Study G-301 January 26, 2016

Memorandum 2016-5

Government Interruption of Communication Service (Discussion of Issues)

In 2013, the Legislature approved Senate Concurrent Resolution 54 (Padilla), which directs the Commission[1] to study two related topics involving government action that affects private communications.

The main topic assigned by SCR 54 is state and local agency access to customer information from communication service providers (i.e., the surveillance of electronic communications). A final report on constitutional and federal statutory law governing that issue has been completed.[2] Further work on that topic has been deferred until after the end of 2016.[3]

With this memorandum, the Commission returns to its work on the *second* topic assigned by SCR 54, government interruption of communication services.[4]

GENERAL ANALYTICAL APPROACH

In this study, the Commission needs to answer two questions:

- To what extent should government be allowed to interrupt private communications?
- What legal process should be required when government interrupts private communications?

In answering those questions, the Commission needs to consider constitutional free speech and due process rights, relevant federal and California statutory law, and the practical consequences of interrupting communications.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. *State and Local Agency Access to Electronic Communications: Constitutional and Statutory Requirements* (August 2015), available at http://clrc.ca.gov/pub/Printed-Reports/Pub239-G300.pdf

3. See Minutes (Dec. 2015), pp. 4-5.

4. *Id.*

Those considerations present very differently in different factual situations. For that reason, the analysis in this study has been organized around the different circumstances in which government might wish to interrupt communications.

The first two memoranda in this study analyzed the following scenarios:

- **Interruption of a specifically-identified communication service that is used in an unlawful enterprise.** For example: the termination of a telephone number used in an illegal bookmaking operation.[5]
- **Interruption of communications within an entire area, to protect public safety, for a reason that is unrelated to speech and assembly.** For example, the suspension of cell phone service in an area to prevent the detonation of a cell phone triggered bomb.[6]

The scenario addressed in this memorandum is identical to the second of the scenarios listed above, with one important difference. This memorandum discusses the interruption of area communications to protect public safety *where the reason for the interruption is to prevent a dangerous assembly*. In other words, it is expressive activity itself that is believed to pose a threat to public safety.

For example, in 2011, protests were held on train station platforms of the Bay Area Rapid Transit ("BART") system. Officials were concerned that such demonstrations posed a threat to public safety (e.g., jostling crowds on narrow platforms could knock a person in front of an approaching train or onto the high voltage "third rail"). When further demonstrations on station platforms were expected, BART shut down cell service in some of their underground stations. The purpose of the interruption seems to have been to make it harder for demonstrators to coordinate their actions within those stations, making it easier for police to control the crowds. In that example, it was unruly public assembly that was seen by government as a threat to public safety.

This memorandum analyzes that general scenario — the interruption of communications to suppress a public assembly that is expected to be dangerous.

RECAP OF DUE PROCESS ANALYSIS

The extent to which constitutional due process rights are compatible with government interruption of communications has been analyzed in the prior

5. See Memorandum 2015-18.
6. See Memorandum 2015-32.

memoranda in this study. As that analysis bears with equal force on the scenario examined in this memorandum, it is very briefly revisited below.

The California Supreme Court has held that government interruption of a communication service can be a taking of property for due process purposes.[7]

Nonetheless, government can summarily interrupt communications, without prior notice to the affected person, if it acts pursuant to a magistrate's order, based on a finding of probable cause that communications are being used for illegal acts and that immediate and summary action is needed to prevent significant dangers to public health, safety, or welfare.[8] However, if such action is taken, government must provide a prompt opportunity for judicial review of the merits of the government's allegations.[9]

It also seems likely that government could summarily interrupt communications without a magistrate's order, if doing so is necessary to address an emergency posing an imminent threat to public health, safety, and welfare, where the delay involved in seeking prior court approval would be problematic.[10]

The interruption of communications to protect public health, safety, or welfare would probably not require any compensation under the takings provisions of the United States and California Constitutions.[11] As discussed in a prior memorandum, there is a well-established exception to the compensation requirement for losses that result from an emergency exercise of the police power.[12] For example, compensation was not owed for property damaged when flood control officials intentionally breached a levy to minimize the destructive effect of a flood, even though doing so damaged property that might otherwise have been unharmed:[13]

> The proper exercise of a public entity's police power is an exception to the just compensation requirement in inverse

7. Goldin v. Pub. Util. Comm'n, 23 Cal. 3d 638, 662 (1979) (interuption of telephone service allegedly used for prostitution). See also Sokol v. Pub. Util. Comm'n, 65 Cal. 2d 247 (1966) (interuption of telephone service allegedly used for illegal gambling).

8. *Goldin*, 23 Cal. 3d. at 664.

9. *Id.* at 665.

10. See Memorandum 2015-32, pp. 5-6. See also Pub. Util. Code § 7908(c) (emergency exception to general requirement that government obtain court order before interrupting communications).

11. See U.S. Const. amend V ("nor shall private property be taken for public use, without just compensation."); Cal. Const. I, § 19(a) ("Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. …").

12. Memorandum 2015-32, pp. 8-10.

13. Thousand Trails, Inc. v. California Reclamation Dist. No. 17, 124 Cal. App. 4th 450 (2004).

> condemnation cases. This "emergency exception" arises "when damage to private property is inflicted by government under the pressure of public necessity and to avert impending peril."[14]

All of the foregoing analysis applies with equal force to the scenario analyzed in this memorandum. In all likelihood, due process would not be an obstacle to government interruption of area communications to protect the public, so long as the interruption is either (1) approved by a magistrate as discussed above, or (2) necessary to address an emergency.

RECAP OF FIRST AMENDMENT ANALYSIS

The extent to which First Amendment rights are compatible with government interruption of communications has been analyzed in the prior memoranda, in the limited context of the scenarios examined in those memoranda. That analysis is not dispositive with regard to the scenario examined in this memorandum, because the new scenario includes an important element that was missing from the prior scenarios. Nonetheless, the staff believes it would be helpful to briefly recap the First Amendment analysis from the prior memoranda, before turning to an analysis of the distinguishing feature of the scenario examined in this memorandum.

It seems clear that the interruption of communications would have an effect on First Amendment free expression rights. "Inasmuch as the rights of free speech and press are worthless without an effective means of expression, the guarantee extends both to the content of the communication and the means employed for its dissemination."[15]

However, the First Amendment does not protect all types of expression. There are limited classes of unprotected speech. For example, the California Supreme Court found no violation of the First Amendment when government interrupted a communication service that was being used to conduct an unlawful enterprise, because the First Amendment does not protect such speech. "In short, telephone communication [used to operate an outcall prostitution service] is not protected speech within the meaning of the First Amendment. Thus, it is subject to total suppression by means of an otherwise valid limitation."[16]

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14. *Id.* at 462 (citations and internal quotations omitted).
15. Sokol v. Pub. Util. Comm'n, 65 Cal. 2d 247, 255 (1966) (citations omitted).
16. Goldin v. Pub. Util. Comm'n, 23 Cal. 3d 638, 657 (1979).

That was the first scenario analyzed in this study — government interruption of a specifically targeted communication service, that is reasonably believed to be used as part of a criminal enterprise.

The justification for that kind of interruption of communications is inapplicable to the scenario discussed in this memorandum, because this memorandum is examining an *area* interruption of communications. An area interruption would necessarily have a broad effect on the lawful speech of all persons within the affected area. Such an interruption would almost certainly suppress speech that is protected by the First Amendment.

The second scenario examined in this study involved an area interruption of communications that was not intended to suppress speech. Instead, it was targeted at non-expressive use of communications to trigger a destructive act (like using a cell phone to set off a bomb). Such action would broadly affect protected communications, but that effect would be *incidental* to the purpose of the interruption.

In *United States v. O'Brien*,[17] the Supreme Court set out the standard that is used to assess the constitutionality of government action that incidentally affects free expression, but is not intended to do so:

> [We] think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[18]

It seems clear that government action to prevent a destructive criminal act (e.g., the detonation of a bomb) would be a constitutional exercise of the police power, in service of an important and substantial government interest. Furthermore, the government's interest in preventing such an act would seem to be "unrelated to the suppression of free expression."

> The proper interpretation of the phrase "unrelated to the suppression of free expression" requires that the reasons advanced by the government to justify the law be grounded solely in the *non*communicative aspects of the conduct being regulated. When the dangers that allegedly flow from the activity have nothing to do with what is communicated, but only with what is *done*, the

17. 391 U.S. 367 (1968).
18. *Id.* at 377.

> dangers are unrelated to free expression. When the dangers the government seeks to prevent are dangers that it fears will arise because of what is communicated, then the regulation *is* related to free expression and should be subjected to the applicable version of heightened scrutiny, and not to *O'Brien*. Prong three of *O'Brien* is, thus, nothing more nor less than an application of the general test for content-neutrality: the law must be "*justified* without reference to the content of the regulated speech."[19]

It is not clear whether the *O'Brien* standard would apply to the scenario examined in this memorandum. If government interrupts cell phone service in a geographical area to suppress a public demonstration that is expected to become dangerous, there is a good argument that the effect on free expression is more than incidental. On the other hand, if the government's purpose is understood to be regulating dangerous *conduct*, rather than suppressing the communication of particular *ideas*, it is possible that the effect on speech could be considered incidental. That was the reasoning in a case upholding a riot curfew, *United States v. Chalk*,[20] which is discussed later in the memorandum.

SUPPRESSION OF DANGEROUS PUBLIC ASSEMBLY

The staff did not find any cases that squarely address the constitutionality of a government interruption of communication services in order to suppress expressive activity that poses a danger to public health, safety, or welfare (an "Expression-Related Interruption of Communication Services"). Consequently, in this part of the memorandum the staff will consider whether such action would survive scrutiny as a prior restraint; as a time, place, or manner regulation; as an effort to prevent "imminent lawless action;" or as a specialized form of curfew.

Prior Restraint

The Supreme Court has long held that "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."[21] The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint."[22]

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19. R. Smolla, Smolla and Nimmer on Freedom of Speech § 9.13 (2013) (emphasis in original) (footnotes omitted).
20. 441 F.2d 1277 (1971).
21. New York Times Co. v. United States, 403 U.S. 713, 714 (1971).
22. Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

Would an Expression-Related Interruption of Communication Services survive scrutiny if it were challenged as a prior restraint? The staff sees only two ways in which it might survive such a challenge.

First, the prior restraint doctrine is not absolute. It is subject to a few narrow limitations, including one for government action to protect "the security of … community life … against incitements to acts of violence."[23] Thus, if government interruption of communications is necessary to protect against incitement of violence, it could survive scrutiny under the prior restraint doctrine. (The related, perhaps overlapping question of whether such action would survive scrutiny as necessary to address imminent lawless action is discussed further below.)

Second, it appears that the prior restraint doctrine is primarily or perhaps exclusively intended to restrict actions that wholly prohibit the dissemination of specific information, because of some characteristic of the information (e.g., scandalous rumors, illegally obtained information, obscene material). If government interruption of communications to prevent a dangerous assembly is found to be content-neutral and it leaves open other effective methods of communication, a court might find that it is not a prior restraint.

Government action affecting speech is content-neutral if it can be justified "without reference to the content of the regulated speech."[24] Would government action to interrupt communications to protect against a dangerous public assembly be content-neutral? It would depend on the circumstances. If the government took such action because of its disapproval of the views to be expressed at the public assembly, then it would not be content-neutral and would probably be held unconstitutional as a prior restraint. If instead, such action were taken to prevent dangerous *conduct*, without regard to the views of those engaged in the conduct, then it would be content neutral and would probably not be struck down as an impermissible prior restraint. For example, suppose that rioting has broken out between the fans of two rival football teams after an important game. The rioting spreads to members of the general population, who are unconcerned with the outcome of the game but are eager to join in the disorder and looting. Police suspect that the situation is worsening because participants are texting their friends and encouraging them to come and join in. In order to address the growing threat to public health, safety, and

23. Near v. Minnesota, 283 U.S. 697, 715-16 (1931).
24. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

welfare, police interrupt cell phone service in the affected area. That action can be justified without any reference to the ideas of any of the rioters.

It also appears that a content-neutral regulation of communication is not a prior restraint. For example, in *Madsen v. Women's Health Center*[25] a state court had enjoined certain types of protest activity within a specified proximity of a particular women's health facility, based on past acts of intimidation and obstruction. The injunction was challenged, in part, on the ground that it was a prior restraint. The Supreme Court held otherwise, in part because the injunction was content-neutral and left open other effective means to communicate:

> We also decline to adopt the prior restraint analysis urged by petitioners. Prior restraints do often take the form of injunctions. See, e. g., New York Times Co. v. United States, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971) (refusing to enjoin publications of the "Pentagon Papers"); Vance v. Universal Amusement Co., 445 U.S. 308, 63 L. Ed. 2d 413, 100 S. Ct. 1156 (1980) (per curiam) (holding that Texas public nuisance statute which authorized state judges, on the basis of a showing that a theater had exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene was unconstitutional as authorizing an invalid prior restraint). Not all injunctions that may incidentally affect expression, however, are "prior restraints" in the sense that that term was used in New York Times Co., supra, or Vance, *supra*. Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone. *Moreover, the injunction was issued not because of the content of petitioners' expression, as was the case in New York Times Co. and Vance, but because of their prior unlawful conduct.*[26]

More pointedly, the California Supreme Court, summarizing relevant United States Supreme Court cases, held that a content-neutral restriction on speech is not a prior restraint: a "prior restraint is a *content-based* restriction on speech prior to its occurrence."[27]

In summary, there appear to be two ways in which an Expression-Related Interruption of Communication Services might survive a challenge that it is an unconstitutional prior restraint:

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25. 512 U.S. 753 (1994).
26. *Id.* at 763 (emphasis added).
27. DVD Copy Control Ass'n, Inc. v. Bunner, 31 Cal. 4th 864 (Cal. 2003) (emphasis in original); see also Congressional Research Service, *Freedom of Speech and Press: Exceptions to the First Amendment* at 7 (2014) ("*only* content-based injunctions are subject to prior restraint analysis") (emphasis in original).

(1) If it is necessary to protect the public from the incitement of violence.
(2) If the interruption is content neutral and it leaves open other effective avenues for communication.

Time, Place, and Manner

A "time, place, and manner regulation" is consistent with the First Amendment so long as it is reasonable, content-neutral, narrowly tailored to serve a significant government interest, and it leaves open "ample alternative channels for communication of the information."[28] For example, a reasonable limit on noise levels at a public concert would likely be a constitutional time, place, and manner regulation.

Could an Expression-Related Interruption of Communication Services survive First Amendment challenge as a proper time, place, and manner regulation? It would depend on the circumstances of the government action.

Content-Neutrality

As discussed above, it is possible that such action could be content-neutral. It would depend on whether the action could be justified without reference to the content of the affected communications.

Narrow Tailoring and Important Government Interest

There is an important government interest in quelling civil disorder:

> "[T]he Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."… An insurrection or riot presents a case in which the government's interest in safety outweighs the individual's right to assemble, speak or travel in public areas so long as an imminent peril of violence exists.[29]

The question would be whether the government's interruption of communications is narrowly tailored to achieve that interest. This is a particular concern with respect to the area interruption of communications, because it might be difficult to match the area affected by the interruption with the area affected by civil disorder. For example, a suspension of cell phone service may not be particularly fine-tuned. It could well affect people outside of the area targeted by the action.

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28. Ward v. Rock Against Racism, 491 U.S. 781 (1989).
29. *In re* Juan C., 28 Cal. App. 4th 1093, 1101 (1994), *quoting* United States v. Salerno, 481 U.S. 739, 748 (1987).

Furthermore, it appears that the tailoring requirement is applied more strictly when a time, place, and manner regulation is imposed by injunction. In that case

> "a somewhat more stringent application of general First Amendment principles" is required than is required in the case of a generally applicable statute or ordinance that restricts the time, place, or manner of speech. Instead of asking whether the restrictions are "narrowly tailored to serve a significant governmental interest," a court must ask "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." /n74/ This is not "prior restraint analysis," which courts apply to content-based injunctions….[30]

That stricter standard would probably apply to the kind of interruption of communications discussed in this memorandum, because such action would be carried out on a case-by-case basis, to address specific dangers as they arise.

Ultimately, the question of whether an Expression-Related Interruption of Communication Services would be narrowly tailored enough to survive muster as a time, place, and manner regulation would depend on the facts specific to the action under review. That assessment would probably require a balanced consideration of the degree of precision employed and the seriousness of the threat to public safety.

Ample Alternative Channels for Communication

Would a government interruption of communications leave open sufficient alternative channels of communication to survive scrutiny as a time, place, and manner regulation? Again, this would seem to be a factual question that would need to be decided on a case-by-case basis. Suppose cell phone service is interrupted in four square city blocks. Persons in that area could not use their cell phones, but could still speak, use land lines, and use the Internet. If they knew the scope of the interruption, they could leave the area and resume use of their cell phones. Would that be sufficient to meet the standard for a constitutional time, place, and manner regulation? It probably could, under certain circumstances.

30. Congressional Research Service, *Freedom of Speech and Press: Exceptions to the First Amendment* at 10 (2014) (footnote omitted).

Summary

It is possible that an Expression-Related Interruption of Communication Services could survive First Amendment scrutiny as a time, place, and manner regulation, if it is:

- Reasonable.
- Content-neutral.
- Narrowly tailored to burden no more speech than is necessary to serve a significant government interest.
- Does not foreclose other ample alternative channels of communication.

Although not directly on point, the Ninth Circuit Court of Appeal has justified the broad suppression of free speech and assembly rights (through the imposition of a curfew where riotous protests had occurred) based on the idea that such a curfew was a valid time, place, and manner regulation.[31] That case is discussed further, later in the memorandum.

Imminent Lawless Action

There is a body of case law under which government action affecting speech can survive First Amendment scrutiny if it is necessary to address a "clear and present danger." The modern formulation of the rule governing such situations was first expressed in *Brandenburg v. Ohio*.[32] In that case, a Ku Klux Klan leader was convicted of criminal syndicalism, for advocating political reform through violence. In reversing the conviction, the Supreme Court held as follows:

> [T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.[33]

The rationale for proscribing incitement has been explained as follows:

> When a speaker uses speech to cause unthinking, immediate lawless action, one cannot rely on more speech in the marketplace of ideas to correct the errors of the original speech; there simply is not enough time, because there is an incitement. In addition, the state has a significant interest in, and no other means of preventing, the resulting lawless conduct. The situation is comparable to

31. *Menotti v. City of Seattle,* 409 F.3d 1113 (9th Cir. 2005).
32. 395 U.S. 444 (1969).
33. *Id.* at 447 (emphasis added).

> someone urging the lynch mob to string up the prisoner. Or, to use the Holmes' analogy, it is akin to someone falsely shouting "fire" in a crowded theater. In such circumstances, there is no time for reasoned debate, because both the intent of the speaker and the circumstances in which he harangues the crowd amount to incitement.[34]

Could an Expression-Related Interruption of Communication Services survive First Amendment scrutiny on the grounds that is necessary to protect against imminent unlawful action? Possibly. The key requirements would be to demonstrate that the danger at issue is (1) "imminent" and (2) "likely."

For example, there is a California case upholding the constitutionality of a curfew imposed to prevent rioting. The court's reasoning seemed to rely on the *Brandenburg* test:

> "'Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.'"[35]

Interruption of Communications as Limited Curfew

The staff found a number of cases where curfews in public areas were upheld as constitutional. This seems relevant because a curfew banning any public assembly or speech in a particular area would seem to have a greater effect on First Amendment rights than interrupting communications in the same area. Arguably, if government can *completely* curtail the exercise of First Amendment assembly rights in a specified area on a temporary basis, then it stands to reason that they could instead impose *a less restrictive* temporary curtailment of rights in the same area (e.g., the suspension of cell phone service).

For that reason, this part of the memorandum considers when a curfew would survive First Amendment challenge.

The need for a curfew can arise from a natural disaster that causes civil disorder or otherwise makes it unsafe to be out in public. For example, in *Smith v. Avino*,[36] the Eleventh Circuit Court of Appeal considered the constitutionality

34. R. Rotunda & J. Nowak, Treatise on Constitutional Law — Substance and Procedure § 20.15(d), at 109 (5th Ed. 2013).

35. *In re* Juan C., 28 Cal. App. 4th at 1100, *quoting* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

36. 91 F.3d 105 (11th. Cir. 1996).

of a nighttime curfew imposed by local government in the wake of Hurricane Andrew. The court upheld the facial constitutionality of the curfew, stating in relevant part:

> Cases have consistently held it is a proper exercise of police power to respond to emergency situations with temporary curfews that might curtail the movement of persons who otherwise would enjoy freedom from restriction. …
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> In such circumstances, governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency. From prior decisions involving natural disasters, both of the judges in the district court gleaned the proper approach in such matters: when a curfew is imposed as an emergency measure in response to a natural disaster, the scope of review in cases challenging its constitutionality "is limited to a determination whether the [executive's] actions were taken in good faith and whether there is some factual basis for the decision that the restrictions … imposed were necessary to maintain order." …
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> …
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> *In an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended.*[37]

The standard applied when reviewing a natural disaster curfew may not be appropriate when reviewing a curfew aimed at curbing dangerous public assembly.[38] When public assembly itself is the perceived source of danger to the public, First Amendment concerns are more directly implicated.

The staff has not found a Supreme Court opinion that directly addresses the use of curfews to suppress a dangerous assembly. However, there was an opinion in which the Court expressly declined to address that issue. It is discussed below.

In response to the assassination of Martin Luther King, Jr., the City of Philadelphia adopted an emergency ordinance imposing a daytime curfew. With certain exceptions, it prohibited any public gathering of 12 or more individuals in a specified part of the city. The purpose was to minimize the risk of major rioting. A number of peaceful groups were arrested solely for violation of the curfew. They challenged its constitutionality. An intermediate state court of appeal upheld the convictions, per curium and without a written opinion. However, one justice entered a concurring opinion that explained his reasoning:

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37. *Id.* at 109 (citations omitted) (emphasis added).

38. See, e.g., Menotti v. City of Seattle, 409 F.3d 1113, 1142 n. 55 (9th Cir. 2005) (rejecting natural disaster curfew standard as basis for evaluating curfew restrictions on public demonstrations).

> In ordinary times and at ordinary places, large public assemblies, especially for the purpose of peacefully communicating controversial ideas and minority viewpoints, must be given the greatest possible protection. However, in the highly charged atmosphere prevailing when the danger of a large scale riot is present, large public assemblies, although peaceful to all appearances, may inflame passions or promote clashes between persons or groups with divergent views and ignite the violence which may quickly become a full scale riot. The purpose of the limitation upon assembly is to eliminate the possibility of these dangerous confrontations at times and places where there is a clear and present danger of a large scale riot. The effect of the limitation is merely to delay assemblies until they can be held without endangering the entire community.
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> I therefore would construe Ordinance 10-819 as authorizing the Mayor to declare a State of Emergency only after he has found that there is a *clear and present danger* of a *large scale civil disorder* and granting him the power to limit public assembly only if the limitation is *necessary* to avert the danger and only in those geographic areas where it is *needed* for the success of the preventive action.
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> As so construed, I believe the ordinance to be constitutional. The limitations imposed upon assembly by Ordinance 10-819 are attained through a legislative directive that specific conduct be restricted because that conduct threatens *an interest which may legitimately be protected by the state*. Maintaining peace and public order is the most fundamental duty of government and is the primary justification for the existence of State police power. "The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."[39]

Note the requirements for constitutional action cited in the concurring opinion: the action must be "necessary" to address a "clear and present danger" that "threatens an interest which may legitimately be protected by the state" (e.g., averting "a large scale civil disorder") and it must not be overbroad.

That case was presented to the U.S. Supreme Court for review, but was dismissed, without explanation, "for want of a substantial federal question."[40] Justice Douglas dissented from that decision, arguing that the imposition of the curfew raised a number of important constitutional questions:

> Control of civil disorders that may threaten the very existence of the State is certainly within the police power of government. Yet

39. Commonwealth v. Stotland, 214 Pa. Super. 35, 43-44 (1968) (Spaulding, J., concurring) (emphasis added).

40. Stotland v. Pennsylvania, 398 U.S. 916 (1970).

> does a particular proclamation violate equal protection? Is it used to circumvent constitutional procedures for clearing the streets of "undesirable" people? Is it used selectively against an unwelcome minority? Does it give fair notice and are its provisions sufficiently precise so as to survive constitutional challenge? Does it transgress one's constitutional right to freedom of movement which of course is essential to the exercise of First Amendment rights?
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> I do not intimate that Philadelphia's proclamation has a constitutional infirmity. But the questions are so novel and undecided that we should hear the case.
>
> This Court can serve no higher function than to review serious and substantial questions regarding alleged infringements of the First Amendment rights of speech and assembly, whether they occur in fair weather or in foul.[41]

The use of a curfew to suppress riotous assembly has been upheld at lower levels of appellate review. Three such cases are discussed below, each offering a different rationale for the constitutionality of the curfew at issue.

United States v. Chalk

In *United States v. Chalk*,[42] a car was pulled over and searched for weapons pursuant to an emergency curfew that had been imposed following a violent conflict between high school students and police. A shotgun and bomb-making materials were discovered. The search was challenged on the ground that it was conducted pursuant to an unconstitutional curfew order. The court upheld the search, holding that the curfew was constitutional under the *O'Brien* standard for government action that is not intended to suppress speech, but has an incidental suppressive effect:

> The invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected. Actions which citizens are normally free to engage in become subject to criminal penalty. A curfew, like ordinances restricting loudspeaker noise and limiting parade permits, doubtless has an incidental effect on First Amendment rights. The standard that has developed where regulation of conduct has an incidental effect on speech is that the incidental restriction on First Amendment freedoms can be no greater than is essential to the furtherance of the government interest which is being protected. See, e. g., United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. L. Ed. 2d 672 (1968). The limitation on the use of emergency powers by the executive is essentially the same. The declaration of a state of

41. *Id.* at 920-21 (Douglas, J., dissenting).
42. 441 F.2d 1277 (1971).

> emergency and the restrictions imposed pursuant to it must appear to have been reasonably necessary for the preservation of order.[43]

It might seem surprising that government action to forbid public assembly would be seen as having only an incidental effect on First Amendment rights, but there is a reasonable argument for that view. A curfew may be aimed at suppressing violent *conduct*, rather than the communication of ideas. In that situation, the suppression of communication may be an unavoidable side effect.

In re Juan C.

A California case, *In re Juan C.*,[44] considered a nighttime curfew imposed by the City of Long Beach in response to severe rioting, which had included arson, looting, and homicide (the "Rodney King" riots). Here too, the court stated that the curfew's effect on speech was "incidental."[45] But it went on to analyze the First Amendment issue based on a "clear and present danger" test (the historical predecessor to the modern "imminent unlawful action" test established in *Brandenburg*[46]):

> An inherent tension exists between the exercise of First Amendment rights and the government's need to maintain order during a period of social strife. The desire for free and unfettered discussion and movement must be balanced against the desire to protect and preserve life and property from destruction. Restrictions on speech are justified when an undeniable public interest is threatened by clear and present danger of serious substantive evils. "'Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.'" …
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> …
>
> It cannot be gainsaid that the government must make every effort to avoid trammeling its citizens' constitutional rights. By the same token, those rights are not absolute. "[T]he Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."… An insurrection or riot presents a case in which the government's

43. *Id.* at 1280-81.

44. 28 Cal. App. 4th 1093 (1994).

45. *Id.* at 1099 ("A curfew primarily regulates conduct or, more specifically, movement. Its effect on speech is incidental.").

46. See "Imminent Lawless Action," *supra*.

> interest in safety outweighs the individual's right to assemble, speak or travel in public areas so long as an imminent peril of violence exists.
>
> The Long Beach curfew regulation does not offend constitutional precepts because the restrictions it imposes are reasonably related to a compelling government interest. The regulation limits outdoor activities in public places during specified hours only so long as an emergency exists, and there is no dispute that a bona fide emergency existed in the city in late April and early May of 1992. The regulation is not directed at any particular class or group, and regulates conduct rather than the content of speech.[47]

Menotti v. City of Seattle

Finally, *Menotti v. City of Seattle*[48] involved a constitutional challenge to a curfew that was imposed to suppress rioting that had broken out during several days of meetings of the World Trade Organization. The curfew affected only a specified area near the site of the WTO meetings. The court upheld the constitutionality of the curfew, on the grounds that it was a time, place, and manner regulation:

> Perhaps it has not been said with more elegance than in these words of Justice Brennan in the landmark decision of New York Times Co. v. Sullivan: "Debate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." … However, we do not think that even the most vital First Amendment expressions — and for purposes of our analysis we consider political protest adverse to WTO activities and internationalist philosophy to be political comment at the core of the First Amendment — can be said automatically to overcome the need of a city to maintain order and security for its residents and visitors, in the face of violence. Burson v. Freeman, 504 U.S. 191, 197, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992) ("At the same time, however, expressive activity, even in a quintessential public forum, may interfere with other important activities for which the property is used …. The government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.").
>
> …
>
> We hold that Order No. 3 was a constitutional time, place, and manner restriction on speech on its face. Because we hold that Order No. 3 was a valid time, place, and manner restriction, we

47. In re Juan C., 28 Cal. App. 4th at 1100, 1101.
48. 409 F.3d 1113 (9th Cir. 2005).

> need not reach Appellants' contention that Order No. 3 was a prior restraint. Baugh, 187 F.3d at 1042 ("Even prior restraints may be imposed if they amount to reasonable time, place, and manner restrictions on speech.").[49]

The court found that there were ample alternative channels of communication because the curfew permitted demonstrations to take place reasonably near the WTO events.

Discussion

In order to be confident that an Expression-Related Interruption of Communication Services would be constitutional, it would be prudent to require that the government satisfy *all* of the criteria discussed above. That would ensure that the action would survive First Amendment scrutiny *regardless* of the nature of the challenge.

Proposed Conditions on Government Interruption of Communications

For that reason, **the staff suggests that an Expression-Related Interruption of Communication Services** (i.e., a government interruption of communication services in order to suppress expressive activity that poses a danger to public health, safety, or welfare) **only be allowed if all of the following criteria are met:**

- The action is content-neutral.
- The action is needed to address a danger of serious harm that is both imminent and likely to occur.
- The scope of the action is narrowly tailored to burden no more speech than is necessary to address the identified danger.
- The action leaves open ample alternative channels for communication.

An action that meets all of those standards would stand a good chance of surviving any of the grounds for constitutional challenge discussed above.

Public Utilities Code Section 7908

Existing Public Utilities Code Section 7908 permits government to interrupt communication services in order to protect public health, safety, and welfare.

Action pursuant to that section must either be authorized in advance by a magistrate or fall within an exception for "extreme" emergencies.

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49. *Id.* at 1139-40, 1142-43 (some citations and footnotes omitted).

If a magistrate authorizes the action, the magistrate's order must include all of the following findings:

> (1)…
> (A) That probable cause exists that the service is being or will be used for an unlawful purpose or to assist in a violation of the law.
> (B) That absent immediate and summary action to interrupt communications service, serious, direct, and immediate danger to public safety, health, or welfare will result.
> (C) That the interruption of communications service is narrowly tailored to prevent unlawful infringement of speech that is protected by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution, or a violation of any other rights under federal or state law.
> (2) The order shall clearly describe the specific communications service to be interrupted with sufficient detail as to customer, cell sector, central office, or geographical area affected, shall be narrowly tailored to the specific circumstances under which the order is made, and shall not interfere with more communication than is necessary to achieve the purposes of the order.
> (3) The order shall authorize an interruption of communications service only for as long as is reasonably necessary and shall require that the interruption cease once the danger that justified the interruption is abated and shall specify a process to immediately serve notice on the communications service provider to cease the interruption.[50]

Arguably, those statutory requirements already provide sufficient guidance to help ensure that such action will only be taken in situations where the constitutional criteria discussed above would be met.

In particular, the statute includes a broad requirement that the government action be "narrowly tailored to prevent unlawful infringement of speech that is protected by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution …." That language expressly directs the magistrate to determine that a contemplated action does not violate the First Amendment before giving necessary authorization.

The statute also includes some more specific requirements:

- *The requirement that action be necessary to prevent serious, direct, and immediate danger to public safety, health, or welfare.* That requirement would seem to satisfy the *Brandenburg* test and would probably fit within the public safety exception to the prior restraint doctrine.

50. Pub. Util. Code § 7908(b)(1).

- *The requirements of narrow tailoring, immediate danger, and limitations on geographical scope and duration.* Those criteria would meet many of the requirements for a valid time, place, and manner regulation.

The existing statutory requirements could perhaps be improved by expressly requiring a finding of content-neutrality and a finding that ample alternative channels of communication would be left open. Those requirements would arguably be redundant, since the magistrate will already have assessed compatibility with the First Amendment, but adding the express requirements would provide additional guidance to the court and greater public confidence that such action would only be taken in situations where it is proper. **Should the staff draft language along those lines for review in a future memorandum?**

In addition to the procedure for action pursuant to a magistrate's order, Section 7908 permits action without prior court approval, if a "governmental entity reasonably determines that an extreme emergency situation exists that involves immediate danger of death or great bodily injury and there is insufficient time, with due diligence, to first obtain a court order…."[51] It seems reasonable to preserve scope for government to address this kind of extreme emergency. **The staff recommends that the existing "extreme emergency" rule be continued.**

Curfew Procedures

It is worth noting that the riot curfew cases discussed above all involved a declared state of local emergency. In California, the statute that authorizes the imposition of a curfew is expressly conditioned on the existence of a local emergency:

> During a local emergency the governing body of a political subdivision, or officials designated thereby, may promulgate orders and regulations necessary to provide for the protection of life and property, including orders or regulations imposing a curfew within designated boundaries where necessary to preserve the public order and safety. Such orders and regulations and amendments and rescissions thereof shall be in writing and shall be given widespread publicity and notice.
>
> The authorization granted by this chapter to impose a curfew shall not be construed as restricting in any manner the existing authority of counties and cities and any city and county to impose

51. Pub. Util. Code § 7908(c).

> pursuant to the police power a curfew for any other lawful purpose.[52]

A local emergency can only be declared by a local government's governing body (or an official designated by that body).[53] The term "local emergency" is defined, by related law, as follows:

> "Local emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the territorial limits of a county, city and county, or city, caused by such conditions as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy, which are or are likely to be beyond the control of the services, personnel, equipment, and facilities of that political subdivision and require the combined forces of other political subdivisions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission.[54]

In reviewing this law, one further reform occurred to the staff. If the Commission wishes to further tighten the statutory standards for an Expression-Related Interruption of Communication Services, it could provide that such action can only be taken if there is a state of local emergency. This would align Section 7908 with existing law on the imposition of a curfew. It would also provide stronger evidence that a "clear and present danger" exists. **Should the staff pursue that possibility?**

FEDERAL EMERGENCY WIRELESS PROTOCOL

As discussed in the prior memoranda, there is a secret federal protocol that governs at least some actions to interrupt area communications.[55] *The exact scope of the protocol is not known.*

This memorandum does not reiterate the prior discussions of the federal protocol. The issue is only being raised to acknowledge that federal authority may supersede California law on the issue discussed in this memorandum. It is

52. Gov't Code § 8634.
53. Gov't Code § 8630.
54. Gov't Code § 8558(c).
55. See Memorandum 2015-18, pp. 18-22 & Exhibit pp. 11-12; Memorandum 2015-32, pp. 14-18.

possible that any government interruption of area communications is governed exclusively by the federal protocol.

At a prior meeting, the staff committed to meeting with the California Homeland Security Advisor to discuss the intersection of the federal protocol and state law in this study. That meeting has not yet occurred. When it does, the staff will discuss the scenario examined in this memorandum.

PRACTICAL CONCERNS

Even if it is constitutional under some circumstances for government to interrupt communication services in order to suppress a dangerous assembly, the staff is not sure that such action would always be wise. Suppose that there is major rioting in part of a city. Would it be a good idea to turn off cell phone service in that area? What if citizens are threatened by fires, or armed rioters, or have some run-of-the-mill emergency that requires immediate assistance (e.g., a serious traffic accident or stroke). It has been estimated that 70% of all 911 calls are now made with mobile phones.[56] There is a good argument that a state of civil disorder would be the *worst* time to disrupt mobile communications.

That said, the staff is not comfortable assuming that there would *never* be a situation in which it would be helpful to interrupt communication services to address civil disorder. While appropriate circumstances for such a step might be rare, it seems prudent to preserve the existing statutory option of doing so (if the Commission concurs that it is lawful, when exercised within proper bounds).

Nor does the staff assume that emergency response officials would be unable to recognize the disadvantages of disabling mobile communications and weigh those disadvantages in deciding whether to act. On most occasions, such officials probably would exercise sound judgment in deciding whether to interrupt communication services pursuant to Section 7908.

Nonetheless, **it might be helpful to revise Section 7908 to require consideration of the risks associated with interrupting communications before taking such action.** This would not rule such action out, but would help to ensure that the practical disadvantages are weighed. The staff is not comfortable trying to craft a statutory test for that type of decision. The possible circumstances are too varied to imagine all of the factors that might be relevant in a particular case.

56. https://www.fcc.gov/guides/wireless-911-services.

CONCLUSION

There do seem to be some situations in which an Expression-Related Interruption of Communication Services (i.e., a government interruption of communication services in order to suppress expressive activity that poses a danger to public health, safety, or welfare) might survive a challenge under the First Amendment. However, the question of constitutionality would be highly dependent on the circumstances. While there are situations in which such action may be proper, there are also circumstances where such action would likely violate First Amendment rights (e.g., where the purpose was to discriminate based on content, where the action is overbroad, or where the justifying "emergency" is neither imminent nor likely to occur).

Existing Public Utilities Code Section 7908 imposes fairly strict requirements on such action, including magistrate review of the constitutionality of the action. That general approach seems sound, as it allows a court to assess the need for the action and its scope, with an eye squarely on the First Amendment. With that level of prior review in place, the staff is confident that most problems could be avoided.

The reliability of the prior review could perhaps be strengthened in two ways:

- Import language drawn directly from the relevant constitutional tests (e.g., the requirements of content-neutrality and ample alternative channels of communication).
- Require that a state of local emergency exist.

It might also make sense to require consideration of the practical disadvantages of interrupting communications in an entire area, before doing taking such action.

The staff does not recommend making any changes to the existing expedited procedure for extreme emergencies. That procedure is already sufficiently constrained that it seems likely to withstand constitutional scrutiny.

Respectfully submitted,

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