John Doe, Inc. v. Mukasey (*Doe V*)

United States Court of Appeals for the Second Circuit, 2008
549 F.3d 861

JON O. NEWMAN, Circuit Judge: This appeal concerns challenges to the constitutionality of statutes regulating the issuance by the Federal Bureau of Investigation ("FBI") of a type of administrative subpoena generally known as a National Security Letter ("NSL") to electronic communication service providers ("ECSPs"). *See* 18 U.S.C. §§2709, 3511 (collectively "the NSL statutes). . . . Primarily at issue on this appeal are challenges to the provisions (1) prohibiting the recipient from disclosing the fact that an NSL has been received, *see* 18 U.S.C. §2709(c), and (2) structuring judicial review of the nondisclosure requirement, *see id.*§3511(b). . . .

Background . . .

Amendments to the NSL statutes. While appeals in *Doe I* and *Doe* [*II*] were pending, Congress amended the NSL statutes in two respects. *See* USA Patriot Improvement and Reauthorization Act of 2005, §§115, 116(a), Pub. L. No. 109-177, 120 Stat. 192, 211-14 (Mar. 9, 2006) ("the Reauthorization Act"), *amended by* USA Patriot Act Additional Reauthorizing Amendments Act of 2006, §4(b), Pub. L. No. 109-178, 120 Stat. 278, 280 (Mar. 9, 2006) ("Additional Reauthorization Act"), codified at 18 U.S.C.A. §2709(c) (West Supp. 2008). . . . The Reauthorization Act amended subsection 2709(c) by replacing the single paragraph of former subsection 2709(c) with four subdivisions, the fourth of which was amended by the Additional Reauthorization Act. We consider below the text of amended subsection 2709(c), which is set out in the margin.[7] Second, in the Reauthorization Act, Congress added provisions for judicial

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7. Subsection 2709(c), as amended by the Additional Reauthorization Act, provides:
(c) Prohibition of certain disclosure.—

(1) If 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, certifies that otherwise 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, no wire or electronic communications service provider, or officer, employee, or agent thereof, shall disclose to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

(2) The request shall notify the person or entity to whom the request is directed of the nondisclosure requirement under paragraph (1).

(3) Any recipient disclosing to those persons necessary to comply with the request or to an attorney to obtain legal advice or legal assistance with respect to the request shall inform such person of any applicable nondisclosure requirement. Any person who receives a disclosure under this subsection shall be subject to the same prohibitions on disclosure under paragraph (1).

(4) At the request of the Director of the Federal Bureau of Investigation or the designee of

review, now codified in section 3511, to permit the recipient of an NSL to petition a United States district court for an order modifying or setting aside the NSL, *see* 18 U.S.C.A. §3511(a) (West Supp. 2008), and the nondisclosure requirement, *see id.* §3511(b). The NSL may be modified if "compliance would be unreasonable, oppressive, or otherwise unlawful." *Id.* §3511(a). The nondisclosure requirement, which prohibits disclosure by the NSL recipient of the fact that the FBI has sought or obtained access to the requested information, may be modified or set aside, upon a petition filed by the NSL recipient, *id.* §3511(b)(1), if the district court "finds that there is no reason to believe that disclosure may endanger the national security of the United States" or cause other of the enumerated harms (worded slightly differently from subsection 2709(c)(1)), *see id.* §3511(b)(2), (3). The nondisclosure requirement further provides that if the Attorney General or senior governmental officials certify that disclosure may endanger the national security or interfere with diplomatic relations, such certification shall be treated as "conclusive" unless the court finds that the certification was made "in bad faith." *Id.* . . .

The District Court's second decision. On September 6, 2007, the District Court issued its second opinion, ruling, on cross-motions for summary judgment, that, despite the amendments to the NSL statutes, subsections 2709(c) and 3511(b) are facially unconstitutional, *see id.* at 387, and that the Defendants-Appellants are enjoined from issuing NSLs under section 2709 and enforcing the provisions of subsections 2709(c) and 3511(b), *see id.* at 425-26. . . .

[The district court held that the nondislosure requirement constituted a "prior restraint" under First Amendment law, requiring "strict scrutiny" by the court. Acknowledging that national security is a compelling state interest, the district court held that the nondisclosure provisions vested executive officials with broad discretion without necessary procedural safeguards. It also found that the statutory amendments violated the First Amendment and the separation of powers by prescribing judicial review procedures and a judicial review standard inconsistent with strict scrutiny and by permitting nondisclosure orders that are not narrowly tailored in scope or duration.]

Discussion . . .

I. Applicable Principles

The First Amendment principles relevant to the District Court's rulings are well established, although their application to the statutory provisions at issue requires careful consideration. A judicial order "forbidding certain communications when issued in advance of the time that such communications are to occur" is generally regarded as a "prior restraint." A content-based

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> the Director, any person making or intending to make a disclosure under this section 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, except that nothing in this section shall require a person to inform the Director or such designee of the identity of an attorney to whom disclosure was made or will be made to obtain legal advice or legal assistance with respect to the request under subsection (a).

18 U.S.C.A. §2709(c) (West Supp. 2008). . . .

restriction is subject to review under the standard of strict scrutiny, requiring a showing that the restriction is "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813 (2000).

Where expression is conditioned on governmental permission, such as a licensing system for movies, the First Amendment generally requires procedural protections to guard against impermissible censorship. *See Freedman* [*v. Maryland,* 380 U.S. 51, 58 (1965)]. *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.

Once constitutional standards have been authoritatively enunciated, Congress may not legislatively supercede them. . . .

The national security context in which NSLs are authorized imposes on courts a significant obligation to defer to judgments of Executive Branch officials. . . .

The last set of principles implicated by the Plaintiffs' constitutional challenges concerns the somewhat related issues of judicial interpretation of unclear statutes, judicial revision of constitutionally defective statutes, and judicial severance of constitutionally invalid provisions from otherwise valid provisions. It is well established that courts should resolve ambiguities in statutes in a manner that avoids substantial constitutional issues.

Less clear is the authority of courts to revise a statute to overcome a constitutional defect. Of course, it is the province of the Legislative Branch to legislate. But in limited circumstances the Supreme Court has undertaken to fill in a statutory gap arising from the invalidation of a portion of a statute. . . .

III. The Interpretation of the NSL Statutes . . .

. . . [S]ubsection 2709(c) specifies what senior FBI officials must certify to trigger the nondisclosure requirement, and subsection 3511(b) specifies, in similar but not identical language, what a district court must find in order to modify or set aside such a requirement. Senior FBI officials must certify that in the absence of a nondisclosure requirement "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." 18 U.S.C. §2709(c)(1). Upon challenge by an NSL recipient, a district court may modify or set aside 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." *Id.*§3511(b)(2).

These provisions present three issues for interpretation: (1) what is the scope of the enumerated harms? (2) what justifies a nondisclosure requirement? and (3) which side has the burden of proof?. . .

[The government made concessions on each of these questions.]

Under the principles outlined above, we are satisfied that we may accept the Government's

concessions on all three matters of statutory interpretation without trenching on Congress's prerogative to legislate. We will therefore construe subsection 2709(c)(1) to mean that the enumerated harms must be related to "an authorized investigation to protect against international terrorism or clandestine intelligence activities," 18 U.S.C. §2709(b)(1), (2), and construe subsections 3511(b)(2) and (3) to place on the Government the burden to persuade a district court that there is a good reason to believe that disclosure may result in one of the enumerated harms, and to mean that a district court, in order to modify or set aside a nondisclosure order, must find that such a good reason exists.

IV. Constitutionality of the NSL Statutes

(a) *Basic approach.* Turning to the First Amendment issues with respect to the NSL statutes as thus construed, we believe that the proper path to decision lies between the broad positions asserted by the parties. Although the nondisclosure requirement is in some sense a prior restraint, as urged by the Plaintiffs, 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 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.

On the other hand, we do not accept the Government's contentions that the nondisclosure requirement can be considered to satisfy First Amendment standards based on analogies to secrecy rules applicable to grand juries, judicial misconduct proceedings, and certain interactions between individuals and governmental entities. The justification for grand jury secrecy inheres in the nature of the proceedings. As the Supreme Court has noted, such secrecy serves several interests common to most such proceedings, 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.

Although these interests do not warrant a prohibition on disclosure of a witness's own testimony after the term of the grand jury has ended, they generally suffice to maintain grand jury secrecy against First Amendment claims to divulge information a witness obtained through participation in the grand jury process. Unlike the grand jury proceeding, as to which interests in secrecy arise from the nature of the proceeding, the nondisclosure requirement of subsection 2709(c) is imposed at the demand of the Executive Branch under circumstances where secrecy might or might not be warranted, depending on the circumstances alleged to justify such secrecy. . . .

The nondisclosure requirement of subsection 2709(c) is not a typical prior restraint or a typical content-based restriction warranting the most rigorous First Amendment scrutiny. On the other hand, the Government's analogies to nondisclosure prohibitions in other contexts do not persuade us to use a significantly diminished standard of review. In any event, John Doe, Inc., has been restrained from publicly expressing a category of information, albeit a narrow one, and that information is relevant to intended criticism of a governmental activity. *See Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1034 (1991) ("There is no question that speech critical of the exercise

of the State's power lies at the very center of the First Amendment."); *Landmark* [*Communications, Inc. v. Virginia,* 435 U.S. 829, 838 (1978)] ("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.") (internal quotation marks omitted).

The panel is not in agreement as to whether, in this context, we should examine subsection 2709(c) under a standard of traditional strict scrutiny or under a standard that, in view of the context, is not quite as "exacting" a form of strict scrutiny, *Seattle Times* [*Co. v. Rhinehart*, 467 U.S. 20, 33 (1984)]. Ultimately, this disagreement has no bearing on our disposition because, as we discuss below, the only two limitations on NSL procedures required by First Amendment procedural standards would be required under either degree of scrutiny. We note that, for purposes of the litigation in this Court, the Government has conceded that strict scrutiny is the applicable standard.

(b) *Strict scrutiny.* Under strict scrutiny review, the Government must demonstrate that the nondisclosure requirement is "narrowly tailored to promote a compelling Government interest," *Playboy Entertainment,* 529 U.S. at 813, and that there are no "less restrictive alternatives [that] would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve," *Reno v. ACLU,* 521 U.S. 844, 874 (1997). Since "[i]t is obvious and unarguable that no governmental interest is more compelling than the security of the Nation," *Haig v. Agee,* 453 U.S. 280, 307 (1981) (internal quotation marks omitted), the principal strict scrutiny issue turns on whether the narrow tailoring requirement is met, and this issue, as the District Court observed, essentially concerns the process by which the nondisclosure requirement is imposed and tested.

With subsections 2709(c) and 3511(b) interpreted as set forth above, *see* Part III, *supra,* two aspects of that process remain principally at issue: the absence of a requirement that the Government initiate judicial review of the lawfulness of a nondisclosure requirement and the degree of deference a district court is obliged to accord to the certification of senior governmental officials in ordering nondisclosure.

(i) *Absence of requirement that the Government initiate judicial review.* The Plaintiffs alleged, and the District Court agreed, that the third *Freedman* procedural requirement applies to the NSL statutes, requiring the Government to initiate judicial review of its imposition of a nondisclosure requirement. . . .

Instead of determining whether, as the Government contends, a burden of initiating litigation can prevent application of the third *Freedman* procedural safeguard, we consider an available means of minimizing that burden, use of which would substantially avoid the Government's argument. The Government could inform each NSL recipient that it should give the Government prompt notice, perhaps within ten days, in the event that the recipient wishes to contest the nondisclosure requirement. Upon receipt of such notice, the Government could be accorded a limited time, perhaps 30 days, to initiate a judicial review proceeding to maintain the nondisclosure requirement, and the proceeding would have to be concluded within a prescribed time, perhaps 60 days. In accordance with the first and second *Freedman* safeguards, the NSL could inform the recipient that the nondisclosure requirement would remain in effect during the entire interval of the recipient's decision whether to contest the nondisclosure requirement, the Government's prompt application to a court, and the court's prompt adjudication on the merits.

The NSL could also inform the recipient that the nondisclosure requirement would remain in effect if the recipient declines to give the Government notice of an intent to challenge the requirement or, upon a challenge, if the Government prevails in court. If the Government is correct that very few NSL recipients have any interest in challenging the nondisclosure requirement (perhaps no more than three have done so thus far), this "reciprocal notice procedure" would nearly eliminate the Government's burden to initiate litigation (with a corresponding minimal burden on NSL recipients to defend numerous lawsuits). Thus, the Government's litigating burden can be substantially minimized, and the resulting slight burden is not a reason for precluding application of the third *Freedman* safeguard.

The Government's second argument for not applying *Freedman*'s third safeguard relies on an attempt to analogize the nondisclosure requirement in NSLs to nondisclosure requirements imposed in the context of pre-existing interaction with a governmental activity. Unlike the movies subject to licensing in *Freedman,* which were created independently of governmental activity, the information kept secret by an NSL, the Government contends, is "information that the recipient learns by (and only through) his participation in the [G]overnment's own investigatory processes." Although the governmental interaction distinction has validity with respect to the litigant obtaining discovery material in *Seattle Times* and the former CIA employees seeking to disclose sensitive material in [*United States v.*] *Marchetti* [466 F.2d 1309 (4th Cir. 1972)], and *Snepp* [*v. United States*, 444 U.S. 507 (1980)], we think it has no application to an ECSP with no relevant governmental interaction prior to receipt of an NSL. The recipient's "participation" in the investigation is entirely the result of the Government's action. . . .

Third, the Government seeks to avoid *Freedman*'s third requirement on the ground that the risk of administrative error "is significantly smaller under [sub]section 2709(c) than under licensing schemes like the one in *Freedman.*" Although the risk of error may be smaller, it remains sufficient to require a judicial review procedure that conforms to *Freedman.* The OIG [Office of Inspector General, Dept. of Justice] Report concluded that "'the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies.'" . . .

The availability of a minimally burdensome reciprocal notice procedure for governmental initiation of judicial review and the inadequacy of the Government's attempts to avoid the third *Freedman* safeguard persuade us that this safeguard, normally required where strict scrutiny applies, must be observed. Therefore, in the absence of Government-initiated judicial review, subsection 3511(b) is not narrowly tailored to conform to First Amendment procedural standards. We conclude, as did the District Court, that subsection 3511(b) does not survive either traditional strict scrutiny or a slightly less exacting measure of such scrutiny.

(ii) *Deference to administrative discretion.* The Plaintiffs contended, and the District Court agreed, that the judicial review contemplated by subsection 3511(b) authorizes a degree of deference to the Executive Branch that is inconsistent with First Amendment standards. Although acknowledging that "national security is a compelling interest justifying nondisclosure in certain situations," the District Court faulted the review provision in several respects. First, the Court stated that the statute "requires the court to blindly credit a finding that there 'may' be a reason – potentially any conceivable and not patently frivolous reason – for it to believe disclosure will result in a certain harm." *Id.* Our construction of the statute, however, avoids that concern. As indicated above, *see* Part III, *supra,* we interpret subsection 3511(b) to place on the Government

the burden to show a "good" reason to believe that disclosure may result in an enumerated harm, *i.e.,* a harm related to "an authorized investigation to protect against international terrorism or clandestine intelligence activities," 18 U.S.C. §2709(b)(1), (2), and to place on a district court an obligation to make the "may result" finding only after consideration, albeit deferential, of the Government's explanation concerning the risk of an enumerated harm.

Assessing the Government's showing of a good reason to believe that an enumerated harm may result will present a district court with a delicate task. While the court will normally defer to the Government's considered assessment of *why* disclosure in a particular case may result in an enumerated harm related to such grave matters as international terrorism or clandestine intelligence activities, it cannot, consistent with strict scrutiny standards, uphold a nondisclosure requirement on a conclusory assurance that such a likelihood exists. In this case, the director of the FBI certified that "the disclosure of the NSL itself or its contents may endanger the national security of the United States." To accept that conclusion without requiring some elaboration would "cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct." *Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 426 (1995).

In showing why disclosure would risk an enumerated harm, the Government must at least indicate the nature of the apprehended harm and provide a court with some basis to assure itself (based on *in camera* presentations where appropriate) that the link between disclosure and risk of harm is substantial. As the Government acknowledges, "Nothing in [subs]ection 3511(b) would require a district court to confine judicial review to the FBI's necessarily unelaborated public statement about the need for nondisclosure. The provisions in [subs]ections 3511(d) and (e) for *ex parte* and *in camera* review provide a ready mechanism for the FBI to provide a more complete explanation of its reasoning, and the court is free to elicit such an explanation as part of the review process."

We have every confidence that district judges can discharge their review responsibility with faithfulness to First Amendment considerations and without intruding on the prerogative of the Executive Branch to exercise its judgment on matters of national security. Such a judgment is not to be second-guessed, but a court must receive some indication that the judgment has been soundly reached. As the Supreme Court has noted in matters of similar gravity, the Constitution "envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld,* 542 U.S. 507, 536 (2004).

The District Court's second reason for considering the judicial review procedure of subsection 3511(b) deficient was a perceived preclusion of a court's authority, when presented with a "plausible, reasonable, and specific" enumerated harm, to balance "the potential harm against the particular First Amendment interest raised by a particular challenge." We see no deficiency in this regard. The balance sought by the District Court is an important aspect of judicial review of prior restraints. That is why we have interpreted the statutory standard to permit a nondisclosure requirement only upon an adequate demonstration that a good reason exists reasonably to apprehend a risk of an enumerated harm, and have expressly read the enumerated harms as being linked to international terrorism or clandestine intelligence activities. As a result of this interpretation, the balance sought by the District Court is now inherent in the statutory standard.

A demonstration of a reasonable likelihood of potential harm, related to international terrorism or clandestine intelligence activities, will virtually always outweigh the First Amendment interest in speaking about such a limited and particularized occurrence as the receipt of an NSL and will suffice to maintain the secrecy of the fact of such receipt.

The District Court's third objection to the judicial review procedure is far more substantial. The Court deemed inconsistent with strict scrutiny standards the provision of subsections 3511(b)(2) and (b)(3) specifying that a certification by senior governmental officials that disclosure may "endanger the national security of the United States or interfere with diplomatic relations . . . shall be treated as conclusive unless the court finds that the certification was made in bad faith." 18 U.S.C. §3511(b)(2). We agree.

There is not meaningful judicial review of the decision of the Executive Branch to prohibit speech if the position of the Executive Branch that speech would be harmful is "conclusive" on a reviewing court, absent only a demonstration of bad faith. To accept deference to that extraordinary degree would be to reduce strict scrutiny to no scrutiny, save only in the rarest of situations where bad faith could be shown. Under either traditional strict scrutiny or a less exacting application of that standard, some demonstration from the Executive Branch of the need for secrecy is required in order to conform the nondisclosure requirement to First Amendment standards. The fiat of a governmental official, though senior in rank and doubtless honorable in the execution of official duties, cannot displace the judicial obligation to enforce constitutional requirements. "Under no circumstances should the Judiciary become the handmaiden of the Executive." *United States v. Smith,* 899 F.2d 564, 569 (6th Cir. 1990).

V. Remedy

To recapitulate our conclusions, we (1) construe subsection 2709(c) to permit a nondisclosure requirement only when senior FBI officials certify that disclosure may result in an enumerated harm that is related to "an authorized investigation to protect against international terrorism or clandestine intelligence activities," (2) construe subsections 3511(b)(2) and (b)(3) to place on the Government the burden to show that a good reason exists to expect that disclosure of receipt of an NSL will risk an enumerated harm, (3) construe subsections 3511(b)(2) and (b)(3) to mean that the Government satisfies its burden when it makes an adequate demonstration as to why disclosure in a particular case may result in an enumerated harm, (4) rule that subsections 2709(c) and 3511(b) are unconstitutional to the extent that they impose a nondisclosure requirement without placing on the Government the burden of initiating judicial review of that requirement, and (5) rule that subsections 3511(b)(2) and (b)(3) are unconstitutional to the extent that, upon such review, a governmental official's certification that disclosure may endanger the national security of the United States or interfere with diplomatic relations is treated as conclusive.

Implementing these conclusions requires us to apply the principles of judicial interpretation and limited revision of statutes and consider the related issue of severance discussed in Part I, *supra.* We are satisfied that conclusions (1), (2), and (3) fall within our judicial authority to interpret statutes to avoid constitutional objections or conform to constitutional requirements. Conclusions (4) and (5) require further consideration.

We deem it beyond the authority of a court to "interpret" or "revise" the NSL statutes to

create the constitutionally required obligation of the Government to initiate judicial review of a nondisclosure requirement. However, the Government might be able to assume such an obligation without additional legislation. As we discussed in Part IV(b)(i), *supra,* the Government's concern about the potentially substantial burden of initiating litigation can be readily alleviated by use of the reciprocal notice procedure we have suggested. . . .

In view of these possibilities, we need not invalidate the entirety of the nondisclosure requirement of subsection 2709(c) or the judicial review provisions of subsection 3511(b). Although the conclusive presumption clause of subsections 3511(b)(2) and (b)(3) must be stricken, we invalidate subsection 2709(c) and the remainder of subsection 3511(b) only to the extent that they fail to provide for Government-initiated judicial review. The Government can respond to this partial invalidation ruling by using the suggested reciprocal notice procedure. With this procedure in place, subsections 2709(c) and 3511(b) would survive First Amendment challenge. . . .

Conclusion

Accordingly, for all the foregoing reasons, subsections 2709(c) and 3511(b) are construed in conformity with this opinion and partially invalidated only to the extent set forth in this opinion, the injunction is modified as set forth in this opinion, and the judgment of the District Court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.