The Honorable James L. Robart

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and LORETTA LYNCH, in her official capacity as Attorney General of the United States,

Defendants.

No. 2:16-cv-00538-JLR

UNOPPOSED MOTION GRANTING PROPOSED *AMICI CURIAE* LAW PROFESSORS LEAVE TO FILE BRIEF IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

NOTE ON MOTION CALENDAR:

SEPTEMBER 2, 2016

Proposed *amici curiae* law professors respectfully move, pursuant to this Court's August 23, 2016 Order (Dkt. 42) and inherent authority, and in accordance with "the applicable rules found in the Federal Rule of Appellate Procedure" (Dkt. 46), for leave to file a brief supporting Plaintiff's opposition to Defendants' Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (Dkt. 38).[1] A copy of the proposed brief is attached hereto as Exhibit A, a proposed order granting leave to file is attached as Exhibit B, and a compendium of difficult-to-find authorities cited in the proposed brief is attached as Exhibit C.[2] The parties do not oppose this

[1] "In the absence of local rules governing the role of amicus curiae," *amici* have formatted this brief to comply with the Federal Rules of Appellate Procedure. *See* Dkt. 46.

[2] The proposed brief reflects the views of *amici* law professors, but does not purport to reflect the views (if any) of any institutions that *amici* are affiliated with.

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motion and do not oppose the Court noting this motion and *amici*'s proposed brief for consideration on September 2, 2016.

Amici are a group of 18 law professors whose research and teaching primarily focus on issues of privacy, security, and technology within the broader contexts of constitutional law and criminal procedure. The attached brief addresses issues that are specifically within their areas of scholarly expertise. *Amici* believe that their perspective—developed through years of academic study and inquiry—will be useful to the Court as it adjudicates the Government's motion to dismiss (which it should deny). *Amici* have a strong interest in ensuring that First and Fourth Amendment rights—including rights of liberty, privacy, and speech—are fairly and fully protected and that this case is decided correctly, consistent with precedent. Proposed *amici* are:

- **Jonathan Manes**, Clinical Assistant Professor and Director of the Civil Liberties and Transparency Clinic at the University at Buffalo School of Law, the State University of New York. He writes, teaches, and directs the Clinic's efforts on issues involving the protection of individual rights and the public's right of access to information in the areas of national security, law enforcement, privacy, and technology.
- **Derek Bambauer**, Professor of Law at the University of Arizona. His research explores freedom of speech, Internet censorship, intellectual property, and cybersecurity.
- **Jane Bambauer**, Associate Professor of Law at the University of Arizona. Her research assesses the social costs and benefits of data, and involves many popular privacy laws.
- **Jordan "Jody" Blanke**, Distinguished Professor of Computer Information Systems and Law at the Stetson School of Business and Economics at Mercer University in Atlanta. He writes about the law and ethics of privacy and technology and teaches courses such as The Law and Ethics of Big Data in a Business Analytics Master's Degree program and Privacy Law in an MBA program.

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- **Catherine Crump**, Assistant Clinical Professor at the University of California, Berkeley School of Law and Associate Director of the Samuelson Clinic for Law, Technology, & Public Policy. Her writing, teaching, and clinical work focus on application of the First and Fourth Amendments to new technologies, in both the law enforcement and national security contexts.
- **Susan Freiwald**, Professor of Law and Dean's Circle Scholar at the University of San Francisco School of Law. She teaches courses on criminal procedure, information privacy and internet law and writes extensively on the Fourth Amendment's application to new technologies and the electronic communications privacy laws.
- **David C. Gray**, Professor of Law at the University of Maryland, Francis King Carey School of Law. He teaches courses on criminal procedure and writes extensively on the Fourth Amendment.
- **Dennis D. Hirsch**, Professor of Law at The Ohio State University Moritz College of Law and the Capital University Law School. He also serves as director of the Program on Data and Governance at the Moritz College of Law. His research focuses on information privacy law and governance theory.
- **Margot E. Kaminski**, Assistant Professor of Law at The Ohio State University Moritz College of Law and an Affiliated Fellow of the Yale Information Society Project. She writes on law and technology, with a focus on First Amendment and privacy law and the intersections between the two.
- **Vivek Krishnamurthy**, Assistant Director of the Cyberlaw Clinic at Harvard University's Berkman-Klein Center for Internet & Society and a Clinical Instructor and Lecturer on Law at Harvard Law School. His clinical teaching and academic research focus on the impacts of internet-based technologies on the human rights to privacy and free expression both here in the United States and around the world.

- **Yvette Joy Liebesman**, Professor of Law at Saint Louis University School of Law. She teaches courses related to intellectual property and her research focuses on the intersection of intellectual property and technology.
- **Neil Richards**, Thomas & Karole Green Professor of Law at Washington University. He writes and teaches in the areas of First Amendment Law, Fourth Amendment Law, and privacy and technology law.
- **Jorge R. Roig**, Associate Professor of Law at the Charleston School of Law (currently Visiting Associate Professor at the Touro College Jacob D. Fuchsberg Law Center). He writes and teaches on the subjects of Constitutional Law, Internet and Technology Law, and Intellectual Property, with a particular interest in issues regarding freedom of speech and privacy.
- **Ira Rubinstein**, Senior Fellow at the Information Law Institute, New York University School of Law, where he is also an Adjunct Professor of Law. He writes and teaches in the areas of privacy, cybersecurity, national security, voter privacy, and the intersection of privacy law and technical design.
- **David A. Schulz**, Senior Research Scholar in Law and Clinical Lecturer at Yale Law School. His scholarly writing and legal practice focus on the First Amendment, access to information, and newsgathering law.
- **Adina Schwartz**, Professor in the Department of Law, Police Science and Criminal Justice Administration at John Jay College of Criminal Justice, City University of New York. She teaches the required law course for students in the John Jay College Master's Program in Digital Forensics and Cybersecurity, and is Assistant Director of the Cybercrime Studies Center there. She writes on Fourth Amendment law, law and technology, and comparative legal regimes on data protection and national security.
- **Daniel J. Solove**, John Marshall Harlan Research Professor of Law at George Washington University Law School. His work focuses on information privacy law.

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- **Katherine J. Strandburg**, the Alfred B. Engelberg Professor of Law at the New York University School of Law. She teaches in the areas of patent law, innovation policy, and information privacy law, and her research considers the implications of "big data" for privacy law.

As this Court is well aware, federal district courts possess the inherent authority to accept *amicus* briefs. *See* Dkt. 42; Dkt. 46 ("The court has 'broad discretion' to appoint amicus curiae." (citation omitted)); *see also, e.g.*, *Skokomish Indian Tribe v. Goldmark*, No. C13-5071JLR, 2013 WL 5720053, at *1 (W.D. Wash. Oct. 21, 2013) (Robart, J.) (same). District courts frequently accept amicus briefs from non-parties "concerning legal issues that have potential ramifications beyond the parties directly involved or if the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Skokomish*, 2013 WL 5720053, at *1 (internal quotation marks omitted). *See also Miller-Wohl Co. v. Comm'r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) (explaining that the "classic role" of *amici curiae* is to assist the court "in a case of general public interest [by] supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration").

Amici law professors have reviewed the briefs filed to date in this case so as to avoid unnecessary duplication of the parties' arguments. *Amici*'s proposed submission, unlike the parties' briefs, primarily offers historical context for the important First and Fourth Amendment issues raised by the Plaintiff's constitutional challenge. Specifically, the submission demonstrates that the Government's modern use of Section 2705(b) to indefinitely bar online service providers from speaking publicly, and to preclude constitutionally required notice about Government searches and seizures is incompatible with the historical understandings of the First and Fourth Amendments. The Government's use of Section 2705(b) in this manner not only decisively departs from common-law search-and-seizure practices, which the Supreme Court has said must inform the meaning of the Fourth Amendment today, but also threatens to inhibit public debate about government practices—core First Amendment speech. The proposed submission then demonstrates that rejecting Section 2705(b) is consistent with the arc of modern

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constitutional jurisprudence as well as historical understandings. As the brief explains, federal courts have routinely stepped in to ensure that traditional First and Fourth Amendment protections remain robust when Government practices and evolving technology threaten to disrupt the delicate balance our society has struck between privacy and security.

Accordingly, the proposed brief "concern[s] legal issues that have potential ramifications beyond the parties directly involved" and offers "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Skokomish*, 2013 WL 5720053, at *1. The Court should therefore grant the unopposed motion for leave to file the proposed brief of *amici* law professors. If the Court grants the motion, *amici* request the brief be considered filed as of the date of this motion.

Dated: September 2, 2016

Respectfully submitted,

By: /s/ David Freeburg
/s/ Todd Williams

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2016, I electronically filed the foregoing Unopposed Motion of Proposed *Amici Curiae* Law Professors for Leave to File Brief in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss (with the proposed *amicus* brief, proposed order granting leave to file, and a compendium of difficult-to-find sources as attached exhibits), using the CM/ECF system which will send notification of such filing to the attorneys of record who are registered as such on the CM/ECF system.

Dated: September 2, 2016

/s/ David Freeburg
David Freeburg

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EXHIBIT A

The Honorable James L. Robart

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Defendants.

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[PROPOSED] BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

NOTE ON MOTIONS CALENDAR:
SEPTEMBER 2, 2016

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INTRODUCTION

Amici curiae law professors, whose work focuses on privacy, technology, security, and constitutional law, write to assist the Court by providing important context for the Government's motion to dismiss Microsoft's challenge to secrecy orders under 18 U.S.C. § 2705(b) that accompany digital searches and seizures.[1] That provision of the Electronic Communications Privacy Act ("ECPA"), which authorizes "preclusion of notice," violates historical and modern understandings of the First and Fourth Amendments because it allows the Government to indefinitely bar online service providers from speaking publicly or notifying users about the seizures they effect at the Government's behest. Section 2705(b) is therefore unconstitutional.

The Government's use of Section 2705(b) today decisively departs from the Constitution's historical underpinnings. Under pre-founding law, notice accompanied execution of a warrant in all but extreme circumstances. That common-law rule was incorporated into the Fourth Amendment, which offered protections considered critical to privacy, liberty, and free expression. As the Framers recognized, the right to discuss and criticize government affairs presupposed the right to be free from arbitrary and abusive Government intrusions. The Supreme Court has since repeatedly affirmed—in watershed opinions authored by Justices of all constitutional perspectives—that historical understandings of the Government's search-and-seizure authority guide modern interpretation of the Fourth Amendment. *See, e.g.*, *Riley v. California*, 134 S.Ct. 2473, 2484, 2494-95 (2014) (Roberts, J., for a unanimous court); *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (Souter, J.); *Wilson v. Arkansas*, 514 U.S. 927, 931-36 (1995) (Thomas, J., for a unanimous court); *Marcus v. Search Warrants*, 367 U.S. 717, 724-29 (1961) (Brennan, J., for a unanimous court); *Olmstead v. United States*, 277 U.S. 438, 473-74 (1928) (Brandeis, J., dissenting). Here, the historical understandings cannot be squared with Section 2705(b).

The Government's widespread use of Section 2705(b) to impose an indefinite gag order is also incompatible with modern First and Fourth Amendment jurisprudence. The principles underlying the First and Fourth Amendments have remained constant since the Founding. But

[1] The Appendix lists the identity and interest of *amici*, who have filed an unopposed motion for leave to submit this brief. No party or its counsel authored this brief in whole or in part, and no person (including a party or its counsel), other than *amici* or their counsel, contributed money intended to fund preparing or submitting this brief.

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experience shows the Government will push the limits of those principles, and overstep them, whenever it can. Today, the exponential increase in the depth and breadth of information the Government can easily obtain, in an age where vast troves of personal data are customarily stored in the cloud, requires courts to reconsider how to apply those principles in order to maintain the delicate balance between privacy and security. Section 2705(b) dramatically upsets that balance. It tips the scales far in favor of the Government by indefinitely gagging online service providers, who are uniquely positioned to inform the public about the Government's use and interpretation of its search-and-seizure authority. As a result, Section 2705(b) inhibits public debate regarding the protection of online privacy against Government intrusions, precludes the public from learning the Government has violated an individual's privacy, and prevents individuals from vindicating their constitutional rights, including the right to notice of a search. That must end. This Court should deny the Government's motion to dismiss and hold that Section 2705(b) is unconstitutional.

ARGUMENT

I. THE GOVERNMENT'S USE OF SECTION 2705(b) VIOLATES HISTORICAL UNDERSTANDINGS OF THE FIRST AND FOURTH AMENDMENTS.

The Fourth Amendment secures individual liberty and privacy from arbitrary governmental searches and seizures. *See, e.g.*, *Boyd v. United States*, 116 U.S. 616, 624-27 (1886). Although the Fourth Amendment does not mention notice, there is compelling historical evidence that notice is implicit in its prohibition of "unreasonable searches and seizures." U.S. Const. amend. IV.

When America was founded, English law required notice for most governmental searches and seizures. Notice was regularly provided in the American colonies, and that practice was carried into the Constitution. In addition, history reveals that restrictions on the search-and-seizure power were understood to be critical to ensuring freedom of speech—the ability to speak about government (mis)conduct presupposed protection from unreasonable intrusions, and protection from unreasonable intrusions presupposed the ability to speak about government (mis)conduct. The Government's modern-day reliance on Section 2705(b) to prevent service providers from informing the public and users about the Government's exercise of its ECPA authority conflicts with these founding-era understandings that inform whether a practice is constitutional today.

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A. English and Colonial Law Favoring Notice of a Search Was Carried into the Fourth Amendment.

The Fourth Amendment resulted from "a centuries-long history of legal, political, and popular opposition to expansive and abusive search powers." Jonathan Witmer-Rich, *The Rapid Rise of Delayed Notice Searches, and the Fourth Amendment "Rule Requiring Notice,"* 41 Pepp. L. Rev. 509, 565 (2014). In particular, the Framers reacted to the English practice of using "writs of assistance"—general warrants that failed to describe with particularity what officers were authorized to search and seize. *See, e.g.*, *Boyd*, 116 U.S. at 625-26. Writs of assistance empowered English officers to use "discretion" to search "suspected places" for illegal goods—a practice described during the colonial era as "'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book.'" *Id.* at 625 (citation omitted). The detested writs allowed officers to enter homes at will and indiscriminately seize personal papers, one's "'dearest property.'" *Id.* at 628 (citation omitted).

Despite the awesome power of a writ of assistance, colonial officers were nonetheless required to give notice when executing one. 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.8(a) (5th ed. 2010). The notice requirement was part of English common law centuries before the establishment of the American colonies. *See Wilson*, 514 U.S. at 932 n.2. As early as 1603, English courts recognized that except in exigent circumstances a government officer "'ought to signify the cause of his coming, and to make request to open doors,'" when "'execut[ing] the King's process.'" *Id.* at 931 (citation omitted). And officers actually made such requests. "[P]rominent founding-era commentators agreed" that the "'constant practice'" was for officers to "'first signify to those in the house the cause of his coming, and request them to give him admittance'" before exercising search-and-seizure authority. *Id.* at 932-33 (citation omitted).[2] The English tradition of providing notice of a search was adopted in the colonies. "It was firmly established long before the adoption of the Bill of Rights that the fundamental liberty of the individual includes protection against unannounced police entries." *Ker v. California*, 374 U.S. 23, 47, 52 (1963) (Brennan, J., dissenting) ("[G]eneral warrants and writs of assistance [were]

[2] *See* G. Robert Blakey, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U. Pa. L. Rev. 499, 500-02 (1964) (discussing the history of the notice requirement in English law).

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usually preceded at least by some form of notice."); Daniel J. Steinbock, *Announcement in Police Entries*, 80 Yale L.J. 139, 142-44 (1970) ("American colonial experience with announcement prior to entrance was parallel to England's: execution of all warrants was made with notice.").

The notice requirement, a critical feature of searches and seizures in Colonial America, was implicitly carried into the Constitution. Although the Fourth Amendment's text does not specifically mention notice, the common-law notice requirement "forms a part of" the Fourth Amendment's "reasonableness inquiry," which is "guided by the meaning ascribed to it by the Framers." *Wilson*, 514 U.S. at 929, 931; *see also Atwater*, 532 U.S. at 326 (considering "'traditional protections against unreasonable searches and seizures afforded … at the time of the framing,'" because such "'common-law understanding of an officer's authority'" shows "'what the Framers of the Amendment might have thought to be reasonable'"). It would make little sense to interpret the Fourth Amendment differently. Why would the Founders have considered non-exigent searches *without* notice to be reasonable if even the hated writs of assistance that inspired their revolution were executed *with* notice? *See* Steinbock, *supra*, at 145 n.29. And why would the Founders have required in the Fourth Amendment that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized" if they were comfortable with warrants that provided targets no notice about the scope of an officer's search-and-seizure authority? *See* Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 Gonz. L. Rev. 1, 38-39 & nn.241, 248 (2010). The obvious answer is that they did not. This conclusion is reinforced by multiple 19th century decisions that presumed, consistent with historical understanding of the Government's search-and-seizure authority, that officers must give notice when executing a warrant. *See* Blakey, *supra* note 2, at 507-08; *Wilson*, 514 U.S. at 933-34. The Government's use of Section 2705(b) to avoid providing constitutionally required notice of searches, including those effected under ECPA, sharply contrasts with this longstanding tradition.

B. The Fourth Amendment Was Enacted to Bar Unreasonable Searches that Were Used to Inhibit Freedom of Expression.

History also demonstrates that restricting the Government's search-and-seizure power was critical to securing the freedom of speech guaranteed by the First Amendment. For centuries

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English authorities used freewheeling searches and seizures to suppress free speech—rummaging and ransacking in search of supposedly seditious and libelous papers. *Marcus*, 367 U.S. at 724-29. In *Wilkes v. Wood*, 98 Eng.Rep. 489 (C.P. 1763), and *Entick v. Carrington*, 95 Eng.Rep. 807 (K.B. 1765), English courts rejected warrants that authorized general searches for papers by writers and publishers who criticized the government. *See* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 43-48 (1937). "It may be confidently asserted" that those cases "were in the minds of those who framed the fourth amendment … and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures." *Boyd*, 116 U.S. at 626-27; *see, e.g.*, Roots, *supra*, at 38-39 (*Wilkes* and *Entick* are "universally acknowledged" as "the most famous search and seizure cases known to the drafters of the Fourth Amendment"). The Fourth Amendment was therefore "fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus*, 367 U.S. at 728-29; *see* James J. Tomkovicz, California v. Acevedo*: The Walls Close in on the Warrant Requirement*, 29 Am. Crim. L. Rev. 1103, 1148 (1992) ("The Framers understood that privacy was a critical premise of free speech.").

To ensure liberty was not stifled, the Framers rejected limits on speech about how government exercises its authority: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of … structures and forms of government, [and] the manner in which government is operated or should be operated[.]" *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). As James Madison put it, "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 Writings of James Madison 103 (G. Hunt ed., 1910). The First Amendment ensures that knowledge can flow freely. It "prohibit[s] government from limiting the stock of information from which members of the public may draw." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). And it is designed to "ensure that … constitutionally protected 'discussion of governmental affairs,' is an informed one." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982). By contrast, Section 2705(b) allows the Government to

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indefinitely restrict notice of and speech about its search-and-seizure practices with only a generalized showing of need. That violates the First Amendment, and in turn undermines the Fourth Amendment's role in guaranteeing free discussion of government affairs.

II. THE GOVERNMENT'S USE OF SECTION 2705(b) CONTRAVENES MODERN FIRST AND FOURTH AMENDMENT JURISPRUDENCE.

Section 2705(b) as it operates today violates historical understandings of the First and Fourth Amendments, and also conflicts with their modern application. Section 2705(b) violates the First Amendment by stifling speech about Government practices by online service providers who are uniquely positioned to increase the universe of information that the public may draw from to inform its debate about the proper balance between civil liberties and security. And Section 2705(b) violates the Fourth Amendment by allowing notice of a search to be withheld in perpetuity, thereby preventing a user from ever learning about the Government's conduct and insulating that conduct from public scrutiny and an adversarial challenge in the courts.

History, once again, resolves any doubt on this score. The way that constitutional law developed in response to emerging technology in the past strongly supports invalidating Section 2705(b) today. Time and again courts have tested the Government's then-contemporary practices against the foundational principles embodied in the First and Fourth Amendments and rejected those practices as unconstitutional. The Supreme Court and lower courts have recently done so as to a wide variety of the Government's digital search-and-seizure practices. This Court should do the same as to Section 2705(b) by concluding that the Government's routine reliance on Section 2705(b) to cloak its electronic search activities encroaches too deeply upon individual liberty.

A. More than Ever, Section 2705(b) Is Unconstitutional Because It Bars Provider Speech about Law Enforcement Demands and Deprives Individuals of Notice.

In curtailing providers' freedom to speak about the orders they receive, Section 2705(b) undermines the core First Amendment right to engage in informed discussion of government activities. Just as the First Amendment protected speech about government activity historically, it continues to do so today. *See, e.g.*, *Richmond*, 448 U.S. at 571-72, 580. And today that protection is especially critical when technology companies—like Microsoft—are the speakers.

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Online service providers operate at the intersection of technology, privacy, and security. They make possible the global communication system that can simultaneously be used as a tool by those who favor democracy and justice as well as those with criminal intent. This puts providers "in a special position" to inform the important public discussion about balancing civil liberties and the Government's needs, because those providers "are privy to information that the rest of [the] public is not: they know what kinds of information the government demands of them." Jonathan Manes, *Online Service Providers and Surveillance Law Transparency*, 125 Yale L.J. F. 343, 344 (2016); Mag. Judge Stephen Wm. Smith, *Gagged, Sealed & Delivered: Reforming ECPA's Secret Docket*, 6 Harv. L. & Pol'y Rev. 313, 330 (2012) (providers are in the "best position to challenge ECPA orders"). Simply put, that public discussion *depends* on those companies being able to speak freely about their relationship and experience with the Government. Without that speech, the public cannot understand what the Government is doing. And if the public cannot understand what the Government is doing, it can neither ensure the Government's searches and seizures are reasonable nor assess whether the legal barriers protecting online privacy are too low or too high.

Yet in practice Section 2705(b) bars exactly this type of bedrock First Amendment speech about government affairs. A Section 2705(b) gag order forbids service providers from revealing when they are conscripted to search and seize their customers' information and disclose it to the Government. It prevents the public from grasping or evaluating the extent of the Government's online investigative activities, the type or scope of alleged criminal activity it targets, and the justification for the Government's intrusions. It even obscures the very existence—and the substance—of the massive shadow ECPA docket in courthouses across the country. *See* Judge Smith, *supra*, at 313-22. These harms erode trust in government at a crucial moment when public and legal institutions are actively deliberating about how to adapt core protections for liberty and privacy to the cloud computing era. Section 2705(b) therefore cannot be squared with the First Amendment. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991) ("[S]peech critical of the exercise of the State's power lies at the very center of the First Amendment.").

Courts across the country have recognized that, by silencing service providers, Section 2705(b) may unconstitutionally inhibit public scrutiny of government conduct. For example, one

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court rejected the Government's application for an open-ended Section 2705(b) order because such orders "cannot stand" in "an era of increasing public demand for transparency about the extent of government demands for data from providers." *Matter of Grand Jury Subpoena for: [Redacted]@yahoo.com*, 79 F. Supp. 3d 1091, 1095 (N.D. Cal. 2015). Another court pointedly observed that Section 2705(b)'s "pernicious effects of concealing even lawful conduct should not be overlooked" because "these secret orders, issued by the thousands year after year by court after court around the country, may conceal from the public the actual degree of government intrusion that current legislation authorizes." *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 886 (S.D. Tex. 2008). These decisions rest comfortably on longstanding precedent highlighting the importance of transparency and rejecting efforts to shield government conduct from public review. *See, e.g.*, *Gentile*, 501 U.S. at 1035; *Butterworth v. Smith*, 494 U.S. 624, 632, 636 (1990) (invalidating statute barring disclosure of "information relating to alleged governmental misconduct," which is "at the core of the First Amendment," because it could be used "to silence those who know of unlawful conduct or irregularities on the part of public officials"). But these district court rulings, rightly decided, are not binding elsewhere. This Court should build on them by invalidating Section 2705(b) whenever the Government tries to use it.

Section 2705(b) also insulates the Government's actions from judicial and public scrutiny. When the Government seizes an individual's data from a service provider, and bars the provider from disclosing that seizure, the individual cannot mount a challenge. How could she contest a search that she doesn't know (or can't reasonably allege) happened? *See Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1148-49 (2013). A gagged provider could sue as a third party to vindicate its users' rights. *See Powers v. Ohio*, 499 U.S. 400, 410-11 (1991). But a provider cannot reasonably be expected to file or fully prosecute *tens of thousands* of lawsuits each year to do so, especially given the Government's mistaken view (MTD 11-12) that providers lack standing to challenge the search the Government compelled *them* to perform (often under threat of criminal contempt). *See also* Judge Smith, *supra* at 327-31 (lamenting difficulty of appealing ECPA cases). And the public benefit from such suits is mitigated because the proceedings would likely be under seal—frustrating the public's constitutional right of access that "ensure[s] that the individual

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citizen can effectively participate in and contribute to" civic affairs. *Globe*, 457 U.S. at 604. In other words, the Government's misguided interpretation of Section 2705(b) enables it to impose a speech restriction (itself unconstitutional) to undermine First Amendment rights and to avoid Fourth Amendment scrutiny. That is incredibly dangerous for civil liberties. It cannot be the law.

Section 2705(b) is not rescued by its reference to "delayed notice." The indefinite "delay" is, in practice, typically *perpetual*. "[T]emporary sealing orders almost always become permanent" because "judges almost never have occasion to revisit these cases, so the 'further order' lifting the seal rarely arrives." Judge Smith, *supra*, at 325. This leaves the provider at the Government's mercy, waiting and wondering when, if ever, the Government will permit the provider to speak. As one court explained in rejecting an application for a Section 2705(b) order: "The problem is that the government does not seek to gag Microsoft for a day, a month, a year, or some other fixed period. … [I]t wants Microsoft gagged for … well, forever." *In re Search Warrant for: [Redacted]@hotmail.com*, 74 F. Supp. 3d 1184, 1185 (N.D. Cal. 2014); *cf.* Samuel Beckett, *Waiting for Godot*, Act I (1953). Even if delay is not perpetual, it can still violate the Constitution. *See, e.g.*, *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986) (mandating notice "within a reasonable, but short, time subsequent to [a] surreptitious" search, usually seven days); *United States v. Villegas*, 899 F.2d 1324, 1337 (2d Cir. 1990) (same). Fourth Amendment "reasonableness" may be flexible, but the pervasive modern application of Section 2705(b) to bar targets from ever learning about a search bends the Fourth Amendment well beyond the breaking point. *See Berger v. New York*, 388 U.S. 41, 60 (1967) (rejecting wiretapping statute that had "no requirement for notice as do conventional warrants"); *cf. Wilson*, 514 U.S. at 934 (finding notice of a search is part of the Fourth Amendment's "reasonableness inquiry").

B. Finding 2705(b) Unconstitutional Follows Historical Practice of Preserving Core Constitutional Protections as Technology Evolves.

Rejecting Section 2705(b) is consistent with the arc of First and Fourth Amendment jurisprudence. Fourth Amendment "reasonableness" is meant to evolve to fit modern times. But this evolution happens slowly. By necessity, the law lags behind technology; the former responds cautiously, case by case, as the latter develops. *See, e.g.*, *City of Ontario v. Quon*, 560 U.S. 746,

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759-60 (2010). But the law eventually catches up. When the time is right, courts strike down previously approved Government practices that can no longer be reconciled with first principles.

Many examples illustrate this point. In the Fourth Amendment context, the Supreme Court initially held "surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution." *Katz v. United States*, 389 U.S. 347, 353 (1967) (citing *Olmstead*, 277 U.S. at 457, 464-66 (majority op.)). The Court later rejected that "narrow view," because it "ignore[d] the vital role that the public telephone has come to play in private communication." *Id.* at 352-53; *see Kyllo v. United States*, 533 U.S. 27, 36 (2001) ("[T]he rule we adopt must take account of more sophisticated systems that are already in use or in development."). In the First Amendment context, the Court has similarly recognized that what might pass for a permissibly tailored speech restriction one day may be impermissibly broad the next, due to advancing technology. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 807-08, 814 (2000); *Reno v. ACLU*, 521 U.S. 844, 891 (1997) (O'Connor, J., concurring and dissenting in part) ("[W]e must evaluate" a statute "as it applies to the Internet as it exists today" not as it might develop).

Following this trend, courts are adapting constitutional law to account for ubiquitous technology and the reality that personal information previously stored on premises is now routinely stored in the cloud operated by online service providers. Courts have thus extended First Amendment protection to online providers who wish to speak about government investigative practices, invalidating and narrowing gag orders analogous to Section 2705(b) orders even in the context of national security investigations. *See Merrill v. Lynch*, 151 F. Supp. 3d 342, 344-46 (S.D.N.Y. 2015); *In re Nat'l Sec. Letters*, No. 11-cv-2173, slip op. 2-17 (N.D. Cal. Mar. 29, 2016).

The Supreme Court has also been refreshing Fourth Amendment doctrine to ensure that it provides as much protection in the digital age as it did in the analog and mechanical ones. In myriad contexts, the Court has emphasized the importance of "assur[ing] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, 533 U.S. at 34; *see also Riley*, 134 S.Ct. at 2495 ("[T]echnology … does not make the information any less worthy of the protection for which the Founders fought."); *United States v. Jones*, 132 S.Ct. 945, 949-51 & n.3 (2012); *Quon*, 560 U.S. at 759-60. Lower courts have followed

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suit ad hoc, rejecting the Government's expansive interpretation of its authority to obtain digital evidence, including evidence stored in the cloud.[3] Justices and circuit judges have also questioned the scope of the third-party doctrine—which exempts information disclosed to third parties from Fourth Amendment protection—because the doctrine is "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." *Jones*, 132 S.Ct. at 957 (Sotomayor, J., concurring); *accord id.* at 963-64 (Alito, J., concurring) (using new technology to conduct previously impossible searches may "impinge[] on expectations of privacy").[4] As Judge Leon summarized in evaluating NSA's bulk metadata collection, "present-day circumstances—the evolutions in the Government's surveillance capabilities, citizens' phone habits, and the relationship between" the Government and service providers—are "so thoroughly unlike those considered" by courts in the past that fresh scrutiny is required. *Klayman v. Obama*, 957 F. Supp. 2d 1, 30-32 & n.42 (D.D.C. 2013).

The Government (once again) misunderstands the scope and power of modern technology when it defends Section 2705(b) as only concealing searches that occur somewhere other than a user's home. *See* MTD 23. In *Riley*, a unanimous Supreme Court chastised the Government for equating "a search of all data stored on a cell phone" with a physical search, because "[t]hat is like saying a ride on horseback is materially indistinguishable from a flight to the moon." 134 S.Ct. at 2488. The same could be said of the Government's contention here. Section 2705(b) allows for secret digital searches that "implicate privacy concerns *far beyond* those implicated by the search" of physical objects, and that "would typically expose to the government *far more* than the most exhaustive search of a house." *Id.* at 2488-89, 2491 (emphasis added). Section 2705(b) permits secret seizures of digital data that are even more a person's "dearest property" than the physical

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[3] *See, e.g.*, *Microsoft v. United States*, 2016 WL 3770056, at *1-2 (2d Cir. July 14, 2016) (finding Government cannot compel production of data held abroad); *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) (requiring warrant to obtain email "contents"); *In re Search of Premises Known as: Three Hotmail Email Accounts*, 2016 WL 1239916, at *11-15, *23 (D. Kan. Mar. 28, 2016) (denying warrant for "entire email account" due to "substantial amount of data collected"); *In re Grand Jury Subpoena to Facebook*, No. 16-mc-1300, Mem. & Order (E.D.N.Y. May 12, 2016) (denying non-specific request for Section 2705(b) order); *In re Search of Google Email Accounts Identified in Attachment A*, 92 F. Supp. 3d 944, 953 (D. Alaska 2015) (denying warrant for emails without date restrictions).

[4] *See also In re App. of United States*, 620 F.3d 304, 317-18 (3d Cir. 2010) (declining to apply third-party doctrine to cell site location information ("CSLI")); *United States v. Graham*, 824 F.3d 421, 441 n.2 (4th Cir. 2016) (en banc) (Wynn, J., dissenting) (collecting dissents and concurrences questioning application of third-party doctrine to CSLI).

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papers that have been protected since before the Founding. That data includes "a cache of sensitive personal information" that is "a digital record of nearly every aspect of [people's] lives—from the mundane to the intimate." *Riley*, 134 S.Ct. at 2490; *see also In re Grand Jury Subpoena*, 2016 WL 3745541, at *5 (9th Cir. July 13, 2016). It "reflects a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." *Jones*, 132 S.Ct. at 955. The Ninth Circuit's reasons for rejecting clandestine searches of a physical home apply with even greater force to the clandestine searches of a digital home that Section 2705(b) purports to permit.

> [S]urreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interest, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth Amendment, demands that surreptitious entries be closely circumscribed.

Freitas, 800 F.2d at 1456. "[T]hat covert searches and surveillance are favorite tools of totalitarian control and repression" reveals that Section 2705(b) poses "very real dangers to privacy, liberty, and dissent." Witmer-Rich, *supra*, at 555. Even in America, "[a]wareness that the Government may be watching chills associational and expressive freedoms." *Jones*, 132 S.Ct. at 956.

Of course the fruits of digital searches could prove useful to the Government. Technology enables those searches to be mind-bogglingly broad—capturing nearly every aspect of modern human existence—and to occur without a target's detection. But just as the Constitution has long guarded against secret government intrusions for even the juiciest evidence in the physical realm, it must protect against such searches in the digital realm. The Government should not get a Fourth Amendment free pass whenever evidence happens to be stored with a third party outside the user's home or business. Privacy and liberty depend on transparency. Service providers must be able to speak about the searches they have been compelled to conduct and the private user data they have been compelled to disclose. Users must also get notice of those actions to enable them to challenge improper Government practices. Section 2705(b) is unconstitutional because it permits the Government to obtain indefinite gag orders—without a compelling case-specific reason—and prevents the target of a search from receiving the notice required by the Fourth Amendment.

CONCLUSION

For the foregoing reasons, this Court should deny the Government's motion to dismiss.

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DATED: September 2, 2016

Respectfully submitted,

By: /s/ David Freeburg

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APPENDIX OF *AMICI CURIAE* LAW PROFESSORS

The following professors, who have a strong interest in this case because their research and teaching focus on privacy, technology, security, and constitutional law, have joined this brief as *amici curiae* to offer the Court their unique perspective and to help the Court decide the issues presented. This brief reflects the views of *amici*, but does not purport to reflect the views (if any) of any institutions that *amici* are affiliated with.

Jonathan Manes is Clinical Assistant Professor and Director of the Civil Liberties and Transparency Clinic at the University at Buffalo School of Law, the State University of New York. He writes, teaches, and directs the Clinic's efforts on issues involving the protection of individual rights and the public's right of access to information in the areas of national security, law enforcement, privacy, and technology.

Derek Bambauer is Professor of Law at the University of Arizona. His research explores freedom of speech, Internet censorship, intellectual property, and cybersecurity.

Jane Bambauer is Associate Professor of Law at the University of Arizona. Her research assesses the social costs and benefits of data, and involves many popular privacy laws.

Jordan "Jody" Blanke is Distinguished Professor of Computer Information Systems and Law at the Stetson School of Business and Economics at Mercer University in Atlanta. He writes about the law and ethics of privacy and technology and teaches courses such as The Law and Ethics of Big Data in a Business Analytics Master's Degree program and Privacy Law in an MBA program.

Catherine Crump is an Assistant Clinical Professor at the University of California, Berkeley School of Law and Associate Director of the Samuelson Clinic for Law, Technology, & Public Policy. Her writing, teaching, and clinical work focus on application of the First and Fourth Amendments to new technologies, in both the law enforcement and national security contexts.

Susan Freiwald is Professor of Law and Dean's Circle Scholar at the University of San Francisco School of Law. She teaches courses on criminal procedure, information privacy and internet law and writes extensively on the Fourth Amendment's application to new technologies and the electronic communications privacy laws.

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David C. Gray is Professor of Law at the University of Maryland, Francis King Carey School of Law. He teaches courses on criminal procedure and writes extensively on the Fourth Amendment.

Dennis D. Hirsch is Professor of Law at The Ohio State University Moritz College of Law and the Capital University Law School. He also serves as director of the Program on Data and Governance at the Moritz College of Law. His research focuses on information privacy law and governance theory.

Margot E. Kaminski is Assistant Professor of Law at The Ohio State University Moritz College of Law and an Affiliated Fellow of the Yale Information Society Project. She writes on law and technology, with a focus on First Amendment and privacy law and the intersections between the two.

Vivek Krishnamurthy is the Assistant Director of the Cyberlaw Clinic at Harvard University's Berkman-Klein Center for Internet & Society and a Clinical Instructor and Lecturer on Law at Harvard Law School. His clinical teaching and academic research focus on the impacts of internet-based technologies on the human rights to privacy and free expression both here in the United States and around the world.

Yvette Joy Liebesman is Professor of Law at Saint Louis University School of Law. She teaches courses related to intellectual property and her research focuses on the intersection of intellectual property and technology.

Neil Richards is the Thomas & Karole Green Professor of Law at Washington University. He writes and teaches in the areas of First Amendment Law, Fourth Amendment Law, and privacy and technology law.

Jorge R. Roig is Associate Professor of Law at the Charleston School of Law (currently Visiting Associate Professor at the Touro College Jacob D. Fuchsberg Law Center). He writes and teaches on the subjects of Constitutional Law, Internet and Technology Law, and Intellectual Property, with a particular interest in issues regarding freedom of speech and privacy.

Ira Rubinstein is Senior Fellow at the Information Law Institute, New York University School of Law, where he is also an Adjunct Professor of Law. He writes and teaches in the areas

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of privacy, cybersecurity, national security, voter privacy, and the intersection of privacy law and technical design.

David A. Schulz is Senior Research Scholar in Law and Clinical Lecturer at Yale Law School. His scholarly writing and legal practice focus on the First Amendment, access to information, and newsgathering law.

Adina Schwartz is Professor in the Department of Law, Police Science and Criminal Justice Administration at John Jay College of Criminal Justice, City University of New York. She teaches the required law course for students in the John Jay College Master's Program in Digital Forensics and Cybersecurity, and is Assistant Director of the Cybercrime Studies Center there. She writes on Fourth Amendment law, law and technology, and comparative legal regimes on data protection and national security.

Daniel J. Solove is the John Marshall Harlan Research Professor of Law at George Washington University Law School. His work focuses on information privacy law.

Katherine J. Strandburg is the Alfred B. Engelberg Professor of Law at the New York University School of Law. She teaches in the areas of patent law, innovation policy, and information privacy law, and her research considers the implications of "big data" for privacy law.

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2016, I electronically filed the foregoing [Proposed] Brief of *Amici Curiae* Law Professors in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record who are registered as such on the CM/ECF system.

Dated: September 2, 2016

/s/ David Freeburg
David Freeburg

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EXHIBIT B

The Honorable James L. Robart

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and LORETTA LYNCH, in her official capacity as Attorney General of the United States,

Defendants.

NO. 16-cv-00538-JLR

[PROPOSED] ORDER GRANTING LAW PROFESSORS LEAVE TO FILE AMICUS BRIEF

Having considered *Amici Curiae* Law Professors' unopposed motion for leave to file an *amicus* brief and any responses, it is hereby ORDERED that the motion is GRANTED. The Court GRANTS the Law Professors *amicus curiae* status and GRANTS their request to file a brief in support of Microsoft's opposition to the United States' motion to dismiss. The *Amici Curiae* Law Professors' brief shall be considered filed on the date of this order.

DATED this ____ day of _____, 2016.

HONORABLE JAMES L. ROBART

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EXHIBIT C

APPENDIX OF DIFFICULT-TO-FIND AUTHORITIES

For the convenience of the Court, *amici curiae* have appended the following unpublished decisions and relevant excerpts of other hard-to-find sources that are cited in the proposed brief.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

IN RE: GRAND JURY SUBPOENA
SUBPOENA TO FACEBOOK

----------X

----------X

IN RE: SUBPOENA

----------X

MEMORANDUM AND ORDER

16-MC-1300 (JO) 16-MC-1301 (JO)

16-MC-1302 (JO) 16-MC-1303 (JO)
16-MC-1304 (JO) 16-MC-1305 (JO)
16-MC-1306 (JO) 16-MC-1307 (JO)
16-MC-1308 (JO) 16-MC-1309 (JO)
16-MC-1310 (JO) 16-MC-1311 (JO)
16-MC-1312 (JO) 16-MC-1313 (JO)
16-MC-1314 (JO)

James Orenstein, Magistrate Judge:

In my role as the Duty Magistrate Judge for May 10, 2016, *see* Rules for the Division of Business Among District Judges for the Eastern District of New York 50.5(b), I have received fifteen separate applications, each with one of the two captions set forth above, each submitted in hard copy by hand but not yet filed on the court's docket, and each seeking an order pursuant to 18 U.S.C. § 2705(b) commanding the recipient of a subpoena not to disclose the subpoena's existence to any person. In each case, the application relies on a boilerplate recitation of need that includes no particularized information about the underlying criminal investigation. For the reasons set forth below, I now deny each application without prejudice to renewal upon a more particularized showing of need sufficient to support a finding that disclosure of the existence of a given subpoena will result in any of the harms that the pertinent statute lists as a basis for such a restraint.

I. Background

A. Authority to Issue Non-Disclosure Orders

The Stored Communications Act, 18 U.S.C. § 2701, *et seq.* (the "SCA"), authorizes a court, under certain defined conditions, to prohibit providers of electronic communications and remote computing services (collectively, "service providers") from notifying others of the existence of various types of government-issued orders compelling the disclosure of records. Specifically:

> The court shall enter such an order *if it determines* that there is reason to believe that notification of the existence of the warrant, subpoena, or court order *will* result in—
>
> (1) endangering the life or physical safety of an individual;
>
> (2) flight from prosecution;
>
> (3) destruction of or tampering with evidence;
>
> (4) intimidation of potential witnesses; or
>
> (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

18 U.S.C. § 2705(b) (emphasis added).

B. The Government's Applications

1. *In re: Subpoena*

In each of the *In re: Subpoena* ("*Subpoena*") actions, the government has filed under seal a motion styled as follows: "APPLICATION FOR ORDER COMMANDING [SERVICE PROVIDER] NOT TO NOTIFY ANY PERSON OF THE EXISTENCE OF SUBPOENA[.]" The text of each application is identical, save for the identification of the service provider that is the subject of the proposed order. I reproduce below the application's full text.[1]

> The United States requests that the Court order [service provider] not to notify any person (including the subscribers and customers of the accounts(s) listed in the subpoena) of the existence of the attached subpoena until further order of the Court.
>
> [Service provider] is a provider of an electronic communication service, as defined in 18 U.S.C. § 2510(15), and/or a remote computer service, as defined in 18 U.S.C. § 2711(2). Pursuant to 18 U.S.C. § 2703, the United States obtained the attached subpoena, which requires [service provider] to disclose certain records and information to the United States. This Court has authority under 18 U.S.C. § 2705(b) to issue "an order commanding a provider of electronic communications service or remote computing service to whom a warrant, subpoena, or court order is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order." *Id.*

[1] The application in each case includes a copy of the pertinent grand jury subpoena as an attachment; it should therefore remain under seal. There is nothing in the quoted text of the application, however, that will reveal anything about the government's investigation.

In this case, such an order would be appropriate because the attached subpoena relates to an ongoing criminal investigation that is neither public nor known to all of the targets of the investigation, and its disclosure *may* alert the targets to the ongoing investigation. Accordingly, there is reason to believe that notification of the existence of the attached subpoena *will* seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, and/or change patterns of behavior. *See* 18 U.S.C. § 2705(b). Some of the evidence in this investigation is stored electronically. If alerted to the existence of the subpoena, the subjects under investigation *could* destroy that evidence.

WHEREFORE, the United States respectfully requests that the Court grant the attached Order directing [service provider] not to disclose the existence or content of the attached subpoena, except that [service provider] may disclose the attached subpoena to an attorney for [service provider] for the purpose of receiving legal advice.

The United States further requests that the Court order that this application and any resulting order be sealed until further order of the Court. As explained above, these documents discuss an ongoing criminal investigation that is neither public nor known to all of the targets of the investigation. Accordingly, there is good cause to seal these documents because their premature disclosure may seriously jeopardize that investigation.

Subpoena, Application at 1-2 (emphasis added).

On the basis of that application, the government in each case asks me to enter the following order:

The United States has submitted an application pursuant to 18 U.S.C. § 2705(b), requesting that the Court issue an Order commanding [service provider], an electronic communication service provider and/or a remote computing service, not to notify any person (including the subscribers and customers of the account(s) listed in the subpoena) of the existence of the attached subpoena until further order of the Court.

The Court determines that there is reason to believe that notification of the existence of the attached subpoena *will* seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, and/or change patterns of behavior. See 18 U.S.C. § 2705(b).

IT IS THEREFORE ORDERED under 18 U.S.C. § 2705(b) that [service provider] shall not disclose the existence of the attached subpoena, or this Order of the Court, to the listed subscriber or to any other person, unless and until otherwise authorized to do so by the Court, except that [service provider] may disclose the attached subpoena to an attorney for [service provider] for the purpose of receiving legal advice.

IT IS FURTHER ORDERED that the application and this Order are sealed until otherwise ordered by the Court.

Subpoena, Proposed Order at 1-2 (emphasis added).

2. *In re: Grand Jury Subpoena to Facebook*

Each of the two applications captioned *In re: Grand Jury Subpoena to Facebook* ("*Facebook*") is similar to its counterparts in the *Subpoena* cases, with one exception discussed below. Each relies on the same assertions about potential investigative harms to seek an order prohibiting Facebook from disclosing the existence of the pertinent subpoena to any person, and each seeks a non-disclosure order including, in essentially the same language, the same findings and directives quoted above.[2]

In addition to seeking a non-disclosure order, the *Facebook* applications also include a request for an order prohibiting Facebook from taking certain other actions – which the government asserts Facebook has previously taken in comparable circumstances – that do not inherently reveal the existence of the subpoena but that, in the government's view, "provid[e] government targets effective notice that they are the subject of government investigation." *Facebook*, Application at 2.[3] Based on that assertion about "effective notice," the government asserts that the additional relief it seeks is authorized under the non-disclosure provision of 18 U.S.C. § 2705(b). Accordingly, the proposed order in each *Facebook* action also includes the following language:

> *The Court determines* that there is reason to believe that notification of the existence of the Subpoena or [the additional actions at issue] *would* provide targets of the

[2] The only textual difference between the two categories of applications and proposed orders that is even remotely substantive, aside from those differences that accommodate the government's additional request in *Facebook*, is that the *Facebook* applications cite subsections (2), (3), and (5) of 18 U.S.C. § 2705(b), whereas the *In re: Subpoena* applications provide no such specificity. In each case, however, the government raises concerns about the same potential harms to its investigations.

[3] As discussed below, the government has not yet provided any basis to conclude either that Facebook will take the actions at issue if not prohibited from doing so or that such actions would in any way compromise any criminal investigation. Nevertheless, because I have not previously asked the government to substantiate its assertions in this regard, I avoid a specific description of the conduct the government seeks to regulate in order to allow a public discussion of the reasons for this order.

> investigation with effective notice of *the government's investigation* and would seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates. See 18 U.S.C. § 2705(b)(2), (3), (5).

Facebook, Proposed Order at 1 (emphasis added).

II. Discussion

A. Prejudice to Investigations

1. Prejudice Arising From Actual Notification of a Subpoena's Existence

As noted above, the sole fact that the government posits in each case in support of a non-disclosure order is that the pertinent subpoena "relates to an ongoing criminal investigation that is neither public nor known to all of the targets of the investigation[.]" Application at 1. From this premise, the government concludes that the subpoena's "disclosure *may* alert the targets to the ongoing investigation." *Id.* (emphasis added).[4] Having thus sought to demonstrate the possibility of tipping off a target to the existence of an investigation, the government then reasons that disclosure of the subpoena therefore "*will* seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, and/or change patterns of behavior." *Id.* at 1-2 (emphasis added). Moreover, the government notes that "[s]ome of the evidence in this investigation is stored electronically." *Id.* at 2. As a result, the government concludes, "[i]f alerted to the existence of the subpoena, the subjects under investigation

[4] I assume for purposes of discussion that in each case there are in fact specific "targets" of the pertinent investigations – that is, persons "as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." U.S. Attorney's Manual § 9-11.151. It would, however, be somewhat surprising if that were true: in a great many cases – including some in which the government might have a very good reason to fear that disclosing a subpoena's existence might prejudice the government's investigation – a grand jury can subpoena and receive a great deal of information long before the government concludes that anyone qualifies as a "target" rather than a "subject" of the investigation (that is, a person whose conduct is merely "within the scope of the grand jury's investigation[,]" *id.*). The difference between a target and a subject, however, is one of some significance to consideration of the likely effect of the disclosure of a subpoena.

could destroy that evidence." *Id.* (emphasis added).[5] I respectfully disagree with the government's reasoning.

First, while it is unquestionably true that a service provider's disclosure of a subpoena for customer records "may" alert the target of an investigation to its existence, it is just as true that disclosure may not have that effect. To cite just one example, sometimes subpoenas for service providers' records seek information from the account of a target's victim (who might well fall within the definition of an investigative "subject"), or from some other person whose interests are not aligned with the target's but who may nevertheless have information relevant to the investigation. In such circumstances, there is simply no reason to presume that disclosure of the subpoena to the customer whose records the government seeks will harm the investigation in any way at all. Thus, before I can conclude that disclosure "will" result in such harm as the statute requires, I must have information about the relationship, if any, between the customer whose records are sought and any target of the investigation.[6] The sole fact asserted by the government to date – the targets' ignorance of the existence of an ongoing criminal investigation – does not support an inference that a service provider's disclosure of a subpoena to the pertinent customer will have any effect on the investigation.

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[5] It is not clear that the government intends to posit a connection between the fact that some evidence is stored electronically and the likelihood of any of the harms listed in Section 2705(b). If that is the government's intent, it has not explained why it is any more likely for an investigative target to engage in obstructive conduct when some evidence is stored electronically than when the evidence takes other forms. If anything, the reality that electronically stored evidence is often accessible in multiple repositories (and thus harder to effectively erase) and that attempts to delete or alter such evidence (even if successful) often leave identifiable traces – facts which appear to be gaining wider dissemination in an increasingly technologically proficient society – suggests at least a possibility that tipping off a target to the existence of an investigation will pose less risk to electronically stored evidence than to physical documents or the availability of oral testimony.

[6] The government provides no reason to anticipate that the service provider in each case would notify anyone other than the customer whose records are sought. If there is reason to believe the service provider would alert persons other than the pertinent customer if not prohibited from doing so, the government can of course make such a showing.

Second, there is no reason to assume that tipping off an investigative target to the investigation's existence necessarily "will" result in one of the harms contemplated by the SCA. To be sure, such information can easily have such an effect. But if Congress presumed that providing such information to an investigative target would inevitably lead to such consequences, the judicial finding the SCA requires would be meaningless. There will plainly on occasion be circumstances in which an investigative target either lacks the ability or the incentive to flee, to tamper with evidence, or otherwise to obstruct an investigation. To cite just two possibilities: the target may be incarcerated and lack effective access to evidence and witnesses; alternatively, the target may be a public figure with a strong incentive to affect a public posture of innocence and cooperation with law enforcement. In most cases, it seems likely that the government can easily make a showing that there is reason to believe that a target's knowledge of an investigation will indeed lead to obstructive behavior – but not in every case.

In short, the government contends that notification necessarily will lead to obstruction. But the SCA precludes such reasoning; to the contrary, it allows a court to issue a non-disclosure order only "if it determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result[.]" 18 U.S.C. § 2705(b). That language inherently assumes that sometimes notifying the target of the existence of an investigation will result in certain types of misconduct but that other times it will not, and that it is up to a judge to make the necessary determination in a given case based on the available evidence. As a result, in the absence of any case specific information aside from the assertion that the target of an investigation does not know of its existence, it is impossible to make the factual determination necessary for a non-disclosure order.

Finally, the government's assertion that "[i]f alerted to the existence of the subpoena, the subjects under investigation *could* destroy that evidence[,]" Application at 2 (emphasis added), is

manifestly insufficient. The SCA requires a determination that disclosure "will" have certain adverse effects, not that it "could" do so.

Government prosecutors and agents have a difficult job investigating crime, and one that is made more difficult by the fact that some of the investigative techniques they must rely on can backfire by alerting criminals to the fact of the investigation.[7] The SCA provides some measure of relief against that risk, but it does not do so indiscriminately. The government cannot, consistent with the statute, obtain an order that constrains the freedom of service providers to disclose information to their customers without making a particularized showing of need. The boilerplate assertions set forth in the government's applications do not make such a showing, and I therefore deny all of the pending requests for non-disclosure orders. The ruling is without prejudice to the government's right to renew its requests on the strength of additional facts about each investigation that permit a finding that disclosure of a subpoena will result in an identifiable form of harm to the investigation.[8]

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[7] To guard against that risk, the government routinely asks subpoena recipients who are not investigative targets to voluntarily refrain from disclosure – and also, on occasion, improperly turns that request into what appears to be a judicial command on the face of the subpoena itself. *See United States v. Gigliotti*, 15-CR-0204 (RJD), docket entry 114 (Memorandum and Order), slip op. at 2-3, 7-8 (E.D.N.Y. Dec. 23, 2015). It is entirely understandable that the government is as proactive as the law allows it to be in maintaining the secrecy of its investigations, and just as understandable that it will seek to test those legal limits. Applications for the kind of non-disclosure orders at issue here have been routinely granted for a long time, and I do not fault the government for continuing to engage in a practice that I and other judges have unquestioningly endorsed. But having belatedly reconsidered the issue, I now conclude that my prior orders granting similar boilerplate applications were erroneous.

[8] I do not consider or address here the extent to which the relief the government seeks is in tension with either the First Amendment rights of service providers to provide information to their customers or the Fourth Amendment rights of those customers to be provided notice of the government's search or seizure of their records. First, as explained above, the government has not yet established the facts necessary to support a non-disclosure order under the SCA, and so any such discussion would be premature. Second, such issues can more efficiently be resolved through adversarial testing. It is clear that a service provider subjected to a non-disclosure order under the SCA has the ability to raise such arguments in an adversarial setting after the order has issued. *See Microsoft Corp. v. U.S. Dep't of Justice*, 16-CV-0538 (JLR), docket entry 1 (Complaint) (W.D. Wash. Apr. 14, 2016) (seeking a declaration that the provision for non-disclosure orders under 18 U.S.C. § 2705(b) is unconstitutional).

2. Prejudice Arising From Facebook's Potential Additional Actions

In addition to a prohibition on explicit notification of the existence of the pertinent subpoena, each of the *Facebook* applications also seeks an order prohibiting Facebook from taking certain actions that the government asserts would indirectly, but effectively, alert targets to the existence of the government's underlying investigation. As an initial matter, this request fails for the same reasons that the request for a prohibition of explicit notification of the subpoena fails: the government has not established either that disclosure of the subpoena to a given customer will result in alerting the target to the investigation's existence or that the target of the investigation will, if notified, engage in obstructive conduct. As explained below, another reason to deny relief with respect to indirect notification is that the government has not adequately explained the connection between the actions it wants to prohibit Facebook from taking and the harm it seeks to forestall.

The government has stated no more than that Facebook has taken such actions previously in response to receiving subpoenas. *Facebook*, Application at 2. What the government has not told me is (a) whether Facebook routinely does so in response to every subpoena, or only in certain circumstances; and (b) whether, and under what circumstances, Facebook takes the same actions even in the absence of receiving a subpoena. The actions are of a sort that a service provider like Facebook might take for a wide variety of reasons having nothing to do with any criminal investigation of the customer. It therefore seems quite likely – indeed, in my view, more likely than not – that the actions at issue would not necessarily lead a Facebook customer to infer the existence of a criminal investigation, much less the existence of a subpoena.[9]

[9] In this context, the distinction between the subpoena and the underlying investigation is significant. The SCA allows a court to order a service provider "not to notify any other person of the existence of the warrant, subpoena, or court order." 18 U.S.C. § 2705(b). If Facebook took the actions at issue in response to any indication of a criminal investigation of a customer – including informal requests for assistance, or reports about the existence of an investigation, or allegations by other customers of criminal conduct – a customer might correctly infer from Facebook's actions the existence of an

Moreover, the government provides no authority for the proposition that the SCA authorizes a court to prohibit an action that merely allows a customer to infer the existence of a subpoena – as opposed to prohibiting actual notification of that fact. The statute does not explicitly provide such authority, and such a broad reading of the law might have adverse consequences for a service provider or others that Congress did not intend. For example, if Facebook takes the actions for its own business purposes upon learning of a subpoena as a prophylactic measure to prevent a customer suspected of criminal conduct from using Facebook's services to harm others, prohibiting it from doing so would impose burdens on Facebook and others that a prohibition on actual notification of a subpoena would not.[10] Accordingly, in the absence of legal authority for its broad reading of the SCA, as well as the absence of any factual basis for determining that Facebook's actions would themselves disclose the existence of the pertinent subpoenas, I deny the government's request to prohibit Facebook from taking certain actions.

B. Imposing Secrecy Requirements on the Recipients of Federal Grand Jury Subpoenas

The SCA provision generally authorizing a court to issue a non-disclosure order to a service provider receiving a subpoena does not differentiate among the different specific types of subpoena

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investigation even if no subpoena existed that could serve as the predicate for a non-disclosure order. The SCA confers no authority to prohibit notification of the existence of an investigation – only "the existence of the warrant, subpoena, or court order." 18 U.S.C. § 2705(b). Without more information about the circumstances in which Facebook does and doesn't take the actions at issue, it is impossible to determine whether, in a given case, they would cause a customer to infer the existence of a subpoena.

[10] The government's broad reading of the SCA could also justify issuing an order requiring a service provider to make affirmatively false or misleading statements to its customers and to the public. *See generally* Wendy Everette, *"The F.B.I. Has Not Been Here (Watch Very Closely For The Removal Of This Sign)": Warrant Canaries And First Amendment Protection For Compelled Speech*, 23 Geo. Mason L. Rev. 377 (2016) (discussing the emergence of "warrant canaries" that periodically advise the public about the extent to which warrants and court orders have been served, to allow an inference of the existence of a warrant subject to a non-disclosure order if the periodic notification stops); Naomi Gilens, *The NSA Has Not Been Here: Warrant Canaries As Tools for Transparency in the Wake of the Snowden Disclosures*, 28 Harv. J.L. & Tech. 525 (2015) (same). I need not and do not consider here whether an order requiring a service provider to engage in such affirmative deception would be in tension with the First Amendment.

that a service provider might receive.[11] However, to the extent the statute provides for the issuance of an order prohibiting a service provider from disclosing the existence of a federal grand jury subpoena in particular, it is in tension with the specific rule that, as to federal grand jury proceedings, "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Fed. R. Crim. P. 6(e)(2)(A). The cited rule does not make any provision for imposing an obligation of secrecy on a witness or subpoena recipient. *See* Fed. R. Crim. P. 6(e)(2)(B); *see also* Fed. R. Crim. P. 6 advisory committee's note (1944 adoption note 2 to subdivision (e): "The rule does not impose any obligation of secrecy on witnesses.... The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate.").

I need not and do not resolve here the tension between the provision of the SCA allowing a court to impose a secrecy requirement on certain businesses receiving a wide array of state and federal compulsion orders and the rule specifically exempting federal grand jury witnesses from any secrecy requirement. My research to date reveals only two federal court opinions that address the matter: the two cases were decided in district courts outside of this circuit and reached opposite conclusions. *See In re Application of the U.S. For An Order Pursuant To 18 U.S.C. § 2705(b)*, 131 F. Supp. 3d 1266, 1276 (D. Utah 2015) (holding that the SCA permits the imposition of "secrecy obligations in addition to those stated in Rule 6(e)(2)"); *In re Application of U.S. for an Order Pursuant to 18 U.S.C. § 2705(b)*, 866 F. Supp. 2d 1172, 1173 (C.D. Cal. 2011) (holding that because of the prohibition of additional secrecy

[11] The SCA contemplates a variety of ways in which a government entity can compel a service provider to produce records, including by means of a warrant issued by a state or federal court; an administrative subpoena issued by a state or federal agency; a state or federal grand jury subpoena, or another kind of state or federal court order. *See* 18 U.S.C. § 2703(b)(1).

requirements in Fed. R. Crim. P. 6(e)(2)(A), the SCA "cannot properly be read as authorizing the Court to enjoin a provider from revealing that it has received a grand jury subpoena").[12]

The government's failure to establish the factual assertion necessary for an order under the SCA obviates the need for such a decision now. Should the government renew its applications based on individualized evidence that disclosure of a given subpoena will result in any of the harms listed in Section 2705(b), it should be prepared to demonstrate legal authority for the imposition of a secrecy requirement on a federal grand jury witness notwithstanding the specific prohibition in Rule 6.

III. Conclusion

For the reasons set forth above, I deny the application for a non-disclosure order in each of the captioned cases without prejudice to renewal upon a particularized showing of need. I respectfully direct the Clerk to create a separate public docket for each application, and within each such docket to file the pertinent application under seal to preserve the secrecy of the underlying criminal investigation, and to file this document, unsealed, on each such docket.

SO ORDERED.

Dated: Brooklyn, New York
May 12, 2016

/s/
JAMES ORENSTEIN
U.S. Magistrate Judge

[12] In a third case, *In re Application of the United States of Am. for Nondisclosure Order Pursuant to 18 U.S.C. § 2705(b) for Grand Jury Subpoena #GJ2014032122836*, 2014 WL 1775601, at *4 (D.D.C. Mar. 31, 2014), the court declined to issue a non-disclosure order without first allowing the subject of the proposed order (Twitter) to be heard. The magistrate judge's opinion did not refer explicitly to Rule 6(e)(2)(A), but did rely in part on the decision from the Central District of California cited above. *See id.* at *3. The district judge reviewing the magistrate judge's decision overruled it and issued the requested non-disclosure order. In doing so, the court noted that Rule 6(e) did not authorize seeking Twitter's input and permitted the sealing of the application and non-disclosure order; but the court did not address the applicability of Rule 6(e)(2)(A) to the viability of the government's request for a non-disclosure order under the SCA. *See Matter of Application of United States of Am. for an Order of Nondisclosure Pursuant to 18 U.S.C. §2705(B) for Grand Jury Subpoena # GJ2014031422765*, 41 F. Supp. 3d 1, 6-8 (D.D.C. 2014).

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

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

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

BACKGROUND

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

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

seeking "all subscriber information, limited to name, address, and length of service, for all services provided to or accounts held by the named subscriber and/or subscriber of the named account." Dkt. No. 7, Ex. A in 3:11-cv-2173 SI. By certifying, under section 2709(c)(1), that disclosure of the existence of the NSL 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," the FBI was able to prohibit petitioner from disclosing the existence of the NSL. 18 U.S.C. § 3511(b)(2-(3) (2014). On May 2, 2011, petitioner filed a Petition to Set Aside the National Security Letter and Nondisclosure Requirement, pursuant to 18 U.S.C. § 3511(a) and (b). *In re National Security Letter*, 3:11-cv-2173 SI. The government opposed the petition, filed a separate lawsuit seeking a declaration that petitioner was required to comply with the NSL, *United States Department of Justice v. Under Seal*, 3:11-cv-2667 SI, and filed a motion to compel compliance with the NSL.

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

[1] The version of the NSL statutes in effect at the time these lawsuits were filed in 2011 provided as follows. 18 U.S.C. §§ 2709(a) and (b) stated that a wire or electronic communication service provider was required to comply with a request for specified categories of subscriber information if the Director of the FBI or his designee certified that the records sought were relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person was not conducted solely on the basis of activities protected by the First Amendment to the Constitution of the United States. 18 U.S.C. §§ 2709(a)-(b) (2011). Section 2709(c)(1) provided that if the Director of the FBI or his designee certified that "there may result 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," 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

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

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

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issued within a year of the time a challenge to the nondisclosure order was made, a court could "modify or set aside such a nondisclosure requirement if it finds that there is 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 endanger the life or physical safety of any person." 18 U.S.C. § 3511(b) (2011). However, if a specified high ranking government official (i.e., the Attorney General, Deputy or Assistant Attorney Generals, the Director of the Federal Bureau of Investigation, or agency heads) certified that disclosure "may endanger the national security of the United States or interfere with diplomatic relations, such certification shall be treated as conclusive unless the court finds that the certification was made in bad faith." 18 U.S.C. § 3511 (b)(2) (2011).

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

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[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)).

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

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

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

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

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

In this Court's March 13, 2013 decision, the Court largely agreed with the analysis of the Second Circuit in *John Doe, Inc. v. Mukasey*, and held that although section 2709(c) did not need to satisfy the "extraordinarily rigorous" *Pentagon Papers* test,[3] section 2709(c) must still meet the

[3] In *New York Times v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam), the Supreme Court denied the United States' request for an injunction enjoining the *New York Times* and the *Washington Post* from publishing a classified government study. Citing Justice Stewart's concurrence, petitioners have contended throughout this litigation that the 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.

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

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

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

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

[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.

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

The consolidated appeals were submitted for decision following oral argument on October 8, 2014. On June 2, 2015, while the consolidated appeals were pending before the Ninth Circuit, Congress amended 18 U.S.C. §§ 2709 and 3511 through the passage of the USA Freedom Act of 2015 ("USAFA"), Pub. L. No. 114-23, 129 Stat. 268 (2015). In June 2015, the Ninth Circuit ordered the parties to file supplemental briefing regarding the impact of the amendments on the appeals. On August 24, 2015, the Ninth Circuit issued an order stating "[i]n light of the significant

[5] In a few instances, the government withdrew the information requests for particular 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).

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

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

> (a) Duty to provide.--A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.
>
> (b) Required certification.--The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may, using a term that specifically identifies a person, entity, telephone number, or account as the basis for a request--
>
> (1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and
>
> (2) request the name, address, and length of service of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely 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.

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." 18 U.S.C. § 3511(b)(2) (2016). The statute provides that the district court "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" one of the enumerated harms. *Id.* § 3511(b)(3) (2016). The USAFA repealed the provision formerly contained in section 3511(b)(2)-(3) that gave conclusive effect to good faith certifications by specified government officials. *See* H.R. Rep. No. 114-109, at 24 ("This section repeals a provision stating that a conclusive presumption in favor of the government shall apply where a high-level official certifies that disclosure of the NSL would endanger national security or interfere with diplomatic relations."). The USAFA also repealed the provision formerly set forth in section 3511(b)(3) under which an NSL recipient who unsuccessfully challenged a nondisclosure requirement a year or more after the issuance of the NSL was required to wait one year before seeking further judicial relief.

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

> (a) The recipient of a request for records, a report, or other information under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947 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. The court may modify or set aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful.
>
> (b) Nondisclosure.--
>
> (1) In general.--
>
> (A) Notice.--If a recipient of a request or order for a report, records, or other information under section 2709 of this title, section 626 or 627 of the Fair Credit Reporting Act (15 U.S.C. 1681u and 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

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

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

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

(2) Application contents.--An application for a nondisclosure order or extension thereof or a response to a petition filed under paragraph (1) shall include a certification from the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the Federal Bureau of Investigation, or a designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, or in the case of a request by a department, agency, or instrumentality of the Federal Government other than the Department of Justice, the head or deputy head of the department, agency, or instrumentality, 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 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.

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

C. Other Provisions of USAFA

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

> **III. Review Procedures**
>
> **A. Timeframe for Review**
>
> Under these NSL Procedures, the nondisclosure requirement of an NSL shall terminate upon the closing of any investigation in which an NSL containing a nondisclosure provision was issued except where the FBI makes a determination that one of the existing statutory standards for nondisclosure is satisfied. The FBI also will review all NSL nondisclosure determinations on the three-year anniversary of the initiation of the full investigation and terminate nondisclosure at that time, unless the FBI determines that one of the statutory standards for nondisclosure is satisfied. When, after the effective date of these procedures, an investigation closes and/or reaches the three-year anniversary of the initiation of the full investigation, the agent assigned to the investigation will receive notification, automatically generated by FBI's case management system, indicating that a review is required of the continued need for nondisclosure for all NSLs issued in the case that included a nondisclosure requirement. Thus, for cases that close after the three-year anniversary of the full investigation, the NSLs that continue to have nondisclosure requirements will be reviewed on two separate occasions; cases that 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.
>
> **B. Review Requirements**
>
> The assessment of the need for continued nondisclosure of an NSL is an 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

[8] The procedures are available at 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.

under the statutory standard for imposing a nondisclosure requirement when an NSL is issued—i.e., 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 physical safety of any person. *See, e.g.*, 18 U.S.C. § 2709(c). This assessment must be based on current facts and circumstances, although agents may rely on the same reasons used to impose a nondisclosure requirement at the time of the NSL's issuance where the current facts continue to support those reasons. If the facts no longer support the need for nondisclosure of an NSL, the nondisclosure requirement must be terminated.

Every determination to continue or terminate the nondisclosure requirement will be subject to the same review and approval process that NSLs containing a nondisclosure requirement are subject to at the time of their issuance. Thus, (i) the case agent will review the NSL, the original written justification for nondisclosure, and any investigative developments to determine whether nondisclosure should continue; (ii) the case agent will document the reason for continuing or terminating the nondisclosure requirement; (iii) the case agent's immediate supervisor will review and approve the case agent's written justification for continuing or terminating nondisclosure; (iv) an attorney—either the Chief Division Counsel or Associate Division Counsel in the relevant field office or an attorney with the National Security Law Branch at FBIHQ—will review and approve the case agent's written justification for continuing or terminating nondisclosure; (v) higher-level supervisors—either the Assistant Special Agent in Charge in the field or the Unit Chief or Section Chief at FBIHQ—will review and approve the case agent's written justification for continuing or terminating nondisclosure; and (vi) a Special Agent in Charge or a Deputy Assistant Director at FBIHQ will review and make the final determination regarding the case agent's written justification for 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.

C. Notification of Termination

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

. . .

Second, section 604 of the USAFA, titled "Public Reporting by Persons Subject to Orders," sets forth a structure by which persons subject to nondisclosure orders or requirements 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.

concurring).

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

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

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

[10] Petitioners A and B are represented by the same counsel, and filed virtually identical briefs in the briefing on remand. The main difference in the briefing is that the petitioner's motion in 3:11-cv-2173 SI additionally challenged the "compelled production" provision of section 2709(b) as unconstitutional. (In the Court's 2013 decision, the Court denied the government's 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 mooting 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.

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

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

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

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

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

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

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

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

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

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

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

[11] The Court does, however, recognize the differences between licensing schemes such as those at issue in *Freedman*, which always act as a restraint because such systems are applied to all 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

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

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

B. "Expeditious" Judicial Review

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

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

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

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

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

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

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

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

The amended statute now states, "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." 18 U.S.C. § 3511(b)(3) (2016). Section 3511(b)(2) now requires the government's application for nondisclosure order to include a certification from a specified government official that contains "a statement of specific facts indicating that the absence of a prohibition on disclosure may result in" an enumerated harm. In addition, through the USAFA Congress eliminated the "conclusive" nature of certain certifications by certain senior officials.

The Court concludes that as amended, section 3511 complies with constitutional requirements and cures the deficiencies previously identified by this Court. Section 3511 no longer contains the "essentially insurmountable" standard providing 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 result in an enumerated harm. The government argues, and the Court agrees, that in the USAFA, Congress implicitly ratified the Second Circuit's interpretation of section 3511 as "plac[ing] on the Government the burden to persuade a district court that there is a good reason to believe that disclosure may risk one of the enumerated harms, and that a district court, in order to maintain a nondisclosure order, must find that such a good reason exists." *John Doe, Inc.*, 549 F.3d at 875-76.[13] This conclusion is supported by the legislative history of the USAFA, which states that section 502 of the USAFA (which amended section 3511 as well as section 2709), "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); *see also Midatlantic Nat'l Bank v. N.J. Dep't of Envt'l Prot.*, 474 U.S. 494, 501 (1986) (citing the "normal rule of statutory construction" that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ."); *United States v. Lincoln*, 277 F.3d 1112, 1114 (9th Cir. 2002) (where Ninth Circuit had previously interpreted statutory definition of "victim" to include the United States and Congress amended that definition without excluding the United States, the court "inferred that Congress adopted the judiciary's interpretation.").[14]

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[13] In so interpreting the pre-USAFA version of section 3511, the Second Circuit accepted the government's concessions that (1) "'reason' in the quoted phrase means 'good reason'"; and (2) "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.

[14] The Court notes that the "good reason" standard is also discussed in the Attorney General's recently promulgated "Termination Procedures for National Security Letter Nondisclosure Requirement." Those procedures state, *inter alia*, "The FBI may impose a 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

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

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

The Court concludes that the amendments to section 3511 addressed the Court's concerns. 18 U.S.C. § 3511(b)(1)(C) now provides that upon review, a district court may "issue a nondisclosure order that includes conditions appropriate to the circumstances." 18 U.S.C. § 3511(b)(1)(C) (2016). At the hearing, the government stated that "conditions appropriate to the circumstances" could include a temporal limitation on nondisclosure, as well as substantive conditions regarding what information, such as the identity of the recipient or the contents of the subpoena, is subject to the nondisclosure order. The amended statutes also now authorize the Director of the FBI to permit additional disclosures concerning NSLs. *See* 18 U.S.C. §§ 2709(c)(2)(A)(iii) (2016) (recipient of NSL "may disclose information otherwise subject to any applicable nondisclosure requirement to . . . other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.")[15]; 18 U.S.C. § 2709(c)(2)(D) ("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."). In addition, Congress eliminated the provision that precluded certain NSL recipients from challenging a nondisclosure requirement more than once per year. USAFA § 502(f)(1), Pub. L. No. 114-23, 129 Stat. 268 (2015).

[15] The prior version of section 2709(c) permitted NSL recipients to disclose that they had 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).

In addition, on November 24, 2015, pursuant to section 502(f) of the USAFA, the Attorney General adopted "Termination Procedures for National Security Letter Nondisclosure Requirement." 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 nondisclosure requirement of an NSL three years after the initiation of a full investigation and at the closure of the investigation, and to terminate the nondisclosure requirement when the facts no longer support nondisclosure. These procedures apply to investigations that close or reach their three year anniversary on or after the effective date of the procedures. At the hearing in this case, the government stated that the investigations related to the NSLs issued to petitioners all remain open, and thus the procedures would apply when (and if) the investigations are closed.[16] The procedures state, *inter alia*,

> The assessment of the need for continued nondisclosure of an NSL is an 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 under the statutory standard for imposing a nondisclosure requirement when an NSL is issued—i.e., 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 physical safety of any person. *See, e.g.*, 18 U.S.C. § 2709(c). This assessment must be based on current facts and circumstances, although agents may rely on the same reasons used to impose a nondisclosure requirement at the time of the NSL's issuance where the current facts continue to support those reasons. If the facts no longer support the need for nondisclosure of an NSL, the nondisclosure requirement must be terminated.

Id.

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

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[16] The FBI has also re-reviewed the need for the nondisclosure requirements for these 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.

provide a further mechanism for review of nondisclosure requirements.

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

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

In addition to the parties' combined challenge to the constitutionality of the statutes and regulations now governing NSL requests, this Court is presented with consideration of the appropriateness of continued nondisclosure of the four specific NSL applications which gave rise to these cases. The Court has reviewed, *in camera* and subject to complex security restrictions, the certifications drafted pursuant to amended 18 U.S.C. § 3511(b)(2), supporting the government's request for continued nondisclosure of the existence of the NSLs. The regulations and the case law then require that this Court determine whether there is a reasonable likelihood that disclosure of the information subject to the nondisclosure requirement would 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 a person's life or physical safety.

As to three of the certifications (in cases c:13-cv-1165 SI and 3:11-cv-2173 SI), the Court finds that the declarant has made such a showing. As to the fourth (in case 3:13-mc-80089 SI), the Court finds that the declarant has not. Nothing in the certification suggests that there is a reasonable likelihood that disclosure of the information subject to the nondisclosure requirement would 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 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

SUSAN ILLSTON
United States District Judge

United States District Court
Northern District of California

Waiting for Godot

tragicomedy in 2 acts

By Samuel Beckett

Estragon
Vladimir
Lucky
Pozzo
a boy

ACT I

Act II

A country road . A tree . Evening.

Estragon, sitting on a low mound, is trying to take off his boot. He pulls at it with both hands, panting. He gives up, exhausted, rests, tries again.

As before.

Enter Vladimir.

ESTRAGON:

(*giving up again*). Nothing to be done.

VLADIMIR:

(*advancing with short, stiff strides, legs wide apart*). I'm beginning to come round to that opinion . All my life I've tried to put it from me, saying Vladimir, be reasonable, you haven't yet tried everything. And I resumed the struggle . (*He broods, musing on the struggle. Turning to Estragon.*) So there you are again.

ESTRAGON:

Am I?

VLADIMIR:

I'm glad to see you back. I thought you were gone forever.

ESTRAGON:

Me too.

VLADIMIR:

Together again at last! We'll have to celebrate this. But how? (*He reflects.*) Get up till I embrace you.

ESTRAGON:

(*irritably*). Not now, not now.

VLADIMIR:

(*hurt, coldly*). May one inquire where His Highness spent the night?

ESTRAGON:

In a ditch.

VLADIMIR:

(*admiringly*). A ditch! Where?

ESTRAGON:

(*without gesture*). Over there.

VLADIMIR:

And they didn't beat you?

ESTRAGON:

Beat me? Certainly they beat me .

VLADIMIR:

The same lot as usual?

ESTRAGON:

The same? I don't know.

VLADIMIR:

When I think of it . . . all these years . . . but for me . . . where would you be . . . (*Decisively.*) You'd be nothing more than a little heap of bones at the present minute, no doubt about it.

ESTRAGON:

And what of it?

VLADIMIR:

(*gloomily*). It's too much for one man. (*Pause. Cheerfully.*) On the other hand what's the good of losing heart now, that's what I say. We should have thought of it a million years ago, in the nineties .

ESTRAGON:

Ah stop blathering and help me off with this bloody thing.

VLADIMIR:

Hand in hand from the top of the Eiffel Tower, among the first. We were respectable in those days. Now it's too late. They wouldn't even let us up. (*Estragon tears at his boot.*) What are you doing?

ESTRAGON:

Taking off my boot. Did that never happen to you?

VLADIMIR:

Boots must be taken off every day , I'm tired telling you that. Why don't you listen to me?

ESTRAGON:

(*feebly*). Help me!

VLADIMIR:

It hurts ?

ESTRAGON:

(*angrily*). Hurts! He wants to know if it hurts!

VLADIMIR:

(*angrily*). No one ever suffers but you. I don't count. I'd like to hear what you'd say if you had what I have.

ESTRAGON:

It hurts?

VLADIMIR:

(*angrily*). Hurts! He wants to know if it hurts!

ESTRAGON:

(*pointing*). You might button it all the same.

VLADIMIR:

(*stooping*). True. (*He buttons his fly.*) Never neglect the little things of life.

ESTRAGON:

What do you expect, you always wait till the last moment.

VLADIMIR:

(*musingly*). The last moment . . . (*He meditates.*) Hope deferred maketh the something sick , who said that?

ESTRAGON:

Why don't you help me?

VLADIMIR:

Sometimes I feel it coming all the same. Then I go all queer. (*He takes off his hat , peers inside it, feels about inside it, shakes it, puts it on again.*) How shall I say? Relieved and at the same time . . . (*he searches for the word*) . . . appalled. (*With emphasis.*) AP-PALLED. (*He takes off his hat again, peers inside it.*) Funny. (*He knocks on the crown as though to dislodge a foreign body, peers into it again, puts it on again.*) Nothing to be done. (*Estragon with a supreme effort succeeds in pulling off his boot. He peers inside it, feels about inside it, turns it upside down, shakes it, looks on the ground to see if anything has fallen out, finds nothing, feels inside it again, staring sightlessly before him.*) Well?

ESTRAGON:

Nothing.

VLADIMIR:

Show me.

ESTRAGON:
There's nothing to show.

VLADIMIR:
Try and put it on again.

ESTRAGON:
(*examining his foot*). I'll air it for a bit.

VLADIMIR:
There's man all over for you, blaming on his boots the faults of his feet. (*He takes off his hat again, peers inside it, feels about inside it, knocks on the crown, blows into it, puts it on again.*) This is getting alarming. (*Silence. Vladimir deep in thought, Estragon pulling at his toes.*) One of the thieves was saved . (*Pause.*) It's a reasonable percentage . (*Pause.*) Gogo .

ESTRAGON:
What?

VLADIMIR:
Suppose we repented.

ESTRAGON:
Repented what?

VLADIMIR:
Oh . . . (*He reflects.*) We wouldn't have to go into the details.

ESTRAGON:
Our being born?

Vladimir breaks into a hearty laugh which he immediately stifles, his hand pressed to his pubis, his face contorted.

VLADIMIR:
One daren't even laugh any more.

ESTRAGON:

Dreadful privation.

VLADIMIR:

Merely smile. (*He smiles suddenly from ear to ear, keeps smiling, ceases as suddenly.*) It's not the same thing. Nothing to be done. (*Pause.*) Gogo.

ESTRAGON:

(*irritably*). What is it?

VLADIMIR:

Did you ever read the Bible?

ESTRAGON:

The Bible . . . (*He reflects.*) I must have taken a look at it.

VLADIMIR:

Do you remember the Gospels?

ESTRAGON:

I remember the maps of the Holy Land . Coloured they were. Very pretty. The Dead Sea was pale blue. The very look of it made me thirsty. That's where we'll go, I used to say, that's where we'll go for our honeymoon. We'll swim. We'll be happy.

VLADIMIR:

You should have been a poet.

ESTRAGON:

I was . (*Gesture towards his rags .*) Isn't that obvious?

Silence.

VLADIMIR:

Where was I . . . How's your foot?

ESTRAGON:

Swelling visibly.

VLADIMIR:

Ah yes, the two thieves . Do you remember the story?

ESTRAGON:

No.

VLADIMIR:

Shall I tell it to you?

ESTRAGON:

No.

VLADIMIR:

It'll pass the time. (*Pause.*) Two thieves, crucified at the same time as our Saviour. One—

ESTRAGON:

Our what?

VLADIMIR:

Our Saviour. Two thieves. One is supposed to have been saved and the other . . . (*he searches for the contrary of saved*) . . . damned .

ESTRAGON:

Saved from what?

VLADIMIR:

Hell.

ESTRAGON:

I'm going.

He does not move.

VLADIMIR:

And yet . . . (*pause*) . . . how is it —this is not boring you I hope— how is it that of the four Evangelists only one speaks of a thief being saved . The four of them were there —or thereabouts— and only one speaks of a thief being saved . (*Pause.*) Come on , Gogo, return the ball , can't you, once in a while ?

ESTRAGON:
(*with exaggerated enthusiasm*). I find this really most extraordinarily interesting .

VLADIMIR:
One out of four. Of the other three two don't mention any thieves at all and the third says that both of them abused him .

ESTRAGON:
Who?

VLADIMIR:
What?

ESTRAGON:
What's all this about? Abused who?

VLADIMIR:
The Saviour.

ESTRAGON:
Why?

VLADIMIR:
Because he wouldn't save them.

ESTRAGON:
From hell?

VLADIMIR:
Imbecile! From death.

ESTRAGON:
I thought you said hell.

VLADIMIR:
From death , from death.

ESTRAGON:
Well what of it?

VLADIMIR:
Then the two of them must have been damned.

ESTRAGON:
And why not?

VLADIMIR:
But one of the four says that one of the two was saved.

ESTRAGON:
Well? They don't agree and that's all there is to it.

VLADIMIR:
But all four were there. And only one speaks of a thief being saved. Why believe him rather than the others?

ESTRAGON:
Who believes him?

VLADIMIR:
Everybody. It's the only version they know.

ESTRAGON:
People are bloody ignorant apes .

He rises painfully, goes limping to extreme left, halts, gazes into distance off with his hand screening his eyes, turns, goes to extreme right, gazes into distance. Vladimir watches him, then goes and picks up the boot, peers into it, drops it hastily.

VLADIMIR:
Pah!

He spits. Estragon moves to center, halts with his back to auditorium.

ESTRAGON:

Charming spot. (*He turns, advances to front, halts facing auditorium* .) Inspiring prospects . (*He turns to Vladimir.*) Let's go .

VLADIMIR:

We can't.

ESTRAGON:

Why not?

VLADIMIR:

We're waiting for Godot.

ESTRAGON:

(*despairingly*). Ah! (*Pause.*) You're sure it was here?

VLADIMIR:

What?

ESTRAGON:

That we were to wait.

VLADIMIR:

He said by the tree . (*They look at the tree.*) Do you see any others?

ESTRAGON:

What is it?

VLADIMIR:

I don't know. A willow.

ESTRAGON:

Where are the leaves?

VLADIMIR:

It must be dead.

ESTRAGON:
No more weeping.

VLADIMIR:
Or perhaps it's not the season.

ESTRAGON:
Looks to me more like a bush.

VLADIMIR:
A shrub.

ESTRAGON:
A bush.

VLADIMIR:
A—. What are you insinuating? That we've come to the wrong place?

ESTRAGON:
He should be here.

VLADIMIR:
He didn't say for sure he'd come.

ESTRAGON:
And if he doesn't come?

VLADIMIR:
We'll come back tomorrow .

ESTRAGON:
And then the day after tomorrow.

VLADIMIR:
Possibly.

ESTRAGON:

And so on.

VLADIMIR:
The point is—

ESTRAGON:
Until he comes.

VLADIMIR:
You're merciless .

ESTRAGON:
We came here yesterday.

VLADIMIR:
Ah no, there you're mistaken.

ESTRAGON:
What did we do yesterday?

VLADIMIR:
What did we do yesterday?

ESTRAGON:
Yes.

VLADIMIR:
Why . . . (*Angrily* .) Nothing is certain when you're about .

ESTRAGON:
In my opinion we were here .

VLADIMIR:
(*looking round*). You recognise the place?

ESTRAGON:
I didn't say that.

VLADIMIR:
Well?

ESTRAGON:
That makes no difference.

VLADIMIR:
All the same . . . that tree . . . (*turning towards auditorium*) that bog . . .

ESTRAGON:
You're sure it was this evening ?

VLADIMIR:
What?

ESTRAGON:
That we were to wait.

VLADIMIR:
He said Saturday. (*Pause.*) I think.

ESTRAGON:
You think.

VLADIMIR:
I must have made a note of it. (*He fumbles in his pockets, bursting with miscellaneous rubbish.*)

ESTRAGON:
(*very insidious*). But what Saturday ? And is it Saturday? Is it not rather Sunday? (*Pause.*) Or Monday? (*Pause.*) Or Friday?

VLADIMIR:
(*looking wildly about him, as though the date was inscribed in the landscape*). It's not possible!

ESTRAGON:

Or Thursday?

VLADIMIR:
What'll we do?

ESTRAGON:
If he came yesterday and we weren't here you may be sure he won't come again today.

VLADIMIR:
But you say we were here yesterday.

ESTRAGON:
I may be mistaken. (*Pause.*) Let's stop talking for a minute, do you mind?

VLADIMIR:
(*feebly*). All right. (*Estragon sits down on the mound. Vladimir paces agitatedly to and fro, halting from time to time to gaze into distance off. Estragon falls asleep. Vladimir halts finally before Estragon.*) Gogo! . . . Gogo! . . . GOGO!

Estragon wakes with a start.

ESTRAGON:
(*restored to the horror of his situation*). I was asleep! (*Despairingly.*) Why will you never let me sleep?

VLADIMIR:
I felt lonely .

ESTRAGON:
I had a dream.

VLADIMIR:
Don't tell me !

ESTRAGON:
I dreamt that—

THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

CHAPTER I

Early Background

The antecedent history of the Fourth Amendment to the Constitution concerns itself primarily with those events which took place in England, in France, and in the American Colonies, in the thirty years preceding the adoption of the Amendment, which were immediately and directly the moving factors in the elevating of the principle of reasonable search and seizure to a constitutional instead of a merely legal significance. Prior to this period, however, there are several hundred years of English history in which also appear many instances of arbitrary and unrestricted and, for the most part, unchallenged powers in this regard.

Before entering into a discussion of this historical background, it may be of interest to look back for a moment upon several aspects of the subject even more remóte. The peculiar immunity that the law has thrown around the dwelling house of man, pithily expressed in the maxim, "a man's house is his castle," was not an invention of English jurisprudence. Even in ancient times there were evidences of that same concept in custom and law, partly as a result of the natural desire for privacy, partly an outgrowth, in all probability, of the emphasis placed by the ancients upon the home as a place of hospitality, shelter, and protection.

Biblical literature affords a number of illustrative instances of a relatively strong respect for the dwelling as a place which was not subject to arbitrary visitation, even on the part of official authority. In the story concerning Achan, Joshua did not send his messengers to search for and seize the prohibited articles in Achan's tent, even after his detec-

tion, until the latter had first confessed both his deed and the place where the articles were concealed.[1] Indeed, it seems that under the Hebrew law there was little or no occasion for the question to arise, since the cases appear to turn solely upon the testimony of witnesses. The extreme solicitude in such matters shown by the authorities of that particular jurisprudence is demonstrated in a passage of the Talmud which states that no writ of replevin of personal property is to be granted by the court when the bailee of that property ***denies its possession*** before the court, for to do so would make it appear that the court issued a writ, the execution of which was not certain. The rule goes on to hold that where the bailee *admits possession,* but not ownership by the plaintiff, a writ might be issued.[2]

Where the point does arise incidentally in certain civil cases, a right not to be disturbed in the occupation of the home seems everywhere to be upheld. One old leading commentator broadly states as a principle of ancient law that no one could enter the house of another without express permission.[3] By Biblical law a creditor is forbidden to enter his debtor's house to get security for his debt but must wait outside for the bringing forth of the pledge.[4] Even a bailiff of the court is enjoined from entering for that purpose.[5] And the high regard that the law had for the home is reflected in the protection with which it sought to surround it by punishing housebreaking at night with the death penalty.[6]

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[1] Joshua 7: 10-26. Earlier in the same book we find that when the king of Jericho received information of the presence of the spies in the dwelling of Rachab, he did not thereupon dispatch a searching party to that place, but sent a message ordering Rachab to produce them. This gave her the opportunity to conceal the spies and throw their pursuers off the track. *Ibid.* 2: 1-7. Note also the apparent hesitation of the crowd, even in a community of the enlightenment of Sodom, in front of the house of Lot and the demand, before any attempt was made to force an entry, that he bring out the strangers he had sheltered. Genesis 19: 4-11.

[2] Michael L. Rodkinson, *The Babylonian Talmud* (Boston, 1918), V, 158.

[3] Rosh, in the *Hosen Mishpat*, chap. 389, sec. 5.

[4] Deuteronomy 24: 10. [5] Rodkinson, VI, 113.

[6] W. W. Davies, *Codes of Hammurabi and Moses* (Cincinnati, 1915), p. 33. Article 21 of the Code of Hammurabi, a contemporary of Abraham, provides: "If a man makes a breach into a house, one

In Roman history and law there are also instances of the prevalence of similar ideas. According to the primitive view, the house was not only an asylum but was under the special protection of the household gods, who dwelt and were worshipped there.[7] If even an enemy reached the fireplace of the house, we read that he was sure of protection.[8] Cicero expressed the general feeling in this matter when he said in one of his orations: "What is more inviolable, what better defended by religion than the house of a citizen. . . . This place of refuge is so sacred to all men, that to be dragged from thence is unlawful."[9]

As regards Roman criminal procedure, the prosecution in most cases was a private one and began with the accusation of one party by another, before the proper court, of the commission of some criminal offense. A number of safeguards against oppression were thrown around the accused which are of particular interest here. The accuser had to state the grounds of his action and take oath that his suit was not vexatious or frivolous. If the suit proved in the end to be such, the defendant had an action for malicious prosecution, an offense punishable at that time by fine or imprisonment. The court in addition had to be satisfied that there was sub-

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shall kill him in front of the breach, and bury him in it." Cf. Exodus 22: 2, 3. The code may also be found in A. Kocourek and J. H. Wigmore, *Sources of Ancient and Primitive Law* (Boston, 1915), pp. 395 ff.

[7] J. B. Moyle, *Imperatoris Iustiniani Institutionem* (Oxford, 1923), p. 515.

[8] Example of Coriolanus and Aufidius, cited by the South Carolina patriot of the Revolutionary War, Judge William Henry Drayton, in his charge to the grand jury in 1776. Hezekiah Niles, *Principles and Acts of the Revolution* (Baltimore, 1822), p. 88.

[9] Professor Radin states that many of the safeguards against oppression found in our present-day bills of rights were maintained in Roman law as general principles and embodied in maxims which were frequently cited. "The famous maxim 'every man's house is his castle' cited by Coke, 5 Rep. 92, and generally regarded as a peculiarly English privilege, comes directly from the Roman law. *Nemo de domo sua extrahi debet.*" But as has been indicated above, it would seem that the concept far antedates that body of law.

Professor Radin goes on to say that the criminal systems of England and all other modern states, until the 19th century, were far more rigid and less humane than the Roman system adopted by the Corpus Juris. Max Radin, *Roman Law* (St. Paul, 1927), pp. 475-476.

stantial and probable cause for the complaint. The suit was then held over and a certain period of time set for an investigation by the accuser.[10]

These salutary precautions having been observed, however, the accuser was allowed quite a bit of latitude in his investigation. This was a function which was left entirely to him to carry out. He was granted two kinds of precepts or warrants. One was an official writ of the court, which stated the names of the parties and the nature of the accusation and commanded all officials or other individuals to assist the complainant in the gathering of evidence and the summoning of witnesses. The other was a statement of the law that regulated the procedure of gathering the evidence. It provided that all papers and documents relating to the case were at the disposal of the prosecutor[11] and everyone was placed under pain of penalty for resistance to the proper execution of the precept.[12] Armed with these warrants, the accuser had what apparently amounted to a general power of search for the desired documentary evidence. He could search the house of the defendant or of any other person.[13] Cicero tells of a number of these formal searches in his prosecution of Verres.[14] The wording of the law set forth in the writ

[10] A. W. Zumpt, *Criminalprocess der römischen Republik* (Leipzig, 1871), pp. 142 ff., 150 ff.

[11] *Ibid.*, pp. 304 ff.

[12] *Ibid.*, p. 195.

[13] *Ibid.*, pp. 307-308, and note, p. 308; A. H. J. Greenidge, *Legal Procedure of Cicero's Time* (New York, 1901), pp. 493-494.

[14] Cicero, *The Verrine Orations* (tr. L. H. G. Greenwood, New York, 1928), I, Bk. i, pp. 19, 50; Bk. ii, pp. 74, 182; II, Bk. iii, pp. 66, 154. In certain cases, such as those concerning election frauds, the accused had a competence probably equal to that of the accuser regarding search for documentary evidence. See Zumpt, p. 305 n.; Theodor Mommsen, *Römisches Strafrecht* (Leipzig, 1899), p. 420.

According to authorities, this right of search for evidence seems to have been a principle dating from very early times. See Gustav Geib, *Geschichte des römischen Criminalprocesses* (Leipzig, 1842), p. 144. His citation, however, of an incident in Diony., IV, 48, 57, is a doubtful precedent, since there the accused practically requested the search to be made. See also Mommsen, p. 418.

In case of abuse of power, the complaint could be made to the praetor in Rome or to the consul in the provinces, but the warrant was so general that these officials, according to Zumpt (p. 308), could give little protection.

Cicero had was so general that his authority to search everywhere seems to have been practically unlimited.

When it came, however, to the seizing and the taking away of documents and records, the Roman law showed itself a little more thoughtful of the interests of the accused and took precautions to prevent any forging or insertion of evidential papers.[15] The accuser had to seal up the documents in the presence of witnesses and within a certain time deliver what he had taken to the court. The court then, as its first duty in the case, had to examine the seal and investigate the attestation of the witnesses.[16]

The search for stolen goods was another field in which the question of search and seizure was involved. In this situation the law displayed a greater concern for safeguarding the suspected person. Here we find a peculiar combination of modern legal principle and primitive ceremonialism. The victim of a theft, before he could institute a search in the house of a suspect, *had to describe with particularity* the goods he was seeking. This precaution, it will be remembered, was lacking in the method of gathering evidence discussed above.[17] The next step was the procedure called *lance et licio,*—as old, incidentally, as the Twelve Tables. This

[15] See the citations to Cicero's *Verrine Orations* in Greenidge, p. 494.

[16] The weight given documentary evidence in the time of the juristic classics was such that, according to Geib, once the authenticity of a document was proven, all contradictory testimony of witnesses was simply excluded, a rule that was also recognized in later periods. But as the weight accorded this form of evidence increased, a limitation appeared which Geib finds it difficult to reconcile with the spirit of inquisitorial procedure. This limitation was that the production of documents could not be compelled. This exemption stands in such remarkable contradiction to that procedure that Geib hardly considers it an all-embracing principle of the period. He prefers to suppose that since in certain crimes search was permitted, the rule had some exceptions. Geib, pp. 644 ff.

[17] Mommsen, p. 748, quoting the following passage in Paulus, 2, 31, 22: *Qui furtum quaesiturus est, antequam quaerat, debet dicere, quid quaerat et rem suo nomine et sua specie designare.* Mommsen also cites a provision in the *Digest* (11, 4, 1, 8a) which required particularity in the description of fugitive slaves for whom search was to be made. See C. H. Monro's translation of the *Digest of Justinian* (Cambridge, 1909), II, 237 ff.; A. F. von Pauly, *Real-Encyclopädie der classischen Altertumswissenschaft* (Stuttgart, 1912), VII, 393-394.

was a ceremony which, although outwardly a mere form, reveals an underlying practical purpose. Clad only in an apron (*licio*), and bearing a platter in his hand (*lance*), the person whose goods had been stolen entered and searched, in the presence of witnesses, the house where the goods were suspected to be.[18] He was ordinarily accompanied in his search by a bailiff of the court, who represented his legal authority; by a public crier, who proclaimed the theft of the various articles; and by a community slave, who broke open doors whenever necessary. If anyone offered resistance to the search or refused to give up the property if and when it was discovered, he was punished with the same penalty as attached to the theft itself.[19]

As regards Anglo-Saxon England, the Roman laws and institutions implanted in that country during the régime of the Empire exercised, in general, a strong influence upon later Anglo-Saxon law.[20] However, due to the scantiness of material concerning what was, at the most, an undeveloped legal system of a primitive civilization, the information which is available concerning this period is not particularly helpful. The fact, that the system of frankpledge and proof by compurgation and ordeal which existed then seems to have done away to a great extent with the necessity of discovering specific evidence of wrongdoing, no doubt also has much to do with this situation. Broadly speaking, however, there were indications of a regard for the privilege of the individual not to be disturbed in the peaceful occupancy of his home. The law, for example, recognized the crime of *hamsocn* (or *ham-*

[18] The apron as the sole article of apparel was prescribed evidently to prevent concealing of objects in the garments and "planting" them in someone's house in order to place a false charge. The platter, Mommsen says, was probably a symbol of the intended seizure and carrying away of the goods. According to Petronius, however, the searcher carried in the platter the stipulated reward, together with a certain "caution-money" by which he pledged himself to secrecy to his informer. See Mommsen, pp. 748-749, and notes.

[19] *Ibid.*, citing *Institutes*, 4, 1, 4. Later on, in the time of Justinian and Plautus, these searches were undertaken and conducted by public officers and not by the complainant. Moyle, p. 516 n.

[20] See the introduction to John Reeves' *History of English Law* (Finlason ed., Philadelphia, 1880), I, lxii ff.

fare), an offense the whole gist of which was solely the forcible entry into a man's dwelling, a "*domus invasio.*" [21] Throughout the laws of Anglo-Saxon and Norman times this offense was looked upon with great severity, justifying the killing of the perpetrator in the act without the payment of compensation usual in those days.[22] In the reign of King Edmund (940-946) the law provided that the person who committed this crime should forfeit all of his property, and even his life if the king so willed.[23]

Alfred the Great (871-891) was a king who seemed to be most solicitous of the rights of his subjects. One old work gives several examples which are of particular interest here and indicate how, at least during Alfred's reign, judges who valued their heads had to be careful not to make mistakes. The *Mirrour of Justices* relates,[24] among other such instances, that Alfred "hanged Ostline because he judged Seaman to death by a false warrant, grounded upon false suggestion, which supposed Seaman to be a person in the warrant, which he was not." And "he hanged Maclin, because he hanged Helgrave by warrant of indictment not special." [25]

Magna Carta frequently has been cited as one of the foun-

[21] See the definitions of *hamsocn* in *Ancient Laws and Institutes of England* (London, 1840), II, Glossary; *Select Pleas of the Crown* (W. Maitland, ed.), "Selden Society Publications" (London, 1888), I, 142; Henry de Bracton, *Legibus et Consuetudinibus Angliae* (as translated in No. 70 of the Chronicles of Great Britain and Ireland, London, 1883), II, 464, 465. The force of the distinction between this offense and those that were aggravations thereof is well brought out in a case that came up in the year 1201: "Roger appeals William for that he came with armed hand and with his force, and broke his houses *in hamsoken*, and *in felony* robbed him of six marks of silver," etc. *Select Pleas*, p. 43. See also cases 60, 86, 165 in the same work, and especially *Mirrour of Justices* (Washington, 1903), pp. 50-51.

[22] Laws of King Cnut (1017-1035), in *Ancient Laws and Institutes of England*, I, 409.

[23] *Ibid.*, p. 251. Most of the Anglo-Saxon codes, however, provided for the payment of a fine to the king as one of his "rights." *Ibid.*, pp. 382 n., 383, 409, 587, etc.

[24] This work, attributed to Andrew Horne, was written about 1290. Many say that the substance of the *Mirrour of Justices* is older than the Conquest.

[25] *Ibid.*, pp. 246, 248. As related to the principle against self-incrimination, it is recorded that "he hanged Seafaule because he judged Olding to death for not answering." *Ibid.*, p. 246.

dations of the principle against unreasonable search and seizure. Careful consideration, however, should be exercised in according a proper place to that document in the history of the Fourth Amendment. The oft-quoted Article 39 of Magna Carta provides as follows: "No freeman shall be taken or [and] imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land." This early "due process" clause has been taken to mean much more than it originally did, because of the general tendency—and indeed the great temptation—to explain what is not altogether familiar in an ancient document with what is familiar in one's own experience.[26] Actually, its general and comprehensive phraseology was aimed at certain definite abuses of power by King John,[27] consisting in the main of his practice of taking the law into his own hands and, without legal judgment of any kind or respect for any form of legal procedure whatever, proceeding with or sending an armed force to punish by imprisonment or seizure of property or worse, some person who displeased or disobeyed him.[28] The object of the provision was to prevent in the future all such *extra-legal* procedure, to affirm the validity of feudal law and custom against arbitrary caprice and the indiscriminate use of force,[29] and to prohibit constituted authority from placing execution before judgment.[30]

But here were some roots, these broad generalities in favor

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[26] William S. McKechnie, *Magna Carta* (Glasgow, 1905), p. 456.

[27] *Ibid.*, p. 437. See the same author, "Magna Carta, 1215-1915," in *Magna Carta Commemoration Essays* (H. E. Malden, ed., Aberdeen, 1917), p. 10.

[28] F. M. Powicke, "Per Iudicum Parium Vel Per Legem Terrae," *ibid.*, p. 103; McKechnie, p. 451; John Lingard, *History of England* (London, 1849), II, 355-356; Reeves, II, 41 n.

[29] See Sir Paul Vinogradoff, "Clause 39," in *Magna Carta Commemoration Essays*, pp. 78-95.

[30] This type of justice was illustrated in the ancient tradition quoted by McKechnie, p. 437:

> I oft have heard of Lydford law,
> How in the morn they hang and draw,
> And sit in judgment after.

of law and liberty, out of which could grow the constitutional maxims of later centuries. They pointed in the direction of the more definite principles which were to develop and they provided imposing precedent and respectable argument for their establishment. Coke and other eminent authorities assumed, perhaps honestly, the existence in some part of Magna Carta of a warrant for every legal principle established in their own day. Moreover, the veneration with which Coke's learning was viewed secured the acceptance of his opinions as to exactly what was meant by the more or less uncertain provisions,[31] although these very errors of Coke and others were of incalculable service to the cause of constitutional progress.[32] "By discovering precedents for a desired reform in some obscure passage of Magna Carta," writes McKechnie, "a needed innovation might be readily represented as a return to the time-honored practice of the past."[33] From this viewpoint more than from any other, the Great Charter may be regarded as important in the background of the principle of reasonable search and seizure. Chapter 39 was relied upon in the arguments and decisions which did much to establish the right as one of constitutional law. It was cited, for example, by James Otis in his famous argument against writs of assistance,[34] by Chief Justice Pratt in *Huckle* v. *Money*,[35] and by Lord Mansfield in *Money* v. *Leach*.[36] These cases will be discussed more fully a little later on.

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[31] *Ibid.*, p. 447. McKechnie, in *Magna Carta Commemoration Essays*, pp. 12, 19. Cf. James Fitzjames Stephen's comment on the Bill of Rights of 1688 in his *History of the Criminal Law of England* (London, 1883), I, 412.

[32] George B. Adams, *Origin of the English Constitution* (New Haven, 1912), pp. 242-244.

[33] McKechnie, in *Magna Carta Commemoration Essays*, p. 11. See also William Holdsworth, *History of the English Law* (3d ed., London, 1926), IX, 104.

[34] *Paxton's Case* (1761), Josiah Quincy, *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, 1761-1772* (Boston, 1865), pp. 51 ff.

[35] 2 Wils. 205, 95 Eng. Rep. 768 (1763).

[36] 3 Burr., 1692, 1742, 97 Eng. Rep. 1050, 1075, *State Trials*, XIX, 1001 (1765). But Madison, in the debate in the first Congress on the occasion of his proposing and sponsoring a bill of rights, stated: "Magna Carta does not contain any one provision for the security

During the Anglo-Norman period, as was the case with the Anglo-Saxon period, just what the rule was which governed official search and seizure within the law is a question upon which hardly any information seems to be available. There is little reason to believe, however, that the authorities, in those cases where official search was necessary, were hampered by any of the limitations and safeguards which we have today.[37] It is most probable that the official badge or commission was sufficient warrant, in everyday administration of the criminal law, for any action of this kind, and that the written warrant was a later development.[38]

However, the objection and resistance of the English people to general inquisitorial methods and their attendant abuses were early reflected in the important statute passed in 1360 in the reign of Edward III, pertaining to powers of justices of the peace. "The King will," the act provided, "that all general inquiries before this time granted within any seignories, for the mischiefs and oppression which have been done to the people by such inquiries, shall utterly cease and be repealed." [39]

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of those rights, respecting which the people of America are most alarmed." *Annals of Congress*, 1st Cong., 1st sess., p. 453. Cf. F. J. Stimson, *Law of the Federal and State Constitutions* (Boston, 1908), p. 45; H. D. Hazeltine, "The Influence of Magna Carta on American Constitutional Development," in *Magna Carta Commemoration Essays*, pp. 215 ff. On the subject of Magna Carta as related to this discussion, see also *Mirrour of Justices*, chap. v, sec. 2 (p. 262); *ibid.*, p. 293; Holdsworth, I, 60 ff. For Coke's generally discredited exposition of Article 39, see his *Institutes of the Laws of England* (London, 1671), I, 45 ff.

[37] Once in a while, the excesses of minor officials would occasion a demand for reform. For examples of unwarranted seizures of property and of orders that satisfaction be made to those damaged and that in the future *express* authorization should be necessary, see Britton, who wrote about 1300 (translation by F. M. Nichols, Washington, 1901, p. 77). See also, Stephen, I, 81, on the "Inquest of the Sheriffs" in 1170; 3 Hen. VIII, ch. 12.

[38] See Stephen, I, 189 ff.

[39] 34 Edw. III, ch. 1 (1360). The practice of issuing general commissions of inquiry, such as for the arrest of all suspected of having committed a certain type of criminal offense, and imprisonment until further order, was prevalent during this period. Imprisonment of two or three years pending trial was not extraordinary. *Select Cases before the King's Council, 1243-1482* (I. S. Leadam and J. F. Baldwin, edd.), "Selden Society Publications" (Cam-

The legislative history of search and seizure in England may be traced back to the first half of the fourteenth century. Beginning with the early statutes and running down to those enacted in the latter part of the seventeenth century, legislation of this character seems to have been uniformly characterized by the granting of general and unrestricted powers. It was not until the close of this period that a consciousness that such authority was arbitrary and inconsiderate of the liberties of the subject began to filter into parliamentary legislation. This reaction was probably influenced in large measure by the development of more modern ideas in the common law, as we shall see presently.

The first act which comes to attention was passed in 1335. It provided that innkeepers in passage ports were to search guests for false money imported and were to be rewarded with one-fourth of any resulting forfeiture. Official searchers in turn were to search the inns to check up on the innkeepers and receive the same reward for discovery.[40] It may be stated, parenthetically, that still another statute was found necessary in 1402 to regulate abuses in turn among the searchers of the customs.[41]

In the reign of Henry VI (1422-1461), the king granted the Company of Dyers in London the privilege of searching

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bridge, 1918), XXXV, p. xl. See also *ibid.*, pp. liii, xc, xcii, civ ff., 59, 83, 85, etc.; 27 Edw. III, St. I, ch. 3 (1352).

Discussing the principle which holds general warrants to be illegal, Stimson remarks: "It is, of course, closely connected with the right of a person not to be compelled to give self-incriminating evidence, but it has a far broader historical connection with the general objection of the Englishman to inquisitions, visitatorial expeditions by king or crown officer, going straight back, indeed, to the great clause of Magna Carta." *Federal and State Constitutions*, p. 45.

[40] 9 Edw. III, St. II, ch. 11. See also chapters 9 and 10 passed at the same session.

[41] 4 Hen. IV, ch. 21. The act prohibited the farming of offices, the occupying of them by deputy, and the acceptance of *douceurs* from merchants.

The general authority and the method of remuneration were in themselves an open avenue to oppression. But the statute indicates in addition the existence of a practice by which the searcher delegated his wide powers to one of his own choosing. See Otis' argument in the Writs of Assistance Case in 1761, charging a like practice in colonial Massachusetts, see below, page 60 n. As to the farming of the customs, see 15 Char. II, ch. 11 (1663).

for and seizing cloth dyed with logwood.[42] This was probably the origin of the practice which was subsequently adopted by Parliament and the Court of Star Chamber, of giving general searching powers to certain organized trades in the enforcement of their sundry regulations. Thus, in 1495, Parliament gave the Mayor of London and the wardens of shearmen in London authority "to enter and search the workmanship of all manner of persons occupying the broad shear, as well as fustians of cloth."[43] A few years later, in the time of Henry VIII, a statute gave the governing authorities of every city, borough, or town, and the masters and wardens of tallow-chandlers, "full power and authority to search for all manner of oils brought in to be sold, in whose hands they be, and as often as the case shall require," with the right to condemn and destroy all altered oils and to commit and punish the persons violating the act.[44]

With the enforcement, in the Elizabethan and Stuart periods, of oppressive laws concerning printing, religion, and seditious libel and treason, the history of search and seizure runs into a broader channel. In 1566, the Court of Star Chamber enacted the first of its famous ordinances in aid of both the licensing of books and the restrictions upon printing established by injunctions, letters patent, etc., regulations which an abundance of evidence shows could never be properly enforced.[45] The Star Chamber, in conformity with the

[42] Richard Thomson, *Historical Essay on the Magna Charta* (London, 1829), p. 226; *Select Cases*, p. cxi (introd.).

[43] 11 Hen. VII, ch. 27. The act 39 Eliz., ch. 13 (1597) provided that since the Mayor of London was too busy to make search with the wardens, the same authority was granted to the master and wardens of the clothworkers or to such "discreet persons" as the latter might appoint.

[44] 3 Hen. VIII, ch. 14 (1511).

[45] The licensing of books had already been decreed by the Queen's Injunctions of 1559, for which see G. W. Prothero, *Select Statutes and Constitutional Documents* (Oxford, 1913), p. 188.

Many patents issued to cover the printing of the best paying books were violated by the poorer printers. In 1560, the Queen's Printer was beginning to make his long series of complaints concerning infringement of his patents. See *Calendar of State Papers (Dom.), 1547-80*, p. 167; John R. Dasent (ed.), *Acts of the Privy Council* (New Series, London, 1895), X, 169, 188, 240, 287. For various cases brought by patentees before the Star Chamber, see

practice mentioned above, decreed that the wardens of the Stationers' Company [46] or any two members deputed by them should have authority to open all packs and trunks of papers and books brought into the country, to search in any warehouse, shop, or any other place where they suspected a violation of the laws of printing to be taking place, to seize the books printed contrary to law and bring the offenders before the Court of High Commission.[47] This was followed in 1586 by another Star Chamber decree which recited that the various laws and ordinances to regulate printing had been totally unheeded and ineffective and provided for stricter censorship, more rigorous penalties, and similar unlimited powers of search and seizure.[48] It would seem that resistance to such search under the older ordinance had not been unusual. This is indicated by the fact that it was now found necessary to insert an additional provision severely punishing any opposition to this authority.

In the same period, great zeal was being shown by the Privy Council and its closely related Courts of Star Cham-

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Edward Arber, *Transcript of the Registers of the Company of Stationers of London* (Birmingham, 1894), II, 753-806.

[46] For the history of this organization (incorporated in 1556) and the press, see Holdsworth, VI, 362 ff.

[47] Arber, II, 751 ff.; J. R. Tanner, *Tudor Constitutional Documents* (Cambridge, 1922), p. 246; Prothero, p. 168.

The records of the Stationers' Company furnish an interesting and amusing illustration of a search undertaken under this ordinance. Thomas Purfoot and Hugh Singleton, members of the company, instituted a long and continuous search, as evidenced by the large expense item which they incurred and which the company paid. This search resulted in the fining of a number of printers for violation of the law. Following the enumeration of these fines, it is recorded that Purfoot, pursuant to a decree of the preceding year for some violation, had to pay a fine that was even greater in amount than the expenses of the search and had to provide also a very heavy bond as surety for future compliance with the law. Evidently those apprehended in his investigation had turned Queen's evidence and had raked up an old decree against Purfoot that might otherwise have been unenforced. Arber, I, 347-348.

That the searchers carried with them a written authority is attested by the fact that the Company paid for engrossing copies. *Ibid.*, p. 346. For further details, see *ibid.*, pp. 107b-108b; II, 5a, 5b.

[48] *Ibid.*, pp. 807 ff.; Tanner, pp. 282-283. Cf. the draft act drawn up by William Lambard, the great common law authority of the time, in 1577 and 1580. Arber, II, 751 ff.

ber and High Commission in the detection and punishment of non-conformism, of seditious libel, and parallel offenses.[49] No limitations seem to have been observed in giving messengers powers of search and arrest in ferreting out offenders and evidence. Persons and places were not necessarily specified, seizure of papers and effects was indiscriminate, everything was left to the discretion of the bearer of the warrant.[50] Oath and probable cause, of course, had no place in such warrants, which were so general that they could be issued upon the merest rumor with no evidence to support them and indeed for the very purpose of possibly securing some evidence in order to support a charge. To cite one example, a Privy Council warrant was issued in 1596 for the apprehension of a certain printer, upon information "which maye touche" his allegiance, with authority to search for and seize "all bookes, papers, writinges, and other things whatsoever

[49] The supervision which the Court of Star Chamber thus exercised led to the assumption of jurisdiction by this tribunal even in ordinary libel cases. These cases could have been tried in the regular courts but prosecuting officials for good reasons chose to proceed in Star Chamber. According to Lord Camden (in *Entick* v. *Carrington, State Trials*, XIX, 1067 ff.), it was because of this practice that there were no libel cases in the Court of King's Bench before the Restoration.

[50] The records of the Privy Council are full of such instances, of which the following are examples: A letter to the Knight Marshal directing him to go to the house of Sir George Peckham "and there to searche for all manner of letters and papers that may concern the State," etc. (Dasent, XII, 291); a letter requiring certain persons to go to the house of an author already under arrest, "to make searche for all letters, bookes or writings whatsoever that may concern in your judgmentes matter that hath been or may be intended to be moved in Parliament, and especially suche notes, collections, books or papers as containe matter touching the establishment of the Crowne of England," with power to break doors, locks, etc. (*ibid.*, XXI, 392); a warrant to apprehend certain priests by searching in any place suspected, and to seize *all* their letters, papers, and writings (*ibid.*, XXIV, 328). Deference to female temperament by the Council may be seen perhaps in an entry in 1615 that there had been issued a "generall warrant directed to all his Majesty's publique officers." It recited that a certain Lady Packington had gone to London for a visit and had sent up several trunks of clothing which had been "carried aside" and detained. All officials were ordered to make search in all places directed by her ladyship. *Ibid.*, XXXIV, 427. For other illustrations see *ibid.*, X, 25; XII, 23, 26, 318; XXI, 403, 409; XXII, 446; XXIV, 399; XXVIII, 120; *Calendar of State Papers* (*Dom.*), *1547-80*, p. 524; *ibid.*, *1581-90*, *passim*. Compare with these the case reported in Dasent, XXII, 15, 18, 90, 103.

that you shall find in his house to be kept unlawfully and offensively, that the same maie serve to discover the offense wherewith he is charged." [51]

Because of its inordinate character, another instance must be presented to illustrate the methods, as they are related to our study, of such institutions as the Court of Star Chamber in their attempts at law enforcement. In order to apprehend those responsible for certain objectionable and allegedly libellous posters, that tribunal in 1593 issued a warrant to three messengers authorizing them to search for and arrest every person suspected of the libels,

> and for that purpose to enter into all houses and places where any such shall be remaining. And, upon their apprehension, to make like search in any of the chambers, studies, chests, or other like places for all manner of writings or papers that may give you light for the discovery of the libellers. And after you shall have examined the persons, if you shall find them duly to be suspected, and they shall refuse to confess the truth, you shall by authority hereof put them to the torture in Bridewell, and by th'extremity thereof, to be used at such times and as often as you see fit, draw them to discover their knowledge concerning the said libels. We pray you herein to use your uttermost travail and endeavor, to th'end the authors of these seditious libels may be known, and they punished according to their deserts. And this shall be your sufficient warrant.[52]

This precept was inspired by Archbishop Whitgift, member of the Privy Council, Star Chamber, and High Commission, who had drafted the decree of 1586 for the censorship of printing, and who was then at the height of his career in suppressing Puritan dissent.[53] The same warrant, incidentally, had an intimate connection with the death of Christopher Marlowe.[54]

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[51] *Ibid.*, XXVI, 425.

[52] Quoted in C. F. Tucker-Brooke, *Works and Life of Christopher Marlowe* (New York, 1930), pp. 54 ff.

[53] *Ibid.*, pp. 55-56; Tanner, p. 246. For Whitgift's participation in searches for papists and in the case of the famous Martin Marprelate libels, see John Strype, *Life and Acts of John Whitgift* (London, 1822), I, 182 ff., 232, 551-601, *passim*.

[54] One line of investigation under this warrant led to the arrest on the following day of Thomas Kidd, whose papers were searched in the manner desired by the Privy Council. Certain heretical works discovered there were imputed by Kidd to Marlowe and this resulted in an inquiry by the Council into Marlowe's atheism. For the connection of this inquiry with his death soon afterwards, see the

The reign of James I did not set a much better example. Arbitrary powers were again granted freely in the continued persecution of non-conformists, in the censorship of the press, and in statutes for the regulation of trade.[55] In addition, the authorities were beginning to use the writ or warrant of assistance, a general search warrant which was later to become so famous. This warrant was found to be of convenient use in the customs service and developed during this time from the similar practice of the Privy Council. This fact, incidentally, may properly be emphasized at this point. Writers and jurists have shown no acquaintance with the existence of the writ of assistance as of such an early date but have assumed its creation by a statute of 1662 for the better enforcement of the customs laws. For example, in the case of *Cooper* v. *Boot*,[56] it was a material factor in the case

interesting article by Ethel Seaton, "Marlowe, Robert Poley, and the Tippings," *Review of English Studies*, 1929, V, 274 ff.

[55] See the various documents in Prothero, pp. 370, 394-396, 424 ff., 427. See also the following statutes: 1 Jac. I, ch. 19, sec. 3; 3 Jac. I, ch. 4, sec. 35; 3 and 4 Jac. I, ch. 5, sec. 15; 7 Jac. I, ch. 4.

Laws in regulation of religion were enforced by the Court of High Commission and apposite remarks concerning the functioning of that body, although the facts presented are of a slightly later period, might be presented at this point. In 1634 there were issued from that tribunal *circulars* to all peace officers directing them to search *every room* of any house where they should have intelligence that non-conformist services were being held, to arrest all persons there assembled, and to seize all unlicensed books. Such general warrants, of the broadest possible kind, were very usual throughout these times, warrants which Stephen writes were wholly illegal even according to existing laws, for they authorized the arrest and imprisonment, merely upon suspicion, "persons who by law were not liable to be imprisoned at all even upon conviction, except upon a significavit from the Court of King's Bench and a writ *de excommunicato capiendo*."

The oppression which these warrants must have caused is indicated by a petition which the keeper of a certain prison submitted to the Court of High Commission. After detailing his past success in discovering such offenders and hoping for "better service in that kind hereafter," the keeper requested that he be favored by the Court and that more of these prisoners should be committed into his custody. The petition pleased the tribunal and the keeper was rewarded for his good work with the order that the offenders should be committed "now and then" to his prison, where, of course, they were a source of profit to him. In this manner, his zeal to continue his patriotic and conscientious service in behalf of both church and state was no doubt still further inspired. See Stephen, II, 426 ff.

[56] 4 Doug. 347 (1785).

whether the writ existed independently of this statute. The question was specifically put to counsel by Lord Mansfield, but although the case was postponed in order that an inquiry might be made, no earlier trace of the writ was reported found.[57] Yet, in 1621, a member of Parliament was already recommending that such warrants should not be issued so frequently.[58]

The attempted rule of Charles I by prerogative alone was naturally productive of even more outstanding instances of arbitrary action of interest in this discussion. In the first few years of this reign the question of general warrants had already come into prominence. These, however, were not of the type considered above. They were mandates, on the other hand, to arrest and imprison *named* persons upon the mere fiat of the king—"*per speciale mandatum domini regis*"—similar to the *lettres de cachet* of French history. They were general in the sense that no definite legal offense was charged against the person except that he had incurred the displeasure of the monarch.[59] These precepts were used with convenience in 1627 to imprison those who would not pay the "forced loan" levied by Charles I to fill his empty treasury after Parliament had refused to grant him the necessary appropriations. Upon habeas corpus, the court held that the

[57] See also the monograph by Horace Gray, Jr., on writs of assistance, in Quincy, pp. 530 ff.

[58] A quotation in Edward Channing, *History of the United States* (New York, 1912), III, 5 n., gives the clue to this fact of the early existence of the writs, but the source there cited (*Proceedings and Debates of the House of Commons, 1620-1621*, p. 225) does not make it entirely clear whether the reference was to search warrants used by customs officers or to other distinct types of legal process also known as writs of assistance which were used in Chancery or in the Exchequer. However, all doubts on this question are dispelled by an item in a manuscript which the present writer chanced upon in the *Fourth Report of the Historical Manuscripts Commission* (London, 1874), p. 312. In the list of the Earl de la Warr collection, the following appears: "July 30, 1621—Copy of Council Order, that the Lord Treasurer may make Warrants of Assistance for suppressing the importation and sale of Tobacco except by the Undertakers, and the Constables may break into any shop or place suspected." The development of this type of warrant in the Privy Council may be traced in Dasent, XXXIV, 588, 672; XXXV, 321; XXXVI, 407; XXXVII, 56; XXXVIII, 423, 449, 452, 465, 479.

[59] Cf. the Sixth Amendment to the United States Constitution.

justification in the return, namely, that the king had so willed, was sufficient.[60] Those imprisoned were later released but the damage had already been done. The storm that had long been brewing from this and other causes now broke upon the king. The Parliament of 1628, to which were elected many of those who had been imprisoned as just described, forced him to sign the Petition of Right, calling for the cessation of this procedure of committing persons "without any cause showed" and other practices as contrary to Magna Carta and the laws of England.[61]

The year following, the king attempted to collect the duty of "tonnage and poundage," a clear violation of law and indeed of the Petition of Right itself, since Parliament had refused to grant the tax.[62] The people resisted and employed numerous devices to avoid payment, whereupon the government resorted to the use of violence, the seizure of goods, and the imprisonment of the merchants to enforce satisfaction of the tax. The Privy Council gave orders, moreover, empowering its messengers to enter into any vessel, house, warehouse, or cellar, search in any trunk or chest and break any bulk whatsoever, and arrest anyone making any speech against his Majesty's service or causing any disturbance. An historian of the period writes that these officers under pretense of searching "used many oppressions and rogueries, which

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[60] *Darnell's Case*, *State Trials*, III, 1 ff. Cf. the Opinion of the Judges (1591), in Holdsworth, V, 497-499.

[61] For the long history of this type of warrant and comment thereon, see McKechnie, pp. 458-459; Powicke, in *Magna Carta Commemoration Essays*, pp. 113 ff.; Holdsworth, V, 191; VI, 32 ff. Cf. William Lambard, *Justices of the Peace*, pp. 95-96; *Parliamentary History of England* (W. Cobbett, ed.), II, 260 ff.

With reference to the search and seizure provision of the Massachusetts Bill of Rights adopted in 1780, it has been remarked in an article on the sources of that document that, as regards the stipulation governing seizure of the person, relation was undoubtedly had to these events which had made a deep impression on the public mind in England in 1627, just before the Massachusetts colonists left for America. E. Washburne, "Massachusetts Bill of Rights," *Massachusetts Historical Society Proceedings, 1864-1865* (Boston, 1866), VIII, 312-313. See also the first article of the Massachusetts Body of Liberties of 1641, in Francis Bowen, *Documents of the Constitution of England and America* (Cambridge, 1854), p. 58.

[62] Holdsworth, VI, 42 ff., 70.

caused the people still more to exclaim."[63] The final and natural result of all these arbitrary measures, characteristic of all attempts at law enforcement in the teeth of public feeling, was that the king had little revenue and the people were more dissatisfied than ever.

General search for documentary evidence was also a prevalent practice during Charles' rule. Privy Council warrants, for example, were issued in 1629 for the searching and sealing of the trunks, studies, cabinets, and other repositories of papers of such leading personages as John Selden and Sir John Elliot after their insurrectionary speeches in Parliament on the levying of tonnage and poundage without the consent of Parliament.[64] They were subsequently committed along with others "during the king's pleasure" for their seditious actions and language, upon warrants similar to those in use before the Petition of Right, although the return upon habeas corpus was more specific.[65] But the most outstanding of these instances was the case of Sir Edward Coke, the celebrated authority on the common law and most influential of the Crown's opponents. On the theory that certain works in preparation contained matter prejudicial to the prerogative, that seditious papers were in circulation among the popular party, and that this was an opportune time to discover them and to strike a telling blow, the Privy Council in 1634, when Coke was on his deathbed, sent a messenger to his home with an order to search for "seditious and dangerous papers." Practically all of his writings, including the manuscripts of his great legal works, his jewelry, money, and other valuables, and even his will, were seized under that warrant and carried away. His chambers at the Inner Temple were ransacked in the same manner. The havoc wrought by the custodians of these papers was wanton,[66] and

[63] Paul de Rapin-Thoyras, *History of England* (London, 1747), II, 285. His statement, however, that these search powers had never been practiced before is, of course, subject to criticism. See also the paper presented to the king in 1629 by the Bishop of London, in John Rushworth, *Historical Collections* (London, 1722), II, 8-9.

[64] *Ibid.*, I, 665 ff. [65] *State Trials*, III, 235 ff., 313.

[66] Cuthbert W. Johnson, *Life of Sir Edward Coke* (London, 1837),

seven years elapsed before what remained was restored to his heirs at the request of the Long Parliament. His will, of great importance to his family, was never returned.[67]

In 1637, the Star Chamber issued another ordinance placing a still stricter censorship upon everything printed. Searchers were given authority in even more blanket terms than before and, lest any doubt exist as to whether there were any limitations of propriety upon the general powers usually conferred, *express* provision was made this time that they could search at any time of the day or night they saw fit.[68]

But with the upheaval in English politics beginning with the assembling of the Long Parliament in 1640, certain steps were taken, at the outset at least, that seemed to augur well for the cause of liberty. The Court of Star Chamber which, notwithstanding the high opinion of contemporaries [69] and its development of certain departments of substantive law,[70] has left a black name in history because of the methods it employed, was abolished, along with its associated tribunal, the Court of High Commission.[71] The year following, the House of Commons resolved that the searching and sealing of the studies and papers of the members of Parliament in 1629 and the issuance of warrants for that purpose had been a

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II, 320 ff. For a catalogue of the property seized, see *ibid.*, pp. 323-329.

[67] See Humphrey W. Woolrych, *Life of Coke* (London, 1837), pp. 189 ff.; Holdsworth, V, 454-455, with citations to original sources; W. H. Lyon and H. Block, *Edward Coke* (Boston, 1930), pp. 329-330.

[68] Arber, IV, 534-535; Rushworth, III, 313-314.

The system of licensing which was enacted is interesting. Law books, for example, had to be licensed by the lord chief justice or the lord chief baron, books on history by the secretaries of state. Hale stipulated in his will that none of his manuscripts should be printed after his death, for fear of changes which might be made by the licensers.

[69] See the opinions of Coke, Bacon, and others in Prothero, pp. 175, 180 ff., 401, 408.

[70] For a comprehensive survey of its work and influence by a present-day authority, see Holdsworth, V, 178-214.

[71] 16 Char. I, ch. 10; 16 Char. I, ch. 11. The Privy Council, however, was still permitted to retain the power of examining and committing persons charged with offenses, provided that on habeas corpus the jailer would certify the true and specific cause of imprisonment. The court then examined the legality and justice of the complaint.

breach of privilege on the part of those who executed the warrants, for which they were to be punished.[72] One of the grounds of impeachment of the Earl of Strafford was that he had granted to a certain bishop and his subordinates a general warrant of arrest.[73]

However, as is more or less typical of human nature, once this Parliament had become firmly seated in power, it adopted and permitted measures that were no more heedful of the liberty of the individual than were those of the preceding régime. In 1643 an ordinance for the regulation of printing continued the severe censorship and allowed equally broad discretionary powers of search in enforcing its provisions.[74] It was this ordinance which caused Milton to write his *Areopagetica,* pleading for a free press. Moreover, in the prosecution of disaffected persons the same arbitrary methods usual in the reign of Charles were employed by some of the very men who had in such righteous manner inveighed against

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[72] Rushworth, I, 665 ff.; *State Trials*. III, 310 ff. See the various speeches on grievances in 1640 in *Parliamentary History*, especially II, 641, 649, 658. See also the proceedings in the House of Lords relating to the search of the studies and pockets of the Earl of Warwick and Lord Brook and the seizure of their papers as a breach of privilege on the ground that the warrants *did not specify any particular act* (*ibid.*, pp. 667 ff.); and the case of Lord Kimbolton and others referred to in Somers' *Collection of Tracts* (London, 1810), IV, 342-343.

[73] *State Trials*, III, 1391. In the colony of Virginia there was passed in 1643 what was probably the first legislative precedent of the Fourth Amendment, prohibiting the issue of blank warrants. Hening, *Statutes at Large*, I, 257-258, cited in a German dissertation on the Virginia Bill of Rights by Gustav A. Salander, *Vom Werden der Menschenrechte* (Leipzig, 1926), p. 58. The abuses of this practice, however, had been recognized even in England and the Privy Council had ordered in 1631 that no more blank warrants should be presented by the clerk for signature, an indication of the presence and probable abuse of the practice beforehand. Edward R. Turner, *The Privy Council* (Baltimore, 1928), I, 199. And the Star Chamber had fined a justice of the peace for issuing blank warrants, with name and offense to be filled in later. Michael Dalton, *Justice of the Peace* (London, 1746), p. 402.

[74] *Acts and Ordinances of the Interregnum* (C. H. Firth and R. S. Rait, edd., London, 1911), I, 185-186. This ordinance was followed by a number of other regulations to promote enforcement, giving authority of search to a great variety of persons. See Ordinance of 1647, *ibid.*, I, 1022; Act of 1649, *ibid.*, II, 247-248, 251; Act of 1652-53, *ibid.*, p. 698.

these methods at that time.[75] A new form of tax, the excise, was invented and imposed to raise funds for the war against Charles, carrying with it an unlimited authority of invasion of private homes with which this tax was always later identified by the people.[76]

To be sure, the activities of the excise officers soon provoked remonstrances from a public opinion which was becoming more and more sensitive to arbitrary practice and more alive to what *ought to be* the right of the individual.[77] This growing consciousness was in line with what the judges were doing in developing the common law, as will be seen presently. If it was wrong for a sheriff to do a certain thing, what right had an excise or other officer to do the same thing?

Let us then inquire into the state of development of the common law at this period with regard to search and seizure. English jurisprudence it seems had begun to shape itself along more modern lines and conceptions of liberty and justice. The principle that search and seizure must be reasonable, that there must be a balancing of the problems of the administration of justice with those of the freedom of the individual, was emerging slowly and was assuming more and more the character of an underlying concept of jurisprudence.[78] However, before this principle could definitely and

[75] For example, Prynne, the champion of liberty who himself objected to general powers in excise officers, searched the study of Archbishop Laud and seized his private papers and books. Certain of these were needed for the latter's defense but, although restitution was promised, only part was returned. Somers, IV, 443.

[76] *Ibid.*, I, 164-165, 207, 282, 667-669. See the criticism of the excise on this ground by Sir William Blackstone in his *Commentaries* (Cooley ed., Chicago, 1876), I, 318 ff.

[77] Many pamphlets appeared, denouncing the excise and the procedure of its enforcement. See citations in William Kennedy, *English Taxation* (London, 1913), p. 62 n. In *Excise Anotomiz'd*, anonymously published in 1659, the writer lists as one of his grievances: "The uncivil Proceedings of the Officers thereof, who, upon every suspicion, and often malicious Information, come into our Houses, with armed men, and if not immediately let in, violently break open our Doors, to the great Affrightment and Amazement of our Wives, Children, and Families." (ed. 1733, p. 15.)

[78] The idea that a man's house was his castle had always continued to play a part in English legal thought. In 1470, for exam-

finally impress and establish itself in the public mind as a fundamental right of *constitutional* importance, the more spectacular situations present in the eighteenth century were necessary.

In a contemporaneous seventeenth-century treatise on the history of the pleas of the crown by Chief Justice Hale, one of the greatest jurists in English history,[79] the chief limitations upon the exercise of search and seizure now embodied in such constitutional provisions as the Fourth Amendment are already found presented either as law or as recommendations of the better practice, which later hardened into law. For instance, a general warrant to apprehend all persons suspected of having committed a given crime was held by Hale to be void and no defense to a suit for false imprisonment.[80] The party asking for the warrant should be examined under oath touching the whole matter, whether a crime had actually been committed and the reasons for his suspicion.[81] The warrant should specify by name or description the particular person or persons to be arrested and must not be left in general terms or in blanks to be filled in afterwards.[82] Upon the reasoning of the first rule, Hale held that warrants to search any suspected place for stolen goods were invalid (although he admitted that there were precedents of such general warrants)[83] and should be restricted to search

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ple, it was decided that although it was lawful for an owner of goods to enter upon the land of another who had wrongfully taken them from him, he could not break into his house. *Yearbooks*, 9 Edw. IV, Mich. Pl. 10, cited in Holdsworth, III, 279. A constable broke doors to search at his peril in hue and cry. Sir Matthew Hale, *History of the Pleas of the Crown* (Philadelphia, 1847), II, 98-104. A debtor's house was always considered his asylum and could not be broken into. James Paterson, *Commentaries on the Liberty of the Subject* (London, 1877), II, 231 ff. See also *Semaine's Case*, 5 Coke 91 (1604); Francis Lieber, *Civil Liberty and Self-Government* (Philadelphia, 1874), pp. 62-63.

[79] For an evaluation of Hale's work, see Holdsworth, VI, 574-595.

[80] Hale, I, 580; II, 112, citing *Justice Swallow's Case*, P. 24, Car. I.

[81] *Ibid.*, II, 110. Cf. *ibid.*, I, 582. The examination must be put down in writing. *Ibid.*, p. 586.

[82] *Ibid.*, pp. 576-577; II, 112-114.

[83] See an example of such a warrant in the old work by Dalton, pp. 418-419.

in a particular place suspected, after a showing, upon oath, of the suspicion and the "probable cause" thereof, to the satisfaction of the magistrate. "For these warrants," he said, "are judicial acts, and must be granted upon examination of the fact. And therefore, I take these general warrants dormant, which are made many times before any felony committed, are not justifiable, for it makes the party to be in effect the judge; therefore, searches made by pretense of such general warrants give no more power to the officer or party, than what they may do by law without them." [84] It is "convenient," he added, that the precept should express that the search be made in the daytime; that the complainant ought not be given the warrant for execution, although he should be present to give the officer information of his goods; that no doors be broken open; and that the goods should not be delivered to the complainant until so ordered by the court.[85] Coke previously, in a somewhat ambiguous statement, had denied altogether the legality of search warrants for stolen goods.[86] On the question of warrants of arrest "to answer such matters as shall be objected" against the party, Hale wrote that such warrants, notwithstanding earlier precedents

[84] Hale, II, 150. See also *ibid.*, p. 79.

[85] *Ibid.*, pp. 113-114, 149-151.

[86] Coke, IV, 176, 177. See Hale's comment, II, 107, 149; James Fitzjames Stephen, *Digest of Criminal Procedure* (London, 1882), p. 81. See also Hale's criticism of Coke on the question of granting warrants of arrest upon suspicion before indictment. II, 79-80, 107-110.

The practical workings of the police system seem to have nullified much of the substantial progress made by the law. This was due to the fact that in those times the justices of the peace combined in their persons the functions of magistrate, policeman, and prosecutor. The oppressive practices of these officials in the 17th century are described in John Pollock, *The Popish Plot* (London, 1903), pp. 267 ff. "They raised hue and cry, chased criminals, searched houses, took prisoners. A Justice of the Peace might issue the warrant for arrest, conduct the search himself, effect the capture, examine the accused, and sans witnesses, extract a confession by cajoling as friend and bullying as magistrate, commit him, and finally give damning evidence on trial." See also Stephen, *History of the Criminal Law*, I, 221 ff.; *State Trials*, VI, 572-575.

of their use, were not regular [87] and anyone so arrested was to be discharged upon habeas corpus.[88]

However, these salutary rules of the common law exercised but little influence upon Parliament. In the first year after the Restoration, it is true, an act to enforce the payment of customs duties did provide for the issuance of special warrants under oath in searches of houses and for full damages and costs against the informer if the information proved to be false.[89] But two years later, several statutes were enacted which were of the same stamp as the legislation of preceding régimes. Incidentally, these statutes were to play leading rôles in the events on both sides of the Atlantic that laid the permanent foundation for the principle of reasonable search and seizure. The first was the Licensing Act for the regulation of the press.[90] It made provision for powers of search as broad as any ever granted by Star Chamber decree. The second was an act "to prevent frauds and abuses in the custom." One instrumentality to aid in its enforcement was the general writ of assistance already mentioned.[91] A third statute passed in the same year brought into existence the hated "hearth money," in the collection of which officials

[87] *Ibid.*, I, 577-578, citing Lambard, pp. 95-96; Coke, II, 591, 615. Dalton gives instances of such warrants by Chief Justice Popham, pp. 401-402.

[88] Hale, II, 111, citing *Brown's Case*, P. 23, Car. B. R. Such warrants had been held good in earlier times in treason and felony cases. *Ibid.* See Coke's argument before the House of Lords in 1628, *Parliamentary History*, II, 260 ff.

[89] 12 Char. II, ch. 19; see also 12 Char. II, ch. 4, sec. 22. But compare other statutes of the same year, 12 Char. II, ch. 22, sec. 5, and 12 Char. II, ch. 23, sec. 19.

[90] 13 and 14 Char. II, ch. 33. The search and seizure provision of the act is section 15.

[91] 13 and 14 Char. II, ch. 11, sec. 5. For further discussion, see pages 53 ff., below. Provision for this general warrant was probably made in order to avoid the inconveniences from the standpoint of enforcement which were involved naturally in the use of the special warrant of 1660. See the opinion of Attorney General de Grey, in Gray, Quincy's *Reports*, pp. 452-454. The argument of James Otis to the effect that these warrants were not originally meant to be general may be found in the succeeding chapter. There is no doubt, however, that the later practice was to issue general writs of assistance by virtue of this statute. Walpole, in *Parliamentary History*, VIII, 1278; Mansfield, C. J., in *Cooper* v. *Boot*, 4 Doug. 347; Opinion of de Grey, cited above.

were given right of entry into all houses any time during the day.[92]

The Licensing Act expired upon the refusal of Charles II to summon Parliament in 1679. In order not to lose the advantages of this legislation, the king called together the twelve judges of England to decide whether the press could be as effectively regulated by the common law as by the statute. The chief justice was Scroggs, always extremely facile in arriving at any opinion agreeable to the Crown. After resolving that seditious libel was a criminal offense at common law and that such libels could be seized, the judges came to the rather remarkable conclusion that to write, print, or publish any book, pamphlet, or other matter, was illegal without a license from the king.[93] A proclamation was accordingly issued by Charles to suppress seditious libels and unlicensed printing and the chief justice, in turn, upon the basis of the proclamation, issued general warrants of search and arrest to enforce it.[94] In 1680, the activities of Scroggs and his associates were investigated by the House of Commons. Printers and booksellers hastened to complain of unjust vexation by the messengers of the press armed with these warrants. When Scroggs was impeached, one of the articles of impeachment was based on his issuance of "general warrants for attaching the persons and seizing the goods of his majesty's subjects, *not named or described particularly,* in the said warrants; by means whereof, many . . . have been vexed, their houses entered into, and they themselves grievously oppressed, contrary to law."[95] Here was a legislative recognition of the

[92] 13 and 14 Char. II, ch. 10, sec. 3.

[93] *Harris' Case, State Trials,* VII, 929 ff.; *Carr's Case, ibid.,* p. 1127. See the caustic reference to this opinion by Chief Justice Pratt in *Entick* v. *Carrington, ibid.,* XIX, 1069 ff.

[94] Two of these warrants are set out in *ibid.,* VIII, 192-193.

[95] *Ibid.,* p. 200 (italics mine). First the committee of investigation and then the House of Commons had resolved that these warrants were "arbitrary and illegal." *Ibid.,* pp. 193, 195, 211.

Parliament was soon after prorogued and the proceedings against Scroggs dropped. The king later did remove him from the bench, but at the same time every mark of favor was shown him, including the granting of a pension.

It is interesting to note in passing that such considerations as the

idea that general warrants were an arbitrary exercise of governmental authority against which the public had a right to be safeguarded.[96]

After the Revolution of 1688, another forward step was taken in acknowledgment of this privilege. One of the first acts of the new government, by insistance of King William himself, was to abolish "hearth-money." But what is of most interest here is the reason given for this action. The "hearth-money," declares the preamble of the statute, is not only a great oppression of the poorer classes, "but a badge of slavery upon the whole people, exposing every man's house to be entered into, and searched by persons unknown to him."[97] From this time on through the whole succeeding

House of Commons expressed in its resolutions did not prevent the reenactment of the Licensing Act in 1685 and 1692 with provision for general search and seizure. Upon the expiration of the act in 1695, however, it was finally rejected.

[96] Mention might be made here of the infamous trial of Algernon Sidney in 1683, so important in constitutional history generally. The point that is of interest here is that a general warrant contributed to the results reached in that case. The Privy Council sent an order to seize *all* of Sidney's papers and writings. This warrant was carried out to the letter. Under a later warrant his money, valuables, and clothes were seized. Certain private papers that were picked up, in which Sidney had once jotted down remarks unfavorable to the king and which were not meant for publication, were held by the corrupt presiding judge to supply the defect of the second witness necessary in treason cases. G. Van Santvoord, *Algernon Sidney* (New York, 1854), pp. 228 ff. It is stated in a leading work on the American Constitution that this seizure of papers in Sidney's case was very intimately connected with the adoption of the Fourth Amendment itself. See Thomas M. Cooley, *The General Principles of Constitutional Law* (4th ed., Boston, 1931), p. 267; also T. J. Norton, *Constitution of the United States* (Boston, 1922), p. 208. In view of the much more proximate reasons for the Fourth Amendment, however, this statement is entirely too broad.

For other cognate material in the reign of Charles II, see an instance where the king himself censured a too rigorous search of the houses of certain favorites as done "to satisfy the private passion" of the minister responsible. Clarendon to Bagot, *Report of Commission on Historical Manuscripts* (London, 1874), IV, 329. See also *State Trials*, IX, 1005.

[97] 1 Wm. and M., ch. 10. The king played a leading part in this reform. As early as March 1, 1689, he sent a message to Parliament urging the regulation or abolition of this tax as grievous to the people. In the debate thereon, it was brought out that he did this on his own initiative and that nobody had expected it when he made the motion in council saying he was much concerned about the matter. *Parliamentary History*, V, 152-153.

period there may be noticed a certain tendency in legislation not to grant powers of search and seizure as lavishly as had been the case in former years.[98]

Upon occasion, a threatened invasion of this privilege could inflame the public mind in a remarkable manner. This was what happened in 1733 when Walpole proposed his plan, known in history as the Excise Scheme, to tax wines and tobaccos, not as a custom duty upon importation, but after warehousing and as the goods were withdrawn for home consumption. From the standpoint of economics, this project has been declared adequate to establish Walpole as a finance minister far in advance of his day.[99] At the time, however, it excited such popular agitation as to shake his power to its very foundations.[100] The party opposing Walpole, quickly

[98] See 1 Wm. and M., ch. 24, levying an excise on liquor, which provided for the same means of enforcement as by 12 Char. II, ch. 19 (the "special warrant" act of 1660 considered above) and 15 Char. II, ch. 11, but significantly omitted the writs of assistance act of 1662. Compare the summary powers granted for the enforcement of the gaming and fishing laws, 3 and 4 Wm. and M., ch. 10, sec. 3; 4 and 5 Wm. and M., ch. 23.

See also 5 Geo. I, ch. 28; 10 Geo. I, ch. 10, sec. 13. In connection with sections 10 and 12 of this last act, however, see the protest of the merchants in 1733 after the success of the opposition to the Excise Scheme. *Parliamentary History*, IX, 9.

[99] See Adam Smith's *Wealth of Nations*, Book V, chap. ii, cited in R. H. I. Palgrave's *Dictionary of Political Economy* (London, 1925), I, 781 ff. But Smith viewed with disfavor "frequent visits and odious examination" of tax collectors, exposing people "to much unnecessary trouble, vexation, and oppression." He was of opinion that this was one of the ways in which a tax frequently became so much more burdensome to the people than it was beneficial to the sovereign and was therefore to be avoided (Cannon ed., London, 1904, II, 312).

[100] *Parliamentary History*, VIII, 1307-1310.

Besides being a tax, and therefore unpopular of itself, the harassing practices associated with the enforcement of the excise and the great number of people who were subjected to the methods employed made this form of taxation and even its very name peculiarly disagreeable to the English people. Johnson so defined the word "excise" in his dictionary that in the opinion of legal authorities it amounted to a libel upon the excise commissioners. Chesterfield, remembering the troubles experienced by Walpole in 1733 and by Bute with the cider tax in 1763, once facetiously remarked concerning a pending measure: "As for a general excise, it must change its name by act of Parliament before it goes down with the people, who know names better than things; for aught I know, if an act for a general excise were to be entitled 'An act for better preserving the liberty and property of his majesty's subjects, by repealing

sensing the opportunity, strongly emphasized both the proposed extension of the unpopular excise laws to additional commodities and the investigation and search provisions of the bill.[101] In vain did Walpole argue that only those places registered as storehouses of tobacco were to be liable at all times to the inspection of the officer, that a special warrant would be necessary to search any other part of the house, and that the customs practice was stronger, since officers there could enter merely by virtue of their writs of assistance, without an affidavit.[102] But the inquisitorial provisions for strict supervision were offensive and he was forced for this and other reasons to withdraw the bill, an action which met with as loud rejoicing, says one writer, as the most glorious national victory ever gained.[103]

Great opposition was likewise aroused in 1763 when the cider tax was passed, extending the excise laws to a commodity which would bring practically everyone into contact with the administration of these laws. William Pitt spoke against it, particularly against the dangerous precedent of admitting officers of the excise into private houses. The laws of excise were grievous to the trader, he said, but intolerable to the private person. The government admitted that the excise was odious but maintained it was necessary. Provisions in the act regarding investigation the government

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some of the most burdensome custom-house laws,' it might be gladly received." See Stephen Dowell, *History of Taxation in England* (London, 1884), II, 105-107.

[101] See the debates in Parliament over the measure, particularly the statements of Mr. Pulteney and Sir John Barnard on the vexatious practices of excisemen in *Parliamentary History*, VIII, 1299-1300, 1316-1317, with which compare the comment in the note, *ibid.*, p. 1232.

Blackstone, after describing in his *Commentaries* (I, 318 ff.) the economic advantages of the excise, says: "But, at the same time, the rigour and arbitrary proceedings of excise laws seem hardly compatible with the temper of a free nation. For the frauds that might be committed in this branch of the revenue, unless a strict watch is kept, make it necessary . . . to give officers a power of entering and searching the houses of such as deal in exciseable commodities at any hour of the day, and in many cases, of the night likewise. . . ."

[102] *Parliamentary History*, VIII, 1278.

[103] *Ibid.*, IX, 8; Dowell, II, 106.

justified on the ground that they were much more lenient than in the case of hop-growers who, so the argument ran, often had their very bedchambers visited by the exciseman. In the House of Lords a number of protests were filed by dissenting members "because by this Bill our fellow subjects, who from the growth of their own orchards, make Cyder and Perry, are subjected to the most grievous mode of excise; whereby private houses of peers, gentlemen, freeholders, and farmers are made liable to be searched at pleasure."[104] Disturbances broke out in the cider counties and troops had to be moved into them. London and many other corporations and counties petitioned against the act and especially against its visitation provisions. The tax had to be repealed several years later, coincidental with the resolution of the House of Commons concerning general warrants.[105]

Probably arising out of the practice under the Licensing Act and inadvertently continued when that act failed of reenactment, a usage had grown up for the secretary of state to issue general warrants of search and arrest in seditious libel and similar cases. Strange to say, in all the years between the rejection of the statute in 1695 and the accession of George III in 1760, the validity of these warrants was questioned only once, and then more or less casually. In that instance, in the case of *Rex* v. *Earbury*,[106] the warrant had directed the seizure of *all* the defendant's papers, but Lord Hardwicke had refused to give an opinion on the point on the ground that since he had no authority to order the return of the papers, the question was not before the court.[107] But it was this continued exercise of power that was destined to lead to the final establishment of the principle of

[104] *Parliamentary History*, XV, 1307-1316.

[105] William Hunt, *History of England, 1760-1801*, "The Political History of England" (William Hunt and Reginald L. Poole, edd.), X (London, 1905), 43-44, 72.

[106] 2 Barn. K. B. 396, 94 Eng. Rep. 544 (1733).

[107] Earlier in the same year, when he was still attorney general and not yet on the bench, Hardwicke had argued with Walpole that the broad powers of search and seizure in enforcing the customs and excise laws were not unreasonable. *Parliamentary History*, VIII, 1289. Compare his position in 1763 on the cider tax, *ibid.*, XV, 1311-1312.

reasonable search and seizure upon a constitutional footing in England and to constitute at the same time one of the main factors in the history of such provisions in American bills of rights.

In 1762, John Wilkes, then a member of Parliament, began to publish anonymously his famous series of pamphlets called the *North Briton,* deriding the ministers and criticizing the policies of the government. This continued until the following year when *Number 45* of this series appeared, containing an unusually bitter attack upon the King's Speech in which, incidentally, among other things, the cider tax had been highly praised.[108] Smarting under the constant and effective censure, the government determined to apprehend and prosecute the responsible party and by the usual procedure. A warrant was issued by Lord Halifax, the secretary of state, to four messengers, ordering them "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers."

Here was a warrant, general as to the persons to be arrested and the places to be searched and the papers to be seized. Of course, probable cause upon oath could necessarily have no place in it since the very questions as to whom the messengers should arrest, where they should search, and what they should seize, were given over into their absolute discretion. Under this "roving commission," they proceeded to arrest upon suspicion no less than forty-nine persons in three days,

[108] The King's Speech (recognized, of course, as that of his ministers) had lauded the unpopular Peace of Paris and also, due to the riots in the cider districts, had called for a spirit of concord and obedience to law which were essential to good order. The *North Briton,* Number 45, retorted: "Is the *spirit of concord* to go hand in hand with the PEACE and EXCISE, through this nation? Is it to be expected between an insolent EXCISEMAN, and a *peer, gentleman, free holder, or farmer,* whose private houses are now made liable to be entered and searched at pleasure?" *The North Briton* (London, 1772), II, 256; see also *ibid.,* Number 43, p. 205.

Asked once by Madame Pompadour how far the liberty of the press extended in England, Wilkes replied: "I do not know. I am trying to find out." Raymond Postgate, "*That Devil Wilkes*" (London, 1930), p. 53.

even taking some from their beds in the middle of the night.[109] Finally, they apprehended the actual printer of *Number 45* and from him they learned that Wilkes was the author of the pamphlet. Wilkes was waiting for just such an opportunity, having on different occasions advised others to resist such warrants.[110] He pronounced the messengers' authority "a ridiculous warrant against the whole English nation" and refused to obey it. The messengers thereupon took him up in a chair and conveyed him in that manner to the office of the secretary of state, after which, accompanied by an undersecretary of state, they returned to the house. Refusing admission to any of Wilkes' friends, they had a blacksmith open the drawers of Wilkes' bureau and took away, uninventoried, all of his private papers including his will and also his pocketbook. Wilkes afterwards was committed to the Tower by the secretary of state upon his refusal to answer questions but was released a few days later upon habeas corpus by reason of his privilege as a member of Parliament.

All the printers, upon the suggestion and with the support of opponents of the government, brought suit against the messengers for false imprisonment. Chief Justice Pratt held the warrant to be illegal. "To enter a man's house by virtue of a nameless warrant," said the Chief Justice, "in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour." The London jury awarded the particular plaintiffs in the test cases damages of £300 and the other plaintiffs had verdicts of £200 by consent.[111]

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[109] Dryden Leach, a printer who had worked on other numbers of the pamphlet but not this one, was arrested during the night, together with his employees, and all of his papers seized. The messengers did this on the following information: "Mr. Carrington, the messenger, told three other messengers, who executed the warrant, that he had been told by a gentleman, who had been told by another gentleman, that Leach's people printed the paper in question." Nuthall to Pitt, July 7, 1763, in *Correspondence of William Pitt* (W. S. Taylor and J. H. Pringle, edd., London, 1838), II, 230.

[110] See Postgate, pp. 57-58.

[111] See *Huckle* v. *Money*, 2 Wils. K. B. 206, 95 Eng. Rep. 768 (1763). The defendants asked for a new trial on the ground that

Wilkes brought suit against Wood, the undersecretary who had superintended the execution of the warrant. The Chief Justice this time upheld a verdict of no less than £1000 in favor of the plaintiff. He declared that this warrant was a point of the greatest consequence that he had ever met with in his whole practice.

> The defendants claimed a right under precedents to force persons' houses, break open escritoires, seize their papers, upon a general warrant, where no inventory is made of the things taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject. If higher jurisdictions should declare my opinion erroneous, I submit as will become me, and kiss the rod; but I must say I shall always consider it as a rod of iron for the chastisement of the people of Great Britain.[112]

A suit by Leach, a printer, against the messengers brought him a verdict of £400. Wilkes got a judgment of £4000 against Lord Halifax himself a number of years later. The government undertook the responsibility of defending all actions arising from the warrant and the payment of all judgments. The expenses incurred were said to total £100,000.[113]

These decisions were greeted with the wildest acclaim all over England. "Wilkes and Liberty" became the byword

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the verdict was excessive. But Pratt, after admitting that £20 would have been sufficient for the imprisonment of six hours, went out of his way with a bit of novel reasoning to sustain the verdict: "But the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light which the great point of the law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the king's subjects, exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom, by insisting on the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavor to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages."

[112] *Wilkes* v. *Wood*, Lofft 1; 98 Eng. Rep. 489; *The North Briton*, III, 42-43.

[113] See in general T. E. May's *Constitutional History of England* (Boston, 1864), II, 245-252.

of the times, even in far-away America.[114] Chief Justice Pratt became one of the most popular men in the country. He was given addresses of thanks in large numbers and presented with the freedom of London, Dublin, and other cities. The city of London requested, in addition, that he sit for his portrait for the famous artist, Sir Joshua Reynolds. When completed, the portrait was hung in Guildhall with an inscription by Dr. Johnson, designating him the "zealous supporter of English liberty by law."[115] Pratt's opinions on the question of general warrants, moreover, were directly responsible for his subsequent elevation to the peerage in 1765 and to the lord chancellorship in 1766.[116]

The government appealed the Leach case to the Court of King's Bench. The case came up before that court two years later. Judgment for the plaintiff was affirmed but, because the facts of the particular case did not render it necessary to go further, the actual decision was made to turn on the point that since the warrant had authorized the arrest of the authors, printers, and publishers of the *North Briton, Number 45,* and of them only, the defendants could not in any event justify under it when they arrested persons who were in no way involved in the publishing of *Number 45.* The judges, however, went on to give their opinion of the validity of the warrant itself and in this they agreed fully with the views of Pratt. "A usage to grow into law," held Chief Justice Mansfield, "ought to be a general usage, one which it would be harmful to overthrow after a long continuance. This on the other hand, was a usage of a particular office,

[114] In the famous elections of 1768 and later, when Wilkes was repeatedly elected to and expelled by the House of Commons, one of the chief grounds of his candidacy was his conduct with regard to general warrants. See *The North Briton,* III, 155, 158, 195, 199. His correspondence with leading Americans in this period was also considerable. See Postgate, chap. x, especially the address to Wilkes signed by James Otis, Samuel Adams, John Hancock, John Adams, and Josiah Quincy, among others (p. 193).

[115] Edward Foss, *Judges of England* (London, 1870), p. 536. His portrait became the favorite sign of public-houses throughout the country, William E. H. Lecky, *History of England in the Eighteenth Century* (London, 1882), III, 79-80.

[116] See the very interesting material in Basil Williams' *Life of William Pitt* (London, 1913), II, 158 ff.

and contrary to the usage of all other justices and conservators of the peace. . . . It is not fit that the judging of the information should be left to the officer. The magistrate should judge, and give certain directions to the officer." Mr. Justice Wilmot thought the warrant "illegal and void," and the two other judges, Yates and Anson, had no doubt of its illegality, "for no degree of antiquity can give sanction to a usage bad in itself." [117]

In November of 1762, a half year before the *North Briton* incident, Lord Halifax had issued a warrant to the messengers to search for John Entick, author of the *Monitor or British Freeholder,* and seize him together with his books and papers. This warrant was specific as to the person but general as to papers. The messengers in this instance also, as might be expected, made the most of the discretion granted them. Entick at first took no action, but after witnessing the success of Wilkes and the printers, he was encouraged to sue the messengers in trespass for the seizure of his papers.[118] The jury gave him a verdict of £300 damages.

This case was later argued before the Court of Common Pleas. In 1765, Pratt, now Lord Camden, delivered the opinion of the court,[119] an opinion which has since been denominated a landmark of English liberty by the Supreme Court of the United States.[120] "If this point should be decided in favor of the Government," said the court, "the secret cabinets and bureaus of every subject in this kingdom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." An unreasonable power, the court went on, must have a specific foundation in law in order to

[117] *Money* v. *Leach,* 3 Burr. 1692, 1742, 97 Eng. Rep. 1050, 1075, *State Trials,* XIX, 1001 (1765). See the extended argument of de Grey, who at that time was solicitor general, attempting to uphold the warrant. *Ibid.,* pp. 1016 ff.

[118] Dr. Birch to Lord Royston, in George Harris, *Life of Lord Chancellor Hardwicke* (London, 1847), III, 368.

[119] *Entick* v. *Carrington, State Trials,* XIX, 1029 (1765).

[120] *Boyd* v. *United States,* 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746 (1886).

be justified. A person's "house is rifled," the court continued, "his most valuable papers are taken out of his possession, before the paper, for which he is charged, is found to be criminal by any competent jurisdiction, and before he is convicted of writing, publishing, or being concerned in the paper. Such is the power, and therefore one should naturally expect that the law to warrant it should be as clear in proportion as the power is exorbitant." The origin of the practice was in Star Chamber days; the Licensing Act had expired; and the usage since the Revolution of issuing these warrants, not based upon any statutory authority, was absolutely illegal. The court, sarcastically referring to the old tribunal consisting of Scroggs and his associates as "a great and reverend authority," denied that they could by their extrajudicial resolution establish in law the general search warrant which, indeed, was so soon thereafter condemned by the House of Commons. To the argument of long usage the court answered: "There has been a submission of guilt and poverty to power and the terror of punishment. But it would be a strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law, which a few criminal booksellers have been afraid to dispute." [121]

The subsequent resolutions of the House of Commons with respect to general warrants were largely a result of these two circumstances, the opinions of the judges in the recent cases and the popular feeling on the question. None of the law officers of the Crown defended the legality of the warrant in the course of the parliamentary debate. Charles Yorke, who had been attorney general at the time the warrant was issued, actually protested its legality during the discussion and maintained that he had not been consulted on that question. But to Pitt goes the actual credit of forcing the hand of the Commons in the matter. In February, 1764, when the question was brought up on the floor of the House, he was the central figure in the debate. All that the Crown and the ministers had desired, he declared, had been

[121] *Entick* v. *Carrington*, cit. above. The opinion in 2 Wils. 275 is a shorter report.

accomplished in the conviction of Wilkes for libel and his expulsion from Parliament. Now it was the duty of Parliament to do justice to the nation, the constitution, and the law. He denied that precedent afforded any justification. He himself, as secretary of state, had issued similar warrants in 1760, not in mere libel cases, but in cases of emergency arising from the state of war. He knew them to be illegal because his friend Pratt, who was then attorney general, had told him they would be illegal and that he would have to take the consequences. But "preferring the general safety, in time of war and public danger, to every personal consideration, he ran the risk, as he would of his head, had that been the forfeit, upon the like motive." [122]

The government succeeded in postponing the decision on the question only by the barest majority. Two years later, in April, 1766, the House of Commons resolved that general warrants in cases of libel were illegal. But this limited condemnation did not satisfy Pitt. He forced the House to declare that general warrants were universally invalid, except as specifically provided for by act of Parliament, and if executed upon a member of the House, a breach of privilege. But an attempt to introduce a bill to prohibit the seizure of persons by general warrants was turned down. And a bill to restrain the issuance of warrants to seize papers, except in cases of treason and felony without the benefit of clergy, and then under certain regulations, which was passed by the Commons, was rejected by the House of Lords.[123]

One of Pitt's many eloquent remarks on these occasions, a sample of his great oratorical powers, has become classic:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may

[122] *Parliamentary History*, XV, 1401-1403; *Correspondence of William Pitt*, II, 288.

Most of the groundwork of Pitt's classic arguments in Parliament was also furnished by Pratt. A secretary of state, Pratt told him, could no more issue general warrants than any other magistrate since there was no difference between state crimes and other crimes; they were all to be prosecuted, judged, and punished by the same common and equal law, the law books admitting no such things as the French *raison d'état*." See Williams, II, 157-158.

[123] *Parliamentary History*, XVI, 207 ff.

blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.[124]

In this manner did Pitt express the consummation of the ideal "a man's house is his castle," the subordination of governmental authority to the principle of safeguarded search and seizure.[125]

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[124] Quoted in Thomas M. Cooley, *A Treatise on Constitutional Limitations* (8th ed., Boston, 1927), I, 611.

[125] The *lettres de cachet* of French history have also been mentioned in connection with the Fourth Amendment. See *United States* v. *Innelli*, 286 Fed. 731 (1923); John E. F. Wood, "Scope of Constitutional Immunity Against Searches and Seizures," *West Virginia Law Quarterly*, 1928, XXIV, 1. It may be recalled that the violent outcry by the French people against these warrants was more or less contemporaneous with the adoption of the American bills of rights. However, the *lettres* seem to be more closely related to the provisions of the Sixth Amendment which guarantee to an accused a public trial, the right to be informed of the nature of the accusation against him, to be confronted with the witnesses against him, and the right to counsel. See also page 29, above. There were a number of different types of these warrants, but the one that is of interest here is that by which the king sentenced a subject to possibly lifelong imprisonment without the privilege of a trial and the opportunity for defense. The search for and seizure of evidential papers or other things were not necessary since this was a final commitment and did not require any substantiation in fact to support it. The *lettres* did not charge any criminal offense and sometimes were issued in blank, the name of the person to be arrested being filled in by some functionary. Besides the injustices inherent in the *lettres* themselves, many abuses were naturally prevalent in their administration. The practice was abolished by the Constituent Assembly as demanded by the *cahiers* of 1789 and was the source of repeated protest and a factor in the causes of the French Revolution.

A facsimile of a *lettre de cachet* is in Frantz Funck-Brentano, *Les lettres de cachet* (Paris, 1926), p. 7. A leading work on the subject is André Chassaigne, *Des lettres de cachet sous l'Ancien Régime* (Paris, 1903).

The Code of Offenses and Punishments in 1793 provided that searches and seizures had to take place in the presence of the accused, if arrested, and that the latter was entitled to furnish explanations, identify the objects seized, and initial seals. A. Ésmein, *History of Continental Criminal Procedure* (Boston, 1913), p. 506.

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The merit will be doubled by the other lesson that Religion flourishes in greater purity, without than with the aid of Govt.

My pen I perceive has rambled into reflections for which it was not taken up. I recall it to the proper object of thanking you for your very interesting pamphlet, and of tendering you my respects and good wishes.

J. M. presents his respects to Mr. [Henry B(?)]. Livingston and requests the favor of him to forward the above inclosed letter to N. Orleans or to retain it as his brother may or may not be expected at N. York.

TO W. T. BARRY. MAD. MSS.

Aug 4, 1822

Dr Sir, I recd some days ago your letter of June 30, and the printed Circular to which it refers.

The liberal appropriations made by the Legislature of Kentucky for a general system of Education cannot be too much applauded. A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

I have always felt a more than ordinary interest in the destinies of Kentucky. Among her earliest settlers were some of my particular friends and