Study G-301 November 23, 2016

# First Supplement to Memorandum 2016-56

## Government Interruption of Communication Service (Comments of American Civil Liberties Union and Electronic Frontier Foundation)

At its September meeting, the Commission[1] considered a staff draft recommendation on *Government Interruption of Communication Service*.[2] The American Civil Liberties Union and the Electronic Frontier Foundation (hereafter "ACLU and EFF") had concerns about some aspects of that draft.[3] In response to those concerns and other input, the Commission made several changes to the proposed law and directed the staff to prepare a revised staff draft recommendation for consideration at the December meeting.[4] That revised draft is attached to Memorandum 2016-56.

In response to the revised draft, the Commission has received a new letter from the ACLU and EFF. The letter is attached as an Exhibit.

While ACLU and EFF appreciate the consideration of their input at the September meeting, there is one issue that continues to cause them concern: a proposed exception to court authorization requirements for an interruption of communication service that is caused by the execution of a search warrant. This memorandum discusses that issue.

### SUMMARY

Existing Public Utilities Code Section 7908 provides a procedure that must be followed before government can interrupt a communication service to protect public health, safety, or welfare, or to prevent the use of the service for an

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. See Memorandum 2016-46.
3. See First Supplement to Memorandum 2016-46.
4. See Minutes (Sept. 2016), p. 4 (attached to Memorandum 2016-51).

unlawful purpose. Under that procedure, the interruption must be authorized by a judicial officer who finds, among other things, that the interruption would be narrowly tailored so as to avoid an unlawful violation of free expression rights.

The Commission's draft recommendation would continue the substance of Section 7908, with minor improvements to its expression, some filling of procedural gaps, and some clarification of its application. One of the proposed clarifications would be an exception to the statutory procedure for an "interruption of communication that results from the execution of a search warrant."[5]

ACLU and EFF strongly urge the Commission to reconsider that exception. They correctly point out that the judicial review that precedes the issuance of a search warrant is focused on privacy rights, rather than free expression rights. They argue that the law should also require judicial review of the impairment of free expression rights when the execution of a search warrant would interrupt a communication service.

That concern is discussed below.

## APPLICATION OF PROPOSED EXCEPTION

When ACLU and EFF first raised this concern, it was in response to the draft recommendation considered at the September meeting. That version of the recommendation would have applied the Section 7098 procedure to all forms of electronic communication, including Internet services.

In response to concerns raised by ACLU and EFF, and input received from counsel at the California Public Utilities Commission, the proposed law was narrowed to continue the existing scope of Section 7908.[6] Consequently, the revised staff draft would only apply the Section 7908 procedure to an interruption of *telephone service*.[7] It would not apply to an interruption of Internet communications (such as email and social media).

That narrowed application is important, because it would significantly narrow the effect of the proposed search warrant exception. That exception would only come into play if execution of the search warrant would interrupt *telephone* communication.

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5. See proposed Penal Code § 11481(a)(7); Memorandum 2016-56, attached draft p. 35.
6. Minutes (Sept. 2016), p. 4 (attached to Memorandum 2016-51).
7. See proposed Penal Code § 11470(a); Memorandum 2016-56, attached draft p. 29.

The revised staff draft recommendation provides an example of how that could occur: "if law enforcement has a search warrant authorizing it to seize and search the contents of a cell phone, the ability to use that phone for communication purposes will be interrupted."[8]

The only other example of how a search warrant could interrupt telephone communication was raised by ACLU and EFF in their earlier letter. In that letter, they describe cell-site simulators as "powerful surveillance devices used by the government to identify and locate cellular devices…."[9] They go on to describe those devices as "preventing access to 911 emergency service as well as disrupting routine communications."[10] The ACLU expressed similar concerns in a complaint it submitted to the Federal Communications Commission, urging a federal investigation of the lawfulness of the use of cell-site simulators.[11]

The staff does not have the technical knowledge to evaluate the extent to which a cell-site simulator would disrupt cell-phone communications. There are some popular press articles that conclude that there can be some disruptive effect.[12]

The attached ACLU and EFF letter seems primarily concerned about the application of the proposed exception to a warrant authorizing the use of a cell-site simulator. The letter does not specifically address the interruption of cell phone communication when a phone is physically seized incident to a warrant-authorized search.

The attached letter also expresses concern about application of the proposed warrant exception to "network investigatory techniques."[13] From the prior ACLU and EFF letter, the staff understands such techniques to involve the manipulation of communication on the Internet.[14] Because the proposed law has

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8. See Memorandum 2016-56, attached draft p. 25.
9. First Supplement to Memorandum 2016-56, Exhibit p. 6.
10. *Id.* at Exhibit p. 7.
11. *Complaint for Relief Against Unauthorized Radio Operation and Willful Interference with Cellular Communications – Petition for an Enforcement Advisory on Use of Cell Site Simulators by State and Local Government Agencies,* Aug. 16, 2016, Center for Media Justice, Color Of Change, New America's Open Technology Institute, *available at* https://ecfsapi.fcc.gov/file/10816659216934/CS%20Simulators%20Complaint%20FINAL.pdf.
12. See, e.g., Globe and Mail, *Case sheds light on how police in Toronto use 'stingray' surveillance* (May 17, 2016) ("The police devices can have the side effect of temporarily blocking all new calls – and while 911 calls are supposed to override the interference, up to half the time this does not happen.") *available at* http://www.theglobeandmail.com/news/national/case-involving-first-documented-use-of-stingray-technology-in-toronto-goes-to-trial/article30057813/.
13. See Exhibit p. 2.
14. First Supplement to Memorandum 2016-56, Exhibit pp. 8-9.

been narrowed in scope, it would not apply to Internet communications. Consequently, the staff does not believe that the proposed warrant exception would apply to "network investigatory techniques."

## EFFECT OF PROPOSED EXCEPTION

**Interruption Caused by Warrant-Authorized Seizure of Cell Phone**

When law enforcement obtains a warrant to search a person's cell phone, the warrant serves to ensure that the search does not violate constitutional privacy rights. However, the seizure of the phone will also impair free expression, by denying use of the phone while the search is conducted. Should the law require that such an interruption be separately authorized by a judicial officer charged with ensuring that the interruption will not violate constitutional free expression rights?

When law enforcement is conducting a search, pursuant to a lawful warrant, its *purpose* is to search for evidence of a crime. Any temporary interruption of communication that results from the search is merely an incidental effect.

In *United States v. O'Brien*,[15] the Supreme Court set out the standard of review for a government action that is not intended to suppress free expression, but has an incidental effect on free expression:

> [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.[16]

Under that standard, it seems very likely that an interruption of communications that results from a warrant-authorized search of a cell phone would not violate the First Amendment. The interruption would be incidental to a proper governmental purpose and it would have only a minimal effect on the available means of expression. The seizure of the phone would not prevent the phone's owner from speaking, using another phone, or communicating by other means.

15. 391 U.S. 367 (1968).
16. *Id.* at 377.

For that reason, the staff sees no compelling reason to require that a court expressly find that the First Amendment is not offended, every time a warrant is issued to search a cell phone. Imposing such a requirement would create a significant new burden on the courts and law enforcement, for little apparent benefit.

As explained in the staff draft recommendation, applying the Section 7908 procedure to cell phone search warrants would also create a significant substantive limitation on such searches.[17] In addition to finding that an interruption of communication would not violate free expression rights, Section 7908(b)(1)(A) & (B) would require that a court find both of the following to be true:

> (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.

It seems likely that a warrant-authorized cell phone search would often fail to meet one or both of those standards. This would create significant new obstacles to warrant-authorized cell phone searches. In non-emergency situations, such searches might not be permitted at all. The staff sees no good policy rationale for that result.

ACLU and EFF concede that not all of the requirements of Section 7908 may be apt as applied to an interruption of communication that results from the execution of a search warrant:

> This is not to say that the requirements for search warrants must precisely parallel those for other orders that interrupt communications. The Commission may want to consider if there are specific procedural provisions that should be drafted differently in order to more effectively address the context of when the government obtains a court order in the form of a warrant that knowingly or intentionally interrupts communications service.[18]

The staff agrees. In particular, Section 7908(b)(1)(A) & (B) should probably not apply to a warrant-authorized cell phone search.

The fact that key provisions of Section 7908 seem inappropriate when applied to a warrant-authorized cell phone search has another important implication. It

17. See Memorandum 2016-56, attached draft p. 26.
18. See Exhibit p. 4.

suggests that the Legislature never *intended* for Section 7908 to apply to an interruption that results from a warrant-authorized cell phone search. That implication is consistent with the legislative history of Section 7908. As discussed in prior materials, that history focuses on one particular event in which Bay Area Rapid Transit police shut down cell phone service in their underground stations, for the purpose of disrupting the communications of demonstrators.[19]

The reference to the federal Emergency Wireless Protocol ("EWP") in Section 7908(d) also sheds light on the Legislature's intentions. As discussed, the EWP is a federal protocol that governs an area shut down of cell phone service to address an emergency. The event that prompted promulgation of the EWP was an interruption of cell phone services in tunnels leading to New York City, to prevent the detonation of cell-phone triggered bombs.[20]

Neither of those events has much in common with a temporary interruption of cell phone use that is incidental to a warrant-authorized search of the phone. The two scenarios contemplated by the Legislature both involve situations in which the government's *purpose* was to interrupt communications.

For the reasons discussed above, the staff finds it unlikely that the Legislature even contemplated that Section 7908 would apply to an incidental interruption of communication caused by a warrant-authorized cell phone search.

## CELL-SITE SIMULATORS

All of the analysis in the preceding section of the memorandum also applies to an interruption of communication service caused by the warrant-authorized use of a cell-site simulator:

- The government's purpose in using a cell-site simulator to conduct a warrant-authorized search is not to interrupt communications. Any such interruption is incidental to its court-reviewed and authorized purpose — conducting a search.
- Under *United States v. O'Brien*, it seems likely that an incidental disruption of cell phone communications in the area affected by a warrant-authorized cell-site simulator would not offend the First Amendment.
- Many of the requirements of Section 7908, most notably the findings required by Section 7908(b)(1)(A) & (B), seem

19. See, e.g., Senate Energy, Utilities, and Communications Committee Analysis of SB 380 (April 1, 2013).

20. See generally Memorandum 2016-56, attached draft pp. 17-20.

inappropriate when applied to an interruption caused by the warrant-authorized use of a cell-site simulator. They would impose significant new obstacles to the use of cell-site simulators.

- It seems unlikely that the Legislature contemplated or intended that Section 7908 apply to an interruption of communication caused by the warrant-authorized use of a cell-site simulator.

However, there are two additional factors that must be considered in connection with an interruption caused by the warrant-authorized use of a cell-site simulator.

First, if the disruptive effect of a cell-site simulator is serious enough — especially if it blocks access to 911 — there may be an additional policy reason, independent of constitutional concerns, to limit the use of such devices. The staff does not have reliable empirical data about the disruptive effect of cell-site simulators to evaluate that possibility. Moreover, it seems that the ACLU has already petitioned the FCC to bar the use of cell-site simulators because of their disruptive effect on communications.[21] To date, it appears that that the FCC has declined to do so.[22]

Second, the use of cell-site simulators has been the subject of very recent legislative attention. In 2015, the California Electronic Communication Privacy Act was enacted.[23] Under that law, which was sponsored by ACLU, a search warrant is required to use a cell-site simulator.[24] In enacting that new law, the Legislature could have added additional restrictions on the use of cell-site simulators, to somehow limit their disruption of communications, but it did not.

The staff is concerned about using the present study as a vehicle to impose new substantive restrictions on the use of cell-site simulators, especially so late in the process. The issues surrounding the use of cell-site simulators are important, very technical, and politically charged. It could be problematic to address those issues in a study that was not clearly intended to encompass them.

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21. See *supra* note 11.
22. See The Hill, *Chairman: FCC has Minimal Jurisdiction over Surveillance Tool* (Mar. 19, 2015) *available at* http://thehill.com/policy/technology/236326-chairman-fcc-has-minimal-jurisdiction-over-surveillance-tool.
23. SB 178 (Leno); 2015 Cal. Stat. ch. 651.
24. See Penal Code § 1546.1.

## CONCLUSION

**The Commission needs to decide whether to retain the proposed exception for an interruption of communication caused by execution of a search warrant, with or without changes.**

If the Commission decides to eliminate the exception (either entirely or only for cell-site simulators), further changes would need to be made to the proposed law to avoid problematic consequences.

Respectfully submitted,

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November 21, 2016

Re: Revised Staff Draft Recommendation for Government Interruption of Communication Service (G-301).

The ACLU of California and Electronic Frontier Foundation appreciate the consideration that the Commission granted to our comments on the initial Staff Draft Recommendation for Government Interruption of Communication Service (G-301).[1] However, we write again today because of deep concerns with the modified recommendation to include an exception for any interruption occurring pursuant to the execution of a search warrant.[2] This exception gives rise to the same fundamental issues as the "incidental" interruptions exception in the previous recommendations.[3] It undermines the clear intent of the law to safeguard the communications rights of Californians by requiring heightened judicial process for any knowing or intentional interruption of communications, above and beyond the privacy protections inherent in a search warrant. In addition, since warrants are sought and obtained by California government entities in very large numbers and increasingly involve communication interruptions, the potential impact of this exception on the rights of Californians may be extensive. In order to be consistent with the intent of the law and safeguard the expressive rights of Californians, the Commission should remove the exception for communication interruptions pursuant to a search warrant from its Proposed Language.

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[1] *See* First Supplement to Memorandum 2016-46, Government Interruption of Communication Service (Comments of American Civil Liberties Union and Electronic Frontier Foundation), Sept. 16, 2016, *available at* http://www.clrc.ca.gov/pub/2016/MM16-46s1.pdf (hereinafter "First Supplement").
[2] Memorandum 2016-56, Government Interruption of Communication Service (Revised Staff Draft Recommendation) at 36, Sept. 2, 2016, *available at* http://www.clrc.ca.gov/pub/2016/MM16-46.pdf (hereinafter "Revised Draft").
[3] *Id*. at 2.

1. **Allowing interruptions pursuant to a search warrant may permit frequent and intentional interruptions, particularly as technology advances.**

According to the Commission, the exception for communication interruptions occurring as the result of the execution of a search warrant is justified because the exception would apply only in "unusual circumstances"[4] where "the interruption of communications would not be the government's *purpose*."[1] We disagree with these assumptions.

As discussed in detail in our previous Comments to the Commission, cell-site simulators and network investigatory techniques, which interrupt communications as part of their designed operation, are increasingly used by government entities.[5] We now know that government entities up and down California, including Sacramento, San Francisco, Los Angeles, and San Diego, have these powerful technologies and use them in a wide variety of circumstances and investigations.[6] Viewed in light of technologies like cell-site simulators, this proposed exception may not be limited to "unusual circumstances" but instead exempt interruptions caused by increasingly common investigative tools and techniques from judicial scrutiny.

In addition, it is not obvious that an interruption pursuant to a search warrant would not be purposeful. As noted above, existing technologies including cell site simulators and network investigatory techniques may interrupt communications by design. Furthermore, in digital searches, law enforcement agents routinely obtain "gag orders" that allow them to prevent communication with the suspect of an investigation about the investigation itself.[7] In both cases, law enforcement is not only knowingly but intentionally interrupting communications specifically in order to effectively execute a warrant.

Moreover, Section 7908 does not distinguish between an interruption by the government that is purposeful and one that is incidental to some other action. And rightly so, since these distinctions have no bearing on the actual impact to a Californian when she is not able to utilize

[4] Revised Draft at 25.
[5] First Supplement at 6–9.
[6] *See* Dave Mass, Electronic Frontier Foundation, *Here Are 79 California Surveillance Tech Policies. But Where Are the Other 90?*, https://www.eff.org/deeplinks/2016/04/here-are-79-policies-california-surveillance-tech-where-are-other-90.
[7] *See, e.g.*, Penal Code 1546.2(b)(1) (allowing law enforcement, when obtaining a search warrant, to also obtain an order "prohibiting any party providing information from notifying any other party that information has been sought.").

her communications service, nor is there any guarantee that an incidental interruption will be in any way smaller in scope than an intentional interruption. Instead, the law encompasses both "knowing[] and intentional[]" interruptions.[8] Introducing an exception for interruptions pursuant to a search warrant on the assumption that such interruptions are not intentional undermines the clear intent of including "knowing[]" as well as "intentional[]" interruptions in Section 7908.[9]

2. **Allowing interruptions pursuant to a search warrant without heightened judicial scrutiny undermines the intent of Section 7908.**

The Commission further asserts that an interruption "would [not] violate constitutional free expression rights" because the search warrant process itself serves to protect those rights.[10] However, that conclusion is directly opposed to the intent of Section 7908 to require specific attention to and heightened scrutiny of communication interruptions even when judicial process was already required. This heightened scrutiny is all the more appropriate for technologies whose mere use has been hidden from lawmakers, the public, and the courts, thus undermining any effective evaluation of their impact on constitutional rights.

The recommended exception for search warrants undermines the intent of Section 7908 to broadly safeguard Californians against government interruption of communications service. The Legislature enacted Section 7908 because it believed that judicial authorization is not in itself an adequate safeguard when a government entity wants to interrupt a communications service, even when the objective of doing so is to protect public safety or prevent its use for an illegal purpose. Instead, the law requires that the court assess the effect that its order will have on communications before determining whether to issue the order and ensure that those actions do not unnecessarily interfere with communication.[11]

In addition, the secrecy that often surrounds the existence, let alone details, of modern investigative tools heightens the need for effective judicial scrutiny to ensure that constitutional rights are not violated. In many cases, law enforcement has concealed even the bare fact that

[8] Public Utilities Code § 7908(a)(3)(A).
[9] Moreover, because Section 7908 only applies to "knowingly or intentionally" interrupting communications services, such an exception is unnecessary when the interruption is not actually foreseeable. *Iid.* § 7908(a)(3)(B). Thus, there is no need to create an exception for scenarios where the government entity enforcing search warrant is unaware that doing so may cause an interruption.
[10] Revised Draft at 25.
[11] *See* Public Utilities Code § 7908(b).

technologies such as cell site simulators are in use at all from lawmakers, the public and even judges who have been authorizing their use.[12] This has undermined the ability of these entities to evaluate new technologies and determine whether their deployment "violate[s] constitutional free expression rights." The heightened scrutiny under Section 7908 is necessary to ensure that the impact of new investigative tools on individual rights is given appropriate scrutiny and consideration by the courts.

**Conclusion**

We strongly urge the Commission to reconsider the recommended exception for search warrants. The search warrant process was designed to protect privacy interests at stake, but Section 7908 serves a different purpose: protecting the right and ability of Californians to communicate. When law enforcement knowingly or intentionally interrupts communications in order to execute a search warrant, both protections are necessary to safeguard individual rights.

This is not to say that the requirements for search warrants must precisely parallel those for other orders that interrupt communications. The Commission may want to consider if there are specific procedural provisions that should be drafted differently in order to more effectively address the context of when the government obtains a court order in the form of a warrant that knowingly or intentionally interrupts communications service. But the need for enhanced judicial review focused on the protection of freedom of expression is no different. For that reason, we urge the Commission to reconsider its recommendation.

We look forward to discussing this further and answering any questions you may have.

Sincerely,

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[12] *Memorandum to FCC in Support of Complaint and Petition Regarding Cell Site Simulator Use by State and Local Law Enforcement*, American Civil Liberties Union, American Civil Liberties Union of Northern California, New York Civil Liberties Union, American Civil Liberties Union of Maryland, Electronic Frontier Foundation (ACLU & EFF Memorandum to FCC), *available at* https://www.aclu.org/sites/default/files/field_document/aclueff_fcc_cell_site_simulator_filing.pdf.