

# GAGS AS GUIDANCE: EXPANDING NOTICE OF NATIONAL SECURITY LETTER INVESTIGATIONS TO TARGETS AND THE PUBLIC

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## ABSTRACT

National Security Letters (NSLs) are administrative subpoenas that the FBI uses to demand information from Internet service providers without prior judicial approval. They almost always include nondisclosure orders, commonly called “gags,” which prohibit the recipient from discussing the letter’s contents or even its mere existence. Courts and commentators have expressed concern that these gags may be overbroad prior restraints that violate the First Amendment and shroud government surveillance in undue secrecy. On November 30, 2015, an NSL gag order was lifted in full for the first time after a federal district judge found no “good reason” to retain it.

This Note considers the related rights of NSL targets. It argues that the FBI should provide notice of NSL investigations to targets and the public once government interests in secrecy abate. Specifically, once a nondisclosure order is lifted, thereby authorizing the recipient of the NSL to reveal any information about it that she desires, the government should disclose that same information. Enhancing transparency about government surveillance in this manner would not risk harm or cause undue administrative burden. It would harmonize with longstanding, closely related domestic criminal statutes. And it would advance core principles that underlie the Fourth Amendment. Moreover, the First Amendment offers ready balancing tests that can easily and reasonably be applied to guide government notice practices.

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## I. INTRODUCTION

On November 30, 2015, a National Security Letter gag order was lifted in full for the first time.<sup>1</sup> National Security Letters (NSLs) are administrative subpoenas that the FBI uses to demand information from Internet service providers without prior judicial approval.<sup>2</sup> Over 300,000 NSLs have been issued over the past decade.<sup>3</sup> They almost always include nondisclosure orders, commonly called “gags,” which prohibit the recipient from discussing the letter’s contents or even its mere existence.<sup>4</sup> One such recipient, Nicholas Merrill, fought an eleven-year court battle to be able to speak freely about the NSL that he received.<sup>5</sup> In November 2015, he finally won; a federal district court found no “good reason” to retain the gag in relation to any part of the NSL.<sup>6</sup> Mr. Merrill may now tell anyone he wants anything about the NSL that he chooses to reveal, including precisely what kinds of information the FBI wanted to know—and about whom. Yet, despite the fact that this investigation ended without criminal charges years ago, the actual target of the investigation has no right to any of that information at all.

This Note proposes that the FBI provide notice to the targets of NSL investigations once government interests in secrecy abate. The government should also make public more information about its actual NSL practices than is currently required. The following discussion offers standards for

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1. *Merrill v. Lynch*, No. 14-CV-9763, 2015 WL 9450650, at \*3 (S.D.N.Y., Aug. 28, 2015). The author served as counsel for Mr. Merrill in this case, along with supervising attorneys Jonathan Manes and David Schulz and fellow students Amanda Lynch and Lulu Pantin, as part of the Media Freedom and Information Access Clinic at Yale Law School. *E.g.*, Press Release, Info. Soc’y Project, *Following Major First Amendment Victory, National Security Letter Recipient Nicholas Merrill Able to Reveal Previously Undisclosed Scope of FBI Warrantless Surveillance Tool* (Nov. 30, 2015), <http://isp.yale.edu/node/6037> [<https://perma.cc/H9AT-TEEX>] [hereinafter Info. Soc’y Project, *First Amendment Victory*]. The ACLU represented Mr. Merrill in a prior case that lifted his NSL gag in part. *Doe v. Holder*, 703 F. Supp. 2d 313 (S.D.N.Y. 2010).

2. 18 U.S.C. § 2709 (2012); *see also* Charles Doyle, *National Security Letters: Proposals in the 113th Congress*, CONG. RESEARCH SERV., R43322, at 1 (2015), <https://www.fas.org/sgp/crs/intel/R43322.pdf> [<https://perma.cc/HAD9-ZRZN>].

3. *E.g.*, Elec. Frontier Found., *National Security Letters: FAQ*, DEFENDING YOUR RIGHTS IN THE DIGITAL WORLD, <https://www.eff.org/issues/national-security-letters/faq> [<https://perma.cc/4RTR-229K>]; Elec. Privacy Info. Ctr., *Foreign Intelligence Surveillance Act Court Orders 1979-2014*, EPIQ.ORG, [http://epic.org/privacy/wiretap/stats/fisa\\_stats.html#background](http://epic.org/privacy/wiretap/stats/fisa_stats.html#background) [<https://perma.cc/UD9X-GBE2>].

4. *See Reauthorizing the USA Patriot Act: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 6 (2009) (statement of Glenn Fine, Inspector Gen., U.S. Dep’t of Just.), [www.justice.gov/oig/testimony/t0909.pdf](http://www.justice.gov/oig/testimony/t0909.pdf).

5. Info. Soc’y Project, *First Amendment Victory*, *supra* note 1.

6. *Merrill*, 2015 WL 9450650 at \*3.

when and how much notice should be provided. Specifically, once an NSL nondisclosure order is lifted, thereby authorizing the recipient of the letter to disclose information about it to whomever she desires, the government should provide that same information to the target of the investigation. Further, when the government permits the recipients of NSL nondisclosure orders to publish general information about the letters they receive, the government should make similar materials available for public review. Either Congress should amend the relevant NSL statutes to require such notice, or the Executive should adopt a policy to provide it unilaterally.

Expanding notice of NSL investigations to targets and the public will enhance transparency about government surveillance. NSLs have existed since the 1980s, but originally targeted only information pertaining to foreign powers or their agents.<sup>7</sup> In 2001, the USA PATRIOT ACT added domestic surveillance of U.S. persons to the FBI's NSL authority and authorized the agency to collect a far broader category of information relevant to "protect against international terrorism or clandestine intelligence activities."<sup>8</sup> Congress also altered the NSL procedural requirements, permitting the FBI to deploy more NSLs more quickly, enabling an exponential increase in their issuance.<sup>9</sup> Currently, the FBI issues almost sixty NSLs each day.<sup>10</sup> After the leak of classified information by Edward Snowden in 2013, the President's Surveillance Review Group proposed mandatory prior judicial approval for all NSLs and nondisclosure orders.<sup>11</sup> To date, this proposal has not been adopted. Instead, the USA FREEDOM Act of 2015 expanded existing procedures

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7. *E.g.*, Elec. Frontier Found., *In re: National Security Letter*, DEFENDING YOUR RIGHTS IN THE DIGITAL WORLD, <https://www.eff.org/cases/re-matter-2011-national-security-letter> [<https://perma.cc/34DP-G5XL>]; *see also*, Charles Doyle, *National Security Letters in Foreign Intelligence Investigations: A Glimpse at the Legal Background* 2, CONG. RESEARCH SERV., RS22406, at 1–2 (2014) [hereinafter Doyle, *A Glimpse*], <http://fas.org/sgp/crs/intel/RS22406.pdf> [<https://perma.cc/RK29-Y8NW>] (noting that Congress passed the first NSL statute as an amendment to RFRA).

8. Doyle, *A Glimpse*, *supra* note 7, at 1–2; § 2709(b).

9. *Id.* at 2.

10. RICHARD A. CLARK ET. AL, LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES 93 (2013), [https://www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf) [<https://perma.cc/7EQR-KKLP>].

11. *E.g.*, Julian Sanchez, *Can We Do Without National Security Letters*, JUST SECURITY (Jan. 9, 2014), <http://justsecurity.org/5351/national-security-letters> [<https://perma.cc/CK64-HMAE>].

that can be used to limit or terminate NSL nondisclosure orders,<sup>12</sup> and also created new ones.<sup>13</sup>

Notice for NSLs would reduce the risk of government overreach for this surveillance authority. NSLs have been abused in the past. Two reports by the Department of Justice's Inspector General found that "the FBI had used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies."<sup>14</sup> Wrongful behavior may have been even more common than was documented because possible additional violations were not "identified or reported" as required.<sup>15</sup> There is also evidence that some NSL investigations may have been constitutionally unreasonable. An Inspector General report on Section 215 Orders, a related surveillance statute, confirmed that the FBI has used NSLs to conduct investigative actions after authorization for those same actions was denied by the Foreign Intelligence Surveillance Court (FISC).<sup>16</sup> The FISC cited concern that individuals were being targeted "solely on the basis of activities protected by the First Amendment."<sup>17</sup> No further review addressed that concern before the FBI conducted identical actions under its NSL authority.<sup>18</sup> If the FISC's concerns were accurate, these investigations may have been both statutory violations and also

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12. USA FREEDOM Act of 2015, H.R. 2048, 114th Cong. § 3511(b)(1)(A)–(B) (2015) [hereinafter USA Freedom Act]. This law codified a prior procedure for recipient initiated judicial review of NSL nondisclosure orders, which was originally developed by the Second Circuit. *See, e.g., Doe v. Mukasey*, 549 F.3d 861, 879 (2008) ("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 . . .").

13. The USA FREEDOM Act also added new procedures to limit the gags. The Attorney General is now required to review all NSL nondisclosure orders and lift them when the facts no longer support a need for secrecy. USA Freedom Act § 502(f). The Act also permits NSL recipients themselves to disclose general information about the letters they receive. USA Freedom Act § 604.

14. Doyle, *National Security Letters: Proposals*, *supra* note 2, at 7.

15. *Id.*

16. U.S. DEPT OF JUSTICE, INSPECTOR GEN., REPORT ON 215 ORDERS 73 (2006) ("[T]he FISA Court twice refused to authorize Section 215 orders based on concerns that the investigation was premised on protected First Amendment activity, and the FBI subsequently issued NSLs to obtain information . . . based on the same factual predicate without first reviewing the underlying investigation to ensure it did not violate the First Amendment caveat.").

17. *Id.* at 72 n.67.

18. OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FBI'S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS IN 2006, 73 (Mar. 2008). The same prohibition applies to NSL searches. § 2709.

constitutionally problematic. NSL investigations could also be unlawful if they were not properly authorized, or if they were not relevant “to protect against international terrorism or clandestine intelligence activities.”<sup>19</sup>

Notice would help to ensure accountability. A notice requirement would enable the targets of unreasonable or abusive NSL investigations to sue the government. Congress could codify an express cause of action and specify a remedy for NSL violations, as it has already done for improper surveillance that violates the Wiretap Act or the Stored Communications Act.<sup>20</sup> Even without statutory amendment, targets who were investigated solely as a result of their First Amendment protected activities may have constitutional claims that would enable them to file *Bivens* suits for civil damages.<sup>21</sup> Depending on the type of information that the FBI sought to obtain using an NSL, targets might also have Fourth Amendment *Bivens* claims.<sup>22</sup> Admittedly, the Supreme Court’s current “third party doctrine,” which retracts Fourth Amendment safeguards for information that individuals share with others,<sup>23</sup> would pose a substantial hurdle to those claims. But courts have begun to restrict the scope of the third party doctrine when the government collects particularly sensitive electronic data,<sup>24</sup> some of which can ostensibly be obtained with an NSL.<sup>25</sup>

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19. § 2709(b); *see also*, *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 496 (S.D.N.Y. 2004) (stating reasons why an NSL might be “unreasonable or otherwise unlawful”).

20. 18 U.S.C. § 2520; § 2707(a).

21. In *Bivens v. Six Unknown Named Agents*, the Court recognized a private right of action against federal officers for money damages in cases of alleged constitutional violations. 403 U.S. 388 (1971). The Third, Ninth, and D.C. Circuits have recognized *Bivens* claims for First Amendment violations. *E.g.*, *David Bloem v. Unknown Department of the Interior Employees*, 920 F. Supp. 2d 154, 159-160 (D.D.C. 2013). A rich array of secondary literature addresses First Amendment concerns about NSLs. *E.g.*, Jack Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2329-41 (2014); Niel M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008) (locating intellectual privacy within First Amendment theory).

22. One criticism of *Bivens* as an enforcement mechanism is that monetary damages from abusive searches are often so small that potential plaintiffs will not pursue them. But this is not always true. For instance, the plaintiffs in *Clapper v. Amnesty International* spent significant sums in an effort to avoid government collection of confidential communications. *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1146 (2013) (“[R]espondents declare that they have undertaken ‘costly and burdensome measures’ to protect the confidentiality of sensitive communications.”).

23. *See, e.g.*, Orin S. Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009) (“The ‘third-party doctrine’ is the Fourth Amendment rule that . . . [b]y disclosing to a third party, the subject gives up all of his Fourth Amendment rights in the information revealed.”).

24. For an excellent overview of recent Fourth Amendment case law as applied to sensitive electronic data, *see In re Application for Telephone Information Needed for a Criminal Investigation*, 2015 WL 4594558, at \*7-9 (N.D. Cal., Jul. 29, 2015).

Finally, notice to the public through stronger reporting requirements would add another layer of oversight. As the Snowden revelations revealed, when intelligence agencies interpret their surveillance authority in secret, they can stretch the scope of that authority far beyond what regular observers would expect from reading the law on the books.<sup>26</sup> Greater public transparency about the FBI's actual NSL practices would counteract this risk.

Part II of this Note offers a detailed proposal for implementing such a notice policy without risking harm or causing undue administrative burden. Part III considers likely counterarguments and turns to longstanding statutory precedents for guidance on how to address them. It concludes that notice should outweigh competing interests in secrecy, security, and confidentiality for NSL investigations because, in this particular context, there is a substantial risk of government abuse. Possible constitutional support for the notice proposal is examined in Part IV. This Part builds on Akhil Reed Amar's theory of the original Fourth Amendment to develop a series of constitutional arguments in favor of notice to NSL targets and the public. It also offers a structural claim that the relationship between the First and Fourth Amendments substantiates using limits on nondisclosure orders as standards to guide the government's notice obligations.

## II. THE PROPOSAL: PROVIDING NOTICE OF NSL INVESTIGATIONS ONCE NONDISCLOSURE ORDERS END

Policy shifts over the last two years suggest that a substantial number of nondisclosure orders will presumably be lifted soon. Until recently, almost all National Security Letter nondisclosure orders stayed in effect

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25. See *infra* notes 72–77 and accompanying text. For instance, the FBI claims the authority to collect cell-site location information using an NSL. *E.g.*, Info. Soc'y Project, *First Amendment Victory*, *supra* note 1 (“The FBI also claims authority to obtain cell-site location information with an NSL, which effectively turns a cell phone into a location tracking device. In court filings, the FBI said that at some point it stopped gathering location data as a matter of policy, but that it could secretly chose to resume the practice under existing authority.”). Some courts have held that this information is protected by the Fourth Amendment. *E.g.*, *In re Application for Telephone Information*, 2015 WL 4594558, at \*9 (“[T]he Court finds that individuals have an expectation of privacy in the historical CSLI associated with their cell phones, and that such an expectation is one that society is willing to recognize as reasonable.”).

26. *E.g.*, Jonathan Manes, *Online Service Providers and Surveillance Law Transparency*, 125 YALE L.J. F. 343 (2016).

indefinitely.<sup>27</sup> Only a handful of recipients managed to even challenge their gag orders in court, including Mr. Merrill,<sup>28</sup> four Connecticut librarians,<sup>29</sup> the Internet Archive,<sup>30</sup> two Internet service providers whose identity remains under seal because they are still fighting their case,<sup>31</sup> and—most recently—an unidentified plaintiff who filed a challenge in September of 2015.<sup>32</sup> But this state of affairs is changing. On January 17, 2014, President Obama instructed the Attorney General “to amend how we use National Security Letters so that [their] secrecy will not be indefinite, and will terminate within a fixed time unless the government demonstrates a real need for further secrecy.”<sup>33</sup> In response, the FBI announced a new policy to “presumptively terminate” all NSL gag orders after three years.<sup>34</sup> The USA FREEDOM Act of 2015 added yet another layer of change; the law directs the Attorney General to review all NSL gags at regular intervals and to rescind them when the facts no longer require secrecy.<sup>35</sup>

This Part proposes extending these policy shifts with two easy reforms to reduce secrecy about the government’s use of NSLs without causing harm or undue administrative burden. First, when an NSL nondisclosure order ends, the government should notify the target of that NSL investigation. Second, the government should publish more information

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27. *E.g.*, *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 502 (S.D.N.Y. 2004) (concluding until 2004, no NSL had ever been challenged in court).

28. *E.g.*, *My National Security Letter Gag Order*, WASH. POST (Mar. 23, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/22/AR2007032201882.html> [<https://perma.cc/MB8D-RF9C>].

29. *E.g.*, Alison Leigh Cowan, *Four Librarians Finally Break Silence in Records Case*, N.Y. TIMES (May 31, 2006), <http://www.nytimes.com/2006/05/31/nyregion/31library.html> [<https://perma.cc/66DH-AAL3>].

30. *E.g.*, Ryan Singel, *FBI Targets Internet Archive with Secret National Security Letter, Loses*, WIRED.COM (May 7, 2008), <http://www.wired.com/2008/05/internet-archiv> [<https://perma.cc/5T4G-HHHY>].

31. *E.g.*, Cindy Cohn & Kurt Opsahl, *Justice Delayed: Ninth Circuit Sends EFF’s NSL Cases Back for Consideration Under USA FREEDOM*, DEFENDING YOUR RIGHTS IN THE DIGITAL WORLD (Aug. 31, 2015), <https://www.eff.org/deeplinks/2015/08/justice-delayed-ninth-circuit-sends-effs-nsl-cases-back-consideration-under-usa> [<https://perma.cc/QV34-CFD5>].

32. *E.g.*, Tim Cushing, *Another NSL Challenge is Made Public; Court Decides Government can Keep Gag Order in Place Indefinitely*, TECHDIRT (Dec. 29, 2015), <https://www.techdirt.com/articles/20151229/10144633190/another-nsl-challenge-is-made-public-court-decides-government-can-keep-gag-order-place-indefinitely.shtml> [<https://perma.cc/L7CU-SPGS>].

33. Office of the Dir. of Nat’l Intelligence, *Strengthening Privacy & Civil Liberties Protections*, IC ON THE RECORD, <http://icontherecord.tumblr.com/ppd-28/2015/privacy-civil-liberties> [<https://perma.cc/8P87-M7DP>].

34. *Id.*

35. USA Freedom Act § 502(f).



about NSLs than it currently makes available for public review. Congress could implement this proposal by amending 18 U.S.C. § 2709 to incorporate a notice requirement and expanding the government's current reporting obligations under 50 U.S.C. § 1873. Alternately, the Executive should adopt these policies unilaterally.

Expanding notice to NSL targets and the public in these ways would not be harmful. Before the government can rescind an NSL nondisclosure order in full, it must make a prior decision that revealing information about that NSL would not cause harm. This prior decision should function like a form of collateral estoppel; it should bar re-reconsidering the issue of harm. In other words, once a gag order is lifted in full, the government should not be able to claim, at a later time or in a different context, that it has an interest in the secrecy of the same information that the gag once restricted. Even if nondisclosure orders are only lifted in part, as long as the recipient is no longer gagged with respect to the identity of the target, that person should be notified of whatever portion of the letter is no longer restricted. Of course, once a gag order ends, the NSL recipient is authorized to notify the target directly. My proposal merely places the burden of notifying the target on the government, rather than leaving it to the ad hoc decision of an NSL recipient.

Note that there are a number of different reasons why third-party speech about an NSL investigation might pose an insignificant risk of harm. Perhaps the information at issue is granular and yet, even so, permitting the third party to notify the target of an investigation directly would not be harmful.<sup>36</sup> In this case, the government should notify the target directly. Alternately, perhaps the information at issue is general and so permitting the third party to speak about that information would not actually reveal the specifics of any particular investigation. In that case, the government should publish the general information for public review.

These forms of notice would require nominal administration. Indeed, the government should have little difficulty contacting the target of an NSL investigation because NSLs themselves collect the target's name, address, and billing records.<sup>37</sup> Further, standards to guide how much notice to provide, and when, already exist. The USA FREEDOM Act of 2015 recently established a new set of procedures to rescind NSL

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36. Courts have made highly granular determinations of harm in the past, and partially lifted NSL gags as a result. *See, e.g.*, *Doe v. Holder*, 703 F. Supp. 2d 313, 318 (S.D.N.Y. 2010) (“ORDERED that motion . . . to lift the nondisclosure requirement . . . is GRANTED in part and DENIED in part.”).

37. § 2709(b)(1).

nondisclosure orders. It requires various decision-makers, including the Attorney General and courts, to determine whether disclosure would risk harm. The statute also provides tests for decision-makers to apply when making their determinations. The same procedures and tests could easily govern notice as well.

To implement my first proposal, then, the government could tie notice to NSL targets directly to existing statutory procedures for rescinding individual nondisclosure orders. For instance, Congress has directed the Attorney General to review NSL gags “at appropriate intervals” and to terminate them “if the facts no longer support nondisclosure.”<sup>38</sup> This same review could prompt government notice to NSL targets. Likewise, the government could use the tests that courts apply when evaluating nondisclosure orders.<sup>39</sup> Congress has stipulated that when an NSL recipient initiates ex post judicial review of a gag order, the government must provide “a statement of specific facts indicating” that disclosure “may result in” an enumerated harm.<sup>40</sup> Note that a risk of harm other than those enumerated will not justify maintaining the gag.<sup>41</sup> If a district court then finds no “reason to believe” the government’s assertions, the court has discretion to order the gag terminated.<sup>42</sup> This was the reasoning that a district court applied to lift Mr. Merrill’s eleven-year nondisclosure mandate in full. Under a parallel notice procedure, the court’s decision would oblige the government to provide all of the information contained in that NSL, including the categories of information the FBI had sought to obtain, to the target of the investigation.

Courts may also apply a constitutional analysis to rescind nondisclosure orders that violate the First Amendment. When a court undertakes a First Amendment analysis of an NSL gag, it must evaluate whether the government has a compelling interest in the speech prohibition. Precisely what level of First Amendment scrutiny should apply to NSL nondisclosure requirements is presently disputed.<sup>43</sup>

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38. USA Freedom Act § 502(f).

39. 18 U.S.C. § 3511 (b)(3).

40. § 3511(b)(1)–(2).

41. In *Doe v. Holder*, Judge Victor Marrero lifted part of Mr. Merrill’s gag order because he was “not persuaded that disclosure of these two categories of information would raise a substantial risk that any of the statutorily enumerated harms would occur.” *Doe v. Holder*, 703 F. Supp. 2d 313, 316 (S.D.N.Y. 2010).

42. § 3511(b)(3).

43. See, e.g., Brief of Amici Curiae Floyd Abrams Institute for Freedom of Expression and First Amendment Scholars in Support of the Parties Under Seal at 25–28, Nat’l Sec. Letter, *Under Seal v. Holder* (Sealed), Nos. 13-15957, 13-16732 (9th Cir. Mar. 31, 2014), <http://cdn.ca9.uscourts.gov/datastore/general/2014/05/23/13-15957,13>

Regardless, a holding that an NSL gag is unconstitutional necessarily establishes that speech about that NSL poses an insufficient risk of harm to outweigh an individual liberty enshrined in the Bill of Rights. In that case, the government could follow the court's holding and disclose the NSL to its target.

My second proposal concerns a related though significantly more abstract issue: to what extent should information about the government's NSL practices be publically available? I suggest that when the government authorizes private parties to reveal general information about NSL usage, it should publish that same material for public review. In other words, existing limits on the scope of NSL nondisclosure orders—which have already been negotiated and thoroughly reviewed—can guide the government's public disclosures with minimal administrative burden.

As of June 2015, the Director of National Intelligence must publish an annual report online every April.<sup>44</sup> The report needs to contain both “the total number” of NSLs issued over the preceding calendar year and also the “number of requests for information” that those letters contained.<sup>45</sup> This disclosure is inadequate, I argue, because it provides less information to the public than NSL recipients may reveal ad hoc. The USA FREEDOM Act allows even those NSL recipients who remain under gag to publish a semiannual report of the approximate number of letters they have received, and roughly how many of their customers were targeted, during the preceding 180 days.<sup>46</sup> This authorization to report certain controlled categories of information was not new. The Attorney General had previously permitted a select group of Internet service providers to publish “transparency reports” that described—in vastly general terms—the quantity of NSLs they had received and the number of their customer

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-16731Floyd.pdf [https://perma.cc/KN8M-V4JT ] (arguing that the more stringent tests in Pentagon Papers or Nebraska Press should apply); Balkin, *Old-School*, *supra* note 21, at 2334–35 (explaining that the Second Circuit applied the Freedman standard in one NSL case).

44. Charles Doyle, *National Security Letters in Foreign Intelligence Investigations: Legal Background*, CONG. RESEARCH SERV., RL33320, at 23 (July 30, 2015) [hereinafter Doyle, *Legal Background*] (noting that this reporting requirement was imposed by the USA FREEDOM Act).

45. 50 U.S.C. § 1876(b)(6), (c) (2012)

46. 50 U.S.C. § 1874(a)(b). Section 604 of USA Freedom codified the executive branch's authorization for recipients to report the number of NSLs they have received in large aggregated bands of one thousand, starting with 0–999. Because the authorized disclosure includes “0” in the lowest reporting band, it effectively bans smaller providers from disclosing that they have received at least one letter. *See* USA Freedom Act § 604.

accounts that were targeted.<sup>47</sup> The USA FREEDOM ACT codified the agreement and extended it to all NSL recipients.<sup>48</sup>

To authorize these disclosures, then, both Congress and the Executive must have made a prior decision that revealing this particular information will not cause harm. Even so, the government has yet to make that same information publicly available. Private transparency reports—narrow as they may be—provide more information than the government’s annual disclosure. The bulk “transparency report” permissions ameliorate First Amendment concerns by loosening NSL nondisclosure orders, but don’t actually guarantee parallel transparency relief. In short, select private parties are currently able to make unilateral decisions about the secrecy of government surveillance practices. By negotiating these guidelines but failing to disclose the same, the government has empowered Internet service providers to act as discretionary filters on the public’s ability to know about government surveillance practices.

To resolve this incongruence, the government should increase the transparency level of its own reports to match that permitted private parties. There are various ways to accomplish this goal. The government could publish semiannual reports documenting in general terms how many NSLs it issued to various Internet service providers over the prior 180 days. These reports could use the same broad numeric ranges of 0–999 and 1000–1999 that NSL recipients may currently disclose.<sup>49</sup> Of course, one problem with this reporting scheme might be that when the government first adds an Internet service provider to its list of recipients, it would implicitly reveal that this particular entity received its first NSL during the prior 180 day period.<sup>50</sup> If the government were concerned that revealing this information would risk harm, it could redact the name of that entity until a subsequent reporting cycle. Alternately, the government could publish some information about each individual NSL every time a gag is

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47. *Letter from James M. Cole, Deputy Attorney Gen., to Colin Stretch et al., Gen. Counsels of Tech. Cos.*, WASH. POST (Jan. 17, 2014), <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/10/07/National-Security/Graphics/dagletter.pdf> [<https://perma.cc/23Y7-MNXX>]. For an overview of advocacy efforts by NSL gag recipients, see Rebecca Wexler, *Warrant Canaries and Disclosure by Design: The Real Threat to National Security Letter Gag Orders*, 125 YALE L.J. F. 158 (2014).

48. 50 U.S.C. § 1874; USA Freedom Act § 604.

49. *Cf.* USA Freedom Act § 604.

50. Twitter is currently fighting a lawsuit that addresses a similar concern. *Twitter v. Lynch*, 2015 WL 5970295, at \*1 (Oct. 14, 2015) (ordering Twitter to file an amended complaint in light of the USA Freedom Act).

lifted.<sup>51</sup> Indeed, the government has disclosed similar information in the past that has proven useful. For instance, in response to an ACLU Freedom of Information Act request, the government released a list of every NSL it issued between 2001 and 2003. While the substance of the list was completely redacted, the number of entries proved to be a valuable piece of information and even helped a federal district court to evaluate the constitutionality of the NSL statute.<sup>52</sup>

### III. STATUTORY PRECEDENTS: BALANCING NOTICE WITH COMPETING INTERESTS IN SECRECY, SECURITY, AND CONFIDENTIALITY

Three primary issues complicate the goal of expanding notice to NSL targets and the public: concerns about interfering with covert surveillance or national security investigations; concerns about unanticipated exigent circumstances; and concerns about the reputational interests of third parties who aid an investigation. This Part draws on existing statutes that offer established solutions to balance these competing interests. Specifically, a number of statutes require the government to provide notice to the targets of some types of law enforcement investigations, regardless of whether they are ever charged with a crime.<sup>53</sup> Where these types of investigations are analogous to National Security Letters, the statutes that govern them offer useful guidance. When the government has no need to keep information about an NSL secret, I contend, the target's interest in knowing that specific information should outweigh competing concerns. And when the government has no manifest need for secrecy, the public's interest in knowing general information about the FBI's NSL practices should also prevail.

Providing notice of NSL investigations in the manner detailed in Part II would produce a negligible risk to covert surveillance or national security investigations; it only requires notice after the government

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51. The author thanks Jonathan Manes for proposing that the government should publicly report information about each NSL once a gag order is lifted.

52. *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 502 (S.D.N.Y. 2004) (“Although the entire substance of the document is redacted, it is apparent that hundreds of NSL requests were made during that period.”).

53. Patrick Toomey & Brett Max Kaufman, *The Notice Paradox: Secret Surveillance, Criminal Defendants, & the Right to Notice*, 54 SANTA CLARA L. REV. 843, 853 nn.29, 52 (2014) [hereinafter Toomey & Kaufman, *The Notice Paradox*], (citing Federal Rule of Criminal Procedure 41(f); its predecessors, Rule 41(d) and 18 U.S.C. § 622 (1928); 18 U.S.C. § 3103(a)(b) (2012); 18 U.S.C. § 2518(8)(d) (2012); 18 U.S.C. § 2518(8)(d) (2012); 18 U.S.C. § 3109 (2012); 18 U.S.C. § 3406(b)).

determines that it has no compelling interest in keeping that particular information secret.<sup>54</sup> Even so, it is worth noting that some existing statutes already enable notice to the targets of investigations in both surveillance and national security contexts. After the government uses certain covert monitoring techniques—including an electronic tracking device<sup>55</sup>—it must notify the target whose person or property was tracked.<sup>56</sup> Judges reviewing applications for wiretaps also have discretion to require that the government provide notice to “the persons named in the order or the application.”<sup>57</sup> And the Foreign Intelligence Surveillance Act authorizes covert physical searches of U.S. residences for national security intelligence investigations,<sup>58</sup> but requires that once the government’s interests in the secrecy of those searches abate, the Attorney General must notify the person whose home was searched.<sup>59</sup>

To be sure, not every harm can be anticipated. Particularly relevant then, a number of existing statutes permit delayed notice in exigent circumstances. Traditional search warrants generally require notice before the police physically enter a residence.<sup>60</sup> But this notice may be temporarily delayed if providing it immediately would result in one of five enumerated harms, including “flight from prosecution” or “intimidation of potential witnesses.”<sup>61</sup> Notice may also be delayed if the warrant is particularly restrictive and prohibits “the seizure of any tangible property, any wire or electronic communication . . . [or] any stored wire or electronic information . . . .”<sup>62</sup> The Stored Communications Act (SCA) requires notice when the government collects the contents of online communications without a warrant.<sup>63</sup> This notice too can be temporary

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54. *See supra* Part II.

55. 18 U.S.C. § 3117(b).

56. FED. R. CRIM. P. 41(f)(2)(C) (requiring the law enforcement agent who executes the warrant to provide a copy of the warrant itself to the target).

57. 18 U.S.C. § 2518(8)(d).

58. 50 U.S.C. § 1824.

59. 50 U.S.C. § 1825(b).

60. *See, e.g.,* Wayne R. LaFare, *Manner of Entry for Which Notice Ordinarily Required*, in 2 SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.8(b) (5th ed. 2015); *see also*, TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 80–81 (1969) (“a search warrant, although initially issued *ex parte*, becomes known to the individual, whose person or premises are the field of the search, as soon as the warrant is executed”).

61. 18 U.S.C. § 3103a(b)(1); 18 U.S.C. § 2705(B)(D).

62. § 3103a(b)(2).

63. 18 U.S.C. § 2703(b). NSLs are similar to SCA orders in that they all collect information from third party Internet service providers. They are also related via

delayed if—but only if—there is “reason to believe”<sup>64</sup> it might cause one of five enumerated harms, such as endangering “life or physical safety”<sup>65</sup> or “jeopardizing an investigation.”<sup>66</sup> An un-enumerated risk of harm does not justify delayed notice. NSL notice requirements could contain similar exigent circumstances provisions.

More complicated concerns arise from the potential reputational interests of third parties who cooperate with law enforcement investigations. For example, when the government demands customer information from Internet service providers, these service providers may prefer to keep that fact confidential. Even if they are legally compelled to assist law enforcement investigations—perhaps by an NSL—companies might not want their cooperation publicized. Though challenging, these types of concerns are also familiar. Some existing statutes require notice even when it might impinge on a third party’s business or confidentiality interests. For instance, when the IRS demands information from a third party record keeper as part of a tax liability investigation, it must notify the person whose information it collects.<sup>67</sup> There are also statutory precedents for favoring a target’s interest in notice over third party business interests when the government collects information from an Internet service provider. The SCA, mentioned above, governs these types of collections in domestic criminal investigations and requires notice to targets in certain circumstances.<sup>68</sup> Specifically, unless a judge reviews the government’s demand *ex ante*, the target usually has a right to notice under the SCA regardless of an Internet service provider’s confidentiality concerns.

The mere fact that NSL investigations involve third party service providers, then, should not prevent notice to NSL targets and the public. That said, current laws do not always require notice. One way to explain when they do and do not is to focus on the level of judicial oversight for the government’s activities. For the most part, the SCA obliges the government to choose between providing notice to the target and obtaining some form of prior judicial approval. For instance, unless the government obtains a full warrant, which requires probable cause, it must

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legislative history. Indeed, the statute authorizing the FBI to issue NSLs to Internet service providers was enacted as part of the SCA. 18 U.S.C. § 2709.

64. 18 U.S.C. § 2705(a)(1).

65. § 2705(a)(2)(A).

66. § 2705(a)(2)(E).

67. 26 U.S.C. § 7602(c).

68. 18 U.S.C. §§ 2701–2711; *see also*, Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending it*, 72 GEO. WASH. L. REV. 1208, 1223 (2004) (chart summarizing when the SCA requires notice).

notify the customer of an Internet service when it demands the contents of her communications.<sup>69</sup> Less process is required to collect non-content information, such as customer transactional records. Even so, unless the government obtains some type of court order, it usually needs the customer's consent before it can access his information.<sup>70</sup> The single exception is that collecting limited categories of basic subscriber information requires a mere administrative subpoena and no notice.<sup>71</sup> Collecting non-content telephone logs under the Pen Register statute does not require notice either.<sup>72</sup> Another way to parse these requirements, then, is to focus on the type of information the government collects: collecting the contents of communications generally require notices while collecting basic subscriber information generally does not.

Synthesizing these rules, a guiding principle for notice requirements seems to be reducing the risk of government abuse. When the risk of abuse is lower—as with warrants that expressly prohibit the seizure of any electronic communications—notice is less urgent. In those circumstances, a third party's confidentiality or business interests might prevail. When the risk of abuse is higher—as when the government uses an SCA order to collect sensitive transactional records without prior judicial oversight—notice is more urgent and should outweigh competing concerns.

How should these principles apply to NSLs, which currently require neither prior judicial approval nor notice? On the one hand, the statutes that govern NSLs supposedly restrict their use to the collection of lower-risk information. On its face, § 2709 vests the FBI with the authority to seek only limited materials about the customer of an Internet service provider, including her “name, address, length of service, and local and long distance toll billing records.”<sup>73</sup> Yet, on the other hand, the secrecy surrounding the letters has made it difficult to determine precisely what information the FBI collects—or believes it has authority to collect—under the statute. The FBI may secretly interpret its authority to have far broader scope than a plain reading of § 2709 at first suggests. For instance, the NSL that Mr. Merrill received demanded a surprising array of sensitive information about his customer, including URLs that could potentially expose the target's entire web browsing history, lists of every person the target had contacted over telephone, Skype, Facebook, instant

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69. 18 U.S.C. § 2703(b).

70. § 2703(c)(1).

71. § 2703(c)(2)–(3).

72. 18 U.S.C. §§ 3121–3127.

73. 18 U.S.C. § 2709(b)(1).



messaging or email, and records of all the target's online purchases.<sup>74</sup> Especially alarming, the FBI demanded cell-site location information that could be used to monitor the target's physical location.<sup>75</sup> Cell-site location information can effectively transform a mobile phone into an electronic tracking device.<sup>76</sup> Courts across the country have considered what protections the Fourth Amendment requires before the government can collect precisely this information.<sup>77</sup> Many have held that a full warrant—or at least a court order—is needed.<sup>78</sup> More generally, changes in technology mean that the distinction between content and non-content may no longer identify which types of information are particularly sensitive for the government to collect.<sup>79</sup>

The risk of government overreach or abuse of its NSL authority is arguably high. We know that such abuses have occurred in the recent past,<sup>80</sup> and ongoing secrecy around the FBI's actual NSL practices exacerbates this risk. As a result, interests in NSL notice should be afforded substantial weight. In contrast, third party business interests are hardly the sole confidentiality concerns associated with NSL investigations; the target has privacy interests—potentially constitutional ones—at stake as well. When balancing these interests, then, it is both reasonable and urgent to resolve the competing concerns in favor of notice to NSL targets and the public.

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74. *E.g.*, Unredacted Attachment to 2004, NSL *Merrill*, 2015 WL 9450650, <https://yale.app.box.com/NSL-Attachment-Unredacted> [<https://perma.cc/JMH4-ELY8>].

75. *E.g.*, *Merrill*, 2015 WL 9450650, at \*7 (noting a document authorizing the FBI to use an NSL to collect “cellular site and sector information”); *see also* Info. Soc’y Project, *First Amendment Victory*, *supra* note 1 (explaining that the FBI claimed the authority to collect cell-site location information in court filings in Mr. Merrill’s case).

76. *E.g.*, *In re Application for Telephone Information*, 2015 WL 4594558, at \*1–3 (detailing CSLI technologies). Recall that the government must generally provide notice when it uses an electronic tracking device. FED. R. CRIM. P. 41(f)(2)(C).

77. Courts in California, Florida, Massachusetts, and New Jersey have found a “reasonable expectation of privacy” in cell-site location information. *In re Application for Telephone Information*, 2015 WL 4594558, at \*11.

78. *Id.*

79. Chris Conley has provided an excellent overview of how changing technologies have blurred the line between content and non-content electronic information, and how these changes are affecting privacy laws. Chris Conley, *Non-Content is Not Non-Sensitive: Moving Beyond the Content/Non-Content Distinction*, 54 SANTA CLARA L. REV. 821, 829–39 (2014).

80. *See, e.g.*, Doyle, *A Glimpse*, *supra* note 7, at 3–4.

#### IV. CONSTITUTIONAL PRINCIPLES: FOURTH AMENDMENT SUPPORT FOR NOTICE AND FIRST AMENDMENT GUIDES FOR DISCLOSURE

This Part considers possible constitutional support for reducing NSL secrecy through notice. It explores how a policy to notify the targets of NSL investigations, and to increase the government's public reporting of its actual NSL practices, would further core principles that underlie the Fourth Amendment. To do so, it turns to established theoretical claims about the original understanding of the Fourth Amendment. Specifically, it draws on two key claims in Akhil Reed Amar's theory of the Fourth Amendment: First, a primary motive for drafting the Fourth Amendment was the agency problem of how to police government abuse. Second, the drafters sought to solve this problem by empowering non-governmental actors to enforce Fourth Amendment violations.<sup>81</sup> Requiring notice to the targets of NSL investigations would further these principles by empowering targets to sue for civil damages. These suits—by private individuals not government agents—would mitigate a demonstrated risk of government abuse. Likewise, if the government were to report more information about the FBI's actual NSL practices, it would empower the public to oversee government surveillance more directly. Finally, I suggest that First Amendment balancing tests to weigh the government's interests in secrecy against an individual's right to free speech should provide standards to guide any Fourth Amendment notice obligations.

Some legal scholars and practitioners recently began to rehabilitate an under-theorized and largely marginalized idea that the Fourth Amendment implies a right to notice. Also building on Amar's originalist framework, Nola Breglio argued over a decade ago that to facilitate *Bivens* claims for foreign intelligence surveillance, the Fourth Amendment should "require law enforcement authorities to provide notice to every surveillance target once the investigation is complete."<sup>82</sup> Similar arguments gained traction after *Clapper v. Amnesty International*, in which the Supreme Court denied standing to plaintiffs seeking to raise a Fourth Amendment challenge to a mass surveillance statute because they had "no actual knowledge" of whether the government had collected their particular

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81. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 176 (1994).

82. Nola K. Breglio, Note, *Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance*, 113 YALE L.J. 179, 213 (2003).

communications.<sup>83</sup> These arguments for Fourth Amendment notice draw support from common law, longstanding practice codified in statutes, and recent case law.<sup>84</sup> Patrick Toomey and Brett Max Kaufman point out that notice is and has always been an “inevitable consequence” of most physical searches because the searches themselves are likely to disrupt a person or object in a readily apparent manner.<sup>85</sup> In other words, search targets notice when law enforcement officers stop and frisk them on the street, fingerprint them, force them to walk through a metal detector, or seize their belongings.<sup>86</sup> Toomey and Kaufman also observe that law enforcement officers at common law were required to “knock-and-announce” before conducting a search. Not only has the knock-and-announce rule been codified,<sup>87</sup> but the Court has also incorporated it into its Fourth Amendment reasonableness analysis.<sup>88</sup> Jonathan Witmer-Rich offers evidence that covert searches without simultaneous notice were either rare or non-existent when the Fourth Amendment was drafted.<sup>89</sup> As a result, he argues that courts have wrongly separated the Fourth Amendment knock-and-announce requirement from case law that governs delayed notice warrants.<sup>90</sup> Witmer-Rich claims that the Fourth

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83. *Clapper*, 133 S. Ct. at 1143, 1147, 1148 (“[R]espondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.”).

84. *See, e.g.*, Toomey & Kaufman, *The Notice Paradox*, *supra* note 53, at 851, 900 (arguing that “the right to notice is implicit in the right to privacy guaranteed by the Fourth Amendment,” and that courts must vigilantly police this right); Jonathan Witmer-Rich, *The Rapid Rise of Delayed Notice Searches, and the Fourth Amendment “Rule Requiring Notice,”* 41 PEPP. L. REV. 509, 571 (2014) (“[T]he argument that covert searching raises Fourth Amendment concerns does not rest only on a generalized analysis of privacy interests, but also on the common law—and constitutional—“rule requiring notice.”).

85. Toomey & Kaufman, *The Notice Paradox*, *supra* note 53, at 852 (citing *United States v. Chadwick*, 433 U.S. 1 (1977); *Camara v. Mun. Court of S.F.*, 387 U.S. 523 (1967); *Michigan v. Tyler*, 436 U.S. 499 (1978); *Berger v. New York*, 388 U.S. 41 (1967); *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986)).

86. For examples of warrantless searches that take place throughout everyday life and that also trigger built-in structural notice, see Amar, *First Principles*, *supra* note 81, at 176 (“consider[ing] the vast number of real-life, unintrusive, non-discriminatory searches and seizures to which modern day Americans are routinely subjected: metal detectors at airports, annual auto emissions tests, inspections of closely regulated industries, public school regimens, border searches, and on and on”).

87. *See, e.g.*, 18 U.S.C. § 3109 (2012).

88. Toomey & Kaufman, *The Notice Paradox*, *supra* note 53, at 852–53 n.25 (citing *Wilson v. Arkansas*, 541 U.S. 927, 931–37 (1995)).

89. Witmer-Rich, *The Rapid Rise*, *supra* note 84, at 561–70.

90. *Id.*, at 571 (citing *Richards v. Wisconsin*, 520 U.S. 385, 387–88 (1997)). An example of the divide that Witmer-Rich identifies can be found in the Court’s

Amendment must require both practices, not just one, because these are logically continuous phenomena; a delayed notice search, he argues, is “simply a more extreme version of a no-knock search.”<sup>91</sup>

Nor is the idea of a Fourth Amendment notice right completely foreign to courts. Case law concerning the constitutional status of statutory notice practices is under-developed but has at times suggested that the right to notice might have constitutional underpinnings. Toomey and Kaufman offer an excellent collation and analysis of this doctrine.<sup>92</sup> They point out that the Supreme Court has sometimes incorporated the adequacy of notice requirements into its Fourth Amendment analysis. In *Berger*, for instance, the Court invalidated an electronic eavesdropping statute under the Fourth Amendment in part because it provided “no requirement for notice.”<sup>93</sup> *Katz* found that delayed notice to accommodate exigent circumstances is constitutional.<sup>94</sup> The Sixth Circuit later recognized a “Fourth Amendment requirement of notice” for wiretaps.<sup>95</sup> And when the Supreme Court itself considered wiretaps in *Donovan*, it observed that Congress may have intended the notice provisions of the Wiretap Act to satisfy Fourth Amendment requirements. Justice Powell quoted Senator Hart, who introduced the notice provisions on the floor of the Senate: “notice of surveillance is a constitutional requirement of any surveillance statute.”<sup>96</sup>

Yet, the scarcity of these theoretical and judicial gestures creates an opportunity to scrutinize the issue using other sources of authority. This Part turns to originalist understandings of the Fourth Amendment that can shed new light on a constitutional right to notice. It first considers

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observation in *Katz* that the exigent circumstances exception to the notice requirement addresses considerations such as shock, fright or embarrassment that “are not relevant to the problems presented by judicially authorized electronic surveillance.” *Katz v. United States*, 389 U.S. 347, n.16 (1967).

91. Witmer-Rich, *The Rapid Rise*, *supra* note 84, at 576.

92. Toomey & Kaufman, *The Notice Paradox*, *supra* note 53, at 853, nn.31, 34, 36–39, 41 (citing *Berger v. New York*, 388 U.S. 41, 60 (1967); *United States v. Villegas*, 899 F.2d 1324, 1337 (2d Cir. 1990); *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986); *Nordelli v. United States*, 24 F.2d 665, 666 (9th Cir. 1928); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000); *Dalia v. United States*, 441 U.S. 238 (1979); *United States v. Johns*, 948 F.2d 599 (9th Cir. 1991)).

93. *Berger v. New York*, 388 U.S. 41, 60 (1967); *see also*, Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act*, 56 ALA. L. REV. 9, n.100 (2004).

94. *Katz*, 389 U.S. at n.16.

95. *United States v. Martinez*, 498 F.2d 464, 468 (1974).

96. Senator Hart in turn cited *Berger* and *Katz* as the authority for this Fourth Amendment interpretation. *United States v. Donovan*, 429 U.S. 413, 430 (1977) (quoting 114 CONG. REC. S14485–86 (1968) (statement of Sen. Hart)).

how the drafter's intent relates to the Article III standing issues in *Clapper*. Next, it examines how republican theories of collective Fourth Amendment rights can justify some level of public transparency for surveillance practices. Finally, it offers a novel structural claim that First Amendment limits on the government's power to censor third parties who are conscripted into a search—such as the Internet service providers who receive NSL nondisclosure orders—can guide what, when, and how much notice the Fourth Amendment may require.

A. NOTICE TO THE TARGET PROTECTS THE INDIVIDUAL RIGHT TO CONTEST FOURTH AMENDMENT REASONABLENESS IN JURY TRIALS

This Section draws on Amar's "civil-enforcement model"<sup>97</sup> of the Fourth Amendment to suggest that providing notice of NSL investigations to their individual targets would further the drafters' original intent. Amar argues that the agency issue of how to police government abuse was a key motivator for the drafters of the amendment. To solve this problem, the drafters deliberately sought to empower non-governmental actors to enforce Fourth Amendment violations, rather than entrust the task to any branch of the federal government.<sup>98</sup> This reading implies that establishing civil enforcement mechanisms, such as private causes of action, advances the drafters' original intent. Moreover, I would add, this is particularly true when there is a high risk that the government will abuse its search and seizure powers. Using prudential, textual, historical, and ethical modalities as well as executive precedent, I consider whether this original preference for private enforcement implies a right to notice for the targets of investigations.

1. *Non-Governmental Actors Should Police Government Abuse*

Amar's theory of the original Fourth Amendment contains two key claims for purposes of the NSL notice proposals discussed above: first, the drafters were concerned with how to police government abuse; and second, they sought to empower non-governmental actors to enforce Fourth Amendment violations. The following overview summarizes the textual and historical details that sustain this reading of original intent.<sup>99</sup>

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97. Amar, *First Principles*, *supra* note 81, at 811–14.

98. *Id.* at 176.

99. *E.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 73, 96 (1998) [hereinafter AMAR, BILL OF RIGHTS] ("If we seek a paradigmatic image underlying the original Bill of Rights, we cannot go far wrong in picking the jury. Not only was it featured in three separate amendments (the Fifth, Sixth,

Amar joins Telford Taylor in theorizing that the drafters were particularly concerned over the due process limitations of warrant proceedings. The drafters sought to limit warrants, the argument goes, because warrants perfectly executed could indemnify law enforcement officers from post-intrusion civil suits.<sup>100</sup> At common law, judges or magistrates would issue warrants for stolen goods in secret *ex parte* proceedings that authorized surprise searches.<sup>101</sup> To compensate for the due process limitations of these proceedings, the search target could adjudicate the legality of the intrusion after the fact in an adversarial proceeding.<sup>102</sup> Warrants were a problem because they could reduce the target's capacity to mount a convincing case. As a result, any errors that resulted from the covert, non-adversarial nature of the initial warrant proceedings would become even more difficult to correct.<sup>103</sup>

Amar finds textual support for these claims by reading the two clauses of the amendment in relation to one another. The second clause of the Fourth Amendment, which directs that “no Warrants shall issue, but upon probable cause,”<sup>104</sup> limits warrants by conditioning their issuance on ex

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and Seventh), but its absence strongly influenced the judge-restricting doctrines underlying three other amendments (the First, Fourth, and Eighth.”); *see also* AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* [hereinafter *AMAR, AMERICA'S UNWRITTEN*] 174 (2012); AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 326 (2005) [hereinafter *AMAR, A BIOGRAPHY*].

100. Amar documents that, at the founding, the “aggrieved target” of an unreasonable search could sue the government official for damages under the common law of trespass. *AMAR, BILL OF RIGHTS*, *supra* note 99, at 69. If the official had obtained and complied with a legal warrant, whether particular or general, he could raise it in defense. Amar concludes that the warrant would compel a form of “declaratory judgment” or “directed verdict” for the defense. Not only would the warrant effectively have barred the trespass cause of action, but also and critically for this discussion, a directed verdict would rob the determination of reasonableness from the jury decision-maker. *Id.*

101. *Id.* at 72.

102. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION*, *supra* note 60, at 82 (arguing that search warrants “are ancillary *ex parte* preludes to confrontation and controversy.”); *AMAR, BILL OF RIGHTS*, *supra* note 99, at 69–70 (arguing that warrants were disfavored by the drafters of the Fourth Amendment because “even when issued by a judge—and in some places executive magistrates also claimed authority to issue warrants—warrants lacked many traditional safeguards of judicial process: notice, adversarial presentation of the issues, publicity, and so on”).

103. *Cf.* AKHIL REED AMAR, *THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC* 336 (2015) (documenting how the framers “prefer[ed] open tort suits to secret warrants”).

104. U.S. CONST. amend. IV (“no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”).

ante showings of probable cause and particularity. The result prohibits vague or general warrants in keeping with an antipathy towards them that many people recognize was both common at the time of the drafting and clear in the intent of the drafters. (State constitutions of the era incorporated similar restrictions on general warrants, and discussions of the First Congress also cautioned against general warrants.<sup>105</sup>) But, Amar contends, the relative weight of the clauses shows that the drafters' hostility towards warrants reached beyond the general to condemn *all* warrants. To be sure, recent doctrine has expanded the probable cause and particularity requirements of the warrant clause to a wide variety of searches,<sup>106</sup> and deemed those without to be per se unreasonable unless they fall into one of a series of judge-made exceptions,<sup>107</sup> such as customs and border searches,<sup>108</sup> roadblock seizures,<sup>109</sup> and DNA cheek swabs.<sup>110</sup> In short, twentieth century case law begins with the warrant clause and defines the reasonableness clause in relation to it. But the text that the drafters begot and bestowed begins with reasonableness and only subsequently restricts the subset of warranted searches. The reasonableness

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105. An early precursor to the federal Fourth Amendment, Article XIV of the 1780 Massachusetts Constitution stated that all warrants lacking an oath, affirmation, or "special designation of the persons or objects of a search, arrest, or seizure" were per se unreasonable and impermissible. Similar prohibitions on general warrants appeared in the New Hampshire Constitution of 1784, and in proposals for federal amendments from constitutional conventions in Virginia, New York, and North Carolina. And James Madison cautioned against general warrants when introducing the Fourth Amendment to the First Congress. AMAR, LAW OF THE LAND, *supra* note 103, at 343–44.

106. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 230–31 (1983) (adopting a totality-of-the-circumstances test for probable cause and overruling the *Spinelli* and *Aguilar* tests); *Spinelli v. United States*, 393 U.S. 410, 587 (affirming the *Aguilar* test for probable cause); *Aguilar v. Texas*, 378 U.S. 108, 115 (1964) (requiring knowledge of underlying circumstances showing that information is "credible" or "reliable" in order to establish probable cause).

107. *See* Amar, *First Principles*, *supra* note 81, at 757 (Amar describes the Court's Twentieth Century doctrine as: "Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays.").

108. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (relying on reasonableness, rather than a warrant and probable cause requirement, to permit suspicion-less stops of vehicles traveling over the Mexican border).

109. *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 450–52 (1990) (applying a mere reasonableness test to permit a twenty-five second delay at roadblocks).

110. *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (applying a mere Fourth Amendment reasonableness requirement, and not a warrant requirement, to DNA cheek swabs, because the intrusion is negligible when weighed against countervailing government interests).

standard thus applies to all searches, while the second clause limits merely the quantum that satisfies the preconditions for a warrant.<sup>111</sup>

This reading of the amendment incorporates an individualistic solution to the agency problem of policing government abuse: civil-jury enforcement. At common law, *ex post* adversarial proceedings to review the legality of a search often treated the reasonableness of that search as a factual issue for a civil jury. Thus another reason that the drafters worried about warrants, Amar argues, is that a lawful warrant defense could compel a directed verdict of reasonableness that robbed even the subsequent adversarial proceeding of jury review, and the jury in turn of its decision-making power.<sup>112</sup> This theft of decision-making authority from jury to judge mattered because it risked the excesses of a self-interested government self-policing. By ensuring jury supremacy, the drafters could also ensure that the final arbiters of Fourth Amendment reasonableness would not be on the government payroll.

The text of the amendment also suggests a republican justification for this “civil-enforcement model.” According to Amar, the drafters sought to empower “the people”—conceived as a collective entity—to oversee Fourth Amendment abuses. The first clause of the Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .”<sup>113</sup> Amar points out that the words “persons, houses, papers, and effects” reference intimate materials of the most private sphere, a sphere apart from government that merits protection from its unreasonable intrusion.<sup>114</sup> But, in seeming contradiction, the text does not bestow the right “to be secure” in these facets of the personal on the individuals who embody, inhabit, or produce them. Instead, it bestows this right on “the people,” a public entity in every sense of the term. The text thus entrusts the security of the most private sphere to its most public counterpart. How can a public collective entity possess rights to the security of an individual’s

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111. Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN’S L. REV. 1097, 1098 (1998) (“[T]he Fourth Amendment means what it says and says what it means: All searches and seizures must be reasonable. Reasonableness—not the warrant, not probable cause—thus emerged as the central Fourth Amendment mandate and touchstone.”).

112. Amar, BILL OF RIGHTS, *supra* note 99, at 69–71 (“A warrant issued by a judge or magistrate—a permanent government official, on the government payroll—has had the effect of taking a later trespass action away from a jury of ordinary citizens.”).

113. U.S. CONST. amend. IV.

114. AMAR, A BIOGRAPHY, *supra* note 99, at 326 (“Clearly, this amendment seemed to center on the domain of domesticity—on ‘persons’ in their private ‘houses’ as distinct from the people in the public square.”).



person or property? Amar resolves this puzzle by reading “the people” as an enforcement mechanism. More specifically, “the people” acting in symbolic collective as juries offer a means for enforcement other than by the paid officials of the very government whose intrusions the amendment protects against.<sup>115</sup> Jury enforcement of the Fourth Amendment harmonizes both with the public entity of “the people” and with the republican nature of the Bill of Rights as a whole. Juries are populist, representing the sovereign electorate, and federalist, comprising local decision-makers.<sup>116</sup> “[T]he central role of the jury in the Fourth Amendment should remind us,” Amar urges, “that the core rights of ‘the people’ were popular and populist rights—rights that the popular body of the jury was well suited to vindicate.”<sup>117</sup>

To summarize, the drafters sought to limit warrants in order to enable local juries to determine the reasonableness of searches. Civil juries representing the sovereign people—not salaried judges or executive officials who might act in the interests of government—would enforce the Fourth Amendment.<sup>118</sup>

## 2. *The Right to Contest Implies an Individual Right to Notice*

This Section draws on the “civil-enforcement model” of the Fourth Amendment to reason in support of an implied individual right to notice. To begin, I note that the drafters’ preference for civil juries can be read in combination with Article III to imply a private cause of action to contest the reasonableness of government searches. Because the Bill of Rights did not originally apply to the states, the drafters must have contemplated that

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115. Thus, Amar writes, the phrase “right of the people” may “highlight the part that civil jurors, acting collectively and representing the electorate, were expected to play in deciding which searches and seizures were reasonable and how much to punish government officials who searched or seized improperly.” *Id.*

116. *Id.*

117. AMAR, BILL OF RIGHTS, *supra* note 99, at 73.

118. To be sure, the damages-as-remedy solution has practical limits. For instance, Anthony G. Amsterdam has questioned whether anti-criminal bias, professional conflicts of interest, and the difficulty of litigating against the police might improperly dissuade contingency-fee lawyers from filing damages claims. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 430 (1974) (“Taking on the police in any tribunal involved a commitment to the most frustrating and thankless legal work I know.”); *see also id.* at 447–48 n.137. But the good news is that damages harmonize individual rights with individual remedies. And indeed, the tide may be shifting in current doctrine away from deterrence through exclusion of evidence in criminal trials and towards civil liability. *See, e.g., Virginia v. Moore*, 128 S. Ct. 1598, 1603 (2008) (“[F]ounding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness.”).

civil juries would enforce the Fourth Amendment in federal courts.<sup>119</sup> Article III grants federal court jurisdiction over nine categories of “cases” and “controversies.”<sup>120</sup> Jury enforcement thus presupposes a case or controversy, which in turn requires a private cause of action to file a complaint—or a “right to contest.” Without this right, the government’s search practices would never be subject to civil jury review. And indeed, the Supreme Court recognized such a cause of action for federal Fourth Amendment violations in *Bivens*.<sup>121</sup>

Arguing for an implied right to notice is a more challenging jump. Yet, I submit, the underlying motives that Amar identified for drafting the amendment offer a foundation to bridge this gap. Here is a possible prudential claim.<sup>122</sup> Without notice, the peoples’ limited capacity to discover and dispute what they don’t know would emaciate civil jury enforcement of the Fourth Amendment. Alleged victims of unreasonable covert searches would either lack the knowledge and incentive to initiate a suit, or fail to satisfy the Article III case and controversy requirement to obtain standing (as happened in *Clapper*).<sup>123</sup>

The alternative is to argue that searches are per se reasonable when no one notices them, so secret searches need not be litigated. But, as the heated public debates that followed the Snowden revelations show, this categorical determination is subject to popular dispute.<sup>124</sup> Establishing ex

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119. The Supreme Court did not begin to apply the Bill of Rights to the states by incorporating it into the due process clause of the Fourteenth Amendment until the late Nineteenth Century. See, e.g., Jerold Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 336–38 (1982); MICHAEL CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

120. U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . to Controversies to which the United States shall be a party . . .”).

121. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 391–93.

122. See, e.g., PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 16–17 (1991) (describing the prudential modality as claims about the wisdom of certain actions and their political expediency that are “actuated by facts”).

123. U.S. CONST. art. III, § 2; TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION, *supra* note 60, at 82 (arguing that search warrants “are ancillary ex parte preludes to confrontation and controversy”).

124. E.g., Editorial Board, *Mass Surveillance Isn't the Answer to Fighting Terrorism*, N.Y. TIMES (Nov. 17, 2015), <http://www.nytimes.com/2015/11/18/opinion/mass-surveillance-isnt-the-answer-to-fighting-terrorism.html> [<https://perma.cc/L5QB-RV45>]; *End Mass Surveillance Under the Patriot Act*, ACLU.ORG, <https://www.aclu.org/feature/end-mass-surveillance-under-patriot-act> [<https://perma.cc/8TXZ-6LBE>]; see also, Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904 (2013); Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934 (2013); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008).

ante categorical immunity for any search that the government can keep secret from its target is thus analogous to a directed verdict compelled by a warrant; both rob the ultimate judgment of reasonableness from the sovereign people represented in juries. If the drafters of the Fourth Amendment sought specifically to empower non-governmental actors to police government abuses, then permitting the government to achieve categorical ex ante immunity by preventing anyone outside of it from even knowing about a search belies the amendment's original intent.

History lends additional support for a notice right. Built-in notice attended the types of searches most immediately contemplated by the drafters of the Fourth Amendment. Customs searches were of prime concern, generating complaints that lower-class government officers were entering elite homes without justification.<sup>125</sup> The two famous English cases that dominated colonial conversations about the government's investigative powers at the time were *Wilkes v. Wood* in 1763 and *Entick v. Carrington* in 1765.<sup>126</sup> In *Wood*, government officers operating under general warrants broke into the house of John Wilkes, and later arrested and detained his person. Wilkes was well aware of the happenings, a fact that enabled him successfully to sue in an ex post trespass action.<sup>127</sup> Entick likewise would have noticed when government officers broke into and damaged his home before seizing his papers.<sup>128</sup> And warrants at common law required government officers to provide search targets with a receipt of anything seized.<sup>129</sup>

This is neither to say that the drafters must have intended only built-in notice nor that they would have had difficulty contemplating covert

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125. See, for example, James Otis on Writs of Assistance as quoted in Telford Taylor's, *Two Studies*, *supra* note 60, at 37 ("Custom house officials may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter . . ."). After Taylor published his book, Charles Warren showed that the pamphlet was actually written by Mercy Otis Warren. See AMAR, BILL OF RIGHTS, *supra* note 99, at 66.

126. *Wilkes v. Wood* (1763) 98 Eng. Rep. 489; Lofft 1 (K.B.); *Entick v. Carrington* (1799) 95 Eng. Rep. 807; 19 How. St. Tr. 1029 (K.B.); see also AMAR, BILL OF RIGHTS, *supra* note 99, at 66–67 ("[B]oth the target of the government search, John Wilkes, and the author of the opinion, Lord Chief Justice Charles Pratt (soon to become Lord Camden), became folk heroes in the colonies.").

127. Lord Camden deciding the case found that the warrants were illegal, ordered the government to pay substantial compensatory and punitive damages, and in the process transformed himself and Wilkes into popular heroes in the colonies whom the drafters would have known about. *Id.* at 65–68.

128. See AMAR, LAW OF THE LAND, *supra* note 99, at chs. 2, 7.

129. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION, *supra* note 60, at 82.

searches with the possibility of delayed notice. Rather, the primacy of notice in the searches discussed and experienced at the time of the drafting bolsters the idea that notice had some role in the original understanding of the amendment. For further support, these observations about the drafting era can also be combined with longstanding practice. Criminal procedure rules and statutes requiring notice<sup>130</sup> reveal at once popular acceptance, legislative enactment, and executive precedent to provide some form of notice.<sup>131</sup> Because the constitutional reasonableness of Fourth Amendment searches is a subjective standard, these practices help to shape “the people’s” expectations in their image. If non-governmental actors are ultimately responsible for enforcing Fourth Amendment reasonableness, then these longstanding popular expectations should help to define constitutional meaning.

B. NOTICE TO THE PUBLIC PROTECTS THE REPUBLICAN RIGHT TO CONTEST FOURTH AMENDMENT REASONABLENESS IN THE POLITICAL ARENA

This Section shows how providing notice of NSL investigations directly to the public can also further the drafters’ original intent. First, it examines the republican, or collective, aspects of the Fourth Amendment. It then considers whether, if Fourth Amendment rights to notice exist, they belong merely to individual search targets or also vest in some form with the people as a whole. The following discussion presents textual, historical, prudential, and doctrinal analyses to show that the Fourth Amendment encompasses collective as well as individual rights. It then argues that to satisfy both of these elements, any right to notice should extend in some form directly to the public. Some level of public transparency about government search practices would thus advance the original understanding of Fourth Amendment.

1. *Republican Fourth Amendment Rights*

The Fourth Amendment is the only part of the Constitution to reference in a single clause both ‘the people’ and the individual ‘persons’ who compose that communal body. Certainly, the two concepts implicitly appear in relation to each other throughout the Bill of Rights. For instance, amendments five and six guarantee the individual rights of

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130. See *supra* Part III.

131. For a helpful overview of executive precedent in this domain, see Jared Cole, Note, *Historical Gloss and Congressional Power: Control over Access to National Security Secrets*, 99 VA. L. REV. 1855 (2013).

‘persons’ and ‘the accused’ while also referencing the jury, an institution of popular sovereignty that embodies ‘the people’ in their collective identity.<sup>132</sup> And the democratic process of ratification that gave rise to the Bill as a whole casts a populist sheen across the individual rights of amendments four through six.<sup>133</sup> But exceptional to the Fourth Amendment, the explicit reference and proximate juxtaposition of the terms ‘the people’ and ‘persons’ emphasize at once their uniqueness and their interdependence.

If the terms ‘the people’ and ‘persons’ were not unique, the first clause—protecting the “right of the people to be secure in their persons”<sup>134</sup>—would be redundant. It would also clash with the use of these terms in other parts of the Constitution. Internal consistency demands that “the people” of Article I, § 2, cl. 1, “the people” whose rights Amendments I, II, and IV protect, and “the people” whose powers Amendments IX and X reserve, constitute a community capable of forming the “Union” of “We the People” that the Preamble envisions.<sup>135</sup> The phrase “the people” in Amendment XVII also necessarily refers to a union because, like Article I, § 2, cl. 1, it presupposes collective action through democratic elections.<sup>136</sup> In contrast, the term “person,” as it appears in Amendments V, XII, XIV and XXII, is individualistic and not collective; each has one and only one, while none can share. Persons are therefore incapable of union, leaving the two terms by necessity unique.

Yet the word “their” also highlights that “the people” and “*their* persons” inter-depend. In a common contemporary reading of the phrase, each individual must enjoy some basic security as a prerequisite to joining a union in the first place. Control over one’s person by necessity precedes any determination of what to do with it. As a result, Fourth Amendment rights to individual security support and enable “We the People” to form a union capable of choosing representatives to govern—the constitutional project writ large.<sup>137</sup> At the same time, “their” reads in the other direction to mean that the union as a whole possesses the persons it comprises.

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132. See U.S. CONST. amend. II, V–VII; AMAR, A BIOGRAPHY, *supra* note 99, at 329 (“Of the five amendments in the Bill of Rights that did not directly invoke ‘the people,’ three explicitly referred to the closely related idea of the ‘jury.’”).

133. AMAR, A BIOGRAPHY, *supra* note 99, at 321 (“The text of the Bill itself poetically recapitulated its own populist enactment sage.”).

134. U.S. CONST. amend. IV.

135. See, for example, *United States v. Verdugo-Urquidez* for a discussion of the phrase “the people” as a term of art. 494 U.S. 250, 265–55 (1990).

136. U.S. CONST. amend. XVII.

137. Preamble; U.S. CONST. art. I, § 2, cl. 1.

Grammatically, this possessory reading of “their” requires an understanding of “the people” not merely as a single entity like “the union,” but also as a plural noun like “the shareholders.”

In an originalist reading of these terms, “their” could mean that the Fourth Amendment protects the rights of individuals in the electorate to the security of other persons in their keep. Indeed, the free male voters who constituted “the people” at the time of the drafting, in a strictly political interpretation of the concept,<sup>138</sup> enacted the amendment with the explicit intent to protect their own rights to the security of *their* women—persons other than themselves whom they nonetheless in some sense possessed under the laws of coverture.<sup>139</sup> Of primary concern were the male customs officers who searched for imported goods inside people’s homes,<sup>140</sup> and who might enter them by surprise before the women inside could dress.<sup>141</sup> Hence, at the time, the drafters could reasonably have sought to ensure that “the people”—free and male—be secure in *their* persons, including their own bodies and also those of their wives and children. To be sure, the concept of virtual representation, whereby men participating in the electorate were to guarantee the interests of their female dependents, need not transform all individual rights into collective ones. Fourth Amendment rights may be unique in this sense because they focus so prominently on the domestic sphere of the home often associated with women.<sup>142</sup>

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138. See, e.g., AMAR, LAW OF THE LAND, *supra* note 99, at 295 (“Free women in 1787 had the rights of ‘persons’ . . . [but] did not as a rule vote in constitutional conventions or for state lawmakers or for Congress; nor did they serve on juries; nor were women part of the militia/people at the heart of the Second Amendment.”); see also, AMAR, A BIOGRAPHY, *supra* note 99, at 324 (“Elsewhere in the Bill of Rights, the phrase ‘the people’ generally gestured toward voters as the core rights-holders, even as the phrase in certain contexts plainly radiated beyond the core group.”).

139. See, e.g., Margaret Valentine Turano, *Jane Austen, Charlotte Brontë, and the Marital Property Law*, 21 HARV. WOMEN’S L.J. 179 (1998).

140. It thus makes particular sense that it was a woman, Mercy Otis Warren, who wrote the pamphlet about the Writ of Assistance decrying the ease with which lower class customs officers could enter domestic spaces. See AMAR, BILL OF RIGHTS, *supra* note 99, at 66.

141. For a contemporary example, see *Kyllo v. United States*, 522 U.S. 27, 30 (2001), expressing Fourth Amendment concerns that surveillance technologies might “disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath.”

142. AMAR, A BIOGRAPHY, *supra* note 99, at 326 (“Clearly, this amendment seemed to center on the domain of domesticity—on ‘persons’ in their private ‘houses’ as distinct from the people in the public square.”).

While political realities have changed, the dual nature of individual and collective Fourth Amendment rights remains politically expedient. From a prudential perspective, collective security depends on individual security and vice versa. For “the people” as a whole to be secure, each must also be individually secure. Were some unfortunate few singled out for lesser treatment, their insecurity would radiate outward to degrade the rights of all.<sup>143</sup> The insecurity of some may cause the identity and unity of the collective as a whole to suffer and cause social unrest. An insecure union threatens the security of each individual within it.

Finally, from a doctrinal perspective, the Court’s exclusionary rule doctrine lends further support for a collective reading of Fourth Amendment rights. The exclusionary rule prohibits the state from introducing information obtained through unconstitutional searches as evidence in a criminal trial.<sup>144</sup> While often criticized and a divergence from jury enforcement,<sup>145</sup> the rule also manifests collective Fourth Amendment rights because it depends on deterrence for justification.<sup>146</sup> Deterrence is a collective good entirely inapplicable to the past injury of the party with standing. In sum, collective Fourth Amendment rights at once depend on and also encompass individual Fourth Amendment rights.

## 2. *The Right to Contest Implies a Public Right to Notice*

If the Fourth Amendment requires notice, the amendment’s republican elements intimate that notice should be given in some form

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143. This is the sentiment memorialized so beautifully in Pastor Martin Niemöller’s iconic quote, “[i]n Germany they came first for the Communists, and I didn’t speak up because I wasn’t a Communist. Then they came for the Jews . . . Then they came for me, and by that time no one was left to speak up.” NAT’L WWII MUSEUM, EXPLORING PERSONAL AND COLLECTIVE RESPONSIBILITY IN WWII (2011), <http://www.nationalww2museum.org/learn/education/for-teachers/lesson-plans/pdfs/when-they-came-for-me.pdf> [<https://perma.cc/747S-9UHM>].

144. *E.g.*, *Mapp v. Ohio*, 367 U.S. 643, 649 (1961) (establishing the exclusionary rule doctrine).

145. The exclusionary rule extracts enforcement power from “the people” of the jury and hands it to the judge, once again expanding federal power in contradiction to the enactment history of the Bill as a whole. *See Amar, First Principles, supra* note 81, at 811 (“Fixated on the exclusionary rule, the twentieth-century Supreme Court has betrayed the traditional civil-enforcement model . . .”).

146. *See, e.g.*, Donald L. Doernberg, *The Right of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 283 (1983) (“[T]he remedy which has been created in response to law enforcement officials’ fourth amendment violations is said to be not personal but collective, designed to prevent future violations rather than to repair those that have already occurred. Its purpose is not to benefit the individual who invokes it but instead to protect society by deterring unlawful police behavior.”).

directly to the public. Notice to Congress alone would not fully address the amendment's populist concern with self-policing by a self-interested government. Amar's jury-enforcement model of the original Fourth Amendment is fundamentally populist;<sup>147</sup> the drafters, the argument goes, preferred juries over judges because they did not trust decision-makers who received a government salary.<sup>148</sup> The deeper enforcement logic at work is this: The drafters sought to solve the agency problem of relying on self-interested government actors to police government actions.<sup>149</sup> Their solution was to use actors who are completely outside of government to control for Executive overreach and abuse. Critically, the drafters did not choose a mere inter-branch checks and balances enforcement scheme. Indeed, they distrusted judges even though judges represent a different branch of government from the executive officials who might perform abusive searches. According to this logic, enforcement by any government agent—including legislators—would contravene original intent. After all, legislators receive government pay just like judges. And while legislators must eventually face the electorate, they need not do so until the end of a term. Any collective Fourth Amendment right to notice should thus vest directly with the public to reach non-government-agent ears.

To be sure, congressional review offers more protection than self-enforcement by the Executive alone.<sup>150</sup> And the Court's recent holdings on Fourth Amendment standing support a view that the political branches—not courts—should enforce collective Fourth Amendment rights. Arguments for the Court's decision in *Clapper*, for instance, focused on separation of powers issues:<sup>151</sup> Courts have developed a prudential

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147. See AMAR, A BIOGRAPHY, *supra* note 99, at 327 (arguing that the second and fourth amendments were designed “to protect popular rights via institutions (the military and the jury) that would embody ‘the people’ themselves”).

148. See AMAR, LAW OF THE LAND, *supra* note 99, at 296.

149. In Amar's originalist interpretation, “the Fourth Amendment evinces at least as much concern with the agency problem of protecting the people generally from self-interested government policy as with protecting minorities against majorities of fellow citizens.” AMAR, BILL OF RIGHTS, *supra* note 99, at 68.

150. For an interesting contrast, see Philip Bobbitt's argument that the notice to Congress mandated by the Spending Clause controls for the excesses of a self-policing, self-interested Executive Branch. Bobbitt, CONSTITUTIONAL INTERPRETATION, *supra* note 122, at 64–82 (analyzing the Iran–Contra affair).

151. As government counsel emphasized during oral argument in that case, “the basic, most fundamental point about the case or controversy requirement and the injury-in-fact requirement that is embedded in it is to preserve the separation of powers.” Transcript of Oral Argument at 58, *Clapper*, 133 S. Ct. 1138 (2013) (11-1025), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-1025.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1025.pdf) [<https://perma.cc/DQT7-W5ZD>].



standing doctrine of nonjusticiability for generalized grievances in order to protect the balance of powers and prevent judicial overreach into political questions best addressed by the other branches.<sup>152</sup>

Yet, more may sometimes be needed; the enactment history of the Bill of Rights suggests that something is missing from the prudential standing perspective. For example, the First Congress enacted the Bill as a whole not to establish, but rather to limit, the powers of the political branches.<sup>153</sup> It would thus have been illogical for the drafters of the Fourth Amendment to reference “the people” in order to identify a collective right that, through proper congressional enforcement, would actually engorge the power of the federal government. If today the political branches hold the sole key to Fourth Amendment remedies for unreasonable mass surveillance searches, they likely do so contrary to the drafter’s intent. Notice to Congress alone runs counter to the amendment’s original populist logic. Public notice, in contrast, permits political solutions for generalized grievances without risking unmitigated dependence on officials who receive government pay.

Applying this understanding of the Fourth Amendment to NSLs lends constitutional support for the proposal that the government should publish more information about its actual NSL practices for public review. Individual rights may be justiciable and collective rights political, but both may sometimes mandate notice to contest the reasonableness of searches—particularly when the risk of government abuse is high.

### C. FIRST AMENDMENT STANDARDS FOR NOTICE

This Section posits that First Amendment standards should guide the government’s notice obligations. The previous Sections offered possible arguments to support the idea of a Fourth Amendment right to notice. They suggested that the government may have a constitutional duty to notify both the individual target of an investigation and also the public directly. However, as the exceptions to statutory notice requirements in

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152. See also, Andrew Nolan, *Foreign Surveillance and the Future of Standing to Sue Post-Clapper*, CONG. RESEARCH SERV., R43107, at 4 (Jul. 10, 2013) (“[T]he rule barring adjudication of generalized grievances . . . ensure[s] that legal injuries that are shared in equal measure by all or a large class of citizens are properly a subject of the elected branches and not the judiciary.”). For instance, the Court in *Alderman v. United States* made clear that “Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.” *Alderman v. United States*, 394 U.S. 165, 174 (1969).

153. AMAR, A BIOGRAPHY, *supra* note 99, at 315 (prefacing a discussion of the First Congress’s enactment of the Bill of Rights with the reflection, “[s]elf-denial is a wonderful thing to behold and an intriguing one to explain”).

criminal procedure show, the government may at times have compelling reasons to delay notice. For instance, disclosure might risk physical danger, threaten an investigation, or cause some other harm.<sup>154</sup> The difficult question, then, is when, what, and how much notice should the government provide? Fortunately, the First Amendment offers ready balancing tests that can easily and reasonably be applied to guide government notice practices.

Turning to the First Amendment to help resolve Fourth Amendment issues is not new. For example, Jack Balkin recently proposed that the First Amendment should offer less protection to “information fiduciaries,” or entities that enjoy certain relationships of trust and confidence with people who give them information, and thus that these entities may be subject to greater regulation than other speakers.<sup>155</sup> Kiel Brennan-Marquez then developed the “information fiduciary” idea to argue that, for similar reasons of trust and confidence, these same entities should have a different relationship to the Fourth Amendment.<sup>156</sup> Likewise, Daniel Solove has observed that Fourth Amendment limits on certain kinds of government information gathering have failed adequately to safeguard some First Amendment values, such as anonymity or the right to listen.<sup>157</sup> Solove argues that the First Amendment should fill the gaps and prevent the government from collecting information about certain types of expressive activities.<sup>158</sup> While my argument moves in a different direction—it seeks to draw on the First Amendment to safeguard Fourth Amendment values—similar rationales apply, such as the historical ties between the two amendments and the fact that they were drafted in response to some overlapping concerns.<sup>159</sup>

There is also a particular, concrete justification for applying First Amendment tests to guide Fourth Amendment notice: as with policy

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154. See *supra* text accompanying notes 60–66.

155. Jack Balkin, *Information Fiduciaries and the First Amendment*, 49 UC DAVIS L. REV. 1183 at 1185–86 (2016).

156. Kiel Brennan-Marquez, *Fourth Amendment Fiduciaries*, 84 FORDHAM L. REV. 611 (2015). Balkin also draws the connection between First and Fourth Amendment information fiduciaries. “The reasons why this information is not public discourse for purposes of the First Amendment also provide reasons why we should have a reasonable expectation of privacy for purposes of the Fourth Amendment.” Balkin, *Information Fiduciaries*, *supra* note 155, at 1231.

157. Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 121, 122, 132–49 (2007).

158. *Id.* at 152.

159. *Id.*, at 133 (“The First, Fourth, and Fifth Amendments share a common background in concerns about seditious libel.”).

arguments for notice about NSL investigations,<sup>160</sup> collateral estoppel should prevent the government from reconsidering a prior constitutional decision about whether revealing certain information would cause harm. This idea plays out in constitutional terms as follows.

The First Amendment bars the government from making any law “abridging the freedom of speech,”<sup>161</sup> including the speech of private citizens whom the government conscripts into aiding a search (such as Internet service providers). But the rights of the people to life, liberty, and security, as enshrined in the Executive’s Commander-in-Chief powers, sometimes permit the government to intrude on an individual’s free speech rights (such as by issuing a nondisclosure order).<sup>162</sup> Free speech rights can be outweighed when speech risks alerting targets to an *ongoing* covert investigation or revealing classified intelligence methods.<sup>163</sup> To evaluate whether an individual’s First Amendment rights should prevail even in the context of a national security investigation, courts apply a series of established tests to determine whether the speech would cause harm.<sup>164</sup>

First Amendment protections against NSL nondisclosure orders thus establish instances of third-party speech that pose no national security harms, or that pose risks of harm too minimal to outweigh an individual liberty enshrined in the Bill of Rights. For example, judges, lawyers, and legal scholars have questioned whether NSL nondisclosure requirements are “overbroad.” In other words, if the gags restrict more speech than necessary, they violate the First Amendment.<sup>165</sup> These concerns persist despite recent statutory developments. United States District Judge Susan Illston of the Northern District of California is currently considering a challenge by two unnamed electronic communication service providers who argue that the post-amendment NSL statutes remain unconstitutional.<sup>166</sup>

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160. See *supra* Part II.

161. U.S. CONST. amend. I.

162. U.S. CONST. art. II, § 2.

163. See, e.g., *Doe v. Holder*, 703 F. Supp. 2d 313, 318 (S.D.N.Y. 2010) (lifting an NSL gag order in part).

164. See *supra* note 43.

165. See, e.g., *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2008); *In re Nat’l Sec. Letter*, 930 F. Supp. 2d 1064 (N.D. Cal. 2013); Clark et. al, LIBERTY AND SECURITY, *supra* note 10; Jack Balkin, *Old-School*, *supra* note 21, at 2329–41. The issue has also reached public debate. See, e.g., Maria Bustillos, *What It’s Like to Get a National-Security Letter*, NEW YORKER (June 27, 2013), <http://www.newyorker.com/tech/elements/what-its-like-to-get-a-national-security-letter> [<https://perma.cc/355X-37VM>].

166. Appellee/Appellant Under Seal’s Supplemental Brief Re USA Freedom Act at 1, *Under Seal v. Lynch*, Nos. 13-15957, 13-16731 (9th Cir. July 6, 2015), <http://cdn.ca9.uscourts.gov/datastore/general/2015/07/15/13-15957%20dkt%2099%20Supp%20Brief.pdf>

I contend that the same standards that require the government to rescind a nondisclosure order under the First Amendment should trigger any Fourth Amendment notice obligations. A prior determination that speech about specific information cannot be suppressed by a nondisclosure order should prevent the government from claiming in other contexts that disclosing that same information would be harmful. In other words, the government's national security interests should pose a parallel limitation on both First and Fourth Amendment rights. This parallel limitation has the following consequences. If the limitation is the same for both amendments, the moment that one is trumped by national security interests so must the other be; and the moment one overcomes these competing concerns, so does the other. The very same minute that government interests in secrecy fail to outweigh the First Amendment rights of a third party conscripted to aid an investigation, they should also fail to outweigh any Fourth Amendment interests in notice about that investigation.

Note that in situations where national security interests fail to outweigh the speech rights of a third party conscripted into an investigation, that third party's right to speak does not require her to speak.<sup>167</sup> If the government were to permit third-party speech that produces some probability of notice, but fail to provide notice itself, the government would toss the Fourth Amendment interests of targets and the public to the happenstance whims of their fellow citizens. The result is unbecoming to the Bill of Rights.

## V. CONCLUSION

Expanding notice of NSL investigations to their targets and the public would enhance transparency about government surveillance; reduce the risk of government overreach and abuse; and help to ensure accountability for the government's actual NSL practices. There are good reasons to believe that it would also advance the core principles that underlie the Fourth Amendment. Moreover, the FBI could accomplish these benefits

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[<https://perma.cc/5C96-Y5WT>]. This litigation is on remand after the USA Freedom Act of 2015 revises the statutes at issue. Order Remanding Cases, Under Seal v. Lynch, Nos. 13-15957, 13-16731, 13-16732 (9th Cir. Oct 8, 2014), <https://www.eff.org/document/9th-circuit-order-remanding-case> [<https://perma.cc/VQ7X-RPRC>].

167. *Wooley v. Maynard* held that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." 430 U.S. 705, 714 (1977); *see also* *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (striking a policy requirement as unconstitutional under the First Amendment because it "compels as a condition of federal funding the affirmation of a belief").

without risk of harm or an undue administrative burden. To be sure, the Supreme Court's current doctrine does not compel the FBI to adopt a notice practice for NSL investigations.<sup>168</sup> But, in addition to the prudential justifications detailed in Parts I–III, the Executive also has an independent obligation to interpret and enforce the Constitution in good faith.<sup>169</sup> Therefore, if Congress does not amend the NSL statutes to require notice to targets and the public, the Executive should adopt these policies of its own accord.

The Northern District of California is currently considering a challenge by two unnamed Internet service providers who argue that even with the USA FREEDOM Act amendments, NSL nondisclosure orders remain unconstitutional.<sup>170</sup> In a prior decision, the court agreed with the plaintiffs that the pre-amendment nondisclosure orders were insufficiently narrowly tailored—in both scope and duration—to the government's national security interests and thus facially unconstitutional.<sup>171</sup> If the court again finds that the gags are unconstitutional under the First Amendment and lifts them in full, the court will have determined that the government's interests do not justify the scope and duration of its secrecy. If that happens, the government would similarly be unable to justify its lack of post-intrusion notice to the targets of those particular NSL searches. If the gag orders are lifted, perhaps the plaintiffs will notify the targets of these investigations and join them in a Fourth Amendment challenge.

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168. See *supra* text accompanying notes 92–96.

169. See, e.g., Brian Galle, *The Justice of Administration: Judicial Responses to Executive Claims of Independent Authority to Interpret the Constitution*, 33 FLA. ST. U. L. REV. 157 (2005); John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 110 (2008) (“Formally, no express clause of the Constitution singles out one branch or the other for exclusive responsibility of constitutional assessment. Indeed, members of all branches take an oath to uphold the Constitution.”).

170. See sources cited *supra* note 165.

171. In re Nat'l Sec. Letter, 930 F. Supp. 2d 1064, 1075–77 (N.D. Cal. 2013).

