **V. 18 USC § 3551(b) Review of Pending Nondisclosure Requests**

9 In addition to the parties' combined challenge to the constitutionality of the statutes and
10 regulations now governing NSL requests, this Court is presented with consideration of the
11 appropriateness of continued nondisclosure of the four specific NSL applications which gave rise
12 to these cases. The Court has reviewed, *in camera* and subject to complex security restrictions,
13 the certifications drafted pursuant to amended 18 U.S.C. § 3511(b)(2), supporting the
14 government's request for continued nondisclosure of the existence of the NSLs. The regulations
15 and the case law then require that this Court determine whether there is a reasonable likelihood
16 that disclosure of the information subject to the nondisclosure requirement would result in a
17 danger to the national security of the United States, interference with a criminal, counterterrorism
18 or counterintelligence investigation, interference with diplomatic relations or danger to a person's
19 life or physical safety.

20 As to three of the certifications (in cases c:13-cv-1165 SI and 3:11-cv-2173 SI), the Court
21 finds that the declarant has made such a showing. As to the fourth (in case 3:13-mc-80089 SI), the
22 Court finds that the declarant has not. Nothing in the certification suggests that there is a
23 reasonable likelihood that disclosure of the information subject to the nondisclosure requirement
24 would result in a danger to the national security of the United States, interference with a criminal,
25 counterterrorism or counterintelligence investigation, interference with diplomatic relations or
26 danger to a person's life or physical safety.

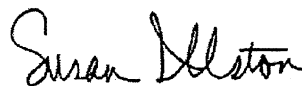
CONCLUSION

For the foregoing reasons and for good cause shown, in cases c:13-cv-1165 SI and 3:11-cv-2173 SI the Court hereby DENIES petitioners' motions and GRANTS the government's motions. In case 3:13-mc-80089 SI, the Court hereby GRANTS in part and DENIES in part petitioner's motion and GRANTS in part and DENIES in part the government's motion. The Government is therefore enjoined from enforcing the nondisclosure provision in case 3:13-mc-80089 SI. However, given the significant constitutional and national security issues at stake, enforcement of the Court's order will be stayed pending appeal, or if no appeal is filed, for 90 days.

The Court sets a status conference for April 15, 2016 at 3:00 p.m. to address what matters, if any, remain to be decided in these cases prior to the entry of judgment, as well as whether any portions of this order can be unsealed.

IT IS SO ORDERED.

Dated: March 29, 2016



SUSAN ILLSTON
United States District Judge