AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

**In re National Security Letter, No. 16-16067** (9th Cir. 2017)

*The USA Patriot Improvement and Reauthorization Act of 2005 authorized the Federal Bureau of Investigation to issue a national security letter (NSL) to an electronic communication provider, requiring the provider to produce specific subscriber information. The service providers are prohibited from disclosing that they have received a NSL. The nondisclosure requirement can be contested in court.*

*CREDO Mobile and CloudFlare sought to have a federal trial court set aside several NSLs. The district court found the NSL provisions of the 2005 statute to be constitutionally defective, but Congress responded with a revised USA FREEDOM Act of 2015. The trial court upheld the revised NSLs (with one exception). On appeal, a panel of the Court of Appeals for the Ninth Circuit upheld the nondisclosure requirement and the NSL framework of the 2015 statute as consistent with the First Amendment.*

JUDGE IKUTA

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The First Amendment provides that “Congress shall make no law ․ abridging the freedom of speech, or of the press.” Despite the breadth of this language, the Supreme Court has concluded that some restrictions on speech are constitutional, provided they survive the appropriate level of scrutiny. When the government restricts speech based on its content, a court will subject the restriction to strict scrutiny. *Reed v. Town of Gilbert* (2015). . . . If the governmental restriction on speech is content neutral, a court will uphold it if it furthers “an important or substantial governmental interest unrelated to the suppression of free speech, provided the incidental restrictions did not burden substantially more speech than is necessary to further those interests.” *Turner Broadcasting System v. FCC* (1997).

Even if the government has constitutional authority to impose a particular content-based restriction on speech, the government does not have unfettered freedom to implement such a restriction through “a system of prior administrative restraints.” *Bantam Books v. Sullivan* (1963). . . . A system that gives public officials authority to regulate or prohibit an individual's exercise of First Amendment rights based on the content of the individual's speech must have “narrow, objective, and definite standards to guide the licensing authority,” and must have the “procedural safeguards that reduce the danger of suppressing constitutionally protected speech.”

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Applying this framework here, the nondisclosure requirement in § 2709(c) is content based on its face. By its terms, the nondisclosure requirement prohibits speech about one specific issue: the recipient may not “disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records” by means of an NSL. Such a restriction “target[s] speech based on its communicative content,” and restricts speech based on its “function or purpose.” . . .

Because we have determined that the restriction imposed by the nondisclosure requirement is content based, we turn to the Supreme Court's strict scrutiny test for content-based restrictions on speech and ask whether the nondisclosure requirement permitted by § 2709(c) is narrowly tailored to serve a compelling state interest.

As a threshold matter, we readily conclude that national security is a compelling government interest. Indeed, the Court has recognized that “[e]veryone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order.” . . . By the same token, keeping sensitive information confidential in order to protect national security is a compelling government interest. *Department of the Navy v. Egan* (1988). . . .

We therefore turn to the question whether the nondisclosure requirement in § 2709(c) is narrowly tailored. A restriction is not narrowly tailored “if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” . . .

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The statute does not authorize the government to issue a nondisclosure requirement based on a mere possibility of harm; rather, a high ranking official must certify that disclosure “may result” in one of four enumerated harms, 18 U.S.C. § 2709(c)(1)(B), meaning that there is “some reasonable likelihood” that harm will result from the disclosure. The government must engage in an individualized analysis of each recipient when making such a certification, which may include consideration of the size of the recipient's customer base. . . .

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. . . . Under these procedures, the FBI is required to reassess the necessity of nondisclosure on two occasions: three years after an investigation is begun and upon the closing of an investigation. This mandated reassessment reduces the likelihood that an overly long nondisclosure requirement will be imposed. . . .

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Moreover, as part of the judicial review process, a court may require the government to justify the continued necessity of nondisclosure on a periodic, ongoing basis, or may terminate the nondisclosure requirement entirely if the government cannot certify that one of the four enumerated harms may occur. . . .

We therefore conclude that the 2015 NSL law is narrowly tailored to serve a compelling government interest, both as to inclusiveness and duration. Accordingly, we hold that the nondisclosure requirement in § 2709(c) survives strict scrutiny.

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. . . . The Supreme Court has generally focused on two types of government schemes requiring safeguards: censorship schemes and licensing schemes. The Court has long held that schemes requiring a putative speaker to submit proposed speech to a governmental body, which is then “empowered to determine whether the applicant should be granted permission — in effect, a license or permit — on the basis of its review of the content of the proposed” speech, “avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.” *Freedman v. Maryland* (1965). . . . The need for procedural safeguards in these cases derived from the principle that “a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.” *Southeastern Promotions, Ltd. v. Conrad* (1975).

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The NSL law does not resemble these government censorship and licensing schemes. It neither requires a speaker to submit proposed speech for review and approval, nor does it require a speaker to obtain a license before engaging in business. Rather, the NSL law prohibits the disclosure of a single, specific piece of information that was generated by the government: the fact that the government has requested information to assist in an investigation addressing sensitive national security concerns, i.e., “to protect against international terrorism or clandestine intelligence activities.” . . .

Rather than resembling a censorship or licensing scheme, the NSL law is more similar to governmental confidentiality requirements that have been upheld by the courts. In *Butterworth v. Smith* (1990), for instance, the Court considered a Florida statute that “prohibit[ed] a grand jury witness from ever disclosing testimony which he gave before that body.” While the statute could not constitutionally prohibit a witness from disclosing “information of which he was in possession before he testified before the grand jury,” the Court did not invalidate that “part of the Florida statute which prohibits the witness from disclosing the testimony of another witness.” Similarly, the only information subject to nondisclosure under § 2709(c) relate to the NSL and its contents — information of which a recipient was not in possession prior to the NSL's issuance. . . . But the Court has not held that these sorts of government confidentiality restrictions must have the sorts of procedural safeguards required for censorship and licensing schemes.

We need not, however, resolve the question whether the NSL law must provide procedural safeguards, because the 2015 NSL law in fact provides all of them. First, *Freedman* requires that “any restraint prior to judicial review can be imposed only for a specified brief period.” . . . The 2015 NSL law readily provides this assurance: a recipient may immediately notify the government that it desires judicial review, and the recipient is guaranteed by statute that the government will “go to court” within 30 days of receiving notice by “apply[ing] for an order prohibiting the disclosure of the existence or contents” of the NSL at issue. . . .

Second, *Freedman* requires that “expeditious judicial review” must be available. The 2015 NSL law's direction to reviewing courts, that they “should rule expeditiously” on any petition by a recipient or application by the government regarding the validity of a nondisclosure order, 18 U.S.C. § 3511(b)(1)(C), provides this safeguard. . .

. . . . [T]he government must certify to the reviewing court and establish to the court's satisfaction, that there is a good reason to believe that absent nondisclosure, one of the enumerated harms is reasonably likely to result. . . . Because the government must sufficiently certify and establish that both disclosures would likely result in one of the four enumerated harms, these requirements place the burden of proof on the government and thereby provide *Freedman*'s third safeguard.

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*Affirmed*.